



TC01305

Appeal number: SC 3027/2009

Income Tax and National Insurance, discovery assessment; whether assessment excessive; No; appeal dismissed

FIRST-TIER TRIBUNAL

TAX

DAVID SCOTT REID THOMSON

Appellant

- and -

THE SERIOUS ORGANISED CRIME AGENCY

Respondents

TRIBUNAL JUDGE:
Member:

J GORDON REID, Q.C., F.C.I.Arb.
PETER SHEPPARD, F.C.I.S., F.C.I.B., ATII

Sitting in public at George House, 126 George Street, Edinburgh on 23 May 2011

Graeme Robbie, Accountant, t/a Robbie & Co., Accounting Services Dundee for the Appellant

David Yates, barrister for the Respondents

DECISION

Introduction

1. The taxpayer appeals against discovery assessments for the years 1996/1997 to
5 2005/2006 all raised on 16 January 2008. The Serious Organised Crime Agency (the
“Agency”) assumed responsibility for these appeals from its predecessor, the Assets
Recovery Agency in terms of Section 317 of the Proceeds of Crime Act 2002. The
Assets Recovery Agency merged with the Agency on 1 April 2008. Penalty
Determinations for the same years of assessment were issued on 7 December 2009
10 and again, it seems, on 21 January 2010. It was accepted that these would stand or
fall with the outcome of this appeal.

2. A Hearing took place in Edinburgh on 23 May 2011. The Appellant, who gave
evidence, was represented by Graeme Robbie, an accountant trading as Robbie & Co,
Accounting Services, Dundee. The Agency was represented by David Yates,
15 barrister. He led the evidence of Roy Stoddart, a senior official with the Agency.
Two large lever arch files of documents were produced. They included witness
statements from the Appellant and Mr Stoddart, and a witness statement from John
Freeman, another senior official of the Agency who had previously been in charge of
the investigation and appeal.

20 The Assessments and Grounds of Appeal

3. Under Section 317 of the 2002 Act, the Agency (and prior to the merger) the
Assets Recovery Agency were entitled to assume the functions of the Commissioners
of Her Majesty’s Revenue and Customs “(HMRC”) if they have reasonable grounds
to suspect that income arising or a gain accruing to a person in respect of a chargeable
25 period is chargeable to income tax or is a chargeable gain and arises or accrues as a
result of the person’s or another’s criminal conduct. A statutory notice was duly
served by the Assets Recovery Agency on HMRC on 19 December 2007 intimating
that they intended to carry out the general HMRC functions in relation to the
Appellant for the periods of assessment which are the subject of appeal. The basis for
30 this step was a considerable body of police and Customs intelligence and reports that
the Appellant had been trading in contraband goods since about 1995.

4. On 16 January 2008, the Assets Recovery Agency wrote to the Appellant
enclosing Notices of Schedule D Income and National Insurance assessments as
follows:-

35	1996/97	£5,948.40
	1997/98	£5,726.85
	1998/99	£5,717.55
	1999/00	£5,606.15
	2000/01	£5,795.95

	2001/02	£5,709.25
	2002/03	£5,681.25
	2003/04	£5,880.30
	2004/05	£5,834.10
5	2005/06	£5,780.70

These assessments, amount in total to £57,680.50, and were based on an estimated annual income of £25,000. Penalty Determinations over the same period amount in total to £23,072.50.

5. The ground of appeal for the assessment relating to the tax year 1996/1997 is

10 *The estimated income/profit for the tax year is a fiction. I earned no income other than that on which PAYE was levied.*

For all subsequent years, the ground of appeal is

The estimated income/profit is fiction. I earned nothing in the financial year

6. These grounds of appeal have *evolved* since then. In a letter from the Appellant's solicitors to the Assets Recovery Agency dated 21 January 2008, it was stated that

20 *Throughout the period upon which you have assessed Mr Thomson he was unemployed. He was not in receipt of benefits as a consequence of erroneous information been (sic) given to him by the Benefits Agency in Dundee. That is a matter he is reviewing with them. However, he is in receipt of Benefits now and has been for some time. During the period he was unemployed and not earning he was reliant on the income of his wife.*

7. In a letter from the same solicitors to the Agency dated 15 May 2008, it was stated that

25 *In the meantime would you note that our client's position is that having lost his employment in 1996-1997 he did not trade nor have any source of income. He advises that he attempted to "sign on" only to be told that as his wife was in employment she would require to support him. From that moment on until such times as he did "sign on" he was supported by his wife.*

8. The Agency produced a note of a telephone conversation with Mr Robbie on 30 5 March 2009 in which Mr Robbie appeared to intimate that the Appellant had traded in the purchase and sale of dog food.

