



[2021] UKFTT 128 (TC)

TC08109

LATE APPEAL – Martland considered – length of delay is serious and significant – no good reason for delay - in all the circumstances fairness and justice do not support an extension of time – application refused

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2020/00656

BETWEEN

REGENCY SITE PERSONNEL LIMITED

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE DAVID BEDENHAM
DUNCAN MCBRIDE**

The hearing took place on 26 February 2021. With the consent of the parties, the form of the hearing was video with the parties attending through the Tribunal video platform. A face to face hearing was not held because of the ongoing Covid 19 pandemic and social distancing guidance.

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

Tim Brown, Counsel, for the Appellant

Kevin Brooke, litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents

DECISION

INTRODUCTION

1. The Appellant seeks permission to appeal out of time against decisions made by HMRC pursuant to the Income Tax (Construction Industry Scheme) Regulations 2005.
2. HMRC oppose that application.

THE APPELLANT'S SUBMISSIONS

3. The Appellant's submissions can be summarised as follows:
 - (1) This is a "late appeal" case, and the Tribunal should apply the principles set out in *Martland v HMRC* [2018] UKUT 0178 (TCC).
 - (2) The date of the review letter is simply "June 2019". If that was the relevant date, the length of the delay in filing the appeal was just over 6 months. "However, discussions and correspondence continued between the Appellant and the Commissioners until 19 December 2020...when the latter issued a "Case Closure Letter"...if 19 December 2020 was the operative date, then the delay was only 18 days."
 - (3) In January 2020, there was a change of advisor; the Appellant's former accountants ("FA") were replaced by Appleton Richardson & Co ("ARC"). Neither the Appellant nor ARC was aware of the letter dated 19 December 2019 until after 20 January 2020.
 - (4) The Appellant relied on FA "to ensure compliance with the relevant provisions in respect of appeals; the failure was that of the accountant. By analogy, reliance on an accountant was found to be a reasonable excuse in the case of [an appeal] against a penalty...(Barrett v HMRC [2015] UKFTT 329 (TC))...In the same way it is not unreasonable for a taxpayer to rely upon its accountant to comply with conditions relating to appeals, and therefore a factor that should be taken into account."
 - (5) Whilst there is much to be said for the principle of finality, HMRC were still willing to enter into correspondence as late as 19 December 2019.
 - (6) The amount at stake is significant especially during these challenging times.
 - (7) The appeal is likely to take no more than one day.
 - (8) HMRC are wrong to say that where a regulation 13 determination has been made, regulation 13(3) precludes a direction being given under regulation 9(5). To the extent that the FTT indicated otherwise in *Barrett v HMRC*, that decision was wrong.

HMRC'S SUBMISSIONS

4. HMRC's submissions can be summarised as follows:
 - (1) This is a "late appeal" case, and the Tribunal should apply the principles set out in *Martland v HMRC* [2018] UKUT 0178 (TCC).
 - (2) Prior to making the regulation 13 determination, HMRC gave the Appellant an opportunity to make a claim for relief under regulation 9(3) or (4). The Appellant did not do so and HMRC proceeded to make the regulation 13 determination. Regulation 13(3) precludes a direction under regulation 9 being given if a regulation 13 determination has already been made.
 - (3) The delay in appealing to the Tribunal is significant and serious.

(4) There is no good reason for the delay. Relevant correspondence was sent both to the Appellant and FA.

(5) That there is a significant amount at stake for the Appellant “cuts both ways” – it can properly be expected that the Appellant would act with all due expedition given there was a significant amount in issue.

EVIDENCE AND FINDINGS OF FACT

5. The following chronology was apparent from the correspondence and documentation that we were provided with:

(1) On 13 December 2018, HMRC wrote to the Appellant’s then accountants, FA, stating:

“CIS records indicate that your client was advised on 29 October 2018 of the change in RWR Contract Management Ltd’s tax treatment. All payments made after that date should have been subjected to 20% deductions.

...

Your client’s return for month ending 5/11/18 recorded a gross payment to RWR in the sum of £539611.00 whereas I would have expected deductions in the sum of £107922.00 to feature. I propose raising a Determination in that amount upon Regency as it failed to comply with a HMRC instruction concerning RWR...

