[2015] UKFTT 0399 (TC)

TC04576

Appeal number: TC/2014/3857

INCOME TAX – accounts investigation – closure notice adjustment and penalty

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mr MOHAMMED SHAKEEL **Appellant**

- and -

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

TRIBUNAL: Judge Peter Kempster
Mr David Batten

Sitting in public at Centre City Tower, Birmingham on 11 August 2015

Mr Mohammed Naseem (brother of the Appellant) for the Appellant

Mr Brian Morgan (HMRC Appeals Unit) for the Respondents

DECISION

1. The Appellant ("Mr Shakeel") appeals against a closure notice (under s 28A TMA 1970) raised by the Respondents ("HMRC") in respect of the tax year 2008-09 in the amount of £6,616.94, and against a penalty charged (under sch 24 FA 2007) in the amount of £1,397.76.

Background

2. Mr Shakeel was at the relevant times the proprietor of a restaurant supply business in Wolverhampton. In November 2010 HMRC opened an enquiry (under s 9A TMA 1970) into Mr Shakeel's self-assessment return for the tax year 2008-09.

3. In March 2011 documents were supplied to HMRC and a meeting was held at the offices of Mr Shakeel's accountants. The meeting covered the topics of the business, record-keeping, and private income. Full business records were agreed to be supplied. Copies of the meeting notes were issued with an invitation to propose amendments.

4. In May 2011 a second meeting was held at Mr Shakeel's business premises. Mr Shakeel signed bank mandates. Copies of the meeting notes were issued.

5. In November 2011 a third meeting was held at the offices of Mr Shakeel's accountants. Further information was agreed to be supplied. Copies of the meeting notes were issued.

6. In June 2012 a fourth meeting was held at the offices of Mr Shakeel's accountants. Adjustments were agreed in respect of certain missing purchase invoices. Copies of the meeting notes were issued.

7. In September 2012 a fifth meeting was held at the offices of Mr Shakeel's accountants. Adjustments were agreed in respect of certain petrol receipts. Copies of the meeting notes were issued.

8. In March 2013 HMRC wrote stating their conclusions that adjustments were required in relation to three items as follows, and that a carelessness penalty charge was under consideration:

(1) £11,295.56 in respect of the purchase invoices and petrol receipts

(2) £9,264.79 in respect of a balancing figure described by Mr Shakeel's accountants as "capital introduced"

(3) £1,625.00 in respect of an unidentified cheque deposit.

9. In June 2013 a sixth meeting was held at the offices of Mr Shakeel's accountants.

10. On 16 August 2013 a closure notice was issued reflecting the above adjustments, and a penalty assessment was issued levying a penalty of 22.5% of the potential lost revenue.

11. Following appointment of a new agent, agreement was confirmed to the adjustment in respect of the purchase invoices and petrol receipts, but not to the other two adjustments. A formal internal review was requested.

12. On 17 June 2014 HMRC's formal review confirmed the earlier decisions on both the closure notice and the penalty assessment. On 14 July 2014 Mr Shakeel appealed to this Tribunal against those decisions.

Respondents' case

13. For HMRC Mr Morgan submitted as follows.

14. Before the Tribunal were three disputed matters.

(1) The business accounts prepared by Mr Shakeel's accountants contained a balancing figure of £9,264 described as "capital introduced". The accountant had explained that this was necessary to reconcile the bank statements. It had become apparent during the enquiry that Mr Shakeel had used his personal bank account in respect of certain business receipts and expenditures. It had also become apparent during the enquiry that a number of sales invoices were missing; it was suggested by Mr Shakeel that this was due to a faulty EPOS system; the case officer (Mrs Hanbury) had established that there were batches of consecutive invoices missing, rather than isolated examples; no satisfactory explanation had been given. The accountant then stated of the amount "in hindsight it should have been deducted from the trade debtors". Mrs Hanbury formed the view that the balancing figure represented sales not properly accounted for. Two and a half years into the enquiry Mr Shakeel's new agent suggested that the disputed amount represented loans and gifts from family members when the business was started. In February 2014 Mr Shakeel had produced affidavits from his two brothers stating that they loaned cash to him in stated amounts on stated dates. Mrs Hanbury had noted that the disputed amounts had been regular deposits rather than lump sum payments, and discounted this explanation. Further, no evidence tracing the payments had been provided such as bank statements from the brothers.

(2) The initial explanation of the unidentified cheque receipt of £1,625 was that it related to insurance compensation following a car accident. On 28 October 2013 the accountant wrote, "my client says he can sign an affidavit stating this money was received from insurance company and it was his personal money." On 30 November 2013 the explanation was changed to being a "friendly loan" from a Mr M Ali who "has nothing to do with Mr M Shakeel's business". Mrs Hanbury noted that Mr Ali was a customer of the business and concluded the cheque represented a business receipt.

(3) Given the adjustments agreed and maintained, HMRC concluded Mr Shakeel had been careless in the preparation of his 2008-09 self-assessment return. The penalty had been calculated in accordance with sch 24, which provided for a penalty of minimum 15% and maximum 30% of the potential lost

revenue. In relation to the 15% discretionary element of the penalty HMRC had awarded mitigation of:

(a) 10% as regards disclosure, as it was only on challenge that errors were accepted

(b) 25% as regards co-operation, as Mr Shakeel attended all meetings requested but gave conflicting information on more than one occasion

(c) 15% as regards provision of records, as there were some delays throughout the enquiry and formal powers were used on one occasion.

