



**TC03796**

**Appeal number: TC/2013/06193**

*INCOME TAX – Construction Industry Scheme – monthly returns – penalties – whether returns submitted on time – whether HMRC records conclusive – no – s 7 Interpretation Act 1978 – evidence as to arrangements for posting – on balance of evidence, held returns posted in sufficient time to be received by due dates – appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**CHRISTOPHER MARK ODDY  
t/a  
CMO BIRD PROOFING SPECIALISTS**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE JOHN CLARK  
MR MICHAEL BELL ACA CTA**

**Sitting in public at 45 Bedford Square London WC1B 3DN on 5 June 2014**

**The Appellant in person**

**Deborah Williams, Officer of HM Revenue and Customs, for the Respondents**

## DECISION

1. Mr Oddy appeals against a series of penalties in respect of Construction Industry Scheme (“CIS”) monthly contractors returns.

### **The background facts**

2. The evidence consisted of a bundle of documents prepared by Mr Oddy, and also a bundle of documents prepared by the Respondents (“HMRC”). In addition, Mr Oddy and his partner Sarah Jaffray made statements in the course of presenting his case which we treated as oral evidence. No oral evidence was presented on behalf of HMRC.

3. Elements of the factual background were disputed. We therefore set out the parts of that background which were not matters of dispute, and return later in this decision to the remaining matters. We find the following background facts.

4. Mr Oddy had been registered under the current CIS since it began in April 2007. He had also been registered under the previous CIS.

5. In the course of discussions with HMRC on another matter, it was drawn to his attention that there were outstanding penalties totalling £3,700 for the late filing of contractors’ monthly returns.

6. He received a notification of charge and notice to pay issued by HMRC on 4 July 2011. This stated: “We do not appear to have received your return by the monthly Filing Date 19 June 2011.” The “Period of Charge” was from 6 April 2011 to 5 May 2011, and the amount of the penalty was £100.

7. On 14 July 2011 Mr Oddy wrote to HMRC. He referred to “the supposedly late penalty notice whereby £100 fine has been given”. He said that he disputed the penalty, as the return had been posted within good time; according to his records the return for the April 2011 period had been posted on Monday 11 April, via Royal Mail; he could not be held responsible for what Royal Mail did, if the return had been posted in good time. He asked whether HMRC had a copy of this return with a date stamp showing when HMRC received this return.

8. As he did not receive any reply, he telephoned HMRC to enquire what had happened in relation to his letter. He had been told that he should write to appeal, but the HMRC adviser had not been able to tell him whether his letter had been received. He therefore wrote again to HMRC on 1 August 2011 to explain this, enclosing another copy of his letter dated 14 July 2011, and explaining that he would not be paying any money until he had received a reply.

9. On 8 August 2011 he wrote again to HMRC, referring to another penalty notification letter for the period 6 May 2011 to 5 June 2011; the amount of this penalty was also £100.

10. On 13 June 2012 he wrote again to HMRC at the Newry office disputing a further penalty of £100 in respect of the period 5 April 2012 to 5 May 2012; he explained that his returns were posted within good time to reach HMRC by the 19th of each month, and that he did not have any control over the postal system, especially  
5 when this return had been posted in good time. He presumed that these returns were date stamped by HMRC, and asked HMRC to supply by return a copy of the April-May return showing the date stamp as confirmation of late submission; once he had received this from HMRC, payment would be forthcoming. He also explained that he was still awaiting two replies to his letters relating to two previous penalty notices,  
10 sent to HMRC at Saughton House, Edinburgh, and asked HMRC to chase up such replies.

11. In the course of a telephone conversation on 28 September 2012 HMRC informed Mr Oddy that his CIS36 annual return for 2005-06 had never been received. He wrote on the same day to HMRC's Croydon office enclosing a copy of the return  
15 which had been sent to Saughton House on approximately 24 April 2007.

