



**TC01396**

**Appeal number: TC/2010/07877**

*Construction Industry Scheme - Gross Payment Status – Withdrawal – Former accountant retired – New accountant failed to pass on reminders tax due – Both partners had exemplary records of payment in past – Cancellation of status determined by computer – No consideration given by the commissioners as to whether or not they had a discretion – Appeal allowed to the extent that it is referred back to the Commissioners*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**B G & M A SAUNDERS**

**Appellants**

**- and -**

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

**Respondents**

**TRIBUNAL: MISS J C GORT (Judge)  
MARK BUFFERY (Member)**

**Sitting in public in Reading County Court on 8 December 2010**

**The Appellants appeared in person**

**Mr C Ward, Officer of HMRC, appeared on behalf of the Respondents**

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## DECISION

1. This is an appeal against a decision of the Commissioner for Her Majesty's  
5 Revenue and customs ("HMRC") dated 15 April 2010, reviewed on 26 July 2010, and  
upheld on a further review by a letter dated 16 September 2010, to withdraw Gross  
Payment Status.

2. The Appellants ("Mr B G Saunders" and "Mr M A Saunders") are a father and  
10 son who work as a partnership in the construction industry and have done so for very  
many years. Mr B G Saunders has worked for the past 60 years. Neither has any  
record of defaulting either with their direct tax payments or VAT, as was  
acknowledged by Mr Ward on behalf of HMRC.

3. From the late 1970s they have worked under a contract with Astra Zeneca  
15 which has been renewed annually each December and which accounts for 95% of  
their work. They do groundwork which sometimes involves their being called to  
work at night. It is their belief that if they are no longer able to be paid without  
deductions under the Construction Industry Scheme then the main contract will not be  
20 renewed.

4. About 3 years ago the accountant who had handled all their tax matters retired.  
It had been his custom to contact them whenever their tax fell due, which was not the  
25 practice of their new accountants. On the present occasion the due date for the second  
interim payment in the case of both Mr B G Saunders and Mr M A Saunders fell on  
31 July 2009. In the case of the former the sum due was £1,051.19 of which (£840.02  
was paid late. In the case of the latter the sum due was £1,448.50 of which £1,426.98  
was paid late. For some unexplained reason the date payment was received from Mr  
30 B G Saunders was 8 September 2009 and for Mr M A Saunders it was 9 September  
2009. HMRC had sent reminders to the new accountants in respect of both men on 14  
and 19 May respectively, and on 13 and 18 August respectively had sent a notice of  
the sums now overdue. None of these notices were forwarded to either Mr B G or Mr  
M A Saunders.

5. We heard evidence from both Mr B G and Mr M A Saunders. It was Mr B G  
35 Saunders' evidence that he had been aware that the tax was due, but he was unable to  
find the relevant documents giving the amount due, despite searching the house from  
top to bottom. He did not know what to do and tried to contact his accountants but  
was unable to do so, in part because it was a very busy period for him, regularly  
40 working until 9.00pm at night. Mr B G Saunders did not feel able to deal directly  
with HMRC and considered it safer for his accountant to handle the matter. In his  
own words he was "bred to do work, not papers." It transpired that he had filed the  
documents with his VAT receipts and it was only when sorting them out towards the  
end of August when his VAT payment was due that he found the relevant payment  
45 slips.

6. Mr M A Saunders gave evidence that his father handled all the paperwork, it being easier for one person to deal with it, but he too had searched extensively for the payment slips. The slips were sent directly to the accountant once they were found.

## 5 **The Legislation**

7. The Finance Act 2004 (“FA”) provides:

10 1. The taxation of payments by contractors to subcontractors in the industry is governed by legislation, at Section 57-68 Finance Act 2004, Schedules 11 and 12 Finance Act 2004 and by regulations. The Income Tax (Construction Industry Scheme) Regulations 2005, SI 2005 No.2045 and is effective on or after 6 April 2007.

