TC05458

Appeal number: TC/2015/07325

Income tax - incorrect returns - HMRC amendments to self-assessment returns in respect of profits of self-employment and employment - whether HMRC had incorrectly disallowed expenditure - on the facts, no - whether assessment correctly calculated - yes - whether penalties correctly assessed – yes - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVID WATSON **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER CHRISTINE OWEN

Sitting in public at Liverpool Civil and Family Court, Vernon Street, Liverpool on 25 August 2016

Mr David Watson, the Appellant in person

Mr A J O'Grady, Officer of HM Revenue and Customs, for the Respondents

DECISION

The Appeal

1. This is an appeal by David Watson ("the Appellant") against a closure notice under the provisions of s 28A(1) and (2) Taxes Management Act 1970 and amendments to his self-assessment return for the tax year ended 5 April 2010 in respect of the profits of his self-employment. The amendment was issued on 1 June 2011.

2. The Appellant also appeals against a discovery assessment and amendments to his self-assessment return for the tax year ended 5 April 2009 issued under the provisions of s 29(4) and (5) Taxes Management Act 1970 in respect of the profits of his self-employment for that tax year. The amendment was issued on 2 June 2011

3. The Appellant also appeals against the penalty determinations imposed under the provisions of Schedule 24 of the Finance Act 2007, on the basis that he failed to take reasonable care in submitting his returns for each of the tax years 2009 and 2010.

4. The points at issue are:

(1) Whether, the Appellant understated profits from his self-employment for tax year 2009 and the tax year 2010.

(2) Whether the Appellant's calculations for expenditure claimed to have been incurred should be accepted.

(3) Whether HMRC are correct to impose penalties on the Appellant for making an incorrect income tax return for tax years 2009 and 2010 and, if so, in what amount.

Background

5. By profession the Appellant is a project manager, but sometimes is a self-employed glazing installer in new build construction.

6. From April 2008 until June 2008 he was employed by Red Architectural Limited (Red Architectural was a specialist in the building envelope design and construction industry).

7. From June to October 2008, the Appellant was a self-employed project manager within the Construction Industry Scheme ("CIS"). He says that he was contracted via Recruitment Development Engineering Limited (a labour recruitment agency). From November 2008 to January 2009 he took three months' vacation.

8. From January 2009 until January 2010 he was employed by a cladding company in Leeds.

9. Following that he became a self-employed project management consultant, which he says continued until April 2010, when he became ill and stopped working. At the end of September 2010 he went to work in in Abu Dhabi.

10. The Appellant's 2008-09 return was received electronically on 6 April 2009, and his 2009-10 return, again electronically, on 9 April 2010. His self-assessment returns showed that he had received £29,375 income in the tax year 2009 and had claimed £20,306 expenses. His return for the 2010 tax year showed that he received £26,547 income and had claimed £20,363 expenses. The returns also showed deductions claimed under the CIS and after expenses a claim for repayment of overpaid tax for both the 2009 and 2010 tax years.

11. On 12 August 2010, within the time allowed by the legislation, HMRC opened an enquiry into the 2009-10 return under s 9A of the Taxes Management Act 1970. The notice of enquiry included a request for information and documents, specifically a request for a breakdown of expenses claimed, and copies of the contractor's statements showing income and tax deducted, which would have been referred to when completing the 2009-10 return.

12. On 20 September 2010, as no response was received to the opening enquiry notice, HMRC issued an information notice under Paragraph 1 of Schedule 36 to the Finance Act 2008.

13. Having received the information notice, the Appellant contacted HMRC to say that he could not find the original enquiry notice sent to him on 12 August 2010, and a copy was sent. The Appellant advised HMRC that he could provide the information and documentation by 20 October 2010.

14. According to the Appellant in later correspondence, he said that he had not in fact received the 12 August 2010 letter. He says that he spoke to a Mr Devine at HMRC at the end of September 2010 and informed him of a pending move to the UAE and that as he would have no postal address provided an email address. He says he was asked to complete a form (as to leaving the UK) which he completed at the HMRC offices in Bootle.

