[2019] UKFTT 27 (TC)

TC06923

Appeal number: TC/2015/04917

PAYE/NIC – VAT – INCOME TAX – Best judgment assessments – Penalties – Assessments based on HMRC finding that Appellant paid unrecorded wages to staff the funds for which came from unrecorded profits from unrecorded sales, and that the Appellant made unrecorded sales of cigarettes

FIRST-TIER TRIBUNAL
TAX CHAMBER

TERENCE McCLOSKEY **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MR DAVID MOORE

Sitting in public at Belfast on 12 April 2018

The Appellant in person

Mr P Oborne, Presenting Officer, for the Respondents

DECISION

Introduction

1. Following a hearing on 12 April 2018, the Tribunal's decision in this case was released to the parties on 21 June 2018. That decision was a final decision in relation to certain matters, while in respect of others it was an in principle decision. In respect of those latter matters, the Tribunal issued directions for HMRC to set out revised calculations of the assessments and penalties in a manner giving effect to the in principle findings in the Tribunal's decision, and for the Appellant to file any response to the HMRC calculations.

2. In compliance with those directions, HMRC have filed and served a written submission dated 30 August 2018, and the Appellant has filed a written submission in response dated 26 September 2018.

3. The Tribunal now gives its final decision on the outstanding matters. The present decision is to be read in conjunction with its 21 June 2018 decision, the contents of which are not unnecessarily repeated.

Whether a further hearing should be held

4. The Tribunal's directions stated that "Unless either party … requests permission to make further submissions or requests a further hearing, the Tribunal may proceed to issue a final decision".

5. HMRC have not requested a further hearing.

6. The Appellant's submission ended with a request that "all parties sit around a table and agree a settlement once and for all", in order to avoid "the parties of this dispute going back and forth arguing each point *ad infinitum*". The Tribunal has considered whether this should be treated as a request for a further hearing, and if so, whether to grant that request.

7. The Tribunal has decided that a further hearing would not be warranted. The concern expressed by the Appellant appears to be that this matter has been pending for some 8 years and has caused him immense stress, and that it should now be concluded as speedily as possible. The Tribunal considers that having a further hearing would further delay finalisation of this appeal, and would therefore be counterproductive from the Appellant's point of view unless there was some good reason for it. The Appellant appears to envisage a meeting at which a final conclusion would be reached by agreement between the parties. In fact, the appeal has already been determined by the Tribunal, and what remain to be determined are the correct figures for giving effect to certain aspects of that decision. The Tribunal considers that it can now do this on the basis of the material before it. The parties have now both had an opportunity to make whatever submissions they wish, and the Tribunal finds that the submissions they have made do not reveal any points not yet decided by

the Tribunal and still in dispute which would require a further hearing in order to be decided fairly.

Appeal against the PAYE and NIC assessments

1996-97 to 2005-06 and 2010-11

8. The 21 June 2018 decision at paragraphs 81 and 135(1) has already allowed the appeal against the assessment for 2010-11 and has set that assessment aside.

9. The 21 June 2018 decision at paragraphs 105 and 135(4) has already allowed the appeal against the assessments for 1996-97 to 2005-06 and has set those assessments aside.

2006-07 to 2009-10: calculation of undeclared wages

10. The 21 June 2018 decision at paragraph 83 and 135(2) found that the *total* (declared and undeclared) wages paid by the Appellant in 2008-09 and 2009-10 was the same as his *declared* wages in 2010-11 (49,593.32 *2011* pounds) appropriately adjusted for inflation, and that from that *total* figure for each of those years, the amount of *declared* wages for each of those years needs to be deducted, in order to determine the amount of *undeclared* wages.

11. The 21 June 2018 decision at paragraph 85 and 135(3) found that the *total* (declared and undeclared) wages paid by the Appellant in 2006-07 and 2007-08 was 85% his *declared* wages in 2010-11 (49,593.32 *2011* pounds) appropriately adjusted for inflation, and that from that *total* figure for each of those years, the amount of *declared* wages for each of those years needs to be deducted, in order to determine the amount of *undeclared* wages.

