



TC05896

Appeal number:TC/2016/06496

INCOME TAX – penalties – construction industry scheme – monthly returns – whether returns late – whether special circumstances – whether penalties disproportionate – appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PM REINFORCEMENTS (NW) LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE JONATHAN CANNAN
MISS SUSAN STOTT FCA**

Sitting in public in Leeds on 1 March 2017

Mr Mark Hill of Simple Accounting Limited for the Appellant

Mr Paul Hunter of HM Revenue & Customs for the Respondents

DECISION

Background

1. This is an appeal against assessments to penalties notified to the Appellant for the late submission of returns under the Construction Industry Scheme (“CIS”). The penalties were assessed pursuant to Schedule 55 Finance Act 2009 and total £7,680.

2. The CIS regime and associated penalties for non-compliance were considered in detail by the Upper Tribunal in *Commissioners for HM Revenue & Customs v Boshier [2013] UKUT 579 (TCC)*. For present purposes we adopt from that decision the following description of the regime including abbreviations:

“ 2. The CIS is a tax compliance scheme for businesses operating in the construction industry. This is an industry that has traditionally attracted a large, itinerant workforce and 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 construction industry “disappeared” without settling their tax liabilities, with a consequential loss of revenue to the Exchequer. The solution was described by Ferris J in *Shaw (Inspector of Taxes) v Vicky Construction Ltd [2002] STC 1544* at [4]:

‘In order to remedy this abuse, Parliament enacted legislation, which goes back to the early 1970s, under which a contractor is obliged, except in the case of a sub-contractor who holds a relevant certificate, to deduct and pay over to the Revenue a proportion of all payments made to the sub-contractor in respect of the labour content of any sub-contract. The amount so deducted and paid over is, in due course, allowed as a credit against the sub contractor’s liability to the Revenue.’

3. 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”). As Ferris J said, the CIS requires certain payments by contractors to sub-contractors to be made subject to deduction of tax, but the sub-contractors are entitled to claim credit for tax withheld under CIS against their tax liability for the tax year in question.

4. Contractors are required to make a return no later than 14 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. So a monthly return must 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).

5. 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 ...”

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3. Paragraph 1 Schedule 55 Finance Act 2009 makes provision for penalties for failure to make a return, including monthly returns under the CIS. A penalty is payable where a person fails to make or deliver a return on or before the filing date. Paragraphs 7-13 make provision for the amount of those penalties in relation to CIS returns as follows:

(1) Failure to make the return on time gives rise to a penalty of £100 (paragraph 7).

(2) If the failure continues after the end of 2 months from the penalty date then there is a further penalty of £200 (paragraph 9). The penalty date is the day after the filing date.

(3) If the failure continues 6 months after the penalty date then there is a further penalty of £300 or 5% of the liability to make payments shown in the return, whichever is the greater.

(4) If the failure continues 12 months after the penalty date then there is a further penalty of £300 or 5% of the liability to make payments shown in the return, whichever is the greater. That penalty is increased in circumstances where the person is deliberately withholding information but that is not relevant for present purposes.

4. There are no reductions for disclosure in relation to the penalties relevant to this appeal. However paragraph 16 provides for a special reduction if HMRC think it right because of special circumstances to reduce a penalty. Paragraph 23 provides that a penalty will not arise where the tribunal is satisfied that there is a reasonable excuse for the failure to make a return.

5. The appeal provisions are contained in paragraphs 20-22. There is provision for an appeal against a decision that a penalty is payable and in relation to the amount of the penalty. Such appeals are treated in the same way as appeals against tax assessments. On an appeal against a decision that a penalty is payable the tribunal may affirm or cancel HMRC's decision. On an appeal against the amount of a penalty the tribunal may affirm HMRC's decision or substitute another decision that HMRC had the power to make. In the latter case, if HMRC have decided that there are no special circumstances the tribunal can still reduce a penalty on the ground of special circumstances but only if HMRC's decision was "flawed" by reference to the principles of judicial review.

6. The penalties in the present case were notified in relation to 15 monthly returns in the period November 2014 to September 2016. It appears that the penalties were notified in various documents issued between August 2015 and September 2016. We did not have any correspondence relating to the penalties prior to a letter dated 26 September 2016 from Mr Hill to HMRC in which he notified an appeal to HMRC. The time for notifying an appeal depends on whether there has been a request for a review. It is not clear whether any such request was made in this case. In any event, by letter dated 21 October 2016 HMRC refused to accept Mr Hill's letter as a late

5 appeal against the penalties for the 13 return periods up to November 2015. The officer considered that there was no reasonable excuse for a late appeal. In a second letter of the same date the same officer refused the appeal in relation to the returns for June 2016 and September 2016. Those appeals were treated as being in time but the officer considered that there was no reasonable excuse for late filing of the returns.

