



**TC02008**

**Appeal number: TC/2010/07802**

*Construction Industry Scheme – failure to make returns – whether penalties correctly charged – appeal allowed in part*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**PROJECT DEVELOPMENTS (SOUTH WALES) LTD      Appellant**

**- and -**

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

**TRIBUNAL: JUDGE MALCOLM GAMMIE CBE QC**

**The Tribunal determined the appeal on 6 February 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 4 October 2010 and HMRC's Statement of Case submitted on 4 May 2011.**

## DECISION

### *Introduction*

1. This is an appeal against the penalties imposed for the late submission of the  
5 monthly Construction Industry Scheme (CIS) return for the periods ended 5 June  
2008, 5 July 2008, 5 August 2008, 5 November 2008 and 5 April 2009.

2. The Appellant's notice of appeal was submitted late on 4 October 2010. The  
latest date by which the appeal ought to have been made was 19 June 2010 but  
according to the Appellant's notice, HMRC's review letter (which is dated 20 May  
10 2010) was not received until 20 September 2010. The Tribunal agrees, however, to  
extend the time for appeal.

3. The notice of appeal states that "there is a reasonable excuse why each of the 5  
CIS returns was submitted late". By comparison HMRC's review letter of 20 May  
2010 records that "although most of the [5 CIS returns] have now been submitted you  
15 have not provided a reasonable excuse or any additional information as to why the  
returns were submitted late". This appears very largely to remain the case.

4. According to HMRC's statement of case, the CIS returns for the periods ended 5  
June 2008, 5 July 2008, 5 August 2008 and 5 April 2009 were filed on 19 October  
2009 and that for the period ended 5 November 2008 was filed on 14 May 2010. A  
20 total of 52 penalties were charged in respect of the late submission of 5 monthly  
returns amounting to £8,200. This includes 4 final late filing penalties amounting to  
£2,700. This final figure should in fact have been £3,000 but HMRC have indicated  
that they do not intend to pursue the additional amount.

### *The Facts*

5. It appears that the Appellant has been within the new CIS since it began on 6  
25 April 2007 and prior to that it had been within the old CIS since 2004. It seems  
reasonable to suppose, therefore, that the Appellant was fully aware of its return  
obligations under the scheme and of the penalties that would follow from any default.  
HMRC's statement of case summarises the correspondence in some detail. The  
30 following paragraphs concentrate on what the Appellant says about the matter.

6. On 14 August 2009 the Appellant wrote to HMRC referring to the penalty notices  
that HMRC had issued on 4 August 2009. According to the Appellant, "copies of the  
company's monthly returns have been submitted and apparently rejected". In that  
letter the Appellant also indicated that it had requested duplicates of the five returns  
35 and that the completed returns would be submitted as soon as possible. The Appellant  
also complained of being cut off the helpline three times before being connected to an  
officer. Subsequent correspondence suggests that in fact the Appellant was never  
connected to an officer on that occasion and (presumably) that it did not persevere.

7. HMRC replied on 17 September 2009 and on 21 September 2009 the Appellant  
40 wrote again stating that it had "today requested duplicates" of the 5 returns and that  
these would be submitted as soon as the duplicates were received. The Appellant

indicated, however, that duplicates had previously been requested and it referred again to the difficulty with the helpline.

8. On 7 October 2009 the Appellant wrote again to note that the duplicate returns had not been received. On 14 October 2009, however, the Appellant submitted  
5 completed duplicate returns for the 5 periods. That letter noted that the returns had been sent to the Appellant's previous address. (HMRC say that a change of address was not recorded until 20 October 2009.)

9. On 3 February 2010 HMRC confirmed receipt of 4 of the returns but indicated that no return for 5 November 2008 had been received. On the other hand two returns  
10 had been received for 5 November 2009 and, as notified on 25 November 2009, had been merged. As appears from the Appellant's letter of 9 December 2009, one of the returns was in fact that for 5 November 2008.

10. On 30 April 2010 HMRC wrote rejecting the Appellant's appeal against the penalties and also noting that the return for the period ending 5 November 2008 was  
15 still missing. On 7 May 2010 the Appellant repeated his explanation of the missing return but also indicated that he had submitted new returns for both November 2008 and November 2009.

