



**TC04241**

**Appeal number: TC/2011/02027**

*CONSTRUCTION INDUSTRY SCHEME - late filing of returns - Section 98A  
Taxes Management Act - Schedule 55 to the Finance Act 2009 - whether penalties  
unfair or disproportionate - principles set down in Boshier applied - appeal not  
allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**ROGER JOHN FARROW**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE MICHAEL S CONNELL  
MR TYM MARSH**

**Sitting in public at 45 Bedford Square London on 28 October 2014**

**The Appellant Roger Farrow in person**

**Ms Karen Evans Officer of HM Revenue and Customs for the Respondents**

## DECISION

### The Appeal

5 1. This is an appeal by Roger John Farrow (“the Appellant”) against penalties of £11,900 imposed under s 98A Taxes Management Act 1970, reduced to £3,376.58, for his failure to make monthly returns by the due date under the Construction Industry Scheme (“CIS”).

2. The Appellant does not dispute that his CIS returns were filed late or that he made incorrect returns.

10 3. When this matter was listed for hearing the issues to be determined were:

i. Whether the Appellant should account for tax of £2,174 that he did not deduct under the Construction Industry Regulations, and which had not been paid to HMRC by the sub-contractor.

15 ii. Whether the penalties for the late submission of annual and monthly returns are unreasonable.

4. At the hearing it was ascertained that most of the CIS tax not deducted at source had in fact been paid by the sub-contractor concerned and consequently HMRC had applied Regulation 9(4) and relieved the Appellant of the obligation to make payments in respect of those non-deductions.

20 5. The Appellant appeals the penalties on the grounds that they are disproportionate and unreasonable

### The CIS penalty regime

25 6. The CIS is a tax compliance scheme for businesses operating in the construction industry. This is an industry that often involves “cash in hand” transactions. Historically, this resulted in a significant loss of tax and national insurance contributions because many sub-contractors engaged in the industry “disappeared” without settling their tax liabilities, with a consequential loss of revenue to the Exchequer.

30 7. The legal basis of the CIS, as it has been in force from 6 April 2007, is ss 57 -77 of the Finance Act 2004 (“FA 2004”) and the Income Tax (Construction Industry Scheme) Regulations 2005 (SI 2005/2045) (“the 2005 Regulations”). The CIS requires certain payments by contractors to sub-contractors to be made subject to deduction of tax. The sub-contractors are entitled to claim credit for tax withheld under CIS against their tax liability for the tax year in question.

35 8. Contractors are required to make a return no later than 14 days after the end of every tax month (“a monthly return”) (s 70 FA 2004 and reg 4 of the 2005 Regulations). For these purposes, a tax month means the period beginning with the 6th day of a calendar month and ending on the 5th day of the following month. A

monthly return must therefore be received by HMRC no later than the 19th day of the month. Nil returns are also required (s 70 FA 2004 and reg 4(10) of the 2005 Regulations).

5 9. If a monthly return is received after the filing date, it will be treated as late and the contractor will be liable to a penalty under s 98A of the Taxes Management Act 1970 (“TMA”) (introduced by the Finance Act 1989 and amended by FA 2004), which provides:

10 “(1) ... regulations under section 70(1)(a) or 71 of the Finance Act 2004 (Sub-contractors) may provide that this section shall apply in relation to any specified provision of the regulations.

(2) Where this section applies in relation to a provision of regulations, any person who fails to make a return in accordance with the provision shall be liable –

15 (a) to a penalty or penalties of the relevant monthly amount for each month (or part of a month) during which the failure continues, but excluding any month after the twelfth or for which a penalty under this paragraph has already been imposed, and

20 (b) if the failure continues beyond twelve months, without prejudice to any penalty under paragraph (a) above, to a penalty not exceeding –

(ii) in the case of a provision of regulations under section 70(1Xa) or 71 of the Finance Act 2004, £3,000

25 (3) For the purposes of subsection (2)(a) above, the relevant monthly amount in the case of a failure to make a return -

(a) where the number of persons in respect of whom particulars should be included in the return is fifty or less, is £100 ...”

30 10. Late filing penalties are therefore chargeable for each month during which a return is outstanding after the filing date for a maximum of 12 months and a further penalty if the return has still not been filed after 12 months. There are two types of penalty:

- 35 1. The monthly penalty of £100 for each month or part month that a return is late during the first 12 months when the employer has no more than 50 sub-contractors; and
2. A final late return (commonly referred to as the “month 13 penalty”) if the failure to submit a return continues after 12 months. The month 13 penalty may not exceed £3,000.

