Neutral Citation: [2024] UKFTT 1045 (TC)

Case Number: TC09356

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video hearing]

Appeal reference: TC/2022/01555

CONTRUCTION INDUSTRY SCHEME –Claim under Regulation 9(3) Condition A Income Tax (Construction Industry Scheme) Regulations 2005 - Refusal Decision Notices for 2018-2019 and 2019-2020 – whether agency chosen supplied workers within the construction industry – yes - whether taxpayer took reasonable care to comply with legislation regarding the operation of the Construction Industry Scheme when engaging an agency – no – Section 61 Finance Act 2004 - Appeal dismissed.

Heard on: 05 November 2024
Judgment date: 21 November 2024

Before

TRIBUNAL JUDGE RUTHVEN GEMMELL WS
PATRICIA GORDON

Between

EVANCAST (KENT) LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Sarah Carstens, of Trinity Tax ("Counsel for EKL")

For the Respondents: Maria Serdari and David Lewis, Litigators of HM Revenue and Customs' Solicitor's Office ("Counsel for HMRC")

DECISION

INTRODUCTION

1. The form of the hearing was by video on 'Teams' and all parties attended remotely.

2. The documents to which the tribunal was referred comprised of an amended Hearing Bundle of a total of 2458 pages and a supplementary bundle of 252 pages.

3. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely to observe the proceedings. As such, the hearing was held in public.

4. This is an appeal by Evancast (Kent) Limited ("EL") against a decision of His Majesty's Revenue and Customs ("HMRC") dated 6 October 2021 refusing to grant relief under Regulation 9(5) of the Income Tax (Construction Industry Scheme) Regulations 2005 ("the Regulations") in response to a claim under 9(3) (Condition A) of the Regulations.

5. The company began trading on 15 January 1999, and its main activities consist of construction work involving steel fixing and reinforcement bars.

EVIDENCE

6. The tribunal heard evidence from Patrick Fitzgerald ("PF") a director of EL. The other director was Edward Neville ("EN"), who is nearly 80 years of age and due to his age and health was not able to give evidence to the tribunal. PF worked as a subcontractor steel fixer foreman and became a director of EL in 2008 and a shareholder in 2009. Ultimately, he said he ran the business with EN 'in the background'.

7. PF's daughter Katherine Beddingfield ("KB"), gave evidence, and dealt with EL's administration including timesheets, chasing site foreman for hours, the payment side of pay and sending information to EN and Robina Hornby ("RH"), a bookkeeper.

8. When the company was busy, EL had approximately 120 - 150 personnel engaged in various company projects. Approximately 95% of EL's workforce were self-employed subcontractors and subject to the Regulations.

9. The evidence given by PF in relation to the matter under appeal was vague as he was primarily involved in working on various sites or obtaining new business and because nearly all arrangements, discussions and interactions with or about Langdale & Goodfellow ("LG") were verbal so that there was very little written evidence.

10. During 2018, PF met with a director of Arran Construction who was using LG for approximately 50 workers (referred to at the tribunal and hereinafter as "labourers") and recommended LG to EL.

11. PF arranged a meeting with Iram Hassan ("IH") of LG who said he could pay the wages, and "we just had to tell him the names and payee details and he would charge £16 per week". He asked questions of IH but did not obtain any other external information about LG. EL obtained LG's company details, registration number and their bank details.

12. PF stated that EL provided the labourers who were paid by LG which was sent the appropriate amount of funds by EL to pay the workers and the CIS amounts, which in the tax year 2018-2019 amounted to at least £3 million.

13. HMRC said that LG provided the labourers.

14. PF stated that he did not ask LG about CIS issues because those "were down to them" and this was, therefore, not an issue for EL. EL's means of ascertaining that the CIS payments

were made was to ensure that the employees were getting the correct remuneration and from receipt of a monthly statement that LG provided for EL.

15. PF stated that the statements were seen by EL's accountants, Ceaser Conteh, Accountants ("CC"), but that he did not speak to RH. PF stated that he trusted CC and Bai Bai Conteh ("BC") of CC.

16. PF did not see anything incorrect in CC distinguishing between Staff costs of approximately £375,000 and subcontractors' costs of approximately £5,316,000 in EL's statutory accounts for the year ended 31 January 2019.

17. No check was made by EL that LG had made CIS payments to HMRC.

18. Throughout, the engagement of LG, EL stated that it was sourcing the labour and did not think that LG was in the CIS system. There was no set review period in which to check the position or to review matters. It was only when HMRC raised the issue that the problem arose and EL believed that it was doing the right thing but had made a mistake.

19. EL emphasised that it had been in business for a long time and had always paid tax correctly and on time.

20. PF stated that when he met IH, he "seemed like a nice guy. I know I felt comfortable with using his company. It looked well run and he gave us lots of assurance". PF stated that IH said he offered an "admin service providing payroll".

21. The payment process was dealt with by KB on a day-to-day basis, with support from RH and CC, with "EN on the technical side".

22. PF stated that he understood the CIS system but was not very involved with EL's operation of it. EN was the appropriate supervisor but if PF had a query on CIS, he would refer this to RH, BC or KB. All his queries would have been verbal and not in writing. No details on any such queries made to these individuals were provided to the tribunal.

23. PF could not remember a conversation with BC about the CIS but "he would have been of the opinion that LG was offering an admin service including payroll and, therefore, would have agreed with the position that LG was not within CIS. HMRC objected to this evidence on the basis that it was hearsay.

24. PF stated there were no problems or concerns and it worked well and although occasionally there were queries, none of them stood out as a problem.

25. Approximately 18 months after they had been engaged, LG said it could not pay the labourers because of trouble with its bank accounts and bankers.

