



**TC06423**

**Appeal number: TC/2017/04890**

*Income tax –Construction industry scheme – late filing penalties – whether reasonable excuse - no*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**APLEX CONTRACTS LIMITED**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ABIGAIL MCGREGOR  
IAN MENZIES CONACHER**

**Sitting in public at Taylor House, London on 24 January 2018**

**The appellant was not present or represented**

**Siobhan Brown, presenting officer for HM Revenue and Customs, the Respondents**

## DECISION

### Background and appeal

5 1. This was an appeal against decisions of HMRC to issue penalties amounting to £2000 for late submission of monthly construction industry scheme (**CIS**) returns by Aplex Contracts Limited (**Aplex**).

2. The appellant's director, Mr Brett Bishop, did not attend and was not represented at the hearing. Mr Bishop had, in the days running up to the hearing, sought and been refused a postponement. After that refusal, Mr Bishop had notified  
10 the Tribunal that he was content for the hearing to proceed in his absence. On that basis we were satisfied that it was in the interests of justice to proceed with the hearing.

3. Aplex's original appeal to HMRC regarding the late filing penalties, made on 23  
15 January 2017, was made outside of the 30 day time limit for all of the penalties issued. HMRC originally refused permission to make a late appeal in a letter dated 2 March 2017. In the hearing, HMRC confirmed that it did not now object to the lateness of the appeal. We concluded that it was in accordance with the overriding objective in rule 2 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber)  
20 Rules 2009 SI 2009/273, to allow the late appeal and proceed to determine the substantive issue.

### Evidence

4. The tribunal was presented with a bundle of documents prepared by HMRC, including the Notice of Appeal from Aplex and its attachments.

### 25 Law

5. A contractor who makes payments under construction contracts is obliged by section 70 of Finance Act 2004 (**FA 2004**) to submit periodic returns to HMRC in accordance with regulations issued under that provision.

6. The Income Tax (Construction Industry Scheme) Regulations 2005, SI  
30 2005/2045 (the **CIS Regs**) are regulations issued under that provision. Regulation 4(1) requires that contractors make monthly returns of payments made to subcontractors within 14 days of the end of the tax month, being the fifth day of the month, meaning that returns are due by the nineteenth day of the month.

7. The CIS Regs were amended, with effect from 6 April 2016, so that, under  
35 Regulation 4(4), the CIS returns had to be transmitted to HMRC using an approved method of electronic communication, unless:

(1) The individual (or partners or company directors) is a practising member of a religious society whose beliefs are incompatible with the use of electronic communications; or

5 (2) The contractor considers that it is not reasonably practicable for them to use an approved method of electronic communication and HMRC has issued a direction to that contractor authorising them to transmit the return by another method.

8. Late submission of CIS returns under section 70 of FA 2004 attracts penalties under Schedule 55 to Finance Act 2009 (**FA 2009**) as follows:

- 10 (1) £100 penalty when a return is late (paragraph 8);  
(2) £200 penalty when a return is 2 months late (paragraph 9); and  
(3) penalty of the greater of 5% of any liability to make payments which would have been shown on the return or £300 when a return is 6 months late (paragraph 10).

15 9. A penalty does not arise if the taxpayer is found to have had a reasonable excuse under paragraph 23 of Schedule 55 to FA 2009.

10. HMRC may, if it thinks it right due to special circumstances, reduce any of the penalties under paragraph 16 of Schedule 55 to FA 2009.

### **Parties arguments**

20 11. The appellant's arguments, set out in the Notice of Appeal and original letter of appeal to HMRC from Brett Bishop, were that:

(1) They had tried, between April and November 2016, to follow the guidelines for making online CIS returns but had been unable to make it work;

25 (2) Their attempts included calling the HMRC CIS helpline, but the problem was not resolved;

(3) They had problems with their accountants who were not helping them to get it resolved, meaning that they changed their accountants, before having to go back to the original accountants to get the returns filed;

30 (4) Mr Bishop had been keeping a record of all the relevant amounts in the meantime in his diary, so he would be able to populate the information once he got online; and

(5) The company had made payments via BACS while he tried to work out the online access.

12. HMRC's arguments were that:

35 (1) The returns in question were submitted late and the penalties were therefore validly issued;

(2) Aplex did not have a reasonable excuse for the late filing because it made no efforts to resolve its online access in a reasonable time frame; and

(3) HMRC did not consider that special circumstances were present in relation to Aplex which would allow a reduction to the penalties.

### **Facts**

5 13. The following facts were not in dispute:

(1) Aplex is a roofing contractor;

(2) Aplex registered for the PAYE subcontractor scheme on 7 November 2015;

10 (3) Aplex submitted its first four CIS returns on paper (for the periods to 5 December 2015, 5 January 2016, 5 February 2016 and 5 March 2016);

(4) Aplex submitted the CIS returns for the periods ending 5 May, 5 June, 5 July, 5 August, 5 September and 5 October 2016 online on 1 December 2016; and the return for the period ending 5 November 2016 on 2 December 2016;

15 (5) HMRC issued the following penalties (referring to the returns by month for ease of reference):

(a) seven £100 late filing penalties for each of the returns from May to November;

(b) five £200 two month late filing penalties for each of the returns from May to September; and

20 (c) one £300 six month late filing penalty for the May return.

