[2017] UKFTT 437 (TC)

TC05899

Appeal number: TC/2015/04590
TC/2015/07016

INCOME TAX – ***Assessment and Penalties following third party information — whether return complete – no - whether competent Discovery- yes – whether assessment 'stands good' – no – whether penalty for errors due – no – whether penalties due for failure to provide documents and information – yes. Section 29 Taxes Management Act 1970, Schedule 24 Finance Act 2007, Paragraphs 39, 40 and 46 of Schedule 36 Finance Act 2008 - Appeal allowed in part***

FIRST-TIER TRIBUNAL
TAX CHAMBER

GEORGIOS KANTOPOULOS **Appellant**

- and -

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

TRIBUNAL: JUDGE W RUTHVEN GEMMELL WS
MEMBER: PETER R SHEPPARD, FCIS, FCIB, CTA

Sitting in public at George House, Edinburgh, on 20 March 2017

Brian Cairney of BCAS Accountants Ltd for the Appellant

Matthew Mason Officer of HMRC, for the Respondents

DECISION

Introduction

1. Georgios Kantopoulos (GK) appealed against (1) penalties charged under Schedule 36 of the Finance Act 2008 by letters dated 13 April 2015 and 2 July 2015 in amounts, respectively, of £300 and £780 for failure to produce information and documents and (2) against a Discovery Assessment issued by HMRC for the tax year 2011-2012 under section 29 of the Taxes Management Act 1970 issued on 3 November 2015 in an amount of £15,699.13 and a penalty assessment for the tax year 2011-2012 under Schedule 24 of the Finance Act 2007 issued on 28 October 2015 in an amount of £4,709.73.

2. The issues before the Tribunal were (1) whether the self-assessment tax return ("SATR") submitted by GK for the tax year ended 5 April 2012 was correct and complete; (2) whether there had been a Discovery under section 29 of the Taxes Management Act 1970 ("TMA") for the year ended 5 April 2012; (3) whether GK is liable to a penalty under Schedule 24 of the Finance Act 2007 for the period 6 April 2011 to 5 April 2012 and whether that penalty was in the correct amount; (4) whether GK was liable for a penalty under Paragraphs 40 and 46 of Schedule 36 of the Finance Act 2008 for failing to comply with a notice to provide information and produce documents issued on 17 October 2014 under Paragraph 1 of Schedule 36 to the Finance Act 2008; (5) whether GK is liable for further daily penalties under Schedule 36 of the Finance Act 2008 for his continued failure to comply with a notice to provide information; and (6) whether the amount of the penalty charged under Paragraphs 40 and 46 of Schedule 36 of the Finance Act 2008 is in the correct amount.

3. GK was not present at the hearing and evidence was given by Marnie Ewart ("ME") an Officer of HMRC who was examined and cross-examined and who was a credible witness.

Legislation

4. See Appendix 1.

Cases Referred To

5. See Appendix 2.

The Facts

6. HMRC notified GK by letter dated 5 September 2014 that they would be carrying out a check of his SATR for the tax year ended 5 April 2012. The letter advised that any assessment to reflect additional tax due would be made under Section 29 TMA 1970. A copy of the letter was sent to GK's agent Mr Brian Cairney ("BC") of BCAS Accounting Services with a schedule of information and documents required to carry out the check.

7. By letter dated 22 September 2014 BC queried HMRC's authority to raise the enquiry, as he believed the time limit for opening an enquiry into the 2011/2012 SATR had passed, and by letter dated 30 September 2014, HMRC advised that the check into GK's 2011/2012 SATR was being made under the Discovery provisions of Section 29 TMA 1970.

8. When the information, requested informally, in HMRC's letter dated 5 September 2014 was still outstanding, a formal request was made to the appellant by Notice under Paragraph 1 of Schedule 36 FA 2008 on 17 October 2014. The Notice, to provide information and produce documents, advised that GK may have to pay a penalty of £300 if the information and documentation was not provided by 21 November 2014.

9. ME called BC on 30 October 2014 when BC advised that he was due to meet with his client the following Saturday and had asked him to bring bank statements etc. to the meeting. ME called BC again on 24 November 2014, as she had heard nothing from him, when BC advised that he had found an amount missing from sales and suggested sending in his proposals for settlement. ME said she wanted to see the documents requested in her earlier letter.

