[2019] UKFTT 0200 (TC)

TC07048

Appeal number: TC/2018/01467

INCOME TAX – Penalty imposed on company for inaccuracy in Construction Industry Scheme return – (Sch 24 FA 2007) – Personal Liability Notice issued to director of the company (para 19 Sch 24 FA 2007) – Whether inaccuracy was "deliberate"

FIRST-TIER TRIBUNAL
TAX CHAMBER

NEIL ANTHONY FARROW **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR DAVID MOORE

Sitting in public at Manchester on 9 January 2019

Charlotte Brown, counsel, for the Appellant

David Lewis, Presenting Officer, for the Respondents

DECISION

Introduction

1. The Appellant appeals against a personal liability notice ("**PLN**") issued by HMRC on 8 September 2017 under paragraph 19(1) of Schedule 24 to the Finance Act 2007 ("**Schedule 24**").

2. The effect of the PLN is to make the Appellant personally liable for 50% of certain penalties imposed by HMRC under Schedule 24 on Spectrum Contracting Services Ltd ("**Spectrum**"), a company of which the Appellant was at material times a director. The person who was at material times the other director of that company has been made personally liable to the other 50% of those penalties.

3. The penalties were imposed on Spectrum in respect of inaccuracies found by HMRC to be contained in its Construction Industry Scheme ("**CIS**") returns. The HMRC case is that Spectrum's CIS returns should have included, but failed to include, payments made by Spectrum to various companies which are referred to by HMRC as "umbrella companies", and referred to by the Appellant as "service companies" or "payroll companies". The use of these various expressions in the decision below reflects the terminology used by the parties, and does not of itself imply any findings by the Tribunal as to the particular nature of these companies.

Factual background

4. Spectrum was incorporated in April 2005. From the time of its incorporation, the Appellant was a director and major shareholder. According to HMRC he was originally the 99% shareholder.

5. On 24 February 2016, HMRC officers undertook a compliance visit at Spectrum's business premises. HMRC were looking into Spectrum's compliance with respect to both VAT and CIS. During that visit HMRC officers spoke to the Appellant and to Spectrum's finance manager Mr Chris Stevenson. Also present for part of the meeting were Nimesh Pau and Dipesh Modi of the firm R Pau & Co, who were Spectrum's accountants. During the meeting, HMRC put it to the Appellant and to Mr Stevenson that Spectrum had been making payments to various companies without deducting CIS tax. The Appellant and Mr Stevenson freely admitted that this was the case, and stated that it had been their understanding that the CIS did not apply to payments made to service or payroll companies rather than to subcontractors directly.

6. In a letter dated 19 May 2016, HMRC advised Spectrum that its gross payment status under the CIS was being cancelled as a result of compliance failures identified during the 24 February 2016 visit.

7. Spectrum appealed to HMRC against the cancellation of its gross payment status. HMRC upheld its decision to withdraw gross payment status in a letter dated 24 June 2016 and in a review decision dated 23 September 2016. The review decision

concluded that there were reasonable grounds to suspect that Spectrum had fraudulently made an incorrect return or failed to comply with CIS provisions, given that all of its CIS returns were nil returns and it had not included any payments to any contractors in the CIS returns. That decision acknowledged that HMRC had no direct evidence that Spectrum had behaved fraudulently, and that the HMRC case was based on circumstantial evidence alone.

8. Spectrum subsequently went into administration. The Appellant's evidence, which HMRC have not sought to dispute, is that this was due to the cash flow consequences of the cancellation of Spectrum's gross payment status. It is however noted that in the notes of the 24 February 2016 meeting, the Appellant is recorded as stating that Spectrum might become unprofitable in the future.

9. In two letters to Spectrum dated 4 October 2016, HMRC concluded that Spectrum had made payments to subcontractors without deducting and paying to HMRC the amounts that should have been so deducted under the CIS. The letters concluded that Spectrum did not satisfy the conditions to be relieved of that obligation under regulation 9(5) of the Income Tax (Construction Industry Scheme) Regulations 2005 (the "**Regulations**").

