



TC02101

Appeal number: TC/2010/09199

INCOME TAX – amendment of partnership returns to reflect undeclared income of partnership – income not declared – appeal dismissed and amounts assessed confirmed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ABDUL LATIF

Appellant

- and -

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

**TRIBUNAL: JUDGE GREG SINFIELD
GORDON MARJORAM**

Sitting in public at 35 Bull Street, Birmingham B4 6EQ on 23 April 2012

Mr John Mitchell of Mitchell and Company, accountants, for the Appellant

Mr Bryan Morgan of HM Revenue and Customs for the Respondents

DECISION

1. Mr Latif and his son in law, Mr Ahmed, traded in partnership as Raj Bangladeshi Cuisine during the relevant periods. The business was (and remains, although now carried on by a limited company) a restaurant with premises at 30 Birmingham Road, Great Barr, Birmingham. The restaurant has seating for around 48 customers and also offers a takeaway service. The present appeal concerns amendments to the partnership returns following enquiry closure notices in relation to tax years 2002-03 and 2003-04. It also concerns discovery amendments in relation to tax years 1998-1999, 1999-2000, 2000-2001 and 2001-02.

2. The extent to which the amendments described above increase the partnership's taxable profits appears from the table below.

Year	Type	Profits shown on return £	Additional profits assessed £
2003-2004	Closure notice	6594	26594
2002-2003	Closure notice	15737	35737
2001-2002	Discovery amendment	14081	30081
2000-2001	Discovery amendment	17320	37320
1999-2000	Discovery amendment	14272	36272
1998-1999	Discovery amendment	11365	26365

3. Mr Latif accepted that errors had occurred in recording sales of meals for a period in 2002 but contended that it was an isolated occurrence while he had been out of the country and the partnership had declared all income from the business correctly in the other years. There were 14 meetings and a considerable amount of correspondence between Mr Latif or his accountant and HMRC in an attempt to reach a settlement. A settlement could not be agreed and, in a letter dated 21 March 2010, Mr Latif requested a review of the decisions leading to the amendments to the partnership returns.

4. HMRC notified Mr Latif of the conclusions of the review by letter dated 7 May 2010 which upheld the amendments to the partnership returns. Mr Latif appealed to the Tribunal in a notice of appeal dated 27 October 2010. The reason for the appeal being notified after the expiry of the 30 day time limit was that Mr Latif's brother in Bangladesh was ill and subsequently died and Mr Latif himself became ill and was

admitted to hospital. HMRC did not object to Mr Latif's application for an extension of the time to appeal and the Tribunal allowed the appeal to proceed.

5. At the appeal, Mr Latif was represented by his accountant, Mr Mitchell, and HMRC were represented by one of their officers, Mr Morgan. In summary, HMRC submitted that the admitted failure to include all tax in the return for 2002-2003, unexplained amounts paid into Mr Latif's personal bank account and the low gross profit margin achieved by the business showed that the business had under declared takings in the amounts in the table above. Mr Latif accepted that errors had occurred in recording sales of meals for a period in 2002 and that his records were not perfect but he rejected HMRC's conclusions that takings had been underdeclared in other periods. He said that his gross profit margin was low but this could be explained. He denied that cash deposited in his personal bank account came from the business and said that the amounts came from family members.

6. We heard oral evidence from Mrs Diane Hickman, the HMRC officer who conducted the enquiry. We also heard oral evidence from Mr Latif. In addition, the bundles contained a comprehensive collection of correspondence and other documentation generated by the enquiries which we have taken into account in this decision.

7. Mrs Hickman said that the case was referred to her following a risk assessment. She opened the enquiry by issuing a notice under section 12AC Taxes Management Act 1970 to the partnership on 13 September 2004 in relation to the 2003 tax return. The tax return covered the period 1 November 2001 to 31 October 2002 and showed a business turnover of £129,375, exclusive of VAT, with a net profit of £15,737. In October, Mrs Hickman received various schedules, including copies of the drawings account, sales summary and cash account. At that stage Mrs Hickman had concerns about the gross profit margin which, at 62%, was low compared to similar businesses and the low drawings which were shown on the balance sheet as £12,898 for both partners.

