



TC05563

Appeal number: TC/2016/02797

INCOME TAX – discovery assessments – Closure Notice – omitted cash sales – wife’s wages – penalties – assessments and penalties confirmed – Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WILLIAM McADAM

Appellant

- and -

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

**TRIBUNAL: JUDGE ANNE SCOTT
MEMBER: IAN MALCOLM**

Sitting in public at Eagle Building, Glasgow on Monday 12 December 2016

Mark Lees, for the Appellant

Matthew Mason, Officer of HMRC, for the Respondents

DECISION

Issues for the Tribunal

1. In the Statement of Case HMRC had identified three issues, namely:-

- 5 (a) whether there are omitted cash sales from work done by the appellant resulting in the turnover being understated,
- (b) whether the deduction for wife's wages was reasonable, and
- (c) whether in view of the alleged inaccuracies in the 2010-2014 self-assessment tax returns, penalties under Schedule 24 Finance Act ("FA") 2007 are due.

10 At the outset of the hearing we enquired of the parties whether these were still the issues and it was confirmed that that was the case.

Background

15 2. On 15 April 2015, HMRC wrote to Mr McAdam to advise of their intention to open an enquiry under Section 9A Taxes Management Act 1970 ("TMA") into the appellant's self-assessment tax return for the 2013/14 tax year. That opening letter was followed by a detailed request dated 5 May 2015 for the business records together with details or analysis of estimates/balancing figures, turnover/income, drawings, cost of sales and other papers. Copies of the letters were also issued to Mr McAdam's representative, Mr Lees.

20 3. As far as the business records for the period 6/4/13 to 5/4/14 were concerned, HMRC stipulated that they needed to see the statutory records including income/sales invoices, receipts books, purchase/expense invoices /receipts, business bank statements (and if business transactions were dealt with through personal bank accounts then statements for the personal accounts), credit card statements, cash
25 books, sales day book, wages records and booking diaries.

4. The business records produced were a ledger, business bank records and purchase invoices.

30 5. On 27 May 2015, Officer Steven met with Messrs McAdam and Lees and thereafter on 29 May 2015 wrote to Mr Lees enclosing three pages of Notes of Meeting stating: "If you feel any items are inaccurate or I have missed any important points, then please let me know". No objection was taken at any point until this hearing.

6. The said letter pointed out that the main issues arising were summarised at "Summary" in the Notes of Meeting. That read as follows:-

"Steven outlined three main issues so far:

- 35 (1) The sales records are weak and there is no way for him to test the accuracy or completeness of the cash income from the business records. Steven asked to see all the private bank records including savings/ISAs for the period of his checks, ie 6/4/13 to 5/4/14 ...

(2) Evidence is required concerning the purchase and funding of the second property ...

(3) Steven felt the deduction claimed for wife's wages was unreasonable ...

Steven indicated that he was not satisfied at this point that the account/return was accurate".

7. On 16 July 2015, HMRC were furnished with the evidence requested. On
5 24 July 2015, Officer Steven responded pointing out that in one Royal Bank of
Scotland bank account there were deposits which were neither drawings nor transfers
totalling £1,950 which it was assumed was cash that had been banked. The other
private bank account had deposits which were not drawings totalling £9,280 and
which again was assumed to be cash that had been banked. Officer Steven accepted
10 that approximately £6,960 may have come from Mr McAdam's daughter and that that
left £2,320 for which there was no evidence of the source.

8. He also pointed out that he had reviewed the cash drawn from the joint account
either by cashback or cashline and only £690 had been withdrawn in the entire year
with gaps, and sometimes long gaps, in cash drawn. He asked for credible
15 explanations and evidence as to how Mr McAdam covered private cash expenditure.

9. Lastly, he pointed out that, as far as wife's wages were concerned, this was a
small service trade business with a turnover of £35,000 and the accounting records
were limited to a ledger which simply mirrored the bank statements. Obviously, he
was satisfied in regard to the second property.

20 10. On 14 August 2015, Mr Lees wrote to HMRC with explanations of the
unexplained cash deposits shown in the two Royal Bank of Scotland accounts. On 3
September 2015, Officer Steven wrote back pointing out that, in regard to the first
account, the deposits of £1,950 could not possibly have come as gifts from Mr
McAdam's late mother and cash discovered at her home after her death since all the
25 deposits were made after her death and the Confirmation had shown cash of only £26.
In regard to the other account, where there was excess cash of the order of £2,320
which "came from possibly his daughter, his brother and his son", HMRC asked for further
evidence and pointed out that the detail was vague and there were doubts as to the
credibility of the explanation.

