



[2020] UKFTT 0141 (TC)

TC07634

Appeal number: TC/2019/01133

Procedure – application to admit late appeal - CIS - determinations and penalties - delay of 28 months - Denton and Martland considered - Application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WAYNE HINDMARSH

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE MICHAEL CONNELL
NOEL BARRETT**

Sitting in public at Tribunal Tax Service, Darlington County Court, 4 Coniscliffe Road Darlington on 8 October 2019

Mr Christopher Bailey, accountant for the Appellant

Mr Neil Humpleby of Solicitors Office and Legal Services HM Revenue and Customs for the Respondents

DECISION

The Application

1. This is an application by Wayne Hindmarsh (“the appellant”) to admit an appeal under Rule 20(4)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and extend time to give notice of appeal under Rule 5(3)(a) against determinations made pursuant to Regulation 13 of the Income Tax (Construction Industry Scheme) Regulations 2005 totalling £11,587.35 and penalties charged under s 98A (2)(a)(b) of the Taxes Management Act 1970 (“TMA 1970”) totalling £31,500 but reduced to £3,546.62 and Schedule 55 to the Finance Act 2009 (“FA 2009”) totalling £3,649.70.
2. HMRC oppose the application.

The CIS and relevant legislation

3. The CIS is a tax compliance scheme for businesses operating in the construction industry. The legal basis of the CIS regime is the FA 2009, Schedule 55 paragraphs 1, 8 - 13 and 23; ss 57 -77 of the Finance Act 2004 (“FA 2004”) and the Income Tax (Construction Industry Scheme) Regulations 2005 (SI 2005/2045) (the “2005 Regulations”). The regime came into force for CIS monthly returns with effect from 6 October 2011.
4. The CIS requires certain payments by contractors to sub-contractors to be made subject to deduction of tax. The sub-contractors are entitled to claim credit for tax withheld under CIS against their tax liability for the tax year in question.
5. Contractors are required to make a return no later than 14 days after the end of every tax month (a “monthly return”) (s 70 FA 2004 and regulation 4 of the 2005 Regulations). For these purposes, a tax month means the period beginning with the 6th day of a calendar month and ending on the 5th day of the following month. A monthly return must therefore be received by HMRC no later than the 19th day of the month. Nil returns are also required (s 70 FA 2004 and reg 4(10) of the 2005 Regulations).
6. If a monthly return is received after the filing date, it will be treated as late and the contractor will be liable to a penalty under s 98A of TMA 1970 (introduced by the Finance Act 1989 and amended by FA 2004).
7. Late filing penalties are chargeable for each month during which a return is outstanding after the filing date for a maximum of 12 months and a further penalty if the return has still not been filed after 12 months. There are two types of penalty:
 1. The monthly penalty of £100 for each month or part month that a return is late during the first 12 months when the employer has no more than 50 sub-contractors; and
 2. A final late return (commonly referred to as the “month 13 penalty”) if the failure to submit a return continues after 12 months. The month 13 penalty may not exceed £3,000.
9. The total exposure to penalties for any one return is thus a maximum of £4,200.
10. Section 118(2) of TMA 1970 states that where a person had a reasonable excuse for not doing anything which was required to be done, he shall be deemed not to have failed to do it if he did it without reasonable delay after the excuse ceased.

13. Under s 102 of TMA 1970, HMRC has a specific power to mitigate penalties. The section provides:

“The Board may in their discretion mitigate any penalty, or stay or compound any proceedings for a penalty, and may also, after judgment, further mitigate or entirely remit the penalty.”

14. Schedule 55 to FA 2009 introduced a new penalty regime for the late filing of returns. The regime came into force for CIS monthly returns with effect from 6 October 2011 and applies to returns due to be filed on or after 19 November 2011. In November 2010, because the new CIS penalty regime was about to come into force, HMRC introduced a revised policy for considering mitigation of penalties under s 102 of TMA 1970 for late contractors’ monthly returns. If a monthly return is received after the filing date, it will be treated as late and the contractor will be liable to a penalty under Schedule 55 FA 2009 as follows:

8. If a CIS return is 1 day late, an initial fixed penalty of £100 is payable.

9. If HMRC have still not received that return:

- 2 months after the date it was due, a second fixed penalty is payable of £200.
- 6 months after the date it was due, a further penalty of £300 or 5% of any liability to make payments that should have been shown in the return is payable.
- 12 months after the date it was due, a second further penalty is payable – the amount of this penalty depends on why the return was late. The amount HMRC charge will be either £300 or 5% of any liability to make payments, or a ‘higher’ penalty of up to 100% of any liability to make payments.

