



Neutral Citation: [2023] UKFTT 361 (TC)

Case Number: TC08785

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

London

Appeal reference: TC/2020/03659

INCOME TAX – closure notices and discovery assessments – whether amounts displaced by appellant – no – whether behaviour careless – yes - appeal dismissed

Heard on: 29 July 2022
Judgment date: 4 April 2023

Before

TRIBUNAL JUDGE ANNE FAIRPO

Between

LIBAN AWDON

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

The Appellant appeared in person

For the Respondents: Ms Costello, litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

1. The hearing took place on 29 July 2022, starting at 10:30am. The appellant (Mr Awdon) did not appear at the start of the hearing and had not contacted the Tribunal to say that he would be late. The Tribunal clerk was unable to contact Mr Awdon by telephone to determine whether he was simply delayed. HMRC submitted that it was in the interests of justice to proceed with the hearing in Mr Awdon's absence.

2. Mr Awdon had been specifically advised in directions issued by Judge Poole in February 2022, following an earlier postponement, that this hearing would go ahead in his absence if he did not attend. The hearing therefore commenced at 10:30 in his absence. The documents in the bundle were adopted as HMRC's submissions and witness evidence without amendment. The hearing then concluded.

3. Mr Awdon subsequently arrived at the Tribunal centre later that morning, after HMRC had left the area. I heard his explanation for his late arrival in the court room.

4. Mr Awdon had accompanied his wife that morning to Heathrow airport in order for her to catch a flight to Germany, where she was to attend a hospital appointment. He could not provide details of the flight or the appointment. He had believed he could get to the Tribunal centre from Heathrow in time and so had not advised the Tribunal that he might be late. I noted that it would appear likely that Mr Awdon had left Heathrow airport after the time at which he was supposed to attend the Tribunal centre, although he could not provide a clear timeline for his movements. Mr Awdon stated that he had called a number (which he subsequently thought might not be the number for the Tribunal) at 10:36am and had left a voicemail. No message was received by the Tribunal.

5. Considering the Tribunal rules and, in particular, the overriding objective and the need for matters to be resolved fairly but without delay and, bearing in mind that this hearing had already been postponed once and that Mr Awdon had been warned that the hearing would not be postponed, I did not consider that his explanation merited any change to my earlier decision that the matter should not be further adjourned.

6. However, acknowledging that Mr Awdon did eventually attend the Tribunal Centre, I decided that he should be permitted to make his short statement in writing, to be sent to the Tribunal and HMRC within seven days. HMRC would then be provided with the opportunity to similarly provide written submissions in reply. These written submissions would be reviewed in deciding the substantive appeal, and I advised both parties that I would take into account the fact that neither party had had the opportunity to cross-examine any evidence in those statements.

7. Mr Awdon sent a written statement dated 3 August 2022. For reasons which are not clear, this was not received by the Tribunal until 12 October 2022 (and was then received in triplicate). I decided to allow the submission as it was unclear where the delay in receipt had arisen; it later became clear that HMRC had also not received the statement and so the time for their reply was extended. On 5 January 2023, HMRC confirmed that they did not have any written submissions in reply as they considered that their Statement of Case addressed the issues in Mr Awdon's statement.

Introduction

8. Mr Awdon appealed against closure notices for the 2013/14 to 2015/16 tax years and discovery assessments for 2016/17 and 2017/18 tax years. The aggregate amount appealed was £25,331.19 He also appealed against penalties raised on the basis for carelessness for the 2015/16 to 2017/18 tax year, in the aggregate amount of £3,202.24.

9. Mr Awdon's later correspondence and his statement to the Tribunal indicate that he believed that HMRC considered that he was deliberately understating his liability to tax. The assessments and penalties were, in fact, issued on the basis that Mr Awdon had been careless in his approach to his tax affairs. There was no submission or contention that he had been dishonest.

10. The conclusion of this Tribunal, as set out below, is also that Mr Awdon was careless with regard to his tax affairs and that he has not provided any evidence to support his contention that HMRC's assessments were excessive. The appeal is dismissed and the assessments and penalties are upheld in full.