26. In 2020, HMRC instigated a review, but PF had little involvement with this. PF had no reason to question the use of LG, and EL had used RH, the bookkeeper, and BC, the accountant, for years "to ensure they were on top of things".

27. EL then moved their accounting affairs to Trinity Tax to ensure that any CIS employment status compliance was dealt with. PF stated that "the mistake in relation to LG was a genuine one that even our expert advisers did not pick up".

28. KB gave evidence that she had worked for EL for approximately 15 years, first starting as its office manager. She is AAT qualified and had undertaken CIS courses to ensure her knowledge of this was up to date. Even after the appointment of LG, KB and EL were submitting CIS returns for certain employees, including foremen. ("reserved CIS work")

29. KB's CIS work had been carried out in an exemplary fashion with no concerns raised by HMRC and the correct tax was paid and continue to be paid, even after the appointment of LG, in respect of the reserved CIS work.

30. KB attended the meeting in 2018 with IH who offered to take away "any hassle from the processing of payments" and all EL needed to provide were names and gross payment amounts for the labourers.

31. KB stated that IH sold LG's services as an admin service that would reduce time constraints and remove the risks of errors on payments. After the appointment of LG, KB prepared a weekly spreadsheet with names and a gross value due. LG would send an invoice and would make payment to the labourers. KB stated that this was an admin function and at no point was a 'deemed construction service' being provided.

32. The spreadsheet was sent to EN and RH in the same format as had previously been sent, prior to the engagement of LG, the only change being that in the comments section on the spreadsheet, KB would note 'LG'. RH would complete the CIS and PAYE returns. KB stated that no problems were flagged to her by either RH or BC throughout the period EL used LG.

33. There was no written contract between EL and LG, and PF and KB both stated that there was only a verbal agreement.

34. Notwithstanding this, LG was due to receive substantial sums of money and in the course of the tax year 2018 19 was sent at least £3.6 million.

35. EL checked that the company existed on the Companies House website and perused the company's accounts, but no other 'due diligence' was carried out other than the verbal recommendation from the director of Arran Construction. No detailed information about LG was, therefore, obtained and recorded when EL appointed them.

36. PF stated that from time to time he received tax information from LG which showed the tax payments it was deducting, in effect the CIS payments, and it 'seemed to be in order'. No check was made to discover whether the amounts had been paid to HMRC and it transpired that LG had ceased to do so after a period of time.

37. KB stated that "all she had is her memory" and she believed that LG provided an admin service and at no point was this ever challenged or brought into question by RH or BC or CC.

38. EL say it relied on CC to guide it on its accounting and tax areas and paid for their expertise which was why they were engaged.

39. No terms of employment between EL and RH or terms of business between LG and CC were produced to the tribunal setting out their responsibilities and obligations.

40. KB confirmed that, as she was Association of Accounting Technicians (ATT) qualified and had undertaken CIS training, she was cognisant of the CIS and had, until LG was appointed, always verified all subcontractors, including limited company subcontractors of which EL had a few. KB was still making correct CIS returns after the appointment of LG in relation to reserved CIS work.

41. EL made no reference to the CIS guidance produced by HMRC CIS340 and in particular to paragraph 2.1.

42. KB stated that if she was ever in doubt about the correct CIS treatment, she would contact RH and, once she was no longer with each EL, she would speak to BC. There was no written evidence of any such contact by KB to either RH or BC.

43. KB stated that "although I do not have evidence of any conversations, what she could say with absolute certainty is that her treatment of LG was never questioned or challenged by

either BC or RH who were EL's professional advisers, whom EL had relied on for years and, who were well qualified in these areas.

44. KB said, "I made a mistake in not verifying LG, a mistake highlighted by HMRC's review and corrected it as soon as it was highlighted but our "experts" perpetuated this error".

45. Once EL was made aware of the error, it had ensured that the robust procedures were in place to ensure that any payments were reviewed to ensure the correct treatment was in place.

46. The tribunal heard evidence from Officer Linda Hale ("LH") of HMRC in their Construction Industry Functional Lead Team.

47. LH set out the background to the CIS and provided a general description of the scheme, details of the registration process, the rates of deduction, the contractor's monthly obligations and the guidance and literature available. LH also referred to Regulation 9 (3) Condition A and Regulation 9 (4) Condition B of the Regulations.

48. LH's involvement with the case began on 6 September 2021 when she considered a regulation 9 (4) claim whereby HMRC systems are used to check the relevant criteria in relation to the subcontractors included in the claim. Relevant decision notices for both acceptance and refusal were issued on 6 October 2021. None of these decision notices were before the tribunal and were not relevant to the matter under appeal.

49. At the same time consideration was made relating to the claim in relation to regulation 9 (3) and whether EL had met the criteria for a claim to be successful including whether EL had demonstrated that the failure to operate the CIS correctly met the test which requires EL, to satisfy an officer of HMRC that it took reasonable care in the operation of the CIS.

50. Evidence was initially sought from EL, by the caseworker working for the review relating to the failure to operate the scheme.

51. EL, via CC, made a claim under regulation 9 (3) in a letter dated 2 September 2021 stating that their client took reasonable care and that it was its understanding that CIS did not apply. CC stated that, "it was their (EL's) understanding that Langdale & Goodfellow Ltd were not the same as their subcontractors. Langdale & Goodfellow Ltd were recruitment/payroll company, Evancast (Kent) had no subcontract in place with L & G Ltd and no valuations were carried out-in our clients opinion this shows they complied with 9(3)(a)."

52. LH asked the caseworker to get further information from EL in order to make sure HMRC had considered all the factors that may have influenced its decision to not operate the CIS.

