[2015] UKFTT 636 (TC)

TC04769

Appeal number: TC/2015/02720

INCOME TAX – construction industry scheme – determinations under Regulation 13 of Income Tax (Construction Industry Scheme) Regulations 2005 – Tribunal's jurisdiction in relation to Regulation 9(5) of Regulations - penalties – whether "reasonable excuse" – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

KRZYSTOF SOWINSKI **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS
JOHN ADRAIN FCA

Sitting in public at Fox Court, Brooke Street, London on 6 November 2015

J Muraszko, Chartered Certified Accountant, for the Appellant

Hellie Lai, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. Mr Sowinski is appealing against penalties imposed under s98A of the Taxes Management Act 1970 ("TMA 1970") for failure to make returns under the "construction industry scheme" (the "Scheme") contained in Part 3 of the Finance Act 2004 ("FA 2004"). He is also appealing against determinations made under Regulation 13 of the Income Tax (Construction Industry Scheme) Regulations 2005 (the "Regulations").

Overview of the Scheme

2. Since there is an issue as to precisely which aspects of Mr Sowinski's appeal are before the Tribunal, we will start with an overview of salient features of the Scheme which will explain the issues in dispute.

Contractors' obligations to withhold tax

3. Very broadly, the Scheme in its current form took effect from 6 April 2007. It imposes obligations on "contractors" in the construction industry with a view to ensuring that "sub-contractors" to whom they make payments under construction contracts are paying the right amount of tax associated with those payments.

4. Section 59 of FA 2004 sets out a description of those persons who can be required to withhold tax under the Scheme including, by virtue of s59(1)(a), "any person carrying on a business which includes construction operations". Section 59(1)(l) of FA 2004 also includes persons who, while not themselves carrying on a construction business, have an average annual expenditure on construction operations over a three-year period in excess of £1m. The evident purpose of this is to bring, for example, large-scale developers of real estate within the scope of the Scheme.

5. Certain sub-contractors have registrations with HMRC that entitle them to receive payments from contractors without deduction of tax. Therefore, a key obligation of a contractor under the Scheme is to check whether a sub-contractor has this status (referred to in the industry as "gross payment status"). If not, the contractor is required, by s61 of FA 2004, to withhold tax from payments made to that sub-contractor and pay it to HMRC.

6. If HMRC have reason to believe that a contractor has not, in any particular tax year, paid them the full amount of tax required to be withheld, regulation 13 of the Regulations permits HMRC to determine the amount due (a "Regulation 13 Determination") and recover it from the contractor.

Circumstances in which contractors are not liable for a failure to withhold tax

7. However, there are circumstances in which it is recognised that it would be inequitable to recover amounts from the contractor. Therefore, regulation 9(5) of the Regulations provides that, even if a contractor has not paid the full amount due under

s61 of FA 2004, if either of two conditions is satisfied, HMRC may make a direction (a "Regulation 9(5) Direction") that the contractor is not liable to pay the shortfall. The relevant conditions are:

(1) "Condition A" – that the contractor satisfies HMRC that it took reasonable care to comply with s61 of FA 2004 and either (i) that the failure to comply was due to an error made in good faith or (ii) that it held a genuine belief that s61 did not apply to the payment.

(2) "Condition B" – that the sub-contractor to whom the relevant payments was made either (i) had no tax liability on those payments or (ii) has included those payments on a relevant tax return and paid the tax due on them (recognising that, if HMRC have recovered the tax in question from the sub-contractor, it would be unfair if they could recover the same tax from the contractor as well).

8. If Condition A is not met, HMRC may issue a "refusal notice", refusing to make a Regulation 9(5) Direction. Regulation 9(7) provides the taxpayer with a right of appeal against the issue of a refusal notice. However, there is no right of appeal prescribed in the Regulations in situations where HMRC refuse to issue a Regulation 9(5) Direction because they consider that Condition B is not satisfied.

