



TC01447

Appeal number: TC/2011/03495

Construction Industry Scheme - penalty for late delivery of return - no certificate of posting - whether return deemed to be delivered in the ordinary course of post - yes - whether return delivered late - no - appeal allowed

FIRST-TIER TRIBUNAL

TAX

MEM INDUSTRIAL ROOFING LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)

The Tribunal determined the appeal on 26 August 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 4 May 2011 and HMRC's Statement of Case submitted on 10 June 2011.

DECISION

1. MEM Industrial Roofing Limited (“the company”) is a contractor operating within the Construction Industry Scheme (“CIS”). Contractors are required to file monthly returns, and the late filing of a return triggers a penalty.

2. This is the company’s appeal against a £100 late filing penalty for the tax month ended 5 December 2010.

3. HMRC’s case is that the company’s CIS return for December 2010 was due on 19 December 2010, but was not received until 23 December, and that the company must thus pay the £100 late filing penalty.

4. Mr Mitchell, the company’s director, appealed the penalty on behalf of the company. Mr Mitchell said he posted the return on 12 December by first class post, in good time for the deadline.

5. The issue between the parties is thus one of fact: was the return delivered before the due date, or was it late.

The legislation

6. CIS was introduced in 1975 to counteract perceived evasion of tax by self-employed workers in the building industry. The current rules are set out at FA 2004, ss 58-63 and Schedule 11 of that Act, together with the Income Tax (Construction Industry Scheme) Regulations 2005 (“the Regulations”).

7. Regulation 4, dealing with the submission of monthly returns, is set out as an Appendix to this Decision, together with the relevant parts of Taxes Management Act 1970 (“TMA”) s 98A, which prescribes penalties for failing to meet the return submission deadlines.

The evidence

8. The Tribunal was provided with the correspondence between the parties. HMRC also provided an internal document relating to the company’s CIS filing and a copy of a proforma “education letter”.

Mr Mitchell’s submissions on behalf of the company

9. Mr Mitchell submits that he posted this return by first class post on 12 December 2010 in good time to arrive at HMRC’s offices before the deadline of 19 December 2010.

10. He says that his earlier returns were also posted on time, and asks whether his letters to HMRC are always the last to be opened.

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11. In his request for a review of the HMRC penalty decision, he says:

“I am running a small company on my own in times of recession...I have now come to a decision to stop using subcontractors to avoid all this paperwork”

5 12. In his Notice of Appeal, he says:

“I have now stopped using subcontractors because of the amount of mail I receive from yourselves. My taxes for my company are all up to date and I believe I should not pay any more.

10 I can fully understand the amount of mail yourselves go through on a day to day basis but feel my payments seem to be at the back of your log.”

13. He also submits that he was not told that to send his returns by recorded delivery and that this “would add pressure to my already struggling company.”

HMRC’s submissions

15 14. HMRC say that:

“A contractor is legally bound to ensure that HMRC has received their return by the 19th of the month - it is not enough simply to have posted the return in what is believed to be sufficient postage and time to reach HMRC by the 19th of the month.”

20 15. They also say that “the Appellant does not state the date the return was posted or the rate of postage used and he has not provided evidence of postage.”

25 16. They state that the company was issued with an “education letter” on 6 September 2010. The copy of the standard education letter provided to the Tribunal, on page 2, includes a sentence which reads “if any future appeals against late filing penalties mention postal delays we will require evidence of posting with your appeal.”

17. On that issue they say:

30 “Although proof of posting is not a legislative procedure, in cases where the grounds for reasonable excuse are cited as postal delays or when it is contended that the return was posted in good time, it is reasonable to expect that some evidence of actual postage should be provided.”

35 18. They also submit that “this is not the first occasion on which the issue of a late return has arisen.” They have provided a table showing that on three previous occasions the company was issued with a penalty for sending in a late return but appealed the penalty. The table also shows that each of these three appeals was upheld. On a fourth occasion HMRC logged the return as being received two days late and the company did not appeal.

19. The HMRC response to Mr Mitchell's statement that the company has now ceased to use subcontractors because of HMRC paperwork, is as follows:

“The Appellant states that he no longer engages subcontractors. HMRC have noted their records and advised the Appellant accordingly.”

5 **Date the return was posted**

20. The history of previous appeals is taken by HMRC as evidence that Mr Mitchell regularly posts his returns late. Mr Mitchell sees the same facts as proof that HMRC regularly delay opening letters. These earlier appeals are not before this Tribunal and I make no finding in relation to them.