30 11. That letter concluded with Officer Steven pointing out that:-

"It is my view, based on the information currently available, that Mr McAdam has understated
his turnover and claimed excessive expenses in terms of the deduction claimed for his wife's
wages. If there is any evidence available which you feel may effect this view, then of course
you should let me have this as soon as possible... I propose you speak to Mr McAdam again
35 concerning these issues and the accuracy of his returns."

On 23 September 2015, in a telephone call to Officer Steven it was confirmed that
Mr McAdam believed that the records, accounts and returns were all accurate.
HMRC disagreed.

40 12. On 2 October 2015, HMRC wrote to the firm representing Mr McAdam setting
out their views and advising that they would now open an enquiry into previous years
and would also look at the question of penalties.

13. On 11 November 2015 Officer Steven wrote to Mr McAdam explaining the action that he would take. In regard to turnover he stated “The only record you have to support the turnover returned is the business bank records”.

5 14. On 13 November 2015, HMRC issued a Closure Notice for 2013/14 under Section 28A(1) and (2) TMA 1970 and discovery assessments for the tax years 2009/10 to 2012/13 in terms of Section 29 TMA. On the same day HMRC issued a penalty explanation letter in respect of their decision to charge a penalty under Schedule 24 FA 2007.

10 15. On 11 December 2015 that was appealed and on 9 February 2016 an independent review of both assessments and the penalty assessment was requested.

16. On 21 April 2016, the reviewing officer upheld the disputed decisions.

17. On 20 May 2016, this appeal was lodged with HMCTS.

The appellant’s Grounds of Appeal

15 18. Mr McAdam argues that a salary of £90 per week for his wife is not excessive for the duties that his wife carried out and that is “... to maintain the administrative and accounting functions and these duties extend, and are not restricted to, taking telephone enquiries, processing orders and checking part prices”. No new argument was advanced in relation to cash lodgements in the bank accounts. He states that almost all of the payments into the second bank account would have been made by his wife and the funds did not
20 derive from his trading income. In these circumstances, there should be no penalties.

HMRC’s arguments

25 19. The appellant is a plumbing and heating engineer and has been self-employed since 1 July 2008. Having examined the records maintained by the appellant, HMRC take the view that the appellant had not complied with his obligations in terms of Section 12B TMA to keep statutory records. Further HMRC have identified £11,230 in cash being deposited to Mr McAdam’s private bank accounts, of which £6,960 is accepted as being attributable to the appellant’s daughter. HMRC argue that the appellant has failed to establish the derivation of the remaining £4,270.

30 20. In regard to “wife’s wages”, HMRC state that they are not wholly and exclusively paid for the purposes of the trade and are in any event excessive. HMRC’s stance is that calls made to the appellant’s home telephone number would be few and far between and it is far more likely that calls would be made to the appellant’s mobile telephone. Even if calls were made to the home telephone it would presumably be the appellant who would contact the clients to establish what was required and to issue
35 quotations. HMRC argue that an appropriate wage would be of the order of £1,344 per annum at an hourly rate of £8. HMRC accept that some work would be involved in writing up the ledger with the bank statements and therefore attribute two hours a month to updating the ledger and three hours a week for taking calls, checking part prices and ordering parts.

21. HMRC based their argument for the earlier years on the “presumption of continuity” described in *Jonas v Banford*¹ in which Judge Walton commented:-

5 “There can be no doubt at all that the Inspector of Taxes discovered that Mr Jonas was the
possessor of resources which would not be explained by reference to known sources of capital
and income. This is virtually the classic case of ‘discovery’ ... but, so far as the discovery point
is concerned, once the Inspector comes to the conclusion that, on the facts which he has
10 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”.

22. HMRC aver that the amounts assessed by Officer Steven are based on his best
judgement from the records made available to him and in the absence of evidence to
support the figures declared by the taxpayer. In that regard HMRC reduced the
15 unidentified deposits in 2014 by the Retail Prices Index for each year and added an
amount that for disallowed wages to arrive at the additional amount of profit to be
added.

Discussion

23. The first point for the Tribunal was the competency and timing of the discovery
assessments. We had an unchallenged witness statement from Officer Steven and we
20 heard from Mr Mason. HMRC have established, to our satisfaction, that the
assessments were both competent and timeous. There was no challenge in that regard
by Mr McAdam.

24. The next issue for the Tribunal was the question of the unidentified cash deposits.

25. Essentially the appellant offered absolutely no new evidence whatsoever and
25 relied on the same arguments that had been advanced to Officer Steven.

26. When we pursued that with Mr McAdam we found that he now stated that the first
substantive paragraph in the letter of 14 August 2015 (see paragraph 10 above) from
Mr Lees was not correct. He now said that cash funds had not been held by his
mother at home and discovered by the family after her death and the source of the
30 cash deposits to the first bank account were cheques from his brother and sister who
were the executors. Unfortunately, he was wholly unable to identify a single cheque
payment into the bank account.

