



[2019] UKFTT 0667 (TC)

**TC07442**

*INCOME TAX – construction industry scheme – whether determination under Regulation 13 Income Tax (Construction Industry Scheme) Regulations 2005 must take into account sub-contractors’ tax positions not reflected in a direction under Regulation 9(5) – no – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2018/04434**

**BETWEEN**

**PETER ORMANDI**

**Appellant**

**-and-**

**THE COMMISSIONERS FOR  
HER MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE ASHLEY GREENBANK  
IAN MENZIES-CONACHER FCA**

**Sitting in public at Birmingham on 23 April 2019 and following further written representations by the parties**

**Mr Peter Kosar of ASP Corporate for the Appellant**

**Mr Muhammad Khan, litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents**

## **DECISION**

### **INTRODUCTION**

1. This is an appeal by Mr Peter Ormandi against two decisions of the Commissioners for Her Majesty's Revenue & Customs ("HMRC"), which are contained in two determinations made under Regulation 13(2) of the Income Tax (Construction Industry Scheme) Regulations 2005 (the "CIS Regulations") each of which is dated 22 March 2018.

2. The determinations relate to amounts which HMRC say should have been deducted under section 61 of the Finance Act 2004 ("FA 2004") by Mr Ormandi from payments made to sub-contractors in the course of his business and for which Mr Ormandi was required to account to HMRC under Regulation 7 of the CIS Regulations. The determinations are in the aggregate amount of £22,424.20 and relate to payments made by Mr Ormandi in the tax years 2013-14 to 2017-18. (In this decision notice, we have referred to the legislation which governs the obligations of contractors to deduct amounts from payments made to subcontractors more generally as the "Construction Industry Scheme" or the "Scheme".)

3. Mr Ormandi accepts that the relevant payments fell within the scope of the Construction Industry Scheme; that he should have made deductions from the payments; and that he should have accounted to HMRC for the amounts deducted from the payments. However, he challenges the amount demanded by the determinations on the grounds that the relevant subcontractors have paid (or will pay) tax on income or profits which reflect the payments that he has made to them.

4. Mr Ormandi's appeal was made to HMRC outside the 30 day time limit specified by s31A of the Taxes Management Act 1970 ("TMA"). HMRC did not agree that an appeal could be made outside the time limit. Mr Ormandi therefore applied to the Tribunal for permission to make a late appeal.

### **THE HEARING**

5. We were provided with an agreed bundle of documents for the hearing. We also heard evidence from Mr Ormandi.

6. Following the hearing, HMRC made further written representations to the Tribunal. We accepted those representations and permitted Mr Ormandi to make representations in response. His advisers made further representations supported by additional documentary evidence, which we have accepted.

### **THE FACTS**

7. We have set out our findings of fact below.

8. Mr Ormandi carried on business as a painter and decorator. He also undertook work installing flooring, fitting kitchens and bathrooms and constructing outdoor decking.

9. In the relevant tax years, Mr Ormandi made payments to sub-contractors. Mr Ormandi accepts that those payments fell within the Construction Industry Scheme and that under the Scheme, unless the sub-contractors were registered to receive payments gross, he was obliged to make deductions at source from the payments that he made to sub-contractors (at a fixed rate of 20% or 30% depending upon whether the sub-contractors were or were not registered with HMRC) and to account to HMRC for the amounts, which he was required to deduct.

10. Mr Ormandi did not make any deductions from any of these payments as required by the Construction Industry Scheme and did not account to HMRC for any amounts that he should have deducted from payments made to sub-contractors.

11. On 26 April 2017, HMRC opened an employer compliance check into the records of Mr Ormandi. HMRC held meetings with Mr Ormandi on 9 May 2017 and 11 May 2017. Mr Ormandi acknowledged from the outset that he was not aware of the Construction Industry Scheme, that he had not made deductions from payments to his sub-contractors as required by the Scheme and that he had failed to account for the tax due.

