



**TC01948**

**Appeal number:TC/2010/07983**

*INCOME TAX – amendment to self assessment – evidence of expenditure claimed – amendment confirmed – penalty for negligent conduct confirmed – appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**GARY KAY**

**Appellant**

**- and -**

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

**TRIBUNAL:    JUDGE JONATHAN CANNAN  
                     HARVEY ADAMS**

**Sitting in public at 45 Bedford Square London on 7 February 2012**

**Mr Lovemore Sisimayi and Dr Elisha Mafunga of L Wilson & Co accountants  
for the Appellant**

**Mrs J Ballingall of HM Revenue & Customs for the Respondents**

## DECISION

### *Background*

5 1. The appellant, Mr Gary Kay, is a general tradesman who has worked in the construction industry for some years. In the years relevant to this appeal he was a sub-contractor working exclusively for a company called IAC Construction Limited. His work involved him travelling to sites mainly in London but also on occasion to the south coast, the midlands and the north west of England. On 22 August 2008 HMRC  
10 commenced an enquiry into Mr Kay's self assessment tax return for the tax year 2006-07. The enquiry was dealt with on his behalf by Mr Kay's accountants, L Wilson & Co ("Wilsons").

2. At the conclusion of the enquiry in January 2010 HMRC issued a closure notice amending Mr Kay's self-assessment return for 2006-07. At the same time HMRC  
15 issued assessments for tax years 2003-04, 2004-05, 2005-06 and 2007-08. The effect of these assessments was as follows:

| <b>Tax Year</b> | <b>Profits Returned</b> | <b>Additional Profits Assessed</b> |
|-----------------|-------------------------|------------------------------------|
|                 | <b>£</b>                | <b>£</b>                           |
| 2003-04         | 5,189                   | 22,202                             |
| 2004-05         | 14,119                  | 18,989                             |
| 2005-06         | 5,467                   | 15,444                             |
| 2006-07         | 10,389                  | 23,028                             |
| 2007-08         | 14,711                  | 23,022                             |

3. In each year, the reason for additional profits being assessed was what HMRC considered to be excessive claims to relief for expenditure. In relation to tax year  
20 2003-04 there was also an understatement of income. Mr Kay, through his representative has agreed part of the assessments relating to expenditure claims. He has also agreed the assessment in relation to 2003-04 in so far as it relates to an understatement of income. The issues between the parties which fall for determination in this appeal relate to the following items of expenditure summarised in a letter dated  
25 10 August 2011 from Wilsons to HMRC. The amounts in the following table represent the sums for which relief has been given by HMRC with the amounts in brackets being the sums claimed by Mr Kay:

|                               | <b>2003-04</b> | <b>2004-05</b>   | <b>2005-06</b>   | <b>2006-07</b>   | <b>2007-08</b>   |
|-------------------------------|----------------|------------------|------------------|------------------|------------------|
| <b>General Admin Expenses</b> | 180            | 180<br>(2,717)   | 180<br>(1,908)   | 180<br>(1,988)   | 180<br>(1,664)   |
| <b>Motor Expenses</b>         | 1,000          | 1,000<br>(3,873) | 1,000<br>(4,685) | 1,000<br>(6,647) | 1,000<br>(7,256) |
| <b>Travel and Subsistence</b> | 0              | 0                | 0<br>(105)       | 0<br>(255)       | 0                |
| <b>Other Costs</b>            | 1,000          | 1,000            | 1,000<br>(3,789) | 1,000<br>(5,992) | 1,000<br>(9,823) |
| <b>Other Direct Costs</b>     | 0              | 0<br>(8,869)     | 0<br>(3,214)     | 0<br>(6,392)     | 0<br>(1,685)     |

4. We understand that the tax due as a result of the assessments totals £30,135.11 for the 5 tax years, although the amount in respect of the items in dispute will be less than that. In addition HMRC have assessed a penalty totalling £10,544. Mr Kay  
5 appeals against the assessments in so far as they relate to the expenditure claimed under the heads described above, and also against the penalty.

***Issues on the Appeal***

5. There is no issue between the parties as to any applicable law, certainly none was raised at the hearing. The issue for us is therefore one of fact, namely what  
10 expenditure has Mr Kay incurred so that he is entitled to relief in calculating the profits of his trade. The burden is on Mr Kay to satisfy us that the expenditure claimed was actually incurred by him (See generally *Bi-Flex Caribbean v The Board of Inland Revenue 63 TC 515*). As far as the penalty is concerned, the burden is on  
15 HMRC to satisfy us that the returns for the years above were made by Mr Kay “negligently”, there being no allegation of fraud.

