[2012] UKFTT 198 (TC)

TC01893

Appeal number TC/2010/05689

PAYE – appeal against a direction notice requiring the appellant to pay income tax and interest in respect of untaxed remuneration which HMRC alleged he had received as a shadow director – appellant disputed the allegation and the amounts of the payments –the Tribunal found that he was a shadow director but allowed a reduction in the amount of the deemed payments

FIRST-TIER TRIBUNAL
TAX

MR MICHAEL RANGOS **Appellant**

- and -

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

TRIBUNAL: S.M.G.RADFORD (TRIBUNAL JUDGE)
H. ADAMS

Sitting in public at 45 Bedford Square, London WC1 on 2 December 2011

Mr J Gibbons for the Appellant

Dr L Jacobs for the Respondents

DECISION

1. This is an appeal against a notice issued by HMRC under Regulation 81(4) Condition A of the Income Tax (PAYE) Regulations 2003.

2. The notice required the appellant to pay tax plus interest of some £215,888.22 in respect of untaxed remuneration in respect of tax years 2006/07 and 2007/08.

3. HMRC claimed that the appellant was a shadow director and thus an employee of Ticket Tout Limited ("TT") and Ticketout Limited ("TO") and that he received relevant payments from them. The companies acted as secondary ticket agents.

4. HMRC claimed that the Appellant received those relevant payments knowing that his employer had wilfully failed to deduct the amount of tax which should have been deducted from those payments.

5. The appellant claimed that although he helped the director of the companies to obtain tickets he was not an employee and did not receive payments in that capacity.

6. The appellant, Mr Howells his accountant and Mr Lee of HMRC gave evidence.

Background and Facts

7. HMRC's interest in the affairs of the appellant started with an approach from the Public Interest Unit of the Official Receiver. The Official Receiver was dealing with the liquidation of a string of five phoenix companies operating in the secondary ticket market. The Official Receiver believed that the appellant was behind all the companies.

8. The Public Interest Unit had taken an interest in the appellant's dealings following complaints from the public over the companies failing to provide tickets or refunds to events for which they had paid via web sites. The companies' transactions were mainly in cash with incomplete company records being submitted to enable the Official Receiver's office to determine whether the considerable cash transactions were for business or personal use.

9. The appellant was a named director of the first company in the chain, Get Me Tickets Limited ("GMT"). He was given a disqualification undertaking for eight years in respect of that company and admitted that proper accounting records had not been kept and that there was no proper record kept of directors' remuneration or loan accounts.

10. The appellant was not a named director of the fourth company in the chain, MLT Services Limited and claimed initially during interviews with the Official Receiver that he was only an employee who acted on instructions. However later he admitted that he was a director and that the company had kept inadequate accounting records.

11. TT and TO were numbers two and three in the chain. The appellant was not a named director in either company and denied that he was an employee of either company.

12. TO was incorporated to provide banking facilities for TT after its banking facilities were withdrawn.

13. The Official Receiver decided not to continue with disqualification proceedings against the appellant in respect of TT and TO as the appellant had already been given a fourteen year disqualification undertaking.

14. HMRC claimed that the appellant was a shadow director of TT and TO. Ms Caroline Beale was the named director of TT and TO. At the initial interview with the Official Receiver Ms Beale maintained that she was solely responsible for TT and TO and the appellant merely provided contacts to source tickets. At the end of the interview Ms Beale stated that she did not want to say anything about the appellant's involvement until she had taken legal advice.

15. At a subsequent interview Ms Beale said "Michael had the final say in everything and I had no real control of the company only on a superficial level". Ms Beale asserted that the appellant had persuaded her to allow company funds to pass through her bank account as he was unable to obtain a bank account of his own.

16. The registered secretary of TT, Mr Woodhouse-Powell, told the Official Receiver that TT was the appellant's company and that "Mr Rangos was careful not to have his fingerprints on anything to hide the fact that he was running the company."

17. In interviews with the Official Receiver both Ms Beale and Mr Woodhouse-Powell confirmed that prior to handing over the computers belonging to TT and TO the appellant instructed the staff to purchase new computers, load certain data onto them and then hand them over to the administrators.

18. The Official Receiver's analysis of the computers showed that certain data was missing which included emails subsequently retrieved by the Official Receiver from TT's internet provider and spreadsheets provided to the Official Receiver from TT's accountants.

19. The appellant was shown to have sent most of the emails to the web designers of TT and TO. Mr Norbury of Arclid.Com Ltd, the web designers, provided the Official Receiver with copies of email correspondence with TT. A review of the emails showed that of the 1108 email items provided, 729 emails were sent by the appellant from michael_rangos@hotmail.com. In an email to Mr Norbury from the appellant dated 19 October 2006 which was sent from the appellant's hotmail address, the appellant stated "You should be getting a cheque tomorrow morning (Thursday) by special delivery post in full settlement of the 2 outstanding invoices for Ticket Tout".