12. Appendix 1 to the HMRC submission sets out HMRC's calculations applying this methodology, as follows:

2009/10

Base year amount: £49,593.32 (2010/11)

less inflation:

2010/11 4.48% £47,371.54

less declared £24,853.27

Undeclared £22,518.27

2008/09

Base year amount: £49,593.32 (2010/11)

less inflation:

2010/11 4.48% £47,371.54

2009/10 3.29% £45,813.00

less declared £18,720.00

Undeclared £27,093.00

2007/08

Base year amount: £49,593.32 (2010/11)

85% per Tribunal £42,154.32

Less inflation:

2009/10 3.29% £40,767.44

2008/09 2.17% £39,882.79

less declared £19,136.00

Undeclared £20,746.79

2006/07

Base year amount: £49,593.32 (2010/11)

85% per Tribunal £42,154.32

Less inflation:

2009/10 3.29% £40,767.44

2008/09 2.17% £39,882.79

2007/08 3.61% £38,443.02

less declared £ 8,652.80

Undeclared £29,790.22

13. The Appellant's submission does not seek to dispute these particular calculations.

14. The Tribunal therefore finds that in 2006-07 to 2009-10, the Appellant paid total undeclared wages of **£100,148.01** as set out in paragraph 12 above.

15. Paragraph 6 of the Appellant's submission argues that he should not be liable to income tax on these undeclared wages, as they were a business expense and not profit. He relies in this respect on paragraph 119 of the 21 June 2018 decision. The Appellant is correct. He is not personally liable to income tax on these undeclared wages as they are a business expense and not profit. However, the employees to whom these undeclared wages were paid can be liable to pay income tax on the amounts paid to them by the Appellant, and the Appellant as employer can be liable to deduct the employees' income tax and NIC from those wages and pay it to HMRC through the PAYE system. That is the issue that is dealt with below.

2006-07 to 2009-10: calculation of unpaid PAYE and NIC

16. The 21 June 2018 decision at paragraph 86 found that once the amount of undeclared wages for these years was determined, it would be necessary for HMRC to give conscious consideration to the rate at which PAYE/NIC should have been deducted by the Appellant from those undeclared wages and paid to HMRC. The Tribunal noted that according to the Appellant, all of his employees earned less than the income tax threshold so that there would have been no PAYE to deduct, but that HMRC was not bound in a best of judgment assessment to accept that this was so.

17. In this respect, the HMRC submission argues as follows. The wages records have been discredited and the wages may have been paid to persons unknown to HMRC. It is reasonable to assume that the amounts are due to the basic rate of tax.

18. The Appellant argues that this is unreasonable and grossly unfair, and repeats his position that many of his employees were employed part-time and fell below the threshold earnings for income tax. The Appellant argues that the HMRC calculation assumes that he had 5 undeclared employees working 7.5 hours per day for 5 days a week on the minimum wage, and that on this methodology none of these staff would have been over the income tax threshold. The Appellant adds that even they were over the income tax threshold, they would have been entitled to a personal allowance, and the Appellant questions whether this has been factored in to the HMRC calculation.

19. In relation to PAYE income tax, the Tribunal finds as follows.

20. The assessments in question are best of judgment assessments by HMRC. The law relating to such assessments is described in paragraphs 55 to 57 of the 21 June 2018 decision. In making such an assessment, HMRC must act honestly and on the basis of some material, but HMRC are not required to do the work of the taxpayer.

21. In this case, HMRC had a basis for concluding that the Appellant had paid undeclared wages. HMRC does not know the identities of the persons to whom those undeclared wages were paid. Even if a person might have fallen below the income tax threshold if their only employment was their employment with the Appellant, it is for instance possible that some or all of those employees might also have had other jobs such that their combined income was over the tax threshold. If so, it would also have been possible that they were being taxed in their other employment in a way that gave effect to their personal allowance. There was no material before HMRC showing positively who the undeclared employees were, exactly how many hours each week they worked for the Appellant, exactly how much the Appellant paid them, whether or not they worked for anyone else at the same time, and if so, what they were earning in their other employment. There was therefore no material before HMRC showing positively that the employees to whom undeclared wages were paid were below the income tax threshold or that they had not already received their personal allowance through any other employment or through declared employment with the Appellant.

22. The Tribunal finds that HMRC are in the circumstances entitled to proceed on the basis that the employees were subject to income tax at the basic rate on all of their undeclared earnings from the Appellant. To succeed in an appeal, the Appellant would have to show positively what corrections would be needed to make the assessments right or more nearly right. The Appellant has produced no material to make such a positive showing. The Tribunal therefore finds that all of the undeclared wages paid by the Appellant were subject to income tax at the basic rate.

23. Appendix 5 to the HMRC submission calculates that income tax at the basic rate on these undeclared wages amounts to **£21,040.12**, as follows:

(1) 2006-07: £6,553.80 (on undeclared wages of £29,790.22 = 22%)

(2) 2007-08: £4,564.12 (on undeclared wages of £20,746.79 = 22%)

(3) 2008-09: £5,418.60 (on undeclared wages of £27,093.00 = 20%)

(4) 2009-10: £4,503.60 (on undeclared wages of £22,518.27 = 20%)

24. The Appellant's submission does not seek to dispute these particular calculations. The Tribunal therefore finds that these figures are correct.

