



**TC06677**

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**Appeal number: TC/2017/08654**

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*Application to appeal late against Construction Industry Scheme penalties for late returns – Whether reasonable excuse for late appeal – No. Whether appellant’s appeal against the penalties would have a realistic chance of success – No.*

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**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**DISCOUNT KITCHEN AND BATHROOMS LIMITED      Appellant**

**- and -**

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

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**TRIBUNAL:    PRESIDING MEMBER:  
                  PETER R. SHEPPARD FCIS FCIB  
                  CTA AIIT  
                  MEMBER: DAVID BATTEN**

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**Sitting in public at Eagle Building, 215 Bothwell Street, Glasgow on 25 July 2018.**

**The appellant was not represented.**

**Mr. Moran for the respondent**

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## DECISION

### 1. Introduction

5 On the morning of the hearing the Tribunal learned from HMRC that the appellant had telephoned on the previous day to advise them that they would not be attending the hearing. There was correspondence in the file from the appellant's agent, Sharles chartered accountants so the Tribunal telephoned the agent and was advised that they no longer represented the appellant and would not be attending.

10 The Tribunal considered Rule 33 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. This rule considers hearings in a party's absence. The Tribunal was satisfied that the appellant had received proper notification of the hearing and it was in the interests of justice to proceed with the hearing in the appellant's absence.

The appeal is an application to appeal late against penalties totalling £1,946.77.

### 2. Legislation

15 Finance Act 2004 in particular Section 70  
Finance Act 2009 Schedule 55 "(Schedule 55)"  
Taxes Management Act 1970, in particular Sections 31A, 49 and 118  
Income Tax (Construction Industry Scheme) Regulations 2005 Part 2 Contractors, in particular section 4 Monthly return

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### 3. Case law

Advocate General for Scotland v General Commissioners for Aberdeen City [2006] STC  
O'Flaherty v Revenue and Customs Commissioners [2013] UKUT 161 (TCC)  
25 Obhloise Benjamin Ogedegbe v Commissioners for HMRC [2009] UKFTT 364 (TC)  
Romasave (Property Services) Ltd [2015] UKUT 0254 (TCC)  
Qualapharm Ltd [2016] UKFTT 0100 (TC)  
William Martland [2018] UKUT 178 (TAC)  
Christine Perrin [2018] UKUT 156 (TC)  
30 The Clean Car Company Ltd v Customs and Excise. [1991] VATTR 234

### 4. Facts

Section 70 Finance Act 2004 permits HMRC to make regulations concerning periodic returns by contractors.

35 Section 31A Taxes Management Act 1970 provides:

- (1) Notice of an appeal under Section 31 of this Act must be given
  - (a) In writing
  - (b) Within 30 days of the specified date
  - (c) To the relevant officer of the board

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Section 49 covers Late Notices of appeal. It states:

- "(1) This section applies in a case where
  - (a) Notice of appeal may be given to HMRC, but

- (b) No notice is given before the relevant time limit.
- (2) Notice may be given after the relevant time if-
  - (a) HMRC agree, or
  - (b) Where HMRC do not agree, the tribunal gives permission.
- 5 (3) If the following conditions are met, HMRC shall agree to notice being given after the relevant time.
- (4) Condition A is that the appellant has made request in writing to HMRC to agree to the notice being given
- 10 (5) Condition B is that HMRC are satisfied that there was reasonable excuse for not giving the notice before the relevant time limit.
- (6) Condition C is that HMRC are satisfied that request under subsection (4) was made without unreasonable delay after the reasonable excuse ceased
- 15 (7) If a request of the kind referred to in subsection (4) is made, HMRC must notify the appellant whether or not HMRC agree to the appellant giving notice of appeal after the relevant time limit.
- (8) In this section “relevant time limit”, in relation to notice of appeal, means the time before which the notice is to be given (but for this section).

The Finance Act 2009 Schedule 55 covers “Penalty for failure to make returns etc.”

20 Paragraph 1 (1) states

“A penalty is payable by a person “P” where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date.”

The table below appears at paragraph (1)(5). Item 6 of the table states

25 “Deductions on account of tax under chapter 3 of part 3 of FA 2004 (construction industry scheme) Returns under regulations under Section 70 FA 2004.”

Paragraph 1 (4) states ““filing date” in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC.....”

30 It states ““penalty date”, in relation to a return or other document.....means 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.”

