[2016] UKFTT 833 (TC)

TC05558

Appeal number: TC/2016/00440

INCOME TAX – CONSTRUCTION INDUSTRY SCHEME – Regulation 9 CIS Regulations – failure to take reasonable care – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MAYPINE CONSTRUCTION LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE RUPERT JONES
MR LESLIE HOWARD

Sitting in public at Northampton Tribunal on 25 October 2016

Mr Alastair Kendrick, representative for the Appellant

Mrs P Checkley, Presenting Officer of HMRC for the Respondents

1. The appellant, Maypine Construction Ltd, appeals against a decision of HMRC dated 8 December 2015 to refuse to make a direction under Regulation 9(5) of The Income Tax (Construction Industry Scheme) Regulations 2005 ('the Regulations') relieving the appellant of liability to make payments to HMRC in respect of amounts under-deducted from payments to subcontractors with the Construction Industry Scheme (CIS).

2. The issue in the appeal is whether, for the purposes of Regulation 9(3), the appellant, as a contractor who failed to make deductions from subcontractors, took reasonable care to comply with section 61 of the Finance Act 2004 ('the Act') and the Regulations.

3. HMRC did not seek to submit that the failures by the appellant to deduct the excess were due to errors not made in good faith.

The facts

4. The tribunal received a bundle of documents including witness statements from Mr Peter Bawler and Mr Paul Johnson, officers of HMRC. Mr Bawler and Mr Johnson gave oral evidence on behalf of HMRC at the hearing as did Mark Nannery, company secretary, for the appellant. All the witnesses were cross examined.

5. The tribunal finds the following facts.

6. The appellant has been trading for approximately 42 years as a company involved in ground works, foundations, excavating sewers, road building for new developments. It obtains contracts for its work from large house building companies.

7. The appellant in addition to its own work force and employees, also engages subcontractors from specific trades such as brick laying, steel fitters, block pavers and businesses supplying machinery and operators.

8. While making payments to subcontractors in the construction industry, it failed to make CIS deductions for payments to the subcontractors for a range of payments for materials that included vans, fuel & tools and the use of plant and machinery owned by the subcontractors.

9. The failures resulted in a liability for tax years 2010/2011 to 2014/2015 as follows:

2010/2011 - £3,953 (as rounded down) – in respect of three sub-contractors

2011/2012 - £9,710 (as rounded down) – in respect of four sub-contractors

2012/2013 - £3,621 (as rounded down) – in respect of three sub-contractors

2013/2014 - £3,804 (as rounded down) – in respect of four sub-contractors

2014/2015 - £728 (as rounded down) – in respect of six sub-contractors

[The failures were in respect of twelve sub-contractors in total - some of the same sub-contractors were involved in more than one tax-year]

10. Therefore, the total additional CIS deductions due for those years is £21,816.

11. HMRC notified the appellant of a penalty for 'miscellaneous items claimed by subcontractors on their invoices as 'materials' have been found not to be allowable per the Construction Industry Scheme regulations'. It is noted that the potential penalty for the tax years ending 05/04/11-05/4/15 was mitigated down to 15% resulting in £3,272.40 being potentially due. However, the penalty was suspended for four months, subject to a number of conditions.

12. A review of subcontractor invoices was undertaken by HMRC on 24 April 2014. On that date a meeting took place at the appellant's address attended by Mr Nannery and Mr Cave, Company Secretary and director for the appellant, and Officer Johnson and Skipworth on behalf of HMRC. Subsequent meetings took place in July and November 2014.

13. Following the first meeting, an initial sample of invoices reviewed raised queries arising centred on amounts shown and marked as 'materials'. Officer Johnson advised Mr Nannery and Mr Cave that unless the appellant, as contractor, was able to satisfy itself that the sub-contractor had hired in the machine / plant and had incurred additional costs for doing so, no amount could be excluded from CIS deductions (for appropriate net payment subcontractors), because no 'material' costs had been incurred by the subcontractor.

14. Officer Johnson also stated that the daily rate charged by certain subcontractors for 'van use' was also not actually 'materials' and so should not have been excluded from any deductions to be made.

15. The initial review was expanded to a six-month period which identified further 'material' costs that should not have been treated as allowable.

16. In response to a claim under Regulation 9(4), the appellant was notified on 21 October 2015 that HMRC was not satisfied that the criteria under Regulation 9(4) had been met so that relief under Regulation 9(5) would not be granted. That decision was not appealable.

