



**TC03906**

**Appeal number: TC/2012/06740**

*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**

**WOODBINE ELECTRICAL 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 27 June 2012, and HMRC's Statement of Case submitted on 27 March 2014 the Appellant submitting no response.**

## DECISION

### The Appeal

- 5 1. Woodbine Electrical 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 March 2012.
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 August 2013. The filing date for the return was 19 March 2012.
15. The Contractor Monthly return was filed on 20 March 2012.
16. As the return was not received by the filing date, HMRC sent the Appellant a late filing penalty notice on 31 March 2013 in the amount of £100.
17. On 17 April 2012 the Appellant appealed against the penalty, saying:
- 15                                “We do not agree that this penalty is due and appeal against the charge; the company is under great duress at this moment due to the economic condition and limited staff levels due to illness within families and holidays.
- 20                                Unfortunately it was overlooked because of the company position at this present time; it was filed online on 20 March 2012.”
18. HMRC sent the Appellant a decision letter on 26 April 2012 rejecting its appeal and offering a review.
19. On 9 May 2012 the Appellant requested a review of HMRC's decision.
- 25 20. HMRC carried out a review and issued their review conclusion on 6 June 2012. The outcome of the review was that HMRC's decision should be upheld.
21. On 27 June 2012 the Appellant notified its appeal to the Tribunal.

Appellant’s contentions

22. The grounds of appeal were stated as;
- 30                                i. We have limited staff due to the economic climate, which is making small businesses like ours very difficult to meet our deadlines.
- ii. Our return was filed only one day late and to make a charge at all is totally unjust, let alone impose a penalty of £100.

- iii. We have been in business for over 70 years and up until December 2009 any late returns were due to the postal service in the UK for which we had no control over.
- iv. We currently now file our returns online and in the last two and half years have filed thirty returns, of which the following three penalties were filed against us.
  - a) Jan 2010 - was a computer error on HMRC's part that was acknowledged.
  - b) Nov 2011 - was overlooked due to staff off ill. (One lady who completes the returns)
  - c) Mar 2012- was filed one day late due to staff holidays.

HMRC's contentions

23. The Appellant has traded within the new Construction Industry Scheme since 6 April 2007. Therefore HMRC consider the company to be well aware of the requirement to submit a return for each tax month by the 19th day of the calendar month.

24. In this instance, the CIS monthly return for the period ended 5 March 2012 has been submitted late. The nil return, due on 19 March 2012 was not filed online until 20 March 2012.

25. In accordance with Income Tax (Construction Industry Scheme) Regulations 2005 [SI 2005 No 2045] every contractor who makes payments to subcontractors in respect of construction operations must file a single monthly return (CIS300) with details of all of these payments to HMRC every month. If a contractor has not made any payments he/she must file a 'nil return'. Alternatively, a contractor can make a nil return by calling the HMRC CIS Helpline. This information is shown on the HMRC website.

26. The Appellant did not file a nil return or notify HMRC of a nil declaration for the month ended 5 March 2012 on or before 19 March 2012.

27. As well as filing returns in respect of payments made in the current month, a contractor can also submit returns for up to three periods in the future. There could be any number of reasons why a contractor might want to submit a return for a future period. But the most common will be when it is known that a contractor will be unavailable to complete returns for a while (say, for example, because of a holiday).

28. HMRC maintain that a holiday does not constitute an unexpected, usual or unforeseeable event beyond the control of the contractor.

29. Sometimes, the deadline for submitting a return may coincide with a contractor's holiday period. In those circumstances the contractor should:

5 arrange his business affairs in such a way that a responsible person, is  
able to complete and sign the return for him;  
file a future period return online (e-channel);  
10 file the CIS monthly return online from his holiday destination;  
file an early nil return (but only where a nil return is appropriate for  
that month);  
send the return early by completing a blank manual return (future  
period return).

