



TC01514

Appeal number: TC/2011/01156

Construction Industry Scheme—Penalties for late returns (Taxes Management Act 1970 s.98A)—Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

A E JOINERS LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: Dr Christopher Staker (Tribunal Judge)

The Tribunal determined the appeal on 17 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 appeal letters dated 7 and 17 February 2011, HMRC's Statement of Case dated 17 May 2011, and other papers in the case.

DECISION

Introduction

5 1. This is an appeal against a penalty of £100 imposed on the Appellant under s.98A(2)(a) of the Taxes Management Act 1970 (the “TMA”) for late provision of its monthly return under the Construction Industry Scheme (“CIS”) in respect of the month ending 5 July 2010.

10 2. The Appellant requests permission if necessary to bring this appeal out of time, on the basis that an original letter to the Tribunals Service sent on 14 December 2010 appears not to have reached the Tribunals Service. HMRC do not object. In the particular circumstances of this case, the Tribunal will determine the merits of the appeal.

The relevant legislation

3. Section 70 of the Finance Act 2004 states in relevant part as follows:

15 (1) The Board of Inland Revenue may make regulations requiring persons who make payments under construction contracts—
(a) to make to the Board, at such times and in respect of such periods as may be prescribed, returns relating to such payments; ...

20 4. Section 98A of the TMA states in relevant part as follows:

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

25 (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—

30 (a) to a penalty or penalties of the relevant monthly amount for each month (or part of a month) during which the failure continues, but excluding any month after the twelfth or for which a penalty under this paragraph has already been imposed, ...

...

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

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

(b) where that number is greater than fifty, is £100 for each fifty such persons and an additional £100 where that number is not a multiple of fifty.

5. The Income Tax (Construction Industry Scheme) Regulations 2005, SI 2005 No 2045 (the “Regulations”), regulation 4, made pursuant to s.70 of the Finance Act 2004, provides in relevant part as follows:

- 5 (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 but for section 60(4) of the Act (contract payments: exceptions), ...

...

- 15 (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. This is subject to paragraph (11).

- 20 (11) Paragraph (10) does not apply if the contractor has notified the Commissioners for Her Majesty’s Revenue and Customs that the contractor will make no further payments under construction contracts within the following six months.

- (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), ...

- 25 (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.

30 6. For the purposes of the Regulations, “tax month” is defined in regulation 2 of the Regulations to mean “the period beginning on the 6th day of a calendar month and ending on the 5th day of the following calendar month”.

7. Section 100(1) of the TMA states in relevant part as follows:

- 35 (1) ... an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate.

8. Section 100B(2) of the TMA states in relevant part as follows:

- 40 (2) ... on an appeal against the determination of a penalty under section 100 above section 50(6) to (8) of this Act shall not apply but—
- (a) in the case of a penalty which is required to be of a particular amount, the First-tier Tribunal may—

- (i) if it appears that no penalty has been incurred, set the determination aside,
- (ii) if the amount determined appears to be correct, confirm the determination, or
- 5 (iii) if the amount determined appears to be incorrect, increase or reduce it to the correct amount,

9. Section 118(2) of the TMA provides as follows:

- 10 (2) For the purposes of this Act, 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 the Board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased.

The evidence and submissions of the parties

10. The Appellant letters requesting the appeal state amongst other matters as follows. The CIS return in question was overlooked as there were no sub-contractors in this period, and the Appellant subsequently submitted a nil return for this period. Nil returns can be easily overlooked, and when failing to submit a nil return, no relevant information or liabilities are withheld from HMRC. Other returns were filed on time. The Appellant is a very small limited company that has no employees, and which only engages sub-contractors on a very limited basis when work permits. It has engaged a subcontractor in only one month of the previous 10 months. Work in the construction industry is suffering for various reasons. The Appellant cannot afford to pay the fine. The profits of the business are less than the national minimum wage. The PAYE regime would not fine a taxpayer for failing to submit a tax return if no tax was due. The Appellant has since incurred further penalties, the total amount of which are now in excess of £1,000. HMRC is seeking to recover as much money as possible from easy targets.

11. The HMRC statement of case submits amongst other matters as follows. The Appellant has traded within the new CIS scheme since October 2007. The monthly return to which this appeal relates was filed late and the penalty has been correctly charged in accordance with the legislation. The penalty can only be set aside if the Appellant has a “reasonable excuse” which existed for the whole period of the default. A “reasonable excuse” is an exceptional event beyond the taxpayer’s control which prevented the return from being filed by the due date, for instance because of severe illness or bereavement. The legislation includes an obligation to submit a return even if it is a nil return. HMRC cancelled a penalty on a previous occasion on which the Appellant filed a CIS return late, when the Appellant appealed on the ground that the return was overlooked as it was a nil return. On that occasion HMRC sent the Appellant an “education letter” reminding it of its responsibilities under the CIS

scheme. The possible effect of the penalty on future trade is not relevant. The legislation has been designed to treat all taxpayers fairly and equally.

Findings

12. The Tribunal has considered all of the information and arguments before it. The Appellant has not disputed that the return in question was filed late as contended by HMRC. The burden is on the Appellant to establish a reasonable excuse for the late filing, on the civil standard of a balance of probabilities.

13. The Appellant is required to file a CIS return each month, even if a nil return. Simply “overlooking” a nil return is not a reasonable excuse. The Tribunal does not consider that the effect of the penalty on the business is relevant to whether there is a reasonable excuse, but in any event, the Tribunal does not consider that there is sufficient evidence before the Tribunal to establish that there would be genuine hardship caused by a £100 penalty. The Tribunal finds that the Appellant has not advanced any other circumstance that would amount to a reasonable excuse for the late filing throughout the period of default.

Conclusion

14. Thus, under s.100B(2)(a)(ii) of the TMA, the Tribunal confirms the penalties and dismisses the appeal.

15. 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.

DR CHRISTOPHER STAKER

**TRIBUNAL JUDGE
RELEASE DATE: 20 OCTOBER 2011**