53. LH stated that "following further enquiries by the caseworker, CC wrote on 29 September 2021 explaining that for workers directly recruited by the client, EL continued to operate the scheme in the normal way. They were approached by an agency [LG] who provided workers for construction contracts and began contracting with them to provide workers for construction contracts that the contractor obtained. The transactions between them were viewed as administrative functions and EL did not consider that there was any implication with regard to this CIS."

54. LH continued "EL subsequently acknowledged that CIS should have applied but had provided no evidence in relation to any advice taken at the time the payment started in respect of CIS and a former bookkeeper [RH] who had now retired, who it is claimed oversaw the payments, could not be asked to provide any details of what, if anything, was considered at the time.

55. LH referred to HMRC guidance at paragraph 2.1 CIS 340 which sets out and says: –

A subcontractor is a person or body that has agreed to carry out construction operations for a contractor. The subcontractor may be carrying out the operations in any way, including:

- carrying out the operations themselves
- having the operations done by their own employees or subcontractors

Subcontractors include:

- companies, corporate bodies or public bodies, as well as any self-employed individual running a business or partnership
- labour agencies or staff bureaux that contract to get work done with their own workforce, or to supply workers to a contractor
- foreign businesses being paid for construction operations that take place in the UK or its territorial waters (up to the 12-mile limit)
- gang leaders who agree with a contractor on the work to be done and receive payment for the work of their gang
- local authorities and public bodies who carry out construction operations for someone else

56. A page from LG's LinkedIn entry referred to its providing "a reliable payroll service" and said, "Because of the systems HMRC use, it can be weeks, months or even years before issues come to light and that's where our service comes into it's own".

57. HMRC stated that LG was registered under the CIS with HMRC.

58. In LH's opinion, EL had not demonstrated that it had taken reasonable care by consulting the regulations available on the HMRC website or from other sources and had provided no evidence to show that it had consulted their advisers as to whether the scheme applied to the payments it was making to the bureau [LG] and what the position was relating to operating the CIS, nor had it contacted the HMRC CIS helpline to enquire about whether the scheme may apply to the payments it was making.

59. Further consideration was made by HMRC after EL's appeal was received against the decision to refuse relief under regulation 9 (3) but there was no additional information provided to explain why they failed to operate the CIS.

60. Having considered all the factors present and available and all the available evidence about what EL did to consider whether CIS applied before starting to make any payments to LG, LH's opinion was that it did not pass the reasonable care test, so EL was invited to seek an independent review of the decision.

61. The invitation was accepted, and an independent review was carried out by HMRC and the decision not to uphold the claim was upheld which led to the subsequent claim to the tribunal by EL.

Timeline

62. On 30 June 2020, HMRC Officer Smart sent a letter to EL in order to assess whether it was paying the correct amount of tax, including CIS deductions.

63. On 24 August 2020, EL's then agent sent information and documents via email to HMRC.

64. On 29 October 2020, HMRC Officers Smart and Dobbin had a remote meeting with PF and BC.

65. On 19 January 2021, HMRC Officer Smart requested more information regarding BPL Building Services Limited and BPL Recruitment Ltd.

66. By letter dated 2 February 2021, CC wrote to provide details of recruitment agencies who provided labour to the company, and enclosed invoices and details of payments paid to them.

67. On 13 August 2021, a Regulation 13(2) warning letter dated 6 August 2021 was issued to EL. Officer Mealey provided details of the Determinations that would be raised in order to collect the additional tax regarding payments made to LG under the CIS.

68. In a letter dated 2 September 2021, CC wrote to request that the officer considered Reg 9(3) and 9(4) of the Regulations, with a view to providing a direction under 9(5). They advised that the company had taken reasonable care to comply with section 61 Finance Act 2004 and had acted in good faith.

69. On 29 September 2021 EL's agent described how the company arrived at the conclusion that certain payments were not under CIS as follows:

> "Re: Evancast Kent Ltd
>
> Further to your email, we have detailed below [how] Evancast Kent Ltd (the company) process to try to demonstrate the differences and why they reached the conclusion that they did:
>
> For men that were on site and engaged by the company they were engaged as follows:
>
> **Site Operatives - Word of Mouth, Advertisements, Repeat trade**
>
> Operative provides via a starter form - UTR, National Insurance Number, DOB, Contact Details, Payment details.
>
> Operative verified for CIS to find out CIS tax deduction. 30%, 20% or Gross applied as directed by HMRC.
>
> Operative agrees rate of pay x Hours worked, operative are paid less CIS tax deduction.
>
> Bookkeeper completed the monthly CIS return for the month to be submitted, they would take advice from HMRC/Sage and were conscientious if they were unsure they took advice.
>
> *On the other hand [emphasis added]*
>
> **Agencies, Recruitment & Payroll - Ltd Companies**
>
> These companies came to Evancast Kent Ltd as recruitment companies they would supply the men and payments are made directly to the men from the recruitment Company - offering to streamline our administration. They did not have any dealings with any of the men directly, this was all handled by the agency.
>
> The company classed it as an administrative function and didn't realise it would be considered a construction operation and therefore within CIS. They engaged with Evancast without commenting. on the CIS position, as such Evancast incorrect position was deemed accurate through the contractual chain.

> The company appreciate now that this is not accurate, however, they were happy that their position was correct and as the relationship was not questioned there was no reason for Evancast to believe that they were doing anything inaccurately.
>
> Their understanding was that CIS was for Construction Operations - they did not believe that an administrative/recruitment company would fall within the remit of Construction Operations. As you can see from the company's compliance in general, returns and payments are all submitted on time as they take their obligations extremely seriously.
>
> They engaged the services of a bookkeeper at the time and they never brought this to their attention, again, supporting their treatment - if they had known that a recruitment company fell within CIS they would have immediately altered their engagements - as they have now done. The company have reviewed their processes and made them more robust to ensure that all payments are assessed. Moreover, they now have a tax retainer for just such advice.
>
> In respect of evidence the discussions were predominantly verbal and our bookkeeper has now retired therefore in respect of paper evidence there is little for us to provide.
>
> I believe that the above answers your questions 1-3, if you have any further questions please let us "know.

