



TC05777

Appeal number: TC/2012/6757

INCOME TAX, CAPITAL GAINS TAX, VAT, PENALTIES – Back duty investigation – Restaurant undeclared takings and unreported staff wages – Treatment of PAYE unpaid but assessed - Property disposal – Rental income - Penalties

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**Mr RONG GEN POON
(formerly known as WING KAN POON)**

Appellant

-and-

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

Respondents

**TRIBUNAL: Judge Peter Kempster
Mr Terence Bayliss**

Sitting in public at Centre City Tower, Birmingham on 29 November 2016

The Appellant did not appear and was not represented

Mr Brendan Hone (HMRC Appeals Unit) for the Respondents

DECISION

1. The Appellant (“Mr Poon”) carried on business as a restaurateur in Belfast at the relevant times. In June 2008 the Respondents (“HMRC”) started an enquiry into Mr Poon’s tax affairs; in October 2010 this developed into a full Code of Practice 9 civil fraud investigation. HMRC concluded that the business had unrecorded cash receipts and unrecorded staff wages.

2. Mr Poon appeals against:

(1) Income tax and capital gains tax assessments (a mix of discovery assessments and closure notices) for the tax years 20001-02, and 2005-06 to 2009-10. Associated penalties for incorrect returns (s 95 TMA 1970 and sch 24 FA 2007).

(2) PAYE assessments (determinations under reg 80 PAYE Regs 2003 and NIC decision notices under s 8 SSC(ToF)A 1999) for the same periods. Associated penalties under s 98A TMA 1970.

(3) VAT assessments for the VAT periods 03/06 to 03/10. Associated penalties under s 60 VATA 1994 and sch 24 FA 2007.

3. Formal internal reviews were conducted at Mr Poon’s request, the result of which was an adjustment to the discovery assessment for 2005-06 and the associated penalty, but otherwise the disputed decisions were upheld.

4. In September 2013 after a case management hearing before Judge Poole, the various appeals were consolidated and HMRC served a consolidated statement of case.

The Hearing

5. Mr Poon did not appear and was not represented. The Tribunal was satisfied that reasonable steps had been taken to notify Mr Poon of the hearing (there was on file a letter dated 26 July 2016 sent to Mr Poon at the address notified by Mr Poon to the Tribunal on his notice of appeal) and considered that it was in the interests of justice to proceed with the hearing, pursuant to Tribunal Procedure Rule 33.

6. We had a large bundle of documents, including formal witness statements from Mr Poon and Ms Lisa Rae (HMRC case officer for the COP9 investigation).

The Investigation

7. In June 2008 HMRC opened a s 9A TMA 19070 enquiry into Mr Poon’s 2006-07 self-assessment return. The information they gathered led HMRC to widen the scope of their enquiries and, in October 2010, launch a COP9 investigation into Mr Poon’s tax affairs. Mr Poon at that time was represented by Alliot’s Chartered Accountants. The partner dealing with Mr Poon’s affairs was Mr YC Luk FCA and it is relevant that on the firm’s website he is described as having the “ability to

communicate fluently in Mandarin and Cantonese”. Mr Luk agreed to prepare a disclosure report for use in connection with the COP9 investigation. The formal COP9 interview took place in London on 17 & 18 May 2011. Mr Poon signed formal questionnaires stating:

- 5 (1) Transactions had been omitted from or incorrectly recorded in his business books;
- (2) The business accounts sent to HMRC were not correct and complete;
- (3) His tax returns were not correct and complete;
- 10 (4) He was aware that his VAT returns were incorrect or incomplete at the time they were submitted; and
- (5) He would co-operate in an examination of business and private records.

8. In more detail, Mr Poon admitted to HMRC:

- (1) Suppressed business takings of £1,700 per week;
- 15 (2) Employing staff without the necessary work permits and paying staff cash without PAYE – details of names and weekly amounts were supplied;
- (3) Ownership of half-a-dozen properties in Belfast; and
- (4) That he had a gambling habit.

9. The meeting also included a discussion of a possible offer of settlement. The details were doubtless subject to refinement and negotiation but, in view of Mr Poon’s subsequent contentions, it is relevant that (a) Mr Luk indicated a total payment of £350,000; and (b) the day after the meeting HMRC received a cheque for payment on account for £10,000 (the cheque was later bounced by the bank).

