



TC04454

Appeal number: TC/2014/04726

CONSTRUCTION INDUSTRY SCHEME – *penalty for late filing of CIS300 returns-whether reasonable excuse-inexperienced taxpayer-incomplete advice from HMRC*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BARKING BRICKWORK CONTRACTORS LTD. Appellant

- and -

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

**TRIBUNAL: JUDGE MARILYN MCKEEVER
 MRS JANET WILKINS**

Sitting in public at Fox Court, Grays Inn Road, London on 13 April 2015

Mr Stanley Kenner, accountant for the Appellant

Mrs Bisi Sanu, Presenting Officer, for the Respondents

DECISION

1. *Introduction*

5 2. This case concerns penalties charged under Schedule 55 Finance Act 2009 for the late filing of 19 monthly Construction Industry CIS300 returns between 5 December 2011 and October 2013.

3. The principal question before the tribunal is whether the Appellant had a reasonable excuse for the failure.

10 4. *The law*

5. The relevant law is not in dispute.

6. Under paragraph 1 of schedule 55 Finance Act 2009 (“schedule 55”), “a penalty is payable by a person (“P”) where P fails to make or deliver a return...specified in the Table... on or before the filing date. Sub-paragraph (4) provides that the “filing date”
15 is the date by which the return is required to be made or delivered to HMRC.

7. A CIS300 return is specified in the Table at item 6.

8. Section 70 Finance Act 2004 empowers HMRC to make regulations requiring returns under the Construction Industry Scheme and Regulation 4 of the Income Tax (Construction Industry Scheme) Regulations 2005 requires a return (the CIS300) to be
20 submitted each month to HMRC. The return must set out details of all the sub-contractors employed by the taxpayer during the period and the amount of tax (if any) deducted from payments to the sub-contractors.

9. Section 58 Finance Act 2004 defines “sub-contractor” for the purposes of the Regulations as follows:

25 “For the purposes of this Chapter a party to a contract relating to construction operations is a sub-contractor if, under the contract—

(a) he is under a duty to the contractor to carry out the operations, or to furnish his own labour (in the case of a company, the labour of employees or officers of the company) or the labour of others in the carrying out of the operations or to arrange for
30 the labour of others to be furnished in the carrying out of the operations; or

(b) he is answerable to the contractor for the carrying out of the operations by others, whether under a contract or under other arrangements made or to be made by him.”

10. This definition means that an employment agency or similar company is a “sub-contractor” for the purposes of the Regulations and any payment to such an entity must be recorded on the CIS300.

5 11. Paragraph 8 of Schedule 55 provides for P to be liable for a penalty of £100 if the return is late. Paragraph 9 provides for a further penalty of £200 if the failure to file continues for two months and paragraph 10 provides for an additional penalty of £300 or 5% of the payments which should have been shown in the return if greater, if the return is still not filed after six months. If the return has still not been filed after 12 months, paragraph 13E provides for an additional penalty of the greater of 5% of any liability which would have been shown in the return or £300.

12. Paragraph 23 of schedule 55 provides: “(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

15 (2) For the purposes of sub-paragraph (1)—

(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

20 (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. *The evidence and the facts*

25 14. Barking Brickworks Ltd. is a small brickwork contractor carrying out a mixture of domestic and commercial, new construction and refurbishment work for various building companies. Its sole director is Mr Thomas Burling who has been running the company since he set it up in 2001 and his role is to get in the work and ensure that it is carried out. He employs a bookkeeper to deal with the office paperwork including the submission of the CIS300 returns. The company has employees and until October 30 2010 engaged its own sub-contractors. From that date, it worked through an agency, Lee Docherty Contractors Ltd. (“LDCL”). LDCL provided the required manpower to Barking Brickworks. LDCL had gross payment status for the purposes of the Construction Industry Scheme, which meant that Barking Brickworks could pay it without deduction of any tax.

15. The Appellant had operated the CIS scheme for a number of years and was well aware of its obligations to submit CIS300 returns. The company had duly complied with its filing obligations until the period under review.

