



*Construction Industry Scheme - penalties for late filing of CIS returns – whether proportionality of penalties in comparison to the amount of tax due amounted to special circumstances – para 16 Sch 55 FA 2009 – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**TC07302**

**Appeal number: TC/2018/04567**

**BETWEEN**

**DAVID HALLS**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE GREG SINFIELD  
MRS JANET WILKINS**

**Sitting in public at Ipswich Magistrates' Court, Elm Street, Ipswich IP1 2AP on 15 July 2019**

**Susan Fayers, chartered accountant of Ballams Chartered Accountants, for the Appellant**

**Muhammed Khan, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents**

## DECISION

### INTRODUCTION

1. The Appellant, Mr David Halls, appeals against penalties, amounting to £3,482 in total, under Schedule 55 of the Finance Act 2009 ('Schedule 55') for failing to submit Construction Industry Scheme ('CIS') monthly returns by the due date for 22 monthly periods between May 2014 and March 2016.

### CIS REGIME AND PENALTIES

2. The relevant legislation is set out in an appendix to this decision. In summary, the legislation applies as follows.

3. Paragraph 4 of the Income Tax (Construction Industry Scheme) Regulations 2005 ('CIS Regulations') requires a contractor to make monthly returns in respect of all payments to sub-contractors in a tax month. This includes payments to sub-contractors who are registered for gross payment and where no tax therefore has to be deducted by the contractor making the payment.

4. A tax month runs from the 6th of one month to the 5th of the next. The returns must be received by HMRC no later than 14 days after the end of the tax month, ie by the 19th of the month. If a return is received after the deadline of the 19<sup>th</sup> of the month, it is treated as being late.

5. Prior to 6 April 2015, a contractor was required to make a nil return even where there were no relevant payments in that month if payments had been made in the previous month (paragraph 4(10) of the CIS Regulations). From 6 April 2015, if a contractor does not make any payments under a construction contract during the tax month, they must file a 'nil' return for the month unless they have informed HMRC that they do not anticipate making any payments to subcontractors for a period of up to 6 months.

6. Paragraph 8 of Schedule 55 provides that a person who fails to make or deliver a return on or before the filing date is liable to a fixed penalty of £100 ('FP1'). A further fixed penalty of £200 ('FP2') is incurred under paragraph 9 if the return has not been submitted within two months of becoming liable to pay FP1. Where the return has still not been submitted six months after incurring liability for FP1, paragraph 10 provides that the person is liable to a tax related penalty of the greater of 5% of any payments that should have been shown in the return and £300 ('TRP1'). If the return remains outstanding after 12 months, a further tax related penalty ('TRP2') is payable under paragraph 11 of Schedule 55. Where the withholding of information is not deliberate, the amount of TRP2 is the same as TRP1.

7. Paragraph 13 of Schedule 55 limits the amount of penalties for failure to file CIS returns where a taxpayer has not previously filed a return. The limit applies not only in respect of the first return which is filed but also in respect of any other returns which should have been filed before the date on which the first return is filed. Other than any tax related penalties, the total aggregate amount of penalties which can be charged in respect of such returns may not exceed £3,000. This cap was applied in Mr Halls' case but at a lower amount – see [12] below.

8. Paragraph 16 of Schedule 55 provides that HMRC may reduce a penalty if they think it right to do so because of special circumstances. The paragraph specifically states that "special circumstances" does not include the person's ability to pay or the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

9. Under paragraph 23 of Schedule 55, a person is not liable to a penalty for any failure to make a return if he or she can satisfy HMRC or (on appeal) the Tribunal that there is a

reasonable excuse for the failure. The legislation provides that certain things cannot be a reasonable excuse such as an insufficiency of funds or reliance on another person to do anything, save in certain circumstances. Further, where a reasonable excuse has ceased, it only continues to relieve the person from liability to a penalty if the failure is remedied without unreasonable delay thereafter.

#### **EVIDENCE**

10. The evidence consisted principally of a bundle of documents and correspondence produced by HMRC. However, Mr Halls produced further documents at the hearing which the Tribunal agreed to accept as part of the evidence. There was no dispute about the facts in relation to the events giving rise to the penalties and the of appeal. On the basis of this evidence, we find the following facts.