12. There followed a period during which HMRC sought clarification of various matters following the information provided by Mr Ormandi at the initial meetings. HMRC issued several information notices in order to obtain information and documents. At times, Mr Ormandi was slow to respond to those notices. HMRC issued penalty notices in relation to some of the notices. But, in the final analysis, Mr Ormandi provided all of the information that was requested and paid all of the related penalties.

13. Although we were not provided with the documentary evidence to support this, it is clear that at some point, Mr Ormandi (or someone on his behalf) made an application for a direction under Regulation 9(5) of the CIS Regulations 2005 relieving Mr Ormandi from liability on the grounds that the relevant subcontractors had made tax returns and paid the income tax and national insurance contributions (“NICs”) in respect of any relevant income or profits in which the payments were taken into account (within Regulation 9(4)(ii) of the CIS Regulations).

14. On 10 October 2017, HMRC issued two decision notices in response to Mr Ormandi’s application: the first allowed the claim for relief for some of the payments to some of the sub-contractors; the second denied relief for the remainder of the payments (including, in some cases, payments made to the same sub-contractors identified in the first notice albeit in respect of different payments in different tax years). The second notice also contained a statement informing Mr Ormandi that he had no right of appeal against the decision notice.

15. On 19 January 2018, HMRC sent a letter to Mr Ormandi notifying him of HMRC’s intention to make a determination under Regulation 13(2) of the CIS Regulations and to issue penalties in the amount of £4,781.48 under Schedule 55 to the Finance Act 2009 in respect of Mr Ormandi’s failures to file monthly returns and account for amounts deducted under the Scheme for the relevant periods.

16. On 12 February 2018, Mr Ormandi’s agent (Mr Kosar) sent an email to HMRC accepting HMRC’s decision regarding the amounts owed and asking if “any reductions” were available as Mr Ormandi was unable to pay the outstanding amount at once.

17. On 22 February 2018, HMRC (Ms Coleman) called Mr Ormandi to discuss proposals for payment. On this call, Mr Ormandi advised Ms Coleman that two other sub-contractors had now submitted their returns. Ms Coleman agreed to review the decision notices in the light of that information.

18. On 13 March 2018, HMRC issued two updated decision notices in response to Mr Ormandi’s application for a direction under Regulation 9(5) of the CIS Regulations. The notices were in similar form to those issued on 10 October 2017, except that an additional payment was included in the list of payments in the first notice for which relief was allowed and that payment was removed from the list of payments in the second notice for which relief was denied. Details of the payments referred to in the second notice are set out in the Appendix to this decision notice. We have anonymized the details of the sub-contractors to whom the payments were made. Once again, the second notice included a statement that there was no right of appeal against the notice.

19. On 22 March 2018, HMRC issued two determinations under Regulation 13(2) of the CIS Regulations for periods from 6 June 2013 to 5 July 2018:

- (1) the first in the amount of £10,829.20 (in respect of payments from which deductions should have been made at 20%); and
- (2) the second in the amount of £11,595.00 (in respect of payments from which deductions should have been made at 30%).

The determinations contained standard language setting out the process by which Mr Ormandi could appeal against the determinations.

20. HMRC also notified Mr Ormandi that he would be liable to penalties under Schedule 55 to the Finance Act 2009 in respect of his failures to file monthly returns and account for amounts deducted under the Scheme for the relevant periods. Those penalties have not been disputed by Mr Ormandi.

21. On 4 April 2018, Mr Kosar wrote to HMRC requesting an explanation as to why Mr Ormandi had to pay the outstanding amounts when the sub-contractors had disclosed the payments in their tax returns and paid any income tax and NICs due.

22. HMRC (Ms Coleman) replied on 19 April 2018. She advised that there was no provision within the legislation for relief from liability on the grounds that a recipient would account for income tax and NICs in the future and that that no further claims under Regulation 9(4) could be considered once formal determinations had been raised.

23. On 24 May 2018, Mr Kosar called HMRC again to reiterate his point that the sub-contractors had taken the payments into account in their income and profits and paid any tax and NICs due.

