TC01456

Appeal number: TC/2010/8105

Construction Industry Scheme. Compliance failures: held no reasonable excuse. Did HMRC have a discretion under section 66FA 1994: John Scofield TC 1068 applied. HMRC's decision void. Appeal allowed

FIRST-TIER TRIBUNAL

TAX

PIERS CONSULTING LTD **Appellant**

- and -

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

TRIBUNAL: CHARLES HELLIER (TRIBUNAL JUDGE)
RICHARD CORKE

Sitting in public in Cardiff on 10 January 2011

Gwydion Hughes, counsel, for the Appellant

Dave Lewis for the Respondents

DECISION

1. Introduction

1. Pier Consulting appeals against a decision made by HMRC to withdraw its gross payment status under the construction industry scheme.

2. The decision against which the Appellant appeals was dated 10 September 2010. The Appellant's Notice of Appeal was dated 8 October 2010 but received by the tribunal on 19 October 2010 and was therefore received outside the time limit for making an appeal. Mr Lewis indicated that the Respondents accepted that the Notice of Appeal had been posted on 8 October 2010. We decided to extend the time for making this appeal in these circumstances accordingly to admit the Notice of Appeal.

3. In outline, HMRC withdrew gross payment status because the company was late in paying its corporation tax for the period ended 31 December 2008.

4. At the hearing Mr Hughes agued that the Appellant had a reasonable excuse for the delay in its payment, that the failure to pay on time should therefore be ignored, and that as a result the Appellant should be treated as not having breached the compliance tests for CIS status.

5. Another issue arose. The statutory provision relating to the withdrawal of gross payment status indicates that HMRC 'may' withdraw such status if the taxpayer breaches the compliance conditions, rather than that it 'shall' do so. That appeared to confer a discretion on the HMRC. But Mr Lewis told us that HMRC did not exercise a discretion: if there was a compliance failure which was not reasonably excused then gross payment status was automatically withdrawn. That raised the questions as to whether and how a failure by HMRC to examine any discretion affected the jurisdiction of the tribunal in the appeal. At the hearing we undertook to consider these issues in our decision.

6. After the hearing we became aware that a differently constituted tribunal were considering the same issues in the case of *John Scofield* TC/2010/04709 TC1068. In that case there had been full argument on the issues. We decided to delay the release of our decision until the decision in that case had been published. When it was we sought the representations of the parties on it.

7. In this decision we address first the question as to whether the Appellant had a reasonable excuse for its failure to pay corporation tax on time, and then the issue of the jurisdiction of the tribunal in relation to the failure by HMRC to address any discretion which might be given to it under the legislation.

The statutory Provisions

8. Chapter 3, part 3 Finance Act 2004 contains the provisions for the Construction Industry Scheme. Under the scheme certain payments to sub contractors must be made under deduction of tax unless the subcontractor is registered for gross payment. Section 63(1) provides that the Board must register a person for gross payment if it is satisfied that certain conditions have been met.

9. Among those conditions are those in Part 3 of Schedule 11 to the Act which include, in paragraph 12 of that schedule, the requirement that the company has complied with all obligations imposed on it by the Taxes Act within the preceding twelve months. That strict requirement is mitigated by provisions in regulations, the Income Tax (Construction Industry Scheme) Regulations 2005 (the "CIS Regulations") which permit certain failures to be ignored, and by para 12(3) of those Regulations which declares that a company is to be treated as having complied notwithstanding an actual failure, if:

> "(a)the company had a reasonable excuse for the failure to comply, and
>
> (b) if the excuse ceased, it complied….without unreasonable delay after the excuse ceased" .

10. Section 66 provides that the Board "may at any time make a determination cancelling a person's registration" if it appears to them that if an application to register for gross payment was to be made at that time the Board would refuse to register the company.

11. Among the provisions of the Taxes Act with which compliance is required is that in section 59D TMA which requires corporation tax for an accounting period to be paid on the day following the expiry of nine months from the end of the period.

