



[2019] UKFTT 597 (TC)

TC07380

INCOME TAX AND VAT – tax agent – Schedule 38 Finance Act 2012 – conduct notice – whether engaged in dishonest conduct – appellant’s claim that legitimate expectation no action would be taken – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2017/02767

BETWEEN

COLIN RODGERS

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE JONATHAN CANNAN
MS ANN CHRISTIAN**

Sitting in public in Leeds on 13 August 2019

There was no appearance by the Appellant

Mr Simon Clegg of counsel instructed by the Solicitor’s Office and Legal Services of HM Revenue and Customs for the Respondents

DECISION

INTRODUCTION

1. Mr Colin Rodgers, the appellant was given a conduct notice by HM Revenue & Customs (“HMRC”) on 13 September 2016 pursuant to paragraph 4 Schedule 38 Finance Act 2012 (“FA 2012”). The conduct notice was given because HMRC had determined that Mr Rodgers was a tax agent who had engaged in dishonest conduct. This is an appeal against HMRC’s determination pursuant to paragraph 5 Schedule 38 FA 2012.

2. The appeal first came on for hearing on 24 April 2018. Mr Rodgers did not appear at that hearing, although he did provide a written submission dated 3 May 2018 after the hearing. In a decision released on 31 July 2018 the appeal was dismissed. The decision was subsequently set aside on 7 December 2018 because the Tribunal subsequently considered that Mr Rodgers had not had a reasonable opportunity to participate in the hearing. We shall not set out the detailed reasons why the Tribunal came to that conclusion but the decision to set aside is reported at *Rodgers v HM Revenue & Customs* [2018] UKFTT 709 (TC). In summary, Mr Rodgers was unable to participate because of caring responsibilities he has for his sick wife. The Tribunal directed that the appeal should be re-heard before a new panel.

3. Mr Rodgers was given an opportunity to participate at the re-hearing before us. In a letter dated 19 February 2019 he was invited to express a preference as to whether he wanted to attend a hearing at a venue close to his home, by video hearing from his home or by telephone. In the event, arrangements were made for Mr Rodgers to attend by telephone.

4. By letter dated 7 August 2019 received on 12 August 2019 Mr Rodgers informed the Tribunal that he would be unable to attend the hearing by telephone because his wife needed constant attention. He enclosed a copy of a letter dated 17 April 2018 which he wished the Tribunal to take into account and which we have taken into account. There was no request for a postponement of the hearing and no suggestion that a postponement might put Mr Rodgers in a position to participate more fully in the proceedings. We were satisfied that it was in the interests of justice to proceed with the hearing in the absence of Mr Rodgers pursuant to Tribunal Rule 33. In doing so we have carefully considered and, insofar as relevant to the issues, taken into account all the written evidence and submissions provided by Mr Rodgers in relation to the appeal.

STATUTORY FRAMEWORK

5. Schedule 38 FA 2012 provides for sanctions in the case of tax agents who engage in dishonest conduct. Those sanctions include the imposition of penalties of £5,000 – 50,000 and the publication of information about an individual who is subject to a penalty. A penalty may only be assessed where HMRC have given a conduct notice to the individual involved. There are provisions for an individual to appeal where a conduct notice has been given and also to appeal against any penalty assessment. The present appeal is concerned with an appeal by Mr Rodgers following receipt of a conduct notice.

6. Conduct notices are given under paragraph 4 Schedule 38. A conduct notice is a notice of determination given by an authorised officer or with the approval of an authorised officer that an individual has engaged in dishonest conduct. Paragraph 4 provides as follows:

“4(1) This paragraph applies if HMRC determine that an individual is engaging in or has engaged in dishonest conduct.

