



**TC04118**

**Appeal number: TC/2013/09292**

*PAYE and NICs – PAYE Regulation 80 determination and NIC decision – whether amounts paid to one individual were earnings from employment or self-employed income – no PAYE or NIC accounted for in respect of another individual, admitted to be an employee – whether credit should be given for individual’s personal allowance in assessing amount of PAYE recoverable from the Appellant – appeal allowed in part*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**YAU WING LIU**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE KEVIN POOLE  
MR ROGER FREESTON FRICS**

**Sitting in public in Priory Court, Birmingham on 4 November 2014**

**Simon Poon of J Fisher (UK) Limited for the Appellant**

**Tony Burke, presenting officer of HM Revenue and Customs, for the Respondents**

## DECISION

### Introduction

1. This decision concerns the liability of the Appellant for PAYE and NICs in  
5 respect of two individuals. It is accepted that one of the individuals worked as his  
employee, but the Appellant asserts that in calculating the amount of PAYE and NICs  
due, credit should be given in respect of that individual's personal allowance. As to  
the other individual, the Appellant claims that he was not an employee but an  
10 independent self-employed contractor, in respect of whom the Appellant should  
therefore have no PAYE and NIC liability.

2. Mr Poon applied at the start of the hearing for an adjournment, on the basis  
that the HMRC officer who had attended the relevant visit (see below) and raised the  
relevant decisions was not in attendance and Mr Poon wanted to put questions to him.  
We refused this application on the basis that HMRC were not seeking to rely on any  
15 formal evidence of the officer and therefore his attendance was not necessary; to the  
extent his evidence was contained in the document bundle before us, we would give it  
whatever weight we considered appropriate, in the light of the other evidence we  
heard.

### The facts

#### 20 *Background*

3. We heard oral evidence from the Appellant (who had also delivered two three  
line witness statements). There was also a two line witness statement from James  
Kerr, and a bundle of documents (which included witness statements of the events of  
the visit made to the Appellant on 5 July 2012, by the immigration officer and the  
25 police officer in attendance on that visit).

4. We find the following facts.

5. The Appellant carried on business as proprietor of a Chinese takeaway in  
Grantham. On 5 July 2012 there was a joint HMRC/UKBA/police visit to his  
business premises. One illegal immigrant worker was detected, Tian Qiang He. The  
30 Appellant's wife informed the officer that he had been working at the takeaway since  
the first week of April 2012.

6. In HMRC Officer Rawlings' note of the events of the visit (which was  
included in the bundle), the Appellant's wife was said to have told him that Mr He  
had joined after the departure of the previous chef, one "James".

7. HMRC examined the Appellant's year-end employer's return and found no  
35 mention of Mr He or anyone called James. When put to the Appellant's  
representative, its reply was that Mr He and James were both employed through an  
agency and they were not therefore employees of the Appellant; that was why they  
did not appear on the Appellant's year-end return and also why no forms P45/P46 had  
40 been lodged.

8. Later, on 18 July 2013, HMRC sent a computation of the PAYE and NICs which they considered the Appellant to be liable for in relation to Mr He and James. The calculations were not explored before the Tribunal, but HMRC stated in their subsequent formal decision letter dated 19 September 2013 that they reflected the amount “that we believe is due and payable on the earnings that HMRC believe was payable to the workers involved based on their periods of employment and National Minimum Wage regulations”.

9. The earnings, PAYE and NICs which HMRC calculated as due are as follows:

Employee	Tax Year	Earnings	PAYE due	NIC due
James	2011-12	£8,214.80	£1,642.96	£913.91
Tian Qiang He	2011-12	£243.20	£48.64	£27.29
Tian Qiang He	2012-13	£3,161.60	£632.32	£329.55
		<b>Totals:</b>	£2,323.92	£1,270.75

10. The NIC Section 8 Decisions and PAYE Regulation 80 Determinations issued to the Appellant on 19 September 2013 followed the above calculations.

