Neutral Citation: [2024] UKFTT 00594 (TC)

Case Number: TC09233

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2022/02280

CONSTRUCTION INDUSTRY SCHEME – whether public law issues relevant to an appeal against a determination under regulation 13 of the Income Tax (Construction Industry Scheme) Regulations 2005 – no – appeal dismissed.

Heard on: 29 February 2024
Judgment date: 4 July 2024

Before

TRIBUNAL JUDGE MARK BALDWIN
MR LESLIE HOWARD

Between

THE OAKS (GATLEY) LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Colin Smith of The Independent Tax & Forensic Services LLP

For the Respondents: Christopher Vallis, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The Appellant ("TOGL") appeals against determinations (the "Determinations") made by HMRC under regulation 13 of The Income Tax (Construction Industry Scheme) Regulations 2005 (the "CIS Regulations"), charging TOGL to tax on the amounts it should have deducted from payments to sub-contractors in the tax years ended 5 April 2018 to 5 April 2020. Following review, the total tax liability covered by the determinations is £324,993.

2. TOGL also appeals against late filing penalties ("the Penalties") amounting to £35,435.90 imposed pursuant to Schedule 55 ("Schedule 55") to the Finance Act 2009 for the period from 6 October 2017 to 5 May 2019.

3. It is not disputed that TOGL failed to make (and account to HMRC for) deductions from payments to which the Construction Industry Scheme ("CIS") applied, nor is it disputed that TOGL failed to make the filings which gave rise to the Penalties. However, TOGL takes issue with HMRC's handling of the matter. It says that HMRC has not followed its internal guidelines on issuing regulation 13 determinations and has unduly enriched itself at TOGL's expense. Accordingly, it asks that the Determinations be "rescinded".

4. It is HMRC's case that the Tribunal does not have jurisdiction to entertain TOGL's appeal and that the Determinations and Penalties were correctly issued and should be upheld.

THE FACTS IN OUTLINE

5. TOGL was set up to carry out a one-off residential development project in Cheshire.

6. As part of the residential development project, TOGL paid various construction service providers (including Dreamspace Construction Ltd ("Dreamspace")).

7. TOGL did not, however, make deductions at source as required by the CIS rules. This is undisputed.

8. In September 2018 TOGL's accountant began to make enquiries with HMRC about whether TOGL's payments were within the CIS. On 21 September 2018, HMRC asked the accountant to provide details of "the payments made from the start of the build up to the date of registration.".

9. After that telephone call, HMRC attempted for over a year to acquire enough information from TOGL to determine whether regulation 9 of the CIS Regulations applied. TOGL did not provide the information.

10. In September 2019 the HMRC officer who was conducting the investigation became aware that TOGL was going to deregister for VAT and suspected that TOGL might be dissolved.

11. On 30 October 2019 HMRC issued the Determinations for 2017/18 and 2018/19.

12. On 28 November 2019 TOGL appealed to HMRC against those two Determinations, attaching a letter from Dreamspace confirming that it had brought all amounts received from TOGL into account in calculating its corporation tax liabilities.

THE CONSTRUCTION INDUSTRY SCHEME

13. By way of introduction, the CIS is a set of rules governing how payments to sub-contractors for construction work must be handled by contractors in the construction industry and certain other businesses. In broad terms, under the scheme, all payments made by contractors to sub-contractors must take account of the sub-contractor's tax status, as

determined by HMRC. Depending on a sub-contractor's tax status, the CIS may require the contractor to make a deduction, which they then pay to HMRC, from that part of any payment to a sub-contractor that does not represent the cost of materials incurred by the sub-contractor. All contractors must register with HMRC for the CIS. Sub-contractors who do not wish to have deductions made from their payments at the higher rate of deduction also need to register. Effectively, the CIS operates as a pre-payment of a sub-contractor's tax liabilities, as CIS deductions suffered by a sub-contractor can be set against its PAYE and National Insurance Contributions liabilities, its own CIS liabilities (on payments it makes to its sub-contractors) and its own tax liabilities.

14. The legislative provisions governing the CIS are to be found in Chapter 3 of Part 3 of the Finance Act 2004 ("FA 2004") and the CIS Regulations.

15. Section 61 FA 2004 contains the primary obligation on a contractor to deduct tax from payments to which the CIS applies and, in respect of each tax period, regulation 7 of the CIS Regulations requires a contractor to pay to HMRC all amounts they were liable to deduct from contract payments in that period within 17 days of the end of the period.

16. In certain circumstances HMRC may discharge the contractor's obligation to make payments to it under the CIS. Regulation 9(5) provides that a HMRC officer 'may' direct that a contractor is not liable to pay any shortfall between the amounts it should have deducted under CIS and the amounts actually deducted if one of two conditions is met. The two conditions are:

> "(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)."