5 16. The HMRC records included in the bundle show that normal returns were submitted up to and including the return for the month ending 5 October 2010. From that point, when the arrangement with LDCL began, the company began to submit nil returns. A nil return is submitted if no sub-contractors have been paid in the period. Normal returns, ie those showing payments to sub-contractors, were submitted for the months of April 2011 and August 2011. Further nil returns were submitted up to 10 November 2011, then no returns were submitted for the six months between December 2011 and May 2012 inclusive. A nil return was submitted for June 2012, then there were no returns for a further six months to December 2012. Nil returns were submitted in January and February 2013 and the next return (a nil return) was submitted in September 2013. No return was submitted for the month to 5 October 15 2013. All the returns which were submitted were submitted on time.

17. On 22 October 2013 Mr Peter Elkington, a compliance officer with HMRC, visited Barking Brickworks in order to carry out a routine check of the company's employer and contractor records. The meeting notes prepared by Mr Elkington show that in the course of this visit, Mr Elkington informed Mr Barking that a payment to 20 an agency such as LDCL, even if made gross, was regarded as a payment to a sub-contractor for the purposes of the CIS scheme and that the company should have been making returns of the payments to LDCL in the normal way. Mr Elkington advised Mr Barking that the company should show the payments in its future returns with immediate effect.

25 18. HMRC's documents included in the bundle indicate that all 19 missing returns were received by HMRC on that very day ie 22 October 2013.

19. Mr Burling thought that the bookkeeper believed that invoices from LDCL should be dealt with in the same way as other invoices from suppliers as a "bought ledger" item, and she had not realised that an agency which was paid gross was, 30 technically, a "sub-contractor" for the purposes of the CIS rules.

20. This is borne out by the transcript of a telephone call by Barking Brickworks' former bookkeeper to the HMRC CIS helpline. The former bookkeeper, who has now left the company, telephoned the helpline on 9 February 2011 in connection with a penalty which had been charged for late payment. In the course of that conversation, 35 the bookkeeper asked to submit a nil return on the telephone. The person on the helpline asked for confirmation that "no sub-contractors were paid". The bookkeeper replied "I can confirm that". The conversation then went as follows:

21. Helpline: "I have accepted your confirmation of a nil return. I do have to advise you that there may be a penalty, or we may prosecute if a false statement is given."

40 Bookkeeper: "well, how do you mean, a false statement?"

Helpline: "well, if you have given us incorrect information."

Bookkeeper: "oh, I see, no, no, that's – there was (sic) no sub-contractors to pay."

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22. This appears to be the origin of the mistake which was subsequently continued and compounded.

23. We heard evidence from Mr Thomas Burling, the director of the company. We found him to be a truthful and straightforward witness. Mr Burling readily admitted that he was not familiar with computers and he focused on the building side of the business leaving the office administration to the bookkeeper. Among the bookkeeper's duties was the submission of the CIS 300 returns. She also dealt with the payroll and other office duties.

24. In April or May 2011, the bookkeeper left in acrimonious circumstances. Mr Burling's daughter, Joanne Black stepped into the breach and took over the office duties on a part time basis. Mrs Black had no previous experience of bookkeeping. Mr Burling told her to continue doing what the previous bookkeeper had done and if she had any doubts or queries or if she was unsure what to do with an invoice to contact HMRC. Mrs Black did, indeed, contact the HMRC helpline on several occasions.

25. Mr Burling believed that the previous bookkeeper had been completing and filing the CIS returns correctly. It is clear from the above extract from the transcript, that the previous bookkeeper had made an error concerning the status of LDCL. This error was continued by Mrs Black.

26. The error was compounded by a subsequent conversation which Mrs Black had with HMRC's helpline and this conversation led to the penalty which is now in dispute. There is no indication of the date of this conversation. Mrs Black rang the helpline in order to submit a nil return. It appears that this was the first time she had done this over the telephone

27. The conversation included the following exchange

35 HMRC: "it's a nil return that you are doing yeah?"

Mrs Black: " Pardon, yes please."

40 HMRC: "would you like me to set an activity so that you don't need to do one for six months?"

Mrs Black: "what do you mean, sorry?"

HMRC: "basically, I can set it so that you don't need to do a return for six months if you are not going to be paying anyone."

5 Mrs Black: "no, I think there might be one for next month."

HMRC: "Fine, I can leave it open for you then".

