



TC04086

Appeal number: TC/2014/00845

CONSTRUCTION INDUSTRY SCHEME – failure to deduct tax from payments made to sub-contractors – Regulations 9 and 13 Income Tax (Construction Industry Scheme) Regulations 2005 – appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BRITANNIC ESTATES LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR JOHN COLES**

Sitting in public in London on 16 October 2014

No appearance by or on behalf of the Appellant

Ms J Bartup, Presenting Officer, for the Respondents

DECISION

Introduction

1. The Appellant appeals against a determination dated 7 June 2013 made by
5 HMRC under regulation 13 of the Income Tax (Construction Industry Scheme)
Regulations 2005 (the “Regulations”).

2. The following facts alleged by HMRC have not been disputed by the Appellant.
The Appellant is a contractor in the construction industry. In tax year 2009-10 it
made payments to a number of subcontractors, including Mr Kosalka and Mr
10 Romanovas. The Appellant was legally required by the Regulations to deduct tax
from those payments, but did not do so. The amount of tax that should have been
deducted was £1,450 in the case of Mr Kosalka and £304 in the case of Mr
Romanovas (total £1,754). On 7 June 2013, HMRC issued the determination under
regulation 13 of the Regulations referred to above, in the sum of £1,864. (Another
15 determination was issued in respect of tax year 2011-12, but this was subsequently
withdrawn.)

3. HMRC accept that there is a right of appeal to the Tribunal against a
determination under regulation 13. HMRC accept that the figure of £1,864 in the
determination was incorrect, and state that the correct figure is £1,754. HMRC accept
20 that the appeal should therefore be allowed to the extent that the determination should
be reduced to £1,754.

4. However, the Appellant seeks to appeal against the whole of the determination.
The Appellant’s grounds are as follows. The Appellant contends that Mr Kosalka and
Mr Romanovas submitted tax returns for the years in question and paid the tax due, so
25 that it would be wrong for HMRC now to seek to collect the tax from the Appellant.
The Appellant contends further that in 2009, HMRC accepted that the Appellant was
not liable to pay the tax not deducted in circumstances where the relevant
subcontractor had filed the tax return and paid the tax due.

Applicable legislation

30 5. Regulation 9 of the Regulations relevantly provides:

9. Recovery from sub-contractor of amount not deducted by contractor

(1) This regulation applies if—

- 35 (a) it appears to an officer of Revenue and Customs that the
deductible amount exceeds the amount actually deducted, and
(b) condition A or B is met.

(2) In this regulation—

40 “*the deductible amount*” is the amount which a contractor was liable
to deduct on account of tax from a contract payment under section 61
of the Act in a tax period;

“the amount actually deducted” is the amount actually deducted by the contractor on account of tax from a contract payment under section 61 of the Act during that tax period;
“the excess” means the amount by which the deductible amount exceeds the amount actually deducted.

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(3) Condition A is that the contractor satisfies an officer of Revenue and Customs—

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

(b) that—

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

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

(4) Condition B is that—

(a) an officer of Revenue and Customs is satisfied that the person to whom the contractor made the contract payments to which section 61 of the Act applies either—

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(i) was not chargeable to income tax or corporation tax in respect of those payments, or

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(ii) has made a return of his income or profits in accordance with section 8 of TMA (personal return) or paragraph 3 of Schedule 18 to the Finance Act 1998 (company tax return), in which those payments were taken into account, and paid the income tax and Class 4 contributions due or corporation tax due in respect of such income or profits;

and

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(b) the contractor requests that the Commissioners for Her Majesty's Revenue and Customs make a direction under paragraph (5).

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(5) An officer of Revenue and Customs may direct that the contractor is not liable to pay the excess to the Commissioners for Her Majesty's Revenue and Customs.

(6) If condition A is not met an officer of Revenue and Customs may refuse to make a direction under paragraph (5) by giving notice to the contractor (“the refusal notice”) stating—

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(a) the grounds for the refusal, and

(b) the date on which the refusal notice was issued.

(7) A contractor may appeal against the refusal notice—

(a) by notice to an officer of Revenue and Customs,

(b) within 30 days of the refusal notice,

- (c) specifying the grounds of the appeal.
- (8) For the purpose of paragraph (7) the grounds of appeal are that—
 - (a) that the contractor took reasonable care to comply with section 61 of the Act and these Regulations, and
 - 5 (b) that—
 - (i) the failure to deduct the excess was due to an error made in good faith, or
 - (ii) the contractor held a genuine belief that section 61 of the Act did not apply to the payment.
- 10 (9) If on an appeal under paragraph (7) that is notified to the tribunal it appears that the refusal notice should not have been issued the tribunal may direct that an officer of Revenue and Customs make a direction under paragraph (5) in an amount the tribunal determines is the excess for one or more tax periods falling within
- 15 the relevant year. ...

6. Regulation 13 of the Regulations relevantly provides:

13. Determination of amounts payable by contractor and appeal against determination

- (1) This regulation applies if—
 - 20 ...
 - (b) an officer of Revenue and Customs has reason to believe, as a result of an inspection under regulation 51 or otherwise, that there may be an amount payable for a tax year under these Regulations by a contractor that has not been paid to them, or
 - 25 (c) an officer of Revenue and Customs considers it necessary in the circumstances.
- (2) An officer of Revenue and Customs may determine the amount which to the best of his judgment a contractor is liable to pay under these Regulations, and serve notice of his determination on
- 30 the contractor.
- (3) A determination under this regulation must not include amounts in respect of which a direction under regulation 9(5) has been made and directions under that regulation do not apply to amounts determined under this regulation.
- 35 ...

