



TC02620

Appeal number: TC/12/10558

*CIS Scheme late submission of returns – whether appeal made on time – No
- Whether reasonable excuse for late appeal – No - Appeal dismissed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

J D SEALANTS & CO LTD

Appellant

- and -

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

**TRIBUNAL: PRESIDING MEMBER: PETER R SHEPPARD,
FCIS, FCIB, CTA
KENNETH MURE, QC**

**Sitting in public at Wellington House, 132-134 Wellington Street, Glasgow on
Friday 15 February 2013**

**John Dempsey for the Appellants and William Kelly, HMRC Officer, for the
Respondents**

DECISION

1. This was an appeal against six penalties imposed by the Respondents between 2007 and 2012. The appeal which was dated 16 November 2012 was lodged in respect of the following penalty notifications:

Date of Penalty	Year	Reason	Amount of penalty
22 August 2007	End of year 2006/07	P35return 51 days late	£ 200 (2 months @ £100)
24 September 2007	End of year 2006/07	CIS 36 returns	£ 400 (4 months @ £100)
28 January 2008	End of year 2006/07	CIS 36 returns	£ 400 (4 months @ £100)
26 May 2008	End of year 2006/07	CIS 36 returns	£ 400 (4 months @ £100)
4 November 2008	End of year 2007/08	P35 return 95 days late	£ 400 (4 months @ £100)
12 November 2012	End of year 2011/12	P11D form late	£ <u>400</u> (4 months @ £100)
		Total	£2,200

2. Following lodgement of the appeal the Respondents cancelled the penalty dated 12 November 2012.

3. At the hearing the Respondents advised that they considered that the penalties dated 22 August 2007, 24 September 2007 and 4 November 2008 had all been paid. This puzzled Mr Delaney who had said until the week prior to the hearing he had only been aware that the 12 November 2012 penalty had been cancelled. In particular he had no recollection of paying the penalty dated 24 September 2007.

4. This left two amounts each of £400 outstanding. These were both for failure to submit forms CIS36. Under the CIS scheme rules in force at the time nil returns were required. The penalties were for failure to provide eight monthly nil returns.

5. Mr Delaney openly accepted that he had not understood that nil returns were required under the CIS scheme and accepted that returns had not been submitted and that penalties were due. However, he argued that in 2009/10 he had got into difficulties with his business affairs and had entered into a payment plan with HMRC to pay off all outstanding monies. He had kept to the arrangements and as he thought had paid everything off. He had not appreciated that the CIS penalties had not been included.

6. He said that he first “got wind” that all was not right towards the end of August 2012. He said he first understood that the problem was outstanding penalties on 27 September 2012. This had surprised him as he thought his tax arrears had been sorted out. It was only the week before the hearing when he received papers that showed him the arrears were £800 being entirely penalties for late CIS returns. On 10 October 2012 the Appellants wrote to HMRC appealing against the penalty decisions. In a letter dated 1 November 2012 HMRC wrote to the Appellants

advising them that the appeals against the 2007 and 2008 penalties were out of time but that they could appeal to the Tribunal to see if they would accept a late appeal. It indicated that he should show he had reasonable excuse for the lateness of the appeal.

Legislation

- 5 Section 559-567 Income and Corporation Taxes Act 1988

The Income Tax (Sub-Contracts in the Construction Industry) Regulations 1993 (S.I.1993 No. 743) Regulation 40A

The Tax Management Act 1970 Sections 31A and 98A

Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009

10 **Case Law**

The Respondents referred the Tribunal to the following cases:

Advocate General for Scotland v General Commissioners for Aberdeen City (2006) STC 1218

Former North Wiltshire District Council v HMRC (TC/00/714)

- 15 7. Mr Kelly for the Respondents referred to Section 31A of the Taxes Management Act 1970 which provides that a notice of appeal must be given

- (a) in writing
- (b) within 30 days after the specified date
- (c) ...

