TC02564

Appeal number: TC/2012/04440

INCOME TAX – Construction Industry Scheme - Appeal against cancellation of registration for gross payment – 'Compliance test' – Whether there was a reasonable excuse on the facts – No – Failure to take account of cancellation on appellant – JP Whitter (Waterwell Engineers) Ltd v HMRC [2012] UKFTT 278 (TC) applied – Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN KERR ROOFING CONTRACTORS **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
CLAIRE HOWELL

Sitting in public at Vintry House, Wine Street, Bristol on 21 September 2012 with further written submissions received from the Respondents on 18 December 2012

Joe Martin of Joe Martin Business Services for the Appellant

David Glassonbury of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Mr John Kerr, who trades as John Kerr Roofing Contractors, against the decision by HM Revenue and Customs ("HMRC") to cancel his registration for gross payment status under the Construction Industry Scheme.

Background

2. Registration for gross payment may be cancelled by HMRC at any time under s 66(1)(a) of the Finance Act 2004 (the "Act") if it appears that "*if an application to register the person for gross payment status were to be made at that time*" it would be refused. Section 63(2) of the Act provides that HMRC "*must*" register a person if satisfied that the requirements of section 64 of the Act are met. To meet these requirements, insofar as they are relevant to the present appeal, a person must satisfy the "business test"; the "turnover test"; and the "compliance test" as set out in Part 1 of schedule 11 to the Act (see section 64(4)(a) of the Act).

3. It is not disputed that the business and turnover tests have been satisfied in this case and that this appeal is concerned only with the "compliance test" which, as its name suggests, requires a person to comply with his obligations under the tax legislation.

4. However, an individual will be treated as having satisfied the compliance test, in accordance with paragraphs 4(4) and (7) of schedule 11, if he can establish that he has a reasonable excuse for the failure to comply with his tax obligations, has complied with his obligations without unreasonable delay after the excuse ceased and can be expected to comply in respect of periods after the qualifying period which, in the present case, is the 12 months to 7 September 2011, the date of the review by HMRC of Mr Kerr's gross payment status. Also, although not applicable in the present case, some compliance failures may be ignored under Regulation 32 of the Income Tax (Construction Industry Scheme) Regulations 2005, eg a payment of income tax not later than 28 days after the due date.

5. During the review by HMRC it became apparent that Mr Kerr had not made his first self-assessment payment on account for 2010-11 on time. The payment of £3,914.08 which was due on 31 January 2011 was not paid until 30 March 2011. As this was more than 28 days late it cannot be disregarded under Regulation 32 of the 2005 Regulations and, in the absence of a reasonable excuse, Mr Kerr had not satisfied or be treated as having satisfied the compliance test.

6. Therefore, on 21 September 2011, HMRC wrote to Mr Kerr to give him an opportunity to explain why the tax payment had not been made on time and consider whether there he had a reasonable excuse. Such a letter was necessary, in the light of the Tribunal decision in *Scofield v HMRC* [2011] UKFTT 199 (TC), to ensure that HMRC were aware of all material facts to enable them to exercise their discretion as to whether Mr Kerr's gross payment status should be withdrawn.

7. Mr Joe Martin replied on behalf of Mr Kerr on 28 September 2011 confirming that there was no time to pay arrangement in place and that as Mr Kerr "was spending his time working away from home he [had] simply overlooked making the payment sooner." HMRC did not consider that this amounted to a reasonable excuse for the late payment of tax and concluded that, in the circumstances, Mr Kerr's registration for gross payment should be cancelled. HMRC sent notice of this to Mr Kerr in a letter dated 3 October 2011.

8. In subsequent correspondence between HMRC and Mr Martin it was accepted that Mr Kerr did not have a reasonable excuse for the late payment of tax. However, it was contended, and we accept, that as Mr Kerr was already subject to an Individual Voluntary Arrangement (IVA) the effect of the loss of gross payment status would most likely lead to his bankruptcy and the laying off of the subcontractors he employed.

9. On 21 October 2011 Mr Martin wrote to HMRC to request a review of the decision to cancel Mr Kerr's gross payment status registration.

