



TC04448

Appeal number: TC/2014/04994

CONSTRUCTION INDUSTRY SCHEME – penalties – whether a reasonable excuse shown for the late filing of returns – held yes for a limited period, but not thereafter – appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MCM2 CLADDING SYSTEMS LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JOHN WALTERS QC
ALAN R REDDEN FCA**

Sitting in public at Manchester on 17 November 2014 and 13 May 2015

P McMahon, Director, for the Appellant

P Jones, Presenting Officer, HM Revenue and Customs, for the Respondents

DECISION

1. MCM2 Cladding Systems Limited (“MCM2”) appeals against penalties charged by the Respondents (“HMRC”) in respect of the late submission of monthly Construction Industry Scheme (“CIS”) returns due on 19 April 2012, and the 19th day of each month between December 2012 and January 2014 (inclusive). The total amount of penalties charged is £8,500.
2. MCM2 accepts that the CIS returns due on those dates were submitted late.
3. According to the ‘historical record’ handed up by Mr Jones at the hearing on 13 May 2015, the returns, which were due to be filed on the 19th day of each month, were filed between one day (the April 2012 return) and over a year (the February 2013 return) late.
4. The requirement to submit returns is provided by regulation 4 of the Income Tax (Construction Industry Scheme) Regulations 2005 (SI 2005/2045) made under section 70, Finance Act 2004.
5. The penalty is payable pursuant to paragraph 1(1), Schedule 55, Finance Act 2009 by reference to item 6 in the Table referred to in that sub-paragraph, and to paragraphs 8 to 13 of that Schedule which refer to the amount of the penalty in relation to CIS returns.
6. The penalties charged in this case were a combination of £100 penalties under paragraph 8, Schedule 55, Finance Act 2009, where the return was submitted less than 2 months late, £200 penalties under paragraph 9 of that Schedule, where the return was submitted more than 2 months but less than 6 months late, and £300 penalties under paragraph 10 of that Schedule, where the return was submitted more than 6 months but less than 12 months late and under paragraph 11 of that Schedule, where the return was submitted more than 12 months late.
7. We did not understand Mr McMahon, on behalf of MCM2, to be taking any point in the end that the penalties were incorrectly calculated. (He had taken such a point at the original hearing on 17 November 2014, which caused us to adjourn the appeal to allow time for HMRC to check the position.)
8. MCM2’s grounds of appeal were that Mr McMahon (the Director with ultimate responsibility for the matter) had been out of the office most of the time desperately trying to keep MCM2’s business going, and he trusted a member of staff and his accountant to file the CIS monthly returns, and that MCM2’s financial situation was very precarious and these penalties could well be the final straw.
9. The argument, as it was developed before us by Mr McMahon, was that MCM2 had a reasonable excuse for the failures, in that he entrusted the matter of filing the CIS returns in the relevant period to a Mr Mark Copeta, a qualified accountant, towards the end of 2011.
10. Mr McMahon told us that he ‘got fine after fine’ as the penalty notices came in. He asked Mr Copeta what had happened, and was told (incorrectly) that he had

‘sorted it’. Mr McMahon took him at his word and it was only when an employee, Christine Armstrong, was taken on towards the end of the tax year 2013-14 that the matter was properly addressed.

11. Mr Jones, for HMRC, told us that with effect from 5 April 2015, HMRC would not collect an unpaid penalty where it related to a “nil” CIS return (as opposed to a CIS return which contained details of payments to sub-contractors). From the Schedules Mr Jones handed up, it appeared that the return for April 2012 was a “nil” return, as was the return for January 2013. None of the other returns in issue were “nil” returns. This means that the £100 penalty charged in respect of the April 2012 return and a total of £900 in penalties charged in respect of the January 2013 return will not in any event be collected.

12. Mr Jones referred us to paragraph 23 of Schedule 55, Finance Act 2009 which provides that liability to a penalty does not arise if the person charged satisfies HMRC or (on appeal) this Tribunal, or the Upper Tribunal, that there is a reasonable excuse for the failure. However, as he pointed out, this is qualified by sub-paragraph 23(2) which provides that for relevant purposes:

‘(a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P’s control,

(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.’

13. Mr McMahon did not rely on any insufficiency of funds. He did, however, rely on his reliance on Mr Copeta arranging for the timely submission of CIS returns.

14. Mr Jones accepted that such reliance was reasonable to start with, but that there would come a time when the continuing arrival of penalty notices ought reasonably to have alerted Mr McMahon that Mr Copeta was failing to arrange for timely submission of CIS returns. He suggested that this would be after, say, 4 periods in respect of which penalty notices had been received.

15. We considered our decision and told the parties that we had decided that MCM2 had had a reasonable excuse for the late filing of CIS returns up until (and including) the late filing of the February 2013 return (which was first notified to MCM2 by the issuing of the first penalty notice in respect of that month on 2 March 2013). We consider that the reasonable excuse ended at that time, so that there was no reasonable excuse for the late filing of the CIS returns for the months of March 2013 to January 2014 inclusive.

16. We therefore allowed the appeal in respect of the penalties for the months of April 2012, January 2013 and February 2013 but affirmed the rest of the penalties charged. We said that this would reduce the liability for penalties from £8,500 to £5,700.

17. However, in the course of writing up this Decision Notice, it appears to us that the strict technical position is that the penalties ought to be recalculated on the basis that the reasonable excuse ceased to exist on 3 March 2013. This may give a different liability, but the Tribunal hopes that it will not exceed £5,700.

18. After we had announced our decision, Mr McMahon made a new point, that he thought the penalties, even in the reduced amount of £5,700, were disproportionate in amount.

19. Although this point was not taken into account by us in reaching our decision we have considered it in the course of writing up this Decision Notice. It seems to us clear that it has been established by authority binding on us – the decision of the Upper Tribunal in *Commissioners of Revenue and Customs v Hok Limited* [2012] UKUT 363 (TCC) – that this Tribunal has no jurisdiction to reduce or discharge a statutory penalty imposed pursuant to statute, in particular where, as here, no relevant element of EU law applies. Accordingly, even if we had considered the proportionality point before we made our decision, it would have made no difference, because we would have rejected it.

20. The appeal is therefore allowed in part, to the extent that we have indicated.

21. 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.

JOHN WALTERS QC
TRIBUNAL JUDGE
RELEASE DATE: 2 June 2015