Neutral Citation Number: [2023] EWHC 977 (Admin)

Case No: CO/913/2022

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

Friday 28th April 2023

Before:
MR JUSTICE FORDHAM

- -

Between:

THE KING (on the application of (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 -	
COMMISSIONERS FOR HM REVENUE AND CUSTOMS	**Defendants**

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Philip Coppel KC and **Charlotte Brown** (instructed by Freeths LLP) for the **Claimants**
Philip Simpson KC (instructed by HMRC) for the **Defendants**

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Hearing date: 29.3.23 and 30.3.23

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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

MR JUSTICE FORDHAM:

Introduction

1. This is a case about "directions" and "determinations" as they feature in the Construction Industry Scheme (the "CIS"). The CIS is governed by Part 3 Chapter 3 of the Finance Act 2004 (the "2004 Act") enacted by Parliament and the Income Tax (Construction Industry Scheme) Regulations 2005 ("the Regulations") made by HMRC. The central legal question is whether HMRC can lawfully issue a "direction" of 'non-liability to pay' an amount (a "Non-Liability Direction": §10 below), in circumstances where there is an existing and prior HMRC "determination" of 'liability to pay' that same amount (a "Liability Determination": §8 below). There is a line of relevant decisions of the First-Tier Tribunal ("FTT") decided between April 2012 and July 2021 (§§18-21 below): Hoskins v HMRC [2012] UKFTT 84 (TC) (20.4.12); Barrett v HMRC [2015] UKFTT 0329 (TC) (7.7.15); Ormandi v HMRC [2019] UKFTT 0667 (TC) (5.11.19); and North Point (Pall Mall) Ltd v HMRC [2021] UKFTT 0259 (TC) (12.7.21).

The Interrelationship Provision: Limbs [i] and [ii]

2. Regulation 13(3) of the Regulations (the "Interrelationship Provision") addresses the interface between Non-Liability Directions and Liability Determinations. Here it is, with square bracketed numbers to identify what I will be calling "Limb [i]" and "Limb [ii]":

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

The phrases "a determination under this regulation" in Limb [i] and "determined under this regulation" in Limb [ii] refer to a Liability Determination (§8 below). The phrases "a direction under regulation 9(5)" in Limb [i] and "directions under that regulation" in Limb [ii] refer to Non-Liability Directions (§10 below). Simplified, and using the lexicon of this judgment, the Interrelationship Provision comes to this:

> ***[i] A Liability Determination must not include amounts in respect of which a Non-Liability Direction has been made and [ii] Non-Liability Directions do not apply to amounts determined by a Liability Determination.***

A Basic Example

3. So far as relevant to the present case, the CIS is concerned with the following scenario. A Contractor (2004 Act s.59) makes a Contract Payment (s.60) to a Sub-Contractor (s.58). The Sub-Contractor has not been registered for gross payment (s.63(2)). The Contract Payment is a payment for construction services. From it are subtracted anything paid in respect of the direct costs to the Sub-Contractor of materials (s.61(1)). That leaves a payment which, in essence, relates to labour. The CIS regulates what is to happen in that scenario. I will be taking this as what I will call my "Basic Example": the Contractor is making a Contract Payment (from which the costs of materials have already been deducted) of £100 to the Sub-Contractor; the £100 is being paid for construction services (provided by the Sub-Contractor and received by the Contractor).

Contractor's Duties under the CIS

4. In the context of making the Contract Payment to the Sub-Contractor, the Contractor comes under three key statutory duties:

   i) First, the Contractor owes a statutory duty to verify with HMRC the Sub-Contractor's registration status (s.69(1); reg.6). The Sub-Contractor may be registered for gross payment (s.63(2)), or "registered for payment under deduction" (s.62(3)), or unregistered. If the Sub-Contractor is registered for gross payment (s.63(2)) the other two statutory duties do not arise. Otherwise, there is a "relevant percentage" (s.61(2)) which is currently set at 30% if the Sub-Contractor is unregistered and 20% if the Sub-Contractor is "registered for payment under deduction".

   ii) Secondly, the Contractor owes a statutory duty to deduct a sum from the Contract Payment (s.61(1)). This "deductible amount" (reg.9(2)) is calculated as the "relevant percentage" (s.61(2)) of the relevant Contract Payment (s.61(1)). The "amount actually deducted" (reg.9(2)) should be the "deductible amount", but in the real world it may be the wrong amount or zero. A shortfall between the "amount actually deducted" and the "deductible amount" is called "the excess" (reg.9(2)). Treating my Basic Example as involving an unregistered Sub-Contractor, the situation is this. The Contractor is statutorily duty-bound to deduct a "deductible amount" of £30 from the £100. That means the Contractor pays the Sub-Contractor £70 and retains £30. If the Contractor fails to make any deduction, so that the "amount actually deducted" is zero, they will have paid the Contractor the full £100, and the "excess" will be £30.

   iii) Thirdly, the Contractor owes a statutory duty to pay to HMRC the "deductible amount". That payment duty applies whether the "deductible amount" was actually deducted (s.62(1)) or not, because it suffices that the Contractor was "required" and "liable" to deduct it (reg.7(1), reflecting s.71(1)). The amount actually paid should be the "deductible amount", but in the real world it may be the wrong amount or zero. In my Basic Example, the Contractor is statutorily duty-bound to pay HMRC £30.

Purpose of the CIS

5. The purpose of this framework is to promote effective tax collection in respect of the liabilities to HMRC of Sub-Contractors, avoiding risks which arise when tax collection has to be undertaken from the Sub-Contractors themselves. The "broad outline" given in HMRC's published Construction Industry Scheme Reform (CISR) Manual describes the CIS (at §11020) as "aimed at preventing evasion of tax by subcontractors working in the industry and who are unknown to HMRC". An 'upstream' mandatory retention of money paid to HMRC by the Contractor promotes the effective collection and discharge of 'downstream' tax liabilities of the Sub-Contractor. So, the deduction is described as being "on account of tax" and is referable to "tax periods" (reg.7(1)). The purpose can be seen from the "treatment" of the deduction when in the hands of HMRC.

Upstream-Treatment (s.62; reg.56)

6. In my Basic Example, the Contractor should pay the Sub-Contractor £70, with a deduction of £30 and a payment of that £30 to HMRC. The sums which are deducted by Contractors and paid to HMRC are then to be "treated" in a prescribed way. I will call this "Upstream-Treatment". The key points are these:

    i) First, liabilities are discharged. In the case of a non-corporate Sub-Contractor, the sums are "treated" as payments in respect of the Sub-Contractor's income tax then any Class 4 (self-employed) National Insurance contributions (s.62(2)). In the case of a corporate Sub-Contractor, the sums are "treated" as payments in respect of the Sub-Contractor's "relevant liabilities" to HMRC (s.62(3)(a) and (4)) then its corporation tax liabilities (s.62(3)(c)).

    ii) Secondly, those liabilities which are discharged are 'wider' than tax liabilities arising in relation to the relevant Contract Payment. The Upstream-Treatment – of sums deducted by the Contractor which are now in HMRC's hands – includes collecting tax to discharge the Sub-Contractor's tax liabilities referable to the Contract Payments under the Construction Contract. That is part of it. To take my Basic Example, if the Sub-Contractor had received £100, a tax liability could arise in relation to that £100 received. The "treatment" of the retained £30, in the hands of HMRC, includes collecting to discharge any such tax liability. The tax liability remains that of the Sub-Contractor. For the purposes of collecting in respect of it, the sum of £100 is treated as having been paid undiminished by the deduction of £30 (see s.62(1)(b)). But the Upstream-Treatment is 'wider' than this. Other liabilities of the Sub-Contractor can be collected using the £30 deducted. In the case of a non-corporate Sub-Contractor, the "treatment" of the retained sum extends to discharging tax liabilities relating to the Sub-Contractor's "profits from the trade, profession or vocation" (s.62(5)(b)). In the case of the corporate Sub-Contractor there is detailed provision (reg.56). The "relevant liabilities" extend beyond "tax", for example, to sums owed to HMRC which relate to Sub-Contractors' employees' student loans and statutory sick pay (reg.56(2)(d)(e)). And the treatment to discharge the Sub-Contractor's corporation tax liability extends to liability which is owed from previous years (reg.56(6)).

    iii) Thirdly, an Upstream-Treatment surplus can be repaid to the Sub-Contractor. If, after the prescribed "treatment", there is a surplus from the retained sum left over in the hands of HMRC, the corporate Sub-Contractor is "repaid" (s.62(3)(d), reg.56(3)). I return to my Basic Example. Suppose the Sub-Contractor is a corporate entity. Suppose that only £25 of the deducted £30 in the hands of HMRC is needed for the discharge of all of the Sub-Contractor's "relevant liabilities" and all of its corporation tax due. If so, HMRC then pays £5 to the Sub-Contractor, to add to the £70 from the Contractor.

<u>Downstream-Collection (reg.9(4)(a)(ii))</u>

7. Suppose the Contractor fails to make the deduction and fails to make the payment to HMRC. Taking my Basic Example, the Sub-Contractor has now received £100. They should have received £70. What happens in relation to the Sub-Contractor's tax liabilities? The answer is that they have to be collected in the usual way, 'downstream'. There is no "treatment" of a deducted sum. The Sub-Contractor has been paid with no deduction. The Sub-Contractor will now be duty-bound (under applicable tax

legislation) to account for their income and profits, by reference to the receipt of the £100. They are duty-bound (under applicable tax legislation) to file a tax return, and to make a tax payment. When this happens, and everything is properly regularised, there is a situation where liabilities have been discharged. I am going to focus on the 'narrow' scenario where the tax on the £100 (the contract payment to which the s.61 deduction duty applied) has been accounted for and discharged by the Sub-Contractor. I will call this scenario "Downstream-Collection". It is significant under the Regulations because it is the scenario described within regulation 9(4)(a)(ii), where:

> ***the person to whom the contractor made the contract payments to which section 61 of the Act applies … has made a return of his income or profits in accordance with section 8 of TMA (personal return) or paragraph 3 of Schedule 18 to the Finance Act 1998 (company tax return), in which those payments were taken into account, and paid the income tax and Class 4 contributions due or corporation tax due in respect of such income or profits…***

"TMA" is the Taxes Management Act 1970. Downstream-Collection in relation to the £100 – as described in regulation 9(4)(a)(ii) – does not mirror what happens with the Upstream-Treatment of the £30 if deducted and paid to HMRC (s.62; reg.56). That is because Upstream-Treatment (§6 above) has a 'wider' function than simply collecting liabilities referable to the £100. There can, of course, be a similarly 'wider' type of 'downstream collection' scenario, in which a Sub-Contractor had discharged every liability to which Upstream-Treatment could apply. But that 'wider' scenario is not the position described in regulation 9(4)(a)(ii), which I am calling "Downstream-Collection".