10. On 9 December 2014, ME called BC having received a Freedom of Information request from BC dated 25 November 2014. ME stated that she had not refused BC's offer to send proposals but still needed to see the bank statements and other records to back up the figures in GK's SATR. BC stated that his client had lost his records and ME said that even if certain records had been lost GK could still get duplicate bank statements to progress the check.

11. ME called BC on 5 February 2015 to ask if GK had obtained duplicate bank statements when BC confirmed that GK had not asked for them from his bank. BC wrote to HMRC on 5 February alleging ME's mishandling of the enquiry and maladministration and a copy of the letter was sent to the HMRC Complaints team.

12. ME wrote to BC on 24 February 2015 asking for confirmation of the information he required under the Data Protection Act 1998 and he responded by letter dated 27 February 2015 listing the information and documents. ME liaised with HMRC's Data Guardian to ascertain what information could be released under the DPA request and ME responded with the DPA request in those terms on 17 March 2015.

13. An HMRC Complaints Handler, Karon Wake, formally responded to BC`s complaint by letter dated 1 April 2015. The complaint was not upheld. The conclusion reached was that ME had acted in accordance with the relevant legislation, instructions and guidelines in carrying out the check and in making a formal request for documents and information required to complete the check.

14. On 13 April 2015 ME issued a Penalty Notice charging a penalty of £300 under Paragraphs 39 and 46 Schedule 36 Finance Act 2008 for failing to comply with an Information Notice, dated 17 October 2014, issued under Paragraph 1 of Schedule 36 Finance Act 2008 ("the Information Notice"). The Penalty Notice advised that to

avoid further penalties of up to £60 a day, the information and documents requested should be provided by 14 May 2015.

15. GK lodged a Notice of Appeal against the Penalty Notice by letter dated 27 April 2015 and BC wrote directly to the Complaints Team on 29 April 2015 with a series of issues that he wished addressed. Another Complaints Handler, Susmita Naik, formally responded to him by letter dated 8 June 2015. The complaint was not upheld.

16. As the complaint had been finalised, as HMRC saw it, ME wrote to GK on 17 June 2015 regarding his appeal against the £300 penalty charged under Paragraphs 39 and 46 Schedule 36 Finance Act 2008. The letter stated HMRC's view of the matter in dispute that the penalty had been correctly charged under the appropriate legislation, and offered an independent statutory review of the Decision.

17. A further Penalty Notice was issued to GK on 2 July 2015 charging a daily penalty of £20 per day from 15 May 2015 to 2 July 2015 totalling £780 under Paragraphs 40 and 46 of Schedule 36 FA 2008 for the continued failure to comply with the Information Notice. By letter dated 3 July 2015 BC accepted HMRC's offer of a review of the initial £300 penalty under appeal.

18. Ms Ros Shields from HMRC's Appeals and Review Unit carried out an independent statutory review of the Decision under appeal being the £300 penalty and notified GK by letter dated 13 August 2015 that she had upheld the Information Notice and resulting £300 penalty. It was her conclusion that the information requested by the Information Notice was reasonably required to check GK's tax position.

19. By letter dated 27 July 2015 BC informed HMRC that he had submitted an application to the First-tier Tribunal to have the case closed. An Application to Close Enquiry form T245 was lodged with HM Courts and Tribunals Service dated 28 July 2015.

20. In light of the application, ME wrote to GK on 2 October 2015 advising that she intended to issue an assessment for tax year 2011/2012 and a penalty explanation letter was issued dated 5 October 2015 advising GK that HMRC intended to charge a penalty and showing how it had been calculated.

21. HMRC issued a Notice of Assessment to GK dated 3 November 2015 formally closing the check into his 2011/2012 SATR under Section 29 TMA 1970. A Penalty Assessment was issued to GK charging a penalty for the period 6 April 2011 to 5 April 2012 under Schedule 24 of the Finance Act 2007.

22. By letter dated 9 November 2015, GK lodged a formal Notice of Appeal against the Assessment and requested postponement of all tax and penalties and by letter dated 19 November 2015 ME acknowledged receipt of the Notice of Appeal and outlined HMRCs current view of the Discovery assessment. The letter offered an independent statutory review.

23. On 30 November 2015 GK rejected HMRC's offer of review and advised that he would be submitting a second appeal to HM Courts & Tribunals Service against the Discovery assessment under Section 29 TMA 1970 which was lodged with HM Courts & Tribunals Service on 3 December 2015.