70. On 6 October 2021, Decision Notices were issued to EL to refuse claims under Reg 9(3) (Condition A) and Reg 9(4) (Condition B) of the Regulations. EL was advised it could appeal against the decision regarding the Reg 9(3) claim, but there was no right of appeal for the Reg 9(4) decision.

71. LH concluded that EL had failed to operate the CIS on payments made to subcontractors it had engaged, namely LG.

72. In a letter dated 3 November 2021, EL's new agent (Trinity Tax Ltd) wrote to appeal against the decision notice to refuse the claim under Reg 9(3) (Condition A) of the Regulations.

73. On 31 January 2022, Review Officer Bartlett upheld LH's decision.

74. On 4 October 2022, both parties attended an Alternative Dispute Resolution meeting, but no agreement was reached.

Disputed Amounts

75. The amount under deducted for 2018- was £729,767.12 and the amount under deducted for 2019-20 was £197,819.47, totalling £927,586.59.

POINTS AT ISSUE

76. Whether EL engaged LG as a labour agency or staff bureau that contract to get work done with their own workforce, or to supply workers to a contractor.

77. Whether EL took reasonable care to comply with comply with Section 61 of the Finance Act 2004 regarding the operation of the Construction Industry Scheme (CIS) when engaging an agency who supplied workers within the Construction Industry.

BURDEN OF PROOF

78. The burden of proof is on EL to evidence that they have satisfied Regulation 9(3) (Condition A) of the Regulations.

79. The standard of proof is the civil standard on the balance of probabilities.

LEGISLATION

80. Income Tax (CIS) Regulations 2005, SI 2005/2045:

Regulation 4 – relates to monthly returns

Regulation 7 – relates to payments of CIS deductions to HMRC

Regulation 9 – relief for the under-deduction of CIS payments.

81. The Finance Act 2004 (FA2004):

Section 58 – defines subcontractors

Section 59(1) – defines contractors

Section 60 – the definition of a contract payment

Section 61 – deductions on account of tax from contract payments

Section 74 – defines the meaning of construction operations.

CASELAW LISTED BY HMRC

82. *Ormandi* [2019] TC 07442

83. *North Point (Pall Mall) Ltd & Anor* [2021] TC 08205

84. *Nicholson v Morris* 51TC95

85. *HMRC v David Collis* [2011] TC 01431

86. *Maypine Construction Ltd* [TC05558],

87. *HMRC v Muhammed Hafeez* Katib [2019] UKUT 0189 TC

CASELAW LISTED BY EL – NO CASE REFERENCES PROVIDED

88. *Blyth -and- The Company of Proprietors of The Birmingham Waterworks* 1856

89. *The Clean Car Co Ltd v The Commissioners of Customs & Excise* 1991

90. Mrs A M Rowland v The Commissioners for Her Majesty's Revenue and Customs 2006

91. Stephen Mutch v The Commissioners for Her Majesty's Revenue and Customs (Tax) 2009

92. *M R Harris Groundworks (A Partnership) v The Commissioners for Her Majesty's Revenue and Customs* 2010

93. Anthony Bosher v The Commissioners for Her Majesty's Revenue and Customs 2012

94. *The Commissioners for Her Majesty's Revenue and Customs v Anthony Bosher* 2013

95. *Christine Perrin v The Commissioners for Her Majesty's Revenue and Customs* 2014

96. *Nigel Barrett -and- The Commissioners for Her Majesty's Revenue and Customs* 2015

97. *Barking Brickwork Contractors Ltd v The Commissioners for Her Majesty's Revenue and Customs* 2015

98. *Tayfield Homes v The Commissioners for Her Majesty's Revenue and Customs* 2016

99. *Schotten & Hansen (UK) Limited v The Commissioners for Her Majesty's Revenue and Customs* 2017

100. *William Archer v The Commissioners for Her Majesty's Revenue and Customs* 2021

101. *Access Contracting Services Ltd v - The Commissioners for His Majesty's Revenue and Customs* – 2023.

APPELLANT'S CONTENTIONS

102. EL did not believe CIS applied to the invoices from LG as they thought that the agency was not within CIS and that LG only provided an administrative and payroll service. This was due to a lack of knowledge, and was an error or misunderstanding made in good faith.

103. EL relied on a bookkeeper and accountant for advice and support and has processes in place to ensure compliance with the CIS.

104. EL utilises external consultants and advisers to ensure compliance with tax legislation including but not limited to the CIS.

105. EL takes its responsibility seriously and has always ensured that its returns are complete and submitted on time with the support of qualified experts.

106. EL acted as prudent and reasonable businessman and because of this EL contend that it took reasonable care to comply with Section 61 of the Finance Act 2004 and held a genuine belief that Section 61 of the Act did not apply.

107. HMRC contacted EL in August 2019 regarding LG's tax status. HMRC should have educated the company with regard to the correct operation of CIS.

108. EL is firmly of the opinion that Regulation 9(3) of the Regulations applied and that HMRC should have made a direction under regulation 9(5).

109. EL considered its position regarding the payment and in its opinion, there was no construction contract and as such no construction payment and, therefore, no deduction or verification was needed.

110. This information was the first step in making a decision as to whether the work was within construction, and in their opinion, it was not. It deemed the services administrative not construction and so it was not necessary to take its consideration any further than that.

111. EL wish HMRC to grant relief under Reg 9(5) of the Regulations and say it is a small business with a turnover of just over £6 million in the year ended 31 January 2019, with an average of 7 employees and a workforce of approximately 100 people.