Liability Determination (reg.13(2))

8. A Liability Determination is a species of decision which an officer of Revenue and Customs (a "Revenue Officer") is empowered to take, by "notice of … determination". A Liability Determination is made pursuant to regulation 13(2) which provides:

> ***An officer of Revenue and Customs may determine the amount which to the best of his judgment a contractor is liable to pay under these Regulations, and serve notice of his determination on the contractor.***

Where the Revenue Officer does not make a Liability Determination, a Contractor or Subcontractor may apply to the FTT to determine the matter (reg.13(6)). Three situations stand as triggering scenarios for a Determination of Liability (reg.13(1)(a)-(c)), namely:

> ***(a) there is a dispute between a contractor and a sub-contractor as to – (i) whether a payment is made under a construction contract, or (ii) the amount, if any, deductible by the contractor under section 61 of the Act from a contract payment to a sub-contractor or his nominee, or (b) an officer of Revenue and Customs has reason to believe, as a result of an inspection under regulation 51 or otherwise, that there may be an amount payable for a tax year under these Regulations by a contractor that has not been paid to them, or (c) an officer of Revenue and Customs considers it necessary in the circumstances.***

Appeal: Liability Determination (reg.13(5))

9. Pursuant to regulation 13(5), a Liability Determination is due and payable within 14 days, but it is appealable by the Contractor "as if it were an assessment" and "as if the amount determined were income tax charged on the Contractor". An appeal is governed by TMA Part 5. Steps include: the appeal (s.31); its notification to HMRC (s.31A); the

expression of an HMRC "view" (s.49C(2)) with the offer of a "review" (s.49A); a review decision (s.49E(5)); then notification to the FTT (s.49G). The FTT's jurisdiction includes provision for the appeal to succeed if the FTT concludes that the Contractor "is overcharged by" the Determination (treated as the assessment), in which case the FTT can "reduce … the amount" which is "taken to have been reduced ... accordingly." This is seen in section 50(6) and (8) of the TMA:

> ***(6) If, on an appeal notified to the tribunal, the tribunal decides … (c) that the appellant is overcharged by an assessment …, the assessment or amounts shall be reduced accordingly … (8) Where … the tribunal decides as mentioned in subsection (6) … above, the tribunal may, unless the circumstances of the case otherwise require, reduce … only the amount assessed; and where any appeal notified to the tribunal is so determined the tax charged by the assessment shall be taken to have been reduced … accordingly.***

Non-Liability Direction (reg.9(5))

10. A Non-Liability Direction is action which a Revenue Officer is empowered to make under regulation 9(5):

> ***An officer of Revenue and Customs may direct that the contractor is not liable to pay the excess to the Commissioners for Her Majesty's Revenue and Customs.***

The "excess" is the shortfall between the "amount actually deducted" by the Contractor and the "deductible amount" (reg.9(2)). There are two statutory preconditions, to be assessed by the Revenue Officer, before a Non-Liability Direction can be made. The first precondition is that there must be an "excess" (reg.9(1)(a)). The second precondition (reg.9(1)(b)) is the satisfaction of one (or both) of the prescribed Bases known as "Condition A" (reg.9(3)) and "Condition B" (reg.9(4)). Condition B is in two parts (reg.9(4)(a)(i) and (ii)), each of which also requires the Contractor to have requested HMRC to make a Non-Liability Direction (reg.9(4)(b)). The two statutory preconditions for a Non-Liability Direction arise by reason of regulation 9(1) which provides:

> ***This regulation applies if – (a) it appears to an officer of Revenue and Customs that the deductible amount exceeds the amount actually deducted, and (b) condition A or B is met.***

Bases for a Non-Liability Direction (reg.9(3)(4))

11. The prescribed Bases for a Non-Liability Direction – Condition A and Condition B – are described in Regulation 9(3) and (4), as follows:

> ***(3) Condition A is that the contractor satisfies an officer of Revenue and Customs – (a) that he took reasonable care to comply with section 61 of the Act and these Regulations, and (b) that (i) the failure to deduct the excess was due to an error made in good faith, or (ii) he held a genuine belief that section 61 of the Act did not apply to the payment.***
>
> ***(4) Condition B is that – (a) an officer of Revenue and Customs is satisfied that the person to whom the contractor made the contract payments to which section 61 of the Act applies either – (i) was not chargeable to income tax or corporation tax in respect of those payments or (ii) has made a return of his income or profits in accordance with section 8 of TMA (personal return) or paragraph 3 of Schedule 18 to the Finance Act 1998 (company tax return), in which those payments were taken into account, and paid the income tax and Class 4 contributions due or corporation tax due in respect of such income or profits; and (b) the contractor requests that the Commissioners for Her Majesty's Revenue and Customs make a direction under paragraph (5).***

I have found it helpful to separate out three distinct Bases on which the Revenue Officer is empowered to make a Non-Liability Direction. I will give them shorthand labels: the "Carefulness-Basis" (Condition A: reg.9(3)); the "Chargeability-Basis" (Condition B: reg.9(4)(a)(i)); and the "Collection-Basis" (Condition B: reg.9(4)(a)(ii)). Although regulation 9(5) is expressed as a discretion ("may"), Mr Simpson KC accepted that, if one of the Bases is satisfied it would be "difficult to imagine that the discretion would not be exercised positively".

Carefulness-Basis (reg.9(3))

12. The Carefulness Basis on which a Revenue Officer is empowered to make a Non-Liability Direction is where the Contractor took reasonable care to comply with the s.61 duty of deduction and they made the described good faith error or had the described genuine belief. This is Condition A (reg.9(3)). It is a sufficient basis for a Non-Liability Direction. It does not require a request (cf. reg.9(4)(b)) but it does require that the Contractor "satisfies" the Revenue Officer. Here it is again:

> ***(3) Condition A is that the contractor satisfies an officer of Revenue and Customs – (a) that he took reasonable care to comply with section 61 of the Act and these Regulations, and (b) that (i) the failure to deduct the excess was due to an error made in good faith, or (ii) he held a genuine belief that section 61 of the Act did not apply to the payment.***

Carefulness Appeal (reg.9(6)-(9))

13. Where the Revenue Officer finds that the Carefulness-Basis for a Non-Liability Direction is not met, a "refusal notice" is generated (reg.9(6)) and the Carefulness-Basis constitutes grounds of appeal (reg.9(8)) on which the refusal notice is appealable to the FTT (reg.9(7)). I will call this a "Carefulness Appeal". The appeal is pursuant to TMA s.48. If the FTT disagrees with the Revenue Officer and finds the Carefulness-Basis satisfied, the FTT is empowered to "direct" the Revenue Officer to make a Non-Liability Direction in an amount of the relevant excess for the relevant tax period or tax periods (reg.9(9)). It was common ground between Mr Coppel KC (who appeared with Charlotte Brown for the Claimants) and Mr Simpson KC (for HMRC) that such a 'directed direction' would take effect from the date when it was made, not from the date when the Non-Liability Direction had been refused. Here are regulations 9(6)-(9):

> ***(6) If condition A is not met an officer of Revenue and Customs may refuse to make a direction under paragraph (5) by giving notice to the contractor ("the refusal notice") stating – (a) the grounds for the refusal, and (b) the date on which the refusal notice was issued. (7) A contractor may appeal against the refusal notice – (a) by notice to an officer of Revenue and Customs, (b) within 30 days of the refusal notice, (c) specifying the grounds of the appeal. (8) For the purpose of paragraph (7) the grounds of appeal are that – (a) that the contractor took reasonable care to comply with section 61 of the Act and these Regulations, and (b) that – (i) the failure to deduct the excess was due to an error made in good faith, or (ii) the contractor held a genuine belief that section 61 of the Act did not apply to the payment. (9) If on an appeal under paragraph (7) that is notified to the tribunal it appears that the refusal notice should not have been issued the tribunal may direct that an officer of Revenue and Customs make a direction under paragraph (5) in an amount the tribunal determines is the excess for one or more tax periods falling within the relevant year.***

Chargeability-Basis (reg.9(4)(a)(i))

14. The Chargeability-Basis on which a Revenue Officer is empowered to make a Non-Liability Direction is this (reg.9(4)(a)(i) and (b)):

> ***(4) Condition B is that – (a) an officer of Revenue and Customs is satisfied that the person to whom the contractor made the contract payments to which section 61 of the Act applies… – (i) was not chargeable to income tax or corporation tax in respect of those payments …; and (b) the contractor requests that the Commissioners for Her Majesty's Revenue and Customs make a direction under paragraph (5).***

Taking the Basic Example, the Chargeability-Basis is as follows. The Sub-Contractor has been paid the £100, rather than the £70 with the £30 retained by the Contractor. But the Sub-Contractor is not chargeable to income tax or corporation tax in respect of the £100 paid to them and received by them. That means no 'downstream' tax arises for collection and no 'downstream' tax liability arises to be discharged. In other words, no liability arises for any Downstream-Collection (§7 above). Where the Revenue Officer rejects the Chargeability-Basis for a Non-Liability Direction, there is no right of appeal on that issue to the FTT. It is common ground that a claim for judicial review could be made in that situation.

Collection-Basis (reg.9(4)(a)(ii))

15. The Collection-Basis on which a Revenue Officer is empowered to make a Non-Liability Direction is this (reg.9(4)(a)(i) and (b)):

> ***(4) Condition B is that – (a) an officer of Revenue and Customs is satisfied that the person to whom the contractor made the contract payments to which section 61 of the Act applies … (ii) has made a return of his income or profits in accordance with section 8 of TMA (personal return) or paragraph 3 of Schedule 18 to the Finance Act 1998 (company tax return), in which those payments were taken into account, and paid the income tax and Class 4 contributions due or corporation tax due in respect of such income or profits; and (b) the contractor requests that the Commissioners for Her Majesty's Revenue and Customs make a direction under paragraph (5).***

The Collection-Basis reflects the scenario which I have been calling Downstream-Collection (§7 above). Taking my Basic Example, the Collection-Basis is as follows. The Sub-Contractor has been paid the £100, rather than the £70 with the £30 retained by the Contractor. But the Sub-Contractor has 'done its duty' and, having accounted for the £100 received, has paid all relevant income tax, self-employed National Insurance contributions, or corporation tax. That means 'downstream' tax arises for collection and 'downstream' tax liability arises to be discharged, but the collection and discharge have taken place. Where the Revenue Officer rejects the Collection-Basis for a Non-Liability Direction, there is no right of appeal on that issue to the FTT. Again, it is common ground that a claim for judicial review could be made in that situation.

