



TC05098

Appeal number: TC/2015/06380

Income Tax - Construction Industry Scheme – Direction under Regulation 9(5) refused – whether or not Condition A or Condition B in Regulation 9 is fulfilled – whether or not taxpayer took reasonable care – held yes – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BRIAN MABE

Appellant

- and -

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

**TRIBUNAL: JUDGE PHILIP GILLETT
CHRISTOPHER JENKINS**

Sitting in public at Portsmouth on 10 May 2016

The Appellant appeared in person, assisted by Mrs Stacey Walker, tax adviser

Ms K Powell, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. This was an appeal against HMRC's refusal to grant relief under Regulation 9(5) Income Tax (Construction Industry Scheme) Regulations 2005 ("the CIS Regulations") in respect of a claim under Regulation 9(3) of those regulations.

Background

2. Mr Mabe runs a Fire Protection business, which it was agreed fell within the definition of a construction operation for the purposes of the Construction Industry Scheme ("the CIS"). During the years in question, 2011-12 and 2012-13, Mr Mabe failed to deduct income tax from payments made to a number of sub-contractors. The amount of income tax in question amounted to £19,295 for 2011-12 and £16,558 for 2012-13.

3. Following an investigation into Mr Mabe's tax affairs HMRC wrote to Mr Mabe's tax adviser, on 6 March 2015 stating that they would be raising a determination under Regulation 13(2) of the CIS Regulations in respect of the income tax which Mr Mabe had failed to deduct.

4. Mr Peter Bawler of HMRC issued a refusal letter dated 19 May 2015 refusing Mr Mabe's request that HMRC should issue a direction under Regulation 9(5) CIS Regulations relieving Mr Mabe of the obligation to account for the income tax in question, because he was not satisfied that the criteria in Regulation 9(3) CIS Regulations had been met. Mrs Walker appealed against this decision on Mr Mabe's behalf on 19 June 2015.

The Facts

5. Ms Powell presented evidence and made representations on behalf of HMRC and Mr Mabe and Mrs Walker presented evidence and made representations on behalf of Mr Mabe. Much of the factual background was unchallenged and we therefore make the following findings of fact from the evidence presented.

6. Mr Mabe had been registered personally as a sub-contractor since 25 May 1999. He had also run a business, B&J Sprinklers Ltd, with his wife until 2010. Mr Mabe had been the company secretary and his wife had been the sole director. This company had operated the CIS satisfactorily for a number of years.

7. In a letter to HMRC from Mrs Walker dated 17 October 2014 she said that "she could almost guarantee [that the persons to whom the relevant payments had been made] would not have submitted a tax return and declared their income".

8. Ms Powell said that HMRC had checked to see whether or not the individuals to whom Mr Mabe had made the payments had in fact filed tax returns and accounted for their income from Mr Mabe properly. They discovered that in most cases a complete return of the income from Mr Mabe had not been made. They had

established that a full return had been made by one of the recipients, Sonny Wall, and they had adjusted the tax assessed accordingly, but this accounted for only a small part of the tax payable.

5 9. We were shown copies of various payment advice notices from Tyco Fire & Integrated Solutions (UK) Ltd and Blue Shield Fire Protection Ltd which showed that they had made payments to Mr Mabe after deducting tax under the CIS.

10 10. Mr Mabe was a man of limited formal education. He had not attended school as often as he should and he had a limited ability to read and write. He had no understanding of tax or accounting and clearly became extremely anxious when faced with such issues.

15 11. Although he had been the company secretary of B&J Sprinklers Ltd his wife had handled all the paperwork, including all tax and accounting matters, and he had had absolutely nothing to do with that side of the business. He had also had a very messy and unpleasant divorce from his wife after a marriage of 22 years and as a consequence had become very depressed and had been unable to work for some considerable time.

20 12. When he eventually returned to work he decided to find an accountant to handle his accounting and tax affairs. He was introduced to David Entwistle, of Witham, Essex, by the mechanic who serviced his van. Mr Entwistle was a Chartered Accountant and Mr Mabe therefore trusted Mr Entwistle to handle all his tax and accounting affairs. Mr Mabe had taken a carrier bag containing all his invoice and payment records to Mr Entwistle and Mr Entwistle had produced a set of accounts and negotiated the tax liability with HMRC. Mr Entwistle had also advised Mr Mabe to set up a PAYE system for the employees of another business run by Mr Mabe, Pompey Fish Doctors, but he had not advised Mr Mabe about any obligations he might have under the CIS.

30 13. In early 2013 Mr Mabe became friends with Mrs Walker, who was his ex-wife's sister. They had not spoken much during the divorce but had started to meet again after the divorce was finalised. Mrs Walker worked for a firm of chartered accountants and had some expertise in tax and accounting matters and she pointed out to Mr Mabe that he needed to register for VAT and also for the CIS. Mr Mabe's first return under the CIS had been sent in February 2013 and he had registered for VAT around the same time. This had resulted in a significant payment of VAT to HMRC but Mr Mabe's customers had been happy to pay this, so there was no net loss to Mr Mabe.

