



TC06344

Appeal number: TC/2017/00967

INCOME TAX – Construction Industry Scheme – penalty for failure to deliver returns on time

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MICHAEL LAVERTY T/A ML DECORATORS Appellant

- and -

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

**TRIBUNAL: JUDGE CHARLES HELLIER
 WILLIAM HAARER**

Sitting in public in Exeter on 18 January 2018

The Appellant in person

Rhiannon Lewis for the Respondents

DECISION

1. Mr Lavery appeals against penalties totalling £4,000 which HMRC assessed for his failure to deliver certain construction industry scheme (“CIS”) returns on time.

Late Appeal

2. Mr Lavery’s appeal to HMRC was made late. It may be pursued only with the permission of this tribunal. HMRC did not object to the giving of permission. We decided to permit the appeal.

The relevant legislation

3. Chapter 3 Part 3 FA 2004 provides that when a contractor in the construction industry makes a payment to a subcontractor he must deduct tax unless the subcontractor is accepted by and registered with HMRC for gross payment. Section 70 provides that regulations may be made requiring “persons who make payments under construction contracts” to make periodic returns (“CIS returns”) to HMRC. The Income Tax (Construction Industry Scheme) Regulations 2005 were made under that power and Regulation 4 requires a contractor to make a monthly return of payments made to the 5th of each month within 14 days after that day, that is to say by the 19th of the month.

4. Sch 55 FA 2009 contains provision making taxpayers liable to penalties if they fail to provide certain returns, or fail to provide them on time. Among the returns to which the schedule applies are CIS returns (para 1(5), Table entry 6). Paras 7 to 13 set out the liability to penalties:

(1) if the return is not received on time the taxpayer becomes liable to a penalty of £100 (para 8);

(2) if the return is received more than 2 months late the taxpayer becomes liable to a further penalty of £200 (para 9);

(3) if the return is received more than 6 months late the taxpayer becomes liable to a further penalty of £300 (or in some circumstance more) (para 10);

(4) if the return is received more than 12 months late paras 11 and 12 provide for a penalty of £300 (or in some circumstances more).

5. Para 16 provides that HMRC may reduce a penalty in special circumstances (and later provisions provide that if the tribunal considers that HMRC’s application of this provision is “flawed” the tribunal may apply such reduction as it thinks fit) ; and para 23 provides that no penalty liability arises if there is a reasonable excuse for a failure. Para 18 provides that if a penalty liability accrues HMRC must: assess it, notify the taxpayer and state in the notice the period in respect of which the penalty is assessed.

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Mr Laverty's appeal

6. In his notice of appeal to the tribunal Mr Laverty records £4,000 as the amount of the penalties against which he appeals and refers to HMRC's letter of 12 January 2007 which sets out 20 late filing penalties totalling £4,000. in that letter the writer
5 declines to accept Mr Laverty's appeal to HMRC because it was made late but says that he might apply (as he has done) to this tribunal.

7. In his Grounds of Appeal Mr Laverty addresses in turn the penalties in respect of each of the relevant months for which penalties were charged. He says that he has already paid some of the penalties so they are not due. Mr Laverty also makes two
10 more general points.

8. First, he says that in the period 2012 to 2014 (which covers the dates of all but one of the penalties) he did not receive a Statement of Liabilities from HMRC, and so had no record that he owed anything like £4,000 or that there were lots of dates when there were supposed to be late filing penalties. We shall deal with this issue later

9. Second he refers to correspondence and discussions he had with HMRC's officer Mrs Sugrue. We shall also refer to this later.
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10. In the summary section of his Grounds of Appeal Mr Laverty says that his appeal should be allowed because (i) he had not received any statements of liabilities, and (ii) he had either already paid the penalties or submitted the return on time. As a
20 result he says the amount he owes in respect of the penalties should be only £600.

Our jurisdiction

11. The Taxes Acts give this tribunal jurisdiction to hear appeals against penalties assessed under schedule 55. We are given the task of deciding, by reference to the facts as we find them and the law as we understand it, whether all the conditions for
25 the assessment of a penalty have been met. If we conclude that those conditions have been met we affirm the penalty; if we conclude they have not, we set aside the penalty. We are not given jurisdiction to deal with the question of whether a penalty has or has not been paid; all we can say is in effect "We judge that the following penalties were correctly charged (if any) ... and the following penalties (if any) are not
30 due ...".

