Neutral Citation: [2024] UKFTT 00489 (TC)

Case Number: TC09187

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/00041

PROCEDURE – application to bar HMRC – refused – application for HMRC to admit additional evidence – allowed – application for Appellant's costs – allowed

Heard on: 12 September 2023
Judgment date: 22 May 2024

Before

TRIBUNAL JUDGE AMANDA BROWN

Between

DANIEL WITTON

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Michael Avient, of Counsel instructed by Simmons Gainsford LLP

For the Respondents: Mr Dave Lewis litigator of HM Revenue and Customs' Solicitor's Office

DECISION

REVIEWED DECISION

1. This document is the decision of the Tribunal following the review of the decision originally released to the parties on 15 November 2023. The review was carried out pursuant to the Tribunal's powers under rule 41 Tribunal Procedure (First-tier Tribunal) Tax Chamber Rules 2009. The review was undertaken following receipt of an application for permission to appeal from the Appellant. The reasons for the review are set out in a decision previously released to the parties on 22 February 2024 attached as annex 1.

INTRODUCTION

2. With the consent of the parties, the form of the hearing was Video using the Tribunal video hearing system. A face-to-face hearing was not held because it was expedient not to do so. I was provided with a bundle of documents prepared for the full hearing of 2574 pages, and two supplemental bundles of 106 pages and 24 pages, together with skeleton arguments from both parties.

3. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

BACKGROUND

4. HM Revenue & Customs' (**HMRC**) primary power to recover unpaid PAYE liabilities is against the employer. However, pursuant to regulation 72 Income Tax (Pay As You Earn) Regulations 2003 (for income tax) and Social Security Contributions (Transfer of Functions) Act 1999 (for National Insurance Contribution (**NICs**), HMRC have the power to determine that where an employer has wilfully failed to deduct income tax and/or NICs prior to payment being made to the employee the income tax/NICs may be recovered from the employee provided that the employee knows that the employer has wilfully failed to make the relevant deductions.

5. The applications set out in paragraph 7. below arise in connection with the appeal of Daniel Witton (**Appellant**) against the decisions of HMRC that together require him to pay income tax and NICs in the sum of £424,930.50 in connection with payments made to him by Direct Sharedeal Limited (**DS Limited**) in tax years ended 5 April 2007 through to 5 April 2011. In respect of tax years ended 5 April 2009 – 2011 the Appellant was an employee of DS Limited and HMRC have invoked the powers identified in paragraph 4. above.

6. The proceedings are well progressed. Lists of documents and witness statements have been served and the matter is ready for listing, but no hearing has been listed.

7. This hearing was listed to consider the following applications:

(1) The application dated 9 June 2022 made by HMRC to amend their list of documents to include two documents namely:

(a) An email chain between HMRC and the liquidator of DS Limited between 2 July 2018 and 31 August 2018;

(b) Internet news article concerning the disqualification of the Appellant as a director.

(2) The Appellant's objection to HMRC's application at (1).

(3) The application dated 1 August 2022 made by the Appellant that HMRC be barred, pursuant to rule 8(3)(c) and rule 8(7)(a) Tribunal Procedure (First-tier Tribunal)

(Tax Chamber) Rule 2009 (**FTT Rules**) from participation in the proceedings such that HMRC be precluded from evidencing or arguing that DS Limited had wilfully failed to deduct income tax and NICs from the payments made to the Appellant.

(4) HMRC's objection to the Appellant's application at (3) above.

(5) The application dated 16 November 2022 made by HMRC to admit a second witness statement of Ms McGuigan (the officer responsible for the decisions under appeal) and exhibited documents.

(6) The Appellant's objection to HMRC's application at (5) above.

(7) The application dated 9 January 2023 for costs pursuant to rule 10(1)(b) FTT Rules.

(8) HMRC's objection to the Appellant's application at (7) above.

THE LEGISLATION

8. In summary, the relevant FTT Rules are:

(1) Rule 2 – the overriding objective pursuant to which I must deal with these applications fairly and justly including dealing with them in a way which is proportionate to the importance of the case, the complexity of the issues and the costs and resources of each party, avoiding unnecessary formality, and ensuring participation of both parties.

(2) Rule 5 – general case management powers permitting me to extend time for compliance with directions and permitting a party to provide documents.

(3) Rule 8(3)(c) and (7) – providing for a party to be excluded (struck out or barred) where I consider that the position adopted in the proceedings has no reasonable prospect of succeeding.