Paragraph 7 to 13 of Schedule 55 cover the amount of the penalty. The paragraphs relevant to this case are numbers 7 to 10. They read as follows:

“7. Paragraphs 8 to 13 apply in the case of a return falling within item 6 of the Table.

8. P is liable to a penalty under this paragraph of £100

35 9 (1) P is liable to a penalty under this paragraph if, and only if P’s failure continues after the end of the period of 2 months beginning with the penalty date.

(2) the penalty under this paragraph is £200

10 (1) P is liable to a penalty under this paragraph if, and only if P’s failure continues after the end of the period of 6 months beginning with the penalty date.

(2) the penalty under this paragraph is the greater of

5 (a) 5% of any liability to make payments which would have been shown in the return in question, and

(b) £300”

5. On 11 October the appellant’s agent wrote to HMRC National Insurance Contributions and Employers Office. The letter stated:

10 “We .....would ask you to accept this letter as an appeal of the penalties totalling £1,947.66 charged for late CIS Returns being submitted in 2016/2017.

15 The circumstances were that the directors were unsure of their responsibilities with regards to deducting and remitting CIS to HMRC on a monthly basis. As their appointed agents we assisted them in completing their CIS Return to 5<sup>th</sup> October 2016 and once we had completed their Annual Accounts the CIS turns covering the period 6<sup>th</sup> April to 5<sup>th</sup> September were duly filed.

The outstanding CIS Tax for this period have also now been settled.....”

There is no detail to explain how the figure of £1,947.66 has been calculated.

6. In a letter to the appellant dated 2 November 2017 HMRC said that they had taken the appellant’s agent’s letter as an appeal against penalties totalling £2,205.

20 HMRC refused to consider the appeals against the penalties on the grounds that they were made very late, and that the appellant had been issued with several penalties which should have let the appellant know that the returns had either been received late or had not been received. The letter advised the appellant that it had a right to make application to the Tax Tribunal for the appeal to be accepted late.

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7. On 7 February 2018 HMRC wrote to the Tribunal. The letter included “From 30 April 2016 to 4 March 2017 HMRC issued 16 penalty notices for the late filing of monthly Contractor’s monthly returns. Each penalty can be appealed within 30 days.

30 Their agent appealed to HMRC on 11 October 2017. The notice of appeal to HMRC ranges from 499 to 191 days late. HMRC advised they could not accept the late appeal on 2 November 2017.”

8. At the hearing HMRC provided the following table

<b>Return Period</b>	<b>Date Penalty Issued</b>	<b>Penalty Amount £</b>	<b>Appeal Due</b>	<b>Appeal Received</b>	<b>Days late</b>
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05/04/2016	30/04/2016	100	30/05/2016	11/10/2017	499
05/04/2016	04/08/2016	200	04/09/2016	11/10/2017	402
05/05/2016	10/07/2016	100	09/08/2016	11/10/2017	429
05/05/2016	15/08/2016	200	14/09/2016	11/10/2017	393
05/06/2016	04/08/2016	100	04/09/2016	11/10/2017	402
05/06/2016	28/08/2016	200	28/09/2016	11/10/2017	378
05/07/2016	15/08/2016	100	14/09/2016	11/10/2017	393
05/07/2016	02/10/2016	200	01/11/2016	11/10/2017	345
05/08/2016	28/10/2016	100	27/11/2016	11/10/2017	319
05/08/2016	30/10/2016	200	29/11/2016	11/10/2017	317
05/09/2016	02/10/2016	100	01/11/2016	11/10/2017	345

The difference of £605 between the £1600 of penalties in the above table and the £2,205 in HMRC's letter is made up of the following 5 additional penalties

<b>Return Period Ended</b>	<b>Date Penalty Notification Issued</b>	<b>Penalty Amount £</b>
05/05/2016	04/03/2017	91
05/06/2016	04/03/2017	116
05/07/2016	04/03/2017	78
05/08/2016	04/03/2017	120
05/09/2016	04/12/2016	200

- 5 9. HMRC also provided a table which showed that the returns had all been received between 165 and 318 days late.

#### **10. Appellant's Submissions**

On 1 December 2017 the appellant's agent made application to the Tribunal to be allowed to make a late appeal.

- 10 The agent made the following comments

“The directors of the company were not fully aware of their obligations in relation to C.I.S. and it was only when they engaged their tax advisers that their C.I.S. affairs were put in order.

The company has traded for several years and this was their first introduction to C.I.S.

5 On considering this appeal we would ask you to take into account that the company is now fully compliant in relation to C.I.S, and all other tax matters.