17. Regulation 13 of the CIS Regulations allows HMRC to make a determination to recover any shortfall in the tax that should have been deducted and paid over by a contractor.

An amount covered by such a determination must be paid within 14 days. So far as relevant for us, regulation 13 provides as follows:

> "(1) This regulation applies if—
>
> (a) there is a dispute between a contractor and a sub-contractor as to—
>
> (i) whether a payment is made under a construction contract, or
>
> (ii) the amount, if any, deductible by the contractor under section 61 of the Act from a contract payment to a sub-contractor or his nominee, or
>
> (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 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."

18. Regulation 13(3) is important to this appeal, as it has been to many others. It sets out the relationship between regulation 9 and regulation 13. Essentially, the regulation which is applied first prevails: a regulation 13 determination cannot be made in respect of an amount in relation to which a regulation 9 direction has already been made, and a regulation 9 direction cannot be given in respect of an amount in relation to which a regulation 13 determination has already been made.

19. The breadth of the power to issue a regulation 13 determination coupled with the fact that the issue of a determination closes the door on the possibility of making a regulation 9

direction has troubled the tribunals and the courts; see *North Point (Pall Mall) Limited v HMRC*, [2021] UKFTT 259 (TC) at [18], and *R (oao Beech Developments (Manchester) Limited and Ors) v HMRC*, [2023] EWHC 977 (Admin) at [49]-[53].

20. In *North Point*, the FTT noted the procedural safeguards in HMRC's Compliance Manual, which indicates that, unless there is a risk to the revenue, a possible claim for relief under regulation 9 should be considered before a regulation 13 determination is made, and the availability of judicial review were a regulation 13 determination to be made which prejudices a taxpayer exercising its rights of appeal under regulation 9(7).

21. In *Beech Developments,* Fordham J considered that issuing (or not withdrawing) a regulation 13 determination are both situations which could involve unfairness or unreasonableness in the operation of the CIS and they stand against the constitutional backcloth

> "[49] … which involves the recognised, undiluted application of public law duties and availability of the supervisory jurisdiction of the High Court. One way to think of this is as follows. Think of regulation 13(1)(c) and regulation 13(2) so that the phrase "an officer of Revenue and Customs" means "an officer of Revenue and Customs acting lawfully, reasonably and fairly, such duties being enforceable in law". That reflects the constitutional backcloth, where power cannot be abused and there are established guarantees and safeguards to ensure that this is so.
>
> [50] It is undoubtedly right that the legally correct interpretation of [the part of regulation 13(3) which means that the issue of a regulation 13 determination precludes a regulation 9 direction], in light of the constitutional backcloth, gives rise to important questions about the way in which HMRC acts in approaching the making of Non-Liability Directions and the making or withdrawal of Liability Determinations. HMRC must act in accordance with its view of the 'merits'. It must act lawfully, reasonably and fairly. Some such questions are directly addressed in HMRC's published CISR Manual.
>
> ...
>
> [51] Importantly, HMRC has the power – an ongoing power – to withdraw a Liability Determination. The exercise of that power of withdrawal itself attracts not only 'merits' questions for HMRC but also basic and legally-enforceable public law duties of lawfulness, reasonableness and fairness."

22. Turning to HMRC's procedural safeguards, HMRC's Manual (at COG909400) contains guidance on the process for issuing regulation 13 determinations. In particular, it directs that "You must always consider all the information you hold in respect of possible claims under Regulation 9(3) and (4) for a direction granting relief under Regulation 9(5) prior to the issue of Regulation 13(2) determinations." Once a manager has approved a determination and considered the most appropriate course of action, a regulation 13 warning letter should be issued giving 30 days to respond (unless the circumstances in COG909390 obtain). COG909390 indicates that a regulation 13 determination must be issued "immediately" if the officer is of the view that the contractor has made insufficient deductions and "there is likely to be a loss of tax to the Crown". In particular this course of action should be considered if "you discover or suspect that … a company intends to go into liquidation".

THE EVIDENCE

23. We heard from Simon Ashdown, the sole Director of TOGL, who provided us with some useful background to the development and explained why TOGL had not operated the

CIS in relation to it. We also heard from Kavita Lakhani, an HMRC officer, and reviewed documents in the hearing bundle.

Mr Simon Ashdown

24. Mr Ashdown has been involved in the real estate/property development fields for over 27 years. He explained how the development TOGL had been structured as follows:

(1) On 21 July 2017 TOGL and Dreamspace signed a Joint Contracts Tribunal standard form Design and Build 2016 contract ("JCT") for the design and construction of 26 residential properties. Mr Ashdown was also a Director of Dreamspace at the time and he completed the JCT on the basis that Dreamspace was not a contractor for CIS purposes. This was because Mr Ashdown had taken advice some time before that, where Dreamspace is engaged under a licence to undertake a development on land with the finalised development being sold as a completed development, then the contract would not be subject to the CIS.