10. Paragraph 23 of Schedule 55 makes provision as to what may or may not constitute a reasonable excuse.

“23(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) -

- (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
- (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.”

11. Section 57(2) Finance Act 2004, states that:

“(2) In this section ‘Construction Contract’ means a contract relating to construction operations, which is not a contract of employment but where

- a. One party to the contract is a subcontractor and
- b. Another party to the contract (‘the contractor’) is either –
 - (i) Is a subcontractor
 - (ii) Is a person to whom s59 applies

12. Section 59 (1) (a) Finance Act 2004 provides that:

“Contractors

(1) This section applies to the following bodies or persons –

any person carrying on a business which includes construction operations.”

Background

13. The appellant is a self-employed flooring contractor based in Stanhope, Bishop Auckland.

14. HMRC say that he engaged subcontractors within the Construction Industry scheme without deducting and accounting for tax at source or without submitting returns, as required. The relevant legislation is set out in FA 2004 sections 57-77 and Schedules 11 and 12.

15. On 13 August 2013 HMRC opened an enquiry into the appellant’s Self-Assessment tax return for the year ending 5 April 2012.

16. On 16 July 2014 HMRC advised the appellant that his PAYE and Construction Industry costs and receipts would be reviewed.

17. On 5 August 2014 HMRC advised the appellant that his VAT returns were also to be reviewed.

18. The VAT, CIS and Self-Assessment reviews were dealt with by the relevant HMRC department and both the accountant and appellant will have been aware that different officers were conducting the reviews.

19. The appellant and his accountant attended meetings with HMRC on 20 August and 2 October 2014 to discuss the appellant’s tax affairs. HMRC requested information from the appellant relating to those contractors who came within CIS with whom the appellant had traded.

20. On 5 August 2015, after a number of requests and as no response had been received from his accountant, HMRC issued a Schedule 36 FA 2008 notice to the appellant to provide the information. Subsequently the accountant provided the information including schedules of payments the appellant had made under CIS.

21. On 3 November 2015 HMRC finalised their computations and decision notices were issued to the accountant.

22. On 18 November 2015 in response to a claim for relief under Regulation 9(4) (Condition B) of the Income Tax (Construction Industry Scheme) Regulations 2005, HMRC issued amended provisional computations.

23. On 23 December 2015 HMRC wrote to the appellant, and sent a copy to the accountant, to advise that if no further information was received by 15 January 2016 formal determinations and penalties would be put in place as set out in the letter.

24. On 15 January 2016 a closure notice in respect of the enquiry into the appellant's 2011-12 self-assessment was issued. The appellant's return had previously shown that he paid £2,254.98 too much. The enquiry into his return showed that there was in fact a difference of £15,708.42 and that the appellant was liable to pay £13,453.44. As at 15 January 2016 the total income tax payable by the appellant was £16,901.48.
25. On 29 January 2016 HMRC responded to further information provided and amended their proposed determinations under regulation 13 of the 2005 Regulations relating to outstanding CIS deductions and the related penalties for failure to operate the scheme.

Year	Decision	Amount	Date of issue
		£	
2010/11	Regulation 13	225.00	11/04/2016
2011/12	Regulation 13	6,432.60	11/04/2016
2012/13	Regulation 13	2,910.75	11/04/2016
2013/14	Regulation 13	504.00	11/04/2016
2014/15	Regulation 13	1,158.00	11/04/2016
2015/16	Regulation 13	357.00	11/04/2016
Total		<u>11,587.35</u>	
05/11/2011	Section 98A	31,500	11/04/2016
—	(2)(a)(b)	Reduced to	
05/10/2011		3,546.62	
05/01/2011	Schedule 55	3,649.70	11/04/2016
—	penalty		
05/04/2016			
Total		<u>7,195.32</u>	

26. On 29 March 2016, HMRC wrote to the appellant to explain that the evidence showed that he had failed to submit monthly returns CIS300 for tax years 201-11 to 2015-16 under Regulation 4 of the 2005 Regulations. He was advised that HMRC were considering formal penalty action in accordance with s 98A (2) (a) TMA 1970 for returns up to 12 months late, and in accordance with s 98A (2) (b) TMA 1970 for returns over 12 months late, which totalled £31,500 and formal penalty action in accordance with Schedule 55 FA 2009, which provides for a total of £3,649.70. Copies of the calculations were attached.