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10. In August 2011 Mr Poon changed advisers. HMRC sent copies of the meeting notes to both Alliotts and the new advisers. There was correspondence with the new advisers and HMRC hoped to have a further meeting but this did not happen. HMRC considered there had been inadequate co-operation since the COP9 interview and in February & March 2012 HMRC issued the disputed assessments and notices.

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11. There was subsequent correspondence including, in June 2012, a statement by Mr Poon to HMRC: “Due to family problems and being misled into signing a false declaration by Jon YC Luk of Alliotts I have now changed my name from Wing Kan Poon to Rong Gen Poon.”

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12. Mr Poon made a complaint to the Adjudicator about HMRC’s investigation, which was dismissed in March 2015.

Appellant's case

13. Mr Poon's grounds of appeal may be summarised as:

5 (1) There was no qualified interpreter at the COP9 interview; Mr Poon had not understood the questions put to him; and HMRC could not have understood the answers.

(2) Mr Luk coerced Mr Poon into giving his answers.

(3) The meeting notes were not reliable or credible.

10 (4) There was "no conclusive evidence to support" HMRC's findings. The assessed additional turnover was not achievable. No observations had been conducted, not interviews with third parties.

(5) The staff names were incomplete or non-existent, so the PAYE calculations must be flawed.

15 (6) The staff wages were paid out of the £1,700 per week undeclared takings, not in addition thereto. The amount of staff wages had been miscalculated and this led HMRC to conclude incorrectly that the proprietor's outgoings could not be met from the £1,700 per week.

(7) The VAT assessments were out of time.

(8) The food supplies should be zero-rated for VAT purposes.

(9) The penalty rates were excessive.

20 14. Mr Poon's witness statement dated 8 January 2014 repeated most of the above points.

Ms Rae's evidence

25 15. Ms Rae confirmed and adopted two witness statements dated 4 December 2013 and 10 December 2015. She was one of the case officers who conducted the COP9 investigation. She stated:

(1) The COP9 was motivated by discoveries in an enquiry that in 2007 Mr Poon had made bank lodgements exceeding £800,000 but had declared drawings from the business of around £17,000.

30 (2) The COP9 interview was conducted formally, with Mr Poon present and represented by his chartered accountant who spoke Cantonese and assisted Mr Poon in understanding the progress of the meeting.

(3) Several admissions were made by Mr Poon:

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(a) There were more staff than recorded on the PAYE system. They were paid cash. Also, PAYE registered staff were paid cash top-ups outside the PAYE system. Detailed names and amounts were disclosed and recorded; those were the figures used by Ms Rae in her subsequent calculations, except that she had ignored certain casual delivery drivers (which was to the taxpayer's benefit). Because HMRC had no record of most of the individuals, Ms Rae assumed they were all basic rate taxpayers but did not allow a personal allowance as they could have had other casual or formal earnings.

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(b) Additional cash takings of £1,700 per week. Mr Poon had substantial personal outgoings including maintenance payments to his ex-wife and servicing of several property mortgages.

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(c) Omitted rental income for a property known as Blue Sky Restaurant (operated by a third party). The rent was £400 per week and Ms Rae had allowed 25% for deductibles.

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(d) Omitted property transactions resulting in admitted gains on properties called Magic Wok and 16 Ormonde Street. Further, an admitted disposal of a property called 82 Botanic Avenue; Mr Poon stated this transaction resulted in a loss (or at least no gain). However, Ms Rae's subsequent research revealed that Mr Poon's interest in the property was purchased for £40,000 and sold for £120,000; in the absence of any further information or explanation from Mr Poon, she assessed a gain of £80,000.

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(e) The VAT assessments were calculated using the admitted additional takings.

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(f) The direct tax penalties were a mix of old rules (TMA 1970) for tax years 2000-01 and 2005-16 to 2007-08, and new rules (FA 2007) for 2008-09 to 2010-11. Under the old rules, abatement had been given of 10% for each of disclosure, co-operation and seriousness, resulting in a penalty of 70% of the tax. Under the new rules, mitigation had been granted of 10% for each of telling and helping, and 5% for giving access, resulting in a discretionary element of 37.5% of the tax which, when added to the mandatory 50% element, resulted in a penalty of 87.5% of the tax.