(2) A third related company became involved in January 2018. This was a company called Dermarr Properties Limited ("DPL") which provided funding via a loan to TOGL. DPL had also provided funding to Dreamspace historically.

(3) In October 2018 Mr Ashdown was made aware by his advisors that TOGL was actually a contractor for CIS purposes. However, at this point no money had been transferred between TOGL and Dreamspace and so Mr Ashdown was under the impression that CIS need not be applied.

(4) In November 2018 TOGL exchanged contracts on the final property in the development. No money had been transferred between TOGL and Dreamspace. Then, as both parties owed money to DPL, Dreamspace's debt to DPL was assigned to TOGL. Mr Ashdown was still under the impression that, even though payments to Dreamspace by TOGL were subject to CIS, as no money had been transferred, CIS did not need to be operated. He now understands that this is not the case.

25. It will be apparent there are some curious features about Mr Ashdown's account of the development arrangements. Following questioning during the hearing, it would appear that what happened was that Dreamspace paid third-party sub-contractors using money borrowed from DPL. When TOGL paid for the development, this was done by Dreamspace's obligations to DPL being novated to TOGL, so that TOGL effectively took over Dreamspace's position, as a debtor to DPL.

26. Mr Ashdown explained that he had received some advice from Grant Thornton in 2008 to the effect that the CIS did not apply where a development was sold. We queried with Mr Ashdown whether the effect of entering into the JCT contract (which is a contract for the provision of services) was that Dreamspace actually had something to sell to TOGL. Mr Ashdown was not entirely sure about the position, although he reiterated that he had been advised that the CIS did not apply where a "development was sold ".

27. Mr Ashdown said that he takes his responsibilities as director very seriously. He understands the principles of the CIS and what it is trying to achieve. He seeks advice if he does not know how it operates in a particular situation. Mr. Vallis asked Mr Ashdown whether he had seen HMRC guidance which indicates that loans and indirect payments are treated as payments for CIS purposes, but he said he had not. He said that all he was doing was following Grant Thornton's advice. He did not consider that this was a tax avoidance scheme; he was simply trying to avoid cash flow problems. Mr Vallis suggested to Mr Ashdown that he should have sought fresh advice, given that Grant Thornton's advice was

more than 10 years old and related to a different project. He suggested to Mr Ashdown that, so far as the CIS was concerned, what he was doing was crossing his fingers and hoping.

28. Mr Vallis took Mr Ashdown through HMRC's interactions with TOGL and its advisers, which ran as follows:

(1) email of 23 October 2018 in which Officer Murthwaite wrote: "Please also let me have the names, addresses and unique taxpayer reference numbers of the subcontractors engaged by your client together with the date and amounts paid to them showing a split between labour and materials."

(2) email of 20 November 2018 in which Officer Murthwaite asked for an update regarding her email of 23 October 2018.

(3) email of 31 January 2019 in which Officer Murthwaite asked for information relevant to regulation 9(3) of the CIS Regulations (whether the contractor took reasonable care to comply with section 61 FA 2004 and whether the failure to deduct was made in good faith, etc);

(4) email of 6 February 2019 where Officer Murthwaite raised questions and asked for further information;

(5) telephone call of 2 May 2019 in which Officer Murthwaite explained that: "…if all of the information was not received by the deadline [17 May 2019] then estimated determinations would be issued based on the build cost in the contract allowing for an estimated amount for materials. I also pointed out that it would not be possible to consider any claim to relief once a determination had been issued."

(6) telephone call and email of 10 July 2019 in which Officer Murthwaite asked for: "The date and amount paid to the subcontractor Dreamspace Construction Ltd as I have been unable to identify the payments from the bank statements I hold. The payments should show a split between labour and materials in order for the correct amount of CIS deductions to be determined. This information should also be provided in respect of any other subcontractors who have incurred costs for materials as part of the construction."

(7) email of 17 September 2019 in which Officer Murthwaite explained that: "I hope you will be able to let me have the information by the end of the week as I am unable to allow any more time. … If the information remains outstanding I will be required to take formal action and arrangements will be made for estimated determination(s) to be raised in respect of the CIS deductions that should have been paid to HMRC.";

(8) telephone call of 16 October 2019 (HB, 168) in which Officer Murthwaite… "… stressed that [she] still needed to determine the CIS under deducted by the company from payments made to the subcontractors."

(9) email of 16 October where the accountant informed HMRC that "we will provide you with the necessary details of payments by the new deadline of 25 October at the latest".

