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TC01862

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Appeal number: TC/2011/07247

***CORPORATION TAX – Construction Industry Scheme – Late filing of
monthly return – Whether reasonable excuse – no – Appeal dismissed***

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WESTWOOD HOUSES LIMITED

Appellant

- and -

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

Respondents

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TRIBUNAL: JUDGE JOHN BROOKS

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The Tribunal determined the appeal on 16 January 2012 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 14 September 2011 (with enclosures) and HMRC's Statement of Case submitted on 25 November 2011(with enclosures).

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DECISION

Introduction

1. This is an appeal, by Westwood Houses Limited (“Westwood”) against penalties of £200 imposed as a result of the late filing of its monthly return under the Construction Industry Scheme for the period ended 5 May 2011.

2. A Decision Notice dismissing the appeal and containing a summary of the Tribunal’s findings of facts and reasons for the decision was released to the parties on 18 January 2012. On 27 January 2012, following receipt of the Decision Notice, Mr Michael Thornton wrote to the Tribunal on behalf of Westwood requesting “full written findings and reasons” to enable an appeal to be made against the decision.

3. This is in accordance with Rule 35(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 which provides that before an application for permission to appeal can be made it is necessary to request full written findings of fact and reasons for the decision of the Tribunal.

Law

4. Insofar as it applies to the present case Regulation 4 of the Income Tax (Construction Industry Scheme) Regulations 2005 (the “Regulations”) provides:

(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), ...

...

(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).

(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), ...

(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.

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”.

5 5. Section 98A of the Taxes Management Act 1970 (“TMA”) provides:

(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.

10 (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—

15 (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—

20 (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.

25 6. Section 118(2) TMA, so far as it applies to this appeal, provides that “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”.

30 7. There is no definition in the legislation of a “reasonable excuse” which has been held to be “a matter to be considered in the light of all the circumstances of the particular case” (see *Rowland v HMRC* [2006] STC (SCD) 536 at [18]).

Facts

35 8. Westwood has traded within the current Construction Industry Scheme since it began on 6 April 2007 and had traded within the previous Construction Industry Scheme since 2005. Although it had not made payments to subcontractors during the period concerned, as it had not notified HMRC that it was not going to make any payments under construction contracts within the next six months, Westwood was required, as it had been on previous occasions, to make a nil return (the “CIS Return”) for the period from 6 April 2011 to 5 May 2011.

40 9. The CIS Return should have been submitted by 19 May 2011. However, it was filed online on 21 June 2011, 33 days late.

10. On 1 June 2011 HMRC issued a penalty notice in the sum of £100. This states:

5 A Contractor return was required for the period shown above [6 April to 5 May 2011]. Late Filing Penalties are due for each month (or part month) that the return is late. These are £100 for every 50 (or up to 50) subcontractors to whom payments have been made in the period. We do not appear to have received your return by the monthly Filing Date 19 May 2011.

11. As the CIS return had not been received by 19 June HMRC imposed a further £100 penalty on 30 June 2011.

10 12. Westwood appealed against the imposition of the penalties to HMRC on 15 June 2011. The penalties were upheld following a review and Westwood appealed to the Tribunal on 14 September 2011.

Discussion

15 13. It is contended on behalf of Westwood, in its Notice of Appeal, that the penalty notice issued by HMRC:

... quite clearly states that the penalty is £100 for every 50 subcontractors to whom payments have been made in the relevant period; in this instance there were no sub-contractors payments in the relevant period, therefore no penalty is due.

20 14. Although this is not strictly accurate (the penalty notice states “50 (or up to 50) subcontractors”) it is necessary to consider the relevant legislation under which the liability to a penalty is imposed.

25 15. Paragraph 10 of Regulation 4 of the Regulations requires a nil CIS return to be made, under paragraph 1 of Regulation 4, when, as in this case, no payments were made to subcontractors in the relevant period. It is clear from paragraph 12 that s 98A TMA applies to the failure to make a CIS return in accordance with paragraph 1.

30 16. Under s 98A TMA a person (which includes a company such as Westwood) that fails to make a CIS return, where the number of persons in respect of whom particulars should be included in the return is 50 or less, is liable to a penalty of £100 for every month or part of a month during which the failure continues. In the case of a failure to make a nil CIS return, as nil is “less than 50”, it must follow that the penalty is £100 for every month or part of a month that the failure continues.

35 17. In this case the CIS Return was due on 19 May 2011 and submitted to HMRC on 21 June 2011. It was outstanding for one complete month and part of the next month and, as such the penalties under s 98A TMA are £200.

18. Therefore, in the absence of any evidence of a reasonable excuse for the late submission of the CIS Return the penalties must stand.

19. As no evidence of any matter that could amount to a reasonable excuse has been advanced on behalf of Westwood I dismiss the appeal and confirm the penalties.

20. I note that in HMRC's Statement of Case it is stated that if the Tribunal finds, as I have, in HMRC's favour the penalties will be mitigated to £100 and I trust that this will indeed be the case.

5 21. 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)" 10 which accompanies and forms part of this decision notice.

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JOHN BROOKS

TRIBUNAL JUDGE

RELEASE DATE: 29 February 2012

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