Background

11. Mr Awdon registered online with HMRC for self-assessment on 26 June 2012, with a business commencement date of 4 June 2012. He described himself as a self-employed motor trader. He also worked as a truck driver through an agency.

12. HMRC opened an enquiry to Mr Awdon's tax affairs for the 2013/14 to 2015/16 tax years and held a meeting with him on 14 March 2016, at which it was established that his accounts had not been prepared in accordance with GAAP. A number of requested were made, including by way of Schedule 36 Finance Act (FA) 2008 notices, for information to establish the correct self-assessment figures for Mr Awdon. Some prime records were provided for February 2012 to May 2014, principally an incomplete number of bank statements and purchase invoices, but no such records were provided for the rest of the periods in question. Mr Awdon also provided HMRC with a notebook in which he made notes relating to transactions.

13. A further meeting was held on 17 November 2016. Following further correspondence and another meeting, HMRC had been unable to correlate the amounts included in Mr Awdon's tax returns with the information provided by Mr Awdon, both in his notebook and his bank statements.

14. HMRC issued the closure notices and discovery assessments under appeal on 20 June 2019. The penalty assessment was issued on 15 January 2020.

15. Following a review by HMRC, Mr Awdon appealed to this Tribunal on 19 October 2020. His grounds of were that HMRC had unfairly targeted him and that they had not taken his evidence and submissions into account. In particular, the assessment that 5% of his income was received in cash was made without evidence. Mr Awdon also made a number of complaints about HMRC which are outside the jurisdiction of this Tribunal.

Mr Awdon's evidence and submissions

16. The following information is taken from the correspondence and meeting notes in the bundle provided to the Tribunal. Mr Awdon provided no new substantive evidence in his written statement to the Tribunal.

17. Mr Awdon bought and shipped trucks and truck parts to Africa. The purchases were made to order, as his clients would contact him and request trucks and truck parts to be shipped over. If Mr Awdon had not worked with a particular client before, he would request a deposit before starting to look for a vehicle. Mr Awdon would locate a suitable vehicle, and the client would then transfer sufficient funds to him for him to buy the vehicle and a fee which he described as commission. The money was received in full prior to the vehicles being shipped. The money received would also generally include an amount for shipping fees, although clients sometimes paid for shipping directly. Mr Awdon would then buy the vehicle and arrange for it to be shipped. The trucks and parts were purchased by Mr Awdon

in his own name. The payments to shipping companies were made from Mr Awdon's business bank account.

18. The fee described as commission was loosely based on the distance which Mr Awdon would be required to travel to collect the truck and transport it to the relevant port. There was no fixed amount or rate charged, as the fee would depend on what Mr Awdon could agree with the customer.

19. Mr Awdon's accounts, and tax returns, had recorded the commission element of payments as his turnover. He did not agree that the funds for the purchase of the trucks and parts, and their shipping, formed part of his turnover as he took the view that these funds were held on behalf of clients.

20. Payments from clients were generally made by bank transfer to Mr Awdon's bank account. Mr Awdon had also had some clients in the UK who had asked him to purchase items for him and paid him in cash. Mr Awdon's explanation as to whether all of this cash was banked varied: he stated initially that all of the cash was paid into his bank account but then revised this to say that to the best of his knowledge approximately 95% of the cash received was paid into his bank account. He subsequently stated again that all of the cash received was banked. In later correspondence, he stated that no cash payments were received at all.

21. Mr Awdon's records consisted of a notebook in which he made notes when he remembered, and he thought this was about 90% of the time. Mr Awdon did not keep detailed records of expenses, or receipts, but estimated that approximately 90% of his vehicle mileage was business related, to source trucks and parts nationwide and also driving to agency jobs. He estimated that approximately 30% of his phone expenses were private. He subsequently stated in correspondence that all of his expenses were for business use and so should be allowed in full. He had claimed a deduction for the cost of insuring his car, which had been purchased via his business bank account in April 2013. The funds for this car had been provided by his mother and wired to his account by his brother. In subsequent correspondence, Mr Awdon's agent stated that the car had been sold in March 2015.

