Neutral Citation Number: [2022] EWHC 1849 (Admin)

Case No: CO/913/2022

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN MANCHESTER

Friday 15th July 2022

Before :

MR JUSTICE FORDHAM

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Between :

(1) BEECH DEVELOPMENTS (MANCHESTER) LIMITED **(2) WESTPOINT MANCHESTER LIMITED** **(3) NEWTON STREET MANCHESTER LIMITED** **(4) PS 121 LIMITED** **(5) BYROM STREET LIMITED** **(6) BLACKFRIARS STREET LIMITED**	**Claimants**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Defendant**

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Philip Coppel QC and **Charlotte Brown** (instructed by Freeths LLP) for the **Claimant**
Iain Callow (instructed by HMRC) for the **Defendant**

Hearing date: 15.7.22
Judgment as delivered in open court at the hearing

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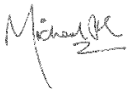
Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced and approved by the Judge, after using voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM :

1. I am going to grant permission for judicial review in this case. I am satisfied that the Claimants have identified a properly arguable point of law. The sole issue in the case, as I see it, concerns whether the Defendant has any power to make what I will call a non-liability direction ("NLD") under regulation 9(5) of the Income Tax (Construction Industry Scheme) Regulations 2005 (SI 2005 No. 2045) where it has made a regulation 13(2) "determination" of liability. The impugned decision declined to make NLDs on the basis that such a course was statutorily precluded. In broad terms, a regulation 9(5) NLD is empowered in this situation: where there is a deficit in terms of sums which a contractor should have deducted and passed on to the Revenue, in respect of the tax liability of a subcontractor; but where statutorily criteria are satisfied relating to the excusability of that default and the subcontractor's direct accountability for the liability.

2. Regulation 13(2) empowers the Revenue to determine and notify an amount which the contractor is liable to pay under the Regulations. Regulation 13(3) provides:

> ***A determination under this regulation must not include amounts in respect of which direction under regulation 9(5) has been made and directions under that regulation do not apply to amounts determined under this regulation.***

Regulation 13(3) appears to be doing two things. First, it mandates that an amount which is the subject of a regulation 9(5) NLD is deductible in the making of a regulation 13(2) determination. Secondly, it mandates that the regulation 9(5) NLD has no bite (or application) as to the substantive content of a determination which has been made.

3. In the present case, the Claimants' position is that they had (and still have) extant appeals under extant appeal rights against the regulation 13(2) determinations made by the Revenue. They say a merits appeal tribunal would have the function of revisiting the appropriate "assessment" of their liability under the Regulations as contractors. They say the appeal tribunal would have the power, if appropriate, of making a substitute "assessment". One way of looking at that is that the tribunal would, in effect, be remaking the regulation 13 "determination". Another is that regulation 9(5) informs the tribunal's consideration of the merits of the "assessment". It is, in my judgment, an arguable point of law that the Defendant does have a power to make a section 9(5) direction, having made a determination, which could have a 'bite' (applicability) if there is a right of appeal and it could be appropriate for the appealable determination as an "assessment" to be remade by the appeal tribunal (which may be in form or substance the making of a fresh determination), in which the NLD would be deductible. There may, as it seems to me, be a similar point about whether a determination could be "remade" by the Revenue itself. It could be helpful to look at what happened in this case in July 2019, when there were review conclusion letters involving an adjusted amount.

4. The Defendant's position in the impugned decisions refusing the requested NLDs (13.12.21) – a position foreshadowed in warning letters written in early 2019 – was that it has no statutory power to issue an NLD, and therefore to consider regulation 9(4) representations, once its regulation 13(2) determination has been made. Mr Callow says that is right – the two regulations are mutually exclusive – as a matter of the plain English reading, supported by 3 First Tier Tribunals over a period of a decade. Heather Williams J was persuaded on the papers on 10 June 2022 that this was, beyond

argument, correct. That may well be right. I am not deciding whether there is an arguable defence; but whether there is an arguable claim. If it is incorrect, as a matter of statutory interpretation, the argument is that there was a material misdirection in law on the face of it in an impugned decision, challenged within time.

5. The Defendant was as I see it understood to have advanced the argument that the circumstances and timing of judicial review would warrant refusing judicial review by reason of delay and lack of promptness, even if the Defendant is wrong about the power. Mr Callow has today accepted, on instructions, that there is no freestanding delay point, independently of the point of law; that all relevant timing points are bound up in that point of law. All arguments can therefore be considered together.

6. The arguments in this case focus on the regulations and their proper construction, in their wider statutory setting, against the backcloth of appeal rights, in the context of what are said by the Claimants to be exclusive bases for refusing an NLD, and what is said by them by and about a principle regarding double taxation, and in the context of the series of First Tier Tribunal cases in which the issue has arisen in contexts related to the tribunal's "jurisdiction". In those case, the point is said to have attracted an analysis favourable to the Defendant's submissions, but is said by the Claimants to have done so with a degree of discomfort or reservation. Those cases are Ormandi [2019] UKFTT 667 (TC); North Point [2021] UKFTT 259 (TC) and Hoskins [2012] UKFTT 284 (TC).

7. Since the only view that I have formed at this in-person renewal hearing is that the threshold of arguability is crossed, I say no more.

15.7.22