



TC03846

Appeal number: TC/2013/04904

VAT – Whether reasonable excuse for late submission of 11 CIS returns during the period November 2011 to September 2012. Yes in part for the first three returns, no for the remainder. Whether special circumstances existed yes, penalty reduced.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

THOMAS DALZIEL STEELFIXING & FORMWORK Appellant

- and -

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

**TRIBUNAL: PRESIDING MEMBER PETER R SHEPPARD FCIS FCIB CTA AIIT
MR S A RAE LLB, WS**

Sitting in public at Wellington House, Glasgow on 14 May 2014

Thomas Dalziel and Marion Dalziel for the Appellant

Linda McGuigan, Officer of HMRC, for the Respondents

DECISION

Introduction

5 1. Thomas Dalziel is self-employed in the construction industry, he is based in Ardrossan, Ayrshire. The administration side of the business is undertaken by his wife Marion.

2. Mr and Mrs Dalziel presented an appeal against a number of penalties levied by HMRC for the late filing by the appellant of his Construction Industry Scheme
10 monthly returns for the 11 month period ended 5 September 2012. The penalties total £4,030. This total is made up of ten fixed penalties of £100 each, ten fixed penalties of £200 each, ten tax generated penalties type 1 in varying amounts totalling £947 and four tax generated penalties type 2 in varying amounts totalling £83. It should be pointed out that all of these 34 penalties are for failing to file 11 returns. No tax was
15 paid late.

Statutory Framework

3. Part 3 Chapter 3 of the Finance Act 2004 Section 70 requires the provision by a contractor of monthly returns.

4. The Income Tax (Construction Industry Scheme) Regulations 2005 Part 2
20 Contractors provides the due dates for provision by a contractor of monthly returns, and gives in considerable detail the requirements for returns, including the requirement for nil returns.

5. Schedule 55 of the Finance Act 2009 sets out the provisions whereby penalties may be levied where HMRC have not received a CIS return for a prescribed
25 accounting period by the due date, or have received the return but have not received by the due date the amount of tax shown on the return as payable.

6. Both Section 118 Taxes Management Act 1970 and paragraph 23 of Schedule 55 of the Finance Act 2009 cover the concept of a person having reasonable excuse for failing to submit CIS returns or payment therefor on time.

7. Further, paragraph 16 of Schedule 55 Finance Act 2009 provides for a "special reduction" under which if HMRC think it right because of special circumstances they may reduce any penalty under this Schedule.
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8. Case law

HMRC v Total Technology (Engineering) Ltd [2012] UKUT 418 (TCC)

35 *HMRC v Hok Ltd* [2012] UKUT 363 (TCC)

HMRC v Anthony Boshier [2013] UKUT 0579 (TCC)

Algarve Granite Ltd v HMRC [2012] UKFTT 463 (TC)

Rodney Warren & Co v HMRC [2012] UKFTT 57 (TC)

The Appellant's Submissions

5 9. Mr & Mrs Dalziel, who were unused to Tribunal procedure, made submissions in a rather haphazard way from which the Tribunal established the following:

- The recession hit Mr & Mrs Dalziel harder than most.
- A construction company run by Mr Dalziel failed in 2010 and following that with effect from 6 October 2010 he became self-employed.
- 10 • Just over one year into this self-employment in about November 2011 an invoice issued to another contractor, Donachy's, for approximately £3,300 was unpaid because Donachy's went into liquidation and all their assets were used to repay secured creditors. Mr Dalziel said that this was a traumatic period for him because this was a significant sum for him to lose.
- 15 • In August 2011 a gift shop run by Mrs Dalziel also failed and she had no work for about 12 months. She is now self-employed.
- During the period Mrs Dalziel's father was suffering with dementia and his declining health resulted in considerable demands on Mrs Dalziel's time for over a year until his demise on 14 December 2011 with a funeral
20 on 22 December 2011.
- Mr and Mrs Dalziel had to deal with a difficult domestic problem involving their daughter and grandson. This occurred in the period December 2011 to February 2012.

25 10. In respect of Mr Dalziel's self-employment Mrs Dalziel advised that it appeared to her that under the CIS scheme her husband would receive income which had had tax deducted at source yet it appeared necessary for her to complete monthly returns on which the tax would have to be paid over again, only to be reclaimed at the end of the tax year. She considered payment of the tax twice placed impossible financial constraints on their business. No business could operate on such margins where about
30 half any income earned was initially paid away in tax. She therefore telephoned HMRC and discussed the situation. She discussed with HMRC the annual return form P35 which has a box on it requiring declaration of amounts paid to sub-contractors. Following on that discussion she understood that because of that information which she supplied to HMRC it would not be necessary to complete monthly CIS returns.
35 She now accepts that this was a misunderstanding on her part. She said that she was not experienced in tax matters and possibly had not asked the right questions. However at no time in the conversation did HMRC mention tax exemption certificates.

