[2017] UKFTT 191 (TC)

TC05679

Appeal number: TC/2016/04406

CONSTRUCTION INDUSTRY SCHEME – penalties – late filing of returns – one foreign sub-contractor – whether reasonable excuse – reliance on accountant – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SCHOTTEN & HANSEN (UK) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT
MEMBER: IAN SHEARER

Sitting in public at Eagle Building, Glasgow on Monday 20 February 2017

Having heard Mr and Mrs Hansen and Mr Dargie for the Appellant and Mr Mason, Presenting Officer of HMRC, for the Respondents

DECISION

Introduction

1. This is an appeal by the appellant against two decisions dated 5 May 2016 by the respondents ("HMRC") being:-

(a) A penalty determination issued by HMRC under Section 98A(2)(a) and 98A(2)(b)(ii) Taxes Management Act ("TMA") 1970 for the late filing of Contractors Monthly Returns (CIS300) for the period 6 April 2010 to 5 October 2011, in the sum of £24,007.02 but with an offer of mitigation to £15,141.54, and

(b) A penalty assessment issued by HMRC under Schedule 55 Finance Act ("FA") 2009 for the late filing of Contractors Monthly Returns (CIS300) for the period 6 October 2011 to 5 April 2014 in the sum of £13,069.49.

Background

2. The appellant supplies and fits wooden flooring which is of a high quality and specialist nature. The product manufacturer is a German company owned and run by Mr Hansen's brother. Because of the high specification and quality of the product a German company is used for the installation and the fitters are supplied by Roland Langenegger GmbH ("RL"). The fitters travel to the UK to do the fitting and the appellant pays for the labour and separately pays for the fitters' travel costs and subsistence.

3. On 7 March 2014, HMRC wrote to the appellant to advise of their intention to undertake a check of the appellant's Employers and Construction Industry Scheme ("CIS") records (a compliance check). HMRC met with Mr and Mrs Hansen at the appellant's premises on 28 April 2014 and it was established that the appellant had not operated the CIS on the basis that the work was done by fitters supplied by a German company which was not a UK taxpayer, and this was the appellant's only relevant sub-contractor. HMRC disagreed with that approach.

4. Correspondence and a number of meetings then ensued.

5. The appellant ascertained that (under a previous name) it had been registered as a Contractor under the previous CIS with effect from 30 April 2005 but that no Returns had ever been made. When the present CIS came into effect on 6 April 2007, the existing CIS registration and scheme for the appellant were overlooked, as they were already not "live". Obviously, no Returns were made. On 14 May 2014, the appellant's agent Mr Dargie confirmed that the appellant had now registered as a Contractor for CIS purposes and that RL had taken advice on its position regarding CIS registration and was in the process of registering as a sub-contractor. By notice dated 14 July 2014, HMRC issued confirmation that RL's sub-contractor's payment status was gross.

6. In the course of correspondence it was eventually agreed that although technically the appellant should have made deductions at the rate of 30% on payments made to

RL and was therefore liable for those deductions totalling £395,031.67, nevertheless HMRC were prepared to relieve the appellant of that liability in terms of Regulation 9(5) Income Tax (Construction Industry Scheme) Regulations 2005.

7. The appellant had also been registered under the previous CIS as a sub-contractor prior to 6 April 2007. This was to meet the requirements of CIS Contractors with whom the appellant dealt. On 1 April 2007, HMRC wrote to the appellant, as it did to all other "live" sub-contractors, confirming that they would automatically transfer the appellant's current CIS record (as a sub-contractor) across to the new system. No such letter was sent in regard to the appellant in its capacity as a Contractor since no Returns had been submitted and it was therefore, as stated above, not "live" at the time at which the systems changed over.

8. No agreement could be reached between the parties in regard to the level of penalties or the mitigation offered. Accordingly on 5 May 2016, HMRC issued penalty explanation letters and late Return penalty notices to the appellant and their agent. On 26 May 2016 those were appealed and a review requested (whilst it was also pointed out that the letters and notices had not been received). On 9 June 2016 further copies of the letters and notices were issued and on 21 July 2016 the review officer wrote to the appellant and agent upholding the penalties.

9. On 16 August 2016, the appellant lodged this appeal.

The Law

The CIS

10. The legal framework of the CIS, as it has been in force from 6 April 2007, is to be found in Sections 57 to 77 of Finance Act 2004 and the Income Tax (Construction Industry Scheme) Regulations 2005 ("the 2005 Regulations"). The CIS is described by Ferris J in *Shaw (Inspector of Taxes) v Vicky Construction Ltd*[1]:-

> "… a contractor is obliged, except in the case of a sub-contractor who holds the relevant certificate, to deduct and pay over to the Revenue a proportion of all payments made to the sub-contractor in respect of the labour content of any sub-contract. The amount so deducted and paid over is, in due course, allowed as a credit against the sub-contractor's liability to the Revenue."