7. It is apparent that the HMRC officer dealing with the appeals misunderstood the grounds of appeal. One matter raised by Mr Hill in his appeal letter was that HMRC had used incorrect figures to calculate the penalties in 2014/15. He stated “actually no CIS was due for that year”. In both letters dated 21 October 2016 the officer interpreted that as “your agent has stated that no CIS returns were due but all CIS returns have been made ...”.

8. The issues before us may be summarised as follows:

15 (1) Was there a failure to make returns on time? The Appellant contends that the returns were made on time, or at least some of the returns for which a penalty has been imposed were made on time.

(2) Was there any liability to make payments to support the “tax geared penalties” which were imposed?

(3) Are there special circumstances by reference to which the penalties should be reduced?

20 9. Mr Hill lodged a notice of appeal with the tribunal on 22 November 2016. He requested permission to appeal or notify the appeal out of time. HMRC were informed of the appeal by the tribunal in a letter dated 14 December 2016. In relation to the application for permission to make a late appeal the tribunal stated as follows:

25 “The Notice of Appeal includes an application for permission to make a late appeal. If you object to this application you must address it at the hearing. If you do not object the Tribunal will consider that you have consented.”

30 10. There was no material before us to explain the lateness of the appeal. However at the hearing of the appeal no issue was raised in relation to the lateness of the appeal, either in notifying the appeal to HMRC or in notifying the appeal to the Tribunal. In those circumstances we take HMRC to have consented to the appeal being notified late in relation to all return periods and we extend time accordingly.

Findings of Fact

35 11. The Appellant carries on business in the construction industry. It is a small business operated by its director, Mr Paul Monaghan and we understand it commenced trading in late 2014. For CIS purposes it was not registered for gross payment and as a result payments made to the Appellant by its customers were subject to deduction of tax at 20%. It also made payments to sub-contractors from which it deducted tax.

12. The appellant retained Mr Hill of Simple Accounting Limited for the purpose of preparing and submitting its CIS monthly returns. We understand Mr Hill is a chartered management accountant. Mr Hill told us and we accept that he used a software system known as Moneysoft to make and submit electronic returns to HMRC.

13. We set out in the table below the dates on which HMRC say the relevant returns were submitted and the dates on which the Appellant through Mr Hill says the returns were submitted. Where no date is shown that is because Mr Hill has no direct evidence as to the date of submission. We also include the total penalty assessed under Schedule 55 in relation to each return that HMRC say was submitted late. It can be seen that there were three returns in which tax geared penalties were assessed.

Return Period	HMRC Date	Appellant's Date	Penalty £
11/14	23 Nov 15		1,052
12/14	16 Nov 15		300
01/15	10 Feb 16		2,109
02/15	10 Feb 16		951
03/15	09 Jul 15		100
04/15	14 Apr 16		300
05/15	14 Apr 16	19 May 15	300
06/15	14 Apr 16	15 Jun 15	1,268
07/15	30 Nov 15	06 Jul 15	300
08/15	14 Apr 16	14 Aug 15	300
09/15	14 Apr 16	08 Sept 15	300
10/15	14 Apr 16	16 Oct 15	100
11/15	14 Apr 16	17 Nov 15	100
12/15	14 Dec 15	14 Dec 15	
01/16	18 Jan 16	18 Jan 16	
02/16	16 Feb 16	16 Feb 16	
03/16	18 Mar 16	18 Mar 16	
04/16	18 Apr 16	18 Apr 16	
05/16	19 May 16	19 May 16	
06/16	27 Jun 16	17 Jun 16	100
07/16	18 Jul 16	18 Jul 16	
08/16	19 Aug 16	19 Aug 16	
09/16	20 Sept 16		100
Total:			£7,680

14. The evidence relied upon by HMRC to establish the dates on which the returns were submitted comprised printouts from HMRC's computer system. The bundle contained a page for each return period, printed off on 2 February 2017. Each page showed CIS return details for the relevant monthly returns of the Appellant including the "Date Processed". We are satisfied from the evidence as a whole that the date a return is processed is the date of receipt. No time of delivery was recorded on these printouts.

