TC03828

Appeal number: TC/2013/04677

INCOME TAX – PAYE – Penalties and income tax – Whether sufficient evidence to displace decisions under s 8 Social Security Contributions (Transfer of Functions Etc.) Act 1999, Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 determinations, Closure Notice and discovery assessments – No – Whether reasonable excuse for failure to submit employers' annual returns – No evidence from appellant – Appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

HUMAYUN KABIR **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
MR NIGEL COLLARD

Sitting in public at 45 Bedford Square, London WC1 on 15 July 2014

Monir Ahmed FCCA, of Rauf & Co Chartered Certified Accountants, for the Appellant

Darren Bradley, of HM Revenue and Customs, for the Respondents

DECISION

1. Mr Humayun Kabir appeals against:

(1) Decisions, made by HM Revenue and Customs ("HMRC") under s 8 of the Social Security Contributions (Transfer of Functions Etc.) Act 1999 ("SSCTFA") that Mr Kabir is liable to pay Class 1 National Insurance Contributions ("NIC") of £931.53 for the period from 21 October 2008 to 5 April 2011 and £60.45 for the period from 1 September 2010 to 5 April 2011.

(2) Determinations, made by HMRC under Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 ("PAYE Regulations") for 2008-09 in the sum of £1,705.24, 2009-10 in the sum of £3,717.27 and 2010-11 in the sum of £1,705.24.

(3) Penalties of £1,500 and £2,700 imposed under s 98A of the Taxes Management Act 1970 ("TMA") for the years 2008-09, 2009-10 and 2010-11 for the failure to file an employers' annual return, a P35.

(4) A Closure Notice made under s 28A TMA following an enquiry into Mr Kabir's 2010-11 self-assessment tax return which increased the tax due from him to £8,834.40. However, after a further review this was reduced to £6,650.40 and it is the lower amount with which this appeal is concerned.

(5) Discovery assessments made under s 29 TMA for tax of £1,491.52 for 2008-09 and £6,869.47 for 2009-10 which were subsequently reduced, following a further review, to £877.48 and £5,016.07 respectively.

Although Mr Kabir had appealed each of these matters separately, on 4 September 2013 the Tribunal directed that the appeals be consolidated and proceed under the same appeal number as a standard category case.

2. Mr Kabir, who did not attend the hearing, was represented by Mr Monir Ahmed FCCA, of Rauf & Co Chartered Certified Accountants and HMRC by its presenting officer Mr Darren Bradley.

Evidence

3. In addition to a bundle of documentary evidence which included copies of correspondence between the parties, meeting notes, notices of assessments etc, we had oral evidence from Peter Chapman, a Higher Officer of HMRC for the Small and Medium Enterprises and Daniel Marks an Employer Compliance Officer of HMRC with the Hidden Economy Team for the South West.

4. Both gave their evidence under oath and were cross-examined by Mr Ahmed.

Facts

5. Between September 2008 and 31 October 2011 Mr Kabir traded as *Chutney Mango*, a takeaway specialising in contemporary Indian and Bangladeshi cuisine, in Cambourne, Cornwall. His home, however, is in Mitcham in the London Borough of Merton.

6. On 20 April 2011 HMRC wrote to *Chutney Mango* regarding a check of employers' records (ie a PAYE compliance check) and requesting a meeting at the business premises.

7. The meeting, attended by Mr Kabir and Mr Marks and Mrs H Penfold, both of HMRC, took place on 20 July 2011. At that meeting Mr Kabir confirmed that he was the owner of *Chutney Mango* and had been since September 2008. He also said that he worked in the takeaway seven days a week taking orders at the counter and over the telephone. He explained that he employed two members of staff, a delivery man called Damien who also worked seven days a week and a Mr Ghosh who is a chef and said that both were paid £60 cash a week, although no record of wages had been kept or payslips provided to the employees. Mr Marks provided Mr Kabir with several P46 forms to be completed by his staff.

8. Although HMRC provided a note of this meeting, Mr Kabir made it clear, in his letter of 15 August 2011 to Mr Marks, that he did not accept HMRC's account of the meeting. He wrote:

> I think there is a lot of misunderstanding going on between you and me. In future to avoid any misunderstanding it will be better to write to my accountant or to me. I think it was a waste of time for both of us to have that meeting. The question you have asked me. You could write to me or my accountant with your question. In future you can write to me or my accountant with your question.

The letter continued stating:

> Please make a note that I take about £1100.00 a week.

9. On 24 August 2011 Mr Marks wrote to Mr Kabir to say that despite a letter to Rauf & Co (Mr Kabir's accountants) on 2 August 2011 requesting that the completed P46 forms be submitted by 19 August 2011 they had still not been received. However, online P46 forms had been submitted by the accountants for employees Alison Roberts and Damien Carr. Mr Marks therefore wrote again to Mr Kabir on 6 September 2011, enclosing further P46 forms and explaining that all employees were required to complete a form P46. He asked for these to be returned by 16 September 2011.