12. On 9 October 2012 he wrote to HMRC's Customer Operations office in Newcastle-Upon-Tyne enclosing a copy of the 2005-06 CIS36 annual return sent to Edinburgh in 2007. This carried an Inland Revenue Lothians Area date stamp with the date 12 April 2007. He asked HMRC to "confirm by return that the penalties accrued  
20 on this account will be removed".

13. On 10 October 2012 HMRC's Debt Management Office wrote to Mr Oddy concerning a "Payment Plan"; they explained that they had agreed to this on the understanding that he had told them about all of his HMRC debts.

14. On 13 November 2012 HMRC's Newry office wrote to Mr Oddy in relation to  
25 the penalty issued for the late filing of monthly returns; the periods referred to at the head of the letter were 5 August 2008, 5 November 2008, 5 December 2008, 5 June 2009 to 5 January 2010, 5 May 2010, 5 March 2011, 5 May 2011 to 5 July 2011, 5 October 2011 to 5 December 2011, 5 May 2012 and 5 July 2012. HMRC stated that they could not process in full his appeal received on 9 October 2012, as they had not yet received the CIS300 monthly returns for the months ending 5 April 2009, 5 May  
30 2011, 5 November 2011 and 5 December 2011.

15. On 4 December 2012 Mrs McManus of HMRC's Newry office wrote to Mr Oddy to inform him that HMRC were unable to accept his appeal because a "return request letter" had been sent to him on 13 November 2012 concerning two  
35 outstanding returns and these returns remained outstanding.

16. On 23 December 2012 Mr Oddy wrote to Mrs McManus, stating firmly that he had received no letter dated 13 November 2012 from HMRC, so he was therefore unable to reply to a letter which he had never received. He was astounded to be informed that 20 penalty notices had been issued against him, when he had only ever  
40 received five penalty notices. Of these, he had disputed three, as these had been posted within good time. (He agreed with two of the notices, for November and December 2011, and would be making payment of those penalties.) He attached the

5 letters sent to HMRC, and emphasised that no reply had ever been given to these letters. He had made various telephone calls to chase to see whether his letters had been received, and he was still waiting for a reply to the letters. He repeated his request for date stamped copies of the returns said to be late. He asked for HMRC's decision to be reviewed.

17. On 14 February 2013 Mr Harkin, HMRC's Review Officer, wrote to Mr Oddy requesting copies of the returns for the periods ending 5 September 2009, 5 May 2011 and 5 December 2011, in order to enable him to deal fully with the review.

10 18. On 7 March 2013 Mr Oddy sent Mr Harkin copies of the returns for the periods ending 5 September 2009, 5 May 2011, 5 November 2011 and 5 December 2011; the first two of these were nil returns. He agreed to an extension of the review period to 18 March 2013.

15 19. Mr Harkin replied on 19 March 2013. He had forwarded the copies of the returns to the Newry office, but was unsure whether these would be accepted, as photocopies of contractor returns or continuation sheets were unacceptable. He requested a further extension of the review period to 19 April 2013.

20. On 18 April 2013 HMRC issued an "Appeal outcome" in respect of the penalty for the return period 5 July 2012, for which the filing date was 19 July 2012; the amount was £0 and the "Appeal Outcome" was "Upheld".

20 21. Mr Harkin wrote to Mr Oddy on 19 April 2013 to let him know that HMRC's Newry office had accepted the photocopies of the four monthly returns enclosed with Mr Oddy's letter dated 7 March 2013. Mr Harkin asked for a further extension of the review period to 21 May 2013.

25 22. Mr Harkin wrote again with the results of his review on 8 May 2013. His decision was that the decision to charge the penalties was correct. He set out his reasons. As the matters covered in his letter were the disputed matters raised at the hearing, we consider these later in this decision.