25. Appendix 5 to the HMRC submission also calculates that the Class 1 National Insurance contributions on the undeclared wages which should have been paid by the Appellant to HMRC is **£23,835.27**, being 23.8% of the undeclared wages as follows:

(1) 2006-07: £7,090.07 (on undeclared wages of £29,790.22)

(2) 2007-08: £4,973.73 (on undeclared wages of £20,746.79)

(3) 2008-09: £6,448.13 (on undeclared wages of £27,093.00)

(4) 2009-10: £5,359.34 (on undeclared wages of £22,518.27)

26. The Appellant's submission queries whether 23.8% is the correct rate of Class 1 National Insurance Contributions, stating that it appears to be too high.

27. The Tribunal agrees that a rate of 23.8% for Class 1 National Insurance contributions seems very high. It is regrettable that HMRC have not included in their submission details of the basis on which it arrived at this figure, given especially that the effective rate of Class 1 National Insurance contributions will vary depending on how much a worker earns in a given period, and may vary from year to year depending on the amount set for a given year as the Lower Earnings Limit, Primary Threshold, Secondary Threshold, Upper Earnings Limit, and so forth.

28. By way of example, suppose an employee in 2009-10 was earning the minimum wage of £5.93 per hour, and working 40 hours per week, thus earning £237.20 per week. According to the HMRC online NICS Calculator at http://nicecalculator.hmrc.gov.uk/Class1NICs1.aspx, at present, if that worker was in NIC category A, the employer's NICs due would be £10.38 and the employee's NICs due would be £9.02, giving total National Insurance contributions due of £19.40. That total of £19.40 is about 8.18% of the earnings of £237.30. Of course, the contributions may have been somewhat different in 2009-10 (and other years to which

this appeal relates) to what they are today. However, there is no reason for thinking that they would have been 3 times as much, which would be the result of the figure used in the HMRC submission of 23.8%.

29. As noted above, as it is not known who the employees were who were paid the undeclared wages, it is possible that those employees might also have had other employment, and it is also possible that those employees were earning more than the minimum wage in that other employment. However, as a test example, it is noted that using the HMRC online calculator referred to above, even if an employee was earning £1,000 a week (£52,000 a year), the employer's NICs due would be £115.64 and the employee's NICs due would be £89.76, giving total National Insurance contributions due of £205.40. That total of £205.40 is about 20.5% of the earnings of £1,000. The Tribunal considers that it is an unrealistic assumption that the employees receiving the undeclared wages would have been earning as much as £1,000 per week, but even at this level the amount of National Insurance contributions would not have reached the level of the 23.8% figure used by HMRC. Again, it is possible that the figures would have been slightly different in the earlier years to which this appeal relates, but there is nothing before the Tribunal to indicate specifically that the calculations in earlier years would have led to a higher figure, much less the specific figure of 23.8%.

30. The Tribunal has given consideration to whether it should issue a further direction, giving HMRC a further opportunity to explain in more detail how it arrived at a figure of 23.8% for National Insurance contributions. The Tribunal has decided against that course. The Tribunal's direction expressly required HMRC in its written submission to set out the detailed methodology, amongst other matters, for the NIC calculations, and HMRC have therefore had the opportunity to explain its calculations. It would cause further delay in the proceedings, be inconsistent with the public interest in judicial efficiency, and in this Tribunal's view would be contrary to rule 2(2)(e) of the Tribunal's Rules, to now give HMRC a further opportunity to make submissions on the same matter. The Tribunal therefore proceeds on the basis of the limited information now before it.

31. On the basis of that limited information, the Tribunal is satisfied that the HMRC figure of 23.8% for National Insurance contributions appears to be wrong, for the reasons given above.

32. The Tribunal considers that a more reliable figure can be reached by applying the following methodology.

33. The Tribunal considers that the maximum number of hours that a person would realistically be capable of working per week, either for the Appellant alone or in combination with other employment elsewhere, would be 60. An employee working 60 hours per week in 2009-10 for the minimum wage of £5.93 per hour would have earned £355.80 per week. Any employee might also have earned that amount by working for both the Appellant and for another employer, for less than a total of 60 hours per week, but in circumstances where the person was earning more than the minimum wage in the other employment. According to the HMRC NICS Calculator, at present, if a worker in NIC category A earns £355.80 per week, the employer's

NICs due are £26.74 and the employee's NICs due are £23.26, giving total National Insurance contributions due of £50. That total of £50 is about 14.05% of the earnings of £355.80.