- (2) An authorised officer (or an officer of Revenue and Customs with the approval of an authorised officer) may notify the individual of that determination.
 - (3) The notice must state the grounds on which the determination was made.
 - (4) For the effect of notifying the individual, see paragraphs 7(2) and 29(2).
 - (5) A notice under this paragraph is referred to as a ‘conduct notice’.
 - (6) In relation to a conduct notice, a reference to “the determination” is to the determination forming the subject of the notice.”
7. Paragraph 3 defines what is meant by “engaged in dishonest conduct”. It provides as follows:
- “(1) An individual “engages in dishonest conduct” if, in the course of acting as a tax agent, the individual does something dishonest with a view to bringing about a loss of tax revenue.”
8. For these purposes a “tax agent” is defined by paragraph 2 as follows:
- “(1) A “tax agent” is an individual who, in the course of business, assists other persons (“clients”) with their tax affairs.”
9. Paragraph 5 makes provision for an appeal by individuals against a determination that an individual has engaged in dishonest conduct. The notice of appeal must be given in the first instance to the officer who made the determination and must state the grounds of appeal. For procedural purposes the appeal is treated as if it were an appeal against an assessment to income tax. The powers of the Tribunal on an appeal are to confirm or set aside the determination.
10. The burden in this appeal is on HMRC to establish that Mr Rodgers was engaged in dishonest conduct.

FINDINGS OF FACT

11. Mr Rodgers was at all material times between 2011 and 2015 an accountant providing accountancy and bookkeeping services. One of his clients in that period was Mr Anthony Ferguson, a self-employed electrical contractor. In 2015 HMRC commenced a compliance check into Mr Ferguson’s self-assessment returns and VAT returns.
12. There is no dispute in the present case that Mr Rodgers, in the course of his business, was assisting Mr Ferguson with his tax affairs. The principal issue is whether Mr Rodgers engaged in dishonest conduct in the course of assisting Mr Ferguson. We say more about the question of dishonesty in our reasons below.
13. We had witness statements served on behalf of HMRC from Mrs Anne English, Mr Keith Newbury and Mr Nigel Robinson who have all had dealings with Mr Rodgers as described below. Mrs English is a Higher Officer of HMRC in the Individual and Small Business Compliance Team. Mr Robinson is a Team Leader in HMRC’s Agent Compliance Team with operational responsibility for Schedule 38 FA 2012. Mr Newbury is a Higher Officer of HMRC in the Agent Compliance Team. We also heard oral evidence from these witnesses.
14. In support of Mr Rodgers’ case we admitted in evidence a witness statement from Mr Rodgers dated 13 November 2017 and a statement from Mr Ferguson dated 2 October 2016. We have also taken into account as evidence what Mr Rodgers has said in correspondence with HMRC and with the Tribunal. The fact that Mr Rodgers and Mr Ferguson have not given oral evidence or been available for cross-examination affects the weight we attach to their evidence.
15. At one stage Mr Rodgers expressed the intention of requiring Mr Neil Furber to give evidence. Mr Furber was a VAT officer who had dealings with Mr Rodgers as described below.

He has since left HMRC and we understand he ordinarily resides outside the UK. By letter from the Tribunal dated 18 April 2019 Mr Rodgers was given an opportunity to apply to the Tribunal for a witness summons in relation to Mr Furber but no application was received.

16. Based on the evidence of the witnesses and the documentary evidence before us we make the following findings of fact, by reference to the balance of probabilities.

17. In May 2015 there was a meeting involving Mrs English, Mr Furber, Mr Ferguson and Mr Rodgers. The meeting was part of a cross-tax enquiry into Mr Ferguson's tax affairs and was held at Mr Ferguson's home. At that stage HMRC had certain concerns that Mr Ferguson's deductions under the construction industry scheme (CIS) had been overstated. At the outset of the meeting Mrs English gave Mr Ferguson a copy of HMRC's Factsheet "Penalties for inaccuracies in returns and documents". The factsheet contained information about the civil penalties that HMRC might charge where inaccurate returns are sent to HMRC. The meeting was amicable and Mr Ferguson and Mr Rodgers were very cooperative. At the end of the meeting the officers were provided with Mr Ferguson's business records.