(4) Rule 10(1)(b) – the power to award costs against a party whose conduct in the proceedings is unreasonable.

(5) Rule 15 – powers concerning matters of evidence.

THE APPROACH

9. The Appellant urged me to consider the barring application (i.e. paragraph 6(1)) first. It was contended, by reference to the Upper Tribunal (**UT**) judgment in *HMRC v Stephen West* [2018] UKUT 0100 (TC) (***West***), that HMRC bore the burden of proving that DS Limited had wilfully failed to deduct income tax and NICs from the payments made to the Appellant. As HMRC had adduced no evidence, either in their list of documents or in the first witness statement of Ms McGuigan, meeting the burden on them in this regard then, applying the relevant test for issue of summary judgment (accepted as applying to the Tax Tribunal in *The First De Sales Ltd Partnership and others v HMRC* [2018] UKUT 396 (TCC)) (***First De Sales***), there was no reasonable prospect of HMRC succeeding in meeting the burden on them such that the Appellant's appeal must necessarily succeed. The necessary consequence was therefore that HMRC should be barred from further participation in the proceedings.

10. HMRC's principal defence to the barring application was that they did not accept that the burden of proof lay on them to establish that there had been a failure by DS Limited to make the relevant PAYE and NICs deductions. They directed my attention, in this regard, to the FTT judgment in *Marsh and Price v HMRC* [2016] UKFTT 359 (TC) (***Marsh***) and contended that as the burden fell on the Appellant to show that there had been a relevant deduction the absence of evidence led by them to prove that point did not affect their prospect of success in the appeal. However, and in any event, they contended that I should consider

their application to admit additional evidence either in advance of, or in the round with the barring application and determine the outcome of them both by reference to the overriding objective. HMRC contended that applying this approach there was no basis for barring them from the proceedings as any deficiency in the evidence is remediated by admitting the witness statement and that the balance of prejudice in refusing to admit the statement weighed so heavily in their favour that it should be admitted.

11. Dealing firstly with where the burden of proof lies on the question whether or not there was a failure to deduct income tax and NICs prior to payment to the relevant employee (and whether that failure was wilful). It is plain to me that it lies with HMRC. Paragraphs 67 and 72 in *Marsh*, relied on by Mr Lewis, do not, in my view, support his submission that the burden is on the Appellant to show that there was deduction by the employer or that the failure to deduct was wilful. In that case HMRC had provided the Tribunal with P35 forms (the employer annual PAYE return) and P14s (which match the employee P60) which demonstrated the PAYE and NICs had not been deducted and had not been accounted for to HMRC. HMRC had therefore met the burden of proof on them. The Appellants then sought to contend, despite the evidence indicating otherwise, that deductions had, in fact, been made. In that context the Tribunal stated that the Appellant must prove that despite clear evidence to the contrary there had in fact been a deduction.

12. *Marsh* does not therefore assist HMRC in the present case where they have not met that prima facie burden. In any event, *Marsh* predates the judgment in *West* which is, in any event, an UT judgment. *West* is clear that the FTT in that case was right to consider that HMRC could only succeed if it can establish (on the balance of probabilities) that on making the payment to the employee the employer had failed to deduct PAYE and NICs and had done so wilfully. HMRC's position on *Marsh* was also contrary to the pleaded position at paragraph 70(a) which accepts that the burden rests with them.

13. The only evidence on which it appears that HMRC can rely to meet the burden on them, unless the witness statement and exhibits are admitted, is the notes of the COP 9 interview on 17 July 2017. The interview notes record that the Appellant stated that "undeclared income may have arisen from 1 May 2008 onwards" and "it is entirely possible that the company did not make all the necessary deductions from the payments I received". On the basis of this statement HMRC have asserted that at all times prior to the barring application, they understood that DS Limited's failure to make the relevant deductions was not in dispute and/or that the interview notes were evidence sufficient to meet the burden on them as reflected in paragraph 70(a) of their statement of case. At least implicitly, HMRC appeared to consider that there was no need for further evidence (in the form of P35/P14s or otherwise) to meet the burden of proof on this question.

14. I must decide whether it is right to consider the barring application in isolation or whether I should consider the application to admit the additional witness statement and exhibits first or at least in the round.

15. In this context the Appellant contends that considering the applications in the round does not help HMRC. In the first instance the Appellant contends that HMRC have not met, and cannot satisfy, the conditions derived from the Upper Tribunal judgment in *Martland v HMRC* [2018] UKUT 178 (TCC) (***Martland***). Secondly, they contend that the evidence is insufficient to meet the burden on HMRC, particularly for the years other than tax year ended 5 April 2011. HMRC did not respond in any material way to the challenge on the *Martland* principles.

