[2015] UKFTT 0240 (TC)

# TC04432

**Appeal number: TC/2013/3587**

***INCOME TAX – penalties – mitigated CIS penalties – whether disproportionate – RCC v Bosher – whether delay in arranging oral hearing of appeal was breach of article 6 Convention for the Protection of Human Rights – appeal dismissed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**Mr JAMES MERRIN** **Appellant**

**- and -**

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

**TRIBUNAL: Judge Peter Kempster**
**Mrs Shameem Akhtar**

**Sitting in public at Priory Courts, Birmingham on 22 April 2015**

**Mr David Pattinson (David Pattinson Chartered Accountants) for the Appellant**

**Mr Martin Foster (HMRC Appeals Unit) for the Respondents**

## DECISION

1. The Appellant ("Mr Merrin") appeals against late filing penalties charged by the Respondents ("HMRC") pursuant to s 98A Taxes Management Act 1970.

2. During the course of enquiries into the tax affairs of Mr Merrin it came to the attention of HMRC that he had made certain payments from which tax should have been deducted at source, pursuant to the Construction Industry Scheme ("CIS") in ss 55-77 Finance Act 2004 and the Income Tax (Construction Industry Scheme) Regulations 2005, SI 2005/2045 (the "CIS Regulations"). Mr Merrin accepts that he was in breach of the CIS Regulations. That failure had two consequences:

(1) The under-deductions could be assessed on Mr Merrin, subject to a reduction under Reg 9 of the CIS Regulations for tax paid by the recipients of the payments (ie the subcontractors).

(2) Mr Merrin was liable to penalties for failure to file the required returns of payments made, pursuant to s 98A.

3. On 7 September 2011 HMRC wrote to Mr Merrin on both the above matters, stating:

> "I have enclosed a revised computation for your consideration of the Construction Industry Scheme Tax that is due in respect of the payments not covered by the Regulation 9(4). May I please have your agreement to my computation of the arrears outstanding?
>
> I am also writing concerning the fixed monthly Construction Industry Scheme penalties for the non operation of the Construction Industry Scheme for the period month ending 19/08/2007 to 19/06/2011.
>
> As a Contractor engaging sub contractors you failed to operate the new Construction Industry Scheme from 19/08/2007 until a scheme was opened for you on 06/07/2011. Fixed penalties for this period stated above, total £144,000 and are chargeable under Section 98A(2) of the Taxes Management Act 1970, but under this process authorisation has been sought to reduce the total amount payable to £5,610 which is the amount that would be charged under Schedule 55 of the Finance Act 2009.
>
> I am now seeking your agreement to pay the lesser amount of £5,610. If you are in agreement then you should write to me at the above address stating this. Once I receive your agreement to the lesser figure then I will ask you to sign and return a letter of offer for £5,610.
>
> I expect to receive your letter of agreement within 30 days from the date of this letter. If I don't receive a written reply, then HMRC will seek to recover the full £144,000."

4. The background to the "process" mentioned in that letter was examined by the Upper Tribunal (Warren J and Judge Bishopp) in *RCC v Bosher* [2014] STC 617 (at [14]):

> "… Sch 55 to the Finance Act 2009 introduced a new penalty regime for the late filing of returns (including CIS 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 would shortly come into force, HMRC introduced a revised policy for considering mitigation of penalties under s 102 of TMA for late contractors' monthly returns. This policy was announced on HMRC's website. HMRC compared the penalties charged under s 98A of TMA with the amounts that would be charged under Sch 55. If the penalties under the new regime were less, HMRC offered to mitigate the s 98A penalties to the lower amount, using their discretion under s 102 of TMA."

5. After receipt of HMRC's letter Mr Merrin instructed Mr Pattinson, and on 30 September 2011 Mr Pattinson wrote to HMRC, stating:

> "There are several points of your most recent letter which are unacceptable:
>
> 1. You are still asking Mr. Merrin to pay CIS tax which should have been deducted, mainly for the tax year 2010/11, although amounts for earlier years will not be pursued because the same subcontractors (mainly) have paid their tax liabilities. It is reasonable to assume that they will also pay their 2010/11 tax, so collecting CIS tax would be double taxation.
>
> 2. You have mentioned a figure of £144,000 for fixed penalties without giving any details of how you calculated it.
>
> 3. Likewise, you have not said how you calculated the lower figure of £5,610 which you have asked Mr. Merrin to agree to pay.
>
> 4. Although you have sent a factsheet about the Human Rights Act, you do not seem to understand the nature of its provisions. The right to a hearing before an independent tribunal is inalienable, but that right would not be available under a contract settlement, so the contract itself could not be valid. You have to issue penalty notices, as an appeal is the only mechanism by which Mr. Merrin could exercise his right to a hearing.
>
> Finally, please issue a Closure Notice for the enquiry into the 2009 return, as you do not seem to have any more questions."