10. On Saturday 8 September 2011 HMRC officers Daniel Marks, Peter Chapman and Amanda Branton made an unannounced visit to *Chutney Mango*, where Alison Roberts was working behind the counter and two men were working in the kitchen. Ms Roberts explained that Mr S Kabir (the brother of Mr Humayun Kabir, the appellant) was making deliveries but would shortly return. She agreed to answer questions from Mr Marks telling him about her role as "front of house", something

that was also done by Damien, who had been working earlier that evening, in addition to making deliveries. However, before Mr Marks had finished asking his questions Ms Roberts answered a telephone call from Mr Humayun Kabir.

11. Although Mr Kabir agreed to let Mr Marks continue with his questions to Ms Roberts, he did not give permission for the kitchen staff to be interviewed by HMRC and the officers therefore left the premises. Mr Marks said that when he was at *Chutney Mango* he had seen four people, Ms Roberts, Mr S Kabir and the two men in the kitchen and had been told that another person, Damien, had also been working that evening.

12. Mr Marks wrote to Mr Kabir on 9 March 2012 reminding him that the PAYE compliance check was still open and asking for his, Mr Kabir's, co-operation. On 16 April 2012 Mr Marks received a telephone call from Accountancy Planet and was advised that they were now acting for Mr Kabir. A form 64-8 was subsequently sent to HMRC confirming Accountancy Planet were Mr Kabir's agent.

13. On 9 July 2012 Accountancy Planet wrote to Mr Marks enclosing a letter from Mr Kabir, also dated 9 July 2012, which stated that:

> There were 4 people including me, working from 5:00-10:30 (3 people at a time divided into shifts/days)
>
> 1. I was mostly working for an average of 33-35 hours a week p/w (from start till end) and I was covered by other employees, when needed a day off.
>
> 2. One delivery boy working 20 hours p/w.
>
> 3. One chef working about 23 hours p/w.
>
> 4. Cover One employee working 18-20 hours per week covering me/chef for the rest of the time
>
> All the times I paid them the minimum wage, but did not know I have to operate the PAYE scheme. Also I was struggling, but was running the business with a hope, that it will get better

14. On 27 September 2012 Mr Kabir wrote to Mr Marks to say that he had re-appointed Rauf & Co. as his agent.

15. On 18 October 2012 HMRC issued the Determinations and Decisions and penalties which are the subject matter of this appeal in the amounts stated in paragraph 1, above. These were based on the information provided to HMRC by Mr Kabir in his letter of 9 July 2012 ie the number of employees and hours worked and payment of the minimum wage. Where P46 information had been provided this was taken into account. However, in the absence of such information the employees' tax was calculated at the basic rate.

16. Also on 18 October 2012, as Mr Kabir had not submitted any employers' annual returns (P35s), HMRC issued penalties for the failure to file such returns for 2008-09, 2009-10 and 2010-11 as stated in paragraph 1, above.

17. In addition to the PAYE compliance check, HMRC had opened an enquiry into Mr Kabir's 2010-11 self-assessment tax return on 8 March 2012. Although Mr Kabir's income from *Chutney Mango* was shown in his 2010-11 self-assessment return it had not been included in his returns for 2008-09 and 2009-10. Also, although HMRC records indicated that Mr Kabir was in receipt of £3,411.11 in benefits, £1,783.56 from MGM Advantage and £1,127.64 from Scottish Equitable, these were not included on his 2010-11 return.

18. In the absence of information to the contrary HMRC were of the view that the business turnover was understated and revised the turnover to £1,250 per week. However, as we have already noted (in paragraph 1, above) this was reduced to £1,100 to reflect the amount stated in Mr Kabir's letter of 15 August 2011 (see paragraph 8, above).

19. HMRC were also of the view that expenditure had been overstated and estimated this at £30,000. Accounts prepared by Rauf & Co. for the year ended 5 April 2011 (the only period for which accounts were prepared) show total expenditure of £33,216 and a turnover of £36,868. Mr Ahmed told us that business records were not maintained. In particular, there were no records of cash income or expenditure. The turnover had been calculated by analysing the bank deposits and doubling the total, but he could not satisfactorily explain how he had arrived at this figure. Purchases had been estimated to produce a gross profit of approximately twice the purchases.

20. In the circumstances an amendment was to Mr Kabir's 2010-11 self-assessment tax return and discovery assessments for 2008-09 and 2009-10 were issued on 19 March 2013 as stated in paragraph 1, above. The amounts assessed for 2008-09 and 2009-10 were based on a reduction in profits of 25% for each year with a further reduction in 2008-09 to reflect the shorter trading period.