16. Having considered the submissions of the parties on the correct approach I consider that the overriding objective can only be met by stepping back considering both the application to

admit the second witness statement of Ms McGuigan and the exhibits and the barring application in the round. From a practical perspective I consider the merits of each of HMRC's applications on its own merits and then the barring application. Finally, I determine the costs application.

LATE APPLICATION TO ADMIT EVIDENCE

17. The test to be applied in respect of HMRC's application to amend the list of documents (application at 6(1)) and to admit the second witness statement and the exhibited documents (application 6(3)) is, as the Appellant contended, set out in *Martland*. The UT summarised the approach taken by reference to the relevant authorities as:

> "[40] In *Denton*, the Court of Appeal was considering the application of the later version of CPR Rule 3.9 above to three separate cases in which relief from sanctions was being sought in connection with failures to comply with various rules of court. The Court took the opportunity to "restate" the principles applicable to such applications as follows (at [24]):
>
> > "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' ... If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b) in Rule 3.9(1)]"
>
> [41] In respect of the "third stage" identified above, the Court said (at [32]) that the two factors identified at (a) and (b) in Rule 3.9(1) "are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered.
>
> [42] The Supreme Court in BPP implicitly endorsed the approach set out in Denton. That case was concerned with an application for the lifting of a bar on HMRC's further involvement in the proceedings for failure to comply with an "unless" order of the FTT
>
> [43] … The clear message emerging from the cases – particularised in *Denton* and similar cases and implicitly endorsed in *BPP* – is that in exercising judicial discretions generally, particular importance is to be given to the need for "litigation to be conducted efficiently and at proportionate cost", and "to enforce compliance with rules, practice directions and orders". …"

18. Neither of HMRC's applications apply the *Martland* principles.

Application to amend the list of documents

19. The explanation for the application referred to amend the list of documents to include two additional documents was that the documents were identified when preparing the witness statement.

20. The Appellant's objection is on the grounds that 1) the application was made without supporting witness statement and 2) the evidence itself it inadmissible.

21. Strictly, *Marland* applied to this application. However, the application succeeds at the first stage. HMRC did not fail to comply with a direction. The direction was to serve a list of documents and it met that direction. However, when preparing the list of documents it did not include the documents which they now wish to add. The documents were identified as

the witness statement was prepared. This is routine in tax appeal. Most commonly parties would exhibit such documents to the witness statement, and the documents would thereby be admitted. There may be a debate in the context of Civil Procedure Rules as to the necessity for the formalities associated with making an application to amend the list of documents in respect of such documents; however, this Tribunal is not bound by such formalities and is intended to be a more informal and flexible procedure ensuring its accessibility to the parties. There is certainly no requirement that an application to amend be supported by its own witness statement. I do not consider that there was a serious or significant default in identifying documents during the course of the preparation of the witness statement and then applying to amend the list of documents.

22. I have considered the nature of the documents and the Appellant's objection to their admissibility. The Appellant contends that the documents are irrelevant and that the second document should be excluded on the grounds that it is hearsay.

23. Rule 15(3) FTT Rules empower the Tribunal to admit evidence which would not be admissible in a civil trial. I am not therefore bound by the strict rule on evidence. I do not consider it can be said that the documents are irrelevant, they pertain to the Appellant's involvement with DS Limited and information obtained from the liquidator of DS Limited. As such they should not be excluded. The weight to be placed on such documents and associated evidence will be a matter for the Tribunal hearing the case.

24. I therefore grant HMRC's application to amend its list of documents and refuse the associated objection.

Application to admit second witness statement of Ms McGuigan and exhibited documents

25. The application for late service of the witness statement contends that prior to the barring application HMRC were not aware that the Appellant contested that DS Limited had not made the relevant deductions, and that HMRC understood the scope of the dispute to be the Appellant's knowledge that DS Limited had wilfully failed to make the relevant deduction. HMRC claim that there was no prejudice to the Appellant in admitting the new evidence.

26. The Appellant objects to the application on the basis that it is predicated on a misrepresentation of HMRC's knowledge of the dispute as set out in the pleadings and, in any event, when the *Martland* principles are applied the application must fail.