18. When Mrs English examined Mr Ferguson's business records she formed a view that in some respects they had been falsified. In particular, she could not find any evidence that some of the supplier invoices had been paid and it appeared that some of the phone numbers on those invoices did not exist.

19. A further meeting was arranged for 10 September 2015 at Mr Ferguson's home with the same people in attendance. Mrs English's notes of that meeting indicate that Mrs English explained that they had serious concerns about Mr Ferguson's records. At that stage Mr Rodgers stated that in 2011 he had tried to help Mr Ferguson by creating false supplier invoices to reduce Mr Ferguson's VAT liability. Mr Ferguson stated that he was aware what Mr Rodgers had been doing.

20. The notes record that Mrs English then pointed out that what had been done amounted to fraud and "HMRC were not going to prosecute but civil penalties would be imposed". Mr Rodgers told Mrs English that he and Mr Ferguson had discussed the matter straight after the May meeting and Mr Rodgers had advised Mr Ferguson that there was no doubt HMRC would find the false invoices.

21. Mrs English maintained that when she told Mr Ferguson and Mr Rodgers that there would be no prosecution she was referring to no prosecution of Mr Ferguson for tax evasion. It was Mr Ferguson's tax affairs that she was checking and prior to the meeting a decision had been taken to deal with Mr Ferguson on a civil basis without a criminal prosecution.

22. On 14 September 2015 Mrs English made a referral to HMRC's Agents Compliance Team on the grounds of suspected dishonest conduct by Mr Rodgers. On 17 November 2015 Mr Robinson decided that the case should be taken forward by his team.

23. In January 2016 Mrs English's referral was allocated to Mr Newbury. On 25 February 2016 Mr Newbury made contact with Mr Rodgers by telephone and wrote to him on the same date. The letter explained that Mr Newbury had reason to believe that Mr Rodgers had engaged in dishonest conduct as a tax agent. It included a copy of HMRC's Factsheet "Tax agents: Dishonest conduct" which explains the procedure and penalties under Schedule 38 FA 2012 for dishonest conduct by tax agents. A meeting was then arranged for 15 March 2016 at Mr Rodgers' home. It was attended by Mr Newbury, Mr Robinson and Mr Rodgers.

24. Mr Newbury prepared a typed "meeting brief" prior to the meeting. Mr Newbury and Mr Robinson each had a copy which they used during the course of the meeting. The meeting brief contained information intended to be provided to Mr Rodgers during the meeting and questions to be asked of Mr Rodgers. Mr Newbury and Mr Robinson each made manuscript notes on

their copies of the meeting brief recording the information that was provided and Mr Rodgers' responses to the questions.

25. It is recorded in the manuscript notes that Mr Rodgers specifically asked whether this was a prosecution. The notes indicate that it was explained to Mr Rodgers that this was not a criminal investigation and that the investigation was not being conducted with a view to prosecution. Any penalties would be civil penalties only. Mr Rodgers was told that it could become a criminal matter if full disclosure was not made. Mr Rodgers stated that he assumed the investigation was in connection with Mr Ferguson's affairs and that he had been told that there would be no prosecution. Mr Robinson is recorded as confirming that the meeting did relate to Mr Ferguson and that a decision had been made not to prosecute Mr Ferguson. Mr Rodgers told the officers that full disclosure had been made to Mrs English and Mr Furber. The notes record Mr Rodgers going on to explain that he had created false purchase invoices on his computer to reduce Mr Ferguson's liability to VAT, income tax and national insurance. This had started in 2011-12 and continued up to February 2015 for VAT and the 2013-14 tax return for income tax and national insurance. Mr Rodgers explained that he had tried to mimic the invoice style of traders he knew, some of whom were his clients. He had made up some of the details on the false invoices. He identified the names of specific traders he had used. Mr Rodgers estimated that the tax loss as a result of his actions would be about £10,000 in relation to income tax and national insurance and £12,000 in relation to VAT.

