[2017] UKFTT 0200 (TC)

TC05688

Appeal number: TC/2014/04115

INCOME TAX – Closure Notices and Amendments – Penalty assessments – Benefits in Kind – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PHILIP JINKS **Appellant**

- and -

COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE RUPERT JONES
IAN MENZIES-CONACHER FCA

Sitting in public at Fox Court on 1 December 2016

The Appellant, Philip Jinks, appearing in person

Anthony O'Grady, Presenting Officer of HMRC for the Respondents

DECISION

The decisions subject to appeal

1. The appellant appeals against four decisions of HMRC.

2. The first decision was a notice issued under the provisions of Section 28A (1) & (2) Taxes Management Act 1970, which concluded HMRC's enquiries into the appellant's return covering the tax year 2007-2008. This notice, issued on 21 January 2014, amended the additional income tax payable by the appellant in the sum of £17,633.06, being over-repaid tax of £1,646.40 and further tax due of £15,986.66.

3. The second decision was a notice issued under the provisions of Section 28A (1) & (2) Taxes Management Act 1970, which concluded HMRC's enquiries into the appellant's return covering the tax year 2008-2009. This notice, issued on 21 January 2014, amended the additional income tax payable by the appellant in the sum of £42,643.00, being over-repaid tax of £8,826.20 and further tax due of £33,816.80.

4. The third decision was a penalty determination for the tax year 2007-2008, issued on 21 January 2014 under the provisions of Section 95(1)(a) Taxes Management Act 1970. The basis of the penalty charged was the negligent submission by the appellant of an incorrect return for the tax year 2007-2008. The abated penalty was charged at 40% of the additional tax which HMRC alleged was due for 2007-2008. Abatement of 10% was allowed for the appellant's disclosure, 25% for his co-operation, and 25% for seriousness, leaving a net penalty loading of 40%. The penalty calculation was therefore, £17,633.06 at 40%, equalling £7,053.

5. The fourth decision was a penalty assessment issued on 20 January 2014 for the tax year 2008-2009, issued under the provisions of Schedule 24 to the Finance Act 2007. The basis of the penalty charged was the deliberate submission by the appellant of an incorrect return for the tax year 2008-2009, the disclosure of which was prompted by HMRC's enquiry. The penalty charged for 2008-2009 was £42,643.00 at 47.25%, equalling £20,148.81.

6. It was calculated as follows. The penalty range for a prompted disclosure which is deliberate but not concealed is 35% (minimum) and 70% (maximum). The range between 36% and 70% may be reduced depending upon the quality of the disclosure given. This range of 35% was reduced by 65% to 12.25%. The 65% abatement consists of 20% for the appellant telling HMRC about the inaccuracy, 25% for helping HMRC to understand the inaccuracy, and 20% for giving HMRC access to records for the purpose of ensuring that the inaccuracy was fully corrected. This meant that the penalty loading was 47.25%, being the 35% minimum plus 12.25%. The penalty charged was 47.25% of the potential lost revenue, i.e. the additional tax charged by the closure notice.

The Facts

7. The tribunal received two bundle of documents from HMRC and one from the appellant. The appellant gave oral evidence and was cross examined. The tribunal finds the following facts.

8. On 14 June 2011, HMRC gave notice of its intention to enquire into the appellant's returns for the tax years 2007-2008 and 2008-2009, under the provisions of Section 9A Taxes Management Act 1970.

9. The 2007-2008 return was filed with HMRC on 22 November 2010 (this being late), and the 2008-2009 return was filed with HMRC on 28 January 2011 (this also being late).

10. Both enquiries were initiated within the time limits prescribed by legislation.

11. HMRC made enquiries into the appellant's returns, because of a conflict between the figures included in the forms P14 and P11D for 2007-2008 and 2008-2009 (returns of gross pay, tax deducted, and certain benefits in kind) submitted to HMRC by two companies of which the appellant was sole director during those years, and the figures recorded on the appellant's personal returns for 2007-2008 and 2008-2009 for income, benefits in kind and tax deducted.

12. During 2007-2008, the appellant was a director of Saturn Leisure Ltd ("Saturn") and Mirage Marketing Ltd ("Mirage").

13. During 2008-2009, the appellant was a director of these two companies and Regal Entertainments Limited ("Regal").

2007-2008

14. On his 2007-2008 personal return, the appellant included the following figures of director's remuneration and tax deducted for Saturn Leisure Ltd, namely gross pay of £86,500.00 and tax of £29,029.00.

15. However, the form P14 submitted to HMRC by Saturn showed gross pay to the appellant of £86,500.04 and tax deducted of £19,028.24.

16. The HMRC case officer therefore identified an apparent overclaim of tax credit in the sum of £10,000.76.

Benefits in Kind

17. The other perceived problem with the 2007-2008 return related to the correct quantification of the benefits in kind received by the appellant.

18. On his 2007-2008 return, the appellant included medical benefits of £3,696.00 for Saturn but nothing else.

19. However, the form P11D for 2007-2008 submitted by Saturn Leisure Ltd showed not only the medical benefits returned, but also an accommodation benefit of £17,840.00 and total car benefits of £8,448.00, being £2,989.00 in respect of a Kia Sorrento made available to the appellant from 30 September 2007, and £5,459.00 in respect of a BMW Z4 roadster made available to the appellant for the full year.

20. The case officer therefore concluded that total benefits from Saturn to the appellant should have been reported in the sum of £29,984.00 rather than the £3,696.00 returned. However, as will be seen, because of HMRC's own error, not all of the additional benefits have been included in the revised figures accompanying the closure notice.

2008-2009

21. On his 2008-2009 personal return, the appellant included director's remuneration and gross pay £34,000.00 from Saturn and tax deducted of £32,673.00.