27. Section 50(6) TMA provides (so far as relevant) –

35 “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.”

¹ 51 TC 1

That puts upon the taxpayer the burden of proving that he had been overcharged by the assessment. The applicable standard of proof is the usual civil standard, namely on the balance of probability.

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

10 “... 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.”

20 29. We have considered carefully the basis of adjustment of the turnover adopted by Officer Steven (which we consider was a reasonable and conscientiously performed exercise) and also the very vague arguments offered by Mr McAdam. Officer Steven has not adjusted the turnover to reflect the very low level of personal drawings. In calculating the revised profits, Officer Steven considered the limited information provided by Mr McAdam and arrived at the additions in the enquiry year based on the unidentified cash deposits and an amount added back for disallowed wages.

25 30. As far as “wife’s wages” are concerned, Mr McAdam wished to produce to the Tribunal job sheets from this year to demonstrate that his wife would pin receipts to the job sheets. He said that he had been keeping job sheets since 2001 and that she would therefore have performed the same function in the years in question. He was wholly unable to explain why these had not been produced to Officer Steven if they had existed at the time. He had not challenged the Notes of Meeting which recorded that the only business records were the ledger, business bank records and purchase invoices. The letter of 11 November 2015 to which we refer in paragraph 13 above was sent to Mr McAdam himself and made it clear that the only record in relation to turnover was the business bank records. He could not explain why, even if at that late stage, the job sheets had not been produced. It was put to him that Officer Steven had recorded in the Notes of Meeting that he was concerned that “... there were no invoices/receipts book to support the jobs recorded in the ledger. The ledger simply shows a date, and name and the sum for the job.”

35 40 31. Mr McAdam tried to argue that his wife did most of the banking of the cash and cheques, albeit he did some. That was in stark contrast to the Note of Meeting which stated “Mr McAdam banks cash and cheques once or twice a week”. Since that had not been challenged until the date of the hearing, we find that on the balance of probability, the contemporaneous account is correct. On a similar note, he argued that she answered telephone inquiries yet the Notes of Meeting record that “Mr McAdam confirmed she also took the occasional phone call ...”. Mr McAdam again tried to argue that that was incorrect. However, he conceded in evidence that in reality his wife took a note of the

calls coming to the landline but most of the calls went to his own mobile telephone. It was he who contacted the clients and offered quotes. On the balance of probability we consider it more than likely that the vast majority of calls would be to the mobile number.

5 32. In summary, Mr McAdam tried to argue that his wife “worked for the business for 9 or 10 hours per week”. By contrast Officer Steven was prepared to accept that she might spend say three hours a week, taking some calls and checking part prices and ordering parts for 48 weeks of the year and she might spend two hours per month to update the ledger from monthly bank statements.

10 33. We have been furnished with no credible evidence to support even that level of activity.

15 34. It is not disputed that there has been no significant change in the way the business is operated over the years in question and therefore we accept HMRC’s argument that the usual presumption of continuity will apply (see paragraph 21 above). Nothing whatsoever has been produced by Mr McAdam to suggest that there has been any change.

20 35. In order to calculate the amounts of the earlier years HMRC reduced the unidentified deposits in 2014 by the Retail Prices Index for each year and added an amount back for disallowed wages to arrive at the additional amount of profit to be added.

25 36. Lastly, we considered the position in relation to penalties and having considered carefully the evidence and HMRC’s basis of calculation, we can see no reason to disturb the percentage rates calculated by HMRC. We do not accept Mr Lees argument that Mr McAdam had, at worst, been careless and, at best, should not be exposed to any penalties. Since we find that the assessments are upheld the penalties follow. Mr McAdam clearly had cash receipts which were not disclosed in turnover. In those circumstances Mr McAdam must have been deliberate in submitting his tax returns to HMRC when they contained an inaccuracy.

30 37. We agree with HMRC that there was a prompted disclosure and that Mr McAdam did give access to the records including private bank accounts in the year of enquiry. At no stage has Mr McAdam offered any assistance in quantifying the adjustments.

Decision

35 35. As we pointed out at the hearing, it is trite law that an appellant wishing to challenge a tax assessment, including an assessment to this tax, must produce credible evidence from which the Tribunal can determine the correct amount of tax.

36. We have absolutely none of the credible evidence we need if we are to make any adjustment to the assessments. Any adjustments we did make would amount to nothing more than a guess, and a guess is not open to us. It follows that there are no adjustments, the penalties are confirmed and the appeal is accordingly dismissed.

37. 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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**ANNE SCOTT
TRIBUNAL JUDGE**

RELEASE DATE: 20 DECEMBER 2016

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