26. At the end of the meeting the notes record that Mr Rodgers acknowledged that he had been fairly treated and had no complaints about how the meeting had been conducted.

27. Mr Newbury prepared typed notes of the meeting and on 30 March 2016 he sent a copy of the notes to Mr Rodgers for his approval. Mr Rodgers provided a substantive response on 29 April 2016. Mr Rodgers did not challenge the description in the note of how and why he had falsified the invoices. His principal point was that the investigation appeared to be a prosecution and that any penalty amounted to a fine, despite the fact that Mrs English and Mr Furber had told him that there would be no prosecution. Mr Rodgers also complained that the caring responsibilities he had for his wife were dismissed lightly in the note and also stated that he would not be able to pay any penalty. He was concerned by the effect this would have on his wife.

28. Mr Rodgers did not sign the typed notes, however we are satisfied that they are a true account of the meeting. They reflect what was recorded in manuscript by Mr Robinson and Mr Newbury on copies of the meeting brief as described above. The notes do not purport to set out in detail the caring responsibilities Mr Rodgers has for his wife, which we acknowledge were and are important and considerable.

29. On 13 September 2016 Mr Newbury issued a conduct notice to Mr Rodgers pursuant to paragraph 4 Schedule 38 FA 2012 in relation to his conduct as Mr Ferguson's tax agent. The grounds on which the determination of dishonest conduct was made referred to the circumstances in which Mr Rodgers had created false invoices.

30. Mr Rodgers appealed against the conduct notice by letter dated 7 October 2016. His grounds of appeal were that he had been told by Mrs English and Mr Furber at the meeting on 10 September 2015 that no further actions or prosecutions would be taken against him.

31. In the first instance the appeal was considered by Mr Newbury. In a letter dated 14 November 2016 Mr Newbury found that no valid grounds of appeal had been provided. The grounds relied on by Mr Rodgers related not to the reasons given for the determination, but to the circumstances in which the determination was made. Mr Rodgers clarified his grounds of appeal in a letter dated 25 November 2016 where he stated as follows:

“I did assist my client to understate his tax liabilities but my actions in doing so were not deliberate or dishonest so I hereby appeal against the above notice.”

32. Mr Newbury confirmed his decision in a letter dated 2 December 2016 and offered Mr Rodgers a review of the decision by an officer not previously involved in the matter. Mr Rodgers accepted that offer and in a review dated 1 March 2017 the decision was upheld.

33. Mr Rodgers notified his appeal to the Tribunal on 27 March 2017. The grounds of appeal were that there were “factual errors and misstatements” in the review decision, that he did not engage in any dishonest conduct and that he had been assured that there would be no prosecution if he and Mr Ferguson co-operated fully with the investigation.

34. Mr Rodgers has not particularised any of the “factual errors and misstatements” referred to in his grounds of appeal, other than in relation to the assurance he claims he was given by Mrs English and Mr Furber that he would not be prosecuted. Mr Rodgers’ case, set out in the correspondence described above and in subsequent correspondence with the Tribunal may be summarised as follows:

- (1) He did not engage in any dishonest conduct;
- (2) He had been categorically assured by Mrs English and Mr Furber that he would not be the subject of any further action or a prosecution in return for full co-operation.

35. We are satisfied that Mr Rodgers created false invoices in order to enable Mr Ferguson to reduce his liability to income tax, national insurance and VAT. He did this in relation to Mr Ferguson’s self assessments returns for 2011-12, 2012-13 and 2013-14 and his VAT returns for accounting periods between 2011 and February 2015. To his credit Mr Rodgers has never disputed these matters.

36. In support of his case Mr Rodgers relied on a statement from Mr Ferguson as follows:

“... I can confirm that as per instruction from Anne English and Neil Furber we were informed that no further actions/proceedings would be pursued. They explained that they alone would be dealing with the matter directly ...”