#### **LATE RETURNS AND PENALTIES IMPOSED**

11. Mr Halls accepted that the CIS Monthly Returns were not filed on time. It was accepted that Mr Halls started operating as a contractor on 6 April 2014 but he did not register under the CIS until August 2016 (HMRC's Statement of Case said 5 June 2016, which seems to be an error, but nothing turns on that). Consequently, the CIS monthly returns for the period 05/14 to 03/16 were submitted late. The details of the CIS monthly returns and penalties that are the subject of this appeal are as follows:

<b>Return period</b>	<b>Return due</b>	<b>Return received</b>	<b>Days late</b>	<b>FP1 £</b>	<b>FP2 £</b>	<b>TRP1 £</b>	<b>TRP2 £</b>
05/14	19/05/2014	23/09/2016	858	100	200		
06/14	19/06/2014	28/09/2016	832	100	200	12	12
07/14	19/07/2014	28/09/2014	802	100	200	19	19
08/14	19/08/2014	28/09/2016	771	100	200	42	42
09/14	19/09/2014	28/09/2016	740	100	200	24	24
10/14	19/10/2014	28/09/2016	710	100	200	22	22
11/14	19/11/2014	28/09/2016	679	100	200	12	12
12/14	19/12/2014	28/09/2016	649	100	200	13	13
01/15	19/01/2015	28/09/2016	618	100	200	6	6
03/15	19/02/2015	28/09/2016	559	capped	capped	9	9
04/15	19/03/2015	28/09/2016	528	capped	capped	30	30
05/15	19/05/2015	29/09/2016	499	capped	capped	33	33
06/15	19/06/2015	29/09/2016	468	capped	capped	29	29
07/15	19/07/2015	29/09/2016	438	capped	capped	24	24
08/15	19/08/2015	29/09/2016	407	capped	capped	31	
09/15	19/09/2015	29/09/2016	376	capped	capped	24	24
10/15	19/10/2015	29/09/2016	346	capped	capped	33	
11/15	19/11/2015	29/09/2016	315	capped	capped	37	
12/15	19/12/2015	30/09/2016	286	capped	capped	17	
01/16	19/01/2016	30/09/2016	255	capped	capped	24	

02/16	19/02/2016	30/09/2016	224	capped	capped	24	
03/16	19/03/2016	30/09/2016	195	capped	capped	18	
		<b>Sub-totals</b>		900	1800	483	299
		<b>Total</b>					<b>3482</b>

12. There is no penalty for period 02/15. Mr Khan, who represented HMRC at the hearing, told us that it appeared from the file that Mr Halls had appealed against the penalties and that HMRC had withdrawn the penalties for that period. There was some suggestion by Mr Khan that HMRC had accepted that there was a reasonable excuse. Mr Khan said that there was no information on the file and he was unable to explain further. Mrs Fayers, who appeared for Mr Halls, said that they were not aware of any penalties for a particular month being withdrawn. We were left in the unsatisfactory position of not knowing why the penalties for period 02/15 had been withdrawn. It might have been because HMRC had accepted that Mr Halls had a reasonable excuse for not filing the return for that period on time but, if that were the case, it seems strange that the same reasonable excuse did not apply to any other periods. On the other hand, it might have been a simple administrative error that was not detected until now. We consider that administrative error is the most likely explanation.

13. There is another unexplained and possibly related anomaly in the list of penalties. Paragraph 13 of Schedule 55 caps the amount of fixed penalties in a case such as this at £3,000. As can be seen from the table above, the total amount of FP1 and FP2 penalties imposed on Mr Halls was £2,700. It appears that when the penalties for period 02/15 (which would have taken the uncapped fixed penalties to £3,000) were withdrawn, the total amount was never increased to restore the capped amount to £3,000 but stayed capped at £2,700. Mr Khan confirmed that HMRC were not seeking to increase the capped penalties from £2,700 to £3,000.

#### **FACTUAL BACKGROUND**

14. In 2014-15, Mr Halls was carrying out construction work for a company, Needhams Construction Limited or Needhams Contracts Limited ('Needhams'), which deducted 20% from all amounts paid to Mr Halls. Mr Halls knew that Needhams was operating the CIS. Mr Halls knew how the CIS worked in relation to companies that engaged sub-contractors. He knew that because when he had carried on his business through a limited company, that company had been registered as a contractor under the CIS and made deductions from payments to sub-contractors and monthly returns. We find that Mr Halls would also have known that Needhams was operating the CIS because the company would have provided him with a CIS deduction certificate showing the tax deducted.