10 21. HMRC say that the company “does not state the date the return was posted or the rate of postage used.” This is not correct. Mr Mitchell has given evidence that he posted the return on 12 December 2010, by first class post. I accept this evidence.

15 22. It is true that no proof of posting was obtained, but as HMRC concede, “proof of posting is not a legislative procedure”. HMRC cannot simply impose a requirement that taxpayers obtain proof of postage: this is outwith their statutory powers. As Mr Mitchell says, obtaining proof of posting can be an onerous requirement, particularly for a small business.

Date the return was “made”

20 23. The Regulations require that the CIS return “must be made to the Commissioners” by the due date. The issue the Tribunal has to decide is whether the company's return was “made” by 19 December 2010.

24. In making my decision I must comply with the Interpretation Act 1978, s 7, which reads as follows:

25 “an Act authorises or requires any document to be served by post
(whether the expression ‘serve’ or the expression ‘give’ or ‘send’ or
any other expression is used) then, unless the contrary intention
appears, the service is deemed to be effected by properly addressing,
pre-paying and posting a letter containing the document and, unless the
contrary is proved, to have been effected at the time at which the letter
30 would be delivered in the ordinary course of post.”

25. There is no contrary intention in the relevant legislation, and, noting in particular the width given to the expression “serve”, the Interpretation Act s 7 clearly applies to the delivery of CIS returns to HMRC.

26. I take judicial notice of the following facts:

35 (1) first class post normally arrives at its destination, if not the next day, at least by the day after that;

(2) 12 December 2010 was a Sunday, and 19 December 2010 was the following Saturday; and

(3) “the ordinary course of post” may be somewhat slower in the week before Christmas than at other times of the year.

5 27. Taking all this into consideration, I find that a letter posted first class on Sunday 12 December, if there was no Sunday collection, could normally be expected to arrive on or before Wednesday 15 December. Even allowing for a certain dilatoriness over the Christmas period, it would normally arrive on or before Friday 18 December.

10 28. As a result, HMRC are deemed to have received the company’s return, unless they can prove the contrary.

29. They have provided a computer print-out which they say shows the date of receipt. The document states that the form was “scanned at RDC” on 23 December. It thus gives the date the return was logged by HMRC, which may or may not be the date it actually arrived.

15 30. HMRC have provided no evidence as to procedures for opening the post and logging it; and in particular have not given evidence that post delivered to the building to which the company posted its CIS return is invariably opened, logged and scanned on the day of arrival. I therefore find that this document, on its own, is insufficient to rebut the legislative presumption in the company’s favour.

20 31. As a result of the foregoing, I find the following facts:

- (1) Mr Mitchell posted the company’s return on 12 December 2010; and
- (2) the return was received by HMRC before the deadline of 19 December 2010.

32. In consequence, the company’s appeal is allowed and the penalty discharged.

25 33. 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
30 “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: 15 SEPTEMBER 2011**

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APPENDIX

Income Tax (Construction Industry Scheme) Regulations, Reg.4

5 Monthly return

(1) A return must be made to the Commissioners for Her Majesty's Revenue and Customs in a document or format provided or approved by the Commissioners—

(a) not later than 14 days after the end of every tax month, by a contractor making contract payments or payments which would be contract payments

10 (b) ...

(2)-(9) ...

(10) If a contractor who has made a return, or should have made a return, under this regulation makes no payments under construction contracts in the tax month following that return, the contractor must make a nil return not later than 14 days after the end of that tax month.

15 (11) ...

(12) Subject to paragraph (13), section 98A of TMA (special penalties in the case of certain returns) applies to the requirements in—

(a) paragraph (1),

20 (b)–(c) ...

(d) paragraph (10).

(13) A penalty under section 98A of TMA in relation to a failure to make a return in accordance with paragraphs (1) or (10) arises for each month (or part of a month) during which the failure continues after the 19th day of the sixth month following the appointed day.

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Taxes Management Act 1979, s 98A

Special penalties in the case of certain returns

(1) ...regulations under section 70(1)(a) or 71 of the Finance Act 2004 (sub-contractors) may provide that this section shall apply in relation to any specified provision of the regulations.

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(2) Where this section applies in relation to a provision of regulations, any person who fails to make a return in accordance with the provision shall be liable—

(a) to a penalty or penalties of the relevant monthly amount for each month (or part of a month) during which the failure continues...

35 (b) ...

(3) For the purposes of subsection (2)(a) above, the relevant monthly amount in the case of a failure to make a return—

(a) where the number of persons in respect of whom particulars should be included in the return is fifty or less, is £100....