



**TC05547**

**Appeal number: TC/2016/02479**

***CONSTRUCTION INDUSTRY SCHEME - fixed and tax geared penalties -  
late filing of returns - whether reasonable excuse - no - appeal dismissed***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**ASM (REFURBISHMENTS & DECORATORS) Ltd      Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE MICHAEL CONNELL  
                  MEMBER SUSAN STOTT**

**Sitting in public at Manchester Tribunals Service, Alexandra House, 14 – 22 The  
Parsonage, Manchester on 16 November 2016**

**Mr Mark Simpson for the Appellant**

**Mr Paul Hunter, Officer of HM Revenue and Customs, for the Respondents**

## DECISION

### **The Appeal**

1. This is an appeal by ASM (Refurbishments & Decorators) Limited (“the Appellant”) against penalties of £10,181, imposed on the Company by HMRC under Schedule 55 Finance Act 2009 for its failure to submit by the due date monthly returns under the Construction Industry Scheme (“CIS”) for the period May 2013 to May 2015 inclusive.
2. The issue before us is whether the Appellant has a reasonable excuse for making the late returns.

### **The CIS penalty regime**

3. 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.
4. The legal basis of the CIS regime in force from 6 October 2011, is the Finance Act 2009, Schedule 55 paragraphs 1, 8 – 13 and 23 (“FA 2009”); 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 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.
5. 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.
6. Contractors are required to make a return no later than 14 days after the end of every tax month (a “monthly return”) (s70 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 (s70 FA 2004 and reg 4(10) of the 2005 Regulations).
7. 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 Schedule 55 FA 2009 as follows:

If a CIS return is 1 day late, an initial fixed penalty of £100 is payable

If HMRC have still not received that return:

- 2 months after the date it was due, a second fixed penalty is payable of £200

- 6 months after the date it was due, a further penalty of £300 or 5% of any liability to make payments that should have been shown in the return is payable.

- 12 months after the date it was due, a second further penalty is payable – the amount of this penalty depend on why the return was late. The amount HMRC charge will be either £300 or 5% of any liability to make payments, or a ‘higher’ penalty of up to 100% of any liability to make payments.

8. Paragraph 23 of Schedule 55 makes provision as to what may or may not constitute a reasonable excuse.

‘23(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.

(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
- (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.’

**Background Facts**

9. The Appellant was late submitting its monthly CIS returns for the 25 months between May 2013 and May 2015. Fixed penalties and tax geared penalties were charged as shown in the table below:

	FP1	FP2	TGP1	TGP2	Tax	5%
May-13	100	200	186	186	3737.84	186.89
Jun-13	100	200	280		5608.42	280.42
Jul-13	100	200	428		8579.80	428.99
Aug-13	100	200	241		4829.46	241.47
Sep-13	100	200	406		8125.66	406.28
Oct-13	100	200	423		8472.07	423.60
Nov-13	100	200	211		4230.00	211.50
Dec-13	100	200			4320.65	216.03
Jan-14	100	200			4936.00	246.80
Feb-14	100	x			3465.10	173.26
Mar-14	100	x			4201.45	210.07
Apr-14	100				5933.70	296.69
May-14	x	x	114	114	2296.50	114.83
Jun-14	x	x	192		3859.85	192.99
Jul-14	100	200	300		4428.39	221.42
Aug-14	100	200	300		3343.95	167.20
Sep-14	100	200	300		4458.85	222.94
Oct-14	100	200	300		5676.24	283.81
Nov-14	100	200	300		5788.94	289.45

	Dec-14	100	200	6431.80	321.59
	Jan-15	100	200	4565.45	228.27
	Feb-15	100	200	4153.40	207.67
	Mar-15	100	200	3500.46	175.02
5	Apr-15	100		4404.65	220.23
	May-15	100		3618.36	180.92
		<u>2,300</u>	<u>3,600</u>	<u>3,981</u>	<u>300</u>

Total 10,181

10 [x = Penalty withheld as capping limit of £3,000 reached. First return received 20/05/14.]

15 10. Mr John Dodd, the sole director and shareholder of the Appellant Company, accepts that the CIS return for each of the months from May 2013 to May 2015 were late and that he received each penalty notice as and when they were issued.

20 11. On 20 July 2015, the Appellant's accountant Mr Buckley, having submitted all the outstanding returns, wrote to HMRC asking for the penalties to be reviewed. He explained that Mr Dodd verified the labour only sub-contractors, each of whom were taxed at the correct rate each week, but because he had been exceptionally busy he had not filed the weekly or CIS 300 monthly returns, nor accounted for the tax deducted. Mr Buckley explained that Mr Dodd had been the main carer for his elderly mother for most of the default period and time spent caring for her meant that the administrative aspects of running the business had been neglected. HMRC were however never at risk of losing monies as the Appellant was owed refunds for each of the 2014 and 2015 years [which in April 2016 he qualified at £36,948.24].

