



TC06212

Appeal number: TC/2016/05605

INCOME TAX –application to make late appeal against refusal under regulation 9(3) (Condition A) of the Income Tax (Construction Industry Scheme) Regulations 2005

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

TOTAL PROPERTY MAINTENANCE (STAFFS) LTD Appellant

- and -

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

TRIBUNAL: JUDGE VICTORIA NICHOLL

Sitting in public at Centre City Tower, Birmingham on 9 October 2017

Ms J Mann of Abbey Tax for the Appellant

**Mr Jones, instructed by the General Counsel and Solicitor to HM Revenue and
Customs, for the Respondents**

DECISION

1. The appellant (“Total Property”) made an application on 18 October 2016 to make a late appeal against the refusal decision that the respondents (“HMRC”) notified on 14 August 2015 under regulation 9(6) of the Income Tax (Construction Industry Scheme) Regulations 2005 (“CIS Regulations”). We told the parties, following our deliberations at the end of the hearing, that we had decided to refuse the application. This decision notice sets out the reasons for our decision.

Facts found

2. We have found the following facts from the evidence in the bundle and the further explanations put forward at the hearing:

2.1 Total Property’s business has grown over the years from domestic patio and drive maintenance to commercial contract maintenance work for Carillion plc. This growth in work led to the business being registered for the construction industry scheme (“CIS”) in November 2009. Total Property appointed J C Barker & Co to deal with the CIS registration and filings.

2.2 Total Property’s day to day tax and financial affairs, including CIS matters, were managed for many years by Mrs Sherwin, the wife of Mr Sherwin who operates the business. Mr Sherwin has had limited formal education and relied on his wife to deal with the paperwork for the business, with assistance from the business’s professional advisers.

2.3 When HMRC began an enquiry into the business’s failure to file monthly returns and to make deductions from certain payment to contractors as required by the CIS, Mr and Mrs Sherwin decided to appoint new accountants. In April 2015 CJ Lawrence & Co were appointed as accountants. At about the same time Mrs Mann of Abbey Tax became involved as an adviser because Mr Sherwin is a member of the Federation of Small Businesses and entitled to use her services in connection with the CIS issues and HMRC’s enquiry.

2.4 On 8 April 2015 Ms Mann wrote to HMRC to appeal against Mrs Cant’s decision that Total Property could not be relieved from paying the amounts under-deducted under Regulation 9(5) of CIS Regulations. HMRC responded that there was no right of appeal as HMRC’s decision had only addressed relief under Condition B of Regulation 9(4), and not Condition A of Regulation 9(3) of the CIS Regulations. HMRC advised that there would be a right of appeal in relation Condition A, but that a decision remained to be made when HMRC had sufficient information to do so. Ms Mann responded on 15 June 2015 that her “client reserves the right to do so, but considers that, quite properly, Regulation (3) should be considered in the first instance, for obvious reasons.”

2.5 On 21 July 2015 Ms Mann referred HMRC to a case in support of her client’s request under Regulation 9(3) Condition A of the CIS Regulations as the Tribunal

in that case had found that a taxpayer could reasonably rely on persons whom she believed to have specialist knowledge and expertise.

5 2.6 On 14 August 2015 HMRC issued a refusal notice under Regulation 9(6) of the CIS Regulations as Condition A was not met and further notices that Condition B was not met. The notices in relation Condition A stated that Total Property had 30 days to appeal against the decision. Mrs Sherwin gave Ms Mann verbal instructions in August 2015 not appeal against HMRC's refusal notice.

10 2.7 On 24 September 2015 HMRC issued notice of penalties to be charged in respect of the late filing of CIS returns and a letter explaining the duties and interest payable. By this time Mr and Mrs Sherwin had separated and it was Mr Sherwin who contacted Ms Mann following the issue of these notices and thereafter.

15 2.8 Following the issue of the refusal notices and penalty notices, the correspondence between HMRC and Ms Mann continued with a view to settlement of the matter. For example, on 19 October 2015 Ms Mann responded to HMRC's letter of 24 September 2015 by setting out payment proposals "on the basis that my client is willing to settle on the basis of the figures set out in your letter, providing that a suitable payment plan can be agreed." A cheque for £25,000 (to be paid in on 16 January 2016) was enclosed with the letter, with a proposal that the balance should be paid by 31 March 2016. HMRC accepted this payment offer but the settlement could not be finalised because HMRC did not have the necessary information available in order to agree the liabilities. This was highlighted by the fact that in November 2015 HMRC identified overpayments made in 2013-2014 and 2014-2015 that were not shown on HMRC's online account system. In the light of this information, Ms Mann informed HMRC on 16 November 2015 that it was not appropriate for her client to agree to make further payments to HMRC until it could demonstrate "how the online account sits at present."

