



TC01395

Appeal number TC/2010/08338

Appeal against the amendment made to the Appellant's tax return for the tax year 2005/06, the discovery assessments for the tax years 2002/03 and 2003/04 and the consequent penalty imposed - appeal allowed in part

FIRST-TIER TRIBUNAL

TAX

RADOSLAW MYSLIWEK

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: S.M.G.RADFORD (TRIBUNAL JUDGE)
E.BRIDGE**

Sitting in public at 45 Bedford Square, London WC1 on 2 August 2011

Mr J.Muraszko for the Appellant

Mr A O'Grady for the Respondents

DECISION

1. This is an appeal against the amendment made to the Appellant's tax return for the tax year 2005/06, the discovery assessments for the tax years 2002/03 and 2003/04 and the consequent penalty imposed.

2. Further amendments and assessments for other years were agreed by Mr Muraszko, the Appellant's accountant.

Background and facts

3. An enquiry was opened into the Appellant's tax return on 7 August 2006 for the tax year 2004/05. Mr Ahmed of HMRC stated in evidence that following an examination of all the available records he had established that the turnover figure had been understated.

4. He had noted that there were a number of sales invoices apparently settled by cash which did not link to the gross CIS vouchers and which in total amounted to £3,418.65. Having taken account of an explanation from the Appellant's accountant Mr Muraszko he calculated that the sales figure should be revised and resulted in a net addition of £2,747 for non CIS sales.

5. After a long period of correspondence and negotiation with Mr Muraszko a number of adjustments were made to the tax return which included a reduction in the expenses claimed and the addition of omitted income.

6. A closure notice was finally issued by Mr Ahmed on 15 March 2010 which showed that instead of a £566.05 repayment being due to the Appellant he owed £2,751.68 of tax. Mr Ahmed commented under oath that he had been lenient in respect of his final calculation of the addition of £2,747 to the sales figures.

7. Mr Muraszko stated that he agreed the amendments to the 2004/05 tax return.

8. Until this tax year the Appellant's tax returns had been prepared by the Appellant's ex-wife but from tax year 2005/06 they were prepared by Mr Muraszko.

9. On 7 May 2008 Mr Ahmed informed Mr Muraszko that based on the 2004/05 tax return he believed that similar omissions and errors had been made in other years and he intended to issue discovery assessments in respect of those years. If this was not the case then Mr Muraszko would need to produce evidence to rebut his decision.

10. No such evidence was produced and so using the presumption of continuity as set out in the case of *Jones v Bamford (Inspector of Taxes)* [1973] STC 519 an amount of £2,747 was added to the sales figures for the tax years 2003/04 and 2005/06.

11. Mr Muraszko disputed the addition of £2,747 to the sales figures for the tax year 2003/04 but Mr Ahmed had discovered that the CIS income had been understated and vouchers to the value of £12,548 had been omitted.

12. Mr Muraszko also disputed the adjustments made to the 2005/06 tax year because he had prepared the accounts for this year himself based on actual numbers and had actual expense vouchers for that year. In addition to an adjustment to the sales figures HMRC had also added back £6,769 of expenses.

5 13. Mr Ahmed however was able to show that one CIS voucher to the value of £974 had been omitted for this year.

14. For tax year 2002/03 Mr Ahmed added an amount of £17,000 to the sales. This was as a result of Mr Ahmed's predecessor having requested a purchase receipt for a Mitsubishi vehicle purchased on 19 November 2002 by the Appellant on which the Appellant wished to claim capital allowances. The purchase receipt showed that a
10 balancing payment of £17,000 was made and the invoice confirmed that this was a cash purchase without any formal finance arrangements with the vehicle dealer.

15. Mr Muraszko claimed that this amount had been lent to the Appellant by his father-in-law in order that he might pay for a car and he produced an affidavit sworn
15 under oath to this effect from Mr Sliwinski.

16. In addition Mr Ahmed imposed a penalty of fifty percent of the additional tax due. This was reduced to forty percent by an HMRC officer who reviewed the HMRC's decisions.

