



TC01944

Appeal number: TC/2011/06908

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

**FIRST-TIER TRIBUNAL
TAX**

FIRST IN SERVICE 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 24 January 2012 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 Appellant's notice of appeal dated 31 August 2011, HMRC's Statement of Case dated 14 October 2011, and other papers in the case.

DECISION

Introduction

5 1. This is an appeal against a penalty of £100 imposed on the Appellant under s.98A(2)(a) of the Taxes Management Act 1970 (the “TMA”) for late provision of its monthly return under the Construction Industry Scheme (“CIS”) in respect of the month ending 5 January 2011.

10 2. The Appellant requests permission if necessary to bring this appeal out of time. HMRC has not objected. In the particular circumstances of this case, the Tribunal will determine the merits of the appeal.

The relevant legislation

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

- 15 (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; ...

4. Section 98A of the TMA states in relevant part as follows:

- 20 (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.
- (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—
- 25 (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, ...
- 30 ...
- (3) For the purposes of subsection (2)(a) above, the relevant monthly amount in the case of a failure to make a return—
- (a) where the number of persons in respect of whom particulars should be included in the return is fifty or less, is £100, and
- 35 (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.

40 5. 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:

- 5 (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), ...
- 10 ...
- (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).
- 15 (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.
- 20 (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), ...
- 25 (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.

6. 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”.

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

- (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.

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

- 40 (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—
 - (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,

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

- (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
10 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 the excuse had ceased.

15 **The evidence and submissions of the parties**

10. The Appellant's notice of appeal states as follows. The penalty is unreasonable as the return and payment were made on time. The return was originally submitted on 14 January 2011. After a later return penalty notice was received, the Appellant called HMRC, and was informed that the return had not been received. The Appellant
20 was advised to submit the return online, and accordingly immediately filed a duplicate return online on 18 February 2011.

11. The HMRC statement of case submits amongst other matters as follows. The Appellant has not provided evidence in support of the contention that the return was originally sent on 14 January 2011. HMRC have no record of having received it. The
25 Appellant was previously issued with late payment penalty notices in respect of the periods ending 5 June 2008 and 5 November 2008. On both occasions the penalties were cancelled on appeal, but on 25 September 2009, HMRC sent the Appellant an "educational letter", stating that if any future appeals mention postal delays, evidence of postage will be required. This put the Appellant on notice that proof of posting
30 should be routinely obtained. There is no evidence of any delay on the part of HMRC in this case.

Findings

12. The Tribunal has considered all of the information and arguments before it. The burden of proof is on HMRC to establish that the return in question was filed late. If
35 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.

13. In the present case, there is no dispute between the parties that the second return submitted online was after the applicable deadline. The Appellant's case is that he
40 previously submitted a return on 14 January 2011, which was within the deadline. HMRC says that it has no record of having received this earlier return. The Appellant impliedly suggests that if HMRC have no record of receiving it, either it was lost in

the mail, or it was lost in HMRC's internal administration. The issue for determination in the appeal is thus whether or not the Appellant did originally send a return on 14 January 2011.

5 14. The Appellant is under no obligation to provide proof of posting, and the burden of proof is on HMRC to establish that the return was not submitted on time. However, the Tribunal can only determine the appeal on the basis of the evidence before it. Proof of posting would have been evidence that would clearly have assisted the Appellant's case.

10 15. The Tribunal is satisfied that HMRC has a system in place to 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 reasonably reliable evidence of whether or not a return has been received, and if so, the date of receipt. In the absence of any evidence suggesting that this HMRC record is wrong, that HMRC record may be sufficient to establish on a balance of probabilities that what it states is correct.

15 16. In the present case, there is no evidence that a return was originally posted on 14 January 2011, other than a mere claim by the Appellant that this is the case. Even if there is no proof of posting, the Appellant might have provided more details of how and why the Appellant can be sure that an original return was posted on 14 January 2011. In the absence of any details at all of the circumstances of the claimed posting
20 of the original return, the Tribunal is not in a position to test the reliability of the claim.

25 17. In the circumstances, the Tribunal finds that the HMRC evidence that the claimed original return was not received is more reliable evidence than the Appellant's evidence that the original return was sent on 14 January 2011. The Tribunal is not persuaded on a balance of probability that a return was sent on 14 January 2011.

18. The Tribunal is therefore satisfied that the online return in February 2011 was the return for this period, and that it was late.

30 19. The Tribunal finds that the Appellant has not advanced any other circumstance that 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 other such claimed circumstance.

Conclusion

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

35 21. 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

TRIBUNAL JUDGE

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RELEASE DATE: 10 April 2012

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