TC02622

Appeal numbers: TC/2010/06683 & TC/2010/07998

CONSTRUCTION INDUSTRY SCHEME – notices of determination – whether UK contractor obliged to make deductions under the scheme in respect of payments made to its Isle of Man parent company –yes- withdrawal of gross payment status – whether discretion properly exercised -yes– FA 2004 Sections 57 to 67 – Income Tax (Construction Industry Scheme) Regulations 2005 Regulations 9 and 13- appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ISLAND CONTRACT MANAGEMENT (UK) LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE TIMOTHY HERRINGTON
CHARLES BAKER FCA

Sitting in public at 45 Bedford Square, London WC1 on 3, 4 and 5 October 2012

Matthew Boddington, Accountax Consulting, for the Appellant

Akash Nawbatt, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellant, Island Contract Management (UK) Ltd ("ICM UK"), appeals against a number of decisions of the Respondents ("HMRC").

2. First, ICM UK appeals against decisions of HMRC to issue notices of determination under Regulation 13(2) of the Income Tax (Construction Industry Scheme) Regulations 2005, ("the Regulations") the first of which were issued on 28 February 2008, ("the 2008 Determinations") followed by further notices during 2010 ("the 2010 Determinations"). These notices covered the tax years 2002/2003 to 2009/2010. Pursuant to those notices, HMRC has determined that ICM UK is liable to pay to HMRC sums in aggregate amounting to £42,751,508.78 which HMRC contends should have been deducted from sums paid by ICM UK to sub-contractors during the years referenced above. We refer to these notices of determination collectively as "the Determinations".

3. Secondly, ICM UK appeals against HMRC's decision, made on 16 February 2009, (""the Gross Payment Determination") to withdraw ICM UK's gross payment status on the grounds that ICM UK had failed to make deductions under the Construction Industry Scheme ("CIS") in respect of payments made to sub-contractors in the tax years 2007/2008 and 2008/2009.

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4. We deal with matters in the following order:

Background to the CIS

5. Before turning to the specific facts of this case it is helpful to set out the manner in which the CIS has operated during the period that is relevant to these appeals. This description is taken largely from the evidence of Mr Kenneth Claydon ("Mr Claydon"), a senior HMRC Officer with operational responsibilities for the CIS. Mr Claydon's evidence in respect of this description was unchallenged.

6. The CIS is an HMRC administered tax compliance scheme for businesses and other concerns operating in the construction industry. This was an industry that, historically, attracted a large itinerant workforce involving a "cash in hand" approach to business resulting in a significant loss to the Exchequer of payment of tax and National Insurance Contributions. In common parlance, it was known as the "lump". As a result of persistent non-compliance, since 1972, there has been a dedicated compliance scheme in place to monitor payments made between "contractors" and "sub-contractors" in the industry. In general terms, a contractor is a business or other concern, such as a local authority or Government Department that pays sub-contractors for construction work. A sub-contractor is a business that carries out construction work for a contractor.

7. Section 559 of the Income and Corporation Taxes Act 1988 ("ICTA"), which governed the basic requirements of the scheme until 5 April 2007, provided that when a contractor in the construction industry made a payment to a sub-contractor for construction work, unless that sub-contractor was excepted from this requirement by virtue of Section 561 of ICTA, the contractor was legally required to make a deduction from that payment (excluding any part of it that was shown to represent the direct cost of materials). Prior to making such a payment, Regulation 7F of the Income Tax (Sub-contractors in the Construction Industry) Regulations 1993 (the "1993 Regulations") required the contractor to have seen and examined a Registration Card issued by HMRC to the sub-contractor.

8. Within the construction industry it is common for a business to be both a sub-contractor, providing services to another contractor, and a contractor, employing other sub-contractors to do the work that they themselves are contracted to undertake.

9. Any sub-contractors acting as contractors themselves are, in turn, obliged to operate the same system whenever they make any payments to any sub-contractor further down the chain and so on indefinitely. An individual sub-contractor, or a partnership acting in the role of the contractor, was not permitted to set off any deductions withheld from payments made to their own subcontracting labour force against deductions from any payment made to them by their own contractors. At the end of the year, their gross labour costs were a deductible expense in computing their own net profit and tax liability under self-assessment. Since 6 April 2002, company sub-contractors that had deductions made from their from their income could set these

deductions off against the company's own liability for PAYE and National Insurance Contributions and any deduction made from its own sub-contractors.

10. A contractor was legally obliged to make, from any payment made to the holder of a Registration Card, a deduction of 23% of the sum paid, less the direct cost of any materials purchased by the sub-contractor. However, from 6 April 2000, this deduction rate was reduced to 18%, and that would have been the amount to be deducted where appropriate from the time ICM UK was registered under the scheme, until 5 April 2007.

11. The contractor was obliged under Regulation 8 of the 1993 Regulations to pay the deductions to HMRC on a monthly, or, where the amounts involved were small, quarterly basis. The deductions were treated as payments on account of the sub-contractor's eventual liability to tax and Class 4 National Insurance Contributions or, where appropriate, corporation tax on their trading profits for the periods in question. A contractor who failed to make a deduction from a payment to a sub-contractor, when one was due, was liable to account to HMRC for the amount that should have been deducted.

12. For each month that a contractor made payments to a sub-contractor from which the statutory deduction was made, the contractor was required to complete a three part voucher on a document supplied by the HMRC, Number CIS25. Then, within 14 days of the end of the tax month in which the payments were made, the contractor had to provide the sub-contractor with a form of receipt for all payments made using part 2 of the CIS25 voucher, and they were required to send the top copy to the HMRC, keeping the third copy for their own records.

13. Before they could be paid by a contractor within the CIS, Regulation 7F of the 1993 Regulations required each sub-contractor who was not exempted from the requirements of Section 559 of ICTA to hold and to present to the contractor a Registration Card on a document numbered CIS4. The Registration Card bore the holder's photograph, and in every application for a Registration Card, the applicant was required to attend a local HMRC office at the time of submitting the application, for the purposes of an identity check, which if satisfactory, was followed by the issue of a Registration Card.

14. Where a sub-contractor was able to satisfy three statutory tests; the 'business' test, the 'compliance' test and the 'turnover' test, they would be issued with a CIS5 or CI6 Tax Certificate which entitled them to be paid gross by contractors for whom they worked.

15. At the end of the tax year, the sub-contractor was obliged to provide an annual return of his income to the HMRC, and the income was assessed to tax under the self-assessment regime in the same manner as any self-employed person. Any difference between the sub-contractor's full tax liability and the total deductions suffered by the sub-contractor during the year, from previous payments made to contractors, was paid to the HMRC or was refunded to the sub-contractor as appropriate by HMRC.

16. Following detailed consultation between HMRC and the construction industry, a new scheme was introduced from April 2007. Like the old scheme, sub-contractors register with the scheme in order to receive their payments from contractors either gross or under deduction – however, there are now no CIS4 Registration cards or CIS6/CIS5 Tax Certificates. The current deduction rate is 20% but, for those who are not registered for the scheme, the deduction rate is 30%. On initially engaging a sub-contractor to undertake construction work, the contractor is obliged to contact HMRC either by telephone or online, to "verify" the payment status of the sub-contractor prior to making any payment to them. HMRC then advise the contractor, during this process, whether the payment to the sub-contractor in question can be paid in full or whether a deduction must be made from it. If a deduction is necessary, the contractor is advised whether it is the standard rate of 20% or the higher rate of 30% (where the sub-contractor's record cannot be found). On making payment to the sub-contractor, if instructed that a deduction is necessary, the contractor will make it at the relevant rate and pay over the balance to the sub-contractor. The contractor must then for all their sub-contractors, pay over the deducted amounts to HMRC on a monthly basis (or quarterly in some limited circumstances). The deducted amounts are held by HMRC on account of the sub-contractor's end of year tax liabilities. Once the sub-contractor sends in their end of year return, they pay any additional balance due or, if appropriate, receive payment of any excess deductions.

17. Sub-contractors can register to receive their payments gross under CIS, provided they meet three statutory qualifying tests of business, turnover and compliance (Section 64 of the Finance Act 2004). Sub-contractors are required to demonstrate a good compliance record, and the CIS legislation sets out the tolerances that will be disregarded when considering their application to be paid gross by contractors for whom they have worked. Additionally, all sub-contractors registered to receive their payments gross under CIS have their tax compliance reviewed from time to time against the tolerances set out in the legislation. Any sub-contractor business failing their annual compliance review will be notified by HMRC of the reason for their failure and their gross payment status will be withdrawn.

18. In order for the scheme to run efficiently, HMRC need to know who, within the construction industry, has been paid by whom and what deductions, if any, have been made from those payments. This is so that the sub-contractors' accounts can be kept up-to-date, ready for when they submit their self assessment returns or make an in-year claim for early repayment where circumstances allow this before the tax year end. The contractor is required to submit a return, showing details of all sub-contractors the contractor has paid in the tax month, regardless of whether the sub-contractor was paid gross or under deduction, by 19th of each month. The return shows the sub-contractors' names, HMRC reference numbers and the amount paid by the contractor, together with details of any statutory deductions the contractor had been required to make from those payments. The returns can be submitted either electronically or on paper and are processed by HMRC with the return data being recorded on the CIS computer system. This allows HMRC to monitor what has been paid between the various parties within the construction industry. Details of payments made to sub-contractors are recorded on the sub-contractors' individual records and are available for HMRC to cross-check against the sub-contractors' own

tax returns, submitted to HMRC at the year end. Contractors are also legally obliged to submit nil returns for each month in which they have paid no sub-contractors.

Relevant Legislation

19. The current legislation regulating payments under the CIS and which is relevant to these appeals is now to be found in Chapter 3 of Part 3 of the Finance Act 2004 ("FA 2004") and the Income Tax (Construction Industry Scheme) Regulations 2005 ("the Regulations"). The provisions of this legislation which are relevant to this Decision are set out in the Annex to this Decision.

20. The relevant provisions in FA 2004 replaced the provisions under Section 559 to 572 of ICTA (some of which were referred to in the paragraphs above describing the background to the CIS) with effect from 6 April 2007. The provisions in ICTA will therefore be relevant in relation to the arrangements which are the subject of these appeals as they operated prior to 6 April 2007. However those provisions are, as regards the relevant provisions in FA 2004 which we interpret in this decision, equivalent in all material respects to the corresponding provisions in ICTA and we therefore refer only to the relevant provisions in FA 2004 in this decision. References therefore to a section number or a regulation number are, unless indicated otherwise, to be taken as a reference to a provision of FA 2004 or the Regulations as relevant.

The Facts

21. It is against that background that we turn to the facts of these appeals.

22. We had before us various documents relating to the operations carried on by ICM UK and its parent company, Island Contract Management Limited, ("ICM"), a company incorporated in the Isle of Man. This included some limited contractual documentation recording the arrangements between ICM UK and ICM and between ICM and the various individuals working in the construction industry it paid for their services ("the construction workers"), and between ICM UK and the entities operating in the construction industry from which it received payments. We also had the audited report and accounts for ICM UK for some of the tax years relevant to these appeals, correspondence between ICM and ICM UK and HMRC and notes of meetings and discussions between those entities.

23. Witness Statements were submitted by Mr David Boothman ("Mr Boothman"), who was at all material times a director of ICM which in turn was at all material times a corporate director of ICM UK, and Mr Claydon.

24. Mr Boothman's evidence was unsatisfactory. He tended to be vague and some of his answers were contradictory or inconsistent with the contemporaneous documentation. He would often give evasive or over complicated answers to what were straightforward questions which required further questions to seek clarification. Consequently his cross examination on what was a relatively short witness statement took almost two days of the hearing. We give specific examples of Mr Boothman's approach in our consideration of the evidence but note in particular that when he was

asked questions as to the operations of ICM his attitude was defensive, adopting the stance that its affairs, as an Isle of Man company, were outside the scope of HMRC's jurisdiction was none of HMRC's business. As a result our task in establishing the true nature of the relationship between ICM and ICM UK and ICM and the construction workershas been more difficult than it might have been had Mr Boothman been more co-operative. As a result we have been reluctant generally to accept Mr Boothman's evidence where it is not supported by corroborating written material.

25. The financial statements of ICM UK for the long period ended 31 May 2002, the year ended 31 May 2003 and 31 May 2004 included a Report of the Auditors signed by Boothmans, Chartered Accountants. All three reports were dated 27 July 2004. It was put to Mr Boothman that his firm was not eligible to act as auditors of ICM UK because of his ownership of the company, and his control of the management of the company, as we find to be the case below. He attempted to excuse himself by saying that those financial statements did not need an audit and that an independent firm of auditors had been appointed for 2005 and subsequent periods. Although not directly relevant to the matters under appeal, it does demonstrate a casual approach to regulatory requirements.

26 We found Mr Claydon to be a knowledgeable and honest witness with in depth experience of the operation of the CIS. He changed his evidence in one respect on his own volition at the outset of his oral evidence but as we discuss below, in our view this was due to an honest mistake.

27. From the documents submitted and the oral evidence we make the following findings of fact.

28. Mr Boothman, an English qualified Chartered Accountant, has been resident in the Isle of Man since November 1984. In the autumn of 1986 he formed his own practice Boothmans, Chartered Accountants ("Boothmans"). He developed the business of Boothmans to include undertaking fiduciary work, as an auditor of fiduciaries and their clients.

29. In 1991 Mr Boothman incorporated an investment company, Oakfield Investments Limited for the benefit of his mother and himself, the shares of which ere held by his family trust. This company also formed a subsidiary company, Oakfield Corporate Services Limited, which was registered in the Isle of Man in 1998. This company became licensed in the Isle of Man to provide trust and corporate services and is regulated by the Isle of Man Financial Services Commission in this regard. On 23 June 1999 ICM was incorporated as a wholly owned subsidiary of Oakfield Investments Limited. Mr Boothman accepted that in reality he controlled both Oakfield Investments Limited and ICM Limited and as a director was responsible for the management of ICM Limited. In answer to a question from Mr Nawbatt he confirmed that he "called the shots" for ICM Limited, and subsequently its subsidiary ICM UK Limited when that company was formed.

30. It was not entirely clear from the documents we saw and Mr Boothman's evidence as to what ICM Limited's business was when it first started to trade. Mr Boothman confirmed that the description on ICM's website, which is accessed via Boothmans' own website, of ICM being the contract payments arm of Boothmans is accurate. We therefore find that ICM was established as a firm to make payments under third party contracts.

31. As to the nature of the contracts in respect of which it made payments, there was a clear inconsistency between Mr Boothman's evidence and the documentary evidence. In his witness statement Mr Boothman stated that ICM was formed to exploit a particular market opportunity, namely the engagement of construction industry operatives through limited companies and thus the purpose of the company was to engage sub-contractors working within the construction industry and to contract with employment agencies for the services of those sub-contractors.

32. Mr Boothman qualified the statements referred to in paragraph 31 above in his oral evidence when taken to a copy of a letter which he wrote on 16 August 2001 to HMRC. This letter was written on behalf of ICM but it referred both to ICM's business and that of its new subsidiary ICM UK as follows:

> "Island Contract Management Limited was formed in the Isle of Man in June 1999 to supply itinerant labour to various sectors of the European economy, in shipping transport and healthcare. It is owned by myself, David A Boothman, a resident of the island and is registered in the Isle of Man with the tax authorities (Ref: no.C105657-07) which is 100% owner of the UK company.
>
> The new subsidiary company has been formed specifically to undertake the contracting of construction workers in the UK, which business will be run by Mr Halliwell and be separate to that undertaken by the Isle of Man Company. The UK company already has a bank account (no.100009806) set up with Barclays Bank, 10 Market Street, Bradford BD1 1NR, sort code 20-11-81, and Group VAT registration 001 6054 38."

33. This letter was written in the context of a forthcoming application by ICM UK for registration under the CIS Scheme so as to enable it to receive payments gross.

34. Mr Boothman gave an unconvincing explanation in his oral evidence as to the discrepancy between what was said in this letter and his witness statement. He said that in the witness statement he was focussing purely on the CIS and that from the outset ICM was involved in construction payments outside the CIS and in other sectors in Europe.

35. We can make no finding as to whether ICM was involved in sectors other than construction as we received no evidence to that effect and we do not accept Mr Boothman's assertion in his oral evidence or in the letter referred to above that it was involved in other sectors. What is clear from the letter is that it does not disclose that ICM is specifically involved in the construction sector, which it is common ground that it was; but it does disclose that ICM UK will be involved in that sector. The clear impression is given that in relation to construction workers in the UK, only ICM UK was to be involved not ICM. Mr Boothman rather lamely suggested that the first

paragraph was sufficient to demonstrate ICM’s involvement in the UK construction sector, talking as it does about “various sectors of the European economy”, the United Kingdom being part of Europe. We cannot accept that interpretation; it is plain to us that the letter sought to draw a clear distinction in scope between the business of ICM and the business of ICM UK. We return to this issue later, in the context of our findings as to the nature of the business of the respective companies.

36. When ICM was incorporated a Mr Gary Ramsden (“Mr Ramsden”), who was based at Boothmans’ offices in the Isle of Man, was employed to run the company on a day to day basis, reporting to Mr Boothman.

37. As ICM began to develop its business of paying construction workers carrying out work in the UK it became apparent that its business would be hampered unless it was able to receive payments gross from contractors which it would then pass on to the construction workers concerned. For example, a recruiting agency for construction workers, whose business it was to procure labour for firms carrying out construction contracts, would not wish to have the responsibility of making payments under deduction so would seek to enter into a sub-contract with a firm which possessed a certificate issued under the CIS enabling the construction workers to be paid gross.