12. This decision therefore does not address the calculation of what in total is due from Mr Laverty (if anything); that will be a matter of accounting between HMRC and Mr Laverty on the basis of the decisions we make as to whether the penalties are due. But in due course we shall consider:

- 35 (1) when the relevant return was submitted;
- (2) whether the conditions for liability to a penalty were satisfied;
- (3) whether the asserted lack of Statements of Liability affects whether a penalty may be assessed;
- 40 (4) whether his correspondence with Miss Sugrue affects his liability to any to the penalties.

The burden of proof

13. A penalty becomes due if a return is received late by HMRC. HMRC will have received the return and should have evidence of when it received it - that is not something in the taxpayer's ken. The burden is therefore on HMRC to produce evidence to persuade the tribunal that the relevant return was in fact received late (and Miss Lewis accepted that this was the case).

14. The position is different if the taxpayer argues that some circumstances afford him a reasonable excuse for his failure to deliver a return on time. In these circumstances he is in the best position to know why the return was late and to produce evidence to support his account of the circumstances and why they caused the return to be late: thus the initial burden of bringing the evidence proving the facts which support the argument that there was a reasonable excuse lies on the taxpayer (although of course thereafter HMRC may bring some evidence to the contrary).

The Evidence

15. We had a bundle of correspondence before us and heard the oral evidence of Mr Laverty.

(i) Mr Laverty's evidence

16. Mr Laverty's evidence can be described under three headings. The first relates to exchanges with Mrs Sugrue of HMRC's debt management division. This is relevant to his contentions that HMRC should have sent statements of liability, and in turn implicitly to an argument that he therefore had a reasonable excuse for some or all of his defaults. The second relates to evidence as to when and how he posted his returns to HMRC. That is relevant to whether or not he failed to make a return on time. The third relates to what he paid HMRC. This last category is not, for the reasons given above, directly relevant to the issues we had to decide.

Mrs Sugrue

17. In relation to the penalties charged by HMRC for the September 2013 and April 2014 months, Mr Laverty told us that he received nothing from HMRC until 14 July 2016 when he received a letter indicating that £415.87 was outstanding in respect of these months. He wrote to HMRC querying this three months later, saying he thought he had made payment and that if he heard nothing further he would assume that there was nothing due. He told us that he then heard nothing from HMRC until 23 November 2016 when Mrs Sugrue knocked on his door and delivered a statement of liabilities showing that he owed £674.63. Mrs Sugrue rang him on the following day and explained that the September 2013 and April 2014 CIS returns had not been received by HMRC and that was why penalties have been charged. Following this conversation he sent off the returns for those two periods and paid the amount shown as due on the statement. He told us, and we accept, that Mrs Sugrue told him that HMRC should have sent a statement of liabilities at the time they sent the penalty notices.

The dispatch of the returns on the receipt of the penalty notices

18. Mr Laverty told us that he posted his returns in the envelopes provided by HMRC and always used first-class stamps. We accept that evidence.

19. He told us that at some stage he got into the habit of asking for, and keeping
5 certificates of posting. Unfortunately he said that his filing system was not sufficiently good to produce all those he had obtained: he could produce them only for the returns for the months ending 5 January 2014 and 5 September 2014.

20. Mr Laverty did not say to us that all his other returns had been posted on time although he queried the accuracy of HMRC's record.

10 21. He told us that apart from the penalty notices in the bundle (dated 2 August 2012, 6 December 2012, 6 March 2014 and 6 November 2014) he could not say that he did not receive the relevant penalty notice but he could not say that he did.

Payments

15 22. Mr Laverty told us that he had paid the 6 November 2012 penalty notice on 24 November and exhibited a post office receipt to that effect.

(ii) HMRC's evidence of the date of receipt of returns.

23. Miss Lewis provided us with a printout which we accept she had extracted from HMRC's computer system which showed HMRC's record of the date of receipt of each return from that for 5 June 2012 to that for 5 August 2014. The printout, under
20 the heading "channel" indicated that the return was "scanned at RDC" in all but two cases or "data entered" in the remaining two. Miss Lewis could not tell us whether "scanned" meant that a copy of the return was retained in the system. She told us that the Received Date was the date a return was last received - so that if a later replacement copy return was submitted only the date of receipt of the latter
25 submission would be shown. The bundle also contained extracts from the penalty notices which we accept were likely to have been received by Mr Laverty.

Discussion

(i) When were the returns received?

24. We observe that HMRC's evidence of the date of receipt was weak. We had no
30 evidence from those involved in the process of the way in which a return was received, opened and its date of receipt recorded. There was no direct evidence which could confirm that the date logged as the date of receipt was not (i) merely the date on which the entry was made in HMRC's computer system or (ii) the day the envelope containing the return was opened, rather than the date on which it was actually
35 received. We were in effect asked to trust, not just in the accuracy of the computer record, but in the hope that the recorded dates of receipt were those on which the returns had actually been received.

