



TC01470

Appeal number: TC/2010/5898

Construction Industry Scheme. Compliance failures: held no reasonable excuse. Did HMRC have a discretion under section 66FA 1994: John Scofield TC 1068 applied. HMRC's decision void. Appeal allowed

FIRST-TIER TRIBUNAL

TAX

CARDIFF LIFT COMPANY

Appellant

- and -

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

Respondents

**TRIBUNAL: CHARLES HELLIER (TRIBUNAL JUDGE)
RICHARD CORKE**

Sitting in public in Cardiff on 10 January 2011

David Patterson, partner in the Appellant firm, and Hugh Morgan for the Appellant

Dave Lewis for the Respondents

DECISION

Introduction

1. The Cardiff Lift Company, a partnership between Ms H Davies, Mrs G Patterson
5 and Mr Patterson, appeals against HMRC's decision to cancel its gross payment status
under the Construction Industry Scheme (CIS).

2. HMRC say that they may cancel gross payment registration if the partnership or
the partners do not comply with their obligation under the Taxes Acts. They point to
failures of each of the parties and of the partnership to do so within the twelve month
10 preceding their decision to cancel.

3. As will be seen the legislation provides that if a person has a reasonable excuse
for a failure it is to be disregarded. The first question we addressed was therefore
whether there were reasonable excuses for these failures.

4. A question arises as to whether HMRC have a discretion to cancel registrations or
whether they are required to do so if the taxpayer does not comply with his obligations.
15 This issue was fully argued before a differently constructed tribunal in the case of
John Scofield TC/2010/4709 TC 1068. The tribunal delayed its decision in this case
to await the decision of the tribunal in that case, and after its publication sought
representations from the parties in connection with the issues it raised. In the second
20 part of this decision we consider the question of HMRC's discretion to cancel
registration.

The statutory Provisions

5. Chapter 3, part 3 Finance Act 2004 contains the provisions for the Construction
Industry scheme. Under the scheme certain payments to subcontractors must be made
25 under deduction of tax unless the subcontractor is registered for gross payment.
Section 63(1) provides that the Board must register a person for gross payment if it is
satisfied that certain conditions are met.

6. Among those conditions are those in Part 2 of Schedule 11 to that Act which
includes the requirement that each of the partners in the partnership have "complied,
30 so far as any charge to income tax or corporation tax is concerned as falls to be
computed by reference to the profits or gains of the firm's business, with all
obligations...under the Tax Acts or the Taxes Management Act 1970" within the
preceding 12 months. A further condition is imposed in the case of a partnership by
s64(3) and Part I of the Schedule that the individual partners must comply with their
35 obligations under those Acts.

7. These strict requirements are mitigated somewhat by provision in the Income Tax
(Construction Industry Scheme) Regulation 2005 (the "CIS Regulation") which
permit some failures to be ignored, and by paras 2(4) and 8(3) which require the
disregard of a failure if the person who failed had a reasonable excuse for the failure.

8. Section 66 provides that the Board “may at any time make a determination cancelling a person’s registration if it appears to them that” if an application to register had been made at that time the Board would refuse to register that person.

5 9. Section 67 FA2004 permits an appeal to this tribunal against the cancellation of regulation, and in subsection (4), provides that the jurisdiction of the tribunal on such an appeal shall include jurisdiction to review any relevant discussion of the Board under section 66.

10 10. The Taxes Act imposes requirements for individuals to make payments of and on account of their own tax liabilities and for employers to account for PAYE and NI on amounts paid to employees by certain dates.

11. **The Evidence and the Facts**

12. We had a bundle of copy correspondence between HMRC and the Appellant before us and heard oral evidence from Mr Patterson and Mr Morgan. Mr Lewis also gave his account of the practice of HMRC. We find the following facts.

15 13. The firm conducts the business of the manufacture, installation and maintenance of lifts. It started business in 1986 manufacturing and installing lifts on a small scale, but in about 2008 moved into larger projects. The firm found that cash flowed from the larger projects more slowly since the majority of the payment for the work done was made after the (longer) job was finished.

20 14. Some of the firm’s counterparties deduct tax from payments to it in error. In the year to August 2009 some £17,700 had been erroneously deducted.

25 15. The firm’s customers also made retentions at the end of contracts. The total amount due and retained at any time has risen from about £100,000 in 2006 to £130,000 in 2009. Customers also pay late. Thus in April 2010 some £100K was due and awaited from customers.

16. These issues have meant that the partnership found cash flow difficult, but it had had these problems for many years although they became worse in the period after 2008.