22. Mr Awdon stated that he had sent HMRC a parcel with car fuel receipts, car insurance expenses, phone bill receipts and accountants receipts, but that this parcel had been lost in the post and as they had not been sent by any tracked method could not be retrieved. No explanation was given as to why Mr Awdon could not request further copies of most of these receipts.

23. Payments shown as being receipts of rent in Mr Awdon's bank account were explained as instalments of a property deposit for a third party who was seeking to come to the UK and wanted him to arrange a property for them. Mr Awdon stated that, in the event, he had been unable to source a property and so had reimbursed the third party when they eventually came to the UK. He thought this reimbursement had been done through his bank account but could not show where in the bank statements the reimbursement took place.

24. Mr Awdon was unable to provide HMRC with copies of his bank statements for all of the relevant periods. He signed bank mandates for HMRC to approach his former banks for information. The banks refused to provide the requested statements on the basis that Mr Awdon's signature did not match the signature on their records.

25. Mr Awdon did not accept that HMRC's assessments were reasonable, as he considered that they were far too high. He thought that mistakes had been made by his first accountant but did not explain the nature of these mistakes. He did not provide an alternative figure or

explanation for what he believed to be the correct figures, stating only that he could not have earned such amounts and could not afford to pay tax on the total turnover.

26. I note that it appears that Mr Awdon may have confused the nature of the assessment, as he stated that it was impossible to pay “20% or 17.5 tax from [the money he received]” and referred to an exemption from VAT for exported vehicles. The assessments under appeal are assessments to income tax and not to value added tax; the assessments are based on the profit calculated rather than the turnover of the business.

27. Mr Awdon considered that the amounts and penalties were unfair and that he had provided all evidence requested, and that HMRC had ignored his evidence.

HMRC evidence and submissions

28. As Mr Awdon was unable to provide any detailed information to explain the differences between his tax returns and the information in his bank statements, HMRC calculated the amounts of the assessments from the available bank statements and the information provided at the meetings between Mr Awdon and HMRC.

29. HMRC accepted the figures in the bank statements for banked income, adjusting for inter-account transfers and refunds. In addition to the amounts established from the bank statements, a further 5% of amounts banked was added to account for unbanked cash, following Mr Awdon’s estimate in a meeting with HMRC in March 2016 that he banked 95% of his income. HMRC calculated this as 5% of the amount physically paid into the accounts, excluding amounts transferred directly by clients.

30. Although there was very little evidence provided with to support expenses deductions, HMRC had allowed deductions for unevidenced expenses where the amounts were considered to be likely on the balance of probabilities. Cash withdrawals were not taken into account as Mr Awdon had stated that only a few postage costs were paid in cash. The deduction for Mr Awdon’s personal car insurance was disallowed. Amounts deducted for fines and taxes were also disallowed. Car and telephone expenses were allowed with a deduction for personal use; HMRC accepted Mr Awdon’s explanation at a meeting that his personal use of the car was approximately 10% and his mobile phone personal use was approximately 30%.

31. The assessments for 2013-14, 2014-15 and 2015-16 were made on the basis of the bank statements provided. For 2016-17 and 2017-18, as no information was available, HMRC had used the same percentage uplift as for 2015-16 (which was substantially lower than that in the previous two years) to calculate the taxable profit as the declared profits were similar and there was no reason to believe that anything had changed in the business. HMRC contended that the presumption of continuity applied, as set out in *Jonas v Bamford* (1973-1978) 51 TC 1, as the evidence from the three meetings held between March 2016 and March 2018 made it clear that the business was ongoing, without changes to the format.

32. The effect of these assessments was as follows:

- (1) 2013-14 Declared profit of £7,598 increased to £30,711
- (2) 2014-15 Declared profit of £10,887 increased to £32,861
- (3) 2015-16 Declared profit of £13,856 increased to £29,518
- (4) 2016-17 Declared profit of £12,989 increased to £27,667
- (5) 2017-18 Declared profit of £11,718 increased to £24,959

Closure notices

33. HMRC contended that the closure notices for the 2013-14 to 2015-16 tax years were validly issued as they were made within the required time limits, correctly stated the HMRC officer's conclusion and made the required amendments to the relevant self-assessments to reflect those conclusions.