22. However, the form P14 submitted to HMRC by Saturn showed gross pay of £22,514.00 and tax of £4,502.00.

23. The HMRC case officer therefore identified an overstatement of gross pay in the sum of £11,486.00, but more importantly an overclaim of tax credit in the sum of £28,171.00, resulting in a significant net understatement of tax due.

24. The case officer was also in possession of a form P14 which showed that during 2008-2009 the appellant had received the following from Regal Entertainments Ltd, namely gross pay of £65,850.03, and tax of £13,170.00.

25. However, on his 2008-2009 return, the appellant had included nothing in the way of remuneration received or tax paid in respect of his directorship with Regal Entertainments Ltd.

26. The HMRC case officer therefore identified an omission of gross pay £65,850.03, and tax deducted of £13,170.00, once again resulting in a significant net understatement of tax.

Benefits in Kind

27. The other perceived problem with the 2008-2009 return related to the correct quantification of the benefits in kind received by the appellant.

28. On his 2008-2009 return, the appellant included benefits in kind totalling £4,522.00 in respect of his directorship with Mirage Marketing Ltd.

29. However, no benefits in kind in respect of any other company were reported.

30. The case officer had however identified two forms P11D submitted in respect of the appellant for 2008-2009, one by Saturn Leisure Ltd, and one by Regal Entertainments Ltd.

31. The P11D for Saturn Leisure showed that for 2008-2009 the appellant had received medical benefits of £924.00, accommodation benefits of £3,714.00, and car benefit of £1,186.00 which related to a BMW Z4 roadster made available up until 20 June 2008.

32. The P11D for Regal Entertainments Ltd showed that for 2008-2009 the Appellant had received medical benefits of £2,847.00, accommodation benefits of £10,043.00, and car benefit of £1,186.00 which related to the BMW Z4 roadster made available from 21 June 2008 to 4 September 2008.

33. The case officer therefore concluded that total benefits from Saturn, Mirage, and Regal should have been reported in the sum of £24,422.00 rather than the £4,522.00 returned. Again, as will be seen, because of HMRC's own error, not all of the additional benefits have been included in the revised figures accompanying the closure notice.

The enquiries

34. HMRC's enquiries were initiated in order to confirm with the appellant that errors had been made by him, or to give him the opportunity to demonstrate by adducing his own evidence that the forms P14/P11D submitted by the companies were wrong.

35. It should be noted that the appellant had added the following notes to his 2007-2008 and 2008-2009 returns which were filed in November 2010 and January 2011 respectively:

> 2007-2008 – there is a long running dispute between my employer and myself as to the taxation amount deducted on a company 4x4 used to travel between the different farm and related company sites. There is also a dispute as to the taxable value of essential temporary accommodation provided for the purposes of health, security and supervision of Livestock. Rather than delay the return any further I am submitting the return to the best of my belief. If my position on the correct level of taxation is deemed incorrect in anyway by the appropriate authority I will of course be happy to settle the account as properly ordered; and
>
> 2008-2009 – I have had a long running dispute with my employer in respect of the declared salary waiver implemented for the tax year 2008-2009. Rather than continue to incur penalties I have provided what I believe to be the accurate amounts. If my calculations are properly deemed to be incorrect then I will of course account for any under payment.

36. The HMRC case officer wrote to the appellant, asked for documentation to support the figures which had been entered on the returns for pay and benefits, and also asked for details of the disputes referred to by the appellant in the notes spaces provided in the returns.

37. The appellant appeared to accept that for 2007-2008 the tax credit of £29,029.00 claimed in respect of Saturn Leisure was wrong. No explanation for this error was provided to HMRC.

38. The appellant also appeared to accept that the pay and tax details included for Saturn Leisure for 2008-2009 were wrong, and again no explanation for this error was provided. In his letter dated 20 August 2011 the appellant stated, "I have absolutely no idea at this present time where the figure of £32,673 in box 2 (the tax credit shown on the return), came from."

39. With regard to the gross pay of £65,850.03 and tax of £13,170.00 returned to HMRC on a form P14 by Regal Entertainments Ltd for 2008-2009, the appellant disputed that all of the £65,850.03 was taxable pay.

40. In a letter dated 20 August 2011, the appellant said that "the discrepancy is due to the employer Regal Entertainments Ltd paying then incorrectly allocating money as salary which was subject to a salary waiver. The salary that I should have been paid was £34,000. The company therefore incorrectly allocated £31,850.03 to salary".

41. Attached to this letter was a copy of a letter to the appellant dated 26 March 2008 from the "Mirage Marketing Limited [Director] for and on behalf of Saturn Leisure Limited. This letter states that "I write to confirm that with effect from 6 April 2008 your salary will until further notice be reduced to £34,000 per annum. Would you please indicate your agreement to this reduction by signing below." The appellant has signed where indicated, but the actual letter is not signed.

42. As far as HMRC was concerned the appellant was the sole director of Mirage, Regal and Saturn, so given this, and the fact that the salary waiver letter was not signed, HMRC treated this letter with some suspicion.

43. In HMRC's letter dated 23 May 2012 the appellant was asked to provide certain details regarding the alleged salary waiver, i.e. why was the waiver agreed? why was the overpayment of salary in the sum of £31,850.03 not challenged by him? What did he do with the excess payment of £31,850.03?

44. In his reply dated 12 June 2012 the appellant said he thought that the payment of £31,850.03 was being made as a dividend on shares "as was agreed by the board of directors".

45. In the caseworker's response dated 16 November 2012, the point is made that no evidence has been produced which substantiates what is being claimed. HMRC's records show that there was only one director of Regal Entertainments Ltd, being the appellant, and therefore there was no board of directors. On this basis, the claim to salary waiver was disallowed.