Obligation to deliver returns and penalties for failure to do so

9. Regulation 4 of the Regulations obliges contractors to deliver monthly returns containing specified information on payments that they have made to sub-contractors in that month. Even if no payments have been made, regulation 4(10) requires contractors to make nil returns (unless they notify HMRC they will not be paying any payments to sub-contractors at all in the next six months). For the tax years at issue in this appeal, penalties were chargeable on contractors who failed to comply with this obligation under s98A of the Taxes Management Act 1970 ("TMA 1970").[1]

Evidence

10. We had oral evidence from both the appellant and his accountant, Mr J Muraszko. Officer Lai cross-examined these witnesses and we found them both to be reliable and honest.

11. HMRC did not present any witness evidence. However, Officer Lai prepared a helpful bundle of documentation, the authenticity of which was not in dispute, and she made submissions by reference to those documents.

[1] A new penalty regime dealing with failure to deliver returns on time was enacted in Schedule 55 of the Finance Act 2009. However, pursuant to the Finance (No 3) Act 2010, Schedule 10 and the Finance Act 2009, Schedule 55 and Sections 101 to 103 (Appointed Day, etc) (Construction Industry Scheme) Order 2011, the "old" penalty regime contained in s98A of TMA 1970 continues to apply in relation to failure to file returns under the Scheme that were due to be filed on or before 19 October 2011.

Findings of fact

12. The findings of fact set out at [13] to [38] below were either made by the Tribunal, or were not in dispute.

The nature of Mr Sowinski's business and his operation of the Scheme

13. Mr Sowinski carries on business as a builder and decorator under the name "C S Building Services". From the description of his business that Mr Sowinski gave the Tribunal, and from the way it was described in Mr Sowinski's tax returns and in correspondence with HMRC, we concluded that he carries on a "business which includes construction operations" and therefore fell within s59(1)(a) of FA 2004. Therefore, even if his turnover was below £1m, the payments he made to sub-contractors under construction contracts between 2007/08 and 2009/10 were subject to deduction of tax under s61 of FA 2004.

14. Mr Sowinski is registered as a "sub-contractor" under the Scheme. However, he has not, at any time material to this appeal, been registered as a "contractor" and is not registered as a contractor at the date of this appeal. He has not, therefore, submitted any returns under the Scheme, or made any payments under the Scheme, in relation to the tax years 2007/08, 2008/09 or 2009/10.

15. In Box 17 of his income tax self-assessment returns for each of the tax years 2007/08, 2008/09 and 2009/10 Mr Sowinski claimed relief for "construction industry expenses". The commentary and guidance on Box 17 in HMRC's guidance notes for the preparation of self-assessment returns stated that Box 17 included:

> Total payments made to subcontractors in the construction industry (before taking off any deductions). (If you need to register as a contractor within the Construction Industry Scheme (CIS) please phone our New Employer Helpline on 0845 60 70 143).

16. By claiming relief in Box 17, therefore, Mr Sowinski was acknowledging that he had made payments to sub-contractors in the construction industry.

Correspondence between Mr Muraszko and HMRC

17. On 5 July 2012, HMRC notified Mr Sowinski of their intention to enquire into his obligations as a contractor under the Scheme. The stated reason for opening that enquiry was that, since Mr Sowinski had claimed a deduction for payments made to sub-contractors in his tax returns for 2008/09 and 2009/10, HMRC wanted to establish that he had met his obligations as a contractor under the Scheme. That letter asked Mr Sowinski to provide full details of payments to sub-contractors for "the above tax years [i.e. 2008/09 and 2009/10] and also any subsequent tax years, if applicable" and the amount of any tax deductions made from those payments under the Construction Industry Scheme.[2] A long chain of correspondence ensued. Not all of

[2] HMRC subsequently considered that Mr Sowinski had been "careless" in his operation of the Scheme with the result that an extended time limit for assessment of tax applied and extended their enquiry to payments that Mr Sowinski made in the 2007/08 tax year.

that is relevant to this appeal and, therefore, we will simply explain those aspects of that correspondence that are relevant.