27. The appellant's accountant appealed the decisions on 5 May 2016. He said:

“We believe that CIS deductions should not have been due and therefore returns should not have been due. Hence the penalties are not due. We believe that the extra work we are carrying out at present to locate the [subcontractors] will show that they are/were either employed or outside the scope of the scheme.”

28. On 12 May 2016 HMRC replied setting out their view of the matter and offering a review within 30 days of their letter. The appellant says he did not receive this letter, although a copy was also sent to his accountant.
29. The checks into the appellant's VAT returns were concluded on 27 September 2016.
30. On 11 October 2018, following the CIS determinations and penalties being referred to HMRC's debt collection division, the appellant appealed the CIS penalty determinations. His accountant asserted that the individuals from whom HMRC stated that the appellant should have deducted CIS tax, were working within domestic houses and therefore CIS tax would not have been deductible.
31. HMRC replied on 9 November 2018 to say that as no response had been received within the 30 days following HMRC's letter of 12 May 2016 the appeal had been regarded as settled and as a result the late appeal was not accepted.
32. The accountant responded on 9 December 2018 requesting clarification of the correct appeal route.
33. HMRC responded on 11 January 2019 outlining the original timeline in 2016 and reiterated that the appellant would have to demonstrate:
 - i. Why the information referred to by the accountant in his letter of 5 May 2016 was and had still not been provided.
 - ii. Why no response was received either from the appellant or his accountant in response to HMRC's letter of 12 May 2016 which addressed the initial appeal.
 - iii. Why the determinations that had been issued were incorrect.
 - iv. Why the appellant had not responded to the determinations within the specified period of 30 days following the decision.
34. On 3 April 2019 the appellant appealed to the Tribunal.

Appellant's case

35. In the appellant's notice of appeal the reason given for the late appeal is:

“The reason why the appeal is late is because HMRC closed two other parts of a taxpayer review (income tax and VAT) at the time (two years ago) and the assumption was that all parts have been closed. This was backed up by the fact that HMRC never asked for any moneys (in relation to the CIS review) for over two years - hence we assumed all parts of the review had finished. They have only just (in December 2018) started to ask for payment of the outstanding tax.”

36. At the hearing, the appellant said that he and his accountant had met with HMRC in October 2017, when a final settlement was reached with regard to the appellant's income tax, VAT and the current CIS deductions. The appellant's accountant said that a global figure of approximately £45,000 had been agreed with HMRC, paid in settlement of all liabilities. The appellant was however unable to provide any further information or details as to precisely when the meeting took place, with whom or any documentary evidence.

37. The grounds of appeal were stated as follows :

“HMRC believe that invoices raised by subcontractors should have had CIS deducted from them. We believe this is not the case, because of the type of work that was being carried out by the subcontractors. They were fitting flooring to properties and this flooring (carpets) did not form part of the fabric of the building - they could be removed and therefore they were not attached to the building and hence should fall outside the construction industry scheme.”

HMRC’s case

38. HMRC responded to the appellant’s appeal dated 5 May 2016 on 12 May 2016 and offered the appellant the opportunity of providing further information and requesting a review.

39. As the offer of review was not accepted and an appeal was not lodged with the tribunal within the time limit, the appeal to HMRC was treated as settled in accordance with s 49 C(4) TMA 1970.

40. The time to appeal to the tribunal was exceeded by over 28 months.

41. HMRC do not accept that the CIS determinations and penalties were settled when the self-assessment and VAT enquiries were closed. The self-assessment and VAT enquiries were led by different HMRC Officers. Nothing had been issued by the CIS officer to indicate that the determinations and penalties were not still outstanding.

42. No evidence has been put forward to support the appellant’s contention that the CIS determinations and penalties formed part of any agreed settlement with HMRC.

43. Without evidence to dispute their findings HMRC do not accept that the CIS determinations are incorrect.

44. At the hearing the tribunal heard preliminary submissions from the parties. The appellant asserted that any liability for CIS determinations and penalties had been paid and/or waived as part of a full and final settlement reached with HMRC which included all outstanding income tax, VAT and any CIS determinations or penalties. He asserted that two payments were made to HMRC, one early in 2017 and a balancing payment shortly after a meeting in September 2017. The appellant asserts that nothing further was heard from HMRC until August 2018, when he received a further CIS determination from HMRC. During an exchange of correspondence and at a meeting between the parties on 15 February 2019, the appellant reiterated his contention that any outstanding CIS/penalties had been settled in 2017, together with agreed outstanding self-assessment income tax and VAT.

45. HMRC maintain that the CIS determination/penalties were dealt with entirely separately from any settlement that may have been reached in respect of SA income tax and VAT, and that such determinations and penalties remain outstanding.

