



**TC01956**

**Appeal number: TC/2011/01732**

*INCOME TAX – PAYE Regulation 80 determinations – Information on employers’ end of year return inconsistent with business records – whether sufficient evidence to displace determinations – No – Appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**ABDUL KAHIM T/A BALTI NITE**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE JOHN BROOKS  
PETER LAING**

**Sitting in public at Eastgate House, Newport Road, Cardiff on 19 January 2012 with written closing submissions received from HMRC on 30 January 2012 and from the Appellant on 15 February 2012**

**Latif Mohammed, Counsel, instructed by IRMAA Associates for the Appellant**

**Jack Lloyd of HM Revenue and Customs, for the Respondents**

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## DECISION

1. This is an appeal against the following Determinations made by HM Revenue  
5 and Customs (“HMRC”) under Regulation 80 of the Income Tax (Pay as You Earn)  
Regulations 2003 which were issued to Mr Abdul Kahim on 19 November 2010:

2004-05: £1,774.30

2005-06: £4,474.14

2006-07: £5,075.06

10 2007-08: £4,194.66

2008-09: £444.40

2. The appeal is on the grounds that HMRC has not considered the P60s for all  
employees; that HMRC has assumed, without evidence, that there are more  
employees than declared on the employers’ annual return; and all the employees earn  
15 less than their personal tax code, ie the calculations did not reflect their personal  
allowances.

### *Law*

3. Unless otherwise stated all references to Regulations are references to the  
Income Tax (Pay as You Earn) Regulations 2003.

20 4. If an employee commences employment without providing his employer with  
parts 2 and 3 of Form P45 he is required, under Regulation 46, to provide information  
including his national insurance number, his full name, sex, date of birth and full  
address including postcode to the employer in a signed Form P46. Regulation 49  
requires the employer to send the P46 to HMRC “*on making the first relevant*  
25 *payment [ie payment net of tax] to the employee.*”

5. Regulation 21 provides that, on making a payment to an employee and  
employer “*must*” deduct or repay tax in accordance with the relevant tax code. The  
tax deducted is then paid by the employer to HMRC under Regulation 68.

6. If it appears that tax may be payable under Regulation 68 which has not been  
30 paid, a determination may be made by HMRC under Regulation 80, “*to the best of*  
*their judgment*”.

7. Such a determination is subject to the appeals provisions of the Taxes  
Management Act 1970 (“TMA”)(Regulation 80(5)).

8. Section 50(6) TMA provides that if, on an appeal, it appears to the Tribunal that  
35 an appellant is overcharged by an assessment (which by virtue of Regulation 80(5)  
must be read as referring to a determination) it shall be reduced accordingly but  
“*otherwise the assessment ... shall stand good.*”

9. In the decision of the Court of Appeal in *T Haythornwaite & Sons v Kelly (HM Inspector of Taxes)* (1927) 11 TC 657 Lord Hanworth MR, referring to a previous incarnation of this enactment, said, at 667:

5 “Now it is to be remembered that under the law as it stands the duty of  
the Commissioners [and from 1 April 2009 the Tribunal] who hear the  
appeal is this: Parties are entitled to produce any lawful evidence, and  
if on appeal it appears to a majority of the Commissioners by  
10 examination of the Appellant on oath or affirmation, or by other lawful  
evidence, that the Appellant is over-charged by any assessment, the  
Commissioners shall abate or reduce the assessment accordingly; but  
otherwise every assessment or surcharge shall stand good. Hence it is  
quite plain that the Commissioners are to hold the assessment as  
standing goods unless the subject – the Appellant – establishes before  
15 the Commissioners, by evidence satisfactory to them, that the  
assessment ought to be reduced or set aside.”

#### *Evidence*

10. We heard oral evidence, under oath or affirmation, from Mr Kahim, the appellant, his accountant, Mr Zahir Minhas and Mr Lyndon Beard an employer compliance officer of HMRC.

20 11. We were also provided with a witness statement signed by Mr Mohammed Kamal Khan on 22 October 2011 and a ‘Statement of Employment’ signed by him on the same day as well as a ‘Statement of Employment’ signed by Mr Hakim Khan on 12 December 2011.

25 12. On the morning of the hearing we were provided with a document headed ‘Statement of employment’ signed by Mr Hakim Khan on 18 January 2012 and an undated ‘witness statement’ signed by Mr Mohammed Kamal Khan which states that when informed that Mr Kahim had lost his P46 he told Mr Kahim to fill in a new P46 “and put my name in the space provided for signature.”

