



Neutral Citation: [2023] UKFTT 00973 (TC)

Case Number: TC08994

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

[By remote video/telephone hearing]

Appeal reference: TC/2019/03663

CIS Penalties – reasonable care - appeal dismissed

Heard on: 20 September 2023

Judgment date: 6 November 2023

Before

**TRIBUNAL JUDGE SARAH ALLATT
MR SIMON BIRD**

Between

ACCESS CONTRACTING SERVICES LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Colin Smith

For the Respondents: Mr John McCabe, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The form of the hearing was by video. The documents to which we were referred are the main bundle of 406 pages, a small supplementary bundle, the authorities bundle and the skeleton arguments of both parties.
2. 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.

THE APPEAL

3. The matters being appealed are HMRC's refusal notices to make a direction under Regulation 9(5) of the Income Tax (Construction Industry Scheme) Regulations 2005 ('Regulation 9 (5)') relieving the company of their liability because Regulation 9(3) (Condition A) was not met.
4. The Appeal relates to the Appellant's failure to make deductions from payments made to sub-contractors in accordance with the scope of the Construction Industry Scheme (CIS Scheme) legislation.
5. The total amount of tax under appeal is £446,777.
6. A further matter being appealed is the penalty assessment that was raised for the penalty amount of £97,173.88 that was charged under Schedule 24 Finance Act 2007 (Sch 24 FA 2007).

BACKGROUND

7. The Appellant ('ACS') is a labour provider, providing a range of tradespeople from general labourers to crane drivers through contractor companies.
8. The Appellant was incorporated in April 2003 and run by Michael Byrne (senior) who held an 80% stake in the company, with 2 sons Paul and Michael Byrne (junior) each holding a 10% stake.
9. From the inception of the company, one of Michael Byrne (senior)'s main duties was to run the back-office matters. To assist him, in the early stages of the business, the Appellant employed office manager Annette Chivral to help assist Michael Byrne (Senior) with the company's general compliance obligations, including completing the company's CIS returns. Paul Byrne and Michael Byrne (Junior) worked as project managers on the sites with the subcontractors and managed the staff. Whilst they were aware of the company's CIS obligations, they did not have much experience with the back-office function.
10. In 2008 Michael Byrne (Senior) retired from the business, although he retained his directorship on Companies House (albeit without any duties) until 2011. He handed over the compliance and administrative duties of the business to Ms Chivral. It was made clear to the directors, Paul Byrne and Michael Byrne (Junior), by their father that she was fully capable of running the compliance function of the business, including completing the respective CIS returns and conducting the required diligence checks on gross payment status.
11. On the retirement of Michael Byrne (senior), ACS engaged Riddingtons Ltd, their accountants, on a general advisory basis to be available to support Ms Chivral.

12. In 2014/15, upon the suggestion of Ms Chivrell, the Appellant agreed to commence work with 3 new (to them) companies: Smart Tax UK Limited, Ultimate Payroll Limited and United Contract Services Limited.
13. Ms Chivrell contacted HMRC to obtain the CIS status of these companies.
14. Smart Payroll Ltd and Ultimate Payroll Ltd were not registered for CIS.
15. United Contract Services held net pay status.
16. All 3 companies should therefore have been paid net of tax. The Appellant made gross payments to all 3 companies, and returned the payments as gross payments on the CIS return.
17. HMRC enquired into the CIS returns. At the end of the enquiry HMRC issued decision notices to the effect that there was no tax due in relation to Smart Tax UK Ltd as Regulation 9 (4) condition B was satisfied.
18. For the payments to United Contract Services Ltd and Ultimate Payroll (UK) Ltd, they refused to issue notices under Regulation 9(3) condition A and Regulation 9 (4) condition B.
19. There is no right of appeal against the refusal notices for 9 (4) condition B.
20. The Appellant appealed the refusal notices in respect of Regulation 9 (3) condition A.

THE LAW

21. Regulation 9 (1) of The Income Tax (Construction Industry Scheme) Regulations 2005, allows the Respondents to grant relief under Regulation 9(5) if the following conditions are met:

“This regulation applies if—

(a) it appears to an officer of Revenue and Customs that the deductible amount exceeds the amount actually deducted, and

(b) condition A or B is met”

22. There is no contention from either party that point (a) of Regulation 9(1) applies, being that the deductible amount exceeds the amount actually deducted.