46. In a letter dated 20 February 2013, the caseworker stated that there is no evidence of any dividend being voted by a board of directors, and that the salary waiver letter does not include the actual signature or name of the director acting for Mirage Marketing Limited. A complete copy of this letter was requested, something which HMRC has never received.

47. In a letter dated 13 March 2013 from Hilary Elms (Company Secretary for Saturn Leisure Ltd) the first page of this letter attempts to clarify the position. Ms Elms confirms that the £31,850.03 was not received as a dividend because neither Regal nor Mirage had sufficient profits to cover such a payment. "I can therefore confirm that the £31,850.03 should not have been paid as salary and was not paid by Regal Entertainments Ltd as salary. If it was mistakenly and in error allocated to the payroll, it would or should have been claimed back from the company which should have paid the dividend".

48. In the caseworker's response dated 22 April 2013, the point is made that the appellant had already confirmed that he had spent the £31,850.03 which was being claimed to be a salary waiver. He had admitted he had received the full amount. It was therefore irrelevant whether it was / should have been paid as a dividend, the amount was considered to be income, and was therefore taxable and should have been included on the appellant's return.

49. The form P14 returned to HMRC by Regal Entertainments Ltd shows that during 2008-2009 £65,850.03 was paid to the appellant and that 20% tax in the sum of £13,170.00 was deducted.

50. During the enquiry, the appellant provided no evidence or explanation to demonstrate that the figures were incorrect and that therefore they should not form part of his return.

Benefits in Kind

Accommodation

51. The appellant also disputed the accommodation benefits included on the P11D's for Saturn Leisure for 2007-2008 and 2008-2009, and those on the P11D for Regal Entertainments Ltd for 2008-2009.

52. In a letter from the appellant dated 20 August 2011, he says that the accommodation was provided as a necessary requirement "in order to perform my duties and for my and my family's safety".

53. On 24 January 2012, the HMRC case officer wrote to the appellant and stated, "I need the address of the property and why it was required to perform your duties. Also, please explain further why the accommodation was required for your family's safety".

54. In his reply dated 1 February 2012, the appellant explained that his services were contracted out to a number of related companies, one of which operated an Ice hockey team, and one which ran a number of recirculation fish farms.

55. The appellant said that on more than one occasion he and his family had received death threats from Ice hockey fans and those against recirculation fish farming. "We have suffered personal property damage amounting to more than £150,000". Four police crime report references were also supplied. The letter continued "The decision was therefore taken by my employer to provide secure accommodation on one of the farm sites, so that I could monitor and care for the fish and as the premises were gated and fenced, could reside and work safely away from personal harm".

56. This accommodation was stated to be, The Old Hermitage, Hermitage Lane, Maidstone, ME16 9ET.

57. In HMRC's reply dated 23 May 2012, the question was put "which of the companies owned the property, The Old Hermitage"

58. This letter also asks for the period of occupancy, details of all of the occupants, and details of the incidents relating to the crime reports.

59. On 12 June 2012, the appellant responded, and confirmed that The Old Hermitage was leased by Regal Car Parks Ltd as a research site. "The Old Hermitage was occupied by me up to 5 days per week, but for up to 30 weeks per year I was resident at Gatehouse Farm".

60. By letter dated 16 October 2012, the HMRC caseworker posed further questions to the appellant about the accommodation benefit, i.e. asking for addresses of all

properties lived in by the appellant between 6 April 2007 and 5 April 2009, copies of the leases for all the properties and details of other family members referred to.

61. At this juncture HMRC had not received information regarding the precise incidents which resulted in the crime reports which were supplied.

62. In addition, the appellant had not provided a summary of where he was living during the 24 months ended 5 April 2009, or who precisely was living with him. Nor had the appellant provided any explanation as to why residing at The Old Hermitage was necessary for the proper performance of his duties.

63. HMRC looked to the forms P11D provided by Saturn Leisure Ltd and Regal Entertainments Ltd, and these forms P11D showed that for 2007-2008 the appellant received an accommodation benefit in the sum of £17,840 (Saturn Leisure) and for 2008-2009 the appellant received benefits of £3,714 (Saturn Leisure) and £10,043 (Regal Entertainments Ltd).

64. On this basis, HMRC assessed these benefits in the same sums in which they were reported by the two companies.

Vehicles

65. The appellant also disputed the car benefits reported on the P11D for Saturn Leisure Ltd for 2007-2008, and those car benefits reported by Saturn and Regal Entertainments Ltd for 2007-2008 and 2008-2009.

66. In his letter dated 20 August 2011, the appellant stated that the Kia and the BMW were pool cars and that on this basis they should not have been included on the 2007-2008 P11D for Saturn Leisure, and the 2008-2009 P11D's for Saturn Leisure and Regal Entertainments.

67. On 24 January 2012, the HMRC case officer wrote to the appellant and asked him why he thought that the Kia and the BMW should have been treated as pool cars, asking for examples of when they were used.

68. On 1 February 2012, the appellant replied, and confirmed that these vehicles were pool cars for the following reasons.

"They were owned and leased by my employer".

"Kept on company premises".

"Available and used by a number of staff by way of their employment".

"Not used by one person to the exclusion of everyone else".

"For business use or incidental private use only".

69. The appellant said that the BMW was used primarily by Susan Lyons "and head office staff including myself for attending to company business away from the place of work". "The Kia was used as an emergency response vehicle by a number of staff, as well as for making and collecting deliveries from the various sites". The appellant also said that the Kia was kept overnight on company premises.

70. On 23 May 2012, the HMRC case officer wrote to the appellant and put the following questions.

Kia/BMW – which of the companies were these vehicles leased to?

At which address were these vehicles kept, and what business if any was carried out at this address?

What was Mrs Lyons' position in the companies, and what was the Appellant's connection/relationship with her?

What other pool cars were available for private use?