15. Mr Halls did not carry out the Needhams work alone but engaged two others, working on a self-employed basis, to help him. Mr Halls paid them their share of the net amount paid by Needhams without making any further deduction under the CIS. Mr Halls never suggested that he was not a contractor or that either of the workers had CIS gross payment status. We find that Mr Halls would have known, from his time trading through a limited company, that he was a contractor and that payments by a contractor to sub-contractors were subject to the CIS.

16. Mr Halls said that he knew from when he had traded as a limited company that companies can offset amounts deducted as basic rate tax under the CIS. He said, when he was a sole trader, he was effectively doing the same thing as a company operating the CIS. That is not correct. As Mr Halls admitted in reply to a question from the Tribunal, he did not

(could not) provide his workers with a CIS deduction certificate. Accordingly, they would be unable to obtain any credit for any tax they had suffered if, for example, the amount deducted was in excess of the tax that was due from them at the end of the year. Further, they would be unable to demonstrate to HMRC that tax had been paid on their earnings in the event of an enquiry by HMRC. Mr Halls said that neither person had ever said anything about it.

17. In 2016, Mr Halls was subject to an enquiry by HMRC into his 2014-15 self assessment tax return. The enquiry was opened by a letter dated 29 February 2016 in which HMRC asked Mr Halls to provide a breakdown of an amount of £45,588 claimed as allowable expenses of his self-employment for the year. The expenses included payments made by Mr Halls to persons working for him on the Needhams contract.

18. Mr Halls' accountant, Ballams, replied in a letter dated 23 March 2016 which enclosed a breakdown of the expenses. The breakdown showed payments of £20,047 to subcontractors. The letter explained that Mr Halls had made additional use of subcontractors during the year because he had taken an extended holiday.

19. HMRC responded to Ballams in a letter of 1 April 2016. HMRC stated that they could not trace a CIS contractor's return for Mr Halls and asked for further details about the payments.

20. Ballams wrote again to HMRC by letter dated 12 May 2016. In the letter, Ballams provided a breakdown of payments to subcontractors in year 2014-15. The letter explained that there were no receipts for the subcontractors who had worked exclusively on the Needhams contracts. Ballams stated that the payments for this work were made by Needhams, after deducting 20% tax, to Mr Halls. Mr Halls then paid the subcontractors their share of the net amount.

21. In a letter dated 12 July 2016 to Ballams, HMRC stated that the information provided was not enough to enable them to accept the claim for the subcontractor expenses. HMRC asked that Mr Halls register as contractor and complete CIS monthly returns (CIS300) for the payments made. HMRC asked for the information to be submitted by 12 August 2016.

22. As stated above, Mr Halls registered as a contractor for the purposes of the CIS in August 2016.

23. On 16 August 2016, HMRC issued various CIS penalty notices to Mr Halls. On 25 August, Ballams wrote a letter to HMRC in which they appealed against the penalties on the following grounds:

“As part of [the HMRC enquiry into Mr Halls' 2014-15 self assessment tax return] it was requested that he register as a contractor and was asked to complete retrospective CIS300 returns. As such we do not consider that the returns relating to the above penalty notices were filed late and we therefore request cancellation of the above specified penalty notices.”

24. As shown in the table above, the CIS returns were filed on various dates in late September 2016.

25. In a letter dated 15 November 2016, HMRC rejected Mr Halls' appeal against the penalties. Ballams requested a review of that decision in a letter dated 24 November. Unfortunately, that letter was never received by the relevant team in HMRC. In the letter, Ballams simply repeated the grounds set out in their letter of 25 August but with the addition of the following:

“It is this insistence on retrospective returns rather than dealing with the issue via the self assessment enquiry that has given rise to the issue of

penalty notices. We believe this is unfair and therefore request a review of the decision to charge penalties in this case.”

26. Between November 2016 and September 2017, there were various conversations between Ballams and HMRC Debt Management.

27. On 18 September 2017, Ballams sent a letter to HMRC Debt Management enclosing a copy of their letter of 24 November 2016 and asking why no review had taken place. The letter stated:

“Since [24 November 2016] our client has received demands for payment on three separate occasions despite us being assured by debt management that collection was on hold. In fact on 30 November 2016 we were told in one conversation that there was nothing outstanding on the account. We wish to see this matter resolved and trust that consideration will be given regarding the length of time that has now passed since our request was made.”

