



TC02227

Appeal number: TC/2012/01097

*INCOME TAX – construction industry scheme- penalty under section 98A
Taxes Management Act 1970- late submission of monthly return – whether
reasonable excuse*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CHRISTOPHER DUNN

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE GUY BRANNAN

The Tribunal determined the appeal on 17 August 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 January 2012 (with enclosures), HMRC's Statement of Case submitted on 1 March 2012(with enclosures).

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DECISION

1. This is an appeal against a penalty imposed under section 98 A Taxes Management Act 1970 ("TMA") in respect of the late submission of a monthly construction industry scheme ("CIS") return for the month ended 5 September 2011.

The legislation

2. The statutory provisions relating to the CIS are contained in Part 3 Finance Act 2004. Section 70 Finance Act 2004 permits HMRC to make regulations in relation to returns under the CIS, including periodic returns.

3. A contractor within the CIS must send a completed monthly return in respect of each monthly period to reach HMRC not later than the 19th day of each month (Regulation 4 The Income Tax (CIS) Regulations 2005 ("the Regulations")). In more detail, Regulation 4 provides that the return must be made no later than 14 days after the end of every tax month and Regulation 2 defines a tax month as the period beginning on the sixth day of a calendar month and ending on the fifth day of the following calendar month.

4. A contractor is required to make a "nil" return pursuant to Regulation 4 of the Regulations even though no payment has been made to a subcontractor in respect of the relevant month (Regulation 4 (10)). This requirement does not apply if the contractor has notified HMRC that no further payments will be made under construction contracts within the following six months (Regulation 4 (11)). Where this occurs monthly returns are not issued to the contractor. However, a contractor who notifies HMRC of the period of inactivity becomes liable to file a monthly return if he makes a payment to a subcontractor in this period.

5. Section 98A TMA (2) and (3) provides for penalties in respect of failures to make returns in accordance with, inter-alia, Regulation 4 (see Regulation 4 (13)). In the present case the relevant penalty is £100.

6. Section 118 (2) TMA provides:

"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 ceased."

The facts

7. The appellant notified HMRC period of future inactivity on his return for the month ended 5 July 2011. Accordingly, HMRC did not issue CIS returns for subsequent months.

8. The appellant paid a contractor in the period ended 5 September 2011 and, consequently, was under an obligation to submit a return by 19 September 2011.

9. The appellant notified HMRC by telephone of this payment on 13 September 2011, requesting a return and a return was thereupon issued to the appellant. HMRC's electronic records state that a replacement return was issued to the appellant on 13 December 2011. It is not clear whether this means the return was posted on that day or simply that the necessary documentation was produced on that day with posting occurring on the following day. The appellant did not receive the return until 19 September (ie the day it was due to be submitted). He completed it and posted it first-class the same day. The return was received on 22 September 2011.

10. The appellant had previously tried to register with HMRC for CIS online services. HMRC's website contains guidance on how to register and the process was explained to the appellant in a letter dated 30 August 2011. The appellant's attempt to register was unsuccessful – he described himself as being "only semiliterate with regard to IT." He said that he was "beaten by the system."

11. The appellant complained that HMRC failed to send him a return form for the period ended 5 September 2011 until 19 September 2011. The appellant made two calls to what he described as "the inaccessible [HMRC] helpline" to request that a form be sent. He was told that his account was "not active."

12. The appellant submitted late returns for the months ended 5 March, 5 May and 5 June 2011 but had his appeals against penalties upheld by HMRC. In letters dated 5 May 2011 and 30 August 2011 HMRC advised the appellant regarding CIS online filing, proof of postage and periods of inactivity.

13. The appellant is a registered carer for his disabled wife and is a carer for his mother who is 91.

Decision

14. The appellant telephoned HMRC on 13 September (a Tuesday). If the return was posted on 14 September (Wednesday) it should have been delivered on Friday or Saturday i.e. 16 or 17 September. There seems to be no dispute that it was actually received on 19 September (i.e. the following Monday). In my view, the appellant left it too late to call HMRC and request a replacement monthly return. He should have been aware from his experiences earlier in the year of the need to file his returns on time and to exercise caution regarding the amount of time the post can sometimes take to reach its destination. On this occasion he "cut it too fine." It was his responsibility to ensure the return was received in time. He should have contacted HMRC earlier than 13 September and he has given no reason why he failed to do so.

15. In my view, therefore, the appellant did not have a reasonable excuse for his failure to submit his monthly return in time and that the penalty was correctly charged.

16. 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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**GUY BRANNAN
TRIBUNAL JUDGE**

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RELEASE DATE: 29 August 2012