10. On 4 November 2016, HMRC issued to Spectrum pursuant to regulation 13 of the Regulations determinations of CIS tax liability in respect of tax years 2013-14 and 2015-16.

11. On 28 June 2017, HMRC issued to Spectrum's administrators a notice of penalties that HMRC intended to impose on Spectrum under Schedule 24 (for submitting inaccurate CIS returns) and under Schedule 55 to the Finance Act 2009 ("**Schedule 55**"). This was copied to the Appellant on 30 June 2017.

12. On 7 September 2017, HMRC sent to Spectrum a notice of penalty assessment, setting out penalties under Schedule 24 and Schedule 55 in respect of periods from 6 April 2012 to 6 April 2016.

13. On 8 September 2017, the PLN to which these proceedings relate was sent to the Appellant and the other director of Spectrum, making each of them liable to 50% of the penalties imposed on Spectrum.

14. On 3 November 2017, the Appellant appealed to HMRC against the PLN.

15. HMRC upheld the PLN in a letter dated 8 November 2017. However, a subsequent HMRC review decision dated 19 January 2018 confirmed that only the Schedule 24 penalties should have been included in the PLN.

16. On 15 February 2018, the Appellant appealed to this Tribunal.

Applicable legislation

17. Paragraph 1 of Schedule 24 provides that a penalty is payable where a person ("P") gives HMRC a CIS return which contains an inaccuracy that amounts to or

leads to an understatement of a liability to tax, where that inaccuracy was either "careless" or "deliberate".

18. Paragraph 3(1) of Schedule 24 provided that an inaccuracy is:

> (a) "careless" if the inaccuracy is due to failure by P to take reasonable care,
>
> (b) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and
>
> (c) "deliberate and concealed" if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

19. Paragraph 19 of Schedule 24 provides that in cases where a penalty is payable by a company for a *deliberate* inaccuracy which was attributable to an officer of the company, the officer is liable to pay such portion of the penalty (which may be 100%) as HMRC may specify by written notice to the officer.

The Appellant's evidence

20. In his witness statement, the Appellant states amongst other matters as follows.

21. He first started work in the recruitment sector in around 2001, and worked for two different companies specialising in recruitment in the construction industry. In 2005, he set up his own business as a recruitment consultant and to this end he incorporated Spectrum. At its inception, Spectrum was basically a one person operation, but ultimately grew to have a turnover of many millions of pounds.

22. The Appellant's role within Spectrum was in sales and marketing. He was the "face" of the business, responsible for driving the company forward, and he always relied on other professionals to deal with back office functions. He never had any day to day involvement in any of the back office operations of the company, including CIS matters.

23. At the beginning, Spectrum outsourced its back office function to an external company called Logic Systems Management Limited. It then gave this function to another external company called Easypay Services Limited. Then, for a period from 2008, on the advice of a senior manager newly recruited by Spectrum, it brought the back office function in house with a view to saving costs. However, this was not successful and the function was subsequently outsourced again to Easypay.

24. In 2013, Spectrum reached a level of turnover which made it economically unviable to continue outsourcing the back office function, which was then brought back in house again following the arrival of Chris Stevenson as Spectrum's finance manager, who recruited a team to perform this function under his direction.

25. The revocation of Spectrum's gross payment status had a massive impact on the company's cash flow. Once its appeal against that decision was rejected by HMRC, Spectrum had no choice but to seek advice from an insolvency practitioner, and Spectrum went into administration.

26. The Appellant is now in a perilous financial position personally. He did not personally gain from any of the alleged conduct and had no personal motive to defraud HMRC. He would never have acted dishonestly in any matter relating to his business, and would not deliberately have caused damage to the reputation of the company which was one of the leading providers of workers to the construction industry.