17. A subsequent request for consideration under Regulation 9(3) was submitted by the appellant on 26 November 2015. It stated:

"at some point there was a misunderstanding of the CIS rules relating to what constituted a qualifying deduction. This error meant that there was a netting off of some incidental costs for items like the use of a van, fuel and small tools. We accept this was an error but it was not deliberate and did not create a tax advantage for our client.

You will appreciate that in relation to the second error this was created by subcontractors who presented payment requests which assumed the particular item is not taken into account by the contractor when calculating the tax due. Whilst we appreciate this error should have been identified by our client, we can hardly consider this as a deliberate error and again one which gave any tax advantage to our client."

18. On 8 December 2015 HMRC, in accordance with Regulation 9(6), notified the Appellant that they were not satisfied the criteria in Regulation 9(3), Condition A (taking reasonable care to comply with s 61 of the Act and Regulations), and that relief under Regulation 9(5) claimed by the appellant should be refused.

19. On 24 December 2015, the appellant advised HMRC of its intention to appeal the decisions. HMRC identified the refusal against the Regulation 9(3) decision as an appealable matter and on 11 January 2016 accepted the appeal, offered a review, and provided guidance on appeals to the tribunal.

20. The appellant filed its notice of appeal at the tribunal on 20 January 2016.

The law

21. The Construction Industry Scheme (CIS) was set up to counter tax evasion and a new scheme, to replace the previous scheme, was set up in 2007. Some contractors or subcontractors can apply to be paid gross but others are due to have deductions made from every invoice they submit. Any payment which represents a reimbursement of the cost of materials supplied by the subcontractor is excluded from the amount which is subject to deduction of tax.

22. Section 61 Finance Act 2004 provides as follows:

> "(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 payment is to be made relates."

23. The CIS legislation therefore requires a deduction to be made from certain payments to subcontractors. Any payment which represents a reimbursement of the cost of materials supplied by the contractor is excluded from the amount which is the subject to the deduction.

24. HMRC Guidance CIS 340 "Construction Industry Scheme: a guide for both contractors and sub-contractors" is specific in respect of plant hire and states:

3.24 Plant hire claimed as materials

'Plant' includes, for example, scaffolding, cranes, cement mixers, concrete pumps, earth moving equipment and compressors.

Where the subcontractor hires plant in order to carry out construction work, the cost of the plant hire and any consumable items such as fuel needed for its operation may be treated as materials for the purposes of calculating any deduction.

This treatment only extends to plant and equipment actually hired by the subcontractor from a third party. <u>If the subcontractor owns the plant used in executing the work no notional deduction for plant hire may be made, although consumable items such as fuel used by the plant may still be treated as materials.</u>

[<u>Emphasis Added</u>]

25. HMRC guidance CISR 14260 states:

Where the contractor hires the plant used from another person they must consider whether CIS applies to the payments. The following rules apply:

- Payments for the hire of plant without an operator are outside the scope of CIS.

- Payments for the hire of plant with an operator are subject to CIS

26. Regulation 9 of the Income Tax (Construction Industry Scheme) Regulations 2005 ("CIS Regulations") provides as follows:

> 9(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 [Finance Act 2004] 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 contractor satisfies an officer of Revenue and Customs—
>
> (a) that he took reasonable care to comply with section 61 of the Act and these Regulations, and
>
> (b) that—
>
> (i) the failure to deduct the excess was due to an error made in good faith, or
>
> (ii) he held a genuine belief that section 61 of the Act did not apply to the payment.
>
> (4) Condition B is that—
>
> (a) an officer of Revenue and Customs is satisfied that the person to whom the contractor made the contract payments to which section 61 of the Act applies either—
>
> (i) was not chargeable to income tax or corporation tax in respect of those payments, or
>
> (ii) has made a return of his income or profits in accordance with section 8 of TMA (personal return) or paragraph 3 of Schedule 18 to the Finance Act 1998 (company tax return), in which those payments were taken into account, and paid the income tax and Class 4 contributions due or corporation tax due in respect of such income or profits; and
>
> (b) the contractor requests that the Commissioners for Her Majesty's Revenue and Customs make a direction under paragraph (5).
>
> (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).

27. Therefore, the Regulations provide that if a contractor fails to deduct the correct amount from a subcontractor then the contractor is liable to account for that amount to HMRC. Relief from having to account for that amount can be given if regulation 9(3) (Condition A) is satisfied.

28. On an appeal to the tribunal under Regulation 9(7) the grounds of appeal under Regulation 9(8) for the appellant are:

(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."

