



[2021] UKFTT 0482 (TC)

TC 08357

Construction industry scheme – cancellation of gross payment registration supposedly obtained on the basis of false information – shadow director – whether failure to notify shadow director of applicant company to Companies House gave rise to “false information” – whether obligation to notify shadow directors to Companies House under Companies Act 2006 arises – held no (unlike Companies Act 1985) – failure to notify therefore incapable of giving rise to false information allowing cancellation of registration – s 66(3) and 67 Finance Act 2004 – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/09374

BETWEEN

BAGRI SERVICES LIMITED

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE KEVIN POOLE
SHAMEEM AKHTAR**

Sitting in public at Centre City Tower, Birmingham on 20 October 2021, with subsequent written submissions

Mr Jay Vaghela of Vaghela & Co (Services) Limited, Chartered Certified Accounts, for the Appellant

Gary Cruddas, litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against the cancellation with immediate effect of the Appellant's registration for gross payment under the Construction Industry Scheme pursuant to S.66(3) Finance Act 2004 ("FA04") on the grounds that the Appellant's registration had been obtained "on the basis of information which was false". The information in question was the Appellant's omission to disclose in its returns to Companies House that the husband of its sole director was a shadow director of the company, the husband having previously been involved as a director of another company whose gross payment status had been cancelled by HMRC.

2. As will be seen, in response to a legal point raised at the hearing by the Tribunal, HMRC have confirmed they no longer wish to defend the appeal and requested the Tribunal to allow it.

THE FACTS

3. We heard evidence from Tanya Sanderson, the HMRC officer who issued the decision cancelling the Appellant's gross payment registration, and from Mrs Narinder Kaur Johal and her husband Kulvir Singh, both now directors of the Appellant (though Mr Singh was not a director until after the relevant events had taken place, as mentioned below). We also received a bundle of documents which included some 340 pages of documentary evidence.

4. We find the following facts.

5. Mr Kulvir Singh ("KS") was (and remains) the sole director of a company called Bagri Construction Limited, which had been registered with HMRC under the Construction Industry Scheme. It had held "gross payment" status, but HMRC decided to revoke this status on 23 August 2016. The revocation was effective immediately, on the basis that HMRC considered the company had submitted a false application for gross payment status and had knowingly failed to comply with the requirements of the scheme. The company had appealed, but HMRC rejected the appeal and confirmed the decision, following a statutory review, on 5 January 2017. There does not appear to have been any appeal to the Tribunal in respect of that decision.

6. The Appellant was incorporated on 16 September 2016, shortly after Bagri Construction Services Limited had been notified of the revocation of its gross payment status. It was incorporated with Mrs Narinder Kaur Johal ("NKJ") as its sole director and shareholder. NKJ has at all relevant times been the wife of KS.

7. On 16 January 2017 (11 days after HMRC had confirmed the revocation of gross payment status for Bagri Construction Limited), HMRC's CIS registration section received a telephone call from NKJ. A transcript of a recording of that call was included in the documents before us. NKJ started the call by saying that she wanted to register her company under the CIS scheme "for 20%". She had a child with her and was clearly prompted in nearly all her answers to HMRC by a male person. First, she was asked what her position was in the company and her initial response was "manager", but after the male voice could be heard to say "director" in the background, she changed her response to "manager director". In response to questions from the HMRC agent, she then provided the Appellant's UTR number, company name, registered office address and registration number. She confirmed the Appellant was resident in the UK, that its work fell within the scope of the CIS, that it planned to start working in construction on 18 January 2017 (two days later), that the registration should be effective immediately so that contractors could verify the Appellant, that the Appellant would be doing labour supply, had no other business name or trading name, or trading address, and that it was registered for VAT (providing the VAT registration number). She confirmed that the company had not received any payments yet as a subcontractor and wished its accountant (already registered for

corporation tax purposes) to act for it in CIS matters. She confirmed she was “applying for the 20% deduction” and that she was the company secretary. She was then asked to confirm the following declaration: “You declare that you carry out and are seeking construction work or arrange for it to be done. The information you have given is correct and complete to the best of your knowledge and belief. Do you agree?” She replied that she did, and it was confirmed to her that the Appellant was now registered as a subcontractor for 20% deduction. In giving most of her answers to the various questions, it was clear she was being prompted by the male voice in the background, which she and KS confirmed at the hearing was KS.

8. According to the internal submission which was made to officer Sanderson dated 1 May 2019 (apparently received by her on 24 May 2019) when seeking her agreement to the immediate revocation of the Appellant’s gross payment status, the Appellant had been granted such status on 3 April 2017 and had also registered as a contractor under the CIS on 15 May 2017. No copy of any application form submitted by the Appellant for gross payment status nor note or transcript of any telephone call making such application was included in the documents before us.