12. Section 67 FA 2004 permits an appeal to the tribunal against the cancellation of registration, and in subsection (4) provides that the jurisdiction of the tribunal on such an appeal "shall include jurisdiction to review any relevant decision" of the Board under section 66.

The Facts

13. We had before us a bundle of correspondence between HMRC and the Appellant and heard oral evidence from Stephen Turner, the Appellant's accountant from January 2001, who provided a witness statement, and from Phillipa George, the Managing Director of the Appellant who also provided a witness statement. We find the facts set out below.

14. The Appellant conducts the business of a recruitment agency specialising in the construction sector. It has eight full time members of staff and about 60 contract staff. The Appellant's customers are large companies which insist upon the Appellant having gross payment status. The removal of such status would result in its customers going elsewhere. Its business would be seriously adversely affected.

15. The company employs a book-keeper without formal accounting qualifications and engaged the independent help of a qualified accountant to oversee its accounting and compliance. It was clear that the Appellant took its statutory obligations very seriously and strove to ensure compliance with them. That was why it employed an external qualified accountant.

16. Until the beginning of December 2009 the company had engaged Rhianna Wilcox to perform this oversight role. She fulfilled the duties which would have been performed by a Finance Director. She was responsible for checking the Sage accounting system, and NI and VAT returns; she prepared quarterly accounts and statutory accounts; she prepared annual returns; she was responsible for the corporation tax returns and payments; and she attended meetings with the company's bank and other meetings.

17. Ms Wilcox was a qualified accountant in private practice. She also acted for a number of other companies. In late 2009 one of those companies offered her a full time position as Finance Director. She accepted, and in or around late November informed the Appellant that she would cease to act for it.

18. The Appellant set about finding a new accounting practice to replace Ms Wilcox. In January 2001 it appointed Stas Ltd., whose principal was Mr Turner. Mr Turner also took over responsibility for another 30 or so companies from Ms Wilcox. He had a meeting with Ms Wilcox in early December 2009 at which he was given contact and other details for these companies and some details of the status of their accounting affairs including a file of correspondence finishing in mid 2009.

19. The Appellant's year end is 31 December. The accounts for the period to 31 December 2008 were prepared by Ms Wilcox. The corporation tax return was prepared and submitted by Ms Wilcox during 2009. The return disclosed a corporation tax liability of £6,707.26. (The due date for payment was thus 1 October 2009).

20. No payment in respect of this liability was made until June 2010.

21. After Ms Wilcox accepted the full time position in late November 2009 the directors of the Appellant had difficulty contacting her. Their attempts to get in contact were unsuccessful. However, she told them at about the time of her departure that everything was up to date.

22. When Mr Turner started his duties for the Appellant in January 2010 he examined the Sage accounts and noted that no outstanding liability was shown for corporation tax. He concluded that its liability for the year to 31 December 2008 had been paid. He was mistaken; the liability had not been entered on the system and had not been paid.

23. Mr Turner told us that there had been problems with late filings in relation to a number of the other companies he had taken over from Ms Wilcox.

24. When HMRC wrote to the Appellant in April 2010 cancelling its gross payment registration, it cited the failure to pay corporation tax for the year to 31 December 2008. This came as a shock to the directors and to Mr Turner who hitherto had believed that Ms Wilcox had arranged the payment of the tax.

25. The Appellant changed its business address in March 2009 from Sycamore House to The Business Centre. Mrs George told us, and we accept, that she believed that Ms

Wilcox had sent notification of the change to HMRC and Companies House. After the move, however, it appears that reminders from HMRC were not received by the Appellant.

Discussion

26. Corporation tax for the year to 31 December 2008 was due on 1 October 2009. The first question for us whether there was a reasonable excuse for the failure to pay by that date.

27. It was plain that in the period from 1 October 2009 to December 2009 the Appellant was relying upon Ms Wilcox to organise the payment of its tax. The Company will have a reasonable excuse for its failure only if it had such an excuse both in that period and for the period from December 2009 to the time of its eventual payment. We therefore consider first whether it had such an excuse in that earlier period. In that connection the events after Ms Wilcox' departure are relevant only to the extent that they cast light on the earlier period.