37. Mr Rodgers also alleged that the reason there was a gap of some 6 months between his meeting with Mrs English and Mr Furber and the contact by Mr Newbury was because Mr Furber would have objected to it and by March 2016 Mr Furber had left the country. Mr Rodgers has also criticised the professionalism of Mr Newbury and Mr Robinson and alleged that their notes of the meeting were a “complete invention”. There is no evidence to support the first of these allegations and we reject it. As to the second allegation, we have heard the evidence of Mr Newbury and Mr Robinson. We are satisfied that they are honest witnesses and that their notes of the meeting on 15 March 2016 are a reliable and true account of that meeting. We reject Mr Rodgers’ second allegation.

38. We are satisfied that at the meeting on 15 March 2016 Mr Rodgers made his disclosures about the nature of his conduct understanding that proceedings were being contemplated by the officers under Schedule 38 rather than a criminal prosecution. He was made aware that Schedule 38 provided for financial penalties in the case of dishonest conduct by tax agents. Mr Rodgers has made allegations that the officers intimidated him and acted unprofessionally at that meeting. Having heard the evidence of Mr Newbury and Mr Robinson we reject that allegation.

39. Having heard the evidence of Mrs English we are satisfied that when Mrs English and Mr Furber stated that civil penalties would be imposed but that HMRC would not prosecute they were referring to the investigation into Mr Ferguson’s tax affairs. It was only afterwards that a referral was made to the Agents Compliance Team. Mrs English and Mr Furber were

focussing solely on the records, returns and conduct of Mr Ferguson who was the taxpayer. It is possible, we suppose that Mr Rodgers and Mr Ferguson somehow misunderstood what they were told at this meeting and came away with the impression that Mr Rodgers would not be prosecuted or be the subject of further action. Even if that is right, we do not consider that Mrs English or Mr Furber can validly be criticised or held responsible for that misunderstanding.

DECISION

40. Mr Rodgers in his witness statement stated as follows:

“I did not commit a dishonest act but merely tried to help Mr Ferguson which with hindsight was the wrong way to do it ...”

41. Counsel for HMRC submitted and we accept that the test for dishonesty is that set out by the Supreme Court in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67. It is an objective test by reference to the standards of ordinary decent people. The test was described by the Court as follows:

“74 ...The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* and by Lord Hoffmann in *Barlow Clowes*: see para 62 above. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.”

42. Mr Rodgers has never disputed that he created false invoices with a view to reducing the tax liability of Mr Ferguson. It is unclear how exactly Mr Rodgers contends that the creation of false invoices in those circumstances is not dishonest. There is no evidence before us to suggest that it was not dishonest. Clearly such conduct is dishonest by reference to the standards of ordinary decent people. We are satisfied that Mr Rodgers was engaged in dishonest conduct and that HMRC were entitled to make a determination to that effect. The first ground of appeal is therefore dismissed.

43. As to the second ground of appeal, Mr Rodgers’ case appears to be that he had a legitimate expectation that he would not be the subject of a prosecution. There are three answers to that as far as this appeal is concerned. Firstly, this Tribunal has no jurisdiction in relation to such arguments of legitimate expectation (see *HM Revenue & Customs v Noor* [2013] UKUT 71 (TCC), *The Trustees of the BT Pension Scheme v HMRC* [2015] EWCA Civ 713 and *R & J Birkett v HMRC* [2017] UKUT 89 (TCC)). Secondly, Mr Rodgers has not been prosecuted. He has been the subject of an enquiry pursuant to Schedule 38 FA 2012 and a conduct notice has been given to him. Those are civil proceedings and do not amount to a prosecution, although we accept for present purposes that they engage the protections in *Article 6(3) Schedule 1 Human Rights Act 1998*. Thirdly, we have found that even if Mr Rodgers did understand that he would not be prosecuted or be the subject of further action, that was a misunderstanding for which the officers were not responsible. The second ground of appeal is therefore dismissed.

CONCLUSION

44. For the reasons given above we dismiss the appeal and confirm the determination.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

45. 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 CANNAN
TRIBUNAL JUDGE**

Release date: 20 SEPTEMBER 2019