30 23. In a second letter dated 8 May 2013, Mr Harkin referred to the penalties totalling £3,700 in respect of the contractor monthly returns. He explained that from October 2011 a new penalty system had been introduced, and in many cases the penalties were now less than those under the previous system. Under the new system the new penalties would be £2,700 instead of £3,700. HMRC had a legal power to reduce penalties in limited circumstances and they were prepared to use this power to reduce the penalties which they had charged Mr Oddy HMRC under s 98A Taxes Management Act 1970 ("TMA 1970") to £2,700.

24. On 30 May 2013 Mr Oddy gave notice that he would like the matter to be heard at the Tribunal.

40 25. On 3 July 2013 Mr Harkin replied to the correspondence received from Mr Oddy on 4 June 2013, explaining that Mr Oddy should contact HM Courts & Tribunal Service ("HMC&TS"), and requesting that he should notify HMRC within 21 days of

the case reference of the appeal for their records; if Mr Harkin did not hear within 21 days, he would assume that Mr Oddy agreed with the review decision and his appeal would be treated as settled.

5 26. Mr Oddy wrote to Mr Harkin on 22 July 2013, explaining that he was in the course of completing the application to HMC&TS and would inform Mr Harkin of the case number once obtained. Mr Oddy explained that his father had become ill and passed away within the week before 22 July, and this was the first opportunity to inform Mr Harkin of the current situation within the 21 day time limit.

10 27. Mr Oddy gave Notice of Appeal to HMC&TS on 26 July 2013. Although the review letter was dated 8 May 2013, Mr Harkin's letter dated 3 July 2013 extended the normal 30 day time limit for giving Notice of Appeal, and therefore the appeal was not treated as having been made late.

15 28. As Mr Oddy had not heard from HMRC, on 30 August 2013 he sent a further email requesting an acknowledgment. On 2 September 2013 HMC&TS acknowledged receipt of the appeal, which had been allocated to the Standard category. Directions had been given to stand the case over until 60 days after the release by the Upper Tribunal on the matter of *Bosher v The Commissioners for Her Majesty's Revenue and Customs*. On 26 February 2014, HMC&TS wrote to both parties to the present appeal to inform them that the *Bosher* case was now final and  
20 that Mr Oddy's appeal could proceed to hearing.

25 29. A hearing date of 25 April 2014 was arranged, but on 17 March 2014, Mr Oddy requested that this be rearranged because of an existing commitment which had been booked for some time. He forwarded this message to HMC&TS on 15 April 2014, and on the same date HMRC confirmed that they had no objection to the postponement request.

### **Mr Oddy's arguments**

30 30. We cover later Mr Oddy's arguments on the facts, together with those of HMRC. Mr Oddy had considered the Upper Tribunal's decision in *Bosher*, but did not think that it was relevant to his case. In the research which he and Sarah Jaffray had carried out, they had found the case of *Heronlea Limited v Revenue and Customs Commissioners* [2011] UKFTT 102 (TC) (TC00978). He drew particular attention to that case at [31] and [37], which we deal with in detail below.

### **Arguments for HMRC**

35 31. Ms Williams provided a copy of HMRC's submissions. She referred to s 70 Finance 2004 ("FA 2004") and reg 4 Income Tax (Construction Industry Scheme) Regulations 2005 (SI 2005/2045) ("the Regulations"), which together had the effect of requiring contractors to make monthly returns of payments made to sub-contractors; such returns were to be submitted within 14 days of the end of the tax month, ie by the 19th of each month.

32. In relation to penalties, for periods up to 5 October 2011 s 98A TMA 1970 provided for penalties in respect of returns issued under s 70 FA 2004, for each month or part month for which a return remained outstanding. It also provided for a further penalty if the return was still outstanding after 12 months. The rate of monthly penalty was £100 where the number of sub-contractors was under 50.

33. Section 100 TMA 1970 provided for the issue of a determination, and s 102 TMA 1970 gave HMRC the discretion to mitigate penalties.