10. On 6 December 2011 HMRC wrote to Mr Kerr informing him that the review had been completed and the decision to withdraw his gross payment status upheld. This letter also contained the following paragraph:

> In your agents initial appeal request he refers to the effect the loss of Gross Payment Status will have on you and your business. While it may seem harsh to withdraw your Gross Payment Status, there is a fundamental need for all subcontractors to be treated equally and fairly. HMRC can only act in accordance with legislations; possible effect on future trade is not relevant. HMRC accept that the current economic conditions maybe difficult but the excuse does not alter your responsibility and obligation to ensure your tax affairs are dealt with correctly and on time. Failing to make the required payments by the deadlines constitutes failure to comply with your obligations. Withdrawal of Gross Payment Status does not remove your Construction Industry Scheme registration. You are still able to undertake construction work. However, payment of such work will be subject to deduction on account of tax by the contractor as required under Section 60 and 61 of the Finance Act 2004.

Given that the letter refers to the possible effect of withdrawal of gross payment on future trade as "not relevant" we find that this cannot have been taken into account by HMRC in reaching, and upholding on review, the decision cancel Mr Kerr's registration for gross payment status under the Construction Industry Scheme.

Appeal to Tribunal

11. On 28 March 2012 Mr Martin, on behalf of Mr Kerr, sent a Notice of Appeal to the Tribunal. This was in accordance with s 67 of the Act which provides a person "*aggrieved by the cancellation of his registration for gross payment*" with a right of appeal.

12. The jurisdiction of the Tribunal on such an appeal, under s 67(4) of the Act:

> … shall include such jurisdiction to review any relevant decision taken by [HMRC] in the exercise of their functions under section 63, 64, 65 or 66.

13. Before us Mr Kerr fully accepted that he did not have a reasonable excuse for the late payment of his first payment on account for 2010-11 but referred to the devastating effect that withdrawal of gross payment status would have on his business.

Direction

14. In *Grosvenor v HMRC* [2009] UKFTT 283 (TC) Judge Staker said, at [37]:

> "I … find that the consequences of cancellation of gross payment status is not relevant to the issue whether or not there is a reasonable excuse …"

However, in a subsequent case, *Terence Bruns t/a T K Fabrications v HMRC* [2010] UKFTT 58 (TC), it was found that a withdrawal of gross payment status would be likely to cause the Appellant to lose his livelihood and suffer severe economic loss on the sale or scrappage of his equipment. Judge Walters QC said, at [32]:

> "These consequences which would be likely to flow from a withdrawal of gross payment status would, in our judgment, be wholly disproportionate to the late payment of tax in this case (for which HMRC were, we assume, in any case compensated in interest). This factor could well render the Appellant's excuse reasonable even if, contrary to our findings above, there was no other basis on which his excuse could be held to be reasonable."

15. In *S Morris Groundwork Ltd v HMRC* [2010] UKFTT 585 (TC) the Tribunal (Judge Brooks and Norah Clarke), because of the experience of Judge Walters QC, preferred the decision in *T K Fabrications* over that in *Grosvenor* and took account of the consequences of the withdrawal of gross payment status.

16. In *Paul Wright v HMRC* [2011] UKFTT 14 (TC) at [24] the Tribunal (Judge Tildesley OBE and Julian Stafford LLB ACA CTA) referred to the appellant's submission that it should have regard to the adverse impact of withdrawal of the gross payment status on his business and, that effectively he was being punished twice for the same contravention of his tax obligations and found:

> … that his submission did not deal with reasons for why he failed to make the tax payments on time but with the consequences of his failure. The Tribunal holds that consequences by definition did not meet the description of a reasonable excuse.

17. As the Tribunal had taken into account the effect of the withdrawal of gross payment status in *T K Fabrications* and *Morris Groundwork* but considered that it could not do so in *Grosvenor* and *Paul Wright* we directed that:

> The parties shall, within 60 days … provide the Tribunal with written submissions on whether the effect of the cancellation of gross payment status under the Construction Industry Scheme can amount to a reasonable excuse having regard to the [above] decisions.

18. The direction was issued by the Tribunal on 29 October 2012 and submissions were due by 28 December 2012. Written submissions from HMRC were received on 18 December 2012. However, no further written submissions were received from or on behalf of Mr Kerr.