11. Mrs Dalziel said that she had read the case of *Bosher* but considered that that case could be distinguished from theirs. The main difference being that it was obvious that in *Bosher* HMRC had repeatedly asked for returns and Mr Bosher had failed to provide them. In this case as soon as Mr and Mrs Dalziel had realised the misunderstanding that had occurred they had taken steps to rectify the position. They had become aware of the problem in a telephone conversation they had made to HMRC in January 2013 about another tax matter. In that conversation HMRC had said “when you do your monthly return” and Mrs Dalziel had picked that up and said that she did not do a monthly return because she completed a form P35. It was at this point that the misunderstanding that had occurred became apparent to Mrs Dalziel and it was explained that the appellant should have obtained a tax exemption certificate. She also said that she did not receive information from HMRC about the Construction Industry Scheme until after this telephone conversation, although she accepted it was available on line. Once Mrs Dalziel had realised the misunderstanding she gathered all the information needed to register the appellant for the CIS scheme, to apply for an exemption certificate, and to complete all the returns. She submitted them to HMRC who received them on 2 April 2013.

12. Following on the appellant's registration as a contractor with HMRC on 23 January 2013 with an effective start date of 6 October 2010, HMRC issued penalty notices on 2 February 2013 to the appellant for late filing of the contractor's Monthly Returns (CIS300). Following an appeal by the appellant which was rejected by HMRC, on 13 May 2013 Mr Dalziel asked HMRC to review the penalties. On 26 June 2013 HMRC notified Mr Dalziel that the result of their review was that the penalty was confirmed. In response the appellant filed a Notice of Appeal with the First-tier Tax Tribunal and Mrs Dalziel on behalf of her husband wrote a letter to HMRC dated 24 July 2013 including

“.....These are the basic facts of the case however during this time I also lost my job and you will note from the value of the returns for this period and the number of nil returns that Mr. Dalziel’s work was sketchy so we were looking at the very real possibility of being unable to pay our mortgage and perhaps the loss of our home (we have some arrears now but have held on so far). Also during this time my father was diagnosed with dementia and I was involved in his care until his death and also supported my daughter through a very messy relationship breakdown.

I didn’t include this information previously as it’s very personal but it may go some way to explaining why I maybe wasn’t on the ball as much as I should have been.

Things are beginning to pick up for us but any financial penalty would have a huge detrimental effect on our lives and I ask you to bear in mind that at no time were HMRC owed any money.”

13. Mrs Dalziel said that she had received no reply to that letter.

14. The appellant asked for the penalty to be waived.

HMRC's Submissions

15. Mrs McGuigan for HMRC suggested that Mr Dalziel had only appealed against the 20 fixed penalties totalling £3,000. He had not appealed the tax based penalties. However she accepted that if the appellants established a reasonable excuse for the fixed penalties the tax based penalties fell away.

16. The Tribunal noted the point but asked Mrs McGuigan to continue on the basis that the tax based penalties were also being appealed.

17. Mrs McGuigan pointed out that ample information in respect of the Construction Industry Scheme is available on the HMRC website, even if a booklet on the scheme had not been sent to the appellant. The appellant was not new to the construction industry even though he had not been self-employed before. HMRC do not accept that the appellant had reasonable excuse for the failures to submit returns on time.

18. HMRC gave details of the legislation under which they have levied the penalties.

19. In view of the statement in the Notice of Appeal by the appellant "I am also unclear as to the exact amount of penalties HMRC are seeking (various letters show differing amounts and Helpline advisers state that amounts can alter/increase until the case is settled)" details of the penalties are set out in the following schedule:

Schedule of Penalties charged under Section 55 Finance Act 2005

For tax Period Ending	Return Due	Return Received	Type of Penalty	Amount £	Total £
5 Nov 2011	19 Nov 2011	2 Apr 2013	FP1 FP2 TGP1 TGP2	100* 200* 50 50	100
5 Dec 2011	19 Dec 2011	2 Apr 2013	FP1 FP2	100 200	300
5 Jan 2012	19 Jan 2012	2 Apr 2013	FP1 FP2 TGP1 TGP2	100 200 5 5	310
5 Feb 2012	19 Feb 2012	2 Apr 2013	FP1 FP2 TGP1 TGP2	100 200 27 27	354
5 Mar 2012	19 Mar 2012	2 Apr 2013	FP1 FP2 TGP1 TGP2	100 200 1 1	302
5 Apr 2012	19 Apr 2012	2 Apr 2013	FP1 FP2 TGP1	100 200 27	327
5 May 2012	19 May 2012	2 Apr 2013	FP1 FP2 TGP1	100 200 155	455
5 Jun 2012	19 Jun 2012	2 Apr 2013	FP1 FP2	100 200	