34. For periods beginning 6 October 2011 onwards, Schedule 55 to the Finance Act 2009 (Sch 55 FA 2009”) provided in paras 7 to 13 a penalty of £100 where a return was late, a penalty of £200 where a return was still outstanding after two months, a penalty amounting to the greater of 5 per cent of liability shown on the return or £300 if the return was still outstanding after six months, and differing penalties where the return remained outstanding after 12 months. These depended on whether withholding the information was deliberate and concealed, in which case the penalty would be 100 per cent or £3,000, whichever was greater; or deliberate but not concealed, for which the penalty was the greater of 70 per cent or £1,500; if neither of the latter applied, then the penalty was 5 per cent or £300, whichever was the greater.

35. Ms Williams referred to *Bosher*, but indicated that it was not in point. She referred to the grounds of appeal as being that a reasonable excuse for failure to submit the returns on time existed.

### **Discussion and conclusions**

36. We do not consider that Mr Oddy’s grounds of appeal are as described by Ms Williams. He disputes the penalties; in other words, he submits that he has not incurred the penalties. The implication of his arguments is that (with certain exceptions) all his returns were in fact submitted on time. On that basis, the question of reasonable excuse would not be relevant, as subject to those exceptions he would not have incurred the penalties. Thus the issue before us is whether, on the facts as established by the evidence, the returns were submitted on time despite HMRC’s view that they were not.

37. In his correspondence with HMRC, Mr Oddy persistently requested copies of the returns showing date stamps indicating the date of receipt. HMRC did not do so. In his review letter, Mr Harkin stated:

“I note you require copies of the late returns date stamped with the date of receipt. I can confirm that returns are logged on day of receipt at our processing office in Comben House, Bootle. Due to the volume of post received at HMRC envelopes are not retained. Unfortunately, I cannot give an explanation as to why HMRC did not receive your monthly return on time. This is outside my control and perhaps something you should discuss with Royal Mail.”

38. In our view, Mr Harkin completely failed to deal with the point raised by Mr Oddy. It would not have been necessary for HMRC to retain envelopes in order to put

date stamps on returns received by them. No reason was given for not providing date stamped copies, whether by Mr Harkin or any of the HMRC officers involved in the earlier correspondence.

5 39. If a taxpayer asserts, as Mr Oddy does, that returns have been posted in sufficient time for them to be received by HMRC by the due date, this puts HMRC to proof that they have not been so received. The basis on which HMRC's argument has been put in the present case by Ms Williams, whose submissions were prepared by another HMRC officer, is that the returns are to be taken to have arrived late, purely by reference to the dates shown in HMRC's records as being the dates of receipt.  
10 Without supporting evidence, the dates of receipt shown in HMRC's records can only be taken as their assertions as to the dates on which the returns were received. Those assertions must be weighed against the evidence given by and for Mr Oddy as to the posting of the returns.

15 40. In *Heronlea*, the Tribunal (Anne Redston) considered an argument similar to that raised by Mr Oddy; the director of Heronslea said that he had posted the return in good time so as to meet the deadline. The Tribunal considered the normal pattern followed by that company in posting its returns, and whether the particular return had been posted in accordance with that normal pattern. It also considered whether, as HMRC had implied, Heronslea had a history of late filing. It found on the facts that  
20 the picture emerging from the correspondence was not of a serial late filer but of a diligent taxpayer endeavouring to meet its obligations.

41. In relation to proof of posting, the Tribunal observed at [31]:

25 "It is true that no proof of posting was obtained, but as HMRC concede, "proof of posting is not a legislative (sic) procedure". Clearly, where such proof is provided, it is conclusive; in its absence, the Tribunal must, as here, weigh up the evidence provided. But obtaining proof of posting is not a legal obligation and HMRC cannot insist upon it. As Mr Clifton says, it can be an onerous requirement, particularly for a small business with extended working hours."