34. As it cannot be known whether any of the workers receiving undeclared wages were also working in other employment, or what total hours per week they were working, the Tribunal considers it appropriate to average the 14.05% in the paragraph above and the 8.18% in paragraph 28 above. The average of the two is some 11.11%. Rounding that figure down, the Tribunal applies a figure of 11% for National Insurance contributions, and assumes for convenience that the calculations would have led to similar results for all the years to which this appeal relates if the relevant minimum wages and National Insurance thresholds for each of those years were used.

35. Applying this figure of 11%, the Tribunal finds that the Appellant is therefore liable to pay HMRC the following amounts by way of National Insurance contributions:

(1) 2006-07: £3,276.92 (on undeclared wages of £29,790.22)

(2) 2007-08: £2,282.14 (on undeclared wages of £20,746.79)

(3) 2008-09: £2,908.23 (on undeclared wages of £27,093.00)

(4) 2009-10: £2,477 (on undeclared wages of £22,518.27)

36. This gives a total of **£10,944.29**.

Off-record sales of cigarettes: VAT and income tax

General

37. The 21 June 2018 decision at paragraphs 108-114 and 135(5)-(6) found that the sales of off-record cigarettes should be calculated on the basis that the Appellant sold, at the Sevenoaks shop, 15 packets (300 cigarettes) a day, 7 days a week, 52 weeks per year, from 2005-06 until 9 December 2009, for £2.60 per packet, and that he did not make any such sales at the Ballymac shop.

Profit from the sales

38. The 21 June 2018 decision at paragraph 118 found that HMRC needed to articulate a methodology for calculating the amount of profit made by the Appellant on each of these sales.

39. Appendix 2 to the HMRC submission now sets out HMRC's calculations of the profits made from these off-record cigarette sales. These calculations are based on the premise that 50% of the sale price of £2.60 per packet of cigarettes was profit.

40. Paragraph 11 of the Appellant's submission disputes this profit margin, stating that cigarette profit margins range in the area from 3% to 5%, and that even if an

increased profit margin is assumed for a person who is selling cigarettes illegally, a margin of 5% or 10% would be more realistic.

41. However, this is again a best of judgment assessment by HMRC. The Appellant has not produced any evidence to show what is typically the profit margin on illegal cigarettes sold by convenience stores, or what the profit margin was in this particular case. The Appellant does not dispute that some profit would have been made on the sales, and in the absence of any evidence of what it was, HMRC had to make an estimate of some profit margin or other. The Appellant has not established any better figure. A bare statement in his written submissions that in his experience profit margins on cigarettes range from 3% to 5% is insufficient to displace the HMRC best of judgment assessment. The Tribunal therefore proceeds on the basis that 50% of the sale price of £2.60 per packet of cigarettes was profit.

VAT on the sales

42. Appendix 2 to the HMRC submission indicates that the applicable VAT rate up to 30 January 2008 was 17.5%, that from 1 December 2008 to 31 December 2009 it was 15%, and that from 1 January 2010 to 3 January 2011 it was 17.5%. The calculations are as follows:

2006/2007

Off record cigarettes £14,196 (£2.60 x 15 x 7 x 52)

Profit thereon £7,098 (50%)

VAT calculation

April 2006 to March 2007 at 17.5%: **£1,057** (£7,098 x 7 /47 = £1,057)

Net profit on off record cigarettes £6,041

Additional profit for IT £6,041

Undeclared wages £29,790, therefore no liability to IT

2007/2008

Off record cigarettes. £14,196 (£2.60 x 15 x 7 x 52)

Profit thereon £7,098 (50%)

VAT calculation

April 2007 to March 2008 at 17.5% **£1,057** (£7,098 x7/47 = £1,057)

Net profit on off record cigarettes £6,041

Additional profit for IT £6,041

Undeclared wages £20,746, therefore no liability to IT

2008/2009

Off record cigarettes £14,196 (£2.60 x 15 x 7 x 52)

Profit thereon £7,098 (50%)

VAT calculation

April 2008 to Dec 2008 at 17.5%: profit of £5,324 x7/47 = £792.86

Jan 2009 to March 2009 at 15%: profit of £1,775 x3/23 = £231.46

Total VAT: **£1,024**

Net profit on off record cigarettes £6,074

Additional Profit for ITSA £6,074

Undeclared wages £27,093, therefore no liability to IT

2009/2010

Off record cigarettes. £9,000 (£2.60 x 15 x 7 x 33)