15. The Appellant also says that on 30 September 2010 he had sent all original subcontractor payment certificates, receipts for expenses, bank statements etc. for the attention of Mr Devine at HMRC's Sheffield Tax office address as directed. He says that his only error was not to send them by recorded delivery, although he had not been asked to do that and had no legal responsibility to do so.

16. He says he then left the UK in October 2010 and that he had no further contact with HMRC until his return to the UK about a year later.

17. HMRC have no record of the Appellant either sending in any information or attending their offices in Bootle. HMRC say that by 5 November 2010 the Appellant had still not responded, and so they wrote to him warning that if he did not comply with the information he may be charged a penalty of £300.

18. By 3 December 2010 the Appellant had still not responded, and a £300 penalty was levied.

19. By 25 January 2011 the Appellant had still not sent in the information requested by HMRC, and on that date the case officer wrote to the Appellant highlighting areas of concern regarding entries on the Appellant's return for the year ended 5 April 2010. HMRC also advised that there were similar concerns with regard to the 2008-09 return.

20. The concerns raised included the fact that HMRC had no records which showed the Appellant receiving payments from any CIS contractor.

21. There were also concerns about the level of expenses being claimed against gross income, which amounted to over 76% of the turnover reported for 2009-10, and 69% of the total turnover reported for 2008-09.

22. By 5 May 2011 no additional documents or information had been provided by the Appellant, and on that date HMRC wrote to the Appellant to explain the proposals to be made for the purpose of bringing the enquiry to a conclusion.

23. The enquiry officer, given the lack of documentation provided by the Appellant and having regard for the fact that there was no trace of the Appellant on HMRC's system as a subcontractor, considered it was reasonable to conclude that the income the Appellant had reported on his 2009-10 tax return was outside the CIS, and was therefore received without deduction of tax.

24. Consequently, it was decided that a tax credit claimed in the sum of £5,310 for 2009-10 should be removed.

25. For the same reasons it was decided that a tax credit of £5,875 claimed for 2008-09 should also be removed.

26. The enquiry officer also decided that, for 2009-10, expenses of £20,363 set against turnover of £26,547 had not been verified by the production of business records, notwithstanding HMRC's requests for the same, and the sum claimed was excessive given the periods and type of work carried out by the Appellant.

27. In the absence of any information to the contrary, the case officer concluded that it was reasonable to restrict the expenses claimed to 20% of the turnover, and on this basis the figure of £20,363 claimed would be reduced to £5,310.

28. For 2008-09, having decided that a discovery for that year was justified, the case officer applied the same reasoning and reduced the expenses claimed of £20,306, to £5,875, being 20% of the turnover of £29,375.

29. Consequently, the original net profit reported for 2008-09 of £9,069 was increased to £23,500, and the original net profit reported for 2009-10 of £6,184 was increased to £21,237.

30. On the basis of these proposals, a closure notice for 2009-10 was issued on 1 June 2011, and a discovery assessment for 2008-09 was issued on 2 June 2011. The closure notice charged additional duties of £9,466.64. The discovery assessment charged additional duties of £9,915.68.

31. These notices/assessments were followed by a penalty assessment under Schedule 24 to the Finance Act 2007, which was issued on 6 June 2011.

32. As the penalty was calculated on the basis of careless inaccuracies, the penalty range is prescribed by the legislation as being between 0% and 30%. No abatement was permitted for 'telling' 'helping' or 'giving' so the penalty charged was at the rate of 30%, i.e. £5,814.70 in total.

33. The Appellant says that due to health problems he returned to the UK in October 2011, whereupon it became apparent that HMRC had been sending post to his address in the UK.

34. The Appellant says that on 16 October 2011 he sent a recorded delivery letter apologising for his late reply, explaining that it was due to health reasons and that he wished to make a late appeal. The letter, a copy of which was in the Tribunal bundle, includes [copied to the foot of the letter] a post office 'record of receipt' dated 22 October 2011. In the letter the Appellant says "I do not reside in the UK and now reside in Abu Dhabi". He provided an email address (which it subsequently transpired was incorrect – although his correct email address had two underscored spaces, the whole email address had been underscored). The letterhead however showed the Appellant's address in Bootle.

35. On 16 December 2011, HMRC acknowledged the Appellant's letter of 16 October 2011, advising that they would consider his request for a late appeal.

