TC01934

Appeal number: TC/2011/00346

INCOME TAX – Enquiry into self-assessment return – Appeal against closure notice – Deposits in bank account claimed by the Appellant in oral evidence to be loans or gifts – Absence of documentary evidence supporting claim – Closure notice treating the deposits as earnings – Whether HMRC acted perversely or in bad faith – No – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN EBRILL **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR M M HOSSAIN FCA FCIB

Sitting in public in Sutton on 29 September 2011 and in Ashford on 16 March 2012

The Appellant in person on 29 September 2011, no appearance by or on behalf of the Appellant on 16 March 2012

Ms K Weare, Presenting Officer, for the Respondents

DECISION

Introduction

1. The Appellant appeals against a closure notice dated 6 August 2010, amending his 2006/07 self-assessment tax return under s.28A(1) and (2) of the Taxes Management Act 1970 (the "TMA"). The Appellant's tax return had indicated that he was not due to pay any tax. The closure notice concluded that he was due to pay £9,316.08 tax. A statutory review was concluded by HMRC on 9 December 2010 upholding the decision in the closure notice.

2. The following facts have not been disputed by the Appellant. His self-assessment tax return for 2006/07 showed that he was a self-employed computer engineer. His returned turnover from this self-employment was £4,217 and expenses were £514, giving a taxable profit of £3,703. This was below the amount of his personal allowance, such that according to his tax return, no tax was payable. An enquiry into his self-assessment for that year was opened by HMRC on 22 December 2008. The enquiry was conducted by an HMRC official, Ms Christine Collins, who requested the Appellant to provide statements for all bank accounts operated during that year. Statements were provided for a Nat West Advantage Gold account (the "Advantage Gold Account") and a Nat West Cash ISA account (the "Cash ISA account"). The Appellant also signed a mandate for his bank to provide statements for his Nat West Reward Reserve account (the "Reward Reserve account").

3. The HMRC case is that the bank statements showed the following deposits in excess of the returned turnover of £4,714, which in the absence of evidence to the contrary were considered by HMRC in the closure notice to be omitted income:

(1) Advantage Gold account:	£4,086.50
(2) Cash ISA account:	£2,900.00
(3) Reward reserve account:	£31,000.00 (including a deposit of £25,000 on 30 June 2006

4. HMRC have accepted that the profit should be reduced by expenses of £514 that the Appellant claimed.

5. The Appellant's contention is that the deposit of £25,000 on 30 June 2006 was a loan from a friend, now resident in New Zealand, to buy a camper van, that his mother gave him £5,000 for the same purpose, that none of the deposits were business takings, and that his original tax return was correct.

The hearing of the appeal

6. Prior to the hearing of the appeal, directions were issued by the Tribunal on 23 March 2011, setting a timetable for the parties to provide details of witnesses to be called, dates to avoid and lists of documents. HM Courts and Tribunals Service ("HMCTS") subsequently sent a letter to the Appellant dated 9 May 2011, noting that the Appellant had not provided details of any witnesses, dates to avoid or a list of documents, and requested him to advise of the position within 7 days. Subsequently,

on 29 June 2009, the Tribunal issued a direction noting that the Appellant had failed to respond to correspondence from the Tribunal, and directing that HMRC should prepare the bundles on the basis that the Appellant has no documents other than those on the HMRC list of documents.

7. The appeal was heard in Sutton on 29 September 2011. The Appellant attended the hearing in person and presented his appeal. HMRC were represented by Ms Weare, who presented the HMRC case first. Ms Christine Collins was called as a witness by HMRC, and was cross-examined by the Appellant. The Appellant gave evidence and was cross examined by Ms Weare. The Tribunal heard submissions from the Appellant and from HMRC.

8. However, at the end of this hearing, the Tribunal felt that the Appellant may not have appreciated the significance of the hearing and the need to present evidence. He stated to the Tribunal that he had been on medication and depressed. He had not presented any evidence in support of his case or called any witnesses. In the circumstances, given the amount at stake, the Tribunal of its own motion advised the Appellant that he would be well advised to seek some form of legal representation or advice in relation to this matter, and offered to grant the Appellant an adjournment for this purpose.