38. It is apparent to us from the description that Mr Boothman gave us of ICM’s business, and which is borne out by such limited documentation produced, that the business model within which ICM as a contract payments firm wished to participate worked as follows. A construction company working on a project which required construction workers would go to a specialist recruitment agency to procure those workers. The agency would identify suitable construction workers from those registered with them. The construction company itself would not wish to be responsible for paying directly the construction workers procured and thereby assuming responsibility for operating the CIS in relation to a potentially large number of self employed sub contractors so it will leave it to the agency who procured the labour to make the necessary arrangements. In order for that agency to be relieved of the burden of paying construction workers, it would arrange for their services to be provided through a sub-contractor registered under the CIS with a Certificate that enabled that sub-contractor to be paid gross. That sub-contractor would invoice the agency for the services of the construction workers concerned and receive gross payment from the agency. The sub-contractor would then pay the construction workers against invoices produced by those workers, either on a gross or net basis according to the status of the construction worker under the CIS.

39. In that context Mr Boothman’s evidence was that ICM commenced its business of paying construction workers in 1999 without seeking to participate in any way in the CIS. We have no written details of the contractual arrangements for the period from the commencement of business in 1999 until 2001, either between ICM and any construction worker or between ICM and any construction company or agency. Neither do we have any evidence of the basis on which construction workers were paid. Mr Boothman’s evidence was that ICM made various contracts with construction agency businesses and from an initial engagement of 20 sub-contractors the business grew to engage 200 sub-contractors within a year. Mr Boothman’s

evidence was that the structure was that construction workers that the construction agency found work for received payment for their work from ICM, ICM having received payment from the relevant construction agency. ICM would make a deduction from the monies it received in respect of its fee for providing the service before passing the payments on to the construction workers. This description is consistent with how the arrangements operated after ICM UK was incorporated and accordingly we accept it as accurate.

40. Mr Boothman's evidence was that the contracts that ICM had with its agency clients at this early stage of the business were largely made orally. It seems unlikely that reputable construction companies and recruitment agencies would pay significant sums of money direct to ICM in discharge of the obligation to pay for the labour supplied but we can make no finding on this point in the absence of any other evidence.

41. In the light of construction recruitment agencies requiring the inter-position of a company able to be paid gross under the CIS, Mr Boothman's evidence was that in early 2001 ICM made telephone enquiries of HMRC as to the feasibility of registering ICM under CIS. In his witness statement Mr Boothman stated that several telephone calls (at least four to his recollection) were made to HMRC's CIS helpline. Mr Boothman asserted that following these conversations he concluded that it would be impossible to register ICM, as an overseas company, under the CIS.

42. Mr Boothman's evidence was that during these telephone conversations ICM was informed by HMRC that in order to qualify for a gross payment CIS 6 Certificate the directors of ICM had to have up to date UK tax records and that therefore they were unable to qualify.

43. Mr Clayton's evidence was that there was nothing in the legislation or HMRC practice in 2001 which prevented a company resident outside the United Kingdome obtaining a CIS6 Tax Certificate as long as it was able to satisfy the three statutory tests referred to in Paragraph 17 above.

44. Mr Claydon's evidence was for such an application to be successful, the overseas business concerned (and its directors if the business is a company) would have to present HMRC with a letter from their own Revenue authorities, to demonstrate that they had no adverse compliance history. They would also have to pass the business and turnover tests in the usual way. He referred to HMRC's internal guidance on handling such applications from non-UK businesses during the period from 1999 to 2007 which was produced to us and which makes allowances for compliance with the statutory tests because of the applicant's non resident status. For instance, the applicant strictly would not pass the requirement of carrying on business in the United Kingdom if it had not yet started work in the UK, but if the company had an established business overseas the test would be treated as having been satisfied if it could be shown it was to start business in the UK shortly. In relation to the compliance test the guidance states that HMRC staff were advised to request evidence of the applicant's compliance with tax obligations in its own country which could take the form of a letter of tax clearance from the applicant's tax office.

45. Mr Claydon's evidence therefore contradicts Mr Boothman's evidence as referred to in Paragraphs 41 and 42 above. First Mr Claydon stated in 2001 that there was no dedicated CIS helpline as such, but there was an advice line for contractors and he assumed that was the source that was contacted. Mr Claydon's evidence was that those operating the advice line were well aware of the requirements in respect of foreign businesses and how to apply for a CIS 6 or CIS5 Tax Certificate and would have been in a position to give the appropriate advice or refer to the appropriate section.

46. Mr Claydon referred to the fact that there was no requirement that the directors had UK tax records, provided the relevant foreign tax authority confirmed the applicant's tax affairs were in order.

47. There is evidence that Mr Boothman was aware of this. He confirmed that he had read the guidance referred to in paragraph 44 above and that he could have obtained a compliance letter from the Isle of Man tax authorities.

48. Mr Claydon stated in his Witness Statement that ICM was not within the jurisdiction of the CIS and was therefore not obliged to operate it and that as ICM was a non-UK based company whoever was paying it for undertaking construction work at the time would not have been obliged to operate the CIS. As referred to in paragraph 22 above Mr Claydon changed his evidence on this point at the outset of his oral evidence. He said that HMRC's view was that if construction work was undertaken in the United Kingdom, even if the contractor was not resident in the UK, then the contractor would still need to register for a CIS6 Tax Certificate if it wished to pay the construction workers performing the services in the UK gross. HMRC recognised that if such a contractor did not register under the CIS and failed to make deductions when making payments then it could not take any enforcement action in relation to such failure as the entity concerned was outside the jurisdiction.

49. Mr Boddington suggested that Mr Claydon had been influenced to change his evidence. In our view he simply made an honest mistake and when reviewing his witness statement before giving his evidence realised it did not reflect his view as written and quite properly sought to correct it before giving his oral evidence. We therefore accept his corrected evidence as to what HMRC's view was on this point.

50. Mr Claydon stated that HMRC's view was that an entity such as ICM would be regarded as carrying on business in the UK and therefore within the scope of the CIS if as a sub-contractor it paid construction workers for services which those individuals performed in the UK.

51. Mr Claydon confirmed that in reality if ICM had applied to be registered without a place of business in the UK it would not have been issued with a CIS6 Tax Certificate unless HMRC were satisfied that it would make the necessary deductions and account for the same to HMRC before paying construction workers.

52. We accept Mr Claydon's evidence on the feasibility of ICM being registered under the CIS and being issued with a CIS Tax Certificate if it were able to meet the

statutory tests and give the necessary assurances as described in paragraph 51 above. We also accept that the information available to Mr Boothman and which he acknowledged he had read would have enabled him to come to that conclusion and that it is more likely than not that he did so.

52. Contrary to the impression that is given by Mr Boothman in the statement in his witness statement referred to in paragraph 41 above, Mr Boothman himself did not make the telephone calls to HMRC referred to in that paragraph. In his oral evidence he stated that it was almost certainly Mr Ramsden who had those conversations. We have no evidence from Mr Ramsden and can place little weight on what Mr Boothman says Mr Ramsden was told during these conversations. If those conversations took place, and we have no direct evidence that they did, in our view it is more likely than not that Mr Ramsden would have been given information that is consistent with the internal guidance which was available, as referred to by Mr Claydon in paragraph 44 above.

53. We therefore do not accept Mr Boothman's evidence that the reason ICM Limited did not apply for registration and the issue of a CIS6 Tax Certificate was that in practice it was not possible to do so.

54. In our view it is more likely than not that, having received the guidance which Mr Boothman says that he read, and what Mr Ramsden may have been told in the telephone calls, ICM decided that it would not pursue the route of trying to register ICM, but would look for an alternative method of being able to achieve its objective which was the ability to receive payments gross in respect of services performed by construction workers. Mr Boothman in effect confirmed this to be the case in his oral evidence. He stated that having decided not to attempt to register ICM they did the next best thing they could which was to establish a company which generated no profit of its own but which was as close as it could be to ICM, having a common name although it was a separate company.

55. The route therefore followed to achieve this objective was to incorporate a UK resident company that would apply for registration under the scheme and the issue of a CIS6 Tax Certificate.

56. To that end ICM UK was incorporated on 10 May 2001. It had an issued share capital which consisted of three shares of £1 each which were all issued to ICM. ICM UK's first directors were Mr Timothy Halliwell ("Mr Halliwell") and ICM. Soon after incorporation ICM UK applied to HMRC for registration under the CIS and for the issue of a sub-contractor's Tax Certificate (CIS6), the application being dated 28 August 2001. On this application ICM UK gave as its principal place of business a private house, namely Mr Halliwell's residence. It described the company's business as electrical construction and installation. In due course this application was approved, but we have no details as to when that occurred.

57. We were shown a letter written by FastTrack Management Services Limited ("FastTrack") on 22 August 2001 to Mr Halliwell at ICM UK. FastTrack's business

is as an agency procuring contract technical staff for construction companies. The relevant passages from this letter are as follows:

> "As we outlined, it is the policy of FastTrack Management Services Limited, where possible to pay its operatives via Composite Companies.
>
> Currently FastTrack has two approved suppliers within this area. It is our intention to appoint a third company to provide this service to FastTrack and the operatives it engages, however that company must be in possession of a valid CIS Certificate.
>
> I understand that you have an application in for your CIS Certificate. Only when this has been issued we will be in a position to approve you as a registered supplier of FastTrack.
>
> Our intention is to equally divide our operatives between the composites we use. We would anticipate paying Island Contract Management (UK) Limited for the services of up to 75 operatives at an average of 3500 per week. At that level you would have to invoice us approximately £40,000 per week."

58. What emerges from this letter and which we find is that FastTrack will obtain work for construction workers and will then arrange for them to be introduced to other companies who will take responsibility for paying them. ICM UK would become one of those companies once it had received its CIS6 Tax Certificate.

59. Once those arrangements had been made with ICM UK the process would be as follows, as described by Mr Boothman and reflected in such documentation as was available. FastTrack would inform ICM's staff, operating out of Boothmans' offices in the Isle of Man, that they had a construction worker they wished to be paid through ICM/ICM UK. Mr Boothman's office would take details of the construction worker concerned and issue him with a contractual document, which is described in more detail below. The essence of the contractual document is that the construction worker agrees to be paid by ICM Limited for the services he has provided to FastTrack's construction client subject to a deduction of 5% of the monies due to him to cover ICM's fee for providing the service. Neither ICM nor ICM UK would play any role in procuring work for the construction worker.

60. Once the construction worker concerned has signed his contract with ICM, the payment process would be as follows. The construction worker would provide ICM with a timesheet and invoice showing the number of hours he had worked on the project concerned and the amount due to him for his services.

61. In parallel, an invoice would be issued in the name of ICM UK to the main contractor (that is the construction company for whom the construction worker has provided his services or to an agency such as FastTrack) for an amount equivalent to the amount in the invoice the construction worker has provided to ICM. We were shown a number of the invoices issued by ICM UK. Such an invoice would be prepared by Boothman's staff in the Isle of Man and the contact details in the invoice were shown as Mr Halliwell's physical address but with Boothmans' telephone and fax numbers and email address.

62. ICM UK's invoice purports to show a sum due from the contractor in respect of construction services provided by ICM UK. ICM UK Limited has not in the commercial sense provided any construction services; it merely assumes the responsibility for receiving payment for the services that have been provided. It passes the monies it receives, which are paid into its own bank account in the UK, directly to ICM without deduction. ICM then makes a corresponding payment to the construction worker, less the agreed fees, but without any deduction in respect of any income tax.

63. Mr Boothman was asked by Mr Nawbatt in cross examination as to why ICM UK described its business as electrical construction and installation. Mr Boothman initially answered that ICM UK was engaged in the electrical construction industry but ultimately agreed that a fair and accurate description of its business would be the supply of labour for electrical construction and installation and we find that to be the case.

64. When asked by Mr Nawbatt whose labour ICM UK supplied Mr Boothman answered that it was ICM's labour, not the labour of the construction workers who ICM paid, but accepted that neither ICM or ICM UK played any part in finding any labour themselves, which would be done by employment agencies such as FastTrack who would introduce the construction worker concerned directly to ICM so that he could be set up on ICM's payment systems. Mr Boothman agreed that neither ICM nor ICM UK had any role in agreeing the rates for the labour provided; the construction workers agreed the rates with the end construction client or the agency that found them the work.

65. This structure and its characterisation is supported by ICM UK's report and accounts which were provided to us in respect of the financial years ending 31 May 2002, 31 May 2003, 31 May 2004 and 31 May 2005 and 31 May 2006. In respect of each of those years the report and accounts describes the principal activity of the company as that of the provision of contractual labour in the construction industry. The first year's accounts also contain the following statement:

> "The company transfers all funds received to its parent company Island Contract Management Limited. All overhead expenses are borne by the parent company."

66. Those report and accounts and those for the subsequent years that were submitted in evidence show that no profit arises in ICM UK. Its turnover is matched exactly by the sum representing cost of sales which means that all the sums it receives from contractors is passed on without deduction to ICM.

67. In terms of the management of ICM UK, We find that Mr Halliwell, although a director and the only UK resident director, had a limited role. Mr Boothman asserted that Mr Halliwell ran ICM UK's business, stating that only he could do so as he was resident in the UK. The reality was quite different. Mr Boothman accepted in cross-examination that Mr Halliwell's role was limited to ensuring the correct arrangements with the employment agencies or construction companies that paid ICM were in place by presenting ICM UK's CIS6 Tax Certificate to those entities thus enabling those

entities to pay ICM UK gross for the labour they introduced. He would also have a role in assessing the creditworthiness of the agencies concerned, and occasionally would deal with issues arising if an agency failed to make a payment that was due and collect any overdue monies. Mr Boothman confirmed that Mr Halliwell received no remuneration as a director but was paid his expenses by ICM from the Isle of Man. Mr Halliwell's wife also assisted from time to time; in addition to Mr Halliwell from 2006 she held an individual registration card under the CIS which enabled her to verify ICM UK's credentials under the scheme with agencies.

68. Mr Boothman also asserted that Mr Halliwell's residence was ICM UK's principal place of business, but having accepted that all invoicing by ICM UK was carried out under Mr Ramsden's supervision from the Isle of Man, all individual sub-contractors were dealt with directly from the Isle of Man and the contact details provided for ICM UK were those of ICM in the Isle of Man, when asked whether a truthful and accurate answer would be that ICM UK's principal place of business was that of ICM in the Isle of Man he replied that "this was a point of view I suppose". This was a clear example of an evasive answer; there was no doubt that ICM UK Limited was in reality operated in all material respects by Boothmans' staff from the Isle of Man under a structure in which Mr Boothman agreed he "called the shots".

69. It was against the background of this structure that Mr Boothman wrote to HMRC on behalf of ICM, the letter dated 16 August 2001 referred to in paragraph 32 above.

70. It is not clear exactly what prompted this letter to be written but it was written shortly before ICM UK submitted its application for registration under the CIS and its CIS6 Tax Certificate, so it may be inferred that the reason was to assist HMRC with understanding the ownership structure of ICM UK, and, with its reference to ICM having experience in supplying itinerant labour, that the business had some substance and was in good order.

71. In terms of disclosing the true nature of ICM's business and the arrangements under which ICM and ICM UK would operate in relation to the engagement of construction workers carrying on business in the UK it was however grossly misleading in a number of key respects.

72. First, as we have already noted in paragraph 35 above no mention is made of ICM's previous involvement in the construction sector, and in particular that it had already been involved in the UK construction sector in making payments to construction workers. Mr Boothman sought to downplay this by stating that the first paragraph quoted was merely discussing what the situation was in 1999 when ICM started business, but in our view the letter was misleading in not stating what ICM's activity in the construction sector was at the time the letter was written, on the basis that the letter was designed to give HMRC comfort in the context of ICM UK's application.

73. Secondly, the letter makes no mention of ICM having made enquiries of HMRC as to the possibility of ICM itself becoming registered under the CIS and that the

perceived difficulties ICM encountered in registering that company under the CIS had led it to incorporate a UK resident subsidiary so as to facilitate registration.

74. Thirdly, the statement that "The new subsidiary company has been formed specifically to undertake the contracting of construction workers in the UK which business will be run by Mr Halliwell and be separate to that undertaken by the Isle of Man company" is misleading both for what it does say and what it omits. First it omits any mention of ICM being involved at all and that ICM will be receiving payments from ICM UK without deduction which will then be paid on to construction workers. The impression to be taken from the letter is that ICM UK will be contracting with construction workers and paying them direct under the CIS. Secondly it is wrong in stating that Mr Halliwell is running the company and does not say that all significant management is carried out by ICM in the Isle of Man. It is therefore misleading to say that the business of ICM UK is separate from ICM. Its business is inextricably linked and it has no viability on its own without the participation of ICM.

75. We infer that these statements and omissions are deliberate. As we have found in paragraph 54 above, ICM's objective was to be in a position to receive payments gross and to be able to pay the construction workers gross. Had that been fully explained to HMRC undoubtedly a discussion would have taken place as to whether such a structure is consistent with how the CIS is intended to operate bearing in mind HMRC's view, as explained by Mr Claydon, that a contractor making payments to UK sub-contractors in respect of construction business carried on in the UK would be subject to the scheme notwithstanding the fact that it was not resident in the UK. The way the letter of 16 August 2001 was phrased leads us to conclude that this was a discussion that Mr Boothman wished to avoid having.

76. Mr Boothman conceded that ICM UK's role could have been better described in this letter and that it would give the impression that ICM UK would be itself engaging construction workers directly because of its failure to mention the role of ICM. Mr Boothman defended the structure on the basis that the implication of what had been said to ICM to HMRC in the telephone conversations referred to above was that it was not possible to register ICM itself. He did not accept that the letter should have disclosed the essence of those conversations.

77. The fact of these non disclosures and the other misleading statements in Mr Boothman's letter raises questions as to whether the purpose of the structure was to ensure that payments could be made to the construction workers without the need to deduct sums for income tax and national insurance contributions.

78. Mr Boothman's evidence was that ICM was willing and able to comply with the CIS if necessary but was prevented from doing so because of the difficulties in registering a non-resident company.

79. Mr Boothman confirmed that if a construction worker wished to have the monies due to him paid net it would be open for him to so elect. In that eventuality,

ICM UK, as the responsible entity subject to the CIS, would make the necessary deductions and pass them on to HMRC.