25. In relation to the returns for 5 January 2014 and 5 September 2014 Mr Laverty provided copies of certificates of posting:

5 (1) for the 5 January 2014 return the certificate showed that it had been posted on 18 January 2014 at 11.29. That day was Saturday. So the earliest the return could have arrived was Monday, 20 January 2014. The printout from HMRC's records shows receipt on Wednesday, 22 January 2014.

10 (2) for the 5 September 2014 return the certificate shows that it was posted on Thursday, 18 September 2014 at 17.02. Assuming that at 17.02 the last collection had not been taken, the earliest this return would have arrived would have been Friday, 19 September 2014. The printout from HMRC's records shows a receipt on Monday, 21 September 2014.

26. We take judicial notice of that fact that a first-class letter which catches the post on one day and is posted from, and to an address within, mainland England generally arrives the next day. In other words it is likely to arrive on the following day.

15 27. Taking all this together we find that that HMRC's records are generally likely to record the date of receipt as being either: the day of actual receipt, the following business day if the day of actual receipt is a Saturday, or in either case the day after that (so that a letter received on say 5 January 2018 would be recorded as received in either 5 or 6 January 2018). The lack of evidence as the rigour with which HMRC
20 systems were operated means that in the face of the evidence of certificates of posting, we cannot find that it was likely always to be the case that the recorded date of receipt was the actual date of receipt.

25 28. Section 7 Interpretation Act 1978 provides that unless the contrary is proved, a letter which has been properly addressed, prepaid and posted is deemed to have been received at the time which the letter would be delivered in the ordinary course of post.

30 29. The 5 January 2014 return, we have recorded, was proved to have been dispatched properly addressed with a first-class stamp on Saturday 18 January. In the ordinary course it would have arrived on Monday 20 or Tuesday 21 January. We do not regard the record in HMRC's printouts showing receipt on 22 January to be sufficiently weighty evidence to prove otherwise. Therefore we find that return was received on Monday 20 or Tuesday 21 January.

35 30. The 5 September 2014 return, we have recorded, was proved to have been dispatched properly addressed and with a first-class stamp on Thursday, 18 September 17.02. In the ordinary course of the post it would have arrived on Friday 19 or Saturday 20 September. We find it more likely than not the last postal collection was after 17.02 and that the letter would have arrived on Friday 19 September. We do not regard the record in HMRC's printout of receipt as being 21 September to be sufficiently weighty evidence to prove otherwise. Therefore we find that this return was received on Friday 19 September.

40 (ii) *Were the statutory conditions for the imposition of each penalty satisfied?*

31. The first condition is that the taxpayer was a contractor making payments to subcontractors. We find that Mr Laverty was such a person. The returns recorded a liability for deductions from payments he had made.

32. The second condition is that the return was late. We take each return period in turn.

5 June 2012.

5 33. HMRC say that the return, whose due date was 19 June 2012, was received on 9 July 2012, and that therefore Mr Laverty became liable to a £100 penalty.

34. Even if the date recorded in HMRC's computer records is a few days after the date of actual receipt, this return would have been received after the due date. That, and the fact that Mr Laverty paid the penalty, indicate to us that the return was indeed late. We conclude that it is likely that the lateness condition was satisfied.

10 5 October 2012

35. HMRC's records indicate that they did not receive a return for this period. Therefore they say that Mr Laverty became liable to penalties of £100, £200, £300 and £300.

15 36. Mr Laverty paid the first £100 penalty. He offered us no evidence that the return had in fact been dispatched. We conclude that it is likely that no return was dispatched and none had been received. The lateness condition is thus satisfied in relation to each penalty.

5 November 2012.

20 37. HMRC's records indicate that they did not receive a return for this period. They therefore say that Mr Laverty became liable to penalties of £100, £200, £300, and £300.

38. Mr Laverty offered no evidence that a return for this period had indeed been dispatched. We conclude that it is likely that none was dispatched or received. We conclude that the lateness conditions in relation to these penalties are satisfied.

25 5 September 2013.

39. This return was due on 19 September 2013. HMRC's records indicate that it was received on 6 December 2016.

30 40. This was one of the two returns Mr Laverty had discussed with Mrs Sugrue. He told us, and we accept, that after the visit by Mrs Sugrue in November 2016 he created a new return from his records and dispatched it to an HMRC office in Ireland. This is consistent with HMRC's record of the receipt of 6 December 2016. We conclude that a return was received at about that time.

41. Mr Laverty was unable to say that he had used a copy of an original return to send to Ireland. He said he had no other records for this period.

