



TC01481

Appeal number: TC/2011/03977

Construction Industry Scheme – failure to submit end of year returns – penalties totalling £2,400 - whether reasonable excuse – no – whether disproportionate – no

FIRST-TIER TRIBUNAL

TAX

DARREN IRETON

Appellant

- and -

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

Respondents

TRIBUNAL: ANNE REDSTON (PRESIDING MEMBER)

The Tribunal determined the appeal on 23 September 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 21 May 2011, HMRC's Statement of Case submitted on 29 June 2011 and the Appellant's Reply dated 23 July 2011

DECISION

1. This is the appeal of Mr Darren Ireton against penalties totalling £1,200 for non-submission of the 2005-06 End of Year (“EoY”) Construction Industry Scheme (“CIS”) Return, and further penalties, also totalling £1,200, for non-submission of the 2006-07 EoY Return.

2. The issues in the case were whether Mr Ireton has a reasonable excuse for not filing the returns by the deadlines, and if not, whether the penalties were disproportionate.

3. Having considered the evidence and the parties’ submissions, the Tribunal dismissed the appeal and confirmed the penalties.

4. A number of jurisdictional and practical points are briefly discussed at the end of this Decision.

The evidence

5. The Tribunal was provided with the correspondence between the parties relating to this appeal.

6. HMRC also supplied screenprints showing details of the penalty notices and reminders which were sent out.

7. Mr Ireton provided the Tribunal with correspondence between him and his accountant at the time, and with his current accountant.

The law

8. In the years 2005-06 and 2006-07 contractors were required to make EoY returns (SI 1993/743 Reg 40A). This requirement was abolished for subsequent years.

9. The due date for EoY returns was 19 May after the end of the tax year (SI 1993/743 Reg 40A(1)).

10. If the EoY return was not submitted by the due date, the contractor was liable to a penalty of £100 per month or part of a month, up to a maximum of 12 months (Taxes Management Act 1970 (“TMA”) s 98A(2)(a) and (3), imported by SI 1993/742 Reg 40A). It is under these provisions that Mr Ireton has been charged a penalty of of £1,200 for each of the two years in question.

11. An officer of HMRC “may make a determination imposing a penalty and setting it at such an amount as, in his opinion, correct or appropriate” (TMA s 100).

12. If Mr Ireton has a “reasonable excuse” for not submitting the EoY returns, no penalty is chargeable (TMA s 118(2)).

13. If the penalty is chargeable the Tribunal does not have power to reduce the penalty, but only to confirm it (TMA s 100B). In contrast, HMRC have a wide-ranging power to mitigate or remit a penalty (TMA s 102).

The facts

5 2005-06

14. Mr Ireton first took on subcontractors in 2005-06. The tax deducted from the subcontractor(s) in this year £1,807.29. This was paid over to HMRC.

15. Mr Ireton used an accountant but it is unclear whether the accountant's responsibilities included advice on CIS. I discuss this further below.

10 16. Mr Ireton's 2005-06 EoY return was due to be submitted on or before 19 May 2006.

17. On 12 March 2007 an interim penalty notice of £900 was issued as the EoY return had not been received. This was sent to Mr Ireton's address in Basingstoke.

15 18. On 21 May 2007 a further penalty notice for the same year was issued, for £300. This was sent to the same address.

19. On 8 June 2007 a reminder letter was sent to Mr Ireton from HMRC's Debt Management and Banking department, again to his Basingstoke address.

20. HMRC took no further action until 13 October 2010, when they issued a letter threatening distraint action.

20 2006-07

21. Mr Ireton used one or more subcontractors in 2006-07, and the tax deducted from these subcontractor(s) was £1,980.90. This tax was paid over to HMRC.

22. The 2006-07 EoY return was due on 19 May 2007.

23. On 3 August 2007 Mr Ireton moved house, from Basingstoke to Hoddeston.

25 24. On 24 September 2007 HMRC issued a penalty notice of £400 as they had not received the 2006-07 return. The notice was sent to the Basingstoke address.

25. On 28 January 2008 a further penalty notice, also for £400, was issued, again to the Basingstoke address.

26. On 25 May 2008, HMRC updated their contact address for Mr Ireton.

30 27. On 26 May 2008 a further penalty notice of £400 was issued to Mr Ireton; this was sent to the Hoddeston address.

28. Again, HMRC took no further action until 13 October 2010, their letter threatening distraint action covered both years.