27. In cross-examination, the Appellant stated amongst other matters as follows.

28. Spectrum's business was to provide "workers" or "operatives" to clients in the construction industry. Normally, Spectrum would itself find the individual workers, through databases and other sources. Once workers had been found, they would be engaged by a service company which took care of their PAYE and CIS. The end user would pay Spectrum for providing the operatives. The service company would take a fee for its services from the individual workers.

29. The reason for having these service companies was so that Spectrum would not have to do the payroll for the operatives. Some workers stipulated which service company they wanted to use, otherwise Spectrum would choose one for them.

30. In about 2011, the Appellant was approached by Mr Phil Taylor-Guck. Around 2012, they and a third person set up a company called PGF Investments Ltd ("**PGF**"), which the three of them owned in equal shares. PGF became the owner of Spectrum. PGF also owned a number of other companies, including Multiwork 505 Ltd and Multiwork Adapt Ltd. PGF declared a dividend of half a million pounds in 2015-16.

31. In reply, the Appellant stated amongst other matters as follows. At the time neither he nor his accountant thought that the service companies were in the CIS system.

The evidence of HMRC Officer Mercer

32. In his witness statement, HMRC Officer Mercer stated amongst other matters as follows.

33. Not all of the companies to which Spectrum made payments (which he referred to as "umbrella companies") had CIS gross payment status. If the umbrella company held gross payment status, Spectrum should have paid the umbrella company without deduction of CIS tax, but should have declared the payment in its CIS return. However, Spectrum did not include such payments in its CIS returns. If the umbrella company did not hold gross payment status, Spectrum should when making payment have deducted the CIS tax and paid this to HMRC. However, Spectrum did not do this.

34. Spectrum provided HMRC with full details of payments made to umbrella companies for the years ending 30 April 2015 and 30 April 2016, but despite HMRC issuing an information notice, did not provide details for the years ending 30 April 2013 and 30 April 2014.

35. In cross-examination, Officer Mercer stated amongst other matters as follows. In 2014, the CIS rules changed, requiring subcontractors to be employees. Rather than employment agencies having to pay PAYE and NIC, it became common practice in the industry to use umbrella companies to do that.

The Appellant's submissions

36. The Tribunal must determine, first, whether the inaccuracy penalty for deliberate behaviour was properly imposed on Spectrum, and secondly, whether the deliberate behaviour is attributable to the Appellant. At both stages the burden of proof falls on HMRC.

37. The evidence does not establish that someone acting on Spectrum's behalf intentionally and knowingly understated Spectrum's liability to CIS tax (reliance was placed on *Auxilium Project Management Ltd v Revenue and Customs* [2016] UKFTT 249 (TC)). The Appellant could not challenge the Schedule 24 penalty imposed on Spectrum as the company was in administration so that he had no standing to do so. The mere fact that the penalty was unchallenged does not mean that Spectrum's behaviour was deliberate.

38. Even if the evidence did establish that someone acting on Spectrum's behalf intentionally and knowingly understated Spectrum's liability to CIS tax, the evidence does not establish that Spectrum's deliberate inaccuracy was attributable to the Appellant. Inadequate reasons are given in the PLN. A serious allegation of deliberate behaviour cannot be based on mere assumptions and supposition rather than evidence. There are no specific allegations of deliberate behaviour by the Appellant, or supporting evidence.

The HMRC submissions

39. The word "deliberate" is not defined in the legislation, nor is there any currently binding case law, and the case law is not consistent (reference was made to *Lyth v Revenue and Customs* [2017] UKFTT 549 (TC) at [23]-[24]).

40. The onus of proof is on HMRC to show on a balance of probability that the behaviour and actions leading to the penalty being issued to Spectrum was attributable to the Appellant as an officer of the company.

