



TC03902

Appeal number: TC/2013/06919

Penalty for late filing of CIS return - Appellant overlooked filing return on time - return filed one day late - whether reasonable excuse - no - appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

VIRIDIAN ENERGY SOLUTIONS LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE MICHAEL S CONNELL

The Tribunal determined the appeal on 26 May 2014 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 4 October 2013, and HMRC's Statement of Case submitted on 24 March 2014, the Appellant submitting no response.

DECISION

The Appeal

- 5 1. Viridian Energy Solutions Ltd ('the Appellant'), appeals against a £100 penalty imposed under Paragraph 8 of Schedule 55 Finance Act (FA) 2009 for the late filing of the Contractor's Monthly return for the period ending 5 June 2013.
2. The point at issue is whether or not the Appellant has a reasonable excuse for submitting a late return.

Background

- 10 3. The Construction Industry Scheme relating to the periods under appeal was introduced by Finance Act (FA) 2004 with effect from 6 April 2007. The primary legislation was supplemented by the Income Tax (Construction Industry Scheme) Regulations 2005, SI 2005 No. 2045.
- 15 4. The Scheme 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 who are registered for gross payment may receive payment without deduction.
- 20 5. Sections 58, 59 and 60 FA 2004 define a subcontractor, a contractor and a contract payment respectively.
6. Section 61 FA 2004 requires a contractor to make deductions at a relevant percentage from payments made to those subcontractors who are not registered to be paid gross under Section 63 FA 2004.
- 25 7. Section 70 FA 2004 permits HMRC to make regulations requiring contractors to submit periodic returns. The regulations are provided in Regulation 4 of The Income Tax (CIS) Regulations 2005.
- 30 8. Regulation 4(1) provides that a return must be made to HMRC in an approved form not later than 14 days after the end of every tax month. A tax month runs from the 6th of one month to the 5th of the next. So a return must be made by the 19th of each calendar month.
9. Regulation 4(2) and (3) specify the information which must be included on the return and Regulation 4(5) requires the return to include declarations made by the person making the return.
- 35 10. Regulation 4(10) requires a contractor to make a nil return if they have not made any payments under a construction contract during a tax month. However Regulation 4(11) provides that a nil return is not required if HMRC have been notified that the contractor will make no further payments under CIS within the following 6 months.

11. If the return is not received by the filing date a penalty of £100 is payable in accordance with Paragraph 8 Schedule 55 FA 2009.
12. If after a period of 12 months beginning with the penalty date the return remains outstanding a penalty is payable in accordance with Paragraph 11 Schedule 55 FA 2009; the penalty is the greater of 5% of any liability to make payments which would have been shown in the return or £300.
13. Both the 'filing date' and the 'penalty date' are defined at Paragraph 1(4) Schedule 55 FA 2000.
14. The Appellant was required to file a Contractor Monthly return for the period ended 5 June 2013. The filing date for the return was 19 June 2013.
15. The Contractor Monthly return was filed on 20 June 2013.
16. As the return was not received by the filing date, HMRC sent the Appellant a late filing penalty notice on 2 July 2013 in the amount of £100.
17. On 13 July 2013 the Appellant appealed against the penalty, saying:
- 15 “The return was filed early on 20 June and the payment was made the same day. This was merely an oversight and the revenue wasn't disadvantaged financially by the late return.”
18. HMRC sent the Appellant a decision letter on 24 July 2013 rejecting its appeal and offering a review.
19. On 30 July 2013 the Appellant requested a review of HMRC's decision saying:
- “My return was only a few hours late. The revenue was paid the same day and not disadvantaged financially in any way.
- The company is still in its infancy with only two administration employees, which are new to the tax administration systems. Despite this the company have only made two mistakes which were rectified immediately and still submitted on the '20th' of the month (technically only a few hours late). The tax due payments were made immediately and the revenue was not disadvantaged financially as a result of the late return.”
20. HMRC carried out a review and issued their review conclusion on 5 September 2013. The outcome of the review was that HMRC's decision should be upheld.
21. On 4 October 2013 the Appellant notified its appeal to the Tribunal reiterating their earlier grounds of appeal, and saying “..the return was filed only eight hours late. To impose a fine of £100 on a small company for a minor oversight is both unjust and immoral.”