Submissions

19. In his written submission Mr Glassonbury, for HMRC, refers to the specific authorities mentioned in the direction contending the finding in *Grosvenor*, that the consequences of cancellation of gross payment status are not relevant to whether there is a reasonable excuse, underpins the reasoning in that case. He contrasts it with the decision in *TK Fabrications* which was decided without submissions from HMRC or any reference to *Grosvenor* and was decided on the basis that there were no failures within the relevant period. He submits that as a result the comments of the judge regarding reasonable excuse in *TK Fabrications* are obiter and the Tribunal in *Morris Groundwork* was wrong to prefer *TK Fabrications* over of *Grosvenor*.

20. Mr Glassonbury contends that the Tribunal adopted the correct approach in *Paul Wright* as it is not possible "as a matter of language" for the consequences of an event to be an excuse for that event, "an excuse for an event must predate the event, whilst a consequence necessarily follows it."

21. He also refers to additional relevant authorities.

22. In *Enderbey Properties Ltd v HMRC* [2010] UKFTT 85 (TC) the Tribunal held that it was bound by the decision of the High Court in *Barnes v Hilton Main Construction* [2005] EWHC 1355 (Ch) that the consequences of losing gross payment status could not be considered in determining an appeal against such a withdrawal.

23. Mr Glassonbury submits that is the correct view of the law despite the fact that the Tribunal in *J P Whitter (Waterwell Engineers) Ltd v HMRC* [2012] UKFTT 278 (TC), (Judge Cannan and Peter Whitehead) held that *Enderbey Properties* was wrongly decided. However, he contends that it is significant that the Tribunal in *Whitter* rejected the approach taken in *TK Fabrications* and *Morris Groundwork* that the consequences of failure could amount to a reasonable excuse.

24. In support of the argument that that *Enderby Properties* contains "the correct statement of the law and should be preferred" over *Whitter*, HMRC relies on the decision of the Upper Tribunal in *HMRC v Hok Ltd* [2012] UKUT 363 (TCC) (which was not available to the Tribunal in *Whitter*). In *Whitter* it was concluded, at [19], that the (First-tier) Tribunal ("FTT") had a supervisory jurisdiction in relation to gross payment status cases and the Tribunal described, at [20], what this entails.

25. This, Mr Glassonbury submits, is in essence, a judicial review function, purporting to supervise the reasonableness of HMRC's conduct in exercising its discretion. However, the Upper Tribunal in *Hok,* at [41], said:

> "There is in our judgment no room for doubt that the FTT does not have any judicial review jurisdiction.'

26. Although, as he accepts, the reasoning of the Upper Tribunal was based on the wording of the legislation under consideration in that case, which is different to that in this appeal, Mr Glassonbury also refers to *Hok* at [43] where the Upper Tribunal concluded:

> "That the FTT has no judicial review function is, in addition, the only conclusion which can be drawn from the structure of the legislation which brought both that Tribunal and this into being."

At [57], the Upper Tribunal said:

> "Parliament must be taken to have known, when passing the 2007 Act [The Tribunals, Courts and Enforcement Act 2007 which established the First-tier and Upper Tribunals], of the difference between statutory, common law and judicial review jurisdictions. The clear inference is that it intended to leave supervision of the conduct of HMRC…. where it was, in the High Court save to the limited extent it was conferred on this Tribunal."

27. Mr Glassonbury submits that the judgment in *Hok* also provides the answer to the concerns of the Tribunal in *Morris Groundwork* about the consequences of withdrawal of gross payment status being disproportionate as at [37] it is made clear that in matters concerning direct taxation arising under UK law (as opposed to VAT with its origins in European Law) there is no scope for questions of proportionality. As such he contends that the consequences of withdrawal of gross payment status cannot be taken into account in this appeal, either as a reasonable excuse, under a review function or because of any alleged lack of proportionality.

Discussion and Conclusion

28. Mr Glassonbury makes the point that there was no reference to *Grosvenor* by the Tribunal in its decision in *TK Fabrications.* We do not consider this surprising as in that case although the appellant, a subcontractor was, as is often the case, representing himself, somewhat unusually HMRC were not represented before the Tribunal. Usually, not only is HMRC represented but, as in the present case, they will prepare a bundle for the hearing containing, in addition to correspondence between the parties, copies of relevant legislation and authorities.

29. However, we are concerned that while authorities in support of HMRC's case will be included in the bundle and cited by HMRC those likely to assist an appellant, unless specifically requested, will not always be included in the bundle or brought to the attention of the Tribunal. For example, in *Morris Groundwork,* while HMRC did cite and rely on *Grosvenor* which supported its argument the decision in *TK Fabrications*, which did not, was not brought to the attention of the Tribunal.

