[2016] UKFTT 112 (TC)

TC04899

Appeal number: TC/2014/05478

TYPE OF TAX –Construction Industry Scheme – refusal of HMRC to issue direction under regulation 9 Income Tax (Construction Industry Scheme) Regulations 2005 – whether Appellant took reasonable care when filing CIS return – held not – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TAYFIELD HOMES LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE PHILIP GILLETT
SIMON BIRD

Sitting in public at Southampton on 4 February 2016

Alastair Kendrick, of MHA MacIntyre Hudson, for the Appellant

Colin Brown, Officer of HMRC, for the Respondents

DECISION

1. This was an appeal against HMRC's refusal to issue a direction under Regulation 9 Income Tax (Construction Industry Scheme) Regulations 2005. It was common ground between the parties that the Appellant ("Tayfield") had made payments totalling £982,526, over the tax years 2010-11, 2011-12 and 2012-13, to Britannia Contracting Ltd ("Britannia"), and that Tayfield should have deducted tax under the CIS scheme from these payments. The amount of tax which should have been deducted amounted to £79,172.

Evidence

2. We heard evidence from Mark Wingfield, one of the two directors of Tayfield, Carolyn Baker, Administrative Assistant of Tayfield and Stuart Wilkinson, external accountant for Tayfield.

3. Mr Wingfield explained that Tayfield was a property developer and had been set up in July 2000. It was not a construction company and had always outsourced all building work. They employed PH Warr Ltd, a Quantity Surveyor, who effectively managed the building work and certified the value of the work done on an ongoing basis, although the building contract was directly with Britannia and Britannia rendered invoices directly to Tayfield. This contract made reference to the CIS scheme but was not clear as to whether or not Britannia was a sub-contractor for these purposes.

4. Mr Wingfield said that Tayfield had registered with the CIS scheme because they were in the building industry but they had not believed that the scheme applied to any payments they made because they thought that it only applied to payments made by contractors to sub-contractors, whereas Tayfield only employed the contractors. It was noted that the contract between Tayfield and Britannia described Tayfield as the employer and Britannia as the contractor.

5. Tayfield had made a series of CIS returns from February 2009 onwards but all the returns during the relevant period had been nil returns because, as stated above, Tayfield did not believe that the CIS scheme related to payments made by them to Britannia.

6. Britannia had run into financial difficulties part-way through the project and Tayfield had therefore contracted directly with Britannia's sub-contractors for completion of the work. At this point Tayfield had consulted their external accountant, Stuart Wilkinson, who had advised that they needed to deduct tax under the CIS scheme from payments made to the sub-contractors.

7. Mr Wilkinson confirmed that he prepared the accounts, payroll and VAT returns for Tayfield but he had never been asked to prepare the CIS returns, which were prepared and submitted by Carolyn Baker, after signature by Mr Wingfield. He also described himself as tax adviser to the company but explained that this meant that

he would respond to questions from the company on tax matters but would not normally bring forward issues on his own initiative.

8. Ms Baker confirmed that she had worked for Tayfield since 2001 but that she had no previous experience in the construction industry. When she was asked if she had taken any advice, or phoned the helpline or looked at the guidance material before completing the CIS returns, she stated that she had not. She said that there was however no deliberate attempt to mislead.

9. Because of the change in contractual arrangements and the subsequent operation of the CIS scheme Mr Wingfield had spoken to Britannia and others about the scheme. Following this he had received a letter from Ian Dunesby, Managing Director of Britannia, dated 5 March 2014, which stated that he believed that Britannia had gross status for CIS purposes and that he was aware that Britannia had represented itself to Tayfield as having gross status. Mr Wingfield however confirmed that he had never asked Britannia this question, although Britannia may have represented itself to PH Warr as having gross status.

10. As regards the contract between Tayfield and Britannia, Mr Wingfield said that he did not recall the issue of gross status being discussed, although it was referred to in the agreement.

11. For HMRC Mr Brown stated that Tayfield would have been sent a New Contractors Pack in or around 2008, when the new CIS scheme came into operation. Mr Wingfield stated that he did not recall receiving the pack but this was during a period when Tayfield was not operating due to the recession and he may not therefore have noticed it.