			TGP1	261	561
5 Jul 2012	19 Jul 2012	2 Apr 2013	FP1 FP2 TGP1	100 200 125	425
5 Aug 2012	19 Aug 2012	2 Apr 2013	FP1 FP2 TGP1	100 200 160	460
5 Sep 2012	19 Sep 2012	2 Apr 2013	FP1 FP2 TGP1	100 200 136	436
				Total	4,030

*penalty withheld

Penalty Types

FP1 - Fixed Penalty type 1

5 This is a penalty levied under Schedule 55 paragraphs 1, 7 and 8 of the Finance Act 2009 which provides for a fixed penalty of £100 if a person fails to submit a return by the filing date. For this purpose Schedule 55 paragraph 1(4) states ““filing date,” in relation to a return or other document, means the date by which it is required to be made or delivered to HMRC;”

10 FP2 - Fixed Penalty type 2

15 This is a penalty levied under Schedule 55 paragraphs 1, 7 and 9 of the Finance Act 2009 which provides for a fixed penalty of £100 if a person fails to submit a return within two months of the penalty date. For this purpose Schedule 55 paragraph 1(4) ““penalty date”, in relation to a return or other document, means the date on which a penalty is first payable for failing to make or deliver it (that is to say, the date after the filing date).”

TGP 1 - Tax Geared Penalty type 1

20 This is a penalty levied under Schedule 55 paragraphs 1, 7 and 10 of the Finance Act 2009 which provides that where a failure continues after the end of the period of six months beginning with the penalty date there should be a penalty of 5% of any liability to make payments which would have been shown in the return in question.

TGP2 - Tax Geared Penalty type 2

25 This is a penalty levied under Schedule 55 paragraphs 1, 7 and 10 of the Finance Act 2009 which provides that where a failure continues after the end of the period of 12 months beginning with the penalty date there should be a penalty of 5% of any liability to make payments which would have been shown in the return in question.

30 20. All penalties of Type FP1 and FP2 were issued on 2 February 2013. All penalties of type TGP1 and TGP2 were issued on 4 May 2013.

35 21. HMRC stated that they had considered whether there were special circumstances but had decided that there were none. The Tribunal questioned whether the appellant’s letter of 24 July 2013 had been considered when reaching this decision. Mrs McGuigan could not answer as to why that letter had not been responded to. She

was also unable to confirm whether or not the letter had been part of HMRC's deliberations when they were considering whether there were special circumstances.

22. HMRC requested the appeal be dismissed.

The Tribunal's Observations

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23. The Tribunal does not accept that Mr Dalziel had only appealed the fixed penalties. A letter to HMRC dated 3 March 2013 appeals against 20 fixed penalties totalling £3,000. These were the only penalties that had been notified to the appellant at that time. He received 14 further penalty notices on 16 May 2013. These related to the tax geared penalties. In response Mrs Dalziel wrote to HMRC on 2 June 2013 on behalf of her husband. After listing the 14 penalty reference numbers she wrote "The above penalties were received on 16/5/13. The original penalty issued on these references are all currently under appeal". She was mistaken because the penalty references were slightly different from the fixed penalty reference numbers. Nevertheless it is apparent that the intention was that all the penalties were being appealed. What is more significant is the actual Notice of Appeal document dated 24 July 2013. In section 3 of that form in the box marked "amount of tax or penalty or surcharge" is inserted "don't know". In the grounds of appeal there appears the comment set out in paragraph 19 above. It is clear to the Tribunal that this does not just refer to the fixed rate penalties which total £3,000. The appellant is clearly appealing against all of the penalties. The Tribunal therefore reject this argument by HMRC.

24. The Tribunal is not surprised that the appellant was confused by the plethora of penalty notices. They all had similar reference numbers and two of the tax based penalties were each for a penalty of £1 and two others were each for a penalty of £5.

25. In an environment where HMRC insist on copy VAT invoices being retained by taxpayers to support claims it was disappointing that no copy of any of the 34 penalty notices was provided by HMRC for the Tribunal to review. The Tribunal considers this lack of supporting documentation is not best practice.

26. The level of the penalties and whether or not they are disproportionate is discussed at length in the Upper Tribunal's decision in *HMRC v Anthony Boshier*. The conclusion is that a penalty of £100 per month is not disproportionate.

27. In respect of whether or not the appellant has reasonable excuse for its failure the Tribunal was alerted to Section 118 of the Taxes Management Act 1970. The Tribunal notes that Section 23 of Schedule 55 of the Finance Act 2009 may have been a more appropriate reference. Nevertheless it is clear to the Tribunal that from August 2011 to January 2012 Mr and Mrs Dalziel experienced a series of traumatic experiences which considerably disrupted their lives. This combination of unfortunate events was a major factor in their failure to follow the correct procedures in respect of the Construction Industry Scheme. The Tribunal therefore considers that they have established reasonable excuse for the initial failure to provide returns for the periods

ending 5 November 2011, 5 December 2011, and 5 January 2012 for which they were penalised.