9. The Tribunal subsequently issued written directions confirming what had been directed at the conclusion of the hearing. They were released on 10 October 2011. They stated that the hearing of the appeal was adjourned for two months. They noted that the adjournment had been granted on the Tribunal's own motion, to enable the Appellant to appoint a legal representative. They stated that "Upon appointment, the legal representative should as soon as possible file with the Tribunal and serve on HMRC any additional evidence (including any witness statements) on which the Appellant seeks to rely, details of any witnesses to be called on behalf of the Appellant at the adjourned hearing, and any request for any directions".

10. By a letter to HMCTS dated 16 January 2012, HMRC referred to the directions of 10 October 2011 and stated as follows. The Appellant had made a request under the Freedom of Information Act. He was advised by HMRC on 24 November 2011 that HMRC had complied with his request and that he had received all of the information that he was entitled to receive. The Appellant had not advised HMRC that he had appointed a legal representative as suggested in the directions. The Appellant had advised HMRC that he cannot be contacted at his street address and that he can only be contacted by e-mail.

11. By a letter to HMCTS dated 16 January 2012, HMRC requested that in the absence of any response by the Appellant to the directions of 10 October 2011, the Tribunal consider relisting the appeal for hearing without delay.

12. The appeal was listed for a further hearing at Ashford on 16 March 2012. At that hearing, Ms Weare appeared for HMRC. There was no appearance by or on behalf of the Appellant. The Tribunal clerk was requested to check with HMCTS that the Appellant had been given notice of the hearing. The clerk reported to the Tribunal

that HMCTS had advised that a notice of hearing had been sent to the Appellant by post on 6 February 2012, and subsequently by e-mail on 5 March 2012. The Tribunal clerk was then requested to telephone the Appellant to check whether he had received the notice of the hearing. The clerk reported to the Tribunal that he had spoken by telephone to the Appellant and that the Appellant had said as follows. He did not know that the hearing was going ahead. He would have to check whether he received the notice of hearing. He did not have regular access to a computer and would have to borrow a computer. He was not in the area to attend. He attended a previous hearing but did not know that there was a judge.

13. The Tribunal informed Ms Weare of these enquiries. Ms Weare submitted on behalf of HMRC that the Tribunal should in the circumstances proceed with the appeal in the Appellant's absence pursuant to rule 33 of the Tribunal's Rules.

14. The Tribunal was satisfied that it should do so. It considered that reasonable steps had been taken to notify the Appellant of the hearing. In particular, notification had been sent to him by e-mail given his previous indication that this is what he required. The Appellant was aware that there was a pending appeal, and the Tribunal considered that it was his responsibility to ensure that notices sent to him by HMCTS to the address specified by him are in fact received by him. Furthermore, the Tribunal considered that it was in the interests of justice to proceed with the appeal in the Appellant's absence. The appeal was heard in full by the Tribunal on 29 September 2011. The Tribunal could have proceeded at the end of that hearing to give its determination. The Tribunal adjourned the hearing solely in order to give the Appellant a further chance to obtain legal representation, in which case the Tribunal would have been prepared to receive further evidence and arguments from him. There was no indication that the Appellant had taken any steps to obtain representation, or that he intends to do so. The Tribunal considers that the Appellant has been given every opportunity to present his case on appeal, and that no purpose would be served in delaying the determination of this appeal any further.

15. The Tribunal accordingly proceeded with the hearing, at which Ms Weare simply said that she relied on the evidence and arguments presented at the 29 September 2011 hearing, and again summarised the HMRC case.

The relevant legislation

16. Section 9A of the TMA relevantly provides:

> (1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so ("notice of enquiry")—
>
> (a) to the person whose return it is ("the taxpayer"),
>
> (b) within the time allowed.
>
> (2) The time allowed is—
>
> (a) if the return was delivered on or before the filing date, up to the end of the period of twelve months after the day on which the return was delivered;

...

17. Section 28A of the TMA relevantly provides:

> (1) An enquiry under section 9A(1) of this Act is completed when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions.
>
> In this section "the taxpayer" means the person to whom notice of enquiry was given.
>
> (2) A closure notice must either—
>
> (a) state that in the officer's opinion no amendment of the return is required, or
>
> (b) make the amendments of the return required to give effect to his conclusions.
>
> (3) A closure notice takes effect when it is issued.
>
> ...