20. Mr Norbury stated in an email to the Official Receiver dated 12 June 2008 that "It was my understanding that I was to speak to either Michael Rangos or Caroline Beale in relation to the tickettout.net website".

21. The Official Receiver's agents retrieved an email dated 9 December 2006 to Jim Kurtagh of www.zudfunck.com from the appellant regarding advertising in which the appellant stated "I am the owner of two of the largest independent ticket agencies in the UK: www.londonticketshop.co.uk and www.tickettout.com". On 12 December 2006 the appellant sent exactly the same email to Shane Dell the editor of the Abc of Cricket website. Both emails were sent from michael@londonticketshop.co.uk and were signed Michael Rangos.

22. At an interview with the Official Receiver on 18 June 2008 the appellant was presented with various pieces of evidence showing that he was involved in the affairs of TT. The evidence included emails sent from the appellant's personal email address to the company solicitors, accountants, web designers and staff giving instructions on the running of TT. The emails were obtained by the Official Receiver from TT's server held by Demon. Throughout the interview the appellant either stated that he "could not recall" or he "would look into it".

23. On consulting with the Official Receiver and receiving a number of schedules from them HMRC decided that the appellant had received untaxed remuneration from TT and TO. The Insolvency Service's inspection of the available company records indicated that considerable sums were withdrawn for which there were no analysis to determine whether these withdrawals were personal or legitimate business expenses.

24. HMRC decided that with no company accounts or company PAYE returns submitted, coupled with the incomplete records, it was reasonable to assume that the appellant was in receipt of untaxed income from these companies.

25. In the absence of any company accounts and PAYE returns together with the appellant's failure to submit his tax return for 2007/08 Regulation 80, assessments were issued by HMRC on 27 January 2009 in respect of perceived untaxed remuneration received by the appellant from these companies during 2006/07 and 2007/8. With no appeals lodged against these assessments within thirty days they became due and payable.

26. The appellant did file a return for 2006/07 on which he declared himself to be self employed in the resale of tickets and that he had received £12,000 in net income for the year.

27. HMRC issued the assessments in the amounts of £330,324 for 2006/07 and £195,484 for 2007/08. They reached these amounts by adding the cash withdrawals together with all the unidentifiable payments including those without any supporting company records or invoices and then in the interests of reaching an equitable conclusion decided to allow a 50% reduction in the level of payments uncovered to allow for possible legitimate business expenses. HMRC then split the balance between Ms Beale and the appellant.

28. HMRC stated that their claim that the appellant was in fact a shadow director appeared to be substantiated by the fact that company payments were made to a

company called Metacharge Ltd who confirmed that the payments were in respect of personal debts owed by the appellant.

29. Mr Howells wrote to HMRC explaining that the appellant was suffering from ill health but denied that he had received any untaxed remuneration from the companies. Mr Howells requested a breakdown as to how the amounts were reached. HMRC sent a letter detailing the quantum and suggesting that the appellant and his accountant liaise directly with the Insolvency Service in order to resolve matters.

30. At the same time a letter was received from Mr Howells appealing against the assessments on the grounds that the appellant had at no point been provided with information concerning the alleged payments.

31. An attempt by HMRC to arrange a meeting with all the interested parties was abortive on account of the Insolvency Service pleading that the Confidentiality Act would prohibit such a meeting.

32. Numerous attempts were made by HMRC to provide further information but Mr Howells continued to query the analysed details provided and provided an analysis of his own in respect of the relevant bank accounts.

33. Mr Lee sent Mr Howells' letter to Mr Stone at the Insolvency Service for comment. Mr Stone confirmed that the uncategorised expenditure included payments made to named persons for which there were no books or records to support the transactions. As a result it was not known why these payments were made and so they could not be categorised.

34. Mr Lee passed on Mr Stone's comments to Mr Howells who on reply continued to query several of the uncategorised amounts. He reiterated that whilst the appellant could explain how the system worked, as the appellant did not have access to the company's books he was unable to provide any supporting information.

35. In a subsequent telephone conversation with Mr Howells Mr Lee pointed out that if it was agreed to reduce the Official Receiver's figures on account of business expenditure then it was likely that the 50% concession by HMRC would be reduced downwards.

36. Mr Lee wrote further to Mr Howells having received a response from Mr Stone and forwarded Mr Howells details of the only records which had been made available to Mr Stone. As HMRC had already allowed a concessionary 50% deduction in recognition of the fact that some of the uncategorised expenditure was for legitimate business expenditure, Mr Lee stated that unless the appellant had irrefutable documentary evidence as to how the uncategorised amounts were spent he saw no reason to spend further time on analysing the expenditure.