80. Initially in his oral evidence Mr Boothman asserted that this option had been available from the outset of the arrangements in 2001. Mr Nawbatt put it to Mr Boothman that this option only became available after HMRC started to make enquiries into ICM UK's activities in 2007. He referred Mr Boothman to a letter that Mr Ramsden wrote to HMRC on 6 May 2007 enclosing certain documentation requested by HMRC which referred to the fact that ICM UK "were now taking deductions from them". In the light of this and other documentation that he was taken to, Mr Boothman accepted that it was the case that deductions only started to be made in 2007 and that the statement in his witness statement that "ICM has retained and handed over substantial amounts of CIS deductions to HMRC regularly over its trading history" was "loose". We therefore find that the option to be paid net was only introduced some time in 2007 and Mr Boothman's earlier evidence suggesting the option had always been available was incorrect.

81. We therefore turn to the question as to whether the whole purpose of the structure was to enable the construction workers to be paid gross by ICM, the position that appeared to have been the case until 2001 when it became apparent to ICM that in order to receive the payments it passed on to the construction workers gross the receiving entity need to be registered under the CIS and hold a CIS6 Tax Certificate.

82. In that regard we turn to the contractual documentation that was in use during the relevant period.

83. Mr Boothman accepted that until 2007 there was no written contract between ICM and ICM UK which set out the basis on which ICM UK would pay over to ICM the monies that ICM UK had received from the contractor or employment agency.

84. As far as the relationship with the construction worker is concerned there is no documentation evidencing the relationship between that individual and ICM UK, notwithstanding the fact that ICM UK issued invoices to the construction or employment agency in respect of the labour provided by the construction worker. We have previously referred to the fact that in practice when the employment agency found work for a construction worker, the individual concerned was put in touch with ICM directly in order to set up the necessary arrangements. This is reinforced by the answer given to the question "Does Island find work for me?" contained in the "Most Often Asked Questions" document referred to below which states:

> "No we don't. We are a specialist contract management company and are expert in delivering prompt settlement. It is up to you to find suitable work but tell us whom you work for and we obtain payment".

85. We were provided with some specimen documentation that ICM typically provided to construction workers consisting of the following:

(1) Covering letter from ICM.

(2) Application Form.

(3) Form of Agreement for services (the "Services Agreement") in which the construction worker is referred to as "the Consultant" and ICM as "Island".

(4) Document headed "Most Often Asked Questions".

Mr Boothman confirmed that this documentation would have been in use in this form during the period up to May 2007.

86. We note the following provisions from the covering letter:

(1)The first paragraph refers to the "Contract Management and Settlement Services which Island can provide".

(2) The second paragraph includes the following statement;

> "We would remind you that we act specifically in the management of contracts which you entered into and that the responsibility for accounting for and payment of any Income Tax and National insurance liabilities remains with you at all times".

(3)In numbered sub-paragraph 2(c) of the third paragraph, the following statement is made;

> "Our rates payable for managing contracts on your behalf, which will be deducted from the amounts that we collect on your behalf are up to 5% of your gross pay".

87. With regard to the Services Agreement, the preamble to the operative provisions states:

> "This agreement sets out the terms and conditions under which the Consultant will provide the services of himself to Island and the services which Island will provide to the Consultant."

88. Although the preamble refers to services to be provided by the construction worker in fact there is no operative provision under which the construction worker agrees to do so or which specifies the services to be provided.

89. Clause 5 of the Services Agreement requires the consultant to "observe the terms of any agreements entered into by Island with any agency or clients entered into on the Consultant's behalf and with the Consultant's permission"

90. Clause 6 of the Services Agreement requires that "The Consultant will ensure that his time sheet …. is signed by a duly authorised representative of Island's client immediately upon completion of his contract….." in addition the Consultant will provide Island with an invoice that correctly reflects the gross amount due from Island's client".

91. It is clear from the Services Agreement that ICM is not liable to pay the construction worker if the employment agency or construction firm fails to pay the

construction worker the amount agreed to be paid for his services. In that regard Clause 10 of the Services Agreement provides:

> "In the event that the amount collected for work undertaken by the Consultant is less than the amount set out on the Consultant's invoice then Island will remit such lesser amount and it is agreed that both the Consultant and Island will use their best endeavours to resolve all and any such differences, but that not [sic] further payment will be remitted to the Consultant until further payments are received."

92. Mr Boothman stated in his witness statement that ICM acted as a principal in a chain of construction contracts and that if ICM were not paid by ICM UK it would still be responsible for payment to the construction workers who had done the work. He repeated that statement in his oral evidence but it is inconsistent with the express terms of the Services Agreement, so if it was the case that ICM did pay the individual sub-contractor without itself having received payment, and we had no direct evidence of that having occurred, it would have done so as a matter of commercial judgment rather than because it was legally obliged to do so. When taken to the clause by Mr Nawbatt, Mr Boothman accepted that it was clear that ICM's obligation was limited to remitting sums it actually received.

93. The Contract for Services also recognises the reality that ICM has had no role in recruiting the construction worker to perform the work and recognises that the opportunity to provide the labour concerned will have been arranged directly between the construction worker and the construction firm or employment agency concerned. Thus Clause 13 of the Services Agreement provides:

> "It is expressly acknowledged and agreed that Island is not a party to any contract conditions entered into between the Consultant and his client and that for the purpose of this clause, a client of the Consultant will include any labour agency and that the Consultant hereby indemnifies Island from any loss including but not limited to consequential loss as a result of any action of the Consultant."

94. Mr Nawbatt relied on the "Most Often Asked Questions" document to demonstrate that the structure was marketed as a means for construction workers to be paid gross and without any need for them to be registered under the CIS.

95. The first question to which answers are given in this document is headed "Why can Island Pay Sub-contractors on a Gross Basis?" The answers given are as follows:

> "1. Island is registered in the Isle of Man and is not subject to UK Tax law.
>
> 2. Island is not subject to the Construction Industry Scheme (CIS) because the Inland Revenue has no jurisdiction in the Isle of Man.
>
> 3. There is a management contract between the subcontractor and Island that specifically excludes any Employer/Employee relationships, therefore Income Tax and National Insurance cannot apply.
>
> 4. There is a contract between Island's UK CIS registered subsidiary and the agency or main contractor. They are separate limited companies and National Insurance does not contractually apply between them.

5. The agency or main contractor pays Island UK on a gross basis because of its CIS status. Being outside of UK tax law, Island has no right to deduct Income Tax or National Insurance because these deductions for work done in the UK do not directly apply in the Isle of Man."

96. Under the question "Am I still responsible for Income Tax and National Insurance" the answers fairly remind the individual sub-contractor that as a UK resident, he is responsible for Income Tax on earnings remitted to him by ICM and thus he may be liable for National Insurance Contributions as well. The answer goes on to say:

"The benefit of working via us is that you are paid gross, our charges are tax deductible and, you are in control of your earnings because you will not be stopped any tax or NI deductions at source."

97. In addition to the question "Do I need a CIS Card?" the answer is

"No, your arrangements are outside the UK tax system. Indeed, this may be the only way you can be paid if you do not get, or do not want to hold a CIS card."

98. The answers to the question "What else does Island do for me" indicate a number of other features of the arrangements that may be attractive to the construction worker as follows:

"1. As well as providing a tax-efficient way of being paid, we obtain payment for you more quickly than you would get yourself. We supply many hundreds of men like yourself and have relationships with agencies such that we are collecting not just your money, but for other sub-contractors as well. Agencies will respond to us when they may not respond to you has an individual.

2. We can prepare a record of your earnings each tax year, which we will supply to you or your accountant, making it easier and probably cheaper to prepare your accounts. In addition, because he does not have to chase up your agency for tax vouchers, your accounts should be prepared more quickly, which will make them cheaper as well.

3. Construction is getting more and more competitive and there is no doubt that agencies that use Island are more efficient and are often cheaper than those that do not. We can introduce you to those agencies who will receive more work than the others as time goes on."

99. Mr Boothman initially denied that the structure was marketed on the basis that it enabled a construction worker who might otherwise be expected to hold a CIS registration card and to be paid for work undertaken in the UK net of deductions for Income Tax and National Insurance Contributions to be paid gross. He maintained it was of no concern to him whether deductions had to be made or not and ICM would do so if necessary and the documentation made it clear that that the construction worker was responsible for his own taxes. Nevertheless, when pressed by Mr Nawbatt in cross-examination as to whether the features of the structure highlighted in the answer to the question "Do I need a CIS Card" and to the first question explaining

how ICM can pay construction workers gross were an integral part of the structure he answered with some reluctance "You could call it integral I suppose".

100. We accept that the structure involving payments through ICM UK and ICM to the construction worker were introduced into existing arrangements under which ICM had an existing contract payments business. The paragraph from the "Most Often Asked Questions" document that we quoted in paragraph 98 above also illustrates the wider benefits to be obtained by the use of a paying agent. We also accept that Boothmans and ICM had existing expertise in this area when the structure involving ICM UK was established in 2001.

101. Nevertheless, the decision to establish ICM UK was taken, as Mr Boothman accepted in his oral evidence, so as to satisfy the requirements of employment agencies such as FastTrack who required a sub-contractor to whom they would make payments gross in respect of the construction workers they provided work for. That in itself does not dictate that ICM should have brought the payment structure itself onshore after ICM UK was established; we accept Mr Boothman's explanation that it did not make commercial sense as there was a pre-existing structure in the Isle of Man that was working efficiently. Nevertheless, it is clear that Mr Boothman wanted to preserve as a feature of the structure the ability to pay construction workers gross and we find as Mr Boothman conceded in his evidence, that this was an integral feature of the structure and was marketed as such, as shown by the prominence given to those features in the "Most Often Asked Questions" document.

102. ICM UK was therefore established to facilitate this, it being decided by Mr Boothman not to register ICM, either on his evidence, because it was impossible to in practice to do so or, as we have found, that it became apparent that the result of being registered would be that although it could have been issued with a CIS 6 Tax Certificate enabling it to be paid gross if it met the statutory tests it could not according to the terms of the CIS generally pay construction workers gross. As a consequence, ICM UK was established. The basis on which ICM took the view that it could lawfully make gross payments was explained in the passage in the "Most Often Asked Questions" document referred to in paragraph 95 above, and ICM's services were marketed on that basis. It is implicit from the analysis set out in the that paragraph that Mr Boothman had concluded that had payments been made directly by ICM UK then as that entity was registered under the CIS it would have been obliged to make deductions in respect of payments made to construction workers unless under the scheme the construction worker concerned had a certificate enabling him to be paid gross.

103. This structure appears to have been operated without any interest from HMRC until early in 2007. In the meantime, by the end of 2006 Mrs Linda Halliwell, Mr Halliwell's wife had become company secretary of ICM UK in place of Mr Halliwell and was issued with a CIS registration card to enable her to present ICM's UK credentials to contractors and employment agencies, as described in paragraph 67 above. Mr Halliwell, who became seriously ill and subsequently died, resigned as a director on 31 December 2006, but remained involved with ICM UK for sometime

thereafter, for example attending the meeting with HMRC on 3 April 2007 referred to in paragraph 107 below.

108. Mr Halliwell was replaced as a director of ICM UK by another company controlled by Mr Boothman, Durya Limited, which is a company incorporated in the Dominican Republic and which acts as a nominee for the Oakfield Group of companies in the Isle of Man. Durya Limited was replaced by another similar company, Mandale Limited, on 21 June 2007. On 21 October 2011, a Mr Charles Yu, a family friend of Mr Boothman, was appointed as an additional director of ICM UK. Mr Boothman explained that this was a result of the changes in UK company law which required every UK incorporated company to have at least one director who was an individual.

109. It is clear that none of these changes made any difference to the management of ICM UK; it remained under the ultimate ownership of Mr Boothman and he had overall responsibility for its management.

110. It would appear that HMRC decided to make enquiries into the affairs of ICM UK. We have no direct evidence of precisely when, but Mr Boothman said it was possible that enquiries commenced early in 2007 and we accept that to be the case.

111. A meeting was arranged at an accommodation address in Keighley, Yorkshire which ICM UK had use of from time to time and which was its registered office. The meeting took place on 3 April 2007. We have a note of that meeting, prepared by HMRC and which was signed by Mr R Cullingworth and Mr D Fielding, HMRC Construction Industry officers who attended the meeting. The note records that Mr Ramsden and Mr Halliwell attended the meeting from the outset and that Mr Boothman arrived later, the note recording that he had been trying to download from the internet at a local internet café various documents that HMRC had requested in advance of the meeting. Prior to Mr Boothman's arrival, the note records Mr Halliwell describing their respective roles, Mr Ramsden having been noted as dealing with operations on a day to day basis, and Mr Halliwell the limited role that we described in paragraph 67 above. Mr Boothman declined to comment on whether the descriptions given were accurate, his answer being that those were HMRC's minutes.

112. The note records that when Mr Boothman arrived he reported that he had been unsuccessful in obtaining the documents requested, and then proceeded to describe his working life and his current role in relation to ICM, all of which is consistent with the earlier findings that we have made, and which Mr Boothman confirmed in his oral evidence was correct.

113. In terms of the relationship between ICM and ICM UK and the nature of he operating arrangements the note records as follows:

> "Boothman stated that ICM based in the Isle of Man was an associated company of ICM UK but was unsure if ICM would be considered a holding company or if ICM UK could be considered to be a subsidiary of ICM. Boothman stated that he would look into this. There are at present 30 employees of ICM.

Cullingworth asked Boothman what ICM UK did. Boothman advised that ICM UK was a contracting agent for the supply of labour within the construction industry. Boothman advised that a number of years ago he had been contracted by a recruitment agency who were looking at ways to pay people working within the construction industry. Boothman advised that ICM and ICM UK had been created as a result of this and had grown in size from the initial commencement date.

Boothman advised that ICM and ICM UK customers are agencies and main contractors who engage workers within the construction industry. ICM acts as a financial buffer/payroll bureau for payments between the individual worker and the agency/contractor. Each worker has to be a permanent UK resident holding a UK bank account and a National Insurance Number. Each worker signs a pre-written Contract for Services agreement between them and ICM. Boothman provided a copy of the Contract for Services and a leaflet produced by ICM that provided details of the services offered to individual workers and an application form for completion and return. The individual also has to complete a questionnaire for ICM. This item was one of the documents that Boothman had tried to obtain from the internet and it was agreed that a copy would be provided at a later date. Boothman stated that individual workers signed with ICM would inform new agencies or contractors previously unaware of ICM of the payment agreement held between them and ICM. The rates for each job were negotiated between the individual worker and the agency or the contractor they were working for. There were also contracts completed between ICM UK and the agency or contractor and between ICM and ICM UK. These items were also unavailable for review and it was agreed that copies would be sent at a later date.

Cullingworth asked Boothman how the payment system worked from agency or contractor to ICM UK to the individual worker. Boothman stated that ICM would receive an email from the agency or contractor usually on a weekly basis advising them of the amounts to be paid to each individual worker with the working week running from Monday to Sunday. This information having been taken from the time sheet handed into the agency or contractor by the worker on Monday. The individual would also advise ICM how much they were expecting to receive. By Tuesday or Wednesday there would be an agreed amount of payment due for each individual between ICM and the agency or contractor. An invoice for the agreed amounts due would be sent to the agency or contractor by ICM UK for payments to be made to ICM UK by Friday through CHAPS. Payment would then immediately transfer from ICM UK to ICM and ICM would pay the individual workers by BACS after deducting a fee of approximately 5% gross pay.

Fielding asked Boothman what operations/work was completed by ICM UK that fell within the scope of the Construction Industry Scheme. Boothman advised that the CIS6 Certificate had been obtained in order for payment amounts received by ICM UK from agencies and contractors to be registered with HMRC. Fielding asked what work did ICM UK complete that the company considered fell within the Construction Industry Scheme. Boothman advised that he was not sure and he would look into this. Cullingworth asked what had been put on the CIS6 Certificate application forms and renewals for the business activity to fall within the scope of the Construction Industry Scheme. Halliwell stated that he believed it was contract agent but was unable to locate a copy from the company records present. It was agreed that copies of the application would be sent at a later date.”

114. Mr Boothman's answers on the accuracy of the passages quoted in Paragraph 113 above were evasive and contradictory to some of his earlier answers on the structure and the relevant documentation we have already referred to.

115. In relation to the first sentence of the first paragraph quoted above, Mr Boothman was asked in cross-examination whether the statement that ICM UK's customers were agencies and main contractors who engage workers within the construction industry was correct. He replied that this statement was the note author's interpretation and although it was possible he made that statement it was more likely that this is what the author construed from what was said at the meeting and put it on the record later, notwithstanding the fact that the letter from FastTrack referred to in paragraph 56 above and his own previous answers clearly led to that conclusion.

116. After some initial evasion, Mr Boothman also confirmed what was recorded in the following two sentences was correct.

117. With regard to the next paragraph quoted, Mr Boothman did not accept the description attributed to him of ICM acting as a financial buffer/payroll bureau for payments between the individual worker and the agency or contractor. He replied that the author of the note was putting words into his mouth and recorded statements that he wanted to interpret from these conversations.

118. We reject Mr Boothman's evidence on this point and accept the note as an accurate record of the conversations that took place. The note shows a close attention to detail and Mr Boothman has confirmed the accuracy of a significant number of the statements contained in it. Whilst we do not know precisely when this note was produced, it would have occurred sometime between the date of the meeting and 25 April 2007, when a copy of it was sent to Mr Ramsden by Mr Cullingworth under cover of a letter of that date, a relatively short time after the meeting. Neither Mr Ramsden nor anyone else from ICM or ICM UK challenged the accuracy of the note after it was received. At the point of the meeting on 3 April 2007, HMRC were in the early stages of their enquiries and seeking information from what appears to be a very low knowledge base as to how the arrangements operated in practice. It seems unlikely that the author of the note would have constructed himself the theory that ICM acted as a "financial buffer/payroll bureau" and recorded that in preference to any other arrangement such as a construction contractor/sub contractor arrangement. We observe that the note of the meeting records that the documents referred to in paragraph 85 above were given to HMRC at that meeting and the description of ICM's role in that document is consistent with the description recorded in the note of the meeting.