28. There was little evidence before us which directly related in the earlier period other than that showing that the company relied upon Ms Wilcox at that period. What evidence there was suggested that it was likely that Ms Wilcox began to lose her grip on the affairs of the company and became perhaps preoccupied with the affairs of her new employer. There was no evidence which suggested any other reason for her failure to arrange payment of the corporation tax liability: no evidence that she had been ill or urgently distracted by other matters.

29. The question is therefore whether the simple fact of the Appellant's reliance on Ms Wilcox offers is a reasonable excuse for its failure.

30. The VAT Act 1994 provides that when a person has a reasonable excuse for a default it may be disregarded, but it provides in s71 that where reliance is placed on another person to perform a task neither the fact of that reliance nor any dilatoriness or inaccuracy on the part of that person is a reasonable excuse. This carve out it makes it clear that if reliance is placed on another person there must be something other than the reliance for them to be a reasonable excuse. The absence of that carve out from para 12(3) of the CIS provisions raises the question as to whether mere reliance on another person can for this purpose be a reasonable excuse.

31. In our view the difference between the provisions does not indicate that reliance on another person will always constitute a reasonable excuse for the purposes of the CIS regulations. What is required by para 12(3) is an appreciation of whether, in all the circumstances, there was a reasonable excuse. The reasonableness of the reliance, and the circumstances of the failure will be relevant to that determination.

32. In the Appellant's case it was, in our view reasonable for it to rely upon Ms Wilcox in the period up to the end of November 2009. She was a qualified accountant and in previous periods had shown herself capable and organised. There was nothing to suggest that she had become unreliable in this period.

33. But there was no explanation for Ms Wilcox' failure. She may simply have overlooked the matter.

34. With some hesitation we find that on balance the Appellant did not show that it had a reasonable excuse for its failure. The Appellant adopted a careful and serious approach to its obligations. It appointed a properly qualified capable person. It had no inkling that that person was not performing properly. But the circumstances of Ms Wilcox failure were not explained.

35. After Ms Wilcox departure the Appellant remained ignorant of its failure to have paid the tax until it received notice of the cancellation of its gross payment status. In the period it took reasonable steps to ensure compliance: it appointed Mr Turner and he checked its Sage accounting system. In our view any excuse created by Ms Wilcox' failure would have continued until the receipt of the notice of cancellation and was rectified with reasonable promptness after that date.

36. In reaching this conclusion we have ignored the facts:

(1) that the company had hitherto been fully compliant,

(2) that when the failure to pay was discovered it was put right speedily, and

(3) that the cancellation of CIS gross payment registration would have serious results for the company.

These facts do not seem to us to affect the question of whether or not the company had a reasonable excuse for its failure.

37. We were told that the company was not sent any notice reminding it of its obligation to pay or notify it of its default. It seems to us that a notification of default given after the default can have no bearing on whether there was a reasonable excuse for the default and that not receiving a reminder does not give rise (particularly for a company with professional advisers) to a reasonable excuse.

Escape under the CIS Regulations?

38. Regulation 32 of the CIS Regulations permits a failure to pay corporation tax to be disregarded if the payment is made not later than 28 days after the due date. The payment was considerably later than this. The paragraph cannot therefore apply to afford relief.

A discretion: the tribunal's jurisdiction

(a) a discretion

39. Section 67 provides for appeals against both the refusal of an application for gross payment registration and against the cancellation of such registration.

40. The provisions for the grant of registration in section 63 differ from those for cancellation in section 66 in one important respect. Section 63 says that if the Board are satisfied that the conditions in section 64 are met "the Board *must* register" the

person for gross payment. Section 66, by contrast, says that if it appears to the Board that one of the conditions in section 66(1) is met then the Board "may" make a determination cancelling such registration.

41. The contrast between "may" and "must" suggests that the Act gives a discretion to the Board as to whether or not to cancel registration if the conditions are met. In *John Scofield* TC 1068 the tribunal held that section 63 did indeed confer a discretion. We agree.

