



[2019] UKFTT 518 (TC)

*INCOME TAX – CONSTRUCTION INDUSTRY SCHEME (CIS) – Failure to file CIS monthly returns – reasonable excuse – no – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**TC07314**

**Appeal number: TC/2018/06784**

**BETWEEN**

**MICHAEL PEPPER JOINERY LIMITED**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE JAMES AUSTEN**

The Tribunal determined the appeal on 25 June 2019 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 18 October 2018 (with enclosures) and HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 13 February 2019. The Appellant did not serve a Reply.

## DECISION

### INTRODUCTION

1. This is an appeal against penalties issued to Michael Pepper Joinery Limited (“the appellant”) pursuant to Paragraph 8 of Schedule 55 to Finance Act 2009 (“Schedule 55”) and Paragraph 9(2) of Schedule 55 for the late filing of the contractor’s monthly returns under the Construction Industry Scheme for the period 29 July 2017 to 30 December 2017 inclusive (“the returns”).
2. The appeal was allocated to the default paper track. I gave my decision to dismiss the appeal in a Decision Notice released on 28 June 2019, which set out a summary of my reasons. In reaching my decision, I read the Notice of Appeal dated 18 October 2018 (with enclosures) and HMRC’s Statement of Case (with enclosures) acknowledged by the Tribunal on 13 February 2019. The appellant did not serve a Reply.
3. The appellant has requested full reasons for my decision with a view to seeking leave to appeal to the Upper Tribunal.

### BACKGROUND

4. The appellant was issued with penalties for the late filing of the returns as follows:
  - (1) a penalty of £100 under Paragraph 8 of Schedule 55 for the late filing of the contractor’s monthly return for the period ending 5 July 2017 (penalty issued on 29 July 2017);
  - (2) a penalty of £200 under Paragraph 9(2) of Schedule 55 for the late filing of the contractor’s monthly return for the period ending 5 July 2017 (penalty issued on 30 September 2017);
  - (3) a penalty of £100 under Paragraph 8 of Schedule 55 for the late filing of the contractor’s monthly return for the period ending 5 August 2017 (penalty issued on 2 September 2017);
  - (4) a penalty of £200 under Paragraph 9(2) of Schedule 55 for the late filing of the contractor’s monthly return for the period ending 5 August 2017 (penalty issued on 28 October 2017);
  - (5) a penalty of £100 under Paragraph 8 of Schedule 55 for the late filing of the appellant’s contractor’s monthly return for the period ending 5 September 2017 (penalty issued on 30 September 2017);
  - (6) a penalty of £100 under Paragraph 8 of Schedule 55 for the late filing of the appellant’s contractor’s monthly return for the period ending 5 October 2017 (penalty issued on 28 October 2017);
  - (7) a penalty of £100 under Paragraph 8 of Schedule 55 for the late filing of the appellant’s contractor’s monthly return for the period ending 5 November 2017 (penalty issued on 2 December 2017); and
  - (8) a penalty of £100 under Paragraph 8 of Schedule 55 for the late filing of the appellant’s contractor’s monthly return for the period ending 5 December 2017 (penalty issued on 30 December 2017).

### LATE APPEAL

5. The appellant’s appeal to HMRC in respect of the above penalties was late and was not accepted by HMRC. However, this point was not dealt with in either the appellant’s notice of

appeal to this Tribunal nor in HMRC's statement of case. Both instead concentrated on the substance of the appeal.

6. In light of that, and in the interests of brevity, I considered it to be in the interests of justice to give substantive – rather than technical – reasons for my dismissal of the appeal and I did not deal with the lateness issue in my summary decision.

7. As a result, and as the lateness of the appeal played no part in my decision, I take the view that it would be inappropriate for me to deal with it now and I do not do so. Nevertheless, if this matter reaches a higher Court or Tribunal which does not feel similarly circumscribed and which might wish to address the point, I make the following findings of fact:

- (1) The filing dates and penalty dates are as set out in [4] above;
- (2) The appellant appealed against the penalties by letter dated 4 October 2018. This was between 8 and 13 months late;
- (3) HMRC rejected the late appeals by letter on 16 October 2018; and
- (4) The appellant gave no reasons for the lateness of its appeal to HMRC in its notice of appeal to this Tribunal. There are no reasons for the lateness (as opposed to the substance of the appeal) before this Tribunal.

#### **FACTS**

8. The appellant explains as follows:

- (1) The reason for the late filing of the returns is that a former employee – whose duties had included the completion and submission of the returns – had failed to make them, unbeknownst to the appellant or its owner.
- (2) The appellant further explains that it had come to light that this former employee had stolen £62,000 from the appellant and that the police are investigating the alleged thefts (it is not made expressly clear in the notice of appeal whether the alleged thefts and the failure to file timely returns were directly related).
- (3) Mr Pepper (the owner of the appellant company) is not computer literate and left it to his employee to make the necessary returns.

