



TC04076

Appeal number: TC/2013/00847

*INCOME TAX – back duty investigation – assessments and penalties –
appeal allowed in part*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MR KA MAN PANG

Appellant

- and -

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

**TRIBUNAL: JUDGE PETER KEMPSTER
MRS SHAMEEM AKHTAR**

Sitting in public at Priory Courts, Birmingham on 9 September 2014

Mr Simon Poon (N (14) Limited) for the Appellant

Mr Philip Osborne (HMRC Appeals Unit) for the Respondents

DECISION

1. The Appellant (“Mr Pang”) appeals against a closure notice (under s 28A TMA 1970) and discovery assessments (under s 29 TMA 1970) raised by the Respondents (“HMRC”) in respect of the tax years 2006-07 to 2009-10 inclusive, and against penalties charged in relation to those years (under s 95 TMA 1970 for 2006-07 & 2007-08, and under s 24 FA 2007 for 2008-09 & 2009-10).

2. Both parties requested the Tribunal to make a decision in principle on (a) the adjustments (if any) to be made to the income for the four tax years under appeal, and (b) the rate of penalty (if any) for those years.

Background

3. Mr Pang was at the relevant times the proprietor of a restaurant in Gravesend, Kent. In August 2010 HMRC opened an enquiry (under s 9A TMA 1970) into Mr Pang’s self-assessment return for the tax year 2008-09. Information and documents were provided by Mr Pang and his then accountants, and scrutinised by HMRC; in particular, Mr Pang’s then accountants produced an extended trial balance covering the year ended 31 January 2009 (“the Trial Balance”). Following correspondence between the parties HMRC concluded that adjustments were required to the return under enquiry; also that discovery assessments should be raised for the other years now under appeal; further that penalties should be charged for all those tax years. The closure notice, assessments and penalties were issued in November 2012. In January 2013 that decision was upheld by a formal internal review by HMRC. In February 2013 Mr Pang’s new accountants appealed to the Tribunal.

Evidence

4. As well as bundles of documents produced in accordance with case management directions the Tribunal allowed the parties to submit various further items including chequebook stubs.

5. Mr Pang and his wife were present at the commencement of the hearing but indicated that Mrs Pang had certain health problems and they intended to return to their current business, and so would not be attending the remainder of the hearing. The Tribunal noted that a court-approved interpreter had been booked for the duration of the hearing, which was set down for three full days. Mr Poon for Mr Pang confirmed that neither Mr Pang nor his wife (who had both submitted witness statements) would be giving oral evidence. The Tribunal explained to Mr Poon and Mr Pang that while their witnesses were under no obligation to give oral evidence, that might affect the weight that the Tribunal felt it was appropriate to attach to any of their assertions that conflicted with evidence advanced by HMRC.

6. Mr Surjit Bunger provided a formal witness statement and gave oral evidence. Mr Bunger was the HMRC Inspector who conducted the enquiry and reached the

conclusion as to adjustments and penalties. The points of his evidence which are relevant to our decision are as follows:

5 (1) He had been provided with various business records, the Trial Balance, bank statements for the business and private bank accounts of both Mr & Mrs Pang; and a schedule of private and personal expenditure.

(2) After a thorough examination of the business records he concluded that the records were not robust. In particular:

(a) No till rolls were available.

(b) Stock was included at a notional value.

10 (c) No record was kept of proprietor's drawings.

(d) The daily credit card receipts apparently did not tally to the bank records.

15 (e) No record of cash expenditure was kept. In particular, cash wages had been paid to staff that could not be reconciled to the PAYE records supplied to HMRC.

(f) It had been explained to him that some business cash takings were deposited into the private accounts of Mr & Mrs Pang to avoid bank charges, but the amounts revealed were in excess of the drawings figures disclosed by Mr Pang's then accountants.

20 (3) His investigation also led him to conclude:

(a) Interbank transfers recorded on Mrs Pang's bank account suggested the existence of undisclosed bank accounts in her name (or her maiden name of Miss Jenny Chin).

(b) There were unexplained deposits to Mrs Pang's bank account.