Before the Determination is raised, I’m obliged to offer your client the opportunity to make a claim for relief under Regulation 9(3) or 9(4) of the Income Tax (Construction Industry Scheme) Regulations 2005.

Regulations 9(3) allows for a claim to be made that the contractor be relieved of the liability where an error was made in good faith or a genuine belief was held that the payments concerned did not fall within the scope of CIS.

Regulation 9(4) allows for a claim to be made that the contractor be relieved of the liability where the sub-contractor in receipt of the payments has returned the income to HMRC and paid the tax liability relating to that income.

If your client wishes to make a claim then please ensure it is made within thirty days.

...”

(2) On 22 January 2019, HMRC wrote to the Appellant (copied to FA) stating:

“As there was no response to my letter of 13 December 2018, I have now raised a Determination in the sum of £107922.00

...”

(3) On 1 February 2019, FA wrote to HMRC as follows:

“Sorry for the delay on this.

...

Our client does wish to make a claim for relief under regulation 9(3) of the Income Tax (Construction Industry Scheme) Regulations 2005 as they believe that the error was made in good faith and a genuine belief that the payments concerned did not require for CIS to be withheld.

They would like to apologies for not responding sooner. You mentioned in your initial letter dated 19 December 2018 that our client was advised of the change in status on 29/10/2018 but our client did not receive this notification.

In addition, as of 15/11/2018, RWR... was still showing as gross status on their HMRC online portal so without the notification, our client continued to make payment without any CIS deduction. Please find attached a screenshot of the position at 15/11/2018 for your records.

...”

- (4) On 4 February 2019, HMRC wrote to FA stating:

“As your client wishes to make a claim for relief under Reg 9(3) there is a process which needs to be followed.

You need to formally appeal against the 2018/19 Regulation 13 Determination (£107922.00) and apply for postponement of collection.

...

When [requested information] is received I shall submit a report to an HMRC colleague who decides whether relief should be granted.

...”

- (5) On 3 March 2019 there appears to have been a meeting between HMRC and FA. Neither party provided us with any information as to what was discussed at that meeting.

- (6) On 18 March 2019, HMRC wrote to the Appellant (copying in FA) stating:

“As advised during our meeting on 5/3/19 I am writing to set out my current view of the matter.

I wrote to your accountant on 13/12/18...I said the CIS300 should have recorded deductions in the sum of £107922. I asked for an explanation and also invited the company to make a claim for relief under Regulation 9(3) or 9(4) of the Income Tax (Construction Industry Scheme) Regulations 2005 within thirty days. This letter was copied onto Regency at Halifax House, 93-101 Bridge Street, Manchester, M3 2GX.

As there was no response by the deadline date (13/1/19) I raised a Determination under Regulation 13 of the Income Tax (Construction Industry Scheme) Regulations on 22/1/19.

An email was received from [FA] on 1/2/19 making a late claim for relief under Regulation 9(3). [FA] stated that the Tax Treatment Change Notification was never received and a check made on the HMRC portal on 15/11/18 denoted that RWR still held gross status. A screenshot was attached.

I shall address each point in turn.

At the time when the Tax Treatment Change Notification was generated the company was trading from Halifax House...the HMRC envelope was not returned ‘gone unknown’.

In my opinion the RWR item was correctly issued to the company address notified to HMRC. It is up to the company to have efficient systems in place to accommodate any internal re-direction processes...

The CIS screenshot issue was covered in my email to [FA] 4/2/19. The information thereon related to the Tax Treatment in force at the time of the initial verification.

In conclusion, my view of the matter is that £107992 is due but the tax has been 'stood over' pending resolution of the dispute. The company now has two options. It can either request an internal Review by an HMRC officer not involved in the case or it can proceed direct to the Tribunal. These are explained in the attached fact sheet HMRC1. Please notify me of your decision within thirty days."

- (7) On 10 April 2019, the Appellant's former accountant wrote to HMRC stating:

"We are writing further to your letter dated 18 March 2019 in relation to the Regulation 13 determination and the CIS inspection.

Regulation 13 Determination

In relation to the Regulation 13 Determination, our client wishes for the decision to be reviewed by another officer so we would be grateful if you would initiate the process as they do not agree with the 'View of the Matter.'

..."

