



TC04482

Appeal number: TC/2010/03553

***CONSTRUCTION INDUSTRY SCHEME – LATE FILING PENALTIES
REASONABLE EXCUSE – APPEAL DISMISSED***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PHILIP GOTT

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE IAN HYDE
AND NICHOLAS DEE**

Sitting in public at Priory Courts Birmingham on 13 April 2015

Mr Gott appeared in person

Mrs Rees, Officer of HMRC, for the Respondents

DECISION

1. This is an appeal against penalties for the late submission of monthly
5 Construction Industry Scheme (“CIS”) returns

2. There is no dispute about the facts in this appeal, the Appellant’s appeal being that he had a reasonable excuse for the late filing within section 118(2) of the Taxes Management Act 1970 (“TMA”).

3. Under regulation 4 of the Income Tax (Construction Industry Scheme)
10 Regulations 2005 a contractor is required to complete a return for each monthly period – ending on the 5th of each month – so as to reach HMRC by the 19th of the same month. A nil return is required even if no payments have been made in the month (regulation 4(10)). Any return received after the 19th is treated as late and, under section 98A of the Taxes Management Act 1970, where there are less than 50
15 sub-contractors, attracts a £100 automatic penalty for that month and any subsequent month for which it is not filed. In the period from commencement of the CIS regime on 6 April 2007 to 5 September 2007 the Respondents operated a “soft landing period” in which they did not charge penalties.

4. The Appellant is a builder and has engaged sub-contractors within the CIS
20 regime since its commencement on 6 April 2007. The Appellant filed five late returns in respect of the first months of the CIS regime on 19 October 2007 but as this fell within the soft landing period no penalties were raised. The return for 5 October 2007 was filed on time on 19 October 2007.

5. However, the returns for the months ended 5 November 2007 to 5 October 2008
25 and for the returns for the months ended 5 December 2008, 5 February 2008 and 5 April 2009 (“the Late Returns”) were filed late. Most of the Late Returns were eventually filed on 24 October 2008, with the return for 5 December 2008 filed on 28 January 2009, the return for 5 February 2009 filed on 25 March 2009 and the return for 5 April 2009 filed on 27 April 2009. As a result 15 monthly returns were filed late,
30 generating 83 fixed £100 penalties amounting in total to £8,300.

6. The Respondents issued penalty notices from 30 November 2007 until the final fixed penalty in May 2009. The Appellant did not contact HMRC to discuss the position.

7. It is not disputed that during the relevant periods the Appellant made CIS
35 deductions from his sub-contractors and that he made payments to HMRC on an annual rather than monthly basis, thereby improving his cash flow position.

8. On 25 January 2010 the Appellant’s agent appealed against the penalties and on
40 1 February 2010 the Respondents rejected the appeal. The Appellant’s agent then on 26 February 2010 requested a review of HMRC’s decision but the Respondents upheld the original decision on 16 March 2010. On 10 April 2010 the Appellant appealed the outcome of that review.

9. On 24 January 2011 HMRC wrote advising the Appellant that due to the introduction of the new penalty regime from October 2011 HMRC would exercise their power under section 102 TMA to mitigate penalties due under the old regime where, had the new regime applied, it would have produced a lower penalty liability.
5 In the Appellant's circumstances this would reduce the penalty liability from £8,300 to £5,300. The Appellant could accept this reduced penalty by agreement with HMRC. However, if the Appellant continued to appeal the penalty decision, the appeal on the amount of the original penalty would need to be decided by the Tribunal. The Appellant did not take up the offer and proceeded with the appeal.

10 10. At the hearing the Respondents confirmed that should we dismiss the Appellants appeal they would at that point exercise their discretion and apply the reduction offered in the Respondents letter of 24 January. We note that the Respondents also appeared to indicate that should the Appellant present new circumstances whether in this appeal or at a later date the Respondent was prepared to
15 consider exercising its power under section 102 TMA to further mitigate the penalties. However, that is not a matter for this Tribunal.

