



**TC01407**

**Appeal number: TC/2011/02008**

*Construction Industry Scheme—Penalties for late returns (Taxes Management Act 1970 s.98A)—Appeal dismissed*

**FIRST-TIER TRIBUNAL**

**TAX**

**P G GLAZING LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: Dr Christopher Staker (Tribunal Judge)**

**The Tribunal determined the appeal on 13 July 2011 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 7 March 2011, HMRC's Statement of Case dated 11 April 2011, and other papers in the case.**

## DECISION

### Introduction

- 5 1. This is an appeal against two penalties of £100 each, imposed on the Appellant under s.98A(2)(a) of the Taxes Management Act 1970 (the “TMA”) for late provision of monthly returns under the Construction Industry Scheme (“CIS”) for the months ending 5 May 2010 and 5 July 2010 respectively.

### The relevant legislation

2. Section 70 of the Finance Act 2004 states in relevant part as follows:

- 10 (1) The Board of Inland Revenue may make regulations requiring persons who make payments under construction contracts—
- (a) to make to the Board, at such times and in respect of such periods as may be prescribed, returns relating to such payments; ...

- 15 3. Section 98A of the TMA states in relevant part as follows:

- (1) ... regulations under section 70(1)(a) ... of the Finance Act 2004 (sub-contractors) may provide that this section shall apply in relation to any specified provision of the regulations.
- 20 (2) Where this section applies in relation to a provision of regulations, any person who fails to make a return in accordance with the provision shall be liable—
- (a) to a penalty or penalties of the relevant monthly amount for each month (or part of a month) during which the failure continues, but excluding any month after the twelfth or for which a penalty under this paragraph has already been imposed, ...
- 25 ...
- (3) For the purposes of subsection (2)(a) above, the relevant monthly amount in the case of a failure to make a return—
- 30 (a) where the number of persons in respect of whom particulars should be included in the return is fifty or less, is £100, and
- (b) where that number is greater than fifty, is £100 for each fifty such persons and an additional £100 where that number is not a multiple of fifty.

- 35 4. The Income Tax (Construction Industry Scheme) Regulations 2005, SI 2005 No 2045 (the “Regulations”), regulation 4, made pursuant to s.70 of the Finance Act 2004, provides in relevant part as follows:

- 40 (1) A return must be made to the Commissioners for Her Majesty’s Revenue and Customs in a document or format provided or approved by the Commissioners—

- (a) not later than 14 days after the end of every tax month, by a contractor making contract payments or payments which would be contract payments but for section 60(4) of the Act (contract payments: exceptions), ...

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...

- (10) If a contractor who has made a return, or should have made a return, under this regulation makes no payments under construction contracts in the tax month following that return, the contractor must make a nil return not later than 14 days after the end of that tax month. This is subject to paragraph (11).

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- (11) Paragraph (10) does not apply if the contractor has notified the Commissioners for Her Majesty's Revenue and Customs that the contractor will make no further payments under construction contracts within the following six months.

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- (12) Subject to paragraph (13), section 98A of TMA (special penalties in the case of certain returns) applies to the requirements in—

- (a) paragraph (1), ...

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- (13) A penalty under section 98A of TMA in relation to a failure to make a return in accordance with paragraphs (1) or (10) arises for each month (or part of a month) during which the failure continues after the 19th day of the sixth month following the appointed day.

5. For the purposes of the Regulations, “tax month” is defined in regulation 2 of the Regulations to mean “the period beginning on the 6th day of a calendar month and ending on the 5th day of the following calendar month”.

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6. Section 100(1) of the TMA states in relevant part as follows:

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- (1) ... an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate.

7. Section 100B(2) of the TMA states in relevant part as follows:

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- (2) ... on an appeal against the determination of a penalty under section 100 above section 50(6) to (8) of this Act shall not apply but—

- (a) in the case of a penalty which is required to be of a particular amount, the First-tier Tribunal may—

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- (i) if it appears that no penalty has been incurred, set the determination aside,
- (ii) if the amount determined appears to be correct, confirm the determination, or
- (iii) if the amount determined appears to be incorrect, increase or reduce it to the correct amount,

8. Section 118(2) of the TMA provides as follows:

5 (2) For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the tribunal or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after  
10 the excuse had ceased.

