[2021] UKFTT 0259 (TC)

TC08205

Appeal numbers: TC/2017/06854
TC/2017/06859

Construction Industry Scheme - Regulation 13 determinations - jurisdiction - whether relief available under Regulation 9(3) once a Regulation 13 determination has been given - whether the appellants took reasonable care - appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

NORTH POINT (PALL MALL) LIMITED **Appellants**
CHINA TOWN DEVELOPMENT COMPANY LIMITED

- and -

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL
ANN CHRISTIAN

Hearing held in public by video on 24 and 25 June 2021

Leon Kazakos QC for the Appellants

Siobhan Brown, litigator, of HM Revenue and Customs' National Litigation Team, for the Respondents

DECISION

Background

1. This appeal concerns the Construction Industry Scheme (the "**CIS**") which is governed by the Finance Act 2004 ("**FA 2004**") and the Income Tax (Construction Industry Scheme) Regulations 2005 (the **"Regulations**"). North Point (Pall Mall) Ltd ("**North Point**") appeals against two determinations issued by HMRC on 14 August 2017 which now amount to £663,776 for the year 2015/2016 and £667,046 for the year 2016/2017. China Town Development Company Limited ("**China Town**") appeals against two determinations issued by HMRC on the same date which are now in amounts of £98,638 for the year 2015/2016, and £293,565 for the year 2016/2017 (the "**determinations"**). The amounts in the determinations were originally larger than those set out above but were reduced following an unsuccessful ADR meeting.

2. HMRC have issued the determinations on the basis that the appellants were undertaking construction operations and should have deducted amounts under section 61 FA 2004 from sums which they paid their respective sub-contractors. The determinations were issued pursuant to Regulation 13. The appellants accept that they were undertaking construction operations to which the obligation to deduct under section 61 FA 2004 prima facie applied, but that they took reasonable care to comply with section 61 FA 2004 and that the failure to deduct was due to an error made in good faith or that they held a genuine belief that that section did not apply. They should therefore be absolved from liability under the provisions of Regulation 9(3).

The Law

3. The relevant law is set out in the appendix to this decision.

The Evidence and findings of fact

4. We were provided with a comprehensive bundle of documents. Craig Griffiths and David Choules gave oral evidence on behalf of the appellants and Gill Murthwaite gave evidence on behalf of HMRC. We found all of them to be convincing and truthful witnesses and Mr Griffiths' credibility is not in question notwithstanding HMRC's suggestion that his recollection of what he is alleged to have said to an HMRC officer at a meeting on 15 December 2016 means that his testimony is not wholly reliable. On the basis of this evidence we find the following facts:

Background

(1) North Point was a special purpose vehicle set up to purchase and redevelop a site at 70-90 Pall Mall Liverpool. China Town was a special purpose vehicle set up to purchase and redevelop a site at Great George St, Liverpool. Both developments involved the carrying out of construction operations within the ambit of the CIS. North Point and China Town are connected companies under the umbrella of North Point Global UK Limited.

(2) The appellants engaged sub-contractors to carry out their respective commercial developments and signed contractual agreements with those sub-contractors. These sub-contractors were PHD 1 Construction Ltd ("**PHD 1**"), Bilt (NCT) Ltd ("**Bilt**") the Bilt Group Limited and Bilt (North Point) Ltd ("**Bilt NP**"). These contracts were standard form Joint Contract Tribunal (JCT) contracts.

(3) The contract between North Point and Bilt NP was dated 1 March 2016. In that contract North Point is identified as the Employer and Bilt as the Contractor. The works are described as "demolish industrial buildings with façade retention and redevelop site by the erection of four to eighteen storey mixed use development comprising 426 residential units, offices, café, restaurant gym and external spaces". Inca Management Ltd are identified as the Employer's Agent. The Contract Particulars includes an entry against the heading fourth recital identifying the subject as being the Construction Industry Scheme, and against which there is the statement "Employer at the Base Date is a "contractor/is not a "contractor for the purposes of the CIS". A line has been drawn through the words "is a "contractor"/", so the particulars read "Employer at the Base Date is not "contractor" for the purposes of the CIS". Base Date is defined as "the date which falls 10 days prior to the date of this agreement".

(4) There had been an earlier contract, dated 5 August 2015 relating to the North Point redevelopment, that earlier contract being between North Point and PHD 1 (the "**PHD 1 Contract**"). The relevant terms in that contract are identical to those in the contract between North Point and Bilt NP set out above.

(5) The contract between China Town and Bilt was dated 28 September 2016. China Town is identified as the Employer, and Bilt as the Contractor. And apart from the price and the description of the works ("a 6 storey mixed use building including six townhouses, 115 apartments, 7 commercial units and 7 car park spaces…….") is for the purposes of this appeal, is in identical terms to that between North Point and Bilt NP. Inca Management Ltd are the Employer's Agent, the amendment to the Contract Particulars declares that the Employer at the Base Date is not a "contractor" for the purposes of the CIS.

(6) At all material times, Craig Griffiths was the director of both North Point and China Town. David Choules was a director of Inca Management Ltd. Mr Griffiths was also a director of LJS Accounting Services UK Ltd ("**LJS**"). Mr Griffiths was also a director of an associated company, Warwick Road Developments Manchester Ltd ("**Warwick**").

(7) On 18 May 2016 Mrs Murthwaite wrote to Warwick stating that according to her records, Warwick was not registered as a contractor within the CIS and that she believed that it had made payments to sub-contractors from which amounts should have been deducted. Following that, Mr Griffiths sought advice from accountants Grant Thornton ("**GT**"), who advised that the appellants ought to have registered under the CIS.

(8) On 20 June 2016 the appellants were registered for the CIS.