119. The note records that it was agreed that further documents would be provided after the meeting. Mr Ramsden was reminded of this in Mr Cullingworth's letter of 25 April 2007 which asked again for the following documents to be forwarded:

- "The questionnaire completed by all individual workers.
- The contract between Island Contract Management (UK) Ltd and the recruitment agency or contractor.

- Any contract held between Island Contract Management (UK) Ltd and Island Contract Management Ltd.

- Invoices for the period September 2006 to November 2006 for Ambition 24, IC AMAC, Construction & Property, Premier Engineering and Quin Glass.

- The initial CIS6 Certificate application and any renewals for Island Contract Management (UK) Ltd"

120. The letter also referred to the statement recorded in the note of the meeting of 3 April 2007 to the effect that Mr Boothman was unsure as to whether there was a parent or subsidiary relationship between ICM and ICM UK, as quoted in paragraph 108 above, and would revert on that point. The letter also asked for an explanation as to why it was felt that the nature of the work done by ICM UK fell within the scope of the CIS.

121. We do not know why Mr Boothman did not disclose the fact, which he must have known without having to check, that ICM UK was a wholly owned subsidiary of ICM. His response when questioned about this by Mr Nawbatt was that this was a matter of public record. It would appear that Mr Boothman's attitude to HMRC, was not to co-operate in providing information that HMRC requested, as illustrated by his failure to disclose the connection and the fact that when Mr Ramsden replied to Mr Cullingworth's letter on 6 May 2007 none of the information requested was provided save for the questionnaire and no answer was given to the points about ownership and the scope of ICM UK's activities, His attitude as demonstrated by his answers in cross-examination was that HMRC was not entitled to any information regarding ICM, but this attitude also extended to information regarding ICM UK. He also confirmed that he might have seen the correspondence between Mr Cullingworth and Mr Ramsden and stated that he considered HMRC's questions to be banal.

122. As we have already found, Mr Ramsden's letter of 6 May 2007 demonstrates that the decision to enable construction workers to elect for net payment was taken at this time, following the meeting with HMRC.

123. Mr Cullingworth repeated the request for the outstanding information requested in his letter of 6 May 2007 in a further letter to Mr Ramsden dated 1 June 2007.

124. Eventually after further chasing Mr Ramsden, writing on behalf of ICM UK, provided some of the material requested under cover of a letter of 24 August 2007. In particular the letter enclosed a copy of a pro forma contract, described as a contract of services between ICM UK and its client that is the construction firm or employment agency sourcing the labour. This contract recites that ICM UK is in business as a commercial sub-contractor undertaking construction operations and will provide such services to the client as and when agreed under the terms of the contract. The contract makes provision for payment to ICM UK against the production of relevant invoices.

125. In relation to the contractual arrangements between ICM UK and ICM Mr Ramsden stated that there was no written contract. The letter enclosed none of the other information requested and gave an incomplete description of the relationship

between ICM and ICM UK, merely stating that ICM UK was a member of a VAT group quoting the relevant registration number but omitting to state that ICM UK was a member of that group.

126. Mr Cullingworth acknowledged receipt of Mr Ramsden's letter on 13 September 2007 in a letter which stated that HMRC were in the process of reviewing the information obtained and would be in contact again when the process has been finalised or if further information is required.

127. In the meantime, ICM made some changes to its standard documentation that it used and created a written contract to govern the relationship between ICM and ICM UK. Mr Boothman's evidence was that new standard documentation for the relationship between ICM and the construction workers was introduced towards the end of 2007. We were shown copies of the documentation, consisting of the following:

(1) Covering letters.

(2) Registration Form

(3) An explanatory sheet headed "What have I been given to sign" setting out a number of questions and answers relating to the arrangements.

(4) A sub contractor self-employment check list.

(5) Self Employed Contract for Services.

128. We note that the Contract for Services bearing the following legend on each page: "© 2007 Accountax Consulting Limited" This clearly demonstrates that the Contract was prepared by Accountax who, as Mr Boothman accepted, were appointed to advise ICM and ICM UK sometime during 2007 following the opening of HMRC's enquiries. We therefore find that this documentation was not in use before HMRC commenced their enquiries.

129. The documentation was markedly different from the previous documentation referred to in paragraphs 85 to 98 above in terms of how it described the role of ICM. As we have found in relation to the earlier documentation the essence of it is ICM performing a management role in relation to contracts for work entered into by the construction workers for whom they provided their services. There was no specific reference to ICM itself being a contractor contracting for services to be provided to it by the construction worker as a sub-contractor.

130. We note the following provisions from the revised covering letter:

(1) The first paragraph which states:

> "Further to your enquiry regarding providing your services to us as a Self Employed Sub-Contractor we are pleased to inform you that ICM sub-contracts to a large number of genuinely self-employed individuals such as yourself and you will already be aware of the benefits which self-employment can bring."

(2) The third paragraph which states:

> "Where you choose to be paid with deductions under the Construction industry Scheme (CIS), we will file and pay over these deductions on a monthly basis to HMRC. This may result in you being able to claim a tax rebate at the end of the tax year."

(3) The provisions regarding payment which continue the practice recorded in the previous documentation of deducting 5% of the proceeds received, the net payment to be made two days after receipt "of funds from our own client"

131. In the explanatory sheet in answer to the question "What have I been given to sign?" It is stated:

> "The document you have been given with this leaflet, is a contract which contains the rights and obligations which you have whenever you provide your services to us".

132. The registration form contains a tick box for the construction worker to indicate if he wishes ICM to deduct and pay tax under CIS.

133. As far as the Contract for Services is concerned (under which ICM is the contractor and the construction worker the sub-contractor) the recitals provide as follows:

> "A. The Contractor tenders for business and is appointed by its clients to complete a project for specified works at a certain site or location ("the Assignment").
>
> B. The Sub-contractor has skills and abilities which may from time to time be available to the Contractor ("the Services").
>
> C. The Contractor and the Sub-contractor agree that if the Sub-contractor offers to make his services available to the Contractor and is engaged by the Contractor, the terms and conditions in this Contract for Services shall apply.
>
> D. it is the intention of the parties that when the Sub-contractor provides the Services to the Contractor for an Assignment, such provision of Services shall constitute a separate and distinctive engagement under this Contract for Services. Unless varied or amended or otherwise agreed between the parties under clause 24, these terms and conditions shall apply for each engagement."

134. The operative provisions of the Contract for Services indicate the following in Clause 7:

> "7. Formal written tenders will not be required. The parties agree that the contract price/hourly rate for the Services and the method of payment will be negotiated and agreed between them from time to time and this shall include verbal agreements of the rate of payment for the Services."

135. Whilst this documentation purports to record a contractor/sub-contractor relationship under which the construction worker will provide his services to ICM as sub-contractor to work on a construction contract to which ICM is a party there is no

evidence that the arrangements operated in practice any differently to the way we have found they operated prior to this documentation being introduced.

136. In particular, there is no evidence that ICM and the construction worker negotiated a contract price and hourly rate as envisaged by Clause 7 quoted in paragraph 134 above. It would appear the previous practice of the construction worker being referred to ICM when a construction firm or employment agency had work for him continued so that his payment arrangements would be set up on ICM's systems and the appropriate invoice issued by ICM on ICM UK's behalf to the construction firm or employment agency concerned, with payment passing down on a gross basis to ICM UK then on to ICM without deduction and on to the construction worker when received subject to a 5% deduction for ICM's fees.

137. The only new feature was the ability to opt for net payment and if this happened, it was the case that ICM rather than ICM UK would arrange for the appropriate deductions to be made and paid back to ICM UK for ICM UK to pass them on to HMRC. This reinforces our earlier finding that the option to receive net payments was only implemented after HMRC's enquiries began.

138. Although the Contract for Services implied that ICM acted as a principal, it is noted that, as set out in the passage from the covering letter that we quoted in paragraph 130 above, as with the previous arrangements the construction worker would only be paid when sums were received by ICM in respect of the works undertaken.

139. In addition following the opening of HMRC's enquiries ICM decided to document its arrangements with ICM UK upon, we were told by Mr Boothman, advice from Accountax. We were shown a copy of a contract dated 19 October 2007 made between ICM and ICM UK. It was signed by Mr Boothman on behalf of both parties.

140. We note that the recitals to this contract in which ICM is described as the Company and ICM UK as the Client provide as follows:

> "The Company is in business as a commercial sub-contractor undertaking construction operations (the Services) and has skills and abilities and can undertake services that may be of use to the Client from time to time.
>
> The Client and the Company agree that if and when the Company undertakes services to the Client it will do so in accordance with the Operative Provisions of this Contract for Services."

141. There are provisions in Clauses 11 and 13 of the contract for payments to be made by ICM UK to ICM as follows:

> "11. The Client will pay the Company the Contract Price (plus VAT if appropriate) in accordance with the rates set out in Schedule A solely against the presentation of an invoice.

> 13. The Company will negotiate the Contract Price for the Services and is obliged to honour any agreed Contract Price, unless both parties re-negotiate the Contract Price."

Schedule A as referred to in Clause 11 above merely states that the agreed contract price is variable.

142. As can be seen, this contract mirrors the obligations contained in the standard Form of Contract for services provided by ICM to the construction workers as referred to in paragraphs 133 and 134 above. As was the case with that contract, we have seen no evidence that the nature of the relationship between ICM and ICM UK changed following the introduction of this contract or that the arrangements between them operated any differently.

143. In particular, there is no evidence that ICM negotiated any contract price with ICM UK. Nor is there any evidence to support the statement in the recitals that ICM has "skills and abilities" as a commercial sub-contractor undertaking construction operations. The nature of the relationship between the two companies with Mr Boothman responsible for the management of both companies precluded any realistic negotiation. In practice ICM would continue to receive payments from ICM UK in respect of the services of construction workers who had been introduced to ICM UK for the purpose of making payments to such construction workers in respect of the services performed by the construction worker for the employment agency or construction firm concerned.

144. On 20 February 2008, Mr Cullingworth wrote to Mr Ramsden at ICM UK with HMRC's conclusions following completion of its enquiries. The relevant passages of the letter are as follows:

> "HM Revenue and Customs have now reviewed the information supplied and are of the opinion that payments have been made to the subcontractor Island Contract Management Ltd that fall within the scope of the Construction Industry Scheme. The Scheme has not been operated and the necessary deductions have not been made. The relevant legislation is set out in the Finance Act 2004, sections 57-77 and Schedules 11 and 12.
>
> In view of this HM Revenue and Customs intend to raise a determination under Regulation 13(2) of Statutory Instrument 2005, No. 2045 as detailed below.
>
> 2002/2003 - £ 2,658,009.00 @ 18% = £ 478,441.62 (deduction due)
>
> 2003/2004 - £ 5,016,379.00 @ 18% = £ 902,948.22 (deduction due)
>
> 2004/2005 - £ 7,921,073.00 @ 18% = £1,425,793.10 (deduction due)
>
> 2005/2006 - £10,652,834.00 @ 18% = £1,917,510.10 (deduction due)
>
> 2006/2007 - £20,644,426.00 @ 18% = £3,715,996.60 (deduction due)
>
> The CIS deductions due have been calculated by taking the annual CIS24 voucher amounts submitted to HM Revenue and Customs for payments made to Island Contract Management (UK) Ltd and applying the 18% CIS deduction rate to the total for each year. This is based on the understanding that the amounts received by Island Contract

> Management (UK) Ltd were the same as the payments you made to Island Contract Management Ltd.
>
> Any comments or response you might with to make at this stage should be addressed to me at the address above."

145. It should be noted that the proposed determinations relate to periods falling entirely prior to 6 April 2007 and therefore on the basis of our findings, no deductions will have been made from the monies passed on to ICM in respect of those periods. In so far as deductions should have been made, on the basis of our findings on who the arrangements operated, the only persons who would have the information necessary to calculate the amount in respect of each individuals sub-contractor would be Boothmans' staff working for ICM in the Isle of Man.

146. On 3 March 2008 Mr Matt Boddington of Accountax responded on ICM UK's behalf to Mr Cullingworth's letter asking HMRC to refrain from making any of the determinations proposed, setting out briefly the arguments against liability which are considered in more detail below. Specifically Mr Boddington argued that ICM UK had acted reasonably and that any failure to deduct would have been an error made in good faith and that since ICM was not chargeable to corporation tax in respect of the payments made to it any failure would fall within Regulation 9(3) or 9(4) of the Regulations and a direction under Regulation 9(5) would be appropriate.

147. However, this letter had crossed in the post with the actual determinations themselves which HMRC had proceeded to issue on 28 February 2008 without waiting for ICM UK's representations on Mr Cullingworth's letter of 20 February 2008.

148. Mr Boddington wrote to Mr Cullingworth on 11 March 2008 appealing against the determinations on two grounds. First, that the amounts determined had not been made to best judgment and secondly that there had been a procedural impropriety in that ICM UK had not been given sufficient opportunity to respond to the letter of 20 February 2008 before the determinations were made and in particular, to make an application under Regulation 9 of the Regulations. Mr Boddington pointed out that the procedure followed was not in accordance with that set out in HMRC's internal procedures manual which made it clear that determinations should not been made until HMRC had given consideration to a claim for a direction under Regulation 9 where liability is admitted by a contractor.

149. On 26 March 2008 Sue Cookson of HMRC responded to Mr Boddington's letter of 11 March and accepted in her response that ICM UK should have been given more time to respond to the letter of 20 February 2008 and that HMRC would now consider the claim under Regulation 9(4) (a) (i) on the basis that a reasonable length of time was not given to respond to the letter of 20 February 2008. The letter also referred to the fact that technical advice was being sought on the question as to whether in the circumstances the determinations were valid.

150. On 9 May 2008 Mr Cullingworth wrote to Mr Boddington stating that before HMRC would consider the matter further they required further information so they

could obtain a clear picture of the contractual or otherwise role of ICM UK. In that regard the following were requested;

> "1. Confirmation that the document provided on 6 May 2007 is the only contractual document governing the relationship between ICM (UK) Ltd and its client contractors.
>
> 2. If it is not, what other documents or agreements exist.
>
> 3. As the company have stated that there was no contractual relationship, for the purposes of the Construction Industry Scheme, then what agreements, verbal or otherwise, govern the payments made from the UK based company to ICM Ltd in the IoM.
>
> 4. Why is ICM Ltd not registered with the Centre For Non Residents as a sub-contractor.
>
> 5. Do the workers maintain some form of ongoing contractual relationship with ICM (UK) Ltd's client contractors i.e. Agencies and clients contractors.
>
> 6. Do ICM (UK) Ltd continue to pay ICM Ltd. This information is needed as a matter of urgency as this will impact on deliberations concerning the company's registration for Gross Payment Status."

151. With reference to item 3 quoted in paragraph 150 above, HMRC were unaware that the contract of 19 October 2007 between ICM and ICM UK had now been entered into and it was not provided to HMRC until it was disclosed in these proceedings.

152. This was followed by further correspondence on the procedural impropriety issue, Mr Cullingworth confirming in a letter of 21 May 2008 to Mr Boddington that HMRC would consider the claims made under Regulation 9(4) (a) (i) notwithstanding that the determinations had been made. The letter stated as follows:

> "The Regulation 13 determinations were issued in accordance with the provisions at Regulation 13(1) (b). They were issued in amounts that were obtained from the Company's own records. Those determinations carry legal rights of appeal and the Company have, through you, exercised those rights. HMRC have accepted those appeals and the Company will now have recourse to challenge the basis and nature of those determinations and the amounts, on appeal. By conceding the Regulation 9 point we have effectively placed the contractor in the position they would have been prior to the issue of the determinations."

153. On 13 August 2008 Mr Boddington wrote to Mr Cullingwoth in response to a letter from Mr Cullingworth dated 1 July 2008 which we have not seen but assume was chasing the information requested on 9 May 2008. Mr Boddington's answers were as follows.

> "1. I am currently awaiting our client's confirmation on this point.
>
> 2. I am currently awaiting our client's confirmation on this point.
>
> 3. The company has never asserted that there was no contractual relationship between Island Contract Management (UK) Ltd and Island Contract

Management Ltd. On the contrary please refer to your own notes of the meeting held on 3 April 2007, page 2 paragraph 2. There is a contractual agreement between the companies.

4. This question pertains to a different company from that under enquiry. As stated in my letter of 13 May 2008 I have sought instructions and will advise separately as appropriate.

5. No. The individual workers are engaged under an express contract for services by ICM Ltd.

6. Yes."

154. As can be seen the answers were evasive and continue the theme of non co-operation with HMRC's enquiries. In particular, with regard to Item 3 by this time there was a written contract so it could have been provided and with regard to item 4, bearing in mind the control that ICM exercised over ICM UK and the commonality of the management arrangements, it seems surprising that Mr Boddington had not been given instructions to provide information for both companies, information that has subsequently been provided in these proceedings relating to the consideration that ICM Limited had given to registering itself under the CIS. When this was put to Mr Boothman in cross examination he stated that to provide the information would have over simplified the issue because the theory and practice of registering overseas companies were quite different.

155. We find that the correct inference to be drawn is that there was a deliberate decision not to disclose the previous discussions with HMRC, in the same way as that same decision was taken by Mr Boothman when writing his letter of 16 August 2001 to HMRC as there was a desire not to disclose the fact that ICM was seeking to promote the structure as a means of ensuring that the construction worker could be paid gross.

156. Andrew Lawrence of HMRC wrote to Mr Boddington seeking documentary evidence of the agreement referred to in Item 3 of Mr Boddington's letter and the other outstanding information required in Mr Cullingworth's letter of 9 May 2008.

157. No reply was received to this letter and on 21 January 2009, some nine months after the initial request for further information to enable HMRC to continue to consider ICM UK's claim under Regulation 9(4), Mr Lawrence wrote to Mr Boddington stating that in the absence of any further information HMRC had considered the claim on the basis of the material already provided and had decided to reject the claim. Mr Boothman agreed in cross examination that by this time it would appear that ICM UK had had a full period to provide information and make representations in respect of the determinations.