27. I consider the various points made by each of the parties through the application of the three *Marland* steps.

28. Is there a substantial and serious delay?

(1) HMRC's application to admit the new witness statement and exhibits was made on 16 November 2022. The witness statements were served on time on 8 June 2022. It is therefore appropriate to calculate the delay as from 8 June 2022 and HMRC's application was 161 days late.

(2) The Appellant refers (as HMRC frequently do in application made by taxpayers seeking to bring late appeals or in respect of late compliance) to the UT judgment in *Romasave (Property Services) Ltd v HMRC* [2015] UKUT 254 (TCC) (***Romasave***) in which the UT stated that, in connection with a late appeal, the period of 3 months was both serious and significant given the statutory time limit of 30 days.

(3) I note that *Romasave* concerned the breach of a statutory deadline whereas here the failure was to fully meet the obligations of a Tribunal direction to serve witness

statements on or before 8 June 2022. Such witness statements being presumed to address all factual issues which need to be proven in the appeal. Whilst compliance with statutory deadlines and Tribunal directions is important it cannot be said here that there was a blatant disregard of the deadlines. HMRC contend that they had not understood they needed to prove an issue because it was not, as they understood it, in dispute and/or they relied on the statements in the COP 9 interview.

(4) HMRC assert that the application was said to have been prompted by the barring application at which point it was clear to them that they needed to bring evidence proving an issue which they had previously considered to be accepted. However, despite a very substantive response to the barring application having been served on 5 September 2022 the application to admit the witness statements and exhibits was then not made for a further 72 days.

(5) In the circumstances I consider that the delay is both serious and significant.

29. What is the reason for the delay?

(1) As indicated, HMRC contend that they were not aware that the Appellant disputed that DS Limited had failed to make the relevant deductions. However, they provide no explanation at all for the 72-day delay after the barring application was made.

(2) The Appellant takes great issue with that position.

(3) I have a degree of sympathy with both parties concerning whether the position on DS Limited having made the deduction was admitted. Each party viewed the correspondence from their own perspective and not that of the other party. The Appellant's position at interview and in correspondence was, in my view, ambiguous:

> (a) In the COP9 interview on 17 July 2017 the Appellant stated that "undeclared income may have arisen from 1 May 2008 onwards" and "it is entirely possible that the company did not make all the necessary deductions from the payments I received".
>
> (b) The appeal to HMRC against the discovery assessments for years ended 5 April 2009 – 2011 were originally made by reference to grounds which were stated to be on the same basis as those for the earlier years, years in which the Appellant was not employed by DS Limited and in respect of which no question of deduction could therefore be said to arise. For those earlier years the Appellant disputes HMRC's entitlement to assess him as he contends that the discovery assessments are out of time.
>
> (c) HMRC's view of the matter was clear that they did not believe that the Appellant challenged receiving payments in respect of which no deductions had been made.
>
> (d) The notice of appeal to the Tribunal then stated "HMRC have failed to discharge its burden of proof that Condition B of regulation 72 has been met" and "with regard to the regulation 72 assessments for the years 2008/9 to 2010/11, HMRC have failed to satisfy the burden of proof that the Appellant had knowledge that the employer wilfully failed to deduct…"

(4) HMRC interpreted what was said by the Appellant as accepting that there had been no deduction but challenging that he knew of a wilful failure to deduct and/or the quantum of the excess. The Appellant considered it had made its position clear in the grounds of appeal submitted to the Tribunal. However, it is my view that whilst from

the perspective of the writer the position may have been considered to be clear in the context of the historical communications HMRC's understanding of the absence of a dispute was not wholly unreasonable.

(5) However, stepping back and viewing the position in the round I consider that the reason offered by HMRC for the delay is not a sufficiently good reason to excuse the 72-day delay between the making of the barring application and their application to adduce further evidence.

30. In all the circumstances should I allow the application?

(1) First when undertaking the balancing exercise particular importance should be given to the requirement to enforce compliance.

(2) However, this is not a case in which HMRC failed to serve witness statements. They took the not unreasonable view that the question as to whether DS Limited had made deductions was not a matter in dispute. Whilst, following *West* the burden falls on HMRC to establish that no deduction was made (and that it was wilful) there was at least some evidence that there was no deduction in the form of the somewhat equivocal acceptance in interview to that effect.

(3) I take account of the ambiguous language used in correspondence which certainly indicated in the early stages of the correspondence that the Appellant did not challenge that DS Limited had failed to make deductions and account for them to HMRC. Whilst not a good reason permitting me to determine the application in HMRC's favour without moving on to consider all the circumstances it is a relevant circumstance.