Discovery assessments

34. HMRC contended that an initial discovery was made in respect of the 2016-17 and 2017-18 tax years was made during the first meeting on 14 March 2016 when Mr Awdon stated that he did not always remember to record his income. At this meeting it was also established that Mr Awdon's accounts were not prepared in accordance with UK GAAP and his records were incomplete. After the meeting HMRC concluded that the figures declared in his self-assessment return could not be supported by the information provided by Mr Awdon. From the information provided through the enquiry process, and comparing the tax years against earlier tax years the officer later made the relevant discovery that the record keeping and accounting practices of the business were unchanged and that income which ought to have been assessed to income tax had not been assessed.

35. HMRC submitted that the subjective and objective tests set out in *Anderson* [2018] UKUT 159 were met, as the officer reasonably believed that the information available to him indicated that there was an insufficiency of tax. HMRC contended that as Mr Awdon had confirmed that his records were incomplete and he did not always remember to record matters and as nothing had changed in the interim and Mr Awdon was still unable to provide prime records for the business for periods after the enquiry had started, the insufficiency of tax had arisen as a result of carelessness by Mr Awdon. As the assessments for these two tax years were made within four years of the discovery, on 20 June 2019, HMRC submitted that the requirements of s29 Taxes Management Act 1970 were met, and the assessments were raised in time.

Penalties

36. The penalties were based on careless behaviour, for the same reasons as set out above in respect of the discovery assessments, and a total reduction of 25% had been given from the maximum potential penalty. No reduction was given for telling HMRC about the inaccuracies as Mr Awdon did not accept that any inaccuracies had arisen; 10% was given for helping HMRC understand the position as Mr Awdon had attended meetings; 10% was given for providing access to records as only limited records had been provided and it had been necessary to issue Schedule 36 notices and impose penalties for failure to provide information.

37. HMRC submitted that the penalties had been correctly raised and that it was not appropriate to suspend the penalties as Mr Awdon's record keeping had not improved during the course of the enquiry despite having been made aware of the inaccuracies. HMRC did not consider that any suspension conditions would be complied with.

38. HMRC had considered whether any special circumstances applied that might reduce the penalty and had concluded that no grounds had been put forward or identified which would support any reduction.

Validity of notices and assessments

39. Mr Awdon did not dispute that the closure notices and discovery assessments were validly raised. Considering HMRC's submissions and the evidence before the Tribunal, I find that the closure notices and discovery assessments were validly raised and that HMRC have satisfied the burden of proof upon them in respect of those notices and assessments. The

behaviour which led to the inaccuracies was, as set out below with regard to penalties, at least careless.

Amount of assessments

40. As I have concluded that the notices are valid, the burden of proof moves to Mr Awdon to show that a different amount should be assessed. As already noted, he provided little documentary evidence to HMRC in the course of their enquiries and did not provide any further evidence to the Tribunal. Some bank statements were provided, although these did not cover the entire period of the enquiry and the bank mandates provided by Mr Awdon proved to be ineffective.

Turnover calculations

41. Mr Awdon submitted that he had only earned commission from his activities and that he should be taxed only on this commission. He accepted that his records of the amounts he considered that he had received as commission were incomplete as the notebook in which he kept information was not complete. He considered that any money in his business account in excess of the commission was not his money and was, instead, money held on behalf of his customers. Mr Awdon did not operate a separate account for funds received from customers, and any funds received were mixed with other money received by Mr Awdon.

42. However, from the information that was provided, the documents (including bank statements) indicate that Mr Awdon would be paid a single price to customers for the supply of the vehicle. This price took into account the purchase price of the vehicle, the shipping costs, and a profit margin for Mr Awdon (the amount he described as commission). The profit margin element varied according to the travel involved in obtaining and transporting the truck to the port for export, and also according to the amount which Mr Awdon could agree with the customer.

43. Mr Awdon did not arrange for a purchase directly between his customer and the vehicle owner, with commission being paid separately. He paid for both the vehicle and generally paid the shipping costs, as he received payment from the customer before purchasing the vehicle, and the vehicles were purchased in his name.