36. On 3 January 2012, HMRC wrote to the Appellant to say that the request for a late appeal had been accepted because of his ongoing health problems. They noted that they appeared to have an incorrect email address for the Appellant and reiterated their previous requests for delivery of the outstanding information/documentation, in order to consider the matter further. HMRC asked that the information be delivered no later than 3 March 2012 and also asked for the Appellant's correct email address.

37. On 17 April 2012 as no further response was received from the Appellant, HMRC issued a letter stating that the appeal was now settled under s 49C(4) of the Taxes Management Act 1970. HMRC wrote to the Appellant on 23 April 2012, setting out the amounts which were now due.

38. The Appellant wrote to HMRC on 6 May 2012 to advise that he had sent documents to HMRC in September 2010 only to be later informed that HMRC had no record of receiving the documents.

39. HMRC confirmed that having again re-checked their records, no evidence of the documents having been provided could be found.

40. In a letter dated 15 May 2012, HMRC wrote to the Appellant to offer him the opportunity of providing the relevant information and documents, so that HMRC could reconsider their view.

41. The Appellant then went to live in the UAE, working in Saudi Arabia and then Russia, working in Vladivostok in 2014. He had no more contact with HMRC until HMRC started collection proceedings in mid July 2014. The Appellant made contact with HMRC to say that he had previously made them aware that he was working outside the UK, that the tax claimed was in dispute and that there was an ongoing appeal. He says the collecting officer told him that HMRC would take the matter no further.

42. On 17 November 2014, the Appellant wrote HMRC to say he was unhappy about the fact that he had not been informed of his right for the matter to be referred to a Tribunal.

43. HMRC referred the Appellant to previous correspondence which clearly referred to his right to have the appeal reviewed by an HMRC officer not previously involved with the case and his right to appeal directly to the Tribunal.

44. HMRC eventually agreed to review matters and again the appeal was referred to HMRC's Appeals & Reviews team for consideration.

45. Once again the Appellant was asked to support the figures included in his 2008-09 and 2009-10 tax returns by producing sufficient documentation to verify the expenses being claimed, and the CIS tax credits being offset against his tax liability.

46. Following this request, the Appellant provided HMRC with the following information and documentation in support of the figures entered on his returns for the two tax years under appeal:

- Income and expenditure figures for the two years under enquiry.
- Mileage details for both years.
- Copies of mobile phone bills, but in the form of summaries only with no call details.
- Bank statements covering the five month period 6 April 2008 to October 2008.

47. Having reviewed the information provided, the HMRC case officer wrote to the Appellant in September 2015, and summarised the following conclusions.

i. Having regard to the bank statements and the entries therein, HMRC accepted that there was evidence of payments from contractors, and that it was therefore feasible that the Appellant had received payments after deduction of tax. On this basis the case officer was prepared to accept the CIS tax credits of £5,875 claimed for 2008-09, and £5,310 claimed for 2009¬10.

ii. From the correspondence generated during the enquiry, it also transpired that the Appellant had worked for Red Architectural Limited (this had not initially been disclosed by the Appellant) during the early part of the 2008-09 tax year, and that gross pay of £7,251 plus tax deducted at source of £1,384.26, had been omitted from the 2008-09 return.

iii. The omitted PAYE income/tax credit and the CIS tax credits were now agreed.

iv. The expenses claimed against income for the two years ended 5 April 2010, could not be agreed and therefore this remained the only source of dispute. HMRC were of the view that the information and documentation that had been provided by the Appellant was simply not sufficient for the purpose of supporting the expenses of £20,306 for 2008-09 or the expenses of £20,363 for 2009-10.

48. The mileage log indicated that periods during which the Appellant was not working had been included, and there was no distinction between personal and business calls from the telephone bills provided.

49. HMRC's view remained that on the basis of the information and documentation which had been provided, it was fair and reasonable to allow expenses equating to 20% of the turnover for each year.

50. The Appellant responded that the expenses claimed on his 2008-09 and 2009-10 returns had actually been incurred by him, and although he had no evidence to support the expenses, he was not prepared to accept the compromise offered by HMRC.

