



TC04732

Appeal number: TC/2012/04601

CONSTRUCTION INDUSTRY SCHEME - late filing of monthly returns - obligation delegated to bookkeeper - Appellant asserted that yearly P35's contained details of CIS deductions - whether a reasonable excuse - no - Section 98A Taxes Management Act 1970 - Schedule 55 to the Finance Act 2009 - CIS tax deductions not accounted for to HMRC - whether penalties unfair or disproportionate - no - principles set down in Boshier applied - appeal not allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BRIAN & IAN AGNEW T/A B & I PLASTERING Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER PATRICIA GORDON**

Sitting in public at Mays Chambers, 73 May Street, Belfast on 4 June 2015

Mr Keith McManus accountant for the Appellant

Ms Kate Murphy Officer of HM Revenue and Customs for the Respondents

DECISION

The Appeal

1. This is an appeal by Brian and Ian Agnew t/a B & I Plastering (“the Appellants”) against penalties of £104,100, imposed under s 98A Taxes Management Act 1970 (“TMA”) reduced to £33,800, for their failure to make monthly returns by the due date during the years 2008, 2009 and 2010, under the Construction Industry Scheme (“CIS”).

2. The Appellants do not dispute that their CIS returns were filed late.

3. The Appellants appeal the penalties primarily on the grounds that:

i. their accountants had submitted the Appellants annual P35 Returns for 2008-09 and 2009-10 on 14 May 2009 and 19 May 2010 which contained details of CIS deductions. HMRC’s failure to process them compounded the issue. Had the error been identified in May 2009, the penalties would have been significantly mitigated.

ii. that the penalties are disproportionate and unreasonable.

4. The appeal was originally stood behind the case of *HMRC v Boshier* [2013] UKUT 579 (TCC), [2014] STC 617, an appeal to the Upper Tribunal against penalties for late filing of CIS monthly returns, where the First-tier Tribunal cancelled 193 fixed penalties of £100 each plus year end penalties, amounting to £54,100, on the grounds that they were disproportionate and allowed the appeal. The central issue in HMRC’s appeal was whether the Tribunal had the jurisdiction to cancel the penalties. HMRC said that the Tribunal did not have jurisdiction to do so, but even if it did, the penalties were proportionate and the Tribunal should not have interfered with them.

5. The Upper Tribunal found that the penalties charged under s 98A TMA 1970 had been correctly applied and that the First-tier Tribunal did not have the power to discharge or reduce fixed penalties imposed for the legally correct amount.

6. The Upper Tribunal also concluded that the penalty regime, which includes the right of appeal and provides HMRC with the power to mitigate a penalty, does not infringe a person’s human rights, and in general does not impose disproportionate penalties.

The CIS penalty regime

7. 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.

8. 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.

9. 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 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).

10. 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:

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

11. 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:

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 penalties for any one return is thus a maximum of £4,200.

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12. 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:

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

13. 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:

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“(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.

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(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.

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(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....”

14. 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:

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“(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.”

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

“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.”

5 16. 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 was about to come into force, HMRC introduced a revised policy for considering
10 mitigation of penalties under s 102 of TMA for late contractors’ monthly returns. This policy was announced on HMRC’s website.

Background Facts

15 17. The Appellants are plastering contractors. In the years ended 5 April 2008, 2009, and 2010 they engaged subcontractors within the Construction Industry scheme without deducting and accounting for tax at source or, for substantially the whole of the period, without submitting returns.

18. During a routine check on the Appellant’s business it was discovered that their monthly CIS returns had not been submitted as they should have been. The Appellants said that they were unaware that their monthly returns were not being filed as they
20 had a book-keeper who they assumed had been filing the returns.

19. For the year 2007-08 the Appellant’s P35 (Employers Annual Return) was submitted online and showed CIS deductions of £540. However, only one CIS Return was received for the month ending 5 May 2007, showing CIS deductions of £280. HMRC say that the CIS Return takes precedence over the P35 figure and £280 was
25 accepted as the correct amount. £280 was paid leaving an underpayment of £260.

20. For the year 2008-09, although the Appellant’s accountants, McGuire & Farry, provided (in May 2011 when the missing returns were queried) a manuscript copy of the P35 form which they said had been filed, HMRC had no record of receipt, nor was any return made online. The P35 return included a subcontractor costs analysis
30 showing CIS tax deducted of £4,348.32 but which had not been accounted for to HMRC.