9. The Appellant's tax returns for the tax years 6 April 1997 to 5 April 2006, submitted on 2 April 2009, disclose that he was trading in the years 1999/2000 to 2003/2004. The Appellant's witness statement dated 16 November 2010 records that

for the years 1999/2000 to 2000/2004 he traded in various items including pet related products, and bags of sweets and the delivery of advertising flyers and leaflets.

10. The grounds of appeal do not raise the question of *best judgment*. No argument that the assessments were not made to best judgment was raised at the Hearing. It is sufficient to note that, in the circumstances which we shall describe, the figures are nothing other than estimates. They were the best that could be done on the material before the Assets Recovery Agency. The onus here is on the Appellant to show that the assessments are excessive (see *Rouf v R&C Comrs 2009 STC 1307 paragraph 36*).

Facts

11. HMRC passed information to the Assets Recovery Agency regarding the Appellant's activities. It was suspected that he was involved in the sale of contraband cigarettes. The information disclosed to us satisfies us that there were reasonable grounds for such suspicion. The Assets Recovery Agency took over HMRC functions in relation to the Appellant as described above. Eventually, the Agency obtained bank statements of an account (No ****27) held in the Appellant's name with the Clydesdale Bank. Estimated tax assessments were issued in January 2008. The Appellant consulted Lawson, Coull & Duncan, solicitors, Dundee, who lodged notices of appeal on his behalf. Thereafter, various attempts were made to obtain financial documentation from the Appellant. The Appellant consulted Mr Robbie at the end of August 2008.

12. On 2 April 2009, Mr Robbie, on behalf of the Appellant, submitted tax returns for the years 1997/1998 through to 2005/2006. These were all signed by the Appellant on 1 April 2009. Mr Robbie also, on behalf of the Appellant, prepared and submitted accounts for the years ended 5 April 2000 through to 5 April 2004, but not for the years 1996/1997, 2004/2005 or 2005/2006. No underlying business records appeared to exist to support the accounts. No such records have been produced beyond certain bank statements which we refer to below. The accounts were prepared on the basis of information provided by the Appellant. As there are no underlying records there can be no other basis on which to prepare them. They are unreliable because the information provided by the Appellant is unreliable. He gave no credible explanation in his evidence to the Tribunal of trading which would support the terms of the accounts prepared.

13. The Tax Return for the year ended 5 April 2000 disclosed trading income of £5,531.32 and a gross profit of £2970.86 and purported to show after allowances no tax due. The Tax Return for the year ended 5 April 2001 disclosed trading income of £19,652.06 and a gross profit of £4,199.34 and purported to show, after the deduction of allowances, no tax due. The Tax Return for the year ended 5 April 2002 disclosed trading income of £13,310.50 and a gross profit of £2,289.19 and purported to show, after the deduction of allowances, no tax due. The Tax Return for the year ended 5 April 2003 disclosed trading income of £30,233.23 and a gross profit of £5,687.45 and purported to show, after the deduction of allowances, net taxable income of £1,231.55. The Tax Return for the year ended 5 April 2004 disclosed trading income of £5,446.57 and a gross profit of £1,509.29 and purported to show, after the

deduction of allowances, no tax due. The Tax Return for the year ended 5 April 2005 disclosed no trading income and no tax due. The Tax Return for the year ended 5 April 2006 disclosed no trading income and no tax due.

5 14. On 6 March 2009, the Tribunal ordered the Appellant to produce details of his self-employment, his investments, and the purchase and disposal of all assets between 6 April 1996 and 5 April 2006. He was also ordered to produce his financial records and accounts for any period of self-employment during that period together with bank and building society accounts. Such material as has been produced does not
10 demonstrate clearly what the Appellant's source of income was over that period or how it was earned. It does not demonstrate that the assessments are excessive.

