[2019] UKFTT 309 (TC)

TC07137

Appeal number: TC/2017/07563

INCOME TAX - CONSTRUCTION INDUSTRY SCHEME (CIS) - Failure to file CIS monthly returns - 34 separate penalties - Remarks on burden, and evidential inadequacy - Appeal allowed in relation to 33 penalties - Was there a reasonable excuse in relation to the remaining penalty? - No - Appeal dismissed in relation to that penalty - Appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

ESE RENDERING SOLUTIONS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MISS SUSAN STOTT FCA CTA

Sitting in public at Llandudno Magistrates Court, Conway Road, Llandudno, on 15 April 2019

Mr Jonathan Jones FCA CTA, of Henry R Davis & Co Ltd, Queensferry, for the Appellant

Mr Barry Sellars, an Officer of HMRC, for the Respondents

DECISION

1. The Notice of Appeal, dated 26 September 2017, seeks to challenge 34 separate penalties, totalling £6,900, imposed by HMRC on the Appellant limited company pursuant to Schedule 55 of the *Finance Act 2009*, in relation to the Appellant's late filing of Contractors' Monthly Returns (Forms CIS 300) for a succession of periods from August 2015 to January 2017.

2. The Notice of Appeal was filed out of time. We extend the time for appealing of our own initiative, pursuant to Rules 2 and 5 of the Tribunal's Rules, noting (i) the absence of objection from HMRC and (ii) the detailed procedural history given by the Tribunal (Judge Jane Bailey) as the background to her directions released to the parties on or about 26 October 2018. Judge Bailey remarked "... initially HMRC was unwilling to extend time ... However, by the time HMRC produced their Statement of Case (29 November 2017) it seems that HMRC had changed their mind ... and had gone on to consider the substance of the appeal."

3. The Appellant Company was incorporated on 26 March 2015. It has two directors, one of whom was Katie Langton. It was registered as an employer and contractor for CIS purposes on 14 April 2015. It was, and remains, in business as a plastering and rendering contractor.

4. At the hearing, the Appellant produced documentation which led HMRC, through Mr Sellars, to accept that a reasonable excuse existed for the period until January 2016, and therefore led HMRC to concede the appeal in relation to the penalties imposed in relation to the earliest periods in dispute - August 2015 (x4 penalties), September 2015 (x4), October 2015 (x1), and November 2015 (x4). Mr Sellars told us that those penalties would be administratively discharged.

5. We commend him for his pragmatic approach, even though the documentation produced by the Appellant on the day of the hearing could (and, had the Tribunal's directions been followed by the Appellant, should) have been provided to HMRC sooner. Nonetheless, given that concession, we allow the appeal against the 13 penalties relating to those periods as set out in the Table at Paragraph 6 of the Respondents' Statement of Case. However, HMRC maintained its position that the circumstances amounting to a reasonable excuse for those periods had come to an end by January 2016.

6. One feature of relevance immediately emerges: even though the Company was registered for CIS from 14 April 2015, no penalties were apparently imposed in relation to any month before August 2015.

7. The Appeal is advanced on several grounds. Foremost amongst these is the allegation that 'No penalty notices were received by the Company'. This repeats what was said in the Appellant's representative's letter of 9 August 2017: 'No penalty notices were received by Ms Langton'.

8. We remind ourselves that this is a penalty appeal, and accordingly (as HMRC properly acknowledges in its Statement of Case) HMRC bears the burden of establishing (albeit only to the civil standard, that is to say, on the balance of probabilities) that the penalties remaining in issue are due and payable.

9. Given that the Appellant clearly disputes that the penalty notices had been served, the point is one which we must determine.

10. In this regard, the Respondents - as Mr Sellars appeared to acknowledge - encounter significant evidential difficulty. The Respondents had not filed any witness statements. For the sake of completeness, we note that the Tribunal's directions did not make any provision for witness evidence, but the directions nonetheless did make the usual provision that any party could apply at any time for those directions to be amended. HMRC had not made any such application.

11. Paragraph 7 of the Respondents' Statement of Case reads as follows:

> "The penalty notices were issued to the Appellant and their representative on the dates detailed to the addresses held on record. None of the notices were returned as undelivered."

12. As various panels of the Tribunal have remarked, in the closely analogous context of penalties for the late filing of self-assessment returns, this is a fact-finding jurisdiction, and facts are found on the basis of evidence. As such, evidence (irrespective of whether the evidential burden is on the Appellant or the Respondents) is a necessity, and not a luxury. But, having said that, in an adversarial system, it is down to each of the parties to advance the evidence upon which that party will seek to rely.

