



TC06798

Appeal number: TC/2017/06479

CONSTRUCTION INDUSTRY SCHEME – late filing penalties – whether reasonable excuse - no

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

STUART NOBLE

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE ANNE FAIRPO
DEREK ROBERTSON**

Sitting in public at Lincoln on 27 February 2018

The appellant appeared in person

Ms Mistry, presenting officer for the Respondents

DECISION

Introduction

5 1. This is an appeal against:

(1) Penalties imposed under paragraphs 8, 9, 10 and 11 of Schedule 55 of Finance Act 2009 for the late filing of Construction Industry Scheme (CIS) returns.

10 (2) It was not disputed that the returns had been filed late and the returns and penalties can be summarised as follows:

Period	Due	Received	Para 8 penalty	Para 9 Penalty	Para 10 penalty	Para 11 penalty
04/15	19/04/15	14/10/16	100	200	300	300
05/15	19/05/15	14/10/16	100	200	300	300
07/15	19/07/15	14/10/16	100	200	300	300
08/15	19/08/15	14/10/16	100	200	300	300
09/15	19/09/15	24/10/16	100	200	300	
01/16	19/01/16	10/02/16	100			

Appellant's case

2. The appellant did not dispute that the returns were filed late, but explained that he had a reasonable excuse for the following reasons:

15 (1) He was a sole trader, using no more than three subcontractors, and found CIS to be a complex system. He had entered the CIS system without knowing the details, although he accepts that this is not an excuse.

20 (2) He made several mistakes because, as a sole trader, he had to deal with everything, but HMRC didn't accept that this was a reasonable excuse for the late filing of the returns. He had also had some problems with HMRC's helpline, whose replies did not make sense.

(3) The returns were late because he had computer problems and there had been a broadband failure in his area and information was not available on time.

25 (4) He accepted that returns had been filed late, and that the returns had sometimes had to be altered for errors but he considered that the penalties were out of line as they apply across the board regardless of the size of the trader.

(5) He had been under treatment for prostate cancer but had not been in hospital long enough to not do returns, so he accepted that this was not an excuse although it was another pressure on him.

(6) He would have to increase his work in order to be able to afford the penalties; he had largely retired although he still did some work when asked.

HMRC's case

5 3. HMRC submitted that the legislation is equal for all traders; larger businesses are at risk of higher penalties as the penalties are linked to the number of subcontractors engaged.

4. HMRC further submitted, in summary:

10 (1) The appellant had been in the Construction Industry Scheme since 1999, and had transferred onto the current scheme on 6 April 2007, and so must be aware of the obligations upon him as a trader within CIS. Further, there was plenty of information available online about the requirements.

15 (2) The appellant had applied to be marked as inactive for CIS purposes for the period March 2015 to August 2015 on the basis that he would not be engaging any subcontractors. He should have filed a CIS return for the period ending 5 September 2015 following the end of that period of inactivity. In correspondence with HMRC, the appellant had stated that he had forgotten to file nil returns once the inactivity period ended.

20 (3) The appellant, instead, next filed a CIS return for the period ending 5 November 2015 (which is not within this appeal). This return was incorrect, despite the signature on the form confirming that all details on the form were correct, as it included information for the period ending 5 October 2015.

25 (4) Almost a year later, the appellant filed CIS returns for the periods to 5 April 2015, 5 May 2015, 5 July 2015 and 5 August 2015 which showed that he had engaged subcontractors during the period for which he had applied to be marked as inactive. He filed a nil return for the period ending 5 June 2015, which is not within this appeal.

30 (5) At that time, the appellant also filed a nil return for the period to 5 September 2015 but later amended this return, after having confirmed its accuracy on first submission, so that it was no longer a nil return and instead showed that he had engaged subcontractors in the period.

35 (6) In correspondence with HMRC, the appellant had supplied contradictory evidence, claiming in one letter that he had forgotten that the inactivity period had expired as he had been on extended holiday due to low work but, in another letter, claiming that he had been too busy in the period in which he was marked inactive to remember to file the month returns.