Instruments Pointing in Opposite Directions

16. Taking my Basic Example and the £30 which was not deducted and paid to HMRC by the Contractor, this situation arises. The £30 is an "amount" and constitutes the "excess". If there were a Non-Liability Direction (reg.9(5)) there would be an instrument issued by a Revenue Officer – a formal "direction" – which records that the Contractor is "not liable to pay" the £30. If there were a Liability Determination (reg.13(2)) there would be an instrument issued by a Revenue Officer – a formal "determination" – which records that the Contractor is "liable to pay" the £30. If both of these documentary instruments could be in existence at the same time in respect of the same amount, they would point in opposite directions and be mutually-

contradictory. The Interrelationship Provision (§2 above) is plainly intended to assist with that problem.

Limb [i]: Imperviousness of an Extant, Prior Non-Liability Direction

17. It is Limb [ii] of the Interrelationship Provision which is at the heart of this case. But I will first address Limb [i], about which there is no material dispute. The following is common ground. Suppose there is no extant prior Liability Determination identifying an "excess" as an "amount which" the Contractor is "liable to pay under the Regulations" (reg.13(2)). Suppose, in that situation, a Revenue Officer has made a Non-Liability Direction: that the Contractor "is not liable to pay the excess" (reg.9(5)). Suppose that this Non-Liability Direction is 'extant': it has not been withdrawn. That is the existing state of affairs. Now, suppose a Revenue Officer is considering making a Liability Determination which identifies the "excess" as an "amount which" the Contractor is "liable to pay under the Regulations" (reg.13(2)). This is the situation which triggers Limb [i] of the Interrelationship Provision (§2 above):

> ***[i] A determination under this regulation must not include amounts in respect of which a direction under regulation 9(5) has been made***

The consequence of the mandatory words in Limb [i] ("must not include") is that no Liability Determination can include as a liability an amount in respect of which a Pre-Existing Non-Liability Direction has been made. Where the only "amount" which the Liability Determination would "include" is an amount "in respect of which" a Non-Liability Direction "has been made", the effect of the mandatory words is preclusive: there is no power to issue the Liability Determination. The Pre-Existing Non-Liability Direction is 'impervious': it cannot be contradicted by a later Liability Determination. It stands as a 'shield' against being assessed as having a liability to pay under a Liability Determination. As I have said, all of this is common ground. But what if it is the other way round? What if there is a Pre-Existing Liability Determination, and a Revenue Officer is now considering making a Non-Liability Direction, in respect of the same "amount"? It is common ground that this engages Limb [ii]. What is hotly disputed is whether the Revenue Officer can make a Non-Liability Direction. I will need to return to that issue (§30 below). But, before doing so, I will survey the FTT authorities (§§18-21 below), the sequence of events (§§22-29 below) and a distinct argument (§§30-32 below).

The FTT Cases (§1 above)

18. Hoskins was a Collection-Basis and Carefulness-Basis case. In the tax years 2005/6 and 2006/7 Mr Hoskins was a Contractor who paid his Sub-Contractor (Mr Fletcher) Contract Payments of £6,340 and £4,100 respectively. Mr Hoskins failed to make the necessary deductions of the deductible amounts, with no amounts actually deducted (FTT judgment §25(6)(7)). He failed to make the necessary payments to HMRC, with no amounts actually paid. The deductible amounts were respectively £1,141.20 and £738 (§5). Mr Fletcher said he had accounted for and paid his relevant tax liabilities on the Contract Payments received (§6). If correct, that would constitute Downstream-Collection for the Collection-Basis. The Revenue Officer refused (25.2.10 and 4.11.10) to make a Non-Liability Direction (§25(11)(13)). Mr Hoskins appealed to the FTT (§25(15)). Mr Hoskins argued that he should not be liable under the Regulations, invoking the Collection-Basis (§§26-27) or alternatively the Carefulness-Basis because

he said the non-deduction was a good faith error (§30). Dismissing the appeal, the FTT concluded as follows. No Carefulness Appeal against the refusal to make a Non-Liability Direction could succeed, because the reg.9(3)(b)(i) good faith error (§43) was not accompanied by the reg.9(3)(a) taking of reasonable care to comply (§41). The Collection-Basis was not appealable (§19), "unsatisfactory" though that appeared (§41). Observing that the Collection-Basis and Carefulness-Basis arguments of Mr Hoskins could not have succeeded on a reg.13(5) appeal against a Liability Determination, the FTT analysed Non-Liability Directions and Liability Determinations as "mutually exclusive" (§§21-22). In a nutshell, what Hoskins decided was this: that a refusal of a Non-Liability Direction is appealable only on Carefulness and not on Collection grounds.

19. Barrett was a Collection-Basis case. In the four tax years 2006/7 to 2009/10 Contractor Mr Barrett paid Sub-Contractor Mr Luke various Contract Payments (FTT judgment §24). But Mr Barrett failed to make the necessary deductions of the deductible amounts (totalling £1,894.55: §97), with no amounts actually deducted. He failed to make the necessary payments to HMRC, with no amounts actually paid. On 22 August 2012 the Revenue Officer refused Mr Barrett's request to make a Non-Liability Direction on the Collection-Basis (§42). Mr Barrett's position was that there had been Downstream-Collection: Mr Luke had accounted for and paid his own Sub-Contractor's tax liability. On 2 October 2012 the Revenue Officer made a Liability Determination (£1,894.55), which was maintained on 29 January 2013 (§44). On 21 February 2013 Mr Barrett appealed to the FTT (§44). Mr Barrett argued that he should not be liable under the Regulations, on the Collection-Basis. Dismissing the appeal, the FTT concluded as follows. No Collection-Basis Appeal was available to Mr Barrett. So far as the Revenue Officer was concerned, once a Liability Determination had been made, no Non-Liability Direction could be effective to reduce or eliminate its effect (§§101, 105). That was the consequence of the true construction of Limb [ii] of the Interrelationship Provision. The reg.13(5) appeal against the Liability Determination could be allowed only within the FTT's statutory jurisdiction (§78), meaning only if Mr Barrett was overcharged by reference to the legislation (§80), and the FTT was itself precluded by Limb [ii] from taking account of any subsequent Non-Liability Direction (§§107-109). There was no appeal from the refusal of a Non-Liability Direction on the Collection-Basis (§§115-117). In any event, the Collection-Basis was not satisfied, since Mr Luke's tax returns had not been made in the prescribed period (§§102-104, 130-133). In a nutshell, what Barrett decided was that no Collection-Basis appeal could succeed (a) in the face of a Liability Determination or (b) at all.

20. Ormandi was another Collection-Basis case. In the five tax years 2013/14 to 2017/18 Contractor Mr Ormandi made Contract Payments to various Sub-Contractors (FTT judgment §§2, 9). But Mr Ormandi failed to make the next necessary deductions of the deductible amounts (§10); and failed to make payments to HMRC. His request for a Non-Liability Direction on the Collection-Basis (§13) succeeded in part on 10 October 2017 (§14) and 13 March 2018 (§18). Having given a "warning" on 19 January 2018 (§15) the Revenue Officer made Liability Determinations (in the aggregate sum of £22,424.20) on 22 March 2018 (§19). Subsequent communications suggested Downstream-Collection had taken place: that the Sub-Contractors had accounted for and paid their tax liabilities (§§21, 23). Mr Ormandi appealed (§25) on 10 July 2018 against the Liability Determinations (22.3.18) with an extension of time (§32). The FTT found as follows. There had been Downstream-Collection: the Sub-Contractors had

accounted for and paid the tax liability, so that the Collection-Basis was made out (§28). But the appeal failed. On the correct interpretation of Limb [ii] of the Interrelationship Provision, once a Liability Determination was made – unless it was withdrawn – a subsequent Non-Liability Direction was precluded (§48(4)(6), §49) and the amounts reflected in the Liability Determination could not be excluded (§48). There was no appeal on the Collection-Basis against the refusal of a Non-Liability Direction (§48(5)) which is what success on appeal by Mr Ormandi would constitute. In a nutshell, what Ormandi decided was this: an extant – albeit appealed – Liability Determination precluded the coming into being of a Non-Liability Direction (which alone could excuse, on the Collection-Basis, liability to pay under the Regulations).

21. North Point was a Carefulness-Basis case. In the tax years 2015/16 and 2016/17 the Contractors North Point and China Town each made Contract Payments to various Sub-Contractors. But they failed to make the necessary deductions of the deductible amounts; and failed to make payments to HMRC. Their claims (2.2.17) for Non-Liability Directions on the Carefulness-Basis and Collection-Basis (FTT judgment §4(14)) were refused by a decision (28.2.17) communicated in decision notices (5.4.17) (§4(15) and (18)). They brought Carefulness Appeals (§2) against those refusals under regulation 9(7) on 3.5.17 (§4(19)). Then on 14 August 2017 Liability Determinations were made (§1), against which North Point and China Town also appealed (13.9.17) (§4(21)). The amounts of the Liability Determinations were reduced after an alternative-dispute resolution meeting (11.10.17) (§4(22)). The reduced amounts (§1) were: in respect of North Point, £663,776 (2015/16) and £667,046 (2016/17); and in respect of China Town, £98,638 (2015/16) and £293,565 (2016/17). The appeals came before the FTT as regulation 9(7) Carefulness Appeals against the refused Non-Liability Directions and regulation 13(5) appeals against the Liability Determinations. The FTT dismissed all of the appeals, reasoning as follows. On the correct interpretation of Limb [ii] of the Interrelationship Provision, the Liability Determinations (14.8.17) meant that it was no longer open to the FTT to consider the Carefulness Appeals against the refusals of the Non-Liability Directions (§§20 and 22). Limb [ii] meant that, once a Liability Determination had been made, neither HMRC nor the FTT had power to make a Non-Liability Direction (§§10, 12). Unless HMRC decided to hold a Liability Determination in abeyance pending an appeal (§13) or withdrew it (§48(6)), the Carefulness Appeals against the Non-Liability Direction refusals could not be entertained by the FTT. True, this position was open to "abuse" (§14), which public law principles enforced by judicial review were available to address, as where a Liability Determination were used by HMRC to deprive a person of a regulation 9 right of appeal (§18). Another aspect of protection against "abuse" was addressed in HMRC's 'compliance manual' (§18) which provided that Non-Liability Direction issues should be ventilated and addressed first, before Liability Determinations. In any event, the Carefulness-Basis failed on the facts (§§30-31). In a nutshell, what North Point decided was this: a Liability Determination precluded the success of an extant Carefulness-Basis appeal (which would have failed anyway), brought against a prior refusal to make a Non-Liability Direction, because it precluded the coming into being of even an FTT-directed Non-Liability Direction (which alone could excuse, on the Carefulness-Basis, liability to pay under the Regulations).