18. Mr Sowinski and his representative, Mr Muraszko, set about providing the information that HMRC were requesting. On 14 September 2012 Mrs Nichola Mitton of HMRC sent Mr Muraszko a letter explaining the provisions of Regulation 9(5) of the Regulations and outlining Condition A and Condition B summarised at [7] above. Following receipt of that letter, Mr Muraszko sought to satisfy HMRC that either or both Condition A or Condition B was satisfied.

19. In support of his assertion that Condition B was satisfied, Mr Muraszko provided HMRC with the Unique Taxpayer References (UTRs) of the sub-contractors to whom Mr Sowinski had made payments, together with statements signed by a number of those sub-contractors, to the effect that they had submitted tax returns for the relevant tax years and had paid the tax they owed.

20. Mr Muraszko also put forward submissions (apparently in support of a claim that Condition A was satisfied) to the effect that Mr Sowinski had received advice that the Scheme did not apply to him. In a letter dated 3 April 2013 to HMRC he indicated that:

> … at the offset of CIS we were advised that CIS did not have to be applied if
>
> 1) The turnover over 3 years was less than £1m so as to minimize administration.
>
> 2) Agreements, copy which has been sent in sent to you [sic] were in place stating the conditions for services rendered, and on the understanding that each individual would confirm to the agreement

21. Discussions between Mr Muraszko and HMRC focused almost exclusively on Condition B. Eventually, HMRC completed their investigations as to the sub-contractors' tax liabilities and were satisfied that in some, though not all, cases the sub-contractors had indeed discharged their tax liabilities so that Mr Sowinski should be relieved of some liability. On 4 April 2014, HMRC issued Regulation 13 Determinations (that took into account relief available because Condition B was satisfied) as follows:

Tax year	**Amount of Regulation 13 Determination**
2007/08	£16,414.12
	£2,963.25
2008/09	£2,704.20
	£7,805.70
2009/10	£15,064.80
Total	**£44,952.07**

22. HMRC also considered Mr Muraszko's points referred to at [20] and considered whether they could result in Condition A being satisfied. By letter dated 9 May 2013,

Mrs Mitton confirmed that she considered those points were relevant to Condition A and invited Mr Muraszko to explain who gave the advice referred to and provide evidence of it if possible.

23. However, the correspondence suggests that HMRC do not consider they ever received a satisfactory answer to their request for further information on Condition A. For example, in a letter of 30 August 2013 Mrs Mitton wrote to Mr Muraszko noting that no information had been supplied in response to her letter of 9 May 2013. On 30 September 2013, she wrote a letter to Mr Sowinski himself noting that, if no response was received within 14 days, she would treat any claim in relation to Condition A as withdrawn. We concluded, therefore, that the correspondence on Condition A simply petered out. The bundle of documents available at the hearing did not include any "decision notice" from HMRC formally refusing the claim that Condition A applied and we therefore conclude that no such decision notice was ever issued.

24. On 1 August 2014, HMRC issued penalty assessments under s98A(2) of TMA 1970 in relation to the failure to file monthly returns under the Scheme during the period from 6 August 2008 to 5 April 2010. The penalties assessed amounted to £24,000 but, by the time of the hearing, HMRC had agreed to mitigate those penalties to £5,700.40.

Mr Muraszko's advice to Mr Sowinski

25. Mr Muraszko has practised full-time as an accountant since 2003. He is a chartered certified accountant and his professional letterhead describes him as "J. Muraszko FCCA MIMgt DIP ACC TECH Chartered Certified Accountant". Officer Lai did not suggest that there was any difference between Mr Muraszko's qualifications today and those he held in 2007 and we have therefore concluded that at all times relevant to this appeal, Mr Muraszko was a chartered certified accountant and used the letterhead described above.

26. Mr Sowinski has known Mr Muraszko for a long time. He trusts him and engages him to deal with all of his tax affairs (and indeed asked him to conduct the hearing of this appeal on his behalf). At some point, probably in 2006 or 2007, Mr Sowinski became aware in very general terms of the new form of construction industry scheme that was to take effect from 6 April 2007. He approached Mr Muraszko to ask him if there was anything he needed to do in order to comply with this regime.