51. Between 2 September 2015 and 26 November 2016 in an exchange of correspondence with HMRC, the views of HMRC's case officer in respect of the matters remaining in dispute were summarised as follows.

i. HMRC did not agree that original expenses information/documentation were lost by HMRC. Originals had never been received.

ii. The Appellant had submitted copy bank statements, but only for the period 6 April to 31 October 2008 and for three of those months he had been employed by Red Architectural Limited. No statements had been provided for the period 1 November 2008 to 4 April 2010. The bank statements submitted do not indicate the level of expenditure claimed, and importantly did not include the November 2008 to January 2009 self-employed period. No narrative was supplied and there was no evidence that the Appellant had been working after he left Recruitment Development Engineering Limited in October 2008.

iii. The only other documentary evidence provided was an income and expenditure account, together with a mileage log and copy summary pages of a telephone bill without any details of calls. There was no analysis of the expenditure.

iv. To be allowable, expenses must relate to revenue expenditure that is incurred wholly and exclusively against the income for which it is incurred.

v. The Appellant said that he worked for a cladding firm in Leeds from April 2009 (although subsequently he said it was from January 2009) until January 2010. The mileage log indicated that the Appellant had included periods for which he was not working. Part of the expenditure claimed related to travel and other costs obtaining work. Such costs are not allowable.

vi. The telephone bills that the Appellant sent were only the summary pages and they do not have the detailed call pages. There was no distinction between personal and private calls. The bank statements that he submitted did not verify the level of expenditure claimed and only covered a limited period.

52. HMRC explained that to be allowable, expenses must be incurred wholly and exclusively in carrying out the trade that gives rise to the income against which they are claimed. This is in accordance with Section 34 Income Tax (Trading and Other Income) Act 2005. The individual should be in a position to support the expenses that have been claimed by maintaining adequate records in accordance with s 128 Taxes Management Act 1970 and Schedule 37 of the Finance Act 2008. HMRC did not consider that the Appellant had done this and, in the absence of auditable records, the expenses claimed for each year were not credible as a proportion of his income. In the absence of supporting receipts or invoices, HMRC considered that their offer to allow expenses equal to 20% of the Appellant's turnover was fair and reasonable and should stand for both years. This is the maximum that would have been allowed in similar settlements in the years concerned. HMRC revised the allowable expenses as follows:

Year	Expenses claimed	Expenses allowable
2008-09	£ 20,306	£ 5,875 (£29,375 @ 20%)
2009-10	£ 20,363	£ 5,310 (£26,547 @ 20%)

53. HMRC calculated that the Income tax /Class 4 National Insurance Contributions due/over claimed after allowing for CIS tax credits, would be revised as follows.

Year	As initially assessed	Revised amount
2008-09	£ 9,915.68	£4,106.62
2009-10	£ 9,466.64	£4,156.64

54. With regard to the penalties for inaccurate tax returns in each of the tax years 2009-10, these were calculated having considered:

- Behaviour giving rise to the inaccuracies
- Any appropriate reductions for "giving", "telling" and "helping" in the disclosure information.

55. *Behaviour giving rise to the inaccuracies.* At the time that the assessments were issued the HMRC officer dealing with the review considered that the inaccuracies arose as a result of a failure to take reasonable care rather than being deliberate in nature. It was his view that the Appellant should have been able to support his expenses claims with appropriate receipts, records and other documents. There had also been an absence of a reply to enquiries for extensive periods.

56. *Reductions*. In the absence of engagement with H M Revenue & Customs at the time of the checks, the officer considered that no reductions could be given against the penalty charges which were still considered to be appropriate. The penalties reduced to reflect the agreed CIS credits but to include the omitted PAYE income were as follows:

Year	Penalty
2008-09	£2,840.00
2009-10	£2,974.70
	£5,814.70

57. On 13 December 2015 the Appellant lodged a Notice of Appeal with the Tribunal.

Legislation

58. Section 29 Taxes Management Act 1970 allows for assessments to be made under discovery provisions:

> S29 Assessment where loss of tax discovered:
>
> 29(1) if an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment--
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) That an assessment to tax is or has become insufficient, or
>
> (c) That any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

29(2) Where—

(a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and

(b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,

the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

29(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above--

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

29(4) The first condition is that the situation mentioned in subsection (1) above is attributable to fraudulent or negligent conduct on the part of the taxpayer or a person acting on his behalf.