30. It was only because the Tribunal, in *Morris Groundwork*, was aware of *TK Fabrications* that submissions were sought from the parties in relation to the consequences of cancellation of gross payment status.

31. Similarly, in the present case we were not referred to either *TK Fabrications* or *Morris Groundwork*. Also, as the Tribunal in *Paul Wright* does not refer to either case it can only be assumed that, as in *Morris Groundwork* and the present case, the Tribunal was not taken to or made aware these decisions which do not support HMRC's case.

32. Rule 708(c) of the Code of Conduct of the Bar of England and Wales requires barristers to:

> … ensure that the Court [or Tribunal] is informed of all relevant decisions and legislative provisions of which he is aware whether the effect is favourable or unfavourable towards the contention for which he argues.

Similarly the Solicitors Regulation Authority Code of Conduct (IB5.2), contained in the Solicitors Regulation Authority Handbook, requires solicitors to:

> [draw] the Court's [or Tribunal's] attention to relevant cases and statutory provisions.

33. Although HMRC representatives who are not qualified lawyers but who appear before the Tribunal are not strictly bound by these requirements, we would expect them, as advocates, to adopt and apply these professional standards. Indeed failure to do so would be to mislead the Tribunal. It would also be a clear and serious breach of the requirement, contained in Rule 2(4) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009, for parties to co-operate with the Tribunal and help it further the overriding objective to deal with cases "fairly and justly".

34. In the present case we accept that the failure to direct us to either *TK Fabrications* or *Morris Groundwork* was not, to borrow a phrase from the penalty regime of schedule 24 Finance Act 2007, "deliberate" (we were not taken to *Grosvenor* or *Paul Wright* either), we consider that it may well have been careless and would hope that in future sufficient care is taken to ensure that **all** relevant authorities (including those that do not assist the case advanced by HMRC) are brought to the attention of the Tribunal.

35. Turning to Mr Glassonbury's submissions we accept, as the Tribunal held in *Whitter* and as a matter of logic, that that the consequences of failure to meet the compliance test cannot amount to a reasonable excuse. However, like the Tribunal in *Whitter*, we do not accept that *Enderby Properties* which applied the decision of the High Court in *Barnes v Hilton Main Construction* contains the correct statement of the law.

36. In our judgment the Tribunal in *Whitter* was correct to distinguish *Barnes v Hilton Main Construction* on the basis that provisions for cancellation of an existing registration under the Act which applied in *Whitter* (and also applies in the present

case) are quite different to the provisions for the grant of a certificate under the Income and Corporation Taxes Act 1988 ("ICTA"), the legislation applicable in *Hilton Main Construction*. Under the current legislation HMRC has a discretion as to cancellation of registration for gross payment status even where there is a breach of the compliance test for which there is no reasonable excuse, as is apparent from *Scofield v HMRC*, whereas such a discretion did not exist under s 561 ICTA.

37. We take the same view as the Tribunal in *Whitter*, at [58] that:

> "… it is the existence of such discretion which gives a peg on which to hang arguments that the effect on the appellant of cancellation is a relevant factor.

38. The jurisdiction of the Tribunal in relation to the exercise, by HMRC, of its discretion was considered, as follows, in *Whitter*:

> "17. In *Hudson v JDC Services Limited [2004] STC 834* Lightman J referred to the decision of Ferris J in *Vicky Construction*, and in particular that the nature of the jurisdiction of the old General Commissioners on such appeals had been left open. That case also concerned an appeal against refusal to issue a certificate. Having considered the context of the provisions in *ICTA 1988* he held that the General Commissioners had a full appellate jurisdiction and were free to substitute their own decision for that of the Board. Part of his reasoning for doing so was that the decision under appeal, the granting of a certificate, did not involve any exercise of discretion by the Inland Revenue.
>
> 18. Whether the statutory context in FA 2004 gives rise to the same result has been considered by the First-tier Tribunal on a number of occasions. In *Piers Consulting Limited v HMRC* [2011] UKFTT 613 (TC) and *Cardiff Lift Company v HMRC* [2011] UKFTT 628 (TC) the Tribunal held that it did not have jurisdiction to substitute its own decision for that of HMRC. Effectively the Tribunal has a supervisory jurisdiction which is what might be expected in a case where HMRC are exercising discretion, in this case discretion to cancel a registration. In each of those cases the appeal was allowed, but the Tribunal did not substitute its own decision.
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> 19. In *Scofield v HMRC*, referred to above, HMRC accepted and the Tribunal found that it had a full appellate jurisdiction and could substitute its own view for that of HMRC. The point however does not appear to have been argued and we prefer the view in *Piers Consulting* and *Cardiff Lift Company* for the reasons given in those decisions that we have a supervisory jurisdiction.
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> 20. The test of reasonableness in a supervisory jurisdiction involves consideration of whether HMRC have taken into account some irrelevant matter, have disregarded something to which they should have given weight or have reached a decision which no reasonable decision maker could have reached. If the decision maker has not taken into account material facts which he or she should have taken into account then the decision will not be reasonable for these purposes.