37. Finally a review was requested by the appellant. This was undertaken by Mr Pighills who rang the accountant on 12 April 2010 outlining his understanding of the case and seeking some common ground in order to reach an equitable agreement. Whilst Mr Pighills agreed with Mr Howells that there had been an extraordinary

amount of expenditure treated as uncategorised and that most of the money paid out was for ticket purchases he explained to Mr Howells that Mr Lee had had to reach a starting point.

38. Mr Howells pleaded however that the appellant had no access to any of the companies' records with which to substantiate HMRC's claim and so Mr Pighills decided that the chances of an agreement were remote. Although Mr Pighills produced a further schedule of withdrawals for Mr Howells hoping to use these as a starting point in negotiations there was no response and on 20 May 2010 Mr Pighills wrote to Mr Howells informing him that if no further representation evidence was forthcoming then he intended to conclude his review.

39. On no response being received to this letter Mr Pighills, the reviewing officer, wrote to the appellant in June 2010 upholding the assessments. He stated that his findings were that there were considerable sums of money withdrawn from the companies' bank accounts. He stated that although the appellant had suggested that these monies were used to meet legitimate business expenses, the appellant had also accepted that some of the monies were used for personal expenses and the fact remained that the vast majority of the withdrawals were not identifiable.

40. Mr Pighills subsequently received a letter from Mr Howells with further information but he explained that as his review had been finalised the appellant's only course of action was to appeal to the Tribunal.

The appellant's evidence

41. The appellant contended that HMRC had no evidence that he had been in control of either TT or TO. The only evidence which HMRC had was from Ms Beale who had changed her story and turned against the appellant after taking advice from her solicitor.

42. The appellant denied that he had been a shadow director of either of these companies. He knew Ms Beale because she had worked at GMT.

43. In his witness statement the appellant described his involvement with the Public Interest Unit of the official Receiver. On 1 February 2006 three Public Interest Petitions were presented in respect of GMT, Get Me Tickets Net Limited and Get Me Tickets Com Limited. He stated that GMT was concerned with the secondary ticket market and procured and sold tickets for events, concerts, and sporting fixtures amongst other things. He stated that the latter two companies were dormant but at the time that the Petitions came to trial in May 2006 it was common ground that if GMT was wound up then the other two companies should also be wound up.

44. He stated that on 2 February 2006 Mr Justice Lindsay ordered that the Official Receiver be appointed provisional liquidator of GMT until the conclusion of the hearing of the petitions. That same day the Official Receiver had applied without notice to Mr Justice Lindsay for a freezing order against the appellant's and his co-

director's, Ms Thavaratnam, assets. The official Receiver's request was approved and a freezing order was granted over his and Ms Thavaratnam's assets up to the value of £1,100,000.

45. On 18 May 2006 judgement on the contested winding up application was given and the judge ordered that GMT and the other dormant companies be wound up. The appellant stated that the grounds of complaint justifying winding up did not involve any allegation of misappropriation by the directors of the companies.

46. On 3 February 2006 the Official Receiver who had been appointed provisional liquidator commenced misfeasance proceedings against the directors.

47. On 10 July 2006 following an application to continue the freezing order which was opposed, judgement was given indicating that the Judge would only continue the freezing order in respect of named properties owned by Ms Thavaratnam and the appellant. Following that indication Ms Thavaratnam and the appellant undertook that until the trial of the misfeasance proceedings they would not dispose or deal with or charge in any way whatsoever or diminish the value of their interest in those properties and accordingly no further order was made in relation to the continuation of the freezing order which therefore expired after 10 July 2006. The appellant stated that the undertaking in so far as it related to the two properties he then owned was in place for over five years until May 2011 when the misfeasance proceedings were finally settled between him and the Official Receiver acting as liquidator of GMT and the settlement contained a confidentiality clause.

48. The appellant stated that he had subsequently been involved in directors disqualification proceedings initiated against him in respect of GMT, TT, MLT and London Ticket Shop KFT. In respect of GMT on 3 March 2010 he gave a disqualification undertaking for eight years. He stated that no allegation of misappropriation of funds was made against him. In respect of MLT on 3 May 2011, the same day that the GMT misfeasance summons was finally settled after five years, he gave a disqualification undertaking for fourteen years. The appellant stated that the reason that he gave an undertaking in the MLT proceedings was that, apart from the fact that he was employed by MLT on contract, after all that had happened he was not interested in being the director of a company. Also he had already been disqualified for eight years in respect of GMT and had insufficient resources to fund a legal challenge.

49. The appellant stated that he was aware from the previous proceedings how costly they could be and if he lost he would be responsible for the claimant's costs which would be increasing exponentially if he did not give the undertaking. The appellant stated that the undertaking he was asked to give, like GMT, did not include any allegation of misappropriation of funds, but, as with GMT, that he had failed to maintain, preserve or deliver adequate accounting records.