23. The point in dispute is relatively simple, being whether condition A of Regulation 9(3) of The Income Tax (Construction Industry Scheme) Regulations 2005, applies:

“Condition A is that the contractor 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.”

24. If the Tribunal determines that Condition A is met, the penalty, which is tax geared, falls away. If the Tribunal considers Condition A is not met, then the Appellant submits that special circumstances apply which would merit a reduction in the penalty.

EVIDENCE

25. ACS had been unable to contact Ms Chivrell to give evidence. We heard from Paul Byrne, director of ACS, who provided a witness statement and gave evidence orally.

26. Mr Byrne explained that Ms Chivrell was hired specifically for her experience in CIS matters, and in addition to this her duties included organising the payroll providers and

arranging for invoicing. Ms Chivrall was not a signatory on the bank account and so she would prepare documents for authorisation when payments were necessary.

27. He had been unable to find an employment contract or job description for Ms Chivrall. She worked 9-2, Monday to Friday and was paid around £14/hour.

28. Mr Byrne explained that Ms Chivrall had been diligent in her work, giving examples of her meticulousness in 'right to work in the UK' checks and in invoice reconciliation.

29. Mr Byrne explained that occasionally new payroll providers would approach Ms Chivrall and offer her a modest gift (for example a hamper at Christmas) if they were taken on as a payroll provider and if labourers therefore moved from another payroll provider to the new one.

30. Mr Byrne explained that this didn't happen very often, he estimated once or twice over a 10 year period. Given all the checks and paperwork needed from the individual labourers when a payroll provider changed, this didn't happen very often.

31. ACS had not provided training directly to Ms Chivrall on any CIS processes as she had been hired for her experience in that area. Riddingtons did not have responsibility for the CIS returns, but they would send out updates that companies who operate CIS should be aware of, and were on a retainer to answer any questions that Ms Chivrall may have had.

32. Mr Byrne explained that he is since aware that the 3 payroll companies concerned in this appeal appear to have a common ownership/control, and that he presumes that this was part of an avoidance arrangement.

33. Mr Byrne confirmed that he had checked that the new companies were present on the CIS return, and therefore he presumed that the correct checks had been made for them to be paid gross.

34. He did not think he had specifically asked Ms Chivrall whether the CIS checks had been done, nor why the payroll companies were being used.

35. Mr Byrne was unaware whether the company had, at the time, any written processes to ensure the CIS returns were correct.

36. Mr Byrne explained that the company was very small. At the time concerned, there were only 2 people on the payroll, Ms Chivrall and Mr Byrne's brother Michael. He therefore considered the process in place for the administration to be sufficient, and there had never been any other issues in the entire period of Ms Chivrall's employment. At no time did they doubt Ms Chivrall's capability.

37. Mr Byrne explained it was entirely due to Ms Chivrall that the 3 payroll companies in question started to be used. He now understands that all 3 were under the control of one individual, Sam Malik. He does not know Mr Malik and has no connection with him.

38. He was aware that Ms Chivrall may have been induced by a small gift 'a hamper or a box of chocolates' to start using the companies in question, and he had no issue with that.

39. After the HMRC compliance visit, Ms Chivrall left the company, and they have been unable to contact her.

40. Up to the compliance check Mr Byrne described Ms Chivrall's behaviour as 'amazing' and 'very precise' and gave examples of her diligence on right to work in the UK checks.

41. Mr Byrne explained that Ms Chivrall had been hired for her CIS experience and the onus was on her to keep up to date with the requirements in that area. Riddingtons would send out

updates but he had no specific memory or written records of either the directors or Ms Chivrall undertaking specific training.

42. Mr Byrne explained that the directors would reconcile the CIS returns to the BACS payments manually. Directors signatures were required for the BACS payments.

43. Ms Chivrall was expected to perform due diligence checks on subcontractors but these were not checked by the directors. The directors did not ask why new companies were being used. Mr Byrne could see the companies on the CIS return and he therefore presumed the correct checks had been carried out.