71. On 12 June 2012, the appellant responded, confirming that the Kia was owned and used by Regal Parks Limited and loaned out to Saturn Leisure Ltd, Mirage Marketing Ltd, Regal Entertainments Ltd, Venturecore Ltd, and Weardale Fish Farms Ltd. The BMW was leased to Mirage Marketing Ltd, and loaned out for the business of Saturn Leisure Ltd, Regal Entertainments Ltd, Venturecore Ltd, Weardale Fishfarms Ltd, and Regal Car Parks Ltd.

72. The appellant also said that Mrs Lyons was company secretary and office manager – "Mrs Lyons and I were joint tenants at Clermont House until October 2008".

73. The appellant also stated that both he and Ms Lyons had their own private vehicles for personal use at all relevant times.

74. On 16 November 2012, the HMRC case officer responded to the appellant.

75. This letter stated that the information provided in respect of the Kia and the BMW did not confirm that these two vehicles were pool cars. The appellant was asked to provide the records relating to the use of pool cars which should have been maintained for each business.

76. The case officer also made it clear that in the absence of those records, the car benefits already returned by Saturn for 2007-2008 and Saturn/Regal for 2008-2009 in respect of the appellant would be included on his returns for those two years.

Closure notices

2007-2008

77. On 21 January 2014, a closure notice was issued for the tax year 2007-2008.

78. The appellant's 2007-2008 personal return was also amended in order to incorporate the errors which HMRC allege were made in the original return.

79. The tax credit in respect of the director's remuneration was reduced to £19,028.24, as opposed to the £29,028.00 originally claimed.

80. The benefits in kind were increased to account for the figures included on the form P11D submitted by Saturn Leisure Limited.

81. However, whilst the medical benefit of £36,96.00 and the accommodation benefit of £17,840.00 were included in full, only £1,186.00 car benefit was included as opposed to the £8,448.00 reported on the form P11D.

82. HMRC therefore submit the case officer has under assessed the benefits in kind for 2007-2008 in the sum of £7,262.00.

2008-2009

83. On 21 January 2014, a closure notice was also issued for the tax year 2008-2009.

84. The appellant's 2008-2009 personal return was also amended in order to incorporate the errors which HMRC allege were made in the original return.

85. The gross pay and tax details for Saturn Leisure Ltd were amended to the figures returned on the form P14, i.e. pay received of £22,514.00 and tax deducted of £4,502.00, as opposed to the originally returned figures of pay received of £34,000.00 and tax deducted of £32,673.00. The omitted pay and tax details for Regal Entertainments Ltd, i.e. pay £65,850.00 and tax £13,170.00, were also included.

86. The benefits in kind were increased to account for the figures included on the forms P11D submitted by Saturn Leisure Ltd and Regal Entertainments Ltd.

87. The Mirage Marketing Ltd benefits of £4,522.00 included on the original return were included in the amendment, together with the total accommodation benefits of £13,757.00 and one of the car benefits of £1,186.00, some £19,465.00 in total.

88. However, once again, HMRC submit that its case officer failed to include all of the benefits in kind in the amendments to the 2008-2009 return. HMRC submit that their case officer overlooked the other car benefit of £1,186.00 and the total medical benefits of £3,771.00, consequently total benefits of £4,957.00 were under assessed.

Penalties

89. On 21 January 2014, a penalty determination was issued against the appellant under the provisions of Section 95(1)(a) TMA 1970. It was calculated with reference to the additional culpable duties assessed for 2007-2008 (£17,633.06). The basis for this is set out at paragraph 4 above.

90. On 20 January 2014, a penalty assessment was issued against the appellant under the provisions of Schedule 24 to the Finance Act 2007. It was calculated with reference to the potential lost revenue identified for 2008-2009 (£42,643.00). The basis for this is set out at paragraphs 5 and 6 above.

The Law

91. Under Section 9A TMA 1970 an officer of the board may enquire into a return if he gives notice of his intention to do so, to the person whose return it is, within the time allowed.

92. For personal returns covering the tax year 2007-2008 and later tax years, the time provided is as follows:

If the return was delivered on or before the filing date, the Section 9A notice may be issued at any time up to the end of the period of twelve months beginning on the day after the day upon which the return was delivered; and

If the return was delivered after the filing date, the Section 9A notice may be issued up to and including the quarter day next following the first anniversary of the day on which the return was delivered. For this purpose, the quarter days are 31 January, 30 April, 31 July, and 31 October.

93. Under Section 28A (1) & (2) TMA 1970, an enquiry under Section 9A is completed when an officer of the board by notice (a closure notice) informs the taxpayer that he has completed his enquiries and states his conclusions.

94. A closure notice must either state that in the officer's opinion no amendment of the return is required, or make the amendments to the return required to give effect to his conclusions.

95. Under Section 50(6) TMA 1970, if on an appeal notified to the tribunal the tribunal decides that the appellant is overcharged by a self-assessment, that any amounts contained in a partnership statement are excessive, or that the appellant is overcharged by an assessment other than a self-assessment, that assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

96. Under Section 95(1)(a) TMA 1970, where a person negligently delivers any incorrect return of a kind mentioned in Section 8 or 8A TMA 1970,…….he shall be liable to a penalty not exceeding the amount of the difference specified in subsection (2).

97. Under Section 95(2) TMA 1970, the difference is that between the amount of income tax and capital gains tax payable for the relevant years of assessment by the said person (including any amount of income tax deducted at source and not repayable) and, the amount which would have been the amount so payable if the return…..as made or submitted by him had been correct.

98. Under Section 100(1) TMA 1970, an officer of the board authorised by the board for the purposes of this section may make a determination imposing a penalty under any provision of the taxes acts, and setting it at such amount as, in his opinion, is correct or appropriate.