The total exposure to penalty for any one return is thus a maximum of £4,200.

40 11. HMRC’s policy in calculating the appropriate month 13 penalty is to charge an increasing tariff based on the number of instances a return is over 12 months late in a rolling 12 month period. Thus the amounts levied in respect of the month 13 penalty

for each failure in a 12 month period depend on the number of previous final penalties issued in that period. The tariff amounts are as follows:

1st failure - £300, 2nd failure - £600, 3rd failure - £900, 4th failure - £1200, 5th failure - £1500, 6th and later failures - £3000.

- 5 12. Under s 100 TMA, an authorised officer of HMRC may make a determination imposing a penalty under the provisions of the Taxes Acts. Section 100(3) requires notice of such a determination to be served on the person liable. So far as material, s 100 provides as follows:

10 “(1) Subject to subsection (2) below and except where proceedings for a penalty have been instituted under section 100D below ... an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate.

15 (3) Notice of a determination of a penalty under this section shall be served on the person liable to the penalty and shall state the date on which it is issued and the time within which an appeal against the determination may be made.

(4) After the notice of a determination under this section has been served the determination shall not be altered except in accordance with this section or on appeal....”

- 20 13. Section 118(2) TMA states that where a person had a reasonable excuse for not doing anything which was required to be done, he shall be deemed not to have failed to do it if he did it without reasonable delay after the excuse ceased. The subsection provides:

25 “(2) For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and 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  
30 to do it if he did it without unreasonable delay after the excuse had ceased.”

14. Under s 102 TMA, HMRC has a specific power to mitigate penalties. The section provides:

35 “The Board may in their discretion mitigate any penalty, or stay or compound any proceedings for a penalty, and may also, after judgment, further mitigate or entirely remit the penalty.”

15. Schedule 55 to the Finance Act 2009 introduced a new penalty regime for the late filing of returns. The regime came into force for CIS monthly returns with effect from 6 October 2011 and applies to returns due to be filed on or after 19 November  
40 2011. In November 2010, in the light of the fact that the new CIS penalty regime would shortly come into force, HMRC introduced a revised policy for considering

mitigation of penalties under s 102 of TMA for late contractors' monthly returns. This policy was announced on HMRC's website.

### Background Facts

5 16. The Appellant is a building contractor and in the years ended 5 April 2005, 2006, 2007 and 2008 engaged sub-contractors within the Construction Industry Scheme without deducting and accounting for tax at source.

17. The Appellant acknowledged that he had not complied with the CIS regulations but the 'workers engaged were known to the tax authorities and paying their taxes directly'.

10 18. It transpired that the tax which the Appellant had not deducted, had not in fact been paid over to HMRC by the sub-contractors themselves.

15 19. On 16 June 2010 HMRC therefore raised determinations to recover tax that had not been paid over to HMRC under Regulation 9(4) of the Income Tax (Construction Industry Scheme) Regulations 2005. The amount charged by the determination was after all available relief had been given under Regulation 9(4) Income Tax (Construction Industry Scheme) Regulations 2005.

20. The Appellant appealed the decision on 14 August 2010.

20 21. The Appellant's grounds of appeal were that Regulation 9(4) of the Income Tax (Construction Industry Scheme) Regulations 2005 had not been applied correctly because the sub-contractors concerned either had, or intended to discharge their own tax liabilities.

22. On 27 October 2010 a penalty determination was raised under s 98A (2) Taxes Management Act 1970 for the failure to make monthly returns required by Regulation 4 of the Income Tax (Construction Industry Scheme) Regulations 2005.

25 23. On 19 October 2011 the Appellant said that that largest amount of unpaid CIS tax related to just one individual who had agreed to file tax returns relating to sub-contract monies received by him from the Appellant and that he was willing to discharge the tax due. The Appellant later provided copies of the returns and said that on the basis that HMRC applied Regulation 9(4), he would accept responsibility for  
30 £27 due in 2006-07 and £146 due in 2007-08.

35 24. With regard to the penalties, the Appellant said that correspondence from HMRC stated that penalties *may* be charged and that if any penalties were imposed the extent of any help and/or information provided would be noted in determining the level of penalties. He said that following this he had provided all relevant information that he had been able to obtain, such as addresses and telephone numbers, and co-operated fully with HMRC.

25. The Appellant appealed against the penalty determination on 10 November 2010 on the basis that he had assisted HMRC to the best of his ability in arranging for

the un-deducted tax to be paid, with the exception of two very small amounts. He considered the penalties levied to be excessive. Whilst he agreed that penalties may be due, the amount levied did not reflect the fact that there had been no loss to HMRC.