44. The Tribunal bundle included some shipping invoices. Some of these were addressed to Mr Awdon, and some stated that he was the exporter. Some shipping invoices contained the name and address of one or more businesses in Zambia, although it was not entirely clear whether this was intended to be evidence of the contractual customer or evidence of the delivery address as no separate delivery address was shown on the documents. A small number of bills of lading were provided. Each of these stated that the exporter was Mr Awdon, indicating that he was entering into these shipping arrangements directly and not on behalf of someone else.

45. In the absence of any documentation regarding Mr Awdon's arrangements with his customers, I do not consider that Mr Awdon has established that he held funds on trust for his customers. I note that there were three payments made in 2013-14 which were stated to be repayments to a customer. These were stated to have been repaid because Mr Awdon had not found them a vehicle, although Mr Awdon had stated that he did not receive funds until a vehicle had been identified. Mr Awdon had been unable to provide any evidence to HMRC as to when these amounts had first been paid to him. In the absence of any supporting evidence, I do not consider that these three repayments support any general contention that amounts received were held on trust for Mr Awdon's customers. No other repayments were stated to have been made.

46. HMRC had calculated the turnover for the first three years of assessment from the information in bank statements provided by Mr Awdon, taking into account transfers between the accounts. They had taken into account Mr Awdon's explanation of particular amounts as being family gifts to enable him to purchase a car, and had not included these amounts in their calculation of turnover. The last two years of assessment were based on the uplift calculated for the third year, as the declared turnover was similar.

47. Mr Awdon provided HMRC with mandates to obtain further bank statements for the rest of the relevant periods. However, both of his banks refused to release the information as they were unable to match the signature on the mandate with that of the account holder. One of the banks advised that Mr Awdon should visit a branch to update his signature. HMRC asked Mr Awdon to either visit the bank to update his signature or to obtain the statements and provide them to HMRC. There was no indication that Mr Awdon had taken any further steps to enable these statements to be provided.

48. In Mr Awdon's written statement, provided after the hearing, he states that he had sent HMRC "every payment invoice, banking statements". Whilst he may have sent everything that he could locate, I find that he has not provided "every" bank statement for his business. The invoices provided are also incomplete as they do not evidence all of the purchases indicated in his business bank statements.

49. On balance, I find that Mr Awdon's business was one of the purchase and supply of vehicles and that his turnover was therefore the total sum received from customers rather than a smaller amount of commission. The turnover calculated by HMRC for the first three tax years is based on the amounts shown in the bank statements provided by Mr Awdon, taking into account his explanation of certain deposits, and I consider that this is a reasonable approach in the absence of any other reliable records. I consider that the use of the presumption of continuity for the last two years, in the absence of any records for those years and given the similar level of reported income, is also reasonable.

Cash receipts

50. Mr Awdon submitted that HMRC had ignored his evidence and had assessed him on the basis that 5% of his cash income was unbanked although he had stated that all income was banked and that he did not collect cash from anyone.

51. Mr Awdon's bank statements showed cash deposits in varying amounts. Mr Awdon's explanations for these varied and in his grounds of appeal he insisted that he had not collected cash from customers although, in meetings with HMRC, he said that he was paid in cash by UK customers. He provided no alternative explanation for the cash deposits into his bank account.

52. On balance I consider that these were, as he explained in his second meeting with HMRC, amounts received by Mr Awdon from customers. Given that he agreed initially that he did not bank all of the cash received, and considering his admitted poor record keeping, I also conclude on the balance of probabilities that Mr Awdon received cash amounts which were not banked. I see no reason to disturb HMRC's assessment of this as being 5% of turnover, as this was based on statements made by Mr Awdon in a meeting.

53. Although Mr Awdon now disputes this statement, I note that HMRC had asked him in a letter sending the notes to indicate any omissions or inaccuracies in the notes. Mr Awdon's letter in response to HMRC at that time does not contain any indication that he disagreed with the contents of the meeting note and further states that he considered the meeting to have been useful.

Expenses

54. Mr Awdon did not make any detailed submissions with regard to the expenses allowed by HMRC in the assessment calculations. This presumably arises from his contention that his taxable income should be based on what he considered to be his commission, rather than the overall amounts received from customers.

