



TC05418

Appeal number: TC/2015/03249

*PROCEDURE – permission to appeal Construction Industry Scheme
penalty out of time refused*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ROBERT GAWTHROP

Appellant

- and -

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

**TRIBUNAL: JUDGE SWAMI RAGHAVAN
 DAVID BATTEN**

Sitting in public at Fox Court, London on 17 August 2016

Carol Bunn, solicitor, Birketts LLP for the Appellant

Helen Roberts, HMRC Officer, for the Respondents

DECISION

1. The appellant, in his notice of appeal which was lodged with the Tribunal on 14
5 May 2016, applies for permission to notify his appeal to the tribunal out of time.
HMRC object.

2. The substance of Mr Gawthrop's appeal relates to a penalty of £9254 charged
under s98A(4) Taxes Management Act 1970 ("TMA 1970") for negligently delivering
returns under the Construction Industry Scheme ("CIS") for the tax years 2002-3 to
10 2007-8.

Law

3. Under s100B TMA 1970 the provisions of TMA relating to appeals against
assessments to tax have effect in relation to penalty determinations such as the one
which Mr Gawthrop seeks to appeal against. The decision which the appellant seeks
15 to appeal is contained within HMRC's conclusions of its review of 25 February 2010
which was given in accordance with s49E TMA 1970. The relevant time limit as set
out in s49G(5)(a) and referred to as the "post-review period" is "the period of 30 days
beginning with the date of the document in which HMRC give notice of the
conclusions of the review...". Section 49G(3) TMA 1970 provides that "If the post-
20 review period has ended, the appellant may notify the appeal to the tribunal only if the
tribunal gives permission."

4. Section 49G(3) TMA 1970 is analogous to the provision in s83G(6) ("an appeal
may be made after the period specified...if the tribunal gives permission to do so")
which was, as pointed out by Ms Bunn's submissions, the subject of consideration by
25 the Upper Tribunal in *Data Select Limited v Commrs for HMRC* [2012] UKUT 187
(TCC). In that case Morgan J set out at [37] that it was correct to consider the
overriding objective and all the circumstance of the case including the list of matters
listed in CPR rule 3.9 and at [34] that as a general rule when a court or tribunal is
asked to extend a relevant time limit, it should ask itself the following questions:

30 “(1) what is the purpose of the time limit? (2) how long was the delay?
 (3) is there a good explanation for the delay (4) what will be the
 consequences for the parties of the extension of time? and (5) what will
 be the consequences for the parties of a refusal to extend time.”

5. The consequences for an appellant in not being able to pursue his or her appeal if
35 refused permission will inevitably involve a consideration of the likelihood of success
or merits of their appeal. Although not referred to us by the parties we should also
note the recent guidance given by the Court of Appeal on the approach that should be
taken to applications for extensions of time for filing a notice of appeal in *R (Dinjan
Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633 in
40 particular at [46] where in a section of its decision dealing with merits it set out:

 “...Only in those cases where the court can see without much
 investigation that the grounds of appeal are either very strong or very

weak will the merits have a significant part to play when it comes to balancing the various factors....”

6. The context for the penalty appeal is the CIS regime. For present purposes it is sufficient to note that the provisions of s61 and s62 Finance Act 2004 oblige
5 contractors making payments to sub-contractors to make deductions of a certain percentage (in this appeal it is 18%) and pay the sums deducted to HMRC which are then treated as a credit against the sub-contractor’s income tax. Regulations provide for payment to HMRC by the contractor of sums the contractor was liable to deduct but also provide a mechanism (“Regulation 9”) for HMRC, if satisfied certain
10 conditions are met, to direct that the contractor is not so liable. They also make provision (“Regulation 13”) for HMRC to determine the amount payable by a contractor.

Evidence

7. We had a bundle containing the notice of appeal, the penalty notice and various
15 pieces of correspondence between the parties, and copies of HMRC’s call logs recording contact between the appellant and HMRC. The appellant gave evidence which was subject to cross-examination by HMRC and answered the Tribunal’s questions. We found him to be an entirely candid and credible witness of fact.

