



TC03515

Appeal number: TC/2013/03680

INCOME TAX - Construction industry scheme - penalty for late submission of return – whether there was a “reasonable excuse” – no – whether there were special circumstances – no

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**JOHN BARLETTA
t/a CONFURDEC**

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS**

TRIBUNAL: JUDGE JOANNA LYONS

The Tribunal determined the appeal on 02 April 2014 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 22 May 2013, HMRC’s Statement of Case (with enclosures) acknowledged by the Tribunal on 26 February 2014 and the Appellant’s Reply dated 07 March 2014.

DECISION

Introduction

- 5 1. This is an appeal against a penalty of £100, imposed for the late filing of the Contractor's Monthly Return for the period ending 05 January 2013.

The issue

- 10 2. Mr Barletta appeals on the grounds that the return was submitted before the due date and there is a reasonable excuse for the late filing. These matters are disputed by HMRC.

The law

3. In so far as it is relevant to this appeal the relevant law is summarised below.

Liability to submit the return

- 15 4. 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.
- 20 5. 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

- 25 6. Paragraph 1 (1) Schedule 55 Finance Act 2009. (FA) 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".
7. In relation to the late filing of the CIS return the a penalty of £100 is payable Paragraph 8 Schedule 55 FA.

Delivery by post

- 30 8. Section 7 of the Interpretation Act 1978 provides

"Where an act authorises or requires any document to be served by post .. then unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter ..unless the contrary is proved, at which the letter would be delivered in

the ordinary course of post. Ordinary course of post means delivery on the next business day where first-class post is used and..two business days where second class-post is used.”

Reasonable excuse

5 9. Paragraph 23(1) FA provides that “Liability to a penalty does not arise ... if the person satisfies the Tribunal that there is a reasonable excuse for the failure”.

10. There is no statutory definition of the term “reasonable excuse”. Case law has established that a reasonable excuse “is a matter to be considered in the light of all the circumstances of the particular case”. *Rowland v HMRC [2006] STC (SCD) 536*.

10 *Special circumstances*

11. Paragraph 16 (1) Schedule 55 FA provides “If HMRC think it right because of special circumstances they may reduce the penalty” In the case of *Crabtree V Hinchcliffe (inspector of Taxes) [1971] 3 All ER 967* established that the word “special..must mean unusual or uncommon”.

15 12. The Tribunal may reduce or cancel the penalty due to special circumstances only “if tribunal thinks that HMRC’s decision in respect of the application of paragraph 16 was flawed”. Para 22 (3) (b) Schedule 55 FA. The word “flawed” is defined to be a decision which is either unlawful or wholly unreasonable such that it would be open to judicial review. Para 22 (4).

20 **The facts**

The agreed facts

13. Mr Barletta is registered to file monthly returns under the Construction industry Scheme (“CIS”). Returns can be filed online or on paper. Mr Barletta elected to file his returns on paper. The procedure adopted is that HMRC send him a monthly return
25 which he sends back to HMRC before the due date.

14. Mr Barletta has incurred penalties on three previous occasions. On each occasion he was able to provide proof that he had posted the return before the due date and HMRC have cancelled the penalties. The returns were due on 19 December 2010, 19 September 2011 and 19 December 2012. HMRC also refer to a return due on
30 19 May 2012. In this case the penalty was allowed and an educational warning letter was issued to Mr Barletta stating that future appeals would require proof of posting.

The contested facts

15. For the period ending 05 January 2013 Mr Barletta was due to submit a nil return. The return was due on 19 January 2013 and the date of receipt was recorded as
35 01 February 2013. Mr Barletta states that he posted the return between the evening of 09 January and morning of 10 January. Unfortunately he did not obtain proof of posting.

16. HMRC state that the return was received at their CIS processing centre in Liverpool on 01 February 2013. They confirm that the processing centre is operating efficiently and the date of receipt is accurately recorded. They do not accept that Mr Barletta posted the return on 09 January as he has not provided any proof of postage.

5 *The arguments*

17. Mr Barletta submits that there are clearly difficulties with the receipt of post at HMRC owing to the number of previous penalties.

18. HMRC do not accept that the return was posted on 09 January 2013 for the reasons set out above.

10 **Reasons for decision**

Findings of fact

19. I am not satisfied that on the balance of probabilities that the return was posted before the due date because:

(1) Mr Barletta has not provided proof of posting;

15 (2) HMRC have provided clear evidence that the return was received on 01 February 2013 and

(3) In the absence of any evidence of postal strikes or other intervening events it is unlikely that a letter would take 21 days to be delivered;

20 20. I accept that Mr Barletta has encountered previous difficulties when filing the returns by post. However I am not satisfied that there were general problems associated with the CIS processing centre as there is no other evidence to support this assertion.

Reasonable excuse

25 21. In view of my findings above I am not satisfied that Mr Barletta had a reasonable excuse for the late delivery of the return as I find that the return was not sent on 09 January as asserted by Mr Barletta.

22. I accept that Mr Barletta appears to have encountered similar problems in the past. However in these circumstances it would have been reasonable for him to have obtained proof of posting.

30 *Special circumstances*

23. HMRC have decided not to reduce or cancel this penalty due to special circumstances.

24. I do not find this decision to be flawed as there are no unusual or uncommon features of the case as outlined in paragraphs 21 to 22 above.

Decision

- 25. The return was sent after the due date.
- 26. There is no reasonable excuse for the late return.
- 27. The appeal against the late filing penalty of £100, is dismissed.

5 **Rights of appeal**

28. 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.

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**JOANNA LYONS
TRIBUNAL JUDGE**

RELEASE DATE: 23 April 2014

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