50. The appellant stated that the directors disqualification proceedings commenced against him in respect of TT and KFT were discontinued by consent on 24 May 2011. No disqualification proceedings had ever been brought against him in respect of TO

nor had he ever been involved in any misfeasance proceedings other than in connection with GMT. The appellant stated that he failed to understand why HMRC had found it reasonable to pursue him in these proceedings to recover tax when the burden of proof for these unsubstantiated allegations against him had not been justified by any other body such as the companies' liquidators as would be expected if they had any evidence against him.

51. Having been through the long drawn out liquidation proceedings in respect of GMT the appellant did not want to become involved again as a director in the running of a company. However he had worked in the secondary ticket industry as a tout for some time and it was the only industry which he knew. From early 2006 therefore he worked as a self employed tout and filed his tax return for 2006/07 in that capacity.

52. His business with Ms Beale was as a secondary ticket broker in a sole trader capacity. He remained in contact with Ms Beale because he regarded her as a friend and he was the primary outlet for the sale of the tickets he was able to supply to TT. Ms Beale regularly asked him to obtain tickets for her customers and once he knew of the availability of tickets he would offer them to her for her customers. Although he traded with Ms Beale regularly he was unclear whether she was contracting with him personally or as a director of TT or TO. He was therefore unable to confirm the source of any payments she made to him in respect of the tickets which he sold her. Apart from these payments the appellant denied receiving any income from either TT or TO.

53. The appellant referred to HMRC's statement of case in which it was stated that they considered that there was clear evidence that he had received income from TT and TO because of information received from the Official Receiver because:

- "considerable sums were withdrawn" – the appellant presumed that by this it was meant from the bank accounts of TT and TO – "for which there was no analysis to determine whether these withdrawals were personal or legitimate business expenses";
- "no company accounts or company PAYE returns were submitted by TT or TO";
- "the books and records of TT and TO were incomplete".

54. The appellant referred to the HMRC conclusion that from this "it is reasonable to assume that Michael Rangos was in receipt of untaxed remuneration from these employers". He stated that this was not a reasonable assumption because in fact he had not received such remuneration. Any money which he received from Ms Beale was for tickets which he sold her.

55. The appellant stated that in the bundle of documents HMRC exhibited schedules of income and expenditure from three different bank account of TT from March 2006 to January 2007 and for TO from February to March 2007.

56. The appellant commented that at paragraph 3.7 of the Statement of Case, HMRC had stated that they made a Regulation 80 assessment on both TT and TO and sent those assessments to the relevant liquidators setting out the amounts of PAYE tax liabilities due in respect of the "perceived untaxed remuneration" allegedly received by him. The liquidators did not contradict these figures and, therefore, the assessments became legally due and payable.

57. The appellant stated that he did not know about these assessments. He did not know if they were actually received by the liquidators, checked by the liquidators or whether the liquidators even bothered to respond to HMRC. To the appellant it seemed unjust that he should be bound by an untested, unchecked and unopposed assessment by HMRC.

58. The appellant stated that he and Ms Beale used each other's hotmail accounts and each had access to the other's email address. In her interviews with the Official Receiver Ms Beale was covering her back.

59. Insofar as Mr Norbury was concerned the appellant stated that he had dealt with Mr Norbury when he was with GMT and when Ms Beale set up on her own she used his contacts.

60. The appellant denied sending the emails which were sent in his name to Messrs Kurtagh and Dell as referred to at paragraph 21 above.

61. The appellant denied buying new computers and stated that this was part of the unsuccessful proceedings against him by the Official Receiver in respect of TT and TO.

62. The appellant explained that when tickets are ordered in advance it is necessary to pay 50% of the cost upfront as a deposit. If the sale does not take place because the balance is not paid when the tickets become available then the deposit is lost. When TT went into liquidation therefore their 50% deposits on a number of tickets was lost.

63. The appellant stated that in many cases a credit card was used to purchase the tickets.

64. Reference was made in HMRC's statement of case to payments made to a company called Metacharge Limited in respect of a personal guarantee owed by the appellant. The appellant confirmed that he had discovered that TT and TO had paid £115,000 and £50,000 respectively to Metacharge on his behalf. The appellant stated that these payments were made by Ms Beale in consideration for the tickets he had bought from Ticket Queen and provided to her companies.

65. The appellant stated that it now appeared that some £200,000 had been repaid to the Official Receiver by Metacharge but it was unclear in what capacity. His solicitor was still waiting for a response as to the terms of settlement between the Official Receiver and Metacharge.

The Appellant's Submissions

66. The appellant submitted that if in fact those sums paid to Metacharge were in effect income used to discharge his personal debt then that debt remained undischarged and that money should be credited to him.

67. The appellant accepted that as a result of the administration and liquidation of TT and TO tax was not paid to HMRC but the appellant submitted that those companies were liquidated prior to the end of the financial years in question.