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(g) The indirect tax penalties were a mix of old rules (VATA 1994) for VAT periods 03/06 to 12/08, and new rules (FA 2007) for periods 03/09 to 03/10. Under the old rules, abatement had been given of 10% for each of early and truthful explanation and meeting responsibilities, resulting in a penalty of 80% of the tax. Under the new rules, mitigation had been granted in identical manner as for the direct tax penalties (above).

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(4) A formal internal review had been conducted of all Ms Rae's conclusions and they were upheld except for a small adjustment to the discovery assessment for 2005-06 and the associated penalty.

16. In response to questions from the Tribunal, Ms Rae stated:

5 (1) No deduction had been given in the revised profits calculations for any cost of sales relating to the additional turnover. Mr Poon had been invited to supply evidence of additional purchases but did not provide any. HMRC suspected that Mr Poon's admitted additional takings were an understatement but were prepared to accept them to reach an overall settlement of the COP9
10 exercise.

(2) No deduction had been given in the revised profits calculations for the PAYE assessed. HMRC practice was to deduct only PAYE actually paid, and then in the accounting period of payment.

15 (3) She agreed that the additional turnover used to fund the cash wages had not been properly adjusted to account for the VAT element of that turnover. She agreed that would need to be adjusted.

Consideration and Conclusions

General

20 17. The adjustments assessed by HMRC reflect (a) admissions made by Mr Poon during a formal COP9 interview throughout which Mr Poon was professionally represented by his accountant; and (b) in relation to the disposal of the property at Botanic Avenue, publicly available information taken by HMRC from the Land Registry.

25 18. We do not accept the contention that Mr Poon did not understand the questions put to him in interview. His accountant translated for Mr Poon as necessary and the answers given were detailed. This is clearly recorded in the notes of the meeting. We note that a similar conclusion was reached by the Adjudicator in dismissing Mr Poon's complaint concerning HMRC's investigation. We conclude
30 that HMRC were entitled to take Mr Poon's admissions into account in making their best judgment assessments.

19. We regard the appellant's disclosure report dated 28 August 2014 as unreliable and we place no weight on it. The report does not address the concerns put forward by HMRC in the COP9 investigation, nor offer any explanations or evidence. We conclude that HMRC were correct to dismiss this document as implausible, as do
35 we.

Capital Gains

20. At the COP9 interview Mr Poon stated that the property at Botanic Avenue had been sold at a loss. The Land Registry information researched by HMRC

indicated a disposal at a surplus. In the absence of any explanation by Mr Poon of the discrepancy we conclude that HMRC were entitled to use the Land Registry figures in making their best judgment assessments.

Rental income

- 5 21. We note that HMRC made a notional deduction of 25% from the admitted undeclared rental income by way of allowance for outgoings, which we consider adequate. We uphold the figures used for the taxable rental income.

Additional business turnover

- 10 22. We do not accept the contention that the admitted cash diversions of £1,700 per week included the admitted off-record staff wages. These were clearly admitted as two separate extractions of unrecorded cash takings – one as drawings received by the proprietor and the other as wages received by the staff. Both extractions should be adjusted as additional takings, as HMRC have done.

VAT

- 15 23. We do not accept the contention that the VAT assessments were issued out of time; Mr Poon admitted knowingly filing incorrect VAT returns, thus there was a loss of tax deliberately brought about and HMRC had 20 years to issue corrective assessments (s 77 VATA 1994). We do not accept the contention that the unreported sales were zero-rated for VAT purposes; that was settled by the Court of Appeal in
20 *Sub One Ltd (t/a Subway) v RCC* [2014] STC 2508, but we acknowledge that case was decided after Mr Poon's grounds of appeal had been drafted. We find that the VAT assessments are correctly calculated and we dismiss the appeals against the VAT assessments.

PAYE

- 25 24. HMRC explained that the PAYE assessments must be estimated because there was insufficient information about the particular circumstances of the off-record workers. We agree with that approach and we find that the PAYE assessments represent best judgement, and we dismiss the appeals against the PAYE assessments.