9. HMRC adds:

- (1) HMRC's systems show that previous late filing penalties had been raised against the appellant in 2012 and 2013 and the excuse given in both those cases was the non-performance by an employee of his or her duties. The appellant appealed the imposition of the previous penalties but they were upheld by HMRC. It does not appear from the papers before me that any further appeal was made to this Tribunal in respect of them, but the point is not material in any event.
- (2) After the 2012/2013 late compliance, an education letter was sent by HMRC to the appellant to confirm that it is the responsibility of the taxpayer contractor, not the bookkeeper or any other member of staff, to ensure that the required filings are made on time.
- (3) The notes on HMRC's system for the 2012 and 2013 appeals state that the appellant had subsequently put in place new procedures requiring its directors to review all documents before submission, which should have prevented a recurrence of this issue.

10. I accept [8] and [9] as fact.

## **THE LAW**

11. The applicable statutory provisions and relevant case law are summarised below.

### **Liability to submit the return**

12. Regulation 4 (1) of the Income Tax (CIS) regulations 2005 (“the regulations”) provides that a return must be made to HMRC in an approved form not later than 14 days after the end of every tax month. The tax month runs from the 6th day of one month to the 5th day of the next month. A return must be made by the 19th day of each calendar month.

13. Regulation 4(10) of the regulations requires a contractor to file a nil return if no payments have been made in that month. Regulation 4(11) provides that a nil return is not required if HMRC have been notified that the contractor will make no further payments under CIS within the following six months.

### **Liability to a penalty**

14. Paragraph 1(1) of Schedule 55 provides: “A penalty is payable by a person (“P”) where P fails to make or deliver a return, or to deliver any other document ....on or before the filing date”.

15. Paragraph 1(4) of Schedule 55 defines “filing date” as “in relation to a return or other document... the date by which it is required to be made or delivered to HMRC”; and it defines “penalty date” as “in relation to a return or other document... the date on which a penalty is first payable for failing to make or deliver it (that is to say, the day after the filing date).”

16. In relation to the late filing of the CIS return a penalty of £100 is payable: Paragraph 8 of Schedule 55.

17. If after a period of 2 months beginning with the penalty date the return remains outstanding a penalty of £200 is payable: Paragraph 9 of Schedule 55.

### **Reasonable excuse and special circumstances**

18. Paragraph 16 of Schedule 55 relevantly provides that:

- (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.
- (2) In sub-paragraph (1) “special circumstances” does not include—
  - (a) ability to pay, or
  - (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.
- (3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—
  - (a) staying a penalty, and
  - (b) agreeing a compromise in relation to proceedings for a penalty.

19. Paragraph 22 of Schedule 55 relevantly provides that:

- (3) If the tribunal substitutes its decision for HMRC’s, the tribunal may rely on paragraph 16—
  - (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or
  - (b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.
- (4) In sub-paragraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.

20. Paragraph 23 of Schedule 55 relevantly provides that:

(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

(a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

### ***Reasonable excuse***

21. There is no statutory definition of “reasonable excuse” (other than the two negative propositions at Paragraph 23(2)(a)-(b) of Schedule 55, quoted above), but the words have been judicially considered on a number of occasions.

22. The proper test for considering whether a reasonable excuse to a tax penalty exists has a long judicial history. I have regard to the decisions of HHJ Medd OBE QC in *The Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 239; [1991] BVC 568 at 569-570 and Judge Guy Brannan in *Coales v HMRC* [2012] UKFTT 477 (TC) at [29], [31] and [36]. Those decisions have been superseded to a large extent by the decision of the Upper Tribunal in *Perrin v HMRC* [2018] UKUT 156 (TCC) (Judge Timothy Herrington and Judge Kevin Poole). *Perrin* settled the correct test to be applied when considering reasonable excuse arguments in this Tribunal. It determined at [70] to [75] that a Tribunal required to deal with questions of reasonable excuse must:

(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse;

(2) Secondly, decide which of those facts are proven.

(3) Thirdly, decide whether, viewed objectively, those proven facts do indeed amount to a reasonable excuse.

### ***Special circumstances***

23. The Upper Tribunal in *Edwards v HMRC* [2019] UKUT 131 (TCC) (Nugee J and Judge Timothy Herrington) endorsed (at [72] to [74]) the principle that HMRC (and, on an appeal, this Tribunal) has a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be “special”. This means that if the Tribunal (or HMRC) considers that the circumstances are sufficiently special then it is right to reduce the amount of the penalty.