> 21. In *John Dee v CCE [1995] STC 941* the Court of Appeal considered the jurisdiction of the VAT Tribunal in security appeals. Both parties in that case accepted that the tribunal had a supervisory jurisdiction rather than a full appellate jurisdiction. However if it was shown that the Commissioners had failed to take into account relevant material a tribunal could nevertheless dismiss an appeal if a decision taking into account that material would inevitably have been the same."

39. Mr Glassonbury contends, relying on *Hok*, that this analysis of the Tribunal's jurisdiction is incorrect. We disagree.

40. As Mr Glassonbury recognises the Upper Tribunal in *Hok* did not consider the jurisdiction of the Tribunal in relation to the Act but in regard to entirely different statutory provisions concerning an appeal against the imposition of a penalty for failure to comply with an employers' obligation to make a year-end return under regulation 73(1) of the Income Tax (Pay as You Earn) Regulations 2003.

41. The jurisdiction of the Tribunal on an appeal against such a penalty is contained in s 100B(2) of the Taxes Management Act 1970. This provides:

> (2) ... on an appeal against the determination of a penalty under section 100 above section 50(6) to (8) of this Act shall not apply but—
>
> (a) in the case of a penalty which is required to be of a particular amount, the First-tier Tribunal may—
>
> (i) if it appears that no penalty has been incurred, set the determination aside,
>
> (ii) if the amount determined appears to be correct, confirm the determination, or
>
> (iii) if the amount determined appears to be incorrect, increase or reduce it to the correct amount,

Quite clearly, as the Upper Tribunal found in *Hok*, it is impossible to read this legislation in a way which extends the jurisdiction of the Tribunal to include a power to override a statute or supervise HMRC's conduct or a judicial review function.

42. However, this may be contrasted with the jurisdiction of the Tribunal in the present case under s 67(4) of the Act to "*review any relevant decision taken by* [HMRC] *in the exercise of their functions under section 63, 64, 65 or 66*" of the Act.

43. As the Tribunal found in *Whitter*, at [15], it is now well established that in cancelling a registration pursuant to the power in s 66 of the Act, HMRC are exercising a discretion (see *Scofield v HMRC*).

44. Given that the exercise of its discretion under s 66 of the Act is a function of HMRC and the decision to cancel a person's registration for gross payment status a relevant decision it must necessarily follow that under s 67(4) of the Act the Tribunal has jurisdiction to review any relevant decision taken by HMRC in the exercise of that function.

45. Although similar in nature this is not a judicial review function but one that arises directly from the relevant legislation. Therefore, we are able to review the exercise by HMRC of its discretion to cancel Mr Kerr's registration for gross payment status.

46. Having found (at paragraph 10, above) that the decision was made without taking account the possible effect of withdrawal of gross payment on future trade we are satisfied that HMRC failed to take into account a relevant factor. As such the decision was wrong in law and susceptible to review. Therefore, to adopt the words of the Tribunal in *Whitter*, at [73]:

> " … we do not have power pursuant to our supervisory jurisdiction to substitute our own view based on the facts found and all relevant factors. In the circumstances, we should therefore allow the appeal unless we are satisfied that even if HMRC had taken into account the effect on the business it would inevitably have come to the same decision. We cannot be satisfied that is the case. It may be likely that HMRC would reach the same decision but on the authority of *John Dee* such a finding is not sufficient for us to dismiss the appeal. In the circumstances we must allow the appeal."

47. The appeal is therefore allowed.

48. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 20 February 2013