Profit thereon £4,500 (50%)

VAT calculation

April 2009 to Dec 2009 at 15%: profit of £3,375 x3 /23 = £440.22

Jan 2010 to March 2010 at 17.5%: profit of £1,125 x7 /47 = £167.55

Total VAT: **£607**

Net profit on off record cigarettes £3,893

Additional Profit for ITSA £3,893

Undeclared wages £22,518, therefore no liability to IT

Totals

Total value of sales made: £51,588

Total VAT: **£3,745** (£1,057 + £1,057 + £1,024 + £607)

Total additional profit for ITSA: £22,049 (£6,041 + £6,041 + £6,074 + £3,893)

43. Appendix 4 to the HMRC submission rounds this total VAT figure of £3,745 down to £3,737.

44. The Appellant's submission does not seek to dispute these particular calculations. The Tribunal accordingly finds that the applicable figure is £3,737.

Income tax on the sales

45. The 21 June 2018 decision at paragraphs 123 and 135(7) has already found that apart from off-record sales of cigarettes, there were no other profits from any other off-record sales on which income tax was assessable.

46. The 21 June 2018 decision at paragraphs 125 and 135(8) has also already found that that the profit for each year from the off-record sales of cigarettes should be

reduced by the amount of off-record wages paid by the Appellant in the same year, such that the only part of the profit from off-record sales of cigarettes on which income tax would be payable would be such part as exceeded the total amount of off-record wages paid in that year.

47. The HMRC submission accepts that the profits from the off-record sales of cigarettes did not exceed the amount of off-record wages paid by the Appellant in any of the years referred to in paragraph 42 above, and therefore the off-record sales of cigarettes give rise to no further liability to income tax in those years.

HMRC contention in relation to additional shop sales

48. Paragraphs 21 to 23 of the HMRC submission state that the Appellant's profits from off-record sales of cigarettes were insufficient to meet all of the undeclared wages paid by the Appellant. HMRC ask the Tribunal to assume that the discrepancy was funded by additional off-record shop sales, but to assume that there was no profit from these sales giving rise to any additional income tax. That is consistent with what the Tribunal found at paragraphs 123 and 135(7) of the 21 June 2018 decision.

49. Paragraphs 28 and 29 of the HMRC submission also state that HMRC would be content for the Tribunal to rule that there is no additional output tax recoverable on these sales, if the Tribunal also rules that there is no input tax recoverable by the Appellant on such sales (on the basis that they may have been zero rated). Given that this is a matter of best of judgment assessment by HMRC, and that the Appellant's submission does not argue against this course being taken, the Tribunal finds accordingly.

Appeal against the penalties

Penalties in respect of PAYE/NIC: 2006-07 and 2007-08

50. In respect of these years, the "old" penalty regime under s 95 of the Taxes Management Act 1970 ("TMA") applies.

51. Under that regime, the maximum penalty that can be imposed is 100% of the difference between (1) the amount of income tax payable according to the tax returns filed by the Appellant, and (2) the amount of income tax that would have been payable if the returns had been correct (the "tax difference"). Subject to that maximum, s 100 TMA confers on HMRC the discretion to impose such penalty as they consider "correct or appropriate". No further guidance is given in the legislation as to how that discretion should be exercised in individual cases.

52. However, HMRC has a long-established policy setting out how it will exercise that discretion and the factors which will be taken into account. Prior to 2014, that policy was set out in the Inland Revenue Investigation Handbook at sections 5500-5551. Since 2014, it is found in the HMRC Enquiry Manual at sections 6051 to 6089.

53. Under this policy, the starting point in every case is the statutory maximum (that is, the tax difference). That sum is then reduced, if appropriate, by a process called abatement. Abatement requires HMRC officers to take account of three factors: (1) the extent of the taxpayer's disclosure (for which the penalty can be reduced by up to 20% and exceptionally, for completely unprompted disclosure up to 30%), (2) the extent of the co-operation received from the taxpayer during the enquiry (for which the penalty can be reduced by up to 40%), and (3) the seriousness of the offences (for which the penalty can be reduced by up to 40%).

54. The Tribunal, in the exercise of its statutory jurisdiction, is not necessarily bound to apply the HMRC policy on abatement of penalties, which has no statutory basis. Despite this, the Tribunal considers it to be appropriate, in the interests of consistency of treatment of different taxpayers, to apply the abatement factors in the HMRC policy. However, the Tribunal proceeds on the basis that his has a full appellant jurisdiction, meaning that it is for the Tribunal to determine for itself what it considers the appropriate penalty to be.

