



TC03860

Appeal number: TC/2013/09459

Penalty for late filing of CIS return - Appellant asserts that return was posted in good time - no proof of postage - whether reasonable excuse - no - appeal dismissed

FIRST-TIER TRIBUNAL

TAX CHAMBER

DAW BUILDING & PLUMBING SERVICES

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 23 May 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 3 December 2013, HMRC's Statement of Case submitted on 19 February 2014 the Appellant submitting no response.

DECISION

The Appeal

- 5 1. Daw Plumbing and Building Services, ('the Appellant') appeals against a £100 penalty imposed under Paragraph 8 of Schedule 55 Finance Act (FA) 2009 for the late filing of the Contractor's Monthly return for the period ending 5 August 2013.
2. The point at issue is whether or not the Appellant has a reasonable excuse for submitting a late return.

Background

- 10 3. The Construction Industry Scheme relating to the periods under appeal was introduced by Finance Act (FA) 2004 with effect from 6 April 2007. The primary legislation was supplemented by the Income Tax (Construction Industry Scheme) Regulations 2005, SI 2005 No. 2045.
- 15 4. The scheme provides for certain payments made under construction contracts by a contractor to a subcontractor to be made under deduction on account of income tax. Subcontractors who are registered for gross payment may receive payment without deduction.
- 20 5. Sections 58, 59 and 60 FA 2004 define a subcontractor, a contractor and a contract payment respectively.
6. Section 61 FA 2004 requires a contractor to make deductions at a relevant percentage from payments made to those subcontractors who are not registered to be paid gross under Section 63 FA 2004.
- 25 7. Section 70 FA 2004 permits HMRC to make regulations requiring contractors to submit periodic returns. The regulations are provided in Regulation 4 of The Income Tax (CIS) Regulations 2005.
- 30 8. Regulation 4(1) 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. A tax month runs from the 6th of one month to the 5th of the next. So a return must be made by the 19th of each calendar month.
9. Regulation 4(2) and (3) specify the information which must be included on the return and Regulation 4(5) requires the return to include declarations made by the person making the return.
- 35 10. Regulation 4(10) requires a contractor to make a nil return if they have not made any payments under a construction contract during a tax month. However 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 6 months.

11. If the return is not received by the filing date a penalty of £100 is payable in accordance with Paragraph 8 Schedule 55 FA 2009.
12. If after a period of 12 months beginning with the penalty date the return remains outstanding a penalty is payable in accordance with Paragraph 11 Schedule 55 FA 2009; the penalty is the greater of 5% of any liability to make payments which would have been shown in the return or £300.
13. Both the 'filing date' and the 'penalty date' are defined at Paragraph 1(4) Schedule 55 FA 2000.
14. The Appellant was required to file a Contractor Monthly return for the period ended 5 August 2013. The filing date for the return was 19 August 2013.
15. The Contractor Monthly return was filed on 20 August 2013.
16. As the return was not received by the filing date HMRC sent the Appellant a late filing penalty notice on 31 August 2013 in the amount of £100.
17. On 16 September 2013 the Appellant appealed against the penalty.
18. HMRC sent the Appellant a decision letter on 7 October 2013 rejecting their appeal and offering a review.
19. On 11 October 2013 the Appellant requested a review of HMRC's decision.
20. HMRC carried out a review and issued their review conclusion on 14 November 2013. The outcome of the review was that HMRC's decision should be upheld.
21. On 10 December 2013 the Appellant notified its appeal to the Tribunal.

Appellant's contentions

22. Mr Watson of the Appellant firm disputes that its return was late.
23. He says that the monthly return for August 2013 was posted using first class postage (large letter stamp) from the post box that is always used. The return was posted on 14th August 2013 allowing enough time for the return to be received by HMRC on 19th August. Mr Watson says that
- “it was posted (by my wife) at lunchtime, in the post box at the top of Northumberland Street (she always uses this post box); the last collection from this post box is 6.30pm. I have never received complaints from suppliers that payments have been received late. The blame is being directed at me for returning late; I am fully aware of the consequences of returning late; being a small business, I cannot afford to be fined and always return on time. HMRC have not acknowledged that the fault may lie with them i.e. moving post through internal systems. For this reason, I feel that the penalty should be waived.”