27. At some point (also probably in 2006 or 2007) Mr Muraszko attended a conference dealing with the Scheme that was being led by a former HMRC Inspector of Taxes. Mr Muraszko understood that former HMRC Inspector to be saying that the Scheme did not apply to "small" contractors with a turnover less than £1m. A standard form contract stated to be suitable for use by contractors when engaging sub-contractors was one of the handouts available at that conference.

28. Having attended that conference, Mr Muraszko advised Mr Sowinski that he did not need to do anything to comply with the Scheme as it applied only to businesses

with a turnover in excess of £1m. Mr Muraszko also advised Mr Sowinski that he should nevertheless obtain the UTR of any sub-contractors he engaged and ensure that they sign a standard form contract in a form similar to that Mr Muraszko had obtained at the conference.

29. Mr Muraszko did not independently verify his understanding of what had been said at the conference before giving his advice to Mr Sowinski as he considered that these statements would accurately reflect the view of HMRC since they had been made by a former tax inspector. He did not put his advice relating to the Scheme in writing: all relevant advice was given orally.

30. Mr Muraszko also provided Mr Sowinski with a copy of HMRC's leaflet CIS 340 that dealt with the Scheme as it applied from 6 April 2007 in some detail. Mr Sowinski's first language is Polish. He speaks English to a good standard as he has lived in the UK for 36 years. However we did not consider him to be fluent in English and we therefore accepted his evidence that he did not read that leaflet in any detail as it was in technical language that he did not understand. Mr Sowinski did not at any point contact HMRC to verify the advice that Mr Muraszko had given him.

31. Mr Muraszko now accepts that the advice he gave Mr Sowinski was wrong.

Mr Sowinski's own awareness of the Scheme

32. Since Mr Sowinski is also a construction industry sub-contractor he is aware in general terms that payments to sub-contractors can be made under deduction of tax where that sub-contractor does not have gross payment status. However, we found that his knowledge did not extend much further than this general understanding. In particular, we do not consider that he fully appreciated the distinction between being registered as a contractor and being registered as a sub-contractor. We find that he was not aware at any point between 2007 and 2010 that the advice Mr Muraszko had given was wrong and genuinely believed that the Scheme did not apply to him.

33. In practice Mr Sowinski followed Mr Muraszko's advice and obtained UTRs for all of his sub-contractors. He also required them to sign the standard form contract Mr Muraszko supplied that included the following provisions in addition to those dealing specifically with the services being provided:

> You shall be personally liable for your own tax deductions and National Insurance Contributions, and the C.S. Building Services will disclose any payments made to you to the appropriate authorities….
>
> You are considered to be self-employed, and are therefore not governed by, or entitled to, any standard conditions of employment….
>
> Should you decide to utilise self-employed labour … you will be responsible for operating the sub-contractor's tax deduction scheme on any payments made to subcontractors.

34. Mr Sowinski said that he made all payments to his sub-contractors by banker's draft or by cheque and had no intention of evading his tax liabilities, or those of his

sub-contractors. Those statements were not challenged in cross-examination and we have accepted them.

Matters under appeal

35. HMRC accept that, on 31 December 2014, Mr Sowinski made valid appeals to HMRC against both the Regulation 13 Determinations referred to at [21] and the penalty assessment referred to at [24] and that those appeals have been properly notified to the Tribunal.

36. There was, however, some doubt as to precisely which matters were before the Tribunal and the precise grounds of appeal. Mr Sowinski's Notice of Appeal submitted to the Tribunal referred on its face only to the decision to charge penalties totalling £24,000 and to HMRC's decision that Condition B was not satisfied in all cases. There is, as we have noted at [8], no appeal in relation to a determination by HMRC that Condition B is not satisfied in a particular case.

37. In July 2015, Mr Muraszko filed what he described as a "Statement of Case for the appellant". That document made some points relating to his submission that Condition B was satisfied in relation to payments to particular sub-contractors. It also appeared to assert that the Regulation 13 Determination for 2007/08 was made out of time and expressed the view that the amount of the Regulation 13 Determinations of £44,952.07 was "excessive and unrealistic".