Facts

8. From the evidence we heard and the documents before us we found the following
20 facts.

9. The appellant ran a property maintenance business mostly servicing private
customers, but some private landlords and also carried out some work on new builds installing plumbing and heating. The work dried up following the recession in 2008
25 /2009. Sub-contractors were used. Some of the sub-contractors told the appellant they were on gross payments, and he took what they said at face value. According to the appellant it was not possible at the time to verify the status of subcontractors on-line.

10. In terms of accounting and administrative assistance Mr Gawthrop used the
services of a local accountant and also a local professional bookkeeper (Chapel Road
30 Accounting Services Ltd. (“CRASL”))

11. The notice of penalty determination which is the subject of Mr Gawthrop’s appeal
was issued to the appellant on 28 October 2009 in the amount of £12,337 (which as explained below was subsequently reduced). An earlier letter of 8 July 2009 explained
35 the maximum penalty was £61,698 but advised that an 80% abatement had been given (20% for disclosure, 40% for co-operation, and 20% for “seriousness”). On 9 November 2009 he appealed to HMRC against the penalty on the grounds that the penalty was disproportionate and excessive. On 10 December 2009 HMRC wrote to the appellant offered him the option of either a review or appeal to tribunal with a deadline of 30 days. On 8 January 2010, CRASL on behalf of the appellant’s asked
40 for a review. The letter was marked as received by HMRC on 12 January 2010. On 27

January 2010 HMRC wrote to CRASL and the appellant setting out that HMRC's view of matter was that as confirmed in their 10 December 2009 letter.

12. On 25 February 2010 HMRC (H M Inspector of Taxes, PL Blair) sent the appellant and CRASL a letter setting out their conclusions of review. The appellant confirmed he received this letter. The inspector concluded that HMRC's view of matter should be varied. The letter set out the text of s98A(4) TMA 1970 (extracted at [39]) below and explained that the "difference" referred to in the legislation and which represented the maximum amount that could be charged had been "determined during the enquiry as £61,698". The letter went on to explain that the abatement aspect had been given further consideration and abatement in respect of seriousness ought to be increased from 20% to 25% resulting in an overall abatement of 85% which reduced the penalty to £9254. The inspector concluded a penalty set at this level did not fall into the category of being disproportionate and/or excessive. The letter then went on to state: "it is appreciated that "the amount which would have been so payable if the return had been correct", that is £61698 is substantially greater than the amount of the deductions, £18549, that is actually being sought from you. This reduction is due to the fact that HMRC was able to issue Directions under Regulation 9(4) of Statutory Instruments 2005/2045 to the effect that the difference of £49359 need not be recovered." The inspector went on to explain HMRC's view that the Regulation 9(4) Directions had no effect on the penalty charged. On 20 May 2010, no further contact having been received, HMRC sent the appellant an amended penalty determination in the amount of £9254.

13. Although from HMRC's call log there was then some contact between the appellant and his agent in relation to payment of outstanding sums (a letter of 22 June 2010, and telephone calls of 24 June 2010 and 30 September 2010) it appears, taking account of the appellant's oral evidence and his subsequent correspondence, and phone records that there was no discussion in relation to the outstanding penalty until 30 December 2010 when the appellant made numerous phone calls to ask HMRC about the debt he owed. He was told there was nothing more to pay and he understood this to mean that he was no longer liable to pay the penalty amount. As set out below, HMRC maintained the position, until it changed some time later, that he had not made these calls as HMRC could not find a record of them. Contrary to what he was told the appellant did remain liable for the penalty. (From HMRC's letter of 15 December 2014, it appears that the penalties did not appear on HMRC's "usual Debt Management system" and the collector would not have been able to see the amount due in respect of the appellant's liabilities for CIS deductions (Regulation 13) and presumably also his liability for the penalty.)

14. On 16 November 2011, the appellant was understandably shocked to receive a Notice of Regulation 13 Determination in the amount of £24,441.25 having thought there was nothing more to pay. He telephoned HMRC's Debt Management Office on 7 December 2011 who sent him a break-down of the amount owing with updated interest amounts. On 31 January 2012 the appellant telephoned HMRC to query how it was that he could owe tax when he had been told none was due.