(9) On 22 June 2016 CIS reference numbers were received from HMRC and on 28 June 2016 GT wrote to HMRC to explain that the appellants' CIS filings would be brought up to date.

(10) In, we believe, July 2016, HMRC issued assessments for late filing penalties of £100 pounds per month for each month for each appellant. LSJ appealed against those penalties on 5 August 2016 following which HMRC withdrew those penalty assessments.

(11) On 8 November 2016 HMRC wrote to the appellants advising that they intended to visit the appellants' premises for the purpose of reviewing the appellants' records to ensure they were meeting their PAYE and CIS responsibilities. On 18 November 2016 LJS, during a telephone conversation with an HMRC officer, indicated that the CIS payments attracted gross payment status. A meeting took place on 6 December 2016. This CIS was discussed and it was confirmed that payments are made to sub-contractors on a gross basis. A second meeting took place on 15 December 2016. Present at that meeting were only Mr Griffiths and the HMRC officer. The officer gave Mr Griffiths Regulation 13 warning letters which warned the appellants that HMRC believed that they may have engaged sub-contractors within the CIS but failed to make the necessary deductions from payments made to those sub-contractors. At that meeting a Regulation 9 claim was mentioned by Mr Griffiths who also expressed a concern that any potential Regulation 9 claim would be nullified if a Regulation 13 assessment is issued.

(12) Notes of that meeting were sent by the HMRC officer to Mr Griffiths, but these were not signed by Mr Griffiths, nor were the contents of those notes challenged until Mr Griffiths subsequently compiled his witness statement for these proceedings in July 2019.

(13) On 20 January 2017, Mrs Murthwaite sent an email to Mr Griffiths in which, amongst other things, she indicated that she was not satisfied that a claim under Regulation 9(3) would be successful but that if he did not agree, he should submit a written claim within the next fourteen days setting out why he believed the claim should be accepted.

(14) On 2 February 2017, GT submitted claims under Regulations 9(3) and (4). All these claims were acknowledged by HMRC on 20 February 2017 who told GT that the claims were under consideration and that decisions would be sent out as soon as possible.

(15) On 28 February 2017, HMRC's CIS technical team made the decision that they were not satisfied that the that the criteria in either Regulation 9(3) or (4) were satisfied and that a claim for relief under those provisions would not be granted.

(16) On the same day, GT sent information to HMRC relating to PHD 1 including a copy of that company's accounts which showed that the company had

made a loss. However HMRC did not send a copy of the CIS's technical team's decision that relief under Regulation 9(3) was not to be granted, at that time. That decision was not sent to the appellants or to GT until 5 April 2017 when the determinations were sent to the appellants.

(17) HMRC's CIS technical team considered the information supplied by GT and prepared a further refusal notice dated 4 April 2016 in respect of the claim for relief under Regulation 9(4).

(18) On 5 April 2017 HMRC issued the decision notices in relation to both the Regulation (9)(3) and (4) claims along with the determinations, to the appellants.

(19) On 3 May 2017 GT appealed against the decisions, following which HMRC told GT that given that the determinations had been issued, they were precluded from granting relief under Regulation 9(3) by issuing an appropriate direction under Regulation 9(5).

(20) GT requested a review of the decisions on 8 June 2017.

(21) HMRC issued their view of the matter letter on 3 July 2017 and on 14 August 2017 HMRC issued their review conclusion letter in respect of North Point. The review officer upheld the original decision. On 15 August 2017 HMRC issued their review conclusion letter in respect of China Town. The review officer upheld the original decision. The appellants submitted notices of appeal to the tribunal on 13 September 2017.

(22) An ADR meeting took place on 11 October 2017, following which the appellants submitted further information which enabled HMRC to reduce the original determinations to the amounts set out at paragraph [1] above.

The oral evidence

(23) Mr Choules gave the following evidence in his witness statement: he was at all material times a director of Inca Management Ltd ("**Inca**"); Inca was engaged by North Point in 2015 to provide employers agent services to it; the first contract to which Inca was a party was the PHD 1 Contract; this contract was drafted by a firm of lawyers, DWF LLP; the amendments to the standard JCT contract were agreed by the parties and were replicated in other contracts to which the appellants were party; these were design and build contracts in which payments are made between the developer and the main contractor (and not to the sub-contractors); in these circumstances the developer is described as the employer and the main contractor as the contractor, and the amendments to the standard JCT contract in the circumstances are generally agreed to reflect that the employer is not a contractor for the purposes of the CIS; annexed to his statement were a number of other JCT contracts to which Inca was a party relating to other redevelopments, all of which contained identical amendments to those in the North Point and China Town contracts, i.e. reflecting the fact that the employers were not contractors for the purposes of the CIS; there is no reason why North Point and China Town should be treated any differently; his knowledge of this

situation was based on the precedents set by previous solicitors; he does not profess to be an expert in the field of taxation.

(24) In examination in chief, Mr Choules added: he was a professional project manager in the construction industry who had been involved in the construction industry for thirty years; Inca's role as employer's agent is to ensure that a contract is implemented in accordance with its terms; Inca had been involved in about nine contracts involving PHD before the PHD 1 Contract; the amendments to those contracts were all identical to those made in the PHD 1 Contract; given his knowledge with previous projects and previous lawyers, it was not unusual for PHD to have entered into the PHD 1 Contract on the terms that it did; the precedent that the employer was not a contractor for the purposes of the CIS had been made on many previous schemes, and so it was his honestly held belief that because North Point was a developer, it was not within the CIS; he could not recall whether he expressly pointed this out to Mr Griffiths.