15. The evidence relied on by the Appellant comprised two different types of print out. For return periods from May 2015 to April 2016 there was what appeared to be a screen print showing details from the Moneysoft software. For example, in relation to period 04/16 it showed the following information:

Submission	Monthly Return CIS300 for March
Company	PM Reinforcements (NW) Ltd (120/NB13192)
IRmark	LR6L5F7GA4B4E63JKIPH43FN7RJIBDRR
Correlation ID	DD2FA4331603478C87FDD0F79537F564
Date submitted	18/04/2016 14:09
Status	Success
Response received	18/04/2016 14:10

[Click here to view the sent data](#)

[Click here to view the HMRC response](#)

16. There was no suggestion that this was a test submission. Mr Hill explained that the reference to March was a quirk of the software and referred to the April return period ending 5 April 2016 where most of the payments would be made in March. We accept that explanation.

17. It is notable that the evidence produced by Mr Hill matched the evidence produced by HMRC for the April 2016 return and both parties agreed that the return was submitted on time on 18 April 2016. The dates in relation to returns for periods 12/15 to 08/16 also matched, with the exception of 06/16 where there was an unexplained discrepancy of 10 days which led to a £100 penalty being assessed for a late return.

18. The evidence produced by Mr Hill for periods 05/16 to 08/16 were three page printouts containing a large amount of what at first sight appears to be random data. On closer inspection it can be seen that they are printouts of data from HMRC's systems. One can identify within that data the same information summarised above from the Moneysoft screen prints, including the date and time of submission, the fact that the submission was a success and various references including at least the IR

Mark. For example for June 2016, where there was a discrepancy, the following narratives appears within those pages:

“GatewayTimes>2016-06-17T13:59:56

-<SuccessResponse

5 <Message code=”1”>HMRC has received the IR-CIS-CIS300MR document ref:120/NB13192 at 15.09 on 17/06/2016. The associated IRmark was ... We advise you to keep this receipt in both electronic and hardcopy versions for your records

...The Monthly Return has been processed and passed full validation.”

10 19. We were not referred to the 2005 Regulations during the hearing. The 2005 Regulations provides as follows:

“39 For the purpose of these Regulations, information is taken to have been delivered to an official computer system by an approved method of electronic communications only if it is accepted by that official computer system.

15 43(1) The use of an approved method of electronic communications is presumed, unless the contrary is proved, to have resulted in the delivery of information —

(a) to Her Majesty's Revenue and Customs, if the delivery of the information has been recorded on an official computer system;

(b) by Her Majesty's Revenue and Customs, if the despatch of the information has been recorded on an official computer system.

20 (2) The use of a method of electronic communications is presumed, unless the contrary is proved, not to have resulted in the delivery of information —

(a) to Her Majesty's Revenue and Customs, if the delivery of the information has not been recorded on an official computer system;

25 (b) by Her Majesty's Revenue and Customs, if despatch of the information has not been recorded on an official computer system.

(3) The time of receipt or despatch of any information delivered by a method of electronic communications is presumed, unless the contrary is proved, to be the time recorded on an official computer system.”

30 20. An official computer system is a computer system maintained by or on behalf of the Commissioners for Her Majesty's Revenue and Customs (reg 38). There are also provisions for documents to be certified as a printed-out version of any information delivered by an approved method.

21. It seems to us that for present purposes the effect of these provisions is as follows:

(1) If the delivery of a return has been recorded on HMRC's computer system then, unless the contrary is proved the return is presumed to have been delivered at the time recorded on the system.

5 (2) If the delivery of a return is not recorded on HMRC's computer system then, unless the contrary is proved the return is presumed not to have been delivered.

22. In the present case all the returns have been recorded as delivered to HMRC on its computer system. The starting point therefore is the HMRC record. The Appellant's monthly returns were recorded on HMRC's computer system as having
10 been delivered on the dates identified in the table above. The burden is therefore on the Appellant to establish that the returns were delivered to HMRC by the earlier filing dates.

23. HMRC also relied on a letter from MJC Accountants and Business Advisers. MJC wrote to HMRC on 2 November 2016, following HMRC's refusal of the appeal
15 on 21 October 2016. It appears that MJC had been instructed in place of Simple Accounting at that stage. In short MJC on behalf of the Appellant placed the blame for late submission of returns on Simple Accounting. HMRC were invited to ignore the appeal notified to HMRC by Mr Hill and asked to accept a late appeal by MJC on behalf of the Appellant on the basis that it had been misled by Simple Accounting. In
20 the letter MJC accepted that "all the returns were received late". However, later in the letter MJC acknowledged that they had not yet received information in relation to the CIS returns or details of the dates on which they were submitted. The evidence before us did not include any response to that letter from HMRC. In any event the Appellant continued to instruct Mr Hill because he lodged the appeal with the Tribunal on 22
25 November 2016 although it was not until the day of the hearing that Mr Hill produced in electronic form a scanned authorisation signed by the Appellant for Mr Hill to represent it in the tribunal appeal.