68. The appellant submitted that there had been considerable communication between his accountants (previously Kingston Smith and currently Howells & Co) and the HMRC in respect of the lack of information provided as to how the relevant payments on which tax was due had been calculated and to what such payments related. As this information had not been provided the appellant submitted that it did not exist.

69. The appellant submitted that a letter from HMRC to Kingston Smith dated 6 January 2010 which stated that "…your client has continually failed to provide the Official Receiver's Office with comprehensive company records…he appears reluctant to take the opportunity to meet with them to resolve the impasse" was very misleading.

70. He submitted that as he was not a director or employee of TT or TO he did not hold and had no obligation to hold the books or records of these companies.

71. He submitted that it was also unfair to say the he was reluctant to take the opportunity to meet with the Official Receiver as he had numerous meetings with the Official Receiver in respect of the liquidation of both TT and TO. In respect of the tax issue and the relevant payments HMRC had tried to arrange a meeting between the appellant and the Insolvency Service but the Insolvency Service had declined to attend. The appellant submitted that an internal HMRC memo in which it was stated: "Unfortunately attempts to get Rangos to personally meet with the Official Receiver in order to resolve the matters concerning the "unidentified withdrawals" have proved abortive" was therefore misleading.

72. The appellant submitted that when his accountants asked for a review of HMRC's decision of 6 January 2010 that tax of £193,468.40 plus interest was due Mr Pighills who carried out the review made a harsh finding. He submitted that the fact that Mr Pighills stated that the majority of the withdrawals were unidentifiable did not justify them being classed as his personal expenditure.

Mr Howell's evidence

73. Mr Howells gave evidence that he had acted as the appellant's accountant firstly when he was a partner at Kingston Smith and secondly at his current firm, Howells & Co.

74. Mr Howells referred to the claim by HMRC that the appellant had received notional payments under Regulation 81 Condition A although in fact the legislation referred to relevant payments. He stated that he had written to Mr Lee of HMRC pointing this out but Mr Lee had replied that the terminology did not effect the legality of HMRC's claim that the appellant had received untaxed remuneration from TT and TO.

75. He stated that the information received by HMRC from the Official Receiver was a list of transactions either taken from bank statements for a number of bank accounts or from an analysis provided to the Official Receiver by him when he worked at Kingston Smith.

76. He claimed that the schedules supplied to HMRC by the Official Receiver were inaccurate as transactions which were for legitimate business expenditure had been analysed as personal expenditure.

77. Mr Howells stated that four bank accounts had been analysed and this analysis formed the basis of the claim against the appellant.

78. With reference to TT's bank account 03455808 with Lloyds TSB he stated that HMRC had accepted expenditure on ticket purchases for which the Official Receiver had not seen invoices as the appellant's remuneration. For this account he stated that the only information of any relevance was cash withdrawn of £94,259.69 of which 25% was deemed to be the appellant's remuneration. This was calculated by allocating 50% to Ms Beale and then applying HMRC's allowed discount of attributing 50% of the balance to the appellant.

79. In respect of TT's bank account 90460834 with HSBC he stated that it appeared that there was an unidentified figure of £134,347.55, 25% of which was attributed to the appellant as calculated above.

80. He stated that it appeared that most of the figures were based on the Kingston Smith analysis in which there was various inconsistencies but the appellant had not had a chance to go through the figures and so they remained as analysed. Mr Stone of the Insolvency Service had in fact stated in an email to Mr Lee that the reason that certain items had not been analysed was because "there were no books or records to support the transaction and therefore it is not known why the payment was made and as such they could not be categorised. The example Mr Howells has referred to (payments to H Deluca, D Edmond and Gary Haygarth) are indeed good examples…." Mr Howells stated that this was an interesting response as elsewhere on the spreadsheet payments to D Edmond had been analysed as ticket purchases and to H Deluca as agent cards.

81. Further he stated that a closer look at the analysis showed that there was an entry for £9,000 clearly analysed as for Ms Beale but treated as unknown. 25% of further payments of £3,739.35 and £3,000 to Ms Beale had been assessed on the appellant.

82. Mr Howells stated that there was a significant amount of cash withdrawals from this account, over £228,000 and HMRC had added this to the unidentified payments although often it was necessary to pay for the tickets in cash.

83. Referring to the TT account number 70892726 with Barclays he stated that the summary for this account showed that the payments amounted to £1,237,954.72 of which £781,936.67 was classed as unidentified.

Mr Howells' Submissions on behalf of the appellant

84. Mr Howells submitted that as the appellant had not had access to the books and records of TT and TO the appellant was not in a position to defend himself by being able to look at the transactions which had been alleged to be personal expenditure.