55. As noted below, the cost of the vehicles supplied and related expenses were prima facie deductible expenses of the business. HMRC have allowed deductions for these expenses where they can be identified in the bank statements or from the invoices provided by Mr Awdon, and the tax assessments are based on these net amounts after deduction of identifiable expenses and not, as Mr Awdon appears to contend in his written statement, on the gross turnover received.

56. During the course of the enquiry Mr Awdon's position with regard to some of his expenses changed; having stated in a meeting that some of his mileage and phone expenses were personal, he later stated that he did not use his car or phone for non-business use at all. This latter explanation seems implausible and was made at a time when Mr Awdon appears to have become exasperated with the continuing enquiry, could not understand why HMRC kept asking for information, and was upset at receiving a penalty for failing to supply documents. I consider that it is more likely than not that his original explanation was correct and that it was therefore appropriate for HMRC to disallow that element of these expenses as being for personal use.

57. In meetings with HMRC he stated that virtually all of his business expenses were paid from his bank by card. The only cash transactions that he could recall would be occasional postage or courier payments. He had no receipts to support his expenses.

58. HMRC's assessments have allowed for the expenses declared on his tax returns and also expenses which they had identified from his bank statements. In the absence of any evidence to support any increased deductions, I find that the amounts allowed as deductible expenses are appropriate.

Overall

59. In my view, Mr Awdon has not discharged the burden of proof on him. He has made statements with no evidence, and which are also not supported by the limited evidence which has been provided to HMRC and the Tribunal. I conclude that HMRC have calculated Mr Awdon's income and expenses fairly, taking into account the limited information which he provided to them.

Penalties

60. There were no specific submissions made by Mr Awdon with regard to penalties, other than to say that he had not acted dishonestly. The penalties are not based on dishonest behaviour, nor have HMRC indicated that they considered at any point that Mr Awdon behaved dishonestly.

61. The penalties have been calculated and issued on the basis that Mr Awdon's behaviour with regard to tax was careless. Mr Awdon stated in meetings with HMRC that he had not kept complete records and did not always make a note of transactions, and he was unable to provide HMRC with all of the records required to be kept by his business. I find that he was therefore clearly careless with regard to his tax affairs.

62. I have considered the mitigation applied by HMRC with regard to the penalty amounts and do not consider that there is any reason to amend it.

Whether special circumstances apply

63. HMRC submitted that they had considered whether special circumstances applied to reduce the penalties and had not identified any such special circumstances.. The Tribunal has limited jurisdiction with regard to the question of whether there are special circumstances meriting a reduction in a penalty. It is only if the Tribunal considers that HMRC’s decision is flawed in a judicial review sense that the Tribunal can substitute its own decision.

64. In this context the relevant principles are whether the decision maker has taken into account all relevant factors, and that they have not taken into account any irrelevant factors, and that the decision is one a reasonable decision maker having regard to the available evidence could make.

65. Mr Awdon explained in his written statement that his wife was seriously ill at the time of the HMRC enquiry and that he was therefore under pressure at home, looking after her whilst also working. He stated that he had not wanted to mention this, but his wife had insisted as they considered that the matter needed to end. Mr Awdon stated that he had told HMRC “my situation that was mid 2017”. The telephone attendance notes and letters from Mr Awdon in the Tribunal bundle from mid-2017 onwards make no mention of Mr Awdon’s wife, nor of any illness.

66. Whilst I have sympathy for Mr Awdon’s wife, and the difficulties which they faced, that does not explain Mr Awdon’s poor record keeping throughout the relevant tax years nor does it explain why he did not, for example, visit his bank branch to update his signature to enable bank statements to be provided under the mandate. I therefore do not consider that Mr Awdon’s additional information with regard to his wife’s health establishes any relevant special circumstances.

67. I therefore do not consider that HMRC’s decision with regard to special circumstances is flawed in a judicial review sense.

Conclusion

68. For the reasons set out above, the appeal is dismissed and the assessments and penalties are upheld in full.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

69. 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.

**ANNE FAIRPO
TRIBUNAL JUDGE**

Release date: 04th APRIL 2023