46. At the request of the appellant and with the agreement of HMRC, the hearing was adjourned to allow the appellant the opportunity of producing evidence in support of his assertions that a settlement had been reached, including in particular assessments for income tax and VAT in addition to determinations for CIS and

penalties for all the years in question together with evidence of all payments made to HMRC and any relevant supporting documentation, including copy bank statements.

47. Pursuant to the tribunal's directions the appellant produced a brief summary of various adjustments, payments and repayments of tax which he asserted showed that the appellant owed no CIS tax.
48. HMRC responded that the documentation provided by the appellant related only to his personal self-assessment income tax liability as a self-employed sole trader arising from his self-assessment tax returns and the enquiry into his 2011 – 12 return which was settled by way of a formal closure notice in 2016.
49. The documents did not provide any evidence relating to the appellant's separate and distinct liability as a contractor in the Construction Industry Scheme to make deductions, in accordance with section 61 of the Finance Act 2004, from payments made to subcontractors.
50. The documents provided by the appellant did not provide any evidence of a settlement agreed with HMRC to include personal income tax, VAT and CIS tax and penalties.

Discussion

51. The application before us is for permission to bring a late appeal. The tribunal is not at this stage considering in any detail or substance the merits of the appeal.
52. The burden of proof lies with the appellant to demonstrate why the tribunal should exercise its discretion to admit an appeal that is brought late. To satisfy this, the appellant must show good cause for the delay in lodging his appeal and in this regard we must consider case law authorities.

Case Law Authorities

53. A number of recent decisions have since clarified the approach to be applied in applications for relief from sanction under CPR r. 3.9. The Court of Appeal heard three conjoined appeals: *Denton v TH White Ltd*, *Decadent Vapours Ltd v Bevan and Utilise TDS Ltd v Davies* [2014] EWCA Civ 906. The first was an appeal against the grant of relief. The second and third were appeals against its refusal.
54. The Court of Appeal was unanimous in allowing all three appeals and took the opportunity to clarify the approach that had been advanced in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795. A three-stage approach is now required to applications for relief.
55. The Court took the opportunity to clarify the principles applicable to such applications as follows (at [24]):

“A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the “failure to comply with any rule, practice direction or court order” which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate “all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]”.”

56. In respect of the “third stage” identified above, the Court said (at [32]) that the two factors identified at (a) and (b) in Rule 3.9(1) “are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered”.
57. The first stage is a departure from the test of ‘triviality’ referred to in *Mitchell*, which the Court concluded had caused difficulties in its application. The Court accepted that in many circumstances the most useful measure would be to determine whether the breach imperilled future hearing dates or otherwise disrupted the conduct of litigation generally. If the Court concludes that the breach was neither serious nor significant, relief will usually be granted and it is unnecessary to devote time on stages 2 and 3. At stage 1, only the breach that resulted in the sanction should be considered. Other breaches by the defaulting party fall to be considered at stage 3.
58. The Court of Appeal was divided on the issue of how much importance should be placed on (a) and (b) of Rule 3.9. The majority view was that these two factors are of particular importance and should be given particular weight.
59. The other factors that are relevant in stage 3 will vary from case to case. The promptness of the application is a relevant circumstance to be weighed in the balance. Other breaches by the defaulting party may be considered at this stage.
60. The majority expressed concern that some judges were adopting an unreasonable approach to CPR r. 3.9. In particular, they were approaching applications for relief on the basis that, if the breach was not trivial and there was no good reason for it, the application must fail. This had led to decisions which were manifestly unjust and disproportionate.
61. The Court also noted that litigation cannot be conducted efficiently and at proportionate cost without cooperation between the parties and their lawyers. This applies to litigants in person as much as to represented parties. CPR r. 1.3 specifically requires the parties to assist the Court in furthering the overriding objective.
62. With this in mind, the Court expressed the view that parties should not act opportunistically or unreasonably in opposing applications for relief. The Court will now expect parties to agree applications for relief where (a) the breach is neither serious nor significant, (b) there is a good reason for the breach, or (c) it is otherwise obvious that relief should be granted. The Court will also expect parties to agree reasonable extensions of time of up to 28 days under the new CPR 3.8(4), which states:
- “... unless the court orders otherwise, the time for doing the act in question may be extended by prior written agreement of the parties for up to a maximum of 28 days, provided always that any such extension does not put at risk any hearing date.”
63. The Court of Appeal was critical of the ‘satellite litigation’ and uncooperative attitude that the *Mitchell* decision had fostered. In its view, a contested application for relief should be very much an exceptional case. This is because (a) compliance should be the norm, and (b) parties should work together to make sure that, in all but the most serious cases, satellite litigation is avoided even when a breach has occurred.
64. The Supreme Court in *BPP Holdings Limited v Revenue & Customs Commissioners* [2017] UKSC 55, [2017] 1WLR 2945 implicitly endorsed the approach set out in *Denton*. The case was concerned with an application for the lifting of a bar on HMRC’s further involvement in the proceedings for failure to comply with an “unless” order of the FtT.