6. We must decide, on the balance of probabilities, what expenditure was actually incurred by Mr Kay. Similarly, we must decide on the balance of probabilities whether the returns were made negligently by Mr Kay. We do so on the basis of the  
20 oral evidence we heard during the hearing, the documentary evidence to which we were referred, and where relevant the inferences from that evidence that we consider it appropriate to make.

7. The correspondence between the parties reveals an area of disagreement relating to the collection of tax said to be due and the treatment of certain refunds said to be due. This was not addressed by either party at the hearing and in any event does not fall within the jurisdiction of the tribunal.

5 *The Respondent's Case*

8. At the invitation of the Tribunal and Mr Sisimayi, HMRC opened the appeal and presented their evidence. Mrs Ballingall outlined the issues as we have set them out above and called Mr Nial Browne to give evidence. He is the Inspector of Taxes who was responsible for making the assessments. He had made a witness statement  
10 dated 18 April 2011 which he confirmed in his oral evidence. Mrs Ballingall then proceeded to deal with a number of matters in chief. It became apparent during the course of examination in chief that Mr Browne was effectively reading from a script which contained a number of pre-prepared questions and answers. We were surprised and concerned that evidence should be dealt with in that way. Mrs Ballingall told us  
15 and we fully accept that this was how she had been trained to deal with officers' evidence in chief. In our view however it is wholly inappropriate to do so. The evidence of a witness should not be coached, still less should it be the subject of a pre-agreed script. We make no criticism of the particular officers involved in this appeal, but we do wish to make it clear that the practice should cease.

9. Mr Browne outlined the progress of the enquiry. Initially it had been  
20 commenced by another officer on 22 August 2008. Mr Browne took over in January 2009. Early in the enquiry there was correspondence from HMRC seeking to obtain information and documents in relation to tax year 2006/07. In particular a full breakdown and documentary evidence in relation to the expenditure claimed on the  
25 tax return. No documents were provided. On 17 November 2008 Wilsons stated that Mr Kay had forwarded documents to HMRC comprising receipts and bank statements. Mr Browne told Wilsons that they had not been received and suggested that if they had been lost then invoices for an adjacent accounting period should be obtained. Ultimately, on 26 January 2009 Wilsons stated that in fact one of their  
30 employees had posted the documents without obtaining any proof of postage. Again Mr Browne suggested Wilsons should provide receipts from an earlier year. He also asked whether Wilsons had any working papers to support the entries on Mr Kay's tax return but was told that the computer they had been prepared on had been infected by a virus and could not be retrieved.

10. Mr Browne's evidence, which we accept, was that there was nothing to indicate  
35 that the documents were ever received by HMRC. Wilsons stated that they would look for the records for the earlier year (2005-06), but again these were never provided. A one page schedule prepared by Wilsons itemising expenditure in 2006/07 was produced. Mr Browne sought further information in relation to these items and  
40 was provided with very general descriptions but nothing to substantiate the expenditure. As a result Mr Browne held a meeting with Mr Kay and Wilsons on 25 June 2009. They discussed the general nature of Mr Kay's business and the specific items of expenditure claimed in 2006-07. We consider below the various items of expenditure in so far as they remain in dispute in the appeal.

11. Following the meeting, on 14 October 2009 Mr Browne wrote to Wilsons setting out the basis on which he was proposing to amend the self assessment for 2006-07 and to make assessments for other years. A number of the amendments were agreed by Wilsons. For example, the turnover figure for 2003-04 was increased from  
5 £12,485 to £31,695 based on the CIS vouchers available from IAC Construction Ltd. Premises costs and advertising costs in 2004-05 amounting to £996 and £465 respectively were disallowed. Interest claimed in 2004-05 and 2007-08 amounting to £317 and £425 respectively was disallowed. There was no explanation as to why these amounts had been claimed in the first place. There was no agreement on the  
10 remaining items of expenditure and Mr Browne issued the assessments described above.

12. Penalties were also issued pursuant to section 95 Taxes Management Act 1970. The maximum penalty under that section was 100% of the tax found due as a result of the return being incorrect. Based on HMRC policy, Mr Browne mitigated the penalty  
15 by 10% for disclosure, 30% for co-operation and 25% for seriousness. The penalties chargeable were therefore 35% of the tax due under the assessments. The total penalty was £10,547.21, although we were not told what proportion of this relates to the items in dispute in the appeal and what proportion relates to items assessed which were agreed by Wilsons.

20 13. As far as HMRC are concerned on this appeal, there is insufficient evidence to justify relief for the amounts of expenditure claimed by Mr Kay. Further, that the evidence supports a conclusion that Mr Kay negligently made an incorrect return and that a penalty of 35% of the tax assessed is appropriate.