38. At the hearing, Officer Lai was content to treat the appeal as being against all aspects of the Regulation 13 Determinations and the penalties. She was also content for the appeal to be treated as extending to the question of whether Condition A was satisfied. That was generous of her, as Condition A was not addressed in the Notice of Appeal or Mr Muraszko's "Statement of Case". However, we have concluded that the Tribunal has no jurisdiction to consider the Condition A issue in this appeal. That is because Regulation 9(7) of the Regulations provides that, if a taxpayer wishes to argue that Condition A is satisfied, he or she must do so by appealing against a "refusal notice" issued under Regulation 9(6). No such refusal notice relating to Condition A has been issued and it follows that, despite Officer Lai's agreement, the Tribunal cannot hear an appeal relating to Condition A. Nor do we think that Mr Sowinski's appeal against the Regulation 13 Determinations can be treated as if it were an appeal relating to Condition A. Regulation 13(3) provides only that <u>if</u> a direction is made under Regulation 9(5), amounts included in that direction must not be assessed under Regulation 13. That is not the same thing as saying that a taxpayer can, in an appeal against a Regulation 13 determination, complain about the <u>failure</u> to make a direction under Regulation 9(5).

39. We are reassured to find that Judge Berner appears to have come to the same view in *Nigel Barrett v Commissioners for HM Revenue & Customs* [2015] UKFTT 329 (TC) where he said, at [109]:

> 109. In this regard I accept the submission of Miss McCarthy that this tribunal has no jurisdiction to adjust the amount determined by

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

40. Putting all of that together, in this appeal we will consider all aspects of the Regulation 13 Determinations (including whether they were made in time) and all aspects of the penalties (including whether they were assessed in time). We will not, however, make any formal determination on whether Condition A is satisfied (for the reasons given at [38] above) or whether Condition B is satisfied (since there is no appeal to this Tribunal in relation to Condition B).

Relevant statutory provisions

41. We have referred to a number of relevant statutory provisions in our introduction to the Scheme set out at [2] to [9] above and we will not repeat those references here. However, there are some other statutory provisions that need to be understood particularly in relation to applicable time limits and the defence of "reasonable excuse".

Additional provisions relevant to the Regulation 13 Determinations

42. By virtue of Regulation 13(5) of the Regulations:

> A determination under this regulation is subject to Parts 4, 5, 5A and 6 of TMA (assessment, appeals, collection and recovery) as if –
>
> (a) the determination were an assessment, and
>
> (b) the amount determined were income tax charged on the contractor.

43. We do not consider that Regulation 13(5) "imports" the requirements of s29 of TMA 1970 (even though that provision is contained in Part 4 of TMA 1970) so as to require an inspector to make a "discovery" before issuing a Regulation 13 Determination. That is because Regulation 13(1) specifies the circumstances in which a Regulation 13 Determination may be made, and Regulation 13(2) and (3) set out how HMRC must calculate how much tax to assess. Parliament cannot, therefore, intend these matters also to be governed by s29 TMA 1970 that deal with similar issues. Moreover, Regulation 13 treats a Regulation 13 Determination as if it were an assessment which logically excludes consideration of matters set out in TMA 1970 (such as the question of "discovery") that are relevant to the question of whether an assessment is valid.

44. However, we do consider that Regulation 13(5) "imports" the time limits set out in s34 and s36 of TMA 1970. Noting that any assessment under Regulation 13 is for a "tax year" (which runs from 6 April in one year to 5 April in the next year), we consider that the general time limit is that contained in s34 TMA 1970. Accordingly, we consider that the general rule is that a Regulation 13 Determination must be made no later than four years after the end of the tax year to which it relates.[3]

45. We also consider that s36 of TMA 1970 is relevant to Regulation 13 Determinations. Therefore, if the failure to account for tax that is the subject of a Regulation 13 Determination is brought about "carelessly" by the taxpayer, the time limit is extended to six years after the end of the tax year in question. Where the failure is brought about "deliberately" by the taxpayer, the time limit for making a Regulation 13 Determination is extended to 20 years after the end of the relevant tax year.