112. EL refer to *Blyth and The Company of Proprietors of the Birmingham Water Works* case involving negligence, regarding the laying a water pipe which caused damage to the plaintiff's house, as authority to establish an interpretation of "reasonableness".

113. The court held "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do….."

114. The tribunal noted that this case referred to construction of 'negligence' and not reasonable care in relation to CIS. Similarly, the tribunal noted that many of the cases listed by EL referred to interpretations of 'reasonable excuse' and not 'reasonable care' in the CIS, which the tribunal considered were distinguishable.

115. Counsel for EL stated that the principle, of reasonableness, relied on the same thing.

116. Other cases cited in relation to CIS included *Tayfield Homes v HMRC* [2016] UKFTT 112 (TC), ("Tayfield"), *Schotten & Hausen v HMRC* [2017] UKFTT 191 (TC) ("Schotten") and *Access Contracting Services Ltd v HMRC* [2023] UK FTT 00973 ("Access")

117. EL referred the tribunal to the case of *Nigel Barrett* v *HMRC* [2015] UKFTT 329 TC where a jobbing builder who infrequently used subcontractors, had failed to deduct £1,894.55 of tax payable to a subcontractor. HMRC had issued a number of Decisions under Regulation 13 of the Regulations and penalties under the Taxes Management Act 1970. The tribunal

allowed the tax affairs appeal including the fact that he had employed an accountant or tax adviser.

118. Counsel for EL referred the tribunal to *Nigel Barret* at [161]:

> "The test is one of reasonableness. No higher (or lower) standard should be applied. The mere fact that something could have been done that has not been done does not of itself necessarily mean that 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 a reasonable failure on the part of one taxpayer and one set of circumstances might be regarded as not unreasonable in the case of another whose circumstances are different."

119. EL say that it instructed CC because it did not know the specific financial requirements and expected advice from BC who was an FCCA with whom they had regular contact. EL made reference to an analysis of an invoice from RH showing the costs of bookkeeping which they relied upon which they say is evidence that they took reasonable care by employing experts.

120. EL say that the reason for the distinction in the company's annual accounts between subcontractors and staff costs is not significant. KB made the decision that the invoices to LG were invoices for payroll because LG had told them at the meeting that was what it was going to do and because LG was taking over the payroll service and becoming responsible for the tax position.

121. LG's invoices were administrative invoices and not subject to CIS. This was LG's understanding of what the situation was.

122. EL say that there was no labour provision, and they do not agree that LG were a labour agency or staff bureau as a result. EL say it provided the workforce, notwithstanding that LG paid the labourers. It was for this reason that there was no construction contract and only a verbal contract.

123. As the matter was in the knowledge of BC and RH, advice was, accordingly, taken, but on the basis of EL's conclusion that this was a payroll service only, there was no need to go beyond that.

124. EL rely on *Barking Brickwork Contracts Ltd v HMRC* [2015] UKFTT 0260 (TC) at [71]

> "Whilst we accept that there is a great deal of guidance available on HMRC's website and its publications, it cannot reasonably be assumed that a taxpayer will have read all of it. Indeed the very volume of information makes it unlikely that even the most conscientious of taxpayers will have done so. Nor is it sufficient to say that taxpayers should look for guidance on a particular matter, where, as here, the taxpayer reasonably believed that they were doing everything they needed to do and did not realise that any guidance was needed".

125. Accordingly, the tribunal should accept that mistakes can be made and should consider all EL's behaviours and not just one mistake.

HMRC'S SUBMISSIONS

126. Section 61 of the Finance Act 2004 provides for deductions on account of tax from contract payments made to sub-contractors stating as follows:

> "61(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 the payment is to be made relates.

61(2) In subsection (1) "the relevant percentage" means such percentage as the Treasury may by order determine.

61(3) That percentage must not exceed:

> a. If the person for whose labour (or for whose employees or officer's labour) the payment in question is made is registered for payment under deduction, the percentage which is the basic rate for the year of assessment in which the payment is made, or
>
> b. If that person is not so registered the percentage which is the higher rate for that year of assessment."

127. Regulation 9 of the Income Tax (Construction Industry Scheme) Regulations 2005 makes provision for HMRC to recover amounts due under the Regulations stating as follows:

"9(1) This regulation applies if-

It appears to an officer of Revenue and Customs that the deductible amount exceeds the amount actually deducted, and

128. That condition A or B is met.

9(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 16 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.

9(3) Condition A is that the contractor satisfied 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-

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

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

9(4) Condition B is that-

(a) An officer of Revenue and Customs is satisfied that the person to whom the contract payments to which section 16 of the Act applies

either-

(i) Was not chargeable to income tax or corporation tax in respect of those payments; or

(ii) Has made a return of his income or profits in accordance with section 8 of TMA (personal 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

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

9(5) A 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.

9(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.

9(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 appeal.

9(8) For the purpose of paragraph (7) the grounds of appeal are that-

(a) The contractor took reasonable care to comply with section61 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

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

9(9) If on an appeal under paragraph (7) it appears to the tax appeal Commissioners that the refusal notice should not have been issued they may direct that an officer of Revenue and Customs make a direction under paragraph (5) in an amount the tax appeal Commissioners determine is the excess for one or more tax periods falling within the relevant year.

9(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 period).

130. HMRC submit that this case concerns whether reasonable care was taken by EL to comply with Section 61 of the Finance Act 2004; and if this can be satisfied, whether consideration can be given as to whether relief should have been granted under Regulation 9(3) (Condition A) of the Income Tax (Construction Industry Scheme) Regulations 2005.

131. In this case the calculations provided by HMRC have not been disputed.

132. The matter in dispute is whether the failure to make relevant Construction Industry Scheme deductions is due to the failure of EL to take reasonable care.