(4) The appeal is ready for listing but had not been listed. No hearing date is prejudiced by admitting the evidence. The evidence is focused and not voluminous.

(5) The prejudice to the Appellant in now admitting the evidence is not significant, it means that they face the case which they anticipated at the start. It potentially deprives him of an easy win in circumstances where he received very significant payments from his employer without any form of paperwork by way of pay slips etc. His statement that he was not aware that he should have expected payslips and other documentation is all but incomprehensible but is a matter proper to the Tribunal hearing the appeal.

(6) In contrast the prejudice to HMRC is very significant as they will be precluded from introducing the evidence which they consider meets the burden of proof which rests with them. The potential prejudice to the treasury is also significant.

31. Having taken account of these factors and circumstances into consideration and in exercise of my discretion in accordance with the overriding objective I determine that the application identified at paragraph 6(3) above be granted and the associated objection refused.

BARRING APPLICATION

32. The approach to be taken in respect of the barring application is that derived from *First De Sales*:

(1) The question is whether HMRC has a "realistic" as opposed to a "fanciful" prospect of successfully defending the appeal.

(2) HMRC's case must therefore have some degree of conviction, in that it is more than merely arguable.

(3) In answering the question, no "mini trial" must be conducted.

(4) It is not necessary to take at face value assertions, without analysing what is said, particularly if contradicted by contemporaneous documents.

(5) Consideration should be taken not only of the evidence available at the time the application is made, but also what evidence could reasonably be expected to be available at the hearing.

(6) The tribunal should not make a final decision "where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence".

33. I have decided to admit the second witness statement and exhibits however, I note that on balance I would not have barred HMRC even were I not to have admitted the witness statement.

34. HMRC rely on what they contend to be an admission in the COP 9 interview as demonstrating that DS Limited did not deduct income tax and NICs. To determine whether the comments in the interview are sufficient to meet the burden on HMRC or even to establish whether their reliance on such evidence is "fanciful" would essentially require me to try that issue in isolation and without the benefit of oral evidence likely to be available at a full trial regarding the interview. To attempt to evaluate the scope of the asserted admission is not a matter which is appropriate for me to undertake as part of a barring application.

35. However, having admitted the documents and witness statement I have no hesitation in refusing the barring application. What weight to put on the various pieces of evidence and a determination of whether the evidence in the witness statement, when taken together with the over evidence available, is sufficient to meet the burden of proof is a question to be determined at the substantive hearing. The Appellant will have the full opportunity to raise all the points on the relevance of the evidence at that time.

36. I refuse the barring application.

COSTS

37. The Appellant has applied for the costs of bringing the barring application and various objections raised to HMRC's applications. It does so on the basis that HMRC has acted unreasonably in these proceedings.

38. In determining the costs application I apply the principles directed by the UT in *Market & Opinion Research International Ltd v HMRC* [2015] UKUT 12 (TCC) which in summary provide:

(1) Unreasonable conduct must relate to the proceedings themselves and may represent a single act or failure;

(2) To give rise to a direction to pay costs the conduct need not be "wholly" unreasonable;

(3) The focus is on the standard of handling the case not on the quality of the underlying decision and it will not be unreasonable just to be wrong;

(4) Unreasonable costs orders should not be a "backdoor" to circumventing the general costs rules for standard appeals that each party bears their own costs.

39. Whilst it might appear unusual to grant costs where all applications are lost; applying the above principles I consider that it is appropriate to grant a costs award against HMRC in respect of the costs sought by the Appellant in bringing the barring application and the objection to the admission of the witness statement but not the objection to the amendment to the list of documents.

40. Before me HMRC sought to argue that they did not bear the burden of proving a wilful failure to deduct by DS Limited a submission that ran contrary to the terms of the statement of case. Conduct I consider to be unreasonable. Further, the application to admit the witness statement was deficient as it completely failed to address *Marland* as did their submissions before me. Again I consider such conduct to be unreasonable. This conduct justifies an award of costs.

41. I have reviewed the summary costs schedule. HMRC made no submission on the costs claimed. I consider that the rates and hours claimed in respect of solicitors' time are broadly reasonable (noting that the length for the hearing was considerably underestimated). No breakdown has been provided of Counsel's time however, an in light of the hearing lasting a full day I consider it reasonable to award the Appellant their costs and I summarily assess such costs in the sum of £12,500.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

42. 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.