99. Under Section 100B(1) TMA 1970, an appeal may be brought against the determination of a penalty under Section 100 above.

100. Under Section 100B(2)(b) TMA 1970, in the case of a penalty which is not required to be of a particular amount, the First Tier Tribunal may, if it appears that no penalty has been incurred, set the determination aside, or if the amount determined appears to be appropriate, confirm the determination, or if the amount determined appears to be excessive, reduce it to such other amount (including nil) as it considers appropriate, or if the amount determined appears to be insufficient, increase it to such amount not exceeding the permitted maximum, as it considers appropriate.

101. Under paragraph 1 of Schedule 24 to the Finance Act 2007, a penalty is payable by a person (P) where P gives HMRC a document of a kind listed in the table below (including a return under Section 8 TMA 1970) and conditions 1 and 2 are satisfied.

102. Condition 1 is that the document contains an inaccuracy which amounts to, or leads to, an understatement of liability to tax, a false or inflated statement of a loss, or a false or inflated claim to repayment of tax.

103. Condition 2 is that the inaccuracy was either careless or deliberate on P's part.

104. Under paragraph 3 of Schedule 24 to the Finance Act 2007, for the purposes of a penalty under paragraph 1 an inaccuracy in a document given by P to HMRC is careless if the inaccuracy is due to a failure by P to take reasonable care, is deliberate but not concealed if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and is deliberate and concealed if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it.

105. Under paragraph 4 of Schedule 24 to the Finance Act 2007, the standard penalty tariff for an inaccuracy which is deliberate but not concealed is 70% of the potential lost revenue.

106. Under paragraph 5 of Schedule 24 to the Finance Act 2007, the potential lost revenue in respect of an inaccuracy in a document is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

107. Under paragraph 9 of Schedule 24 to the Finance Act 2007, reductions of the maximum penalty loading may be allowed if the quality of disclosure given by the taxpayer merits such a reduction, and in considering these reductions HMRC will give the taxpayer credit for telling HMRC about the inaccuracy, giving HMRC reasonable help in quantifying the inaccuracy, and allowing HMRC access to records for the purposes of ensuring that the inaccuracy or the under assessment is fully corrected.

108. Under paragraph 10 of Schedule 24 to the Finance Act 2007, if a person who would otherwise be liable to a penalty at the standard percentage (70% for deliberate error but not concealed) has made a disclosure, then HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

109. In the table included within paragraph 10, the standard 70% penalty for an error which is considered to be deliberate but not concealed, and where the disclosure was prompted, may be reduced to a minimum of 35% in order to reflect the quality of the disclosure made.

110. Paragraph 15 of Schedule 24 to the Finance At 2007 provides for an appeal against a penalty assessment, either on the basis that the penalty is not due or as to the amount of the penalty determined.

111. Paragraph 17 of Schedule 24 to the Finance Act 2007 allows the Tribunal to affirm or cancel HMRC's decision to charge a penalty, and as to the amount of the penalty, allows the Tribunal to affirm HMRC's decision or substitute for HMRC's decision another decision that HMRC had power to make.

112. Under Section 97(1) of the Income Tax (Earnings & Pensions) Act 2003 (ITEPA), the chapter applies to living accommodation provided for an employee or a member of an employee's family or household, by reason of the employment.

113. Under Section 97(2) of ITEPA 2003, living accommodation provided for any of those persons by the employer is to be regarded as provided by reason of the

employment unless, the employer is an individual and the provision is made in the normal course of the employer's domestic, family or personal relationships.

114. Under Section 99(1) of ITEPA 2003, the chapter does not apply to living accommodation provided for an employee if it is necessary for the proper performance of the employee's duties that the employee should reside in it.

115. Under Section 99(2) of ITEPA 2003, the chapter does not apply to living accommodation provided for an employee, if a) it is provided for the better performance of the duties of the employment and b) the employment is one of the kinds of employment in the case of which it is customary for employers to provide living accommodation for employees.

116. Under Section 100 of ITEPA 2003, the chapter does not apply to living accommodation provided for an employee if a) there is a special threat to the security of the employee, b) special security arrangements are in force, and c) the employee resides in the accommodation as part of those arrangements.

117. Under Section 114(1) of ITEPA 2003, the chapter applies to a car or a van in relation to a particular tax year if in that year the car or van is made available (without any transfer of the property in it), to an employee or a member of the employee's family or household, is so made available by reason of the employment, and is available for the employee's or member's private use.

118. Under Section 114(2) of ITEPA 2003, where the chapter applies to a car or van sections 120 to 148 provide for the cash equivalent of the benefit of the car to be treated as earnings.

119. Section 167 of ITEPA 2003 provides:

167 Pooled cars

(1) This section applies to a car in relation to a particular tax year if for that year the car has been included in a car pool for the use of the employees of one or more employers.

(2) For that tax year the car—

(a) is to be treated under section 114(1) (cars to which this Chapter applies) as not having been available for the private use of any of the employees concerned, and

(b) is not to be treated in relation to the employees concerned as an employment-related benefit within the meaning of Chapter 10 of this Part (taxable benefits: residual liability to charge) (see section 201).

(3) In relation to a particular tax year, a car is included in a car pool for the use of the employees of one or more employers if in that year—

(a) the car was made available to, and actually used by, more than one of those employees,

(b) the car was made available, in the case of each of those employees, by reason of the employee's employment,

(c) the car was not ordinarily used by one of those employees to the exclusion of the others,

(d) in the case of each of those employees, any private use of the car made by the employee was merely incidental to the employee's other use of the car in that year, and

(e) the car was not normally kept overnight on or in the vicinity of any residential premises where any of the employees was residing, except while being kept overnight on premises occupied by the person making the car available to them.