Additional provisions relevant to penalties

46. By virtue of s103 of TMA 1970 as in force at the relevant times, a penalty under s98A of TMA 1970 could be assessed:

> … at any time within six years after the date on which the penalty was incurred.

47. Section 118(2) of TMA 1970 also provides a defence of "reasonable excuse" where, inter alia, a penalty is imposed for failure to provide a particular return on time. Section 118(2) relevantly provides as follows:

> where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased

48. Since Mr Sowinski is being charged penalties under the regime set out in s98A of TMA 1970, the question of "special circumstances" (which is a feature of the successor regime set out in Schedule 55 of Finance Act 2009) is not relevant in the context of this appeal.

Discussion – Regulation 13 Determinations

49. We heard no argument on who has the burden of proof in relation to the Regulation 13 Determinations. Insofar as HMRC are seeking to assess amounts

[3] We note that the four year time limit specified in s34 TMA 1970 came into force with effect from 1 April 2010 by virtue of s118 and paragraphs 1 and 7 of Schedule 9 of Finance Act 2008 and the commencement provisions contained in regulation 2(2) of SI 2009/403. Previously, the time limit was six years from the end of the relevant period of assessment. We heard no argument as to whether the time limit in this appeal should be four years or six years. Even though some of the tax years at issue in this appeal ended before 2010 we consider that, by virtue of the provisions set out above, the relevant time limit is the "new" four year time limit.

outside the normal time limit provided for by s34 TMA 1970, we consider that HMRC have the burden of proving that an extended time limit applies. (In addition, if contrary to the view we express at [43], HMRC have to demonstrate a "discovery" before making the Regulation 13 Determinations, we consider that HMRC would have the burden of doing so). However, insofar as Mr Sowinski is disputing the amount of the Regulation 13 Determination, we consider that he has the burden of proving what the correct amount of that determination should be. Authority for these propositions can be found in *Revenue and Customs Commissioners v Household Estate Agents Limited* [2008] STC 2045.

Procedural issues relevant to the issue of the Regulation 13 Determinations

50. We have expressed our view at [43] that there is no requirement for HMRC to prove a "discovery" before making a Regulation 13 Determination. However, in any event, we consider that HMRC did make a "discovery" that Mr Sowinski had failed to withhold sums that he should have been withholding under the Scheme.

51. We also find that, during the course of HMRC's enquiry, an officer of HMRC "had reason to believe" that there may be an amount of tax due from Mr Sowinski under the Regulations and considered it necessary to issue the Regulation 13 Determination. That was obvious: Mr Sowinski had not paid amounts due under the Regulations which HMRC considered were due in consequence of their enquiries. The fact that an officer considered a Regulation 13 Determination was necessary is borne out by the fact that such a determination was issued.

52. It was not suggested that the Regulation 13 Determinations were not made to the "best judgement" of the officer who made them. Having reviewed the correspondence leading up to the making of the Regulation Determinations, we are satisfied that they were indeed made to "best judgement". We therefore consider that the Regulation 13 Determinations satisfy the requirements of Regulation 13(1) and (2) of the Regulations.

The amount of the Regulation 13 Determinations

53. Mr Muraszko did not produce any evidence to suggest that the Regulation 13 Determinations were wrong in amount. As we have noted, we cannot decide that a Regulation 9(5) Determination should have been made on the basis that either Condition A or Condition B was satisfied and adjust the Regulation 13 Determinations on that basis. It follows that Mr Muraszko has not discharged the burden of proving that the Regulation 13 Determinations were wrong in amount.

Whether Regulation 13 Determinations issued in time

54. As noted at [21], all of the Regulation 13 Determinations were made on 4 April 2014. The Regulation 13 Determination relating to the 2009/10 tax year was therefore made within the "normal" four year time limit set out in s34 of TMA 1970. However, those relating to 2007/08 and 2008/09 are out of time unless HMRC establish that Mr Sowinski was "careless" in failing to account for the tax that was the subject of those

determinations (there being no suggestion that Mr Sowinski's failure to account for tax was "deliberate").