29(5) The second condition is that at the time when an officer of the Board-

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (I) above.

Section 50(6) Taxes Management Act 1970 places the onus on the Appellant to displace the assessments appealed against.

Schedule 24 Finance Act 2007

Paragraph 1 of Schedule 24 states in relevant part as follows:

(1) A penalty is payable by a person (P) where-

(a) P gives HMRC a document of a kind listed in the Table below, and

(b) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to-

(a) an understatement of a liability to tax,

(b) a false or inflated statement of a loss, or

(c) a false or inflated claim to repayment of tax.

(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.

(4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

Tax	*Document*
Income tax or capital gains tax	Return under section 8 of TMA 1970 (personal return).
……	……

Paragraph 3 of Schedule 24 provides for degrees of culpability as follows:

(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is-

(a) "careless" if the inaccuracy is due to failure by P to take reasonable care,

(b) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and

(c) "deliberate and concealed" if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

(2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate on P's part when the document was given, is to be treated as careless if P--

(a) discovered the inaccuracy at some later time, and

(b) did not take reasonable steps to inform HMRC.

Paragraph 4 sets out the penalty payable under paragraph 1. Paragraph 4(1)(a) provides that the penalty, for careless action, is 30% of the potential lost revenue. For deliberate but not concealed action, the penalty is 70% of the potential lost revenue, and for deliberate and concealed action, the penalty is 100% of the potential lost revenue.

Paragraph 5 defines "potential lost revenue" as "the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment".

Paragraph 9 provides for reductions in the penalty for disclosure depending on whether it is prompted or unprompted.

Paragraph 10(1) provides that "Where a person who would otherwise be liable to a 30% penalty has made an unprompted disclosure, HMRC shall reduce the 30% penalty to a percentage (which may be 0%) which reflects the quality of the disclosure". Paragraph 10(2) provides that "Where a person who would otherwise be liable to a 30% penalty has made a prompted disclosure, HMRC shall reduce the 30% penalty to a percentage, not below 15%, which reflects the quality of the disclosure".

Paragraph 11 further provides that HMRC may reduce the penalty under paragraph 1 "If they think it right because of special circumstances".

Paragraph 14 also enables HMRC to suspend all or part of a penalty for a careless inaccuracy under paragraph 1, but (under paragraph 14(3)) "only if compliance with a condition of suspension would help P to avoid becoming liable to further penalties under paragraph 1 for careless inaccuracy".

Under paragraph 15, a person may appeal against a decision of HMRC that a penalty is payable (sub paragraph (1)), or as to the amount of a penalty payable, (subparagraph (2)) or a decision not to suspend a penalty payable, (subparagraph (3)) or a decision as to the conditions of suspension (subparagraph (4)).

Paragraph 17 deals with the powers of the Tribunal in any such appeal.

"17 (1) On an appeal under paragraph 15(1) the appellate tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 15(2) the appellate tribunal may

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the appellate tribunal substitutes its decision for HMRC's, the appellate tribunal may rely on paragraph 11

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the appellate tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed.

(4) On an appeal under paragraph 15(3)

(a) the appellate tribunal may order HMRC to suspend the penalty only if it thinks that HMRC's decision not to suspend was flawed, and

(b) if the appellate tribunal orders HMRC to suspend the penalty

(i) P may appeal to the appellate tribunal against a provision of the notice of suspension, and

(ii) the appellate tribunal may order HMRC to amend the notice.

(5) On an appeal under paragraph 15(4) the appellate tribunal

(a) may affirm the conditions of suspension, or

(b) may vary the conditions of suspension, but only if the appellate tribunal thinks that HMRC's decision in respect of the conditions was flawed.

(6) In sub-paragraphs (3)(b), (4)(a) and (5)(b) flawed means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(7) Paragraph 14 (see in particular paragraph 14(3)) is subject to the possibility of an order under this paragraph."

The Appellant's case

59. The Appellant's grounds of appeal as set out in the Notice of Appeal to the Tribunal, are summarised as follows.

60. Following the Appellant's submission of his tax returns for 2008-09 and 2009-10, which included the original expenses claims, after appropriate checks, HMRC authorised repayments of tax for both tax years.