30 42. The Tribunal referred at [32] to the requirements in the Regulations as to the making of CIS returns, which could be "made" by being sent in the post. The Tribunal then referred to s 7 of the Interpretation Act 1978, which applies where:

35 "an Act authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document . . ."

40 43. At [34] the Tribunal found that this section applied to the delivery of Heronslea's CIS return to HMRC. At [36] the Tribunal referred to the remaining words of the section, which are:

" . . . and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

The Tribunal found that Heronslea's return was thus deemed to be delivered in the normal course of post unless HMRC could rebut that presumption.

44. At [37] the Tribunal said:

5 "HMRC state that all CIS returns are date stamped on the day of receipt and this date is then recorded on the HMRC computer. However, the Tribunal were not provided with the date-stamped CIS return, nor a computer print-out showing the date of receipt, nor any evidence, in relation to the particular HMRC office concerned, as to procedures for opening the post and logging it. The Tribunal thus has  
10 no evidence, other than the Statement of Case itself and the correspondence with Mr Clifton, to support HMRC's case that the return was delivered late. It thus finds that the presumption has not been rebutted."

45. We are fully in agreement with the approach taken by the Tribunal in  
15 *Heronslea*. We therefore consider below the evidence in Mr Oddy's case in the light of that approach.

46. Before doing so, there is one other point in HMRC's submissions on which we need to comment. Under the heading "Matter at Issue", HMRC state:

20 "The matter that HMRC wish the Tribunal to decide relates to penalties arising in respect of a failure to submit on time [CIS] monthly Contractors Returns . . ."

Putting to one side the assertion of failures to file returns on time, to which we return below, it is incorrect for HMRC to wish the Tribunal to decide the matter; they are the Respondents to Mr Oddy's appeal. Given that title, it is thus for them to respond to  
25 the submissions made by him in support of his appeal.

#### *Evidence for Mr Oddy*

47. Mr Oddy explained that he filled in the returns each month setting out how much tax had been deducted from payments to his sub-contractors. These were then sent to HMRC. His partner Sarah Jaffray dealt with sending the returns.

30 48. Ms Jaffray stated that she posted the returns on about the 15th of each month. Although she described the returns as being sent in a prepaid envelope by first class post, the description in Mr Oddy's grounds of appeal made clear that the returns were posted first class with a large letter stamp.

35 49. Mr Oddy emphasised that he was well aware of the "fine system", ie the penalty regime for late returns. Whereas under the previous system it had been necessary to pay the tax at the same time as sending the return, this was no longer necessary. Sending the return did not involve any cost. Knowing that he could incur a £100 penalty, there was no way that he would want to incur that expense every month.

40 50. He referred to the monthly return to 5 September 2009. As this had been his first nil return, Ms Jaffray had telephoned HMRC. HMRC had indicated that they

would accept the submission of a nil return by phone (as referred to on the second page of the return at section 3, headed “Nil Return”). Ms Jaffray confirmed to us that she had dealt with the return in this way. Mr Oddy stated that, despite this, HMRC had treated the return as having been made late. (A photocopy of this return had been sent to Mr Harkin with Mr Oddy’s letter dated 19 March 2013.)

51. As the return for the month ended 5 May 2011 was also a nil return, Ms Jaffray had telephoned HMRC in the same way. Despite this, that return was said to be 22 months late. (Again, a photocopy of the return had been sent to Mr Harkin on 19 March 2013.)

52. In response to our questions, Mr Oddy explained that Ms Jaffray posted the forms at her place of work, where there was a post room. Ms Jaffray stated that on her phone and on the home computer they had set up reminders to ensure that the returns were dealt with on time. She generally posted the forms through her office, and kept copies of the returns. Where the 19th fell on a weekend or bank holiday, she adjusted the timing of the reminders and the posting to allow for this. Mr Oddy explained that Ms Jaffray worked for a large property company. Ms Jaffray stated that if she was ever unsure about the way anything concerning the returns needed to be dealt with, she would telephone HMRC and find out in order to check the procedure. In addition Mr Oddy commented that his approach to dealing with his tax matters was that “You don’t muck about with HMRC”.