HMRC's contentions

24. The Appellant has traded within the Construction Industry Scheme and engaged subcontractors since the scheme began on 6 April 2007.
25. This is not the first occasion on which the issue of a late filing penalty has arisen.
5 Late filing penalties were previously imposed in respect of late returns for February 2010, March 2010, April 2010, May 2010, October 2011 and November 2012.
26. On previous occasions HMRC chose to educate rather than penalise and issued letters to inform the Appellant of its CIS obligations and responsibilities. The appeals against the October 2011 and November 2012 both cited postal delays as grounds of
10 appeal. The most recent educational letter was issued on 8 January 2013, and the letter stated that if any future appeals rely upon postal delays evidence of postage would be required. HMRC contend that this should have put the Appellant on notice to retain evidence of postage and to provide this to support any appeal. No evidence of postage has been provided with this appeal.
- 15 27. HMRC consider the Appellant as experienced with the CIS monthly filing process, the penalty regime and the appeals process.
28. The Appellant opted to file a paper return. However HMRC's CIS online system allows contractors to file online therefore removing the possibility of postal delays and minimising late filing. There is information on HMRC's website regarding online
20 filing and further help and guidance is available by contacting the CIS helpline. The CIS helpline is also a point of contact for contractors who are experiencing difficulty with making payments.
29. Standard operating procedures on receipt of a paper return posted directly to the central processing office is to batch all returns received per day under date header for
25 processing. Standard operating procedure on receipt of a paper return that has been hand delivered at a public counter or posted to a local tax office is to date stamp the return with the actual date of receipt at HMRC and forward it on for processing. The date of receipt at HMRC is recorded separate to the date of processing on the CIS system. It is the date of receipt and not the date of processing that determines if a
30 penalty is to be charged.
30. An appeal against a late filing penalty will be successful where the contractor shows that there is a reasonable excuse for filing late.
31. HMRC's view is that the actions of the contractor should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence,
35 having proper regard for their responsibilities under the Tax Acts. If the contractor could reasonably have foreseen the event, whether or not it is within their control, HMRC would expect the contractor to take steps to meet their obligations. If there is a reasonable excuse it must exist throughout the failure period.

32. HMRC contend that the Appellant was aware of its obligations as a contractor and were told to retain evidence of postage to support any future appeals that mention postal delays. The Appellant filed late and has not provided any evidence of postage. Therefore the penalty was correctly charged in accordance with the legislation.

5 33. HMRC charge late filing penalties to encourage prompt filing and to provide a
measure of fairness between contractors who file on time and those who do not.
Penalties are imposed to promote the efficient operation of the taxation system. The
Appellant has failed to operate the Construction Industry Scheme correctly and in
10 these circumstances HMRC have to be seen to be consistent in their approach to all
their customers, particularly to those who comply with the regulations. It was the
Appellant's responsibility to ensure that the CIS monthly return was filed on time and
to ensure that all obligations under the Construction Industry Scheme are met.

15 34. The appeal does not contain anything which shows that there is a reasonable
excuse that prevented the Appellant from operating the Scheme correctly and
submitting the monthly return on time.

20 35. Paragraph 16(1) of Schedule 55 FA 2009 allows HMRC to reduce a penalty
below the statutory minimum if they think it is right because of special circumstances.
While 'special circumstances' are not defined, the courts accept that for circumstances
to be special they must be 'exceptional, abnormal or unusual' (*Crabtree v Hinchcliffe*)
or 'something out of the ordinary run of events' (*Clarks of Hove Ltd v Bakers' Union*).

36. HMRC have considered special reduction but their view is that there are no
special circumstances which would allow us to reduce the penalty

Conclusion

25 37. The onus of proof rests with HMRC to show that the penalty was correctly
imposed. If so established, the onus then rests with the Appellant to demonstrate that
there was reasonable excuse for late filing of its CIS return. The standard of proof is
the ordinary civil standard of the balance of probabilities.

30 38. There is no statutory definition of 'reasonable excuse', which is a matter to be
considered in the light of all the circumstances of the particular case. A reasonable
excuse is normally an unexpected or unusual event that is either unforeseeable or
beyond the taxpayer's control, and which prevents them from complying with their
obligation to pay on time. A combination of unexpected and foreseeable events may,
when viewed together, be a reasonable excuse.

35 39. The Appellant's return was one day late. As HMRC say, their operating
procedures on receipt of a paper return, posted to the central processing office, is to
batch all returns received per day under date header for processing. On receipt of a
paper return HMRC date stamp the return with the actual date of receipt prior to
processing. The date of receipt at HMRC is therefore recorded separate to the date of
40 processing and it is the date of receipt and not the date of processing that determines if
a penalty is to be charged.

5 40. A taxpayer acting in a reasonable manner would ensure that they adhered to their legislative obligations. The Appellant has not provided any evidence or proof of posting but would have been aware of the need to do so should HMRC receive a return late.

10 41. The Tribunal therefore finds that the late filing penalty charged is in accordance with legislation and there is no reasonable excuse for the Appellant's failure to file its CIS return on time. There are also no special circumstances which would allow the penalty to be reduced under the Special Reduction provisions. The appeal is accordingly dismissed and the £100 late filing penalty confirmed.

15 42. 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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**MICHAEL S CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 31 July 2014

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