15. On 8 February 2012 the appellant spoke with Amanda Ellis of HMRC and was told the Regulation 13 amount and the penalty were still outstanding. He was informed of HMRC's policy in relation to late appeals and that it was unlikely HMRC would admit late appeal. The note of telephone call suggests Ms Ellis pointed out that the appellant could approach the tribunal if he was not able to persuade HMRC that he had a reasonable excuse for filing after 30 days and that she had based her view on what she had been told by the appellant but did not want to give the appellant false hope or for him to possibly waste his time as he would need to come up with a valid reason. We find that at this point the appellant had accordingly come to the view that it was not worthwhile appealing to HMRC and also that he was under the impression that it was not worthwhile in those circumstances making an appeal to the tribunal.

16. The appellant wrote on 8 March 2012 complaining about being misinformed and asking for the balance to be reduced. On 23 April 2012 a complaints manager from HMRC's debt management section responded to the complaint stating they had no record of a telephone conversation on 6 December 2010 and suggesting coming up with a realistic time to pay arrangement for the Regulation 13 liability. In a May 2012 letter the appellant made that the point that the telephone calls took place not on 6 December but on 30 December 2010 and enclosed various phone bills which highlighted the times of his calls to HMRC. HMRC responded on 14 May 2012 saying they had no record of the call and suggested the appellant contact HMRC's Debt Technical Office as had previously been suggested.

17. There were then various letters through June to August 2012 about paying debt but then for reasons which were not apparent to us matters completely stalled and there was no further correspondence until HMRC wrote to the appellant on 2 June 2014 in a letter headed Regulation 13 determination setting out in a table amounts and interest for the years 2002-3 to 2006-7 which also included a reference to the penalty of £9,254.00.

18. On 8 July 2014 the appellant wrote to HMRC mentioning amongst other matters that he had been sent demands for late payment penalties 18 months after he had been told there was no tax to pay. He stated he was writing to HMRC in the first instance in order for an appeal and the tribunal process to be started.

19. After some delay, for which HMRC apologised, he received a response on 1 October 2014 from HMRC. This letter set out the history of the matter, as HMRC understood it, and explained that where a late appeal was made in order for it to be accepted by HMRC there had to be a reasonable excuse but that there nothing the appellant had indicated which suggested that this was the case. There was no mention in this letter that the appellant could apply to the Tribunal to make a late appeal.

20. The appellant's letter was also treated as a complaint against debt management and, again after a delay for which HMRC apologised, a letter was sent dated 15 December 2014 was sent to the appellant. This letter repeated the view that HMRC did not consider that he had a valid reasonable excuse for appealing late but stated that (in what the appellant describes as a small inconspicuous paragraph) the appellant

was told he could apply to the tax tribunal to try to have a late appeal against the penalty admitted.

21. The appellant tried to complete a notice of appeal form in January 2015 to file it electronically but because internet services are very slow in the rural area where he lives he found it difficult to log on to the government tribunals website to access the notice of appeal. On 6 April 2015 he again asked how to appeal against the penalty and HMRC responded on 20 April 2015. He finally appealed to the Tribunal against the penalty in a notice of appeal (undated) but which was received by the tribunal's office on 14 May 2015.

10 *Discussion*

22. There was not any dispute that the correct legal approach was to consider the overriding objective and the questions set out by Morgan J in *Data Select*. Ms Bunn took us to the pre-1 April 2013 version of CPR Rule 3.9 which was current at the time of Morgan J's decision and in particular (i) "the effect of which the granting of relief would have on each party." We note that this factor is in substance encapsulated by the questions (4) and (5) Morgan J set out so do not address point i) separately below.

23. Taking the *Data Select* tests in turn the purpose of the time limit in 49G TMA1970 is to allow matters to be closed and tax due to be collected. The length of delay is considerable at just over five years. The next question is whether there was a good explanation for the delay.

