{2015} UKFTT 0468 (TC)

TC04635

Appeal number: TC/2014/2740

INCOME TAX – accounts investigation – closure notice adjustment, discovery assessments and penalties

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mr JAZA SULAIMAN **Appellant**

- and -

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

TRIBUNAL: Judge Peter Kempster
Mr Peter Whitehead

Sitting in public at Centre City Tower, Birmingham on 16 September 2015

The Appellant did not appear and was not represented

Mrs Nadine Newham (HMRC Appeals Unit) for the Respondents

DECISION

1. The Appellant ("Mr Sulaiman") appeals against:

(1) A closure notice (under s 28A TMA 1970) raised by the Respondents ("HMRC") in respect of the tax year 2010-11 and discovery assessments (under s 29 TMA 1970) in respect of the tax years 2006-07 to 2009-10 in the amounts shown below.

(2) Penalties charged (under s 95 TMA 1970 or sch 24 FA 2007) in the amounts shown below.

Tax Year	**Tax** **£**	**Penalty** **£**
2006-07	3,497.34	1,399.00
2007-08	215.28	86.00
2008-09	2,084.48	839.00
2009-10	3,374.20	1,358.12
2010-11	2,650.72	1,066.91

Hearing

2. Mr Sulaiman did not appear and was not represented. Prior to commencement of the hearing the Tribunal's clerk telephoned Mr Sulaiman's accountant using the telephone number stated on the notice of appeal but there was only an answering machine. The Tribunal was satisfied that reasonable steps had been taken to notify Mr Sulaiman of the hearing (there was on file a letter dated 6 July 2015) and considered that it was in the interests of justice to proceed with the hearing, pursuant to Tribunal Procedure Rule 33.

Facts

3. Mr Sulaiman was at the relevant times the proprietor of a vehicle dismantling and breaking business trading as "Gill Autospares". HMRC opened an enquiry (under s 9A TMA 1970) into Mr Sulaiman's self-assessment return for the tax year 2010-11.

4. HMRC requested a meeting with Mr Sulaiman but his accountants stated that he would prefer to deal with matters in correspondence – although his accountants did meet with HMRC. HMRC were not satisfied with the business records maintained by Mr Sulaiman. Much of the business dealings were in cash. Documents requested were provided only after formal information notices were issued; however, Mr Sulaiman did provide a mandate for his banks to supply copy statements to HMRC.

5. HMRC noted that some bank receipts were omitted from the business accounts. Mr Sulaiman's explanation was that a business contact, Mr Hamad, had purchased certain vehicles in the name of Mr Sulaiman's business because Mr Sulaiman's business had the necessary registration to satisfy the vendor dealers. Mr Sulaiman received a fee of £50 per transaction from Mr Hamad. Mr Sulaiman later produced a dozen vendor invoices which he said related to these transactions. HMRC accepted that explanation in respect of the documented transactions.

6. HMRC also noted that the business receipts less business outgoings per the bank statements resulted in an unfeasibly small cash surplus to support Mr Sulaiman's living expenses. They considered that was in part explained by the business's 2012 accounts which revealed that out of total declared sales of £53,250 only £39,111 was banked, indicating that 27% of sales were in cash that was not banked. No other information or explanations were provided by Mr Sulaiman. HMRC decided to adjust the accounts on the basis that the recorded sales represented only 75% of actual sales. They did this not only for the year under enquiry (2010-11) but also (under their s 29 TMA 1970 discovery powers) for the four preceding tax years. In relation to 2006-07, their conclusion was that Mr Sulaiman's understatement of turnover was deliberate and thus the extended time limit in s 36 TMA 1970 was applicable.

7. HMRC also determined that Mr Sulaiman's conduct warranted statutory penalties.

(1) For the tax years 2006-07 & 2007-08 these were charged under s 95 TMA 1970 on the basis that the conduct was at least negligent. From the maximum penalty of 100% an abatement of 60% (being 20% for disclosure, 20% for co-operation, and 20% for seriousness) had been granted, giving a penalty of 40%.

(2) For the tax years 2008-09 to 2010-11 these were charged under sch 24 FA 2007 on the basis that the errors were deliberate and prompted, which provided for a penalty of minimum 35% and maximum 70% of the potential lost revenue. In relation to the 35% discretionary element of the penalty HMRC had awarded mitigation of:

(a) 25% as regards disclosure, as it was only on challenge that errors were accepted

(b) 30% as regards co-operation, as Mr Sulaiman's accountants did meet with HMRC

(c) 30% as regards provision of records, as Mr Sulaiman did sign a bank mandate, although formal powers were used on three occasions the enquiry.

The resulting 85% abatement gave a 29.75% reduction and a discretionary element of 5.25%, making the resultant penalty 40.25%.

8. Mr Sulaiman's grounds of appeal against the assessments are that the unrecorded cash transactions all related to transactions with Mr Hamad.

9. Mr Sulaiman's grounds of appeal against the penalties are that they are excessive as his only culpability was carelessness and inadequate record keeping.