Appellant's contentions

22. The grounds of appeal are as stated in the Notice of Appeal.

HMRC's contentions

5 23. This appeal is not concerned with specialist or obscure areas of tax law. It is concerned with the ordinary every day responsibilities of the Appellant to ensure that their CIS return was filed by the legislative due date.

24. The Appellant has been registered within the new Construction Industry Scheme since 14 December 2011.

10 25. HMRC contend the monthly return was submitted late and the fixed penalty has been correctly charged in accordance with legislation. The penalty may only be set aside if the Appellant has a reasonable excuse for the penalty, which existed for the whole of the default period.

15 26. HMRC records show that the CIS return for the month ended 5 June 2013 was received on 20 June 2013, a fact the company is not disputing, at 10:49 am. HMRC can only act in accordance with legislation. The penalty was imposed solely because the Appellant did not file their CIS return by the due date of 19 June 2013. An oversight by the company is not a reasonable excuse.

20 27. HMRC submit that while the Appellant may have met their financial obligations and paid the liabilities due, this is what is expected of them as a contractor who engages contractors under the Construction Industry Scheme and cannot provide a reasonable excuse for failing to file the Contractor's Monthly return for 5 June 2013.

25 28. The penalty was imposed to promote the efficient operation of the taxation system and not to compensate HMRC for lost or late paid tax. It is essential that contractors who file their CIS returns on time feel confident that the system does not reward non-compliance.

30 29. This was not the first occasion on which this issue of a late return had arisen. HMRC themselves have allowed a previous appeal by the Appellant for the month ended 5 February 2013. In this instance, the return was also filed one day late. HMRC had issued an educational letter to the Appellant on 11 April 2013 advising them of their filing obligations. HMRC contend that this should have put a reasonable taxpayer on particular notice to ensure that future CIS monthly returns were received on time. HMRC contend that this is a factor that weighs against the Appellant in determining whether they have a reasonable excuse for the late delivery of their return.

35 30. In addition, HMRC's records show that the CIS monthly return for the period ended 5 January 2014 was also received one day late.

31. Although the Appellant states they have only two administration employees who are new to the tax administration systems, HMRC contend it is incumbent upon the contractor to equip themselves with the relevant knowledge to enable them to comply with their tax obligations under the Construction Industry Scheme.

5 32. HMRC does not consider that reliance on an employee or third party constitutes a
reasonable excuse for the Appellant's failure to deliver their Contractor Monthly
return for the month ended 5 June 2013 by the filing deadline. HMRC maintain that it
was the responsibility of the Appellant to ensure that they complied with their tax
responsibilities by filing a CIS return by the due date of 19 June 2013 in accordance
10 with Regulation 4 of The Income Tax (CIS) Regulations 2005. This responsibility
cannot be transferred to any other person acting on behalf of the contractor. Where a
person has asked another person to do something on his or her behalf, that person is
responsible for ensuring that the other person carries out the task. They cannot claim
they had a reasonable excuse merely because they delegated the task to a third party
15 and that third party failed to complete it. HMRC expect a contractor to take
reasonable care to explain to the third party what they require them to do, to set
deadlines for the work and to make regular checks on progress.

33. Furthermore, HMRC records show that the Appellant enrolled for CIS online on
9 January 2012 and activated their account on 15 January 2012 and have been filing
20 CIS returns online since this date. HMRC would therefore consider them to be
familiar with filing returns online, the filing dates and the consequences of filing
returns late.