5. HMRC submitted, therefore, that the appellant had not established a reasonable excuse for the late submission of the returns for the following reasons:

(1) He could not be said to be unaware of his obligations under CIS;

40 (2) He had not established that there was any event or other matter outside his control which prevented him from filing the returns;

(3) In relation to the return filed late for the period to 5 January 2016, the trader had already received penalties for the earlier periods and cannot in any case be said to be unaware of the need to file the return on time.

5 6. HMRC had considered whether there were any special circumstances that would merit a reduction in the penalties but did not consider that his ability to pay to amount to special circumstances.

7. HMRC submitted that, as set out in *Bosher* [2013] UKUT 01479 (TCC) this Tribunal had no power to amend or discharge penalties on the basis of unfairness.

Discussion

10 8. The appellant does not dispute that the returns were late but submits that the penalties are disproportionate and that he has a reasonable excuse for the delay.

9. With regard to the appellant's submission that penalties charged are disproportionate. The Tribunal's powers on an appeal are set out in paragraph 22 of Schedule 55 and do not include any general power to reduce a penalty on the grounds that it is disproportionate. Moreover, Parliament has, in paragraph 22(3) of Schedule
15 55, specifically limited the Tribunal's power to reduce penalties because of the presence of "special circumstances" and, elsewhere in this decision, we have considered the question of "special circumstances". Therefore, for reasons similar to those set out in *Bosher*, we do not consider that we have a separate power to consider
20 the proportionality or otherwise of the penalties.

10. The test of whether something is a "reasonable excuse" for the late filing of a tax return is not set out in statute but, in our view, the test set out in *Clean Car Company* [1991] VTTR 234 should be applied:

25 "a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered"

30 11. We considered the parties' submissions and concluded that the appellant did not have a reasonable excuse for the late filing of the returns.

12. The appellant had been within the CIS system in general for approximately fifteen years at the time of the default, and within the current CIS system for approximately eight years at that time. We consider that, applying the test in *Clean Car*, a trader who has been within the CIS system for that period of time would be
35 aware of their responsibilities.

13. The appellant also submitted that he had had computer problems and difficulties getting online to submit the returns: the returns for 04/15, 05/15, 07/15, 08/15 and 09/15 were over a year late and the return for 01/16 was approximately three weeks late. Even if computer and other problems had persisted for over a year, we consider
40 that, applying the *Clean Car* test, a trader would have found at a minimum contacted

HMRC to explain the problem and would have in any event sought an alternative internet provider and/or computer.

14. We considered the appellant's comments about having made mistakes, requiring returns to be amended, and noted that the appellant had applied to be marked inactive for a period in which he continued to work and continued to engage subcontractors. The mistakes described did not relate to the delays in filing the returns and could not be regarded as providing a reasonable excuse for the delay.

15. We considered the appellant's comments as to his health, even though he said he was not using his health as a reasonable excuse. Although it was possible that ill-health might form a reasonable excuse, the reasonable excuse must continue and cover the whole period of default and from the appellant's evidence we concluded even if the ill-health could amount to a reasonable excuse, that the ill-health did not provide a reasonable excuse covering the entire period.

16. Finally, we must consider whether HMRC should have made a special reduction because of special circumstances within paragraph 16. The Tribunal's jurisdiction in this context is limited to circumstances where it considers HMRC's decision in respect of special circumstances was flawed when considered in the light of the principles applicable in judicial review proceedings. HMRC have considered whether to apply a special reduction and have found nothing that is exceptional, abnormal or unusual to justify such a reduction. In particular, the appellant's comments that he did not have funds to pay the penalties amounted to special circumstances. Applying the judicial review standards we see no reason to overturn HMRC's decision.

Decision

17. As we find that the appellant does not have a reasonable excuse, and that we have no power to consider the proportionality of the penalties, the appeal is dismissed and the penalties are confirmed.

18. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**ANNE FAIRPO
TRIBUNAL JUDGE**

RELEASE DATE: 6 November 2018