

[2018] UKFTT 45 (TC)



TC06323

Appeal number: TC/2017/05321

*CONSTRUCTION INDUSTRY SCHEME - fixed penalties - late filing of returns -
- company officer dealing with returns had protracted difficulties filing online and
was suffering from cardiological conditions anxiety and stress which resulted in
hospital appointments - whether reasonable excuse - yes - appeal allowed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BTN FLOORING LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER DAVID EARLE**

Sitting in public at Taylor House, Rosebery Avenue, London on 17 October 2017

**Ms Jacqueline Naylor, Company Secretary of the Appellant Company
Ms Mary Donnelly, Officer of HMRC, for the Respondents**

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DECISION

The Appeal

5 1. This is an appeal by BTN Flooring Limited (“the Appellant”) against penalties of £3,200, imposed on the Company by HMRC under Schedule 55 Finance Act 2009 (“FA 2009”) for its failure to make monthly returns (CIS300) by the due dates pursuant to the requirements of the Construction Industry Scheme (“CIS”) for the period April 2016 to December 2016 inclusive.

10 2. The issue before us is whether the Appellant has a reasonable excuse for making the late returns.

The CIS penalty regime

15 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.

20 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.

25 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 reg 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 Schedule 55 FA 2009 as follows:

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

If HMRC have still not received that return:

- 2 months after the date it was due, a second fixed penalty is payable of £200.

35 • 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.

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7. 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.

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(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.’

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20 **Background Facts**

8. The Appellant is a floor and wall covering business, having been incorporated on 22 May 2006. Ms Jacqueline Naylor is the Company Secretary and has always filed the Company’s paper CIS returns without difficulty.

9. From April 2016, CIS returns had to be submitted online. After that date HMRC would no longer accept paper forms.

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10. In order to file returns the contractor had to register with HMRC as a CIS contractor and thereafter, after enrolling for the online service, log in each month to file their monthly returns.

11. The contractor would need an email address, an Employer Reference Number and following registration for the CIS scheme (which Ms Naylor had done many years previously) a 13-digit Accounts Office reference number. They would be given a user ID or password and a 12-digit activation code within 10 days of enrolling for the online service.

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12. The Appellant Company was late submitting its monthly returns for the 9 months between April and December 2016. Penalties were charged as shown in the table below:

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Date	Penalty	Penalty	Penalty
5.4.2016	100	200	300
5.5.2016	100	200	300
5.6.2015	100	200	300
5.7.2016	100	200	
5.8.2016	100	200	
5.9.2016	100	200	
5.10.2016	100	200	
5.11.2016	100		
5.12.2016	100		

The Appellant's case

5 13. Ms Naylor says that she is not IT literate. She does not use computers and does not have a laptop. When she was unable to file the CIS return on-line, she submitted a paper return for the month to 5 April 2016.

10 14. She was able to enroll and logged on on 18 May 2016, but says that she then had to await the activation code. She telephoned HMRC on numerous occasions and was promised an activation code, which she says never arrived. She wrote to HMRC on 6 June 2016 to make it clear that she had all her figures ready to file the 5 May and 5 June 2016 returns but was still awaiting the activation code.

15 15. Ms Naylor says that she made further calls to HMRC between June and August 2016, and on each occasion was told that the activation code either had or would be sent to her. It appeared that the activation code had not arrived possibly because HMRC had misspelt the Company's address (4 Sockets Cottages, Lambourne Road, Chigwell instead of 4 Socketts Cottages, Lambourne Road, Chigwell), which meant that she had to start the enrollment process all over again.

20 16. During this period Ms Naylor was also attending the Cardiology Clinic of King George Hospital, Ilford. She was receiving treatment for stress and anxiety, for which she had MRI scans, echocardiograms and cardio angiograms.

17. She eventually received an activation code in August 2017, but then found it difficult to 'get onto the system'. She says that she contacted HMRC for assistance but to no avail.

5 18. By 30 August 2016, the Company had received four late filing penalties and so Ms Naylor wrote to HMRC explaining her frustration and difficulties. She said that she was "beside herself with worry" and whenever she attempted to telephone HMRC's online help desk or the Government Gateway she was invariably cut off or not given the information she needed. She asked whether she could be allowed to continue to submit paper returns, that is, be granted 'digital exclusion'.

10 19. On 9 November 2016, HMRC acknowledged her letter, treating it as an appeal against the penalties. HMRC's helpline telephone number was provided. Her request for digital exclusion was declined on the basis that she was not elderly or suffering from a disability which might have prevented her accessing HMRC's online service and because she could have enlisted the help of an agent, family member or friend.

15 20. On 29 November 2016, HMRC wrote to the Appellant again saying that they could not deal with her appeal until the outstanding returns were submitted. Shortly after that, Ms Naylor's daughter who had returned home from university was able to help her mother and applied for another activation code, the previous code having lapsed. Ms Naylor was told that it could be up to 28 days before the code could be
20 provided.