- (8) By a letter dated "June 2019", HMRC notified the Appellant of the conclusion of the review: "My conclusion is that the Regulation 13 determination issued on 22 January 2019 should be upheld". Under the heading "What I have considered in my review", the review officer stated:

"The point in dispute falls to whether or not you received notification that your client RWR Contract Management no longer held gross status.

HMRC systems show that this notification was sent to you on 29 October 2019. The address the notification was sent to was your registered address at that time...

...

There is no evidence to suggest that the notification wasn't delivered to your correct address, at that time.

...

The CIS portal accessed by your staff on 15 November 2018 merely shows when each subcontractor was awarded gross status. In order to establish the correct status at the time of making payment, each sub contractor's record need to be accessed. Had your staff done this then RWR Contract Management would have shown gross status had been withdrawn with effect from 29 October 2018."

The letter concluded as follows:

"If you do not agree with my conclusion, you can ask an independent tribunal to decide the matter...If you want to appeal to the tribunal, you must write to the tribunal within 30 days of this letter. You can find out how to do this on the Tribunals Service website..."

- (9) On 30 July 2019, FA wrote to HMRC as follows:

"We are writing further to your letter dated June 2019 which upheld the regulation 13 determination issued on 22 January 2019.

Our client does not agree with the review decision and does intend to pursue the matter further but before they do so, they would like to be given an opportunity for a review under Regulation 9(5) because we believe that the Regulation 13 determination was issued without any consideration to this.

Our client was never offered the opportunity to contest the deduction under Regulation 9(5) and in your letter dated 13 December 2018, our client was only offered relief under Regulation 9(3) and Regulation 9(4) with no mention of Regulation 9(5).

Our client was not aware of Regulation 9(5) and had they been they would have requested this...”

(10) On 31 July 2019, HMRC wrote to FA as follows:

“There seems to be some misunderstanding in respect of Regulation 9(5)...This is **not** an alternative option on top of Regulations 9(3) and (4). It is the legislative authority which allows an officer of HMRC to direct that a contractor is not liable for the amounts under-deducted if said contractor satisfies the conditions covered by Regulations 9(3) and (4). The Reviewing Officer has ruled that Regency did not satisfy those conditions.

...

Your letter infers that Regency Site Personnel Ltd will be taking the matter to Tribunal. Is that correct? I ask because the Regulation 13 Determination remains ‘stood over’. It could be released for collection now but would then have to be stood over again if the Tribunal process was initiated. Please advise as soon as possible.”

(11) On 15 August 2019, FA wrote to HMRC stating

“...your letter dated 31/07/2019 has only come to my attention today so I would ask that our client is given a chance to fully explore their options in relation to your letter and be given a fair opportunity to review your response. ...so would you be able to treat 14 days from today and given them until 28 August 2019.”

HMRC replied on the same day stating “that’s fine...”

(12) On 20 September 2019, HMRC wrote to FA (copied to the Appellant) as follows:

“Your email of 15 August declared that your client would respond to my letter dated 31/7/19 by the end of August. No correspondence was forthcoming.

We had a telephone conversation on 10/9/19 when you informed me that Regency would be taking its appeal to Tribunal. I asked for confirmation in writing but nothing has been received from yourself or your client to date.

Unless I receive written evidence by the end of this month confirming that Regency has applied to the Tribunal Service, I shall treat the appeal as settled and release £107922.00 for collection...”

(13) On 20 September 2019, FA wrote to HMRC stating:

“I can advise that the appeal to the tribunal would be lodged by 13/10/2019...”

HMRC replied on the same day stating “Please send me a copy of the Tribunal acknowledgment when the appeal is lodged.”

(14) On 25 October 2019, FA wrote to HMRC stating:

“...I would like to apologise for the delay. The reason for the delay in appeal to the Tribunal is because our client has now decided to seek seeking legal advice before any application to the tribunal.”

(15) On 1 November 2019, HMRC wrote to FA stating:

“I consider that I’ve been very reasonable in extending the deadline to Regency since the Review decision in June 2019. I cannot allow another unspecified delay and so the Regulation 13 liability will be released for collection...”