24. We have set out the chronology of contact between the appellant and HMRC extensively above. HMRC highlight the fact that the appellant received the review letter, which clearly stated the deadline for appealing to the tribunal, but that no appeal was filed until over five years later. Our view is that the appellant has a good explanation for some of the period but not all of it as we explain below.

25. In relation to the period between March 2010 and December 2010 when the appellant did not take action having been told about his appeal rights, the appellant's explanation for why he did not get back to HMRC with a response despite having received the letter was that this was a difficult time:- his business had gone into "meltdown", he had four children to support and no income; he had other things to worry about. He had as he put it "buried his head in the sand" but then around Christmas of 2010 had realised that he needed to resolve matters, ringing round several offices of HMRC and "breathed a sigh of relief" when he was told at the end of December 2010 that there was no tax to pay. While we sympathise with the strains and pressures this must have put on the appellant, and can see how it was that the need to respond was overlooked, we cannot regard those reasons as providing him with a good explanation for the delay in filing his appeal in relation to this period.

26. We accept the appellant was under the impression from his telephone calls to HMRC on 30 December 2010 that no tax was due. He remained, reasonably given what he had been told, of that view until HMRC notified the outstanding CIS liabilities in 16 November 2011.

27. HMRC highlight that it was not until 17 January 2012 that the appellant specifically enquired about the Regulation 13 CIS tax charge and that his previous enquiries had related only to PAYE, but we accept the appellant genuinely and reasonably thought following his telephone call with HMRC that the CIS and penalty debt had been removed. It is not an answer to being told that no tax was due to suggest, as HMRC had done in correspondence, that the appellant had not asked specifically about the Regulation 13 liabilities or for that matter the penalty. He heard nothing further about the CIS liabilities until November 2011 so it is therefore not surprising that his first contact with HMRC in which it is recorded by HMRC that he mentioned CIS was not until after that period.

28. It is apparent that the focus of the correspondence and phone contact from that point onwards then was very much on addressing the issue of the debt from a collection point of view and although early on in the period there had been mention of making a late appeal, this was effectively ruled out based on the indications the appellant had received from HMRC and the appellant had been under the impression that it was not then possible to take the appeal further. We accept that through this period up until 15 December 2014 when the possibility of being able to make a late appeal re-surfaced following HMRC's letter of that date, that the appellant had a good explanation for the delay in filing the notice of appeal.

29. While the evidence put forward by the appellant that he had difficulties accessing the appeal form online given difficulties with internet access in the rural area where he lived was not challenged, a period of five months to sort this out strikes us as excessive. We would expect that someone faced with such difficulties would, within a couple of weeks, be able, through making enquiries, to be sent a paper copy, or would travel to somewhere temporarily where access was better in order to be able to download a form. Adding the eight month period from March 2010 to December 2010 and the five months from mid-January to mid-May brings the total of delay for which there is not in our view a good explanation to 13 months.

30. Turning then the respective prejudice to the parties of the appeal being allowed or not being allowed to proceed, if permission to appeal out of time is not granted, Ms Bunn argues that if Mr Gawthrop is not able to argue his appeal at a substantive appeal he will suffer an egregious injustice. The appellant made it clear his case centres on the quantum of the penalty, in particular that HMRC have never explained how the maximum amount figure (£61,699.05) was arrived at and further that the penalty amount was disproportionate, excessive and wholly unjustified. The appellant says the total undeclared CIS deductions for the relevant years was only £18,546 and it is that figure that the 85% abatement should be applied to. At no point in the dispute had it been explained where the additional £43,000 came from. His complaint throughout has been that he could not see how a penalty in the amount of £9,254 could be charged when the tax demanded was £18,546.

31. As we see it the appellant's concern in essence encompasses two distinct points. The first is a challenge relating to the factual circumstances underpinning the headline amount. The second is a legal point on the interpretation and application of the

relevant penalty legislation including whether that might be affected when human rights obligations are taken into account.

5 32. On the first point, at the hearing HMRC mentioned that although not in the bundle they had some enquiry papers. They were granted a short adjournment to see if they could put before the tribunal papers explaining how the £61,699.05 headline figure had been arrived at. HMRC produced various letters dated 22 May 2009 which were responses to claims under Regulation 9(4) for each tax year where the letter either set out a table of subcontractors where the officer was not satisfied the Regulation 9(4) conditions had been met or that the decision was that the under-deducted amounts did not need to be paid.