AMANDA BROWN KC
TRIBUNAL JUDGE

Release date: 22 May 2024

APPENDIX 1

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2021/00041

DECISION
ON AN APPLICATION FOR PERMISSION TO APPEAL
IN THE CASE OF

DANIEL WITTON **Appellant**

-and-

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS **Respondents**

1. On 15 November 2023, the Tribunal issued the decision in this appeal (**Decision**). On 9 January 2024 the Appellant made an in-time application for permission to appeal the Decision.

2. The Appellant seeks permission to appeal on two grounds:

   (1) That there was no evidence to justify my conclusions at paragraphs 28(3)(c), 28(4) and 29(2). They contend that absent HMRC having pleaded the purported admission regarding wilful failure by DS Limited there is no evidence on which HMRC can meet the burden on them to establish that condition B of Regulation 72 is met such that the barring application should be allowed. They also contend that the same evidential failure caused an error of law in my assessment of the *Martland* test when considering admission of Ms McGuigan's second witness statement.

   (2) The terms of paragraph 39 of the Decision ran contrary to the factual findings in paragraphs 28(3)(c), 28(4) and 29(2) supporting the argument at 2(1) above.

3. I considered in accordance with Rule 40 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 whether to review the Decision in accordance with rule 41.

4. I determined that it was appropriate to review paragraph 39 of the Decision. In light of the review I propose to reissue the Decision with a redrafted paragraph 39. As I am reissuing the decision, I have also corrected a number of typographical errors including the deletion of an errant paragraph (a) after the heading Barring Application.

5. Paragraph 39, concerning the Appellant's application for costs, read:

> "39. Before me HMRC sought to argue that until they received the barring order they did not appreciate that the Appellant challenged the non-deduction by DS Limited. However, that submission ran contrary to the

terms of the statement of case. Further, the application to admit the witness statement was deficient as it completely failed to address *Marland*."

6. Following review of that paragraph I consider that it appears to be inconsistent with paragraphs 28 and 29 as asserted by the Appellant under ground 2 of his permission application. It was not intended to be so inconsistent.

7. As set out in paragraph 28(3) of the Decision I have a degree of sympathy with both parties in that I consider that there was a possible miscommunication between them as to whether it was accepted (and thereby need not be proven) that there was a wilful failure by DS Limited to deduct tax and NICs through payroll from the payments made to the Appellant. Following review I have become more cynical as to the integrity of the Appellant in the management of the dispute and tend more to the view that the Appellant saw an opportunity for a "quick win" by asserting an initially unintended interpretation of their grounds of appeal. However, I do not consider it appropriate to revise my sympathetic position but consider that the evidence plainly supports the conclusion reached.

8. In this regard the evidence of the scope of the dispute is found in the following documents:

(1) Formal Companies' House documentation regarding the Appellant's appointment as a director signed and dated by him on 2 May 2008 confirming, contrary to assertions made at certain points that the Appellant knew he was a director from appointment with the natural consequences expected to follow from such appointment.

(2) The COP9 disclosure admits that "underdeclared income may have arisen … During the period I was appointed a director at Direct Sharedeal Limited I was paid as an employee and believed that tax was deducted at source. … I believed I was being paid through the payroll and hence had no further obligation to tax. Please note however that I hold no records to verify the position such as payslips/P60s/P11Ds. It is entirely possible that the company did not make all the necessary deductions from the payments I received." A plain, and written, indication that there was no dispute as to a wilful failure to deduct in the context of the seriousness of a COP9 disclosure.

(3) The notes of the COP9 meeting on 15 November 2017, signed by the Appellant as an accurate record of the meeting record that the Appellant believed he was on the payroll, but received no payslips and that he kept no track of the amounts he was paid and did not compare the amounts received to the amounts said that he had invoiced DS Limited. Evidence that there was no rowing back from the formal written disclosure.

(4) Contrary Appellant's statement in interview it was then contended in the letter from his representatives dated 28 March 2018 that the Appellant only issued invoices for the period prior to becoming a director and assumed he was being paid through PAYE; and, again contrary to the admission that he had not been provided with formal payslips etc, that "he was just provided with details of the commissions he earned in that period". But no statement that the disclosure made that it was "entirely possible" that the company did not make the relevant deductions.

(5) In their letter of 11 November 2019 HMRC state: "The PAYE Regulations required Direct Sharedeal Ltd to pay all the tax deductible from your employment income together with the primary Class 1 NIC due on that income to HM Revenue & Customs (HMRC). Your employer did not do this. As a result … no tax was deducted from your income and your employer did not recover the primary Class 1 NIC payable by way of deduction from your income" (emphasis added). A clear position that there was no deduction of tax and NICs.