65. In *Martland v Revenue and Customs Commissioners* [2018] UKUT 178 (TCC) the Upper Tribunal also endorsed the approach in *Denton* applying the three stage approach [at 43 to 45]

“43.Whether considering an application which is made directly under rule 3.9 (or under the FtT Rules, which the Supreme Court in BPP clearly considered analogous) or an application to notify an appeal to the FtT outside the statutory time limit, it is clear that the judge will be exercising a judicial discretion. The consequences of the judge’s decision in agreeing (or refusing) to admit a late appeal are often no different in practical terms from the consequences of allowing (or refusing) to grant relief from sanctions - especially where the sanction in question is the striking out of an appeal (or, as in BPP, the barring of a party from further participation in it). The clear message emerging from the cases - particularised in *Denton* and similar cases and implicitly endorsed in BPP - is that in exercising judicial discretions generally, particular importance is to be given to the need for “litigation to be conducted efficiently and at proportionate cost”, and “to enforce compliance with rules, practice directions and orders”. We see no reason why the principles embodied in this message should not apply to applications to admit late appeals just as much as to applications for relief from sanctions, though of course this does not detract from the general injunction which continues to appear in CPR rule 3.9 to “consider all the circumstances of the case”.....”

44. It must be remembered that the starting point is that permission should not be granted unless the FtT is satisfied on balance that it should be. When considering “all the circumstances of the case”. This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FtT’s deliberations artificially by reference to those factors. The FtT’s role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.”

66. In doing so, the FtT can have regard to any obvious strength or weakness of the applicant’s case; this goes to the question of prejudice - there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal.

Seriousness and significance of delay

67. The purpose of the time limits to bring an appeal is to provide finality and certainty to both the appellant and HMRC.

68. In addressing the seriousness and significance of the lateness, the case of *Romasave (Property Services) Ltd* (paragraph 96) found that “a delay of more than three months cannot be described as anything but serious and significant”. In this case, the appellant was notified of the CIS determinations and penalties in May 2016, but did not lodge an appeal at the tribunal until 23 February 2019. This is clearly a significant and serious delay.

Reason for the default

69. The appellant has not provided an explanation for the delay in appealing save to say that he assumed the CIS determinations and penalties had been settled, but without providing any evidence that may have supported that assumption.

The circumstance and merits of the case

70. The final consideration from the *Data Select* criteria is the consequences for both parties if an extension of time is granted/refused. The obvious consequence for the appellant is he would lose the opportunity to bring the appeal and the penalty would stand.

71. However, as a result of the amount of time between the original decision and this appeal, HMRC may no longer possess, due to their data-retention policy, much of the documentation in respect of the decisions being appealed by the appellant. Accordingly, if an extension is granted, HMRC would be jeopardised in defending the appeal due to the lack of documentation.

72. HMRC may be prejudiced if this appeal were to be allowed to proceed in circumstances where no convincing explanation has been given for the delays and lack of contact from the appellant. Time and costs will be incurred in litigating a case which in HMRC's submission has little chance of succeeding.

73. The appellant has not provided the information requested by HMRC and summarised in their letter of 11 January 2019.

Decision

74. It would have been a relatively simple matter for the appellant and his accountant to produce a comprehensive schedule of the appellant's liabilities in relation to income tax, VAT and CIS deductions as determined by HMRC and payments which the appellant says were made in settlement, with evidence of such payments. A reconciliation of liabilities as against payments asserted to have been made would have shown what amount if any was due for payment by the appellant. It was also indicated at the hearing that copy bank statements together with any supporting correspondence in relation to payments made to HMRC would be required. Nothing of that nature has been produced to us.

75. We agree with HMRC's response to the additional documentation and submissions provided by the appellant pursuant to the tribunal's Directions. HMRC's response is set out at paragraphs 48-50 above.

76. Taking all the circumstances of the case into account, we are not satisfied that there is any reason to allow the application. The application for leave to bring the late appeal is therefore not admitted.

77. 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.

MICHAEL CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 12 MARCH 2020