133. HMRC contend that they have made the decision not to grant relief under Regulation 9(3) of the Regulations because insufficient evidence has been provided by EL to show that reasonable care had been taken to comply with the legislation; and that this decision is correct.

134. The agent advised that there had been a misconception on the part of EL about whether CIS applied to the invoices from LG, and that it assumed the agency was not within CIS. CC advised that EL thought LG simply provided an administrative and payroll service, and that there were no construction services provided by LG.

135. Under the CIS guidance regarding agencies as subcontractors, where a worker is supplied to a contractor by or through an agency and the worker carries out construction operations under the terms of a contract they have with the agency, the agency suppling the worker will be a subcontractor as far as the contractor is concerned. The contractor must always apply CIS when making payments to the agency.

136. HMRC say that it is not disputed that EL required workers for construction projects and LG supplied these workers.

137. HMRC submit that failure to take reasonable care has been discussed in the case of *HMRC v David Collis [2011]* TC 01431 at paragraph 29 where Judge Berner held:

> "that penalty applies if the inaccuracy in the relevant document is due to a failure on the part of the taxpayer (or other person giving the document) to take reasonable care. We consider that the standard by which this falls to be judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question".

138. Reasonable care is taken to be what a prudent and reasonable taxpayer would do in the circumstances. HMRC's view is that the onus is on a contractor to find out about the CIS and how it operates and then to comply with the Regulations.

139. EL has submitted it did not believe CIS applied to the invoices from LG. They thought that the agency was not within CIS and had only provided an administrative and payroll service. This was due to a lack of knowledge, and was an error or misunderstanding made in good faith.

140. EL relied on RH and BC for advice and support.

141. Because of this, EL contend that it took reasonable care to comply with Section 61 of the Finance Act 2004 and held a genuine belief that Section 61 of the act did not apply.

142. HMRC contacted EL regarding LG's tax status in August 2019 and EL considers that HMRC should have educated the company with regard to the correct operation of CIS.

143. EL appears to have relied on the assumption that CC and/or HMRC would notify them if any action regarding the CIS was required. This ground of appeal is essentially to reverse EL's obligations to its agent or HMRC.

144. HMRC contend that it is simply unarguable to reverse EL's obligations to another party. It is not sufficient for EL to simply allude in general terms to the fact they had employed the services of an accountant.

145. In addition, HMRC submit they could not have known about the discrepancy in question purely based on the submission of previous annual company returns. The legal obligation to submit an accurate return in any tax regime is squarely on the taxpayer. In the case of *Nicholson v Morris,* LJ Walton makes it clear that this cannot be a reasonable excuse at [109] saying,

> "… it is idle for any taxpayer to say to the Revenue, hidden somewhere in your vaults are the right answers: go thou and dig them out of the vaults.' That is not a duty on the Revenue. If it were, it would be a very onerous, very costly and very expensive operation, the costs of which would of course fall entirely on the taxpayers as a body. It is the duty of every individual taxpayer to make his own return and, if challenged, to support the return he has made, or, if that return cannot be supported, to come completely clean, and if he gives no evidence whatsoever he cannot be surprised if he is finally lumbered with more than he has in fact received. It is his own fault that he is so lumbered."

146. HMRC also submit that appropriate guidance exists which is published on its website. The guidance is not particularly complicated to understand. CC has advised that EL did not consult the CIS guidance, but relied on its own judgement, and that this was not challenged by the agency itself, or by its professional advisors.

147. The agent states that (hypothetically) if the company did consult the CIS340, after initially ascertaining construction was not a relevant factor, they would have to read much further into the guidance before finding specific advice about whether the engagement of a labour agency fell within the CIS. However, it has been confirmed that this guidance was not consulted or followed.

148. If an error in good faith is made, it is normally after exercising reasonable due diligence, for example by consulting guidance or by seeking advice. As the CIS guidance was not consulted or HMRC contacted for specific advice, it is submitted that it cannot be ascertained that an error was made in good faith or that reasonable care applies here, as a reasonable level of diligence was not exercised.

149. HMRC submit that a prudent and reasonable business with experience in engaging subcontractors, would have made itself aware of its responsibilities and put into place adequate procedures to ensure compliance with the Regulations.

150. In *Maypine Construction Ltd* [TC05558] Judge Jones commented at [85], [86], [87] and [88] as follows:

> "85. The fact is that HMRC did publish guidance, which if followed, would have avoided the appellant making errors in CIS deductions. It is reasonable to have expected the appellant, given its size and frequency of CIS processing, to have read the guidance, have systems in place to monitor and respond to any change in guidance and to apply the rules based on this understanding.
>
> 86. Whether or not there are common misunderstandings within the industry as to the CIS Regulations, it would not be taking reasonable care simply to adopt the same and continued practice without first checking whether it was compliant. Where there is uncertainty a reasonable person can be expected to seek guidance from an appropriate source. The appellant engaged at least one member of staff to deal with the CIS aspect of the business and it should be expected that a reasonable and proportionate care would be taken to read, understand, and apply the requirements within the CIS Regulations.
>
> 87. In our view a prudent and reasonable business the size of the appellant with experience in engaging subcontractors would have been aware of the responsibilities and put into place adequate procedures to ensure compliance with CIS Regulations to avoid the errors the appellant made.
>
> 88. Therefore, we are not satisfied that the appellant has met Condition A under regulation 9(3). We are not satisfied it took reasonable care to comply with

section 61 of the Act and the Regulations. We are not satisfied its failures to make the excess deductions for the purposes of the CIS Regulations were as a result of it taking reasonable care."

151. CC advised that neither bookkeeper, or later, BC, recognised or challenged the company's incorrect assumption, or suggested that payments to LG should fall within CIS. There has been no evidence provided regarding what the terms of the business were for BC or CC and EL in relation to providing advice for CIS.