24. Against that background, and given the acknowledgment of MJC in their letter that they had not seen evidence as to the submission of returns, we give no weight to
30 the admission of MJC on behalf of the Appellant that all the returns were received late.

25. We are satisfied from the Moneysoft screen prints and from what Mr Hill told us that the Appellant's CIS monthly returns were made on the dates identified on those screen prints. Mr Hunter suggested that we could not be satisfied that it was the
35 monthly returns that were submitted on those dates and that the Appellant ought to have produced a print of the data that was sent. We do not consider that the absence of that evidence calls into question the Moneysoft screen prints. Those pages clearly refer to the submission of CIS300 monthly returns for the months in question. We assume it would have been open for HMRC to check their systems to identify what
40 was submitted by reference to the date, time, correlation ID and/or IRmark references covering the submissions referred to in the Moneysoft screen prints but they have not done so. In the absence of any further evidence from HMRC we consider that the

evidence adduced by the Appellant establishes that for periods 05/15 to 04/16 the Appellant's monthly returns were submitted on the dates contended for by the Appellant.

26. In relation to the monthly periods 05/16 to 08/16 the evidence adduced by the Appellant appeared to be derived from HMRC's own computer system. Mr Hill described them as receipts he had received from HMRC. That evidence was consistent with the records produced by HMRC save in relation to period 06/16. We had no evidence as to how HMRC's systems operate. We are faced therefore with an unexplained contradiction for period 06/16. Evidence derived from HMRC's computer system shows two different dates for receipt, namely 27 June 2016 and 17 June 2016. The evidence produced by the Appellant by way of a receipt from HMRC is actually much more detailed than that produced by HMRC on this appeal. It shows not only the date of receipt but the time of receipt, the success response, the IRmark, the time of HMRC's success response and it describes the document as a receipt for the CIS300 monthly return. HMRC have had an opportunity to verify the evidence relied on by the Appellant. They were first provided with copies attached to Mr Hill's original appeal on 26 September 2016. We are satisfied that the evidence relied on by the Appellant is more reliable than that relied on by HMRC.

27. We must now consider those periods where the Appellant has not relied on any documentation, that is periods 11/14 to 04/15 and period 09/16. For those periods the only documentary evidence we have as to the date of submission of the returns is that produced by HMRC. That evidence is from HMRC's computer system and there is no evidence to rebut the presumption in reg 43(3) of the 2005 Regulations. We are satisfied therefore in relation to those periods that the returns were not submitted until the dates identified by HMRC.

28. Mr Hill sought to reduce the penalties on the grounds of special circumstances. We find the following facts that are relevant to Mr Hill's arguments. We shall consider the arguments in more detail below.

29. We have already mentioned that the Appellant was paid by his customers after deduction of 20% tax under the CIS. For present purposes we accept the following figures provided to us by Mr Hill. As at 30 March 2015 the Appellant had suffered a 20% deduction from payments made by its customers amounting to £107,780 since it commenced trade. In turn, at the same date it had deducted £90,597 from payments made to its sub-contractors. The Appellant would have been entitled to a further credit for the balance of £17,183.

30. On 9 January 2016 the Appellant was accepted by HMRC for gross payment status. At that date the Appellant had suffered a 20% deduction from payments made by its customers of £235,635 since it commenced trade. In turn, tax deducted from payments to its sub-contractors of £198,342. The Appellant would have been entitled to a further credit for the balance of £37,293. Mr Hill claimed that there was a discrepancy between that figure and the Appellant's online account with HMRC but

as we explained during the hearing we have no jurisdiction over that matter in the present appeal.

5 31. We also accept for present purposes that the Appellant has been up to date with its corporation tax and VAT obligations and that Mr Monaghan is up to date in relation to his own tax obligations.

10 32. The figures given by Mr Hill involved a broad brush approach over the whole period for which the Appellant was not registered for gross payments. The way in which the CIS works is that a contractor such as the Appellant must deduct tax from payments to sub-contractors who are not registered for gross payments. The contractor is entitled to offset amounts deducted from its own income under CIS against its liability to account for sums deducted from payments to its subcontractors and against any liability it might have to HMRC for deductions it has made pursuant to a PAYE scheme. Any surplus is carried forward to the next month and so on until the end of the tax year at which stage it may be set off against a corporation tax liability or repaid.