(25) In cross examination Mr Choules said: he was a professional project manager, but was not RICS qualified; he was not an expert on tax matters; he had become a director of both North Point and China Town on 14 January 2016; he had carried out no specific research into the striking through of the words in recital 4 in the PHD 1 Contract, it was simply based on the precedent of the previous nine PHD contracts with which he had been involved; the status of the employer as contractor might change between the Base Date (which is defined in the contracts as the date falling ten days before the date of the contract); his understanding is that PHD had been sub-contractors of the sort of work since 2013 and the amendments to the JCT contracts had been advised on by a law firm based in Chester (Aaron & Partners) and those amendments have been carried through into the PHD contracts with which he had subsequently become involved; this was justifiable since there had been no change in the relationship between the developers and the contractors;

(26) In re-examination Mr Charles confirmed that his understanding of the way in which the CIS operated between developers and contractors was based on the advice given (and reflected in the JCT contract amendments) by Aaron in 2013; this contract set the precedent and problems had not been raised about this in the past.

(27) Mr Griffiths gave the following evidence in his witness statement: at all material times he was a director of the appellants; the appellants were advised by Inca who had liaised with the solicitors who had drawn up the JCT contracts, that the CIS was not applicable to the contracts with PHD 1 and Bilt; whilst he had an understanding of the workings of the CIS, he was not an expert and accepted, at face value, what he was told by people with more experience than he; on 30 August 2016 the appellants received an email from Bilt attaching letters from HMRC confirming that as of 22 August 2016 the Bilt companies had gross payment status; he denied saying to the HMRC officer at their meeting on 15 December 2016 that he had overlooked registering the appellants for the CIS, nor that failure to consider the CIS was an oversight on his part; the HMRC officer's

notes of meeting contain other errors; he had acted, as had the appellants, in good faith and followed the professional advice given to him; when the errors were pointed out, he immediately took steps to rectify those errors; he had taken reasonable care; the amounts paid to PHD 1 had been paid on a gross basis but the accounts of that company show that PHD 1 had included those amounts in its profit and loss account; the determinations could not have been issued given that the company never received the original letters denying relief under Regulation 9 (3) and thus had no opportunity to appeal that decision.

(28) In examination in chief, Mr Griffiths added: in his capacity as an accountant and director of LJS he had dealt with the CIS for smaller companies and smaller sub-contractors, but not on the scale of the projects for which North Point and China Town had been established; whilst he was an accountant, he was not a tax adviser although he did have tax experience in the fields of VAT, payroll, Corporation tax and income tax; he knew that David Choules had experience as a project manager and considerably more experience in the construction industry than he had; the explanation as to why the appellants had not registered for the CIS which he had given to the HMRC officer at the meeting on 15 December 2016 would have been the same explanation as it had been all along, namely that reliance was placed upon the contract which the parties had signed in which the appellants had stated that they were not contractors for the purposes of the CIS; those contracts had been completed by Inca and presented to him already completed; all he had to do was sign them (although he did complete the contract sum in the contract between China Town and Bilt); Mr Choules had said, with some conviction, that all of the contracts with which he had been involved previously on similar developments indicated that the Employer was not a contractor for the purposes of the CIS; given Mr Choules' experience in the field, Mr Griffiths took that advice and it was the basis on which he considered that the CIS did not apply to the contracts with PHD 1 and Bilt.

(29) In cross-examination Mr Griffiths said: he had some knowledge of the workings of the CIS in his capacity as an accountant, and that if he had felt the need to investigate how the CIS worked it would have been possible for him to do so; he relied on the advice from Inca who, at the time he believed, were surveyors; he had not checked whether the CIS position was the same in the later contracts as had been in the early one, but that was because nothing had changed since entering into the earlier one; he knew that Mr Choules was not a tax expert but that he had much more experience in the construction industry than he had; he did not think there was any need to take any further tax advice; the contracts were given to him "pre-populated" so the only research he did was to ask Inca whether the projects were the same as the previous ones, and on the basis of what Inca said, and that the CIS provisions indicating that the appellants were not contractors (which he understood to be pretty standard) were included in the contracts, he was satisfied with that; he now understood that to be wrong but at the time he thought it was right, and that there was nothing further that he needed to do to verify the position; by the time that China Town entered into the contract with Bilt on 28 September 2016, Bilt had gross payment status; furthermore, whilst that contract declares that China Town is not a contractor for the purposes

of the CIS notwithstanding that by then, China Town had registered under the CIS and filed its historic returns, China Town had been advised by GT that it did not matter what the contract said and the payments were definitely subject to the CIS; payments to Bilt in the period ended 5 August 2016 might have been made before verification of Bilt had been undertaken in July 2016; payments after that date might have been paid gross because on 22 August 2016 Bilt had been granted gross payment status; he had not verified the payment status of Bilt prior to July 2016, nor had he verified the payment status of PHD 1; this was because of his previous experience of JCT contracts with sub-contractors.

(30) In re-examination Mr Griffiths confirmed that his position was as set out in his letter to Mrs Murthwaite of 15 August 2016, that "within our organisation it was commonly thought that a design and build contract such as this would not fall under the CIS tax legislation which we now understand is completely incorrect."

(31) Mrs Murthwaite gave the following evidence in her witness statement: she has worked as a compliance officer in HMRC for more than fifteen years and took over these cases when the original caseworker moved to a different office; the claims for relief under Regulations 9 (3) and (4) which had been made by GT on 2 February 2017 had been passed on by her to a CIS Technical Higher Officer for consideration; on 28 February 2017 decision notices prepared by that officer refusing both claims had been given to her for issue to the appellants; on the same day GT had submitted accounting information relating to PHD 1; as a result of concentrating on that new information she omitted to send the decision notices refusing the Regulation 9(3) relief to the appellants when those notices were first given to her; the technical officer considered the new information about PHD 1, and prepared refusal notices dated 4 April 2016 in relation to the claim for relief under Regulation 9(4); as both claims for relief had been refused, on 5 April 2017 she issued the refusal notices dated 28 February 17 and 4 April 2017 at the same time as issuing the determinations.