28. On 26 September 2017, HMRC Debt Management told Ballams that their records showed that the penalties were to be cancelled. However, the penalties were not cancelled and HMRC continued to chase for payment.

29. Ballams wrote to HMRC again on 8 March 2018 in response to a letter dated 22 February from HMRC. The letter set out some of the history of the dispute described above. As a reason why Mr Halls should not be liable to pay the penalties, Ballams stated:

“Our client did not register under the CIS Scheme until August 2016. He was not able to submit returns for the months now subject to penalties until that date. As such it was not an active contractor scheme until August 2016 so penalties cannot be charged for return periods ended before that date.”

30. Following receipt of Ballams’ letter of 8 March 2018, HMRC conducted a review of the penalties for late filing of the CIS Monthly Returns. On 6 April, HMRC sent a review conclusion letter to Mr Halls which upheld the penalties in full. In the review conclusion letter, HMRC concluded that Mr Halls not being aware of his legal obligations was not a reasonable excuse for not having registered as a contractor under the CIS and submitting monthly returns. HMRC also held that, based on the points made by Ballams in the correspondence, there were no special circumstances that allowed HMRC to reduce the penalties. The letter set out the points put forward by Mr Halls in correspondence and stated that Mr Halls should let HMRC know if there were any other circumstances that should be taken into account. At the end of the letter, HMRC notified Mr Halls of the right to appeal to the Tribunal within 30 days of the date of the letter, ie by 6 May 2016.

31. Ballams wrote to HMRC on 3 May 2018 setting out other circumstances which Ballams considered should be brought to HMRC’s attention. In this letter, Ballams made several new arguments. The letter stated:

“A number of payments included on the CIS monthly returns for 2014/2015 were made to individuals who had provided invoices for work done on small private jobs managed by David Halls. They ran their own self-employed businesses and provided all materials for the work they undertook.

There were of course other payments included but our client considered himself to be working alongside those individuals and not responsible for their tax liabilities. Yes, he was the only person to receive payment from the main contractor but their share was passed on to them.

On the original submission of his self employment figures, Mr Halls only claimed tax relief on the monies paid over to the other individuals, he did not

gross them up and thereby seek to claim tax relief on monies he had not paid over to HMRC.

...

It should also be borne in mind that our client had previously operated a Limited company and in his mind he was able to offset any "CIS tax" deductible from "deemed subcontractors" against the tax deducted from himself. It was not that he was unaware of the rules but merely operating them as he had done in his Limited company days.

We are concerned what impact the payment of such a significant penalty will have on our client. You will see from his 2016/2017 tax return that self employment income only amounted to £30,750 and payment of the penalty will cause him financial hardship. We accept that this might not be something you take into consideration but we are sure you will understand what impact this will have.

In summary we believe that the penalties are disproportionate in this case. There has been no loss of revenue to HMRC and our client has not gained any advantage. ..."

32. HMRC replied by letter dated 13 June 2018 stating that no new information had been submitted to change their decision and they did not accept that any special circumstances applied in Mr Halls' case. HMRC pointed out that the 30 day time limit had expired but Mr Halls could apply to the Tribunal for permission to make a late appeal.

33. Mr Halls submitted a notice of appeal to the First-tier Tribunal ('FTT') on 12 July 2018 which was 66 days late. In the notice of appeal, Mr Halls applied for permission to make a late appeal on the ground that the notice of appeal was in response to and within 30 days of HMRC's letter of 13 June 2018. At the hearing, HMRC confirmed that they did not object to the late notification of the appeal. Accordingly, we give permission under s49G(3) of the Taxes Management Act 1970 and rule 20(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, for the appeal to be notified late.

#### **GROUND OF APPEAL**

34. The grounds of appeal were stated in the notice of appeal to be as follows:

"The penalties levied in this case are disproportionate. There has been no tax lost to the crown and an independent opinion on the circumstances of this case is necessary."

