



TC05148

Appeal number: TC/2015/05525

*Construction Industry Scheme CIS300 – potential lost revenue – inaccurate returns
– deliberate not concealed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ALPINE CONTRACT SERVICE LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ALASTAIR J RANKIN
MR IAN MALCOLM**

**Sitting in public at Edinburgh Tax Tribunal, George House, 126 George Street,
Edinburgh, EH2 4HH on 23 May 2016 at 10.00 am.**

Mr Graeme Robbie of Robbie & Co Accounting Services for the Appellant

**Mr Matthew Mason, Presenting Officer instructed by the General Counsel and
Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

1. This is an appeal by Alpine Contract Service Limited (the Company) against a penalty assessment issued by HMRC under Schedule 24 Finance Act 2007 (the 2007 Act) for the filing of inaccurate Contractors Monthly Returns CIS300 for the period 6 November 2009 to 5 May 2013. The penalties total £14,933.33.
2. The point at issue is whether HMRC were correct to issue the assessments for the deliberate submission of documents containing inaccuracies. Both parties agreed at the start of the hearing that the appeal would either be allowed or dismissed as the Company took no issue with the actual penalty calculations, if they were legally due.

Background

3. On 5 July 2013 HMRC opened an enquiry under section 9 of the Taxes Management Act 1970 (the 1970 Act) to check the systems the Company had in place in order to enable it to meet its obligations as an employer and as a contractor. At a meeting on 17 September 2013 between HMRC and Mr John Duffy and Mr Graeme Robbie, directors of the Company, HMRC raised the issue of nil CIS300 returns and missing returns. Mr Robbie advised HMRC that he was aware that he should submit monthly returns but he had been too busy to submit monthly returns but as the Company suffered a 20% deduction as a subcontractor in practice HMRC would owe money to the Company.
4. Following completion of its enquiries HMRC wrote to the Company on 15 January 2015 advising that it intended to charge penalties under Schedule 24 of the 2007 Act in respect of incorrect CIS300 returns with a behaviour determined as deliberate. On 21 April 2015 HMRC issued formal penalty assessments based on potential lost revenue of £42,666.66. HMRC reduced the maximum percentage penalty from 70% to 35% resulting in a penalty of £14,933.33 which was appealed by Mr Robbie by letter dated 29 April. Mr Robbie claimed that the Company was allowed to offset any CIS deducted from its contract payments against any CIS tax it deducts from its subcontractors. Secondly, if the way the Company treated the CIS payments and the reported information was incorrect there would in any event be no loss to HMRC as each payment to subcontractors corresponded to a payment from the main contractor.
5. By letter dated 5 May 2015 HMRC rejected the Company's arguments by stating that a limited company is allowed to offset any CIS tax deducted from its contract payments against any CIS tax it deducts from its subcontractors but even if its own CIS deductions in any month are greater than its CIS liabilities the Company is still legally liable to submit accurate monthly returns. HMRC offered an independent review.
6. By letter dated 23 May 2015 the Company requested an independent review. On 10 July 2015 HMRC's Review Officer advised the Company that he was upholding the decision to impose the penalties.

Argument by the Appellant Company

7. Mr Robbie contended that as there was no loss of tax to HMRC there should be no penalty or if there was a penalty it should be zero for the same reason that HMRC had not suffered any loss. His argument is based on Part 2 of Schedule 24 of the 2007 Act which states that any penalty is based on Potential Lost Revenue.

Argument by HMRC

8. As the Company had submitted inaccurate CIS returns for the period 6 November 2009 to 5 May 2013 it was liable to a penalty under Schedule 24 of the 2007 Act. As Mr Robbie had admitted to HMRC that he had been too busy to prepare accurate returns HMRC considered that his action had been deliberate. The Company must send HMRC a complete return of all payments made to all subcontractors within the scheme in the preceding month regardless of whether they are paid gross or net of deductions.

9. HMRC referred the Tribunal to a schedule of CIS tax prepared by Mr Robbie showing the amounts of CIS tax deducted by the Company and the amounts suffered by the Company for each month from May 2009 to July 2013. This schedule showed several months where the Company actually owed HMRC a net amount – the amount deducted exceeded the amount suffered.

10. HMRC advised the Tribunal that the legislation referred to potential lost revenue not actual lost revenue.

The legislation

11. Schedule 24 of the 2007 Act commences as follows:

Penalties for errors

Part 1

Liability for penalty

Error in taxpayer's document

1. (1) A penalty is payable by a person (P) where—
 - (a) P gives HMRC a document of a kind listed in the Table below, and
 - (b) Conditions 1 and 2 are satisfied.
- (2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—
 - (a) an understatement of P's liability to tax,
 - (b) a false or inflated statement of a loss by P, or

(c) a false or inflated claim to repayment of tax.

(3) Condition 2 is that the inaccuracy was careless or deliberate (within the meaning of paragraph 3).

5 (4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

Under-assessment by HMRC

2. (1) A penalty is payable by a person (P) where—

(a) an assessment issued to P by HMRC understates P's liability to tax, and

10 (b) P has failed to take reasonable steps to notify HMRC, within the period of 30 days beginning with the date of the assessment, that it is an under-assessment.