11. In summary, Contractors are required to make a Return to HMRC by no later than the 19th day of each month. Nil Returns are also required. If a monthly Return is received after the filing date it will be treated as late and the contractor will be liable to a penalty. Payment to HMRC of the deductions must also be made by the 19th of each month.

[1] 2002 STC 1544 at paragraph 4

The first decision – penalties under the old Rules

12. Section 98 TMA permitted HMRC to charge a fixed penalty for each month or part of a month that a Return remained outstanding for up to a maximum of 12 months. Although the penalty can vary, in this case the monthly penalty was £100 per month. Penalties are also due where Returns have been outstanding for more than 12 months and HMRC charge a further penalty of up to £3,000 for each failure.

Second decision – penalties under the new Rules

13. Under Schedule 55 FA 2009, for the month ended 5 November 2011 onwards, if any CIS Return is filed one day late there is an initial fixed penalty of £100 and if the Return is still outstanding two months after the due date, there is a second fixed penalty of £200. After six months there is a further penalty of £300 or 5% of any liability to make payments that should have been shown on the Return and after 12 months there is a second further penalty of either £300 or 5% of the liability to make payments to a maximum of £3,000.

Mitigation

14. Section 102 TMA allows HMRC to mitigate penalties after a penalty has been determined and appeal rights exhausted. That does not apply to penalties under Schedule 55 FA 2009.

Special Reduction

15. HMRC can agree to a special reduction of a penalty charged under Schedule 55 FA where there are "special circumstances" and those provisions are contained in paragraph 16 of that Schedule. Special circumstances are not defined but exclude the taxpayer's ability to pay or the fact that a potential loss of revenue from one taxpayer is balanced by a potential overpayment by another.

Reasonable excuse

16. In regard to the first penalties Section 118(2) TMA provides that a penalty will not be exigible where a person had a reasonable excuse for not doing anything required to be done, if it was done without unreasonable delay after the excuse ceased. In regard to the second penalties, paragraph 23 of Schedule 55 FA 2009 reads as follows:-

> "(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 … 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."

P is of course the taxpayer.

Summary of HMRC's arguments

17. HMRC contend that the appellant had no reasonable excuse for the late filing of the Returns. The appellant had a statutory obligation as a Contractor who engaged a sub-contractor within the scope of the CIS to register with the CIS, verify that sub-contractor, make the necessary deductions and submit monthly Returns. The fact that the appellant was eventually relieved of the obligation to pay the CIS tax did not alter the fact that no deductions had been made and no Returns submitted. It was not relevant that the appellant was unaware of the detail of CIS, as ignorance of the law is no excuse. The CIS had been widely publicised and the appellant had been registered as a sub-contractor. HMRC considers that "poor advice" from an accountant does not constitute a reasonable excuse.

18. HMRC have calculated that over the period, a total of £395,031.67 should have been deducted in the absence of the sub-contractor having gross status and there is no provision in the legal framework for the CIS to apply gross status retrospectively. As Mr Mason phrased it, there is a theoretical loss of revenue. Some of the penalties are tax geared and therefore the quantum is the liability that should have been declared on the Returns.

19. HMRC have considered mitigation, have offered mitigation and have specifically stated that should the penalties be determined then the Tribunal should note that the penalties will be mitigated to the previously offered lower amount.

20. HMRC rely on *HMRC v Hok Ltd*[2] for the proposition that the concept of 'fairness' is not a matter that falls within the jurisdiction of the First-tier Tribunal and *HMRC v Bosher*[3] ("Bosher") for the proposition that the UK penalty regime was not disproportionate.

Summary of the appellant's arguments

21. The appellant argues that they had a reasonable excuse in that they had no reason to believe that a German sub-contractor would fall within the CIS and that was their only sub-contractor. There had been no loss of revenue because RL had gross status and would have had gross status.

22. They were mindful of their obligation to comply with the UK tax regime and had taken professional advice from the outset.

23. The penalties were neither reasonable nor proportionate not least because there never would have been a loss of revenue.

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[2] 2012 UKUT 363 (TCC)

[3] 2013 UKUT 0579

Discussion

24. In this appeal we are concerned only with the period from 6 April 2010 to 5 April 2014 although, as a matter of fact, the appellant had made payments to RL without deduction of tax or submission of Returns in all of the months ended 5 September 2008 to 5 April 2014. The period prior to 6 April 2010 has not been subjected to penalties because it is now out of time.

25. Reasonable excuse is not defined in any of the relevant legislation. We were not referred to the case of *Barrett v HMRC*[4] ("Barrett") but it is referred to in passing in *Bosher* which was cited to us by HMRC. In *Barrett*, Judge Berner states at paragraph 154:-

> "The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. 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".