35. Having read the correspondence between Ballams and HMRC and heard the submissions of Mrs Fayers at the hearing, we consider that Mr Halls relies on the following points in his appeal:

- (1) the CIS did not apply because the workers were not subcontractors but independent contractors working for Needhams;
- (2) the returns were not late because Mr Halls could not have submitted them until he had registered under the CIS;
- (3) Mr Halls was merely operating the rules as he had done when he traded through a limited company;
- (4) there has been no loss of tax; and
- (5) the penalties in this case are disproportionate in all the circumstances

## **DISCUSSION**

### **Application of the CIS**

36. There is no doubt that Mr Halls was a contractor for the purposes of the CIS during the relevant period and he did not dispute it at the hearing. Although, in their letter of 3 May 2018, Ballams argued that Mr Halls was paying some of the money received by him from Needhams to his workers as their share as independent contractors, Mrs Fayers did not pursue the point before us. She was right not to do so. It was clear that the only contract was between Needhams and Mr Halls and that he (and not Needhams) had engaged, ie contracted with, the workers. In the circumstances, there is no doubt (and we find) that Mr Halls was a contractor within section 59 of the Finance Act 2004 and the persons who worked for him were sub-contractors. The payments to the persons who worked for him as sub-contractors were thus contract payments within section 60. It follows that, as a contractor, Mr Halls was subject to the obligation to make monthly returns under regulation 4 of the Income Tax (Construction Industry Scheme) Regulations 2005.

37. The fact that Mr Halls did not register under the CIS until August 2016 does not mean that he was not liable to submit CIS monthly returns before that date. The obligation to make monthly returns applies to any person who is a contractor making contract payments. There is no requirement or condition that a person must be registered as a contractor under the CIS before they are obliged to submit monthly returns. It is obvious that a failure to register cannot relieve a person from liability to penalties for failing to make monthly returns. If that were so then there would be no effective sanction for not complying with the CIS. In fact, the penalties for failing to make returns also encourage registration for the purposes of the CIS.

38. If he was subject to the CIS then Mr Halls is liable for the penalties unless he can establish that he had a reasonable excuse for failing to make the CIS monthly returns on time or there are special circumstances which justify reducing the penalty.

### **Reasonable excuse**

39. The Upper Tribunal has recently considered the correct test for reasonable excuse in *Perrin v HMRC* [2018] UKUT 156 (TCC). At [75], the Upper Tribunal concluded that the FTT in that case had correctly stated that “to be a reasonable excuse, the excuse must not only be genuine, but also objectively reasonable when the circumstances and attributes of the actual taxpayer are taken into account.” In considering Mr Halls’ case, we have followed the approach to be taken by the FTT in a reasonable excuse case as described by the Upper Tribunal in [81] of *Perrin*.

40. Mr Halls did not claim that he had a reasonable excuse. As we have already found at [14] and [15] above, Mr Halls was aware of the CIS and how it worked. That was also stated explicitly in Ballams’ letter of 3 May 2018: “[i]t was not that he was unaware of the rules but merely operating them as he had done in his Limited company days”. In those circumstances, we have no choice but to find that Mr Halls did not have a reasonable excuse for his failure to make the CIS monthly returns.

### **Special circumstances**

41. The main focus of Ballams’ correspondence and Mrs Fayers’ submissions was that the penalties of £3,482 in total were disproportionate in the circumstances of the case. Those circumstances included that there was no tax loss and the impact on Mr Halls. Mrs Fayers contended that the purpose of the penalty regime must be to punish conduct that leads to loss of tax and, as there is no loss in this case, penalties at this amount cannot be justified and are not proportionate. Mrs Fayers submitted that, at most, there was a cash flow advantage to Mr Halls in the way that he dealt with the payments. Treating the contract payments in the same

way as limited companies even though Mr Halls was a sole trader did not result in HMRC receiving any less by way of tax and only the timing of payments was different.

42. The Upper Tribunal has recently considered special circumstances in *Barry Edwards v HMRC* [2019] UKUT 131 (TCC) (*Barry Edwards*). The case concerned penalties for a failure to file self-assessment returns on time in circumstances where no tax was payable. The Upper Tribunal reviewed a number of cases that discussed what was meant by “special circumstances”. The Upper Tribunal specifically approved what the FTT in *Advanced Scaffolding (Bristol) Limited v HMRC* [2018] UKFTT 0744 (TC), which concerned the imposition of a large number of fixed penalties for the late filing of CIS returns, said at [101] and [102]:

“101. I appreciate that care must be taken in deriving principles based on cases dealing with different legislation. However, I can see nothing in schedule 55 which evidences any intention that the phrase “special circumstances” should be given a narrow meaning.