41. Spectrum would in all probability have been made aware that the contractors it worked for considered that Spectrum's supply of labour fell within the CIS, given that Spectrum was registered as a sub-contractor in 15 August 2007 and received payments from its contractors subject to CIS deductions for 6 months before it applied for gross payment status under the CIS. Thereafter, Spectrum continued to supply its

tax reference to its contractors in order to receive gross payments, which indicates that the Appellant understood the purpose of gross payment status. Spectrum continued to submit CIS returns including nil returns, which is at odds with the Appellant's claim that he did not think CIS applied to umbrella and payroll companies.

42. The deliberate inaccuracy was attributable to the Appellant. He was involved in the day to day running of Spectrum's business and in control of its finances. He confirmed at the 24 February 2016 meeting that he understood the purpose of gross payment status. He has worked within the construction industry for many years and has owned other companies registered as contractors or subcontractors under the CIS. The Appellant owns a company which in turn owns one of the companies (Multiwork 505 Ltd) that is paid by Spectrum; Multiwork 505 Ltd registered as a sub-contractor on 20 November 2015 and immediately sought gross payment status, and it appears that its only source of income is Spectrum. The PLN has been issued in accordance with HMRC guidance.

The Tribunal's findings

43. A PLN under paragraph 19 of Schedule 24 can be issued by HMRC only if there is a *deliberate* inaccuracy in a company's CIS return. A PLN cannot be issued in the case of an inaccuracy that is careless rather than deliberate (see paragraph 18 above).

44. A false statement is made deliberately where the person making it positively knows it to be untrue. A false statement might also be deliberate in circumstances where the person making it does not positively know that it is untrue, but does not have any real belief in its truth (compare *Derry v Peek* (1889) 14 App Cas 337, 374). However, if a person in good faith believes a false statement to be true, that person will not be making a false statement deliberately merely because the person ought to have known (but did not know) that it was untrue. In this last circumstance, the making of the false statement might be careless, but it would not be deliberate.

45. Thus, where an inaccuracy in a return consists of the omission of information that is required to be included in the return, the omission of the information will be deliberate if the person responsible for the omission knows that it needs to be included, or does not have any real belief that the information can be omitted. However, if the person in good faith believes that it is unnecessary to include the information in the return, the omission of that information will not be a deliberate inaccuracy merely because the person ought to have known (but did not know) that the information needed to be included, or ought to have realised that advice should be obtained before submitting a return omitting that information.

46. In an appeal against a PLN, HMRC have the burden of proving that:

(1) the company's CIS return(s) contained an inaccuracy;

(2) the inaccuracy was deliberate on the part of the company, that is, the company actually knew that it was inaccurate, but nevertheless proceeded;

(3) the Appellant did (or failed to do) something intending or knowing it would bring about the inaccuracy, which requires that the Appellant knew that the CIS return did or would contain an inaccuracy.

47. In this case, the Tribunal considers it convenient to address the last of these three matters first. That is to say, even if it is assumed for present purposes that Spectrum's CIS returns contained an inaccuracy that was deliberate on the part of Spectrum (a matter which the Tribunal is not at this stage deciding), is the evidence sufficient to establish that this deliberate inaccuracy was attributable to acts or omissions of the Appellant himself (rather than to other officers of Spectrum), and that the Appellant himself knew that his acts or omissions would bring about the omission from the CIS returns of something that needed to be included?

48. In his evidence, Officer Mercer accepted that there was no direct evidence that this was the case, and that the HMRC case relies on circumstantial evidence. HMRC invite the Tribunal to draw inferences from various circumstances considered cumulatively.

49. A matter to which HMRC attaches particular importance is that the Appellant was the founder of Spectrum, and was the 99% shareholder of that company until the establishment of PGF, and was its operations director. HMRC observe that the notes of the 24 February 2016 visit indicate that the Appellant, when asked what role each of the directors filled, responded that "he acted as the Operations Director with full control over the day to day running of the company".

50. The Appellant for his part contends that his role in Spectrum was concentrated essentially on "client facing" activities, involving sales, maintaining relations with existing clients, and winning new business, and that he left it to professionals to deal with everything else including the back office functions.