28. So the initial suggestion that the company need not file CIS returns seems to
10 have come from HMRC. Mrs Black was not called as a witness but Mr Kenner stated
in his appeal letter dated 12th May 2014, which was not disputed, that "the new
bookkeeper had read on the HMRC helpsheet "if you do not plan to pay sub-
contractors for a while place an X in the box and we can stop sending you returns for
15 the next six months "". The letter went on to state that the bookkeeper felt the
company qualified for not being sent returns, because there were no payments to sub-
contractors. As mentioned above, she did not realise that payments to an agency
qualified as payments to a sub-contractor.

29. It seems that Mrs Black telephoned HMRC and asked that the company not be
sent returns for six months because there were no payments to sub-contractors. There
20 is no transcript of this call but, again, it was not disputed. This accounts for the lack of
returns between December 2011 and May 2012. At the end of the six month period,
Mrs Black was not sure what to do and so she submitted a nil return and then
requested a further six months suspension of returns. This happened again in March
2013 and in October 2013. On 22 October 2013, the company discovered that it
25 should have been submitting returns and promptly submitted them.

30. Penalties for being one day late, two months late, six months late and 12 months
late were charged for each return which should have been submitted in the tax months
between 5 December 2011 and 5 October 2012. The penalties amounted to £900 for
30 each missed return. The returns from 5 July 2012 to 5 April 2013 incurred the one
day, two month and six month penalties. This amounted to £600 for each return. The
returns for 5 March 2013 to 5 August 2013 incurred the one-day and two month
penalties. These amounted to £200 for each return. The final missing return for
October 2013 incurred the one-day late penalty of £100.

35 31. The total of all these penalties was £12,700. There had been no loss of tax as no
tax was due.

32. *Submissions*

40 33. The Appellant's submissions were as follows.

34. Mr Kenner on behalf of the company, submitted that on the departure of the former bookkeeper, the director, Mr Burling, was of the opinion that payments to LDCL which had gross payment status did not need to be reported on the CIS300. As noted above, this error seems to have arisen as a result of the phone call between the bookkeeper and HMRC's Helpline.

35. Mrs Black relied on the former bookkeeper's practice and the HMRC helpsheet in continuing to make nil returns. She did not realise that payments to an agency qualified as payments to a sub-contractor.

36. The Appellant submits that it had a reasonable excuse for the late filing of the returns. Mr Kenner drew our attention to three cases in the First Tier Tribunal in support of this contention. Other decisions by this tribunal are not, of course, binding on us, but they do indicate the approach which the tribunal has taken in similar cases.

37. Consult Solutions v HMRC [2011] UKFTT 429 (TC) concerned a taxpayer's failure to submit an employer's end of year return. The taxpayer had been in business for only eight months and this was the first time it had submitted the return. The return was submitted on-line, but for some reason, the return was not received by HMRC, The taxpayer was unaware that he would have received an electronic receipt if the return had been received.

38. The Tribunal stated "in considering a reasonable excuse, the Tribunal examines the actions of the Appellant from the perspective of a prudent employer exercising reasonable foresight and due diligence and having a proper regard for its responsibilities under the Tax Acts"

39. The Tribunal was satisfied that taking account of all the circumstances, including the Appellant's inexperience, it had a reasonable excuse for its failure to submit the return,

40. In Dental IT Ltd v HMRC [2011] UKFTT 128 (TC) the taxpayer had sought the assistance of the VAT call centre and had relied on its advice that it had to submit both the return and payment by the seventh of the month, which it did. However, the payments were made late because there were delays in clearing electronic payments, a fact which was stated on HMRC's website.

41. Whilst the tribunal recognised that ignorance of the law or banking procedures could not amount to a reasonable excuse, it decided that in the circumstances of the case, the fact that the taxpayer had relied on misleading advice from HMRC could, and in this case, did constitute a reasonable excuse.

42. Following on from this, the case of Mr T. J. Fisher (T/A The Crispin) v HMRC [2011] UKFTT 235 (TC) concerned the non-submission of an employer's annual return following the cessation of a business. The taxpayer had spoken to HMRC and asked what he needed to do to deal with the PAYE payments. He was told that he simply needed to send a letter to HMRC explaining about the termination of the business, but was not told that a further return would be required.