Respondents' case

10. For HMRC Mrs Newham submitted as follows.

11. The business records presented had been totally inadequate. There was a handwritten record of daily takings but no purchase invoices or sales invoices. This was surprising because the business activity of vehicle breaking was regulated by The Motor Salvage Operators Regulations 2002 (SI 2002/1916) and reg 5 provided:

> "**Requirement for records to be kept by registered persons**
>
> (1) For the purposes of section 7(1) registered persons must keep the records set out in this regulation.
>
> (2) These records may be maintained in either electronic or manual form and must be located at or, in the case of electronic records, accessible from the registered place of business.
>
> (3) When a registered person receives any vehicle he must make and keep a record of the following information—
>
> (a) details of the vehicle registration number, vehicle identification number, make, model and colour of the vehicle;
>
> (b) the name, address and contact details of the supplier of the vehicle;
>
> (c) details of any proof of identity shown to the registered person by, or on behalf of the supplier of the vehicle, to establish the identity of the vehicle supplier, including whether any document produced was a UK photocard driver's licence, a passport, a utility bill, council tax bill or rent book, or other form of identification containing a photograph of the vehicle supplier;
>
> (d) the general condition of the vehicle including details of the type of damage to the vehicle (for example whether the damage has been caused by fire, water or impact) and the part of the vehicle damaged;
>
> (e) the date on which the information referred to in sub-paragraphs (a)–(d) above was entered on the record.
>
> (4) When a registered person sells or otherwise disposes of any vehicle, he must add the following pieces of information to the record made under paragraph (2) of this Regulation—
>
> (a) the date of sale or other disposal of the vehicle;
>
> (b) the name, address, and contact details of the person receiving the vehicle;
>
> (c) details of any proof of identity shown to the registered person by, or on behalf of the purchaser of the vehicle, to establish the identity of the person receiving the vehicle, including whether any document produced was a UK photocard driver's licence, a passport, a utility bill, council tax bill or rent book, or other form of identification containing a photograph of the vehicle purchaser;
>
> (d) the condition of the vehicle at the time of the sale or other disposal. (For example, whether it was repaired, unrepaired, dismantled, or in the same condition as at purchase);
>
> (e) the date when the information referred to in sub-paragraphs (a)–(d) above was entered on the record.
>
> (5) The records referred to in this Regulation must be kept for a period of six years from the date of the last entry on the record for the vehicle."

12. Apart from a handwritten list of vehicle purchases, none of the above items were produced to HMRC.

13. Mr Sulaiman had declined to meet with HMRC. In the absence of adequate records and satisfactory explanations, HMRC had made reasonable assumptions. Mr Sulaiman had belatedly produced invoices to support the explanation of twelve purchases relating to Mr Hamad; these were the sort of documents that should have been available to support all the business purchases; HMRC had not challenged that explanation in relation to those twelve transactions. The amount of unbanked cash sales was a reasonable estimate using the information available. HMRC did not accept the explanation that all these transactions also arose from (undocumented) purchases on behalf of Mr Hamad.

14. HMRC considered that the scale of the underdeclarations indicated deliberate behaviour rather than mere carelessness, and thus the extended assessment deadline under s 36 was available in relation to the tax year 2006-07.

15. The amount of the penalties had been carefully considered and abatements granted for all years, as set out above. The resulting penalties were reasonable and proportionate.

Consideration and Conclusions

16. Section 50(6) TMA 1970 provides (so far as relevant): "If, on an appeal, it appears to the [Tribunal] … that the appellant is overcharged by an assessment … the assessment … shall be reduced accordingly, but otherwise the assessment … shall stand good." That puts upon the taxpayer the burden of proving that he has been overcharged by the assessment. The applicable standard of proof is the usual civil standard, of balance of probabilities.

17. In *Nicholson v Morris* [1976] STC 269 Walton J stated (at 280) (approved by Goff LJ on appeal – [1977] STC 162 at 168):

> "… the Taxes Management Act 1970 throws on the taxpayer the onus of showing that the assessments are wrong. It is the taxpayer who knows and the taxpayer who is in a position (or, if not in a position, who certainly should be in a position) to provide the right answer, and chapter and verse for the right answer, and it is idle for any taxpayer to say to the Revenue, 'Hidden somewhere in your vaults are the right answers: go thou and dig them out of the vaults.' That is not a duty of the Revenue. If it were, it would be a very onerous, very costly and very expensive operation, the costs of which would of course fall entirely on the taxpayers as a body. It is the duty of every individual taxpayer to make his own return and, if challenged, to support the return he has made, or, if that return cannot be supported, to come completely clean; and if he gives no evidence whatsoever he cannot be surprised if he is finally lumbered with more than he has in fact received. It is his own fault that he is so lumbered."

18. Thus it is up to Mr Sulaiman to explain the anomalies that HMRC have identified during the enquiry. No evidence has been produced in support of the assertion that there were significant purchases over a number of years on behalf of Mr Hamad. In fact, although HMRC have accepted the explanation for the twelve invoiced purchases, there is no evidence that even those transactions were on behalf

of Mr Hamad. Our conclusion is that HMRC were generous in their acceptance of Mr Sulaiman's account of Mr Hamad's role in relation to he documented purchases and, when Mr Sulaiman then used that as a convenient story for the other unrecorded sales, they were correct to refuse to believe that.

19. We consider that the disputed closure notice and assessments were calculated using reasonable estimates based on the best information available to HMRC. Also, that Mr Sulaiman's conduct was deliberate and thus the extended time limit in s 36 TMA 1970 was applicable in relation to the 2006-07 tax year.

20. For those reasons we dismiss the appeals against the closure notice and assessments.

Penalties

21. As stated above, we consider that Mr Sulaiman's conduct was deliberate. The method of calculation of the penalties is set out above. We consider the calculations are reasonable and a fair reflection of culpability in this case – if anything, the 85% abatement on the sch 24 penalties appears to us to be generous, but we do not propose to adjust that to the detriment of Mr Sulaiman.

22. For those reasons we dismiss the appeals against the penalties.

Decision

23. The appeals are DISMISSED.

24. This document contains full findings of fact and reasons for the decision and replaces the summary findings and reasons decision notice issued to the parties on 16 September 2014. 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.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 1 OCTOBER 2015