(32) In examination in chief, Mrs Murthwaite added: her role as compliance caseworker was to deal with correspondence, gather information regarding the sub-contractors and the implications for the CIS and to make submissions to the technical officers; she was also responsible for raising the determinations; she was not aware of the appellants asking for HMRC's advice about the need to register for the CIS; following the meetings which took place with the appellants' representatives in December 2016, GT had asked for a subsequent meeting, but she believed that she had all the information necessary about needing to come to a decision regarding the claims under the Regulations, and thus deemed a meeting unnecessary; as far as she is aware, the accounting information provided in respect of PHD 1 would have been taken into account by the technical officer when coming to a decision about relief under Regulation 9(4).

(33) In cross-examination Mrs Murthwaite said: she was not the decision maker regarding the claims under Regulation 9; she was responsible for compiling the determinations but was under instructions to send them out; however it is likely

that she gave a view to the technical officer as to whether, in her opinion, the claims under Regulation 9 were likely to be successful; she could not say precisely what information the technical officer had before him for reaching a conclusion on the Regulation 9 claims; she made no enquiries into the decision-making process regarding the withdrawal of the daily penalty assessments; the notes of the meeting between the HMRC officer and Mr Griffiths on 15 December 2016 were a summary of the matters discussed and were based on the handwritten notes that the officer would have taken at the meeting; the failure to send out the Regulation 9(3) relief decision letters in February 2017 was a simple mistake on her part; those letters should have been sent to the appellants at that time.

(34) In answer to a question from the Judge, Mr Griffiths confirmed that he had not asked whether either Mr Choules or Inca had taken tax advice from anyone.

Submissions and discussion

5. Both Mr Kazakos and Ms Brown made clear and helpful submissions both written and oral for which we are most grateful and which we have carefully considered. However, in reaching our conclusions we have not found it necessary to refer to each and every argument advanced on behalf of the parties.

6. The appellants bring their appeals under both section 50 TMA 1970 and Regulation 9(7). They say that the determinations do not oust their appeal rights under Regulation 9(7), and the appellants satisfy the conditions for relief in Regulation 9(3). So we should make a direction under Regulation 9(5) that the appellants are not liable to pay the tax which they failed to withhold (i.e. the excess). But even if we have no jurisdiction to do that, we should find that the appellants have been overcharged and discharge the determinations.

7. HMRC submitted that once a determination has been made under Regulation 13, it is not open to them or to this Tribunal to make a Regulation 9(5) direction. This is clear from the Regulations, the FTT Decision in ***Peter Ormandi v HMRC*** [2019] UKFTT 0667 ("*Ormandi*"), HMRC's Compliance Handbook and Mrs Murthwaite's evidence. But even if HMRC are wrong, the appellants have not satisfied the conditions for relief under Regulation 9(3) and so these appeals should be dismissed.

8. The issue as to whether an appeal can be brought under Regulation 9(7) once a Regulation 13 determination has been made, we will refer to as the "jurisdiction issue". The question as to whether the appellants satisfy the conditions for relief under Regulation 9(3) we shall describe as the "Condition A issue".

9. Whether the appeals are brought under Regulation 9(7) or under the TMA 1970, the burden of proof lies with the appellants. They have to show that they satisfy the Regulation 9(3) conditions and as a consequence we should either direct that HMRC make a direction under Regulation 9(5) that they are not liable for the excess, or we should say that the appellants have been overcharged and should reduce the determinations under section 50(6) TMA 1970. In both cases the standard of proof is the balance of probability.

The jurisdiction issue

10. On the jurisdiction issue, Ms Brown submitted: Under Regulation 13(3) "a determination under this regulation must not include amounts in respect of which a direction under regulation 9(5) has been made and directions under that regulation do not apply to amounts determined under this regulation."; This means that once a determination has been made under Regulation 13(2) neither HMRC under Regulation 9(5) nor this Tribunal on an appeal under Regulation 9(7) can direct that the appellants are liable for the excess; *Ormandi* supports this interpretation; there is a system in place which ensures that Regulation 13 determinations would not be used in an abusive way; HMRC's Compliance Manual makes it clear that relief under Regulation 9(3) must be considered before making a Regulation 13 determination.

11. On the jurisdiction issue, Mr Kazakos submitted: Regulation 13(3) should not be interpreted as suggested by HMRC; that interpretation is wrong as a matter of law and natural justice; HMRC could prevent an appellant exercising his appeal rights under Regulation 9(7) by issuing a Regulation 13 determination; Regulation 13(3) should not be interpreted to deprive a taxpayer a right of appeal; that is an abuse of the statutory scheme and the process; *Ormandi* concerned relief under Regulation 9(4); to the extent that it has anything to say about the interaction of Regulation 13 and Regulation 9(3) it is wrong; in this case it cannot be right that the appellants have lost their right to appeal under Regulation 9(7) as a result of an error by HMRC in failing to send the appellants the Regulation 9(3) decision letters in February 2017; there was no reason why Mrs Murthwaite should have issued the determinations before the appellants had had an opportunity to appeal against HMRC's refusal to grant relief under Regulation 9(3); there was no justification for issuing the determinations given that none of the circumstances identified at section 909390 of HMRC's Compliance Manual applied to the appellants at that time.