29. At some date before 13 October 2010, Mr Ireton changed his accountant.

The submissions of the parties

5 30. Mr Ireton says:

(1) He began engaging subcontractors in 2005-06, so “this was the first year anyone worked for me, I must not have known about this form, but should have been told by my accountant but was not.” He also provided the Tribunal with a copy of an email from his accountant, who says “we have never been involved with this side as you dealt with these returns yourself.”

10 (2) In relation to the first penalty for £900 this was one “which to my mind I payed”.

(3) The correspondence sent after he moved house never reached him.

15 (4) He “missed a form but it was human error. If I was contacted before 6 years I would have sorted out.”

(5) He paid over all the tax deducted from his subcontractors on time.

(6) In relation to his own tax for these years he says “I am sure I payed too much tax as I payed 20% myself then out of my money payed another 20% for my workers.”

20 (7) The penalty is “too big” and “a lot of money for a piece of paper.”

(8) HMRC should apply ESC A19 and waive the penalties.

(9) His current accountant has “tried to get these [EoY] forms to put them in but has been told that they don’t exist any more.”

25 (10) Finally he says that his gross income after tax and travelling expenses is very low, and is exceeded by his outgoings, which are modest. He is the family breadwinner and is completely unable to pay these penalties. In his words “now in the middle of a recession you want £2,500 (sic) which is nearly 3 months money.”

31. HMRC’s submissions are as follows:

30 (1) Contractors had a legal obligation to submit EoY returns for the years in question. There is no requirement that HMRC remind them of this obligation.

(2) The penalty notices for 2005-06 and the reminder notice were all sent to Mr Ireton at his then current address.

35 (3) The two penalty notices for 2006-07 which were sent to the wrong address were not returned to HMRC, and HMRC were not informed of the change of address until after these two notices were sent out.

(4) The penalties for not submitting the returns are fixed by statute.

(5) The fact that the tax deducted from the subcontractors was paid over to HMRC is not relevant, as these penalties are for non-submission of the returns.

5 (6) The returns have still not been submitted: HMRC say “we have been in contact with you with regards to your penalties for quite some time yet you still refuse to forward the CIS36 to us.”

(7) Mr Ireton has no reasonable excuse for not submitting the returns.

(8) ESC A19 does not apply to CIS penalties.

(9) The Business Payment Support Service can provide assistance if Mr Ireton would like to discuss Time to Pay arrangements.

10 **Discussion and decision**

32. It is not in dispute that Mr Ireton’s EoY forms were not submitted by the due date, or within twelve months afterwards.

33. In relation to 2005-06, I find that:

(1) The penalties were correctly determined by HMRC.

15 (2) The penalty notices and the reminder notice were delivered to Mr Ireton at his home address in Basingstoke. Mr Ireton accepts that at least the first penalty notice for £900 was received, since he says “to my mind” it was paid.

(3) As to whether the £900 was in fact paid, this is not a matter for the Tribunal. I return to this at the end of my Decision.

20 34. In relation to 2006-07 I find that:

(1) The penalties were correctly determined by HMRC.

(2) The first two penalty notices were delivered to Mr Ireton’s old address; the third notice was delivered to his new address.

25 35. Mr Ireton puts forward two possible reasonable excuse defences: the non-delivery of the penalty notices and reliance on his accountant.

Non-receipt of the notices

36. The only penalty notices sent to the wrong address were the first two for 2006-07. The third was delivered to the new address. All those for 2005-06 were sent to the correct address.

30 37. I agree with HMRC that the obligation is on the contractor to make the EoY returns, and the non-receipt of a penalty notice does not remove either the obligation or the penalty. Non-receipt of a penalty notice would possibly provide a reasonable excuse for a late appeal, but HMRC have accepted Mr Ireton’s late appeal in any event.

35 38. I thus find that the non-receipt of two penalty notices does not provide Mr Ireton with a reasonable excuse for non-submission of the EoY returns.

Reliance on accountant

39. It is unclear whether advising on CIS was within the scope of Mr Ireton's then accountant's engagement: she says her firm "have never been involved with this side as you dealt with the returns yourself."

5 40. The fact that Mr Ireton dealt with the returns himself does not of itself mean that the accountant had no overall responsibility to advise on the structure and obligations of CIS – but whether this was or was not the case is an issue to be resolved between Mr Ireton and his then accountant by reference to the contract between them.

10 41. Even if I were to accept that Mr Ireton had relied on his accountant to explain the requirements of CIS, would such reliance be a reasonable excuse? Reliance on a third party agent did provide a reasonable excuse in a case involving "difficult and complex area of tax law", including "the arcane matters of film finance partnerships" (*Rowland v HMRC* [2006] STC (SCD) 536) A similar decision was reached in *The Research and Development Partnership Ltd v HMRC* [2009] UKFTT 328 (TC), which
15 concerned complicated questions of research and development tax credits.