24. On 29 May 2018, HMRC (Ms Coleman) wrote to Mr Ormandi. In that letter, she informed Mr Ormandi that the 30 day time period for an appeal against the determinations issued on 22 March 2018 had expired and that as no appeal had been made she was “closing her review”.

25. Mr Ormandi submitted an appeal to Tribunal on 10 July 2018.

#### **MATTERS ARISING FROM THE EVIDENCE**

26. Mr Ormandi presented documentary evidence that some of the sub-contractors had filed tax returns for the tax years in which the payments reflected in the second updated decision notice (and taken into account in the determinations) were made. That evidence took the form of copies of on-line tax returns and/or on-line filing receipts and/or summary tax calculations for some of the sub-contractors for some of the relevant tax years and, in one case, a copy of the S041 form showing that relevant social security contributions had been paid in another EU member state by or on behalf of one of the sub-contractors.

27. We have identified in the table in the Appendix to this decision notice the sub-contractors in respect of whom there is evidence of their having filed a tax return in the tax year in question, the nature of that evidence and, where it could be discerned from the evidence before us, the date on which the relevant return was filed.

28. Mr Khan pointed out that the evidence that the returns were filed did not amount to direct evidence that the relevant tax had been paid. We accept that submission. It is also the case that it is not possible to identify from the evidence before us whether or not the payments made by Mr Ormandi are reflected in the income or profits shown in the returns. However, although the evidence is not direct, for those sub-contractors for whom there is evidence of tax returns having been filed, the inference that we draw from the evidence is that the tax affairs of those sub-contractors was in order. We therefore accept that, on the balance of probabilities, those sub-contractors made a tax return for those tax years, the payments from Mr Ormandi were

taken in computing their income of profits as shown in that return and that the relevant income tax and NICs have been paid.

29. We noticed that the figures set out in the determinations for the amounts that had not been deducted from the payments made to sub-contractors were in some cases not equal to 20% or 30% of the relevant payment. In response to questions raised by the Tribunal at the hearing, Mr Khan in his written submissions pointed out that these discrepancies can arise where the total payment made to a sub-contractor included reimbursements for the use of materials or where a sub-contractor registered part way through a contract so that the rate at which amounts had to be deducted would fall from 30% to 20%. Mr Khan gave some examples in his submissions of cases in which the payments that had been made to the sub-contractors in this case included payments in respect of materials.

30. Mr Ormandi does not dispute that figures set out in the determinations represent the amounts that should have been deducted from the payments under s61 FA 2004 assuming that there was no relief available for cases in which sub-contractors have paid tax and NICs on receipt of the payments. We have therefore accepted the figures in the determinations as being correct subject to the question as to whether any relief should be given in cases where the relevant sub-contractors have paid tax on the income or profits which reflect the payments.

#### **THE APPLICATION FOR PERMISSION TO MAKE A LATE APPEAL**

31. We considered Mr Ormandi's application to make a late appeal by reference to the principles set out by the Upper Tribunal in *William Martland v Revenue and Customs Commissioners* [2018] UKUT 178 (bearing in mind the process suggested by the Upper Tribunal at [44]).

32. Having heard submissions from the parties, we granted the application for permission for Mr Ormandi to give notice of his appeal outside the relevant time limit in s31A TMA. Our reasons were as follows.

(1) The length of the delay was over three months, which in the light of the comments of the Upper Tribunal in *Romasave Property Services Limited v Revenue and Customs Commissioners* [2015] UKUT 254, we regarded as both significant and serious.

(2) The reasons given by Mr Kosar for the delay were that Mr Ormandi was confused by the statements in the decision notices sent to him on 10 October 2017 and 13 March 2018, which he had taken to mean that he had no right of appeal. It was only after doing further research that Mr Kosar was able to establish on Mr Ormandi's behalf that Mr Ormandi did have a right of appeal to the Tribunal against the determinations issued by HMRC on 22 March 2018.

(3) We agreed that the statements in the decision notices and the determinations might appear contradictory and it was understandable that Mr Ormandi might not have immediately appreciated that he continued to have a right to appeal the determinations.