34. HMRC contend that the legislation places responsibility for delivery of the
completed CIS return squarely on the shoulders of the contractor. The Appellant
25 failed to fulfil their filing obligation and in these circumstances HMRC have to be
seen to be consistent in their approach to customers, particularly to those who comply
with the regulations. It was the Appellant's responsibility to ensure that the
regulations were followed. The CIS return for month ended 5 June 2013 was
submitted late, and as a result a penalty determination has been correctly charged and
30 issued under Paragraph 8 Schedule 55 FA 2009. The fact that the Appellant is a small
company is not a reasonable excuse.

35. It is the responsibility of the Appellant, as a contractor trading within the
Construction Industry Scheme, to ensure that the regulations are followed. In this case
the penalty has been charged under Paragraph 8 of Schedule 55 Finance Act (FA)
35 2009. This appeal does not contain anything, which shows that something unexpected
or unusual prevented the Appellant operating the Scheme correctly and submitting the
appropriate return. Therefore, the penalty has been correctly charged and is due and
payable.

36. Paragraph 16(1) of Schedule 55 FA 2009 allows HMRC to reduce a penalty
40 below the statutory minimum if they think it is right because of special circumstances.
While 'special circumstances' are not defined the courts accept that for circumstances
to be special they must be 'exceptional, abnormal or unusual' (*Crabtree v Hinchcliffe*)
or 'something out of the ordinary run of events' (*Clarks of Hove Ltd v Bakers' Union*).

37. HMRC have considered the special reduction regulations but their view is that there are no special circumstances which would allow a reduction in the penalty.

Conclusion

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38. The onus of proof rests with HMRC to show that the penalty was correctly imposed. If so established, the onus then rests with the Appellant to demonstrate that there was reasonable excuse for late filing of its CIS return. The standard of proof is the ordinary civil standard of the balance of probabilities.

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39. There is no statutory definition of 'reasonable excuse', which is a matter to be considered in the light of all the circumstances of the particular case. A reasonable excuse is normally an unexpected or unusual event that is either unforeseeable or beyond the taxpayer's control, and which prevents them from complying with their obligation to pay on time. A combination of unexpected and unforeseeable events may, when viewed together, be a reasonable excuse.

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40. A taxpayer acting in a reasonable manner would ensure that they adhered to their legislative obligations. The actions of the contractor should be considered from the perspective of a prudent person, exercising reasonable foresight and due diligence, having proper regard for their responsibilities under the Tax Acts. If the contractor could reasonably have foreseen the event, whether or not it is within their control, the contractor should take steps to meet their obligations. If there is a reasonable excuse it must exist throughout the failure period.

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41. HMRC charge late filing penalties to encourage prompt filing and to provide a measure of fairness between contractors who file on time and those who do not. Penalties are imposed to promote the efficient operation of the taxation system. The Appellant has failed to operate the Construction Industry Scheme correctly and in these circumstances HMRC have to be seen to be consistent in their approach to all their customers, particularly to those who comply with the regulations. It was the Appellant's responsibility to ensure that the CIS monthly return was filed on time and to ensure that all obligations under the Construction Industry Scheme are met.

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42. The Appellants grounds of appeal are that the return was filed only eight hours late and that to impose a fine of £100 on a small company in such circumstances is unjust. The Appellant acknowledges therefore that it overlooked filing the return on time, but no reason has been given as to why that happened, even if the return was filed only a few hours late. There appears to have been no unexpected or unusual event that was either unforeseeable or beyond the contractor's control which caused the return to be filed late. In the absence of any explanation the appeal does not contain anything which shows that there was a reasonable excuse that prevented the Appellant from operating the Scheme correctly and submitting the monthly return on time.

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43. The Tribunal therefore finds that the late filing penalty charged is in accordance with legislation and there is no reasonable excuse for the Appellant's failure to file its CIS return on time. There are also no special circumstances which would allow the penalty to be reduced under the Special Reduction provisions. The appeal is accordingly dismissed and the £100 late filing penalty confirmed.

44. 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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**MICHAEL S CONNELL
TRIBUNAL JUDGE**

RELEASE DATE: 11 August 2014

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