85. Mr Howells produced a rough calculation for the Tribunal in which he had added the unexplained cash and unidentified transactions relating to TT and TO. He omitted amounts which he believed had been attributed to legitimate business expenses. The total of these came to £1.088 million. On his calculation this meant that if 50% was attributed to Ms Beale and HMRC's 50% deduction to the balance £272,000 would be attributable to the appellant as untaxed remuneration in respect of being a shadow director, and he would be liable to some £108,000 of tax, assuming the amount was taxable at 40%.

86. Mr Howells submitted that HMRC had not been able to demonstrate that a single payment had been made to the appellant. He submitted that there was no reason for 25% of the payments shown to be Ms Beale's in the HSBC account 90460834 to be attributed to untaxed remuneration of the appellant's.

87. In addition he submitted that a number of unidentifiable transactions in this account were payments to A Powell, B Frew, J Soares, V Costa, Jake Trask, Y Adenyin and V Lopes Nascimento all of whom appeared on the payrolls sent to the Insolvency Service. He asserted that Mr Stone had chosen to ignore these payments and treat them as untaxed remuneration to the appellant. In fact he submitted that there were a number of inconsistencies such as entries described as tickets but not analysed as such. He submitted that if all these entries had been correctly analysed the unidentified figure of £134,347.55 25% of which was attributed to the appellant would be reduced considerably to some £10,000.

88. Mr Howells stated that there was a significant amount of cash withdrawals from this account, over £228,000 and HMRC had added this to the unidentified payments. He submitted that by its very nature ticket touting involved the purchase of tickets for cash. On the schedule of documents delivered to the administrator of TT there were at least three lever arch files labelled Ticket Tout VAT invoices. Mr Howells submitted that he believed that these were records of tickets purchased for cash. He submitted that it was unclear whether the Official Receiver had used this information to establish how the cash was spent. He submitted that Kingston Smith had also provided the Official Receiver with petty cash reports which as far as he was aware

identified tickets purchased for cash. Those reports showed significant cash payments for tickets, in excess of £74,000. He submitted that those reports were supplied by Kingston Smith and he did not have copies but this information appeared to have been ignored by the Official Receiver.

89. Referring to the TT account number 70892726 with Barclays he stated that the summary for this account showed that the payments amounted to £1,237,954.72 of which £781,936.67 was classed as unidentified. However just to mention a few Mr Howells submitted that a review of the spreadsheets showed entries such as A Mizra tickets £1,773.07, Gary Agar tickets £5,000, S J Eris tickets £2,000, Ticketdaddy tickets £15,578 which were categorised as unidentifiable. He submitted that if the expenditure was categorised as ticket sales he did not understand why HMRC had concluded that it was reasonable to conclude that 25% of these sales should be attributed as untaxed remuneration to the appellant.

90. He submitted that the other significant payments were to credit card companies all of which had been treated as unidentifiable. He referred to the appellant's statement that very often credit cards were used to pay the 50% deposit for the tickets.

91. With reference to Ms Beale's account 00445418 account with TSB he submitted that due to the significant number of transactions it was difficult to effectively analyse. He submitted that there were again details obtained regarding payments which seemed to clearly explain the nature of the transaction but once more had resulted in what appeared to be reasonable business expenditure being categorised as unidentifiable, 25% of which had been included as the appellant's untaxed remuneration. Some such examples were payments to Transport for London, Thames Water, Ticketmaster, South West Trains, News international Advertising, Guardian Newspapers, The Royal Albert Hall, Vodaphone Limited, Caroline Beale plus significant payments to J Trask, B Frew, A Powell, A Da Silva and J Soares all of whom were TT employees.

92. He further submitted that there was a sum of £264,684.45 which had fallen under the heading of "corrections and unpaid". As far as he was able to establish this amount represented adjustments to rectify errors but was included in the unidentifiable figure of £813,099. He submitted that this was a significant error which called into question the accuracy of the spreadsheets prepared by the Official Receiver.

93. Mr Howells submitted that a review of the HMRC income and expenditure statement which provided the basis for the calculation of what HMRC claimed to be untaxed remuneration to the appellant showed income from the sale of tickets of £4,638,365. It also showed that according to the Official Receiver's analysis £1,548,056 was spent on purchasing tickets and there were refunds of £98,995, making a combined cost of £1,647,051. He submitted that in order to achieve this turnover tickets would have had to be sold on average at 2.8 times the price paid ignoring for the purpose of the calculation any unsold tickets held when TT an TO ceased to trade.

94. Mr Howells reminded the Tribunal that in Ms Beale's interview with the Official Receiver she had eventually confirmed that the payments made to Metacharge were in respect of tickets purchased by the appellant from Ticket Queen.

95. Mr Howells submitted that much of the delay had been as a result of the appellant's continued health problems for which he was still required to attend the Cromwell Hospital.