21. On 10 January 2017, HMRC wrote to Ms Naylor again, this time dealing with her appeal but rejecting it on the basis that she had not shown a reasonable excuse for the failure to file the returns.

25 22. Ms Naylor wrote to HMRC again on 29 January 2017, saying that the second activation code she had applied for in late November 2016 had still not arrived and that the stress of the problem was making her ill.

23. HMRC treated Ms Naylor's letter as a request for a review of the decision made on 10 January 2017.

30 24. Ms Naylor says that on 4 February 2017 she received three activation codes and with the help of her daughter over the next few days filed all her outstanding returns.

35 25. On 13 April 2017 HMRC reviewed the penalties but decided that no reasonable excuse had been shown for the failure to file on time. HMRC say that there had been no unusual or unexpected event, either unforeseen or beyond the Company's control which had caused the failures. Ms Naylor says that she received HMRC's letter on 22 April 2017.

26. On 11 May 2017, Ms Naylor appealed the decision, saying that she should have received more help in her attempts to file online.

27. On 24 May 2017 HMRC rejected Ms Naylor's appeal.

28. Mrs Naylor lodged the Company's Notice of Appeal with the Tribunal on 20 June 2017.

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HMRC's case

29. All contractors within the new CIS scheme were required to register with HMRC from 6 April 2007. Every contractor who makes payments to subcontractors in respect of construction operations must send a monthly return with details of these payments to HMRC every month. This process is vital to the success of the CIS scheme.

30. Every Company that registers for the CIS is sent a guide for Contractors and Sub Contractors. The guide clearly sets out how the scheme operates, when returns are required and the consequences of late returns (Chapter 4 of the booklet). The guide states that the returns must be filed every month - 14 days from the end of the tax month. The guide clearly sets out that penalties will be charged for late filing of returns.

31. In addition to the Contractors guide, the Company was sent monthly CIS returns to complete (Example Return & Notes). The documents clearly set out the monthly due date and highlight that a penalty will be charged for the late submission of returns.

32. Both documents refer taxpayers to the CIS helpline or the HMRC website if they have any questions or have any difficulty maintaining compliance.

33. Penalties are automatically issued for every month that a particular return is late and so it is clear that Ms Naylor knew that the Company was in default. Nine CIS monthly returns for the period from April to December 2016 inclusive were submitted late.

34. Fixed penalties have therefore been correctly charged in accordance with the legislation. The penalties may be set aside if the contractor has a reasonable excuse which existed for the whole period of default.

35. Reasonable excuse is not defined in the legislation but it is generally accepted that the term must be given its normal everyday meaning. HMRC take this to mean that it is an unexpected or unusual event, either unforeseeable or beyond the person's control, which prevents him from complying with an obligation when he otherwise would have done. It is then necessary to consider the actions of the taxpayer from the perspective of a prudent taxpayer exercising reasonable foresight

and due diligence, having proper regard for their responsibilities under the taxes acts.

5 36. Ms Naylor accepts that she had an activation code in August and should have enlisted the help of an agent rather than allow further penalties to accrue. Whilst accepting that she had been suffering health problems there was no reason why she could not have delegated the task of filing returns.

Conclusion

10 37. We find that the combination of Ms Naylor's health problems and her inability to file online constitutes a reasonable excuse for the defaults. We accept Ms Naylor's evidence that she was trying to comply with her obligations and that she did try to get assistance, albeit with very limited success. Her daughter did try to help her when home from university, but clearly was not in a position to provide sufficient assistance when it was needed. The Appellant tried to enlist the help of her
15 accountant, but in evidence Mrs Naylor said that more than once he was not willing to help (until that changed very late on). Her health concerns were possibly exacerbated by the difficulties she encountered filing the company's CIS returns and that continued to the end of the default period, as is apparent from her references to her state of anxiety and the cardiology tests which were conducted over the
20 Christmas 2016 period.

38. It is necessary to consider what a reasonable person, who wanted to meet their obligations would have done in the same circumstances and decide if the action of the person met that standard as outlined by Judge Medd in *The Clean Car Company* (LON/90/138X):

25 'One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do? Put in another way which does I think alter the sense of the question; was what the
30 taxpayer did not an unreasonable thing for a trader of the sort I have envisaged, in the position that the taxpayer found himself, to do?'

39. Adopting the test set out by Judge Medd, in our view, Ms Naylor's total IT illiteracy, coupled with the real practical difficulties that online filing presented for her, given her good intentions and state of anxiety, constitutes a reasonable excuse
35 throughout the period of default until she was finally able to file the outstanding returns in February 2017.

40. Accordingly penalties are discharged.

41. 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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**MICHAEL CONNELL
TRIBUNAL JUDGE**

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RELEASE DATE: 2 FEBRUARY 2018

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