



TC05656

Appeal number: TC2016/03765

CONSTRUCTION INDUSTRY SCHEME (CIS) – penalty for late filing of contractor returns; whether reasonable excuse for late filing; no; Finance Act 2009 Schedule 55 paragraph 23; appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ADRIAN DOBBS

Appellant

- and -

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

TRIBUNAL: JUDGE J GORDON REID QC, FCI Arb.

The Tribunal determined the appeal on 6 February 2017 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 12 July 2016 (with enclosures), HMRC's Statement of Case (with enclosures) acknowledged by the Tribunal on 5 September 2016 and sundry correspondence.

DECISION

Introduction

- 5 1. This is an appeal against the late filing of monthly contractor returns under the Construction Industry Scheme (CIS). The only issue in the appeal is whether the appellant (Mr Dobbs) had a *reasonable excuse* for such failure. The sum at stake is £3,000.

Procedure

- 10 2. On 9 November 2016, the tribunal directed the appellant to send to the Tribunal and HMRC copies of any documents which he wished to rely on to establish a reasonable excuse. The case was listed for a default paper hearing.
3. Neither party has requested a hearing. Neither party has submitted any further documents or information.

15 Statutory Background

4. The CIS relating to the periods in question provides for certain payments made under construction contracts by a contractor to a subcontractor to be made under deduction on account of income tax. Subcontractors, registered for gross payment may receive payment without deduction.
- 20 5. The relevant statutory provisions are to be found in ss58-60 (definitions), ss61 and 63 (calculation of deductions) and s70 (submission of periodic returns), of FA 2004, and section 98A(2)(a) of the Taxes Management Act 1970 (imposition of penalties). The primary legislation is supplemented by regulations namely the Income Tax (Construction Industry Scheme) Regulations 2005, SI 2005 No. 2045.
- 25 Regulation 4 deals with the timing and content of the return (in effect a return to be made by the 19th of the month ie 14 days after the end of each tax month). Subject to certain exception (not relevant for present purposes), a *nil* return must also be submitted even if no payments have been made by the contractor. None of this is directly relevant to the question of reasonable excuse.
- 30 6. Penalties are payable under paragraphs 8-11 of schedule 55 FA2004. Quantum is not in dispute; broadly the amount payable is £100 if the return is late and £200 if it is over two months late. Filing even later attracts greater penalties (see paragraphs 10 and 11). Paragraph 16 provides for the reduction of a penalty because of *special circumstances*. None was found by HMRC and none is raised in this appeal.
- 35 7. More importantly, for present purposes, paragraph 23 (which relates to reasonable excuse) provides as follows:-

(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)—

5 (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

10 (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.

Factual Background

8. The appellant operates in the construction industry and falls within the CIS. Details of the nature of his business have not been produced. He has, in the past,
15 worked as a subcontractor in the construction industry for a number of years.

9. According to HMRC records, the appellant paid his first subcontractor during the period 6 April 2014 to 5 May 2014. He was not then registered for the CIS.

10. In or about 2015, the appellant was the subject of a compliance investigation by HMRC. The investigation revealed that he should have been registered from an
20 earlier period. One result of it was that he registered under the CIS.

11. The appellant registered under the CIS on or about 8 January 2016. The contractor monthly returns for the period between May 2014 and February 2015 were all filed on 26 January 2016. The effective *start date* of the registration was 6 April 2014.

12. Thereafter, penalties under paragraphs 8 and 9 of Schedule 55 to FA2009 were imposed on the appellant for the periods ending 5 May 2014 to the period ending 5 February 2015 consequent upon his failure to register. The liability (subject to the question of *reasonable excuse*) of the appellant for the periods specified in the notices is not in dispute. A penalty notice for the period from 6 June 2014 to 5 July 2014 was
30 cancelled in error but has not been reinstated.

13. On or about 10 March 2016, the appellant appealed against the penalties. In his letter to HMRC dated 11 March 2016, the appellant relies on personal circumstances, a bereavement, an *unsettled* divorce, and a medical condition including stress, anxiety and depression. He says he was prescribed medication. He offered to provide
35 medical evidence on request (None of any of this has been vouched or particularised either following upon the Direction dated 9 November 2016 or otherwise).

14. The appellant also claims to have relied on his accountant. (see Notice of Appeal) but he makes no mention of this in his letter dated 11 March 2016.

