



TC03979

Appeal number: TC/2013/06710

INCOME TAX–Construction Industry Scheme–appeal against HMRC’s refusal to make direction relieving appellant under regulation 9 CIS regulations–invoices contained references to ‘plant’–appellants made deduction against labour element only – mistaken belief this complied with section 61– had they shown reasonable care– no –one invoice contained simple error in respect of an item mistakenly thought to be materials – reasonable care accepted in respect of this invoice– appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DOOCEY NORTH EAST LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE BARBARA KING
MR IAN MALCOLM**

Sitting in public at North Shields on 12 August 2014

Matthew Boddington, lay representative of Acumen Legal Services Ltd, for the Appellant

Rosalind Oliver of HM Revenue and Customs, for the Respondents

DECISION

The Issue

5 1. The appellant company “Dooceys” have appealed against the refusal of the respondents “HMRC” to make a direction under regulation 9(5) of the Income Tax (Construction Industry Scheme) Regulations 2005 (“the CIS regulations”).

2. At the start of the hearing Dooceys were asking for a direction in respect of £32,107 for the tax year 2010/11, £6,756 for the tax year 2011/12 and £1,021 for the
10 tax year 2012/13.

3. HMRC applied for an adjournment, which was refused by the Tribunal, on the basis that Dooceys have not admitted that there has been a failure within section 61 Finance Act 2004 to deduct tax in respect of all the amounts for which they seek a direction.

15 4. Part way through the hearing the parties reached an understanding about several amounts and agreed that the only amounts for which Dooceys are now seeking a direction are as follows:

(1) On all invoices from EMG Construction Limited (“EMG”) between 20 March 2010 and 19 July 2010, the sums on which HMRC say Dooceys should
20 have deducted tax but have failed to do so. HMRC have calculated that the deductible amount exceeds the amount deducted by £27,607.40. This figure is shown as “Potential CIS under-deducted” on page 149 of the bundle supplied for this hearing.

(2) On a quote from Brian Copsey Limited dated 25 July 2011, the sum of
25 £4000. The CIS tax potentially under-deducted on this would be £800.

The Law

5. The Construction Industry Scheme (CIS) was set up to counter tax evasion and a new scheme, to replace the previous scheme, was set up in 2007. Some contractors or subcontractors can apply to be paid gross but others are due to have deductions
30 made from every invoice they submit. Any payment which represents a reimbursement of the cost of materials supplied by the subcontractor is excluded from the amount which is subject to deduction of tax.

6. Section 61 Finance Act 2004 provides as follows:

35 “(1) On making a contract payment the contractor (see section 57(3)) must deduct from it a sum equal to the relevant percentage of so much of the payment as is not shown to represent the direct cost to any other person of materials used or to be used in carrying out the construction operations to which the contract under which payment is to be made relates.”

7. The CIS regulations provide that if a contractor fails to deduct the correct amount from a subcontractor then the contractor is liable to account for that amount to HMRC. Relief from having to account for that amount can be given if regulation 9(3) is satisfied.

5 8. Regulation 9(3) - Condition A is that the contractor satisfies an officer of Revenue and Customs –

(a) that he took reasonable care to comply with section 61 of the Act and these Regulations, and

(b) that –

10 (i) the failure to deduct the excess was due to an error made in good faith, or

(ii) he held a genuine belief that section 61 of the Act did not apply to the payment.”

The Evidence.

15 9. A bundle of documents had been prepared for the hearing. This contained details of meetings and correspondence between Dooceys and HMRC from November 2011 onwards. It also contained witness statements from Mrs Nuala Doocey and Mr Mark Riley, and copies of all the invoices which were subject to the original appeal.

20 10. Dooceys was started in 1997 by Mrs Nuala Doocey and her husband Charles Doocey. She has been a director since its inception. Mark Riley has worked for Dooceys since 2002 and he has been a director since January 2013. Both had made statements and both attended and gave oral evidence.

25 11. Dooceys are involved in the provision of underground utilities which requires the placing of ducts and/or fibre in the ground from and to areas specified by their clients. This also requires back-filling and re-instatement of ground surfaces as well as laying electric cables. In the years from 2010 to 2013 the turnover was in the region of four to five million pounds. The number of employees varies but is in the region of 50.

30 12. Nuala Doocey gave evidence that she is the company secretary of Dooceys and she oversees the operation of CIS within the company. In the early days she may have completed some of the forms herself. She could not remember ever having tried to read the legislation or any HMRC leaflets on CIS before the visit of HMRC in November 2011. She knew that Dooceys had Gross Payment Status and she believed
35 that in respect of all of their subcontractors, CIS meant that Dooceys had to make 20% deduction against all charges for labour. Beyond that she had very little knowledge of CIS and, until the meeting with HMRC in November 2011, she had no idea whether there was any distinction between plant and materials or whether it
40 mattered. Similarly she was unaware of any distinction between plant owned by subcontractors or hired in by them for a specific contract.

13. In approximately 2007 Dooceys started to employ a Sue Durham (now Corner) to look after CIS record keeping for Dooceys. Mrs Doocey stated that she was extremely relieved to have someone else employed to look after the CIS for Dooceys. Mrs Doocey assumed that Sue Corner knew about the CIS regulations because she had worked for another construction company for seven to ten years before joining Dooceys.

14. At meetings with HMRC in November 2011 Mrs Doocey attended together with Stacey Croft who was described as the in-house accountant.

15. Mark Riley gave evidence that he assessed and priced up contracts and so if any query was raised on an invoice he could answer that query from his knowledge of what he expected the invoice to be for that job. He had very little knowledge of CIS regulations and expected that to be dealt with by others. He could recall being asked whether an item such as “splicer” was labour but could not recall discussing anything more specific to do with CIS regulations –ie whether items of plant were hired or owned. He had mentioned in his statement that he thought some items of plant were hired because they had the name of a hire company on the side. He accepted in oral evidence that he had no knowledge about whether these items were actually hired and that they could have been bought second hand from a hire company. At the time he had not realised there was any need to know the difference.