(4) It should have been clear to HMRC from the telephone conversations which Mr Kosar had with them on 4 April 2018 and 24 May 2018 that Mr Ormandi was continuing to dispute the liabilities as set out in the determinations.

(5) The appeal had been notified within approximately six weeks of the receipt of HMRC's letter of 29 May 2018 "closing the review".

(6) On balance, we regarded the reasons given by Mr Ormandi for any delay as cogent and as outweighing any prejudice to HMRC in permitting a late appeal.

## **THE SUBSTANTIVE ISSUE**

33. Mr Ormandi challenges the amounts of the determinations, in particular, he objects to the determinations including payments, which have been taken into account in the computing the income tax and NICs of the sub-contractors where the sub-contractors have accounted to HMRC for those amounts.

### **The relevant legislation**

34. The obligation on contractors to make deductions from “contract payments” to sub-contractors under the Construction Industry Scheme is set out in s61 FA 2004. It provides:

#### **61 Deductions on account of tax from contract payments**

(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.

35. The rates at which amounts must be deducted from contract payments are 20% if the person for whose labour the payment in question is made is registered with HMRC for payment under deduction or 30% if that person is not registered (Finance Act 2004, Section 61(2) (Relevant Percentage) Order 2007).

36. The definition of a “contract payment” is found in s60(1) FA 2004. It provides:

#### **60 Contract payments**

(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.

The remainder of s60 FA 2004 contains some exceptions from this definition, but they are not relevant in this case.

37. Under Regulation 7(1) of the CIS Regulations, a contractor is required to account to HMRC for all amounts that he or she was required to deduct from contract payments. It provides:

#### **7 Payment, due date for payment of amounts deducted and receipts**

(1) A contractor must pay to the Commissioners for Her Majesty's Revenue and Customs all amounts he was liable under section 61 of the Act to deduct

on account of tax from contract payments made by him during that tax period—

(a) within 17 days after the end of the tax period, where payment is made by an approved method of electronic communications, or

(b) within 14 days after the end of the tax period, in any other case.

The “tax period” is usually one month. However, the CIS Regulations allow some contractors to elect to account quarterly in certain circumstances (see Regulation 8).

38. Regulation 9 of the CIS Regulations permits HMRC to direct that a contractor shall not be liable to account to HMRC for amounts which should have been deducted from contract payments (and which were not in fact deducted) in certain cases. It provides, so far as relevant:

**9 Recovery from sub-contractor of amount not deducted by contractor**

(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 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) ...

39. Regulation 13 contains the power for HMRC to make a determination of the amount which a contractor is liable to pay under the CIS Regulations. It provides, so far as relevant:

**13 Determination of amounts payable by contractor and appeal against determination**

(1) This regulation applies if—

(a) ...

(b) an officer of Revenue and Customs has reason to believe, as a result of an inspection under regulation 51 or otherwise, that there may be an amount payable for a tax year under these Regulations by a contractor that has not been paid to them, or

(c) an officer of Revenue and Customs considers it necessary in the circumstances.

(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, 5A 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.

...

### **The parties' submissions**

#### ***Mr Ormandi's submissions***

40. On behalf of Mr Ormandi, Mr Kosar makes the following submissions.

(1) In the first updated decision notice, HMRC made a direction under Regulation 9(5) of the CIS Regulations which identifies some payments made by Mr Ormandi to sub-contractors in respect of which the relevant sub-contractors have included those amounts in their tax returns and paid income tax and NICs on the relevant income and profits. Those amounts are excluded from the determinations made by HMRC under Regulation 13. However, the direction under Regulation 9(5) does not include all of the payments which have been included in the returns of sub-contractors and on which sub-contractors have paid tax.

(2) The result is grossly unfair. Mr Ormandi has accepted that he failed to operate the Construction Industry Scheme properly or at all. He has cooperated with HMRC. He has paid all the related penalties. The sub-contractors in question have made tax returns and accounted for tax on relevant income and profits which includes the payments made by Mr Ormandi. If Mr Ormandi is now charged on amounts which should have been deducted from those payments, the effect is double taxation and a windfall for HMRC.