The hearing and the arguments of the parties

7. The Appellant sent a letter dated 2 October 2014 stating that it would not be represented at the hearing, and making representations (repeating the existing grounds of appeal) that have been considered by the Tribunal.

40 8. HMRC were represented at the hearing by Ms Bartup, who submitted as follows.

9. HMRC accept that the Appellant has a right of appeal against a determination under regulation 13 of the Regulations, and that the appeal should be allowed to the extent indicated in paragraph 3 above. However, the Appellant's other grounds of appeal are in effect an attempt to appeal against HMRC's refusal to make a direction under regulation 9(5) of the Regulations.

10. HMRC accept that there is a right of appeal against a determination by HMRC that Condition A does not apply: regulation 9(3) and (6)-(9) of the Regulations. However, there is no corresponding right of appeal against a determination by HMRC that Condition B does not apply.

11. Condition A was not satisfied because the Appellant conducted verifications of both subcontractors and HMRC told the Appellant that the subcontractors should be paid net of tax. Furthermore, the Appellant was aware from the previous 2009 compliance check that they should have made deductions. In any event, the Tribunal cannot consider whether Condition A is satisfied because the Appellant has not requested that a direction be made under regulation 9(5) and (6).

12. Condition B is not satisfied. Ms Bartup submitted to the Tribunal orally at the hearing as follows. Mr Kosalka left the UK towards the end of 2010. He attempted to submit a tax return but this was returned to him on the ground that he had used the wrong form and had submitted it before the end of the tax year. Mr Romanovas submitted a tax return but it was not complete as it did not include all of the CIS payments he had received. Mr Kosalka and Mr Romanovas have not paid the tax to which they are liable.

The Tribunal's findings

13. The Tribunal finds that the appeal should be allowed to the extent referred to in paragraph 3 above.

14. As to the Appellant's ground of appeal that the subcontractors in question have submitted their tax returns and paid all tax owing, the Tribunal finds as follows. HMRC deny that the subcontractors have paid all tax to which they are liable (paragraph 12 above). Although Ms Bartup said this as a matter of submission and did not produce documentary evidence that Mr Kosalka and Mr Romanovas had failed to pay all of the tax owing, the Tribunal notes as follows. The burden is on the Appellant to establish the facts on which a ground of appeal relies. The Appellant has not given sufficient evidence or details that could establish a *prima facie* case that the tax has been paid, that would then require evidence in rebuttal from HMRC. In the absence of any *prima facie* case established by the Appellant, the burden is not on HMRC to prove that Mr Kosalka and Mr Romanovas did not pay the tax to which they are liable. The Appellant has therefore not established that all tax due has been paid. The Tribunal thus considers it to be an academic question whether there is any right of appeal to the Tribunal against a finding by HMRC that Condition B is not satisfied, since such an appeal would fail on its merits in any event.

15. The Tribunal considers that on the evidence Condition A is not satisfied. The bundle includes evidence of verification checks undertaken by the Appellant with HMRC in respect of Mr Kosalka and Mr Romanovas, which informed the Appellant that it was required to pay these subcontractors net of tax. There was thus no
5 “genuine belief that section 61 of the Act did not apply to the payment” (regulation 9(3)(b)(ii)). A letter from the Appellant to HMRC dated 12 April 2013 states that “Sub Contractors were paid gross because they provided us with their UTR and assured us that they are filing their Returns and accounting for tax”. In the bundle is a statement signed by one subcontractor in which the subcontractor confirms to the
10 Appellant that “I will pay the tax due to the Inland Revenue myself”. This shows that the decision to pay subcontractors without deducting tax was a conscious and deliberate decision by the Appellant, rather than an “error made in good faith” (regulation 9(3)(b)(i)). Furthermore, because the decision not to deduct tax was a conscious and deliberate decision, there was no “reasonable care to comply with
15 section 61 of the Act and these Regulations” (regulation 9(3)(a)), given that section 61 of the Act and these Regulations required tax to be deducted. The Tribunal therefore considers it to be an academic question whether the Tribunal can consider whether Condition A is satisfied, as any such consideration would in any event lead to the conclusion that Condition A is not satisfied.

20 16. The Appellant’s experience in 2009 may have demonstrated that the Appellant could escape liability where subcontractors pay the tax to which they are liable. The Appellant’s experience in 2009 did not suggest that the Appellant could escape liability where subcontractors promise to pay the tax to which they are liable but then fail to do so. Clearly the Appellant took a risk when proceeding on the basis of such
25 promises by subcontractors. It is precisely because of such risks that the Regulations require tax to be deducted at source.

Conclusion

17. For the reasons above, the appeal is allowed only to the limited extent indicated in paragraph 3 above, but is otherwise dismissed.

30 18. 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
35 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

40 **DR CHRISTOPHER STAKER**
TRIBUNAL JUDGE

RELEASE DATE: 20 October 2014