12. Notwithstanding the cogent and compelling submissions made by Mr Kazakos and with similar reservations made by the Tribunal in *Ormandi*, it is our judgment that HMRC's interpretation of Regulation 13(3) is correct. We accept that *Ormandi* primarily concerns the interaction of Regulation 9(4) with Regulation 13 rather than Regulation 9(5) and in any event is not binding on us. However we agree with the sentiments set out in [48(4)] of that decision i.e,

> "(4) The wording of Regulation 13(3) also precludes the making of a direction under Regulation 9 after the date on which a determination has been made. It seems to us that the intention is that Regulation 9 and Regulation 13 are mutually exclusive. If an amount is included in a direction made under Regulation 9(5) it cannot be included in a subsequent determination under Regulation 13, but if an amount is included in a determination under Regulation 13, it cannot thereafter be the subject of a direction under Regulation 9."

13. We agree that it is entirely logical that where relief has been granted under Regulation 9(5) which effectively relieves a taxpayer from paying the excess, the amount of that excess cannot be included in a Regulation 13 determination. That is the first part of Regulation 13(3). But the second part of that regulation namely "and directions under that regulation do not apply to amounts determined under this

regulation" is more difficult to interpret. We do not see the same logic applying to this limb of that regulation as applies to the first limb. There seems no reason to us why HMRC could not issue a determination for the excess but then, if the appellant has brought or brings (either in time or having been granted permission to bring a late appeal) an appeal under Regulation 9(7), and hold that determination in abeyance pending the outcome of that appeal and any direction made pursuant to it. The determination could then be revived and any excess for which relief had been granted under Regulation 9(3) excluded from it. This might mean that the determination was incorrect and a taxpayer might take a procedural point that to the extent that relief had not been granted under Regulation 9(3) the rest of the determination was invalid since, as things turned out, HMRC had included amounts in respect of which a direction under regulation 9(5) had by then been made. But we suspect such a point might be given short shrift by a Tribunal.

14. We also agree with Mr Kazakos that HMRC's interpretation does have the potential for abuse.

15. The recent Upper Tribunal decision in ***HMRC v Wilkes*** [2021] UKUT 0150 has neatly summarised the principles of statutory construction as follows:

> **"**45. In short, and as summarised by Rose J (as she then was) in *William Reeves v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKUT 293 (TCC) at [34], a provision should be purposively construed in order to identify its requirements, and then the court must decide whether the actual transaction answers to the statutory description.
>
> 46. In construing the statute in question, the words used are to be given their ordinary meaning but an absurd result should be avoided where possible.
>
> 47. In support of this principle, in *Jenks v Dickinson (HM Inspector of Taxes)* [1997] STC 853 at 860g-j, Neuberger J (as he then was) cited with approval the words of Lord Donovan in the Privy Council's judgment in *Mangin v Inland Revenue Commissioner* [1971] AC 739 at 746. Lord Donovan said this:
>
> > "First, the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices …
> >
> > Secondly, ... one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used...
> >
> > Thirdly, the object of the construction of a statute being to ascertain the will of the legislature it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.

> Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction." (Emphasis added.)
>
> 48. Furthermore, in the Supreme Court's judgment in *Project Blue Ltd v HMRC* [2018] STC 1355 at [31] Lord Hodge said: "… it is without question a legitimate method of purposive construction that one should seek to avoid absurd or unlikely results." "

16. When these principles are applied to the words "and directions under that regulation do not apply to amounts determined under this regulation" they seem to us to operate in the manner suggested by HMRC. And once a direction has been made under Regulation 13 a direction under Regulation 9(5) "….do[es] not apply…….".

17. We say this for two reasons. Firstly, looking merely at what is clearly said, and giving the words their ordinary meaning, it seems clear that is the correct construction. Secondly, we can presume that neither injustice nor absurdity was intended. We return to this later but it is our judgment that the literal interpretation does not produce that result, and that we can take the words as meaning what they mean at face value.

18. Mr Kazakos submitted (although not in as many words) that such construction would result in injustice in that Regulation 13 could be applied to deprive a taxpayer of its appeal rights under Regulation 9(5) which cannot have been intended by Parliament. Indeed HMRC might fall out with a taxpayer and deliberately issue a Regulation 9 determination in order to prevent a taxpayer exercising such appeal rights. We do not think that this of itself means that our interpretation leads to an injustice. Firstly, as HMRC's Compliance Manual makes clear, unless (basically stated) there is a risk to the revenue, a claim for relief under Regulation 9(3) should be considered and resolved before the issue of a Regulation 13 determination. Secondly if a Regulation 13 determination is issued so as to prejudice a taxpayer exercising its rights of appeal under Regulation 9(7), an application for relief from such abusive behaviour may be made to the High Court.

19. This reminds us, albeit in a different context, of the arguments concerning the proportionality of the default surcharge regime for VAT. The regime itself has been held to be proportionate, but it can operate in a disproportionate way as regards a particular taxpayer. Our interpretation of the foregoing Regulation does not of itself generate an injustice, but it may be that in its application to a particular taxpayer, that taxpayer suffers an injustice. As we say, in those circumstances, the taxpayer may bring an action before the High Court.

20. So it is our view that once an amount of the excess has been included in a determination, it is no longer open to either HMRC or the Tribunal to make a direction under Regulation 9(5).

21. Mr Kazakos submitted in his skeleton argument that this interpretation means that a series of cases successfully brought by appellants before the First-tier Tribunal and which have not been appealed by HMRC were all decided by a Tribunal that had no power to do so. We have considered the other authorities which were in the authorities

bundle, and apart from *Ormandi*, none of them considers the tension between relief under Regulation 9(5) and determinations under Regulation 13. They did not consider the point. In our view the fact that the issue was not considered in these cases does not influence our view that once a determination under Regulation 13 has been issued, neither we nor HMRC have jurisdiction to issue a direction under Regulation 9(5).