21. It is not disputed that Mr Kabir suffers from poor health and memory loss.

Law

22. Insofar as it applies to the present case s 8(1) SSCTFA provides that:

> … it shall be for an officer (of HMRC):
>
> (a) to decide whether for the purposes of Parts I to V of the Social Security Contributions and Benefits Act 1992 a person is or was an earner and, if so, the category of earners in which he is or was to be included,
>
> (b) to decide whether a person is or was employed in employed earner's employment for the purposes of Part V of the Social Security Contributions and Benefits Act 1992 (industrial injuries),
>
> (c) to decide whether a person is or was liable to pay contributions of any particular class and, if so, the amount that he is or was liable to pay,

> (d) to decide whether a person is or was entitled to pay contributions of any particular class that he is or was not liable to pay and, if so, the amount that he is or was entitled to pay,
>
> (e) to decide whether contributions of a particular class have been paid in respect of any period,
>
> …

23. In an appeal against a decision under s 8 of SSCTFA, Regulation 10 of the Social Security Contributions (Decisions and Appeals) Regulations 1999 provides: —

> If, on an appeal … it appears to the tribunal by examination of the appellant on oath or affirmation or by other evidence that the decision should be varied in a particular manner, the decision shall be varied in that manner, but otherwise shall stand good.

24. Regulation 49 of the PAYE Regulations requires an employer to send a form P46 to HMRC "on making the first relevant payment [ie payment net of tax] to the employee." Under Regulation 21 of the same Regulations an employer, on making a payment to an employee "must" deduct or repay tax in accordance with the relevant tax code. Any tax deducted shall then be paid to HMRC in accordance with Regulation 68. If it appears to HMRC that such has not been paid, they may make a determination under Regulation 80 of the PAYE Regulations:

> … to the best of their judgment and serve notice of their determination on the employer.

Appeals against any such determinations are, by virtue of Regulation 80(5) PAYE Regulations, subject to the appeals provisions of the TMA (to which we refer below).

25. A further requirement on an employer, imposed under Regulation 73(1) of the PAYE Regulations, is to deliver an employers' annual return, a P35, to HMRC "before 20 May following the end of a tax year". Regulation 73(10) provides that:

> Section 98A of TMA (special penalties in case of certain returns) applies to paragraph 73(1).[PAYE Regulations]"

26. Section 98A TMA which sets out the liability to penalties for non-compliance with the PAYE Regulations provides:

> (1) PAYE regulations…may provide that this section shall apply in relation to any specified provision of the regulations.
>
> (2) Where this section applies in relation to a provision of regulations, any person who fails to make a return in accordance with the provision shall be liable—
>
> (a) to a penalty or penalties of the relevant monthly amount for each month (or part of a month) during which the failure continues, but excluding any month after the twelfth or for which a penalty under this paragraph has already been imposed, and
>
> (b) if the failure continues beyond twelve months, without prejudice to any penalty under paragraph (a) above to a penalty not exceeding

> (i) in the case of a provision of PAYE regulations, so much of the amount payable by him in accordance with the regulations for the year of assessment to which the return relates as remained unpaid at the 19th April after the end of that year, or
>
> (ii) …
>
> (3) For the purposes of subsection (2)(a) above, the relevant monthly amount in the case of a failure to make a return—
>
> (a) where the number of persons in respect of whom particulars should be included in the return is fifty or less, is £100…

6. Section 118(2) TMA, so far as is material to this appeal, provides:

> …where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased.

There is no definition in the legislation of a "reasonable excuse", which has been held to be "a matter to be considered in the light of all the circumstances of the particular case" (see *Rowland v HMRC* [2006] STC (SCD) 536 at [18]).

27. Under s 9A TMA an Officer of HMRC may enquire into a tax return that has been filed by giving notice of his intention to do so to the taxpayer within the time allowed. In the present case it is not disputed that notice of an enquiry into Mr Kabir's return was given within the statutory time limit, ie 12 months after the day on which the return was delivered to HMRC.

28. Section 28A TMA 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.

29. Insofar as it applies to this appeal, s 29 TMA provides:

> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax…. have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

(2) …

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition [is not applicable to the present appeals]

30. It is for HMRC to establish that the conditions for making a discovery are satisfied (see *HMRC v Household Estate Agents* [2008] STC 2045 at [48], *Poulter v HMRC* [2012] UKFTT 670 TC at [20] *Rhodes & another v HMRC* [2013] UKFTT 431 (TC)) that the question of whether this condition has been satisfied was a matter for the Tribunal and not the individual tax inspector who made the discovery (see *Hankinson v HMRC* [2012] STC 485)

31. As with the appeals against determinations (see above) s 50(6) applies to appeals against amendments to a self-assessment tax return made under s 28A TMA and discovery assessments made under s 29 TMA. Section 50(6) TMA provides:

If, on an appeal notified to the tribunal, the tribunal decides –

(a) that the appellant is overcharged by a self-assessment;

(b) …

(c) that the appellant is overcharged by an assessment other than a self-assessment [which by virtue of Regulation 80(5) PAYE Regulations must also be read as referring to a determination],

The assessment or amounts shall be reduced accordingly but otherwise the assessment … shall stand good.

