



TC05964

Appeal number: TC/2016/02337

PENALTY – failure to make a monthly CIS return – FA 2009, Sch 55 - late appeal to HMRC – reasonable excuse – special circumstances – irrelevance of treatment of other cases

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

L C PROPERTY MANAGEMENT LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ROGER BERNER

Determined on the papers on 16 June 2017 having considered the notice of appeal dated 25 April 2016 and attachments, and the Respondents' statement of case sent to the Tribunal on 1 June 2016 and attachments. The Appellant was given the opportunity to file a Reply, but did not do so.

DECISION

1. There has been considerable delay between the filing by the appellant, L C
5 Property Management Limited (“LCPM”), of its notice of appeal in this case and the
issue of this decision. The parties deserve both an apology and an explanation,
although the circumstances in which this has occurred are not entirely clear.

2. On receipt of the notice of appeal, which was dated 25 April 2016, the appeal
proceeded in the normal way for one categorised as a default paper case, in other
10 words a case ordinarily determined without a hearing. HMRC sent their statement of
case to the Tribunal on 1 June 2016 and the Tribunal wrote to LCPM on 13 June
advising LCPM of its right to submit a reply. When no reply had been received by
the due date, the appeal was in the normal way allocated to a judge for determination
on the papers. The file was sent to the judge on 19 July 2016.

3. What happened then is something of a mystery. Although the Tribunal received
15 back from the judge decisions in three other paper cases that had been allocated to
him for the same day, no trace has been found of the decision in this case. There is no
record of it in the Tribunal’s files, or electronically, and the judge (who is currently
not available for Tribunal work) has not been able to find it on his own systems.

4. In those circumstances, the President of the Tribunal has directed that the case
20 be considered afresh by another judge. I have now considered LCPM’s appeal, and
this is my decision. Once again, I regret the delay which the parties have had to
endure.

Late appeal

5. The delay by the Tribunal in issuing a decision in this case is not the only delay
25 to have beset it. The appeal is in respect of two penalties relating to a single default in
respect of the late submission of a return under the Construction Industry Scheme
(“CIS”). The return in question was the monthly return for the period ended 5 August
2015, the due date for submission of which was 19 August 2015. The first penalty
30 was issued in the sum of £100 by notice dated 10 September 2015. A second penalty
in the sum of £200 was issued on 21 October 2015. In each case, LCPM had 30 days
from the date of the notice to appeal to HMRC.

6. Mr Stephen Lockwood, a director of LCPM, wrote to HMRC on 16 December
2015 with respect to a number of CIS penalty charges for various companies.
35 Included in that letter was a reference to the two penalties in respect of the period 6
July – 5 August 2015. The letter sought reversal of the charges on the basis that the
failures had occurred through an oversight, and was in effect an appeal against them.

7. That appeal was late. However, nothing further seems to have happened until
16 March 2016, when Mr Lockwood wrote again to HMRC to say that LCPM was
40 being chased for the penalties, and reiterating the appeal on the basis of an oversight.
HMRC then replied on 15 April 2016 to advise LCPM that the appeal (it is not clear

whether the reference is to the letter of 16 December 2015 or that of 16 March 2016, but I infer that it must have been the latter) was late and that HMRC were refusing to accept it. The letter advised LCPM of its right to apply to the Tribunal to be permitted to appeal to HMRC.

5 8. In those circumstances, the proper course would have been for LCPM to apply to the Tribunal, under s 49 of the Taxes Management Act 1970 (“TMA”), for permission to appeal late to HMRC. That was not done, however; LCPM’s notice of appeal instead set out its grounds for appealing the substantive penalty decisions.

10 9. Absent an appeal to HMRC, for which permission would be required from the Tribunal if HMRC have refused to accept the late appeal, this Tribunal has no jurisdiction to entertain LCPM’s substantive appeal. That is the effect of s 49D TMA. On the other hand, the proceedings have progressed as a substantive appeal up to this stage. It would clearly not be in the interests of justice if the appeal effectively had to go back to square one, even if I were at this stage to permit a late appeal by virtue of s
15 49.

10. In light of the conduct of HMRC in addressing in its statement of case the substantive issues in the case, it can be taken that HMRC have accepted that the appeal is indeed a substantive appeal against the penalties. It follows therefore that HMRC have accepted, albeit belatedly, that either LCPM’s letter of 15 December
20 2015 or its letter of 15 March 2016 was an appeal to HMRC, thus rendering the appeal to the Tribunal a valid appeal under s 49D(2).

11. That is the way I intend to proceed. I turn therefore to the substantive issues.

The facts

12. The facts can be stated very straightforwardly. At the material time LCPM was
25 required to file monthly CIS returns. That obligation arose under regulation 4(1) of the Income Tax (Construction Industry Scheme) Regulations 2005, which 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. Accordingly, a return must be made by the 19th of each calendar month.

30 13. LCPM failed to file its monthly return for the period ended 5 August 2015 by the due date of 19 August 2015. It thus became liable to a penalty of £100 in accordance with paragraph 8 of Schedule 55 to the Finance Act 2009 (“FA 2009”). That failure continued, and as at 19 October 2015 LCPM had not filed the return. A penalty of £200 thus arose under FA 2009, Sch 55, para 9.

35 14. The penalty notices under para 8 and para 9 were issued by HMRC on 10 September 2015 and 21 October 2015 respectively. LCPM acknowledged receipt of those notices, and there is no dispute that the notices were properly issued and received.