53. Mr Oddy emphasised that Ms Jaffray would “give him grief” for suffering a penalty.

*HMRC’s submissions on the evidence*

54. Ms Williams referred to the HMRC Manual paragraphs CISR68610 and 68620, of which copies had been included in Mr Oddy’s bundle. The former set out the instructions relating to the recording of monthly returns received by HMRC at their Netherton premises. The latter dealt with returns received at other HMRC offices. (We refer in more detail below to the instructions.) There was no indication that this process had not been followed.

55. Ms Williams submitted that HMRC’s records provided credible evidence that the monthly CIS returns had been received late.

*Our consideration of the evidence*

56. HMRC’s Manual paragraph CISR68610 refers to the procedures at Netherton being carried out by Aspire staff; we assume that Aspire provides outsourced services to HMRC in relation to the CIS. The instructions indicate that no returns will be date stamped by Aspire. Returns which are fit for processing are not among the items to be sorted and batched in date order. The instructions refer to the treatment of a batch of returns suitable for processing, which are to be dealt with as set out in the final two sub-paragraphs of the instruction.

57. The instructions at CISR68620 deal with contractors' monthly returns received by HMRC at a local network or other office. In such cases returns are to be date stamped on the back page of the return in the empty space, without obscuring any text; the returns are then to be forwarded to Netherton.

5 58. We have no evidence to show which address was used for the submission of the returns; we consider it likely that the returns were sent in pre-addressed envelopes provided by HMRC. As a result, it cannot be established whether the returns arrived at other HMRC offices, in which case they should have been date stamped as indicated above, or at Netherton, where the procedure did not involve date stamping  
10 returns. Nor do we have copies of the returns; the documentary evidence is limited to copy print-outs of HMRC's internal records relating to the submission of those returns.

59. HMRC submit that there was no evidence that the process of recording the receipt of monthly returns was not followed. However, there is a question concerning  
15 one of the monthly returns, and there is evidence to show that under the previous CIS the recording relating to the annual return for 2005-06 was deficient. In addition there are issues relating to two nil returns.

60. Ms Williams provided us with a summarised list of the HMRC records of the returns for the periods ending 5 August 2008 to 19 July 2012. According to this list,  
20 the delays were:

- (1) Return to 5 August 2008: 3 days late;
- (2) Return to 5 November 2008: 5 days late;
- (3) Return to 5 December 2008; 11 days late;
- (4) Return to 5 June 2009: 5 days late;
- 25 (5) Return to 5 July 2009: 35 days late;
- (6) Return to 5 August 2009: 5 days late;
- (7) Return to 5 September 2009: 43 months late;
- (8) Return to 5 October 2009: 7 days late;
- (9) Return to 5 November 2009: 5 days late:
- 30 (10) Return to 5 December 2009: 3 days late;
- (11) Return to 5 January 2010: 1 day late:
- (12) Return to 5 May 2010: 6 days late:
- (13) Return to 5 March 2011: 3 days late:
- (14) Return to 5 May 2011: 22 months late;
- 35 (15) Return to 5 June 2011: 2 days late:
- (16) Return to 5 July 2011: 1 day late:
- (17) Return to 5 October 2011: 1 day late;

(18) Return to 5 November 2011: 4 months late;

(19) Return to 5 December 2011: 3 months late;

(20) Return to 5 May 2012: 5 days late.

5 61. The returns for all the other periods were shown as having arrived on the 19th of the relevant month, except for eight instances where the returns were recorded as having been received on earlier dates.