9. In the context of criminal investigations into possible fraudulent transactions involving chains of companies operating under the CIS, NKJ was interviewed under caution on 9 April 2019 by officers of HMRC at a police station in Derby. She was accompanied by her solicitor.

10. In the course of the interview, NKJ maintained that her husband KS ran the Appellant and she knew nothing about its business. She had been to the bank with him to set up the business bank account, but although she was the authorised signatory, he kept the cheque book and merely presented her with cheques for signature. He managed the bank account online himself. She had also been with him to the accountants a couple of times but had no other contact with them.

11. As a result of what had been said by NKJ at her interview on 9 April 2019, the HMRC caseworker formed the view that the Appellant “became registered for gross payment on the basis of information which was false. The application was made to facilitate the tax losses which had been stopped when HMRC actioned the GPS removal from Kulvir Singh’s original company Bagri Construction Ltd.”

12. The formal determination to cancel the Appellant’s gross payment status was issued on 11 June 2019, and the reasons given for the cancellation (as required by s.66(5) FA04) were set out in that letter, sent by Ms Sanderson:

Schedule 11 of the Finance Act 2004 specifies the requirements for companies to register for gross payment status and includes the requirement to undertake obligations under the Companies Act 1985 (repealed to the Companies Act 2006) to file accurate details of the directors, in the qualifying period which is 12 months before the application to be registered for gross payment. Mrs Johal admitted under caution that she takes no part in the control of the company, which means the company applied for gross payment on the basis of false information in order to pass the compliance test.

...

If you do not agree with my decision, you should appeal in writing to me within 30 days from the date of this notice giving your reasons. If I do not agree, I will explain why and ask if you accept this. If you still disagree, I will offer you a review of our decision by a person not involved in making that decision. I will also tell you about your right to appeal to an independent tribunal.

At a hearing of the appeal the grounds for refusal/cancellation may not be limited to the failures listed above and other aspects of your application may be presented to the tribunal.

Your appeal should reflect your disagreement with the correctness of one or more of the details supporting the failure decision.

13. On 17 June 2019, less than a week after HMRC's original decision to revoke gross payment status, KS was appointed as a director of the Appellant.

14. In a letter dated 27 June 2019 from the Appellant's accountants to HMRC, appealing against the revocation of the Appellant's gross payment status, they said this:

1. The Directors of the Company most vehemently deny they provided false information when applying for gross payment status at the relevant time.

2. Please state precisely and in detail the information supplied to you at the time of registering, which you consider to be false, to enable the Directors to defend the allegations.

3. If Mrs Johal stated she takes no part in the control of the business, according to her she was confused and misunderstood your question. Mrs Johal deals with the paperwork and admin of the Company, signs cheques, goes to the Bank, meets and instructs us regarding VAT, PAYE, tax, matters, approves and signs Company Accounts for submission to Companies House, HMRC, etc. She is also an employee and getting paid wages for her services by the Company. The Company meets tax obligations and pays VAT, PAYE, corporation tax, etc, on time.

4. As Mrs Johal is also a housewife, her husband deals with contractors and site management on behalf of the Company. Surely, married Directors are allowed to delegate their duties in one man/woman band Companies to their other half.

15. HMRC confirmed their original decision in a "view of the matter" letter issued by Ms Sanderson on 4 September 2019 in response to this appeal. They said this in that letter:

As explained in my original letter notifying withdrawal of the company's gross payment status (GPS) this was done on the basis that the company provided false information about the company officers in order to pass the Compliance test to qualify for GPS.

The Compliance test per Schedule 11 of the Finance Act 2004 requires limited companies to file accurate details about it as required under The Companies Act 2006. This includes the person who is responsible for directing the affairs and business dealings of the company.

In registering at Companies House on 16/9/16 the sole director and only person with significant control (100% shareholder) was declared as Mrs Nurinder Kaur Johal. She was therefore declaring herself as responsible and liable for directing the affairs of the company, as outlined in the Companies Act 2006 s170.

As declared in her interview under caution at Derby Police Station on 9th April 2019 Mrs Johal confirmed she was the sole director, but that the entire responsibility for the running of the company was that of you, her husband Mr Kulvir Singh. Mrs Johal's only active participation in the company's affairs was to sign cheques already prepared by you and sign the official paperwork to register the company at Companies House and for tax obligations without even reading such documents.

Mrs Johal knew nothing about the company's customers or suppliers, nor legal responsibilities under VAT and Construction Industry Scheme legislation. Whilst I accept your employed role in the company may have to be to organise the day to day commercial operation of the company, and you may choose to arrange certain operational responsibilities between you as a couple, Mrs Johal is not able to absolve herself of the duties required of a director.