26. What then are the particular facts and circumstances?

27. Mrs Hansen was very honest in stating in an email dated 22 August 2014 which was produced to us that:-

> "However as far as Reasonable Excuse goes we can only say that we did what we did in ignorance of the rules, absolutely not in blatant contravention of the rules. As the company in question was not and is not a UK taxpayer we never considered the CIS scheme. This has turned out to be a huge oversight but it was no more or less than that. If we had even thought of the need for registration we would have investigated. We sought no advice on this as we were unaware that any was needed. Only the biblical CIS340 casts any light on this and it wasn't a publication that crossed our radar."

28. That is a very clear summary of what happened in this case.

29. In oral evidence she also stated "Our one mistake then perpetuated for year on year eventually leading to this unfortunate situation". That is indeed the case. Every failure for which the appellant has been penalised is predicated on that mistake. The unfortunate consequence is that what she described as a "simple misjudgement" has resulted in large penalties in circumstances, where, in reality, there never would have been any risk of loss of tax. We say that because the purpose of the CIS was, and is, to protect the Revenue.

30. At the heart of this matter is the simple fact that the appellant assumed that because their sub-contractor was German then the CIS would not apply because RL was outwith the UK tax system. They did not check that assumption. Should they have done so?

31. We found Mr and Mrs Hansen to be straightforward and credible witnesses. We accept that when Mr and Mrs Hansen came to the UK from Denmark in 2002 they did

[4] 2015 UKFTT 329

seek advice about the UK tax system from a major international firm of accountants who provided a full accountancy and tax service including VAT and PAYE. They had faith in that firm because they had used them in Denmark.

32. Mr and Mrs Hansen believed that the appellant was tax compliant and relied on that accountancy firm to ensure that that was the case. When the client handling partner, Mr Dargie, moved firm they moved the appellant's business to that new firm and continued to rely on the checks etc conducted in the course of the ongoing annual audit and tax compliance work.

33. It seems likely that during the period in question, no pro-active advice was given in regard to the CIS nor was advice sought. Certainly the late registration in this matter was prompted by HMRC's compliance investigation. We find that, as Mrs Hansen stated, the CIS was simply not addressed.

34. Mrs Hansen argues that it is an "unreasonable expectation" that the appellant should have sought advice on the CIS. HMRC argue that advice should have been sought because the appellant was a Contractor paying a sub-contractor; there was readily accessible advice on the workings of the CIS in the shape of CIS340; the appellant operates in the construction industry; and the companies for whom it sub-contracts insisted that the appellant itself is, and was, registered in the CIS.

35. Did the appellant exercise due diligence and have a proper regard for responsibilities under the Taxes Acts? We agree with Judge Berner in *Barrett* at paragraph 161 where he finds that:-

> "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."

36. Like Judge Berner in that case we do take into account the fact that the appellant had some experience of the CIS but that was as a sub-contractor and would have given no particular insight. Indeed, Mrs Hansen is very clear, and we accept her explanation, that:-

> "We recognise that we were registered as sub-contractors with the scheme but that was in response to contractors simply stating that they would not work with non registered sub-contractors. We therefore registered as a means of complying with their regulations rather from any recognition that our activities were involved in the CIS scheme."

37. Further, it is unusual that at all relevant times the appellant had only the one sub-contractor and that was RL which was German.

38. Mr and Mrs Hansen were very open about their limited knowledge of UK tax and equally clear that it was for that reason that they took professional advice. They had

registered with the CIS as soon as they were aware of the potential problem and they ensured that RL did so too and obtained gross status.

39. There are many similarities between this case and *Barrett.* Like that case, at paragraph163 this is not a case "….in which a taxpayer knowing of an obligation, merely delegates that task to a third party and does not take reasonable steps to ensure that it has been undertaken." They did not know of the filing obligation. It is not the type of case like those envisaged by paragraph 23(2)(b) Schedule 55 Finance Act 2004 (see paragraph 16 above)

40. The appellant did instruct reputable accountants and provided them with access to all relevant information about their business including the significant sums paid to RL. We find that a reasonable taxpayer in the appellant's position, with limited knowledge of the UK tax system and the CIS in particular, having employed such accountants would have been entitled to rely on those accountants to draw attention to any relevant tax compliance obligation.

41. In all of these circumstances we consider that it was not unreasonable

(a) for the appellant to assume that those accountants would have the capacity to, and would, advise on any relevant compliance issues arising from the information provided to them,

(b) for the appellant to assume that in the absence of any such advice there were no such compliance issues,

(c) that the appellant was not aware of the filing obligations of the CIS, and

(d) that the appellant did not itself investigate the CIS or seek out CIS340.

42. This was a finely balanced case and Mr Mason advanced the HMRC case persuasively. However, in this particular combination of circumstances, we find that the appellant had a reasonable excuse for the non-filing of the CIS Returns for which the penalties have been determined.

43. Accordingly, the appeal succeeds and the penalties are set aside.

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.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 28 FEBRUARY 2017