24. It became apparent whilst reviewing the bundles before the Tribunal and during the cross-examination of ME that BC had prepared GK's accounts and therefore his tax return using the accounting accruals basis whereas HMRC had considered that a cash basis was being used. Further confusion had arisen because according to his tax return and intimations to HMRC, GK ceased to be self-employed on 31 August 2011.

25. BC explained that GK had decided to create his own company Kantop Limited ("Kantop") through whom he would be employed in future by Giffnock Orthodontics ("GO"). Kantop, however, did not commence trading until 26 September 2011 leaving a period of time from 1 September 2011 to 25 September 2011 which HMRC considered to be unaccounted for. It was explained in evidence, that HMRC had assumed that the income during this period was attributable to GK's self-employed income whereas BC, GK's adviser, had added this income to the company's accounts commencing on 26 September 2011.

26. When this difference of approach became known to the Tribunal, a number of available documents were considered in light of this divergence of accounting treatment.

27. The bulk of the documents before the Tribunal were identified as those which HMRC had obtained from GO and which had led HMRC into carrying out their enquiries into GK's tax return. These included bank statements of GO and commission statements although these were merely printed and dated documents without showing any identification for GO.

28. A commission statement for GO dated 30 June 2011, which the Tribunal considered was firmly within the period under appeal of 2011-2012, showed gross fees of £24,607.19 to which were added private fees of £211 making total fees of £24,818.19. From this had been deducted "Armac lab fees of £218.80 which the Tribunal were advised was not an expense of GK but instead GO, and a 45% payment of £11,069.72 was then shown as payable. From this amount was deducted an in-house lab-inclusive cost, "own, NHS superannuation contributions" and an amount designated as "Plus CPD". The resulting total of £9,875.85 was then sent to GK's bank account, according to GO's statement.

29. It was unclear, from this 30 June 2011 statement, why some expenses were in effect deducted at a rate of 45%, and at all if they were not GK's expenses, but some were deducted at a rate of 100%.

30. A similar statement dated 29 April 2011 headed "April 2011 commission statement for GK" referred to an amount for April 2011 but "paid in March 2011". A small number of bank statements were produced by GK for the hearing and, in the statement covering the period 8 April to 7 May 2011, the payment referred to as paid in March had been, after all the deductions, sent to GK's bank account on 29 April 2011. This therefore was the first payment received into GK's bank account, as submitted to the Tribunal, for the tax year 2011-2012.

31. The assessment accompanying HMRC's letter of 2 October 2015 stated that the first payment made on 1 April 2011 was £9,000 but this appeared on GK's bank statement as having been paid on 31 March 2011 and, therefore, was in the tax year 2010-2011. It was not, therefore, income in the year of assessment under appeal.

32. It was explained to the Tribunal that HMRC did not have GK's bank statements when making the assessment, because these had not been produced by GK, but only the records of GO and, therefore, made assumptions which the Tribunal considered whilst justified at the time, were incorrect.

GK's Submissions

33. GK says that the window of enquiry on his tax affairs closed on 29 January 2013, and under the legislation this gives the taxpayer finality, and that HMRC have used the section 29 TMA procedure incorrectly. GK says that for it to be valid it has to be used to discover a loss of tax and come about by a callous or deliberate action or because of information which became available which was not available when the enquiry window was open. If HMRC wish to use a section 29 TMA procedure then they must meet those conditions and GK says that HMRC have failed to do so and that HMRC have made a disingenuous claim of discovery which has no merit or substance.

34. GK say that on 17 October 2014 HMRC issued a Schedule 36 notice demanding the same information as the Section 29 procedure and that for a Schedule 36 notice to be valid it must meet the condition that an assessment to tax is or has become insufficient. GK says that ME refused at the time to provide any information why this was the case and did not have the information at the time. GK says that in calculating their assessment HMRC was using another taxpayer's expenses.

35. GK say that as both the income calculations are flawed and the income expenses are flawed, then not only is the assessment flawed but so also is the penalty. GK say they acted in the way they did because they felt they were not required to provide the information required by HMRC based on their belief that HMRC did not have sufficient authority in terms of the legislation to demand it. GK says that he issued a Freedom of Information request in order to obtain the information to accept or challenge their claims but that this was refused.

36. GK says there was no reason available or known to HMRC to suspect and no reason to request information about capital allowances as in the review carried out by HMRC only income is mentioned and not capital allowances.