61. When asked to provide receipts in support of the expenses claimed, he did so but they were lost by HMRC.

62. The Appellant accepts that the items which he says were sent to HMRC were not sent by way of recorded delivery, but says that a proof of posting certificate is not required by law. The Appellant referred us to the case of *Heronslea Limited v HMRC* [2011 UKFTT] 102 which decided that a CIS return which HMRC asserted had been delivered late had been sent by the Appellant by first class post and under Section 7 Interpretation Act 1978 was deemed to have been delivered, if not the next day at least by the day after that, and on that basis the return was not late. The Appellant therefore says that *Heronslea* is support for his contention that the expenses information was duly delivered to HMRC.

63. The Appellant says that all of the expenses which he claimed were for the purposes of his business, and that because this was "new business" expenditure it was higher perhaps than normal.

64. At the hearing the Appellant said that he maintained a ten foot square lockup and yard where he kept his equipment including vacuum lifts specialist laser equipment, cables and pullies etc (for glazing work).

65. The Appellant says that his only mistake was not to send the expenditure information by Recorded Delivery. He asserts that he had done everything he could to assist HMRC in the enquiry, including where possible sending as much information as he had, albeit somewhat limited and that he had alerted HMRC to the fact that he was leaving the UK to work in The United Arab Emirates and Russia and that having been out of the country for at least two years he had clearly been in difficulty

responding the HMRC's enquiries. He also added that during the early part of the enquiry period he had been seriously ill and had other personal problems.

66. He asserts that his appeal should be allowed and the tax and penalties assessed for the two years should be cancelled.

67. The Appellant said in evidence to the Tribunal that he had sent an accountants spreadsheet to HMRC and that he was not able to keep a copy of this as his accountant was n prison.

HMRC's case

68. HMRC disputes the Appellant's claim that he sent all of his records to HMRC, and that HMRC then proceeded to lose those records.

69. HMRC says that there is no evidence to show that the Appellant's records were ever provided to HMRC. No proof of posting has ever been provided by the Appellant although HMRC acknowledge that proof of posting is not a legal requirement. The Appellant acknowledges that his records were not sent by recorded delivery. The case of *Heronslea* is of no relevance. In that case HMRC asserted that the Appellant's CIS return had been received late but were not able to provide evidence of that. The Tribunal found that the presumption under Section 7 of the Interpretation Act 1978 applied and that there had been a deemed delivery in time of the CIS return. In this case however there is no evidence whatsoever either of the sending or receipt of the Appellant's expenditure evidence.

70. The Appellant has been given numerous opportunities to provide the information and documentation necessary to support the business expenses claimed, and has failed to do so. There is no reason why he could not have reconstituted his records and even if not entirely complete, provided these to HMRC.

71. HMRC contends that expenses claims amounting to over 76% of turnover for 2009-10 and 69% of turnover for 2008-09 are excessive.

72. HMRC makes the observation that the deductions claimed in the accounts for the two years which the Appellant has submitted, are round sum in nature, and look to be entirely estimated.

73. The records, as finally supplied, do not come close to supporting the deductions claimed.

74. An allowance for expenses in each tax year which equates to 20% of the turnover declared for each year is fair and reasonable.

75. HMRC has considered the guidance provided by Walton J in *Johnson v Scott* [1978] STC 48 where he considered the Crown's use of estimated figures and said the following:

> "Indeed, it is quite impossible to see how the crown, in cases of this kind, could do anything else but attempt to draw inferences. The true facts are known, presumably, if known at all, to one person only, the taxpayer himself. If once it is clear that he has not put before the tax authorities the full amount of his income, as on the quite clear inferences of fact to be made in the present case he has not, what can then be done? Of course all estimates are unsatisfactory; of course they will always be open to challenge in points of detail; and of course they may well be under-estimates rather than over-estimates as well. But what the crown has to do in such a situation is, on the known facts, to make reasonable inferences. When in para 7(b) of the case stated, the Commissioners state that (with certain exceptions) the Inspector's figures were 'fair' that is, in my judgement, precisely and exactly what they ought to be, fair. The fact that the onus is on the taxpayer to displace the assessment is not intended to give the crown carte blanche to make wild or extravagant claims. Where an inference of whatever nature falls to be made, one invariably speaks of a 'fair' inference. Where, as is the case in this matter, figures have to be inferred, what has to be made is a 'fair' inference as to what such figures may have been. The figures themselves must be fair."