44. Mr Byrne, when questioned, said he had not asked Ms Chivrall whether checks had been carried out.

45. When asked, Mr Byrne said that as far as he knew, all the subcontractors were paid gross. He did not recall any net payments.

46. We heard from Mr Kayes of Ridlington's accountants, who provided a witness statement and gave evidence orally.

47. Mr Kayes explained that Ridlington's were employed as the accountants for ACS. They prepared the company accounts and the VAT returns. They were not responsible for the CIS returns but they were on a retainer to answer any questions Ms Chivrall may have '[Ms Chivrall] could contact us when she needed to. We were at the end of the phone.' The bundle contains an example of Ms Chivrall asking a question about immigration checks. To the best of his knowledge, Mr Kayes could not remember Ms Chivrall asking about CIS matters.

48. In his witness statement Mr Kayes said 'I was made aware by the directors of ACS that Ms Chivrall was knowledgeable on CIS matters and therefore ACS had decided to keep this function in house.' Mr Kayes confirmed he stood by his statement that Ms Chivrall was competent in CIS matters.

49. Mr Kayes confirmed he had no knowledge of Mr Malik, the individual apparently connected to all three of the companies in this case.

50. Mr Kayes said that Ms Chivrall had told him, after the compliance check, that she had not conducted checks upon the companies as 'they are always gross'. Mr Kayes now thinks that Ms Chivrall was lying when she told him she had not conducted checks.

51. We were provided with a witness statement from Ms Hale, the officer at HMRC who had made the decision that ACS had not taken reasonable care to comply with the relevant legislation. She did not give oral evidence. Ms Hale explained in her witness statement that as each of the sub-contractors had been verified with HMRC but the correct deductions had not been made, she did not consider that reasonable care had been taken.

52. We also heard from Mr Tilsar, of HMRC, who was the compliance officer who made the initial compliance visit to ACS.

53. Mr Tilsar explained that he had selected ACS for a compliance check due to the CIS returns showing gross payments to companies that did not have gross payment status.

54. Although not relevant to this appeal, Mr Tilsar explained the basis, as he understood it, for the denial of Regulation 9 (4) relief in respect of Ultimate Payroll Ltd and United Contract Services Ltd.

55. Mr Tilsar also explained that the penalty under appeal was currently suspended, and explained the likely conditions for that suspension to continue.

56. From evidence elsewhere in the bundle and detail provided on request after the hearing, it appears that during the time Ms Chivrell was employed, 2 contractors were paid net. One was paid net for 3 months and one for 2 months. The total deduction made from all payments to these contractors was £3,635.

57. There were 11 sub-contractors on the CIS returns at the time relevant to the returns which are the subject of this hearing. The other eight contractors were treated correctly.

58. There is no dispute that the contractors in question were checked by Ms Chivrell with HMRC more than once, and that she therefore was in possession of the information to make the correct deductions.

SUBMISSIONS

59. The submissions on both sides were relatively brief and to the point. The main issue is whether or not ACS took reasonable care, and if it did, did it also then make an error in good faith in accordance with Regulation 9(3) of The Income Tax (Construction Industry Scheme) Regulations 2005 and as such does Regulation 9(5) The Income Tax (Construction Industry Scheme) Regulations 2005 apply, with the effect that the Appellant would therefore have no CIS tax liability in relation to the determinations issued.

60. The Appellant submits that the directors properly relied on Ms Chivrell to complete CIS compliance matters, and as all companies concerned had reference numbers on the CIS return, they had no reason to be concerned, given her years of experience both elsewhere and also employed by ACS for many years where no issues had arisen.

61. The Appellant submits that by retaining Riddingtons to be available to Ms Chivrell to answer any questions, and to send out details of relevant updates to legislation, they were ensuring she was able to maintain the expertise required to do her job.

62. The only errors made by Ms Chivrell were, after checking with HMRC on the status of the three companies, to pay them gross when deductions should have been made.

63. The Appellant submits that the small size of the company is relevant to this appeal, and that 'reasonable care' in a company with 2 employees is necessarily very different to what may happen in a larger company.