37. GK says he was not careless in completing his tax returns and the assessment, which purely relates to income, is flawed, as it contains income that has already been returned and taxed.

HMRC's Submissions

38. HMRC say their check into the appellant`s 2011-2012 SATR was conducted under the discovery provisions of Section 29 TMA and was based on information received from GO. HMRC had reason to suspect that GK may have been under-assessed in respect of his tax liability for the 2011/12 tax year.

39. HMRC say that "r*eason to suspect"* means that there are facts which either alone or taken together with others lead HMRC to think that the person may have been under-assessed or may have underpaid tax and does not mean that HMRC already have to be in a position to make an assessment.

40. As the informal request for information was not complied with, HMRC issued a formal request under Schedule 36 Finance Act 2008 which they are entitled to do under the legislation if the information or a document is reasonably required by an officer of HMRC for the purpose of checking a taxpayer's tax position.

41. HMRC contend that the information and documents requested, in the formal notice issued under Paragraph 1 Schedule 36 FA2008 on 17 October 2014, were reasonably required to assist HMRC in determining whether or not GK`s 2011-2012 SATR was complete and correct and that failure to provide the information and documents requested constituted non-compliance with the notice and as such is liable to penalties for the failure.

42. The initial penalty for that failure was £300 which was issued on 13 April 2015. Where there is a continued failure, following the issue of the initial penalty, HMRC may charge a daily penalty of up to £60 per day for each day. Paragraph 40 of the same Schedule provides that HMRC may issue daily penalties of £20 per day for the continued failure, which they assessed as for the period 15 May 2015 to 2 July 2015, on 2 July 2015.

43. HMRC contend the penalty assessments issued, on 13 April 2015 and 2 July 2015, are correct and raised within the time limits provided for by the legislation and is within the European Convention of Human Rights which at Article 8(2) states that there will be some circumstances where it is necessary to interfere with that person's right to privacy and sets out the conditions that must apply before such interference is lawful.

44. This includes that any intrusion into a person's private affairs must be in accordance with the law; necessary in a democratic society; and in pursuit of a legitimate aim.

45. HMRC say this usually means that any intrusive action or request must not only be in accordance with the law but be necessary for the economic wellbeing of the UK. HMRC say their procedures comply with the European Convention on Human Rights and our info powers do not breach any Human Rights laws. They refer to High Court decision, *HMRC v Sokoya* (2008) EWHC 2132 where a taxpayer was of the opinion that a similar HMRC request for information was in breach of his Human Rights. Floyd J highlighted in his ruling at Paragraphs 12 and 13 that –

> *"Article 8 expressly recognises the need in a democratic society to preserve the economy and wellbeing of the country"* and that *"Regrettable though it may seem, tax collection comes fully within that exception".*

46. HMRC say that the same principles apply to this appeal and to the notice issued to GK under Paragraph 1 of Schedule 36 Finance Act 2008, on 17 October 2014.

47. HMRC contend that it is perfectly reasonable for an officer of HMRC to check that a Return is correct with reference to the private and personal means position of a taxpayer especially where no business bank account exists and there has been no reconciliation of the sales figure to (personal) bank accounts. In this particular case

the information requested was reasonably required for the purpose of checking GK's tax position.

48. HMRC contend that Section 29(1) TMA 1970 has been satisfied as an officer of HMRC, ME, discovered that the appellant received taxable income which had not been assessed and that the conditions in Section 29(3) TMA conditions are satisfied namely :

a. Either the situation was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf (Section 29(4) TMA 1970) or,

b. At the time when HMRC ceased to be entitled to open an enquiry into the return, "the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation" (Section 29(5) TMA 1970). The meaning of "*the information made available to him*" [emphasis added] is defined in Section 29(6) TMA 1970, which is set out at Paragraph 49 below.

49. GK submitted a SATR for 2011/12 on 29 January 2013; the time limit for opening an enquiry into it ended on 29 January 2014; no enquiry was, in fact, opened; and so Section 29(3) TMA 1970 permits the issue of an assessment under Section 29 (1) TMA 1970 only if either any understatement of liability was made carelessly or deliberately (Section 29(4) TMA 1970) or, alternatively, HMRC could not reasonably have been expected to be aware of the understatement by 29 January 2014 on the basis of the information provided to them before that date (Section 29(5) TMA 1970). HMRC contend that both provisions of Section 29(4) and (5) are met.