30 17. The firm had, at the beginning of 2009, an overdraft facility of £425,000 which in April 2009 was increased to £500,000. The facility is secured against Mr Patterson’s home and cash deposits by the other partners.

35 18. The firm is an employer and liable to account each month for PAYE and NI in respect of payments made to its employees. These payments are due, when electronic payment’s made, on the 22nd of the month following that of payment to the employee. (see Reg 69 PAYE Regulation SI2003/2682). Payments were made late:-

Latest Due Date	Paid	Days Late
22 August 2009	16 September 2009	25
22 July 2009	18 August 2009	27
22 June 2009	17 July 2009	25
22 May 2009	18 June 2009	27
22 April 2009	30 July 2009	38
22 March 2009	10 April 2009	19
22 February 2009	12 March 2009	18
22 January 2009	12 February 2009	20

19. In earlier periods HMRC had sent an officer to the Appellant's offices to pick up a cheque for the PAYE and NI. The officer was not always the same and generally turned up between 22nd and 30th of the month. The Appellant was happy to take advantage of the extra ten days or so for making payment which this system effectively allowed. We accept however that it was only because the payment was late that the officer called: sending an officer improved the Treasury's cash flow. The officers, however, had busy rounds and did not communicate much with the Appellant. It was unlikely that they either complained that payment was late or expressly indicated that it was acceptable to HMRC for payment regularly to be made in this manner.

20. The Appellant ensured it paid its employees on time.

21. An analysis of the firm's bank account for the period October 2008 to September 2009 showed, for each date on which PAYE and NI became due (if paid by cheque) whether there were funds available to meet such payment. For all payments save that due on 19 April 2009 this analysis showed that payment would have resulted in the balance on the account, after adjusting for uncleared items, exceeding the overdraft limit, and for all periods save about five, that immediate payment would have caused the account to become overdrawn above the overdraft limit.

22. The analysis however did show that the payment due on 19 April could have been made without causing the limit to be breached.

23. We were told that the partners had also been late in paying their personal income tax liabilities. There was evidence that some or all of the delays had been allowed by HMRC either before or after the tax became due. We have not found it necessary to make express findings on these matters for the reason which appears below ("Discusson").

24. During 2009 the partner who ran the day to day aspects of the business went through an acrimonious divorce which reduced his attention to the business. There had also been illness in the accounts department during 2009.

Discussion: reasonable excuse

5 25. One compliance failure by a person in the 12 months prior to any particular date will mean that HMRC could refuse to register that person for gross payment on that date. That is because s63(3) provides that the Board must register a person for payment under deduction only if the conditions for gross payment registration is s63(2) are met.

10 26. Thus, if among the delayed payments due in 2009 there was one which was not reasonably excused or required to be ignored by the CIS Regulations, the Board would by virtue of section 66(1) be entitled to cancel that person's registration.

15 27. It seems to us that the failure to pay the PAYE and NI due on (19 or) 22 April 2009 was such a failure. There is no dispute that it was a failure, and it does not fall within the exculpation afforded by Regulation 32 of the CIS Regulations. The only question is whether there was a reasonable excuse for that failure. For the reasons set out below we conclude that there was not.

20 28. First, the Appellants had sufficient funds to make payment. Making that payment would not have caused the firm to exceed its overdraft limit. Thus the difficulties the firm had in relation to cash flow were not an excuse (and thus could not be a reasonable excuse) for this failure.

25 29. Second, it seems to us that even if the cashflow difficulties we have related above made prompt payment difficult, they were difficulties which the business had had for some time and which it could reasonably be expected to have addressed by 2009. A sudden difficulty may constitute a reasonable excuse but when problems are inherent in the nature of the business it generally becomes reasonable to expect the business to find ways of dealing with them.

30 30. We considered whether HMRC's practice (in 2008) of sending an officer round to collect a cheque for PAYE was such that it might either (a) be treated as HMRC allowing late payment – so that potentially section 118(2) TMA would operate to treat the late payment so allowed as not being late, or (b) as giving rise to such a fair expectation in that the mind of the firm that HMRC did not mind that the payments were late that such expectation would constitute a reasonable excuse. We were not persuaded that either escape was available. There was nothing to indicate that by, on, or in, the personal collection of late payments, HMRC were allowing delay, nor did we see this mechanism as nodding or winking at a failure – rather it underlined the failure.

40 31. We have mentioned that there was illness in the accounts department in 2009. However, there was no evidence before us as to when that illness was, what it was, or how it affected this payment. There was insufficient evidence to conclude that it offered a reasonable excuse.