51. The Tribunal accepts on the basis of the Appellant's evidence that a substantial part of his time may have been taken up with "client facing" activities. However, the Tribunal also finds that he was the founder, operations director, and a major shareholder, and that he did have full control over the day to day running of Spectrum. The Tribunal is satisfied that he was a top level decision maker concerning all of Spectrum's business and financial affairs.

52. Nevertheless, the fact that he had full *control* over the day to day running of the company and was a top level decision maker does not necessarily mean that he micro-managed to the extent of deciding personally everything that occurred during the course of the day to day running of the business. Indeed, it does not necessarily mean that he even *knew* everything that happened in the course of the day to day running of the company. The evidence indicates that Spectrum had some 60 direct employees working in a number of different offices in the UK, and a turnover of millions of pounds. It is quite plausible, indeed likely, that responsibility for many day to day affairs would have been delegated to various company officers, who would have drawn to the Appellant's attention to those matters that he needed to know.

53. HMRC point to the fact that the Appellant has had many years' experience in the construction sector, and that he displayed a knowledge of the CIS during the 24 February 2016 compliance visit. HMRC also point to the fact that the Appellant knew that Spectrum was registered as a sub-contractor with gross payment status, and argue that this means that he understood the purpose of CIS and gross payment status, and that he knew that the workers recruited by Spectrum were within the CIS.

54. The Tribunal is satisfied that the Appellant had an awareness of the CIS, and of the way that it affected Spectrum. However, Spectrum's registration as a CIS sub-contractor with gross payment status, and its registration as a contractor, affected the company in different ways.

55. Spectrum was registered under the CIS as a sub-contractor with gross payment status from 15 August 2007. This meant that Spectrum's customers could make payments to Spectrum without deduction of CIS tax. The Appellant's case is that Spectrum's CIS registration as a sub-contractor with gross payment status was of such critical importance to its cash flow that the company went into administration as soon as it lost this status. If so, the Tribunal has no doubt that the Appellant must have been well aware that Spectrum had gross payment status as a sub-contractor, and must have been aware that this was essential to the continuing viability of the company. Indeed, the notes of the 24 February 2016 meeting indicate that the Appellant was aware that 100% of Spectrum's supplies were subject to the CIS, and that Spectrum was entitled to receive gross payments.

56. On the other hand, Spectrum registered under the CIS as a contractor only on 18 November 2013, over 6 years after it had first registered as a sub-contractor. Registration as a contractor meant that if any of Spectrum's suppliers were subject to the CIS, Spectrum could make payment to those suppliers without deduction of CIS tax, provided that the suppliers had gross payment status.

57. The notes of the 24 February 2016 meeting indicate as follows. At a point during the meeting when Chris Stevenson was not present, the Appellant indicated that he was aware that "when receiving supplies, Spectrum must check net or gross status of supplier and pay accordingly". However, the Appellant said during the meeting that his understanding was that this was only when payments were made direct to a sub-contractor, and not when payments are made via service or payroll companies. The Appellant was then asked whether Spectrum had sought any advice on the matter from HMRC and the Appellant stated that he had not. Mr Stevenson then subsequently rejoined the meeting. Mr Stevenson said that his grasp on the CIS was better than the Appellant's and that he (Mr Stevenson) knew that payments to Spectrum's suppliers fell outside the scope of the CIS. Mr Stevenson also acknowledged that he had never sought any advice from HMRC regarding his interpretation of the HMRC rules.

58. The Tribunal is satisfied on the basis of this evidence that at material times, the Appellant had personal knowledge that payments to Spectrum's suppliers were being made by way of payments to service or supply companies and that CIS tax was not being deducted from these payments.

59. The Appellant's case is that he relied on advice from those performing the back-office functions within Spectrum, in particular Mr Stevenson, to the effect that service companies did not fall within the CIS. The question is whether the evidence shows on a balance of probability that this is untrue, and that the Appellant was in fact aware that it was necessary to include these payments in Spectrum's CIS returns.