29. In *PDF Electrical Limited v HMRC* [2012] TC 02375 the First Tier Tribunal stated at paragraph 18:

The standard required by Regulation 9 is that the business must take reasonable care in its compliance with the CIS. It does not require that mistakes must never be made. We consider that the standard of "reasonable care" is one that must be appropriate and proportionate to the particular contractor's business. The compliance systems to be expected of a substantial multi-national contractor with a large and sophisticated accounting department are very different from the systems to be adopted by a small business.

30. In the Decision in *Doocey North East Ltd v Revenue and Customs* [2014] UKFTT 863 (TC) the First-Tier Tribunal stated at paragraphs 21 to 24:

21. The onus is on the appellant to show that they have taken reasonable care to comply with section 61 **and** that any failure to comply with section 61was due to an error made in good faith or that they had a genuine belief that section 61 did not apply to the payment.

22. We were referred to the cases of *PDF Electrical Limited v HMRC* [2012] TC 02375 and to *J & M Interiors (Scotland) Limited v HMRC* [2014] TC03323 and agree that the standard of "reasonable care" required by Regulation 9 is one that must be appropriate and proportionate to the particular contractor's business.

23. We took into account that Dooeys were of such a size that they employed both an internal accountant and an administrator for CIS record keeping. We would have expected in these circumstances that someone would have taken the trouble to look at the CIS Regulations and to take care to apply them, particularly when an item such as "plant" appeared on an invoice. Several invoices from EMG to Dooceys contain the mention of "gas oil" and it is not clear that a piece of machinery has also been charged on that invoice. We find that these invoices should have alerted Dooceys to question the item and to raise the possibility that they were subject to deduction if they were the cost of fuel as part of travelling expenses.

24. In the case of *Mr Steven Hoskins v HMRC* [2012] TC01972 the Tribunal considered that the complexity of various parts of the scheme meant that a contractor would have to make some effort to establish where he stood in relation to his obligations and also that there are common misunderstandings in respect of the scheme.

31. The burden is on the appellant to satisfy the tribunal it has taken reasonable care.

The evidence of the witnesses

Appellant's evidence

32. Mark Nannery gave evidence on behalf of the appellant. He had been the company secretary for ten years and was a part qualified accountant. His responsibilities were to look after the company's finances and head up the finance department and look after the preparation of management accounts, deal with cash flow control and oversee the administration and accounting functions of the company. He had done that since he had been employed in 1998.

33. The turnover of the company was £20-£25 million per annum. Its expenditure on sub-contractors was in excess of £5 million per annum. During the relevant period, it had spent £18 million on sub-contractor costs, about £4 million per annum. Within the business, it had one member of staff in the accounts department who was operating CIS.

34. He remembered the HMRC visit in 2014 when they conducted the CIS review and the errors which were identified during the course of the meeting. HMRC had

explained after reviewing a sample of subcontractor invoices that the company was not accounting correctly for such items when claiming materials.

35. The error arose because the appellant was not aware it was doing anything wrong as showing labour content and other small items as valid material deductions.

36. The other error was in relation to plant hire. The appellant would receive invoices from third party sub-contractor for the operation and supply of plant equipment. The invoices would be annotated in 100% of cases where the sub-contractors had instructed what their labour rate and element was as against their plant hire rate and element. Not all the invoices separated this out. In some the 'man and machine' was supplied to the appellant at one rate. The appellant also took the labour and plant rates at face value and deducted plant hire as materials without clarifying whether the sub-contractor owned the plant used and supplied rather than hiring it.

37. When the errors came to light, his response to HMRC was that he was surprised by HMRC's findings as he was unaware of the 'Plant hire claimed as materials' rule and what constituted a valid material deduction. There was no officer within the company that knew of the rule. The company believed that was a genuine mistake and error on their part and HMRC accept this to a genuine error as they had not imposed any penalties in the case assessment – or at least penalties were suspended.

38. To rectify the position in future the appellant had asked for clarification from HRMC of what it needed to do and had a much clearer understanding of the relevant section from the CIS 340 HMRC guidance booklet. It now adopted the guidance in the correct manner and more than one person processes the sub-contractor invoices.

39. Mr Nannery stated that the appellant had established a procedure on plant and material and engaging sub-contractors and he had kept up to date with relevant CIS changes but not necessarily those which applied to plant hire. He accepted that errors had taken place – at the time, the appellant did not believe it was not a valid materials deduction. This was how the appellant operated for some time. It did not think it needed to check the rules.