8. On 18 January 2005, Mrs Hickman and a colleague visited the business premises at Birmingham Road, Great Barr. Mr Latif and his then accountant (not Mr Mitchell) were present. The meeting was to discuss the business and to collect business records. The only records produced at the meeting were table order pads (but not any for August to October 2002). The table order pads were added up each day, bundled together and the daily amount written on the back of one of the pads for that day. Further records were provided later, including private bank account statements from Mr Latif. No purchase invoices were provided for the year to 31 October 2002 as Mr Latif said they had been lost.

9. A review of the records by Mrs Hickman revealed that there were discrepancies between the table order pads and the cash sheet figures. The weekly cash sheets formed the basis of the sales figures. There were no weekly cash sheets for the periods February to April 2002 and August to October 2002 so the figures for those periods could not be checked. For the period from November 2001 to January 2002, £3,794 more was recorded on the table order pads than in the weekly cash sheets.

From May 2002 to July 2002, the discrepancy was £2,745. This gave a total discrepancy of some £6,500 for the two quarters. The table order pads also revealed a low level of drink sales with some tables not being shown as ordering any drinks. The cash account prepared by the partnership's accountant showed a cash drawings figure of £7,480 for the partnership. Drawings were not recorded in the accounts so the figure was based on an estimate provided by the partners that Mr Latif normally drew around £100-£150 a week and Mr Ahmed around £50 or £60 a week. The cash account was balanced using an estimated figure. Statements from Mr Latif's private bank account showed deposits, after allowing for a bank loan of £2,500, of £15,200 for the period 1 November 2001 to 31 October 2002.

10. Following the initial meeting in January 2005, there were a further 13 meetings between HMRC and Mr Latif. The details of each meeting were set out in Mrs Hickman's witness statement but, as the same matters were discussed at several meetings, we summarise the relevant points below.

11. The gross profit margin for the period covered by the 2003 tax return was 62%. The gross profit margins of the business for the years under appeal were around 60%. Mrs Hickman found that the gross profit margin for the restaurant for 1998 was 65%. Once the additional amounts from the table pads and the personal bank account deposits were added to the declared figures for 2002-2003, the gross profit margin was 67% which was closer to the level of profit in 1998 and the margins that Mrs Hickman expected restaurants with a similar business to produce.

12. Mr Latif admitted that an error had occurred in transcribing the takings from the table order pads onto the weekly cash sheets for a period in 2002. He accepted that, as a result, sales were understated by around £6,000 but he maintained that this happened in that one year only. Mr Latif said the error had occurred when he had been in Bangladesh. During that time, his partner and son-in-law, Mr Ahmed, had been left to run the business and had rushed matters and made mistakes with the record-keeping. Mr Latif said that he was in Bangladesh in the second or third quarter of 2002. In cross examination, he said that he thought that he was away between July and October but it was definitely for at least two months.

13. Mr Latif acknowledged that the gross profit margin was low but said that this was due to a number of factors. He said that most of the time he offered customers a free drink or dish as a form of promotion; the portions were larger for take aways than for meals in the restaurant; sometimes people left without paying; and he spent a substantial amount on food for his staff. Mr Latif did not produce any evidence of the promotions. Mr Latif said that there were no records to show how much was spent on staff food as it would be on the same invoice as other food. He said that he did not keep records of the expenditure on staff food or treat it as a taxable benefit.

14. In relation to his private bank account, Mr Latif said that he did not bank any of his drawings from the business into his private account. He said that money paid into this account came from his wife and daughters. At Mrs Hickman's request, Mr Latif produced bank and building society statements of his wife and daughter as evidence that the deposits into his private bank account were from his wife and daughter and

not drawings from the business. An analysis of the statements by Mrs Hickman showed that the withdrawals did not match the deposits into Mr Latif's bank account. Mr Latif explained that his wife primarily had cash income from her own restaurant business which would have been the source of the deposits into his account.