- 20 8. The specified dates in this case were the dates of determination of the penalties. Thus the appeals against the two penalties remaining in dispute should have been made by 27 February 2008 for the penalty dated 28 January 2008 and by 25 June 2008 for the penalty dated 26 May 2008. Mr Kelly submitted that not only was the appeal dated 16 November 2012 late, it was excessively late. In the
25 respondents skeleton argument they submit it is unfair to “piggy back” appeals which are excessively late on the back of an appeal which is in time. Mr Kelly submitted that it was not in the interests of natural justice to allow appeals which are so late unless there is a reasonable excuse for the lateness. He considered that no reasonable excuse had been given in this case and he referred in particular to
30 Lord Drummond Young’s opinion in the case of the *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006].

9. Mr Kelly said the time to pay arrangements probably would not have included the CIS penalties as these are dealt with by a separate department of HMRC. They would

not have been included unless the taxpayer had requested it. Mr Delaney was clearly under the impression that everything was included.

5 10. When the Respondents are dealing with a large corporate taxpayer or a professional tax adviser it seems to the Tribunal that the approach of the Respondents is understandable. However, this was not the case here. The Appellant is a small company which does not employ a tax adviser. When such a taxpayer approaches the Respondents to settle all outstanding monies the Tribunal considers that this approach is less satisfactory. HMRC should be pro-active in ensuring that all outstanding monies are included.

10 11. The penalties remaining in dispute are dated 28 January and 26 May 2008. Mr Delaney's excuse for not appealing concerned a payment plan made with the Respondents in respect of the 2009/10 tax year. By that time any appeals were already well over a year out of time. No explanation was offered for that delay. The burden of proof is on the taxpayer in these cases to demonstrate he had reasonable
15 excuse. In the absence of evidence to the contrary the Tribunal must assume that the Appellant received the penalty notifications.

12. It is understandable that Mr Delaney had considered the payment plan covered all outstanding monies due. When he learned that the penalties from 2007/08 remained
20 outstanding in 2012, this had surprised him. However this has no bearing on his failure for well over a year to lodge an appeal against them before the payment plan was put into place.

13. The Tribunal considered the opinion of Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC
25 wherein he suggests five considerations that are relevant when considering late appeals. "First is there a reasonable excuse for not observing the time limit". In the Tribunal's view the Appellant failed to establish a reasonable excuse for not observing the time limit in the period from the issue of the penalties in January and May 2008 until the payment plan for the period 2009/10 was entered into. The Appellant submitted that his belief that the payment plan in 2009/10 had paid off all
30 monies outstanding was a reasonable excuse for the failure to pay the outstanding penalties after that plan had been agreed. However it does not provide reasonable excuse for the failure to appeal against the penalties in the approximately two years prior to that. It could be argued that the Appellant in entering the agreement to pay all monies outstanding had agreed to the penalties and was not at that time intending to
35 appeal against them.

14. The further four suggested considerations made by Lord Drummond Young are "Secondly, once the excuse has ceased to operate.....have matters proceeded with reasonable expedition?" The Tribunal considers that this does not apply because no reasonable excuse has been established for the long period prior to the payment plan.

40 15. "Thirdly is there prejudice to one or other party if a late appeal is allowed to proceed." The Respondents argued it is unfair to "piggy back" appeals which are excessively late on the back of an appeal which is in time. Mr Kelly submitted that it

was not in the interests of natural justice to allow appeals which are so late. In the Tribunal's view allowing such a late appeal to proceed would prejudice the Respondents.

5 16. Fourthly, are there considerations affecting the public interest if the appeal is allowed to proceed, or if permission is refused? The public interest may give rise to a number of issues. One is the policy of finality in litigation and other legal proceedings; matters have to be brought to a conclusion within a reasonable time, without the possibility of being reopened. That may be a reason for refusing leave to appeal where there has been a very long delay." In the Tribunal's view there has been
10 a very long delay in this case.

17. Fifthly has the delay affected the quality of the evidence that is available? Whilst some documentation was not available this would not have affected the Tribunal's ability to determine the case.

15 18. Having reviewed the five suggested considerations and considered the presentations given by both parties the Tribunal has concluded that it is not prepared to allow this very late appeal for the reasons stated in relation to each.

19. 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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25 **PETER R SHEPPARD, FCIS, FCIB, CTA**
TRIBUNAL PRESIDING MEMBER

RELEASE DATE: 27 March 2013

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