64. The Appellant points to the case of *Barrett v HMRC* [2015] TC 04514 where the judge says: 'I do not agree that Mr Barrett's actions were unreasonable. In my view, the steps taken by Mr Barrett to employ an accountant who evidently held himself out as able to provide a comprehensive service, both as regards accounting and tax, for a small business such as that of Mr Aspros, and in providing all relevant documentation to Mr Aspros, were the actions of a reasonable taxpayer in the position of Mr Barrett. Whilst Mr Barrett did not undertake any research in to Mr Aspros' capabilities before appointing him, he was reasonably entitled to assume, from Mr Aspros' acceptance of the appointment, that Mr Aspros would be competent to deal with both the accounting and tax aspects of his business. I do not accept that such a reasonable taxpayer would necessarily have taken separate steps to inform himself, independently of his accountant, of his obligations to make returns under the CIS, whether by seeking a second opinion, or by consulting HMRC, or HMRC's published guidance, himself'

65. The Appellant submits that they acted more reasonably than Barrett, who did not undertake research into their accountant's abilities. The appellant did review the capabilities, and were satisfied that Ms Chivrell would be able to do what was required.

66. The Appellant submits that the only additional measures that they could have implemented, with the benefit of hindsight, would be to have updated themselves on

the CIS obligations using the government website and either reviewed each of the checks before engaging the customers; completed the checks themselves; or engaged Riddingtons Limited to complete returns & necessary checks.

67. The Appellants submit that in the course of their trade, it was reasonable for them to have placed the diligence checks with Ms Chivral, who they viewed as fully trained and capable of conducting the relevant checks.

68. The Appellant submits that the failing was not in the processes set by the Appellant but rather the human element of relying on an individual, which is a risk in any small company when relying on a specialist.

69. The Appellant points out that they had 13 years of full compliance before the errors took place, and that 'reasonable care' does not mean that no errors are made, but that care is taken that is reasonable and proportionate with the Appellant's business.

70. The Appellant's point out that they did not benefit in any way from Ms Chivral's actions, which, to them, appear to be that of a previously trusted employee choosing to act in an untrustworthy manner.

71. HMRC submit that it is the responsibility of the contractor to ensure that any employee acting on their behalf is fully conversant with the CIS legislation regarding verification and tax deductions and that the employee is complying with them. They say that anyone passing this responsibility on should ensure that there are appropriate checks and balances in place to ensure the obligations are met.

72. HMRC submit that there is no evidence that appropriate checks were in place. For example, there is no written process, Riddingtons were not used for CIS returns, and the directors did not check that CIS verification had been performed.

73. HMRC submit that there could be a number of reasons why the CIS deductions were not made correctly. The Appellant alleges deliberate wrongdoing on the part of the employee but has not produced significant evidence that this is the case.

CASE LAW

74. The prevailing case law on the determination of reasonableness is set out in *Anderson (deceased) v HMRC* [2009] TC 00206 by Judge Berner at para. 22: 'The test to be applied . . . is to consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done.'

75. We were also referred to *Barrett v HMRC* [2015] TC 04514 where the Judge says 'The test is one of reasonableness. No higher (or lower) standard should be applied. The mere fact that something that could have been done has not been done does not of itself necessarily mean that an individual's conduct in failing to act in a particular way is to be regarded as unreasonable. It is a question of degree having regard to all the circumstances, including the particular circumstances of the individual taxpayer. There can be no universal rule; what might be considered an unreasonable failure on the part of one taxpayer in one set of circumstances might be regarded as not unreasonable in the case of another whose circumstances are different.'

DISCUSSION – REASONABLE CARE

76. The case hinges primarily on what is 'reasonable' for a small business such as this. From the evidence it is clear that the Appellant considered that Ms Chivral was competent to perform all the CIS obligations. It does appear that she did her job in this area for many years

successfully and with no issues. Although net payments did not happen often, evidence has shown that she had dealt with net payments correctly within a timeframe relevant to this case.

77. However, it appears to us that the Appellant did not appreciate the significant risk that is inherent to the business of not complying correctly with the CIS legislation.