102. It is clear that, in enacting paragraph 16 of schedule 55, Parliament intended to give HMRC and, if HMRC’s decision is flawed, the Tribunal a wide discretion to reduce a penalty where there are circumstances which, in their view, make it right to do so. The only restriction is that the circumstances must be ‘special’. Whether this is interpreted as being out of the ordinary, uncommon, exceptional, abnormal, unusual, peculiar or distinctive does not really take the debate any further. What matters is whether HMRC (or, where appropriate, the Tribunal) consider that the circumstances are sufficiently special that it is right to reduce the amount of the penalty.”

43. In *Barry Edwards*, the Upper Tribunal accepted that whether the penalties are disproportionate in the light of the amount of tax due can constitute special circumstances. The Upper Tribunal held at [82]:

82. ... In considering whether the imposition of a significant penalty for failure to file a return in circumstances where no tax is due infringes the taxpayer’s AIP1 rights it is necessary to determine the aim of the penalty regime, and whether the aim is a legitimate aim in the public interest. It is then necessary to determine whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised, ascertained by establishing whether there is a fair balance struck between the public interest and the requirements of the protection of individual’s fundamental rights.

83. ...

84. However, we were referred to HMRC’s guidance on the Schedule 55 FA 2009 penalty regime, as it relates to late filing penalties. It is clear from that guidance that the aim behind the Schedule 55 penalty regime is to penalise taxpayers who fail to comply with their obligations once a notice to file is issued and to incentivise them to comply with future notifications that they must file a tax return (and pay any tax due) on time. In our view, a penalty regime which seeks to incentivise taxpayers to comply with a requirement to file a return is a legitimate aim, regardless of whether it is subsequently determined that any tax is due. The purpose of the requirement to complete a tax return is so that HMRC is in a position to ascertain whether tax is due from a particular taxpayer. If the taxpayer does not comply with the requirement to file a return, then HMRC is clearly not going to be in a

position to ascertain easily whether tax is in fact due. A taxpayer who does not think he should be within the self-assessment regime when he receives a notice to file because as a matter of course he will have no further tax to pay should enter into a dialogue with HMRC with a view to being removed from the requirement to file rather than take no action in response to the notice. That is precisely what ultimately happened in this case.

85. In our view, there is a reasonable relationship of proportionality between this legitimate aim and the penalty regime which seeks to realise it. The levels of penalty are fixed by Parliament and have an upper limit. In our view the regime establishes a fair balance between the public interest in ensuring that taxpayers file their returns on time and the financial burden that a taxpayer who does not comply with the statutory requirement will have to bear.

86. In view of what we have said about the legitimate aim of the penalty scheme, a penalty imposed in accordance with the relevant provisions of Schedule 55 FA 2009 cannot be regarded as disproportionate in circumstances where no tax is ultimately found to be due. It follows that such a circumstance cannot constitute a special circumstance for the purposes of paragraph 16 of Schedule 55 FA with the consequence that it is not a relevant circumstance that HMRC must take into account when considering whether special circumstances justify a reduction in a penalty.”

44. Exactly the same points as were made in *Barry Edwards* can be made in this case. We considered the aim of the penalty regime, and whether the aim is a legitimate aim in the public interest. It is then necessary to determine whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised, ascertained by establishing whether there is a fair balance struck between the public interest and the requirements of the protection of individual’s fundamental rights. In our view, a penalty regime which seeks to incentivise taxpayers to comply with a requirement to file a return is a legitimate aim, regardless of whether it is subsequently determined that any tax is due in relation to those returns. The aim of the penalties is to enforce compliance with the CIS and, in particular, the submission of monthly returns. The purpose of the requirement to file the CIS monthly returns is to ensure that contractors and sub-contractors pay the correct amount of tax. The fact that, in any particular circumstances, the tax result is the same where a contractor has not registered and made returns under the CIS is not relevant. In this case, we cannot be certain that the overall tax result is correct because we do not know the tax position of the subcontractors. We consider that a scheme of graduated and capped fixed penalties together with tax geared penalties cannot be described as disproportionate.

45. Mrs Fayers and Mr Halls both mentioned the confusion that arose around whether the penalties had been imposed or withdrawn. It seems that there was, at the very least, some misunderstanding. However, any communication that penalties had been or would be cleared when they were still being pursued does not provide any special circumstances. It may be evidence of an administrative error (and might constitute grounds for complaint) but it does not invalidate the penalties.

#### **DECISION**

46. For the reasons given above, Mr Halls’ appeal is dismissed and the penalties are confirmed.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

47. 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.