21. For the year 2009-10, HMRC similarly had no record of receiving a P35 or any CIS Returns. Again the accountants forwarded a photocopy of the Employer’s Return P35 form which they said had been filed which included an analysis of subcontractor deductions. The total unaccounted for CIS tax for that year was £4,098.25.
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22. On 5 July 2011 HMRC advised the Appellant of the penalties chargeable under s 98A(2) (a) TMA 1970, that is £100 per month or part month for each batch of 50 sub-contractors on the return and that the penalties including yearly penalties continued to accrue until the returns are received or treated as received.

40 23. HMRC further advised that new penalty legislation was due to come into force in October 2011 which would reduce the level of penalties charged and allow for

penalties charged under s 98A (2) TMA to be mitigated under s 102 TMA. The penalties would therefore be reduced to £33,900.

24. The Appellant's accountants wrote to HMRC on 26 August 2011 agreeing that the tax underpaid amounted to £260 for 2007-08, £4,348.32 for 2008-09, and
5 £4,098.25 for 2009-10, that is a total of £8,706.57; however they rejected the suggestion that P35 returns for 2008-09 and 2009-10 (with details of subcontractor deductions) were not submitted. They said that these had been submitted on 14 May 2009 and 19 May 2010 respectively, and that this should have alerted HMRC to the fact that monthly CIS returns had not been filed. That would have identified a
10 problem allowing it to be addressed immediately and thereby reducing the penalties significantly. They also asked HMRC to reconsider the level of "disproportionate" penalties charged and reduce these to a more reasonable figure, given the levels of tax involved.

25. The Appellant's accountants stated that they had not been engaged to file the monthly returns. They were only responsible for the submission of the P35 Employer
15 End of Year returns. That task had been delegated to the Appellant's book-keeper.

26. HMRC said that whilst they were prepared to accept that P35 Returns were completed and submitted for the 2008-09 and 2009-10 tax years, the returns were not received. Further, the CIS tax had not been accounted for. Nonetheless, in the
20 circumstances no penalties would be raised by HMRC for the non-receipt of those returns.

27. On 5 December 2011 HMRC issued the penalty determination to the Appellant in the amount of £104,100 under s 98A (2) Taxes Management Act 1970 for the failure to make monthly returns required by Regulation 4 of the Income Tax
25 (Construction Industry Scheme) Regulations 2005. HMRC stated that they would be prepared to mitigate the penalties from £104,100 to £33,800 (the lower figure being what would have been charged had the new penalty regime, under Schedule 55 to the Finance Act 2009, been in place throughout the period under review).

28. HMRC's offer to reduce the penalties was refused by the Appellant's
30 accountants on 23 December 2011. They said:

35 "We note from your letter that HMRC were not seeking returns for these tax years and would query whether this meant that when the P35's were received, they were simply not processed by HMRC & HMRC's failure to process the submitted P35's compounded the issue and had the error been identified at this time, the earlier penalties would have been significantly mitigated."

They added that the Appellant would be prepared to accept, without prejudice, an overall cap of £3,000 on the penalties.

29. HMRC responded that the Appellant's CIS record had been flagged as
40 "inactive". That could only have been because the Appellant had said they were not engaging subcontractors prior to or during the default period. That was why the non-

submission of CIS returns was not queried. The penalty determinations raised were a consequence of the failure by the Appellant to submit their returns.

30. Following a request for a review on 5 March 2012, HMRC upheld the penalty decision. The Appellant lodged a Notice of Appeal with the Tribunal on 2 April 2012.

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31. On 20 April 2012 the appeal was stood over until the Upper Tribunal had reached a decision in *Bosher v HMRC* where issues relating to proportionality of penalties and the Tribunal's jurisdiction in that regard were involved.

The Appellant's case

10 32. The Appellant's grounds of appeal as disclosed in correspondence with HMRC and the Notice of Appeal are:

- i. The partners were unaware that the monthly CIS returns were not being filed as they had a book-keeper who they assumed had been filing the returns.
- 15 ii. The partners agreed that an underpayment of CIS tax arose in each of the years 2007-08 to 2009-10.
- iii. That P35 forms (Employers Annual PAYE Return) for the years 2008-09 and 2009-10 were submitted on time on 14 May 2009 and 19 May 2010 and that an error on the part of HMRC in failing to process the forms, compounded the issue. If the error had been identified earlier the penalties incurred would have been significantly mitigated or not incurred at all.
- 20 iv. That HMRC should reconsider the penalties and reduce them to a more reasonable figure given the level of tax involved.
- v. That the total penalties charged even on a mitigated basis are disproportionate to the tax lost and if they have to pay the penalties they will suffer genuine and absolute hardship. They would be adjudicated bankrupt.
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33. At the hearing Mr McManus for the Appellant reiterated the above grounds of appeal, in particular stressing the hardship which would be suffered by the Appellant if the penalties were imposed. He said that they were being punished for being naïve. He said that the penalties of £33,800 were almost 400% of the underpaid tax of £8,707, and even taking into account the principles set down in *Bosher* the penalties were manifestly disproportionate.

