



TC01324

Appeal number: TC/2010/04627

*INCOME TAX - Construction Industry Scheme - Late payment of self assessment-
Cancellation of registration - Whether reasonable excuse? - No - Appeal dismissed*

FIRST-TIER TRIBUNAL

TAX

FRANCIS P MCDERMOTT

Appellant

- and -

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

Respondents

**TRIBUNAL: Paulene Gandhi (TRIBUNAL JUDGE)
Gordon Marjoram (TRIBUNAL MEMBER)**

Sitting in public at Birmingham on 5 October 2010

Mr BJ Gallagher, accountant, on behalf of the Appellant

**Ivan Allen Presenting Officer of HM Revenue and Customs appeared for the
Respondents**

DECISION

1 This is an appeal against the withdrawal of Mr McDermott's gross payment
status as he did not comply with his tax obligations in the qualifying period
5 from 23 October 2008 to 23 October 2009. He was notified of this decision on
29 October 2009. Although this appeal was made out of time HMRC take no
issue with this.

2. The appellant, Mr McDermott, requested full written findings of fact and reasons
10 for the decision.

3. This decision sets out our findings of fact and reasons.

The evidence

15 4. We were provided with documentation by HMRC which related to both HMRC
and Mr McDermott's case. We have considered all the documentary evidence
before us with the following being the most pertinent to our decision:

- Appeal to HMRC dated 10 December 2009 appealing against the
decision to cancel Mr McDermott's gross payment status
- 20 • HMRC's letter of 14 January 2010
- HMRC's response to the appeal dated 11 February 2010
- Request for a review dated 9 March 2010
- HMRC's conclusion of the review dated 30 March 2010
- 25 • Notice of Appeal to the Tribunal dated 18 May 2010

5. We heard submissions from Mr Gallagher and Mr Allen.

The law

The Construction Industry Scheme and relevant legislation

30 6. The background to the Scheme is well known. It was introduced in 1975 to
counteract perceived evasion of tax by self-employed workers in the building
industry. Under the Scheme, a person making payments to a subcontractor is
obliged to withhold income tax from the payment, unless HMRC registers the
contractor for gross payment.

35 7. The legislation so far as is relevant to this appeal is set out below.

8. Section 66 Finance Act (FA) 2004 under cancellation of registration for gross
payment states:

40 (1) The Board of Inland Revenue may at any time make a determination
cancelling a person's registration for gross payment if it appears to them
that-

(a) If an application to register the person for gross payment were to
be made at that time, the Board would refuse so to register him

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9. Section 64 FA 2004 under requirements for registration for gross payment states:

(1) This section sets out the requirements (in addition to that in subsection (1) of section 63) for an applicant to be registered for gross payment.

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(2) Where the application is for the registration for gross payment of an individual (otherwise than as a partner in a firm), he must satisfy the conditions in Part 1 of Schedule 11 to this Act.

10. 10. Schedule 11 FA 2004 under conditions for registration for gross payment and part 1 - Conditions to be satisfied by individuals - The compliance test states:

4(1) The applicant must, subject to sub-paragraphs (3) and (4), have complied with-

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(a) all obligations imposed on him in the qualifying period (see paragraph 14) by or under the Tax Acts or the Taxes Management Act 1970 (c. 9), and

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(b) all requests made in the qualifying period to supply to the Inland Revenue accounts of, or other information about, any business of his.

(3) An applicant or company that has failed to comply with such an obligation or request as-

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(a) is referred to in sub-paragraph (1), and

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(b) is of a kind prescribed by regulations made by the Board of Inland Revenue, is, in such circumstances as may be prescribed by the regulations, to be treated as satisfying the condition in that sub-paragraph as regards that obligation or request.

(4) An applicant or company that has failed to comply with such an obligation or request as is referred to in sub-paragraph (1) is to be treated as satisfying the condition in that sub-paragraph as regards that obligation or request if the Board of Inland Revenue are of the opinion that-

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(a) the applicant or company had a reasonable excuse for the failure to comply, and

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(b) if the excuse ceased, he or it complied with the obligation or request without unreasonable delay after the excuse had ceased.

(7) There must be reason to expect that the applicant will, in respect of periods after the qualifying period, comply with-

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(a) such obligations as are referred to in sub-paragraphs (1) to (6), and

(b) such requests as are referred to in sub-paragraph (1).

(8) Subject to sub-paragraphs (3) and (4), a person is not to be taken for the purposes of this paragraph to have complied with any such obligation or request as is referred to in sub-paragraphs (1) to (5) if there has been a contravention of a requirement as to-

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(a) the time at which, or

(b) the period within which,

the obligation or request was to be complied with.

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11. Part 4 of the supplementary provisions of FA 2004 under qualifying period states:

14 In this Schedule “the qualifying period” means the period of 12 months ending with the date of the application in question.

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12. Regulation 32 of The Income Tax (Construction Industry Scheme) Regulations 2005 states:

(2) Obligation to pay -

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(a) the amount liable to be deducted under section 61 of the Act from payments made during that tax period...

Payment is made not later than 14 days after the due date...

The Facts

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13. There is no dispute between the parties as to the relevant facts. We therefore make the following findings of fact.