#### ***HMRC's Submissions***

41. For HMRC, Mr Khan makes the following submissions:

(1) HMRC have made directions under Regulation 9(5) of the CIS Regulations on two occasions.

(2) HMRC checked all the available evidence at the time and were not satisfied that the condition in Regulation 9(4) was satisfied in respect of the payments to the other sub-contractors who were listed in the second updated decision notice and whose payments formed the basis of the determinations.

(3) The determinations took into account the directions that had been made under Regulation 9(5). There was no further obligation on HMRC to make any further enquiry.

(4) Once a determination had been issued under Regulation 13(2), it was not possible for Mr Ormandi to make a claim for a further direction under Regulation 9(3) or (4).

(5) Where an appeal against a determination under Regulation 13 was heard by the Tribunal, the determination must stand unless the contractor could show that either (i) the contractor has been overcharged (for example, on an estimated determination); (ii) no payment subject to deductions under the Scheme had been made; or (iii) the payments were made to a sub-contractor who was registered for gross payments before the payment in question was made. None of those circumstances applied in this case.

## **Discussion**

42. The only question in this case is whether Mr Ormandi should be entitled to relief from his obligations on the grounds that the sub-contractors would account for tax and NICs on income or profits which reflected the payments that they had received.

43. Our starting point is Regulation 13 of the CIS Regulations. Regulation 13 sets out the circumstances in which HMRC may make a determination of amounts for which a contractor is liable to account under the Construction Industry Scheme. There are three sets of circumstances in which HMRC may make a determination. They are set out in sub-paragraphs (a) to (c) of Regulation 13(1). Mr Ormandi does not dispute that the requirements of sub-paragraph (b) were fulfilled.

44. In such circumstances, under Regulation 13(2), HMRC “may determine” the amount which a contractor “is liable to pay under [the CIS Regulations]” to the “best of [their] judgment”.

45. The amount which the contractor is “liable to pay” under the CIS Regulations is the amount which the contractor was liable to deduct on account of tax from contract payments made by him under Section 61 FA 2004 (see Regulation 7(1)). This is the full amount of the deductions which the contractor is required to make from contract payments in the relevant period without any relief to reflect the possibility that the sub-contractors may also pay tax and NICs on income or profits which reflect the payments that have been received. In the present case, Mr Ormandi does not dispute that the payments which he made to the sub-contractors (including those reflected in the determinations) were “contract payments” within the Construction Industry Scheme and that he was obliged to deduct amounts from those payments under s61 FA 2004 identified in the determinations at the times at which the payments were made.

46. Regulation 13(3), however, requires that the determination under Regulation 13(2) must not include amounts in respect of which a direction has been made under Regulation 9(5). A direction can be made under Regulation 9(5) in two sets of circumstances.

(1) The first is set out in Regulation 9(3). It relates to errors in the operation of the Scheme by contractors who have taken reasonable care to comply with its requirements. It is not relevant in this case.

(2) The second is set out in Regulation 9(4). It applies where HMRC is satisfied that the person to whom the contract payment was made was either not subject to UK tax in respect of that payment or has made a tax return in which the payment was taken into account in computing income or profits and has paid tax and NICs on any relevant income or profits.

47. As we have mentioned above, HMRC made two directions under Regulation 9(5) in this case. Those directions excluded certain payments from the scope of the CIS Regulations on the basis that they fell within Regulation 9(4). Those payments have been excluded from the determinations made by HMRC under Regulation 13(2) as required by Regulation 13(3).

48. The question for the Tribunal is, therefore, whether any of the other payments currently reflected in the determinations, and in respect of which Mr Ormandi has provided evidence that the sub-contractors have made tax returns, should also be excluded from the determinations. We have concluded, with some reservation given the facts of this case, that they cannot. Our reasons are as follows.

(1) We considered whether, given the evidence of the sub-contractors having filed tax returns provided by Mr Ormandi, it could be said that the determinations have not been made to the “best judgment” of HMRC. We have concluded that this is not the case.