15 15. The Agency attempted to obtain clarification and records from the Appellant and to arrange meetings to discuss matters with him. The Appellant was not co-operative. They also discovered that the Appellant held various policies of assurance which had matured but had not been disclosed. Eventually, through Mr Robbie, the Appellant disclosed in April 2010 that he held *inter alia* 250 shares in the Bradford and Bingley plc, that he had held shares in Marconi Electronics, and that he had four life insurance policies on the joint lives of the Appellant and his wife; that two of them matured in 2005, and the other two matured in 2009 and 2010.

20 16. HMRC found no trace of the Appellant on their PAYE Employment and Self Employment tax record databases.

Basis of Assessment

25 17. As *best judgment* is not in issue, we summarise briefly how the figures in the notices of assessments were reached. HMRC held the Appellant's Clydesdale bank statements for the period 30 November 1999 to 22 April 2004. The lodgements for the tax years to 5 April 2001, 2002 and 2003 were added up and averaged to produce an estimated unreturned taxable profits for the tax years 1996/1997 to 2005/2006. It is common where an individual is trading on a cash basis (whether the trading activity is legal or illegal) for expenses to be paid in cash and the net sum deposited. The bank lodgements usually reflect net profit rather than turnover. That applied to the
30 Appellant as he conceded in evidence that that was how he operated.

Bank Accounts

35 18. The Appellant operated a bank account in his own name with the Clydesdale Bank, High Street Branch, Dundee (Account No ****27). Bank Statements covering the period between 30 November 1999 and 30 April 2004, and from 1 October 2005 to 24 May 2006 were produced. There are a number of substantial unexplained deposits. We note for example the deposit of £8,000 on 28 September 2000, £1,200 and £1,400 on 8 March 2002, £2,000 on 12 April 2002, £5,000 on 23 May 2002, £6,000 on 2 October 2002, £1,200 on 29 November 2002.

40 19. These represent a portion of the income received by the Appellant during period covered by these bank statements. What that portion is, is impossible, on the evidence, to determine.

20. The Appellant produced a single bank statement in his name *T/A Fast Flyers*. It covered the period between the end of March 2004 and 30 April 2004. There was one entry namely a credit transfer from another account in the sum of £165. This leads us to conclude that the Appellant probably had a business known as *Fast Flyers*.
5 However, it tells us nothing about the turnover or the profitability of that business. The Appellant's evidence at the Hearing did not enlighten us further.

21. Mrs Anne Thomson, the Appellant's wife has a bank account with Lloyds TSB Scotland at their Meadowside Branch, Dundee (Account No *****60). She worked full time for NCR Dundee at least from about September 2001 until April 2007. An
10 examination of the Lloyds bank statements produced shows monthly credit entries for her salary. The statements also show a substantial number of large unexplained deposits each year between the tax years ending 5 April 2002 through to 5 April 2005. We note for example deposits of £5000 on 21 December 2001, £4,000 on 24 December 2002, £2,000 on 7 January 2003, £4,500 on 8 January 2004, and £2,040
15 on 24 December 2004. The Appellant claimed he knew nothing about any of these deposits. We did not believe him. As Mrs Thomson had a full time job, we infer that these deposits or at least some of them are related to some of the Appellant's trading activities. No other source was suggested.

The Appellant's business interests during the years of assessments under appeal (our findings)
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22. We are prepared to accept that the Appellant at least started up some form of business selling pet food, sweets and flyers, because and only because there has been produced a bank statement with the trading name *Fast Flyers*. How long he carried on this activity, what the turnover or profit from it has not been established. Apart
25 from a bank statement in the name of *Fast Flyers* there are no business records at all to show that the business ever existed. But for that bank statement, we would not have accepted that the business ever existed. We do not consider the existence of this business for however long or short a period provides an adequate explanation for the numerous deposits in the Clydesdale Bank Account No ****27, with the High Street
30 branch, Dundee (the "Clydesdale Account").

Dealings with Customs and Excise Commissioners (subsequently HMRC)

23. According to documentary material lodged by the Agency, the Appellant has been stopped on several occasions in a vehicle containing large quantities of duty free spirit, cigarettes and hand rolling tobacco. One such occurrence was at Dover in 1998
35 when the goods were seized. Intelligence Reports indicated that the Appellant from 2000 has been collecting 30 to 40 boxes of tobacco each week from the South of Scotland, which had been transported there from the South of England. On 8 November 2000 he was stopped in a van heading north on the A74(M). The van contained 952000 cigarettes. These were seized. A few days later he was seen
40 running away from premises outside Perth. The premises contained 2,732 tonnes of Golden Virginia hand rolling tobacco and 5,360 cigarettes.