Mr Gibbon's submissions on behalf of the appellant

96. Mr Gibbons submitted on behalf of the appellant that the direction notice referred to "notional payments" rather than "relevant payment" as defined by Regulation 4. He submitted that this was a Condition A case and not a case involving "notional payments as defined by Regulation 2 and Section 710(2) of the Income Tax (Estates and Pensions) Act 2003.

97. He submitted that the appellant had always denied the receipt of remuneration from either TT or TO.

98. Mr Gibbons submitted that in order to prove the claim HMRC were required to establish that as an employee the appellant received income from which TT and TO as employer wilfully failed to deduct the right amount of tax and as an employee the appellant knew of that failure.

99. Mr Gibbons submitted that it was not disputed that £165,000 was paid to Metacharge to relieve the appellant of his liability to that company in respect of his personal guarantee. However this money was paid in respect of tickets supplied to TT's customers. Such money did not therefore represent the receipt of untaxed remuneration and as a result of this there should be a significant reduction in the tax claimed.

100. Mr Gibbons submitted that whilst the appellant's primary contention was that he was not liable because HMRC's criteria were not made out, the appellant also took issue with the level of assessment made. The appellant submitted that HMRC schedules were considered to be inaccurate as transactions for legitimate expenditure had been analysed as personal expenditure.

101. Mr Gibbons submitted that HMRC had made their decision based on the second hand hearsay contained in the Official Receiver's report.

HMRC's Submissions

102. Mr Jacobs submitted that the appellant had received income that had not been taxed by TT and TO and the appellant knew of that failure.

103. HMRC considered that there was clear evidence that the appellant had received income from these companies in the light of the information received from the Insolvency Service who were acting on behalf of the companies' creditors.

104. He submitted that their examination of the available company records indicated that considerable sums were withdrawn for which there was no analysis to determine whether they were personal or legitimate business expenses.

105. He submitted that with no company returns or company PAYE records it was reasonable to assume that the appellant was in receipt of untaxed remuneration from those companies.

106. He submitted that Regulation 73(1) of the Income Tax (PAYE) Regulations 2003 required an employer to submit annual returns on or before the end of an income tax year and TT and TO both failed to submit either company accounts or PAYE returns.

107. He submitted that Ms Beale had admitted to the Insolvency Service that she acted on instructions from the appellant who was the person in control of the companies' financed and management.

108. HMRC referred to a number of cases where directions were made prior to the right to appeal against such determination by HMRC. In each of these cases it was shown that income had been paid to an employee who should have known that no tax had been deducted and HMRC succeeded in their claim.

Mr Lee's evidence

109. Mr Lee stated that he felt that by only attributing 25% of the unidentified amount to the appellant he was being quite generous.

110. Mr Lee emphasised that that there was a complete lack of company records by virtue of which the appellant could refute HMRC's claim.

111. He stated that the fact that Ms Beale was unaware of the payments made to Metacharge until she was questioned by the Insolvency Service added credence to HMRC's claim that the appellant had financial and management control over the company.

112. He stated that the Official Receiver's assertion in the directors' disqualification proceedings, which initially included the appellant, that funds were used to the detriment of the customers, was sufficient evidence that the appellant was in receipt of untaxed remuneration.

113. Mr Lee confirmed that he had relied on the information provided by the Insolvency Service in making the tax assessment.

The Law

114. Regulation 81 of the Income Tax (Pay As You Earn) Regulations 2003 states:

> (1) This regulation applies if—
>
> (a) any part of the tax determined under regulation 80 is not paid within 30 days from the date on which the determination became final and conclusive, and
>
> (b) condition A or B is met in relation to an employee.
>
> (2) Condition A is that the Inland Revenue are of the opinion that the employee in respect of whose relevant payments the determination was made has received those payments knowing that the employer has wilfully failed to deduct the amount of tax which should have been deducted from those payments.
>
> (3) Condition B is that the unpaid tax represents an amount for which the employer was required to account under regulation 62(5) (notional payments) in relation to a notional payment to the employee.
>
> (4) The Inland Revenue may direct that the employer is not liable to pay the amount of tax which appears to them should have been but was not—
>
> (a) deducted on making those relevant payments, or
>
> (b) accounted for under regulation 62(5).
>
> (5) If a direction is made, the amount of tax must not be added under regulation 185(5) or 188(3)(a) (adjustments for self-assessments and other assessments) in relation to the employee.
>
> (6) Tax payable by an employee as a result of a direction carries interest, as if it were unpaid tax due from an employer, in accordance with regulation 82 (interest on tax overdue).
>
> (7) The tax payable carries interest from the reckonable date until whichever is the earlier of—
>
> (a) the date on which payment is made, or
>
> (b) the date (if any) immediately before the date on which it begins to carry interest under section 86 of TMA(1).