Decision

33. We have found that the monthly returns for periods 05/15 to 11/15 and for period 06/16 were made on time and therefore we cancel the penalties in relation to those periods.

20 34. We have found as a fact that the monthly returns for periods 11/14 to 04/15 and 09/16 were submitted late on the dates identified by HMRC. Penalties were therefore due in relation to those periods. Mr Hill did not seek to rely on any reasonable excuse for the lateness of those returns.

25 35. Mr Hill did not take issue with the amount of the fixed penalties, however he did take issue with the amount of the tax geared penalties. He submitted that because there was a balance of CIS tax deducted due to the Appellant there was no outstanding tax on which the tax geared penalty could be calculated. We do not accept that argument. The tax geared penalties are payable pursuant to paragraph 10 Schedule 55 for returns which are more than 6 months late and pursuant to paragraph 30 11(5) for returns which are more than 12 months late. In each case the penalty payable is the greater of £300 or:

“5% of any liability to make payments which would have been shown in the return in question.”

35 36. The returns themselves must show payments made by a contractor to each sub-contractor in the monthly period covered by the return, together with deductions made by the contractor. Reg 7 of the 2005 Regulations provides that the contractor must pay those deductions to HMRC on a monthly basis. However sums which have been deducted from payments to a contractor within the CIS as described above may be treated by a company “as paid on account of any relevant liabilities” of the company

5 in the same tax year (section 62(3) FA 2004). Those liabilities are the company's liabilities as an employer or as a contractor in the CIS. Any sum not so relieved may be treated as corporation tax paid and any excess will be repaid. This treatment as a payment on account is a means of satisfying the contractor's obligation to make the payments shown in the monthly return.

37. It is clear that the "liability to make payments which would have been shown in the return" pursuant to paragraphs 10(2) and 11(5) Schedule 55 refers to the obligation under reg 7 of the 2005 Regulations. That is the sum which must be paid to HMRC before any sum is treated as a payment on account pursuant to section 62(3).

10 38. In the alternative, Mr Hill contended that the Appellant's right to set off deductions it had suffered under the CIS with the effect that no payment was ever due to HMRC amounted to special circumstances. HMRC should have reduced the penalties to nil on the grounds of special circumstances or on the basis that they were disproportionate.

15 39. We do not accept that argument. Our jurisdiction in relation to special circumstances is limited. We can only interfere with HMRC's decision that there were no special circumstances if we are satisfied that it was flawed in a judicial review sense. That is a high hurdle and would require the Appellant to satisfy us that the decision took into account irrelevant factors, failed to take into account relevant factors, was wrong in law or was a decision no reasonable officer could have reached.

20 40. Mr Hill's criticism of the decision not to reduce the penalty was that it failed to take into account that no tax was due under the CIS from the Appellant to HMRC. Even if that was the position at the time each return was due for submission, and Mr Hill made no attempt to establish that fact on a month by month basis, we do not consider that it is a relevant factor or that failure to take it into account was unreasonable. The purpose of the penalty regime in the context of CIS monthly returns is plainly to encourage compliance with the reporting requirement. It does so by the imposition of fixed penalties and in cases of extended non-compliance with a penalty geared to the payments shown by the return as due. That is the sum which the Appellant has failed to notify to HMRC by not making the return. There is no reason the penalty should be reduced by reference to other sums the Appellant may be able to take into account in satisfaction of that obligation. If Parliament had intended such sums to be taken into account it would have made express provision. We cannot therefore make any reduction in the amount of the penalties by reference to special circumstances. Further we do not consider that the penalties are in any way disproportionate to the defaults which occurred.

35 41. The result is that we affirm the penalties for periods 11/14 to 04/15 and 09/16

Conclusion

42. For the reasons given above we cancel the penalties for periods 05/15 to 11/15 and for period 06/16. The appeal is allowed to that extent. We affirm the penalties for periods 11/14 to 04/15 and 09/16. In the circumstances the penalties are reduced from £7,680 to £4,912.

5 43. Finally, it is a matter of concern that there should be unexplained discrepancies between the computer generated documents produced by HMRC and computer generated documents produced by Moneysoft and Mr Hill. There may be some explanation for those discrepancies but neither Mr Hunter nor Mr Hill was in a position to offer any explanation. It is important for the integrity of the system that
10 HMRC should seek to identify the explanation for those discrepancies in the light of the material produced in evidence on this appeal.

44. 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
15 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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**JONATHAN CANNAN
TRIBUNAL JUDGE**

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RELEASE DATE: 30 MAY 2017

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