10 33. It was not possible in the limited time available at the hearing to make any reconciliation with variously the Regulation 13 amounts (totalling £18,546), or the headline penalty amounts in the penalty notice prior to abatement (totalling £61,699.05) however after the hearing we noted that the totals of the amounts where the 9(4) claim had been accepted (this was £1930.32 for 2002-03) and tax paid had not been sought from the contractor, when added to the Regulation 13 amount (for 2002-03 this was £1867.05) came to the “headline” penalty amount (£3797.37 for 2002-03).

15 34. This supported the explanation that had been given throughout by HMRC that the penalty headline amount was larger because it took account of sub-contractor under-deductions that were not ultimately pursued under the Regulation 13 determinations. We were however unable to reconcile the totals from the letter in which HMRC had refused the Regulation 9(4) refusal letters with the Regulation 13 determinations made on the appellant.

20 35. It seems unlikely given the explanations given in correspondence and the above observations, that the penalty was calculated on an arbitrary figure; rather it was calculated on the amount after subcontractor amounts which had actually been paid were added back in. This is explained, in the review letter (excerpts of which are set out above at [12]), and has been HMRC’s position consistently in several phone calls and further letters. (We do note there appears to have been error in the review letter in relation to the second reference to the £61,698. That amount should we think refer to the gross amount of deductions; £61,698 being the amount of *difference*.)

25 36. While we do not have a complete picture of the basis on which the Regulation 13 determinations were made there is nothing to suggest that at the time their calculation had not been addressed with the appellant or his agent, and nothing to suggest in the correspondence that the calculations had been disputed. We do not think much turns on HMRC’s inability at the hearing to show how as a matter of fact the headline figure was derived. The point was it seems, only raised by the appellant at the hearing, and if the history of negotiations relating to a dispute between two parties is less clear cut five years after the relevant time those were live that is not a point we think that should be held against one party over the other. It cannot be readily assumed that HMRC would, when it came to preparing a case for a substantive hearing, be incapable of explaining how the headline figure for the penalty had been arrived at.

(In fact the lack of readily accessible documentation showing how the figure was calculated is not surprising given the length of time that has passed since the liability issue was live from HMRC's point of view and illustrates the possible difficulties in allowing appeals which are significantly out of time to proceed).

5 37. That being the case the appellant's case is in essence a legal argument about the correctness of working off a penalty amount without regard to the reductions effected by the Regulation 9(4) directions which were accepted i.e. that the penalty starting point should be on the total of the Regulation 13 determination amounts being the amount of £18,546.

10 38. Noting the guidance given by the Court of Appeal in *Hysaj* the merits are only relevant if without too much investigation we can determine the appeal is very strong or very weak.

39. The penalty provision, s98A(4) TMA 1970 states where relevant:

15 "where this section applies in relation to a provision of regulations, any person who...negligently makes an incorrect return of a kind mentioned in the provision shall be liable to a penalty not exceeding the difference between-

a) the amount payable by him in accordance with the regulations for the period to which the return relates, and

20 b) the amount which would have been so payable if the return had been correct."

40. The "provision of regulations" is in this case Regulation 4 of the Income Tax (Construction Industry Scheme) Regulations 1993 and for later years the 2005 Regulations which provides for monthly returns. Section 98A of TMA (special penalties in the case of certain returns) applies to the requirements in subparagraph 25 (12) which in turn refer to Regulation 4(3)(c) which refers to stating the amount deducted in relation to gross payment subcontractors.

41. The appellant clarified that he does not seek to argue the abatement is wrong – just the starting point. We note that under s100B(2)(b)(iii) the Tribunal hearing the substantive appeal would be able, if the amount appeared excessive to "reduce it to 30 such other amount (including nil) as it considers appropriate".