55. We did not hear any submissions on the meaning of "carelessness" in this context and have therefore performed our own review of the authorities on the question. We respectfully agree with Judge Cannan who, in *Hanson v Revenue & Customs Commissioners* [2012] UKFTT 314 (TC), concluded at [19] that the question of whether a particular inaccuracy is "careless" needs to be determined by considering what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done. While that is primarily an objective test, it does contain some elements of subjectivity as Judge Cannan noted when he said at [21]:

> What is reasonable care in any particular case will depend on all the circumstances. In my view this will include the nature of the matters being dealt with in the return, the identity and experience of the agent, the experience of the taxpayer and the nature of the professional relationship between the taxpayer and the agent.

56. Further support for the proposition that certain, subjective, characteristics of the taxpayer himself must be taken into account in assessing whether behaviour is "careless" can be found in *Harding v HMRC* [2013] UKUT 575(TC). In that case, Judges Bishopp and Sadler said, at [35]:

> I do not accept that the Appellant, who admits that he considered that the 'severance payment' was possibly liable to tax in October 2008, could, by August 2009, reasonably have reached the conclusion that it was definitely not liable to tax. The Appellant is an intelligent person, and held a senior position (such as made him eligible to participate in his employer's profit share and bonus plans reserved for directors) in a company which forms part of a leading accountancy practice.

57. Applying that test, we do not consider that Mr Sowinski was "careless" for the following reasons:

(1) He sought advice on his obligations under the Scheme from Mr Muraszko, someone whose judgement on tax affairs he relied upon and trusted. That was the action of someone taking care to comply with his tax obligations. We do not consider that this conclusion is altered by the fact that the advice was not in writing. While Counsel might write long and considered tax opinions for sophisticated clients, we consider that it was reasonable for a taxpayer such as Mr Sowinski who did not have an extensive knowledge of tax matters to rely on oral advice from Mr Muraszko, particularly given the length of their professional relationship.

(2) Mr Muraszko's advice was, of course, wrong. It is not for this Tribunal to decide whether Mr Muraszko was negligent or not, but it does seem to us that he did not take the steps we would expect a careful and competent adviser to take in order to check the accuracy of the advice he was giving, particularly given the consequences that Mr Sowinski could suffer if he did not comply with the Scheme. However, the question is not whether Mr Muraszko's advice was

wrong, but whether it was reasonable for Mr Sowinski to rely on it. We believe it was. Mr Muraszko held a recognised professional qualification and used a letterhead showing a string of letters after his name. Mr Sowinski himself had only the most rudimentary knowledge of the Scheme and we consider that it was reasonable for him to rely on the advice of Mr Muraszko.

(3) Officer Lai submitted that Mr Sowinski should have checked Mr Muraszko's advice with HMRC. We do not consider that a reasonable taxpayer in Mr Sowinski's position would regard that as necessary. The advice was not on its face obviously questionable: some tax compliance regimes do exclude small taxpayers from their scope. Moreover, Mr Sowinski had an ongoing relationship with Mr Muraszko and trusted him. It was reasonable for Mr Sowinski to take his advice at face value.

(4) Officer Lai also submitted that Mr Sowinski should have read HMRC's leaflet CIS 340 and that, had he done so, he would have discovered the error in Mr Muraszko's advice. For reasons set out above, we consider that it was reasonable for Mr Sowinski to rely on Mr Muraszko's advice and we do not consider that a reasonable contractor, with little specialist tax knowledge, would verify professional advice with HMRC. In addition, even though Mr Sowinski has good conversational English, we were not satisfied that his English was of a standard that would have enabled him fully to digest leaflet CIS 340 even if he had read it.

58. Therefore, the failure to deduct and account for the right amount of tax in 2007/08 and 2008/09 was not due to Mr Sowinski's carelessness. The extended time limit in s36 TMA 1970 did not, therefore, apply and the Regulation 13 Determinations for 2007/08 and 2008/09 were made out of time. However, the Regulation 13 Determination for 2009/10 was made within the normal time limit contained in s34 TMA 1970 and was made in time.

