



**TC01917**

**Appeal number: TC/2010/05222**

*INCOME TAX –PAYE –failure to keep accurate records of employees-  
discovery assessments-records of casino gambling-use of retail price index-  
additional capital gains tax and rental income-appeals allowed in part*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**HAYDER HASSAN**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE Barbara J King  
Peter Whitehead**

**Sitting in public at North Shields on 7, 8 and 9 November 2011**

**Edward Lowe, accountant for the Appellant**

**Ros Shields, HMRC advocate, for the Respondents**

## DECISION

### **The Issue**

5 1. There are two aspects to this appeal.

(1) The Appellant has appealed against determinations issued by HMRC on 4 May 2007 in respect of his liability as an employer to pay the income tax and national insurance contributions for his employees over the tax years 2001-02 to 2005-06.

10 (2) The Appellant also appealed against the closure notices and discovery assessments for the tax years 2000-01 to 2005-06 issued by HMRC on 15 January 2008.

15 2. The Tribunal heard the Appeal over three days. Oral evidence was given by Officers Jon Kirkup, Michael Musgrove and Penelope Land for HMRC. A written statement was submitted for Officer Stefan Cockerill. The Appellant, Mr Hassan submitted two statements by himself and gave oral evidence.

20 3. At the end of the hearing the Tribunal reserved its decisions but indicated that written directions would be issued to allow the Appellant to provide further calculations on specific points. Those written directions were issued on 22 November 2011 and allowed 30 days from the date of issue for the Appellant to produce further calculations. HMRC were given a further 30 days to reply.

25 4. The Appellant did not fully comply with those directions but the Appellant's accountant, Mr Lowe sent further calculations to HMRC on 18 November 2011. HMRC applied to the First-Tier Tribunal and were granted an extension of time until 29 February 2012 to respond to those calculations.

5. On 28 February 2012 Mr Lowe sent a copy of his calculations to the First-Tier Tribunal. Those calculations are shown as appendices A and B to this decision. No response from HMRC was received by the First-Tier Tribunal by 29 February 2012.

### **Decision**

30 6. This decision is based on the evidence available at the hearing and the further calculations which were received on 28 February 2012.

7. Tribunal decided

35 (1) We find that the Appellant has failed to keep proper records of employees employed in Bar B Q Kebabs. The Tribunal is satisfied that the Respondents have exercised best judgment in respect of the regulation 80 determinations. We find that the determinations have not been made dishonestly or capriciously. The assessments set out in the Respondents letter of 2 October 2009 have been based on information supplied by the

Appellant. The PAYE liability amounts to £6514.04 in respect of the years 2001-02 to 2005-06. The imposition of tax geared penalties at 40% is appropriate. Fixed penalties for failure to send in P46s at the appropriate time amount to £4000.

5 (2) The Appellant, in the tax years from 2000-01 through to 2005-06, had additional income which ought to have been assessed to income tax and chargeable gains which ought to have been assessed to capital gains tax. These were not included in his Self Assessments and the Respondents were therefore entitled to make assessments.

10 (3) The Discovery Assessments issued on 15 January 2008 and amended by the Respondents letter dated 14 October 2009, are to best judgment but the Tribunal consider that it is fair and reasonable to take into account the calculations which have been produced following the directions given on 22 November 2012.

15 (4) We find that there should be the following additions to profits:-

	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06
Additional profit	£1115	£1014	£6918	£592	£534	£368

These figures are taken from appendix B attached to this decision but with the addition of £2000 in the year 2002-03

(5) Income tax is due at the appropriate rate, together with National Insurance contributions, on the above additional profits.

20 (6) Additional Capital Gains Tax is due in the sum of £1400 in the tax year 2004-5.

(7) The imposition of tax geared penalties at 40% is appropriate on these amounts of tax.

### **Background**

25 8. The Appellant qualified as an engineer in Iran and came to the UK many years ago. His wife is English and he has 2 children born in 1985 and 1987.

9. He started a kebab shop known as Bar B Q Kebabs in approximately 1987, initially with a partner but he has been the sole proprietor for many years. The business is located in the market town of Ripon in a three storey building which  
30 included bedrooms and storage space over the upper floors.