In regard to point 3 of Mr Vaghela's letter of 27th June, all of Mrs Johal's duties quoted (with the exception of signing cheques as previously mentioned) are directly contradicted by her statements during the interview under caution. A full transcript of the recording of that interview has been provided to Mr Vaghela in support of the unequivocal confirmation that Mrs Johal was asked about the running of the company several times about several aspects, and there is no possibility that she misunderstood the question as stated by Mr Vaghela. The duties of director were thus undertaken by you, Mr Singh, confirmed by Mrs Johal, and it is you that has been in full control of the company from the date of incorporation. Identifying Mrs Johal as the company director was therefore falsely declared to Companies House (as she was a director in name only) and therefore false information about the company was provided in order to apply for Gross Payment Status.

FA2004 determines the requirements for application for Gross Payment status. Section 64(7) defines "director" according to the Income Tax (Earnings & Pensions) Act 2003, s67, which in relation to a company whose affairs are managed by a single director or similar person, is that director or person. FA2004 s64(5) allows HMRC to direct that the compliance test appropriate to individuals in Schedule 11 Part 1 can be applied to the director of the company. As the company did not declare the person acting in that capacity we were unable to apply a s64(5) direction, to check the personal compliance of you, Mr Singh.

I therefore find no evidence as presented by your agent in his grounds of appeal to persuade me that my decision to withdraw the company's GPS was not correct.

16. HMRC's decision was confirmed by letter dated 30 October 2019 following a statutory review. The letter confirmed that the original decision was upheld. It said this by way of conclusion:

My Conclusion

Sch11 FA04 clearly sets out the conditions required for a company to be granted Gross Payment Status which includes the business test, the turnover test and the compliance test. It is also written in legislation at Section 64(5) Finance Act 2004, that HMRC may direct that the conditions shall apply to the directors of a company as if they were an individual applicant. A director in this case has the normal meaning of a director as per s67 ITEPA 2003.

While I have not seen the company's initial application for Gross Payment Status in reviewing this case, I am unable then to say whether any direction was also issued in respect of the director, which I note at that time was only Mrs Nurinder Kaur Johal. Any direction made under Section 64(5) FA04 regarding a director, would then have been an examination into whether Mrs Johal personally satisfied the necessary tests. Under Section 66(3)(a) FA04, HMRC can cancel Gross Payment Status where there are reasonable grounds to suspect that the person became registered for Gross Payment Status on the basis of information which was false.

Turning then to the circumstances of this particular case, it is a fact that at the time the application for GPS was made, Mrs Johal was the sole director of the company. What is now being disputed is whether or not she is a director as defined by legislation. I have then given full consideration of the evidence regarding this, and in particular Mrs Johal's interview under caution which took place on 9 April 2019. I have seen the transcript of this interview and Mrs Johal's responses to questions were quite clear regarding the following:

...

Based then on the evidence I have seen, I am in agreement with the caseworker that the company's Gross Payment Status be revoked as there are reasonable grounds to suspect that the registration was based on false information – namely that Mrs Johal was a director of the company. Clearly, and by her own admission, she is a director in name only and it is yourself Mr Kulvir Singh, who has run the business from its inception in the manner usually expected of a company director.

17. The Appellant notified its appeal to the Tribunal on 22 November 2019.

18. In a further interview of NKJ under caution by officers of HMRC in a Derby police station on 5 April 2020, NKJ once again confirmed that it was her husband who ran the Appellant, and that “my name's on the company as a director but I get told what to do”. She reiterated that she knew “nothing about what had been happening with the Appellant”. Paragraph 3 of the letter set out at [14] above was read out to her and she stated she was not aware of that letter, had not given instructions for it to be sent and was not aware who had. She asserted that she was not doing the things referred to in that paragraph and what she was doing was simply acting on what her husband told her to do.

19. At the hearing, when asked whether his wife was accustomed to acting in accordance with his instructions or directions in relation to the Appellant, KS confirmed that she was.

20. We are satisfied that KS was, at all material times up to his formal appointment as a director, a shadow director of the Appellant.

THE LAW

The tax legislation

21. Unlike most decisions cancelling gross payment status for routine compliance failures and so forth, which are generally made under s.66(1) FA04, the decision in this case was made under s.66(3) FA04, which provides, so far as relevant, as follows:

The Board of Inland Revenue may at any time make a determination cancelling a person's registration for gross payment if they have reasonable grounds to suspect that the person –

- (a) became registered for gross payment on the basis of information which was false....