18. Section 31 of the TMA gives the Appellant a right of appeal against the closure notice.

19. Section 50 of the TMA relevantly provides:

> (6) If, on an appeal notified to the tribunal, the tribunal decides—
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> (a) that, the appellant is overcharged by a self-assessment;
>
> ... or
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment,
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> the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.
>
> (7) If, on an appeal notified to the tribunal, the tribunal decides—
>
> (a) that the appellant is undercharged to tax by a self-assessment …
>
> ... or
>
> (c) that the appellant is undercharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be increased accordingly.

The evidence and submissions of the parties

20. The witness statement of Ms Collins at paragraphs 8, 13 and 14 sets out the deposits into the various bank accounts that were of concern to HMRC. The witness statement of Ms Collins states amongst other matters as follows. The Appellant was asked to provide details of, or documents verifying, the source of these deposits. In particular, the Appellant was asked to explain a deposit of £25,000 banked into one of the accounts on 30 June 2006. The Appellant said that two deposits of £1,000 and

£1,500 were loans from his family. The Appellant had stated that the sum of £25,000 had been lent to him by a friend to buy a camper van, and that the money had been hidden under the bath and repaid to his friend in cash when he failed to purchase the camper van. He was no longer speaking to this friend who now lived in New Zealand. The Appellant subsequently provided the name and address in New Zealand of this friend, but asked HMRC not to approach him directly.

21. Ms Collins was cross-examined by the Appellant, who put it to her that he had never said that he did not buy the camper van, and that in fact he did buy it. He asked Ms Collins on what basis she had concluded that the deposits were earnings and Ms Collins responded that she so concluded by default as the Appellant had been asked for evidence of the source of these earnings and had failed to provide it.

22. The Appellant said in evidence amongst other matters as follows. He is not a great believer in work. He works enough to get by. He sends invoices to some clients but not others, as not all clients require them. He does not invoice every piece of work he does. For his tax returns, he uses invoices and cash deposits with the bank.

23. In cross-examination, the Appellant was referred to a bank statement showing that £25,000 was paid into one of his accounts on 30 June 2006, and that on 28 February 2007, £26,023 was paid out of the account to "B F Ebrill", leaving a remaining balance of only £277. The Appellant said that he borrowed the £25,000 to buy the camper van from a friend in cash about two months before he deposited it into the bank account, which would have been around the end of April 2006. His friend withdrew the amount in cash from the bank in the Appellant's presence, and gave it to the Appellant. The Appellant went to Cologne in Germany to inspect the camper van, but the van had been rented out so was not available at that time, and the dealer in Cologne said that he could not accept Sterling cash as payment. The Appellant came back from this trip to Germany in May or June 2006 and then deposited the money in a bank account to transfer it to the dealer. The Appellant could not explain why the bank statement showed that the money had been transferred to his son, "B F Ebrill". He said that "I find that weird", and that there was no reason why he would give his son money as he had just given him some £100,000 about 4 months previously from the sale of his flat. The Appellant denied that he had ever said that he had repaid the £25,000 to the friend who lent it to him. He said that there was a dispute between his friend and him which was a very personal matter and that it was of no relevance whether or not he had repaid his friend. He said that there had been no written agreement between his friend and him about the loan of the £25,000. He said that it was not unusual for him to borrow or lend such sums of money without anything in writing, and that "I don't live in that world" where written agreements are required. He said that when asked by Ms Collins to provide evidence of the source of other deposits into the bank accounts he had probably not provided anything. He said that he had received a payment of 5,000 Euros from his mother. He said that he had not spoken to his mother for a long time, and that he had sorted matters out with her and that she had given him this sum as she had given money to other members of the family. He said that he had sold his flat in about 2008 for some £250,000.

24. On behalf of HMRC, Ms Weare submitted as follows. The Appellant had deposits into his bank account in excess of turnover. The onus was on the Appellant to show that the assessment in the closure notice is incorrect. The Appellant has provided no satisfactory explanation. He has not kept complete records. He has acknowledged that some earnings were not paid into the bank, although these have not been included in HMRC's assessment. The Appellant has been given every opportunity to provide evidence of the source of the deposits. However, there is no evidence of where they came from. The bank statement indicates that £25,000 was paid to the Appellant's son, and not to the camper van dealer as claimed. The bank statement indicates that the bank account was opened for the purpose of depositing this £25,000 in June 2006, and that it was still in the account in February 2007. The Appellant's family members had not come to give evidence of the matters claimed by the Appellant. The Appellant should be allowed the benefit of the £514 claimed as expenses in the wrong box on the tax return. The appeal should be dismissed.