76. With regard to the discovery assessment made for the 2008-09 tax year, the case officer, having selected the 2009-10 return for enquiry, 'discovered' that expenses had been over-claimed for the two years ended 5 April 2010.

77. With reference to s 29(5) TMA 1970, HMRC says that as at 5 April 2010 when the enquiry window for the 2008-09 return closed, no HMRC officer could have been reasonably expected on the basis of the information made available to him before that time, to be aware that the Appellant's income for 2008-09 had been under assessed. This is because the understatement of income for 2009-10 was only discovered, following the issue of the s 9A TMA 1970 notice for that year, on 12 August 2010.

78. With reference to s 29(4) TMA 1970, HMRC says that the expenses claimed on the 2008-09 return were claimed without any supporting records. The expenses were clearly excessive, and the inaccuracies arose as a result of the Appellant's careless conduct.

79. HMRC also says that on the basis of what was discovered during the 2009-10 enquiry, a presumption of continuity may be applied in respect of the tax year 2008-09.

80. In *Jonas v Bamford* [1973] STC 519, Mr Justice Walton said that

> "But so far as the discovery point is concerned, once the Inspector comes to the conclusion that, on the facts which he has discovered, Mr Jonas 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 onus of proof of which is clearly on the taxpayer."

81. In *Brittain v Gibbs* [1986] STC 418 the Appellant argued that the Commissioners erred in principle in that they took his accounts for one year and satisfied themselves that those accounts were not accurate, and then proceeded to reject his accounts for all the other years, when they ought to have examined his accounts and given reasons for rejecting them in respect of each year. However Mr Justice Vinelott said that such an argument rested upon a misconception, and he said (at page 101);

> "The inspector fastened, not exclusively but to a large extent, on the accounts for one year in order to demonstrate to the Commissioners what the inspector submitted was the unreliability of the taxpayer's accounts. The Commissioners having heard all the evidence, were not satisfied with the accuracy of the accounts, and at that point they were entitled to make their own estimate for each year under appeal."

82. HMRC therefore argues that the 2008-09 discovery assessment and the 2009-10 closure notice are legally sound, and that the reduced expenses figures which HMRC have allowed are fair and reasonable in the circumstances.

83. With regard to the penalties which have been charged under Schedule 24 of the Finance Act 2007, HMRC contends that the Appellant filed incorrect returns for both tax years 2008-09 and 2009-10, because of the fact that expenses were materially overstated, resulting in understatements of profits for both years. PAYE income was also omitted for 2008-2009.

84. HMRC also says that the inaccuracies in these returns arose because of the Appellant's careless conduct, and that the discovery of the inaccuracies was prompted by HMRC's enquiries.

85. Consequently the penalty range prescribed by the legislation is 0% to 30%, depending upon the abatement allowed for 'telling', 'helping' and 'giving'.

86. In this appeal, given the Appellant's lack of cooperation throughout the enquiry, and lack of response to requests for business records, HMRC has not allowed any reductions. The penalty charged is therefore 30%.

87. HMRC acknowledges that in the review carried out by the reviewing officer, no consideration was given to the possibility of suspending the penalty. The reason for this quite simply, is that the Appellant no longer files self-assessment tax returns. Consequently, no conditions which would help him avoid becoming liable for further careless inaccuracy penalties could be set.

88. HMRC may reduce a penalty if it thinks it is right to do so because of special circumstances. There is no statutory definition of special circumstances. The Courts are however familiar with the concept, and in other contexts 'special' has been held to mean 'exceptional, abnormal, or unusual'. The special circumstances must also apply to the particular individual, and must not be general circumstances that apply to many taxpayers by virtue of the penalty legislation.

89. Having regard to the circumstances of this case, HMRC has not found any circumstances which would merit a special reduction of the penalties below the amounts being sought.