32. In the decision of the Court of Appeal in *T Haythornwaite & Sons v Kelly (HM Inspector of Taxes)* (1927) 11 TC 657 Lord Hanworth MR, referring to a previous incarnation of this enactment, said, at 667:

"Now it is to be remembered that under the law as it stands the duty of the Commissioners [and from 1 April 2009 the Tribunal] who hear the appeal is

> this: Parties are entitled to produce any lawful evidence, and if on appeal it appears to a majority of the Commissioners by examination of the Appellant on oath or affirmation, or by other lawful evidence, that the Appellant is over-charged by any assessment, the Commissioners shall abate or reduce the assessment accordingly; but otherwise every assessment or surcharge shall stand good. Hence it is quite plain that the Commissioners are to hold the assessment as standing goods unless the subject – the Appellant – establishes before the Commissioners, by evidence satisfactory to them, that the assessment ought to be reduced or set aside."

Discussion and Conclusion

33. Mr Bradley, for HMRC, submitted that the decision, determination, amendment and assessments had been made on the basis of information provided by Mr Kabir. He explained that, having made the amendment for 2010-11, HMRC had made the discovery assessments for 2008-09 and 2009-10 on a reducing basis of 25% each year to reflect likely growth of the business following its establishment.

34. As Mr Kabir had not included his income from the *Chutney Mango* in his 2008-09 and 2009-10 self-assessment tax returns and omitted any reference to income from benefits, MGM Advantage and Scottish Equitable from his 2010-11 self-assessment tax return we accept Mr Bradley's contention that this was at the very least "careless" and as such HMRC were entitled to make the discovery assessments.

35. We also agree with Mr Bradley that the penalties had been imposed in accordance with the legislation and note that these have, where possible, been mitigated by 75% to allow for co-operation and disclosure by Mr Kabir.

36. For Mr Kabir, Mr Ahmed emphasised the difficulties faced by the business, Mr Kabir's poor health and that *Chutney Manga* was a family business that may have employed school leavers on a part time basis. He submitted that any assessments made by HMRC should be fair and just and that in the present case as they were estimated they could not accurate. He also argued that Mr Kabir had always intended to comply with the legislation, although accepted that he had not done so, and in the circumstances his appeals should be allowed.

37. However, Mr Ahmed was not the first to raise the issue of the unsatisfactory nature of estimated assessments. Mr Justice Walton in *Johnson v Scott (HM Inspector of Taxes)* (1978) 52 TC 383 at 394, in a passage approved by the Court of Appeal (at 403) in that case, said:

> "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. When, in paragraph 7(b) of the case stated, the Commissioners state that (with certain exceptions) the inspector's figures were 'fair' that is, in my judgment, precisely and exactly what they ought to be, fair. The fact that the onus is on the taxpayer to displace the assessment is not intended to give the Crown carte blanche to make wild or extravagant claims. Where an inference of whatever nature falls to be made, one invariably speaks of a 'fair' inference. Where, as is the case in this matter, figures have to be inferred, what has to be made is a

> 'fair' inference as to what such figures may have been. The figures themselves must be fair."

38. In our view the s 8 SSCTFA decisions, the determinations under Regulation 80 PAYE Regulations, s 28A TMA closure notice and s 29 TMA assessments were made on the basis of "fair" inferences drawn from the information provided by Mr Kabir and his professional advisers. Therefore, as is clear from *Haythornwaite* and *Johnson v Scott* it is for Mr Kabir to adduce satisfactory evidence to displace these.

39. Also in the absence of any such evidence it follows that the decisions, determinations, amendment and assessments must "stand good".

40. As Mr Kabir has not submitted P35s and has not provided any evidence of a reasonable excuse for the failure to do so, we find that the penalties must stand.

41. We therefore dismiss the appeals and confirm the penalties.

42. By way of postscript we should add that, although we understand that Mr Kabir did travel to the Tribunal premises, he chose, for health reasons, not to attend the hearing. When it became clear that no evidence was to be adduced on his behalf we referred to *Haythornwaite* and the onus being on the appellant to displace the assessments etc. and allowed a short adjournment for Mr Ahmed to explain this to Mr Kabir and take further instructions. However, having done so, Mr Ahmed confirmed that Mr Kabir did not wish to give evidence or attend the hearing but would rely on Mr Ahmed to make submissions on his behalf.

Right to Apply for Permission to Appeal

43. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 22 July 2014