24. The documentary evidence produced to us included a transcript of an interview by Customs officials, which took place on 8 November 2000. The transcript was put to the Appellant in cross examination and he accepted its authenticity and accuracy at least in part. In the course of the interview, the Appellant indicated that he worked as a motor trader buying and selling cars. He made no mention of his pet food business (The Appellant could offer no explanation for this in cross-examination). He was interviewed by the police a few days later and provided no explanation for his presence in the vicinity of the premises outside Perth mentioned above. He also admitted to having been shoplifting for over 30 years.

10 *Previous Convictions*

25. The Appellant has a number of previous convictions mainly dating from his youth. These convictions related to theft, housebreaking and assault. His last conviction was for a speeding offence in 1998. He has spent short periods in a Young Offender's institution and in prison. He has not been in prison since the age of about 31 years. He is presently 61 years old.

The Appellant's Evidence

26. The Appellant's account of his financial circumstances and trading activities over the periods in question was vague, inconsistent, unsatisfactory, and lacking in credibility. He was obviously uncomfortable about giving evidence about his sources of income. He frequently declined to answer *difficult* questions in cross examination.

27. His general account was that he did not fully understand what was being asked of him when requested to disclose details of his income and assets. He first consulted Mr Robbie at the end of August 2008. He did not disclose to Mr Robbie details of various policies of insurance which had matured or the details of his time share in Aviemore. He did not disclose that he had some shares in Bradford & Bingley plc. He claimed he did not understand what personal allowances were. He also said he did not understand what *assets* meant.

28. Having given evidence about carrying on the business of selling pet food during part of the period to which the assessments relate, he could not explain why the solicitors he consulted stated in a letter to the Agency dated 15 May 2008 stated that *having lost his employment in 1996-1997 he did not trade nor have any source of income.*

29. He also gave evidence that during part of the period to which the assessments relates he was buying and selling cars and made money from that activity. He could not explain why income from that activity formed no part of the tax returns eventually submitted on his behalf by Mr Robbie.

30. His account of the running of the pet food business (combined with the distribution of flyers) was barely credible. The only document produced to show that it ever existed at all is page 1 of the Clydesdale Bank Statement dated 30 April 2004 in the name of the Appellant *T/A Fast Flyers*. There were no other records such as invoices, or any document bearing to show that he traded alone or in partnership

under the name *Fast Flyers* or something similar; or another trading name mentioned by the Appellant in evidence (*K9 Petfoods*). His explanation for the lack of records was that he fell out with his associate or partner, a Mr Conway, who destroyed the records in or before 2004. It was not clear whether the Appellant was saying he was
5 in partnership with him. The Appellant himself did not appear to know. He did say at one point that he shared profits with Mr Conway on a weekly basis.

31. The Appellant's account of the business was that it started up in 1999. Premises, namely a shop, were rented in the Hilltown area of Dundee in 1999. He had eight employees, probably part time. He did not know their names. He had a duplicating
10 machine for printing flyers. He bought pet food for dogs and cats, and other pet related goods from large supermarkets and re-sold the goods to his customers. He also distributed flyers. He said he had several hundred customers. Most paid in cash. He paid his employees in cash. He had no idea how much he paid out in wages from time to time. He also bought and sold sweets in the same way. He sold them at car
15 boot sales. He also said he bought and sold cars although this was said to be a hobby.

32. He said that the shop premises were visited by an Inland Revenue PAYE officer. When this was is not clear but we suspect it may have led to the cessation of the business being conducted from those premises.

33. As the Appellant produced one bank statement bearing the name *Fast Flyers* it
20 seems likely that he did at least start up a business along the lines described. How long it lasted and how much he earned there from is impossible to determine from the evidence with any reasonable degree of accuracy.

34. He had no or no satisfactory explanation for numerous substantial deposits in his Clydesdale Account.

25 35. When confronted with his wife's Lloyds bank statements, he claimed to have no knowledge of the numerous deposits (over and above her monthly salary) paid into her account almost on a weekly basis. We did not believe him. Either she had remunerative additional employment, which he must have known about or was perhaps a heavy and successful gambler which he also must have known about. He
30 offered neither as an explanation, simply denying that the funds originated from him. The strong suspicion must be that he was involved in the generation of funds which led to these deposits and that these funds were generated from activities which may have been unlawful.