11. The matter then proceeded to a review, which confirmed the penalties, and then by way of appeal to the Tribunal. On 23 February 2011 HMRC offered to reduce the  
20 penalties to £3,900 and on 21 March 2011 the Appellant rejected this offer, indicating that it would invite the Tribunal to reduce the penalties to £500 "to let the penalties fit the crime".

12. On 9 April 2011 the Appellant wrote to the Tribunal accepting that the onus was on it to make returns on a timely basis. In that letter it indicated, however, that the  
25 returns had been posted but not received by HMRC. The Appellant's basic contentions was that, "as returns have been submitted for all periods for which late penalties have been issued, the company should not be harshly penalised because of the time taken by HMR&C to accept and process the information".

### *Conclusion*

30 13. There appear to be two particular limbs to the Appellant's case: the first is that the returns were posted but were never received by HMRC; the second is that the penalties that HMRC now seek to recover are disproportionate to the offence, especially given the time taken by HMRC to process matters. The Appellant has provided very little detail to support his contentions.

35 14. The first of its contentions could offer a complete answer to the matter but there is no evidence by reference to which the Tribunal can conclude that the returns were ever posted in time. If only one return were involved and if an explanation had been offered as to how it was dealt with in a timely manner leading to its being posted so as to reach HMRC by or before the due date, consideration might have to be given to the  
40 possibility that the return had gone astray or had been mislaid following receipt. It seems unlikely, however, that that such circumstances would be repeated 3 months in

a row (from June to August 2008) and then again in November 2008 and April 2009. Furthermore, it appears from the papers that the Appellant's returns were late in other months in respect of which no appeal has been made.

5 15. The Tribunal therefore concludes that the returns were not submitted on time. No other reason has been offered that would excuse the late submission of the original returns.

10 16. The schedule of penalties charged indicates that four of the outstanding returns were received on 19 October 2009 and that the fifth (for November 2008) was received on 14 May 2010. The correspondence, however, suggests that a return for November 2008 was submitted at the same time as the other four outstanding returns and that HMRC then combined the November 2008 and November 2009 returns. The Tribunal accepts that the November 2008 return was submitted at the same time as the other outstanding returns so that all 5 should be regarded as having been received on 19 October 2009.

15 17. The final point that arises is whether the duplicate returns would have been submitted sooner but for HMRC's failure to supply them expeditiously when first requested and whether its action in sending the duplicates to the Appellant's old address caused further delay. As regards the latter, it does not appear that the new address was notified to HMRC in time for them to take account of it. .

20 18. As regards the time taken to provide duplicate returns, it seems that the Appellant may initially have sought to submit copy returns for the outstanding months but that these were rejected. There then appears to have been a request for duplicates in August 2009, which was repeated in September 2009 and again in early October 2009. As noted, the Appellant also complained about the difficulties of speaking to an officer via the helpline. Overall, however, the picture is unclear as to the precise steps that the Appellant took, when it did so and with what degree of perseverance and diligence. Penalty notices were issued for each month that the returns were late and other correspondence should have alerted the Appellant to risk of further penalties. As noted, the Appellant had operated within the CIS for some time and it was clearly aware of the penalties that would be incurred for any default.

35 19. Nevertheless, it does appear that the Appellant completed and returned the duplicate returns as soon as they were received. Overall the Tribunal accepts that duplicate returns were first requested in August 2009 but were only supplied by HMRC in October that year. It seems appropriate, therefore, to assume that the duplicate returns would have been received a month earlier than was the case had their issue been processed expeditiously.

40 20. Accordingly, the Tribunal concludes as follows: (1) that the Appellant failed to submit its returns for the 5 months in issue on time, but (2) that the Appellant would have submitted duplicate returns for all 5 months one month earlier (i.e. so as to be received by HMRC on 19 September 2009 rather than 19 October 2009) had HMRC supplied the duplicate returns when first requested. The penalties charged should be recalculated and are confirmed on that basis.

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)” which accompanies and forms part of this decision notice.

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**MALCOLM GAMMIE  
TRIBUNAL JUDGE**

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**RELEASE DATE: 16 February 2012**