152. Reliance on another person can only constitute a valid ground of appeal if the company took reasonable care to meet their obligations. It appears, however, that EL's grounds of appeal rely on the fact that the company was advised by the professionals they engaged rather than the company itself took reasonable care by asking for specific advice. In this way the company has not proactively asked for advice about the correct operation of CIS.

Summary

153. EL relies on BC, CC and HMRC for having no reason to doubt they were compliant; and had taken reasonable care by virtue of the fact they had instructed an accountant to advise in relation to company and taxation matters; and any accounts submitted to HMRC had not been queried. HMRC contend that the onus is very much on a contractor to find out about the CIS and how it operates in order to comply with the Regulations.

154. HMRC submit that it is a fact that EL is actively involved in the Construction Industry and that EL engaged the services and subsequently paid subcontractors within that industry.

155. HMRC submit that what the taxpayer did, or omitted to do or believe, was not objectively reasonable in the circumstances.

156. Taking into account the experience and other relevant attributes of EL and the situation in which it found itself at the relevant time, HMRC contend that EL should have known it may have been subject to the Regulations for these transactions.

157. Even if it were to accept that EL held a genuine belief that Section 61 of the Finance Act 2004 did not apply, HMRC's view is that it was not objectively reasonable for EL to hold that belief in the circumstances as EL found itself, with its particular attributes.

Conclusion

158. HMRC are satisfied that the refusal to make a direction under Regulation 9(5) of the CIS regulations is correct as EL has not satisfied HMRC for the purposes of Regulation 9(3) (Condition A) that he took reasonable care to comply with section 61 of the Act.

159. HMRC, therefore, request that the appeal be dismissed.

DECISION AND REASONS

Evidence

160. The appeal was characterised by a lack of evidence and in particular there was an extremely limited amount of written/documentary evidence provided by EL.

161. There was no evidence from EN who was supervising the administration and was a director with PF.

162. The evidence of PF was vague but as he was ultimately, running the company with EN "in the background" he had responsibility for CIS compliance even if he had little actual interaction with the CIS.

163. No evidence was provided by IH or LG.

164. No evidence was produced by BC, or anyone else from CC, or from RH the bookkeeper, notwithstanding, EL say, that BC and RH were largely responsible for the mistake/error about the CIS, as it relied upon their professional expertise.

165. KB, candidly, stated that much of her evidence was largely based on her memory and could not be corroborated by any written evidence.

166. There was, accordingly, no written evidence about the exact relationship of the EL and LG and no evidence of the exact relationship between EL and BC and CC.

167. In particular there was no evidence of any specific questions about LG and CIS that were asked of RH or CC. EL simply assumed they were both fully aware of all the circumstances surrounding the engagement with LG and say that in the absence of their making any comments, there were no breaches of the Regulations.

168. This would, in any event, have been difficult with no written agreement between EL and LG to specify what the terms of engagement were and consequently whether any of the CIS provisions applied.

CIS compliance and CIS340

169. KB stated that she was ATT qualified and had undertaken CIS courses to ensure her knowledge was up to date.

170. Even after the appointment of LG, EL continue to submit CIS returns for reserved CIS work and had dealt with CIS for EL prior to the appointment of LG.

171. Both EN and PF, the directors of the EL, had knowledge of the CIS scheme.

172. CC stated in its letter of 2 September 2021 to HMRC, that EL had always taken their responsibilities to HMRC seriously and said EL's "CIS returns have always detailed their subcontractors who they have paid directly, and the returns have always been submitted on time. Showing that they take reasonable care with their obligations."

173. CC's letter of 29 September 2021, in response to enquiries by HMRC, was written "to try and demonstrate the differences and why EL reach the conclusion they did in relation to LG".

174. This letter made it clear there were two distinct types of process.

> The first related "For men that were on site and engaged by the company they were engaged as follows: – Site Operatives – Word of Mouth, Advertisements, Repeat trade". In this process the operatives or labourers provided their basic information such as national insurance numbers, dates of birth and payment details and each operative was verified for CIS to find out the CIS tax deduction. This is it explained was 30%, 20% or Gross applied as directed by HMRC. When the rates of pay and hours worked were calculated the operatives were paid less the CIS tax deduction. The bookkeeper completed the monthly CIS return for the month to be submitted and conscientiously "if they were unsure, they took advice" from HMRC/Sage.

175. "On the other hand", referred to the alternative, being labourers who were not engaged by EL, those classified as "Agencies, Recruitment and Payroll-Ltd Companies" who were subject to a second process.

> Under this process "these companies came to EL as recruitment companies [and] they would supply the men and payments are made directly to the men from the recruitment Company--offering to streamline our administration. They [EL] did not have dealings with any of the men directly as this was all handled by the agency."

176. The letter continued.

> "The company (EL) classed it as an administrative function and did not realise it would be considered a construction operation and therefore within CIS. They engaged with EL without commenting on the CIS position, as such EL incorrect position was deemed accurate through the contractual chain. The company appreciate now that this is not accurate, however, they were happy that their position was correct and as the relationship was not questioned there was no reason for EL to believe that they were doing anything inaccurately."

177. This understanding was supported, EL say, as they engaged the services of a bookkeeper who never brought this to its attention, again, supporting their treatment. The letter continued,

> "if they had known the recruitment company fell within CIS, they would have immediately altered their engagements".

178. HMRC in their submission say that there is no dispute that LG supplied the labourers but the evidence of PF and KB and the submissions by EL dispute that LG supplied the labourers and say that they did.

179. CC's letter on behalf of EL of 02 September 2021 stated,

> "They [EL]were approached by an agency [LG] who provided workers for construction contracts and began contracting with them to provide workers for construction contracts that the contractor obtained."