42. A plain reading of the legislation does not support the appellant's argument that the headline figure is the Regulation 13 figure of tax sought from the contractor. But we do not rule out that if the matter went to a substantive hearing that arguments 35 about whether the penalty was disproportionate might lead to arguments about whether there was scope to read the reference to "a provision of regulations" more expansively so as to cover the amount of tax payable by the contractor net of any Regulation 9 determinations relieving the contractor from payment. In any case even if it was possible it would give rise to an odd result because the penalty starting 40 amount would not be that amount but the *difference* between that amount and the amount that ought to have been on the return (and there is no way that provision

(s98A(4)(b)) could be construed as referring to anything other than the amount the contractor should have correctly deducted on the return.)

43. However we cannot rule out an argument that even if the legislation mandated a certain starting point for the penalty amount that it would necessarily be irrelevant in assessing the appropriateness of the amount of penalty to take into account the extent to which tax had gone on to be paid by the sub-contractors and that the tax liability therefore actually sought from the contractor had turned out to be much lower.

44. Regarding merits the appellant case that the penalty is excessive / unfair because it is based on the full amount and not the Regulation 13 amount our view is that we cannot say these arguments are either very weak or very strong. On unfairness, following *Revenue and Customs Commissioners v Hok Ltd* [2013] STC 225 it is clear a tribunal cannot discharge a penalty on the ground its imposition is unfair. If the appellant is to be regarded as arguing that the penalty was unfair / disproportionate however from the point of view of their human rights (Article 1 Protocol 1 ECHR) then there is no binding authority on the point (the UT case of *Revenue and Customs Commissioners v Bosher* [2014] STC 617 dealt with fixed penalties in respect of late returns or returns which had not been filed).

45. Although not directly on point the case of *Barrett v Revenue and Customs Commissioners* [2015] UKFTT 0329 (TC) (which admittedly as an FTT decision would only be of persuasive authority) considered an argument which has similarities with the appellant's. The appellant's argument in that case (see [121] of the decision) was that his human rights would be breached if the legislation did not make provision for relief in the circumstances of his case – he wanted the Regulation 13 determination to take account of a Regulation 9 Condition B direction that he maintained ought to have been made). The argument on human rights failed; the FTT did not accept that CIS can only be proportionate if it enables in all circumstances a credit for the contractor for tax actually paid by the sub-contractor. However it should be noted that the argument was in the context of the Regulation 13 determination. It is not inevitable that the analysis as regards the irrelevance of Regulation 9 determinations would necessarily be the same when it came to the question of what was an appropriate amount of penalty in circumstances (where it was clear, in contrast to the situation with fixed penalties which the tribunal in *Barrett* was dealing with) that the tribunal had jurisdiction over whether the amount was appropriate.

46. The upshot, in terms of the merits of the appellant's case, is that they are neither very strong nor conversely very weak. In terms of the prejudice to HMRC in allowing the appeal to proceed out of time, while the delays that occurred in progressing collection of a sum they thought was final make some inroad into the prejudice they suffered (we do not think that if it is correct that the Limitation Act does not impose any limit this means the delays in collection cannot be taken into account in discounting HMRC's prejudice) it is clear that there would nevertheless remain some amount of prejudice to HMRC to be weighed in the balance.

47. Even when the period of delay of five years is discounted for the periods when the appellant was proceeding under the misapprehension that there was no outstanding

amount, or that it was not worth appealing to the tribunal because of HMRC's likely stance, the amount of delay is still significant at just over one year, (and even if the delay in relation to difficulties arising with internet access were taken out of account the delay without good explanation would still be significant at eight months). The actual length of time of five years is also a factor that we must take into account in its own right in that the ability of the tribunal to administer justice is hampered when dealing with old disputes where such evidence as there is becomes increasingly stale. In addition we cannot ignore the prejudice that arises to HMRC in having to re-engage with a matter they assumed was not going to be contested becoming live again. Taking account of the significant length of delay without explanation, that the appeal was filed just over five years late, that the merits do not point clearly in either direction, but that there is prejudice to HMRC in having to deal with a matter some considerable time after it might reasonably have concluded the matter was closed, it is in our view in the interests of justice that permission to appeal out of time is refused in this matter.

48. 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.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE 18 OCTOBER 2016