Facts of the Present Case

22. This is a Carefulness-Basis and a Collection-Basis case. The Claimants are 6 companies who are members of the same corporate group. Each of them made Contract Payments to the same Sub-Contractor – Beech Construction Partnership Ltd ("BCPL") – in 2017/18, without deducting the deductible amounts, and without making payments to HMRC. It is common ground that the position of the First Claimant – Beech Developments (Manchester) Ltd ("Beech") – exemplifies the position of all of the Claimants and provides a suitable and sufficient reference point. The aggregate amounts at stake for the Claimants are said to be £2.4m. Here is what has happened.

23. In 2017/18, BCPL was registered for payment under deduction but not registered for gross payment (2004 Act s.62(3)). The latter registration (for gross payment) was subsequently applied for (10.8.18) and granted (13.8.18). Prior to that, in 2017/18, Beech as Contractor made Contract Payments in the aggregate sum of £1,806,391 to BCPL as Sub-Contractor. Beech did not deduct the deductible amounts (in the aggregate of £344,074.80) and there were no amounts actually deducted. Beech did not pay the deductible amounts to HMRC and there were no amounts actually paid. HMRC undertook an enquiry in May 2018, as a result of which it was discovered that the Contract Payments had been gross payments with no deductions. In October 2018 HMRC requested certain documents from Beech. A note of a telephone call on 9 October 2018 refers to a discussion about regulation 9(4) and the Collection-Basis.

24. On 18 January 2019 the Revenue Officer (David Mercer) wrote a letter entitled "Regulation 13(1) warning letter". It stated his belief that Beech may have taken on Sub-Contractors and made Contract Payments without making the necessary deductions. It expressed the intention to raise a Liability Determination under Regulation 13(2) in the amount of £344,074.60. The "warning letter" then described the Carefulness Basis and the Collection-Basis for a Non-Liability Direction pursuant to regulation 9. It then said this:

> ***After we've raised the determination we cannot consider any initial or further claims under Regulation 9(3) or Regulation 9(4) for the amount shown in the determination. This is because Regulation 13(3) of th[e] Regulations stops us from doing this.***

There was no response to the warning letter. On 19 March 2019 the Revenue Officer issued a Liability Determination, based on "failure to make deductions under s.61 of the Finance Act 2004", in the amount of £344,074.60. The aggregate Liability Determinations for the Claimants were at that stage £5.4m.

25. By a letter dated 4 April 2019 – sent on 5 April 2019 – responding to "your recent notice of determination", Williamson and Croft LLP (a firm of accountants then acting for Beech) asked that HMRC "review" the Liability Determination in light of the arguments that:

> ***under regulation 9(3) Condition A, allowances can be made where genuine belief or decision in good faith has led to the non-compliance of section 61 Finance Act 2004. This is something we believe is the case in this instance.***

That was squarely reliance on the Carefulness-Basis. By a response dated 10 April 2019 the Revenue Officer treated this as an appeal (TMA s.31A) and said, having set out the previous sequence of events:

> ***Please note I allowed 60 days between the warning letter and issue of determinations, the standard period is 30 days.***
>
> ***Regulation 9(3) & 9(4). You will have seen that the warning letters invite claims under Regulation 9(3) and/or Regulation 9(4) of the Income Tax (Construction Industry Scheme) 2005. HMRC usually allows 30 days for these but as mentioned above, 60 days were allowed here. However, the letters also point out that once HMRC has raised the determination, we cannot consider any initial or further claims under Regulation 9(3) and/or Regulation 9(4). Therefore while it is perfectly possible for you to appeal against the amounts of the determinations, it is now too late for you to claim Regulation 9(3).***

During a telephone conversation on 24 April 2019 it is recorded that the Revenue Officer explained that the appeals against the Liability Determinations were in time but "the claims for Non-Liability Directions were too late", adding that:

> ***R9(3) and/or R9(4) claims are normally made to HMRC before any R13 determinations are issued – that is the purpose of R13 warning letters which invite claims to R9(3) & (4).***

26. An HMRC letter dated 14 May 2019 communicated a view (TMA s.49C(2)) maintaining the Liability Determinations. The same letter offered a review (s.49A(2)(b)) which was taken up by Beech. An HMRC letter dated 9 July 2019 was the outcome of the review (s.49E(5)). It addressed the Carefulness-Basis points that had been raised in the letter of 4 April 2019 and said:

> ***A regulation 13(1) warning letter was issued to the company on 18 January 2019. This letter explained a determination would be issued for failure to verify a subcontractor, and giving you the opportunity to consider a claim under Regulation 9 (3) and/or Regulation 9 (4) of the Income Tax (Construction Industry Scheme) Regulations 2005, with the reasons being detailed and set out in the body of the letter.***
>
> ***Internal guidance at CISR82030 advises: Before you make a Regulation 13(2) determination you should write to the contractor to inform them of your intention, you should allow the contractor a period of 30 days within which to respond to your letter before making a determination under Regulation 13(2).***
>
> ***HMRC it seemed allowed 60 days for a response, but no claim was made, and therefore a determination of tax under Regulation 13(1) Income Tax (Construction Industry Scheme) Regulations 2005, was issued on 19 March 2019, in the amounts as shown above. Regulation 13 Determinations are made so as to recover deductions that the contractor has failed to make from a subcontractor or to recover amounts where there is an insufficiency…***
>
> ***In certain circumstances HMRC can direct that a contractor is not liable for amounts under-deducted. This is provided for by Regulation 9 of The Income Tax (Construction Industry Scheme) Regulations 2005. The relevant subsection of Regulation 9 (3) is as follows: Regulation 9(3) – Condition A. Where a contractor fails to make a deduction from a subcontractor but can satisfy an Officer of HMRC that the failure to make a deduction arose from an 'error made in good faith' or a genuine belief' that the payment was not within the scope of the Scheme and that he took reasonable care to comply with S61 Finance Act 2004 and the Regulations, then an Officer of HMRC may direct that the contractor is not liable to pay the amount due.***
>
> ***Unfortunately, once a determination has been issued under Regulation 13(2) then Officer Merton was precluded, due to the provision of Regulation 13(3), from considering either an initial or further claims under Regulation 9(3) and (4) for a direction granting relief under Regulation 9(5).***

The review having concluded, the FTT was notified of Beech's appeal (s.49G). What I was told about that and the other appeals by the Claimants is as follows. All appeals

have been stayed pending this claim for judicial review. They are all appeals against Liability Determinations, pursuant to regulation 13(5). They raise the Carefulness-Basis and the Collection-Basis. They raise other issues too. One concerned 'quantum' and the deduction for direct costs of materials (§3 above). In March 2021 HMRC intimated that they accepted that substantial sums needed to be deducted as being referable to materials (2004 Act s.61(1)) and would not oppose a reduction on the appeals to an aggregate of £2.4m.

27. By a letter dated 12 October 2021 Freeths LLP (the firm of solicitors by now acting for Beech) made a "formal request that the matters reviewed under [Regulation] 9(4)", relying squarely on the Collection-Basis in regulation 9(4). They wrote:

> ***If Regulation 9(4) applies, then Regulation 9(5) will allow HMRC Officers to direct that the Appellants are no longer liable to pay the alleged sums owed. We ask that if an HMRC Officer agrees with the below, that will result in a direction under regulation 9(5) of the Act and a formal amendment to the Determinations that are currently under appeal.***

Under a heading "tax paid" they said this:

> ***BCPL has, in fact, already made a return of its income in which the payments made by the Appellants were encompassed within BCPL's turnover and prepared accounts, in respect of its corporation tax. Consequently, the assessments raised against the Appellants would result in double taxation.***

28. By a letter dated 13 December 2021 from the HMRC Investigator (Simon Jackson-Clark), HMRC responded, referring to the previous sequence of events and concluding:

> ***I am unable to give any consideration under Regulation 9(4) as the representations made under this regulation have been submitted too late.***

29. After a judicial review letter before claim (10.1.22), the claim for judicial review was commenced on 1 March 2022. The 'target' for the claim is squarely the letter of 13 December 2021. The pleaded ground for judicial review is 'material error of law'. The pleaded claim is that it was wrong in law for HMRC to treat the Non-Liability Directions sought by the Claimants as being precluded by HMRC's prior and extant Liability Determinations. I granted permission for judicial review at an oral hearing on 15 July 2022 for the reasons I explained at [2022] EWHC 1849 (Admin).

Direct-Applicability of the Reg.9(3)(4) Bases?

30. Before I turn to deal with the pleaded claim (§33 below), I will address a new and distinct topic. In his oral submissions at the substantive hearing, Mr Coppel KC advanced a new line of analysis. His new contention was that Non-Liability Directions are unnecessary and their absence irrelevant. This contention focuses on the following underlined phrase within regulation 13(2):

> ***An officer of Revenue and Customs may determine the amount which to the best of his judgment a contractor is liable to pay under these Regulations, and serve notice of his determination on the contractor.***

Mr Coppel KC argues, in essence (as I saw it), as follows. The phrase "is liable to pay under these Regulations" gives the Revenue Officer – in discharging the regulation 13(2) function of making a Liability Determination – the task of directly applying the Carefulness-Basis, Chargeability-Basis and Collection-Basis as identified in

regulations 9(3) and (4) (as shorthand "9(3)(4)"). That is so for these reasons. Regulation 9 is a provision of "these Regulations". It is a provision addressing whether the Contractor "is liable to pay under these Regulations". Regulation 13(2) is all-embracing: it brings in all of "these Regulations"; it brings in all aspects of "liabil[ity] to pay" "under" the Regulations. A Contractor who can demonstrate that they meet the Carefulness-Basis, Chargeability-Basis or Collection-Basis in regulation 9(3)(4) can show that they are not "liable to pay under these Regulations". It is irrelevant that the Contractor has not secured, or is precluded from securing, a regulation 9(5) Non-Liability Direction. A Non-Liability Direction is not a sole and exclusive route through which "liability to pay" is excusable – "under the Regulations" – on the Carefulness-Basis, Chargeability-Basis or Collection-Basis. The Revenue Officer, in deciding whether to make a Liability Determination, will need directly to address these express Bases. On a regulation 13(5) appeal against a Liability Determination (§8 above), when the FTT is deciding whether the Contractor "is overcharged", the FTT will also need directly to address these Bases. The regulation 9(3)(4) Bases – the Carefulness-Basis, Chargeability-Basis and Collection-Basis – are thus directly applicable within the scope of regulation 13(2).