180. There was no other documentary evidence to rely on in relation to either statement other than CC's letters of 02 and 29 September 2021. The latter explained to HMRC the differences between the way in which EL carried out its contracts. The evidence shows that there was clearly involvement of EL with those labourers, but they were paid directly by LG.

181. The tribunal, accordingly, considered that when EL administered CIS directly, and also for reserved CIS work, this fell within the first process.

182. Only the second process could apply to the labourers who were paid by LG as the EL did not submit monthly CIS returns in respect of them. The returns and payments were submitted, or supposed to be submitted, by LG who were registered under the CIS.

183. Because of this binary choice and the statement by CC on 02 September 2021, therefore, the position of LG must fall within the second process of "Agencies, Recruitment & Payroll-Limited Companies" which means that LG supplied the labourers, and the payments were made directly to them from the recruitment company, LG.

184. Accordingly, the tribunal concluded that LG was a subcontractor of EL, in terms of HMRC guidance CIS 340 at paragraph 2.1 being a subcontractor that has agreed to carry out construction operations for a contractor being a labour agency or staff bureau that contract to get work done with their own workforce, or to supply workers to a contractor.

Reasonable Care

185. The tribunal adopted the test as set out in *HMRC v David Collis* when Judge Berners stated that the standard by which reasonable care should be judged "is that of a prudent and reasonable taxpayer in the position of the taxpayer in question."

186. CC's letter 29 September 2021 was also clear in admitting that that EL did not assess that relationship correctly but because the relationship was not questioned by their professional advisers there was no reason for them to believe that they were doing anything inaccurately.

187. EL confirmed that it had not made any reference to HMRC's Guidance and relied on *Barking Brickwork Contracts Ltd v HMRC* as authority for the proposition that taxpayers could not be expected to know all HMRC guidance and, furthermore, that it amounted to reasonable, care, as stated in *Nige*l *Barrett v HMRC*, to rely on the people around them principally RH, BC and CC.

188. The tribunal whilst not bound by the *Barking Brickwork Contracts Ltd* and *Nigel Barrett* decisions, which are persuasive only, considered that there were a number of distinguishing factors.

189. KB had a significant role in the administration of the company and payroll, was an AAT and had undertaken a number of CIS courses in order to expand her expertise. She had considerable experience of the CIS.

190. EL and RH had, with KB, submitted and continue to submit accurate and compliant CIS returns.

191. There was, therefore, a good body of knowledge and expertise in relation to the CIS and the tribunal considered that a prudent and reasonable taxpayer with this experience, knowledge and qualifications should have made further enquiries and obtained a written agreement in relation to its own relationship with LG.

192. EL should also have made further enquiry as to how CIS would operate, as EL was not operating it but knew that compliance was necessary, including whether or not LG were registered with HMRC of the CIS and the reasons for that registration, not least with regard to the large sums of money it was passing to LG on a monthly basis.

193. To conclude as PF did that the CIS obligations "were up to them" and to take no further action nor to take specific professional advice nor to consult CIS guidance, against this background, were not the actions of a prudent and reasonable taxpayer.

194. A principal ground on which EL states that it took reasonable care was that it relied on a bookkeeper, RH, who provided no evidence to the tribunal and for whom there was no evidence as to the remit of her responsibilities nor her qualifications and no evidence that any approaches or questions or queries were been raised with her in relation to LG and whether or not the arrangements would fall within the CIS.

195. Similarly, there was no evidence of any approaches or questions or queries raised in relation to EL's relationship with LG and no terms of business or other written documents in relation to the services provided by BC or CC or whether, in fact, either or both had an ongoing commitment to advise in relation to CIS issues.

196. The tribunal did not accept that by simply passing accounting information to accountants, who were producing annual company accounts, or that the 'matter was in the knowledge of RH and BC' were sufficient to believe that they were then considering all and every tax consequence and so conclude that advice had been taken and amounted to taking reasonable care

197. EL passed over £3 million to LG in the 2018-2019 tax year and no checks were made that the CIS payments were actually made to HMRC or that the returns they received from LG were correct, when EL were fully cognisant of the need for these payments to be made.

198. There was no review process of LG's performance in relation to their contractual obligations to EL which were never confirmed in writing.

199. EL carried out virtually no "due diligence" on LG in relation to how the company would operate and account for CIS payments, which EL knew was required and for which they

supplied the funding as part of the total wages bill for the labourers. They simply took the word of another construction company who used LG and proceeded to use LG which in time failed to pass on the CIS payments to HMRC.

200. The tribunal agreed with HMRC's submissions that EL was actively involved in the construction industry and engaged the services and subsequently paid subcontractors within that industry. They had good knowledge and experience of the CIS and how it operated.

201. If, as EL say, they made an error in good faith, the tribunal agreed with HMRC that such an error is normally after exercising reasonable due diligence, for example by consulting guidance or by seeking advice.

202. As the CIS guidance was not consulted nor was HMRC nor EL's professional advisers contacted for specific advice in relation to the arrangement with LG, the tribunal agreed with HMRC that it cannot be ascertained that an error was made in good faith.

203. The tribunal did not consider that HMRC had an obligation to specifically educate EL about the correct operation of CIS other than providing the help and guidance it provides to all affected taxpayers.

204. The tribunal, considering all the evidence, preferred the submissions of HMRC, to those of EL, and did not consider that it was objectively reasonable in the circumstances, at the relevant time, and in view of EL's relevant and particular attributes to conclude that EL took reasonable care to comply with section 61 of the Finance Act 2004.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

205. 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.

WILLIAM RUTHVEN GEMMELL
TRIBUNAL JUDGE

Release date: 21st NOVEMBER 2024