6. The point in paragraph 4 of that letter is one which Mr Pattinson reiterated before us and we can dispose of here. Although HMRC's letter did not spell out that the reduction they proposed was by way of mitigation pursuant to s 102, the offer of a contract settlement was being made on that basis. We cannot see that an offer to settle for payment of £5,610 statutory penalties totalling £144,000 can constitute a breach of Mr Merrin's human rights, and we dismiss that argument accordingly.

7. In relation to the tax liabilities (as opposed to the penalties) the end result was that HMRC were satisfied after enquiry that the various subcontractors have paid the

appropriate tax and, therefore, deductions have been allowed under Reg 9 so that no tax is due from Mr Merrin.

8. In relation to the s 98A penalties, HMRC accept that their calculation of £144,000 should be adjusted to reflect that the first late return was that for September 2007 rather than that for August 2007. HMRC calculate the adjusted s 98A penalties at £140,000. Mr Pattinson does not accept that figure but the point is academic since HMRC have stated throughout (and Mr Foster for HMRC confirmed both in his statement of case and at the hearing) that if the appeal was dismissed then HMRC would mitigate the penalties to £5,610.

9. In relation to the calculation of the amount of penalties that would apply under sch 55, HMRC consider that £5,610 is correct. Mr Pattinson argues that the amount should be £51 lower, because the last two charges (in the terminology used in HMRC's schedule that was before the Tribunal, the £34.10 six month geared penalty for the December 2010 return and the £16.80 twelve month geared penalty for the June 2010 return) should be removed. We are not clear if that point has already been put to HMRC and dismissed, or if it was advanced first at the hearing – if the latter then doubtless HMRC would consider it before finalising the mitigated amount. We do not consider the point is material to the matters before the Tribunal and we shall assume that the mitigated amount would remain at £5,610.

10. One of Mr Merrin's grounds of appeal is that the s 98A penalties are so harsh as to be disproportionate and thus legally invalid. That was, of course, one of the main points considered in *Bosher*, which was decided after Mr Merrin lodged his appeal with the Tribunal – we examine the chronology of the appeal later. Mr Pattinson accepts that in considering proportionality the penalty to be examined is that actually suffered (see *Bosher*), which here is the mitigated amount of £5,610. Mr Pattinson also accepts (and we agree) that in relation to Mr Merrin's case a penalty of £5,610 is not disproportionate, given the number of defaults and length of delay being penalised.

11. Mr Merrin has a further ground of appeal, which we consider below. Before dealing with that we summarise our conclusions so far as being that (i) Mr Merrin is liable to penalties under s 98A; and (ii) mitigated penalties in the amount of £5,610 are not disproportionate, given the number of defaults and length of delay being penalised.

**Article 6 Rights**

12. Mr Merrin's final ground of appeal is that delays have occurred in bringing his appeal to a hearing which amount to a breach of his human rights. In Mr Pattinson's submissions on this point there was some uncertainty as to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("the Convention") and the Human Rights Act 1998, and the identification and citation of the relevant caselaw. We consider the following paragraph is a fair restatement of the point which Mr Merrin wishes to plead.

13. Mr Merrin contends:

(1) Article 6(1) of the Convention (so far as relevant) states: "In the determination of … any criminal charge against him, everyone is entitled to a … hearing within a reasonable time by [a] … tribunal …".

(2) The severity of the penalties under appeal constitutes a "criminal charge" for the purposes of Art 6(1): *Engel v Netherlands (No 1)* (Applications 5100/71, 5101/71, 5102/71) (1976) 1 EHRR 647.

(3) From HMRC's 7 September 2011 letter ([3] above) it was clear that they had at that date determined that s 98A penalties were assessable. HMRC had determined even earlier (July 2011) that under-deducted tax was due from Mr Merrin under the CIS. Mr Pattinson's 30 September 2011 letter ([5] above) raised the issue of Mr Merrin's Art 6 rights. A penalty assessment was finally issued on 13 March 2013. Mr Merrin had no right of appeal to a tribunal until after the issue of the assessment. HMRC had deliberatively delayed issuing a penalty assessment and had attempted to coerce Mr Merrin into entering a contract settlement, which he had made clear was unacceptable to him. The delay was a breach of Art 6(1). In *King v UK (No 3)* (Application no 13881/02) [2005] STC 438 the European Court of Human Rights had held that a delay of nine months between issuing a tax assessment and a penalty notice was in breach of Art 6(1) – here the delay was twice as long.