55. HMRC propose that in respect of 2006-07 and 2007-08, the Appellant be given 0% abatement for disclosure, 20% (out of a maximum of 40%) for co-operation, and 30% (out of a maximum of 40%) for seriousness.

56. In respect of disclosure, the HMRC submission states that the Appellant declined to disclose any irregularities with regard to his return of employee wages or the sale of illegal cigarettes despite being given the opportunity to do so in the course of numerous meetings with HMRC. In respect of co-operation, HMRC state as follows. The Appellant originally said he would cooperate, but then refused to meet at either his agent's premises or HMRC's offices. The Appellant then did not acknowledge HMRC's 22 February 2012 request, such that HMRC issued pre-assessment letters and computations in April 2012. The Appellant did then have 3 meetings with HMRC, which HMRC used to revise their computations, but the Appellant made no payment on account, commissioned no report and provided minimum help with computation of liability.

57. In response, the Appellant states amongst other matters as follows. He has always been willing to co-operate, and he met with HMRC Officer Hunter at his accountant's offices on 11 February 2010. He subsequently did not wish to meet at his accountant's offices as his accountants would have charged for this. It was HMRC who refused to meet with him at his business premises, and the Appellant disputes the suggestions that there were security reasons justifying this refusal. The Appellant does not recall the exact content of the 22 February 2012 HMRC letter due to the sheer volume of mail received from HMRC. HMRC have consistently singled out his failure to respond to this letter as evidence of his non-cooperation, but it was never his intention to dismiss the letter or to be uncooperative in any way.

58. The Tribunal finds as follows.

59. In respect of disclosure, the Appellant has not pointed to any instance in which he provided HMRC with information relevant to his tax liability in respect of sales of

off-record cigarettes, or in respect of PAYE/NIC liability for payment of off-record wages. Indeed, in this Tribunal appeal he denied any involvement in sales of off-record cigarettes, arguing that Sharon McCloskey had been selling on her own account, and denied that he had paid any off-record wages to employees. It was of course the Appellant's right to deny any such liability. However, having done so, he cannot expect any credit for co-operation in the event that his denials are rejected by the Tribunal. The Appellant has succeeded in some aspects of his appeal, but in respect of those where his appeal has failed, the Tribunal considers that 0% abatement for disclosure is appropriate.

60. In respect of cooperation, the Tribunal finds as follows.

61. Officer Kerr's visit to his premises was on 6 December 2009. Subsequently, in a letter dated 18 January 2010, HMRC Officer Hunter requested a visit at his premises on 11 February 2010. The Appellant cooperated, and that visit proceeded as requested on 11 February 2010. When requested to do so, the Appellant then returned a signed copy of the notes of that meeting, under cover of a letter from his accountant responding to a question asked by HMRC. HMRC asked additional questions in a letter dated 8 April 2010, to which the Appellant did not respond substantively despite further communications by HMRC with his accountant, but on 15 June 2010, the Appellant's accountant telephoned HMRC requesting a meeting, and HMRC did have a COP9 opening meeting with the Appellant's accountant on 25 November 2010. Thereafter, until the 22 February 2012 HMRC letter, the Appellant did have certain further communications with HMRC, either personally or via his agent, on 11 February 2011, 5 July 2011, 8 July 2011, 6 September 2011, 23 November 2011, and 22 December 2011. After HMRC gave notice of proposed VAT and income tax assessments in April 2012, the Appellant indicated his willingness to cooperate with HMRC, and he attended a COP9 opening meeting on 25 July 2012. The Appellant had further communications with HMRC, and attended further COP9 meetings thereafter. The Tribunal takes into account the various communications and meetings between the HMRC and the Appellant or his agent.

62. The Tribunal has taken into account the extent to which the time taken for HMRC to issue the assessments was influenced by the actions of the Appellant or his agent. That is to say, the Tribunal has considered whether the extent to which the cooperation given by the Appellant has shortened the amount of time required by HMRC to reach a determination of the amount of tax that it considered was owing by the Appellant. In considering this question, the Tribunal has taken into account the degree of complexity of the matters concerned, having regard amongst other matters to the fact that the HMRC enquiry involved a variety of matters other than those in respect of which the Appellant has ultimately been found to have a tax liability. The Tribunal has also taken into account that paying an accountant to deal with these various matters cost the Appellant money. The Tribunal has also taken into account that time taken by HMRC officers to undertake various tasks will inevitably also be a factor contributing to the overall length of the time taken, such that the taxpayer cannot be solely responsible for the whole of the time taken for an enquiry.