(16) On 5 December 2019, FA wrote to HMRC stating:

“Having obtained counsel’s advice, we now consider that there is no formal letter detailing the outcome of our request for a Regulation 9(5) Direction, and thus we cannot notify an appeal to the First-tier Tribunal against that outcome until you issue a formal ‘refusal notice’ under regulation 9(6).

...

We refer you to the case of *Sowinski v Revenue and Customs Commissioners* [2015] UKFTT 636 (TC), where Judge Richards determined that in the absence of a formal ‘refusal notice’ under regulation 9(6) the tribunal did not have jurisdiction to hear the appeal in relation to regulation 9.

We further ask you to reconsider your apparent position in relation to RSP’s request for a Regulation 9(5) direction in light of the following passage from the Government’s CIS Guide...

‘When we need to change a subcontractor’s payment status [...] we’ll also contact all contractors who have verified or used the subcontractor in the current or previous 2 tax years. We’ll give the contractors 35 days’ notice of the change [...]

It is apparent that in the present case, RSP did not receive 35 days’ notice between HMRC’s letter dated 29 October 2019, and the relevant payment to RWR, which was necessarily made before 5/12/18.

In the premises, it is clear that Condition A of regulation 9 is satisfied and HMRC should make a Regulation 9(5) Direction in respect of the payment made by RSP to RWR. In any event, RSP is entitled to a formal letter deciding the outcome of its request for a Regulation 9(5) Direction.”

(17) On 19 December 2019, HMRC wrote to FA stating:

“You have requested a Regulation 9(5) direction. Regulation 13(3) of the Income Tax (Construction Industry Scheme) Regulations 2005 states that “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”. Basically legislation precludes HMRC from making any decisions about Regulation 9 claims after a determination had been made.

Once a Regulation 13 determination had been made, Regulation 9(5) cannot be made in respect of any of the amounts included. Neither HMRC nor the tribunal has the power to do so. Even though Regulation 9(9) provides for tribunal to direct HMRC to make a direction under Regulation 9(5), if a regulation 13 determination has already been made then it cannot be overturned on the basis that a Regulation 9(5) direction should have been made. See *Slater v Richardson and Bottoms Ltd*.

The time to make a claim for relief under Regulation 9 was the thirty-day period commencing on 13/12/18 when the warning letter was issued. There was no response within that time and so the determination was raised on 22/1/19.

...

The CIS Guide extract...relates to sub-contractors which lose their Gross Payment Status as a result of non-fraudulent behaviour...Where the sub-contractor has knowingly failed to comply with the provisions of the scheme....Gross Payment Status may be cancelled with immediate effect...This situation arose in the case of RWR...in such instances the contractors which verified the sub-contractors concerned are notified by correspondence on the date that cancellation was effected. In this case Regency was notified by letter in 29/10/18.

...My case is closed.”

(18)The appeal was filed on 5 February 2020:

(a) In box 16 of the appeal form (which asks “why are you late...with your appeal to the tax tribunal), the Appellant stated as follows “HMRC’s review conclusion letter was not dated apart from the month. Therefore the company were under the impression that a further letter would be sent, having heard no more from HMRC until a letter arrived at the end of December 19 from HMRC Compliance.”

(b) In box 17 (Grounds for appeal), the Appellant stated:

“Figures produced by HMRC are fundamentally flawed, Thereby their assessment is incorrect. Our Client has sent correspondence to HMRC pointing out the incorrect amounts used by HMRC. HMRC does not accept our figures and the basis on which we produced our figures and vice versa we do not accept figures produced by HMRC”

6. The Appellant also relied on a written Opinion dated 26 November 2019 provided by specialist tax counsel. That Opinion included the following advice:

“ ...the closest letter to a ‘refusal notice’ (which I have seen) is the View of the Matter letter from HMRC dated 18 March 2019. It is potentially only that letter that can be appealed to the FTT as far as regulation 9 is concerned. However, an alternative analysis would be that HMRC have not yet issued a ‘refusal notice’ in respect of regulation 9(3), in which case RSP should press HMRC to issue such a notice in order to then have the possibility of appealing it to the FTT.

...

