



TC06063

Appeal number: TC/2017/03195

CONSTRUCTION INDUSTRY SCHEME – penalty for failure to make returns- whether appellant had withdrawn from the scheme before the date for which penalties were levied – No. Whether reasonable excuse for late returns – No. Appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MICHAEL BOLGER t/as JMJ ELECTRICAL

Appellant

- and -

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

Respondents

TRIBUNAL: PRESIDING MEMBER :

PETER R. SHEPPARD FCIS FCIB CTA AIIT

MEMBER: G. NOEL BARRETT

Sitting in public at George House, 126 George Street, Edinburgh on 1 August 2017

The Appellant was unrepresented.

Mary Donnelly, HMRC Officer for the Respondents.

DECISION

1. The appellant is appealing against penalties totalling £600 which HMRC have imposed under Schedule 55 of the Finance Act 2009 (“Schedule 55”) for a failure to submit on time Construction Industry Scheme (CIS) returns for the periods ending 5 April 2012 and 5 September 2012.

2. As the Appellant had failed to attend the hearing the Tribunal considered the terms of Rule 33 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (S.I. 2009/273). The rule states;

“Hearings in a party’s absence

33.

If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—

- (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
(b) considers that it is in the interests of justice to proceed with the hearing.”

3. The Tribunal was satisfied that notification of the time and venue for the hearing had been sent to the appellant at his current address, well in advance of the hearing date. In the absence of the appellant on the hearing date the Tribunal clerk twice attempted to contact the appellant by telephone but was unsuccessful. The address used and the telephone number used were both those currently specified by the appellant on their internet site. In the circumstances after delaying the hearing for 25 minutes the Tribunal decided that it was in the interests of justice to proceed with the hearing in the absence of the appellant.

4. The Notice of Appeal had been lodged 3 days late but as HMRC had no objection the Tribunal allowed the hearing to continue.

5. The legislation which covers the Construction Industry Scheme is The Income Tax (Construction Industry Scheme) Regulations 2005 S.I No. 2045/2005. Regulation 4 (1) provides for contractors to submit a monthly return to HMRC not later than 14 days after the end of every tax month. A tax month runs from 6th of one calendar month to the 5th of the next. Therefore a return must be made by the 19th of each calendar month.

6. The penalties that have been charged can be summarised as follows:

- (1) a £100 late filing penalty under paragraph 8 of Schedule 55 imposed on or around 28 July 2012, for the late submission of the return due 5 April 2012.

(2) a £200 “two month” penalty under paragraph 9(a) of Schedule 55 imposed on or around 28 July 2012, for the late submission of the return due 5 April 2012.

5 (3) a £100 late filing penalty under paragraph 8 of Schedule 55 imposed on or around 1 October 2012, for the late submission of the return due 5 September 2012.

(4) a £200 “two month” penalty under paragraph 9(a) of Schedule 55 imposed on or around 1 December 2012, for the late submission of the return due 5 September 2012.

10 7. No case decisions were included or referred to in the bundle of documents presented to the Tribunal.

8. Findings of fact

JMJ Electrical are Electrical, Plumbing and Heating contractors based in Dundee.

15 9. The filing date for the CIS return for the period ended 5 April 2012 was 19 April 2012.

10. Ronald H. Angus of VFM Accounting Services, Dundee acted as agent for the appellant with effect from 15 May 2012.

11. The filing date for the CIS return for the period ended 5 September 2012 was 19 September 2012.

20 12. The appellant submitted to HMRC CIS returns for the periods ended 5 April 2012 and 5 September 2012 on 27 February 2013.

13. Appellant’s submissions

25 The appellant’s grounds for appealing against the penalties are contained in his Notice of Appeal dated 12 April 2017. He said that he “de-registered for CIS in 2013however I did not realise I had to be date specific. I actually stopped using sub-contractors in April 2012. Mr. Angus should have de-registered me then, and of course made me aware of any bills or outstanding fines, which he did not.....”