50. HMRC say that the understatement of liability was made carelessly, in that the appellant failed to fully declare his earnings from GO in his 2011/12 SATR and so Section 29(4) TMA 1970 is satisfied.

51. HMRC say that for the purposes of Section 29(5) TMA 1970, however, the meaning of "the information made available to [HMRC] before that time" is defined by Section 29(6) TMA 1970 as being information which:-

(a) is contained in the tax return or in any documents accompanying the return;
(b) is contained in any claim made for the year of assessment, or in any documents accompanying such a claim;
(c) is contained in any documents produced during an enquiry into the return or claim; or
(d) "is information the existence of which, and the relevance of which as regards the situation […] could reasonably be expected to be inferred by an officer […] from information falling within paragraphs (a) to (c) above; or are notified in writing by the taxpayer to an officer of the Board".

52. HMRC refer to the case of *Langham v Veltema* [2004] EWCA Civ 193, where Auld LJ considered two issues relating to Section 29(6). The first issue was "whether

awareness or inference of actual insufficiency is required to negative the condition, or would awareness that it was questionable do?" and the second issue was: "what is the relevant information before the Inspector on the basis of which he could be said to have been reasonably expected to be aware of an insufficiency?".

53. In addressing the first issue Auld LJ concluded: "it is plain from the wording of the statutory test in Section 29(5) that it is concerned….with what he could have been reasonably expected to be aware of. It speaks of an Inspector's objective awareness, from the information made available to him by the taxpayer, of 'the situation' mentioned in Section 29(1), namely an actual insufficiency in the assessment….It is a mark of the way in which the subsection provides an objective test of awareness of insufficiency, expressed as a negative condition in the form that an officer 'could not have been reasonably expected…to be aware of the insufficiency. It also allows as Section 29 (6) expressly does, for constructive awareness of insufficiency', that is, for something less than an awareness of an insufficiency, in the form of an inference of insufficiency…".

54. In addressing the second issue Auld LJ stated: "It seems to me that the key to the scheme is that the Inspector is to be shut out from making a discovery assessment under the section only when the taxpayer or his representatives, in making an honest and accurate return or in responding to a section 9A enquiry, have clearly alerted him to the insufficiency of the assessment in question."

55. As the information of the payments made to GK came from the records of GO, and not GK, HMRC contend an HMRC officer could not have been reasonably expected to be aware of any insufficiency from the entries on GK's return before 29 January 2014. HMRC say, therefore, that the condition of Section 29(5) TMA 1970 is satisfied.

56. HMRC say that they established at an early date in the intervention, that GK did not maintain adequate business records to support the entries in his SATR and refer to Section 12B TMA which contains the statutory requirement for a self-employed person to keep adequate records required to enable him to make a full and complete return of his business income and expenditure. HMRC contend that adequate records have not been maintained by GK to support the entries in his Return.

57. HMRC submit that due to the failure of GK to provide information as requested during the enquiry, HMRC are entitled to make a best judgement of an assessment based on the information held/made available to HMRC at the time of the raising of the assessment.

58. In support of this HMRC refer to the High Court ruling given by Woolf J, as he was then, in the appeal case *Van Boeckel v C & E QB* Dec 1980, [1981] STC 290. The High Court held that although HMRC had to exercise their judgment as to the amount of the assessment in a reasonable manner, they were under no obligation to do the work of the taxpayer by carrying out exhaustive investigations.

59. In calculating the additional profit to be added to GK's declared self-employment profits, ME reviewed the information received from a review of the records of GO and identified the amounts actually paid to GK by GO (gross sales less various expenses). Then, taking into consideration that the self-employed income declared on GK's SATR, could be income from GO, ME deducted the sales declared on his return from the amounts actually paid. The difference was calculated as being the additional sum HMRC sought to add to GK's self-employed profits. The level of penalty charged is dependent on whether the inaccuracy is considered to be "careless or deliberate" in terms of Schedule 24 Finance Act 2007 and HMRC contend that GK was careless by not declaring his full amount of income received from GO on his 2011/12 SATR. The Collins English Dictionary definition of "careless" is "done with or acting with insufficient attention". HMRC define it as "a failure to take reasonable care" and say that the Courts are agreed that reasonable care can best be defined as the behaviour which is that of a prudent and reasonable person in the position of the person in question.