12. Mr Brown highlighted a number of places in the pack and on the CIS return itself stating clearly that when payments subject to the CIS scheme were made then the payer was required to contact HMRC to check that the recipient of the payments was registered for CIS and had gross payment status. This had clearly not been done by Tayfield.

The Law

13. The legislation requiring contractors to deduct tax from payments made to sub-contractors and to pay the tax deducted to HMRC is contained within sections 61 and 62 Finance Act 2004. However, since there was no dispute between the parties that Tayfield should have deducted tax from the payments it made to Britannia, nor any dispute as to the amount which should have been deducted, this legislation is not reproduced here.

14. Regulation 9 of the Income Tax (Construction Industry Scheme) Regulations 2005 provides that where insufficient tax has been deducted from payments to a sub-contractor then HMRC may, if certain conditions are satisfied, direct that the tax which has not been deducted from the payments in question should not be recovered from the person who made the payments.

15. Condition A for regulation 9 to apply is set out in paragraph (3) of regulation 9 as follows:

> (a) that [the contractor] took reasonable care to comply with s 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.

16. Condition B, which is set out in paragraph (4) of regulation 9, covers the situation where the relevant tax has been paid by the recipient of the payments or the recipient is not liable to tax on those payments. It was common ground between the parties that this condition was not relevant to this appeal.

17. Mr Brown, for HMRC, confirmed that there was no question that Tayfield had acted in good faith and held a genuine belief that s 61 did not apply to the payments. The only issue before the tribunal therefore was whether or not Tayfield had taken reasonable care.

18. We were referred to three cases by both Mr Brown and Mr Kendrick: *Steven Hoskins v HMRC* [2012] UKFTT 284 (TC), *PDF Electrical Limited v HMRC* [2012 UKFTT 708 (TC) and *J&M Interiors (Scotland) Limited v HMRC* [2014] UKFTT 183 (TC). The case of *Steven Hoskins* concerned some very specific facts and was perhaps therefore not directly relevant to the current appeal. In the case of *PDF Electrical Limited* the tribunal stated at paragraph 18:

> "The standard required by regulation 9 is that the business must take reasonable care in its compliance with the CIS regime. 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."

Discussion and Decision

19. Mr Wingfield and Ms Baker were very open in their responses to the tribunal and it was clear that they genuinely believed that the CIS scheme did not apply to the payments they made to Britannia. This was on the basis that they "employed" the "contractor" and that they thought the scheme only applied to payments at the next level down, from "contractor" to "sub-contractor". They had therefore completed the relevant CIS returns as nil returns but had made no enquiries of the HMRC helpline, had not looked at the guidance pack and had not consulted Mr Wilkinson, their tax adviser, for advice. The question for us therefore was whether or not this constituted taking reasonable care when completing the return.

20. We agree with the proposition set out in the case of *PDF Electrical Limited v HMRC* that the standard of reasonable care to be applied is one which is appropriate and proportionate to the particular contractor's business. Tayfield had substantial turnover, normally of the order of £1-2m per annum, but up to £6.7m in the year to 31 July 2007. However, Mr Wingfield had explained that although this looked large, in the context of property sales it was not substantial, and in fact Tayfield had only three full time staff, the two directors and Ms Baker. It was therefore a very small organisation.

21. However, Tayfield had, by its own admission, completed the CIS returns without referring to any guidance from HMRC, even though this was easily available, or any advice from its external accountant, even though it relied on its external accountant to prepare the books of account, to operate the payroll and to complete VAT returns on behalf of the business. Instead it had simply relied on its own analysis that the scheme did not apply to the payments in question. Even for a small company this was a very low level of diligence when faced with a new HMRC return to complete.

22. Having considered the evidence therefore the tribunal decided that Tayfield had not exercised reasonable care when deciding not to deduct tax from the payments. The tribunal therefore decided that the appeal should be dismissed.

23. 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.

PHILIP GILLETT
TRIBUNAL JUDGE

RELEASE DATE: 23 FEBRUARY 2016