63. The Tribunal also takes into account that this is not a case, for instance, where the Appellant has made a payment on account, or has commissioned a disclosure report from his own agent at his own expense setting out his additional tax liability. On the other hand, this is apparently not a case where the Appellant has sought deliberately to conceal assets. Nor does it appear to be a case where irregularities continued during the course of the HMRC enquiry. Indeed, the HMRC case was put on the basis that the Appellant put his PAYE affairs in order after Officer Kerr's visit on 6 December 2009, and the Tribunal has found that there was no evidence that off-record sales of cigarettes continued after that visit.

64. Having regard to all of these matters, the Tribunal considers that 20% abatement for cooperation is appropriate.

65. In respect of seriousness, the Tribunal notes as follows.

66. Although the Tribunal is at this point considering only the penalty for the PAYE/NIC defaults for 2006-07 and 2007-08, in the determination of that penalty the Tribunal can take into account that these defaults were part of a bigger picture. They formed part of a series of defaults, in which the Appellant, over a period of four tax years from 2006-07 to 2009-10 inclusive, failed to pay to HMRC PAYE payments totalling £21,040.12, NIC payments totalling £10,944.29 and VAT totalling £3,737. The total defaults are thus £35,721.41 over a 4 year period, or some £8,930 per year. That is some 23% of the Appellant's profit from self-employment during that 4 year period (see paragraph 58 of the Tribunal's 21 June 2018 decision).

67. The Tribunal takes into account that this is therefore not a case where the omissions amount to as much as a third or a half of the true profits, and this is therefore not a case where seriousness falls at the top end of the scale.

68. The Tribunal finds that this is not a case where the omissions were due to a minor degree of negligence. The off-records sales of cigarettes and off-record payments to staff were in the Tribunal's view undertaken deliberately in full knowledge that they would lead to a loss of tax on the part of HMRC. On the other hand, this is not a case of the most serious fraud. The sales of cigarettes were apparently undertaken quite openly, and were observed without any difficulty by Officer Kerr during her visit. Although the Appellant has submitted incorrect returns to HMRC by failing to include these tax liabilities in them, the evidence does not suggest that he has made deliberately false statements in other documents in order to conceal his liability. Nor does the evidence suggest that he has engaged in any particularly elaborate schemes in order to prevent his undisclosed liabilities from being discovered.

69. The Tribunal also takes into account that it will be rare for the full abatement of 40 percent to be given, and that exceptional cases where full abatement may be given may include cases of omissions at a time when the taxpayer was aged or infirm.

70. Having regard to the circumstances as a whole, the Tribunal considers that 30% abatement for seriousness is appropriate.

71. The Tribunal therefore finds that the Appellant is entitled to 50% abatement, such that the penalties are 50% of the tax difference. This means that the penalty for failure to pay PAYE/NIC for 2006-07 and 2007-08 is **£8,338.49**, that is to say, 50% of £6,553.80 + £4,564.12 + £3,276.92 + £2,282.14 (see paragraphs 23 and 35 above).

Penalties in respect of PAYE/NIC: 2008-09 and 2009-10

72. In respect of these years, the "new" penalty regime under Schedule 24 to the Finance Act 2007 applies.

73. The Tribunal finds that the inaccuracies in relation to the undeclared PAYE/NIC liabilities were deliberate but not concealed, and that the Appellant's disclosure was prompted. The penalty range is therefore 35% to 75% of the potential lost revenue.

74. Just exactly where the penalty will fall within that range will depend on the degree of reduction given to the Appellant for the quality of disclosure.

75. Having regard to the provisions of Schedule 24, the HMRC submission and the findings of the Tribunal in paragraphs 58-71 above in relation to the two earlier tax years, the Tribunal is satisfied that the Appellant should be given 50% reduction for the quality of his disclosure. This means that the penalty is to fall half way in the 35% to 75% range, which is to say that it should be 52.5% of the potential lost revenue.

76. This means that the penalty for failure to pay PAYE/NIC for 2008-09 and 2009-10 is **£8,036.40**, that is to say, 52.5% of £5,418.60 + £4,503.60 + £2,908.23 + £2,477 (see paragraphs 23 and 35 above).

Penalties in respect of VAT: VAT periods 03/06 to 03/09

77. In respect of these VAT periods, the "old" penalty regime under s 60 of the Value Added Tax Act 1994 ("VATA") applies.