31. This new argument strikes at the interrelationship between Non-Liability Directions and Liability Determinations. Its implications – presumably – are as follows. It would mean that the Liability Determination (19.3.19), and subsequent decisions to maintain it, would be said to be impeachable on grounds that the Carefulness-Basis (raised on 4.4.19) and the Collection-Basis (raised on 12.10.21) should directly have been addressed. It would mean that a Non-Liability Direction is not (as the Claimants' pleaded case positively emphasises) necessary to "unlock the door" to the Claimants being able to raise the Carefulness-Basis and Collection-Basis in their regulation 13(5) FTT appeals. It would mean that the absence of an appeal (or right of appeal) against any refusal of a Non-Liability Direction is nothing to the point, because the three express Bases can directly be raised in the context of a Liability Determination and a regulation 13(5) FTT appeal. It would also mean that Limb [ii] of the Interrelationship Provision – whoever is right about it – does not much matter, because the Bases for a Non-Liability Direction are already, straightforwardly and directly, applicable to a Liability Determination and an appeal against a Liability Determination.

32. On this new topic, Mr Simpson KC for HMRC picked up the gauntlet. He did not seek to divert it, by taking a delay point or a pleading point. He simply submitted that the new argument – which engages a pure question of statutory interpretation – is wrong in law. I accept that submission. Here are the reasons why. Regulation 7(1) says "a Contractor must pay to" HMRC. It is a provision under which the Contractor is "liable to pay under the Regulations". It would have been very easy for regulation 9 to have been framed as providing for exceptions, under which the Contractor is not "liable to pay". But that is not how regulation 9 is designed. Regulation 9 is in nature a special mechanism for securing a direction in the nature of 'relief' – a disapplication – of what the Contractor would otherwise be liable to pay. Regulation 9 "applies if" the two statutory preconditions (§10 above) are met (reg.9(1)(b)). Then, where reg.9 "applies", reg.9(5) gives the Revenue Officer the power to make the Non-Liability Direction. The Contractor is excused on the regulation 9(3)(4) Bases through and by – and only through and by – a Non-Liability Direction. A Contractor may or may not be able to satisfy a Revenue Officer in relation to the Carefulness-Basis or the Chargeability-Basis or the Collection-Basis, securing a Non-Liability Direction. But only by a Non-Liability

Direction is there an operative excusability on the regulation 9(3)(4) Bases from liability to pay under the Regulations. Moreover, where there is a prior and extant Non-Liability Direction, the 'relief' for regulation 13(2) purposes, from what would otherwise be the 'liability to pay under the Regulations', is achieved by the operation of Limb [i] of the Interrelationship Provision. This is, rightly, common ground (§17 above). Unless excused by a Non-Liability Direction, as the FTT rightly explained in Ormandi (at §45): the amount which the Contractor is "liable to pay under these Regulations" is the regulation 7 amount which the Contractor was liable to deduct from Contract Payments made under section 61 (§48(2)). As the FTT also rightly explained in Ormandi (at §48(5)), if the Collection-Basis fell directly within the scope of regulation 13(2), there would effectively be a backdoor appeal on the Collection-Basis, inconsistently with the express design of regulation 9. For all these reasons, a Non-Liability Direction is a necessary precondition for a Contractor to be excused from the liability to pay under the Regulations on the regulation 9(3)(4) Carefulness-Basis, Chargeability-Basis or Collection-Basis. All of this is reinforced by the nature, content and indeed existence of both Limbs – Limb [i] and [ii] – of the Interrelationship Provision themselves.

Limb [ii] of the Interrelationship Provision: the Claimants' Arguments

33. I return then to the challenge raised in the pleaded claim for judicial review. As I have explained (§29 above) the 'target' for judicial review is squarely the decision of 13 December 2021 (§28 above). The ground for judicial review is 'material error of law', relating to the meaning and effect of Limb [ii]. It was HMRC's position – as it has been throughout (see §§24-28 above) – that Limb [ii] means that the prior and extant Liability Determinations (March 2019) preclude the making of a Non-Liability Direction. As it is put in the 'target' decision letter, there can be no "consideration" under regulation 9(4) of "the representations made under" regulation 9. The question is whether that is correct in law.

34. What follows in this section of the Judgment (§§35-39 below) is my description of the essence of the Claimants' arguments, as I saw them, regarding the legally correct interpretation of Limb [ii]. This, then, is how the Claimants' arguments go:

35. The correct analysis is as follows:

    i) Limb [i], correctly interpreted, has the following meaning: where there is a prior extant Non-Liability Direction, its effect is to preclude the making of a Liability Determination in respect of the same amount. Limb [i] is dealing with the situation where a Non-Liability Direction has already been made and not withdrawn, and a Revenue Officer comes to consider the making of a Liability Determination. Any Non-Liability Direction will, by its nature, necessarily have "been made" "in respect of" an "amount" or "amounts". Limb [i] says that a Liability Determination "must not include" any "amounts in respect of which" a Non-Liability Direction "has been made". That language is preclusive of any such Liability Determination being made. The Revenue Officer identifies the "amount" which has been included in a Non-Liability Direction. The Revenue Officer identifies the "amount" which would be determined by a Liability Determination. To the extent that they are the same "amount", the Liability Determination is precluded. There is no power to issue it. If a "notice of … determination" were issued (reg.13(2)) it would be unlawful. It would also be

overturned on reg.13(5) appeal, on the basis that the Contractor is overcharged (TMA s.50). All of this is the clear consequence of the language "must not include", when applied to "amounts" in respect of which a Non-Liability Direction has been made, as amounts which could be "determined" under a Liability Determination. This is the impervious directed "amount" and the 'shield' (§17 above).

ii) But Limb [ii], correctly interpreted, does not have the following equivalent meaning: where there is a prior extant Liability Determination, its effect is to preclude the making of a Non-Liability Direction in respect of the same amount. That is not what Limb [ii] is doing. It is true that Limb [ii] is dealing with the situation where a Liability Determination has been made (even if appealable) and has not been withdrawn, and a Revenue Officer comes to consider the making of a Non-Liability Direction. It is true that any Liability Determination will, by its nature, necessarily involve "amounts determined". However, crucially, what Limb [ii] says is that Non-Liability Directions "do not apply to" those "amounts determined". Unlike the language of Limb [i] ("must not include"), this language in Limb [ii] ("do not apply to") is non-preclusive. It does not prevent Non-Liability Directions being made in respect of the same "amounts". The Revenue Officer can identify the "amount" which has been included in a prior, extant Liability Determination. The Revenue Officer can then identify the "amount" in respect of which a Non-Liability Direction would be being made. Even if they are the same "amount", the Non-Liability Direction is not precluded. There is power to make it. It would be lawful and it would have an important effect (see §37 below).

iii) What this means is that a Non-Liability Direction can "include" an "amount", albeit that it does not "apply to" that "amount".

iv) Taking my Basic Example, the position is this. Suppose that a Liability Determination has been made – and not withdrawn – in respect of the £30 which the Contractor was statutorily duty-bound to deduct and pay to HMRC. Suppose that the Revenue Officer is subsequently asked to make a Non-Liability Direction in respect of that same £30. The Non-Liability Direction can lawfully be made. It is not precluded by Limb [ii]. It would have an important effect. The Non-Liability Direction can "include" the £30, albeit that it does not "apply" to that £30.

36. The reasons why this analysis is correct are as follows, starting with the language and structure of the provision:

i) Limb [ii] says nothing about Non-Liability Directions ("directions under that regulation") being precluded in relation to "amounts determined" by a Liability Determination. Limb [ii] does not say:

directions under that regulation <u>may not be made</u> …

It would have been easy for the drafter of the Regulations to use preclusive language of that nature. In fact, the language of Limb [ii] starts by positing that Non-Liability Directions are made and that they do include "amounts determined under this regulation". What Limb [ii] says is that such Non-

Liability Directions "do not apply to" those "amounts determined under this regulation". That presupposes that the Directions have been made, and they are in respect of those amounts. Otherwise, there could be nothing which could "apply".

ii) Regulation 9(5) is a present and ongoing statutory function. The function in regulation 9(1) and (5) involves the Revenue Officer considering whether regulation 9 applies (reg.9(1)), and whether to make a Non-Liability Direction (reg.9(5)). It involves addressing the Carefulness-Basis (reg.9(3)) and (on receipt of a reg.9(4)(b) request from the Contractor) the Chargeability-Basis and/or Collection-Basis (reg.9(4)). This is framed as a present and ongoing power. The power is open-ended. It is, and remains, exercisable from time to time as occasion requires (as in any event reflects a presumption in section 12 of the Interpretation Act 1978). There are temporal restrictions on the regulation 9(5) function being exercised, but these are practical. If, for example, there has been no Liability Determination 4 years after the relevant tax year end (TMA s.34), nobody would ask for a Non-Liability Direction because it would not be needed. Or if, for example, there has been a Liability Determination and a failed appeal by the Contractor, it could be an abuse for a Non-Liability Direction then to be requested.

iii) It would be different if the language of Limb [ii] had used the phrase "must not include amounts". The effect of that language would be preclusive, just as it is for Limb [i] (§35i above). So, a Non-Liability Direction would be precluded if Limb [ii] had been drafted to say:

> ***directions under that regulation must not include amounts determined under this regulation.***

That language was not used by the drafter in Limb [ii]. It was language which was readily to hand. It had been used in the self-same provision, to preclusive effect, within the same sentence of text: in Limb [i] (§2 above). It is an elementary canon of construction that distinct words or phrases should be interpreted as having a distinct – not an identical – meaning, especially when found in the same provision. The drafter must have intended Limb [ii] to have a different effect than Limb [i]. It is wrong in principle to rewrite Limb [ii].