22. As a result, the gross payment status was cancelled with immediate effect (see s.66(4) FA04), as opposed to the more usual cancellation decisions, which do not take effect until any appeal has been finally decided (see s.67(5) FA04).

23. The requirements for registration of a company for gross payment status are set out in s.64(4) to (7) FA04, which read as follows:

64(4) Where the application is for the registration for gross payment of a company (otherwise than as a partner in a firm) –

- (a) the company must satisfy the conditions in Part 3 of Schedule 11 to this Act, and

(b) if the Board of Inland Revenue have given a direction under subsection (5), each of the persons to whom any of the conditions in Part 1 of that Schedule applies in accordance with the direction must satisfy the conditions which so apply to him.

64(5) Where the applicant is a company, the Board may direct that the conditions in Part 1 of Schedule 11 to this Act or such of them as are specified in the direction shall apply to –

- (a) the directors of the company,
- (b) if the company is a close company, the persons who are the beneficial owners of shares in the company, or
- (c) such of those directors or persons as are so specified,

as if each of them were an applicant for the registration for gross payment.

64(6) See also section 65(1) (power of Board to make direction under subsection (5) on change in control of company applying for registration etc).

64(7) In subsection (5) “director” has the meaning given by section 67 of the Income Tax (Earnings and Pensions) Act 2003 (c, 1)¹.

24. The provisions dealing with cancellation of registration for gross payment are set out in s.66 FA04, which reads as follows:

66 Cancellation of registration for gross payment

(1) The Board of Inland Revenue may at any time make a determination cancelling a person's registration for gross payment if it appears to them that—

- (a) if an application to register the person for gross payment were to be made at that time, the Board would refuse so to register him,
- (b) he has made an incorrect return or provided incorrect information (whether as a contractor or as a sub-contractor) under any provision of this Chapter or of regulations made under it, or
- (c) he has failed to comply (whether as a contractor or as a sub-contractor) with any such provision.

(2) Where the Board make a determination under subsection (1), the person's registration for gross payment is cancelled with effect from the end of a prescribed period after the making of the determination (but see section 67(5)).

(3) The Board of Inland Revenue may at any time make a determination cancelling a person's registration for gross payment if they have reasonable grounds to suspect that the person—

- (a) became registered for gross payment on the basis of information which was false,
- (b) has fraudulently made an incorrect return or provided incorrect information (whether as a contractor or as a sub-contractor) under any provision of this Chapter or of regulations made under it, or
- (c) has knowingly failed to comply (whether as a contractor or as a sub-contractor) with any such provision.

(4) Where the Board make a determination under subsection (3), the person's registration for gross payment is cancelled with immediate effect.

¹ This section extends the definition of “director” to include “any person in accordance with whose directions or instructions the directors of the company... are accustomed to act”.

(5) On making a determination under this section cancelling a person's registration for gross payment, the Board must without delay give the person notice stating the reasons for the cancellation.

(6) Where a person's registration for gross payment is cancelled by virtue of a determination under subsection (1), the person must be registered for payment under deduction.

(7) Where a person's registration for gross payment is cancelled by virtue of a determination under subsection (3), the person may, if the Board thinks fit, be registered for payment under deduction.

(8) A person whose registration for gross payment is cancelled under this section may not, within the period of one year after the cancellation takes effect (see subsections (2) and (4) and section 67(5)), apply for registration for gross payment.

(9) In this section "a prescribed period" means a period prescribed by regulations made by the Board.

25. Any decision to cancel gross payment status can be appealed under s.67 FA04, which provides as follows:

67 Registration for gross payment: appeals

(1) A person aggrieved by—

- (a) the refusal of an application for registration for gross payment, or
- (b) the cancellation of his registration for gross payment,

may by notice appeal .

(2) The notice must be given to the Board of Inland Revenue within 30 days after the refusal or cancellation.

(3) The notice must state the person's reasons for believing that—

- (a) the application should not have been refused, or
- (b) his registration for gross payment should not have been cancelled.

(4) The jurisdiction of the tribunal on such an appeal that is notified to the tribunal shall include jurisdiction to review any relevant decision taken by the Board of Inland Revenue in the exercise of their functions under section 63, 64, 65 or 66.

(5) Where a person appeals against the cancellation of his registration for gross payment by virtue of a determination under section 66(1), the cancellation of his registration does not take effect until whichever is the latest of the following—

- (a) the abandonment of the appeal,
- (b) the determination of the appeal by the tribunal, or
- (c) the determination of the appeal by the Upper Tribunal or a court.

26. The conditions in Part 3 of Schedule 11 FA04 (referred to in s.64(4) FA04 above) are divided into a "business test", a "turnover test" and a "compliance test". The business test and turnover test are not relevant for present purposes.