29. Mr Vallis put it to Mr Ashdown that the email of 17 September 2019 clearly gave TOGL 30 days' notice that determinations would be issued. Mr Ashdown agreed. He also put it to Mr Ashdown that HMRC had been trying to get information from TOGL for over a year. Mr Ashdown said that most of the information had been provided in November 2018, but the covering letter from the accountants makes it clear that there is no split between labour and material components. Mr Vallis pointed out to Mr Ashdown that a split between material and other costs not within CIS and the balance of costs was not provided until the

accountants appealed the Determinations in November 2019. Mr Ashdown said that TOGL was not deliberately withholding information; it just took a long time to collate it.

30. Officer Murthwaite's notes record her telling Mr Ashdown (on 18 September 2018) and TOGL's accountant (on 21 September 2018) that TOGL needed to register under the CIS. Mr Ashdown says that he does not recall the call on 18 September and Officer Murthwaite did not send him her note to approve. He says that TOGL did not register under the CIS immediately as he needed to speak to TOGL's accountant and no CIS returns were needed as TOGL never paid any money to anyone.

Officer Lakhani

31. Officer Lakhani took over this case from Officer Murthwaite. Her evidence (which, not surprisingly, reflects the narrative to be deduced from the documents in the bundle) is based on the notes and other materials in HMRC's records she has read and the opinions she formed after doing so. Meaning no disrespect to the officer we do not consider that her opinion on questions such as whether it was appropriate for Officer Murthwaite to make the Directions is relevant to the issue we need to determine and so we have not recorded her evidence in detail.

TOGL'S SUBMISSIONS

32. Mr Smith says that TOGL wishes to challenge the Determinations made on the grounds that HMRC have not followed their own guidance, protocols and taxpayer safeguards regarding the issuance of the Determinations with the resultant effect that HMRC will be unduly enriched as if the Determinations stand then they will have effectively collected tax twice on the same amount. He describes the questions before the Tribunal as ones of public law and specifically whether TOGL is entitled to rely on the legitimate expectation that HMRC will apply the law as their stated guidance says they will.

33. Relying on the Upper Tribunal decision in *Caerdav Limited v HMRC* [2023] UKUT 00179 (TCC) ("*Caerdav*"), which referred to the earlier Upper Tribunal case of *KSM Henryk Zeman SP Zoo v HMRC* [2021] UKUT 182 (TCC) ("*Henryk*"), he says that the Tribunal has jurisdiction to consider public law questions where (as is the case here) the wording of the relevant provision is permissive rather than mandatory.

34. Mr Smith's public law argument is based on *R. (on the application of Aozora GMAC Investment Ltd) v HMRC* [2019] EWCA Civ 1643 ("*Aozora*") is a leading one. In *Aozora*, the Court confirmed that where HMRC's guidance contains clear and unambiguous representation then taxpayers would have a legitimate expectation that HMRC would act in accordance with its stated position. He says that, as a clear and unambiguous undertaking (in the form of HMRC's guidance as to how it would apply the legislation in practice) has been made and TOGL would suffer a high degree of unfairness if HMRC were allowed to resile from their guidance, HMRC should not be allowed to resile from its guidance.

35. Mr Smith also refers us to *R (on the application of Cobalt Data Centre 2 LLP and Cobalt Data Centre 3 LLP) v HMRC* [2019] UKUT 0342 (TCC) ("*Cobalt*") where it was found that there was no good, proportionate reason why HMRC should be permitted to resile from their guidance and the appellants legitimate expectation was upheld.

36. In terms of HMRC's procedural failings, Mr Smith says first that HMRC did not consider the applicability of regulation 9. He says that it was abundantly clear to Officer Murthwaite following the conversation with John Wilkin on 19 October 2019 that the company wished to make a claim under Regulation 9(5) by virtue of Regulation 9(4). Officer Murthwaite captured in her note of telephone conversation that John Wilkin had said that there "will be no loss of tax as the subcontractors will pay the tax on the payments they have received from the company". That Officer Murthwaite some 11 days later issued the

Regulation 13 Determinations without taking into account this statement by John Wilkin is not in accordance with her instructions.

37. Secondly, a warning letter should be issued and then HMRC are to wait 30 days for any response before issuing a regulation 13 determination. No such warning letter was issued to TOGL. There is no justification for not issuing the warning letter. There was no loss of tax to the Crown, as Officer Murthwaite knew. None of the special situations for proceeding without a warning letter was present. John Wilkin had said that TOGL was 'effectively' ceasing to trade, not that it was about to go into liquidation. Mr Smith says that, if HMRC had followed its own published guidance, which he says they had no reason to deviate from, then the application for a Regulation 9(5) Direction would have been recognised and a warning letter would have been sent to the company giving 30 days to respond.