120. Under Section 201(1) of ITEPA 2003, the chapter applies to employment related benefits.

121. Under Section 201(2) of ITEPA 2003, employment related benefit means a benefit, other than an excluded benefit, which is provided in a tax year for an employee or, for a member of the employee's family or household, by reason of the employment.

Burden of Proof

122. By virtue of Section 50(6) TMA 1970, it is for the appellant to adduce evidence to demonstrate that he has been overcharged by the 2007-2008 and 2008-2009 closure notices and accompanying amendments made to the returns for those years, and that HMRC's figures should be reduced or set aside.

123. If the appellant cannot discharge this burden, then the closure notices and accompanying amendments to the returns should be upheld.

124. This principle was affirmed in *Haythornthwaite v Kelly* 11 TC 657 where Lord Hanworth stated: "if on appeal it appears to the majority of the commissioners by examination of the Appellant on oath or affirmation, or other lawful evidence, that the appellant is overcharged by any assessment, the commissioners shall abate or reduce the assessment accordingly; but otherwise every such assessment or surcharge shall stand good".

125. With regard to the penalty charged for 2007-2008 under the provisions of Section 95 TMA 1970, the onus is upon HMRC to show that there was an incorrect return made by the appellant for that year and that it was negligently delivered.

126. With regard to the penalty charged for 2008-2009 under the provisions of Schedule 24 to the Finance Act 2007, the onus is upon HMRC to show that the appellant deliberately delivered an inaccurate return which resulted in an underpayment of tax for that year.

127. The standard of proof is the ordinary civil burden of proof, being the balance of probabilities.

Appellant's grounds of appeals

128. The appellant relied on six grounds of appeal, which can be summarised as follows.

129. The appellant had informed HMRC of the errors on his tax returns and asked for help.

130. HMRC (outwardly) did nothing for 16 months then commenced an enquiry.

131. During the enquiry HMRC would not accept that the appellant was an employee and furthermore that as a director of the companies, the appellant had no powers to intervene under the Companies Act 2006 sections 171 & 172.

132. The appellant's employer went into liquidation thus removing the majority of financial records, which he needed, from his control.

133. In the absence of the employer's records HMRC assessed the appellant to additional tax and then assessed him for penalties.

134. The appellant submitted that HMRC was wholly wrong or substantially wrong on all counts. It was irrelevant that HMRC has produced detailed calculations because due to its own unwillingness to accept the evidence of the "Proper officer" of the company, HMRC was mistaken as to both the facts and the legal position.

135. The appellant submitted penalties should be removed or substantially reduced.

136. The appellant submitted that the additional taxes were not payable because the things to which they relate were not benefits in kind. i.e. they were pool cars and accommodation provided for safety and security.

137. The remaining errors found on the returns can only be resolved by a full disclosure by HMRC of its internal records.

The six grounds in further detail

Ground 1

138. The appellant submitted that HMRC had wrongly declined to accept that the benefits of a vehicle and accommodation were not taxable benefits. Further HMRC were not prevented by law from accepting the documentation provided by the taxpayer as sufficient evidence that the vehicles and accommodation were not benefits or that statements of pay were incorrectly calculated by the employer on the basis of independent advice.

139. He submitted that the Tribunal should have regard to the fact that the appellant was an employee of Regal Entertainments and not a sole Director or a paid Director. The Company Secretary, Hilary Elms, categorically confirmed his status in a letter dated 13 March 2013. She would have no reason to mislead HMRC and by section 108 1) a) of the Income and Corporation Taxes Act 1970, she was the "proper officer of the company". He submitted that Ms Elms made it clear that the vehicles were Pool Cars. This is supported by the Board meeting minutes dated 19 October 2007 and the numerous references to pool car use within the companies meeting minutes recorded some 3 years and 6 months before HMRC commenced its enquiry.

140. The appellant submitted that HMRC had failed to accept the correspondence of Ms Elms which supported the fact that there was a board of directors and a sole director can be a board of directors in accordance with the constitution and articles of association but in any event the appellant was not a sole director and therefore HMRC was mistaken.

141. He submitted that the failure or unwillingness on the part of the case officer to recognise the separate roles and rights of an employee has resulted in an incorrect

imposition of penalties and an unlawful assessment of additional tax on benefits in kind which are not benefits in kind.

142. He submitted that the out-going directors had no powers to make decisions on behalf of a company in liquidation - such matters are for the liquidator under Insolvency Act 2000. The appellant could not be criticised for acting in his own interests as an employee either whilst a director or once released from director's duties under sections 171 and 172 of the Companies Act 2006.

Ground 2

143. The appellant submitted he should not be penalised for mistakes by the employer (i.e the companies), employer's advisors and HMRC, specifically when he brought the matter to the attention of HMRC. Immediately the errors were discovered by letter dated 18 February 2010, HMRC provided no assistance to him in response on 14 April 2010 and took more than a year to begin an investigation on 14 June 2011. Thereafter HMRC took an inordinate time to respond to his letters and enquiries, three to four months being a common time period.

144. The penalties were therefore wrong, unjust and/or excessive in that they did not reflect the fact that: he had used his best endeavours (given the limited access to employers calculations) and/or that HMRC had taken longer than reasonable to complete its enquires due to lack of diligence.

Ground 3

145. The appellant submitted that if the employer (ie. the companies of which he was a director) had provided figures that wrongly included benefits as taxable when they were not taxable, the figures cannot match the actual figures. If the employer's figures were wrong on the matter of taxable benefits then they were also wrong on the total amounts actually paid.

146. He submitted he should not be penalised when as a taxpayer he had done everything possible to pay the right tax, such as ensuring HMRC knew all the companies' income. The employer acts upon advice of specialist tax accountants. If the tax accountant is found to be wrong on the matter of whether a benefit is a taxable benefit, the taxpayer is at a distinct disadvantage when challenging the Tax Code. He submitted that HMRC have the employer's figures which they can challenge with the employer.