27. The compliance test includes the following, at paragraph 12(5) of Schedule 11 FA04:

(5) The company must have complied with any obligations imposed on it by the following provisions of the Companies Act 1985 (c 6) insofar as those obligations fell to be complied with within the qualifying period² –

(a) ...

(b) section 288(2) (return of directors and secretary and notification of changes therein);

The Companies legislation and its link to the tax legislation

28. Until its repeal with effect from the end of 30 September 2009, Companies Act 1985 (“CA85”) provided (so far as relevant) as follows:

288. Register of directors and secretaries.

(1) Every company shall keep at its registered office a register of its directors and secretaries; and the register shall, with respect to the particulars to be contained in it of those persons, comply with sections 289 and 290 below.

(2) The company shall, within the period of 14 days from the occurrence of—

(a) any change among its directors or in its secretary, or

(b) any change in the particulars contained in the register,

send to the registrar of companies a notification in the prescribed form of the change and of the date on which it occurred; and a notification of a person having become a director or secretary, or one of joint secretaries, of the company shall contain a consent, signed by that person, to act in the relevant capacity.

...

(6) For purposes of this and the next section, a shadow director of a company is deemed a director and officer of it.

29. It is accordingly quite clear that under CA85, a company was required to include shadow directors in its register of directors and notify their appointment to Companies House.

30. Paragraph 6 of the Companies Act 2006 (Consequential Amendments)(Taxes and National Insurance) Order 2009 amended Schedule 11 FA04 by the addition of the following paragraph 14A:

14A(1) For any part of the qualifying period falling on 1 October 2009 or later, paragraph 12(5) must be understood as referring instead to—

(a) the Companies Act 2006 (c. 46) sections 394, 395, 437 and 441 (accounts);

(b) sections 167(1), 167(2), 276(1) and 276(2) of that Act (changes in director or secretary);

(c) Part 24 of that Act (annual returns);

(d) regulations under Part 34 of that Act (overseas companies) which are about—

(i) registration of particulars,

(ii) accounts, reports or returns,

² Paragraph 14 of Schedule 11 FA04 defines this as meaning "the period of 12 months ending with the date of the application in question".

(iii) trading disclosures.

(2) For such part of the qualifying period, paragraph 12(6) must be disregarded and paragraphs 12(7)(a) and 12(8) understood as referring to subparagraphs (1) to (5) instead of (1) to (6).”

31. The effect of this provision is that in relation to this appeal (where the whole of the “qualifying period” fell on or after 1 October 2009), the provisions of the Companies Act 1985 referred to above are irrelevant and instead it is necessary to refer to the provisions of the Companies Act 2006 in applying the compliance test.

32. Companies Act 2006 (“CA06”) provides, so far as relevant, as follows:

162 Register of directors

- (1) Every company must keep a register of its directors.
- (2) The register must contain the required particulars (see sections 163, 164 and 166) of each person who is a director of the company.
- (3) The register must be kept available for inspection—
 - (a) at the company's registered office, or
 - (b) at a place specified in regulations under section 1136.
- (4) The company must give notice to the registrar—
 - (a) of the place at which the register is kept available for inspection, and
 - (b) of any change in that place,unless it has at all times been kept at the company's registered office.
- (5) The register must be open to the inspection—
 - (a) of any member of the company without charge, and
 - (b) of any other person on payment of such fee as may be prescribed.
- (6) If default is made in complying with subsection (1), (2) or (3) or if default is made for 14 days in complying with subsection (4), or if an inspection required under subsection (5) is refused, an offence is committed by—
 - (a) the company, and
 - (b) every officer of the company who is in default.

For this purpose a shadow director is treated as an officer of the company.

(7) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of the greater of £5,000 or level 4 on the standard scale.

(8) In the case of a refusal of inspection of the register, the court may by order compel an immediate inspection of it.

167 Duty to notify registrar of changes

- (1) A company must, within the period of 14 days from—
 - (a) a person becoming or ceasing to be a director, or
 - (b) the occurrence of any change in the particulars contained in its register of directors or its register of directors' residential addresses,give notice to the registrar of the change and of the date on which it occurred.
- (2) Notice of a person having become a director of the company must—

(a) contain a statement of the particulars of the new director that are required to be included in the company's register of directors and its register of directors' residential addresses, and

(b) be accompanied by a statement by the company that the person has consented to act in that capacity.

(3) Where—

(a) a company gives notice of a change of a director's service address as stated in the company's register of directors, and

(b) the notice is not accompanied by notice of any resulting change in the particulars contained in the company's register of directors' residential addresses,

the notice must be accompanied by a statement that no such change is required.