38. As far as the conduct of discussions with HMRC is concerned, Mr Smith pointed out that although more than a year passed between TOGL's accountants first dealing with Officer Murthwaite and the issue of the regulation 13 determination, the two longest delays (each of around two months) were caused by HMRC's delay in responding to the accountant. He submits that TOGL's attitude was one of seeking to co-operate fully, but its efforts were hamstrung by illness, and it is wrong for HMRC to paint a picture of TOGL trying to withhold, or delay producing, information. He says that the information supplied in November 2018 would enable HMRC to fund the subcontractor's UTRs and trace their tax records.

39. As far as penalties are concerned, Mr Smith says that TOGL had a reasonable excuse for not submitting CIS returns as:

(1) No monies ever changed hands; there were no bank transfers which may have alerted the company that CIS should be operated.

(2) The structure of the development was intended to be one where TOGL would take over the complete development, meaning that they would not be a contractor for the purposes of CIS.

(3) TOGL had taken advice from reputable advisers and was working on the assumption that what they had been advised was correct.

(4) TOGL did not intend to incorrectly return the CIS; it was borne from the complex and nuanced arrangements that surrounded the development.

HMRC'S SUBMISSIONS

40. Mr Vallis submits that this Tribunal has no jurisdiction to consider public law matters in this case for a number of reasons. Firstly, an appeal brought in accordance with regulation 13 of the CIS Regulations is to be treated as if it were an assessment to income tax (see regulation 13(5)(b)) and is therefore subject to the provisions of the Taxes Management Act 1970 ("TMA") regarding appeals. An income tax appeal may be brought under section 31(1)(d) TMA and the remedies available to the Tribunal on such an appeal flow from section 50(6) TMA. This was considered by the Court of Appeal in *Aspin v Estil*, [1987] STC 723, where the Court held that there was no supervisory role (to entertain the taxpayer's argument that the assessment ought not to have been made). These limitations on an appeal under section 50 were acknowledged the Upper Tribunal in *Zeman* (at [47]-[48]).

41. Secondly, the comments in *Zeman* as regards the Tribunal's jurisdiction were obiter comments made per incuriam. Mr Vallis says that in *Zeman*, the UT held that the starting point is that a taxpayer should be able to challenge the validity of any decision on public law grounds and that it then falls to the Tribunal to decide whether this right is excluded by the legislation. HMRC say this is wrong in principle. The UT relied on *Beadle v HMRC* [2020]

EWCA Civ 562 to support the proposition that the "starting point" was that a taxpayer should be able to rely on public law arguments unless excluded by the statutory scheme. However, this is an incorrect application of *Beadle*. In essence, the UT in *Zeman* appear to have taken the Court of Appeal's acceptance of the principle (that, in enforcement proceedings, there is no restriction on public law challenges) in the context of *Beadle* to mean that it should also exist in the context of all cases. This is where one error of law arises. HMRC submit that the principle does not apply in contexts (such as in *Zeman* and here too) where the source of the jurisdiction is already defined by the legislation. *Beadle* concerned a different scenario - whether the tribunal had jurisdiction over an antecedent decision. The Court of Appeal was not being asked to interpret the statutory basis for its jurisdiction in that case.

42. In Mr Vallis' submission, the question should not be whether the statutory wording (by express words or by implication) ousts a public law jurisdiction, but whether it confers it in the first place. This is a matter of statutory construction, see *Caerdav v HMRC* [2023] UKUT 00179 (TCC) at [151] – [153].

43. In any event, he submits, HMRC did not act outside their guidance, nor did TOGL rely on it. Mr Ashdown's evidence is that he had not looked at the CIS guidance. HMRC did warn TOGL that the determinations would be issued on 17 September 2019, more than 30 days before they were issued. This warning came after a period of over a year of repeated requests for the information that would enable HMRC to consider the applicability of regulation 9 of the CIS Regulations. Whatever the reason, Mr Ashdown accepted that HMRC did not have all the information they needed until the Determinations were appealed. HMRC's guidance (COG90930) provides for situations where officers must issue a regulation 13 determination immediately without a warning letter. These include where, in the opinion of the caseworker, the contractor has made insufficient deductions from the subcontractor and there is likely to be a loss of to the Crown. This applies in this case as it came to the attention of Officer Murthwaite that TOGL was intending to de-register for VAT and therefore that there was a possibility that the company would be dissolved.

44. As regard the Penalties, Mr Vallis submits that Mr Ashdown is an experienced property developer who is familiar with the general operation of the CIS. He should have known that indirect funding operations such as those TOGL engaged in would be caught by CIS. Whether he did or not, he should have taken advice and not clung to what he was told ten years ago, particularly where it is far from clear that TOGL was implementing the "scheme" Grant Thornton had advised on. By 18 September 2018 he knew (as Officer Murthwaite told him) that TOGL should have registered under the CIS. Whatever he thought before then, he should have registered TOGL at that point and taken proper advice.