Conclusion on Regulation 13 Determinations

59. We have therefore decided that the Regulation 13 Determination for 2009/10 should stand, but that those for 2007/08 and 2008/09 should be set aside on the basis that they were made out of time.

60. We should say, however, that the determinations we have made at [57] indicate to us that Mr Sowinski took reasonable care to comply with his obligations under the Scheme. As noted at [32], Mr Sowinski had a genuine (though mistaken) belief that the Scheme did not apply to him. Therefore, it seems to us that both limbs of Condition A are satisfied. While we have no power to require HMRC to issue a Regulation 9(5) Determination on this basis, we think it would be right for HMRC to consider making such a determination at this stage and to conclude that, as a result, the Regulation 13 Determination for 2009/10 should be reduced to nil. If HMRC are not willing to do this, and issue a refusal notice under Regulation 9(6) of the Regulations, we consider that the findings of fact we have made in this appeal are likely to be relevant in any subsequent appeal that Mr Sowinski brings against such a refusal notice.

Discussion – Penalties

61. As noted at [24], the penalty assessments were made on 1 August 2014 and related to a failure to file returns from a period starting on 6 August 2008. Those penalty assessments were, therefore, made within the six year period stipulated by s102 of TMA 1970.

62. The findings that we make at [13] and [14] mean that Mr Sowinski had an obligation to file returns under the Scheme and it was common ground that no returns had been filed by the relevant due dates. The conditions necessary for the penalties to be charged were, therefore, satisfied. Therefore, the penalties were validly charged subject only to the question of "reasonable excuse".

63. For reasons that are essentially the same as those set out at [57] above, we consider that Mr Sowinski did initially have a "reasonable excuse" for the failure to submit returns under the Scheme as he genuinely, and reasonably, believed that no such returns were required because of the advice that he received from Mr Muraszko.

64. However, that excuse ceased at the latest on 5 May 2013 when HMRC wrote to Mr Muraszko asking for further details on the advice that Mr Sowinski had received on the applicability of the Scheme to him. It should have been clear from that letter that HMRC did not regard the fact that Mr Sowinski's turnover was less than £1m as excusing him from complying with the Scheme. Moreover, Mr Sowinski should have been aware by then that HMRC were not asking for details of his turnover (to verify that it fell below the supposed £1m "threshold"), but were continuing to pursue their enquiries with a view to verifying whether sub-contractors had discharged their tax liabilities. It would, therefore, have been evident to a reasonable taxpayer at that date that, for a contractor carrying on a construction business, there was no £1m threshold applicable to Mr Sowinski's business and that Mr Muraszko's advice was, in all likelihood, wrong. Therefore, we consider that on or shortly after 5 May 2013, a reasonable taxpayer would have made further enquiries as to whether Mr Muraszko's advice was correct and, on making those enquiries, would have discovered that it was wrong.

65. Therefore, Mr Sowinski's "reasonable excuse" ceased by 5 May 2013. Accordingly, the second part of s118(2) TMA 1970 applies. As a result, because Mr Sowinski did not remedy his failure to provide returns under the Scheme within a reasonable time after 5 May 2013, he is not able to rely on the original "reasonable excuse" and the penalties (amounting to £5,700.40 after mitigation) must stand.

Conclusion

66. The appeal against the Regulation 13 Determination relating to 2009/10 is dismissed. However, as noted at [60], we urge HMRC to consider issuing a determination under Regulation 9(5), on the basis that Condition A is satisfied, and reduce the Regulation 13 Determination for 2009/10 to nil.

67. The Regulation 13 Determinations relating to 2007/08 and 2008/09 were made out of time and Mr Sowinski's appeal against them is allowed.

68. The appeal against penalties (amounting to £5,700.40) is dismissed.

69. 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.

JONATHAN RICHARDS

TRIBUNAL JUDGE
RELEASE DATE: 7 December 2015