90. In the case of *Julie Ashton* [2013] UKFTT 140(TC), Judge Staker commenting on the definition of 'careless', stated at Para 35:

> "The Tribunal considers that a prudent and reasonable taxpayer must at the very least be expected to take prudent and reasonable steps to ascertain what his or her tax obligations are."

and at Para 37 says:

> "An omission may be innocent, in the sense of not having been deliberate, but such an innocent omission may still be the result of a failure to take reasonable care."

91. Taking the ordinary, every day meaning of the word negligent - lack of proper care and attention or carelessness, HMRC suggest the comments by Judge Staker in the *Ashton* case, at paras 35 and 37 support their view that by failing to take steps to correctly prepare the 2008-09 and 2009-10 tax returns, the Appellant was negligent. A reasonable person would amongst other things:

- make a complete and correct return of their income;
- keep such records as are necessary to enable them to make an accurate return;
- be in a position to supply to HMRC accurate information during the course of an enquiry.

92. Based on the evidence and explanations provided during the course of the enquiry, the conclusions reached by the HMRC and assessments are fair.

Conclusion

93. The Appellant accepts that he has no evidence to verify the expenditure claimed in tax years 2008-09 and 2009-10. He accepts that he is unable to verify that the information and documentation requested by HMRC was sent to them on 30 September 2010, as claimed. The case of *Heronslea* has no application in this case for the reasons outlined by HMRC.

94. The onus is on the Appellant to show that the amendments to self-assessments in the tax years 2009 and 2010 are incorrect. In our view he has not discharged that burden.

95. A prudent tax payer would retain copies of original documentation and information, particularly when sent by ordinary post and not recorded delivery. A prudent tax payer would also be aware that, where expenses claimed are so disproportionate to the tax payer's earnings, as in this case, there is a particular need to retain primary evidence of expenditure. There appears to be no reason why the

Appellant could not have attempted to reconstitute his records. He says that for part of the earlier enquiry period he had been ill and had personal problems. However, the enquiry started in August 2010 and was ongoing until November 2015 and for at least part of that time, the Appellant was in the UK apparently working and therefore had an opportunity to provide the expenditure evidence required by HMRC.

96. The Appellant has offered no real detail in terms of descriptions of the equipment purchased, cost, date of purchase, when and how the equipment was used and why it was purchased as part of a new business set up for such short periods of self-employed sub-contracted activity.

97. The mileage details provided by the Appellant are not supported for example by any evidence that they were incurred whilst undertaking employed or self-employed activities, hotel accommodation costs, which the Appellant says were always paid by the people who had asked him to attend meetings in his search for work and travel costs incurred looking for work are not allowable.

2008/09 Discovery Assessment

98. The Discovery Assessment initially put into charge additional duties of £9,915.68:

(i) we restrict the Appellant's expenses to the sum of £5,875.00.

(ii) HMRC have agreed to reinstate the claimed CIS Tax Credit of £5,875.00 and both parties have agreed to the inclusion of the Appellant's PAYE pay of £7521.00 and PAYE tax of £1,38426.

(iii) the total amount over-repaid to the Appellant (reduced from the original amount calculated by HMRC of £9,918.68) is reduced to £4,106.62.

2009-10 Tax Year

99. The closure notice recently put into charge additional duties of £9,466.64:

(i) we restrict the Appellant's claimed expenditure to the sum of £5,310.00.

(ii) HMRC have agreed to reinstate the CIS Tax Credit claimed of £5,310.00.

The total amount over-repaid to the Appellant (reduced from the original amount stated by HMRC of £9,466.64) is reduced to £4,156.64.

The total duties payable to HMRC are therefore £8,263.26.

Penalties

100. The Appellant accepts that he has submitted tax returns for 2008/09 and 2009/10 which contain inaccuracies. He did not retain copies of his expenditure documentation and has not, in our view, made any real attempt to reconstitute his

records despite numerous remainders by HMRC over a very extended period of time. It is clear that there has been a lack of co-operation from the Appellant. A penalty of 30% is therefore appropriate.

101. We amend the penalty assessment to £2,479.00 that is £8,263.26 x 30% equals £2,479.00.

102. The appeal is accordingly allowed in part to the extent set out above.

103. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 26 OCTOBER 2016