(2) In deciding what steps (if any) were reasonable HMRC must consider—

15 (a) whether P knew, or should have known, about the under-assessment, and

(b) what steps would have been reasonable to take to notify HMRC.

(3) In sub-paragraph (1) “tax” means—

(a) income tax,

20 (b) capital gains tax,

(c) corporation tax, and

(d) VAT.

Degrees of culpability

3. (1) Inaccuracy in a document given by P to HMRC is—

25 (a) “careless” if the inaccuracy is due to failure by P to take reasonable care,

(b) “deliberate but not concealed” if the inaccuracy is deliberate but P does not make arrangements to conceal it, and

30 (c) “deliberate and concealed” if the inaccuracy is deliberate and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

(2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate when the document was given, is to be treated as careless if P—

(a) discovered the inaccuracy at some later time, and

5 (b) did not take reasonable steps to inform HMRC.

PART 2

AMOUNT OF PENALTY

Standard amount

4. (1) The penalty payable under paragraph 1 is—

10 (a) for careless action, 30% of the potential lost revenue,

(b) for deliberate but not concealed action, 70% of the potential lost revenue, and

(c) for deliberate and concealed action, 100% of the potential lost revenue.

15 (2) The penalty payable under paragraph 2 is 30% of the potential lost revenue.

(3) Paragraphs 5 to 8 define “potential lost revenue”.

Potential lost revenue: normal rule

5. (1) “The potential lost revenue” in respect of an inaccuracy in a document or a failure to notify an under-assessment is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

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(2) The reference in sub-paragraph (1) to the additional amount due or payable includes a reference to—

25 (a) an amount payable to HMRC having been erroneously paid by way of repayment of tax, and

(b) an amount which would have been repayable by HMRC had the inaccuracy or assessment not been corrected.

Potential lost revenue: multiple errors

6. (1) Where P is liable to a penalty in respect of more than one inaccuracy, and the calculation of potential lost revenue under paragraph 5 in respect of each inaccuracy depends on the order in which they are corrected—

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(a) careless inaccuracies shall be taken to be corrected before deliberate inaccuracies, and

(b) deliberate but not concealed inaccuracies shall be taken to be corrected before deliberate and concealed inaccuracies.

5 (2) In calculating potential lost revenue where P is liable to a penalty in respect of one or more understatements in one or more documents relating to a tax period, account shall be taken of any overstatement in any document given by P which relates to the same tax period.

(3) In sub-paragraph (2)—

(a) “understatement” means an inaccuracy that satisfies Condition 1 of paragraph 1, and

10 (b) “overstatement” means an inaccuracy that does not satisfy that condition.

(4) For the purposes of sub-paragraph (2) overstatements shall be set against understatements in the following order—

(a) understatements in respect of which P is not liable to a penalty,

15 (b) careless understatements,

(c) deliberate but not concealed understatements, and

(d) deliberate and concealed understatements.

20 (5) In calculating potential lost revenue in respect of a document given by or on behalf of P no account shall be taken of the fact that a potential loss of revenue from P is or may be balanced by a potential over-payment by another person (except to the extent that an enactment requires or permits a person's tax liability to be adjusted by reference to P's).

The Decision

25 12. Although Mr Robbie during his submission to the Tribunal claimed that his comment that he was ‘too busy’ was a throwaway remark he did admit that he had in fact said these words during the meeting on 17 September 2013. The CIS returns which he submitted during the period 6 November 2009 to 5 May 2013 were clearly inaccurate.

30 13. There were clearly periods when the Company owed money to HMRC. A dictionary definition of the word ‘potential’ is ‘a possibility’. When an inaccurate return was filed it would have been impossible for Mr Robbie to have known at that time whether the next return would show a liability or a credit. There was a possibility that the Company would have owed money to HMRC.

14. The CIS300 return records the amount of tax withheld from payments made to subcontractors. This amount is potentially due to HMRC and is held by the Company on behalf of HMRC. Holding this tax and submitting a nil return is clearly incorrect and is at this stage potentially depriving HMRC of this revenue. The offence within the terms of paragraph 5(1) of Schedule 24 of the 2007 Act has been committed and the penalty based on the amount of tax mis-reported is triggered. Subsequent corrections or reconciliations do not change this situation though ultimately the amount of tax due by the Company to HMRC or by HMRC to the Company may change.
15. The Tribunal finds that Mr Robbie's actions gave rise to potential lost revenue within the meaning of paragraph 5(1) of Schedule 24 of the 2007 Act. The fact that there was no actual loss of revenue is immaterial. To find otherwise would render the paragraph meaningless.
16. The Tribunal agrees with HMRC that Mr Robbie's actions were deliberate but not concealed. It also finds there the percentage reduction applied by HMRC was reasonable.
17. The appeal is therefore dismissed and the penalty of £14,933.33 remains due for payment by the Company.
18. 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.

ALASTAIR J RANKIN
TRIBUNAL JUDGE

RELEASE DATE: 6 JUNE 2016