5 15. Mr Latif said the joint drawings of the partners would be in the region of £130
to £160 a week and these were not recorded. Neither partner banks any of their
drawings. Mr Ahmed did not have a bank account although his wife did have one.
The bank statements of Mrs Ahmed showed regular round sum deposits amounting to
10 £11,000 during the enquiry year. At the hearing, Mr Latif produced four letters from
family members detailing their employment history and containing statements that
each contributed between £60 and £150 every month in cash to the family household.
The family members all contributed cash to a pot which was used to cover living
expenses and any excess, after the expenses, was paid into Mr Latif's bank account.
Mrs Latif had a bank account and if she ever received a cheque, it would be paid into
15 her account. The excess from the family pot was never paid into Mrs Latif's account.

16. Mrs Hickman calculated the amendments to the partnership returns by applying
the discrepancy in the table order pads over 12 months, which gave a discrepancy of
more than £10,000, and adding an amount of £10,000 in relation to the deposits into
Mr Latif's bank account. Mrs Hickman increased the profits by £20,000 for 2002-
20 2003 and 2003-2004 which gave a revised gross profit rate of 67% and 66%
respectively. The revised gross profit margins were in line with similar businesses.
Mrs Hickman considered that it was reasonable to revise the figures for the earlier
years to reflect a gross profit margin of 66% which led to the amendments that are the
subject of the appeal.

25 **Discussion**

17. The amendments for 1998-1999 to 2001-2002 were made under Section 30B
Taxes Management Act 1970. Section 30B(4) TMA 1970 prevents HMRC from
making a discovery assessment unless one of two conditions is met. The first
condition is that the omission or deficiency is attributable to fraudulent or negligent
30 conduct of the representative partner or relevant partner or a person acting on behalf
of such a partner. The second condition is that at the time when the enquiry window
had closed, HMRC could not have been reasonably expected, on the basis of
information made available before that time, to be aware of the omission or
deficiency. It was not suggested on behalf of Mr Latif that HMRC should have been
35 aware of any omission or discrepancy in respect to the years 1998-1999 to 2001-2002
before the enquiry window for each of those years had closed. Further, we consider
that the admitted discrepancy in takings records for 2002-2003 together with the
admission that drawings were not recorded and the lack of complete records of sales
for the period of enquiry establish on the balance of probabilities that the partnership
40 was, at the very least, negligent in the completion of the partnership returns.

18. The burden is on the appellant to satisfy us that the amounts charged to tax by
the amendments are wrong - see section 50(6) Taxes Management Act 1970 and
Brady v Group Lotus Car Companies plc [1987] STC 635. The question for us

therefore is whether we are satisfied on the evidence we have heard and seen that the additional amounts chargeable to tax as a result of the amendments are excessive. We answer that question and make our factual findings on the basis of the balance of probabilities.

5 19. In *Jonas v Bamford* 1973 51 TC 1, 1973 STC 519 Walton J observed, at page [25], that once the Inspector comes to the conclusion that, on the facts which he has discovered, the taxpayer has additional income beyond that which he has so far declared to the Inspector, then the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation, the
10 onus of proof of which is clearly on the taxpayer. HMRC referred to *Jonas v Bamford* in this case but they also quite correctly cited the decision of the Tribunal in *Dr I Syed v HMRC* [2011] UKFTT 315 (TC). We agree with the observations of the Tribunal in *Syed* at paragraph 38 that:

15 "In our view this quotation [from *Jonas v Bamford*] expresses no legal principle. It seems to us that it would be quite wrong as a matter of law to say that because X happened in Year A it must be assumed that it happened in the prior year. An officer is not bound by law and in the absence of some change to make or to be treated as making a discovery in relation to last year merely because he makes one for this year. This
20 tribunal is not bound to conclude that what happened this year will happen next year. It seems to us that Walton J is instead expressing a common sense view of what the evidence will show. In practice it will generally be reasonable and sensible to conclude that if there was a pattern of behaviour this year then the same behaviour will have been followed last year. Sometimes however that will not be a proper inference: there will
25 be occasions when the behaviour related to a one off situation, perhaps a particular disposal, or particular expenses; in those circumstances continuity is unlikely to be present."