32. Nor did we feel able to conclude that the strains of a divorce on the main partner afforded an excuse for the delay in the payment. PAYE payments were fairly consistently late and the delay spoke more of the regular conscious seizing of a cash flow advantage rather than the disorganisation occasioned by lack of attention.

- 5 33. We therefore find that there was no reasonable excuse for this default. As a result HMRC were entitled to decide to cancel gross payment status.

A Discretion

(a) a discretion

- 10 34. Section 67 provides for appeals against both the refusal of an application for gross payment registration and against the cancellation of such registration.

15 35. The provisions for the grant of registration in section 63 differ from those for cancellation in section 66 in one important respect. Section 63 says that if the Board are satisfied that the conditions in section 64 are met “the Board *must* register” the person for gross payment. Section 66, by contrast, says that if it appears to the Board that one of the conditions in section 66(1) is satisfied then the Board “may” make a determination cancelling such registration.

20 36. The contrast between “may” and “must” suggests that the Act gives a discretion to the Board as to whether or not to cancel registration if the conditions are met. In *John Scofield* TC 1068 the tribunal held that section 66 did indeed confer a discretion. We agree.

25 37. Mr Lewis suggested that “may” in section 66 referred to the possibility that the taxpayer had a reasonable excuse. We do not agree. Whether or not there is a reasonable excuse affects whether the compliance condition is satisfied. If there is a reasonable excuse there is no compliance failure and HMRC cannot cancel registration. If there is no reasonable excuse there is a compliance failure and HMRC “may” cancel registration.

(b) Jurisdiction

38. If HMRC have failed to exercise a discretion, the question arises as to whether or not the tribunal has jurisdiction to do anything about it.

- 30 39. Section 67(4) provides that the jurisdiction of the tribunal hearing the appeal shall “include jurisdiction to review” any decision of the Board in the exercise of their functions under section 63 to 66. The word “include” suggests that the tribunal’s function may not be limited to such a review.

35 40. In *Hudson v JDC services Ltd* [2004] STC 834, Lightman J considered the jurisdiction given to the Special Commissioners by section 561(9) TA 1988 in relation to the refusal by the Inland revenue of a certificate for gross payment under the predecessor of the current CIS regime. That regime provided:

(1) in section 561(2) that the Board “shall” issue a certificate to a person if specified conditions (similar but not identical to those in section 63) were satisfied;

5 (2) in section 561(8) that the Board “may at any time cancel a certificate” if it appeared to them that certain conditions (again similar but not identical to those in section 66) were satisfied; and

10 (3) in section 561(9) that a person could appeal against the refusal of a certificate or its cancellation and that on such an appeal the jurisdiction of the Special or General Commissioners “ shall include jurisdiction to review any relevant decision taken by the Board in the exercise of their functions under [that] section”.

15 Thus the differences between the mandatory requirement to grant a certificate and the discretionary power to cancel it if conditions were satisfied existed in the previous legislation and parallel the “must” and “may” in the current legislation; and the words describing the tribunal’s jurisdiction are for all relevant intents and purposes identical.

41. Lightman J held that the legislative history and the statutory context indicated that full appellate jurisdiction was conferred on the tribunal entitling it to substitute its own judgement for that of the Board. The legislative history showed that in 1975 the tribunal was restricted to reviewing the exercise of the Board’s function but had been excluded from considering the question of whether or not the conditions had been fulfilled. This restriction was lifted in 1980. Lightman J said:

“In my judgement it is unlikely that the [1980] amendment was merely intended to vest in the [tribunal] a power of supervision...equivalent to that exercisable by the Court on judicial review...”

25 42. In relation to the statutory context he said that it supported the conferment on the tribunal of full appellate jurisdiction for the following reasons:

“(a) the statutory context is a subsection conferring full appellate jurisdiction on the commissioners which is to “include” jurisdiction to review a decision on entitlement to a CIS certificate;

30 “(b) the decision of the Revenue under appeal does not involve the exercise of discretion. Statutory rules regulate how the power to grant CIS certificates is to be exercised. What is required of the Revenue is to apply the statutory criterion. There is no reason why the commissioners should not on appeal undertake the same exercise;

35 “(c) the decision of the Revenue, an administrative body, to refuse the grant has far reaching implications for the applicant;

“(d) the conclusion which I have reached accords with that of Goulding J in *Lothbury Investment Corp Ltd v IRC* [1979] STC 772. [1981] Ch 47.”