24. This Tribunal only has power to interfere with HMRC’s decision on “special circumstances” on the following grounds (helpfully set out in *Abel v HMRC* [2018] UKFTT 194 (TC) (Judge Tony Beare) at [19]):

...[T]he decision as to whether any particular circumstances constitute “special circumstances” is entirely a matter for the Respondents to determine in their own discretion and... their decision can be impugned only if they have acted unreasonably in the sense described in the leading case of *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223 (“*Wednesbury*”). In other words, the Tribunal is not permitted to consider the relevant facts de novo and determine whether

or not it agrees with the conclusion that the Respondents have reached. Instead, it needs to consider whether, in reaching that conclusion, the Respondents have taken into account matters that they ought not to have taken into account or disregarded matters that they ought to have taken into account. As long as that is not the case, then the Respondents' decision may be impugned only if it is one that no reasonable person could have reached upon consideration of the relevant matters. The Respondents' decision cannot be impugned simply because the Tribunal might have reached a different conclusion upon consideration of the relevant matters de novo.

## **SUBMISSIONS**

### **Appellant**

25. Mr Pepper blames his employee for the thefts and non-filing of the CIS returns; he blames HMRC for not notifying him of the latter. In fact, he claims to be "LIVID" that HMRC allowed the non-filing to continue for so long without bringing the situation to his attention.

26. The appellant asks the Tribunal to refund the penalties charged in full.

### **HMRC**

27. HMRC argues that the appeal is not concerned with specialist or obscure areas of tax law. It is concerned with the ordinary every day responsibilities of the appellant to ensure that its CIS returns were filed by the relevant due dates.

28. HMRC contends that the monthly returns subject to this appeal were submitted late and the penalties have been correctly charged in accordance with legislation. The penalties may only be set aside if the appellant has a reasonable excuse for them, which existed for the whole of the default period.

29. HMRC does not consider that reliance on an employee constitutes a reasonable excuse for the appellant's failure to deliver its Contractor's Monthly returns by the filing deadline. HMRC maintain that it was the responsibility of the appellant to ensure that it complied with its tax responsibilities by filing a CIS returns by the applicable due dates. This responsibility cannot be transferred to any other person acting on behalf of the contractor. Where a person has asked another person to do something on his or her behalf, that person is responsible for ensuring that the other person carries out the task. They cannot claim they had a reasonable excuse merely because they delegated the task to an employee and that employee – honestly or otherwise – failed to complete it.

30. HMRC contends that the legislation places responsibility for delivery of the completed CIS return squarely on the shoulders of the contractor. The appellant failed to fulfil its filing obligations. It was the appellant's responsibility to ensure that the regulations were followed.

31. HMRC has considered the special reduction regulations but their view is that there are no special circumstances which would allow a reduction in the penalty.

### **BURDEN OF PROOF**

32. The burden of proof is on the appellant to show – on the balance of probabilities – that there was a reasonable excuse for the late filing of the returns, and/or that special circumstances existed which warrant reduction of the penalties.

### **DISCUSSION**

33. I have considered whether the appellant has provided any evidence which might enable me to conclude that he had a reasonable excuse for filing the returns late, or whether special circumstances exist which enable me to vary the penalties.

34. I have reviewed the law summarised above.
35. I have taken into consideration the requirement that the test for reasonable excuse is an objective one, ie the appellant's actions must be considered reasonable by the standards of a hypothetical reasonable taxpayer with the characteristics of the appellant.
36. I am also conscious that to overrule HMRC's decision on special circumstances, I would have to find that no reasonable HMRC offer could have come to the decision in question (as there are no indications of relevant factors being overlooked or irrelevant factors intruding).
37. I have decided that the appellant has not provided evidence to support a finding of reasonable excuse or special circumstances in this matter: the responsibility for the timely filing of the returns was with the appellant, not any employee.
38. In my view, had the appellant complied with its own updated procedures following the 2012/2013 late compliance, no issue would have arisen at the present time.
39. No failure – fraudulent or otherwise – by an employee mitigates that.
40. It was for the appellant to act responsibly in this regard, not for HMRC to underwrite the appellant's systems and processes. Mr Pepper's anger with HMRC is misplaced.
41. The appellant fails the third limb of the test for reasonable excuse set out in *Perrin*.
42. Accordingly, I conclude that the appellant had no reasonable excuse for the late filing of the returns.
43. I note that if the appellant wished to argue that the alleged thefts committed by its former employee were directly related to the late compliance with its filing obligations (so as to mitigate the latter) then it would be for the appellant to adduce that evidence. That evidence is not before me, which means that I am unable to accept as fact that the alleged illegal actions of the former employee caused or was closely related to the filing omissions. In any event, and for the avoidance of doubt, I note that even if the alleged thefts had been causative of the late filings – or had been directly related to them, this would not have changed my analysis on reasonable excuse.
44. I also conclude that no special circumstances exist which merit reducing the penalties. There are no grounds on which I should disturb HMRC's decision. Lax financial controls do not constitute special circumstances.

#### **DECISION**

45. I dismiss the appeal and I confirm the late filing penalties totalling £1,000.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

46. 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.

**JAMES AUSTEN  
TRIBUNAL JUDGE**

**Release date: 07 August 2019**