40. There was due diligence in authorising payments on invoices but only one accounts clerk who would process them and pass them on to the accounting officer, neither of whom were aware of the rules on 'Plant hire claimed as materials'. The errors in the deductions had occurred in relation to eight different subcontractors over the relevant five tax years.

41. The other type of error the appellant had made was in relation to other incidental costs on the labour-only element of subcontractor's invoices and small items of plant, labour hire and fuel. The appellant failed to appreciate that when the subcontractor invoiced for plant and machinery hire which came with the supply of a worker or labourer, this brought it within the scheme of CIS. The errors in the deductions had occurred in relation to four different subcontractors over the relevant five tax years.

42. The appellant was surprised that errors were being made as it had asked other sub-contractors and not one of them was aware of the HMRC guidelines as to what could be claimed on plant and machinery under the CIS. In his view, the lack of awareness appeared to be industry wide.

43. While the appellant was aware of the CIS 340 Guidance it was unaware of some of the finer details of Guidance CIS 340. During the relevant time the company did refer to it and used the booklet to verify contractors but clearly there was a company failure to account for some items.

44. When HMRC first came in and pointed out the appellant's failings it did supply them with information about one or two companies that were invoicing it, annotating both their plant and labour rate and which severely undercut their labour rate and plant rate so that they would know that they would only take a tax deduction on a smaller part of their invoice.

45. Mr Nannery stated he was instrumental in contacting these supplier sub-contractors and saying to them that this was not acceptable. The appellant did its due diligence and adjusted the labour amounts – and told the sub-contractors to charge them hourly rates on the labour. It was not that the company was not aware of that part of the CIS 340 Guidance – they had due diligence in place to check the invoices for other items. The invoices were subjected to review by going to the surveying department before being authorised.

46. Mr Nannery accepted that the question was whether the appellant exercised reasonable care. The suggestion that a contractor that should be familiar with the whole of the CIS rules and regulations, he found to be unreasonable and unrealistic because it is a very complicated area and the appellant had tried to operate it although it had made a technical flaw in this little area. The appellant had complied with the vast majority of the CIS rules.

47. Mr Nannery stated that large corporations in the construction world would use Quantity Surveyors to sign off invoices. If the invoice came from the surveying department they would have an idea of what the split between material and labour actually was. Working within the industry Quantity Surveyors would sign off the receipts. If the proportion of labour and plant looked correct then this would suffice. Only if it did not look correct then would the contractor go back to the sub-contractor. In the real world it was not practical to check with sub-contractors the invoices which the Quantity Surveyors had signed off as the surveyor would have talked to its suppliers and be properly informed.

48. Mr Nannery stated that the CIS guidance creates practical difficulties. The effect is that the onus is on the contractor to make the right and necessary deductions before tax is applied but in the case of third party operators supplying plant the appellant would then have to request from them evidence as to ownership or hire in order to make the deduction. A plant sub-contractor supplying a man and a machine would have to provide the appellant with invoices and extra documentary evidence that it was not their machine and would require their own invoice of the plant being hired and therefore cross-hired. It may require the appellant to obtain additional information that would make it quite difficult to operate the scheme. The appellant would need to obtain further documentary evidence.

49. There were examples where the appellant's accounts clerk had analysed invoices supplied by sub-contractors, broken down and allocated labour and materials.

50. There was no financial advantage caused be the appellant's mistakes in the operation of CIS.

51. Subsequently the appellant has contacted all its sub-contractors to tell them what they need to do and that they will be subject to tax unless the appellant can be given information that allows it to make deductions. Mr Nannery has conveyed a clear message to the departments that handle invoices so that the genuine errors do not reoccur in the future.

HMRC's evidence

52. Officer Peter Bawler gave evidence on behalf of HMRC. He stated that the under-deductions from the payments to the subcontractors in question arose from the failure by the appellant to check the materials costs claimed by the subcontractors, which included payments for travel and subsistence as well as plant and machinery, which represented the direct cost to the subcontractor of materials used or to be used in in carrying out the construction operations for the purposes of section 61 of the Finance Act 2004.

53. He took into consideration the size and nature of the contractor's business, that it is a mainstream contractor, its main or core business activities being construction and civil engineering with a turnover of approximately £20 million in the year to 30 April 2012 and total payments to subcontractors in the 2011-12 tax year of £6.2 million. The company employed quantity surveyors and administrative staff to deal specifically with the operation of the CIS scheme.

54. Officer Bawler consider that the failures to check invoices and basic requirements of the CIS should have been well within the contractor's capabilities to apply, particularly as guidance was readily available within HMRC Guidance like CIS 340 or on-line Manuals and CIS helplines.