14. Based on the evidence presented to us, we also find the following facts:

(1) Aplex first attempted to register for online filing of CIS returns on 17 December 2015, which was before the first deadline for submission of online returns;

25 (2) Aplex made a second attempt to so register on 15 February 2016;

30 (3) On both of these occasions, Aplex successfully executed the first step of registration, being logging into their government gateway account and entering employer information, which triggered the issuing of an activation PIN by post. On both occasions, the PIN was not subsequently entered within the 28 days allowed;

(4) HMRC systems show no record of calls from Aplex, or anyone on the company's behalf, regarding these unsuccessful registration attempts;

(5) HMRC made an enforcement visit to Aplex's Main Road, Romford address on 11 August 2016;

35 (6) Aplex made a telephone call to HMRC on 7 September 2016 to discuss outstanding CIS returns and amounts;

(7) HMRC issued a further enforcement notice to Aplex's Main Road address on 14 October 2016;

(8) Mr Bishop made a phone call to HMRC on 4 November 2016 saying that he was having trouble with the online registration but that he will get his accountant to do it on his behalf;

5 (9) On 4 November 2016, Mr Bishop contacted his accountant to instruct them to file the CIS returns;

(10) During the course of November 2016:

(a) the accountants made an application for online registration;

(b) a PIN code was issued by HMRC to Aplex which was received by Aplex and passed on to the accountants; and

10 (c) Aplex provided the accountants with appropriate information on contractors, putting them in a position to make the necessary filings on 1 and 2 December 2016.

### **Discussion**

15 15. It is not in dispute that the CIS returns were due or that they were late. On that basis, the penalties for late filing were validly issued and, subject to considerations of reasonable excuse or special circumstances discussed below, the penalties therefore stand.

20 16. It is clear from the initial attempts to register for online filing that Aplex was aware of the change from paper filing to online filing well in advance of the change and that there was no question that a membership of a religious society whose beliefs are incompatible with the use of electronic communications came into play in this case. Nor had Aplex applied for and obtained a direction under regulation 4A of the CIS Regs that it was not reasonably practicable for Aplex to file online.

25 17. While we accept that it does appear that Aplex had made at least two failed attempts to register for online filing, we have no evidence as to why the registrations were not completed, nor of any attempts made by Aplex to resolve the problems encountered. The question we have to consider is whether the problems (whatever they were) amounted to a reasonable excuse, i.e. were Mr Bishop's actions (in his capacity as director of Aplex) the actions of a reasonable taxpayer in his position, exercising reasonable foresight and diligence and having proper regard for Aplex's tax responsibilities.

35 18. We find that the actions taken were not reasonable. When he had problems with the registration, he should have pursued it with HMRC, explaining his problems and trying to find a solution to resolve them. Although Aplex made a telephone call to HMRC in early September regarding the late returns, no active steps were taken to resolve the problem until early November, when they instructed their accountants to file the returns on their behalf.

40 19. Aplex submitted that they had issues with their new accountants and had to return to using their earlier accountants. HMRC's records show that Aplex did change its registered agent from Holgate Court to Mark Ball and Co in February 2016.

5 However, the registered agent was changed back to Holgate Court in April 2016. Given that it was Holgate Court who eventually resolved the problems on Aplex's behalf, albeit not until November 2016, we do not accept that the change of accountants and/or problems with the new accountant was sufficient to justify a reasonable excuse for the late filing between April and November 2016.

20. Aplex have not submitted any evidence of special circumstances that apply to Aplex in a manner that would enable this Tribunal to displace HMRC's decision that there were no relevant special circumstances to justify reducing the penalties arising.

10 21. For the sake of completeness, we mention that there does appear to have been some issue with the receipt of correspondence at Aplex's Main Road address. When HMRC was corresponding with the taxpayer regarding bundles for the hearing, a packet was returned undelivered and Mr Bishop provided an alternative address for the bundle to be sent. Although Aplex did not raise the point of a change of address directly, we considered the issue because it could have contributed to the fact of being  
15 unable to complete the online registration because PINs were being sent to the Main Road address. However, all of the relevant CIS returns continued to use the Main Road address on the face of the return and Aplex had not amended the address registered with HMRC at any time during that period. Therefore, we do not accept that letters issued by HMRC had been incorrectly addressed during the relevant  
20 period.

### **Decision**

22. For the reasons set out above, we find that Aplex filed the May to November 2016 returns late and did not have a reasonable excuse for doing so. Therefore the penalties for late filing stand.

25 23. 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  
30 "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

35 **ABIGAIL MCGREGOR**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 5 April 2018**