42. Mr Lewis suggested that "may" in section 66 referred to the possibility that the taxpayer had a reasonable excuse. We do not agree. Whether or not there is a reasonable excuse affects whether the compliance condition is satisfied. If there is a reasonable excuse there is no compliance failure and HMRC cannot cancel registration. If there is no reasonable excuse there is a compliance failure and HMRC "may" cancel registration.

(b) Jurisdiction

43. If HMRC have failed to exercise a discretion, the question arises as to whether or not the tribunal has jurisdiction to do anything about it.

44. Section 67(4) provides that the jurisdiction of the tribunal hearing the appeal shall "include jurisdiction to review" any decision of the Board in the exercise of their functions under section 63 to 66. The word "include" suggests that the tribunal's function may not be limited to such a review.

45. In *Hudson v JDC services Ltd* [2004] STC 834, Lightman J considered the jurisdiction given to the Special Commissioners by section 561(9) TA 1988 in relation to the refusal by the Inland revenue of a certificate for gross payment under the predecessor of the current CIS regime. That regime provided:

(1) in section 561(2) that the Board "shall" issue a certificate to a person if specified conditions (similar but not identical to those in section 63) were satisfied;

(2) in section 561(8) that the Board "may at any time cancel a certificate" if it appeared to them that certain conditions (again similar but not identical to those in section 66) were satisfied; and

(3) in section 561(9) that a person could appeal against the refusal of a certificate or its cancellation and that on such an appeal the jurisdiction of the Special or General Commissioners " shall include jurisdiction to review any relevant decision taken by the Board in the exercise of their functions under [that] section".

Thus the differences between the mandatory requirement to grant a certificate and the discretionary power to cancel it if conditions were satisfied existed in the previous legislation and parallel the "must" and "may" in the current legislation; and the words describing the tribunal's jurisdiction are for all intents and purposes identical.

46. Lightman J held that the legislative history and the statutory context indicated that full appellate jurisdiction was conferred on the tribunal entitling it to substitute its own judgement for that of the Board. The legislative history showed that in 1975 the tribunal was restricted to reviewing the exercise of the Board's function but had been excluded from considering the question of whether or not the conditions had been fulfilled. This restriction was lifted in 1980. Lightman J said:

> "In my judgement it is unlikely that the [1980] amendment was merely intended to vest in the [tribunal] a power of supervision…equivalent to that exercisable by the Court on judicial review…"

47. In relation to the statutory context he said that it supported the conferment on the tribunal of full appellate jurisdiction for the following reasons:

> "(a) the statutory context is a subsection conferring full appellate jurisdiction on the commissioners which is to "include" jurisdiction to review a decision on entitlement to a CIS certificate;
>
> "(b) the decision of the Revenue under appeal does not involve the exercise of discretion. Statutory rules regulate how the power to grant CIS certificates is to be exercised. What is required of the Revenue is to apply the statutory criterion. There is no reason why the commissioners should not on appeal undertake the same exercise;
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> "(c) the decision of the Revenue, an administrative body, to refuse the grant has far reaching implications for the applicant;
>
> "(d) the conclusion which I have reached accords with that of Goulding J in *Lothbury Investment Corp Ltd v IRCI [1979]* STC 772. [1981] Ch 47."

48. We note that in reason (b) Lightman J appears to disregard the discretionary provision in section 561(8) which said that the board "may" cancel a certificate. But in the case before him the issue related to section 561(2), the grant of a certificate, and there was no discretion afforded under that subsection.

49. It seems to us that it is clear that in relation to the question of whether or not the conditions for registration in section 63, or for cancellation in section 66 are met, the tribunal has a full appellate jurisdiction.

50. In relation to an appeal against a refusal to register the tribunal must consider the evidence and determine whether those conditions are met. That exercise will determine the matter. There is no further question to be asked. If the tribunal decides that the conditions are met, the person must be registered.