**JUDGE GREG SINFIELD  
CHAMBER PRESIDENT  
Release date: 01 AUGUST 2019**

**APPENDIX**

**FINANCE ACT 2004**

**Section 59 Contractors**

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

- (a) any person carrying on a business which includes construction operations
- (b) ...

**Section 60 Contract payments**

(1) In this Chapter “contract payment” means any payment which is made under a construction contract and is so made by the contractor (see section 57(3)) to-

- (a) the sub-contractor,
- (b) a person nominated by the sub-contractor or the contractor, or
- (c) a person nominated by a person who is a sub-contractor under another such contract relating to all or any of the construction operations.

(2) But a payment made under a construction contract is not a contract payment if any of the following exceptions applies in relation to it.

(3) This exception applies if the payment is treated as earnings from an employment by virtue of Chapter 7 of Part 2 of the Income Tax (Earnings and Pensions) Act 2003 (c 1) (agency workers).

(4) ...

**Section 70. Periodic returns by contractors etc**

(1) The Board of Inland Revenue may make regulations requiring persons who make payments under construction contracts-

- (a) to make to the Board, at such times and in respect of such periods as may be prescribed, returns relating to such payments;
- (b) ...

**INCOME TAX (CONSTRUCTION INDUSTRY SCHEME) REGULATIONS 2005**

**Regulation 4**

(1) A return must be made to the Commissioners for Her Majesty's Revenue and Customs in a document or format provided or approved by the Commissioners-

(a) not later than 14 days after the end of every tax month, by a contractor making contract payments or payments which would be contract payments but for section 60(4) of the Act (contract payments: exceptions),

(b) ...

## **SCHEDULE 55 FINANCE ACT 2009 - PENALTY FOR FAILURE TO MAKE RETURNS ETC**

### **Paragraph 1**

(1) A penalty is payable by a person (“P”) where P fails to make or deliver a return, or to deliver any other document, specified in the Table below on or before the filing date.

(2) Paragraphs 2 to 13 set out -

(a) the circumstances in which a penalty is payable, and

(b) subject to paragraphs 14 to 17, the amount of the penalty.

(3) If P’s failure falls within more than one paragraph of this Schedule, P is liable to a penalty under each of those paragraphs (but this is subject to paragraph 17(3)).

...

(5) [Item 6 specifies a return under regulations under section 70 of FA 2004 which relates to deductions on account of tax under Chapter 3 of Part 3 of FA 2004 (construction industry scheme).]

### **Paragraph 7**

Paragraphs 8 to 13 apply in the case of a return falling within item 6 in the Table.

### **Paragraph 8**

P is liable to a penalty under this paragraph of £100.

### **Paragraph 9**

(1) P is liable to a penalty under this paragraph if (and only if) P’s failure continues after the end of the period of 2 months beginning with the penalty date.

(2) The penalty under this paragraph is £200.

### **Paragraph 10**

(1) P is liable to a penalty under this paragraph if (and only if) P’s failure continues after the end of the period of 6 months beginning with the penalty date.

(2) The penalty under this paragraph is the greater of –

(a) 5% of any liability to make payments which would have been shown in the return in question, and

(b) £300.

### **Paragraph 11**

(1) P is liable to a penalty under this paragraph if (and only if) P’s failure continues after the end of the period of 12 months beginning with the penalty date.

...

(4) If the withholding of the information is deliberate but not concealed, the penalty is the greater of -

- (a) 70% of any liability to make payments which would have been shown in the return in question, and
- (b) £1,500.

(5) In any case not falling within sub-paragraph (2), the penalty under this paragraph is the greater of—

- (a) 5% of any liability to make payments which would have been shown in the return in question, and
- (b) £300.

### **Paragraph 13**

(1) This paragraph applies -

- (a) at any time before P first makes a return falling within item 6 in the Table, to any return falling within that item, and
- (b) at any time after P first makes a return falling within that item, to that return and any earlier return.

(2) In respect of any return or returns to which this paragraph applies-

- (a) paragraphs 10(2)(b) and 11(5)(b) do not apply, and
- (b) P is not liable to penalties under paragraphs 8 and 9 which exceed, in total, £3,000.

(3) In sub-paragraph (1)(b) “earlier return” means any return falling within item 6 which has a filing date earlier than the date on which P first made a return.

### **Paragraph 16**

(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-

- (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) ...

### **Paragraph 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.