158. On the same day Mr Lawrence wrote directly to ICM UK requesting the same information they had been requesting from Mr Boddington. This letter was never replied to.

159. On 16 February 2009 Mr Fielding of HMRC wrote to ICM UK notifying them that they were withdrawing ICM UK's ability to make payments gross under the CIS because of failure to make deductions on payment made to sub-contractors in the year 2007/08 and 2008/09.

160. Mr Boddington wrote to Mr Fielding on 4 March 2009 appealing on behalf of ICM UK against that decision on the grounds that ICM UK had a reasonable excuse for failure to make the deductions. This letter also sought details of the sub-contractors to whom it was alleged payments had been made without deduction. Mr Fielding responded to that point in a letter dated 18 March 2009 by stating that the failure to make deductions related to transactions between ICM UK and ICM.

161. On 17 April 2009 Mr Lawrence wrote directly to ICM in the Isle of Man seeking a full explanation of the working relationship between ICM and ICM UK and the relationship between ICM and the construction workers. By this time HMRC had evidence from construction workers in the context of their own tax affairs of having received monies from ICM in respect of construction work those individuals carried out in the UK. The letter also stated that if ICM was making payment to workers carrying out construction operations in the UK it needed to register under the CIS. This letter was ignored by ICM as was a chasing letter sent on 8 June 2009 which also requested details of all the amounts invoiced by ICM to construction workers in the tax years 2002/3 to date.

162. On the same date Mr Lawrence also wrote to Mr Boddington, seeking examples of actual contracts for work carried out by ICM UK in 2006/07 for its clients and stating that if no further documents are produced then HMRC would have no choice but to make a judgment on the information held. The letter also sought information as to amounts paid to ICM since 6 April 2007. No reply to this letter was received and a chasing letter was sent on 30 June 2009.

163. In the absence of any responses, Mrs H Charnock of HMRC wrote direct to ICM on 12 August 2009 explaining the current HMRC position. Mrs Charnock recapped the information and documents previously provided and explained that HMRC decided that ICM UK had made payments in respect of which deductions should have been made, details of which were extracted from HMRC's records and which led to the formal determinations being issued on 28 February 2008. Mrs Charnock also referred to the fact that the appeals submitted against these determinations had been stood over pending further enquiries.

164. Mrs Charnock summarised the current position as follows:

> "On 17 July 2009 a review was undertaken on the progress of these enquiries. Based on the information held on the CISR system from 6 April 2007 we believe that the C1S300 returns submitted by Island Contract Management (UK) Ltd since that date are incorrect. We therefore intend to raise further formal determinations under regulation 13 of the Income Tax (Construction Industry) Regulations 2005 for the outstanding C1S deductions. We have based our assessments on the total payments received by ICM UK in each month. The amounts already returned and paid to HMRC have been taken into account. The balance has been subjected to 5%

> deduction and as we do not have details of sub-contractors receiving the remaining payments we have calculated the C1S deductions using the 30% rate. We presume that you will wish to make a claim for relief under regulation 9(4) and if so please provide names of workers and amounts paid in each month. Could you also please provide samples of timesheets/documentation from sub-contractors to whom work is assigned under clause 9 of the ‘Contract for Services’ between Island Contract Management (UK) Ltd and the ‘Client’.”

165. The letter finished asking for the requested information within 30 days otherwise assessments would be made using the information already held.

166. Mr Boddington replied to this letter on 11 September 2009 stating that if the assessments we made ICM UK would wish to apply for a direction under Regulation 9(5) if the Regulations on the basis that there was no charge to corporation tax on the recipients. No disclosure was made as to the construction workers as requested; Mr Boddington stated that the recipient of the payments was ICM.

167. Mrs Charnock refused the request for a direction under Regulation 9(5) in a letter dated 23 November 2009 on the basis that HMRC did not agree that ICM was the sub-contractor for the purposes of Regulation 9(4). The letter indicated that assessments will be made on the basis that the relevant sub-contractors are the construction workers even though they receive their payments through ICM.

168. The letter contained a detailed analysis of how HMRC had come to that conclusion, and stated that if information about the sub-contractors is provided by 31 January 2010 it would be used to check whether reductions should be made for sub-contractors holding gross payment status, and that appropriate consideration would be given to directions under Regulation 9(5).

169. The letter concluded with a statement that if full information was not supplied by 31 January 2010 HMRC will proceed to raise assessments as shown on a schedule attached to the letter. An updated schedule was sent under cover of a further letter dated 8 February 2010.

170. In the absence of any substantive reply to this letter HMRC proceeded to issue determinations under Regulation 13 for the tax years 2007/08, 2008/09 and 2009/10 which were sent under cover of a letter dated 8 March 2010.

171. In his evidence Mr Boothman agreed that HMRC had given ICM and ICM UK a full opportunity to engage with it and provide information, but qualified that to say it was largely directed to ICM in the Isle of Man, consequently there had been no engagement.

172. On 5 April 2010 Mr Boddington submitted appeals against the determinations, also seeking clarification as to the sub-contractor to whom the alleged deductions related as in respect of the earlier determinations the view appeared to have been that ICM was the sub-contractor.

173. At Mr Boddington's request a review of the determinations was completed by HMRC as a result of which the determinations were confirmed, as communicated to Mr Ramsden in a letter from Mr P Blair of HMRC on 4 August 2010.

174. ICM UK submitted notices of appeal to the Tribunal in respect of all of the decisions which are the subject of these proceedings on 13 October 2010.

Summary of findings of fact

175. We summarise here the principal findings of fact that we have made as follows:

(1) ICM was established in the Isle of Man in 1999 as a contract payments firm under the control and direction of Mr Boothman. ICM was operated by employees of Boothmans.

(2) ICM encountered difficulties in developing its business in the construction sector in the UK because it did not have gross payment status under the CIS. It decided not to pursue the route of registering itself under the CIS, an option which under the legislation and guidance in force would have been available to it. Instead it incorporated ICM UK as a wholly owned subsidiary which obtained a gross payment certificate and thereby achieved its objective of receiving payments gross. It took the view that ICM UK could lawfully pay the sums it received gross to ICM also on a gross basis.

(3) ICM deliberately did not in its application for gross payment status disclose the role of ICM as the entity that received payments from ICM UK and paid them on to the construction workers or the fact that ICM had previously been involved in this sector in the UK.

(4) ICM UK described its business in its annual report and accounts as the provision of contractual labour in the construction industry. ICM UK was under the control and direction of Mr Boothman and managed by Boothmans' staff in the Isle of Man.

(5) Neither ICM nor ICM UK would play any role in procuring work for any construction worker.

(6) Where a construction firm or agency sourced a construction worker who wished to be paid through ICM UK and ICM the construction worker would sign an agreement with ICM under which he would be paid the monies received by ICM in respect of the services provided by the construction worker to the construction firm concerned less a fee of 5% payable to ICM. ICM was only liable to pay the construction worker those sums which it actually received. The essence of this contract was that ICM performed a management role in relation to contracts for work entered into by the construction workers with the firms for whom they provided their services.

(7) ICM UK would invoice the construction firm for whom the construction worker provided his services. The amount was calculated by

reference to a time sheet and invoice provided by the construction worker to ICM in respect of the services provided.

(8) All the invoices issued by ICM UK were prepared by Boothmans' staff in the Isle of Man.

(9) ICM UK's invoices show a sum due from the contractor in respect of construction services provided by ICM UK, but ICM UK did not in the commercial sense provide any construction services. It merely assumed responsibility for receiving payment for services that have been provided by the construction workers, those payments being paid into its bank account in the UK and then passed on to ICM without deduction.

(10) ICM in passing the monies on to the construction workers concerned made no deductions (except in relation to its own fees) except after HMRC started its investigation into ICM UK in 2007 it offered construction workers the option of having their payments made net of income tax and national insurance contributions. Where those deductions were made they would be passed back by ICM to ICM UK for payment on to HMRC.

(11) ICM's explanatory material described itself as a specialist contract management company and explained how the structure adopted enabled construction workers to be paid on a gross basis. This was an integral feature of the structure and was marketed as such.

(12) In 2007 after HMRC's enquiries commenced ICM and ICM UK revised their contractual documentation.. The standard form contract to be entered into between construction workers and ICM purported to record a contractor/sub-contractor relationship between the parties but there is no evidence that after its adoption the arrangements operated in practice any differently to how they were described above.

(13) In October 2007 ICM and ICM UK entered into a contract which purported to record a relationship of contractor and sub-contractor. There is no evidence that the arrangements between these parties operated any differently after this contract was entered into.

(14) ICM UK had a standard form of contract to be entered into with construction firms or agencies under which it described itself as a commercial sub-contractor undertaking construction operations.

(15) HMRC issued the First Determinations without giving ICM UK the opportunity of making representations on its proposal to do so. HMRC made the First Determinations on the basis that ICM UK had failed to make deductions when making payments to the sub-contractor ICM. HMRC agreed to consider ICM UK's claim for relief under Regulation 9(4) (1) (a) notwithstanding that the First Determinations had already been made. ICM UK did not respond to any material extent to HMRC's request for further information to enable it to consider the claim and HMRC accordingly rejected the claim on the basis of such material that had previously been provided.

(16) HMRC issued the Second Determinations on 8 March 2010 on the basis that ICM UK had failed to make deductions in respect of payments made to construction workers. It gave ICM UK the opportunity to provide details of the construction workers to whom payments had been made so that it could consider any claim for relief under Regulation 9(4) before issuing the Second Determinations but ICM UK failed to do so and HMRC proceeded to make the Second Determinations.

(17) HMRC decided on 16 February 2009 to withdraw ICM UK's gross payment status because of its failure to make deductions in respect of payments made to sub-contractors in the years 2007/8 and 2008/9.

Issues to be determined

176. The first issue to be determined is whether ICM UK was under the terms of the CIS required to make any deductions from the sums it paid to ICM and in respect of which the Determinations were made.

177. In order to decide that issue we need to consider the following:

(1) Whether the correct analysis is that the sums paid by ICM UK to ICM were paid under "construction contracts relating to construction operations" under which ICM UK was the contractor and ICM was the sub-contractor: see sections 57 and 58.

(2) If the answer to the first question is in the negative, whether the correct analysis is that the sums paid by ICM UK to ICM were sums paid under construction contracts in respect of which ICM UK was the contractor and the construction worker was the sub-contractor with ICM, as the recipient of the payments from ICM UK, being "a person nominated by the sub contractor or the contractor": see section 60(1).

(3) Alternatively, if the answer to the first question is in the negative, whether the correct analysis is that the sums paid by ICM UK to ICM were sums paid under construction contracts in respect of which ICM UK was the contractor and the construction worker was the sub-contractor with the interposition of ICM between ICM UK and the construction workers being disregarded as it serves no legitimate commercial purpose but is designed to circumvent the CIS, under the principle established in *W T Ramsay Ltd* v *Commissioners of Inland Revenue* [1982] AC 300 ("*Ramsay*").

178. The second issue to be determined is whether the Determinations should be set aside for all or any of the following grounds put forward by the Appellant namely:

(1) The Determinations were void for procedural impropriety as HMRC did not exercise its discretion in conformity with the applicable principles of public law.

(2) Alternatively, the Determinations were not made to best judgment as HMRC should have allowed ICM UK's claim for relief under Regulation 9(5) on the basis that either of the conditions set out in Regulation 9(3) and 9(4) is satisfied with the consequence that the Determinations should be set aside.

(3) The Determinations do not comply with Regulation 13(4) (b) as they do not specify a class, classes or one or more named sub-contractors.

179. The third issue to be determined, if we find that the Determinations were lawfully issued, is whether the amounts determined to be assessed were excessive.

180. The fourth issue to be determined is whether the determination to withdraw ICM UK's gross payment status ("the Gross Payment Determination") should be set aside on all or any of the following grounds put forward by ICM UK namely:

(1) HMRC failed to give notice of its reasons for the determination without delay as required by section 66(5);

(2) ICM UK did not fail to make deductions from payments made to construction workers as these payments were made by ICM UK's sub-contractor, ICM, to the construction workers;

(3) Alternatively, ICM UK reasonably believed that the contractual relationship between ICM and ICM UK was that of contractor and sub-contractor so that if there has been failure to deduct that ICM was a reasonable excuse for that failure within paragraph 4(4) of Schedule 11.

181. We now turn to consider these issues in the light of the findings of fact we have made in paragraphs 20 to 169 above.

Discussion

The nature of the payments made by ICM UK to ICM and by ICM to the construction workers.

182. We start this part of the discussion by analysing the nature of the payments that passed through the chain from the contractor with the primary obligation to carry out the construction works to the construction worker at the end of the chain. We do so on the basis that at all material times after ICM UK commenced business in 2001 the arrangements operated, as we have found that they did, in the manner described in paragraphs 58 to 64above.

183. There can be no doubt that in the hands of the construction worker the monies received represent "contract payments" within the meaning of section 60(1). That is the case as a result of the following:

(1) It is common ground that the construction workers performed "construction operations" within the meaning of section 74(1) (a), being operations of one of the types referred to in section 74(2). We had no

evidence of the particular type of operations carried out by the construction workers but ICM UK's application to HMRC for registration under the CIS referred to its business as being electrical construction and installation, refined by Mr Boothman to be the supply of labour for electrical construction and installation.

(2) At the top of the chain there was a "construction contract" relating to construction operations within Section 57(2) to which the parties were a business or concern requiring construction work to be done (the client) and the construction firm that was engaged for that purpose. That relationship would not fall within section 57(2) unless the client itself carried on a business which included construction operations: see section 59.

(3) At the next link in the chain the construction firm then engaged others to perform the construction operations that the construction firm had undertaken to perform for the client. In that scenario, the construction firm would be a contractor and the firm engaged would be a sub-contractor falling within the scope of section 57(2).

(4) Where the construction firm engaged an agency (such as FastTrack) to procure labour for it to carry out the construction operations rather than engaging its own labour, then the provisions of section 58 would apply so that FastTrack would be a sub-contractor for the purposes of the legislation as a person who arranged for the labour of others to be furnished in the carrying out of the operations within the scope of section 58(a).

(5) Where as the next link in the chain FastTrack procured another entity to arrange for the labour to be furnished, in this case potentially ICM UK, ICM or the construction workers, depending on the correct contractual analysis of the arrangements or if ICM UK or ICM agreed to carry out the operations or provide the labour to do so then there would be a contractor/sub-contractor relationship for the purposes of section 57 FA 2004 between FastTrack as contractor and whoever of the three entities described was deemed to be the sub-contractor concerned. We set out what we consider to be the correct analysis in this case in paragraphs 194 to 210 below.

(6) If instead of an agency such as FastTrack the construction firm asked ICM UK or ICM to provide or procure the labour concerned that would be a contractor/sub-contractor relationship between the construction firm and whichever of the three entities was deemed to be the sub-contractor concerned.

(7) As the final link in the chain, if ICM or ICM UK, according to the correct contractual analysis, agreed to engage the construction worker to provide it with labour to perform the construction operations required by the client or to arrange for the services to be provided by the construction worker then a further contractor/sub-contractor relationship would be created between these parties for the purposes of the legislation.

184. As a result of the chain created each payment made down the chain would be a "contract payment" within the scope of section 60(1) so that each person in the chain who was a contractor for the purposes of the legislation would be obliged (except in the circumstances described in paragraph 185 below) pursuant to section 61(1) to make a deduction at the appropriate rate for the labour element of the construction contract concerned represented by the contract payment when paying his sub-contractor (see section 60(1)(a)) or a person nominated by the sub-contractor or contractor (see section 60(1)(b)). It is common ground that all the payments which are in dispute in these appeals represent payments purely for labour rather than the direct cost of materials used in carrying out the construction operations.

185. The obligation to make deductions did not apply where the sub-contractor concerned had been registered for gross payment, under the provisions which are now contained in sections 63 and 64. We assume that in the chain that we have described in paragraph 183 above that the construction firm and the recruitment agency (FastTrack in our example) were registered for gross payment. We know that ICM UK became registered for gross payment. Consequently payments passing down the chain to ICM UK would all have been paid gross.

186. The question then arises as to whether the correct analysis is that payments made from ICM UK to ICM were under a contractor/sub-contractor relationship falling within section 57, in which case Mr Boddington submits since ICM is not subject to income or corporation tax in the UK relief should have been granted by HMRC in respect of the failure to deduct through a direction made under Regulation 9(5).

187. Alternatively we need to consider whether the correct analysis is that there is a direct contractor/sub-contractor relationship between ICM UK and the construction worker either because on a purposive interpretation of the legislation the interposition of ICM between ICM UK and the ultimate sub-contractor should be disregarded or because ICM is a person nominated by the contractor (ICM UK) or sub-contractor (the construction worker) within the scope of section 60(1) FA 2004, so that in either case deductions at the appropriate rate should have been made by ICM UK when making payments to ICM.

188. Mr Boddington submitted that there was a contractual arrangement of contractor and sub-contractor between ICM and ICM UK Limited. Thus he submitted, ICM UK acted as a principal when contracting with ICM and had no direct contractual relationship with the construction workers, neither was it acting as a disclosed agent of the construction workers. Consequently there was no obligation on ICM UK's part to make any deductions on the payments that were made to the construction workers an obligation which could only fall upon ICM to the extent that ICM was within the jurisdiction of the CIS.

189. Mr Boddington's submitted that the effect of the contractual arrangements between ICM and ICM UK had always been as they were ultimately recorded in the contract between them dated 19 October 2007 referred to in paragraphs 139 to 143 above. That contract, as we remind ourselves, recited that ICM was in business as a

commercial sub-contractor undertaking construction operations and agreed to make its services in that regard available to ICM UK from time to time. In turn, ICM UK as a principal provided construction services to its client, the recruitment agency or construction firm through making available the services of the construction workers provided by ICM to ICM UK.

190. Likewise Mr Boddington submitted that the effect of the contractual arrangements between ICM and the construction worker had always been as they were recorded in the later version of the contract between these parties, as referred to in paragraphs 133 to 138 above. That contract, as we remind ourselves, recited the fact that ICM tendered for business and is appointed by clients to complete a project for specified works at a certain site or location and that the construction worker may from time to time make his skills available to ICM in that context.

