



TC04265

Appeal number: TC/2014/01212

CONSTRUCTION INDUSTRY SCHEME – late filing of returns – incorrect returns – Appellant’s spouse dealt with returns but had been unwell – whether reasonable excuse – on the facts no – whether special circumstances – no – hardship considered – appeal not allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CHRISTOPHER NORTH

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 30 October 2014

Mr Keith Bailey, for the Appellant

Ms Shari McMullen, Officer of HM Revenue and Customs, for the Respondents

DECISION

The Appeal

5 1. This is an appeal by Christopher North (“the Appellant”) against penalties of £31,500, imposed under s 98A Taxes Management Act 1970, reduced to £9,000, for his failure to make monthly returns by the due date under the Construction Industry Scheme (“CIS”) and £301.12 imposed under Schedule 24 Finance Act 2007 for submitting incorrect CIS returns.

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

3. When this matter was listed for hearing the issue to be determined was whether penalties should be charged for:

(1) failure to submit CIS monthly returns during the tax year 2009-10, and

15 (2) incorrectly submitting nil returns for the months ending 5 September 2009 and 5 October 2009. That is, were the returns submitted incorrectly as a result of the Appellant failing to take reasonable care and should a monetary penalty be charged as a result?

4. At the hearing the Appellant acknowledged that penalties were due but appealed the amount of the penalties on the grounds of hardship.

20 The CIS penalty regime

5. 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”
25 without settling their tax liabilities, with a consequential loss of revenue to the Exchequer.

6. 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
30 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.

7. Contractors are required to make a return no later than fourteen days after the end of every tax month (a “monthly return”) (s 70 FA 2004 and Reg 4 of the 2005
35 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).

40 8. 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:

- 5 (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 –
- 10 (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
- (b) if the failure continues beyond twelve months, without prejudice to any penalty under paragraph (a) above, to a penalty not exceeding-
- 15 (ii) in the case of a provision of regulations under section 70(1Xa) or 71 of the Finance Act 2004, £3,000.
- (3) For the purposes of subsection (2)(a) above, the relevant monthly amount in the case of a failure to make a return –
- 20 (a) where the number of persons in respect of whom particulars should be included in the return is fifty or less, is £100”

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

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- (1) The monthly penalty of £100 for each month or part month that a return is late during the first twelve months when the employer has no more than fifty sub-contractors; and
- 30 (2) A final late return (commonly referred to as the “month 13 penalty”) if the failure to submit a return continues after twelve 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.

10. 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 twelve months late in a rolling twelve month period. Thus the amounts levied in respect of the month 13 penalty for each failure in a twelve month period depend on the number of previous final penalties issued in that period. The tariff amounts are as follows:

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40 1st failure - £300, 2nd failure - £600, 3rd failure - £900, 4th failure - £1,200, 5th failure - £1,500, 6th and later failures - £3,000.

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

5 “(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.

10 (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....”

15 12. Section 118(2) of 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:

20 “(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 to do it if he did it without unreasonable delay after the excuse had ceased.”

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

30 “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.”

35 14. 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 2011. In November 2010, in the light of the fact that the new CIS penalty regime would be coming 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.

40 **Background facts**

15. The Appellant is a self-employed painter and decorator. During the tax year 2009-10 he sub-contracted work to five other people without having a clear understanding of his obligations as a contractor, and without seeking professional advice.

45 16. The Appellant submitted his self-assessment return for 2009-10, which included deductions for sub-contractor costs; however he had not submitted monthly CIS returns to support these deductions. Only two ‘nil’ returns were submitted for the

periods to 5 September 2009 and 5 October 2009. Following an enquiry these nil returns were found to be incorrect.

5 17. Following the apparent discrepancy between the amounts returned and the details held on HMRC systems, on 12th August 2011 HMRC opened an enquiry into the 2009-10 return.

18. On 23 April 2012, HMRC concluded their enquiry, the outcome being that the Appellant had made payments to sub-contractors without submitting monthly CIS returns or paying the CIS tax due.

10 19. The Appellant was advised that there would be penalties charged under s 98A(2)(a) Taxes Management Act 1970 due for late/non submission of monthly returns in the sum of £31,500. These were mitigated to £9,000 under Schedule 55.

20. Agreement to the amount of the outstanding CIS tax of £10,605 was reached with the Appellant's agent on 4 May 2012.

15 21. HMRC attempted to settle by way of contract settlement, to include the CIS tax due, interest of £651 and the mitigated penalty. The Appellant's agent advised that he would offer £20,000 to settle his debt in full. He was advised to make this offer in writing.

22. As no offer had been made in writing, HMRC sent formal notification of determinations and penalties to the Appellant on 31 July 2012.

20 23. On 13 August 2012 the Appellant offered £12,000 by way of settlement of the full amount due, in two instalments of £6,000. The offer was rejected by HMRC.

24. On 10 December 2012, having been unable to reach an agreement to the proposed penalty, HMRC issued a formal penalty determination.