10 30. Information relating to the submission of Contractor Monthly Returns during  
holiday periods is shown on the HMRC website and was therefore was available to  
the Appellant.

15 31. HMRC contend that Mr Woodbine, the proprietor of the company, was aware of  
the requirement to submit the CIS monthly return for the period ended 5 March 2012,  
prior to any staff holiday periods and was therefore in a position to make alternative  
arrangements. If alternative internal business arrangements could not be made, Mr  
Woodbine could have filed a future period return online prior to any holiday period or  
20 filed the same from a holiday destination. However, Mr Woodbine chose not to avail  
himself of any of the alternative options available to him and as a consequence filed  
the CIS monthly return late.

25 32. HMRC will treat illness as a reasonable excuse for the late submission of a CIS  
monthly return where an illness is so serious that it prevents a contractor from dealing  
with his tax affairs before the relevant due filing date and from that date to the time  
the monthly return is received. In this case, HMRC contend that the Appellant has not  
demonstrated that serious illness prevented the filing of the CIS Monthly Return for  
the period ended 5 March 2012 on time.

30 33. This is not the first instance on which the issue of a late return has arisen. HMRC  
previously upheld appeals against penalties imposed as a result of the late filing of  
CIS Monthly returns for the months ended 5 January 2010 and 5 November 2011. In  
the appeal against the penalty charged for the late filing of the CIS monthly return for  
the period ended 5 January 2010, the contractor quoted online filing problems. On  
that occasion HMRC accepted the excuse presented by the Appellant and upheld the  
35 appeal. However, HMRC issued a letter to the Appellant which reinforced the  
importance of filing all future CIS Monthly Returns on time.

40 34. In the appeal against the penalty charged as a result of the late filing of the CIS  
Monthly return for the period ended 5 November 2011, the contractor quoted illness.  
HMRC again accepted the excuse presented by the Appellant and upheld the appeal.  
HMRC issued a further letter to the Appellant advising of their responsibility to file  
all future returns on time, the consequences of late filing and HMRC's view of a  
reasonable excuse.

35. HMRC maintain that the information provided in their letters should have put a reasonable contractor on particular notice to ensure that all future returns were filed on time. In this instance the Appellant has not demonstrated that the failure was due to an unexpected or unusual event that was either unforeseeable or beyond the contractor's control.

36. HMRC can only act in accordance with legislation; possible effect on future trade or cash flow is not relevant. This is a commercial consideration, which is not addressed in either the penalty or appeal legislation. HMRC have no discretion in the calculation of the penalty amount which is set in statute under Schedule 55 Finance Act 2009.

37. HMRC maintain that a penalty was correctly charged in accordance with Paragraph 8 of Schedule 55 Finance Act (FA) 2009.

38. In the case of *Anthony Bosher v HMRC*, the Upper Tribunal decided that the penalty regime, which includes a right of appeal and provides HMRC with the power to mitigate a penalty, does not infringe a person's human rights and does not impose disproportionate penalties. Further, the Tribunal does not have jurisdiction to discharge or adjust fixed penalties which have been correctly imposed for the correct amount.

39. Paragraph 16(1) of Schedule 55 FA 2009 allows HMRC to reduce a penalty 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*).

40. 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

41. 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.

42. 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.

43. 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.

5 44. 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  
10 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.

15 45. The Appellant's grounds of appeal are that the company is under great duress due  
to economic conditions and limited staff levels caused by illness within families and  
also because of holidays. Unfortunately the return was overlooked but eventually filed  
one day late. No detail of illnesses has been provided but in any event the Appellant  
says that filing the return was simply overlooked. There was no unexpected or  
unusual event that was either unforeseeable or beyond the contractor's control which  
caused the return to be filed late. The appeal does not contain anything which shows  
that there is a reasonable excuse that prevented the Appellant from operating the  
20 Scheme correctly and submitting the monthly return on time.

25 46. 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.

30 47. 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.

35 **MICHAEL S CONNELL**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 11 August 2014**

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