191. Mr Boddington submitted that Mr Boothman was embarrassed by the original form of contract with the construction workers which did not clearly reflect what had always been the intention, namely that there was a chain of contracts and contractors. He pointed out that there was no contract between ICM UK and the construction workers.

192. In any event, although admitting the wording of the original contract was complicating and confused, Mr Boddington submitted that it is consistent with a contractor/sub-contractor relationship. In particular:

(1) The preamble is consistent with the construction worker providing services to ICM;

(2) The first three operative clauses could be dealing with the question as to whether there is an employer/employee relationship and liability for any acts or omissions of the construction worker, consistent with an agency relationship but make more sense in the context of a contractor/sub-contractor relationship;

(3) Clause 5 although referring to contracts entered into on the construction worker's behalf is consistent with an arrangement whereby the construction worker enters into a contract as a principal with ICM and then authorises ICM to enter into a separate contract as a principal with the client and this is consistent with Clause 6 of the contract which requires the construction worker to have his time sheet signed by "Island's client" and Clause 9 of the contract which provides for ICM to remit sums collected upon receipt of the same from "Island's client";

(4) Mr Boothman was clear that the practice was to pay construction workers even if payment had not been received from the client;

(5) The fact that Mr Halliwell visited clients to assess their creditworthiness and collecting unpaid monies makes no sense if there was no exposure on ICM's point; and

(6) The accounting and invoicing arrangements were all inconsistent with an agency relationship between ICM and the construction worker.

193. We reject Mr Boddington’s submissions on the nature of the arrangements. In our view it is necessary to look at all the surrounding circumstances in construing the effect of the contractual arrangements.

194. When the terms of the original contract are read in conjunction with the explanatory material issued at the time, the way the relationship between ICM and the construction worker was established, and what was said to HMRC at the meeting held on 3 April 2007, in our view it is clear that the role of ICM was to act as a paying agent so as to act as the construction worker’s agent in remitting payments in respect of arrangements entered into by the construction worker for the provision of his services to third parties.

195. The circumstances that lead us to that conclusion are as follows:

(1) ICM has no expertise in the construction sector. It has no labour to make available to those carrying out construction operations. Contractual arrangements between ICM and the construction worker are, as we have found, set up after the construction worker has been found work with the construction firm or through a recruitment agency. ICM has played no part in procuring the services of the construction workers to provide the work to the client concerned or agreeing any rates for the services to be provided. Mr Boothman accepted as much in his evidence: see paragraph 64 above;

(2) The covering letter forwarding the contractual documentation specifically refers to ICM providing “contract management and settlement services” and acting in “the management of contracts which we enter into on your behalf”: see paragraph 84 above;

(3) Although the preamble to the original contact referred to the construction worker providing his services to ICM there is no operative provision to that effect;

(4) The description in (2) above is consistent with what we found Mr Boothman said about ICM’s business at the meeting held with HMRC on 3 April 2007 where he is recorded as saying that ICM “acts as a financial buffer/payroll bureau for payments between the individual worker and the agency/contractor”;

(5) Clause 5 of the original contract is consistent with the findings in (1) to (4) above and so are the other Clauses referred to by Mr Boddington;

(6) The contract makes it clear that ICM accepted no legal liability for making payments unless it itself had received payment. The fact that it sought, through Mr Halliwell, to check the creditworthiness of clients makes commercial sense, regardless of whether it was legally obliged to do so. There is a clear difference between pursuing difficulties in order to maintain an ongoing commercial relationship with a construction worker and having a legal obligation to make good if payment is not forthcoming. ICM’s business may well suffer if it developed a reputation for dealing with difficult payers.

(7) The accounting and invoicing arrangements were entirely neutral; it is clear that ICM needed to have adequate evidence of what was due to be paid to the individual sub-contractor and the combination of a completed time sheet signed by the client for whom the services were provided and an invoice for settlement achieves that. On the basis of our earlier findings an invoice that recorded that the construction worker had provided services to ICM would not be consistent with the true position.

(8) The manner in which ICM was remunerated, namely a deduction of 5% from the payments made is more consistent with a paying agency arrangement rather than back to back contractor/sub-contractor arrangements.

196. Neither do we believe that the nature of the arrangements changed after the new contractual documentation was introduced in 2007.

197. We draw the inference that when ICM engaged Accountax after the commencement of HMRC's enquiries, Accountax advised as to the deficiencies of the existing documentation in demonstrating clear evidence of a contractor/sub-contractor relationship and advised ICM to adopt a new form that clearly stated that to be the case. However, as we have found there was no difference to the way the arrangements operated in practice or in the manner in which ICM was remunerated. We therefore find that the relationships between ICM and the construction worker continued to be one of paying agent and principal after the new documentation was adopted.

198. We now turn to the nature of the relationship between ICM and ICM UK. ICM UK had no viability on its own. We have found that it was established purely to enable payments to be received gross and to replicate what was previously effected directly by construction firms and agencies with ICM until it became clear that those entities required to deal with an entity that could receive gross payments. No profit was retained within ICM UK as all payments were passed through without deduction (unless in the later years requested by the construction worker) to ICM. ICM UK was in all material respects managed by Boothmans.

199. As we have found when ICM UK commenced business no contractual arrangements were put in place between ICM and ICM UK. The contract put in place in October 2007, purported to evidence a contractor/sub-contractor arrangement between the two entities.

200. We reject Mr Boddington's submission that the contract or the arrangements that operated before that contract was put in place have that effect.

201. ICM is no more in a position to provide ICM UK with labour to carry out construction operations than it is to any other entity, whether it be a construction firm or a recruitment agency. ICM UK obtains no remuneration for carrying out construction operations. The reality of the situation is that ICM UK is a mere conduit for the passing through of sums it receives gross in respect of construction services

provided by the construction workers to the construction firms concerned. Nor does it in commercial reality procure labour for those construction firms.

202. This analysis therefore begs the question as to whether ICM UK can properly be regarded as a sub-contractor (in relation to the payments it receives) and a contractor (in relation to the payments it passes on to ICM) within the scope of the CIS.

203. One possible analysis is that ICM UK is, like ICM, purely a paying agent, the true contractor/sub-contractor relationship being that between the construction worker and the contractor firm concerned for whom the individual sub-contractor performs construction operations. We believe that such analysis reflects the commercial reality of the situation.

204. Nevertheless in relation to the operation of the CIS in our view it is clear that ICM UK should be regarded as being a sub-contractor in relation to its relationship with the recruitment agency or construction firm that finds work for the construction worker with such agency or firm being regarded as the contractor. The reasons for this are as follows.

205. As we have found, there was a pro forma contract between ICM UK and its client, the construction firm or recruitment agency sourcing the labour. This contract recites that ICM UK is a commercial sub-contractor undertaking construction operations and will provide such services to the client. Pursuant to this contract, invoices were issued by ICM UK some of which we were shown relating to the services provided pursuant to this contract.

206. As we have observed, section 58(a) provides that a party to a contract relating to construction operations is a sub-contractor if, inter alia, he is under a duty to the contractor to furnish the labour of others in the carrying out of the operations. We know that ICM UK had no construction expertise of its own. The only way it could fulfil its obligations under its contract with the client would be to procure labour for that purpose. In reality the contract was therefore performed by the construction workers who were found work by the recruitment agency or construction firm involved. These construction workers were introduced to ICM as a sub-contractors who wished to be paid through ICM's payment structure, and these construction workers then became sub-contractors to ICM UK, with invoices being issued by ICM UK to the firm or agency to whom ICM UK became contractually obliged to procure their services. The contact details given to the construction workers were for Boothmans' office so it would not be clear to the construction worker whether he was being introduced to ICM, ICM UK or both.

207. This arrangement therefore provides a legal basis for ICM UK to receive payments for these services gross under the terms of the CIS. ICM UK has held itself out as providing the services of construction workers to perform construction operations, such individuals having been introduced to it for that purpose.

208. It is true that there is no written contract between ICM UK and the construction worker under which he agrees to provide his services to ICM UK. Nevertheless, in

our view such a contract is to be implied. As we have found, the “most often asked questions” document refers to the fact that there is a contract between ICM UK and the agency or the main contractor, and that ICM receives payment under that contract gross. The document then goes on to say that ICM pays the monies without deduction because it is “outside of UK tax law”. It is clear therefore that to benefit from this arrangement the construction worker needs to have a relationship with ICM UK, who receives the monies under a contract relating to construction operations, which as we have analysed above, in this case takes the form of ICM UK providing the services of the construction worker. The construction worker impliedly agrees to such an arrangement, in addition to contracting with ICM, so as to receive the benefits of the work he has provided to the construction firm under the umbrella of the arrangements that ICM UK has entered into with that firm or the recruitment agency, subject to the deduction of ICM’s fee. On our analysis of the service that ICM provides, its role is to manage the payments under the contract between ICM UK and the construction worker. Indeed, as ICM’s marketing material makes clear participating in the arrangements in this way may be the only way that the construction worker can be paid gross and as we have found, ICM takes no responsibility for finding work for the construction worker.

209. This analysis is reinforced by the practice that was followed when after 2007 ICM decided to give construction workers the right to receive payments net. As we have found, where this happened those payments to HMRC were routed through ICM UK not directly from ICM. In those cases it was ICM UK and not ICM that reported the deduction of tax to HMRC as deductions made to the sub-contractors of ICM UK.

210. We can therefore now conclude our analysis of the contractual arrangements in the chain of transactions between the construction firm or agency (“the client) and ICM UK, between ICM UK and ICM, between ICM UK and the construction worker and between ICM and the construction worker. We find that these arrangements were in place throughout the period to which the Determinations relate and can be summarised as follows:

(1) ICM UK entered into arrangements with clients which amounted to construction contracts within the meaning of Section 57 under which the client was the contractor and ICM UK the sub-contractor. This contract was a construction contract by virtue of Section 58(a), there being a duty on ICM UK to furnish labour which was performed by ICM UK making available the labour of the construction workers.

(2) The construction worker agreed to make his services available to ICM UK so that ICM UK could perform its obligations to the client.

(3) ICM UK had an obligation as principal to pay the construction workers for the services that they provided to the client out of the sums received from the client for the services of those construction workers under the arrangements described in (1) above. Those sums were received gross as ICM UK was the holder of a CIS6 Tax certificate which enabled it to receive sums gross from contractors.

(4) The construction worker agreed, in a separate agreement with ICM, that the payments due to him under his arrangements with ICM UK would be managed by ICM who would arrange to collect these payments from ICM UK gross (unless, after 2007, the construction worker had agreed to receive those payments net) and then pass them on to the construction worker subject to the deduction of 5% to meet ICM's management fee.

(5) The agreement between ICM and the construction worker was not a construction contract as ICM did not engage in construction operations as there was no obligation on the part of the construction worker to provide his series to ICM. This agreement is purely characterised as a paying agency agreement under which ICM agrees to manage the payments due from ICM UK to the construction worker.

(6) The agreement between ICM and ICM UK likewise was not a construction contract as ICM was never under an obligation to furnish labour to ICM UK. The payments that passed from ICM UK to ICM did so with the authority of the construction worker to enable that construction worker to be paid by ICM as its agent and thereby satisfy ICM UK's obligation to pay the construction worker under the agreement it had entered into with ICM UK.

Effect of the arrangements

211. On the basis of that analysis we now consider whether there was an obligation to make deductions from the payments that ICM UK made to ICM. Section 61 FA 2004 requires a contractor (which we have found ICM UK to be) to make a deduction of the appropriate amount and account for it to HMRC when he makes a "contract payment".

212. In order to be a contract payment the payment concerned must be made by a contractor under a construction contract. We have found that there is a construction contract between ICM UK and the construction worker and that ICM UK is the constructor under that contract. In addition, by virtue of Section 60(1), that payment must be made to:

(a) the sub-contractor

(b) a person nominated by the sub-contractor or the contractor, or

(c) a person nominated by a person who is a sub-contractor under another such contract relating to all or any of the construction operations.

213. In this case sub-paragraph (c) above is not relevant and the payments were not made to the sub-contractor (the construction worker in this case) so that sub-paragraph (a) does not apply. However, in our view the payments were made to a person nominated by the sub-contractor to receive payment, that person being ICM. This arose as a result of ICM being appointed by the construction worker to collect

payments in respect of sums owed to him by ICM UK on his behalf and pass them on subject to the agreed deduction for ICM's fees. On that basis, the construction worker authorised ICM to collect these monies from ICM UK and thus ICM UK made payments to a person nominated by the sub-contractor to receive payment within the meaning of Section 60(1) (b).

214. Consequently ICM UK was obliged to make appropriate deductions pursuant to Section 61 FA 2004 unless, as provided for by section 60(4) FA 2004, the construction worker was registered for gross payment. We have had no evidence that any of the construction workers were so registered.

215. In our view it makes no difference that ICM, as the person nominated to receive payment, was resident outside the UK. The payments made through its agency were payments made in respect of construction operations performed by construction workers in the UK pursuant to the terms of a contract entered into the UK. The effect of section 74(1) (b) is that the CIS covers all construction operations carried out in the UK.

216. We have reached this conclusion through our analysis of the correct characterisation of the contractual arrangements and the way for which they operated and it is on this basis that we determine the first issue that we identified in paragraph 176 above by answering the first question posed in paragraph 177 in the negative and the second question posed in the positive.

217. Mr Nawbatt submitted as his primary argument for concluding that ICM UK was under an obligation to make deductions in the payments to ICM, that the interposition of ICM between ICM UK and the construction worker should be disregarded, as it serves no legitimate commercial purpose but is designed to circumvent the CIS, by application of the principle laid down in *Ramsey*.

218. In the light of or earlier findings set out above it is not necessary for us to determine that issue, but we shall deal briefly with it.

219. Lord Brightman sets out the conditions for the application of the *Ramsay* principle in *Furness v Dawson* [1984] AC 474 at pages 527 C-D:

> "First, there must be a pre-ordained series of transactions; or, if one likes, a single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end … Secondly there must be steps inserted which have no commercial (business) purpose apart from the avoidance of a liability to tax – not "no business effect". If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied."

220. Mr Nawbatt referred us to a number of cases where the Ramsey principle has been applied in a number of different situations. In particular, he referred us to *Barclays Mercantile Business Finance Ltd v Mawson* (2004) 76 TC 446 where the

House of Lords set out the essence of the principle of statutory construction established in Ramsey in paragraphs 32 to 34 of its judgment as follows:

> "[32] The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of statute, upon its true construction, applies to the facts as found. As Lord Nicholls of Birkenhead said in MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL 6 at [8], [2001] STC 237 at [8], [2003] 1 AC 311:
>
> > 'The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case'.
>
> [33] The simplicity of this question, however difficult it might be to answer on the facts of a particular case, shows that the Ramsay case did not introduce a new doctrine operating within the special field or revenue, statutes. On the contrary, as Lord Steyn observed in McGuckian [1977] STC 908 at 915, [1997] 1 WLR 991 at 999 it rescued tax law from being "some island of literal interpretation" and brought it within generally applicable principles.
>
> [34] Unfortunately, the novelty for tax lawyers of this exposure to ordinary principles of statutory construction produced a tendency to regard Ramsay as establishing a new jurisprudence governed by special rules of its own. This tendency has been encouraged by two features characteristic of tax law, although by no means exclusively so. The first is that tax is generally imposed by reference to economic activities or transactions which exist, as Lord Wilberforce said, "in the real world". The second is that a good deal of intellectual effort is devoted to structuring transactions in a form which will have the same or nearly the same economic effect as a taxable transaction but which it is hoped will fall outside the terms of the taxing statute. It is characteristic of these composite transactions that they will include elements which have been inserted without any business or commercial purposes but are intended to have the effect of removing the transaction from the scope of the charge."

221. In *NMB Holdings Ltd v Secretary of State for Social Security* (2000) 73 TC 85 the High Court had to consider whether a scheme designed to avoid the need to pay national insurance contributions on directors' bonuses pursuant to which bonuses were conferred in the form of a platinum sponge which was realised for cash on the following day fell within the scope of the *Ramsay* principle. Langley J in referring to the principle as it has been applied in earlier cases concluded on whether the purchase and resale of the platinum sponge could be disregarded at page 125 of the judgment as following:

> "In those cases the House in effect decided that the substance of reality of the composite transactions was to be considered free of any artificial steps. If the substance of this transaction was, as I think it was, and the Secretary of State found, a

> payment of bonuses in cash that is sufficient and does not involve impermissible picking and choosing bits of the artificial stages and seeking to attach any fiscal of other real consequences to them. The artificial insertion of the sale and purchase of platinum was no different in principle from the insertion of company to on the sale of the companies in *Furness v Dawson*."

He then concluded at the same page:

> "In my judgment the *Ramsay* principle does entitle the Secretary of State to characterise what happened and the cash receipts the directors in fact obtained as payments in cash and not in kind within the meaning of the relevant provisions. That is not to deprive NMB of a choice opened to it by the legislation but to construe the legislation so that the events which happened fall within the ambit of earnings and not payments in kind."

222. In *DTE Financial Services Ltd v Wilson* (2001) 74 TC the Court of Appeal had to consider the effect of a scheme under which an employee who was due to a bonus of £40,000 was provided not with a cash payment but with a contingent reversionary interest under a settlement, which interest shortly thereafter turned into cash as was always intended. The question was whether that scheme successfully avoided the requirement to deduct tax under the PAYE system in respect of the bonus payment. Parker LJ held in paragraph 41 of his judgement as follows:

> "41. As I see it, viewing the matter through Ramsay eyes, the composite transaction in the instant case involved only three relevant stages: first, the purchase by DTE of the contingent reversionary interest; second, the assignment of that interest to Mr MacDonald, and third, the payment of the cash sum by the trustee to Mr MacDonald when the interest fell into possession. If it is legitimate to apply the Ramsay principle to the application of the provisions relating to PAYE to that composite transaction, then to my mind only one result can follow. As the Special Commissioner rightly said:
>
> "The company decided that Mr MacDonald should have a £40,000 bonus; Mr MacDonald got that bonus; that is in both senses – the beginning and the end of the matter."