(4) If default is made in complying with this section, an offence is committed by—

(a) the company, and

(b) every officer of the company who is in default.

For this purpose a shadow director is treated as an officer of the company.

(5) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of the greater of £5,000 or level 4 on the standard scale.

250 “Director”

In the Companies Acts “director” includes any person occupying the position of director, by whatever name called.

251 “Shadow director”

(1) In the Companies Acts “shadow director”, in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act.

(2) A person is not to be regarded as a shadow director by reason only that the directors act—

(a) on advice given by that person in a professional capacity;

(b) in accordance with instructions, a direction, guidance or advice given by that person in the exercise of a function conferred by or under an enactment;

(c) in accordance with guidance or advice given by that person in that person's capacity as a Minister of the Crown (within the meaning of the Ministers of the Crown Act 1975).

(3) A body corporate is not to be regarded as a shadow director of any of its subsidiary companies for the purposes of—

Chapter 2 (general duties of directors),

Chapter 4 (transactions requiring members' approval), or

Chapter 6 (contract with sole member who is also a director),

by reason only that the directors of the subsidiary are accustomed to act in accordance with its directions or instructions.

DISCUSSION

The issue before the Tribunal and the burden of proof

33. HMRC argued in their statement of case that the issue for the Tribunal to decide is “whether the Respondents had reasonable grounds to suspect that the Appellant became registered for gross payment on the basis of information which was false”. In their skeleton argument, they modified this slightly, arguing that the issue was “whether HMRC had reasonable grounds to believe the Appellant had provided false information when registering for GPS”.

34. As to the burden of proof, in their statement of case HMRC stated that “the burden of proof is with HMRC to prove that it had reasonable grounds for suspecting that the Appellant became registered for gross payment on the basis of information which was false”. We would expand on this slightly, to observe that of course whether or not HMRC had reasonable grounds for such a suspicion, gross payment status could only be withdrawn if the relevant information was in fact false.

Did the Appellant become registered for GPS on the basis of information which was false?

Detailed basis of HMRC’s decision

35. HMRC’s stated grounds for cancelling the Appellant’s GPS registration have been expressed differently at various stages.

36. In the original determination dated 11 June 2019 (see [12] above), the reason given was somewhat unclear, but implied that since NKJ took no part in the control of the Appellant, its returns of directors to Companies House were inaccurate in a way which was not specified.

37. In response to the appeal against their decision, a little more detail of HMRC’s position was provided in their letter dated 4 September 2019 (see [15] above). It was said that the Appellant was in breach of its obligation under Schedule 11 FA04 to “file accurate details about it as required under the Companies Act 2006. This includes the person who is responsible for directing the affairs and business dealings of the company.” This, it was said, was because NKJ had been notified to Companies House on 16 September 2016 (its date of incorporation) as the sole director and only person with significant control of the Appellant and was therefore declaring herself as responsible and liable for directing the affairs of the Appellant – which was clearly false in the light of her statements under caution on 9 April 2019. It was said that the failure to disclose KS’s true role had deprived HMRC of the opportunity of applying the personal compliance requirements to him by a direction under s.64(5) FA04.

38. In their review letter dated 30 October 2019 (see [16] above), the stated basis of HMRC’s decision had shifted slightly. Somewhat surprisingly, the review officer said that she had not seen the Appellant’s original application for gross payment status. However, she was satisfied by the evidence before her that the original decision to cancel was justified on the basis that NKJ was not in fact a director of the Appellant (by reason of being a director “in name only”); by representing that she was, the application was based on false information.

39. In their statement of case, HMRC reverted back to an argument similar to that set out in their “view of the matter” letter dated 4 September 2019, arguing that “the list of directors should have included Mr Singh, but didn’t”, and that the omission amounted to the provision of false information.

40. Finally, in their skeleton argument, HMRC appeared to nail their colours more definitively to the argument that KS was a shadow director, his details should have been (but were not) included in a notification to Companies House of his status as such; and that due to

this omission HMRC were unable to issue a direction under s.64(5) FA04 that he should be included in deciding whether the compliance condition was satisfied. As such, the notifications that were made to Companies House amounted to “information which was false”. This was the argument pursued at the hearing.

Companies Act obligations

41. We had already carried some preliminary research prior to the hearing, which led us to doubt the basis of HMRC’s argument. In short, whilst the position under CA85 had been quite clear, in that shadow directors were required to be formally entered in the company’s register of directors and their appointment notified to Companies House, we doubted whether CA06 contained a similar requirement. If this view were correct, clearly it would entirely undermine HMRC’s case – if there were no statutory requirement to notify shadow directors to Companies House, then quite clearly a failure to do so could not amount to the provision of “information which was false”, even if the returns to Companies House formed part of the basis upon which HMRC registered the Appellant for gross payment status. As this point had not been properly addressed in the documents before us and the parties were obviously not ready to argue the point in detail at the hearing, we considered it appropriate to delay reaching a decision until the parties had been given an opportunity of considering the issue which concerned us and making written representations on it following the hearing. We therefore adjourned the hearing after hearing all the evidence and made directions for the parties to deliver written representations on the point, with the representations of HMRC to be delivered first.