HMRC's case

35 34. The partnership submitted a CIS return for the month ended 5 May 2007 showing the tax deducted from sub-contractors. The partnership was therefore aware of the obligations to submit the monthly returns including any nil returns. However for the period 6 May 2007 to 5 December 2010, CIS returns were not filed.

35. The ultimate responsibility to ensure that returns are submitted on time falls on the Appellant. HMRC expect the Appellant to have taken reasonable care to explain to their book-keeper what they required them to do, and to make regular checks to ensure that for example payments were made and/or returns were being submitted as required

36. Where a person fails to submit a return on time due to the failure of a third party, they may have a reasonable excuse, but the person must have remedied the failure without unreasonable delay after the excuse ended. HMRC had written to the partners on 20 January 2011, and queried whether payments to sub-contractors had been made and if so whether returns had been made. It was pointed out that HMRC had not received any CIS Returns since the month ending 5 May 2007. HMRC asked for an explanation why the Appellant had not submitted returns when it appeared that they had engaged sub-contractors and why they had also not accounted to HMRC for deductions made.

37. The Appellant's accountants replied four months later on 20 May 2011 forwarding details of the payments made to sub-contractors for the years 2007-08 to 2010-11 inclusive and advised that their clients were aware that there was outstanding liability to pay. They said that their clients had been in contact with HMRC to arrange to clear the liability via a time to pay arrangement. They said that they had been unaware that the monthly returns had not been filed.

38. The Appellant has not offered a reasonable excuse for their failure to make monthly contractors returns as required by the legislation and they are therefore liable to penalty charges under s 98A (2) Taxes Management Act 1970.

39. 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 have offered to mitigate the s 98A penalties from £104,100 to £33,800.

40. The CIS penalties are proportionate in that they are issued in accordance with the relevant legislation. In the case of *HMRC v Anthony Boshier* [2013 UKUT 0579 (TCC)], the Upper Tribunal decided that:

- 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.
- 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 Convention rights. The Upper Tribunal concluded that these were adequately protected by the person's right to apply for permission to bring Judicial Review proceedings.

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Conclusion

41. The Appellant has for a number of years traded within the Construction Industry Scheme and engaged subcontractors. Every person who 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 month. The guide clearly sets out that penalties will be charged for late filing of returns.

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42. In addition to the Contractors guide, the Appellant would initially have been sent monthly CIS returns to complete (Example Return & Notes) which 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 a sufficient prompt. Both documents refer taxpayers to the CIS helpline or the HMRC website if they have any questions.

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43. The Appellant failed to act in accordance with the legislation in force. They were aware of their responsibilities under the CIS scheme. They deducted tax at source from their sub-contractors but did not account to HMRC for the amounts due. Had they accounted for the CIS tax, which they deducted from payments due to subcontractors, that would have alerted HMRC to the non-submission of the CIS returns.

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44. The Appellant says that the P35's for 2008-09 and 2009-10 included details of CIS deductions which should have alerted HMRC to the missing returns. However P35's were not received by HMRC. In any event for 2009-10 onwards Regulations 205 to 205B of the Income Tax (Pay As You Earn) Regulations 2003 require the mandatory use of electronic communications by employers who must deliver their P35/P14 forms online using an approved method of electronic communication. The Appellants did not file their return electronically for 2009-10.

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45. Section 50 (6) TMA 1970 places the onus of proof on the Appellant. This is the ordinary civil standard based on the balance of probabilities. Taking all the facts and circumstances into account they have not shown a reasonable excuse for the non-submission of the returns. Where a person fails to submit a return on time due to the failure of a third party they may have a reasonable excuse, but the person must have remedied the failure without unreasonable delay after the excuse ended. In this case they did not do so.

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46. The penalties imposed for late filing of the contractor's monthly CIS Returns have been correctly calculated in accordance with the relevant regulations.

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47. HMRC have exercised their power to mitigate the penalty under s 102 Taxes Management Act 1970 from £104,100 to £33,800. The Tribunal has no authority to interfere with the exercise of that discretion. Mitigation is entirely a matter for HMRC and as confirmed in *Bosher* the absence of a power in the Tax Chamber to mitigate a penalty 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 proceedings.

48. For the above reasons we find that the mitigated penalties of £33,800 were correctly charged and the appeal is dismissed.

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.

MICHAEL CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 25 November 2015