14. Although Blue Shield and Tyco had paid Mr Mabe after deduction of tax under the CIS, the majority of Mr Mabe's income had come from Hall and Kay and JFS Fire, who both paid Mr Mabe without deduction of tax.

40 15. Mr Mabe acted in good faith throughout the period, which was acknowledged by Ms Powell on behalf of HMRC. He complied fully with the requirements of both

the CIS and the VAT legislation as soon as he became aware of his obligations. At no time was he attempting to “cheat” the system.

Legislation

16. The relevant legislation is contained in Regulation 9 CIS Regulations. This
5 provides as follows:

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

“(1) This regulation applies if—

(a) it appears to an officer of Revenue and Customs that the deductible amount exceeds the amount actually deducted, and

10 (b) condition A or B is met.

(2) In this regulation—

“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;

15 “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.

20 (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—

25 (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.

(4) Condition B is that—

30 (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—

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

5 (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(a) (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

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

(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.

15 (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—

(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—

20 (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—

25 (a) that the contractor 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

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

(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 the relevant year.

5 (10) If a contractor has deducted an amount under section 61 of the Act, but has not paid it to the Commissioners for Her Majesty's Revenue and Customs as required by regulation 7 (payment, due date etc. and receipts), that amount is treated, for the purposes of determining the liability of any sub-contractor in respect of whose liability the sum was deducted, as having been paid to the Commissioners for Her Majesty's Revenue and Customs at the time required by regulation 8 (quarterly tax periods).”

10 Submissions

17. HMRC considered that Mr Mabe had not taken reasonable care to comply with his obligations under the CIS. Ms Powell emphasised that there was no suggestion on the part of HMRC that Mr Mabe had acted other than in good faith but she did not believe that he had a genuine belief that the CIS did not apply to the payments.

15 18. Ms Powell stated on behalf of HMRC that Mr Mabe would have been aware of the CIS because:

- (a) He had had a personal registration as a sub-contractor since 1999,
- (b) He had been involved with the CIS through B&J Sprinklers Ltd, and
- (c) CIS deductions had been made from payments made to him.

20 19. Ms Powell also argued that the tribunal had no jurisdiction to hear an appeal on the question of whether or not Condition B, in Regulation 9(4) CIS Regulations, was fulfilled.

20. Mr Mabe's grounds of appeal can be summarised as follows:

- 25 (a) It is unfair that Mr Mabe is required to pay the tax which rightfully should be paid by the persons to whom the payments were made,
- (b) Mr Mabe had no prior knowledge of VAT, PAYE or the CIS and did not think he was doing anything wrong, and
- 30 (c) Mr Mabe used a firm of qualified professional accountants who failed to inform him of his obligations, so he had no reason to assume he was not fulfilling his obligations until the fact was made clear to him.

Discussion

21. Looking at the first ground of appeal, this essentially questions the whole rationale for the CIS. The CIS was introduced to address concerns about widespread tax evasion in the construction industry. It may appear to be unfair but essentially it simply replicates the PAYE system and puts the initial burden to account for tax on
35 the person making the payments.

22. Mr Mabe's Notice of Appeal also suggests that the correct course of action would be for HMRC to recover the tax from the recipients. This is effectively what is provided by Regulation 9(5), but HMRC may only take this course of action if either Condition A or Condition B are met, as set out in Regulation 9(3) and 9(4) respectively. We must therefore decide if either of these conditions is satisfied.

23. Ms Powell argued that the tribunal has no jurisdiction to hear an appeal against HMRC's decision as regards Condition B. In support of this contention Ms Powell quoted the case of *Steven Hoskins v The Commissioners for Her Majesty's Revenue and Customs* [2012] UKFTT 284 (TC).

24. Regulation 9(7) sets out the process for an appeal to the tribunal but Regulation 9(8) sets out clearly that any appeal can only be made on the question of whether or not Condition A is fulfilled. We therefore agree with Ms Powell that there is no permissible appeal to the tribunal on the question of whether or not Condition B is satisfied. We would note that, in any case, HMRC have checked the tax positions of the recipients of the payments and have confirmed that they have not made a full disclosure of this income, which is also in line with Mrs Walker's expectation as set out in her letter of 17 October 2014. It would appear therefore that the necessary conditions for Condition B to apply are not met.

25. We now turn to Condition A, which is set out in Regulation 9(3) and is effectively repeated in Regulation 9(8). There are two parts to this condition:

(a) That [the taxpayer] took reasonable care to comply with s 61 Finance Act 2004 and the CIS regulations, and

(b) The failure to deduct tax was due to an error made in good faith or the taxpayer held a genuine belief that s 61 did not apply to the payment.

26. Ms Powell acknowledged when presenting HMRC's case that there is no question that Mr Mabe acted in anything other than good faith. Part (a) of Condition A is therefore fulfilled whether or not Mr Mabe held a genuine belief that s 61 did not apply to the payments. The sole question for us therefore is whether or not Mr Mabe took reasonable care to comply with s 61 and the CIS regulations.