14. In the Notice of Appeal the appellant states

30 “ I had an accountant dealing with all my business (Ronnie Angus, VFM Dundee). Our relationship was strained and he in fact filed a tax return late on purpose so I would get a fine (which was paid). I therefore believe that Mr. Angus did not deal with my CIS affairs in the proper professional manner resulting in these fines. The first I was aware of these fines, totalling over £10,000, was when the compliance officer appeared at my home (almost 5 years after they had been issued) ...”

15. **HMRC submissions**

Ms Donnelly advised that the appellant had commenced using the CIS scheme on 19 August 2011. Returns were initially submitted manually. With effect from 26 June 2012 returns could be submitted electronically backdated to 6 April 2012.

5 16. HMRC pointed out that although the appellant in his notice of appeal said that he stopped using the CIS scheme in April 2012 they received a return for the period ended 5 September 2012 showing 2 sub-contractors had been used in that period. As the return for that period was not submitted until 27 February 2013 late filing penalties have been applied. The return for the period ended 5 April 2012 showing 4
10 sub-contractors had been used was also submitted on 27 February 2013 so late filing penalties for that period were also levied.

17. HMRC say that they do not consider that the fact that the appellant relied on his agent establishes a reasonable excuse and they quote Schedule 55 Paragraph 23 (2) (b) in support. The wording is set out in paragraph 21 below.

15 18. HMRC say that their records show that on 5 August 2013 Mrs. Bolger telephoned them to advise that construction operations ceased on 6 September 2012. This is later than April 2012 as stated by the appellant in his appeal to HMRC. HMRC therefore conclude that returns were due up to and including the period ended 5 September 2012.

20 19. HMRC say that they initially penalised the appellant for failing to submit other returns. At one point the amount due by the appellant was some £10,295. The appellant appealed to HMRC on the grounds that many of the returns were nil returns. HMRC decided to only penalise the appellant for those returns where amounts were due. They therefore reduced the penalties to £600 as shown above.

25 **Discussion**

20. The Tribunal has concluded that the CIS returns for the periods ending 5 April 2012 and 5 September 2012 were both submitted late on 27 February 2013. The Tribunal finds that HMRC has levied penalties in accordance with Schedule 55 paragraphs 8 and 9(a). It therefore follows that unless the appellant can establish a
30 reasonable excuse for the failures to submit the returns on time the penalties of £600 are due.

21. Paragraph 23 of Schedule 55 contains a defence of “reasonable excuse” as follows:

23—

35 (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)—

- 5 (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
- 10 (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.

22. The return for the period ended 5 April 2012 was due by 19 April 2012 but Mr. Angus's appointment as the appellant's agent as notified to HMRC on Form 64-8 was not effective until 15 May 2012. It follows that the Tribunal cannot accept that at 19 April 2012 the Appellant was relying on Mr. Angus to submit his CIS return. Therefore the appellant has no reasonable excuse for failing to submit the return by that date.

23. In respect of the return for the period ended 5 September 2012 it is clear that by that date the appellant was expecting Mr. Angus to submit the return. The Tribunal therefore has to consider whether the appellant took reasonable care to avoid the failure.

24. It is clear that at some point the relationship between the appellant and his accountant had become strained. Unfortunately in the absence of the appellant it was not possible for the Tribunal to ascertain when the difficulties in the relationship originally occurred. In addition there was no evidence available to suggest that the appellant had in any way monitored the performance of his agent or checked whether or not the return had been sent. The appellant stated in the Notice of Appeal dated 12 April 2017 "...my CIS affairs were dealt with by my agent whom I trusted to act professionally and in my best interests."

This does not suggest that the appellant monitored the situation of his CIS returns with his accountant. Later in the Notice of Appeal the appellant stated "The period 5/9/2012 occurred months after I stopped using sub-contractors." He said this despite his wife having to correct this wrong impression years earlier in the telephone call dated 5 August 2013.

The Tribunal therefore concludes that the appellant had not taken reasonable care over the submission of his CIS returns.

25. Conclusion

In the light of the comments made above the Tribunal considers that the appellant has not established that he had reasonable excuse for the delay in filing his CIS returns for

the periods ending 5 April 2012 and 5 September 2012. Therefore the appeal against the penalties totalling £600 is dismissed.

5 26. 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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TRIBUNAL JUDGE

RELEASE DATE: 11 AUGUST 2017