223. The court also considered whether it was legitimate to apply the *Ramsay* principle to what was a mechanism to collect tax rather than a taxing provision in its own right. Parker LJ concluded in this point paragraph 42 of his judgment as follows:

> "42. So far as the Ramsay issue is concerned, therefore, the only question (to my mind) is whether it is legitimate to apply the Ramsay principle – or, if one prefers, adopt a Ramsay approach – to the concept of "payment" in the context of the statutory provisions relating to PAYE. In my judgment it plainly is, I accept Mr Glick's submission that in the context of the PAYE system the concept of payment is a practical, commercial concept. In some statutory contexts the concept of payment may (as Lord Hoffmann pointed out in MacNiven) include the discharge of the employer's obligation to the employee, but for the purposes of the PAYE system payment in my judgment ordinarily means actual payment i.e. a transfer of cash or its equivalent."

224. Mr Nawbatt submits, applying the principles derived from these cases to the facts of the current case as follows:

(1) Viewed realistically and construing the CIS purposively the payment from ICM UK to the construction worker through ICM did not deprive the payments collected and made by ICM UK of their character as a contract payment by ICM UK to the construction worker. The mechanism put in place did not consist in reality of separate steps but a single composite transaction amounting to a process of delivery of the sums due to the construction worker for the services he performed for ICM UK in the UK. The CIS applied to this process so as to require deductions to be made before payments were made to ICM.

(2) Like the PAYE scheme, the CIS is a mechanism for collection of tax and as shown in DTE, the *Ramsay* principle is capable of applying to collection systems;

(3) Consequently, the interposition of ICM between ICM UK and the construction workers serves no legitimate commercial purpose other than to circumvent the CIS so denying the Exchequer payments properly due under the CIS.

225. Mr Boddington accepted that the *Ramsay* principle was capable of applying to the operation of a tax collection system such as the CIS. He contends however that the arrangements did not consulate a composite transaction but a series of construction contracts under which genuine legal rights and responsibilities were created.

226. Mr Boddington submitted that there was a genuine commercial purpose behind ICM's role; it existed long before ICM UK even existed or traded and had a genuine business which for legitimate reasons had been established in the Isle of Man as a contract payments form. The creation of ICM UK was effected so as to secure compliance with the CIS scheme.

227. We reject Mr Boddington's submissions. As we have found, the arrangements were clearly marketed as a structure under which a construction worker could receive payments made to him for work performed in the UK free of any deduction for UK tax. Although it was common ground that he would still be liable for UK tax and for national insurance contributions in respect of the sums he received, the reality of the situation was that many of the construction workers would be working in the hidden economy and would not be assiduous in filing tax returns and meeting their obligations promptly, circumstances which had led to the introduction of the CIS in the first place.

228. We regard the position as being analogous to the circumstances in *DTE* and *NMB Holdings*, just as in those cases the legislation was construed so as to disregard the interposition of an artificial step in the process which had sought to take the arrangements out of what was thought to be the agreed objective, namely the payment to the beneficences concerned of a cash bonus, so we can disregard the role of ICM in the middle of a process designed to pay construction workers remuneration for their

services performed in the UK for a UK based client, circumstances which fall squarely within the scope of the CIS.

229. The fact that ICM had a pre-existing business is in our view irrelevant; what is to be disregarded is their insertion into the contractual chain, purportedly as a sub-contractor in its own right. As we have found, contrary to Mr Boddington's submissions, ICM did not act as a sub-contractor in relation to construction operations in any meaningful sense.

230. We therefore conclude that HMRC succeed on the *Ramsay* argument.

Lawfulness of the Determinations

231. Having considered that ICM UK was generally obliged to make deductions pursuant to Section 61 when making payments to ICM we now turn to the question as to whether the Determinations were lawfully issued.

232. The first ground on which ICM UK submits that the Determinations were void is that HMRC did not exercise its discretion in conformity with the applicable principles of public law.

233. Mr Boddington submits that in relation to the First Determinations there are two procedural irregularities. First, he says, the First Determinations were made only eight days after ICM UK had been warned that HMRC intended to make them and despite seeking ICM UK's representations it had proceeded to issue the First Determinations without waiting to receive those representations and consider them. Secondly, the First Determinations had been issued without HMRC having properly considered whether it was appropriate to have made a direction under Regulation 9(5).

234. Mr Boddington submits that in considering whether to exercise its discretion to issue a determination under Regulation 13(2) HMRC was under a duty to give reasoned consideration on an individual basis as to how the discretion should be exercised and must take into account all matters which they ought to take into account. He relies on the well known case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 233 for the second proposition and there was no dispute between the parties on that point.

235. With regard to the first proposition Mr Boddington relies on *John Schofield v The Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 199 (TC). That case concerned an appeal against cancellation of registration for gross payment under the CIS. The Tribunal found that HMRC had a discretion as to whether to exercise the power to cancel under section 66 and it was required to exercise that discretion in deciding whether to make a determination. The Tribunal's reasoning as set out in paragraph 135 of its decision was as follows:

> "Our conclusion on the correct interpretation of section 66(1) is that HMRC have a discretion whether to make a determination cancelling registration for gross payment.

> They must exercise that discretion in deciding whether to make a determination. They cannot make a determination without exercising the discretion. …"

236. We reject Mr Boddington's submission on this point. Whilst HMRC, having decided to ask for representations which it did in its letter of 20 February 2008, did indeed have a duty under general principles of public law to wait a reasonable time to receive representations on its intended decision to issue the First Determinations and consider these representations before making the determinations it acted promptly in accepting that more time should have been allowed for representations: see HMRC's letter of 26 March 2008 referred to in paragraph 146 above. HMRC also undertook to consider ICM UK's claim under Regulation 9(4) (a) (ii), as referred to in paragraph 149 above. In these circumstances, in our view, ICM UK was put in the same position as they would have been had they considered the representations before the determinations were made and every opportunity was given to ICM UK to make representations as to why they were not obliged to have made the deduction which were the subject of the First Determinations. As can be seen from the sequence of events recorded at paragraphs 148 to 151 above, ICM UK did not put in any further representations as a result of which HMRC determined to reject the claim under Regulation 9(4), as described in its letter of 21 January 2009, referred to in paragraph 157 above. Any grounds that ICM UK may therefore have had to have the Determinations set aside on public law grounds would therefore have ceased to apply as a result of the course of action that HMRC took.

237. Nor do we believe that *Schofield* helps ICM UK in this situation. That case concerned a situation where HMRC had issued a determination without considering whether to exercise its discretion at all. It is not surprising in those circumstances that the Tribunal held that the determination was void. It is clear from the facts in this case that HMRC issued the First Determinations having considered such material as had been made available to it after the meeting on 3 April 2007 and therefore did exercise its discretion before making the First Determinations.

238. With regard to the Second Determinations Mr Boddington submits that they are void because HMRC should have allowed the claim for relief made under regulation 9(5) made by Mr Boddington in his letter of 11 September 2009 referred to in paragraph 166 above.

239. We reject this submission. Mrs Charnock clearly had considered the claim for relief before sending her letter of 23 November 2009 which explained that she considered that there were no grounds for a direction under Regulation 9(4) on the basis that HMRC's view was that ICM was not a sub-contractor for the purposes of that regulation. ICM UK were given the opportunity in this letter to provide information about the construction workers that would enable HMRC to consider the claim in the context that such persons were the relevant sub-contractors for the purpose of the claim but that information was never provided. HMRC made it clear in its letter of 5 February 2010 to Mr Boddington that if the information was not provided then the Second Determinations would be made as previously intended.

240. Consequently it was clear that the Regulation 9(5) claim was considered before the Second Determinations were issued. The fact that ICM UK believes that HMRC's views on its merits were wrong does not amount to a procedural impropriety. There is therefore no basis for Mr Boddington's submission that the Second Determinations were void for procedural impropriety on this ground.

241. The second ground on which ICM UK submits that the Determinations were void is that they were not made to best judgment under Regulation 13(2). ICM UK contends that HMRC should have allowed ICM UK's claims for relief under Regulation 9(5) and therefore by virtue of Regulation 13(3) the Determinations should have excluded the amounts that should have been allowed under Regulation 9(5).

242. Mr Boddington submits that the claims for relief should have been allowed because they met Condition B as set out in Regulation 9(4) (i) .Mr Boddington submits that the "person to whom the contractor made the contract payments to which section 61 of the Act applies" was ICM and that person was not chargeable to income tax or corporation tax in respect of these payments as it was resident outside the UK for tax purposes.

243. In the light of our findings that the construction worker is to be treated as the sub-contractor for the purposes of Section 61 this submission must fail. ICM UK has produced no evidence that the construction workers were not subject to income tax in relation to the payments they received despite being invited to do so by HMRC and accordingly HMRC were right to reject the claims.

244. The third ground on which ICM UK submits that the Determinations were void is that they do not comply with Regulation 13(4) (b) as they do not specify a class, classes or one or more named sub-contractors.

245. Mr Boddington did not expand further on his ground in his submissions. In our view this ground is without merit and we reject it.

246. The Determinations did give details of the sub-contractors concerned to the extent that the relevant information was available to HMRC at the time the respective Determinations were issued. On 28 February 2008 when the First Determinations were issued limited information had been provided to HMRC in response to its requests for information following the meeting on 3 April 2007, but this did include copies of the new form of standard contract to be issued by ICM to construction workers which recited that ICM was a provider of construction services. On that basis it is not surprising that, in its letter of 28 February 2008, HMRC referred to payments having been made to ICM as sub-contractor.

247. In relation to the Second Determinations it was clear that they were issued on the basis that the construction workers were the persons to whom the payments had been made as envisaged in Mrs Charnock's letter of 23 November 2009, which also requested details of the construction workers involved.

248. It is therefore entirely without merit to argue that the Determinations are void because they failed to contain information which was wholly within the knowledge of ICM UK and ICM and which these companies had declined to provide. In any event in our view it is not necessary that such information has to be included. It is clear that the language of Regulation 13(4) (b) is permissive and not mandatory; it refers to the fact that a determination may extend to the persons named in Regulation 13(4) (b) so it is merely defining the boundaries of the determination rather than presenting what information is to be contained in it. This is consistent with the wording in Regulation 13(1) (b) which provides for the power to make a determination to apply where "there may be an amount payable for a tax year under these Regulations by a contractor that has not been paid to them", and does not, in contrast to Regulation 13(1) (a) of the Regulations, refer to disputes or payments between a contractor and a sub-contractor.

249. We therefore find that the Determinations were validly made.

Quantum

250. ICM UK submits that even if the Determinations are valid, the amounts determined were excessive. ICM UK submitted that the question of quantum should be dealt with at a separate hearing after the question of the validity of the Determinations has been determined.

251. We rejected ICM UK's request for deferment of consideration of the question for quantum. There was no reason why ICM UK could not have provided evidence to substantiate its claim that the Determinations were excessive so that it could be considered at the substantive hearing of the appeal and the burden of proof is on them to do so. ICM UK has had many opportunities to provide the necessary information to HMRC as to the position of the individual sub-contractors but has failed to do so.

252. HMRC's letter of 20 February 2008 made it clear that the amounts to be assessed in respect of the First Determinations were calculated by taking the voucher amounts that had been submitted to HMRC for payments that had been paid to ICM UK and applying the 18% deduction rate for the total in each year. It is clear from the schedules attached to HMRC's letter of 8 February 2010 that the Second Determinations were calculated by taking the payments received by ICM UK, deducting the reported payments to sub-contractors to calculate the gross payments to unreported sub-contractors. From that figure was deducted the 5% administration fee charged by ICM and then the tax due was calculated at 30%. That tax rate was appropriate for sub-contractors who had not been verified as registered with HMRC. We question whether the administration fee is a proper deduction and arguably the Second determinations should be increased. However as the point was not argued before us we make no finding on that. In the absence of any information from ICM UK or ICM as to the circumstances of any particular construction worker who was not liable to UK income tax or was entitled to be paid gross or who had paid income tax in respect of the relevant deduction, it is difficult to see how the Determinations could have been calculated on any other basis.

253. We therefore reject ICM UK's contention that the amounts assessed by the Determinations are excessive.

The Gross Payment Determination

254. The first ground on which ICM UK submits that the Gross Payment Determination should be set aside is that HMRC failed to give notice of its reasons for the determination without delay as required by Section 66(5). We accept that failure to comply with this requirement will render the determination void: see *Schofield*, paragraph 139.

255. The letter of 16 February 2009 notifying ICM UK of the cancellation of its gross payment status stated that the reasons for the cancellation was the failure to make CIS Deductions in payments made to sub-contractors in the year 2007/2008 and 2008/2009. Mr Boddington submits that these reasons are insufficient as they do not give details of the sub-contractors concerned or the qualifying period as defined in paragraph 14 of Schedule 11 FA 2004, as pointed out by Mr Boddington in his letter of 4 March 2009 to HMRC. The details of the "qualifying period" were provided in HMRC's letter of 6 March 2009 to Mr Boddington and HMRC's letter of 18 March 2009 to Mr Boddington advised that the failure to make deductions related to transactions between ICM UK and ICM.

256. In our view the requirement to give reasons is satisfied if the recipient could understand the reasons without making further enquiries. ICM UK knew full well that the compliance findings could only relate to the payments it made to ICM as its entire business consisted of making those payments. It knew that HMRC regarded it as a failure to comply with the legislation that ICM UK had failed to make deductions when making payments in the earlier years because it had issued the First Determinations in respect of them. It knew that the way in which its business operated had not changed since then. In our view therefore ICM UK had sufficient information to know why its gross payment status had been cancelled when it received the letter of 16 February 2009. Even if we are wrong in that, we are of the view that the information that was provided on 18 March 2009 was provided without delay and it contained all the further information that HMRC could reasonably be expected to provide in answer to Mr Boddington's letter of 4 March 2009.

257. We therefore find that the requirements of Section 66(5) were satisfied and the Gross Payment Determination is not to be set aside on the ground that there was a failure to comply with those requirements.

258. ICM UK Limited's second ground on which it submits that the Gross Payment Cancellation should be set aside was that there were no compliance failings in respect of the payments made to the construction workers as those payments were made by ICM UK's sub-contractor, ICM, to the construction workers and not by ICM UK.

259. We have effectively already dealt with this by deciding that ICM UK was under an obligation to make deductions when it made payment to ICM and therefore we reject this ground.

260. Finally, ICM UK submits that if it wrongly failed to make deductions it has a reasonable excuse for that failure within Paragraph 4(4) of Schedule 11 to FA 2004,

as it reasonably believed that the true relationship between ICM UK and ICM was that of contractor and sub-contractor and that as ICM was outside the UK tax system there was no obligation to make deductions in respect of the payments made to ICM.

261. We have no hesitation in rejecting that submission. As we have found ICM marketed its services on the basis that payment through ICM was the only way in which a construction worker might be expected to be able to receive gross payment. It wrongly stated in that marketing material that it was not subject to the CIS. There is no obvious basis in the legislation governing the CIS for the assumption that payments to non-UK sub-contractors are outside the scope of the CIS. It chose to take that line apparently without taking professional advice on an issue which, on Mr Boddington's submission, was not entirely clear. We have found that ICM deliberately failed to engage in discussion of the issue with HMRC by writing its highly misleading letter of 16 August 2001 referred to in paragraph 32 above, and that the purpose of the arrangements was to avoid the need to made deductions from payments made to construction workers.

262. We therefore regard ICM's behaviour as reckless in this regard. It was fully aware of the risk that the arrangements may not be compliant with the CIS but deliberately refrained from discussing it with HMRC. It must face the consequences of its actions which, aside from the loss of its own gross payment status and very large assessments being made against it, are likely to have resulted in a shocking level of tax evasion and loss of revenue to the Exchequer in respect of sums that should have been accounted for in respect of payments made to the construction workers. In those circumstances there is no basis on which ICM UK can establish a reasonable excuse for not having made the necessary deductions.

Conclusion

263. As we have rejected all of ICM UK's grounds of appeal in respect of the Determinations and the Gross Payment Determination we must dismiss these appeals.

264. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

TIMOTHY HERRINGTON
TRIBUNAL JUDGE

RELEASE DATE: 2 April 2013

Annex

RELEVANT PROVISIONS OF FA 2004 AND THE REGULATIONS

1. Section 57 of FA 2004, so far as relevant, sets out the scope of the CIS as follows:

> "(1) This Chapter provides for certain payments (see section 60) under construction contracts to be made under deduction of sums on account of tax (see sections 61 and 62).
>
> (2)In this Chapter "construction contract" means a contract relating to construction operations (see section 74) which is not a contract of employment but where—
>
> (a) one party to the contract is a sub-contractor (see section 58); and
>
> (b) another party to the contract ("the contractor") either—
>
> (i) is a sub-contractor under another such contract relating to all or any of the construction operations, or
>
> (ii) is a person to whom section 59 applies.
>
> (3)In sections 60 and 61 "the contractor" has the meaning given by this section.
>
> (4)In this Chapter—
>
> (a) references to registration for gross payment are to registration under section 63(2),
>
> (b) references to registration for payment under deduction are to registration under section 63(3), and
>
> (c) references to registration under section 63 are to registration for gross payment or registration for payment under deduction."

2. Section 58 of FA 2004 contains the definition of sub-contractor as follows:

> "For the purposes of this Chapter a party to a contract relating to construction operations is a sub-contractor if, under the contract—
>
> (a) he is under a duty to the contractor to carry out the operations, or to furnish his own labour (in the case of a company, the labour of employees or officers of the company) or the labour of others in the carrying out of the operations or to arrange for the labour of others to be furnished in the carrying out of the operations; or
>
> (b) he is answerable to the contractor for the carrying out of the operations by others, whether under a contract or under other arrangements made or to be made by him."

3. Section 59(1) of FA 2004 extends the scope of the CIS to a person who is a party to a construction contract who is a person carrying on business which includes "Construction operations".