35 42. Miss Lewis told us that if a return had been received at an earlier time and then a further return to the same period had been received, the date shown in HMRC's computer system would be the date of the second receipt only. Thus the computer

record of 6 December 2016 does not itself show that nothing was received before that time.

43. However, the issue by HMRC's system of penalty notices in September and November 2013 and March and October 2014 indicate that it was likely that HMRC's system had recorded no receipts prior to October 2014. We concluded that it was likely that no return was received before then and as a result that the lateness conditions are satisfied in relation to this period.

5 January 2014.

44. We have discussed the evidence in relation to this return at [29] above. We there concluded that it was likely to have been received on 20 or 21 January - that is to say that its was received late.

45. We conclude that the lateness condition is satisfied in relation to this period.

5 May 2014

46. The return was due on 19 May 2014. HMRC's records indicate receipt on 6 December 2016, more than 12 months late.

47. As with the 5 September 2013 return this was one of the two returns Mr Lavery discussed with Mrs Sugrue, and for which he created a fresh return from his records. As with the 5 September 2013 return we conclude that the version he sent to Ireland was received on or about 6 December 2016 but that HMRC's record of receipt does not rule out the possibility that an earlier return was submitted and received.

48. However the issue of the penalty notices in May 2014, August 2014, November 2014 and May 2015 indicate that it is likely that no receipt earlier than May 2015 would have been recorded in HMRC system. Mr Lavery did not have any records for this month. We conclude on balance that it is likely that the return was not received until after May 2015 and that as a result the lateness condition for this period was satisfied.

49. (We note some initial confusion in relation to this month. In the schedule attached to HMRC's letter of 17 January 2017 the two penalties of £300 were wrongly ascribed to the return period 5 April 2014 rather than to the period 5 May 2015. Mr Lavery raised this oddity in his grounds of appeal. We were satisfied that the penalties had been assessed and notified in relation to the 5 May period and wrongly recorded in that letter).

5 September 2014.

50. We have discussed the evidence in relation to the submission of this return in paragraph [30] above. We conclude that the lateness condition was *not* satisfied.

5 October 2014

51. This was due on 19 October 2014. HMRC's records indicate receipt on 21 October 2014. That was a Tuesday. Our inability to conclude that the computer

records of HMRC specify a completely accurate date for actual receipt means that it is possible that the return was received on Saturday, 18 October 2014.

52. We find that the lateness condition was *not* shown to be satisfied.

(iii) Reasonable excuse

5 53. Mr Laverty offered two excuses for the lateness of some of the returns:

(1) that he had not received any statements of liabilities from HMRC

(2) that the penalty notices, which indicate that a return was "late" give the impression that nevertheless it had been received. Thus on receipt of the notice the taxpayer was given potentially false comfort that a return had in fact been received.

10 54. *The statements of liability.* For something to be a reasonable excuse it has to be an excuse – that is to say something which caused the taxpayer to be late in submitting the return. The lack of receipt of statements of liability can only have caused Mr Laverty to fail to submit a return if he had expected to use them to prompt him to check whether he had made a return. But Mr Laverty said that it was Mrs Sugrue’s comment that statements should have been sent to him which alerted him to the expectation that they should have been sent. Therefore it does not seem to us that the lack of these statements can have caused the late submission of the CIS returns. Even if it could be an excuse it would be a reasonable excuse only if it was a reasonable reaction to non receipt not to send a return. Given the statutory duty to submit a return it seems to us that the lack of a reminder in any form cannot be a reasonable response to a failure to comply with that duty.

15 55. Nor in our judgement can Mrs Sugrue’s comments provide an excuse for what had not been done at the time of Mr Laverty’s conversations with her: they were made after the failure had been continuing for more than 12 months.

20 56. *The Notices.* We accept that the heading of the penalty notice “Notification of late Filing Penalty Charge”, and the first sentence “ We have not received your Contractor monthly return for the period shown above by the due filing date...” might be construed to mean that the return had been received but was late. But a reasonable response to such a notice would, in our judgment, be to check whether and when the return had been despatched. It would prompt a concern rather than assuage one. We do not find that these words provide a reasonable excuse.

25 57. We find that there was no reasonable excuse for the failures.

(iv) Special Circumstances

30 58. We find nothing in the circumstances to warrant consideration of whether the penalties should be reduced under the special circumstances provision.

Conclusion

59. We affirm all the penalties except for the £100 penalties for the 5 September 2014 and 5 October 2014 periods which we set aside.

Rights of Appeal

60. 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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CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 15 FEBRUARY 2018