78. Under that regime, the maximum penalty that can be imposed is an amount equal to the amount of VAT evaded, in cases where a person, acting with dishonesty, does or omits to do anything for the purposes of evading VAT. The Tribunal finds that the Appellant's conduct in this case falls within the scope of that provision.

79. Under s 70 VATA, that penalty can be reduced by HMRC, or on appeal by the Tribunal, to such an amount as is considered proper. The HMRC submission states that it will mitigate penalties to no lower than 20% to ensure that the penalty does not drop below the level of the old mis-declaration penalty level of 20%.

80. Having regard to the relevant provisions of the VATA, the HMRC submission and the findings of the Tribunal in paragraphs 58-71 above in relation to PAYE/NIC, the Tribunal is satisfied that the penalty should be 50% of the VAT evaded during those VAT periods (not 60% as proposed by HMRC).

81. This means that the penalty for failure to pay the VAT on undeclared sales of cigarettes for VAT periods 03/06 to 03/09 is **£1,566**, that is to say, 50% of the VAT due for these VAT periods as per Appendix 3 to the HMRC submission.

Penalties in respect of VAT: VAT periods 06/09 to 03/10

82. In respect of these years, the "new" penalty regime under Schedule 24 to the Finance Act 2007 applies.

83. For the reasons given in paragraphs 72 to 75 above, the Tribunal finds that the penalty should be 52.5% of the potential lost revenue.

84. This means that the penalty for failure to pay the VAT on undeclared sales of cigarettes for VAT periods 06/09 to 03/10 is **£317**, that is to say, 52.5% of the VAT due for these VAT periods as per Appendix 3 to the HMRC submission.

Other matters

85. The Appellant's submission contends that this matter would not have taken so long to complete if it had been carried out as an ordinary investigation rather than a COP9 investigation, that HMRC's intransigence in bringing a COP9 investigation put unnecessary financial burdens on him. The Appellant appears also to suggest that he should for this reason not be required to pay interest for the whole of the period that it has taken for this matter to be concluded.

86. However, the Tribunal has no jurisdiction to deal with any challenge to a decision by HMRC to conduct an investigation under COP9 rather than as an ordinary investigation. Nor does the Tribunal have jurisdiction to deal with appeals against interest charged on outstanding tax or penalties. The present decision therefore does not deal with these matters. The HMRC submission includes calculations of the interest due from the Appellant. However, the Tribunal makes no determination in this decision as to whether or not these calculations of interest are correct, as they are not part of this appeal.

Conclusion

87. For these reasons, the Tribunal finds that:

(1) the Appellant's appeal against the PAYE (excluding NIC) assessments for 2006-07 to 2009-10 inclusive is allowed in part, and those assessments are reduced to a total amount of **£21,040.12** as set out in paragraph 23 above;

(2) the Appellant's appeal against the NIC assessments for 2006-07 to 2009-10 inclusive is allowed in part, and those assessments are reduced to a total amount of **£10,944.29** as set out in paragraphs 35 and 36 above;

(3) the Appellant's appeal against the assessments to VAT in respect of off-record sales of cigarettes at his Sevenoaks shop are reduced to a total amount of **£3,737** as set out in paragraphs 42 and 44 above;

(4) the off-record sales of cigarettes give rise to no further liability to income tax in 2006-07 to 2009-10;

(5) the Appellant is not liable to any additional income tax on any off-record shop sales in the period to which this appeal relates;

(6) the Appellant is not liable to any additional VAT output tax on any off-record shop sales in the period to which this appeal relates, and is not entitled to recover any input tax on any such sales;

(7) the Appellant's appeal against the penalties for failure to pay PAYE/NIC for 2006-07 and 2007-08 is allowed in part, and those penalties are reduced to a total amount of **£8,338.49**, as set out in paragraph 71 above;

(8) the Appellant's appeal against the penalties for failure to pay PAYE/NIC for 2008-09 and 2009-10 is allowed in part, and those penalties are reduced to a total amount of **£8,036.40**, as set out in paragraph 76 above;

(9) the Appellant's appeal against the penalties for failure to pay VAT on undeclared sales of cigarettes in VAT periods 03/06 to 03/09 is **£1,566**, as set out in paragraph 81 above; and

(10) the Appellant's appeal against the penalties for failure to pay VAT on undeclared sales of cigarettes in VAT periods 06/09 to 03/10 is **£317**, as set out in paragraph 84 above;

(11) the Appellant's challenge to interest charged on these outstanding amounts is dismissed for lack of jurisdiction.

88. These findings are additional to those in the 21 June 2018 decision.

89. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

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