In conclusion, RSP should do the following:

- a. Notify a late appeal as soon as possible to the FTT in the terms of the attached draft grounds of appeal. These have been drafted very vaguely to allow RSP to adopt both the argument that no regulation 9(6) refusal notice has been issued and that the View of the Matter letter is a refusal notice.
- b. Write to HMRC in the terms of the attached letter asking for a formal refusal notice under regulation 9(6), which can then be appealed to the FTT in time.”

7. Stephen Dorward, director of the Appellant, gave the following evidence:

- (1) From 30 June 2017, he worked as a consultant for the Appellant.
- (2) On 26 March 2019, he was appointed as a director of the Appellant.
- (3) On 5 June 2019, he purchased all of the shares in the Appellant.

(4) When he purchased the shares in the Appellant he was aware of an ongoing dispute with HMRC in relation to CIS deductions.

(5) The Appellant was heavily reliant on its accountant, FA, in relation to the handling of the dispute with HMRC.

(6) Delay in appealing to the FTT was justified because of “the need to obtain legal representation and an understanding as the commencement of the investigation had become protracted as [HMRC] commenced this case in July 2018. Seeking legal representation was also a costly business, the company had to have funds in place we don’t have the resources of HMRC.”

(7) “The accountants only received notification of a closure notice from HMRC on the 23 December 2019, even though the letter is dated 19 December 2019 it was received Christmas week the secretary filed the letter which was then missed probably down to the festivities.”

(8) “In view of the continued challenges from HMRC, the company decided to instruct [ARC] on the 6 January 2020. They [ARC] arranged a meeting on 29 January 2020...From this meeting they contacted [HMRC in relation to the CIS matter] and discovered the missing letter. They [ARC] actioned the appeals on 5 February 2020.”

8. We accept Mr Dorward’s factual evidence. It is, of course, a matter for the Tribunal to determine whether the delay was justified or otherwise, and whether permission to appeal out of time should be granted.

9. Mark Richardson of ARC gave the following evidence:

(1) ARC represent clients in relation to, amongst other things, HMRC disputes and tax appeals.

(2) ARC were instructed by the Appellant on 6 January 2020 to “examine the financial affairs of the company with reference to HMRC’s enquiries/investigations”.

(3) ARC initiated a meeting with HMRC.

(4) “meeting was arranged for 20 January 2020...HMRC did not want to go over the CIS regulation 13 in any shape or form. They also did not really go into any substantial matters regarding [the other dispute], in reality a very short introductory meeting...”.

(5) On 21 January 2020, he contacted HMRC in relation to the CIS dispute. The decision making officer told him that a letter dated 19 December 2019 had been sent out.

(6) On 21 January 2020, he contacted FA to seek further information, and “it transpired that the letter of 19 December 2019 had been filed but not acted upon”.

(7) He received a copy of the 19 December 2019 letter on 21 January 2020.

(8) On 15 February 2021 he received an email from FA which stated:

“Stephen wanted me to drop you an email on the reason for the delay between June 2019 and December 2019. I recall that HMRC had not issued a closing notice in June 2019, I did not have expertise in the tribunal area and during that period, Stephen got in touch with you in relation to the case.

HMRC then only send the closure notice in December 2019.”

10. We accept Mr Richardson’s evidence.

RELEVANT LAW

11. Regulation 7(1) of the Income Tax (Construction Industry Scheme) Regulations 2005 provides that a contractor must pay to HMRC any amounts that he was liable to deduct under s 61 of the Finance Act 2004.

12. However, where certain conditions are met, HMRC may direct under regulation 9(5) that the contractor is not liable to pay the under-deducted amount to HMRC:

(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.

13. The condition relied on by the Appellant in the present case is set out in regulation 9(3):

“...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.”

14. Regulations 9(6)-(9) provide:

“(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.”

15. Regulation 13 provides:

“(1) This regulation applies if—

...

(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.

...

(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.”

16. In *Barrett*, Judge Berner stated:

“...this tribunal has no jurisdiction to adjust the amount determined by HMRC under regulation 13(2) otherwise than in accordance with the statutory provisions themselves. That, as I have described, is the extent of this tribunal's jurisdiction under s 50(6) TMA. Thus, whilst the tribunal must take account of the effect of regulation 13(3) in excluding from the amount otherwise determined under regulation 13(3) amounts in respect of which a regulation 9(5) direction has been made, once the regulation 13(2) determination is made, the tribunal is precluded from taking into account any subsequent direction that might have been made under regulation 9(5), and a fortiori any amount that could have been the subject of a direction, but in respect of which no direction has been made.”

