



**TC04212**

**Appeal number: TC/2010/08427**

*INCOME TAX: Construction Industry Scheme; late monthly returns; penalty notices sent to accountants; whether contractor's belief that all returns had been filed by accountant and reliance on a third party provided a reasonable excuse -no.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**STEPHEN TURNER**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE CHRISTOPHER HACKING  
MR LESLIE BROWN**

**Sitting in public at Nottingham on 3 December 2014**

**David Wagstaff a director of Burton Accountancy Services Limited appeared for the Appellant.**

**Tony Burke, a Case Presentation Officer, appeared for the Respondents**

## DECISION

### *Concerning the appeal*

5 1. This appeal concerns penalties for the late submission of returns under the  
Construction Industry Scheme (CIS) originally assessed at a figure of £76,200 but  
subsequently reduced to allow for mitigating circumstances to a figure of £23,700.  
The Respondents have confirmed that that figure will, subject to the Tribunal's  
10 the provisions of the new penalty regime established under section 55 of the Finance  
Act 2009.

### *The facts*

15 2. The facts can be simply stated and are not in dispute.

3. Mr Turner is and was at all relevant times engaged as a contractor in the  
specialised business of providing recreational water slides both in the UK and  
overseas. He employs between 4 and 6 men as subcontractors and it is accepted that  
20 as such he is responsible to comply with the requirements of the Income Tax  
(Construction Industry Scheme) Regulations 2005 (the Regulations).

4. Mr Turner relied substantially on his accountant to deal with the matter of the  
filing with HMRC of his returns under the CIS. He provided details to his accountant  
25 of the monies earned by each of his subcontractors and sent a cheque each month to  
his accountant for the total tax payable under the scheme. Mr Turner believed that his  
accountant was making the returns required and says that he had no reason to believe  
that he was other than compliant with the Regulations.

30 5. In fact no returns had been filed between April 2007 and January 2009.

### *The Construction Industry Scheme*

6. The CIS provides for payments by contractors to subcontractors in the  
35 construction industry to be subject to the deduction of amounts on account of the  
subcontractor's tax. Section 61 Finance Act 2004 imposes this obligation. Returns  
showing tax deducted (including if appropriate nil returns) have to be made up to the  
6<sup>th</sup> of each month and submitted to HMRC by the 19<sup>th</sup> of each month.

40 7. The scheme was introduced to avoid the problems of the "lump" system whereby  
in the past subcontractors were paid gross and frequently did not account for the tax  
properly to be assessed on their income. Many subcontractors were itinerant workers  
so that it proved difficult to enforce payment of monies due.

45 *Legislation concerning penalties*

8. Under section 98A (2) of the Taxes Management Act 1970 (the Act) if a monthly return is received after the filing date (the 19<sup>th</sup> of the month) it will be treated as late and the contractor will be liable to a penalty of £100 for each month he is late in the first 12 months. For each month thereafter a similar penalty of £100 arises but no more than £1,200 can be incurred in the second year, provided there are less than 50 subcontractors as is here the case. If the failure continues into a third year then the 13<sup>th</sup> month penalty cannot exceed £3,000. It follows therefore that the total exposure of a contractor in respect of a failure to file any one return cannot exceed £4,200.

9. Neither the computation of the original penalty of £76,200 nor the penalty of £23,700 mitigated under section 102 of the Act have been disputed. What the Appellant does contend is that in relying on his accountant he acted reasonably and that as he had no reason to be aware of the defaults he has what in law amounts to a “reasonable excuse” for the failure and is thereby not liable to the penalty imposed.

“Reasonable excuse”

10. What a “reasonable excuse” might constitute is not made clear in the Act. It is however generally considered by HMRC that a reasonable excuse must be some circumstance which is both unforeseen and beyond the reasonable control of the taxpayer. “It is a matter to be considered in the light of all the circumstances of the particular case” (*Rowland v HMRC* [2006] STC (SCD) 536 at paragraph 18).

11. What is clear, however, is that the delegation of a task for which the taxpayer is responsible will not, by itself, amount to a reasonable excuse. This finds statutory expression in the current law (see section 23 (2) (b) and (c) of Schedule 55 Finance Act 2009 which provides as follows:

- “(2) For the purposes of sub-paragraph (1) (*which provides for reasonable excuse*)-
- (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and
- (c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.”

These provisions simply restate the law as previously understood.

12. The view taken by the Revenue can be seen in the following published advice “CISR81100 - Compliance: Overview & ‘Reasonable excuse’: Reliance on another person

Where a person has asked somebody else to do something on their behalf, that person is responsible for ensuring that the other person carries out the task. They cannot claim they had a reasonable excuse merely because the task was delegated to a third party and the third party failed to complete it.

We expect the person to take reasonable care to explain to the third party what they require them to do, to set deadlines for the work and to make regular checks on progress, reminding where appropriate. We expect the person

- to be able to tell us what action they took to ensure that the obligation to make payment(s) and / or submit a return(s) on time was met, and
- normally, but not always, to know the reason why the failure occurred.