30 2.9 There was then a period of further correspondence to establish the correct position and a new offer was made by HMRC on 16 March 2016 based on calculations in schedules sent to Ms Mann on 7 December 2015. Ms Mann confirmed in response on 7 April 2016 that "my client shares your wishes to settle matters" but that she could not advise her client to settle until HMRC could provide certainty and clarification regarding the duties paid and the repayments made. On 11 and 17 May 2016 HMRC wrote to Ms Mann to explain that HMRC were waiting for comments on the breakdown of the charges, payments and repayments sent to her in December 2015, but that HMRC has time limits to recover outstanding tax and that the duties for 2009-2010 were no longer enforceable. HMRC concluded that if Total Property wished to settle by a contract settlement or a letter of offer it should do so before 17 June 2016 as HMRC would then have no choice but to issue assessments to protect the amounts due.

40 2.10 As a settlement was not agreed HMRC issued determinations under Regulation 13 of the CIS Regulations on around 15 July 2016 for the periods 6 April 2010 – 5

April 2015. Total Property has appealed against these determinations and they are not the subject of this appeal.

2.11 In May 2016 CS Lawrence & Co (Total Property’s accountants) informed Ms Mann of the decision in *Brian Mabe v HMRC* [2016] UKFTT 340 (TC) (“*Mabe*”).
5 Both advisers considered that the facts of the case resembled those of their client. On 27 June 2016 Ms Mann completed a draft letter to ask HMRC to give “further consideration of the matter under the terms of Regulation 9(3)” as her client had acted reasonably and should have should have been able to rely on the accountants charged with the preparation of its CIS returns. The letter was sent to HMRC on
10 25 July 2016 as an enclosure to the appeal against the Regulation 13 determinations.

2.12 On 11 August 2016 HMRC responded to Ms Mann’s letter dated 27 June 2016 by advising that HMRC could not consider a late appeal against the decision to refuse to make directions under Regulation 9(3) Condition A of the CIS Regulations. On 18 October 2016 Total Property notified the Tribunal of its
15 appeal, including the application the subject of this decision to make the appeal late.

The law

3. Section 61 Finance Act 2004 requires contractors to make deductions on account
20 of tax from contract payments. If a contractor fails to make the deductions, **Regulation 9 of the CIS Regulations** provides for recovery from the sub-contractor in certain circumstances as follows:

- “ (1) This regulation applies if—
25 (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;
30 “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.
35 (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—
40 (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—

5 (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 TMA (personal return) or paragraph 3 of Schedule 18 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;

10 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

20 (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.

25 (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—

30 (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).”

4. It will be noted that regulation 9(7) of the CIS Regulations provides that if HMRC refuses to make a direction under regulation 9(5), the contractor has a right to appeal, specifying the grounds of appeal, within 30 days of HMRC’s refusal.

5. If HMRC refuses to allow a late appeal under the CIS Regulations, the taxpayer can apply to the Tribunal for permission under **section 49(2)(b) Taxes Management Act 1970 (“TMA”)** as follows:

- “(1) This section applies in a case where—
- (a) notice of appeal may be given to HMRC, but
 - (b) no notice is given before the relevant time limit.
- (2) Notice may be given after the relevant time limit if—
- (a) HMRC agree, or
 - (b) where HMRC do not agree, the tribunal gives permission.”

6. **Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (‘the FTT Rules’)** provides:

“(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes –

- (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
- (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
- (d) using any special expertise of the Tribunal effectively; and
- (e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it –

- (a) exercises any power under these Rules; or
- (b) interprets any rule or practice direction.”

Submissions

7. Total Property argues that:

8.1 there has been a major change in the business’s circumstances. Whereas Mrs Sherwin had managed the business’s paperwork and relationship with HMRC, this now falls to Mr Sherwin who lacks formal education and knowledge;

8.2 the decision of the Tribunal in the case of *Mabe* is applicable to Mr Sherwin’s circumstances given his difficulty with paperwork and reliance on his accountants, and an appeal could not have been made earlier as it was not published until May 2016. An appeal was made as soon as the facts of the case had been considered applicable to Total Property’s situation; and

8.3 a “protective appeal” was made before the Regulation 9 (6) CIS Regulations refusal decision was issued and this has not been considered by HMRC.

8. HMRC argues that Total Property should have made a timeous appeal following HMRC's Regulation 9(6) refusal decision. The *Mabe* decision does not set a precedent, and cannot be used to justify a change of heart following the discovery of a successful appeal by another taxpayer. HMRC had every right to expect that its decision had been accepted by the taxpayer some 9 months after it was made, especially following the detailed settlement negotiations.