28. In respect of the continued failure after that date the Tribunal finds that the reasonable excuse did not continue beyond 19 January 2012. It is surprising that Mr Dalziel, who said that he had worked in the construction industry for at least 17 years, was unaware of the need for a general exemption certificate and for the provision of monthly Construction Industry Scheme returns. Information on the scheme is readily available on HMRC's web site.

29. The effect of the Tribunal's decision in paragraphs 27 and 28 would appear to make little or no effect on the level of the penalties.

30. In considering the matter of special circumstances as described in the Finance Act 2009 Schedule 55 paragraph 16 the Tribunal was greatly assisted by the decision of the Tribunal (Judge Guy Brannan and Leslie Howard) in *Algarve Granite Ltd*. In this present case the Tribunal are not satisfied that HMRC had properly considered whether there were special circumstances that they needed to consider. In the Tribunal's view the legislation provides for the possibility of both reasonable excuse and special circumstances. The Tribunal were not satisfied that the letter from the appellant dated 24 July 2013 had been considered by HMRC. As at the date of the hearing although the letter had been received by HMRC, they had included it in the bundle they had prepared, it had not been responded to. It was not apparent to the Tribunal that the letter had been considered by HMRC when considering whether there were special circumstances, and when asked Mrs McGuigan could not confirm whether or not it had. Whilst she was able to confirm that whether special circumstances existed had been considered by HMRC she said that she had received no instructions giving any details of what had been considered. In these circumstances and in the absence of any reply to the appellant's letter of 24 July 2013 the Tribunal considers it was more likely than not that HMRC had failed to consider that letter when considering special circumstances. The Tribunal also observes that in addition to the letter of 24 July 2013 the following facts should also have been taken into consideration when considering whether special circumstances existed.

- (i) Mrs Dalziel had telephoned HMRC to seek guidance when her husband was starting out in business on his own but there had been a misunderstanding, the need for an exemption certificate had not been explained;
- (ii) no tax had been lost or paid late as a result of this misunderstanding;
- (iii) the initial misunderstanding had occurred at a stressful time for the appellant and his wife, they had continued under a misapprehension that they did not need to do monthly returns and no communication from HMRC had alerted them to that misunderstanding until January 2013;
- (iv) the appellant drew the outstanding returns to the attention of HMRC rather than the other way round. There was no evidence to confirm whether or not any of these points had been considered. Accordingly The Tribunal considers that

the consideration of special circumstances had not been done properly and HMRC's penalty assessment is flawed.

5 31. On this basis the Tribunal must consider whether or not the circumstances put forward by the appellant constitute "special circumstances" justifying a reduction in the penalty.

32. In considering the meaning of special circumstances the Tribunal notes the following paragraph from the Tribunal decision in the *Algarve Granite Ltd* case:

10 "62. 'Special circumstances' therefore means something more than circumstances that are simply unique or particular to the individual taxpayer. The correct test, therefore, is to determine whether the circumstances are 'out of the ordinary, something uncommon'".

We also agree with the comments of the Tribunal in *Warren*:

15 "53. ...Plainly [*special circumstances*] must mean something different from, and wider than, reasonable excuse, for (i) if its meaning were confined within that of reasonable excuse, paragraph 9 would be otiose, and (ii) because paragraph 9 envisages a reduction in a penalty rather than absolution, it must be capable of encompassing circumstances in which there is some culpability for the default: where it is right that some part of the penalty should be borne by the taxpayer.

20 "54. They [*i.e special circumstances*] must encompass the situation in which it would be significantly unfair to the taxpayer to bear the whole penalty."

25 33. In the Tribunal's view although the appellant, through his wife, had contacted HMRC in order to clarify what procedures to adopt there had been a misunderstanding. No explanation of the need for an exemption certificate had been given by HMRC. It is to be expected that taxpayers will familiarise themselves with the procedures that are applicable to their circumstances. In difficult circumstances, the appellant had tried to do this, but there had been a misunderstanding.

30 34. In the Tribunal's view this is a case where the appellant has some culpability for the default and therefore some part of the penalty must be borne by him, however we consider it would be significantly unfair for the appellant to bear the whole penalty.

35 35. Where misunderstandings occur it is usually both parties that are to some extent to blame. In the absence of any evidence to show that either party was more or less to blame for the misunderstanding the Tribunal considers both parties to be equally to blame and therefore considers that the penalty remaining after the reduction for reasonable excuse, if any, (see paragraphs 27 to 29) should be reduced by 50%.

36. 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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PETER R SHEPPARD
TRIBUNAL PRESIDING MEMBER

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RELEASE DATE: 29 July 2014