(4) There had been further delays after Mr Merrin filed his appeal with the Tribunal on 21 May 2013. The appeal was stayed while *Bosher* was heard by the Upper Tribunal. After *Bosher* was determined, Mr Merrin confirmed to the Tribunal on 27 February 2014 that he intended to continue his appeal. Despite several chasers and a formal complaint no action had been taken by the Tribunal until case management directions were issued on 13 January 2015, which resulted in the current hearing. It did not matter that those further delays were on the part of HM Courts & Tribunals Service ("HMCTS"), rather than HMRC – the result was still that Mr Merrin had been denied a hearing within a reasonable time.

14. Mr Foster for HMRC submitted as follows:

(1) Once the CIS under-deductions by Mr Merrin had been discovered by HMRC, it was still necessary for HMRC to establish whether any Reg 9 deductions were available to Mr Merrin. He had contended that deductions may be available to cover all the liabilities, and that had indeed proved to be the case. HMRC could not verify the position until the self-assessment returns for all the subcontractors had been submitted and examined. There had been no undue delay.

(2) HMRC could not comment on the delays that had occurred on the part of HMCTS.

(3) The amount of the s 98A penalties was unaffected by any delay, as was the amount of the mitigated penalty.

*Consideration*

15. We agree that the disputed penalties constitute a "criminal charge" for the purposes of Art 6(1), and thus engage Mr Merrin's right to a hearing within a reasonable time – see *Jusilla v Finland* [2009] STC 29 at [29 – 39].

16. In relation to events leading up to Mr Merrin's notification of his appeal to the Tribunal on 21 May 2013, we do not accept that there was any unreasonable delay by HMRC. HMRC were not in a position to establish the tax due until they had full information concerning the Reg 9 deductions that Mr Merrin (correctly) claimed should be allowed. That involved consideration of the tax returns of the various subcontractors, and HMRC did not delay in carrying out that exercise. It was reasonable for HMRC to hold back formal assessment of the penalties until they had established the amount of tax due from Mr Merrin (which after Reg 9 deductions was nil). HMRC were prompt in warning Mr Merrin that a liability to s 98A penalties had arisen, and in offering a very substantial mitigation of the penalties. Further, we do not accept Mr Pattinson's submission that HMRC deliberately delayed issuing a penalty assessment, for which contention we can find no evidence in the materials before us. Accordingly, we find there was no breach of Mr Merrin's Art 6 rights in the period up to 21 May 2013.

17. Turning to events after Mr Merrin's notification of his appeal to the Tribunal on 21 May 2013, we give the chronology as follows:

(1) 21 May 2013 – appeal notified to Tribunal

(2) 23 July 2013 – proceedings formally stayed pending decision of Upper Tribunal in *Bosher*

(3) 17 January 2014 – HMRC produce statement of case

(4) 24 February 2014 – Tribunal enquires whether appellant wishes to continue appeal post-*Bosher*

(5) 27 February 2014 – appellant confirms intention to continue

(6) 23 April, 3 June, 3 July, 11 August & 28 October 2014 – appellant chases Tribunal for progress on fixing a hearing date – August and October letters specifically refer to Art 6 right to a hearing within a reasonable time

(7) 3 July 2014 – HMRC chase Tribunal for progress on proceedings

(8) 18 December 2014 – appellant makes formal complaint to HMCTS about delays in responding to correspondence

(9) 22 December 2014 – HMCTS gives apology to appellant, stating:

> "*Delay in progressing Mr Merrin's appeal*
>
> Thank you for your letters received 25 April 2014, 06 June 2014, 07 July 2014, 13 August 2014, 30 October 2014 and 22 December 2014 setting out your wish to progress your client's tax appeal and our lack of response to the earlier letter. I am sorry you have had reason to complain about the service you have received from the First-tier Tribunal - Tax. I am also sorry for the delay in replying to you.
>
> I realise that you have found our handling of your appeal frustrating. I have looked into the reasons why it had not been progressed further and a hearing arranged if that was the most suitable course of action. I have found that the appeal was referred to the registrar for further instruction by a caseworker on 16 May 2014. Your further correspondence was added to the appeal as is usual practice so that any outstanding correspondence can be dealt with simultaneously. Your

> client's appeal has been delayed due to the high volume of appeals awaiting review by the registrar.
>
> I have spoken to the registrar today and made her aware of your correspondence and it's contents. I have requested that this appeal be reviewed as soon as is practicable.
>
> I am sorry for any inconvenience this delay has caused you and your client. If you are not satisfied with my reply, you can write to: [contact details for HMCTS Operations Manager]. Please explain why you remain dissatisfied."