16. Various invoices were looked at during the hearing. On several occasions Mrs Doocey stated that she had queried the amount for items charged as “plant” by the subcontractors. She did this because she thought the total of the particular invoice was higher than expected. If she raised a query in her own mind, she would then ask her husband Charles Doocey or Mark Riley whether the invoice should be accepted. In the main they gave her reasons why the costs were higher than usual on that occasion and she then authorised the invoice to be paid. On one or two occasions she was told that a particular piece of equipment – such as a tipper truck or a Stihl saw – had not been used at all and this item was struck off the invoice.

17. All these queries were directed as to whether Dooceys were being overcharged not as to whether the item should be charged as plant or labour. She could not recall ever having contacted the subcontracting firm to ask them about the items she was querying. Mrs Doocey thought that all the subcontracting firms had accepted any alterations she made on their invoices, without further question.

18. Mrs Doocey stated that Sue Corner had not occasioned any item to be struck off an invoice. As far as she was aware Sue Corner had never contacted the subcontractors to raise any query directly with them. Mrs Doocey believed that several people, including Sue Corner and an accountant previously employed by Dooceys had had the same understanding of the CIS regulations as she did.

19. Before the meetings with HMRC in November 2011, Mrs Doocey had not discussed with her husband, Mark Riley or Sue Corner the question of whether an item was “hired in” or owned by a subcontractor because she had not been aware that there was any reason to question this.

20. Sue Corner had not attended any of the meetings with HMRC in November 2011 and she has not made a statement. We were told that she has now left Dooceys.

Discussion and Findings

5 21. The onus is on the appellant to show that they have taken reasonable care to comply with section 61 **and** that any failure to comply with section 61 was due to an error made in good faith or that they had a genuine belief that section 61 did not apply to the payment.

10 22. We were referred to the cases of *PDF Electrical Limited v HMRC* [2012] TC 02375 and to *J & M Interiors (Scotland) Limited v HMRC* [2014] TC03323 and agree that the standard of “reasonable care” required by Regulation 9 is one that must be appropriate and proportionate to the particular contractor’s business.

15 23. We took into account that Dooceys were of such a size that they employed both an internal accountant and an administrator for CIS record keeping. We would have expected in these circumstances that someone would have taken the trouble to look at the CIS Regulations and to take care to apply them, particularly when an item such as “plant” appeared on an invoice. Several invoices from EMG to Dooceys contain the mention of “gas oil” and it is not clear that a piece of machinery has also been charged on that invoice. We find that these invoices should have alerted Dooceys to question the item and to raise the possibility that they were subject to deduction if they were the cost of fuel as part of travelling expenses.

20 24. In the case of *Mr Steven Hoskins v HMRC* [2012] TC01972 the Tribunal considered that the complexity of various parts of the scheme meant that a contractor would have to make some effort to establish where he stood in relation to his obligations and also that there are common misunderstandings in respect of the scheme.

25 25. Mrs Doocey was the director who oversaw the application of the CIS records for Dooceys. She stated that her only knowledge was that she thought the deduction for CIS tax should apply to labour only and that this was a common misunderstanding of the CIS regulations.

30 26. Mrs Doocey may have genuinely believed that the CIS tax deduction only applied to labour but we do not find that her mistaken belief was reasonably held: a company director exercising supervision of the application of a tax scheme is expected to familiarise themselves with the current details of that scheme. The legislation in section 61 refers to “a contractor may deduct ... the direct cost ... of material ...”. There is no mention of “labour only”.

35 27. Mr Riley did not appear to have thought that it was his responsibility to make sure that the CIS regulations were applied correctly in respect of any invoice. Furthermore, he appeared not to have familiarised himself with the scheme in preparation for his appearance before the Tribunal. There was no direct evidence from Sue Corner as to her understanding of the CIS regulations.

28. We find that the evidence from Dooceys showed that they had not made a reasonable and proportionate effort to understand the complexities of the CIS regulations. We find that it has not been shown that it is a “common misunderstanding” that the CIS deduction applies only to “labour costs”.

5 29. The size of firm involved in the case of *Refit Shopfitting Services Limited* [2011] TC02462 differed greatly from that in this appeal and in any event the appeal appears to have been allowed on new evidence which was not described fully in the decision.

10 30. The quote from Brian Copsey Limited dated 25 July 2011 did not make any mention of plant on it. It contained items which were, in the main, items of labour. The one item on which we have been asked to make a ruling is that which is described as “Armoured cable contingency plus disassembling”. We accept that the level of care attributed to this invoice could be described as reasonable. We accepted that this item could have been mistakenly taken to be for “Armoured cabling” – a material cost and
15 that such a mistake could be classed as a simple mistake.

Decision

31. We find that Dooceys did not take reasonable care to comply with section 61 Finance Act 2004 in respect of all the payments from Dooceys to EMG.

20 32. We are satisfied that Dooceys took reasonable care to comply with section 61 and that the failure to deduct the excess in respect of the £4000 paid by Dooceys to Brian Copsey Ltd, following the quote dated 25 July 2011 for “Armoured cable contingency plus disassembling” was an error made in good faith.

33. We direct that an officer of HMRC should make a direction under regulation 9(5) of the CIS regulations in respect of the excess on that £4,000.

25 34. The appeal is therefore allowed in part.

35 35. 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.

35 **BARBARA KING**
TRIBUNAL JUDGE

RELEASE DATE: 2 September 2014

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