20. We understood Mr Morgan to accept the views of the Tribunal in *Syed*.
30 HMRC's submission was that, in the absence of evidence that shows that the underdeclarations were one off events, the underdeclarations in the year to 31 October 2002 are evidence that underdeclarations also occurred in other years.

21. Mr Mitchell, on behalf of Mr Latif, accepted that the records for the year ended 31 October 2002 were not accurate for the reasons described above but that the year
35 chosen for investigation was exceptional and, as such, should be treated in isolation and not used as a model for other years. Mr Latif's evidence was that the under-recording of sales was an isolated occurrence when he was out of the country and left the running of the business to his partner, Mr Ahmed, who made some mistakes. We do not accept this explanation. Mr Latif said that he was in Bangladesh for two
40 months or so from July 2002. The discrepancies between the table order pads and the weekly cash sheets established by reference to the only records available related to the periods from November 2001 to January 2002 and from May 2002 to July 2002. The two periods together cover six months while Mr Latif was in the UK. We conclude from the evidence that Mr Latif was present when the errors occurred and that he

must share the responsibility with Mr Ahmed for the discrepancies that led to takings being understated. We regard this as evidence of conduct that is, at the lowest, negligent. The fact that the discrepancies arose before Mr Latif went away undermines his argument that the under-recording of sales was a one-off event.
5 Further, we consider that such systemic errors over a period of six months are evidence from which HMRC could properly have inferred that under-recording occurred in other periods. Mr Latif did not produce any evidence to show that the records of takings in the other years subject to amendment were more likely to be correct than the figures for the year ended 31 October 2002.

10 22. The low gross profit margins also support HMRC's view that takings had been underdeclared. Mrs Hickman's evidence was that a gross profit margin of 65% was achievable and, if the figures from the table pads and deposits were added, the business produced a gross profit margin of 67% which, on Mrs Hickman's evidence, is in line with similar businesses. Mr Latif did not produce any evidence to support
15 his claims for the items of expenditure which reduced the profit margin and there was no explanation why these factors should affect the partnership's business more than other similar businesses. On the basis of the evidence, we conclude that the low profit margin reported by the business was more likely to be due to the underdeclaration of takings than to the various factors advanced by Mr Latif.

20 23. Finally, we do not accept Mr Latif's explanation of the source of the payments into his private bank account during the period of the enquiry. The fact that members of the family contributed to household expenses by putting cash into a joint pot does not adequately explain the deposit of £15,200 in the period. The evidence presented by Mr Latif was that the payments were between £240 and £600 each month. The pot
25 was used for household and family expenses with the excess being paid into Mr Latif's account. If the contributions were the only source of deposits that would mean an excess of £1,250 each month. Another source was cash payments from Mrs Latif. It seems to us unlikely that Mrs Latif, who had her own restaurant business and her own bank account, would pay cheques from her business into her account but pay
30 cash from her business into Mr Latif's account. We did not see any evidence to substantiate such payments by Mrs Latif.

Decision

35 24. In conclusion, Mr Latif has not produced evidence to satisfy us that the additional amounts chargeable to tax as a result of the amendments are excessive. On the evidence that we have seen, we are satisfied on the balance of probabilities that the takings of the partnership's business were understated for the tax years in question. We consider that the amounts as amended for the years under appeal are reasonable. Accordingly, we confirm the amendments and dismiss the appeal.

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25. 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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**GREG SINFIELD
TRIBUNAL JUDGE**

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RELEASE DATE: 14 June 2012