LCPM's appeal

15. In its letter of 16 March 2016, which essentially repeated what had been said in the letter of 16 December 2015, LCPM stated that the late submission of the return had been due to an oversight. No further particulars were provided in that respect.

- 5 16. Its appeal to the Tribunal referred to the December 2015 and March 2016 letters, and expressed the view that because those letters had referred to penalties levied against companies other than LCPM, and those penalties had apparently been reversed, the same treatment should be afforded to the penalties in respect of LCPM.

The law

- 10 17. I have referred to the provisions of Schedule 55 FA 2009 which give rise to the penalties on the facts of LCPM's case. There are three further material provisions which I should refer to.

18. The first is in paragraph 23 of Schedule 55, and relates to the defence of reasonable excuse:

- 15 (1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a return if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.
- (2) For the purposes of sub-paragraph (1)—
- 20 (a) an insufficiency of funds is not a reasonable excuse, unless attributable to events outside P's control,
- (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and
- 25 (c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

- 30 19. The second is paragraph 16, which makes provision for what are described as "special circumstances":

- (1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.
- (2) In sub-paragraph (1) "special circumstances" does not include—
- 35 (a) ability to pay, or
- (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.
- (3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—
- (a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

20. Finally, there is paragraph 22, which sets out the Tribunal’s powers on a penalty appeal:

5 (1) On an appeal under paragraph 20(1) [decision that a penalty is payable] that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 20(2) [decision as to the amount of a penalty] that is notified to the tribunal, the tribunal may—

10 (a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 16—

15 (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

20 (b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 16 was flawed.

(4) In sub-paragraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.

25 (5) In this paragraph “tribunal” means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 21(1)).

Discussion

21. As there is no dispute that LCPM failed to make the relevant return by the due date and continued with that failure so that the penalties under paragraphs 8 and 9 arose in principle, nor any dispute that the penalty notices were properly made by HMRC and received by LCPM, the appeal resolves itself around the question whether there was any reasonable excuse for those failures, and if not whether any adjustment might fall to be made with regard to special circumstances.

Reasonable excuse

22. I should say at once that mere oversight cannot be regarded as a reasonable excuse. In the context of a penalty for failure to make CIS returns, I described the test of reasonable excuse in *Nigel Barrett v Revenue and Customs Commissioners* [2015] UKFTT 329 (TC), at [154], in the following terms:

40 “The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances,

and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard.”

23. In my judgment a reasonable taxpayer would take care to avoid mere oversights. The suggestion here is that such oversights occurred on at least five occasions, and it is clear that even after the oversight had been discovered with respect to the return in question no attempt was made to rectify it by then filing the return. Indeed, according to HMRC’s statement of case, which has not been disputed, at the date that statement had been prepared, 17 May 2016 – some 8 months after the due date for its filing - the relevant return had not been received by HMRC. There is no evidence of any reasonable excuse in that respect.

24. I should at this point, however, reiterate the point that I made in *Barrett*, following on from other decisions of the FTT, that the formulation of the test of reasonable excuse which appears in HMRC’s statement of case, namely that it is “normally an unexpected or unusual event that is either unforeseeable or beyond a person’s control and which prevents the person from complying with the obligation when they otherwise would have done” is inappropriate, reflecting as it does the dissenting judgment of Scott LJ in *Stepto v Customs and Excise Commissioners* [1992] STC 757, which was not shared by the majority in that case. Whilst such events might well constitute a reasonable excuse, the expression is not confined in that way, and other cases may also arise that would be equally unexceptional.

25. Since *Barrett*, the same point has been made at the level of the Upper Tribunal in *ETB (2014) Limited v Revenue and Customs Commissioners* [2016] UKUT 0424 (TCC), where at [14] the Upper Tribunal made the same criticism of the formulation of the test by reference to an unexpected or unusual event that is either unforeseeable or beyond the taxpayer’s control. The Tribunal referred to what it regarded as a more appropriate formulation in the Compliance Handbook, at CH555800 with respect to circumstances of a shortage of funds, namely:

“... occurred despite the person exercising reasonable foresight and due diligence, having given proper regard to their tax due date obligations.”

26. Applying what I regard as the correct test, I conclude that a mere oversight is insufficient to amount to a reasonable excuse, and that the penalties are not precluded from arising by reason of the asserted oversight on the part of LCPM.

Special circumstances

27. The power of the Tribunal to intervene and make an adjustment to the penalty by reference to special circumstances arises only if the Tribunal finds that HMRC acted in a way that no reasonable decision maker would have acted in the exercise of their power to reduce the penalty by reason of special circumstances.

28. In this case, HMRC’s statement of case confirms that they considered the question of special reduction. They did so on the basis that special circumstances would require there to be something exceptional, abnormal or unusual or something out of the normal run of events.

29. That judgment cannot be criticised in any way as flawed. There is nothing in the case put by LCPM that can be described as special circumstances. Apart from the question of oversight, which I have addressed above, the only other point made by LCPM is in relation to the apparent willingness of HMRC to withdraw certain similar penalties levied on other companies, which I assume to be associated in some way with LCPM. That is not a special circumstance. Nor is it in any way relevant to the question of the liability of LCPM to these particular penalties, which must be considered on their own terms and in accordance with the applicable statutory provisions.

10 **Decision**

30. For those reasons, with renewed regret for the delay in the parties receiving this decision, I dismiss LCPM's appeal, and I affirm HMRC's decisions with respect to both penalties.

Application for permission to appeal

15 31. 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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**ROGER BERNER
TRIBUNAL JUDGE**

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RELEASE DATE: 21 JUNE 2017