22. For these reasons we decide the jurisdiction issue in favour of HMRC.

23. But if we are wrong on this, and the appellants still have a right of appeal under Regulation 9(7), we must now consider the Condition A issue. And we need to do so in any event since Mr Kazakos has submitted that even if we find against him on the jurisdiction issue, we should still decide this appeal in favour of the appellants on the basis that the determinations should be discharged under section 50(6) TMA 1970 as the appellants meet the conditions for relief under Regulation 9(3) and have therefore been overcharged by the determinations.

The Condition A issue

24. On the Condition A issue Ms Brown submitted: In her skeleton argument, she said that the appellants failed to take reasonable care and that they did not have a genuine belief that section 61 FA 2004 did not apply; in her closing submissions, she also suggested that the failure to deduct the excess was not due to an error made in good faith; at the meeting with the HMRC officer on 15 December 2016, Mr Griffiths said that failure to consider the CIS was due to an oversight on his part, and failure to register the appellants for the CIS had been overlooked; this demonstrates that he acknowledged his failure to take reasonable care; the appellants failed to make deductions from the payments they made to the sub-contractors even after they had verified the status of those sub-contractors in July 2016; the fact that PHD 1 had reported the payments from the appellants in its profit and loss account does not mean that they had accounted for tax on those payments to HMRC; the appellants have provided no evidence that tax returns or payments of tax were made to HMRC; Mr Griffiths in his capacity as a director of the appellants did not seek to determine the correct tax position of payments made to the sub-contractors; instead he took the opinion of Inca and of Mr Choules who by his own admission is not a tax expert; nor was he independent as he was also a director of the appellants; Mr Griffiths is an accountant and although he did not consider himself to be a tax expert, he had given advice on the operation of the CIS to clients in his capacity as an agent of LJS; he could (and should) have taken advice from a suitably qualified advisor; he simply did what Mr Choules had advised which was not expert advice; the other contracts to which Mr Choules referred in his evidence are largely irrelevant since every case should be determined on its own merits; no proper consideration was given by Mr Griffiths to the particular circumstances of the appellants' position compared to the position of the parties to the other contracts provided by Mr Choules; the position in the earlier contracts was simply "carried forward" to the later contracts without independent advice being sought on whether that was appropriate.

25. On the Condition A issue, Mr Kazakos submitted; Mr Griffiths denies that he said to the HMRC officer at their meeting on 15 December 2016 that he had overlooked

registering the appellants for the CIS, or that failure to consider the CIS was an oversight on his part; his direct testimony is to be preferred to the hearsay evidence of the HMRC officer's notes; the appellants' position, in a nutshell, was set out in Mr Griffiths' letter to Mrs Murthwaite of 16 August 2016, namely that "within our organisation it was commonly thought that a design and build contract such as this would not fall under the CIS tax legislation which we now understand is completely incorrect"; the appellants, through the agency of Mr Griffiths, had acted in good faith and had a genuine belief; Mr Griffiths had dealt with the CIS for smaller clients of LJS, but the transactions for which the appellants were established were a step up in complexity and value; Mr Griffiths relied on Mr Choules and Inca as they had greater experience of these sorts of high value transactions and the application of the CIS to them than he did; Mr Choules and Inca genuinely believed that the obligation to withhold as a contractor did not apply to employers under design and build contracts; Mr Choules is a man of intelligence and academic ability and considerable experience in the field of project managing construction contracts; he was absolutely convinced that he was right, and that conviction was important in persuading Mr Griffiths that the contracts which the appellants were signing correctly reflected the application of the CIS to these appellants; the contracts exhibited by Mr Choules to his witness statement are not irrelevant since they demonstrate his understanding of the way in which design and build contractors generally interpreted the application of the CIS to their circumstances, namely that the employer was not a contractor; the appellants' contracts with their sub-contractors were pre-populated by Inca and presented to Mr Griffiths for signing; he could justifiably expect Inca to have completed them correctly; that was what the appellants were paying Inca for; HMRC submit that Mr Griffiths should have taken expert advice; but that is not necessary to fulfil the obligation to take reasonable care; the test of reasonable care is set out in the First-tier Tribunal decision in ***PDF Electrical Ltd v HMRC*** [2012] UKFTT 708 ("*PDF*"); in *PDF* the Tribunal held that;

> "18. The standard required by Regulation 9 is that the business must take reasonable care in its compliance with the CIS. It does not require that mistakes must never be made. We consider that the standard of "reasonable care" is one that must be appropriate and proportionate to the particular contractor's business. The compliance systems to be expected of a substantial multi-national contractor with a large and sophisticated accounting department are very different from the systems to be adopted by a small business. In the case of PDF, we are satisfied that it took reasonable care to meet its obligations under the CIS. The fact that this is the only error that PDF has ever made under the CIS in ten years is the practical evidence of this."

So reasonable care means the care that the ordinary director in the circumstances in which that director finds themselves should have taken; so if a director is told by someone who does not hesitate for a second to say that the CIS does not apply, that is reasonable care; Mr Griffiths' behaviour was not perfect but it was in the spectrum comprising reasonable care; the appellants had many other commercial and perhaps more pressing issues on their mind which must be taken into consideration when looking at the circumstances in which Mr Griffiths found himself; Mr Griffiths has explained that the reason why payments made to the sub-contractors after they had undertaken their verification in July 2016 had been paid gross was that the payments

for the period to 5 August 2016 might have been made before verification had been carried out, and those made for the period to 5 September 2016 might have been made after the appellants had been notified that Bilt had been given gross payment status by HMRC.