Income Tax on business profits

- 30 25. During the hearing we raised three points with HMRC:
- (a) *The admitted undeclared takings had been assessed as profit, with no allowance for cost of sales.* We accept HMRC's explanation that if evidence had been produced of additional off-record purchases then that would have been taken into account in the calculations, but no
35 information had been provided by Mr Poon.
- (b) *The admitted undeclared drawings had been reduced by the relevant output VAT fraction, but not the admitted undeclared takings used for*

off-record wages. HMRC conceded that the VAT adjustment should be made to both elements of the undeclared takings, and agreed to provide revised figures reflecting that adjustment (which was done on 29 December 2016).

5 (c) *No income tax relief had been given for the PAYE assessed.* HMRC
submit that the PAYE assessed (and confirmed by this Tribunal at [24]
above) should constitute a deduction from the profits assessed to
income tax only if (a) the statutory window for Mr Poon to amend his
self-assessment returns is still open (in which case the “open” tax year
10 can be adjusted); or (b) the PAYE is paid (in which case the deduction
can be taken in the tax year in which the payment is made). HMRC
point to their published practice stated in BIM47090 and SAM124165.
Neither condition is satisfied in Mr Poon’s case. We consider that the
practice cited by HMRC refers to circumstances different from the
15 ones before the Tribunal in this case. That practice is designed to deal
with cases where the taxpayer is reaching a voluntary settlement
agreement with HMRC concerning his tax affairs - BIM47090 refers to
“employer compliance settlements” and SAM124165 to “taxpayer
amendments”. Such a voluntary agreement would require an “open”
20 year to accommodate a taxpayer amendment, failing which a deduction
could only be given when the payment of tax was actually made, and
in those circumstances we agree with HMRC’s published guidance.
However, in this case we have appeals against discovery assessments
(and a closure notice) and the Tribunal’s role is stated in s 50(6) TMA
25 1970: “If, on an appeal notified to the tribunal, the tribunal decides ...
that the appellant is overcharged by an assessment other than a self-
assessment, the assessment ... shall be reduced accordingly, but
otherwise the assessment ... shall stand good.” The Tribunal, in our
view, needs to make such adjustments as are necessary to ensure that
30 the taxpayer pays the right amount of tax, given the discoveries made
by HMRC and agreed by the Tribunal. The Tribunal is not fettered by
the time limit on taxpayer amendments to self-assessment returns. We
consider the additional income tax liabilities should reflect all the
consequences of the fact that admitted off-record staff wages were
35 paid, and adjust for all those consequences including that PAYE
should have been accrued and paid (and is now rightly being assessed).
Thus, in our view, a deduction for the confirmed PAYE liabilities
should be made from the adjusted profits assessed to income tax.

Penalties

40 26. We have considered in detail the explanations given by HMRC for the penalty
weightings applied (under both the old and new penalty regimes applicable to the
relevant years of assessment). Mr Poon gave considerable disclosure in the course of
the COP9 interview and had he delivered the information and co-operation promised
at the meeting then – as HMRC accepted – a lower penalty would be appropriate.
45 However, after the interview Mr Poon has done little except attempt to retract his

admissions and delay the resolution of the dispute. On balance we consider that the penalty calculations are justified and we uphold the basis of calculation. The adjustment to the income tax assessments described above also necessitates an adjustment of the penalty amounts.

5 **Decision**

27. The appeals against the VAT assessments are DISMISSED.

28. The appeals against the PAYE assessments (tax and NIC) are DISMISSED.

29. The appeals against the self-assessment closure notice and assessments are ALLOWED IN PART so as to reduce the figures to reflect the adjustments
10 determined at [25(b) & (c)] above.

30. The appeals against the penalties are ALLOWED IN PART so as to reduce the figures to reflect the adjustments determined at [25(b) & (c)] above.

31. In the summary decision notice issued to the parties on 27 February 2017 we DIRECTED that no later than 60 days after the issue of that decision notice the
15 Respondents shall send or deliver to the Tribunal, with a copy to the Appellant, revised figures for the income tax assessments/closure notice and penalties to reflect the adjustments determined at [25(b) & (c)] above; and the Tribunal will then either formally confirm the revised figures or raise queries thereon.

32. This document contains full findings of fact and reasons for the decision, and
20 replaces the summary decision issued to the parties on 27 February 2017. 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
25 accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

30 **PETER KEMPSTER**
TRIBUNAL JUDGE

RELEASE DATE: 11 APRIL 2017