40 43. We note that in reason (b) Lightman J appears to disregard the discretionary provision in section 561(8) which said that the board “may” cancel a certificate. But

in the case before him the issue related to section 561(2), the grant of a certificate, and there was no discretion afforded under that subsection.

5 44. It seems to us that it is clear that in relation to the question of whether or not the conditions for registration in section 63, or for cancellation in section 66 are met, the tribunal has a full appellate jurisdiction.

45. In relation to an appeal against a refusal to register the tribunal must consider the evidence and determine whether those conditions are met. That exercise will determine the matter. There is no further question to be asked. If the tribunal decides that the conditions are met, the person must be registered.

10 46. In relation to an appeal in relation to the cancellation of a certificate there remains the question of the exercise of the Board's discretion under section 66. The questions which arise in relation to our jurisdiction are (a) whether the tribunal has the power to consider the exercise of that discretion, (b) if it has such a power whether it is entitled to substitute its judgment as to the proper exercise of that power for that of the Board,
15 or whether it is merely required to determine, in a manner similar to that on a judicial review, whether the discretion has been "reasonably" exercised or exercised at all, and (c) if it has that power and decides that the discretion has not been so exercised (or exercised at all) whether it must remit the decision to be made again by the Board, or must simply allow the appeal.

20 47. It seems to us that the answer to the first question is that the tribunal has the power to consider the exercise of the discretion. The words of section 67(4) are clear: the tribunal's jurisdiction includes a power to review any relevant decision of the Board in the exercise of its functions under section 66. One of those functions is deciding to cancel a certificate. The tribunal can therefore review that decision.

25 48. The answer to the second question is less clear, but it seems to us that our jurisdiction in this respect is limited to upholding or striking down the decision. That is for the following reasons:

30 (1) Lightman J says, in relation to the legislative history that it was unlikely that the [1980] amendment was "merely" intended to provide for a *Wednesbury* type judicial review. But the extension of the jurisdiction effectively to consider the question as to whether or not the conditions were fulfilled leaves the possibility that a review jurisdiction was at least retained in relation to the exercise of any discretion;

35 (2) Lightman J's discussion in subpara (b) of his reasons reveals that his decision as to full appellate jurisdiction was in the context of the operation of the statute where there was no discretion. It is clear that he regarded the presence of any statutory discretion as being at least potentially indicative of a limited jurisdiction, and also clear that his decision as to full
40 jurisdiction does not determine the tribunal's jurisdiction in an appeal against the cancellation of a certificate (or thus of registration);

5 (3) Although, as Lightman J notes at [20] a “review” jurisdiction may encompass a full appellate jurisdiction, the use of the phrase “include jurisdiction to review” indicates to us that a review should be something in addition to a full appellate consideration of the operation of the relevant conditions. Indeed Lightman J recognises this possibility in his reason (a);

10 (4) Where a discretion is conferred by statute there is some recognition that there may be policies developed by the body to which the power is given which may influence the exercise of that power. A body given a power may rightly take into consideration the need to act fairly as regards a wide body of taxpayers. The development of such policies would be precluded if the tribunal had the jurisdiction to substitute its own. The issues in relation to CIS certificate are ones in which it would be reasonable to suppose that such policies could be applied.

15 49. So far as the third issue is concerned it seems to us that the proper outcome of an appeal is that it should be allowed or dismissed, and that an express power would be needed for the tribunal to remit a decision to be remade (a power along the lines of that in section 16(4) FA 1994 for example). We conclude that if we were to determine that the discretion had not been properly exercised then we should allow the appeal.

(c) Was there an exercise of a discretion in this case?

20 50. Mr Lewis told us that the Board did not give any separate consideration to the question of whether, if the conditions for deregistration were satisfied, it should proceed to deregister a person. If the conditions were satisfied deregistration followed automatically. We concluded that such had been the case in the Appellant’s circumstances.

25 51. After we sought the parties representations in relation to the *John Scofield* decision, HMRC wrote to explain that they had now amended their procedures, but offered no new evidence in relation to this case.

30 52. It seems to us that there was no proper exercise of the power given to the Board by section 66. Where a power is given a decision on whether or not to exercise it must be taken on the facts of the case. This the Board did not do.

53. Whilst we find that HMRC were entitled to decide to withdraw gross payment status we find that this decision to do so was void.

Conclusion

54. We allow the appeal.

35 55. 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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CHARLES HELLIER

TRIBUNAL JUDGE

RELEASE DATE: 23 SEPTEMBER 2011

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