60. The Tribunal considers that it is not inherently implausible that the Appellant would rely on others within Spectrum to advise on or deal with Spectrum's CIS returns as a contractor. It is not apparent that it would have been of any critical significance to Spectrum's cash flow whether or not it suppliers were subject to the CIS, or if so, whether or not the suppliers had gross payment status. The total payment made by Spectrum would essentially have been the same, whether it paid a supplier gross, or whether it paid the supplier net of CIS tax and then paid the CIS tax to HMRC. The Tribunal is not persuaded on the evidence before it that issues concerning preparation of Spectrum's CIS returns as a contractor were necessarily the kinds of matters that would inevitably have occupied the attention of the top level decision makers in the company.

61. The fact that the Appellant was aware of the CIS did not necessarily mean that he necessarily knew all of the details of the scheme and the changes made to it from time to time. Evidence has not been presented by HMRC to establish that it would have been so obvious to any company director that payments to service companies fell within the CIS that no company director could in good faith have believed otherwise. The evidence is that the whole purpose of service companies or umbrella companies is that they take care of matters such as payroll and PAYE tax. On the limited evidence before it, the Tribunal is unable to conclude that it is inherently implausible that the Appellant would have believed in good faith advice from Spectrum's finance director that payments to service companies fell outside the CIS.

62. It is said by HMRC that the fact that the Spectrum registered as a CIS contractor and made nil returns in its CIS returns is inconsistent with the Appellant's claim that it was believed that payments to suppliers did not fall within the CIS. HMRC ask "why make nil returns if the appellant believed CIS did not apply to umbrella companies and payroll companies"?

63. The Tribunal does not accept that reasoning. The omission of these payments from Spectrum's CIS returns is obviously consistent with the belief that it was not necessary to include these payments in CIS returns. If Spectrum thought that these payments did not need to be included in its CIS returns, it could have done one of two things. It might have simply not registered as a CIS contractor at all, given that the only payments to suppliers that it was making at the time were to umbrella or service companies. Alternatively, it could have registered as a CIS contractor, and made nil returns, which is what it did. The real question is therefore, "why register as a CIS contractor at all, if Spectrum believed that none of the payments it was making at the time needed to be included in CIS returns"?

64. The Appellant said in his evidence that Chris Stevenson took the decision to register Spectrum as a CIS contractor, and that the Appellant did not know why he did

this. As Chris Stevenson did not give evidence at the hearing, no explanation was offered as to why this was done. It would be pure speculation to suggest reasons why this might have occurred. However, it does not seem to the Tribunal that this is a case where there can be no plausible explanation at all. For instance, even if Spectrum at the time only made payments to umbrella or service companies, and believed that these were not subject to the CIS, being registered as a CIS contractor might have given Spectrum the flexibility of being able to use other suppliers at any time who were subject to the CIS, should the occasion have ever arisen.

65. More importantly, if Spectrum positively knew that payments needed to be included in CIS returns, but was pretending not to know this, the Tribunal does not see why this would lead Spectrum to register for CIS and put in nil returns, rather than to not register for CIS at all. The Tribunal simply does not see how the fact that Spectrum registered as a CIS contractor and put in nil returns makes it more likely that Spectrum knew that the payments it made needed to be included in CIS returns. The fact that Spectrum registered as a CIS contractor and then put in nil returns is, in the Tribunal's view, a neutral factor.

66. It is said by HMRC that one of the service companies to which Spectrum made payments was Multiwork 505 Ltd, a company which like Spectrum was owned by PGF. HMRC contend that Multiwork 505 Ltd registered as a CIS subcontractor on 20 November 2015 and immediately sought gross payment status, and that no other contractor has verified or returned payments to Multiwork 505 Ltd, suggesting that Spectrum was its only source of income. HMRC argue that this shows that Multiwork 505 Ltd knew that the payments it received from Spectrum were subject to the CIS. HMRC reason that although the Appellant was not a director of Multiwork 505 Ltd, "it is not unreasonable to expect that his [the Appellant's] personal knowledge within one business can be extended to others within the ownership structure".