51. In relation to an appeal in relation to the cancellation of a certificate there remains the question of the exercise of the Board's discretion under section 66. The questions which arise in relation to our jurisdiction are (a) whether the tribunal has the power to consider the exercise of that discretion, (b) if it has such a power whether it is entitled to substitute its judgment as to the proper exercise of that power for that of the Board, or whether it is merely required to determine, in a manner similar to that on a judicial review, whether the discretion has been "reasonably" exercised or exercised at all, and

(c) if it has that power and decides that the discretion has not been so exercised (or exercised at all) whether it must remit the decision to be made again by the Board, or must simply allow the appeal.

52. It seems to us that the answer to the first question is that the tribunal has the power to consider the exercise of the discretion. The words of section 67(4) are clear: the tribunal's jurisdiction includes a power to review any relevant decision of the Board in the exercise of its functions under section 66. One of those functions is deciding to cancel a certificate. The tribunal can therefore review that decision.

53. The answer to the second question is less clear, but it seems to us that our jurisdiction in this respect is limited to upholding or striking down the decision. That is for the following reasons:

(1) Lightman J says, in relation to the legislative history that it was unlikely that the [1980] amendment was "merely" intended to provide for a *Wednesbury* type judicial review. But the extension of the jurisdiction effectively to consider the question as to whether or not the conditions were fulfilled leaves the possibility that a review jurisdiction was at least retained in relation to the exercise of any discretion;

(2) Lightman J's discussion in subpara (b) of his reasons reveals that his decision as to full appellate jurisdiction was in the context of the operation of the statute where there was no discretion. It is clear that he regarded the presence of any statutory discretion as being at least potentially indicative of a limited jurisdiction, and also clear that his decision as to full jurisdiction does not determine the tribunal's jurisdiction in an appeal against the cancellation of a certificate (or thus of registration);

(3) Although, as Lightman J notes at [20] a "review" jurisdiction may encompass a full appellate jurisdiction, the use of the phrase "include jurisdiction to review" indicates to us that a review should be something in addition to a full appellate consideration of the operation of the relevant conditions. Indeed Lightman J recognises this possibility in his reason (a);

(4) Where a discretion is conferred by statute there is some recognition that there may be policies developed by the body to which the power is given which may influence the exercise of that power. A body given a power may rightly take into consideration the need to act fairly as regards a wide body of taxpayers. The development of such policies would be precluded if the tribunal had the jurisdiction to substitute its own. The issues in relation to CIS certificate are ones in which it would be reasonable to suppose that such policies could be applied.

54. So far as the third issue is concerned it seems to us that the proper outcome of an appeal is that it should be allowed or dismissed, and that an express power would be needed for the tribunal to remit a decision to be remade (a power along the lines of that in section 16(4) FA 1994 for example). We conclude that if we were to determine that the discretion had not been properly exercised then we should allow the appeal.

(c) Was there an exercise of a discretion in this case?

55. Mr Lewis told us that the Board did not give any separate consideration to the question of whether, if the conditions for deregistration were satisfied, it should proceed to deregister a person. If the conditions were satisfied deregistration followed automatically. We concluded that such had been the case in the Appellant's circumstances. The approach taken by HMRC was also evidenced in a note of a telephone call on 21 September 2010 made by Andy Simpson of HMRC's Appeals and Revenue unit. He said that "unfortunately the legislation did not permit him to reach any conclusion other than to uphold the decision".

56. After we sought the parties representations in relation to the *John Scofield* decision, HMRC wrote to explain that they had now amended their procedures, but offered no new evidence in relation to this case.

57. It seems to us that there was no a proper exercise of the power given to the Board by section 66. Where a power is given, a decision on whether or not to exercise it must be taken on the facts of the case. This the Board did not do.

58. Whether or not HMRC were entitled to decide to withdraw gross payment status we find that this decision to do so was void.

Conclusion

59. We allow the appeal

Rights of appeal

60. 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.

CHARLES HELLIER

TRIBUNAL JUDGE
RELEASE DATE: 20 SEPTEMBER 2011