12. Mr. Buckley said that the Appellant's system had since changed. His daughter was now dealing with the sub-contractor returns each week using bespoke software and since week one of the 2015-16 tax year, the weekly and monthly returns had been submitted on time under RTI or CIS 300.

30 13. HMRC's VAT section had allowed the Appellant to bring missing VAT returns up to date and had agreed a time to pay arrangement in respect of £65,000 of arrears, the terms of which he had fully complied with. The imposition of additional fines totalling in excess of £10,000 would cause severe hardship by inevitably eroding the Appellant's available cash flow, and potentially sending the company into a cash flow crisis levels.

14. Mr Buckley says that he did not receive a response and on 11 December 2015 resubmitted his letter.

40 15. HMRC responded on 3 February 2016 saying that a period of 30 days is allowed for an appeal against each monthly penalty and that the Appellant's appeal was therefore out of time. In any event, the Appellant had not shown a reasonable excuse for the late returns and should have contacted HMRC for help.

16. The Appellant lodged its Notice of Appeal with the Tribunal on 29 April 2016.

## **The Appellant's case**

17. At the hearing, Mr Simpson for the Appellant Company, said that the failure to file CIS returns began in May 2013 and arose mainly because of a sudden and dramatic upturn in work for the Company, when it secured a new contract with Café Nero to undertake refurbishment work on a significant number of its outlets, initially in the London area but latterly on a nationwide basis.

18. Prior to March 2013, Mr Dodd had worked as a sole trader employing just two or three subcontractors. The company, ASM (Refurbishments & Decorators) Ltd, was formed on 19 March 2013 shortly after Mr Dodd secured the contract with Café Nero. The increase in work placed Mr Dodd under a great deal of pressure (the business had previously been exclusively North West based), because his presence was required at sites in London and around the country on a regular basis. He also had to identify and engage a large number of subcontractors at short notice. This situation was exacerbated by the fact that the work had to take place at night so as not to compromise the ability of the coffee shops to open during the day. Mr Dodd was often working 100 hours and driving 1,000 miles a week.

19. The situation was exacerbated by the state of health of Mr Dodd's mother, who was resident in Oldham, and for whose care Mr Dodd was in large part responsible, together with his two sisters, one of whom was herself seriously ill, and has since died. Mrs Dodd had suffered a stroke in 2007, and had become clinically depressed. She was also suffering from Alzheimer's Dementia. In August 2012 she was admitted to a care home for long term care and some months later, following a fall, admitted to hospital.

20. During most of 2013, Mr Dodd was extremely concerned for Mrs Dodd, who was felt by the family not to be receiving an appropriate standard of care from local health and care services, to the extent that an official complaint was lodged with the NHS and with Oldham Social Services. In August 2013 Mrs Dodd was admitted to hospital again following a fall.

21. In November 2014, Mrs Dodd was again admitted to hospital and diagnosed with cerebrovascular disease. After a brief period of respite she was re-admitted to hospital with pneumonia. On 6th February 2015 Mrs Dodd died.

22. Mr Simpson said that Mr Dodd was mentally and physically exhausted by the worry and inordinate amount of travelling he was doing to keep his business, and in particular the contract with Café Nero, going. Mr Dodd was often required to work nights supervising the Café Nero contracts, mostly in London and the South of England, and had to manage a significant number of subcontractors. He also had to frequently travel back to Oldham to share with his sister the responsibility for the care of his mother, including participating in meetings with the care home, hospital and social services.

23. Mr Buckley the Company's accountant gave evidence and said that he had been Mr Dodd's accountant since 2005-06. Up until 2013 there had never been any CIS

compliance issues. He said that after Mr Dodd secured the Café Nero contract Mr Dodd would often make appointments to see him in order to provide the information he needed to file the outstanding CIS returns, but failed to turn up. Because of the various pressures he was under, Mr Dodd did not have the time to comply with the requirements of the subcontractors' tax deduction scheme, and to deduct and pay over to HM Revenue & Customs on a monthly basis the tax deducted from non-exempt subcontractors. Because the Company did not itself have a subcontractors' exemption certificate, and was therefore subject to a tax deduction from income it received from Café Nero and other customers, HMRC held far more funds in respect of the Company than the Company held in respect of the subcontractors it engaged. HMRC was never at risk of losing out financially, as it quite correctly held onto the deductions from the Appellant Company pending reconciliation of the position regarding its own subcontractors.

