



**TC01228**

**Appeal number TC/2009/12131**

***NATIONAL INSURANCE CONTRIBUTIONS – enterprise zone capital allowances – set against trading income in self-assessment of Class 4 NICs – evidence of HMRC allowing such set-off in other cases – was it unfair to deny set-off in this case –tribunal jurisdiction - appeal dismissed***

**FIRST-TIER TRIBUNAL**

**TAX**

**BRIJESH J PATEL**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: Nicholas Aleksander (Tribunal Judge)  
John Coles**

**Sitting in public at 45 Bedford Square, London WC1 on Monday 28 February 2011**

**D Amin of Amin, Patel and Shah, Accountants for the Appellant**

**Paul Shea, an officer of HM Revenue and Customs, for the Respondents**

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## DECISION

1. This appeal relates to the liability of the Appellant, Mr Brijesh Patel, to Class 4 national insurance contributions ("NICs") for the 2005/6 tax year.
- 5 2. Mr Patel was represented by his accountant Mr Amin. HMRC were represented by Mr Shea. We had before us a bundle of documents.
3. The background facts and substantive law are not in dispute.
4. Mr Patel is a dentist and practised as such throughout the tax year 2006/7. In the 2006/7 tax year, Mr Patel subscribed for units in the Tritax Next EZ Unit Trust, giving rise to an entitlement to 100% industrial building allowances (as the unit trust had in turn invested in a qualifying building in an enterprise zone). In his tax return, Mr Patel set this loss (£48,844) against the profits of his dental practice in computing his liability to income tax. He also set this loss against the profits of his dental practice in computing his liability to Class 4 NICs.
- 10 5. On 21 January 2008, HMRC opened an enquiry into Mr Patel's tax return for the purposes of reviewing his claim to enterprise zone capital allowances and into student loan repayments. During the course of the enquiry, Mr Patel supplied a certificate issued by the unit trust to HMRC confirming his entitlement to capital allowances of £45,663. Mr Patel also confirmed that a liability to repay student loans of £603 had been omitted from the tax return.
- 15 6. On 6 August 2008, HMRC issued a closure notice and amended the 2006/7 tax return. The amendments included additions for the student loan repayments, a reduction in losses to the reported figure of £45,663, and the removal of relief for those losses from the computation of the Class 4 NICs.
- 20 7. An appeal was made against the amendments on the grounds that HMRC have in the past allowed enterprise zone capital allowances against trading profits for Class 4 purposes.
- 25 8. In determining Mr Patel's liability to Class 4 NICs, Mr Amin agrees that there is no statutory basis on which capital allowances arising in respect of expenditure on buildings in an enterprise zone ("EZ allowances") can be set against earnings from a profession. However he argues that there is an established practice of HM Revenue and Customs to allow relief, such that Mr Patel has an enforceable legitimate expectation to the relief.
- 30 9. Mr Amin's argues that he has prepared tax returns for many of his clients where he has set EZ allowances against profits in calculating Class 4 NICs. Mr Amin said that due to the duty of confidentiality that he owed his clients, he could not disclose details of these cases without the consent of the relevant client. He had been given such consent in one case. That case was the subject of an enquiry by HMRC. In correspondence the HMRC officer conducting the enquiry raised in correspondence the point that EZ allowances could not be set against profits in calculating Class 4 NICs, however (for reasons which are not apparent on the face of the documents
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before us), the enquiry was closed on the basis that the EZ allowances were allowed against profits for Class 4 NICs purposes.

10. Mr Amin says that this (and the other cases which he could not disclose) evidence a policy on the part of HMRC to allow EZ allowances to be taken into account for Class 4 NICs purposes. He says that the terms of the closure of the enquiry by the HMRC officer would have been subject to review by the officer's immediate line manager, and would then have also been subject to the approval of the Board of HMRC. Mr Shea says that this case does not evidence any policy on the part of HMRC, rather it was a mistake.

11. We had no evidence that this particular case would have been referred to the Board of HMRC for approval, and from our experience consider that straightforward enquiry cases (such as this one) would not be referred to the Board. Mr Amin's only grounds for arguing that there would have been a reference to the Board is his experience that agreements settling back-duty cases are signed in the name of the Board of Inland Revenue. However in our view this was because this is the legal name of the (then) Inland Revenue, and does not in any way suggest that the case was reviewed by Board itself.

12. "Legitimate expectation" is a doctrine of administrative law, deriving from the principle that public authorities must act fairly. Although a formally published statement or an consistent administrative practice might bind HMRC, it does so because it gives rise to a legitimate expectation enforceable by judicial review, rather than under tax and NIC statutes. Subject to recent developing case law, this tribunal only has the jurisdiction given to it under tax statutes, and does not have jurisdiction to require HMRC to give effect to the legitimate expectation of taxpayers as a matter of administrative law. Such remedies must be sought in the High Court by way of judicial review (although the High Court has discretion to transfer such case to the Tax and Chancery Chamber of the Upper Tribunal).

13. As Mr Amin concedes, as a matter of NIC statutory law, EZ allowances cannot be set against profits in calculating Class 4 NICs. Our jurisdiction is limited to NIC statutes, and any remedy for legitimate expectation must be sought elsewhere. For these reasons we dismiss the appeal.

14. However we recognise that there is developing case law on the jurisdiction of this tribunal as regards the legitimate expectation of taxpayers. In the event that we are wrong on the limits of this tribunal's jurisdiction, we have considered whether the conduct of HMRC gives rise to an enforceable legitimate expectation for Mr Patel.

15. In our view, the conduct of HMRC in relation to other matters does not give rise to any legitimate expectation for Mr Patel. We were referred by Mr Shea to three cases: *R (oao Weston) v Inland Revenue*, *R (oao Esterson) v HMRC* and *R (oao Wilkinson) v Inland Revenue*.

16. Of these we consider that the decision of Moses J in *Weston* is the most apposite. In refusing permission to allow an application for judicial review, Moses J says:

5 "There is no arguable fairness in [HMRC] pursuing that duty merely because, for some reason, they have failed to pursue their obligations in relation to the other taxpayers. Nor could it possibly be contended that there was unfairness to the other taxpayers since they had the good fortune ... to have escaped the tax. But the mere fact that two taxpayers in arguably the same situation have not in fact been charged tax does not raise a case of unfairness without more."

10 17. The situation described by Moses J is exactly the situation in this case. Merely because some taxpayers appear to have been allowed to set EZ allowances against profits in calculating their Class 4 NICs, does not create unfairness for Mr Patel giving rise to any enforceable rights against HMRC. For this reason Mr Patel's appeal must be dismissed.

15 18. 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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**NICHOLAS ALEKSANDER**

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**TRIBUNAL JUDGE**  
**RELEASE DATE: 8 June 2011**

30 Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 8 July 2011.