42. In a little more detail, the point which we put to the parties was as follows.

43. It is notable that under CA85, there used to be a specific obligation on a company to include shadow directors in its register of directors, and accordingly to notify Companies House of the appointment of any shadow director: s.288(6) CA85 is quite clear in this.

44. However, the position under CA06 is different. On the face of the legislation, the obligation to keep a register of directors (s.162 CA06) and to notify changes of director to Companies House (s.167 CA06) apply only in relation to a “director”. There is no provision analogous to s 288(6) CA85 making it explicit that a shadow director is “deemed an officer and director of the company” for the purposes of the obligation to include him/her in the register of directors and notify his/her appointment to Companies House.

45. Mr Cruddas had initially submitted that s.162(6) CA06 had a similar effect to s.288(6) CA85, by stating that “For this purpose a shadow director is treated as an officer of the company”.

46. We tended to disagree with this analysis. The provision Mr Cruddas cites is clearly applicable only to s.162(6), making it clear that a shadow director will be regarded as an officer of the company for the purpose of deciding whether he/she should be liable for an offence of failing to maintain the company’s register of directors appropriately and notify Companies House where the register is kept; even if one refers instead to s.167(4) CA06 (the provision which establishes an offence for failing to notify appointments or changes in the directorate to Companies House) it is again clear that the only purpose of including the words “For this purpose a shadow director is treated as an officer of the company” is to make a shadow potentially guilty (as a deemed officer of the company) of an offence for failure to deliver the requisite details to Companies House. We considered it to be clear that the words in question (in either place) do not have a wider effect of including shadow directors within the scope of the “directors” in respect of whom details must be supplied to Companies House under s.167 CA06.

47. Furthermore, in our view the general interpretation provisions in CA06 do not appear to have that effect either. Under s.250 CA06, it is clear that “any person occupying the position of director, by whatever name called” is included as a “director” for the purposes of CA06 as a whole; however, any suggestion that a shadow director might be intended to be encompassed within this definition is negated by s.251, which deals separately with shadow directors, defining them in terms which clearly assume they are not “directors” in their own right. S. 250 CA06 in our view is intended to cover the situation where a company gives a different name (such as “trustees” or “management board members”) to the persons who carry out all the functions of directors.

48. Thus we were driven to the provisional conclusion that unlike under CA85, there is no obligation on a company under CA06 to include shadow directors in its register of directors, or to notify Companies House of the appointment, removal or change of details of any shadow director. If this were correct, it would follow that the returns which had been made to Companies House in this case could not be said to amount to “information which was false”, nor therefore, insofar as HMRC relied on those returns, was the Appellant registered for gross payment “on the basis of information which was false”. Thus, even if HMRC had adduced evidence that they actually relied on the returns to Companies House in granting gross payment status, their argument under this heading could not have succeeded.

49. In passing, though the point was only mentioned in HMRC’s letter dated 4 September 2019 and has not since been advanced, we discount any suggestion that the content of the Appellant’s incorporation documents in September 2016 can be treated as “information which was false” at the time the Appellant applied for gross payment status in April 2017; those documents did not purport to speak to the future, only to provide confirmation of the state of affairs at the date of incorporation.

50. In response to our direction for written submissions, HMRC replied after due consideration as follows:

1. HMRC understand the legal point raised at the hearing by Judge Poole and referenced in the Tribunal Directions to be as follows:

“In relation to the Register of directors and secretaries, within the 1985 Companies Act (section 288) there was a specific requirement that shadow directors had to be notified to Companies House but no such requirement exists in the 2006 Act (section 167) and if that was the case the omission may be fatal to HMRC’s arguments”.

2. HMRC has considered the legal point raised by Judge Poole with policy colleagues and having taken internal legal advice, HMRC do not think the legislation, as it now applies, refers to shadow directors within the context of Schedule 11 Finance Act 2004.

3. Schedule 11 FA 2004 was amended by The Companies Act 2006 (Consequential Amendments) (Taxes and National Insurance) Order 2009 SI No 1890 which amended the conditions for registration for gross payment within the Construction Industry Scheme.