78. The CIS legislation is in place precisely because there was a large amount of non-compliance within the industry. The risk to the business of paying net where it should pay gross is up to 30% of the payroll costs.

79. The Appellant was aware that Ms Chivral was likely to receive an inducement, however small, for the use of a new subcontractor. She was therefore not neutral in any decision to start using someone new. And yet Mr Byrne in his evidence said he did not ask Ms Chivral whether she had checked the CIS status with HMRC. He said this was because the reference numbers were on the CIS return. However without an element of verification by him or another director, he would not know whether these reference numbers were genuine or not.

80. We consider that 'reasonable' in this context needs to be both by relevance of the size of the business (what it is reasonable for a business with 3 people in to have in the way of processes and checks) and also by the size of the payments being made. The payments made in the years in question were significant, totalling over £700k to United Contract Services and Ultimate Payroll in 2015/16.

81. We accept that for some elements of Ms Chivral's job, it was reasonable for her expertise to be relied upon.

82. However, we consider that the Appellant should have placed checks and balances to deal with those elements of her job that posed significant risks to the business, such as compliance with legislation.

83. Controls were in place for BACS payment to be made.

84. These payments requests were prepared by Ms Chivral after she had been induced to facilitate the change of payment provider, and the directors knew this.

85. No formal procedure was in place to require Ms Chivral to show any detail at all of CIS status checks other than the reference number on the CIS return.

86. Ms Chivral was not asked whether those checks had been performed.

87. It would appear that no significant due diligence was performed by Ms Chivral because in the bundle we were provided with Companies House records for the relevant payroll companies that show the companies made minimal filings prior to the dates they were taken on by ACS. Had any due diligence been performed we would have expected firstly that there would be some evidence for this, and secondly that initial due diligence checks would have flagged up the need for further checks to be made.

88. In short, the Appellant had no controls in place for any checks at all on the CIS compliance, other than reconciling the amount paid out under BACS with the amounts on the CIS return.

89. Ms Chivral appears to have done no due diligence on the new provider other than phoning up HMRC to check their status (which she would have done after she decided to use them).

90. For whatever reason, Ms Chivral was then not diligent in applying correctly the information she was given by HMRC.

91. ACS directors did not ask Ms Chivral whether the checks had been done.

92. We appreciate that the directors felt they could rely on a long standing employee. However, given the significant impact that failure to comply with the regulations would have on the company, we do not think that sufficient reasonable care was taken to ensure that the regulations were complied with.

DISCUSSION – SPECIAL CIRCUMSTANCES

93. We do not consider that the Appellant has demonstrated any special circumstances that warrant the reduction of the penalty.

DISCUSSION – PENALTY REDUCTION

94. HMRC allowed a penalty reduction in line with the penalty for ‘careless inaccuracy with prompted disclosure.

95. This penalty range is at a minimum 15% and at a maximum 30%.

96. HMRC assessed a penalty of 21.75%

97. HMRC did not give the maximum reduction in the penalty allowed under the ‘telling’ and ‘helping’ sections because ‘directors never explained the lack of internal controls’ and ‘the company officer’s disengagement from the enquiry precluded a comprehensive understanding as to why these inaccuracies arose and continued unchecked’.

98. Having reviewed the correspondence between HMRC and the Appellant over the relevant time period, we disagree with HMRC’s reasons for the lack of full reduction.

99. The Appellant appeared to be in regular contact with HMRC and we see no evidence of disengagement. There is no evidence that HMRC asked for anything that the Appellant could provide that was not provided. Information on internal controls could not be provided because there were no internal controls, this is not a reason to determine that the Appellant was not telling HMRC everything.

DECISION

100. For the reasons given above:

(1) We find the Appellant did not take reasonable care and that condition A in Regulation 9 (3) has not been satisfied and a direction under Regulation 9 (5) is not appropriate.

(2) We find HMRC were correct in not allowing a special reduction when calculating the penalties due.

(3) We understand the penalties are likely to be suspended but in the event they are not, we find that the maximum reduction for telling, helping and giving should be used.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

101. 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.

**SARAH ALLATT
TRIBUNAL JUDGE**

Release date: 06th NOVEMBER 2023