11. The Appellant argued that his personal circumstances should be taken into account in determining whether the penalties should be payable. The Appellant's appeal, whilst not expressed as such, can only be treated as a claim for reasonable
20 excuse under section 118(2) TMA the relevant wording of which is;

“(2) For the purposes of this Act...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 that excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse
25 had ceased”

12. This appeal was stayed for a period allowing the Appellant to consider the decisions of the Upper Tribunal in *Revenue and Commissioners v Antony Boshier* [2013] UKUT 0579 and FTC/3/2013. The Appellant did not argue in this appeal that these decisions applied but we would note the Upper Tribunal's comments at
30 paragraph 17 of the decision of 19 November 2013 that the power under section 100B TMA of the Tribunal to increase or decrease a fixed £100 late filing penalty if it is “incorrect” does not give the Tribunal jurisdiction to adjust such a penalty because of a perception that it is unfair or for any similar reason. Further, we note the Upper Tribunal's dismissal of the taxpayer's wider arguments. For completeness we do not
35 find that the penalties in this appeal are incorrect for the purposes of section 100B.

13. The circumstances the Appellant raised were both personal and business related. Eight or nine years ago the Appellant's partner of some 10 years left him. Later, his ex partner suffered from and then died of cancer in September 2014. About the same time as his partner left him his daughter, with whom he was very close, went through
40 a divorce and had to move into the Appellant's house with her son, then 8 years old. His daughter works three days a week for the NHS but her ex husband does not support her. Her ex husband has been very ill and nearly died from blood clots. The Appellant's uncle also died but the Appellant agreed in evidence that this was at the earliest in 2009.

14. During this period the Appellant had severe cash flow problems with his business. He had to borrow on credit cards to pay suppliers, up to £30,000 at one point. His accountant's advice was always to pay HMRC but it was a struggle. The Appellant owned his own house subject to a mortgage but did not think he would be able to get an increased mortgage because of his credit history. If the Appellant had to pay the penalties it would potentially make his business insolvent.

15. The Appellant gave evidence that he could not afford an accountant and, until 2008, assumed that if he filed a CIS return he would have to pay the tax at the same time. As a result, when he received a letter from HMRC he would not read it but add it to a pile of HMRC letters on his dining room table. The Appellant also made the point that he has now filed all the returns and is up to date on VAT and income tax.

16. The Respondents are sympathetic to the Appellant's personal circumstances but point out that the late filing took place over 18 months and the Appellant could have taken steps to file the returns.

17. As to the Appellant's financial difficulties, the Respondents point out that the penalty relates to filing of returns not payment of tax and so financial difficulties should not have prevented the Appellant from filing the returns. The Appellant has been in the CIS regime since the outset and so would have received all the advertising and publicity material sent out at the time. Further, the Appellant had filed a number of CIS returns before the Late Returns and so knew how to operate the system. Finally, HMRC sent a large number of reminders to the Appellant to which the Appellant did not respond.

18. In our view the Appellant has not demonstrated a reasonable excuse. What amounts to a reasonable excuse must be considered in the light of all the circumstances of a case. We accept that the personal circumstances raised by the Appellant took place and affected the Appellant in his private life. However, the Appellant must have been aware of his filing responsibilities under the CIS regime. He had filed six returns at the outset of the regime and received numerous reminders from the Respondents. The Appellant's evidence that he simply did not read HMRC's letters reminders and did so over a protracted period in the knowledge of his obligations under the CIS regime demonstrates a lack of regard for compliance with his statutory obligations. We accept that the Appellant's did not understand that filing the returns and payment of the tax were separate but at no point during the relevant period did the Appellant make contact with the Respondents which would have enabled the Respondent to understand his obligations.

19. The appeal is dismissed.

20. 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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IAN HYDE
TRIBUNAL JUDGE

RELEASE DATE: 18 June 2015

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