37. The reasons why a Non-Liability Direction – which does "include" an "amount" but does not "apply" to that "amount" – would have an important effect are as follows:

i) True, there would be no immediate, direct and present effect. That is because it does not "apply" to the "amount" in question. The tense in Limb [ii] is the present tense ("do not"). The prior Liability Determination – for as long as it stands – governs the position so far as the Contractor's "liability to pay" is concerned. There are equal and opposite documents, and the 'liability' document takes precedence. But that is only the current position. It is only for the present. And it is only while the Liability Determination is extant.

ii) The important effect of the Non-Liability Direction is one which is future and contingent. Viewed in terms of the immediate and present position, it is as though the Non-Liability Direction is "hibernating" (Mr Coppel KC's word).

Put another way, it is "inchoate" (my word). This "hibernating" (or "inchoate") Non-Liability Direction is, nevertheless, a decision which formally recognises that the Carefulness-Basis, the Chargeability Basis or the Collection-Basis has been satisfied. There are two scenarios which can arise in future and which, when they do arise, will operate to give the "hibernating" (or "inchoate") Non-Liability Direction a present impact.

iii) The first scenario is where there is a withdrawal of the Liability Determination by HMRC itself. HMRC has general management powers, reflected in section 5 of the Commissioners for Revenue and Customs Act 2005 ("the 2005 Act"). HMRC has power to withdraw a Liability Determination. It has power, having done so, subsequently to issue a replacement Liability Determination. By withdrawing the Liability Determination HMRC can hold the position in abeyance. The FTT in Ormandi at §48(6) described a situation where "the existing determinations were withdrawn". In North Point (§§1, 4(22)) the Liability Determinations were described as having been "reduced" (ie withdrawn and replaced). The FTT in North Point also described HMRC as having the power to decide to "hold [a] determination in abeyance" (§13) (ie. withdrawn temporarily). HMRC can do all of this by reference to the implications of a hibernating (inchoate) Non-Liability Direction which has been made to "include" – but not yet to "apply" – to an "amount" previously determined by the Liability Determination which is now being withdrawn. If HMRC decided to withdraw the Liability Determination, under its recognised powers, then the Non-Liability Direction which post-dated it would then have a present impact. The Non-Liability Direction would now not only "include", but also "apply" to, the "amounts" previously "determined".

iv) That is the sequence of events which will, in principle, need to follow. Once the new (hibernating or inchoate) Non-Liability Direction has been made, a Revenue Officer has made a decision which formally recognises that the Carefulness-Basis, the Chargeability Basis or the Collection-Basis has been satisfied. The Contractor has satisfied the criteria for, and has secured, a Non-Liability Direction. In those circumstances it could not be lawful, or reasonable, for HMRC to do anything other than withdraw the Liability Determination in the exercise of its general powers. After all, the well-recognised overriding "public interest" responsibility of HMRC is to collect "the correct amount" which is due to HMRC (cf. Tower MCashback LLP v HMRC [2011] UKSC 19 [2011] 2 AC 457 §15; R (JJ Management LLP) v HMRC [2019] EWHC 2006 (Admin) [2020] QB 619 §§39-43). There is no public interest in HMRC collecting more than that "correct" amount. The first scenario is not merely a possible one. It is a legally required one.

v) The second scenario, which operates to give the hibernating (inchoate) Non-Liability Direction a present impact is this. Built-into the same regulation (at reg.13(5)) which contains Limb [ii] (reg.13(3)) is a species of TMA s.31 appeal against the Liability Determination. In fact, that appellate process is one which itself engages the first scenario (§37iii above), because it permits HMRC to review the position (TMA s.49E). In the context of such a review, HMRC's general powers apply and HMRC can withdraw the Liability Determination, as it should (§37iv above). If HMRC does not do that, the ultimate destination for

any appeal is the FTT with its statutory jurisdiction (TMA s.50(6)(8)). That appellate jurisdiction entails a merits-assessment of the Contractor's liability to pay under the Regulations, assessed on presently-available evidence. The outcome of the appellate jurisdiction is a function of the FTT's own assessment. It follows that, once the appeal is under consideration by the FTT, the appealed Liability Determination is no longer a governing instrument so far as the Contractor's liability is concerned. The liability is no longer "determined under this regulation" for the purposes of Limb [ii]. Rather, the liability is now being "determined" by the FTT (TMA s.50(8)). A liability which is being FTT-determined is no longer one which is HMRC-determined. So, a liability which is being determined in the FTT appeal is no longer determined, by a Liability Determination, under regulation 13. Insofar as the Liability Determination operated as a preclusive bar, the bar is lifted in the forum of the FTT. The previously hibernating (inchoate) Non-Liability Direction now has its present impact. It serves to "unlock the door" to the Carefulness-Basis, Chargeability-Basis and Collection-Basis being recognised as satisfied by the FTT in the appeal, a door which would remain locked absent the previously hibernating (inchoate) Non-Liability Direction.

vi) Again, this sequence of events in the FTT appeal is what will, in principle, need to follow. Again, the (hibernating or inchoate) Non-Liability Direction is a decision which formally recognises that the Carefulness-Basis, the Chargeability Basis or the Collection-Basis has been satisfied. In those circumstances, it could not be lawful for the FTT to decline to overturn the Liability Determination. That is because the Contractor "is" overassessed, so far as their liability to pay HMRC is concerned. Again, this is a function of "the correct amount" which is due to HMRC.

38. This analysis places things as they should be, in terms of policy and purpose of the CIS, and broader policy and purpose. It does this in several ways:

i) First, non-liability criteria are recognisably met. The Regulations spell out the Carefulness-Basis, Chargeability-Basis and Collection-Basis, each of which is a good and sufficient reason why the Contractor has no regulation 7 "liability" to pay the Revenue. The Contractor should not have a liability when they are able to meet prescribed criteria governing when liability should not be imposed.

ii) Secondly, abuse is avoided. This analysis of Limb [ii] avoids the situation where HMRC can engineer the sequence of events which would prevent the Contractor – ever – from being able to secure a Non-Liability Direction. Suppose a Contractor requests a Non-Liability Direction (reg.9(4)(b)) and HMRC receives that request. HMRC could make a Liability Determination and that would be the end of any opportunity to satisfy the Carefulness-Basis, Chargeability-Basis or the Collection-Basis. Or suppose HMRC refuses a Non-Liability Direction because it is not satisfied on the Carefulness-Basis (reg.9(6)), and the Contractor commences a Carefulness Appeal (reg.9(7)). HMRC could make a Liability Determination and that would be the end of the appeal on the Carefulness-Basis (as in North Point). In these, and other, ways HMRC could 'game the system'.

iii) Thirdly, this analysis of Limb [ii] is supported by recognised principles of "double taxation" and "double recovery". This important point arises out of the

nature of the Chargeability-Basis and the Collection-Basis. It calls for explanation and amplification: see §38 below.

iv) Fourthly, this analysis of Limb [ii] is supported by the position in relation to "penalty". Where the Contractor has wrongly paid the Sub-Contractor in full (in my Basic Example, the £100 instead of the £70), and where HMRC are seeking to enforce the Contractor's duty to pay HMRC (reg.7) the amount which should have been deducted but was not deducted, that means there will be no Upstream-Treatment (§6 above) of any sum recovered from the Contractor. Moreover, if it is the Chargeability-Basis or the Collection-Basis which would be the reason for the hibernating (inchoate) Non-Liability Direction, that means 'downstream' liabilities either do not arise (Chargeability-Basis) or have been discharged (Collection-Basis). For these reasons and in these circumstances, the function and purpose of the Liability Determination and its enforcement are "penalising" and constitute a "penalty". But Liability Determinations do not and cannot be treated as functioning as "penalties". The concept of "penalties" is provided for separately within the statutory scheme: see 2004 Act s.72, reg.4(12)-(13) and reg.7A. The collection, through a Liability Determination, of amounts which would be excused by a Non-Liability Direction would operate as a backdoor "penalty". Limb [ii] should not be interpreted as having that consequence.

v) Fifthly, this analysis of Limb [ii] avoids the obvious and legitimate concerns which otherwise arise. These can be seen from the line of FTT cases (§§18-21 above). They are unmistakeable, repeatedly expressed and well-founded concerns. They would be addressed and resolved. The FTT in Hoskins expressed "disquiet" (§19); in Ormandi "some reservation" (§§48-49); and in North Point "similar reservations" (§12). These concerns all arose from the implications of Limb [ii] as interpreted by HMRC. This Court can grasp that nettle, confronting that unreasonableness and injustice, through a legally correct interpretation which exposes the material error of law in the target decision.

All of these points support the legally correct interpretation of Limb [ii]. The claim for judicial review should succeed, and the matter remitted for the Revenue Officer to consider afresh the Carefulness-Basis and Collection-Basis and issue a (hibernating or inchoate) Non-Liability Direction, if satisfied on either score.

39. By way of elaboration on the "double taxation" and "double recovery" point (§37iii above), the analysis is as follows:

i) Where the Chargeability-Basis is or would be satisfied, that is because the 'downstream' Sub-Contractor is or would be shown not to be susceptible to income tax or corporation tax in respect of the Contract Payment. In my Basic Example, the Subcontractor has been demonstrated not to be susceptible to income or corporation tax in relation to the £100 and any part of it.

ii) Where the Collection-Basis is or would be satisfied, that is because there is or would be shown to have been Downstream-Collection (§7 above) from the Sub-Contractor. That means the Sub-Contractor has accounted for the income and profits (in the Basic Example, for the £100) and to have paid any relevant income tax, self-employed National Insurance or corporation tax.

iii) That means the question of the hibernating (inchoate) Non-Liability Direction bites in circumstances where the tax liabilities which matter are either demonstrably not liabilities which arise (Chargeability-Basis) or demonstrably liabilities which have been discharged (Collection-Basis).

iv) The purpose of CIS (§5 above) is to ensure that HMRC can collect in respect of these liabilities. Purpose is at the heart of legally correct statutory interpretation. The CIS purpose has been met. HMRC Guidance CISR83050 expresses the purpose of the Chargeability-Basis and Collection-Basis as follows:

> ***The purpose of directions under Regulation 9(5) is to avoid the situation where HMRC pursues a contractor for a deduction that should have been made where the subcontractor has no liability, or has already met any tax liability, on the sum paid gross. It follows the principle that HMRC should not recover more tax from both contractor and subcontractor than is correctly payable by the subcontractor. That is why the relief is sometimes known as 'double taxation' relief.***

v) All of this engages "the presumption against double taxation" (see eg. R (Edison First Power Ltd) v Central Valuation Officer [2003] UKHL 20 [2003] 4 All ER 209 at §25) or "double recovery" (see eg. R (Hudson Contract Services Ltd) v SSBIS [2016] EWHC 844 (Admin) at §68). Whichever way it is put, it involves the "commonsense principle of … construction" which can "imply qualifications into the literal meaning of wide and general words in order to prevent them from having some unreasonable consequence", where the "strength of the presumption depends upon" the following (Edison at §25):

> ***the degree to which the consequences are unreasonable, the general scheme of the legislation and the background against which it was enacted.***

vi) Purpose is at the heart of this exercise in statutory interpretation. Where the Chargeability-Basis and Collection-Basis are not demonstrably satisfied, no (hibernating or inchoate) Non-Liability Direction would be granted on those Bases anyway. But if they can demonstrably be satisfied, there is no function for the "retained amount" to perform. The recovery by HMRC has no Upstream-Treatment (§6 above). The cardinal "principle that HMRC should not recover more tax from both contractor and subcontractor than is correctly payable by the subcontractor" is defied. There is a windfall for HMRC. This is patently unreasonable. The legally correct interpretation of Limb [ii] avoids all of this.