25 (4) After correspondence and telephone conversations with Mr Pang and his then accountants, Mr Bunker concluded that:

30 (a) *The turnover of the business had been understated.* He conducted a "takings build up" exercise using the business records, the bank statements, and cash expenditure. He took into account the explanations provided to him to the extent that they could be reasonably verified. Where satisfactory verification was not available, he took bank deposits to comprise business receipts. On Mrs Pang's bank account he had been offered explanations of:

35 • A loan from family/friends – he had asked for details but nothing had been produced.

• Rent from a residential letting – HMRC had no information of a return of lettings income by Mrs Pang; also, contradictory explanations had been provided (including in two witness statements provided by Mrs Pang).

His calculations revealed an understatement of over £32,000 but after negotiation, he had reduced this to £30,000.

5 (b) *Certain expenditure was disallowable.* After negotiation some adjustments had been agreed. Again, he took into account the explanations provided to him to the extent that they could be reasonably verified. In relation to the items still in dispute and thus before the Tribunal:

- Premises costs – 15-30% disallowance to reflect private use of the flat over the restaurant.
- 10 • Legal fees – application for “spouse dependent visa” taken to be non-business expenditure.
- Motor expenses and capital allowances on car – 40% disallowance to reflect private use.

15 (5) Following from his above conclusions, and applying the presumption of continuity, he had determined that adjustments should also be made for the other tax years covered by the discovery assessments under appeal. He had asked whether there had been any changes in the manner of operation of the business but had not received a reply.

20 (6) He also concluded that penalties should be charged for all the relevant tax years.

(a) In determining the appropriate rate of penalty for 2006-07 & 2007-08 (under s 95 TMA 1970) he abated the maximum penalty of 100% by 15% for disclosure, 30% for co-operation, and 25% for gravity – resulting in a penalty of 30%.

25 (b) In determining the appropriate rate of penalty for 2008-09 & 2009-10 (under s 24 FA 2007) he viewed the behaviour as deliberate and the disclosure as unprompted, giving a statutory range of penalty of 35-70%. He then reduced the judgemental element (35%) by 25% for telling, 35% for helping and 25% for access – giving a total reduction of 85% and a resultant judgemental element of 5.25%. Thus the applicable penalty rate was 40.25%.

(7) His conclusions on the adjustments and the penalties had been upheld by a colleague on formal internal review.

35 (8) He had read subsequent correspondence from Mr Pang’s new accountants but considered that it did not address some of his original concerns that were still unanswered, nor provide documents or explanations he had requested during his enquiry. All amounts had been calculated as including any applicable VAT – if the taxpayer wished to adjust his VAT records (and if that was possible) then that would be a separate exercise.

40 **Respondents’ case**

7. For HMRC Mr Osborne submitted as follows.

8. The taxpayer had provided incomplete records. HMRC had been obliged to calculate figures using their best judgment. Mr Bungler's exercise had been conducted carefully and took into account explanations provided to him. The onus then lay on the taxpayer to displace the disputed adjustments.

5 9. In relation to the witness statements of Mrs Pang, there appeared to be two documents of the same date but containing contradictory information. Mr Osborne would have wished to question Mrs Pang about those statements but the witness had not been presented.

10 10. In relation to the penalties, it was clear that Mr Pang had been, at the least, negligent. The basis of calculation of the penalty rates had been set out by Mr Bungler.

Appellant's case

11. For Mr Pang Mr Poon submitted as follows.

15 12. The adjustments proposed by HMRC were excessive. A reasonable offer of settlement had been made but rejected.

13. Mrs Pang had stated that deposits to her bank account included £4,200 student rental income and £6,000 loan from her friends. Those were non-business receipts that should be removed from the takings build-up.

14. The drawings figures should reflect £50 per week, which was quite reasonable.

20 15. The information provided by Mr Pang's previous accountants, including the Trial Balance, was unsatisfactory. For example, no distinction had been made between business premises rates and domestic council tax. An alternative calculation for business expenditure had been provided by Mr Poon's firm, which showed adjustments of only around £7,000.

25 16. HMRC had disallowed legal fees relating to visas and permits but from 2008 it had been necessary to obtain worker permits and thus these were proper business costs. This was borne out by the invoices from the solicitors and the chequebook stub descriptions.

Consideration and Conclusions

30 17. The parties have requested that we make a decision in principle on the matters in dispute, with the parties to agree exact figures in due course.