Discussion

9. We considered this application to make a late appeal in the light of the guidance by Justice Morgan in *Data Select Ltd v Revenue and Customs Commissioners* [2012]UKUT 187 (TCC) that, as a general rule, "when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequence for the parties of a refusal to extend time? The court or tribunal then makes its decision in the light of the answers to those questions." We also noted the guidance with regard to compliance and delay given by the Senior President of Tribunals in the Court of Appeal, that was approved by the Supreme Court in *BPP Holdings Limited v HMRC* [2017] UKSC 55, that the "correct starting point is compliance unless there is good reason to the contrary which should, where possible, be put in advance to the Tribunal... Flexibility of process does not mean a shoddy attitude to delay or compliance by any party." In accordance with the FTT Rules, we applied the terms of the overriding objective in Rule 2 to avoid delay and "[deal] with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and resources of the parties".

10. We concluded that the purpose of the 30 day time limit is to provide finality for HMRC. The delay in this case was over 9 months and therefore considerable. We then considered the wider circumstances of the appeal raised by Ms Mann as an explanation of the delay.

11. We do not accept the argument that Ms Mann raised at the hearing that the change in circumstances in the business after the end of Mr & Mrs Sherwin's marriage explains the delay in making the appeal. By the time that Mrs Sherwin ceased to deal with the business's tax affairs she had instructed Ms Mann not to appeal against the Regulation (6) refusal notice and HMRC were led to believe that the business wished to settle the matter. The business's accountants, C S Lawrence & Co, were negotiating the tax due and a cheque in payment signed by Mrs Sherwin was sent to HMRC. Indeed, this matter might have been settled well before June 2016 but for HMRC's difficulties with its online account system. The consequences of refusing permission to appeal late is therefore that Total Property will resume the negotiation of the settlement that was about to be concluded when this appeal was made.

12. We agree with HMRC that the main reason for the late appeal is that Total Property's advisers considered that their client's circumstances reflected those in the *Mabe* case when it was published in May 2016. Total Property now seeks to rely on

the *Mabe* case, both to make a late appeal and as the grounds of an appeal against the Regulation 9(6) refusal notice.

13. We do not accept the argument that the publication of the decision of the First-tier Tribunal in *Mabe* constitutes grounds to give permission for this late appeal. Total
5 Property has not explained why it could not have made an appeal in the 30 days after the decision was made and argued its case on its own facts. It is not a good explanation that they chose not to do so until they saw favorable findings made in relation to another taxpayer, especially as Ms Mann had already drawn HMRC's attention to another Tribunal case in July 2015 as it supported her client's claim. The
10 decision in *Mabe* was on the facts of that case and does not bind the Tribunal in this case but, together with other cases on the same issue, can provide guidance. In this respect, while we have not considered the merits of any substantive appeal, we note that the findings in *Mabe* do not reflect the facts in this case in any event as Mr Sherwin's problems with paperwork did not give rise to decision not to appeal in
15 August 2015 or the earlier defaults. It was Mrs Sherwin who dealt with the CIS scheme during the period 2009 - 2015 and who made the decision not to appeal in August 2015 (with the assistance of the business's advisers at the relevant times). Ms Mann first made contact with Mr Sherwin in September 2015 and we consider that he, as any other reasonable taxpayer in his position, would have followed her advice to
20 appeal if it had been given at that time.

14. Finally, we considered the impact of the statements in Ms Mann's letters to HMRC on 8 April 2015 and 15 June 2015 that she wished to reserve her client's right to make an appeal (what she refers to as making her "protective appeal"). We do not
25 accept that this can be treated as an appeal or grounds to justify a late appeal being allowed. The procedure for making an appeal against a Regulation 9(6) refusal notice is set out in Regulation 9(7) of the CIS regulations and begins when HMRC's decision is made, not before. The statements by Ms Mann reserving her client's right to appeal put HMRC on notice that Total Property may wish to make an appeal if it did not accept the decision when made, but it was for the taxpayer or its advisers to
30 follow it up with an appeal by reference to the decision eventually made in accordance with regulation 9(7). Instead, after HMRC issued the Regulation 9(6) refusal notice on 14 August 2015, there was continued correspondence between HMRC and Ms Mann with a view to settlement of the matter.

15. In summary, the overriding objective in rule 2 of the FTT Rules requires us to deal
35 with cases fairly and justly taking account of the costs and resources of the parties and avoiding delay. In these circumstances we find that there is no good reason for the considerable delay in making the appeal, and that the consequences of allowing a late appeal would be time and resources costs for HMRC who should be able to treat the settlement payment negotiations over a period of 9 months as confirmation that the
40 refusal decision was final.

Decision

16. For the reasons set out above, Total Property's application to make a late appeal against the decision issued by HMRC on 14 August 2015 is refused.

17. 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.

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**VICTORIA NICHOLL
TRIBUNAL JUDGE**

RELEASE DATE: 10 NOVEMBER 2017

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