4. Schedule 11, Part 4, paragraph 14A(1) Finance Act 2004 (“FA 2004”) provides the provisions of the Companies Act 2006 (“CA 2006”) that must be complied with in order to satisfy the compliance test required for gross payment registration in respect of a company.

5. In the original enactment, the relevant provisions in Schedule 11 FA 2004 relating to directors was section 288 Companies Act 1985 (“CA1985”) and following the amendments brought about by The Companies Act 2006

(Consequential Amendments) (Taxes and National Insurance) Order 2009 sections 167(1) and (2) CA 2006.

3.1³ Section 288 CA1985 defined a company's responsibilities in respect of the register of directors and secretaries. In particular, section 288(6) stated "For the purposes of this and the next section, a shadow director of a company is deemed a director and officer of it".

3.2 Section 167(1) CA 2006 relates to a duty to notify the registrar of changes concerning someone becoming or ceasing to become a director (section167(1)(a) CA 2006) or changes in a director's particulars (s.167(1)(b) CA 2006).

3.3 Section 167(2) CA 2006 provides that notice of a person having become a director must contain a statement of the particulars of the new director that are required to be included in the company's register and (section 167(2)(a) and be accompanied by a statement from the company that the person has consented to act in that capacity (section 167(2)(b) [sic].

3.4 The explicit omission of a similar provision to section 288(6) CA 1985 in section162 CA 2006 (Register of directors) suggests that there was no intent that shadow directors be included in the register of directors post-CA 2006.

4 On the basis of the above analysis, HMRC no longer wish to defend the appeal and as such do not make closing submissions in relation to the Appellant's appeal.

5 HMRC respectfully asks the Tribunal to allow the Appellant's appeal against HMRC's decision to cancel the Appellant's Gross Payment status on the basis of information that was false.

6 HMRC have re-instated the Appellant's Gross Payment Status within the Construction Industry Scheme with immediate effect.

Any other information?

51. Whilst HMRC have confirmed their wish to concede the appeal on the basis of the point we had raised at the hearing, for the sake of completeness we considered it appropriate to indicate our views on the question of whether there could be said to be any other information which was false, on the basis of which gross payment registration was granted.

52. At one point (see [38] above), HMRC had asserted that because NKJ was considered to be a "director in name only", she was therefore not in fact a director at all, and the information comprised in her registration as such at Companies House was therefore false. We reject any such suggestion. It is quite clear that any person who accepts a formal appointment as a director of a company is, in law, a director and as such becomes subject to all the obligations imposed on directors by law. This fact is not affected by any failure of that person to discharge those obligations, for example by seeking to delegate all responsibility in relation to the company's affairs to some other person (thereby acting as "a director in name only").

53. We consider there was nothing to be found in the evidence before us which pointed to any other information available to HMRC at the time of making their decision on GPS status being "false". In the original telephone call applying for registration under the CIS, whilst there were indications in the way the call was conducted that might have put HMRC on enquiry to ask whether there was a shadow director, they did not make any such enquiry, and there does

³ The numbering of HMRC's written submissions from this point on is reproduced from the original, in spite of its obvious incorrectness. This does not affect the sense of the submissions themselves.

not appear to have been any information made available to HMRC in the course of that conversation which could be regarded as “false”. Nor could it fairly be said that NKJ’s omission to volunteer the existence of a shadow director when describing herself as the sole director rendered “false” the information which she actually supplied: unless it was made clear to her that she should include shadow directors when informing HMRC of the identity of the Appellant’s directors, her reference to herself as the sole director was clearly correct.

54. The evidence that HMRC actually relied on the information filed by a company at Companies House when granting GPS was, at best, equivocal. We would have expected a clear statement of such reliance, with details of how it was actioned in the course of the approval process.

55. There was no evidence at all before us as to the content of the subsequent application for gross payment status. Clearly therefore it cannot be said that any false information was provided to HMRC in the course of that application.

CONCLUSION

56. It follows that even though there are obvious concerns on their part about the conduct of the Appellant’s business and its potential abuse of gross payment status, HMRC have accepted that the gross payment registration was not obtained on the basis of information that was false and that accordingly their decision to cancel that registration cannot be justified on the statutory basis.

57. It follows that the appeal must, as HMRC concede, be **ALLOWED**. It goes without saying that if HMRC had actually asked the Appellant, before registering it for gross payment status, whether there was any person apart from NKJ who was involved in the management or control of the Appellant or its business, including any person who would be regarded as a shadow director under s.251 CA06, then cancellation of the Appellant’s gross payment status would undoubtedly have been justified under s.66(3) FA04 if NKJ had not informed HMRC about KS’s status as a shadow director.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

58. 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.

**KEVIN POOLE
TRIBUNAL JUDGE**

Release date: 30 DECEMBER 2021