35 18. Section 50(6) TMA provides (so far as relevant): "If, on an appeal, it appears to the [Tribunal] ... that the appellant is overcharged by an assessment ... the assessment ... shall be reduced accordingly, but otherwise the assessment ... shall stand good." That puts upon the taxpayer the burden of proving that he has been overcharged by the assessment. The applicable standard of proof is the usual civil standard, of balance of probabilities.

19. In *Nicholson v Morris* [1976] STC 269 Walton J stated (at 280) (approved by Goff LJ on appeal – [1977] STC 162 at 168):

5 “... the Taxes Management Act 1970 throws on the taxpayer the onus
of showing that the assessments are wrong. It is the taxpayer who
knows and the taxpayer who is in a position (or, if not in a position,
who certainly should be in a position) to provide the right answer, and
chapter and verse for the right answer, and it is idle for any taxpayer to
say to the Revenue, 'Hidden somewhere in your vaults are the right
10 answers: go thou and dig them out of the vaults.' That is not a duty of
the Revenue. If it were, it would be a very onerous, very costly and
very expensive operation, the costs of which would of course fall
entirely on the taxpayers as a body. It is the duty of every individual
taxpayer to make his own return and, if challenged, to support the
return he has made, or, if that return cannot be supported, to come
15 completely clean; and if he gives no evidence whatsoever he cannot be
surprised if he is finally lumbered with more than he has in fact
received. It is his own fault that he is so lumbered.”

20. We have considered carefully the basis of adjustment of business profits
adopted by HMRC (which we consider was a reasonable and conscientiously
20 performed exercise) and also the alternative proposed by the Appellant. On the
evidence provided the only change we would make is to adjust the HMRC figures so
as to exclude from business turnover the cash receipts by Mrs Pang that represent
rental receipts by her. We have borne in mind that HMRC did not have the
opportunity to challenge Mrs Pang’s evidence but taking all the information together
25 we accept the explanation that there was rental income arising to Mrs Pang. Subject
to the point made in the next paragraph, we do not accept that there should be any
other changes to the adjustments made by HMRC – the alternative put forward was
merely a conjecture with no documentary evidence to support it.

21. In relation to the solicitor’s fee notes, this was a point that was raised only at the
30 hearing but we consider it fair and just to consider it, as HMRC were able to fully
address the point at the hearing. We understand why HMRC treated these payments
as non-business expenditure but, having carefully considered the wording of the fee
notes, we consider that these were business expenses and an adjustment should be
made to the taxable profits accordingly. We understand that there was a change in
35 practice by the Appellant relating to worker visas so that this adjustment is not
relevant to tax years before 2008-09. Accordingly, when applying the presumption of
continuity, this adjustment will not be relevant to the tax years 2006-07 and 2007-08.

22. In relation to the penalties, having considered carefully the evidence and
HMRC’s basis of calculation we can see no reason to disturb the percentage rates
40 calculated by HMRC. Accordingly, we uphold those rates of penalty for the
respective tax years, to be applied to the tax figures as adjusted in accordance with
this Decision.

Decision

23. The appeal is ALLOWED IN PART as follows:

(1) The closure notice for the tax year 2008-09 shall be adjusted so as to reflect the following two points:

(a) The two payments to Christine Lee & Co solicitors (total £8,225) shall be treated as deductible business expenditure; and

5 (b) The bank deposits by Mrs Pang representing rental receipts (£4,200) shall be excluded from the business turnover of Mr Pang.

(2) The discovery assessment for the tax year 2009-2010, which has been calculated on the presumption of continuity, shall be adjusted so as to reflect both the points stated at 1(1)(a) & (b) above.

10 (3) The discovery assessments for the tax years 2006-07 and 2007-08, which have been calculated on the presumption of continuity, shall be adjusted so as to reflect the point stated at 1(1)(b) above (but not the point stated at 1(1)(a) above).

15 (4) Leave to the parties to approach the Tribunal for determination of exact figures if they are unable to agree.

24. This document contains full findings of fact and reasons for the decision and replaces the summary findings and reasons decision notice issued to the parties on 16 September 2014. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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**PETER KEMPSTER
TRIBUNAL JUDGE**

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RELEASE DATE: 15 October 2014