13. A Statement of Case is not a type or species of evidence. An assertion in a Statement of Case is not evidence, nor is it of probative value as to the matter in issue.

14. Whilst Assistant Officer McConville of HMRC's PT Operations North East England wrote a letter on 7 September 2017, setting out, in a table, all the penalties said to have been issued, each given a 'Unique Identification', with a column giving 'Date Penalty Notification Issued', there is nothing, in that letter, to elucidate or substantiate the source of Officer McConville's information. Moroever, the table in that letter does not match the table in the Statement of Case, and there is no evidentially admissible explanation for the inconsistencies.

15. We were informed by Mr Sellars that there is no copy of any of the Penalty Notices. We were informed that the process is an automated one, and that no copies are kept. That is not an entirely unusual feature, and indeed may not - in and of itself - have proved an insuperable obstacle to HMRC discharging its burden.

16. However, the evidential difficulty facing the Respondents is compounded by their failure to place any 'system print' before us in evidence.

17. The only documentary evidence before the Tribunal as to the penalties is produced by the Appellant:

(1) A letter to the Company, at its registered address (the accountants' offices), from Debt Management, dated 16 December 2016, and date-stamped on 23 December 2016, relating to a CIS Fixed Penalty of £200 for the period ended 5 August 2016; and a CIS Fixed Penalty of £100 for the period ended 5 October 2016;

(2) A materially identical letter to the Company, at its registered address (the accountants' offices), from Debt Management, dated 23 January 2017, and date-stamped in on 27 January 2017, relating to the same two CIS Fixed Penalties.

18. Both letters are headed 'Construction Industry Scheme amount due'. Both have a Schedule headed 'Statement of Liabilities'. The first letter says "We have charged you a penalty as you didn't file one or more of your Construction Industry Scheme ... returns on time."

19. One relevant feature to be taken from these letters is that neither letter refers to anything other than £200 for August 2016, and £100 for October 2016. This sits very uneasily with HMRC's stated case, being that, as at December 2016, there were multiple penalties imposed, due, and payable, for a long succession of other months. For instance, for the period August 2015, HMRC's stated case is that four separate penalties had been issued - £100 (10 September 2015); £200 (27 October 2015); £300 (28 August 2016); £300 (7 September 2016) - and all were unpaid. The same can be said of other months. We simply do not understand why, if HMRC, at December 2016, was indeed owed money in relation to other penalties, why those were not mentioned and were not apparently being pursued.

20. In short, there is no evidence, before 16 December 2016, of any penalties being issued at all.

21. Given the nature of the Appellant's case, and the fact that HMRC bears the burden of showing that the penalties were actually issued, then HMRC has failed to discharge the burden in relation to any penalties said to have been issued by it before 16 December 2016, except for those referred to in more detail below. The penalties antedating 16 December 2016 (except for those referred to below) simply cannot be sustained and the appeal in relation to them must be allowed.

22. Paragraph 19 of the Respondents' Statement of Case reads as follows:

"The Respondents consider that whilst it is possible that one or two of the notices may not have been received by the parties, it is unlikely that every notice issued to both the Appellant's trading address and the registered office would fail to be delivered over a period spanning from April 2016 to May 2017"

23. As a proposition, that is comprehensible, although it fails (for the reasons already set out) to meet the evidential burden imposed on HMRC.

24. It is here that the two letters re-engage. Those two letters self-evidently undermine the Appellant's broad assertion that no penalty notices were ever received. That assertion was demonstrably wrong and should not have been made in the sweeping way that it was.

25. Nonetheless, we accept the oral evidence of Mr Jones, the Company's (external) accountant that no other CIS documents or penalties had been received at his office, or had been found by him on the Company's file. That evidence was not challenged by HMRC.

26. This means that the appeal against all the remaining penalties in the Table to the Statement of Case must be allowed, except for the penalties referred to in the two letters. This is because we accept Mr Jones' oral evidence (which was not challenged by HMRC) that the above two letters were - as a matter of fact - received at his office, and were scanned in the office and emailed to the Company.

27. In consequence, we find that HMRC did give notice of those two fixed penalties, and that the Company was made aware, in mid-December 2016, that it was being penalised for the late return of CIS returns for the periods ending 5 August 2016 (in the fixed penalty sum of £200) and 5 October 2016 (in the fixed penalty sum of £100). Those are the only things which the Company was being made expressly aware of.