55. Officer Paul Johnson of HMRC also gave evidence regarding the three meetings and visits he had with representatives of the appellant on 24 April, 27 August and 26 November 2014.

56. He had identified two main areas of concern in the appellant's application of the CIS scheme.

57. Firstly, invoices from suppliers of plant and machinery; these included claims for payments of sums that had been subject to CIS deductions indicates as for 'labour' and other sums that had not been subject to any CIS deductions.

58. Secondly, other subcontractor invoices showed sums that had not been subject to CIS deductions because they had been treated as being for subcontractor 'materials' costs. However, in many instance the items excluded from CIS deductions were not 'materials' in accordance with the guidance to contractors that is published by HMRC. Those amounts had been incorrectly excluded from CIS deductions and incorrectly declared as 'materials' on the company's CIS returns.

59. There had been no procedures in place within the Appellant to check in any detail the individual elements claimed by sub-contractors on their invoices to ensure that CIS deductions were calculated correctly. He had been informed by the appellant's representatives that it had been under a misunderstanding about what were and were not materials costs in respect of subcontractors.

60. In his view the appellant simply took the invoices provided to it at face value – there may have been some checks to write labour and material amounts but there were processes to consider those elements further.

61. In the case of sub-contractors who were claiming van costs – the appellant could have made some effort to ascertain whether vans were hired or whether they were already owned by the sub-contractors.

62. As far as plant hire, if the invoice showed plant supplied with an operator that would have triggered an expectation of the costs within CIS and so the appellant should have contacted the sub-contractor to find out whether it was hired in for that project or was owned.

63. The level of the appellant's responsibilities would be down to relationship it had with a sub-contractor. If the appellant used them regularly it should have an established understanding at the start as to whether the subcontractor hired or owned vans or there be an expectation that if the job was changing some regular check would be performed.

64. A basic premise of CIS was that the appellant as taxpayer should not necessarily take information it is supplied as face value. As at paragraph 3.24 of the CIS 340 Guidance it was the contractor's responsibility to account for correct amount. The contractor would have the right and duty to request information from the sub-contractor to verify the amount claimed. It was the appellant's function and responsibility to make checks and to ask what within an invoice is deductible for CIS purposes.

Appellant's submissions

65. Mr Kendrick made submissions in line with Mr Nannery's evidence. While the appellant had made errors in good faith, it had taken reasonable care. It would be unreasonable and disproportionate to expect it not to make any errors. Indeed, the statutory scheme envisaged such errors being made.

66. The company had informed itself of the guidance but could not be expected to know every part of the CIS 340 guidance. The operation of CIS in this regard was complex and technical and the appellant could not be expected to question or verify invoices supplied by its sub-contractors.

67. The appellant's staff did check invoices, there was due diligence and it was entitled to rely on invoice descriptions and the knowledge of surveyors approving invoices.

68. The mistakes it had made were in good faith and had created no tax advantage for the appellant.

HMRC's submissions

69. HMRC did not make any submissions that the appellant had not acted in good faith.

70. HMRC submitted that given the size of the appellant's turnover and individuals appointed to deal with CIS and its experience within the industry it would be

reasonable for the appellant to ensure that any payments to sub-contractors were correctly treated.

71. It was submitted that the appellant had failed to demonstrate it took reasonable care. Contractors had to meet statutory obligations across a whole range of tests. The burden was on the appellant to be assured that sub-contractors were giving it invoices that met the requirements of CIS and allowed it to be satisfied it was making proper deductions as required. On the basis of that, there was a duty on the appellant to look at the requirements of section 61 of the Finance Act 2004.

72. The appellant had not taken reasonable care in that: it had failed to keep itself informed of all the CIS requirements; it had failed to put systems in place generally to keep itself informed; and it had failed to check invoices – or seek supporting evidence where evidence was omitted.

73. The appellant had nothing in place by way of system to check that invoices could give enough information to satisfy itself the CIS scheme was operated accurately. HMRC submitted that the requirement to be informed was not overly burdensome or unreasonable or impractical. The form of evidence the appellant might require to determine the question of ownership or hire of plant would depend on the sub-contractor and the contractor's relationship with them.