30 13. In Mr Hakim Khan’s statement he confirms that he worked for Mr Kahim and states that he believed he signed a P46 in 2004 but signed a new P46 “recently” as Mr Kahim told him that he “had lost the record.” There is then a reference to the ‘Statement of Employment’ signed on 12 December 2011 and a statement that Mr Beard (of HMRC) “fed me the information about my employment which is in my statement. I can verify that the information given to Mr Beard is not correct. I cannot  
35 remember what happened 7 years ago.”

14. Given that we did not have the benefit of hearing from either Mr Mohammed Kamal Khan or Mr Hakim Khan and that neither of their statements contains a “statement of truth”, where their evidence is inconsistent and conflicts with that of Mr Lyndon Beard we prefer that of Mr Beard who gave sworn evidence before us.

40 15. We also prefer Mr Beard’s evidence, which we found to be to clear and consistent, to that of Mr Kahim and Mr Minhas who we did not find to be particularly convincing witnesses.

16. For example, having strongly asserted that P46 forms (which had been supplied to HMRC after the Notice of Appeal had been sent to the Tribunal) were signed by his employees in 2004 and 2005 Mr Kahim accepted that this could not have been the case when it was pointed out to him that the forms were printed in January 2006.  
5 Also, when questioned in regard to the same P46 forms Mr Minhas, who accepted that they had been completed retrospectively, was only able to answer in vague terms, eg saying that they “might have been” completed in his office and that the handwriting “might” be that of someone in his office.

17. On the basis of this evidence we make the following findings of fact.

10 *Facts*

18. Mr Kahim was the proprietor of a restaurant and takeaway trading from November 2004 to June 2008 as the ‘Balti Nite’.

19. On 19 November 2007 Mr Lyndon Beard of HMRC opened an ‘Employer Compliance Review’ into Mr Kahim’s PAYE records. On 11 December 2007 he met  
15 with Mr Kahim who told Mr Beard that the restaurant had four employees and gave details of their names, rates of pay and hours worked. He said that none of the employees had provided him with P45s when they started employment and none had been asked to complete a form P46.

20. This concerned Mr Beard as did the lack of wages records and the fact that there  
20 did not appear to be enough employees to run the restaurant.

21. Having reviewed the information provided by Mr Kahim and the further information from Mr Zahir Minhas of IRMAA Associates, Mr Kahim’s accountant, Mr Beard discovered discrepancies that certain names were mentioned in the business records but not shown in the end of year returns (P35s) submitted to HMRC. These  
25 included Mr Hakim Khan who was listed as a manager on a wages sheet and a Mr Dil Raj who signed the “streamline” sales vouchers and was commented on by customers in a restaurant “guestbook” eg an entry on 28 October 2005 says “food was excellent Raj is the best waiter ever, top man”.

22. Although Mr Kahim was asked to explain these discrepancies in a meeting held  
30 at HMRC’s offices on 1 December 2009 he could only say that those mentioned in the records were not employees. Mr Beard was not satisfied with the explanations given him by Mr Kahim and Mr Minhas in relation to these people despite a third meeting, on 15 April 2010.

23. Mr Beard had asked for P45 or P46 forms at the meetings and in telephone  
35 conversations with Mr Kahim and his accountant, Mr Minhas. A schedule to Mr Beard’s letter of 27 April 2010 to Mr Minhas had asked “are there any further records including forms P45 and P46 forms which have not yet been made available for review?” The reply from Mr Minhas, in his letter of 23 July 2010, was an unequivocal “No”.

24. In the circumstances Mr Beard concluded that Mr Kahim, as an employer, should have deducted basic rate tax from the wages he paid to his staff. He therefore issued calculations based on the P35s and estimated the wages of the additional employees not included on the returns. In the absence of an agreement to the calculations on 19 November 2010 formal Regulation 80 determinations were issued covering the period 2004-05 to 2008-09 (which are the subject matter of this appeal).

25. The determinations were upheld following a review by HMRC which concluded, in a letter to Mr Kahim dated 1 February 2011:

You were unable to provide any forms P45 or P46 for any of your employees for the period concerned; therefore it is correct that tax is due at basic rate, without any personal allowances, in respect of all these employees, as it has been include in the determinations under appeal.