67. The Tribunal does not accept this reasoning. There is no evidence that the Appellant was in any way involved in the management, day to day or otherwise, of Multiwork 505 Ltd. The Appellant's evidence is that originally Spectrum was a one person company owned by him. The evidence is that the Appellant subsequently joined with Mr Taylor-Guck, and that together they formed PGF which then became the sole owner of Spectrum and various other companies. Thus, the evidence is that when PGF was formed, the Appellant in effect gave up a significant part of his ultimate beneficial ownership of Spectrum, and in return he became the ultimate part beneficial owner of other companies that other shareholder(s) brought to PGF. It appears that the businesses brought to PGF by Mr Taylor-Guck included the Multiwork Group, which included Multiwork 505 Ltd.

68. Thus, Spectrum was originally managed by the Appellant alone, and the Appellant originally had nothing to do with the Multiwork companies. The evidence suggests that after PGF was formed, neither of the other shareholders of PGF became directors of Spectrum, and the Appellant did not become a director of any of the Multiwork companies. The extent to which the Appellant, after the formation of PGF, had any knowledge of or involvement in the management of Multiwork 505 Ltd or

other companies owned by PGF is not known. In any event, there is no evidence at all of any such knowledge or involvement.

69. Furthermore, the evidence is that Spectrum registered as a CIS contractor in November 2013, and that it was filing nil returns from that time. However, the evidence is that the Appellant only became a director of PGF on 6 March 2015, well over a year later.

70. HMRC argue that Chris Stevenson and Nimesh Pau had a good understanding of how the CIS worked. However, even if this were true, this would not mean that the Appellant himself (as opposed to Chris Stevenson and Nimesh Pau) positively knew that payments to umbrella or service companies needed to be included in CIS returns. In any event, the notes of the 24 February 2016 meeting confirm the Appellant's evidence that the firm R Pau & Co had no responsibility for Spectrum's CIS returns. There is no evidence that R Pau & Co ever advised the Appellant personally that Spectrum's payments to service companies needed to be included in its CIS returns.

71. At the hearing, HMRC suggested that there was something suspicious about the very existence of umbrella companies or service companies in the supply chain. It was put to the Appellant that these companies effectively duplicated what Spectrum itself was doing, and that there was no obvious reason for their existence. The Tribunal does not accept this. The Appellant's evidence was that each supply company provided services to the individual worker or operative, while Spectrum provided services to the main contractor. Officer Mercer accepted in his evidence that after about 2014 in particular, the use of such umbrella companies or service companies became quite standard in the industry.

72. There was a suggestion by HMRC that suspicion was cast on the whole of Spectrum's business by the fact that a number of the umbrella companies had become insolvent or disappeared with unpaid VAT liabilities. HMRC produced a chart showing 9 umbrella/service companies to which Spectrum had made payments. Two of these belonged to the Multiwork Group: Multiwork 505 Ltd and Multiwork Adapt Ltd. According to this chart, Multiwork Adapt Ltd was not VAT registered but had been charging VAT, and all of these other service companies were VAT registered but had submitted no VAT returns (or in the case of one of the companies, no VAT returns since April 2012).

73. HMRC also contend that Multiwork 505 Ltd and at least two of the other service companies to which Spectrum made payments traded from the same address as the Wakefield branch of Spectrum. The notes of the 24 February 2016 meeting indicate that the Appellant said to HMRC during the meeting that some of the other service companies had been introduced to Spectrum by, and had involvement with, Mr Taylor-Guck. The Appellant is also recorded as saying that Mr Taylor-Guck was disqualified from being a company director through a previous company entering liquidation.