15 7. Section 66(1) FA 2004 provides that the board may at any time make a determination cancelling a persons (subcontractor) registration for gross payment if it appears to them that if an application were to be made at the time of the determination the Board would refuse to register them for gross payment or has failed to comply with any provision under this chapter or regulations made under it.

20 9. Part 2 of Schedule 11, FA 2004 sets out the three statutory tests which the Firm must satisfy being:

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- Paragraph 6 – the business test
  - Paragraph 7 – the turnover test
  - Paragraph 8 – the compliance test

30 10. Paragraph 8(1), schedule 11, FA 2004 requires that each of the persons who are partners at the time of the application must have complied with:

- 35
- All obligations imposed on them in the qualifying period by or under the Tax Acts or the Taxes Management Act 1970, and
  - All requests made in the qualifying period to supply all accounts of, or other information about, its business.

40 11. Paragraph 8(2), schedule 11 FA 2004 provides that a person that has failed to comply with their obligations can be treated as satisfying the conditions as regards those obligations where the failure is of a kind prescribed by regulations.

45 12. The regulations are at Part 6, Statutory Instrument 2005 No.2045, which sets out the conditions to be satisfied for Gross payment. At table 3 within Regulation 32, the obligations are set out in Column 1. Column 2 of the table set out the prescribed

circumstances where a person can be treated as satisfying the conditions of the obligations within the compliance test. There is a further regulation at Statutory Instrument 2008 No. 1282 which takes effect from 3 June 2008 which sets out a further circumstance when a company can be treated as satisfying the conditions of the obligations within the compliance test.

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13. Paragraph 8(3), Schedule 11 FA 2004 provides that a person who has failed to comply with such an obligation or request referred to in Subsection (1) is to be treated as satisfying the condition if the person had a reasonable excuse for the failure to comply and complied with the obligation without unreasonable delay once the excuse had ceased.

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14. Section 118(2) Taxes Management Act 1970 provides that a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as allowed or where as person had reasonable excuse he did it without unreasonable delay after the excuse had ceased.

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15. Paragraph 8(4), Schedule 11 FA 2004 provides that there must be reason to expect that the person will, in respect of periods after the qualifying period, comply with all such obligations and requests within paragraphs 8(1) to 8(3) Schedule 11 FA 2004.

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18. The qualifying period is defined in paragraph 14, Schedule 11 FA 2004 as the period of 12 months ending with the date of the application in question.

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17. Section 66(2) FA 2004 provides that where a determination is made the person's registration for gross payment is cancelled from the end of the prescribed period after making the determination.

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18. Section 66(5) FA 2004 provides that a notice cancelling a person's registration is issued without delay to the person stating the reasons for the cancellation.

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19. Regulation 26 SI 2005 No.2045 provides that the prescribed period is 90 days from the date of the notice in section 66(5) FA 2004.

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20. Under Section 67(1)(b) FA 2004 a person may appeal against the cancellation of the registration for gross payment.

21. Section 67(2) and (3) FA 2004 provides that the appeal must be by notice to the Board within 30 days of the cancellation and stating the reasons for believing the registration for gross payment should not have been cancelled.

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5                   22.     Section 67(5) FA 2004 provides where a person appeals against the cancellation of his registration for gross payment the cancellation does not take effect until the later of the abandonment of the appeal, the determination of the appeal by the Commissioners or the appropriate court.

10               8.     We heard from Mr Ward that on 2 April 2010 the HMRC computer automatically generated a notice in respect of each of the partners that they had failed to pay the tax by the due date. The effect of this was that Gross Tax Treatment was refused and a notice of this was issued to them. Where there has been a late payment the only circumstances in which the notice is not generated are if either the payment is less than 28 days late or if the amount due is less than £100. If it is even £101 then a computer will record a fail.