26. Mr Kahim appealed to the Tribunal on 1 March 2011.

27. On 23 August 2011 Mr Minhas sent copies of P46 forms “for all employees” to the Tribunal and to Mr Beard. In total there were 11 forms and the handwriting on each of the P46 forms, which had been printed in January 2006 and completed subsequently to the appeal being made, was similar. Every form had the same incorrect spelling of the business address. Four employees were listed as having the same address but not recorded on the electoral records for that address. There was doubt as to whether the signatures on the forms were genuine. Also National Insurance numbers were missing on two of the P46 forms and some of the National Insurance numbers did not match the names of the employees.

28. Mr Beard visited the addresses shown on the P46s and found that none of the employees were living there and in the case of nine of the employees was unable to verify that that had ever lived at the addresses shown on their P46.

29. Although Mr Mohammed Kamal Khan no longer lived at the address shown on his P46 Mr Beard was given a forwarding address at which he visited Mr Khan who said that he had not signed the P46 and had not been asked to complete such a form. In December 2011 Mr Beard was also able to locate Mr Hakim Khan. Although he confirmed that he had signed a P46 within the last few months his answers concerning his employment at the Balti Nite in relation to wages and hours worked were very vague.

#### *Submissions*

30. As there was not time for oral closing submissions on the day of the hearing we directed, with the agreement of the parties, that Mr Lloyd would provide written closing submissions on behalf of HMRC within 14 days of the hearing to be followed by Mr Mohammed’s written submissions, on behalf of Mr Kahim, 14 days later.

31. Mr Mohammed contended that this was a “classic case” of procedural errors rather than one of tax avoidance or evasion, there was no actual loss of tax which if

paid would be claimed back by the employees as personal allowances. He referred to the evidence of Mr Minhas which he urged us to accept in its entirety.

32. In addition Mr Mohammed raised concerns about the manner of HMRC's investigation into Mr Kahim's affairs pointing out that he was first interviewed by HMRC without Mr Minhas being present and that because, as well the PAYE issue with which we are concerned, VAT and income tax matters were also raised in the interviews which were carried out by more than one HMRC officer there were opportunities for "glaring misunderstandings and genuine errors."

33. However, the main thrust of his argument is that HMRC should have accepted the P46s, sent to HMRC on 23 August 2011, retrospectively and that the grounds for rejecting these were "nebulous, flawed and contradictory". Mr Mohammed submits that Mr Beard could have resolved the issue relating to the P46s when he visited the restaurant by obtaining the information from the staff directly and that by failing to do so he was the author of his own misfortune "for which the appellant should not be penalised."

34. For HMRC, Mr Lloyd reminded us that the burden of proof is with Mr Kahim to demonstrate that the Regulation 80 determinations were excessive and submitted that we should prefer Mr Beard's evidence over that contained in the witness statements of Mr Hakim Khan and Mr Mohammed Kamal Khan whose evidence had not been subject to cross examination.

35. Mr Lloyd contends that although retrospective P46s can be accepted by HMRC this is by concession and, as the P46s in this case do not contain sufficient information to comply with Regulation 46 they cannot be regarded as valid and consequently, as Mr Kahim had failed to establish otherwise, the amounts in the determinations are correctly charged and the appeal should be dismissed.

#### *Discussion and Conclusion*

36. The issue for us to determine is whether the evidence adduced by and on behalf of Mr Kahim is sufficient to establish that the Regulation 80 determination ought to be reduced or set aside.

37. Having considered this evidence (in paragraphs 10 – 16) and, for the reasons stated above, preferred that of Mr Beard over that of Mr Kahim and his witnesses we find that Mr Kahim has not adduced sufficient evidence to displace the determinations which were, in our judgement, based on fair and reasonable inferences drawn from the information provided to HMRC in P35s and Mr Kahim's records. Therefore, unless he can rely on the information provided in the P46s submitted on 23 August 2011 Mr Kahim's appeal cannot succeed.

38. In the absence of evidence to the contrary from Mr Kahim's employees we are, on balance, with the exception of Mr Hakim Khan, unable to accept that the signatures on the P46s submitted on 23 August 2011 are genuine. Therefore these do

not meet the requirements of Regulation 46. As such they cannot be valid and consequently cannot be relied upon to displace the determinations.

5 39. With regard to Mr Hakim Khan's P46, given his inability to recall details of his employment, that it was completed after the appeal had been notified to the Tribunal and that it included an incorrect address we find that this too cannot be relied upon to displace or reduce the determinations.

40. In the circumstances we are compelled to dismiss the appeal.

10 41. 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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**JOHN BROOKS**

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**TRIBUNAL JUDGE**  
**RELEASE DATE: 19 April 2012**