11. In response, on 23 September 2013, the Appellant’s representative wrote to HMRC asserting that “James” was a self-employed delivery driver who delivered meals for the Appellant as and when required, using his own car.

12. Following a statutory review, HMRC issued a decision on 18 November 2013 which confirmed their earlier decision.

13. The Appellant then submitted a notice of appeal to the Tribunal dated 3 December 2013.

*Status of Mr He and James*

14. Having previously maintained that Mr He was employed through an agency, the Appellant now accepts that he was in fact a direct employee.

15. Attached to the Appellant’s witness statement dated 28 October 2014 was what purported to be a copy of a form P46 dated 7 April 2012 and signed by Mr He, in which he had ticked statement A (confirming that this was his first job since 6 April 2012, etc). The Appellant claimed to have found this form recently among his papers. He could not explain why he had such a form if (as had been claimed initially on his behalf) Mr He had supposedly been employed through an agency. He could not remember the name of the agency. His understanding of what a form P46 was appeared extremely limited, though he claimed to have obtained it because he knew that one was needed in the absence of a P45 from a previous employer. He could not

remember what he had done with it or whether he claimed to have filed the details in it online (online filing for such documents having become mandatory in April 2011). We found his evidence around this issue wholly unconvincing and, at times, contradictory. We find that this document was not filled out in April 2012 and the information in it was not submitted to HMRC.

16. The status of James is less clear. The Appellant's representative delivered a witness statement signed by one James Kerr and dated 10 June 2014, running to two lines:

10 "I, James Kerr, of [address given] hereby confirm that I was never employed by Mr Yau Wing Liu of Wings Takeaway."

17. Included with our bundle of documents was a print out from HMRC's systems which apparently shows a Mr J R Kerr, of the same address, having two employments during the tax year 2011-12, neither of them with employers whose reference number matches the Appellant's PAYE reference number. His total earnings from those two employments was some £11,500. Mr Kerr apparently declined to attend the hearing to give evidence, stating he could not afford the time off.

18. At the hearing, the Appellant gave evidence that Mr Kerr was a self-employed driver who simply delivered meals when called upon to do so, for a flat fee of £1.50 per delivery (paid to him in cash by the customer when he delivered the meal). When a customer required delivery, the Appellant stated he would call Mr Kerr and give him the details. He had never refused to make a delivery, though if he did so, the Appellant said he would have delivered the meal himself. There was nothing to suggest that the Appellant would have been concerned if Mr Kerr had made arrangements for someone else to carry out a delivery rather than doing it himself. The Appellant said that Mr Kerr used his own vehicle to make the deliveries and he made no contribution to the running costs. In his short written witness statement, he had said that Mr Kerr "was a driver and was on a fixed profit car scheme". When Mr Burke pressed him on why he had used this particular phrase in his witness statement, he gave no clear answer, simply re-iterating the basic terms of the arrangement.

19. As the name "James" had only come up as a result of Mrs Liu mentioning that name at the visit on 5 July 2012, it seems clear to us that Officer Rawlings note of that visit is accurate in recording that she had mentioned the name. His note however did go further, in recording Mrs Liu as saying that James had been a chef at the business up to April 2012. Because Mr Rawlings did not give evidence at the hearing, we were not in a position to test his evidence as to exactly what had been said to him by Mrs Liu at the 5 July 2012 visit, and with the potential for communication difficulties at the time, we do not feel able to accept the evidence of his note in preference to the evidence we heard at the hearing from the Appellant as to the status and activities of James Kerr. Whilst the Appellant's evidence was in some respects entirely unreliable, we consider that in relation to the role of James and his actual activities it is preferable to that contained in a short note of officer Rawlings, untested in cross examination. This conclusion is supported by the fact that, from the employer annual return

information in relation to Mr Kerr before us, he had two other jobs subject to PAYE, in which he had earned some £11,500 during the year in question.