(10) 13 January 2015 – Tribunal's Registrar issues case management directions and gives apology to appellant, stating:

> "Further to my earlier telephone call, I am sorry that I misfiled your client's papers and that this has meant there has been some delay in arranging a hearing of your client's appeal for which I apologise.
>
> On reviewing the papers, I note that this appeal has been stayed pending the outcome of the Bosher appeal and that we contacted you after the Bosher decision became final to ask how your client would like to proceed. You indicated that you wish the matter to proceed to hearing.
>
> As we have received Statements of Case from you and HMRC, the Tribunal has issued the enclosed Directions so that the case can proceed to hearing."

(11) 11 March 2015 – notice of hearing issued, listing 22 April

18. We consider it was entirely appropriate for the appeal to be stayed pending the outcome of *Bosher*, and thus we have no concern in relation to the period up to 27 February 2014, when Mr Pattinson confirmed that Mr Merrin still wished to continue his appeal. In the normal course of events, case management directions to move the appeal to a hearing would then have been issued by the Tribunal in March 2014. That did not happen in this case – instead, case management directions were not issued until January 2015, and the appeal was heard in April 2015. Once the directions had been issued in January, we consider that a normal and reasonable timetable followed to the hearing in April. That leaves the period from March 2014 to January 2015 when, as explained by HMCTS, the appeal papers were misfiled and no progress was made. That delay was, of course, very unfortunate and Mr Merrin has received formal apologies. Was that ten month delay such as to constitute a breach of his Art 6 right to a hearing within a reasonable time?

19. Mr Pattinson relies on the *King v UK (No 3)* case. That case involved a particularly extreme situation where the total period taken into consideration by the ECHR was almost 14 years (at [33]). The Court stated (at [38]):

> "The court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and having regard to the criteria laid down in the court's case law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, and the importance of what is at stake for the applicant in the litigation (see, among other authorities, *Pélissier v France* (App no 25444/94) (25 March 1999, unreported), para 67)."

20. In relation to the complexity of the case, we consider (as we have already stated) that it was entirely appropriate for the appeal to be stayed pending the outcome of *Bosher*. The delays in the March 2014 to January 2015 period were unrelated to the complexity of the case, being wholly due to administrative error.

21. In relation to the conduct of the appellant, Mr Pattinson on Mr Merrin's behalf was diligent in pursuing the Tribunal for progress on the proceedings, and the delays in the March 2014 to January 2015 period were not attributable to the conduct of the appellant.

22. In relation to the conduct of HMCTS, the delays in the March 2014 to January 2015 period were entirely due to the unfortunate misfiling of the appeal papers, and thus entirely due to the conduct of HMCTS.

23. In relation to the importance of what is at stake for Mr Merrin in the litigation, we have come to the following conclusions. First, Mr Merrin has been aware throughout that HMRC would accept penalties in the mitigated amount of £5,610 and that situation has not varied because of the delays in the March 2014 to January 2015 period; in particular, he has been aware all along that HMRC did not intend to collect the full £144,000 penalties assessed. Secondly, the delays which have occurred have not changed the amount of mitigated penalty which HMRC (subject to the outcome of this appeal) intend to collect from Mr Merrin. Thirdly, the delays have not prejudiced Mr Merrin in his conduct of his appeal; this is not a case where, for example, there has been reliance on witness memories or availability of documentation that may have been adversely affected by the passage of time.

24. Overall the only effects of the delays in the March 2014 to January 2015 period have been:

(1) The inconvenience to which Mr Merrin has been subject. That was very unfortunate and Mr Merrin has received formal apologies from HMCTS for the inconvenience caused.

(2) Additional professional costs occasioned by the necessity for Mr Pattinson to chase HMCTS in the March 2014 to January 2015 period. That is not a matter on which this Tribunal can provide any remedy, although it may be something that can be addressed in the course of Mr Merrin's formal complaint to HMCTS.

25. After careful consideration of all the above points, we do not consider the effects of the delay for Mr Merrin are sufficiently grave so as to constitute a breach of his Art 6 right to a hearing within a reasonable time.

**Decision**

26. The appeal is DISMISSED.

27. 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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**PETER KEMPSTER**
**TRIBUNAL JUDGE**

**RELEASE DATE: 21 May 2015**