27. In determining what is reasonable it is well established that this involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. We can do no better than to quote the words of Judge Berner in the First-tier Tribunal in *Barrett v Commissioners for Her Majesty's Revenue and Customs* [2015] UKFTT 329 (TC) at [154]. He said that "The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard."

28. It is also well established that a person who is aware of his obligations cannot avoid those obligations simply by delegating them to a third party without taking reasonable steps to ensure compliance with those obligations. Reliance on a third

party will not therefore normally constitute a reasonable excuse for a failure to fulfil known obligations.

29. Looking at the facts of this case Mr Mabe has, since 1999, been a self-employed worker in the fire protection industry. He had some experience of the CIS from the perspective of a sub-contractor. This, Ms Powell argued, gave Mr Mabe an awareness of the CIS which, in conjunction with his involvement in B&J Sprinklers Ltd, meant that Mr Mabe would have been aware of his obligations under the scheme. However, we have already heard that Mr Mabe had no involvement with the paperwork side of B&J Sprinklers Ltd and therefore he had no knowledge of the operation of the CIS from the perspective of a contractor. In addition Mr Mabe, by his own admission, is a man of limited formal education, and someone who has a very limited understanding of tax and accounting matters.

30. In these circumstances, given Mr Mabe's lack of familiarity with tax and accounting issues, he took the very sensible step of employing a properly qualified chartered accountant, David Entwistle, who had been recommended to him by his mechanic. He did not to our knowledge perform any checks on the professional competence of Mr Entwistle but it is important to note that Mr Entwistle was a professionally qualified chartered accountant and not a less well qualified book-keeper whom Mr Mabe might have employed to prepare his accounts. In these circumstances we do not think it would be reasonable to expect Mr Mabe to have carried out any further checks on Mr Entwistle's abilities.

31. Mr Mabe did not have a formal contract with Mr Entwistle setting out Mr Entwistle's obligations to Mr Mabe as regards additional advice over and above the preparation and submission of accounts to HMRC. However it is important to note in this context that Mr Entwistle did bring to Mr Mabe's attention the need to register for PAYE for his other business, Pompey Fish Doctors. We therefore think it reasonable that Mr Mabe would have expected Mr Entwistle to bring to his attention any other basic tax requirements such as the need to register for VAT and for the CIS.

32. We do not therefore agree with Ms Powell that Mr Mabe failed to take reasonable care. In our view, the steps taken by Mr Mabe to employ a professionally qualified chartered accountant, who evidently held himself out as able to provide a comprehensive service, both as regards accounting and tax, for a small business such as that of Mr Mabe, were the actions of a reasonable taxpayer in the position of Mr Mabe.

33. Again quoting Judge Berner in *Barrett* at [161] "The test is one of reasonableness. No higher (or lower) standard should be applied. The mere fact that something that could have been done has not been done does not of itself necessarily mean that an individual's conduct in failing to act in a particular way is to be regarded as unreasonable. It is a question of degree having regard to all the circumstances, including the particular circumstances of the individual taxpayer. There can be no universal rule. What might be considered an unreasonable failure on the part of one taxpayer in one set of circumstances might be regarded as not unreasonable in the case of another whose circumstances are different."

34. Mr Mabe himself was clearly unaware of his filing obligations when he first employed sub-contractors, but he employed a professional accountant and provided him with all the necessary paperwork from which he had been able to prepare Mr Barrett's accounts, including reference to expenses incurred in relation to sub-contractors. In our view, a reasonable taxpayer in Mr Mabe's position, having employed an accountant to deal with both accounting and tax, including PAYE, and having provided the accountant with all relevant information with respect to his business, would have been entitled to rely on that accountant to draw attention to any relevant filing obligation. It would also have been reasonable for such a taxpayer to have concluded, from his accountant's silence, that there were no such obligations outstanding.

35. In our judgment, in the circumstances of this case, it was not unreasonable for Mr Mabe to have been unaware of the filing obligations in question, and by appointing a chartered accountant in the way that he did Mr Mabe acted as a reasonable taxpayer, who was very aware of his own limitations in tax and accounting matters, would have done. It was not unreasonable for such a taxpayer to have assumed that Mr Entwistle was able to, and would, advise him on any relevant tax obligation that was apparent from the information provided to him. Nor was it unreasonable for a taxpayer such as Mr Mabe, having received from Mr Entwistle no indication that any filing obligation had been incurred in respect of his use of sub-contractors, not to have raised the question himself whether there might be a filing obligation of which he was unaware, either with Mr Entwistle or HMRC.

Decision

36. We find that Mr Mabe did take reasonable care to comply with s 61 and the CIS Regulations and that Condition A, as set out in Regulation 9(3) of the CIS Regulations was fulfilled. Mr Mabe's appeal is therefore allowed. We also direct, in accordance with Regulation 9(9) of the CIS Regulations that an officer of HMRC should make a direction under paragraph (5) of Regulation 9 in an amount of £19,295 in respect of 2011-12 and in an amount of £16,558 in respect of 2012-13.

37. 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.

PHILIP GILLETT

TRIBUNAL JUDGE

RELEASE DATE: 12 MAY 2016