(6) In the direction notice issued to the Appellant on 21 September 2020 again HMRC state: "Your employer Direct Sharedeal Ltd did not deduct enough tax from relevant payments made to you." A letter of 24 September 2020 was sent in the same terms regarding Class 1 NICs" (emphasis added).

(7) The Appellant's appeal did not address either of these clearly stated positions or withdraw the position as set out in the COP9 disclosure. The grounds stated only "Our main grounds as to why we consider the decision to issue discovery assessments to incorrect (sic) follow those as detailed in out letter of 2 March 2020." As the letter of 2 March 2020 concerned assessments for income from self-employment there was no reference to the condition B requirements.

(8) HMRC confirmed their view of the matter (without further particularisation) on 20 October 2020.

(9) HMRC's review of 7 December 2020 narrates the relevant sections of the COP9 disclosure and summarises the letter of 11 November 2019 confirming that that letter stated: "no tax or national insurance contributions ("NIC") were deducted from your earnings from Direct Sharedeal Ltd". At paragraph 7.6 the review identifies:

> "Your accountants appealed against the Regulation 72 direction in your case, but did not specify their grounds. They did not argue that you did not receive the payments, or that you did not know that the company wilfully failed to deduct tax from them, so I can only assume that the appeal is made on the footing that the amounts specified are incorrect."

(10) At paragraph 7.16 the facts for concluding that the condition B requirements are met are set out including "you received payments from your employer knowing that they had failed to deduct tax under PAYE … Whilst you claim to have thought that tax was deducted at source, … the amounts involved are such that you can scarcely have failed to be aware that tax had not been deducted … My view is that you must have been aware that tax was not being paid on this income and you took no steps to correct the position …".

(11) Paragraph 7.17 states in terms: "Your accountants … have not … disputed the fact that no [NICs] deductions were made."

(12) Those statements were not addressed specifically in the Notice of Appeal which includes as ground (b):

> "HMRC have failed to discharge its burden of proof that Condition B of Regulation 72 has been met: to satisfy the burden that the Appellant had knowledge that the employer wilfully failed to deduct the amount of tax which should have been deducted from those payments. … As the Appellant believed that his pay was taxed at source and he had no personal involvement in the payroll operations of the Company, it cannot therefore be reasonably concluded that he had knowledge that his employer failed to deduct the correct amount of tax from his salary."

The terms of that ground whilst referring to HMRC's burden of proof but plainly focuses on knowledge of wilful failure rather than the wilful failure itself.

(13) HMRC's statement of case paragraphs 45 and 46 sets out the burden of proof:

> "45. The burden of proof is upon HMRC to demonstrate the wilful failure of the Company to deduct, and in the case of NICs, pay the tax and primary Class 1 contributions relevant to the determinations raised under Regulation 72 (5) Condition B of the Income Tax (PAYE) Regulations 2003 and

Section 8 (1) (C) Social Security Contributions (Transfer of Functions) Act 1999, respectively.

46. The burden of proof is also with HMRC to demonstrate that the Appellant knew of the wilful failure to deduct and pay to HMRC both income tax and NICs, respectively.

(14) And in respect of ground (b) states:

"70. The three issues relating to PAYE are:

a) On making the relevant payments, did the Company deduct the amount of tax which it should have deducted?

b) If not, was the company's failure to deduct wilful?

c) If so, did the Appellant receive the relevant payment knowing that the Company had wilfully failed to deduct?

71. HMRC contends that it is clear that there has been a PAYE failure. The Appellant was a director, and therefore, an employee of the company during these years and received considerable amounts of money from the company.

72. The company should therefore have deducted PAYE tax and NICs from the payments made to the Appellant during this period but failed to do so. The gross amounts were transferred to the Appellants (sic) bank account and he was not provided with any monthly payslips or form P60 at the end of the tax year detailing his gross pay and tax/NICs deductions for each of the three years.

73. The amounts of PAYE tax and NICs in respect of the payments to the Appellant were not deducted and paid to HMRC so there has been a PAYE failure by the Company.

74. What has to be considered is whether or not the PAYE failure is likely to have been wilful on the part of the Company and whether or not the Appellant would have known that the failure was wilful. The word wilful must be viewed in its normal context in that there was a deliberate choice/action in relation to what happened. Wilful is defined to be intentional and deliberate.