60. Whereas a penalty can be reduced by certain factors such as whether a disclosure was made, if it was prompted or unprompted and also by the quality of the disclosure. HMRC consider that GK's behaviour in submitting an incorrect Return for the year 2011-2012 to be careless.

61. The range for a careless inaccuracy with a prompted disclosure is a minimum penalty of 15% and maximum of 30% of the potential lost revenue at the relevant time. Further reductions are given for the quality of the disclosure covering telling, helping, and giving but no reductions were given to GK.

62. HMRC consider there are no special circumstances which would lead HMRC to further reduce the penalty and can only suspend a penalty for a careless inaccuracy if conditions can be set that would help avoid penalties in the future. As GK's self-employment ceased in 2011, HMRC believed the error was unlikely to recur.

63. Accordingly, HMRC deemed the inaccuracy as a one off error and HMRC considered that no conditions could be set that would help the appellant avoid penalties in the future and have not suspended the penalty.

Decision

64. The Tribunal considered that the initial contact made by HMRC to GK had led to circumstances where, for reasons which both parties justified, that there was an absence of accurate information as to the true position regarding GK's tax affairs.

65. GK on receipt of the letter of 5 September 2014 had taken the view that HMRC were not entitled to breach the principle of giving taxpayers finality by having a "window" which, in relation to the period under review, GK believed closed on 29 January 2013, after which HMRC was not entitled to make further enquiry into his 2011-2012 tax return. GK was, therefore, unwilling to provide any other information except on the grounds within the tax legislation, which GK did not believe had been met.

66. Accordingly when no documents were received HMRC, based on the information they had received from GK's 'employer', GO, issued a Discovery Notice under Section 29 of the TMA.

67. When no further documents were received, which subsequently GK stated had been lost, and in relation to bank statements which were simply not produced, until two bank statements were produced in the papers for the hearing, HMRC raised a formal request for information under Schedule 36 of the Finance Act 2008.

68. As no new information had been received by HMRC, they were working with two sources of information, namely the third party information being the commission statements and bank statements produced by GO of their payments to GK and GK's own tax return. In addition GK ceased to be self-employed on 31 August 2011 but his new company Kantop did not commence trading until 26 September 2011. Income received between 1 September 2011 and 25 September 2011 was treated by HMRC as part of the self-employed income and was included as the income to 31 August 2011 whereas GKs advisers "lumped in" the same income into Kantop's accounts which ran only from 26 September 2011.

69. HMRC, on the information before them, believed that GK was operating on a cash basis whereas GK's advisers stated that they were operating on an accruals basis. When the latter became apparent during the hearing it was clear, that the assessment for the period ended 5 April 2012 as assessed by HMRC included some payments which on an accruals basis were assessable in the previous tax year. Similarly amounts which HMRC believed were included in the 2011-2012 were in fact referable to Kantop, a different taxpayer.

70. The Commission statements produced by GO were also not clear. They showed a date when a payment was made and also a date to which the period referred. Accordingly, if the reader did not understand that the accounts were based on an accrual basis the period in which to allocate the income was unclear. In addition, certain expenses, said to be GO expenses, were deducted from the income GO received from the National Health Service before these were allocated by means of a 45% share to GK. Thereafter, further expenses were deducted from this total so that it appeared that some expenses were deducted to the extent of 100% from GK's 45% of the income, less expenses which may or may not have been attributable to GO.

71. It was not clear to the Tribunal why some expenses were treated in one way and others in another but BC stated that the expenses deducted from the 45% share were indeed GKs expenses and this seemed to the Tribunal clearly the case in relation to a pension contribution to the NHS Superannuation scheme shown on one commission statement and which was clearly paid within the 2011-2012 tax year.

72. As a consequence, the Tribunal could not accept the accuracy of the assessment of income for 2011-2012 as the amounts included were inaccurate as they appeared to include items from a previous tax year, items which belong to another taxpayer, albeit that it was GK's company, and where it was unclear what expenses belonged to whom.

73. The Tribunal considered whether HMRC had met the onus of proof to show that the conditions of Section 29 of the TMA were satisfied.