Discussion

40. The arguments which I have articulated are sustained and comprehensive. But I agree with Mr Simpson KC that they are not correct. I will explain why I cannot accept them.

41. It is as well to begin the analysis by remembering some public law principles which stand as the backcloth to the CIS statutory scheme. The Revenue Officer is discharging statutory public functions when making decisions under regulation 9(5) (Non-Liability Directions) and when making decisions under regulation 13(2) (Liability Determinations). Such functions attract basic public law duties of lawfulness, reasonableness and fairness. Such functions are amenable to the common law supervisory jurisdiction of judicial review, by which those public law duties are enforced. It is right that HMRC's general powers must extend to the power to withdraw

a Liability Determination. That is another public function attracting those basic public law duties and amenable to that judicial review jurisdiction. This is important. It is a constitutional backcloth, against which Parliament enacted the 2004 Act and HMRC made the Regulations. Nothing in the statutory scheme regulating the CIS purports to restrict, still less exclude, these public law duties and this supervisory jurisdiction. The public law duties and the supervisory jurisdiction have been recognised by the FTT in the cases (Hoskins at §19; Ormandi at §49; North Point at §18). They are accepted by Mr Simpson KC for HMRC. The present case is of course an example of a claim for judicial review. But it raises a very particular issue.

42. It is also important to remember the nature of the claim made. There is no claim in the present case that Limb [ii] – a provision in an instrument of delegated legislation – is unlawful on public law grounds. There is no human rights-incompatibility claim. There is no challenge to the policy guidance in the CISR Manual. There is no challenge to the fairness, or reasonableness, of the decision-making adopted by HMRC in this case. The claim is squarely about the legally correct interpretation of Limb [ii] and whether, given that legally correct interpretation, the target decision involved a material error of law. That is the issue which I am determining.

43. The Claimants, rightly, recognise that Limb [i] – of the same provision – is preclusive in its effect. Limb [i] describes a situation in which a Liability Determination is precluded: it cannot lawfully be made. This preclusive (disempowering) consequence arises in the situation where there is a prior and extant Non-Liability Direction. But it is not achieved by the drafter using a phrase such as "may not be made". It is achieved by using the words "must not include". Once it is recognised that a phrase like "[a] determination under this regulation must not include amounts" is preclusive of a determination lawfully being made, that is fatal to the argument (§36i above) about language presupposing the existence of the instrument. Limb [i] does not presuppose, but rather precludes, the "determination" which is described. Limb [ii] cannot therefore be presupposing, rather than precluding, "directions" simply because it refers to "directions". The question is what is meant by "do not apply to amounts determined under this regulation" in Limb [ii].

44. The reason why the Limb [i] language ("must not include") is preclusive, as the Claimants accept, is this. What any Liability Determination does – by its inherent nature and by express statutory design – is to identify an "amount". There is an "amount" which is the subject of the Liability Determination. It is the "amount" which is "determined" as being one which the Contractor is "liable to pay". This inherent nature and express statutory design are seen in regulation 13. The title of regulation 13 begins with the phrase "determination of amounts". The statutory function in regulation 13(2) is that the Revenue Officer "may determine the amount" which a Contractor "is liable to pay". In speaking of Liability Determinations, Limb [i] uses the phrase "include amounts"; Limb [ii] uses the phrase "amounts determined". Regulation 13(4) makes provision about the amount which a Liability Determination can "cover" and to which it can "extend". Regulation 13(5)(b) speaks of "the amount determined". The point is this. In order to have the Liability Determination there has to be an "amount" which is its subject. If the sole candidate "amount" is one which cannot be its subject, there can be no Liability Determination. One way to describe this is to say that a Liability Determination cannot "include" the candidate "amount". That is the language used in Limb [i].

45. However, in the same way what any Non-Liability Direction does – by its inherent nature and by express statutory design – is to identify an "amount". There is an "amount" which is the subject of the Non-Liability Direction. It is the "amount" which is "directed" as being one which the Contractor is "not liable to pay". This inherent nature and express statutory design are seen in regulation 9. The opening provision in regulation 9 identifies when the regulation applies. Regulation 9(1) says:

> ***(1) This regulation applies if – (a) it appears to an officer of Revenue and Customs that the deductible amount exceeds the amount actually deducted, and (b) condition A or B is met.***

Regulation 9(2) then defines the regulation 9(1)(a) statutory precondition – namely "the amount by which the deductible amount exceeds the amount actually deducted" – as being "the excess". The statutory function in regulation 9(5) is then as follows:

> ***An officer of the Revenue and Customs may direct that the contractor is not liable to pay the excess to the Commissioners for Her Majesty's Revenue and Customs.***

Limb [i] of the Interrelationship Provision refers to "amounts in respect of which" a Non-Liability Direction has been made. Limb [ii] speaks of a Non-Liability Direction as something which will "apply to amounts". The point, again, is this. In order to have a Non-Liability Direction there has to be an "amount" which is its subject. If the sole candidate "amount" is one which cannot be its subject, there can be no Non-Liability Direction. One way to describe this is to say that a Non-Liability Direction cannot "apply" to the candidate "amount". That is the language used in Limb [ii].

46. This is a straightforward interpretation of the language used in the Interrelationship Provision. It produces a straightforward operation. It regulates the problem of two instruments pointing in opposite directions (§16 above) in respect of the same amount: one instrument 'determining' liability to pay it; the other instrument 'directing' non-liability to pay it. It regulates that problem in a clear and symmetrical way. It is the prior, extant instrument which governs the position, precluding the other. It means there is an ability to obtain relief by Non-Liability Direction which is specific and tailored; not all-encompassing and open-ended. It would have been easy for the drafter of the Regulations to provide that the Bases for Non-Liability Directions were absolute and enduring, would subsist and would be given primacy at all times. The tailored provision for relief takes its place within a broader statutory scheme with clear policy objectives. The Contractor is required to make the deduction in the deductible amount. The Contractor was given the means to verify the status of the subcontractor and indeed obliged to ensure that verification (reg.6(1)) while being protected if that registered status subsequently changes (reg.6(7)). The Contractor is required to pay the deductible amount, whether or not it has been deducted. The statutorily-imposed obligations reflect the clear primary legislation. They are requirements imposed in the public interest as part of a scheme which secures the collection of downstream tax liabilities. They matter.

47. Mr Coppel KC is right that Limb [i] uses the language "must not include" while Limb [ii] uses the language "do not apply". He is right that these phrases are different. He is right that Limb [ii] could have used the phrase "must not include". But the Interrelationship Provision has not been drafted in a way which involves differences in language connoting legally distinct concepts and ideas. This truth can be seen as follows. The two Limbs unmistakeably use different words and phrases to describe the very same idea, in relation even to the very same species of decision. In Limb [i] a

Liability Determination will "include" an amount, while in Limb [ii] a Liability Determination involves amounts "determined". These are different words ("include" and "determine"), but they are used interchangeably, communicating the same idea. They are each describing amounts which are the subject of a Liability Determination. In the same way, in Limb [i] a Non-Liability Direction is made "in respect of" amounts, while in Limb [ii] a Non-Liability Directions "apply to" amounts. Again, these are different phrases ("in respect of" and "apply to"), used interchangeably, communicating the same idea: amounts which are the subject of a Non-Liability Direction. The Interrelationship Provision is not a provision in which a change in wording means the drafter was communicating a different idea. The ideas communicated by the words derive from their natural meaning in context. Ultimately, the point is this. Regulation 9(1)(a) identifies the amount – defined in regulation 9(2) as the "excess" – which can be the subject of the regulation 9(5) Non-Liability Direction. Where a Non-Liability Direction cannot – by operation of Limb [ii] – "apply" to that very amount, the Non-Liability Direction cannot be made. This language is a natural and straightforward fit. That is unaltered by the fact that other ways of putting the same thing would be to say that the Non-Liability Direction cannot be made "in respect of" that amount; or that a Non-Liability Direction cannot "include" that amount; or even that the amount cannot be an "amount directed" by a Non-Liability Direction.

48. I cannot accept the "hibernating" ("inchoate") direction interpretation. It is very odd. It gives the Limb [ii] phrase "do not apply to" an artificial, and ultimately subversive, meaning. It starts with a dormant (hibernating) existence, coupled with a legal 'inapplicability'. It involves an active operation, in driving HMRC's withdrawal of the prior extant Liability Determination and, failing that, its FTT's appellate re-evaluation. Either way, the 'inapplicable' – "hibernating" – Non-Liability Direction is operative in causing a situation where it leaps into 'applicability' after all. I can find nothing in the wording or structure of the Regulations that supports this analysis. It accepts present 'inapplicability' while entailing present effectiveness in driving change. It accepts an express present primacy for the prior extant Liability Determination, only for that primacy to be reversed by the later Non-Liability Direction, achieved through HMRC withdrawal or FTT appeal. It involves – through an odd and indirect multi-phase process – a "do apply to" outcome. That is what the drafter of Limb [ii] would have said in the first place. Primacy for Non-Liability Directions – whenever made – would have been very straightforward to achieve by language which made a subsequent Non-Liability Direction applicable; not through a convoluted process borne out of words which state the precise opposite ("do not apply to").