75. the company correctly deducted PAYE tax and NICs from payments made to other employees of the company so was aware of how the PAYE system operated yet failed to deduct PAYE tax and NICs from large payments made to the Appellant for a three-year period. HMRC contends that this was a wilful failure by the company.

76. HMRC submit that the Appellant had knowledge as the controlling mind of the company and therefore must have known the financial situation. He had complete control of the companys (sic) activities and would have been in a position to take money from the business whenever he wanted.

77. The Appellant became a director of the Company on 1 May 2008. The Appellant claims that did not know that he became a director until the following year. HMRC disputes this evidence as the Appellant signed on 2 May 2008 the form that was issued to Companys (sic) House declaring that he had become a director on 1 May 2008. This signed document clearly shows that the Appellant was well aware that he had become a director of the company on 1 May 2008 and not the following year as he contends.

78. The Appellant signed both the annual corporation tax accounts and statement of affairs. He was also responsible for the information contained on his personal self-assessment tax returns.

> 79. The Appellant was paid commission by the company and the payments were electronically transferred into his bank account by the Companys (sic) Glasgow Office. It must have been clear to the Appellant that he was receiving gross payments and aware that deduction of PAYE tax/NICs had not been made from these payments; he received no payslips or form P60 at the end of the year and again this would have been a clear indication to the Appellant that PAYE tax/NICs had not been deducted from the payments.
>
> 80. The Appellant contends that he presumed that the Companys (sic) office in Glasgow were correctly operating PAYE but despite receiving no evidence from the company that deductions had been made and the fact that gross payments were being transferred to his bank account he failed to query the position with the Glasgow office.
>
> 81. When the company went into liquidation the Appellant took control of the winding up proceedings. During this period, he authorised two payments of £2,500 to himself on 10 and 13 May 2011 via CHAPS transfer into his personal bank account. He was well aware that PAYE tax and NICs had not been deducted from these payments.
>
> 82. The Appellant failed to submit Self-Assessment Returns declaring the employment income he received from the company during this period. The Appellant again made the presumption that his accountant had submitted the relevant returns. Despite receiving late filing notices from HMRC on a regular basis during this period he failed to clarify the position with his accountant.
>
> 83. HMRC submits that the facts confirm that the Appellant would have known that the PAYE failure by the Company was wilful."

(15) On 1 August 2022 the Appellant sought to bar HMRC under Rule 8(3)(c) and (7) FTT Rules. The application is predicated on there being no documents relating to the failure by DS Limited to deduct and no evidence as to the validity of the directions to collect tax and NICs from the Appellant thus that there is no reasonable prospect of the HMRC succeeding in the appeal in term of the *First De Sales* test.

9. From these documents I confirm my findings at 28(3), 28(4) and 29(2) are justified on the evidence. It was not unreasonable for HMRC to have considered that the Appellant's dispute with the direction to collect and associated assessments concerned his knowledge of a wilful failure to deduct which he was prepared to and had admitted. HMRC had been abundantly clear that they considered that there had been a wilful failure to deduct, and this was never met nor challenged by the Appellant until the barring application was made on 1 August 2022.

10. However, and despite this, the statement of case summarises in paragraphs 3 – 44 all the evidence on which they concluded that there had been a failure to deduct, including, in particular, 13, 16, 17, 31, 40. The documentary evidence was listed in the list of documents and then supported by Ms McGuigan's first witness statement to similar effect (paragraphs 19(h), (i), (j), (k), 27, 47, 48, 49, 50) on which she may be cross examined in due course.

11. At paragraph 39 of my Decision I fell into error when I stated that HMRC's position that they had not appreciated the Appellant's position on a DS Limited's failure to deduct was contrary to their statement of case. At the hearing before me in September 2023 HMRC did introduce a contention, contrary to their statement of case, that they did not bear the burden of proving the requirements of condition B. It was that conduct I considered to be unreasonable and justified the costs claim in respect of the barring application. Costs were

awarded in respect of the application to admit the second witness statement of Ms McGuigan because HMRC did not address *Martland* either in the application itself or at the hearing.

12. Rule 41(3) requires that the parties be given an opportunity to make representations of any action I propose to take following my review. The parties have 28 days in which to make such representations, including, as appropriate, for the Appellant to renew its permission to appeal application should it wish to do so.

AMANDA BROWN KC
TRIBUNAL JUDGE
Release date: 22 February 2024