**The evidence and submissions of the parties**

9. The Appellant has provided evidence that it paid the amounts in respect of CIS deductions for the months in question online within the deadline, namely on 19 May 2010 in respect of the month ending 5 May 2010, and 16 July 2010 in respect of the  
15 month ending 5 July 2010 respectively.

10. HMRC has provided evidence, in the form of a printout from its CIS database, which records that the return in respect of the month ending 5 May 2010 was received on 21 May 2010, and that the return in respect of the month ending 5 July 2010 was received on 21 July 2010.

20 11. The Appellant's Notice of Appeal states by way of grounds of appeal as follows. The Appellant is very much aware of its obligations as a contractor, its returns are submitted at the same time as the payments are made, and although no third party postal records were obtained, it is clear from the Appellant's actions in respect of other monthly returns that the same procedures were used.

25 12. The HMRC statement of case submits amongst other matters as follows. Each contractor is responsible for ensuring that its tax affairs are up to date. Evidence that payments were made online at a certain time is not evidence that returns were posted at the same time. A contractor is obliged to ensure that HMRC has received their return by the 19<sup>th</sup> of the month, and it is not enough simply to have posted the return  
30 in what is believed to be sufficient time to reach HMRC by the 19<sup>th</sup> of the month. The return should be sent using the large letter postage stamp to ensure that it is not delayed in the post, and a first class stamp is insufficient. HMRC allowed a previous appeal against a penalty for the late filing of the return in respect of the month ended 5 December 2009, and advised the Appellant at that time that should any further  
35 appeals be received based on postal delays, appropriate proof of postage would be required. This weighs against the Appellant in determining whether he has a reasonable excuse. HMRC standard operating procedure records the date of receipt as well as the date of processing of a return, and if the 19<sup>th</sup> of the month falls on a Saturday or Sunday, returns received on the following Monday are logged as received  
40 on the 19<sup>th</sup>. The penalties are in accordance with the law, and their effect on the Appellant's future trade is irrelevant. The Appellant's appeal does not contain anything which shows that something exceptional prevented him from operating the

scheme correctly, and there is therefore no reasonable excuse throughout the period of default.

### **Findings**

13. The Tribunal has considered all of the information and arguments before it. The  
5 burden of proof is on HMRC to establish that the two returns in question were filed  
late. If HMRC discharges this burden, the burden then falls on the Appellant to  
establish a reasonable excuse. The burden of proof in both cases is on the civil  
standard of a balance of probabilities.

14. The Appellant has not provided any clear evidence of when the returns were  
10 posted. There is for instance no proof of posting from the Post Office. There is  
evidence of when payments were made, but the Tribunal accepts the HMRC  
submission that proof of payment online is not evidence of the sending of a return by  
mail. The Appellant's notice of appeal states that the returns were sent at the same  
15 time that the payments were made. If so, this would suggest that the return in respect  
of the month ending 5 May 2010 was sent on 19 May 2010, the date of the payment,  
in which case it would in the normal course of events have been received by HMRC  
after the 19<sup>th</sup> in any event. Furthermore, the claim in the notice of appeal that returns  
20 are sent at the same time that payments are made (which in the months in question  
were 19 May 2010 and 16 July 2010) is contradicted by a statement in a letter from  
the Appellant's accountants, which states that the Appellant "has ensured that he had  
posted the returns to you by 1<sup>st</sup> class post before 13<sup>th</sup> on each occasion". In the  
circumstances, there is no clear evidence of when the returns were posted.

15. On the other hand, the Tribunal is satisfied that HMRC has a system in place to  
25 record carefully the date of receipt of returns. The Tribunal accepts that the system  
may not be infallible, but is satisfied that this system provides better evidence of the  
date of receipt than the evidence provided in this case by the Appellant.

16. The Tribunal is therefore satisfied that the date of receipt of the returns was the  
date recorded by HMRC, and that the returns were filed late.

17. The Tribunal finds that the Appellant has not advanced any circumstance that  
30 would amount to a reasonable excuse for the late filing throughout the period of  
default, and in any event, that the Appellant has not provided evidence in support of  
any such claimed circumstance.

### **Conclusion**

18. Thus, under s.100B(2)(a)(ii) of the TMA, the Tribunal confirms the penalties and  
35 dismisses the appeal.

19. 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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**DR CHRISTOPHER STAKER**

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**TRIBUNAL JUDGE  
RELEASE DATE: 22 AUGUST 2011**

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