45. Standing back and looking at TOGL's position overall, Mr Vallis commented that the CIS is a scheme designed to secure tax compliance in a notoriously problematic industry. There are safeguards for taxpayers, but regulation 13 is a safeguard for HMRC. The CIS is to some extent weighted in favour of HMRC, but that is how Parliament designed it. Just because TOGL calculated that the tax "nets back to zero" (by which Mr Vallis means that all the tax due from those involved in the project, other than the CIS deductions, has been fully and properly paid) does not mean that TOGL can just ignore the CIS or that the outcome HMRC seek case is unfair.

DISCUSSION

46. The jurisdiction of the FTT, in particular the question whether it has any general judicial review or supervisory jurisdiction, was summarised, in language we cannot improve on, by the FTT in *Gallagher's Windows, Doors & Conservatories Ltd v HMRC*, [2023] UKFTT 706 (TC) (another CIS case) at [38], as follows:

> "The First-tier Tribunal ('FtT') was created by s. 3(1) of the Tribunals, Courts and Enforcement Act 2007 (hereinafter referred to as 'TCEA'), "for the purpose of exercising the 9 functions conferred on it under or by virtue of this Act or any other Act". It follows that its jurisdiction is derived wholly from statute. The FtT has no judicial review function. That the FtT has no judicial review function is the only conclusion which can be drawn from the structure of the legislation which brought the FtT into being. The TCEA conferred a judicial review function on the Upper Tribunal, a function it would not have had (since it, too, is a creature of statute without any inherent jurisdiction) had the Act not done so[1]; and it hedged the jurisdiction it did confer with some restrictions. It is perfectly plain, from perusal of the TCEA itself that parliament did not intend to, and did not, confer a judicial review jurisdiction on the FtT, and there is nothing in the Transfer of Tribunal Functions Order which points to a contrary conclusion. Furthermore, the FtT has no supervisory jurisdiction over the respondent."

47. However, it does not follow from the FTT having no general judicial review function as such that public law issues always fall to be ignored in determining tax appeals. As the FTT observed, the FTT is a creature of statute and it is always open to Parliament to draft a right of appeal which allows a taxpayer to raise, and the FTT to consider, a public law issue.

48. Putting the point broadly, the question that arose in *Zeman* was whether, when deciding whether a taxpayer can invoke public law grounds in a tax appeal, the tribunal should start on the basis that they can unless that entitlement is excluded by the statutory regime. At [34] the Upper Tribunal emphatically stated that it considered the answer to that question to be "Yes". Mr Vallis tells us that HMRC equally emphatically consider that statement to be wrong.

49. In *Caerdav,* the Upper Tribunal reached the conclusion (at [152]) that appeal grounds which concern public law arguments should generally be pursued in judicial review proceedings rather than before the FTT, but the FTT may have jurisdiction to consider appeal grounds based on public law arguments (such as legitimate expectation) depending on the statutory provisions under consideration. The Upper Tribunal approached the question of statutory interpretation in that case on a more open basis, without the presumption in favour of allowing public law arguments to be found in *Zeman*.

50. Here, regulation 13(2) provides:

> "(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."

51. Regulation 13 provides:

> "(5) A determination under this regulation is subject to Parts 4, 5 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."

52. The provision which sets out the Tribunal's powers where there is an appeal against an income tax assessment is section 50 TMA. So far as relevant, it provides:

[1] *Cobalt* (a case cited by Mr Smith) is an example of a case brought under the Upper Tribunal's judicial review jurisdiction.

"(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.

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

(a) that the appellant is undercharged to tax by a self-assessment;

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

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

the assessment or amounts shall be increased accordingly.

…

(8) Where, on an appeal notified to the tribunal against an assessment (other than a self-assessment) which–

(a) assesses an amount which is chargeable to tax, and

(b) charges tax on the amount assessed,

the tribunal decides as mentioned in subsection (6) or (7) above, the tribunal may, unless the circumstances of the case otherwise require, reduce or, as the case may be, increase only the amount assessed; and where any appeal notified to the tribunal is so determined the tax charged by the assessment shall be taken to have been reduced or increased accordingly."

53. The scope of the tribunal's jurisdiction on an appeal governed by section 50 was considered by the Court of Appeal in *Aspin v Estill*, [1987] STC 723. In that case Mr Aspin was assessed to tax on US pension income (derived from paying into a US federal arrangement during his 20 years working in the US). He had concluded that, if, but only if, the US pension were non-taxable, he could afford to buy a house and live here. He asked the Inland Revenue and, he said, was categorically assured by an expert that this income was not taxable and based on that assurance he resettled in this country. He was then assessed to tax on the US pension. The Court of Appeal held that the question of the allegedly wrong advice given by the Inland Revenue was beside the point. Sir John Donaldson MR said:

> "The function of General Commissioners is to look at the facts and statutes and see whether the assessment has been properly prepared in accordance with those statutes. As I have already indicated, in my view it was. Mr Aspin was properly assessed, leaving aside this question of alleged erroneous advice. So I ask myself, "What difference would it make if the General Commissioners found that he had been advised exactly as Mr Aspin alleges?""