5 26. Following an independent review on 25 January 2011, the decisions were upheld.

27. On 30 April 2012 HMRC determined that CIS tax not deducted at source had in fact subsequently been paid by the sub-contractors and consequently the Appellant was relieved of the obligation to make payments in respect of the earlier non-  
10 deduction. This had been overlooked in HMRC's case preparation (see paragraph 4 above).

28. On 19 March 2013 the appeal was stood over until the Upper Tribunal had reached a decision in *Bosher v HMRC* where similar issues were involved.

#### The Appellant's case

15 29. At the hearing the Appellant said that it was accepted penalties may be payable, but reiterated his view that he had provided HMRC with whatever information they required. He had also contacted the various sub-contractors and arranged for the un-deducted tax to be paid by them. Only two small amounts were outstanding which he had discharged.

#### 20 HMRC's case

30. The Appellant failed to make monthly contractors returns required by the legislation and is therefore liable to a penalty charge under s 98A (2) Taxes Management Act 1970.

25 31. HMRC consider that the CIS penalties are proportionate in that they are issued in line with the legislation at s 98A (2) Taxes Management Act 1970.

32. Section 102 Taxes Management Act 1970 gives HMRC authority to mitigate any penalty and HMRC have exercised that power in this case. HMRC compared the penalties charged under s 98A of TMA with the amounts that would be charged under Schedule 55 FA 2009. Because the penalties under the new regime were less, HMRC  
30 offered to mitigate the s 98A penalties. On 8 August 2011 HMRC offered to reduce the penalty from £11,900 to £3,376.58.

33. In the case of *HMRC v Anthony Bosher* [2013 UKUT 0579 (TCC)] the Upper Tribunal decided that:

35 i. The CIS penalty regime coupled with the right to apply for judicial review does not infringe a taxpayer's rights under Article 1 of the First Protocol of ECHR.

- ii. Section 3 of the Human Rights Act 1998 (HRA) does not enable the Tribunal and the Courts to read the legislation in a way which gives effect to those rights, and in any event, the CIS penalty regime itself is not disproportionate.
- 5      iii. The correct penalty figure by which to assess proportionality is the figure HMRC determine after mitigation under s 102 because this is the amount which the person actually has to pay. It also confirmed that mitigation is entirely a matter for HMRC and the absence of a power in the Tax Chamber to mitigate a penalty on appeal does not breach a person's  
10      Convention rights. The Upper Tribunal concluded that these were adequately protected by the person's right to apply for permission to bring Judicial Review.

### Conclusion

15      34. The Appellant has for a number of years traded within the Construction Industry Scheme and engaged sub-contractors.

35. Every person that registers for the CIS is sent a guide for Contractors and Sub-Contractors. The guide clearly sets out how the scheme operates, when returns are required and the consequences of late returns (Chapter 4 of the Booklet) The guide states that the returns must be filed every month - 14 days from the end of the tax  
20      month. The Guide clearly sets out that penalties will be charged for late filing of returns.

36. In addition to the Contractors guide, the Appellant was sent monthly CIS returns to complete (Example Return & Notes) which clearly set out the monthly due date. The document also highlights that a penalty will be charged for late return  
25      submission. The monthly returns issued to the Appellant, and the CIS Guide should have been a sufficient prompt. Both documents refer Taxpayers to the CIS helpline or the HMRC website if they have any questions.

37. The Appellant has failed to act in accordance with the legislation in force. The Appellant was aware of his responsibilities under the scheme. The Respondents  
30      contend he chose not to act in accordance with the legislation.

38. HMRC have exercised their power to mitigate the penalty under s 102 Taxes Management Act 1970 from £11,900 to £3,376.58. The Tribunal has no authority to interfere with the exercise of that discretion. Mitigation is entirely a matter for HMRC and as HMRC say, the absence of a power in the Tax Chamber to mitigate a penalty  
35      on appeal does not breach a person's Convention rights, which are adequately protected by the person's right to apply for permission to bring Judicial Review.

39. For the above reasons we find that the mitigated penalties of £3,376.58 were correctly charged and the appeal is dismissed.

40. This document contains full findings of fact and reasons for the decision. Any  
40      party dissatisfied with this decision has a right to apply for permission to appeal

5 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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**MICHAEL S CONNELL  
TRIBUNAL JUDGE**

**RELEASE DATE: 20 January 2015**

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