28. However, since no £200 penalty appears in HMRC's Schedule for the period ending 5 August 2016, then the matter in relation to the Company's awareness of that particular penalty ends there: it is not part of this appeal.

29. As to one remaining penalty - the £100 fixed penalty for the period October 2016 - we are satisfied that the Company was made aware of it, through its accountants, in December 2016. The monthly return for that period was due by no later than 19 October 2016, but was not received (as part of a batch of returns) until 29 June 2017.

30. Subject to whether a reasonable excuse exists, that penalty is due and payable.

31. The test which we must apply is whether the Appellant, in the circumstances of this appeal, acted reasonably. That is to say, did the Appellant (through its director) act as a reasonable taxpayer, exercising reasonable foresight and due diligence, and mindful of its proper obligations under the legislation: see (for example) *Barrett* [2015] UKFTT 0329 (TC) (Judge Roger Berner)

32. The Appellant bears the burden in establishing that it meets this test. The standard of proof is the balance of probabilities.

33. The Appellant has not satisfied us that it has a reasonable excuse for the late filing.

34. We do not consider there to be have been any reasonable excuse for the 253 day delay from 19 October 2016 to 29 June 2017. There was no direct evidence from Ms Langton, even though she was present at the hearing and could have been called to give evidence if she had so wished.

35. The upsetting circumstances relied on in the Grounds of Appeal occurred in December 2014 and mid-2015. Although HMRC accepted that a reasonable excuse existed until January 2016, there is still a long delay from then until June 2017. There is no evidence that Ms Langton's condition or circumstances after January 2016 stood in the way of her filing this CIS monthly return. Indeed, a return (for December 2016) seems to have been filed on 19 April 2017. Moreover, the Company remained trading throughout.

36. There is no evidence that the Company was reliant on any other person to deal with its CIS monthly returns for it.

37. We do not consider that we have any jurisdiction to consider the proportionality of the £100 penalty, nor whether it is harsh or unfair. As the Upper Tribunal (Rose J, as she then was, and Judge Berner) remarked in *HMRC v Trinity Mirror* [2015] UKUT 0421 (TCC) (a case which concerns the VAT default surcharge regime) Parliament has a wide discretion in devising a suitable scheme for penalties, and therefore a high degree of deference is due by courts and tribunals when determining the legality of penalties. We must be astute not to substitute out own view of what is fair for the penalty which Parliament has imposed.

38. In the course of a careful and thorough review, the Upper Tribunal held that it was possible, at least in theory, for an individual case to result in a penalty that might be considered disproportionate, this was *'likely to occur only in a wholly exceptional case, dependent upon its own particular circumstances'*: see Paragraph 66 of the judgment.

39. However, in the circumstances of this appeal, we do not consider the £100 penalty to be disproportionate. We do not consider this to be a wholly exceptional case.

40. We do not have jurisdiction to consider whether a penalty is harsh or unfair. Our duty is to apply the law as laid down by Parliament. The legislation does not permit us to adjust or cancel a penalty of this kind on the basis that it appears unfair.

41. Nor do we consider it relevant that the Company was always in a refund situation - i.e., the CIS suffered exceeded the CIS deducted from its sub-contractors and the PAYE/NI deducted from employees. The reason for this is that the fixed penalty regime does not penalise the late payment of tax, but the late submission of returns.

42. Nor is it relevant - insofar as the state of the Appellant's evidence allows us to make any findings - that the Appellant was new to CIS (with the inference that it should be afforded some latitude). It was the Company's responsibility - as with all taxpayers equally in the CIS - to make sure that it followed the law. But, and in any event, by December 2016, it was far from new to the scheme, having been in it, by that point, for about 18 months.

43. We are invited to consider whether the penalty should be reduced below the statutory minimum because of 'special circumstances': see Schedule 55 Paragraph 16(1). We do not consider the circumstances here to be special in the generally-accepted sense of 'exceptional, abnormal, or unusual' or 'something out of the ordinary run of

events'. There is no real explanation, from the Company, as to why the Company, being made aware, through its accountants, in December 2016 and January 2017, that a monthly return was required for October 2016, did not file one until June 2017.

Outcome

44. Accordingly, the appeal against all the penalties set out in HMRC's Statement of Case - except the £100 fixed penalty notified by HMRC's letters of 16 December 2016 and 23 January 2017, being for the period ending 5 October 2016 - is allowed.

45. The appeal against that £100 fixed penalty is dismissed. That fixed penalty is due and payable.

46. 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.

DR CHRISTOPHER MCNALL
TRIBUNAL JUDGE

RELEASE DATE: 10 MAY 2019