54. He answered his question as follows:

> "My conclusion therefore is that, even if the General Commissioners were to find these facts [alleged by Mr Aspin about what the Inland Revenue had told him], they could not found their decision upon them. That being so, they

were right to set the evidence relating to those facts on one side and make no finding."

55. Nicholls LJ observed:

> "The substantial complaint made by Mr Aspin in this case is founded on the wrong advice it is said was given to him by the inspector. Under this head Mr Aspin is saying that an assessment ought not to have been made. In saying that, he is not, under this head, saying that in this case there do not exist in relation to him all the facts which are prescribed by the legislation as facts which give rise to a liability to tax. What he is saying is that, because of some further facts, it would be oppressive to enforce that liability. That is a matter in respect of which, if the facts are as alleged by Mr Aspin, the remedy provided is by way of judicial review."

56. In *Zeman* (at [48]) the Upper Tribunal considered it to be "not surprising", given the limitations in section 50 on the action the General Commissioners (now the tribunal) could take, that Nicholls LJ considered that they had no power to set aside a liability which arose under the legislation.

57. The position is different in the VAT legislation. Section 73(1) of the Value Added Tax Act 1994 ("VATA") allows HMRC, in certain circumstances, to "assess the amount of VAT due from [a person] to the best of their judgment and notify it to him." Section 83(1)(p) VATA provides that an appeal shall lie to the tribunal in respect of "an assessment" under section 73(1). That was the provision being considered in *Zeman*. Even there, where the Upper Tribunal held that an appeal under section 83(1)(p) could encompass public law challenges, it acknowledged that this might not be the case with all of the different appeals that can be brought under section 83; at [70] the Upper Tribunal observed that saying there is no general supervisory jurisdiction "is not, however, the same thing as saying that a taxpayer may not in at least certain of the cases described in section 83(1) defend himself by challenging the validity of a decision on public law grounds" (our emphasis). We have already noted the Upper Tribunal's comments in relation to appeals regulated by section 50 TMA.

58. Regulation 13(1) sets out the three circumstances in which HMRC can make a determination. TOGL concedes that HMRC have correctly calculated the amounts it has failed to deduct and pay over under the CIS rules and it was not suggested that the requirement in regulation 13(1) was not satisfied.

59. So far as the requirement that the officer must determine "the amount which to the best of his judgment" a contractor is liable to pay under the CIS Regulations is concerned, we do not consider that this opens any avenues of challenge beyond one to the amount determined as due under the CIS rules. In contrast to the VAT legislation, where a successful appeal could result in an assessment being struck down (although this outcome is unlikely except in the most extreme cases – see *Pegasus Birds Ltd v CCE*, [2004] EWCA Civ 1015), section 50 TMA limits what the tribunal can do on an appeal in the ways we have discussed. It must follow that, if a regulation 13 determination has not been made to "best judgement", a successful appeal can still only result in the correct amount being substituted for the amount determined and not in the determination being struck down. Accordingly, public law considerations (which could go to the question whether the determination should have been made, rather than to the accuracy of the amount determined) are irrelevant so far as the issues before the tribunal are concerned.

60. To conclude, we consider that the effect of treating regulation 13 determinations as if they were income tax assessments is that the tribunal's jurisdiction does not include matters beyond the amount due under the CIS Regulations. There is no dispute on the amount due under the CIS Regulations in this case, and so that is the end of the matter.

61. Although we have concluded that public law issues have no role to play in this appeal, we should briefly set out our analysis of whether (had they been in point) public law issues would have helped TOGL.

62. Firstly, Mr Smith cast his public law argument as a submission that TOGL had a legitimate expectation that HMRC would follow their published procedures for issuing regulation 13 determinations. He relied on *R (oao Azora GMAC Investment Ltd) v HMRC*, [2019] EWCA Civ 1643. This case makes it clear that, for a claim for judicial review based on legitimate expectation to succeed, there must be a clear and unambiguous representation by HMRC on which taxpayers were entitled to rely and secondly it must be so "unfair as to amount to an abuse of power." to allow HMRC to depart from that statement. The second limb of that test raises issues of reliance and conspicuous unfairness. Whilst a procedure for issuing regulation 13 determinations can be collected from the Manual, it is not clear to us in what sense taxpayers are being invited to rely on that narrative. Similarly, it is not clear to us whether TOGL (itself or through its advisers) relied on that articulation of process (What, if anything, did they do differently because of the Manual contents?), nor did Mr Smith explain to us what other conspicuous unfairness there would be to TOGL if HMRC were allowed to depart from its articulated process.