If the person does this and still fails to make payment(s) or submit a return(s) on time because the third party failed, they **may** have a reasonable excuse. However, the person must also have remedied the failure without unreasonable delay after the excuse has ended, see [CISR81110](#).

Remember that there is no statutory definition of ‘reasonable’ or ‘unreasonable’. Each case must be judged on its own merits in view of the person’s abilities and circumstances.”

13. In the view of the Tribunal the Revenue advice states fairly the position concerning the matter of “reasonable excuse” where reliance on a third party is concerned.

*The Appellant’s contentions*

14. At the hearing of this appeal Mr Wagstaff explained that his firm had taken over responsibility for Mr Turners CIS returns following the receipt by Mr Turner of a letter from his then accountant Mr Tim Shearing who indicated that he was not in a position to carry on acting for him. Mr Shearing was in poor health it seems and, sadly, passed away early in 2010.

15. Mr Turner was present at the hearing and gave evidence to the Tribunal. It would seem from the monthly advices prepared by Mr Turner and sent to his accountant, being documents included in the Appeal bundle, that the last of these was submitted for the 8 months leading up to the end of the calendar year 2008 (stated to be for the tax year ending 5 April 2009). This accords with Mr Turner’s evidence given to the Tribunal that he received the letter from Mr Shearing in around January/February 2009.

16. Thereafter it was some time before Mr Turner was in a position to appoint new accountants and some further time before they were in a position to ascertain what returns had been made under the CIS. When, eventually, they learned of the failure to file CIS returns, the new accountants acted to bring the position up to date by a filing of all of the required returns in June 2010.

17. In the Appellant's Notice of Appeal dated 22 October 2012 Mr Wagstaff who filed the Notice on behalf of Mr Turner stated:

5 "Mr Turner was using an accountant, Mr Shearing, to look after his CIS, PAYE and personal tax. Mr Turner used to e-mail his accountant each month with the names of the subcontractors used and the amount paid to them. He also sent a cheque in the post for the amount of CIS tax due.

As far as Mr Turner was concerned the CIS was being dealt with on a monthly basis I took over as Mr Turner's accountant at the end of 2008 and took over the responsibilities for filing the CIS returns from February 2009.

10 At no time prior to that date was Mr Turner given any notification that prior period CIS returns had not been filed.

Unfortunately Mr Shearing passed away at the beginning of 2010 so we cannot obtain any explanation from him.

15 The appeal review states that penalty notices were being sent to the accountant and not the taxpayer because of a request to do so. However we believe that it is totally unreasonable for no communication being sent directly to Mr Turner when no replies were being received from Mr Shearing.

18. Mr Wagstaff goes on to say that in the Notice of Appeal that from his knowledge of Mr Turner and the prompt way in which he had dealt with accounting matters with his firm he believes that, had Mr Turner been made aware of the fact that returns had not been filed, he would have "done something about it."

*The Tribunal's consideration of the appeal*

19. The tribunal does have considerable sympathy with the Appellant in the position to which the neglect of Mr Turner's former accountant has given rise. It seems clear that Mr Shearing was not a well man and that increasingly he had become unable to give to Mr Turner the attention and careful management of his affairs which would be expected from a professional accountant. However the Tribunal is constrained to consider carefully the facts of the matter and to measure Mr Turner's actions or lack of them against the duties he has as a CIS contractor under the scheme.

20. It has, quite particularly, to consider whether in light of the admitted facts Mr Turner has a reasonable excuse for the failure over a 28 months period to ensure that CIS returns were being properly made on his behalf.

21. The difficulty Mr Turner faces in this latter aspect is that by his own admission both in the Notice of Appeal and at the Tribunal hearing he took no effective steps to check that he was compliant with his CIS filing obligations. Indeed it appears that in

this respect he did no more than to make an assumption that all was well when in fact had he asked for at least a file copy of the returns as they were made he would have become aware of the problem.

22. Mr Turner in answer to a question from the Tribunal stated that he had only  
5 employed Mr Shearing for about 3 years. Prior to that he had dealt with his CIS  
returns himself taking a book issued for the purpose along to the Post Office and  
making his payments in that way. This system is no longer available to CIS  
contractors.

23. Mr Turner said that he did have an annual meeting with Mr Shearing but that  
10 “Everything was OK so far as I was concerned.” He appears not to have asked for  
copies of the returns or for any other positive confirmation that the returns had in fact  
been submitted.

24. During part of the time when returns were not sent it must have been clear to  
Mr Turner that he was in default. We say this because there was included within the  
15 appeal bundle a copy of an e-mail dated 11 September 2007 from Mr Turner to Mr  
Shearing in which Mr Turner sets out details of the breakdown of subcontractor’s pay  
for the tax months ending 5<sup>th</sup> May to 5<sup>th</sup> September 2007 inclusive (5 monthly  
periods). Mr Turner states in the e-mail that he has sent cheques to the Revenue that  
pertain to these months. It must have been obvious to Mr Turner (because he had  
20 omitted to file the 5 monthly returns) and as a man with some experience of the CIS  
that Mr Shearing could not have sent the returns for these months to the Revenue.  
Furthermore although Mr Turner could have done so subsequently he did not do so.