10. The Appellant sold a range of meals including kebabs and pizzas but did not provide a home delivery service.

11. On 13 September 2004 HMRC opened an enquiry into the Appellant's 2002-03 tax return. HMRC Officer Jon Kirkup requested copies of business accounts and records and the Appellant's accountant, Mr Lowe provided various items to HMRC.

5 12. On 19 November 2004 an article appeared in the Ripon Gazette which appeared to identify that there had been three men working at Bar B Q Kebabs on Sunday night 14 November 2004 when an attack had taken place.

13. Officer Kirkup was concerned that the level of staff was not fully declared in the accounts and an Employer Compliance Review was opened by Officer Penelope Land who wrote to the Appellant on 13 December 2004.

10 14. On Friday 7 January 2005 Jon Kirkup attended Bar B Q Kebabs at just after 6pm and purchased various items. He was present in the shop for 14 minutes and observed that at that time there were four men working in the shop.

15 15. A meeting was arranged on 11 January 2005 with Mr Lowe and Mr Hassan and Officer Kirkup. Mr Lowe and Mr Hassan stated that there were no P46 forms for any members of staff who had worked at Bar B Q Kebabs nor was there any record of the days and hours worked by any employees.

#### **The evidence concerning employees.**

16. In respect of the night of Sunday 14 November 2004 Mr Hassan stated that there were only two men working in the shop and that the newspaper article was mistaken.  
20 On Friday 7 January 2005 Mr Hassan stated that the additional men observed by Officer Kirkup in the shop were friends, not all were employed and he did not wish to supply the names and addresses of all of them.

25 17. Mr Hassan gave oral evidence that before the attack in November 2004 his wife and daughter had worked for the number of hours which had been set out on his pay roll in 2001-02 and that they continued to do these hours until the attack in November 2004.

30 18. Mr Hassan stated that he had stopped paying his wife and daughter on the advice of Mr Lowe. The weekly payroll analysis shows that his wife was paid £50 per week until 8 September 2001 and his daughter was paid £24 per week from 15 September 2001 to 3 November 2001, only.

35 19. The explanation given for pay ceasing to be made to Mrs Hassan was that from September 2001 she had other income and therefore it was not cost effective to pay her after that date. The explanation for ceasing to pay his daughter, Sarah, was less clear although there was a suggestion that she too started to have other income, from another job in a clothes shop, at or about this time. She was born in 1987 and in November 2001 she was aged 14.

20. Mrs Hassan was present during the appeal but chose not to give evidence, on the advice of Mr Lowe. There was no statement from her, as to what hours she had

worked in the shop back before 2004. Sarah Hassan, now aged 24, did not give evidence nor was there any statement by her.

21. The Tribunal were not impressed by the evidence given by Mr Hassan.

5 22. Mr Hassan was reluctant to comment on how Mr Lowe had come to the figures put forward in a calculation sent to HMRC on 15 September 2009 showing a different number of hours worked by family and non family members.

23. The explanation given by Mr Lowe for the number of hours put in the calculations produced on 15 September 2009 was that he thought that they produced figures which might be accepted by HMRC if a settlement was to be reached.

10 24. We did not believe Mr Hassan's evidence that his daughter Sarah had regularly worked for 20 hours per week in the shop from the age of 14 until the attack in November 2004. We did not believe that Mrs Hassan had worked 14 hours each week in the shop from 2001 until the attack in 2004. Mr Hassan was very vague about all of this and there was no other evidence to support his contention.

15 25. We find that there were four men working in the shop on Friday 7 January 2005 and that the names and addresses of all these men have never been supplied to HMRC.

20 26. The Appellant did not register as an employer with HMRC for PAYE and national insurance contributions. He failed to complete P46 forms for his employees. He failed to keep timesheets or to retain an accurate record of the hours worked by his employees and we find that the hours entered in his Simplex D book are not accurate. The Appellant's method of paying the wages in cash meant that no record of payments could be traced

25 27. The wages declared in the accounts for Bar B Q Kebabs over the years 2001 to 2006 are not an accurate reflection of the number of persons employed in the shop. We find that the best estimate of the hours worked by employees is that given in the calculations of hours carried out by Mr Lowe on 15 September 2009.