74. The notes of the 24 February 2016 meeting indicate that during that meeting HMRC warned the Appellant that as a result of many missing suppliers within

Spectrum's supply chain, more due diligence should be carried out on suppliers, and that under the principle in *Kittel v Belgium* [2006] ECR 1-6161, [2008] STC 1537, HMRC would have the power to disallow Spectrum's input tax if sufficient due diligence was not carried out.

75. Subsequently, in a decision dated 7 September 2017, HMRC did refuse Spectrum's entitlement to deduct input tax in relation to a number of invoices from several payroll/umbrella companies. That decision contained a number of additional findings of HMRC, including the following. The third shareholder of PGF had also been disqualified as a company director. The behaviours detailed in the disqualification reports are similar to those demonstrated in the supply chains to which that decision related. Many of the payroll companies had been identified as associated to PGF and individuals associated with that company. A high proportion of the payroll companies used by Spectrum had failed to render VAT, PAYE and CIS returns before liquidating leaving behind debts to HMRC. Some of the defaulting companies appear to be closely connected to Mr Taylor-Guck or someone believed to be his sister, who was director of various of the companies. Various Multiwork companies featured in a joint Insolvency Act s 88 meeting, where Mr Taylor-Guck spoke to the affairs of the company. Most defaulter invoices are in an identical or very similar format. Three of the defaulting companies appeared to trade under the same name of The Pay Club, sharing contact details such as address, phone, fax and e-mail. The decision concludes that the directors of Spectrum "will have been fully aware of the facts surrounding their business's direct suppliers introduced by Mr Taylor-Guck becoming insolvent", and that Spectrum nonetheless continued to source suppliers through the same means of introductions, with seeming disregard to meaningful due diligence, and did not appear to seek answers to questions that a reasonable person might have raised.

76. The fact that various of the service companies to which the Appellant was making payment had disappeared with unpaid VAT liabilities, and that some of these defaulting companies were either owned by PGF or had connections to Mr Taylor-Guck, was an understandable cause of concern to HMRC. However, the evidence before the Tribunal does not show that the Appellant personally had knowledge that these service companies were disappearing with unpaid tax liabilities.

77. The Appellant argues that there is no evidence that he benefitted in any way from the omission of the payments from the CIS returns, and that there is no apparent reason why he would have put at risk the company that he had founded and built up by engaging in improper conduct. He did accept in cross-examination that PGF had paid a large dividend in 2015-16. However, there is no evidence that this dividend was made possible by various companies owned by PGF disappearing with unpaid tax obligations, or that the payment of this dividend caused any of the defaulting companies to become insolvent. The Tribunal therefore accepts that there is no evidence that the Appellant personally benefitted from inaccuracies in Spectrum's CIS returns. The Tribunal also accepts that there is no evidence suggesting any other motive as to why the Appellant would put Spectrum at risk by deliberately causing inaccurate CIS returns to be submitted.

78. The Tribunal accepts that matters such as fraud or deliberate behaviour can be established not only by direct evidence, but also by circumstantial evidence. For instance, in some cases knowledge on the part of an appellant of the existence of fraud has been inferred from the fact that the circumstances of the appellant's business was so uncommercial and "too good to be true" that the appellant should have realised that they could not possibly serve any legitimate purpose. However, the evidence in this case does not show that the Appellant's circumstances were "too good to be true". While this is not essential in order for a fact to be established by circumstantial evidence alone, there must be sufficient circumstances to establish personal knowledge on the part of the appellant by one means or another. The mere fact that the Appellant was the director of the company is not of itself, without more, sufficient to establish that he must have had knowledge that payments to service companies needed to be included in CIS returns.

79. The Tribunal has considered the evidence carefully, and has considered the various matters relied upon by HMRC cumulatively. However, the Tribunal finds that the evidence before the Tribunal, considered as a whole, is insufficient to discharge HMRC's burden of establishing on a balance of probability that the Appellant lacked a good faith belief that payments to service companies were outside the scope of the CIS.

80. Accordingly, the appeal is allowed and the PLN is set aside.

81. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 19 MARCH 2019