The resulting 50% abatement gave a 7.5% reduction and a resultant penalty of 22.5%. The business had since ceased trading and thus there were no ongoing conditions that could be applied to allow suspension of the penalty. There were no special circumstances to warrant any further reduction. In the calculation of the penalty HMRC had used an incorrect figure and the penalty assessed was slightly lower than the correct amount; HMRC did not intend to increase the penalty to correct that error.

Appellant's case

15. For the Appellant Mr Naseem and Mr Shakeel submitted as follows.

16. Mr Shakeel's first language was not English and he had come to England when he was 17. There had been misunderstandings between himself and HMRC, and he had not been aware of the severity of the matters. HMRC should have arranged to have an interpreter present at the meetings. His accountant had not been a Chartered Accountant but only a bookkeeper. His accountants had had an internal dispute with the partners taking files and not sharing them. This had been the cause of some of the delays in providing information. He had co-operated fully throughout, attending numerous meetings. He had provided bank mandates. He had offered HMRC the opportunity to analyse the EPOS system and they said they had an expert who could do that but it was never performed. He had provided affidavits from his brothers about the loans they had made to him. He had suffered from depression due to business and family problems, and HMRC had not taken his problems seriously.

17. His business had expanded rapidly but then failed in the economic downturn. He had to remortgage his house and had borrowed money from family members that he could not repay. He had exhausted his overdraft and credit cards to try to keep the business going. His brothers had lent him money and had provided affidavits confirming that. The loans were in cash. Some of the money was used to pay suppliers. He continued to be in bad financial circumstances.

18. Mr Shakeel had thought he recognised the amount of £1,625 as an insurance receipt. It had taken Halifax a long time to track down the cheque and when it eventually appeared Mr Shakeel realised it related to a different matter – there was just a misunderstanding. Mr Ali was a personal friend of Mr Shakeel. Mr Ali's businesses may have been customers of Mr Shakeel but not Mr Ali personally, and the cheque was drawn on Mr Ali's personal bank account. It had been difficult to find Mr Ali, who now lived in Wales. Mr Shakeel should not be blamed for a simple mistake – HMRC had themselves made an error in calculating the penalty.

19. The penalty was harsh and should be waived. There had been misunderstandings, rather than conflicting explanations. Because of the problems

with the accountants it had been difficult to access some of the information requested. He had relied on his accountant and had not appreciated the seriousness of the matters. He had suffered from depression.

Consideration and Conclusions

20. Section 50(6) TMA 1970 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.

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

> "… 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 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 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."

22. Thus it is up to Mr Shakeel to explain the anomalies that HMRC have identified during the enquiry.

23. We do not accept that Mr Shakeel had any serous difficulties in understanding the matters discussed at the numerous meetings with HMRC. He was accompanied at all those meetings by his professional accountant. Before starting his business he appears to have been a University student. The letters he personally wrote to HMRC (for example, that written on 2 April 2013) are in standard business English. There was no reason for HMRC to think that there were any language difficulties involved.

24. Mr Shakeel's accountant had candidly accepted that the £9,264 was a "plug" figure inserted to balance the bank reconciliation; the description "capital introduced" was just a convenient label. His accountant also, at one point, accepted that the figure represented sales although he maintained those sales were already recorded in turnover; Mrs Hanbury had tested that assertion and disproved it. We accept that Mr Shakeel did take loans from his family members. However, the information provided to HMRC indicates lump sums (of amounts in excess of £1,000 on each occasion according to the affidavits) in cash. That does not provide an immediate explanation of how those would account for a £9,264 balancing figure in the bank reconciliation. We note that Mrs Hanbury did attempt to verify that explanation but she concluded there was no observable link between the lump sum cash loans and the periodic amounts that she was investigating. The onus is on Mr Shakeel to show that the

£9,264 was not unrecorded sales and, after careful consideration of all the evidence, we have concluded that he has failed to do so.

25. Different explanations were provided at different times for the £1,625 receipt. If proper business records had been maintained then there should have been a prompt and accurate explanation available. No evidence has been provided from Mr Ali about what really happened. Again, the onus is on Mr Shakeel to show that the £1,625 was not unrecorded sales and, after careful consideration of all the evidence, we have concluded that he has failed to do so.

26. From our conclusions in the two preceding paragraphs, we find that HMRC's adjustments in the disputed closure notice stand.

27. Turning to the penalty, the statutory rules provide for a minimum penalty of 15% and a maximum penalty of 30%. HMRC determined the penalty at 22.5%, for the reasons summarised at [14(3)] above. We have noted that Mr Shakeel and his accountant attended numerous meetings with HMRC as requested, and that Mr Shakeel provided bank mandates when requested. That shows a creditable degree of co-operation with the enquiry. On the other hand, HMRC have been provided with conflicting information and explanations in the course of an enquiry into unprompted errors. On balance we feel the penalty rate of 22.5% is a fair reflection of culpability in this case, and we find the penalty stands as assessed at £1,397.76.

Decision

28. The appeal is DISMISSED.

29. 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.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 18 AUGUST 2015