Ground 4

147. The appellant submitted that his income losses, which arose from his investment in a company are his personal losses and they are not losses of the company they are losses of an individual from investment in the company. He submitted that the losses were allowable against his income. The appellant submitted that HMRC had not correctly assessed his losses and as a result, incorrectly disallowed them.

Ground 5

148. The appellant submitted that HMRC had failed to adequately respond to a request from him made in writing, to provide full and frank disclosure of all errors,

security breaches and omissions relating to his affairs during the tax years 2007 to 2009.

149. He submitted that the Tribunal should have regard to the fact that HMRC, in a tax appeal owed a duty of candour to the appellant. In withholding relevant information from the appellant and by obstructing (deliberately or unintentionally) his access to the information, HMRC were in breach of that duty and their statutory duty of allowing access to relevant information under the Tax Management and Data Protection Acts. He submitted it was therefore irrational for HMRC not to ensure that the Tribunal had before it all the relevant taxpayer records and history of communication.

Ground 6

150. The appellant submitted that closure notices for the enquiries had occurred before the matters in issue had been decided by a court. He submitted that there can be no injustice to HMRC where any delay in determining the outcome of an enquiry can be compensated by an award of interest, penalties and or costs. The appellant submitted that he had put forward a cogent case for delaying the determination of the enquiry, namely: a) the lack of access and the sheer volume of documentation belonging to Regal Entertainments UK Limited (which importantly was no longer under his control); and b) the chaos caused by the closure and ceasing of trading of Saturn Leisure Limited.

Discussion and Decision

151. The Tribunal was not satisfied that the appellant had discharged the burden upon him to adduce evidence to demonstrate that he has been overcharged by the 2007-2008 and 2008-2009 closure notices and accompanying amendments made to the returns for those years, and that HMRC's figures should be reduced or set aside. The Tribunal is satisfied that the amendments to the two returns should be upheld.

Income

152. The P14 forms submitted by the two companies show the following the following payroll information in respect of the appellant:

2007-2008 – Saturn Leisure Ltd – Pay £86,500.04 / tax £19,028.24;

2008-2009 – Saturn Leisure Ltd – Pay £22,514.00 / tax £4,502.00;

2008-2009– Regal Entertainments Ltd – Pay £65,850.03 / tax £13,170.00.

153. The appellant was the sole director of these companies, and would have been well aware of the payroll information being transmitted to HMRC by these companies.

154. The appellant has produced no evidence to show that any of these figures are wrong.

155. The Tribunal accepts HMRC's submissions that these are the amounts that were paid to the appellant, that PAYE was properly operated on these payments, and that the figures set out above are the figures which the appellant should have included on his 2007-2008 and 2008-2009 returns.

156. The appellant was not able to give any explanation or provide any evidence in support of the discrepancies between the figures for income and tax submitted in Saturn's P14 forms and his own personal tax returns in the two years 2007-2008 and 2008-2009.

157. The only dispute the appellant did raise was in relation to his suggestion that with regard to the gross pay of £65,850.03 and tax of £13,170.00 returned to HMRC on a form P14 by Regal Entertainments Ltd for 2008-2009, not all of the £65,850.03 was taxable pay.

158. The Tribunal was not satisfied by the appellant's oral evidence which accorded with that set out in his letter dated 20 August 2011, in which the appellant said that "the discrepancy is due to the employer Regal Entertainments Ltd paying then incorrectly allocating money as salary which was subject to a salary waiver. The salary that I should have been paid was £34,000. The company therefore incorrectly allocated £31,850.03 to salary".

159. The Tribunal relies upon the reasons and material submitted by HMRC at paragraphs 39 to 50 above in rejecting the appellant's case.

160. The Tribunal is not satisfied there was such a salary waiver. Furthermore, it is accepted that the company was not able to pay a dividend. In any event, even if the sum of £31,850.03 was paid as a dividend, the appellant received this income and did not declare it. The appellant was not able to provide any evidence to suggest he had not received the sum in income as declared by the company in Form P14.

Benefits in Kind

161. The forms P11D submitted by Saturn and Regal show the following:

> 2007-2008 – Saturn Leisure Ltd – car benefit £8,448.00, medical benefit £3,696.00, accommodation benefit £17840.00.
>
> 2008-2009 – Saturn Leisure Ltd – car benefit £1,186.00, medical benefit £924.00, accommodation benefit £3,714.00.
>
> 2008-2009 – Regal Entertainments Ltd – car benefit £1,186.00, medical benefit £2,847.00, accommodation benefit £10,043.00.

162. The Tribunal accepts HMRC's submission that the appellant has not provided sufficient evidence to show that the BMW and the Kia were pool cars. Nor has the appellant provided sufficient evidence to show that the accommodation provided was necessary for the performance of his duties, or that it was because of security considerations for himself and his family.

Vehicles

163. The Tribunal is not satisfied that the vehicles in question were pool cars nor that they satisfied each of the conditions set out in section 167 ITEPA:

a) the car was made available to, and actually used by, more than one of those employees,

(b) the car was made available, in the case of each of those employees, by reason of the employee's employment,

(c) the car was not ordinarily used by one of those employees to the exclusion of the others,

(d) in the case of each of those employees, any private use of the car made by the employee was merely incidental to the employee's other use of the car in that year, and

(e) the car was not normally kept overnight on or in the vicinity of any residential premises where any of the employees was residing, except while being kept overnight on premises occupied by the person making the car available to them.

164. The Tribunal relies upon the material relied upon by HMRC as set out at paragraphs 65 to 75 above as reason ro not being satisfied that the vehicles in question were pool cars. In particular, it was not satisfied that subsections 167 (d) and (e) of ITEPA were satisfied in respect of the vehicles.

