



**TC01333**

**Appeal number: TC/2009/13676**

*Construction Industry Scheme - whether return deemed to be delivered in the ordinary course of post - yes - whether return delivered late - no - appeal allowed*

**FIRST-TIER TRIBUNAL**

**TAX**

**MICHAEL MCGILLEN  
t/a MCGILLEN BUILDING SERVICES**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)**

**The Tribunal determined the appeal on 7 July 2011 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 dated 23 August 2009 and HMRC's Statement of Case submitted on 9 August 2009.**

## DECISION

1. On 10 June 2009 the First-tier Tribunal decided the appeal of Mr Michael McGillen, trading as McGillen Business Services, against the imposition of a £100 penalty for late filing of the Company's Construction Industry Scheme ("CIS") return.
2. The First-tier Tribunal found for HMRC, and Mr McGillen appealed to the Upper Tribunal.
3. On 1 June 2011, under powers given by s 12(2)(b)(i) and (3) of the Tribunals, Courts and Enforcement Act 2007 ("the TCEA"), the Upper Tribunal remitted the case back to the First-tier Tribunal for a rehearing before a different Tribunal.
4. Under TCEA s 12(3)(b), the Upper Tribunal may give procedural directions in connection with the reconsideration of the case by the First-tier Tribunal. In this case the Upper Tribunal has directed that this new Tribunal address the following question on the basis of the evidence adduced to it by the parties:
- "was the CIS return (due on 19 May 2009) posted on 12 May 2009, or in any event on a date when it could reasonably have been expected to have reached the Respondents by 19 May 2009"
5. If this Tribunal is satisfied that the answer is "Yes", it is to allow the appeal; otherwise the appeal is to be dismissed.
6. This Tribunal finds that the answer to the question is "Yes", and so allows the Company's appeal.

### **The Appellant's submissions**

7. Mr McGillen states that he posted the return with two first class stamps on 12 May 2009. He is clear that this was the date because he took a photocopy of the return and marked the posting date on the return. A copy of this original return, with the date of posting marked, was sent to HMRC by letter dated 12 June 2009 in support of his appeal against the filing penalty.
8. In the same letter Mr McGillen explains why he wrote a copy of the posting date on the return:
- "there is either a problem with the post getting to you or they are not dealt with immediately they arrive at your offices. We have heard from you more than once in the past while I have always know that they had been posted in adequate time to get you well before the 19th. In recent months I have been putting the date they have been posted on the photocopies so that I have evidence."
9. Mr McGillen further states that two witnesses saw him post the return on that day.

### **HMRC's submissions**

10. HMRC say that the return was submitted late. Instead of being received by 19 May 2009 it was not received until 21 May 2009.

5 11. They also say McGillen Building Services have appealed against three late filing penalties in the past twelve months, and each of these have been upheld by HMRC – in other words, HMRC have found in favour of the Appellant.

12. Since the last successful appeal by Mr McGillen, HMRC have issued him with “an educational letter”, which stated that “if further appeals against late filing penalties mention postal delays, HMRC will require evidence of postage.”

10 13. HMRC contend that Mr McGillen has not provided satisfactory evidence that the return was posted on 12 May 2009 “ie a certificate of posting from the Post Office.”

### **When was the return posted?**

14. Mr McGillen has kept a copy of his return, and recorded the date on which it was posted. He says he adopted this practice because HMRC had previously incorrectly  
15 denied receiving returns within the deadline.

15. HMRC's own evidence supports this – they say that the three times Mr McGillen has appealed against a late filing penalty, they have each time conceded he was correct.

16. I place considerable weight on Mr McGillen's testimony, his history of being  
20 proved correct in relation to previous filing dates, and the fact that he has introduced a systemic practice to record his posting dates.

17. I place little if any weight on the witnesses. The individuals are not named, and they have given no evidence; even assuming that two people did see Mr McGillen post an envelope, would they have known what was inside?

25 18. For their part, HMRC state that the letter was received on 21 May 2009. However, this is a bare assertion. They did not produce the CIS return, date stamped on arrival, or any evidence as to their systems for recording post.

### **The decision**

19. Although I discount the witness evidence, I nevertheless find, on the balance of  
30 probabilities, that the letter was posted with two first class stamps, as Mr McGillen says, on 14 June 2009.

20. I am reassured in my decision by the fact that on three previous occasions, HMRC upheld Mr McGillen's appeal on similar facts: the reason that this appeal has been rejected by HMRC appears to be that Mr McGillen has not complied with  
35 HMRC's non-statutory requirement that he produce a certificate of posting.

21. I therefore decide the question posed by the Upper Tribunal in Mr McGillen's favour.

22. 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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**Anne Redston**

**TRIBUNAL PRESIDING MEMBER**  
**RELEASE DATE: 18 JULY 2011**

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