36. The Appellant also claimed to have opened an account with the Bank of Scotland
35 at their Perth Road, Dundee Branch. If he did, there are no records relating to it.

37. We accept very little of his evidence. Generally, his evidence was unreliable and lacked credibility; it was vague and generally unsupported by the type of vouching which would ordinarily be expected. His assertion that he knew nothing of the deposits into his wife's account, though possible, did not seem credible to us.

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Submissions

38. Mr Robbie, on behalf of the Appellant, acknowledged that the Appellant had given inaccurate, incorrect and untruthful statements in the *lead-up to the Tribunal hearing*. He submitted that this was not deliberate. He accepted that the Appellant was not good at keeping accounts. He accepted too that, apart from the Appellant's evidence and what the Appellant disclosed to him, there was nothing to support the accounts he prepared. He was unable to say in what respect the assessments were excessive or what sums should be substituted.

39. Mr Yates pointed out that there was no issue on the question of entitlement to make a discovery assessment or that the onus lay on the Appellant to show that the assessments were excessive. He referred to *R (Pattullo v R&C Comrs 2010 STC 107 paragraphs 102 and 104*, and *Rouf v R&C Comrs 2009 STC 1307 at paragraphs 31, 32, and 36*).

40. He submitted that the Appellant's pet food trading activities were not vouched at all. His evidence was misleading and untruthful. His position changed over time. Large sums of cash may never have been banked at all. Whether his activities were legal or illegal does not matter. The Appellant had not shown that the assessments were excessive.

Decision.

41. The onus lies on the taxpayer to show that the assessments should be discharged or reduced (*Rouf at paragraphs 31, 32 and 36*). The figures advanced in the Appellant's witness statement, no doubt prepared by Mr Robbie, were not adequately supported by credible or reliable evidence.

42. While we are prepared to accept that he started up a business in selling pet food, his account of the administration of that business was neither credible nor reliable. It was primarily a cash business for which no records appear to have been kept. We do not accept the convenient evidence that his associate or partner destroyed all the records. How long the business operated and at what level of turnover is impossible to say on the evidence we heard. We suspect it simply masks his earnings from other activities.

43. Unless the evidence of the lodging of cash deposits is regarded as comprehensive, the Agency calculations must be regarded as conservative. We were not able to find that the evidence as to the lodgements of the proceeds of the Appellant's earnings was comprehensive or satisfactory.

44. There is, to put it at its lowest, a strong suspicion that the Appellant has been involved in the distribution and sale of *contraband* goods on a large scale and that he has derived substantial income from such activity over the years with which the assessments under appeal are concerned. We do not need to conclude or make a finding that the Appellant is a *career criminal* or even that he has been involved in the distribution and sale of contraband goods. All we need to conclude, as we do, is that the evidence demonstrates that he has received substantial income which he did not

declare for income tax purposes for many years. The source and amount of that income have not been established. It is therefore impossible to conclude that the assessments are excessive, or for that matter, insufficient.

5 45. It is plain that there has been a loss of tax attributable to the fraudulent conduct on the part of the Appellant. No satisfactory explanation for the failure to lodge returns timeously was advanced. If the evidence does not justify a finding of fraudulent conduct on the part of the Appellant, it justifies a finding of negligent conduct. This entitles the assessments to be made not later than twenty years after the end of the chargeable period to which the assessment relates (Taxes Management Act 10 1970 s36). There was no assertion on behalf of the Appellant that the assessments for the tax years 1996/1997 to 2000/2001 were out of time. Nor was there any dispute that the Agency made a discovery in relation to the tax years 1996/1997 to 2005/2006 so as to enable them to make assessments under s29 of the 1970 Act.

15 46. In the foregoing circumstances, the Appellant has failed to demonstrate that the assessments are excessive.

Disposal

47. The appeals against the assessments are dismissed. It was agreed that no expenses should be found due to or by either party, and we so find.

20 48. 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)” 25 which accompanies and forms part of this decision notice.

30 **J GORDON REID, QC, F.C.I.Arb**
TRIBUNAL JUDGE

RELEASE DATE: 6 JULY 2011

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