4. Section 60 of FA 2004 sets out the class of payments which are made subject to the obligation to deduct sums in respect of income tax and national insurance. This section, so far as relevant, provides:

> "(1)In this Chapter "contract payment" means any payment which is made under a construction contract and is so made by the contractor (see section 57(3)) to—
>
> (a) the sub-contractor,
>
> (b) a person nominated by the sub-contractor or the contractor, or
>
> (c) a person nominated by a person who is a sub-contractor under another such contract relating to all or any of the construction operations.
>
> (2)But a payment made under a construction contract is not a contract payment if any of the following exceptions applies in relation to it.
>
> (3)This exception applies if the payment is treated as earnings from an employment by virtue of Chapter 7 of Part 2 of the Income Tax (Earnings and Pensions) Act 2003 (c. 1) (agency workers).
>
> (4)This exception applies if the person to whom the payment is made or, in the case of a payment made to a nominee, each of the following persons—
>
> (a) the nominee,
>
> (b) the person who nominated him, and
>
> (c) the person for whose labour (or, where that person is a company, for whose employees' or officers' labour) the payment is made,
>
> is registered for gross payment when the payment is made.
>
> …
>
> (8) For the purposes of this Chapter a payment (including a payment by way of loan) that has the effect of discharging an obligation under a contract relating to construction operations is to be taken to be made under the contract; and if—
>
> (a) the obligation is to make a payment to a person ("A") within paragraph (a) to (c) of subsection (1), but
>
> (b) the payment discharging that obligation is made to a person ("B") not within those paragraphs,
>
> the payment is for those purposes to be taken to be made to A."

5. Section 61of FA 2004 sets out the obligation to make the deductions referred to in paragraph 23 above and provides:

> "(1) On making a contract payment the contractor (see section 57(3)) must deduct from it a sum equal to the relevant percentage of so much of the payment as is not shown to represent the direct cost to any other person of

materials used or to be used in carrying out the construction operations to which the contract under which the payment is to be made relates.

(2) In subsection (1) "the relevant percentage" means such percentage as the Treasury may by order determine.

(3)That percentage must not exceed—

(a) if the person for whose labour (or for whose employees' or officers' labour) the payment in question is made is registered for payment under deduction, the percentage which is the basic rate for the year of assessment in which the payment is made, or

(b) if that person is not so registered, the percentage which is the higher rate for that year of assessment."

6. Section 62 of FA 2007 provides for the treatment of the sums deducted, so far as relevant, provides:

"(1) A sum deducted under section 61 from a payment made by a contractor—

(a) must be paid to the Board of Inland Revenue, and

(b) is to be treated for the purposes of income tax or, as the case may be, corporation tax as not diminishing the amount of the payment.

(2)If the sub-contractor is not a company a sum deducted under section 61 and paid to the Board is to be treated as being income tax paid in respect of the sub-contractor's relevant profits.

If the sum is more than sufficient to discharge his liability to income tax in respect of those profits, so much of the excess as is required to discharge any liability of his for Class 4 contributions is to be treated as being Class 4 contributions paid in respect of those profits.

(3)If the sub-contractor is a company—

(a) a sum deducted under section 61 and paid to the Board is to be treated, in accordance with regulations, as paid on account of any relevant liabilities of the sub-contractor;

(b) regulations must provide for the sum to be applied in discharging relevant liabilities of the year of assessment in which the deduction is made;

(c) if the amount is more than sufficient to discharge the sub-contractor's relevant liabilities, the excess may be treated, in accordance with the regulations, as being corporation tax paid in respect of the sub-contractor's relevant profits; and

(d) regulations must provide for the repayment to the sub-contractor of any amount not required for the purposes mentioned in paragraphs (b) and (c).

(4)For the purposes of subsection (3) the "relevant liabilities" of a sub-contractor are any liabilities of the sub-contractor, whether arising before or after the deduction is made, to make a payment to the Inland Revenue in pursuance of an obligation as an employer or contractor.

(5)In this section—

(a) "the sub-contractor" means the person for whose labour (or for whose employees' or officers' labour) the payment is made;

(b) references to the sub-contractor's "relevant profits" are to the profits from the trade, profession or vocation carried on by him in the course of which the payment was received;

(c) "Class 4 contributions" means Class 4 contributions within the meaning of the Social Security Contributions and Benefits Act 1992 (c. 4) or the Social Security Contributions and Benefits (Northern Ireland) Act 1992 (c. 7)."

7. Sections 63 and 64 of FA 2004 make provision for registration to enable construction contract payments to be made either gross or net as appropriate as follows:

"**63**

(1) If the Board of Inland Revenue are satisfied, on the application of an individual or a company, that the applicant has provided—

(a) such documents, records and information as may be required by or in accordance with regulations made by the Board, and

(b) such additional documents, records and information as may be required by the Inland Revenue in connection with the application,

the Board must register the individual or company under this section.

(2)If the Board are satisfied that the requirements of subsection (2), (3) or (4) of section 64 are met, the Board must register—

(a) the individual or company, or

(b) in a case falling within subsection (3) of that section, the individual or company as a partner in the firm in question,

for gross payment.

(3)In any other case, the Board must register the individual or company for payment under deduction.

64

This section sets out the requirements (in addition to that in subsection (1) of section 63) for an applicant to be registered for gross payment.

(2)Where the application is for the registration for gross payment of an individual (otherwise than as a partner in a firm), he must satisfy the conditions in Part 1 of Schedule 11 to this Act.

(3)Where the application is for the registration for gross payment of an individual or a company as a partner in a firm—

(a) the applicant must satisfy the conditions in Part 1 of Schedule 11 to this Act (if an individual) or Part 3 of that Schedule (if a company), and

(b) in either case, the firm itself must satisfy the conditions in Part 2 of that Schedule.

(4)Where the application is for the registration for gross payment of a company (otherwise than as a partner in a firm)—

(a) the company must satisfy the conditions in Part 3 of Schedule 11 to this Act, and

(b) if the Board of Inland Revenue have given a direction under subsection (5), each of the persons to whom any of the conditions in Part 1 of that Schedule applies in accordance with the direction must satisfy the conditions which so apply to him.

(5)Where the applicant is a company, the Board may direct that the conditions in Part 1 of Schedule 11 to this Act or such of them as are specified in the direction shall apply to—

(a) the directors of the company,

(b) if the company is a close company, the persons who are the beneficial owners of shares in the company, or

(c) such of those directors or persons as are so specified,

as if each of them were an applicant for registration for gross payment.

(6)See also section 65(1) (power of Board to make direction under subsection (5) on change in control of company applying for registration etc).

(7)In subsection (5) "director" has the meaning given by section 67 of the Income Tax (Earnings and Pensions) Act 2003 (c. 1)."

8. Paragraphs 9 to 13 (supplemented by paragraph 14) of Schedule 11 to FA 2004 sets out the conditions to be satisfied by companies wishing to be registered for gross payment as follows:

"**9.** In the case of an application for a company to be registered for gross payment (whether as a partner in a firm or otherwise), the following conditions must be satisfied by the company.

The business test

10. The company must satisfy the Inland Revenue, by such evidence as may be prescribed in regulations made by the Board of Inland Revenue, that—

(a) it is carrying on (whether or not in partnership) a business in the United Kingdom, and

(b) that business satisfies the conditions mentioned in paragraph 2(a) and (b).

The turnover test

11. (1)The company must either—

(a) satisfy the Inland Revenue, by such evidence as may be prescribed in regulations made by the Board of Inland Revenue, that the carrying on of its business is likely to involve the receipt in the year following the making of the application of an aggregate amount by way of relevant payments which is not less than the amount which is the minimum turnover for the purposes of this sub-paragraph; or

(b) satisfy the Inland Revenue that the only persons with shares in the company are companies which are limited by shares and themselves are registered for gross payment;

and in this sub-paragraph "relevant payments" has the meaning given by paragraph 3(2).

(2)The minimum turnover for the purposes of sub-paragraph (1) is whichever is the smaller of—

(a) the amount obtained by multiplying the amount specified in regulations as the minimum turnover for the purposes of paragraph 3 (1) by the number of persons who are relevant persons in relation to the company; and

(b) the amount specified for the purposes of this paragraph in regulations made by the Board of Inland Revenue.

(3)For the purposes of sub-paragraph (2) a person is a relevant person in relation to the company—

(a) where the company is a close company, if he is a director of the company (within the meaning given by section 67 of the Income Tax (Earnings and Pensions) Act 2003 (c. 1)) or a beneficial owner of shares in the company; and

(b) in any other case, if he is such a director of the company.

(4)The Board may make regulations—

(a) for determining the number of relevant persons to be taken into account for the purposes of sub-paragraph (2) (for example, where the number of such persons has fluctuated over a period);

(b) for the purpose of enabling a company which does not satisfy the condition in sub-paragraph (1) to be treated as satisfying that condition in such circumstances as may be prescribed.

The compliance test

12. (1)The company must, subject to sub-paragraphs (2) and (3), have complied with—

(a) all obligations imposed on it in the qualifying period (see paragraph 14) by or under the Tax Acts or the Taxes Management Act 1970 (c. 9); and

(b) all requests made in the qualifying period to supply to the Inland Revenue accounts of, or other information about, its business.

(2)A company that has failed to comply with such an obligation or request as—

(a) is referred to in sub-paragraph (1), and

(b) is of a kind prescribed by regulations made by the Board of Inland Revenue,

is, in such circumstances as may be prescribed by the regulations, to be treated as satisfying the condition in that sub-paragraph as regards that obligation or request.

(3)A company that has failed to comply with such an obligation or request as is referred to in sub-paragraph (1) is to be treated as satisfying the condition in that sub-paragraph as regards that obligation or request if the Board of Inland Revenue are of the opinion that—

(a) the company had a reasonable excuse for the failure to comply, and

(b) if the excuse ceased, it complied with the obligation or request without unreasonable delay after the excuse had ceased.

(4)The company must, if any contribution has at any time during the qualifying period become due from the company under—

(a) Part 1 of the Social Security Contributions and Benefits Act 1992 (c. 4), or

(b) Part 1 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 (c. 7),

have paid the contribution when it became due.

(5)The company must have complied with any obligations imposed on it by the following provisions of the Companies Act 1985 (c. 6) in so far as those obligations fell to be complied with within the qualifying period—

(a) sections 226, 241 and 242 (contents, laying and delivery of annual accounts);

(b) section 288(2) (return of directors and secretary and notification of changes therein);

(c) sections 363 to 365 (annual returns);

(d) section 691 (registration of constitutional documents and list of directors and secretary of oversea company);

(e) section 692 (notification of changes in constitution or directors or secretary of oversea company);

(f) section 693 (oversea company to state its name and country of incorporation);

(g) section 699 (obligations of companies incorporated in Channel Islands or Isle of Man);

(h) Chapter 2 of Part 23 (accounts of oversea company).

(6)The company must have complied with any obligations imposed on it by the following provisions of the Companies (Northern Ireland) Order 1986 (S.I. 1986/1032 (N.I. 6)) in so far as those obligations fell to be complied with within the qualifying period—

(a) Articles 234, 249 and 250 (contents, laying and delivery of annual accounts);

(b) Article 296(2) (return of directors and secretary and notification of changes therein);

(c) Articles 371 to 373 (annual returns);

(d) Article 641 (registration of constitutional documents and list of directors and secretary of Part XXIII company);

(e) Article 642 (notification of changes in constitution or directors or secretary of Part XXIII company);

(f) Article 643 (Part XXIII company to state its name and country of incorporation);

(g) Article 649 (accounts of Part XXIII company).

(7)There must be reason to expect that the company will, in respect of periods after the qualifying period, comply with—

(a) all such obligations as are referred to in paragraphs 10 and 11 and sub-paragraphs (1) to (6), and

(b) such requests as are referred to in sub-paragraph (1).

(8)Subject to sub-paragraphs (2) and (3), a company is not to be taken for the purposes of this paragraph to have complied with any such obligation or request as is referred to in sub-paragraphs (1) to (6) if there has been a contravention of a requirement as to—

(a) the time at which, or

(b) the period within which,

the obligation or request was to be complied with.

…

14. In this schedule “the qualifying period” means the period of 12 months ending with the date of the application in question.”

9. Section 66 of FA 2004 gives HMRC power to cancel a registration for gross payment and Section 67 provides for appeals to be made by persons aggrieved by decisions to refuse or cancel registration as follows:

“**66**

(1) The Board of Inland Revenue may at any time make a determination cancelling a person’s registration for gross payment if it appears to them that—

(a) if an application to register the person for gross payment were to be made at that time, the Board would refuse so to register him,

(b) he has made an incorrect return or provided incorrect information (whether as a contractor or as a sub-contractor) under any provision of this Chapter or of regulations made under it, or

(c) he has failed to comply (whether as a contractor or as a sub-contractor) with any such provision.

(2) Where the Board make a determination under subsection (1), the person’s registration for gross payment is cancelled with effect from the end of a prescribed period after the making of the determination (but see section 67(5)).

(3)The Board of Inland Revenue may at any time make a determination cancelling a person’s registration for gross payment if they have reasonable grounds to suspect that the person—

(a) became registered for gross payment on the basis of information which was false,

(b) has fraudulently made an incorrect return or provided incorrect information (whether as a contractor or as a sub-contractor) under any provision of this Chapter or of regulations made under it, or

(c) has knowingly failed to comply (whether as a contractor or as a sub-contractor) with any such provision.

(4)Where the Board make a determination under subsection (3), the person’s registration for gross payment is cancelled with immediate effect.

(5)On making a determination under this section cancelling a person’s registration for gross payment, the Board must without delay give the person notice stating the reasons for the cancellation.

(6)Where a person’s registration for gross payment is cancelled by virtue of a determination under subsection (1), the person must be registered for payment under deduction.

(7)Where a person’s registration for gross payment is cancelled by virtue of a determination under subsection (3), the person may, if the Board thinks fit, be registered for payment under deduction.

(8)A person whose registration for gross payment is cancelled under this section may not, within the period of one year after the cancellation takes effect (see subsections (2) and (4) and section 67(5)), apply for registration for gross payment.

(9)In this section “a prescribed period” means a period prescribed by regulations made by the Board.

67

(1) A person aggrieved by—

(a) the refusal of an application for registration for gross payment, or

(b) the cancellation of his registration for gross payment,

may by notice appeal.

(2)The notice must be given to the Board of Inland Revenue within 30 days after the refusal or cancellation.

(3)The notice must state the person’s reasons for believing that—

(a) the application should not have been refused, or

(b) his registration for gross payment should not have been cancelled.

(4)The jurisdiction of the tribunal on such an appeal that is notified to the tribunal shall include jurisdiction to review any relevant decision taken by the Board of Inland Revenue in the exercise of their functions under section 63, 64, 65 or 66.

(5)Where a person appeals against the cancellation of his registration for gross payment by virtue of a determination under section 66(1), the cancellation of his registration does not take effect until whichever is the latest of the following—

(a) the abandonment of the appeal,

(b) the determination of the appeal by the tribunal, or

(c) the determination of the appeal by the Upper Tribunal or a court."

10. Section 74 of FA 2004 deals with the meaning of "construction operations" and which, so far as relevant, provides:

> "(1) In this Chapter "construction operations" means operations of a description specified in subsection (2), not being operations of a description specified in subsection (3); and references to construction operations—
>
> (a) except where the context otherwise requires, include references to the work of individuals participating in the carrying out of such operations; and
>
> (b) do not include references to operations carried out or to be carried out otherwise than in the United Kingdom (or the territorial sea of the United Kingdom).
>
> (2)The following operations are, subject to subsection (3), construction operations for the purposes of this Chapter—
>
> (a) construction, alteration, repair, extension, demolition or dismantling of buildings or structures (whether permanent or not), including offshore installations;
>
> (b) construction, alteration, repair, extension or demolition of any works forming, or to form, part of the land, including (in particular) walls, roadworks, power-lines, electronic communications apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;
>
> (c) installation in any building or structure of systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection;
>
> (d) internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;
>
> (e) painting or decorating the internal or external surfaces of any building or structure;
>
> (f) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection of scaffolding, site restoration, landscaping and the provision of roadways and other access works."

11. Regulation 9 of the Regulations deal with the power to grant relief from liability where the correct amounts have not been deducted from contract payments as follows:

"(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.

(2) In this regulation –

"the deductible amount" is the amount which a contractor was liable to deduct on account of tax from a contract payment under section 61 of the Act in a tax period;

"the amount actually deducted" is the amount actually deducted by the contractor on account of tax from a contract payment under section 61 of the Act during that tax period;

"the excess" means the amount by which the deductible amount exceeds the amount actually deducted.

(3) Condition A is that the contract satisfies an officer of the 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 (a) (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).

(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.

(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.

(10) If a contractor has deducted an amount under section 61 of the Act. But has not paid it to the Commissioners for Her Majesty's Revenue and Customs as required by regulation 7 (payment, due date etc and receipts), that amount is treated, for the purposes of determining the liability of any sub-contractor in respect of whose liability the sum was deducted, as having been paid to the Commissioners for Her Majesty's Revenue and Customs at the time required by regulation 8 (quarterly tax periods).

12. Regulation 13 of the Regulations gives HMRC power to determine deductible amounts to best judgment in certain circumstances and for appeals to be made against such determinations and so far as relevant provides:

(1) This regulation applies if –
(a) there is a dispute between a contractor and 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

(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.

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

(4) A determination under this regulation may –

(a) cover the amount payable by the contractor under section 61 of the Act for any one or more tax periods in a tax year; and

(b) extend to the whole of that amount, or to such part of it as is payable in respect of –

(i) a class or classes of sub-contractors specified in the notice of determination (without naming the individual sub-contractors), or

(ii) one or more named sub-contractors specified in the notice.

(5) A determination under this regulation is subject to Parts 4, 5 and 6 of TMA (assessment, appeals, collection and recovery) as if –

(a) the determination were an assessment, and

(b) the amount determined were income tax charged on the contractor and those Parts of that Act apply accordingly with any necessary modifications, except that the amount determined is due and payable 14 days after the determination is made.”