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14. Mr McDermott’s income tax self-assessment balancing payment for 2007/08 and his first payment on account for 2008/09 were paid 33 days late. The second payment on account for 2008/09 was made five months later. The compliance failures are as follows:

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a) The self assessment balancing charge of £6518.10 due on 31 January 2009 was not paid in full until 5 March 2009

b) The self assessment first payment on account of £3259.05 due on 31 January 2009 was not paid in full until 5 March 2009

c) The self assessment second payment on account of £3259.05 due on 31 July 2009 was paid on 18 January 2010.

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15. Mr McDermott’s failures do not fall within the categories to be disregarded under Regulation 32 of The Income Tax (Construction Industry Scheme) Regulations 2005.

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16. Accordingly we find that Mr McDermott failed to pay his self assessment tax on time on each of the three occasions set out above.

Mr Gallagher's submissions in outline

17. The reasons given by Mr Gallagher on behalf of Mr McDermott for the failures are that:

- 5 a) The self-assessment balancing charge for 2007/08 was £3518.10 and not £6518.10 as stated by HMRC because £3000 had already been paid on account on 28 January 2008.
- 10 b) The self-assessment first payment on account for 2008/09 in the sum of £3259.05 (based on half of the previous year's tax bill) was due on 31 January 2009. A claim to reduce payments on account for 2008/09 could have been made as it was apparent profits for 2008/09 would be lower than 2007/08. However this claim was not made and the payment was paid late on 5 March 2009. If the claim to reduce payment had been made then Mr McDermott would have been able to make payment on time.
- 15 c) The self-assessment second payment on account of £3259.05 was due on 31 July 2009 but did not need to be paid as for that tax year the total tax was less due to the deduction of tax under the Construction Industry Scheme, CIS 25 tax.
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HMRC's submissions in outline

18. In summary HMRC states the following:

- 25 a) Mr McDermott has not met all of his obligations and therefore an application made by Mr McDermott at the time of the determination to be registered for gross payment status would have been refused by HMRC.
- 30 b) Part payment of £3000 for the self-assessment balancing charge for 2007/08 was paid on account on 28 January 2008. However payment in full was not made until 5 March 2009 and was due on 31 January 2009.
- 35 c) With regards to the self-assessment first payment on account for 2008/09 the form S8303 to reduce payments could have been sent to HMRC but was not sent in. It is the taxpayer's responsibility to file this form.
- 40 d) The self assessment second payment on account of £3259.05 due on 31 July 2009 was partly paid with a payment made on 5 March 2009 but full settlement was not made until 18 January 2010, some five months later.
- 45 e) There have been failures after the qualifying period which ended on 23 October 2009. Accordingly, not only is there no reason to expect that Mr McDermott would comply with his obligations after the end of the qualifying period but in fact he has not done so as shown in the payment due on 31 July 2009 but not paid until 18 January 2010.

Discussion

19. It is not in dispute that Mr McDermott's tax liability was paid after the due dates. We consider whether there was any reasonable excuse for the three failures set out above.
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20. There is no definition in the legislation of a "reasonable excuse" which "is a matter to be considered in the light of all the circumstances of the particular case" (see *Rowland v HMRC* [2006] STC (SCD). Although this is a VAT case the proposition set out is equally relevant to direct tax cases).
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21. However *Steptoe v R&C Commrs* [1992] STC 527 requires the Tribunal to take for comparison a person in a similar situation to that of the actual taxpayer who is relying on the reasonable excuse defence.
22. As set out in *Stephen Mutch v HMRC* [2009] UKFTT 288 (TC) the assumed reasonable competent business person must be taken to have exercised reasonable foresight. Then the reasonable business person must be taken to have exercised due diligence and a proper regard for their tax obligations.
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23. Mr McDermott's income tax self assessment balancing payment for 2007/08 and the first payment on account for 2008/09 was due on or before 31 January 2009 but was paid in full 33 days late on 5 March 2009 whilst the second payment on account for 2008/09 due on 31 July 2009 was paid in full five months late on 18 January 2010. These are not failures that we can disregard.
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24. The SA303 form (application for a reduction of the payment on account) was not sent to HMRC until December 2009. No reason has been given by Mr McDermott for not asking for the reduction of his payment on account sooner than December 2009 other than an oversight. If Mr McDermott does not make an application for a reduction of his payment on account then he is expected to pay his tax liabilities in full and on time.
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25. Even if the SA303 form had been submitted according to Mr Gallagher's calculations there was still an outstanding payment on account for 2008/09 as well as the outstanding balancing payment for 2007/08 albeit for lesser amounts. Nevertheless the balancing payment and first payment on account were not paid in full until 5 March 2009. No explanation has been provided as to why it was not paid by the due date (31 January 2009) or within 28 days of the due date.
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26. In our view therefore Mr McDermott has not acted as a reasonable taxpayer and 'exercised due diligence' and 'had a proper regard for his tax obligations'. We therefore find there is no reasonable excuse for the late payment of his tax.
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Conclusion

27. For the above reasons we do not find that Mr McDermott has met all of his obligations under the Construction Industry Scheme during the qualifying period and therefore an application made by Mr McDermott at the time of the determination to be registered for gross payment status would have been refused
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by HMRC. The determination cancelling Mr McDermott's Gross Payment status was correct. We therefore dismiss the appeal.

- 5 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
10 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: 15 JULY 2011