The company acknowledge their initial failings in relation to C.I.S. and are now well aware of their obligations and are filing all Returns and making all payments timeously. The penalties in question are very harsh for a small company that is trying to grow and  
10 continue to be compliant and pay all taxes on time.”

#### 11. HMRC’s submissions

Some of HMRC’s submissions are included as facts in paragraphs 4 to 9 above.

HMRC say the appeals were significantly late.

15 HMRC say that the directors being unaware of their obligations cannot be regarded as providing reasonable excuse. They point out that there was no other excuse provided.

They referred the Tribunal to the cases of Christine Perrin,

12. HMRC say the penalties have been charged in accordance with legislation.

13. In respect of reasonable excuse HMRC say there is no statutory definition of “reasonable excuse”. Whether or not a person had a reasonable excuse is an objective  
20 test and is a matter to be considered in the light of all the circumstances of the particular case”. (Rowland v HMRC (2006) STC (SCD)536 at paragraph 18).

14. HMRC also referred to the Tribunal decision in *The Clean Car Company v The Commissioners of Customs and Excise*. In that case His Honour Judge Medd OBE QC wrote;

25 “It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared  
30 such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably  
35 and so had a reasonable excuse....”

15. HMRC say they consider that the appellant has no chance of succeeding with a submission that it had a reasonable excuse for the late submission of the C.I.S. returns.

## 16. Tribunal's Observations

The Tribunal has considered HMRC's submissions and the grounds of appeal set out in the Notice of appeal, and submissions in other documents written by the appellant's agent.

- 5 In particular the Tribunal has in mind that in the case of Obhloise Benjamin Ogedegbe Sir Stephen Oliver states:

“Whilst this Tribunal has got power to extend the time for making an appeal, this will only be granted exceptionally. Moreover, there must be at least an arguable case for making the appeal.”

- 10 The Tribunal has not found anything exceptional that would allow it to grant an extension of time for making an appeal in this case.

17. In *Advocate General for Scotland v General Commissioners for Aberdeen City* at paragraph 23 where Lord Drummond Young states:

- 15 “Certain considerations are typically relevant to the question of whether proceedings should be allowed beyond a certain time limit. In relation to a late appeal..... these include

First, is there a reasonable excuse for not observing the time limit, for example because the appellant was not aware and could not with reasonable diligence become aware that there were grounds for appeal?.....

- 20 Secondly, once the excuse has ceased to operate,,,,,,, have matters proceeded with reasonable expedition?

Thirdly, is there prejudice to one or other party if a late appeal is allowed to proceed, or if it is refused?

- 25 Fourthly, are there considerations affecting public interest if the appeal is allowed to proceed, or if permission is refused? The public interest may give rise to a number of issues. One is the policy of finality in litigation and other legal proceedings; matters have to be brought to a conclusion within a reasonable time, without the possibility of being re-opened. That may be a reason for refusing leave to appeal where there has been a very long delay. A second issue is the effect that the instant proceedings might  
30 have on other legal proceedings that have been concluded in the past; if an appeal is allowed to proceed in one case, it may have implications for other cases that have long since been concluded.....

Fifthly, has the delay affected the quality of evidence that is available?”

- 35 The Tribunal has considered these comments and considers that with reasonable diligence the appellant could have become aware of the appeals process. In the light of the many penalty notices the appellant received it should have sought help earlier but delayed obtaining the assistance of a tax adviser. The penalties were issued between 30

April 2016 and 4 March 2017. The appellant's agent appealed on 11 October 2017. The Tribunal can see no reason for such a delay.

5 18. The Tribunal does not accept the appellant's agent's submission that the directors of the company being not fully aware of their obligations in relation to C.I.S. provides the appellant with a reasonable excuse for the late returns. The Tribunal considers that a prudent taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously. A prudent taxpayer on entering the Construction Industry Scheme would find out the implications and requirements of doing so.

10 19 For these reasons the Tribunal considers that an appeal would have no realistic chance of success.

15 20. The combination of the facts that the appeal was lodged many months, in some cases over a year, late and that the appeal has no realistic chance of success persuade the Tribunal that the application for an extension of time should be refused. The application for an extension of time for lodging an appeal is therefore dismissed.

20 21. 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.

25 **PETER R. SHEPPARD**  
**TRIBUNAL PRESIDING MEMBER**

**RELEASE DATE: 23 AUGUST 2018**