62. The question concerning one of the monthly returns relates to that for 5 July 2012. HMRC issued a penalty notice in respect of that period, stating that the return had been filed late. According to the print-out from HMRC's records included in the  
10 evidence, the return was received on 19 July 2012, and was therefore received on time. That print-out was taken from HMRC's records up to 5 March 2013, and thus the details for the July 2012 period are shown as at March 2013 rather than at July 2012. The evidence does not include a contemporaneous print-out. However, for a penalty notice to have been issued, it would have been necessary for HMRC's records  
15 to show that the return had been received late.

63. HMRC continued to maintain that a penalty was due in respect of the July 2012 period, until they issued the "Appeal outcome" on 18 April 2013. In the review letter dated 8 May 2013, Mr Harkin arrived at the general conclusion "that the decision to charge the penalties was correct", but later in his letter he stated:

20 "I have cancelled the penalty for period ended 05 July 2012 as your contractor return was received on 19 July 2012."

64. This, together with the apparent failure by HMRC to record receipt of the annual return for 2005-06 under the previous CIS despite the return having been date stamped as received by Inland Revenue Lothians Area on 12 April 2007, indicates  
25 that HMRC's records cannot be taken as conclusive proof that returns were received after the due date. We accept that in many cases there will be insufficient evidence to counter the circumstantial evidence which HMRC's records represent. However, if the weight of the evidence for the taxpayer is such as to be more persuasive than such circumstantial evidence, the taxpayer will not be precluded from contending that,  
30 despite such HMRC records, the relevant returns were submitted in time to be received by HMRC on or before the due date.

65. Mr Oddy accepted that the returns referred to at (18) and (19) in our list above were late, and that the penalties were due for the relevant periods. In respect of the others, the greatest delays according to HMRC's records were for the periods ended 5  
35 September 2009 and 5 May 2011.

66. Among the enclosures to Mr Oddy's letter received by HMRC on 7 March 2013 were photocopies of these two returns. Mr Harkin sent these on to the Newry office. This appears to us to have led to the recording of these returns as having been received 43 and 22 months late respectively (items (7) and (14) above).

40 67. We have considered the evidence given by Ms Jaffray relating to the nil returns. We found her and Mr Oddy to be honest and credible witnesses. We also find that Ms

Jaffray was diligent in her record keeping and compliance, as might well be expected in the case of a legal secretary to a substantial property company. (Her capabilities were illustrated in a different context by the quality of the bundles which she prepared on Mr Oddy's behalf.) We accept her evidence that she made appropriate enquiries by telephone and then made a nil declaration by telephone as indicated on the second page of the return for the September 2009 period; her annotation on the first page of the retained copy indicates that she did so on 1 September 2009. We find that the "nil return", despite being properly made in this way, was not recorded by HMRC as having been made, and this therefore led to their conclusion that the return had been submitted long after the due date. We are also satisfied that Ms Jaffray followed the same procedure in respect of the second return, and that again this was not appropriately reflected in HMRC's records; we find that the return for the period ended 5 May 2011 was duly made on 2 May 2011, as annotated on the copy which she retained for Mr Oddy's records.

68. In her submissions for HMRC, Ms Williams sought to distinguish Mr Oddy's position from that of the taxpayer in *Heron'slea*, on the basis that in that case HMRC had not discharged the burden of providing credible evidence that the CIS returns had been received late, whereas in Mr Oddy's case the records did provide credible evidence to that effect. For the reasons which we have set out above, we are not satisfied in Mr Oddy's case that such records can necessarily be taken as credible evidence of late receipt of the returns.

69. The obligation on the contractor in respect of returns is imposed by reg 4(1) of the Regulations, which requires a return to be "made" to HMRC within 14 days of the end of every tax month. For the periods covered by this appeal (apart from the telephone returns considered above), Mr Oddy did not make electronic returns. Regulation 4(6) indicates that a return, if not made electronically, must be signed by the contractor or by an authorised person. Regulation 55 provides:

"Any notice which is authorised or required to be given, served or issued under these Regulations may be sent by post."