30 28. The appeal concerning employees is therefore allowed in part as the number of hours worked by Employees found by HMRC in their decision issued on 4 May 2007 was much higher.

### **The discovery assessments**

29. HMRC have the power to open an enquiry in respect of any person who has completed a self assessment tax return and if it is discovered that insufficient tax has been paid in other years to raise discovery assessments to 'best judgment.'

35 30. The exercise of best judgment by HMRC officers involved three elements: (i) they have to perform their functions honestly and bona fide; (ii) they had to have some material upon which they could base their judgment; (iii) they are not required to do the work of the taxpayer in order to form a conclusion as to the amount of tax

which in their best judgment was due. *Van Boekel v Customs and Excise Comrs [1981]STC 290*.

5 31. Lord Justice Carnwath in *Customs and Excise Commissioners v Pegasus Birds Ltd* [2004] STC 1509 stated that the Tribunal's primary task on an Appeal against an assessment to VAT was to find the correct amount of tax. Lord Justice Carnwath offered the following advice (per curiam) to Tribunals when dealing with issues of best judgment:

10 "When faced with 'best of judgment' arguments in future cases the tribunal should remember the following four points. (i) Its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the tribunal should not allow itself to be diverted into an attack on the commissioners' exercise of judgment at the time of the assessment. (ii) Where the taxpayer seeks to challenge the assessment as a whole on 'best of their judgment' grounds, it is essential that  
15 the grounds are clearly and fully stated before the hearing begins. (iii) In particular the tribunal should insist at the outset that any allegation of dishonesty or other wrongdoing against those acting for the commissioners should be stated unequivocally; that the allegation and the basis for it should be fully particularised; and that it is responded to in writing by the  
20 commissioners. The tribunal should not in any circumstances allow cross-examination of the Customs officers concerned, until that is done. (iv) There may be a few cases where a 'best of their judgment' challenge can be dealt with shortly as a preliminary issue. However, unless it is clear that time will be saved thereby, the better course is likely to be to allow the hearing to proceed on the issue of amount, and leave any submissions on failure of best of their judgment, and its consequences, to be dealt with at the end of the hearing".

30 32. In order to complete the picture Chadwick LJ in *Pegasus Birds* at paragraph 80 rejected the submission that where a Tribunal has substantially reduced an assessment it must inevitably follow that the assessment was not made to best of judgment:

35 "In *Rahman (No 2)* the tribunal had made their own assessment of the correct amount of VAT due from the taxpayer. They had reduced the Commissioners' 73(1) assessment by about 50%. The submission that I was addressing in paragraph 32 of my judgment in that appeal was to the effect that, where there has been a substantial reduction by the tribunal in the assessments made by the Commissioners on the same material, it must inevitably follow that the Commissioners' assessment was not made to the  
40 best of their judgment. In rejecting that submission I said this:

45 "[32] ... But non sequitur: on a true analysis all that can be said is that the fact that, on considering the same material, the tribunal has reached a figure for the VAT payable which differs from that assessed by the commissioners requires some explanation. The explanation may be that the tribunal, applying its own judgment to the same underlying material at the second, or "quantum", stage of the appeal, has made different assumptions--say, as to food/drink ratios, wastage or pilferage--from those made by the commissioners. ... Or the explanation may be that the tribunal is

5 satisfied that the commissioners have made a mistake--that they have misunderstood or misinterpreted the material which was before them, adopted a wrong methodology or, more simply, made a miscalculation in computing the amount of VAT payable from their own figures. In such cases--of which the present is one--the relevant question is whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable; or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have made it. Or there may be no explanation; in which case the proper inference may be that the assessment was, indeed arbitrary".

10

### **Findings**

15 33. The Tribunal is satisfied that there was no evidence that the officers acted dishonestly or capriciously in this case. In the course of their enquiries evidence was obtained which showed that Mr Hassan had incurred gambling losses and it appeared that he did not have sufficient income to cover those losses.