74. The Tribunal considered that the conditions were satisfied for the reasons set out by HMRC. The Tribunal were not convinced that the fact that the Section 29 notice requested information relating to expenditure and capital allowances, which it was subsequently discovered were no different from those contained in GKs personal tax return, invalidated it. The Tribunal had difficulty in ascertaining how there could be certainty over what expenses belonged to whom given the lack of documentation available. It was indeed that ambiguity that the Tribunal considered justified HMRC coming to the conclusion that there may be income which should have been assessed to income tax which had not been assessed and entitled them to question whether any relief which had been given had become excessive.

75. The Tribunal were, however, not persuaded that the discovery assessment for the tax year ended 5 April 2012 was justified and considered that GK had brought sufficient evidence to prove that the amounts were not wholly accurate and had been based on incorrect assumptions, albeit that the Tribunal considered they were reasonable assumptions at the time HMRC made them.

76. The Tribunal did not accept that the assessments could "stand good" and that GK had produced sufficient evidence to set aside HMRC's figures albeit that this may have consequences for the income and expenses returned in the tax year 2010-2011 and Kantor's income and expenditures as returned in 2011-2012 or 2012-2013. GK had proven to the satisfaction of the Tribunal that he operated on an accruals basis and consequently that some of the income belonged to an earlier tax period and that some belonged to a different taxpayer. It was evident that GK's SATR had been completed carelessly in relation to income earned after 31 August 2011 as that income had been attributed to Kantop by GK.

77. Although the issue of expenses had not been questioned following the enquiries made by HMRC it was clear to the Tribunal that there was some doubt as to which expenses belong to whom and that this also left doubt as to the accuracy of the income assessed. The Tribunal did not believe that HMRC had reached their assessment on an incorrect basis but had simply made assumptions which in terms of the evidence before the Tribunal were incorrect.

78. The Tribunal considered the submission forcibly put by GK that the actions of HMRC amounted to a "fishing expedition" but in the circumstances and with the limited third-party information that they had, the Tribunal considered that HMRC had behaved in an appropriate and predictable manner.

79. Accordingly, the appeal under reference TC/2015/07016 being the assessment for the tax year 2011-2012 in an amount of £15,699.13 under Section 29 of the Taxes Management Act 1970 TMA issued on 3 November 2015 is allowed. Consequently, the Tribunal considered that the appeal against the penalty assessment for the tax year 2011-2012 in an amount of £4709.73 issued under Schedule 24 the Finance Act 2007 on 28 October 2015 is also allowed and the penalty decision cancelled.

80. In respect of the penalties issued under Paragraphs 39, 40 and 46 of Schedule 36 to the Finance Act 2008 issued on 13 April 2015 and 2 July 2015, the Tribunal accepted HMRC's detailed reasons for their issuance including the fact that the SATR excluded the income which the Tribunal considered had been carelessly 'lumped in' with Kantop's accounts and which became the subject of a different tax regime.

81. The information that HMRC had received related to the commission statements provided by GO and their bank statements and HMRC's attempt to reconcile this with the tax return submitted by GK. The Tribunal considered that on the facts, HMRC were entitled to give the taxpayer a notice for the purpose of checking that person's income tax position in relation to the chargeable period.

82. Accordingly, the appeals under the reference TC/2015/04590 against penalties charged under Schedule 36 of the Finance Act 2008 are dismissed.

83. 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.

RUTHVEN GEMMELL WS
TRIBUNAL JUDGE

RELEASE DATE: 10 MAY 2017

Appendix 1

Legislation

Section 12B TMA 1970 - Records to be kept for purposes of returns

Section 29 TMA 1970 - Assessment where loss of tax discovered

Section 36 TMA 1970 - (Time Limits) Fraudulent or negligent conduct

Section 49C TMA 1970 - HMRC offer review

Section 50 (6) TMA 1970 - Procedures before the Tribunal, onus of proof

Section 100 TMA 1970 - Determination of penalties by officer of Board

Schedule 24 FA 2007 - Penalties for Errors

Schedule 36 FA 2008 - Information and Inspection Powers

Schedule 36 (39) & (46) FA 2008 - Penalties for failure to comply or obstruction

Schedule 36 (40) & (46) FA 2008 - Daily default penalties for failure to comply or obstruction

Appendix 2

Cases Referred To

HMRC v Sokoya (2008) EWHC 2132
Langham v Veltema [2004] EWCA Civ 193
Van Boeckel v C & E QB Dec 1980, [1981] STC 290
Johnson v Scott 52TC383
Fane v HMRC [2013] UKFTT 782
Havercroft v Revenue & Customs [2015] UKFTT 389 (TC