(2) The wording of Regulation 13(2) requires HMRC to make a determination in an amount equal to its best judgment of the amounts which a contractor is liable to pay under the CIS Regulations. As we have mentioned above, the amount which the contractor is liable to pay is all of the amounts required to be deducted from all of the payments which fall within the scope of the Scheme.

(3) This is subject to Regulation 13(3) which requires HMRC to exclude from any determination made under Regulation 13(2) any amounts in respect of which a direction under Regulation 9(5) “has been made”. On the wording of Regulation 13(3) HMRC are therefore only required to exclude from a determination amounts included in a direction which has actually been made before the time of the determination.

(4) The wording of Regulation 13(3) also precludes the making of a direction under Regulation 9 after the date on which a determination has been made. It seems to us that the intention is that Regulation 9 and Regulation 13 are mutually exclusive. If an amount is included in a direction made under Regulation 9(5) it cannot be included in a subsequent determination under Regulation 13, but if an amount is included in a determination under Regulation 13, it cannot thereafter be the subject of a direction under Regulation 9.

(5) Furthermore, if we were to take the view that the determination must take into account amounts which were not reflected in a direction, the effect would be to permit an appeal against a refusal to make a direction under Regulation 9(4). As can be seen from the wording of Regulation 9, Regulation 9 permits an appeal to be made against the refusal by HMRC to make a direction in circumstances in which the condition in Regulation 9(3) is met. However, there is no equivalent right to appeal against a refusal of HMRC to make a direction under Regulation 9(4).

(6) If we were to permit an appeal in the present case on the current grounds, the effect would be to breach these principles unless the existing determinations were withdrawn and revised determinations made.

49. For all of these reasons, and with some reservation, we conclude that the amounts in the determinations are in accordance with the scheme of the legislation unless the existing determinations are withdrawn and revised determinations made. The power to withdraw or make a further determination is within the discretion of HMRC and the Tribunal has no inherent jurisdiction to supervise the exercise of those powers by HMRC. If Mr Ormandi is to challenge the determinations made by HMRC on the grounds that he has raised, he could only do so by way of an application for judicial review. This Tribunal has no jurisdiction to consider such an application.

50. In the present circumstances, that might be regarded as an unsatisfactory result. Whilst it is true that Mr Ormandi failed to operate the Construction Industry Scheme, he has subsequently co-operated with HMRC and paid all related penalties; the effect of our decision is double taxation of these payments. However, in our view that is an inescapable result of the legislation.

**DECISION**

51. We dismiss this appeal.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

52. 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.

**ASHLEY GREENBANK  
TRIBUNAL JUDGE**

**Release date: 05 November 2019**

**APPENDIX**

Details of payments to sub-contractors for which relief under Regulation 9(4) was not allowed.

Subcontractor	Tax year of payment	Amount of payment	Amount deductible	Amount under deducted	Evidence of filing	Date on which tax return filed
A	2016/17	2,030	406	406	Copy return	undated
B	2014/15	320	96	96		
B	2015/16	5,080	1,524	1,524		
C	2017/18	1,064	319	319	Copy receipt and calculation	20.07.2019
D	2015/16	17,001	3,289	3,289	Copy receipt and calculation	02.10.2017
D	2016/17	20,983	4,001	4,001	Copy return	undated
D	2017/18	3,165	553	553	Copy return	undated
E	2016/17	9,680	2,307	2,307	Copy receipt and return	24.11.2017
E	2017/18	1,150	230	230	Copy receipt and return	07.06.2018
F	2014/15	8,027	2,408	2,408	Copy return and S041	undated
G	2016/17	1,210	363	363		
H	2016/17	19,590	5,568	5,568	Copy receipt and return	10.10.2017
H	2017/18	2,460	492	492	Copy receipt and return	10.05.2018
I	2015/16	2,390	717	717		
J	2014/15	200	60	60		
K	2017/18	256	51	51		
L	2014/15	110	22	22		