165. The appellant's oral evidence was unclear as to which vehicles were being used, by which employees, when, for what business purpose and where they were being kept overnight. The appellant was not able to provide any oral evidence or documentary records in addition to the explanations provided in correspondence.

Accommodation

166. The Tribunal relies upon the material relied upon by HMRC as set out at paragraphs 51 to 62 above as reasons for not being satisfied that the accommodation was necessary for the performance of the appellant's duties nor that it was necessary because of security considerations.

167. The Tribunal is satisfied that the accommodation provided to the appellant does not meet the statutory requirements under section 99 of ITEPA. The appellant has not demonstrated that the accommodation was necessary for the performance of his duties or a) provided for the better performance of the duties of the employment and b) the employment is one of the kinds of employment in the case of which it is customary for employers to provide living accommodation for employees. Indeed, the appellant abandoned reliance on this submission during the hearing.

168. The appellant relied on the alternative ground under section 100 ITEPA that a) there is a special threat to the security of the employee, b) special security arrangements are in force, and c) the employee resides in the accommodation as part of those arrangements. However, the Tribunal was not satisfied that section 100 ITEPA applied.

169. The appellant's oral evidence continued to be very unclear as to where exactly he was living, for what precise points in time during the relevant years and for what purpose. The threats that the appellant alluded to were not of the type that could be considered a 'special threat'. Employment income manual EIM11361-11362 states that the exemption is only likely to apply where an employee is under genuine terrorist threat to her / her life and does not apply where the threat is to the employee's premises or stock. There was no evidence of special security

arrangements being in force for the appellant nor that the accommodation was part of those arrangements.

170. The Tribunal was not satisfied there was a special threat to the appellant or that special security arrangements were in force or that he resided in the accommodation as part of those arrangements.

HMRC's under-assessment

171. HMRC has submitted that in the HMRC caseworker's amendments to the 2007-2008 and 2008-2009 returns, not all of the additional benefits identified have been incorporated in those amendments. The 2007-2008 amendment failed to include additional benefits of £7,262.00, and the 2008-2009 amendment failed to include additional benefits of £4,957.00. In addition, the 2007-2008 amendment shows total gross pay of £89,340.00, whereas in fact the figure should be £89,540.00.

172. On appeal HMRC did not to seek to increase amendments to the returns for these years to include the additional amounts that it submitted may have been included. Therefore, the Tribunal does not need to determine this issue.

173. The Tribunal upholds the closure notices and amendments which have been issued for both 2007-2008 and 2008-2009.

Penalties

174. The tribunal is satisfied that HMRC has discharged its burden of proof with regard to the penalty charged for 2007-2008 under Section 95 TMA 1970. It is more likely than not that the incorrect return made by the appellant for that year was negligently delivered. The omissions are such that the appellant failed to take reasonable care that the figures were correctly stated. They were in fact substantially understated.

175. Such a discrepancy between the appellant's personal returns and the returns of Saturn (of which he was sole director) was apparent to the appellant. On his personal return in the notes section, as set out at paragraph 35 above, he highlighted the issues regarding benefits in kind for vehicles and accommodation. He was aware of Saturn's returns and that the company had determined what was properly allowable. However, he failed to take reasonable care to ensure that these benefits were properly allowable. He made no mention of the discrepancy in income and tax deducted compared to Saturn's returns. He had no explanation for this discrepancy.

176. The tribunal is satisfied HMRC has discharged its burden of proof with regard to the penalty charged for 2008-2009 under the provisions of Schedule 24 to the Finance Act 2007. For the reasons set out above it is more likely than not that the appellant deliberately delivered an inaccurate return which resulted in an underpayment of tax for that year. The tribunal is satisfied that the errors identified on the return submitted for this year are deliberate errors on the part of the appellant, because once again the understatements are of such magnitude that the appellant must have known that the figures were incorrect.

177. Again, the discrepancy between the appellant's personal returns and the returns of both Saturn and Regal (of which he was sole director) was apparent to the appellant. On his personal return in the notes section, as set out at paragraph 35

above, he highlighted the issue regarding what appears to be the salary waiver for Regal. However, he did not declare any of income or tax deducted from Regal in his return and only subsequently entered into correspondence with HMRC regarding the alleged salary waiver. He gave discrepant figures for income and tax deducted from Saturn. He was not able to give any explanation for this. He made no mention of any issue regarding the benefits in kind he had claimed. The only reasonable inference is that these were deliberate errors and he deliberately delivered an inaccurate return understating his tax liability.

178. The Tribunal is satisfied that the reductions and abatements set out at paragraphs 4, 5 and 6 were properly calculated at appropriate rates and that therefore the penalties should be confirmed. HMRC gave the appellant reasonable reductions in respect of the cooperation, disclosure and other assistance that he provided during the course of the enquiry as set out above.

Conclusion

179. The tribunal confirms the 2007-2008 closure notice which was issued on 21 January 2014 and which brings into charge additional tax of £17,633.06 and dismisses the appeal which has been brought against this notice.

180. The tribunal confirms the 2008-2009 closure notice which was issued on 21 January 2014 and which brings into charge additional tax of £42,643.00 and dismisses the appeal which has been brought against this notice.

181. The Tribunal upholds the penalty of £7,053.00 charged for 2007-2008 under Section 95 TMA 1970 and dismisses the appeal which has been brought against this penalty determination.

182. The Tribunal upholds the penalty of £20,148.81 charged for 2008-2009 under Schedule 24 to the Finance Act 2007 and dismisses the appeal which has been brought against this penalty assessment.

183. The appeal is therefore dismissed.

184. 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.

TRIBUNAL JUDGE
RUPERT JONES

RELEASE DATE: 22 FEBRUARY 2017