Findings

115. We considered the direction notice which referred to notional payments rather than relevant payments as stated in the legislation. We decided however that this did not effect the legality nor negate HMRC's claim that the appellant had received

untaxed remuneration from TT and TO. We noted that at 2.5 of their statement of case HMRC referred to Regulation 81(4) and stated that it "provides that Condition A applies where HMRC are of the opinion that the employee in respect of whose relevant payments the determination was made received those payments knowing that the employer had wilfully failed to deduct the amount of tax which should have been deducted from those payments.

116. We found that HMRC had established that they were of the opinion that the appellant had received untaxed remuneration.

117. We accepted that after the appellant's gruelling experience with the Insolvency Service he did not wish to become a director and indeed he could not as a result of his disqualification.

118. Nevertheless we found that by virtue of his actions on balance he was a shadow director and thus an employee.

119. Despite the appellant's evidence concerning the various emails and the fact that we were unable to hear Ms Beale's and Mr Woodhouse- Powell evidence but had to rely on the second hand hearsay, we found the mountain of evidence from HMRC and the Insolvency Service concerning the appellant's involvement with TT and TO impossible to ignore. We also found that although hearsay Ms Beale's evidence was corroborated by Mr Woodhouse – Powell.

120. Both the appellant and his accountant repeatedly stated that if the appellant had a chance to examine the figures he would be able to identify the amounts. We found that this also indicated a high level of involvement with the companies.

121. We accepted that it seemed likely that after the disqualification proceedings the appellant found it hard to obtain a bank account as alleged by Ms Beale in her interview with the Insolvency Service and therefore used her accounts.

122. We found that he was in receipt of remuneration from these companies from which they had wilfully omitted to deduct tax and he was aware of this failure. We found that the appellant failed to prove that he had not received remuneration from the companies.

123. We accepted that a good proportion of the money was paid to him in respect of tickets sold by him to these companies but we found that his declared income of £12,000 for tax year 2006/07 was not credible.

124. We found however that a number of transactions were classified as unidentifiable because although a company or person was named as the recipient there was no supporting invoice. A proportion of the payments for these transactions were also attributed to the appellant.

125. We also accepted that the amount paid to Metacharge was in respect of reimbursement for tickets purchased by the appellant for the companies' customers from Ticket Queen and this was apparently latterly confirmed by Ms Beale. It

appeared however from the evidence that no credit had been given to the appellant for this amount when it was reclaimed by the Insolvency Service.

126. We accepted that in the absence of any substantial evidence from the appellant or his accountant Mr Lee relied entirely on the information from the Insolvency Service and believed that he was being generous in allowing an effective 75% deduction to the appellant in making his assessment.

127. We noted Mr Howells' detailed submissions on the various bank accounts and found merit in them and accepted that there were probably various inconsistencies in the Insolvency Service's final analysis. It appeared to us that their final calculation of the uncategorised expenditure was fairly severe.

128. We found it most unsatisfactory that the Insolvency Service ultimately refused to meet with the appellant and his accountant in order to provide more details of the unidentified amounts of which a 25% proportion was attributed to the appellant.

129. Accordingly we found that we had no option but to accept Mr Howells' calculation which appeared unchallenged by HMRC that the ultimate total of cash and unidentifiable amounts came to £1.088 million of which 50% should be attributed to Ms Beale.

130. Mr Howells suggested that HMRC's deduction of 50% should apply to the balance of £544,000 but we did not agree with that as we presumed his figures were fairly accurate. However as we decided that it was likely that even this lower figure contained some genuine business costs we decided to apply a 10% deduction so that the balance attributable to the appellant was £489,600.

131. We decided however that the £165,000 reclaimed by the Insolvency Service from Metacharge and paid in respect of tickets provided and paid for by the appellant should be deducted from the balance so that the appellant should be taxed as having received £324,600.

132. Generally we found this a most difficult case on which to reach a decision. Whilst we found that the appellant did act as a shadow director albeit perhaps inadvertently, we found the lack of direct evidence from Ms Beale, Mr Woodhouse-Powell and particularly the lack of liaison with the Insolvency Service concerning the various amounts meant that we were left with few firm facts on which to base our decision.

133. We were assisted however by the decision in *Johnson v Scott* 52T383

> "It is quite impossible to see how the Crown, in cases of this kind, could do anything else but attempt to draw inferences. The true facts are known, presumably, if known at all, to one person only- the Appellant himself….Of course all estimates are unsatisfactory; of course they will always be open to challenge in points of detail; and of course they may well be under-estimates rather than over-estimates as well. But what the Crown has to do in such a situation , is on the known facts to make reasonable inferences…."

Decision

134. The appeal is allowed in part. The amount taxable is reduced to £324,600 plus interest on the tax payable.

135. 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.

TRIBUNAL JUDGE

RELEASE DATE: 19 March 2012