17. Mr Ahmed allowed a five percent abatement of the penalty in respect of
20 disclosure by the Appellant. The maximum abatement that could have been offered being twenty percent.

18. He allowed a twenty percent reduction for co-operation, the maximum allowable being forty percent.

19. Mr Ahmed allowed a twenty-five percent reduction for the seriousness of the
25 Appellant's negligence, the maximum allowable being forty percent.

Appellant's Submissions

20. Mr Muraszko submitted that there was no justification for the addition of £2,747 of sales to the 2003/04 tax year.

21. He submitted that as he had prepared the accounts for the 2005/06 year they were
30 factually correct. He submitted that the extra profit added to the 2004/05 year was based on a turnover of some £100,000 whereas the turnover for 2005/06 was only £27,705.

22. He submitted that the add back of £6,769 of expenses by HMRC was out of proportion to the previous year's accounts and was unsubstantiated by HMRC.

35 23. With regard to the add back of £17,000 for the tax year 2002/03 he had produced statements to the Tribunal which proved that it was a loan which had been paid back

over a period of time. He claimed that two amounts totalling £2,500 shown in the Appellant's bank account for the tax year 2004/05 were part payments of the loan.

24. He submitted that the penalty of forty percent was too high given the length of the enquiry and the degree of co-operation given in respect of the lengthy
5 correspondence raised by HMRC. He submitted that the penalty ought to be reduced to thirty percent.

HMRC's Submissions

25. Mr O'Grady called on Mr Ahmed to give his evidence under oath. Mr Ahmed confirmed that no evidence had been produced to rebut the presumption of continuity
10 which had led to the addition of £2,747 to the 2003/04 and 2005/06 income. He emphasised that on finally deciding on this figure for the 2004/05 tax year he had been particularly lenient.

26. Mr O'Grady proposed that on further discussion it was now proposed that the disallowed expenditure for the tax year 2005/06 should be reduced to £2,394.

15 27. Mr Ahmed stated that although he accepted that the £17,000 had been a loan there was no evidence as to how the Appellant had managed to repay it. He believed therefore it had been repaid out of undeclared income. Mr Muraszko had written to him on 8 July 2009 stating "My client bought the vehicle on 20 November 2002 and
20 your enquiry is into 2004/05 and 2005/06 so I do not see the relevance of how the loan was repaid as this is outside your enquiry, since my client assures me that the loan was fully paid up by early 2003".

28. Mr Ahmed submitted that in addition to his living expenses the Appellant could not have afforded to repay the loan unless he had additional income.

Findings

25 29. We found Mr Ahmed's evidence to be truthful, credible and precise. We found that he had been thorough and had spent a considerable amount of time before reaching his conclusions.

30 30. We found that the discovery assessment in respect of the tax year 2003/04 was correctly made and confirm that the additional tax in amount of £1,551.67 has been correctly charged.

31. We found that further to Mr O'Grady's proposal that the disallowed expenditure for the tax year 2005/06 be reduced to £2,394 the amended additional tax due in amount of £1,762.80 has been correctly charged.

35 32. We found that the Appellant has failed to discharge the burden of proof regarding the repayment of the loan to Mr Sliwinski. Neither he nor Mr Silwinski appeared to give evidence and although Mr Muraszko claimed that there was a typographical error in his letter of 8 July 2009 and that the loan was not fully repaid by early 2003 he was unable to substantiate this.

33. The payment of £1,500 by the Appellant to Mr Sliwinski on 10 October 2004 appeared to have been repaid to the Appellant on 10 May 2005 and in all the circumstances we agree that the net additional tax due for the year 2002/03 in amount of £2,466.04 has been properly charged.

5 **Decision**

34. The additional tax due in respect of the tax years 2002/03, 2003/04 and 2005/06 is hereby confirmed in the amounts stated in paragraphs 30, 31 and 33 above.

35. We have decided that a further five percent reduction in respect of the penalty should be allowed for the Appellant's co-operation and confirm that the penalty imposed should be thirty-five percent of the total additional tax due by the Appellant.

36. 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.

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TRIBUNAL JUDGE
RELEASE DATE:12 August 2011

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