49. Like the FTT (North Point §§14, 18), I agree that this means Limb [ii] – viewed in isolation – is a preclusive provision which would be open to "abuse" by HMRC. The power to make a Liability Determination (reg.13(2)) is exercisable in triggering scenarios (reg.13(1): §8 above) which include the Revenue Officer considering it "necessary in the circumstances" (reg.13(1)(c)). A Revenue Officer might act before anyone has had the chance to think about the Carefulness-Basis for a Non-Liability Direction (reg.9(3)); or before the Contractor has had the chance to request a Non-Liability Direction under the Chargeability-Basis or Collection-Basis (reg.9(4)(b)); or before the timeframe has elapsed for the tax returns and payments which would satisfy the Collection-Basis (reg.9(4)(a)(ii)); or after a request has been made for a Non-Liability Direction under the Chargeability-Basis or Collection-Basis but instead of deciding the request on its merits (reg.9(4)(a)); or where an "excess" has been identified

(reg.9(1)(a)) but without ever asking whether the Bases for a Non-Liability Direction are met (reg.9(1)(b)); or on issuing a refusal notice in relation to the Carefulness-Basis (reg.9(6)) thus preventing the Contractor exercising their statutory right of Carefulness Appeal (reg.9(7)-(9)); or after the commencement by the Contractor of a Carefulness Appeal (reg.9(7)) preventing the appeal from being determined on its merits (reg.9(9)). These and other situations could involve unfairness and unreasonableness in the operation of the statutory scheme. But the answer lies in remembering that Limb [ii] does not stand in isolation. It stands against the constitutional backcloth (§41 above) which involves the recognised, undiluted application of public law duties and availability of the supervisory jurisdiction of the High Court. One way to think of this is as follows. Think of regulation 13(1)(c) and regulation 13(2) so that the phrase "an officer of Revenue and Customs" means "an officer of Revenue and Customs acting lawfully, reasonably and fairly, such duties being enforceable in law". That reflects the constitutional backcloth, where power cannot be abused and there are established guarantees and safeguards to ensure that this is so.

50. It is undoubtedly right that the legally correct interpretation of Limb [ii], in light of the constitutional backcloth, gives rise to important questions about the way in which HMRC acts in approaching the making of Non-Liability Directions and the making or withdrawal of Liability Determinations. HMRC must act in accordance with its view of the 'merits'. It must act lawfully, reasonably and fairly. Some such questions are directly addressed in HMRC's published CISR Manual. I repeat that the Claimants do not claim in these judicial review proceedings that the CISR Manual breaches any public law duty. Nor do they claim that HMRC has acted in breach of any public law duty in the decision-making process in the sequence of events in the present case. The CISR Manual describes an important sequential approach. CISR §82020 includes this:

> ***Raising a Regulation 13 Determination. [R]eg.13(2) permits an Officer of Revenue and Customs to raise [a] determination on a contractor to cover deductions the Officer has reason to believe should have been made… You should issue a warning letter to the contractor that you intend to make a determination (CISR82030), following the issue of the warning letter you should allow 30 days for the contractor to respond before proceeding to make the determination under Regulation 13…***

CISR §82030 says:

> ***Before you make a Regulation 13(2) determination you should write to the contractor to inform them of your intention, you should allow the contractor a period of 30 days within which to respond to your letter before making a determination under Regulation 13(2).***

CISR §83040 says:

> ***Where the contractor does not dispute the obligation to make a deduction and the failure to do so, any representations for a direction under Regulation 9(5) must be considered before a Regulation 13(2) determination is raised. This is because once a Regulation 13(2) determination has been issued it will not be possible to consider a direction under Regulation 9(5) as this is precluded by Regulation 13(3).***

CISR §83050 then says:

> ***A request for a direction under Regulation 9(5) may be made at any time except where a Determination under regulation 13(2) has already been issued (see CISR83040).***

51. Importantly, HMRC has the power – an ongoing power – to withdraw a Liability Determination. The exercise of that power of withdrawal itself attracts not only 'merits' questions for HMRC but also basic and legally-enforceable public law duties of lawfulness, reasonableness and fairness. All of this is common ground. A consequence of withdrawal would be that the preclusive consequence of the extant Liability Determination, pursuant to Limb [ii], would be lifted. This is a function of the straightforward interpretation of Limb [ii], in the overall legal context; not an artificial world of hibernating (inchoate) Non-Liability Directions. The exercise of the power of withdrawal will arise in all the facts and circumstances of the case. If there were a case where it was claimed by reference to its preclusive effect to have been unlawful, unreasonable or unfair for a Liability Determination to have been made or maintained, this power of withdrawal would directly be engaged. The Claimants do not claim in these judicial review proceedings that the non-withdrawal of the Liability Determination breaches any public law duty.

52. I turn to the question of double taxation and double recovery. I return to CISR §83050 (see §39iv above), inserting square brackets for referencing purposes:

> ***[a] The purpose of directions under Regulation 9(5) is to avoid the situation where HMRC pursues a contractor for a deduction that should have been made where the subcontractor has no liability, or has already met any tax liability, on the sum paid gross. [b] It follows the principle that HMRC should not recover more tax from both contractor and subcontractor than is correctly payable by the subcontractor. That is why the relief is sometimes known as 'double taxation' relief. [c] A request for a direction under Regulation 9(5) may be made at any time except where a Determination under regulation 13(2) has already been issued (see CISR83040)…***

This involves a recognition (at [a]) that a Non-Liability Direction on the Chargeability-Basis or the Collection-Basis is a form of "relief" whose "purpose" is to "avoid the situation" where the Contractor is pursued for failure to make a Contract Payment deduction where the Sub-Contractor "has no liability, or has already met any tax liability, on the sum paid gross". It involves a recognition (at [b]) that such a Non-Liability Direction "follows" a "principle" concerned with double recovery of payable tax. But it does not follow that such "relief" must, by reason of some legal rule or principle, be open-ended or unrestricted in its operation. It does not follow that there is excluded the limitation also recognised (at [c]), which straightforwardly reflects the wording and structure of Limb [ii]. This limitation on the "relief" arises in the following context: in relation to an important 'upstream' duty to pay imposed on Contractors, reflected in primary legislation made by Parliament; where what is being enforced against the Contractor is an important, distinct duty, to ensure that an 'upstream' payment is made by the Contractor; all in circumstances where the Contractor is in clear default; where that duty does constitute the "correct" amount which is payable by the Contractor under the 2004 Act and Regulations, and not a "penalty"; where Upstream-Treatment has a broader reach than Downstream-Collection; where there is an express but limited protection by way of 'relief'; where 'relief' is not solely a function of the Chargeability-Basis and Collection-Basis but also includes the Carefulness-Basis (whose refusal alone is appealable); where the 'relief' and its availability arise through the exercise by HMRC of functions attracting basic guarantees of lawfulness, reasonableness and fairness; in a context where there is no open-ended and enduring right in a defaulting Contractor to point to Downstream-Collection as excusing their own default; and where the Claimants are unable to point to any inconsistency with any provision of the empowering primary legislation (the 2004 Act), any common law or

constitutional right being abrogated, or any incompatibility with any Convention rights (as protected under the Human Rights Act 1998). Convention-rights incompatibility was unsuccessfully argued in Barrett (at §§118-129); no such incompatibility argument has been raised in this case. In this context and circumstances, I cannot see the "double taxation" or "double recovery" points as supporting and sustaining the Claimants' interpretation of Limb [ii].

53. Finally, I return to the FTT cases (§§18-21 above). In my judgment: the FTT was correct in Hoskins (at §§21-22) to describe Non-Liability Directions and Liability Determinations as "mutually exclusive"; the FTT was correct in Barrett (at §§101, 105) that no Non-Liability Direction can be effective to reduce or eliminate the effect of a prior extant Liability Determination; the FTT was correct in Ormandi (at §§48(4)(6), 49) that a Liability Determination, unless withdrawn, precludes a subsequent Non-Liability Direction; and the FTT was correct in North Point (at §18) that public law principles enforced by judicial review are available to address questions of "abuse". I record that I have wondered whether the North Point situation – where a Carefulness appeal (reg.9(7)) against a refusal (reg.9(6)) is 'extinguished' by a later Liability Determination – is answered by the FTT being able to give a 'directed direction' (reg.9(9)) taking effect from the date of the refusal. But nobody supported this analysis (see §13 above), it is not what is in issue in this case, and public law protection remains.

Conclusion

54. For the reasons which I have given, HMRC's impugned decision involved no error of law, its interpretation of Limb [ii] being legally correct. I will dismiss the claim for judicial review. Having circulated this judgment as a confidential draft, I am able here to deal with any consequential matters. It is agreed that, in light of this Judgment I should Order: (1) that the claim for judicial review be dismissed, and (2) that the Claimants do pay the Defendant's costs to be assessed if not agreed. The Claimants ask for permission to appeal, on which the Defendant's position is neutral.

Permission to Appeal

55. I am going to grant the Claimants permission to appeal on the following ground: the Judge was wrong in law in interpreting Limb [ii] of the Interrelationship Provision as meaning that a prior and extant Liability Determination is preclusive of the making of a subsequent Non-Liability Direction in respect of the same amount. My confidence in the correctness of my reasoned analysis does not extend to regarding as unrealistic (or fanciful) the prospect of the Court of Appeal finding that my conclusions were wrong. Large amounts are at stake with serious implications. Permission to appeal is not opposed. It is for the Claimants and their representatives to decide what arguments to deploy. But I ought to record that I was not materially assisted by the way in which four proposed 'grounds of appeal' (i)-(iv) were put. It was suggested (i) that public law principles could not "operate" and (iv) the general power to withdraw a Liability Determination "will not operate". The answer is that a refusal to withdraw a Liability Determination – in breach of public law standards – would engage public law and constitute a safeguard against abuse, as the FTT too has recognised. There was then an attempt (ii) to disclaim the acceptance – made clear at the hearing, and in my judgment correctly – that Limb [i] is preclusive. There were then references (iii) to my having failed to acknowledge a "basic principle of tax law" and a "constitutional heresy", when what I have found is a liability to the Revenue under Regulations whose legality and

human rights-compatibility have not been impugned. Be all of that as it may, I have identified the ground of appeal on which I grant permission to appeal. If the Claimants and their representatives wish to pursue these matters at higher judicial altitude, they have the permission of this Court to do so.