25. Similarly the Tribunal was not impressed by the speed of bringing the returns  
up to date. We accept that it would take some little time to deal with the returns but it  
25 ought not to have taken as long as from February 2009 to June 2010. Given the fact  
that Mr Shearing was known to be in poor health and had in any event requested to be  
relieved from the responsibility of handling Mr Turner’s affairs we would have  
considered it very important indeed for the new accountants to have verified with the  
Revenue (if not possible with Mr Shearing) whether all CIS returns were up to date.  
30 In any event checking that the returns had been made was Mr Turner’s responsibility.  
That is something which he failed to do.

26. In the event Mr Wagstaff says that it was not until 2 months after the returns  
were discovered to be outstanding that he was able to file these. No reasonable  
explanation for this further delay beyond that referred to at paragraph 16 above is  
35 given.

27. The Tribunal is driven to the conclusion that the filing of the returns was not in  
Mr Turner’s mind a priority. It was something he was happy to leave to someone else  
assuming that all would be satisfactory. To take this position in the case of a newly

appointed sole practitioner with whom he had had no previous experience and who appears not to have been a well man does not in the view of the Tribunal meet the standard of diligence properly required of the contractor. There were no deadlines set or at least confirmed, no regular or indeed any checks were made other than the most casual of enquiries to the effect that all was well. There were no “reminders”. Mr  
5 Turner had himself neglected either to file the 2007 returns referred to above or to instruct Mr Shearing to deal with these.

28. We accept that the fact that no communications had been received direct from the Revenue so as to alert Mr Turner to the mounting penalties. He had however been  
10 content to accept that all communications should be with his accountant. This it seems to the Tribunal places a particular importance on the need to check that all returns had been filed as required.

29. Why the Revenue had not in fact contacted Mr Turner is far from clear. Doing nothing in this context was at least unhelpful. Mr Burke said that the CIS had over the  
15 years since its inception gone through a number of different iterations so far as its practical implementation was concerned. It was only comparatively recently that details of contractors’ CIS returns were cross checked with their subcontractors’ Self Assessment Returns. As long as payments were being received the Revenue appeared not to take any action in relation to the outstanding returns. It was, said Mr Burke,  
20 only the submission by Mr Turner’s new accountants in June 2010 of the outstanding returns which gave rise to the issue of some 72 separate penalty notices. All of this is most unsatisfactory but does not in the finding of the Tribunal provide Mr Turner with a reasonable excuse for failing to ensure that his CIS returns were submitted as required by law.

25 30. Reference was made on behalf of Mr Turner to the First-tier appeal case of *Gary Laithwaite and HMRC* [2014] UKFTT 0759 (TC). This case was said to be supportive of Mr Turner’s position.

31. As a First-tier decision this does not bind this Tribunal. However in our view it provides very little support for Mr Turner as the basis of the Judge’s allowance of the  
30 appeal was at least partly based on the fact that advice had been given by the Appellant’s accountants that he had no obligation to file a return. That advice was clearly wrong. In this appeal however no such advice was given. Mr Turner has never contended that he did not know that he had to file CIS returns or that his accountants ever told him that this was unnecessary. In this appeal therefore Mr Turner, unlike Mr  
35 Laithwaite, was under a clear duty to ensure that the returns were made and to check with his accountant that this had been done. Further Mr Turner had himself failed to make a number of returns when dealing with the matter in 2007 and must have realised that there had been a failure to comply.

32. For these reasons we do not accept that Mr Turner has a reasonable excuse for the filing delays. We confirm the penalty of £23,700 subject to the written assurance of the Revenue, given to Mr Turner’s accountants, that this will now be reduced by way of further mitigation to the sum of £5,807.50 under the provisions of Schedule 55 to the Finance Act 2009.

33. For the sake of completeness we mention two other matters.

34. First we did consider, in view of the evidence that apparently Mr Shearing did send to the Revenue schedules prepared by him but not in the form required by the Revenue, whether this was a matter which might properly be taken into account as substantive compliance with the filing requirement. However there was no evidence to the effect that these schedules were seen, let alone checked or approved by Mr Turner. In any event the requirement of which Mr Turner, as an experienced CIS contractor, will have known is to provide the return “in a document or format provided or approved by the Commissioners” (See regulation 4 of the Regulations). Mr Shearing should most certainly have been aware of this requirement.

35. The second matter relates to the proportionality of the penalty. This is a matter which, in its Statement of Case, the Respondents say that the First-tier Tribunal has no jurisdiction. That is not a proposition with which this Tribunal agrees. However in light of the assurance provided by the Respondents as to their intention to further mitigate the penalty, a practice noted by the Tribunal as increasingly common, it is not necessary to pursue this aspect any further and we do not intend to do so.

36. Accordingly for the reasons stated above we dismiss this appeal

37. This document contains full findings of fact and reasons for the decision set out above. Any party dissatisfied with either of the decisions has a right to apply for permission to appeal against it/them 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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**CHRISTOPHER HACKING**

**TRIBUNAL JUDGE**

**RELEASE DATE: 31 December 2014**

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