15. By letter to the appellant dated 1 April 2016, HMRC refused his appeal.

16. The appellant sought a review on or about 4 April 2016, pointing out that he was unaware of the need for registration but registered as soon as he found out. He also referred to his divorce. However, HMRC upheld its decision by letter dated 31 May 2016. In that letter, HMRC pointed out *inter alia* that (1) the appellant's liability to render monthly contractor returns was triggered on 6 April 2014 when he started operating as a contractor, (2) by the time the appellant submitted the contractor monthly returns the contractor monthly return deadlines had been missed (3) not being aware of his statutory obligations was not a reasonable excuse, (4) information about operating and registering as a contractor was freely available on HMRC's website. The letter gave the appellant the opportunity to provide further information in support of his *reasonable excuse* claim in relation *inter alia* to bereavement, divorce and his health. HMRC also considered whether there were any special circumstances which would justify reducing the penalties but decided there were none.
- 15 There was a further exchange of correspondence on 17 and 24 June 2016. HMRC reiterated their position.

HMRC Case

17. HMRC's position is summarised above. They do not appear to have dealt separately with the reference to the appellant's accountant. I consider this below.

20 The appeal

18. The Notice of Appeal dated 10 July 2016 is late but HMRC have not objected to it proceeding, albeit late by a few weeks. In the circumstances, the tribunal considers it fair and just to allow the appeal to proceed.

19. Under the section of the Notice of Appeal (5) dealing with hardship the appellant states

A LIST OF DOCUMENTS HAVE (SIC) ALREADY BEEN FORWARDED TO HMRC.

DOCTORS NOTE, DIVORCE PAPERS AND BEREAVEMENT DATES

30 MY ACCOUNTS HAVE ALWAYS BEEN DEALT WITH BY AN ACCOUNTANT AND I WAS NEVER ADVISED TO REGISTER CIS UNTIL RECENTL AND AS I WAS ADVISED THIS I COMPLIED AND I FEEL I SHOULD NOT BE PUNISHED NOR DO I HAVE THE FUNDS TO PAY THESE PENALTIES

20. The section headed Grounds of Appeal simply cross refers to section 5 of the Notice of Appeal

21. No such documents have been produced to the tribunal.

35 Discussion and Reasons

22. The appellant has been given several opportunities to amplify and, if appropriate, vouch the general grounds on which he bases his assertion that he has a reasonable excuse for failure to file contractor returns on time. However, he has not

done so. The reality is that his failure was revealed by a compliance investigation. The appellant was trading as a contractor but there was no operating cause that could justify his failure to render returns on time other than his apparent lack of knowledge of his statutory obligations.

5 23. As for reliance on a third-party accountant, the facts are vague and appear to be somewhat different from *Taylor* [2015] UKKFTT 509 (TC) where the accountant in question was under greater pressure than normal in the days before 31 January but had not informed the taxpayer, who had delivered his books to her in the usual way at the usual time. In the present appeal, there is no information about the relationship
10 between the accountant and the appellant. The late registration was prompted by HMRC's compliance investigation. The accountant's knowledge, involvement and terms of engagement are unknown despite the opportunity given to the appellant by the above-mentioned directions and the correspondence to amplify and vouch his case. It is not possible to conclude that the conduct of the accountant has created a
15 reasonable excuse. The tribunal cannot conclude to what extent the appellant relied on his accountant to register under the CIS.

24. Nor is it possible to identify the connection between late filing and any personal or financial circumstances or financial pressure under which he was said to be labouring. When did they start and how did they affect his business? These are,
20 unfortunately for the appellant, not at all clear. The same difficulties arise when one begins to consider Mr Dobbs' poor health. How did this prevent him from registering between April 2014 and May 2015?

25. The whole notion of the appellant having a reasonable excuse is somewhat artificial. He cannot rely on his alleged ignorance of the basic law of the CIS that he ought to have registered under it, operated the system and made regular returns even if ultimately, they were *nil* returns. Basic ignorance of the primary law governing registration under the CIS is not a reasonable excuse (see *Neal v CC&E* [1988 STC] 131 at 135-6).

26. Even if the returns in question were *nil* returns what matters is the lateness not
30 the amounts involved here.

27. It is difficult, on any view, to see how a combination of the general circumstances relied on could create a situation that was not reasonably avoidable throughout the period between April 2014 and February 2015 and thus constitute a *reasonable excuse*

35 28. Insofar as relevant at all here, there is no basis on which the tribunal could conclude that any insufficiency of funds was attributable to events outwith the appellant's control. A reasonable excuse is generally regarded as one involving events outside the taxpayer's control.

40 29. A reasonably prudent contractor taxpayer would be at least aware generally of the existence of the CIS and act or make enquiries accordingly. A letter from his

accountant stating that the CIS did not apply to him or something similar would or at least might create an entirely different picture but there is nothing of that sort here.

30. The appeal must therefore be dismissed.

5 31. 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
10 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

J GORDON REID QC F.C.I.Arb.

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**TRIBUNAL JUDGE
RELEASE DATE: 10 FEBRUARY 2017**