63. Mr Vallis submitted that HMRC have, in any event, followed their published procedures. There is provision for a "warning letter" but the Manual makes it clear that an officer can move straight to making a regulation 13 determination if they consider this necessary. Officer Murthwaite had also been told by TOGL's accountant in a call on 16 October 2019 that "the company has effectively ceased to trade and the final accounts will probably show a loss and that the company has no money". Mr Ashdown said TOGL could not be liquidated for reasons to do with NHBC guarantees. However, Officer Murthwaite did not know this, and Mr Wilkin's comments would clearly concern Office Murthwaite in any event. The Manual allows officers to move forward without a warning letter if they are concerned about the taxpayer, as Officer Murthwaite clearly was.

64. In any event, Officer Murthwaite's email of 17 September (given 30 days before the determinations were issued) makes it very clear that "If the information remains outstanding I will be required to take formal action and arrangements will be made for estimated determination(s) to be raised in respect of the CIS deductions that should have been paid to HMRC." She called TOGL's accountants on 25 October 2019 as the information she asked for had not been supplied. She was told that Mr Wilkin was off sick, and Mr Davies would be asked to call back at 2pm. An email from Officer Murthwaite to TOGL's accountants records that Mr Davies returned her call but after the promised time by when she was unavailable. As the required information had not been provided by the extended deadline, the determination had been made.

65. Given the obvious concerns about TOGL's position (which would have allowed the immediate issue of a regulation 13 determination) and the fact that Officer Murthwaite still gave more than 30 days' notice (in clear terms albeit not using the pro forma warning letter), it is hard to see what conspicuous unfairness TOGL suffered by Officer Murthwaite not issuing a formal warning letter.

66. The Manual does indicate that officers should consider the overall tax/regulation 9 position before moving forward with a regulation 13 determination. COG909400 makes it

clear that "you must always consider all the information you hold in respect of possible claims [for relief under regulation 9] prior to the issue of regulation 13(2) determinations". Although Mr Wilkin asserted that there was no tax loss in his letter of 16 May 2019 and on the call on 16 October, there is no evidence that he supplied material to support that assertion. Saying that HMRC could work out the sub-contractors' UTRs for themselves and find the required information is not sufficient. Even if the process had not needed to be accelerated because of Officer Murthwaite's concerns about TOGL, it is not clear what information she held that would enable her to form a clear view on TOGL's regulation 9 position.

67. In the circumstances, if public law arguments could have been introduced, we would have held, on the basis of the evidence before us, that HMRC did not depart from the process they outlined in the Manual or, if they did, they did not do so in a way which is conspicuously unfair to TOGL.

68. For these reasons the appeals against the Determinations must fail.

69. We can deal with the Penalties more briefly. There was no suggestion that Mr Ashdown knew that the stratagem TOGL adopted did not work as far as the CIS rules were concerned or that he was trying to do anything more than avoid cashflow issues. However, he allowed TOGL to implement an arrangement which was clearly not straightforward and was based on advice he received 10 years previously on a different project.

70. Paragraph 23 of Schedule 55 provides that a person is not liable to a penalty if the person otherwise liable to the penalty satisfies HMRC (or the tribunal on appeal) that there is a reasonable excuse for their failure. There is no evidence that Mr Ashdown took any steps to check whether the arrangements TOGL was a party to would be successful in avoiding the need for deductions under the CIS rules. What TOGL (through Mr Ashdown, an experienced property developer who was familiar with the general purpose and effect of the CIS regime) did was not objectively reasonable for this taxpayer in these circumstances; *Christine Perrin v HMRC*, [2018] UKUT 0156 (TCC) (at [81]).

71. Paragraph 16 allows HMRC to reduce a penalty "if [they] think it right because of special circumstances". The tribunal can substitute for HMRC's decision on penalty another decision HMRC had power to make. It has not been suggested that there any special circumstances here.

72. For these reasons, the appeals against the Penalties must fail too.

DISPOSITION

73. For the reasons set out above, the appeals against the Penalties and the Determinations are dismissed.

74. Although we have held that public law issues cannot be raised in an appeal against a regulation is determination, we should explain before concluding that people in TOGL's position are not without any protection. As Fordham J observed in *Beech Developments*, HMRC has an ongoing power to withdraw a regulation 13 determination, and the exercise of that power of withdrawal attracts basic and legally enforceable public law duties of lawfulness, reasonableness, and fairness. A contractor in receipt of a regulation 13 direction which they consider unfair (because there is no overall loss of tax so that a regulation 9 direction could have been given) can always ask HMRC to withdraw the regulation 13 determination and give a regulation 9 direction in its place. If HMRC declined to do so, the contractor could, if it thought HMRC's reasons for refusing to do this were unreasonable, seek judicial review.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

75. 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.

MARK BALDWIN
TRIBUNAL JUDGE

Release date: 04th JULY 2024