17. In *Martland v HMRC* [2018] UKUT 178 (TCC), the Upper Tribunal held at paragraph 44 that when considering applications for permission to appeal out of time, the Tribunal can usefully follow the three-stage process set out in *Denton and Ors v TH White Limited and Ors* [2014] EWCA Civ 90.

DISCUSSION AND DECISION

18. The first stage of the *Denton/Martland* process requires us to identify the breach and assess its seriousness. The breach in question is the failure to file an appeal within the statutory deadline. The Appellant should have filed its appeal against the regulation 13 Determination

by no later than 30 July 2019 (the decision letter being dated simply “June 2019”, we have taken the 30 days to run from the end of that month). The Appellant did not file an appeal with the Tribunal until 5 February 2020. We consider a delay of this length to be significant and serious.

19. As to whether there was a separate appealable decision under regulation 9: we acknowledge HMRC’s submission that once a determination had been made under regulation 13, regulation 13(3) precluded HMRC from making a regulation 9(5) direction. We see the force in that argument based on the language of regulation 13(3) but consider that there is something unattractive and rather illogical about HMRC being precluded from considering whether the section 9(3) condition is satisfied simply because they have already issued a regulation 13 determination. We are not assisted by *Barrett* because, unlike the present case, that appeal was concerned with whether the Tribunal could in the course of an appeal against a regulation 13 Determination consider whether the condition in regulation 9(4) was satisfied (whereas in the present case the condition in issue is that in regulation 9(3)) which is a relevant difference because, as Judge Berner pointed out:

“...there is no express right of appeal against a refusal to grant relief under regulation 9(5) of the 2005 Regulations where HMRC are not satisfied that Condition B [provided for in Regulation 9(4)] is met. That is in contrast to the position where the refusal is on the basis that Condition A (which looks to whether reasonable care was taken to comply with the CIS rules, and error in good faith or genuine belief that s 61 FA 2004 did not apply) [as provided for in Regulation 9(3)] is not met; an express right of appeal is provided in that regard by regulation 9(7) and (8).”

However, for the reasons explained below, we consider that we do not need to determine this point and it is better left to be considered in a case where it will be determinative and subject to more detailed argument.

20. Whatever the correct interpretation of regulation 13(3), we are satisfied that the decision maker in the present case did in the early part of 2019 understand that a regulation 9(5) direction could be given even where a regulation 13 Determination had already been made – this is supported by the reference in the 4 February 2019 correspondence to “As your client wishes to make a claim for relief under Reg 9(3) there is a process which needs to be followed”, and by the fact that the 18 March 2019 letter engaged with and responded to the substantive matters relied on by the Appellant in support of the contention that a direction should be given under regulation 9(5) on the basis that the condition in regulation 9(3) was satisfied.

21. We are further satisfied that the letter of 18 March 2019 constituted a “refusal notice” for the purpose of regulation 9(6). Accordingly, any appeal should have been filed by the Tribunal by mid April 2019 or, if the 10 April 2019 letter can be read as also requesting a review of the regulation 9(5) decision, by 30 July 2019 at the very latest (i.e. at the same time as the appeal against the regulation 13 Determination). The Appellant did not file an appeal with the Tribunal until 5 February 2020. We consider a delay of this length to be significant and serious.

22. The second stage of the *Denton/Martland* process requires us to consider the reasons why the default occurred.

23. The Appellant sought to blame the delay in filing the appeal on its previous accountant, saying that it was heavily reliant on them. However, the Appellant has not made good that contention in circumstances where:

(1) We were not provided with any evidence as to what passed between the Appellant and its accountant. We therefore do not know what advice was sought and what advice was given. It seems to us that where a party seeks to justify given action (or lack of

action) on the basis of advice received (or not received, as the case may be) it is incumbent on that party to put before the Tribunal any relevant correspondence or, if no such correspondence exists, to provide by way of witness evidence an account of the advice sought, the advice given and any other relevant dialogue with the advisor on whom the Appellant claims to have relied.