### *The Appellant's Case*

25 14. Mr Kay's grounds of appeal against the assessments are essentially that HMRC has allowed too little by way of relief for the expenditure claimed and has not taken into account the explanations given during the course of the enquiry. In relation to the penalties, Mr Kay's case is that he was not negligent and that the penalties are excessive.

30 15. Mr Kay did not give evidence in chief but at our invitation was tendered for cross-examination. He stated that he had given a large bundle of receipts to a Mrs Kirk of Wilsons. These are the records which it is said have gone missing. When asked why he had no records for earlier years he stated that IAC Construction Ltd had records. Wilsons did his tax returns and he would keep every receipt in a folder and  
35 take it to Mr Wilson to go through them. He said that the accountants never returned the records to him.

16. Mr Sisimayi relied upon the explanations given in correspondence during the course of the enquiry. We consider those explanations below in our decision and in the context of each item of expenditure.

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## *Decision*

17. The absence of receipts or other documentary evidence does not help Mr Kay in satisfying us that he had incurred the expenditure claimed. We are prepared to accept that records for the year 2006-07 somehow went missing in the course of being  
5 sent to HMRC. However there is no explanation as to why no records were available for the other years under appeal. Having said that, we are not limited to deciding the issues solely by reference to documentary evidence. We have therefore considered whether in the light of all the evidence as to the circumstances of Mr Kay's business, it is more likely than not that he did incur the expenditure claimed, or indeed any sum  
10 greater than that for which HMRC has given relief.

18. The background matters stated in paragraph 1 above were not in dispute. We have taken them into account in this decision. We also find the following facts based on the evidence before us. Mr Kay worked from 8am to 5pm for 5 days a week and took approximately 4-6 weeks holiday a year. He generally worked on new build  
15 properties and all his work in the relevant periods came through IAC Construction Ltd. He was responsible for providing his own tools and he maintained a van for use in the business. He received a small contribution from IAC towards petrol costs. Most materials would be provided by IAC but Mr Kay was responsible for purchasing small consumable items and would generally pay cash when purchasing items for the  
20 business.

### *General Administrative Expenses*

19. Mr Browne has allowed £180 per year under this heading. It is not clear from the evidence what general expenses were claimed in 2003-04. In subsequent years the expenditure claimed under this heading ranged between £1,664 and £2,717. There is  
25 no analysis in the evidence as to what items are included in the sums claimed. Wilsons claim that the sums relate to mobile phone calls, postage and printing of leaflets and that the payments were made by cash. The mobile phone used was a pay as you go handset. Wilsons suggested that at least £20 per week was spent on work related calls. Based on what we have been told about Mr Kay's business we are not  
30 prepared to accept that evidence. We consider that Mr Browne has made a reasonable estimate of the mobile phone usage. His estimate was based on a bill of £30 per month with 50% business use. We are satisfied that is the likely level of expenditure.

20. Wilsons suggest that there ought to be some allowance for inflation. In an exercise of this nature we do not consider that to be necessary or appropriate. £15 per  
35 month business usage may reasonably be treated as an average for the whole period of assessment. We are not satisfied on the evidence we have heard and seen that any sums were spent on postage or printing leaflets.

### *Motor Expenses*

21. Mr Browne has allowed £1,000 per year under this heading. It is not clear from  
40 the evidence what motor expenses were claimed in 2003-04. In subsequent years the expenditure claimed under this heading ranged between £3,873 and £7,256. Wilsons

claimed that these were the usual expenses of running a car such as servicing, fuel, breakdown recovery, congestion charges and replacement tyres. During the course of negotiations Wilsons suggested a figure of £3,360 for 2006-07 which included petrol at £50 per week and £400 on new tyres.

5 22. We accept that Mr Kay's working patterns involved him using his van to travel  
across London and on occasion elsewhere in the country. Whilst £1,000 might not be  
a generous allowance in the circumstances, we are not satisfied on the balance of  
probabilities that it is wrong. We would have expected Mr Kay to produce at least  
10 some evidence to establish for example his annual mileage and the likely proportion  
of business miles. We would also have expected evidence to be available to  
demonstrate the level of expenditure on motor expenses in another comparable tax  
year. We have been provided with no such evidence, nor is there sufficient material  
for us to make any proper inferences in this regard. There is simply no evidence at all  
by which we can test Mr Kay's assertion that a higher figure should be allowed.