34. It was revealed that insufficient tax had been paid by Mr Hassan in respect of motor vehicles and property income. The employer compliance enquiry showed that Mr Hassan had not kept accurate records of employees in his business.

20 35. We find that it was appropriate for HMRC to attempt to calculate the additional profit which Mr Hassan would have needed to cover his expenditure including expenditure on gambling. Mr Hassan stated that he had additional money from his family in Iran but there was no written evidence to corroborate this and on balance we find that it has not been shown that family money has covered the expenditure.

25 36. The onus of showing that more accurate figures are available lies on the Appellant.

30 37. HMRC produced a schedule from Gala Casino headed 'Personal Profile Details for Hassan Hayder B'. This gives details of attendances by Mr Hassan at the Gala Casino in Stockton between 22 June 1999 and 12 July 2006. On balance we find that the record of the times Mr Hassan has attended the Gala Casino is accurate. The number of visits recorded varies from 73 to 150 in each of the years from April 2000 to April 2005. Mr Hassan had not keep a record of his winning and losses from those visits. On balance we did not believe his evidence that he often just went to socialise and did not spend much money. We found that inherently improbable.

35 38. On balance we find that the figures produced by Gala are a more likely record of the winnings and losses by Mr Hassan whilst he attended the Gala Casino.

40 39. From the Gala schedule HMRC produced the amount of winnings and losses made by Mr Hassan in the enquiry year 2002-03. This figure was then extrapolated, using RPI (Retail Price index) over the years from 2001-02 to 2005-06. The Tribunal find that extrapolating in his way does not allow for the fact that there have been more winnings in some years. The directions issued by the Tribunal on 22 November 2011 directed the Appellant to show the actual winnings and losses in each year but Mr Lowe has produced calculations which show only the loss suffered in 2002-03. He

5 comments that the total loss over the years 2000-01 to 2005-06 is not dissimilar to the major loss in 2002-03. HMRC have made no comment on this calculation. On balance the Tribunal finds that the calculation now produced by Mr Hassan does show a more accurate figure for the additional income required by Mr Hassan to cover his gambling losses over all the years from 2000-01 to 2005-06.

40. We were not satisfied that the evidence from Ladbrokes could be relied upon to produce an accurate figure of the amount spent by Mr Hassan in betting shops each week. There was no explanation about how the writer of the letter dated 12 July 2006, Mr Brewin, had obtained the information which it contained.

10 41. Mr Hassan had entered a figure of £200-£400 per annum, in a 'Private means test' form completed by him in March 2005. On balance we find that this figure is more likely to be the amount spent at Ladbrokes.

15 42. We agree that the 'Private means test' has shown a figure of £16973 in the tax year 2005-06. We agree that payments of £1800 for ISA unit trusts, £241 for life insurance payments, £360 for Pension Payments and £270 for car service can be deducted from this figure as they have already been taken into account in the 'Private Account Bank Payments.' This leaves an amount of £14,302 as the 'adjusted means test value' on which RPI is applied to give the figure in each year from 2000-01 to 2004-05.

20 43. On balance we find that the figures of the net wages for Mrs Hassan should be used in the 'Schedule of Known Income and Expenditure' ie £4197 in 2000-01, £2600 in 2001-02, £4312 in 2002-03, £7813 in 203-04, £8937 in 2004-05 and £7221 in 2005-06.

25 44. In the tax year 2002-03 Mr Hassan did expend £2000 on acquiring a property. The figure of £2000 does therefore need to be included in his expenditure for that year. We agree that it should not be included in expenditure for other years.

30 45. In the Statement of Case produced by HMRC on 28 September 2010 the figures which HMRC considered reasonable and acceptable for the private use of motor vehicles were £658 for 2000-01, £633 for 2001-02, £613 for 2002-03, £634 for 2003-04, £534 for 2004-05 and £367 for 2005-06. Other than the figure for 2003-04 these figures are the same as those used by Mr Lowe in Appendix B. As the difference between the figure produced by HMRC (£634) and that produced by Mr Lowe (£592) is small and has not been questioned by HMRC, we accept Mr Lowe's figures as accurate. We note that the total additions figure on appendix B, shows a rounded figure of £4,500 for 2003-04 but we find this figure is inaccurate and it has not been used in our decision.