43. The tribunal found that Mr Fisher was misled by omission rather than commission. “A reasonably careful person informing the appellant of what he needed to do would have gone further and reminded him that he remained under an obligation to file an end of year return.”
- 5 44. The tribunal rejected HRMC’s contention, rightly in our view, that a reasonable excuse must be based on an exceptional circumstance or exceptional event.
45. The tribunal said “whilst HMRC may not be obliged to give advice or guidance as to what a person must do, in any given circumstances, if it does seek to assist or give advice, then that advice must be complete and accurate....I find that the delay in filing, albeit possibly characterised as a failure to appreciate the law, was primarily caused by the appellant being given either misleading or incomplete information which led him reasonably to believe that he had done all that he was required to do...”
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46. Additionally, Mr Kenner submitted that because the late filing was due to a simple error and had not resulted in any cost to the public purse as no taxes were due, the penalties charged were disproportionate.
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47. HMRC's contentions are as follows.
48. HMRC submits that the company is clearly familiar with the Construction Industry Scheme as it had been registered for the scheme since 2000 and had engaged sub-contractors and submitted CIS300 returns since 2008. HMRC considers that this shows that the company must have good working knowledge of the CIS scheme.
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49. When the old bookkeeper left, the company should have put measures in place to continue compliance with HMRC rules on CIS returns
50. If the new bookkeeper was unsure of how to treat the payments to LDCL as an agency she ought to have sought clarification from HMRC.
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51. HMRC say that their records show that the company made several telephone calls to the CIS helpline and was given advice and warned about penalties but the company failed to act on the information.
52. Lack of knowledge cannot constitute a reasonable excuse. In the case of K G and H E Johnston v HMRC [2010] UKFTT 212 (TC) Judge Vellins said that, “it is well established that ignorance of the law is not a defence.”
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53. HMRC cannot find any reasonable excuse for the non-filing of the returns.
54. HMRC submit that it is the contractor’s obligation to operate the CIS scheme correctly, not for HMRC to check if it is being operated correctly.
55. The treatment of payments made to an agency is explained in the Construction Industry Guide for Contractors and Sub-contractors, booklet CIS340. Section 2.25 of this booklet states that sub-contractors "includes labour agencies or staff bureaux that
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contract to get work done with their own workforce or supply workers to a contractor."

56. Section 2.29 of the guidance explains about agencies as sub-contractors and section 4.2 explains that contractors must submit monthly returns of all payments made to sub-contractors irrespective of whether the payments were made gross or net.

57. HMRC state that there is no evidence to suggest that the bookkeeper or director sought guidance or advice from HMRC or contacted the CIS helpline for guidance.

58. When the company telephoned HMRC to say that no returns would be submitted, there was no obligation on HMRC to explain the terms and conditions for doing so or check that the company was aware of the rules applying to the definition of a sub-contractor unless the company asked HMRC to do so. HMRC says the company did not ask.

59. HMRC contends that the penalties are not disproportionate. The law simply requires returns to be submitted within the specified time frame, even if nil returns. It does not matter whether tax is due or not. If the return is not submitted on time, penalties are due. The question of proportionality of the Construction Industry Scheme penalties was considered in the case of Anthony Boshier v HMRC [2008] FTC/3/2013. In that case, the tribunal found that the penalties imposed by the regime in general are not disproportionate.

60. In HMRC's opinion there would only be a reasonable excuse if a person has been prevented from submitting a return by events outside of their control after they had taken reasonable care to comply with the requirements upon them. HMRC contends that the applicant did not take reasonable care in this case and so it does not have a reasonable excuse for its failure.

61. *Onus of proof*

62. The onus is HMRC to demonstrate that the Appellant failed to submit the CIS returns on time and that the penalty is incurred. The burden then shifts to the Appellant to show that it has a reasonable excuse for such failure.

63. *Discussion*

64. From the documents provided and the evidence we heard, it seems clear that the original bookkeeper mistakenly thought that she was entitled to submit a nil CIS300 return on the basis that LDCL, being an agency which was paid gross, was not a sub-contractor for the purposes of the CIS scheme.

65. Under the legislation, such an agency is regarded as a sub-contractor and payments to it should have been recorded on the return. It was, accordingly, wrong to submit a nil return, although the bookkeeper clearly thought she was acting properly and confirmed there were no sub-contractors to pay even when warned that there could be a penalty or prosecution if she gave a false statement.

66. Following the sudden departure of the former bookkeeper, Mrs Black was told by Mr Burling to continue complying in the same way as had been done previously. Mrs Black accordingly thought it was in order to submit a nil return and she continued to do so.