15 *Travel and Subsistence*

23. Mr Browne has allowed no relief for expenditure under this heading. It is not  
clear from the evidence what travel and subsistence was claimed in 2003-04 and  
2004-05. In 2005-06 and 2006-07 the total claimed was £360. The claim for travel  
and subsistence is said to relate to "*travel between sites. Not much for lunch or hotels*  
20 *except on a few occasions. These were paid for by cash*". In correspondence Wilsons  
invited HMRC to use a round sum figure of £30 per week for 5 weeks, presumably  
being the period of time when Mr Kay was working away from London.

24. It is not at all clear to us how the travel element relates to the motor expenses or  
what the subsistence element is said to cover. In the absence of any further evidence  
25 or explanations we are satisfied that Mr Browne was right to exclude relief under this  
heading.

*Other Costs*

25. Mr Browne has allowed £1,000 per year under this heading. It is not clear from  
the evidence what other costs were claimed in 2004-05. In other years the expenditure  
30 claimed under this heading ranged between £3,789 and £9,823.

26. In the year 2006-07, other costs were broken down as follows:

|              | £            |
|--------------|--------------|
| Gloves       | 1,040        |
| Helmet       | 320          |
| Goggles      | 375          |
| Boots        | 425          |
| Work Clothes | 1,786        |
| PPEs         | 1,682        |
| Laundry      | 364          |
| <b>Total</b> | <b>5,992</b> |

27. Mr Kay described this expenditure in the meeting with Mr Browne. For example he stated that he would purchase approximately 10 building site helmets per year, 10 pairs of goggles per year and 2 pairs of boots. "PPEs" appear to be some other type of protective equipment. Again, there is no evidence by which we can test the reasonableness of the level of expenditure claimed, either by reference to the number of items purchased in a year or the likely cost of each item. In the course of negotiations Wilsons suggested a figure of £1,250 for other costs in 2006-07. No explanation was given as to how they arrived at that figure. It is not far away from the figure allowed by Mr Browne but we do not have any material from which we can say that it is to be preferred to Mr Browne's figure. In the absence of any further evidence or explanations we are satisfied that Mr Browne was right to limit relief under this heading to £1,000 per year.

*Other Direct Costs*

28. Mr Browne has allowed no relief for expenditure under this heading. The expenditure claimed under this heading ranged between £1,685 and £8,869 over the years in question. In the year 2006-07 the costs were broken down as follows:

|                         | £            |
|-------------------------|--------------|
| Small Tools Replacement | 899          |
| Machine and Tool Hire   | 2,681        |
| Consumables             | 2,113        |
| Materials               | 699          |
| <b>Total</b>            | <b>6,392</b> |

29. Wilsons stated in correspondence that the cost of small tools replacement arose because Mr Kay's van was broken into 3 times in 2006-07. Mr Kay produced in evidence a document from Autoglass indicating they had charged £99.16 for replacement glass in a vehicle. The document is addressed to IAC Construction. Even accepting, which we are prepared to, that Mr Kay's vehicle was broken into, there is no evidence as to what was stolen nor, if it was tools, the replacement cost of the tools.

30. Wilsons stated that machine and tool hire would arise where Mr Kay had to do the job but didn't have the right equipment. Consumables were small items such as glue, varnish and fillers. Mr Browne explained that the CIS vouchers evidencing payments by IAC Construction Ltd to Mr Kay identified the cost of materials reimbursed to Mr Kay as £699. Given that sum was not treated as taxable income, Mr Kay would not be entitled to relief for that amount.

31. There is simply insufficient evidence available to us from which we can be satisfied that the expenditure claimed under this heading was incurred by Mr Kay.

That applies not only in relation to the year 2006-07 when records appear to have been lost in transit, but also to the other years which are the subject of assessment. In the circumstances we are not satisfied that Mr Browne was wrong to refuse relief under this heading.

5            ***The Penalty***

32. In broad terms, where a taxpayer negligently makes an incorrect return he is, at the material times, liable to a penalty based on the amount of tax understated by the return. In the present case the tax understated was £30,135.11. For the reasons given above we are satisfied that Mr Kay was not entitled to the reliefs claimed in his tax returns and had also understated his income in 2003-04 to the extent identified by Mr Browne. We infer, from the circumstances generally and in particular the absence of any records for any of the periods assessed, that Mr Kay had no reasonable basis on which to make the claims for relief. As such, we are satisfied that the incorrect returns were made negligently. In our view, taking into account all the circumstances, 35% of the tax due is a reasonable and proportionate amount and we confirm the penalty assessed.

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***Generally***

33. In the circumstances the appeals against the assessments and the penalty are dismissed.

34. 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: 10 April 2012**

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