74. Given the size of the appellant, its turnover, the value of its CIS dealings and its dedicated staff it would be proportionate and appropriate to have systems in place. The fact that the appellant had twelve sub-contractors engaged on a regular basis suggested it would not be too onerous to check the position with each. The checking of each invoice may be excessive where it has regular clients and information is given at the outset which the appellant has no reason to believe has changed the position for invoices thereafter. It may also be excessive to expect the appellant to go behind information given to it by a subcontractor but where there was information missing there was a need to require it in order for the appellant to comply with the CIS rules.

75. HMRC also relied upon the appellant's failure to familiarise itself with the HMRC guidance which existed. It was submitted it was not complicated to understand and someone within the organisation should have been informed and understood the requirements.

76. Therefore, the appellant's failure to inform itself, make itself aware of the rules and failure to have systems in place to examine the invoices was a failure to take reasonable care. Such a view of the appellant was reasonable and proportionate. HMRC was not expecting perfection.

Discussion and Decision

77. The onus is on the appellant to show it has taken reasonable care to comply with section 61 of the Act and the Regulations and any failure to comply with those laws was due to an error made in good faith or it had a genuine belief that they did not apply to the payments.

78. The appellant accepts and agrees all the errors identified by HMRC in its application of the CIS scheme and making of deductions required.

79. The tribunal accepts that the appellant's errors were made in good faith or it had genuine belief that section 61 of the Act and the Regulations did not apply to the payments. The Tribunal accepts that the errors did not result in any financial advantage to the appellant.

80. The tribunal also accepts that the standard of care required by Regulation 9 is one that must be appropriate and proportionate to the particular contractor's business.

81. The Tribunal is of the view that given the not inconsiderable size of its turnover, its long history and experience in the construction industry and size of annual sub-contractor payments it makes, the appellant was not a small company who was dealing with CIS on an occasional basis. It had a member of staff who was dedicated to processing the invoices and applying CIS deductions at the relevant time.

82. The appellant has rightly and fairly accepted that it has made at least two categories of errors in relation to CIS deductions. This is not simply one isolated and technical category of error that has been repeated. These different types of errors have been repeated on multiple occasions in relation to multiple contractors over a number of years. The fact that the appellant's actions continued for a number of years indicated a lack of care.

83. Fairly and properly, Mr Nannery accepted that the appellant, through its staff, was simply not aware of all the CIS rules. The tribunal does not accept that the rules which gave rise to the errors were so obscure or so rarely applicable that the appellant could not reasonably or proportionately informed itself of them. The appellant seeks to suggest that applying the rules would have been impractical or burdensome for example in identifying ownership or hire of plant or the labour elements with supplies of material. However, this would be academic if the appellant never knew the rules in the first place.

84. The appellant also accepts, it has since rectified its practices, examines invoices from sub-contractors and requests the requisite information from them to properly inform itself of the appropriate deductions. The appellant has not suggested that the correct operation of the CIS scheme has placed undue pressures upon it. Therefore the application of the rules has been demonstrated not to be impractical or unreasonable. It is evident that the failures which continued through the tax year 2010-2011 to 2014-2015 could have readily been rectified as proven by the changes mentioned at the early meeting held on 24 April 2014 and subsequent conditions of the potential suspended penalty.

85. The fact is that HMRC did publish guidance, which if followed, would have avoided the appellant making errors in CIS deductions. It is reasonable to have expected the appellant, given its size and frequency of CIS processing, to have read the guidance, have systems in place to monitor and respond to any change in guidance and to apply the rules based on this understanding.

86. Whether or not there are common misunderstandings within the industry as to the CIS Regulations, it would not be taking reasonable care simply to adopt the same and continued practice without first checking whether it was compliant. Where there is uncertainty a reasonable person can be expected to seek guidance from an appropriate source. The appellant engaged at least one member of staff to deal with the CIS aspect of the business and it should be expected that reasonable and

proportionate care would be taken to read, understand, and apply the requirements within the CIS regulations.

87. In our view a prudent and reasonable business of the size of the appellant with experience in engaging subcontractors would have been aware of the responsibilities and put into place adequate procedures to ensure compliance with CIS Regulations to avoid the errors the appellant made.

88. Therefore, we are not satisfied that the appellant has met Condition A under Regulation 9(3). We are not satisfied it took reasonable care to comply with section 61 of the Act and the Regulations. We are not satisfied its failures to make the excess deductions for the purposes of the CIS Regulations were as a result of it taking reasonable care.

89. We uphold HMRC's decision not to make a direction under Regulation 9(5) of the CIS regulations.

90. The appeal is dismissed.

91. 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.

92.

RUPERT JONES
TRIBUNAL JUDGE

RELEASE DATE: 19 DECEMBER 2016