20. We therefore find that James was indeed a casual delivery driver for the Appellant's business, delivering takeaway meals to customers who required them in exchange for a flat fee of £1.50 per delivery which was paid direct to him in cash by the customers. He provided his own vehicle and paid all costs (fuel, insurance, etc) out of the flat fee. He was not supervised by the Appellant in making the deliveries and the Appellant could not require him to make deliveries if he did not wish to do so, or prohibit him from making arrangements for someone else to make them on his behalf. He was not guaranteed any work. He has also signed a witness statement confirming his understanding that he has never been an employee of the Appellant. As such, applying the normal tests which appear from the case law going back to *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1 All ER 433, we consider on balance that James Kerr was an independent self-employed delivery driver and not an employee of the Appellant under a contract of service.

### **The law**

21. Neither Mr Burke nor Mr Poon addressed us in any detail on the law, in spite of invitations to do so.

22. Mr Poon rested his case on the assertion that James Kerr was an independent contractor and not an employee (and therefore PAYE and NIC did not apply at all in his case); and that the liability in relation to Mr He should be reduced by some unspecified amount by reason of Mr He being entitled to the deduction of his personal allowance from the amounts paid to him before applying deductions as appropriate to the balance. Whilst he did not say so, we take him to be asserting that the deduction obligation was limited to emergency code deductions on the cumulative basis pursuant to Regulation 47 of the Income Tax (Pay as you earn) Regulations 2003.

23. Mr Burke rested his case on the submission that both James Kerr and Mr He were employees, that the Regulation 80 Determination and the Section 8 decision had been issued on the basis of the figures which HMRC had fairly derived from the information available to them, and that in the absence of any form P45 and the non-submission of form P46, the Appellant was obliged to deduct and account for basic rate PAYE; whilst he did not say so, we take him to be arguing this should have been on a cumulative basis under regulation 49 of the Income Tax (Pay as you earn) Regulations 2003.

### **Discussion and decision**

#### *James Kerr*

24. Concerning James Kerr, having made a finding that he was not an employee of the Appellant (see [20] above), it follows that no liability arises to the Appellant to account for PAYE or NICs in relation to amounts paid to him and therefore the appeal, insofar as it concerns such payments, must be ALLOWED.

*Tian Qiang He*

25. The parties are agreed that Mr He was an employee of the Appellant. The Appellant has not disputed the amounts of earnings computed by HMRC as having been paid to Mr He. The only dispute is whether the Appellant should have operated  
5 an emergency code on a cumulative basis (as asserted by Mr Poon) or simply deducted basic rate tax on a cumulative basis (as asserted by Mr Burke).

26. On the basis of our finding that the Appellant did not submit form P46 to HMRC (see [15] above) either in paper form or online, we find in favour of HMRC on this point. As no dispute has been raised about the calculation of the liabilities  
10 comprised in the Regulation 80 Determination and Section 8 Decision addressed to the Appellant in relation to Mr He, we uphold them insofar as they relate to Mr He and, to that extent, the appeal must be DISMISSED.

*Summary*

27. The Regulation 80 Determination in respect of the year 2011-12 is upheld in  
15 respect of Mr He but set aside in respect of James. The amount of that Determination is therefore reduced from £1,691.60 to £48.64.

28. The Regulation 80 Determination in respect of the year 2012-13 (which relates entirely to Mr He) is upheld in the sum of £632.32.

29. The Section 8 Decision in respect of Tian Qiang He for the period 1 April to  
20 30 June 2012 is upheld in the sum of £356.84.

30. The Section 8 Decision in respect of James for the period 1 August 2011 to 31 March 2012 in the sum of £913.91 is set aside in full.

31. To the above extent, the appeal is allowed in part.

32. This document contains full findings of fact and reasons for the decision. Any  
25 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  
30 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**KEVIN POOLE  
TRIBUNAL JUDGE**

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**RELEASE DATE: 10 November 2014**