26. The standard of care needs to be reasonable. In our view, whether a taxpayer has taken reasonable care is an objective test and we must ask ourselves whether the care taken was that of a responsible trader conscious of and intending to comply with its obligations regarding tax but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time. In the context of these appellants, it is the human agency, namely Mr Griffiths, through whom the taxpayer is operated which needs to be considered. In the foregoing formulation, we have borrowed very heavily on the test adopted for reasonable excuse by Judge Medd in *the Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234. But the concepts of reasonable excuse and reasonable care have many features in common, and it seems to us that the formulation of the test of reasonable care can be couched in the terms set out above.

27. Mr Griffiths is an accountant who had, at the relevant time, considerable experience in dealing with the CIS albeit for clients of LJS whose CIS issues were less complicated and of lower value than those of the projects which the appellants were set up to undertake. He had a working knowledge of the operation of the scheme and knew that it was the contractor's obligation to verify the payment status of a sub-contractor and in the absence of gross payment status, to deduct tax from payments to that sub-contractor at either 20% or 30%. In this appeal it is accepted by the appellants that this is what should have happened to the payments made to their sub-contractors. The reason why it did not happen in this way was because Mr Griffiths had been told by Mr Choules that the conventional wisdom in the industry on larger projects such as those with which the appellants were involved was that under design and build contracts, the head contractor, defined as the "employer" in the JCT contracts, was not a "contractor" for the purposes of the CIS and this was reflected in the drafting of those contracts. Those contracts were presented to Mr Griffiths, pre-populated, and Mr Griffiths could rightly expect that Inca and Mr Choules, with their greater experience, would have completed them properly and in accordance with the relevant tax legislation.

28. Mr Kazakos submits that this behaviour was taking reasonable care. We are afraid for the appellants that we disagree. In our view the reasonable director, with Mr Griffiths' experience of the CIS, and thus cognisant of the dangers of getting it wrong, would have, at a minimum, read the pre-populated contracts, spotted the reference to the CIS in recital 4 and have tested the interpretation which the amendments to that recital reflected, with Mr Choules. It seems clear to us, and it would have been equally clear to Mr Griffiths with his experience of the CIS that both appellants were carrying out construction operations within the ambit of section 74 FA 2004. Mr Griffiths clearly knew what operations were to be carried out and as described in the contract, these were clearly considerable works of demolition and construction. In these circumstances we cannot understand why he did not check with Mr Choules that the amendments to the contract meant that there was no obligation under the CIS to verify the sub-contractors and, more fundamentally, that the appellants were not contractors for the purposes of

the scheme. He knew how the scheme operated; knew that contractors had to verify and perhaps deduct; he could work out the consequences of failure to operate the scheme properly on the basis of the payments that were being made, which were considerable. With this in mind, he should have enquired of Mr Choules and Inca as to the basis of that interpretation and questioned it on the basis of his knowledge. There is no indication that he did this, and he did not enquire whether Mr Choules or Inca had taken specialist tax advice. There was some talk about whether advice from Mr Choules was independent, but that is not the test. The test is whether the advice is appropriate to the issue under consideration. When numbers are big and the facts complicated, it is more appropriate to go to a tax silk than would be the case if the numbers are small and the facts are simple.

29. In the case of these appellants, the numbers were big. And Mr Griffiths had personal knowledge of what the consequences might be if the CIS did apply. In those circumstances the reasonable director would, in our view, have firstly tested the statement that the appellants were not contractors for the CIS against his own experience; he would not have accepted it at face value given that experience; he would have tested Mr Choules as to the basis of that statement and not simply signed the contract without so doing; he would have asked whether, even though this appeared to be standard practice in the industry, that standard practice was based on appropriate tax advice; given that the CIS is such an important aspect of cash flow in the construction industry, he should have independently checked the position with a tax expert (as subsequently happened when he went to GT). Mr Griffiths should have instructed GT or a firm of similar standing before he entered into the first contract, rather than relying on the word of Mr Choules and Inca. This is far from a counsel of perfection. It is what a reasonable director who finds himself leaving his tax "comfort zone" would do. We make no criticism of Mr Choules or Inca who absolutely believed that the appellants were not contractors for the purposes of the CIS and we have no doubt that conviction was instrumental in influencing Mr Griffiths with the result that the latter did not take independent advice. But Mr Griffiths should have taken independent tax advice. And that would have been the action of a reasonable director, imbued with Mr Griffiths' attributes and experience and placed in his position at the time. The reasonable director with those attributes and experience would not have accepted the contracts and signed them without checking them, and when checking, checking further whether the changes to recital 4, namely that the appellants were not contractors for the purposes of the CIS had been based on tax advice rather than just industry practice. Given the consequences, which were known to him, of failing to comply with the CIS and the fact that he was taking a step up in terms of complexity and financial value, it is our view that the reasonable director would also have taken independent tax advice from a suitably qualified organisation.

30. We accept that Mr Griffiths had a number of things on his plate at the time and may not have focused on the contract and the CIS with the intensity which he now wishes he had done. We accept that mistakes can be made, and that there is a range of behaviour which can fall within the taking of reasonable care. Mr Kazakos submits that Mr Griffiths' behaviour falls within that range. We disagree. For the reasons given above we do not think that Mr Griffiths, nor the appellants, took reasonable care to comply with section 61 of the FA 2004.

31. This is sufficient for us to dispose of this appeal, but we would add that we find that the failure to deduct the excess was due to an error made in good faith and Mr Griffiths held a genuine belief that section 61 FA 2004 did not apply to the payments. We found Mr Griffiths to be a truthful and reliable witness, who, as we have said many times in this decision, relied on Inca and Mr Choules. Whilst this was not taking reasonable care, it is our view that he genuinely believed that the appellants were not obliged, as contractors, to deduct the excess from payments made to the sub-contractors. He made an error and that error was made in good faith.