25. The Appellant submitted amongst other matters as follows. After he came back from Germany, he deposited the £25,000 in the bank, and then shortly afterwards he went back to Germany having transferred the money. He may have transferred the money to his son to transfer to Germany. He completed the purchase of the camper van about 6 weeks later. The bank statement showing the money in the account some 8 months later "doesn't make sense". He believes that he has to the best of his knowledge done what he needed to do. There would be a record with the banks.

The Tribunal's findings

26. The closure notice was issued pursuant to s.28A(2) of the TMA, which states that at the end of an enquiry into a tax return, a closure notice must make the amendments to the tax return required to give effect to the officer's conclusions.

27. The Tribunal finds that the Appellant did not have records to support all of the figures used in the calculation of his tax liabilities in the tax year under enquiry. He admitted that he did not invoice all of the work that he did. He had no proper business records to support the figures that he had given in his tax return. The Appellant must have been aware of his duty to retain business records for tax purposes

28. HMRC were in the circumstances entitled to take the view that without acceptable explanation, amounts banked into the Appellant's bank were earnings. The Appellant did not produce any business records or other documentary evidence to explain the source of these deposits. In the appeal before the Tribunal, despite being given every opportunity to produce evidence, he did not produce any. Despite claiming that the deposits were loans or gifts from a friend or family, no other person gave evidence in support of the appeal. The only evidence of the source of these deposits was the Appellant's oral evidence.

29. The Tribunal finds that in such circumstances, the officer conducting the enquiry is not required to accept the Appellant's unsupported claims in relation to the source of the deposits. Rather, the Tribunal finds that in reaching "conclusions" at the end of

an "enquiry" pursuant to ss.9A and 28A of the TMA, the officer must use his or her best judgement in determining the correct amount of tax.

30. The Tribunal finds that in an appeal against an amendment to a tax return giving effect to such best judgment "conclusions", the burden of proof is on the taxpayer to establish the correct amount of tax due. This is in accordance with the principles established (in different contexts) in *Bi-Flex Caribbean* at 522; *Pegasus Birds Ltd. v Customs and Excise* [2004] EWCA Civ 1015; and *Khan v Revenue and Customs* [2006] EWCA Civ 89 ("***Khan***") at [68]-[76], [78]-[83]. In such an appeal, the officer's conclusions "are *prima facie* right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right" (*Khan* at [69], quoting *Bi-Flex Caribbean*). That test was confirmed in *Khan v Revenue and Customs* [2006] EWCA Civ 8 at [69] by Carnwath LJ (with whom Buxton and Lloyd LJJ agreed). In *Mithras (Wine Bars)* [2010] UKUT 115 (TCC) at [10]-[11], Sir Stephen Oliver QC said at [10]-[11] that:

> 10. In Rahman v Customs and Excise Commissioners [1998] STC 826 ("Rahman 1"), Carnwath J (as he then was) stated that a tribunal should not treat an assessment as invalid merely because the members disagreed as to how the Commissioners' judgment should have been exercised. A much stronger finding was required, for example that the assessments had been reached dishonestly or vindictively or capriciously, or was a spurious estimate or guess in which all elements of judgment were missing or was wholly unreasonable. …
>
> The circumstances in which the FTT can decide that the assessment was not raised to the best of the Commissioners' judgment, and therefore should not have been made at all, are very limited, essentially being restricted to cases where the Commissioners have acted perversely or in bad faith. Cairnwath J in *Rahman 1* indicated that this "kind of case is likely to be extremely rare" and that in the normal case "it should be assumed that the Commissioners have made an honest and genuine attempt to reach a fair assessment": see page 835 of the judgment.

31. In the present case, the Appellant has given an oral explanation of the sources of the deposits, without any documentary evidence in support. Furthermore, the oral explanation that he gave is not consistent with what documentary evidence there is. In particular, the evidence shows that the sum of £25,000 was transferred to the Appellant's son some 7 months after it was deposited into the account, which is inconsistent with the Appellant's claim that it was transferred to Germany to buy a camper van within a period of about 6 weeks after the sum had been deposited in the account on 30 June 2006.

32. The Tribunal finds that the Appellant has not established that HMRC have acted perversely or in bad faith. It follows that this appeal is dismissed.

33. 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.

DR CHRISTOPHER STAKER

TRIBUNAL JUDGE

RELEASE DATE: 04 April 2012