(2) It was made clear to the Appellant that it could challenge HMRC's decisions by appealing to the Tribunal and that there was a time limit in which to do so:

(a) The 18 March 2019 letter made clear that:

“The company now has two options. It can either request an internal Review by an HMRC officer not involved in the case or it can proceed direct to the Tribunal...”

(b) The “June 2019” letter ended:

“If you do not agree with my conclusion, you can ask an independent tribunal to decide the matter...If you want to appeal to the tribunal, you must write to the tribunal within 30 days of this letter. You can find out how to do this on the Tribunals Service website...”

There was no suggestion from the Appellant that it did not see this correspondence. There was no evidence provided to us as to whether the Appellant asked FA about the content of this correspondence (in particular the 30 day time limit) and what advice FA gave in that regard.

(3) HMRC followed up with the Appellant as to whether or not an appeal had been filed: on 20 September 2020, HMRC made clear that “Unless I receive written evidence by the end of this month confirming that Regency has applied to the Tribunal Service, I shall treat the appeal as settled and release £107922.00 for collection...”

There was no suggestion from the Appellant that it did not see this correspondence. There was no evidence provided to us as to whether the Appellant asked FA about the content of this correspondence, and what advice FA gave in that regard.

(4) FA told HMRC that an appeal would be filed by 13 October 2019 and then on 25 October 2019 stated “[t]he reason for the delay in appeal to the Tribunal is because our client has now decided to seek seeking legal advice before any application to the tribunal.”

There was no suggestion from the Appellant that it was not aware of this correspondence or that its accountant was acting otherwise than in accordance with instructions.

(5) At the end of November 2019, the Appellant received clear advice from counsel that the Appellant should file an appeal as a matter of urgency. And yet that did not happen. No satisfactory explanation was provided by the Appellant as to why, on receipt of this advice, immediate steps were not taken to file an appeal.

24. We acknowledge that on being instructed on or about 6 January 2020, ARC appear to have acted with all appropriate diligence, and filed an appeal by 5 February 2020. We understand why, prior to filing the appeal, ARC wanted to gain some understanding of the underlying issues. However, prior to ARC's involvement there had already been significant delay and, in our view, the Appellant has not established a good reason for that delay. As said, we were not provided with any of the correspondence that passed between the Appellant and its accountant but, on the facts as visible to us, the Appellant knew there was a deadline for

filing an appeal to the Tribunal, knew HMRC had followed up and asked whether the appeal had been filed, and yet failed to file an appeal even when counsel made clear that urgent action should be taken.

25. The third stage of the *Denton/Martland* process requires us to consider all the circumstances of the case so as to ensure that the application is dealt with fairly and justly. In addition to the seriousness of the breach and the absence of a good reason for it, we also consider that the need for finality of litigation points towards refusing the application.

26. We recognise that refusing this application means that the Appellant will be unable to proceed with its appeal. But this cannot, in and of itself, justify admitting a late appeal. This is not a case where the merits of the Appellant's appeal are so clear cut that it would be appropriate to factor in those merits when deciding whether to extend time.

27. We also acknowledge that the amount in issue is, on any view, significant. However, in circumstances where we were not provided with any information as to the financial position of the company, this is not a factor that we give any particular weight to.

28. To the extent that the Appellant suggests that the principle of finality should be given less weight because HMRC "were still willing to enter into correspondence as late as 19 December 2019", we do not consider this to be a factor that assists the Appellant on the facts of this case. As late as September 2019, HMRC had indicated that they would not oppose an appeal being filed late if it was filed by 13 October 2019. When no appeal was filed by that date, HMRC made clear that they would not agree to "another unspecified delay". That HMRC responded to a letter in December 2019 does not mean that they somehow tacitly agreed that the Appellant should be permitted to file a late appeal.

29. In assessing all of the circumstances, we have also taken into account the Appellant's submission that the "the failure was that of its accountant". As explained above, the Appellant has not provided us with sufficient evidence for us to be able to reach a conclusion about the advice given and the reliance placed on it.

30. Weighing up all of the circumstances, we are of the view that refusing permission to bring a late appeal is the appropriate course and is not unfair or unjust.

31. For all the reasons above, the Appellant's application is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

32. 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.

**DAVID BEDENHAM
TRIBUNAL JUDGE**

RELEASE DATE: 29 APRIL 2021