Decision

32. It is our decision, therefore, that, correctly interpreted, Regulation 13(3) operates so as to prevent both HMRC and ourselves issuing a direction under Regulation 9(5), and thus, as submitted by HMRC, we have no jurisdiction to consider whether the conditions in Regulation 9(3) have been made out by the appellants. We have also found that the appellants failed to take reasonable care. We do not think therefore that they have been overcharged and that, under section 50(6) TMA 1970 the determinations should be reduced. Our decision is that they shall stand good. If we are wrong on this, and we do have jurisdiction to make a direction under Regulation 9(5), then we have decided not to do so on the basis that we do not consider the appellants to have taken reasonable care. Accordingly, we dismiss these appeals.

Appeal rights

33. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 12 JULY 2021

APPENDIX
The relevant legislation

1. The obligation on contractors to make deductions from "contract payments" to sub-contractors under the Construction Industry Scheme is set out in s61 FA 2004. It provides:

61 Deductions on account of tax from contract payments

(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.

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

(3) That percentage must not exceed-

(a) if the person for whose labour (or for whose employees' or officers' 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.

2. The rates at which amounts must be deducted from contract payments are 20% if the person for whose labour the payment in question is made is registered with HMRC for payment under deduction or 30% if that person is not registered (Finance Act 2004, Section 61(2) (Relevant Percentage) Order 2007).

3. The definition of a "contract payment" is found in s60(1) FA 2004. It provides:

60 Contract payments

(1) In this Chapter "contract payment" means any payment which is made under a construction contract and is so made by the contractor (see section 57(3)) to—

(a) the sub-contractor,

(b) a person nominated by the sub-contractor or the contractor, or

(c) a person nominated by a person who is a sub-contractor under another such contract relating to all or any of the construction operations.

The remainder of s60 FA 2004 contains some exceptions from this definition, but they are not relevant in this case.

4. Construction operations are defined in Section 74 FA 2004

74 Meaning of construction operations

(1) In this Chapter construction operations means operations of a description specified in subsection (2), not being operations of a description specified in subsection (3); and references to construction operations

(a) except where the context otherwise requires, include references to the work of individuals participating in the carrying out of such operations; and

(b) do not include references to operations carried out or to be carried out otherwise than in the United Kingdom (or the territorial sea of the United Kingdom).

(2) The following operations are, subject to subsection (3), construction operations for the purposes of this Chapter

(a) construction, alteration, repair, extension, demolition or dismantling of buildings or structures (whether permanent or not), including offshore installations;

(b) construction, alteration, repair, extension or demolition of any works forming, or to form, part of the land, including (in particular) walls, roadworks, power-lines, electronic communications apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;……..

5. Under Regulation 7(1) of the CIS Regulations, a contractor is required to account to HMRC for all amounts that he or she was required to deduct from contract payments. It provides:

7 Payment, due date for payment of amounts deducted and receipts

(1) A contractor must pay to the Commissioners for Her Majesty's Revenue and Customs all amounts he was liable under section 61 of the Act to deduct on account of tax from contract payments made by him during that tax period—

(a) within 17 days after the end of the tax period, where payment is made by an approved method of electronic communications, or

(b) within 14 days after the end of the tax period , in any other case.

The "tax period" is usually one month. However, the CIS Regulations allow some contractors to elect to account quarterly in certain circumstances (see Regulation 8).

6. Regulation 9 of the CIS Regulations permits HMRC to direct that a contractor shall not be liable to account to HMRC for amounts which should have been deducted from contract payments (and which were not in fact deducted) in certain cases. It provides, so far as relevant:

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 (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;

"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.

(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—

(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—

(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

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

and

(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.

(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—

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

(b) within 30 days of the refusal notice,

(c) specifying the grounds of the appeal.

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

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

(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) 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.

(10) …

7. Regulation 13 contains the power for HMRC to make a determination of the amount which a contractor is liable to pay under the CIS Regulations. It provides, so far as relevant:

13 Determination of amounts payable by contractor and appeal against determination

(1) This regulation applies if—

(a) …

(b) an officer of Revenue and Customs has reason to believe, as a result of an inspection under regulation 51 or otherwise, that there may be an amount payable for a tax year under these Regulations by a contractor that has not been paid to them, or

(c) an officer of Revenue and Customs considers it necessary in the circumstances.

(2) An officer of Revenue and Customs may determine the amount which to the best of his judgment a contractor is liable to pay under these Regulations, and serve notice of his determination on the contractor.

(3) A determination under this regulation must not include amounts in respect of which a direction under regulation 9(5) has been made and directions under that regulation do not apply to amounts determined under this regulation.

(4) A determination under this regulation may—

(a) cover the amount payable by the contractor under section 61 of the Act for any one or more tax periods in a tax year, and

(b) extend to the whole of that amount, or to such part of it as is payable in respect of—

(i) a class or classes of sub-contractors specified in the notice of determination (without naming the individual sub-contractors), or

(ii) one or more named sub-contractors specified in the notice.

(5) A determination under this regulation is subject to Parts 4, 5, 5A and 6 of TMA (assessment, appeals, collection and recovery) as if—

(a) the determination were an assessment, and

(b) the amount determined were income tax charged on the contractor, and those Parts of that Act apply accordingly with any necessary

modifications, except that the amount determined is due and payable 14 days after the determination is made.

8. Section 50 Taxes Management Act 1970 ("**TMA 1970**") states, as far as relevant

50 Procedure

……..

(6) If, on an appeal notified to the tribunal, the tribunal decides

(a) that the appellant is overcharged by a self-assessment;

(b) that any amounts contained in a partnership statement are excessive; or

(c) that the appellant is overcharged by an assessment other than a self-assessment,

the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.