25 25. On 6 January 2013 the Appellant submitted an appeal against the penalty assessment on the grounds that it was unfair.

26. HMRC considered whether there were any special circumstances which would allow them to mitigate the penalties further, and on 31 January 2013 wrote to the Appellant requesting information, including an income and expenditure account. Reminders were sent on 12 April 2013 and 11 June 2013.

30 27. On 23 June 2013 the Appellant supplied the information requested.

28. The Appellant paid £100 as a "token of goodwill" on 5 September 2013.

29. On 13 November 2013 HMRC wrote to advise that there did not appear to be evidence of genuine and absolute hardship by which the penalty could be mitigated further.

35 30. On 25 November 2013 formal determinations under Regulation 13 were issued in respect of the CIS tax owing — these are not in dispute.

31. On 9 December 2013 the Appellant asked for an independent review of the decision to impose penalties.

32. On 31 January 2014 HMRC upheld the decision to charge penalties under s 98A (2) TMA 1970 and Schedule 24 FA 2007.

5 33. On 28 February 2014 the Appellant submitted his appeal to the Tribunal Service.

34. On 15 April 2014 HMRC wrote to the Appellant regarding the outcome of the recent Upper Tribunal case, *HMRC v Anthony Boshier*. Although this case was not stood behind *Boshier*, HMRC recognised the similarities between the situations. HMRC again offered to mitigate the penalties to £9,000.

10 **The Appellant's case**

35. In his letter of appeal to HMRC the Appellant said:

15 "I am not very good at dealing with paperwork so I rely very much on my wife who helps me with it, including the filing of the CIS returns in question. Unfortunately she has not experienced the best of health having for the past 17 years suffered from MS and had a relapse in 2010. She has been told that she could suffer further relapses at any time. I do not know if this contributed to the errors in filing these CIS returns.

20 Subsequently she had a mastectomy operation in January 2013 due to breast cancer and had to work less hours resulting in her earnings reducing significantly. She was also due to have a hysterectomy operation last year but that was postponed due to her breast cancer. She did have that operation in April this year and is at present on sick leave. Because of her ill health I am unable to work harder now as I have to do things which she used to do before.

25 As a result of the above the income of my wife and myself is significantly less than when I provided H M Revenue & Customs with an income and expenditure account in October 2012 and we are only surviving at the present time due to our daughter who is living with us giving us money. I enclose a revised income and expenditure account for last month. That included the final payment under a hire purchase agreement so our current monthly income is now a little higher. I was
30 hoping to be able to start paying £300 a month towards the CIS tax I owe of £10,605 but I will have to review this if and when my wife is able to return to work."

36. In his Notice of Appeal the Appellant reiterated the above as his grounds of appeal.

35 37. At the hearing the Appellant acknowledged that penalties are due but appeals the amount of the penalties on the grounds of special circumstances and hardship.

HMRC's case

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

40 39. 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 - fourteen days from the end of the tax month. The Guide clearly sets out that penalties will be charged for late filing of returns.

5 40. 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 a late return submission. The monthly returns, issued to the Appellant, and the CIS Guide should have been sufficient to remind him that returns were necessary.

10 41. Both the Guide and the return refer Taxpayers to the CIS helpline or the HMRC website if they have any questions.

15 42. The Appellant admitted he did not understand what he was doing or how the CIS system worked. He says that he is barely able to read and write and that is why he relies on his wife to deal with his tax and CIS obligations. Despite this he did not seek any clarification or help from HMRC, or someone who could offer advice. To carry on regardless without seeking appropriate advice can only be classed as careless behaviour.

20 43. 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 offered to mitigate the s 98A penalties of £31,500 to the lower amount of £9,000 using their discretion under s 102 of TMA.

Conclusion

25 44. The appeal does not contain anything which demonstrates that an unexpected or unusual event, either unforeseeable or beyond the Appellant's control, prevented him from complying with its obligations under the CIS. With regard to the imposition of penalties HMRC can only act in accordance with legislation. The Appellant accepts this and asks for special circumstances and hardship to be taken into account.

30 45. Whilst special circumstances are not defined by legislation, the explanatory notes to the Finance Act 2007 state that HMRC has a discretion but only in 'special circumstances' to further reduce a penalty. Special circumstances are circumstances which are out of the ordinary or uncommon. In the present case, although the Appellant's wife has suffered health problems for which we sympathise, unfortunately these occurred after the default period so cannot be taken into account.

46. For the above reasons we find that the mitigated penalties of £9,000 and £301.12 were correctly charged and the appeal is dismissed.

35 47. With regard to mitigation on the grounds of hardship, this is entirely a matter for the Commissioners of HMRC in which their policy is to consider mitigation once the penalty and any appeal has been determined.

40 48. Ms McMullen on behalf of HMRC said that HMRC's power to mitigate is exercised in narrowly constrained circumstances but would be given due consideration.

49. 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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**MICHAEL S CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 3 February 2015