40 46. The income from property at £457 for 2000-01, £381 for 2001-02 and £381 for 2002-03 should be added into the calculation of additional profit for those years. On balance we find that these figures have been made to best judgment by HMRC and they have not been discredited by any evidence from the Appellant.

47. The additional profits required to meet the payment of additional wages found to be due in the Employer Compliance Review should be added into the calculation of additional profits but should then be deducted as having been expended. These are the figures shown in the column headed 'additional wages', as shown in the calculations prepared by Mr Lowe on 15 September 2009 and referred to in the Employer Compliance Review (paragraph 27 above).

48. As they are added and then subtracted they have nil effect on the additional tax now due in this part of the decision.

49. We find that the abatement of penalty at 60% is appropriate for the reasons set out by Officer Kirkup in his letter of 15 October 2008.

50. Our decision is set out in paragraph seven above. The outcome of this decision is that the appeal has been allowed in part.

51. 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.

**Barbara J King**

**TRIBUNAL JUDGE**

**RELEASE DATE: 26 March 2012**

APPENDIX A - calculations produced by Mr E Lowe on 18 November 2011

**HB HASSAN**

**SCHEDULE OF KNOWN INCOME AND EXPENDITURE**

Accounting Period End Tax Year	30/04/2000 2000/01	30/04/2001 2001/02	30/04/2002 2002/03	30/04/2003 2003/04	30/04/2004 2004/05	30/04/2005 2005/06
	£	£	£	£	£	£
<b>INCOME</b>						
Cash Drawings	18,010	17,350	15,650	16,100	16,350	16,100
Gala Winnings						
Wife's Net Wages	4,197	2,600	4,312	7,813	8,937	7,221
<b>Total</b>	<b>22,207</b>	<b>19,950</b>	<b>19,962</b>	<b>23,913</b>	<b>25,287</b>	<b>23,321</b>
<b>EXPENDITURE</b>						
Gala Losses			3,920			
Private bank account payments	6,633	6,750	6,851	7,065	7,241	7,470
Means test	12,697	12,921	13,115	13,526	13,862	14,302
<b>Total</b>	<b>19,330</b>	<b>19,671</b>	<b>23,886</b>	<b>20,591</b>	<b>21,103</b>	<b>21,772</b>
<b>Excess/Shortfall</b>	<b>2,877</b>	<b>279</b>	<b>-3,924</b>	<b>3,322</b>	<b>4,184</b>	<b>1,549</b>
<i>RPI Factor</i>	<i>170.1</i>	<i>173.1</i>	<i>175.7</i>	<i>181.2</i>	<i>185.7</i>	<i>191.6</i>

*Figures shown in italics have been adjusted by RPI factor*

**Included in Means Test paid through Private Bank Account**

Means Test 2005/6 Values	16,973
ISA Unit Trusts	-1,800
Life Insurance	-241
Pensions Payments	-360
Car Service	-270
<b>Adjusted Means Test Value</b>	<b>14,302</b>

APPENDIX B - calculations produced by Mr E Lowe on 18 November 2011

**HB HASSAN**

**CALCULATIONS OF ADDITIONS TO PROFITS**

Accounting Period End Tax Year	30/04/2000 2000/01 £	30/04/2001 2001/02 £	30/04/2002 2002/03 £	30/04/2003 2003/04 £	30/04/2004 2004/05 £	30/04/2005 2005/06 £
Adjustment -Motor 40% to 50%						
MRE	324	333	313	317	328	213
Capital Allowances	334	300	300	275	206	155
Total Technical additions	658	633	613	592	534	368
Property Income	457	381	381			
Shortfall			3924			
Total Additions	1115	1014	4918	592	534	368
Say	1100	1000	4900	4500	500	400