As indicated in *Heron'slea*, service by post is governed by s 7 of the Interpretation Act 1978. This has the effect of shifting the emphasis away from the date on which HMRC record the return as having been received. The question becomes: was the letter containing the return properly addressed, pre-paid (ie stamped) and posted, and was it posted at a time when in the ordinary course of post it could be expected to arrive in the hands of HMRC by the due date?

70. We have found that Mr Oddy and Ms Jaffray were honest and credible witnesses. Ms Jaffray stated that she followed a system of reminders to ensure that the returns would be posted on time. It is clear that she did not personally place the envelopes containing the returns in a Royal Mail post box, as she used the facility of the post room at the property company where she worked. Appropriate stamps were affixed to the envelopes, and they were dealt with as part of the company's post.

71. Although Ms Jaffray did not place the envelopes in an external Royal Mail post box, we find that the use of the property company's post room facilities was the

equivalent of posting the envelopes in a Royal mail post box, with similar expectations as to the time of delivery of the post.

5 72. In *Heronislea*, the Tribunal examined the company's normal pattern of submitting its returns. In Mr Oddy's case, we are satisfied that Ms Jaffray followed the pattern of following the reminders which she set on her phone and the home computer. Although we do not consider HMRC's records to amount to conclusive evidence, we find some assistance in looking at them in order to discern a pattern. For the periods ended 5 August 2008 to 5 July 2012, there were 28 returns which HMRC recorded as having arrived in time; of these, 20 were recorded as arriving on the 19th  
10 of the month, and eight as arriving before that date. The other periods are those listed above; Mr Oddy accepted that the returns for two periods were late, so that there are 18 periods where the returns were said to be late.

15 73. We have already found that the two nil returns were not late, having been made by telephone. This leaves 16 periods, involving a range of days' delays as recorded by HMRC.

20 74. We find that Mr Oddy was not a "serial late filer", as implied by HMRC's records. After weighing the evidence for each party to this appeal, we find on the balance of probabilities that the returns for those 16 periods were posted at a time when in the ordinary course of post they could have been expected to arrive in the hands of HMRC by the due date.

75. In the course of correspondence and at the hearing, Mr Oddy referred to the failure of various items to arrive by post; he had not received a large number of the penalty notices which HMRC had indicated at a later stage had been sent to him, and various items of correspondence which he had sent to HMRC had not arrived.

25 76. Ms Williams, in her submissions for HMRC, argued that the number of penalty notices should have raised concerns for Mr Oddy, and that it was reasonable to assume that he should have sought to address the matter earlier.

30 77. In the review letter, Mr Harkin stated that according to HMRC's records, 45 penalties had been issued between 30 August 2008 and 8 August 2012. Mr Oddy's address had not been changed, and there had been no indication that the penalty notices had been returned to HMRC as being undelivered.

35 78. We accept Mr Oddy's evidence that he did not receive the majority of the penalty notices, although if these had been dealt with according to s 7 Interpretation Act 1978, in particular by the envelopes being properly addressed and stamped, this would be regarded as sufficient service, in the same way as we have found in relation to Mr Oddy's monthly CIS returns. In relation to any correspondence which he sent to HMRC, the reason for correspondence not being recorded as received by HMRC might have been that the office dealing with CIS matters appears to have changed, and correspondence received by the previous office may not have been forwarded in  
40 such a way as to reach the new office and be linked up to the relevant HMRC file for

Mr Oddy. In the absence of evidence as to the postal arrangements, we are unable to make any findings as to the “lost” correspondence.

*Result of the appeal*

5 79. As we have found that the returns were posted in sufficient time for them to be expected to arrive in the hands of HMRC by the respective due dates, we allow Mr Oddy’s appeal against all the penalties listed at (1)-(17) and (20) above, and set aside HMRC’s determination that those penalties were due.

**Right to apply for permission to appeal**

10 80. 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  
15 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

20 **JOHN CLARK**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 9 July 2014**

25 Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 22 July 2014.