5 67. The suggestion that returns could be suspended for six months was first made by HMRC, when Mrs Black contacted them to enquire about submitting a nil return on the telephone. The person on the helpline explained that she did not need to do a return for six months if the company was not going to be paying “anyone”. In the course of that conversation, Mrs Black stated that her position in the company was
10 “just secretary” and from the nature of her enquiry and the tone of the conversation it should have been clear that she did not have a great deal of experience in these matters.

68. Having asked whether Mrs Black wanted to suspend returns and upon her asking what he meant, a reasonably careful HMRC employee, aware that he was
15 speaking to “just a secretary” should have realised that he needed to say more than that she did not need to make returns if “you are not going to be paying anyone”. He might at least have directed her to the specific guidance on the website or in the CIS340 booklet which would have explained the detail about nil returns and suspending returns. The expression “sub-contractor” is a defined term and it would
20 not be obvious to a layman that it includes an employment agency.

69. We agree with the tribunal’s comment in Fisher which applies equally in this case: “whilst HMRC may not be obliged to give advice or guidance as to what a person must do, in any given circumstances, if it does seek to assist or give advice, then that advice must be complete and accurate....I find that the delay in filing, albeit
25 possibly characterised as a failure to appreciate the law, was primarily caused by the appellant being given either misleading or incomplete information which led him reasonably to believe that he had done all that he was required to do...”

70. Contrary to HMRC’s contention that there was no evidence that the Appellant contacted the CIS helpline for guidance and that it failed to act on the information
30 given by HMRC, the evidence shows that the former bookkeeper, Mr Burling and Mrs Black contacted the helpline on several occasions and, indeed, it was because Mrs Black relied on the incomplete information given by HMRC that the late filing penalties arose.

71. Whilst we accept that there is a great deal of guidance available on HMRC’s
35 website and in its publications, it cannot reasonably be assumed that a taxpayer will have read all of it. Indeed, the very volume of the information makes it unlikely that even the most conscientious of taxpayers will have done so. Nor is it sufficient to say that a taxpayer should look for guidance on a particular matter, where, as here, the taxpayer reasonably believed that they were doing everything they needed to do and
40 did not realise that any guidance was needed.

72. We do not accept HMRC's contention that a reasonable excuse must involve events outside the taxpayer's control. That is not what the legislation says and not what the many cases on the phrase indicate it means.

73. The test was explained by his honour Judge Medd in the case of *The Clean Car Company Ltd v the Commissioners of Customs and Excise* [1991] VATTR 234 where he said:

74. "...It seems to me that Parliament in passing this legislation must have intended that the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but who in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered. Thus though such a taxpayer would give a reasonable priority to complying with his duties in regard to tax and would conscientiously seek to ensure that his returns were accurate and made timeously, his age and experience, his health or the incidence of some particular difficulty or misfortune and, doubtless, many other facts, may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse."

75. The Appellant clearly has a responsible attitude to its duties as a taxpayer and did its best to, and thought it had, fully complied with its obligations in relation to its CIS300 returns.

76. We have taken account of the particular attributes of the Appellant, including Mrs Black's inexperience, the fact she had sought HMRC's assistance when she thought she needed it and that she had suspended the returns following an initial suggestion from HMRC. We also take account of the fact that having made that suggestion to a person who was obviously inexperienced and unlikely to be aware of the technical detail of the legislation, the person on the helpline failed to suggest to Mrs Black that she should check that the company was indeed not required to submit returns and failed to direct her to the relevant guidance.

77. *Decision*

78. In all the circumstances of this case, we consider that the Appellant had a reasonable excuse for the late filing of the nineteen CIS300 returns in question and that the failure was remedied without unreasonable delay after the excuse ceased. We note that the default was remedied as soon as the Appellant was informed that the returns should have been filed.

79. We consider that the issue of proportionality is determined by the *Bosher* case and accordingly we must find that the penalty is not disproportionate.

80. For the reasons set out above, we find:

81. That the penalties of £12,700 for late filing of the CIS300 returns were correctly charged under Schedule 55 Finance Act 2004, but that

82. The Appellant had a reasonable excuse for the late filing.

83. Accordingly, we allow the appeal and set aside the penalties.

84. 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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**MARILYN MCKEEVER
TRIBUNAL JUDGE**

RELEASE DATE: 2 June 2015