15               9.     We were referred to the case of *John Grosvenor v HMRC*(TRANS/09/502) to a decision of the Tribunal released on 20 April 2009, and *Templeton (HMIT) v Transform Shop Office and Bar Fitters Ltd* which is a decision of Hart J in the High Court for which no reference was given but which is set out in the Tax Case Leaflets at 3762.

20               10.    We were also provided with the decision of the Court of Appeal in the Value Added Tax case of *Customs and Excise Commissioners v Steptoe* (“*Steptoe*”). Between the last two cases and *John Grosvenor* the relevant law has changed to that contained in the Finance Act 2004 set out above. The Court in the case of both *John Grosvenor* and *Steptoe* is concerned with the issue of whether the taxpayer has a reasonable excuse, which is now provided for by the FA paragraph 8(3) of Schedule 11.

25               11.    It was the HMRC’s case that neither Mr B G nor Mr M A Saunders had a reasonable excuse for the failure to submit the tax by the due date or within 28 days thereof. They had not met their obligations as taxpayers, and had failed the compliance test in Part 2 Schedule 11 of the FA. It was accepted that they had met both the business test and the turnover test. The fact that the consequence of the withdrawal of Gross Payment Status would probably mean that the partnership would go out of business was not a proper consideration, nor was it relevant that it had always previously complied with its obligations to HMRC and had done so since April 2010.

30               **Reasons for Decision**

35               12.    We announced at the hearing that we would allow the appeal to the extent that we would be referring it back to HMRC for reconsideration, given that s.66(1) of the FA gives HMRC a discretion in the matter of whether or not to cancel a person’s registration. In the present case the cancellation was determined by a computer and the decision notice against which the appeal lies was issued without any consideration of the full circumstances. If, for example, either of the partners had guessed the

amount due and underpaid by as little as £101 the notice would still have been generated.

13. We were told by Mr Ward that the case of *Templeton* was still relevant. That case was concerned with s.565 of the Income and Corporation Taxes Act 1988 (“ICTA”) which provides where relevant:

“(3) The company must subject to subsection (4) below, have complied with all obligations imposed on it by or under the Tax Acts or the management Act.

(4) A company which has failed to comply with such an obligation or request as is referred to in subsection (3) above shall nevertheless be treated as satisfying this condition as regards that obligation or request if the Board are of the opinion that the failure is minor and technical and does not give reason to doubt that the conditions mentioned in subsection (8) below will be satisfied.

...

(8) There must be reason to expect that the company will, in respect of periods ending after the end of the qualifying period, comply with all such obligations as are referred to in subsections (2) to (7) above and with such requests as are referred to in subsection (3) above.”

We asked Mr Ward specifically whether the provisions of (8) above still apply after the introduction of the new legislation, and he confirmed that they did. He also confirmed that HMRC had no reason to believe that the partners would not comply with their obligations to pay tax on time in future. However he also believed that HMRC had no discretion in the matter.

14. We find that the word “may” in s.66(i) gives HMRC a clear discretion and that this discretion amounts to more than a consideration of whether or not the taxpayer has a reasonable excuse for its failure. The matters which we believe should be taken into account are:

- (i) the partnerships long-standing record of compliance,
- (ii) Mr B G Saunders’ even longer record of compliance, never having defaulted in almost 60 years as a taxpayer;
- (iii) the fact of the partners having relied on their accountant to keep them informed of the due date and amount of tax due, such reliance in their particular circumstances being reasonable given their particular circumstances being reasonable given their unfamiliarity of their previous accountant;

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- (iv) the fact that HMRC (quite properly) sent notices out to those accountants before and at the time of the due payment but did not send them to the partners;
  - (v) there was no deliberate withholding of money, only a lack understanding of how the partners should set about dealing with the loss of the relevant documents.
  - (vi) the amount of tax which was paid late.

10 15. For the above reasons we allow the appeal to the extent that we direct that HMRC review the matter taking account of the above points.

15 16. 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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**MISS J C GORT  
TRIBUNAL JUDGE**

**RELEASE DATE: 15 AUGUST 2011**

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