42. This Tribunal has taken a different view in more straightforward cases (see, for example, *Richfield Fashion* [2010] TC 00957). In *The Research and Development Partnership Ltd* the judge said that when considering whether reliance on a third party constitutes a reasonable excuse "it is proper to have regard to the nature of the task."

20 43. In this case the task is straightforward, and I find that, even if Mr Ireton's accountant had a contractual obligation to advise him on the scope of his CIS responsibilities and failed to do so, this does not constitute a reasonable excuse for non-submission of his EoY returns.

Proportionality

25 44. Mr Ireton says that £2,400 is "a lot of money for a piece of paper." He also says "now in the middle of a recession you want £2,500 (sic) which is nearly 3 months money."

30 45. The Human Rights Act 1998 obliges the Tribunal to comply with Convention rights, and these require that there be "a reasonable relationship of proportionality between the means employed and the aim pursued", see *Gasus Dosier-und Fördertechnik GmbH v Netherlands* (Application 15375/89) (1995) 20 EHRR 403.

35 46. I thus considered the question of proportionality and in particular the test set out by Simon Brown LJ in *International Transport Roth GmbH v Home Secretary* [2003] QB 728 at [26] that a penalty is disproportionate if it is "not merely harsh but plainly unfair"; this was the test relied upon in *Energys Holdings UK Ltd v R&C Commissioners* [2010] UKFTT 20.

40 47. It sets a high threshold before a court or tribunal can find that a penalty, correctly levied on the taxpayer by statutory provisions set by parliament, should be struck down as disproportionate. Perhaps higher still is the threshold set by Waller LJ in *R (Federation of Tour Operators) v HM Treasury* [2008] STC 2524 at [32], when he

said that the penalty in that case was disproportionate as it was “devoid of reasonable foundation”.

48. One of the factors I take into account in this case is the purpose of the EoY forms. CIS was originally introduced in 1975 to counteract perceived evasion of tax by self-employed workers in the building industry. It has been revised on several occasions.
5 The EoY form was part of CIS in 2005-07 and allowed HMRC to reconcile the monthly amounts to the overall annual totals.

49. I recognise that in the context of Mr Ireton’s current income the penalties are “harsh”, but, taking into account both the purpose of CIS and the high thresholds before a penalty is “disproportionate”, I find that the penalties in this case do not meet those thresholds.
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Decision

50. Mr Ireton has no reasonable excuse for non-payment of the penalties and that they are not disproportionate. As a result his appeal fails.

15 51. Mr Ireton’s penalties thus stand unless mitigated or remitted by HMRC under TMA 102. That is entirely a matter for them.

Other points

ESC A19

20 52. Mr Ireton seeks to rely on ESCA19: HMRC say that it does not apply to CIS penalties.

53. Whether the Tribunal has any jurisdiction to review the operation of extra-statutory concessions is currently uncertain, but in any event HMRC are correct that ESC A19 deals with “arrears of income tax or capital gains tax” and not with penalties. It has no application to this case.

Mr Ireton’s tax liability

54. Mr Ireton says that he believes the tax he paid in these years was too high.

55. This is not a point which can be considered by this Tribunal as it was not under appeal before me.

Whether the £900 penalty was paid

30 56. Mr Ireton says “to my mind” the first £900 of penalties levied for 2005-06 was paid. The payment or otherwise of penalties is not a matter for this Tribunal, its jurisdiction is limited to considering whether there is a liability.

57. If Mr Ireton has evidence showing that that the first £900 penalty was paid, he is advised to provide this to HMRC.

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The EoY forms

58. The requirement to provide EoY returns was abolished for years after 2006-07. HMRC's Statement of Case says at page 2 that "we have been in contact with you with regards to your penalties for quite some time yet you still refuse to forward the CIS36 to us."

59. Mr Ireton's Reply says that his accountant "has tried to get these forms to put them in but has been told that they don't exist any more."

60. If Mr Ireton still needs to complete these forms, HMRC should provide him or his accountant with copies.

10 *Time to Pay*

61. Some of Mr Ireton's submissions concern his current lack of financial means. This is not a factor which the Tribunal can take into account.

62. However, HMRC referred in their Statement of Case to the help which can be provided by their "Business Payment Support Service". Mr Ireton appears not to have noticed this reference and it might be useful if HMRC provided him with appropriate contact details.

63. 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

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**TRIBUNAL PRESIDING MEMBER
RELEASE DATE: 29 SEPTEMBER 2011**