24. Mr Simpson said that although Mr Dodd had been unable to deal fully with the strict legal requirements of the subcontractors' scheme, he did not simply ignore his responsibilities to deduct tax, and in fact deducted tax from all of the subcontractors that the Company used. At the end of the two tax years concerned he provided Mr Buckley with full details of payments to subcontractors, enabling Mr Buckley to reconstruct the returns and pay over the amount of tax required to HMRC.

25. Following the death of his mother in February 2015, Mr Dodd was better able to organise his time and since May 2015 had been fully compliant in respect of all matters concerning subcontractors' tax.

26. Mr Simpson argued that the penalties charged were disproportionate to any damage suffered by HMRC, given that HMRC was always in possession of sufficient tax deducted from the Company's own subcontractor income to comfortably cover sums due in respect of deductions from subcontractors.

### **HMRC's case**

27. All contractors new to the CIS scheme are required to register with HMRC when they engage their first subcontractor. From 6 April 2007, every contractor who makes payments to subcontractors in respect of construction operations must send a monthly return with details of the payments to HMRC. This process is vital to the success of the CIS.

28. Mr Dodd has traded within the new CIS and engaged subcontractors for many years, either as a sole trader or since March 2013 as a limited company.

29. Every company that 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. In addition to the Contractors guide, the Company was sent monthly CIS returns to complete.

30. The HMRC Guide refers Taxpayers to the CIS helpline or the HMRC website if they have any questions or have any difficulty maintaining compliance.

31. Penalties were automatically issued for every month that a particular return was late and so it is clear that Mr Dodd knew the Company was in default.

5 32. Twenty-five CIS monthly returns for the period from May 2013 to May 2015 inclusive were submitted late.

33. Fixed penalties have therefore been correctly charged in accordance with the legislation. The penalties may be set aside if the Appellant has a reasonable excuse which existed for the whole period of default.

10 34. Mr Hunter for HMRC said that the defaults occurred simply through poor management on the part of Mr Dodd and a failure to heed the advice of his accountant. Whilst HMRC sympathised with Mr Dodd for the difficult time he must have endured during his mother's illness, he had the support of other members of his family and his mother was in a care home for most of the period of default. Mr Dodd  
15 should have employed a bookkeeper to assist with filing the CIS returns. He was compliant with all other aspects of the management's business including VAT returns, annual accounts and Company's House returns. He maintained control and management of his workforce, including organising the payroll, dealing with banking and attending to the arrangement of accommodation for subcontractors, their transport  
20 and the overall organisation of projects given to him by Café Nero. Mr Hunter said that Mr Dodd had simply put his head in the sand so far as the CIS returns were concerned.

### **Conclusion**

25 35. It is clear that that Mr Dodd made little effort to comply with his obligations under the CIS. As a consequence, 25 monthly returns were filed late.

36. Clearly, during the default period, Mr Dodd was a very busy man and under considerable pressure. However, it was his responsibility to ensure that the Company complied with its tax obligations under the CIS, and if necessary to organise administrative support for that purpose.

30 37. The Appellant should have put in place procedures to ensure that the Contractor Monthly Returns ("CMRs") were submitted on time. At that time HMRC despatched the CMR by automated system on or about the 29<sup>th</sup> of the month. That was to ensure that the document was received by the contractor by the 5<sup>th</sup> day of the following month.

35 38. It is difficult to understand why, when Mr Dodd visited Oldham to see his mother, he did not combine any one of those visits with one to his accountant in order to provide Mr Buckley with the information he needed to file the CIS returns. All he had to do was deliver the information to the accountant by whatever means. If he had any difficulty compiling the information, he should have employed the services of a  
40 bookkeeper or agent.

39. Reasonable excuse is not defined in the legislation, but it is generally accepted that the term must be given its normal everyday meaning. HMRC take this to mean that it is an unexpected or unusual event, either unforeseeable or beyond the person's control, which prevents him from complying with an obligation when he otherwise would have done. It is then necessary to consider the actions of the taxpayer from the perspective of a prudent taxpayer exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Taxes Acts.

40. The Appellant had taken no action to avoid filing the CMR's late. Mr Dodd had failed to act in a prudent and responsible manner to ensure that the Company's legal obligations were met.

41. The appeal does not contain anything which demonstrates that an unexpected or unusual event, either unforeseeable or beyond the Appellant's control, which may have prevented it from complying with its obligations under the CIS.

42. For the above reasons we find that the penalties £10,181 as set out in paragraph 9 above were correctly charged and the appeal is dismissed.

43. 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: 12 DECEMBER 2016**