TC04677

Appeal number:TC/2015/01854

INCOME TAX – construction industry scheme – whether monies received after deduction of income tax – no – reduction in taxable income to reflect the absence of income tax withheld

FIRST-TIER TRIBUNAL
TAX CHAMBER

SONNY JOSEPH MCEWEN **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE
MR JULIAN SIMS

Sitting in public at Fox Court, 30 Brooke Street, London EC1N 7RS on 22 October, 2015

Mr. Brian Pusser, of BR Pusser & Co. Ltd, Accountants, appeared for the Appellant

Mr Neil Nagle and Mr Jeremy Taylor, officers of HM Revenue and Customs, appeared for the Respondents

DECISION

Introduction

1. This is an appeal made by Mr Sonny Joseph McEwen ("Mr McEwen") against amendments made by Her Majesty's Revenue and Customs ("HMRC") on 5 December 2014 to Mr McEwen's self-assessment tax returns for the tax years of assessment ended 5 April 2012 and 5 April 2013.

2. In respect of each of those years of assessment, Mr McEwen assessed himself on the basis that he had received gross income of £23,000 from JT Tarmac Limited ("Tarmac") but subject to a deduction of income tax of £4,600 (being 20% of £23,000).

3. On 13 November 2013, HMRC opened an enquiry in relation to the income and withholding tax shown in each self-assessment. Those enquiries culminated in two closure notices making the amendments to the tax returns which are the subject of this appeal. In its closure notices, HMRC stated that it had found insufficient evidence to verify the deduction of the withholding tax claimed by Mr McEwen and it therefore amended the self-assessment tax returns in question to show the receipt of income of £23,000 in each year of assessment without any credit for the withholding tax which Mr McEwen claimed to have suffered.

4. On 10 February 2015, Mr McEwen's advisor, Mr Brian Pusser of BR Pusser & Co. Ltd, Accountants ("Mr Pusser"), appealed against the amended assessments on Mr McEwen's behalf.

The law

5. There is no dispute between the parties as to the relevant law in this case. As a registered sub-contractor carrying out construction work, Mr McEwen was required to be paid under deduction of income tax at the basic rate for each year of assessment in question. So Mr McEwen should have received his payments in this case under deduction of income tax at the basic rate.

The parties' contentions

6. Mr. Pusser, on behalf of Mr McEwen, said that this is in fact what happened. He said that the monies received by his client from Tarmac were received under deduction of income tax but that the accountant hired by Tarmac to produce the relevant documentation and also to complete Mr McEwen's self-assessment had suffered a breakdown and had now died without producing either the relevant documentation in respect of the deductions under the construction industry scheme or Mr McEwen's self-assessment.

7. In response, Mr Nagle, on behalf of HMRC, pointed out that there was no evidence whatsoever that the relevant deductions had been made. Indeed, such evidence as did exist suggested that the deductions had not been made.

The evidence

8. Mr Pusser did not produce any evidence to show that the tax had been withheld. He explained that this was impossible because Mr McEwen had been paid in cash (so that there were no bank statements available to evidence the withholding), the accountant in question had died without producing any of the relevant documentation and the contractor, Tarmac, had been unhelpful in response to his requests for information. Mr Pusser explained that there was a limit to the forcefulness with which Mr McEwen could request the information from the relevant individuals at Tarmac given that he was dependent on those individuals for future work and he did not want to reduce his prospects in that regard by being seen as a troublemaker.

9. In response, Mr Nagle pointed out that, in addition to the absence of any evidence that the withholdings had been made, there was positive evidence to suggest the contrary. For instance, Mr McEwen had been verified by Tarmac as a sub-contractor on 18 May 2013 (i.e. in the tax year of assessment following the later of the two years of assessment which were the subject of the present appeal). As a contractor is obliged to verify a sub-contractor only if the sub-contractor has not been included in a return submitted by the contractor in the previous two years of assessment, this suggested that Mr McEwen hadn't been working for Tarmac within the scheme during the relevant years of assessment. Moreover, Mr Nagle produced the monthly returns of Tarmac under the construction industry scheme for the two years of assessment in question and these did not refer to Mr McEwen as the recipient of monies from Tarmac.

10. In the course of the hearing, we asked Mr McEwen to tell us the basis on which he had reported the receipt of £23,000 of income in respect of each of the relevant years of assessment. Mr McEwen explained that he had done this by assuming that he was being paid under deduction of income tax at the basic rate and had therefore grossed up, by reference to the basic rate, the cash he actually received. He said that he had received in cash £400 each week (which he believed to be £500 minus a deduction for withholding tax of £100) and had therefore calculated the £23,000 by aggregating the gross amounts of £500 per week. This evidence was not challenged by Mr Nagle.

Our findings of fact

11. We agree with Mr Nagle that there is no evidence that the monies received by Mr McEwen from Tarmac were paid under deduction of income tax and that the evidence in fact points in the opposite direction because of the subsequent verification of Mr McEwen by Tarmac and the omission of Mr McEwen from Tarmac's own records.

12. We have no reason to doubt that Mr McEwen genuinely believed that he was being paid under deduction of income tax but, in the absence of evidence to that effect, we find that no such income tax was withheld from the payments he received.

13. However, we accept Mr McEwen's statement that the £23,000 of income which he included in each of the self-assessment tax returns was not the aggregate of the cash sums he received in his hands but was rather the aggregate of the cash sums he received in his hands grossed up by reference to the 20% withholding tax which he thought had been deducted from the relevant amounts. We reach this conclusion for two reasons. First, Mr McEwen's demeanour at the hearing was such that we see no reason to disbelieve him. Secondly, given Mr McEwen's assertion that the monies he received had been paid to him under deduction of income tax, it is logical that he would have grossed up the aggregate amounts he received in his hands in order to calculate the income which he included in his self-assessment tax returns.

14. At no point were the expenses claimed by Mr McEwen in his self-assessment tax return for either year of assessment challenged and therefore we find as fact that these are deductible in computing his taxable income.

Conclusion

15. It follows from the findings set out above that we consider that Mr McEwen has not made out his case that the monies he received in respect of his work for Tarmac in the years of assessment in question were paid under deduction of income tax but that the corollary of this is that his income which is subject to income tax in respect of the relevant years of assessment should be reduced from that set out in Mr McEwen's original self-assessments (and the amended self-assessments made by HMRC) to the aggregate of the sums actually received by Mr McEwen in the relevant years of assessment and not those sums as grossed up by reference to the basic rate of income tax. It follows that Mr McEwen should be assessed on the basis that he received £18,400 of income from Tarmac in each of the years of assessment in question but without having received those sums under deduction of income tax. Mr McEwen's self-assessments following their amendment by HMRC (and, specifically, the income arising from his self-employment which appears in those self-assessments) should be reduced accordingly.

16. We therefore hold that the self-assessments as amended by the closure notices shall be further amended to show income tax and national insurance contributions due as follows :

2011/12

Sales income	18,400
Expenses (unchanged)	7,667
Total income	10,733

Tax and Class 4 NIC due £967.32

2012/13

Sales income	18,400
Expenses	8,167
Total income	10,233

Tax and Class 4 NIC due	£662.12

17. 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.

TONY BEARE

TRIBUNAL JUDGE
RELEASE DATE: 30 OCTOBER 2015