TC01420

Appeal number TC/2009/12000

INCOME TAX – Appeal against Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 determinations and Section 8 Social Contributions (Transfer of Functions) Act 1999 decisions and penalties – employer not accounting under PAYE for income tax and national insurance in respect of employees – had appellant failed to pay tax and national insurance due in respect of employees – yes – appeal dismissed

FIRST-TIER TRIBUNAL

TAX

AUSTIN MORAN **Appellant**

- and -

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

TRIBUNAL: Judge Aleksander (Chairman)
I B Abrams

Sitting in public at 45 Bedford Square, London WC1 on 28 June 2011

C McMeeken, an officer of HM Revenue and Customs, for the Respondents

The Appellant failed to attend the hearing and was not represented, but the Tribunal proceeded with the hearing, being satisfied that reasonable steps had been taken to notify the Appellant of the hearing and that it was in the interests of justice to proceed.

DECISION

1. This is an appeal against the Regulation 80 Income Tax (Pay as you earn) Regulations 2003 determinations ("Determinations") made for the tax years ending 5 April 2002 to 5 April 2005 in the amount of £28767.50, the decisions made under Section 8 of the Social Contributions (Transfer of Functions) Act 1999 ("Decisions") that £34,480.01 of national insurance contributions ("NICs") was payable and a determination of penalties of £28,459.00

2. The appeal was originally listed for hearing on 19 January 2010, but was postponed on the request of both the Appellant (Mr Moran) and the Respondents (HMRC). A further hearing date was fixed for 29 January 2010, but this hearing was also postponed at the request of HMRC because the relevant HMRC officer was already attending another appeal on that date. A hearing date of 6 April 2010 was then set, but was vacated at the request of both HMRC and Mr Moran's accountant as it clashed with prior commitments. A new hearing date of 26 July 2010 was then set, but was vacated at the request of Mr Moran as he had a court hearing on another matter on that date and a new hearing date of 22 November 2010 was fixed. An application was made by letter on 25 October 2010 by Mr Moran's accountant to postpone the hearing on the basis that there had been insufficient time to prepare for it. This application was refused, but was renewed at the hearing. At the hearing, the grounds of the application were changed, and were now on the basis that a witness was not available on the hearing date. The Tribunal agreed to postpone the hearing, and gave directions for witness evidence. Following a request by the Tribunal for dates to avoid, a revised hearing date of 28 June 2011 was given. On 16 June 2011, Mr Moran wrote to the Tribunal requesting that the hearing of his appeal be postponed again on the grounds that he had not received the documents required by the Tribunal's directions following the 22 November 2010 hearing. This application was refused, on the basis that the directions did not provide for the delivery of any documents additional to those already provided. The refusal was notified to Mr Moran by telephone, and he was informed that it was open to him to renew the application before the Tribunal at the start of the hearing. At the time the appeal hearing was due to commence, Mr Moran was not at the hearing venue. Accordingly the clerk attempted to call Mr Moran to find out what had happened. Mr Moran told the clerk that he was not attending the hearing as he did not have the documents relating to the appeal in sufficient time to be able to prepare, and that he wanted the hearing to be deferred.

3. The Tribunal was satisfied that Mr Moran was aware of the hearing and had the relevant papers in sufficient time to be able to prepare for it. The substantive hearing bundles had been provided to his accountant in advance of the November 2010 hearing date. A small additional bundle (comprising extracts from documents in the main bundles and spreadsheets collating information from the main bundles) had been sent to Mr Moran's accountant in good time before the hearing date. The Tribunal decided to go ahead with the hearing in the absence of Mr Moran in the interests of fairness and justice.

4. At the hearing, HMRC were represented by Mr McMeeken. The Tribunal heard evidence from two HMRC officers, Mr Andrew Ullyatt and Mr Simon Hughes. In addition the Tribunal had documentary evidence in the form of bundles. These included copies of written statements from Mr Mark Pearce, Mr John McConville and Mr Douglas White.

Legislation

5. Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 ("the PAYE Regulations") is headed "The determination of unpaid tax and appeal against determination. It states:

> (1) This regulation applies if it appears to the Inland Revenue that there may be tax payable for a tax year under regulation 68 by an employer which has neither been—
>
> (a) paid to the Inland Revenue, nor
>
> (b) certified by the Inland Revenue under regulation 76, 77, 78 or 79.
>
> (2) The Inland Revenue may determine the amount of that tax to the best of their judgment, and serve notice of their determination on the employer.
>
> (3) A determination under this regulation must not include tax in respect of which a direction under regulation 72(5) has been made; and directions under that regulation do not apply to tax determined under this regulation.
>
> (4) A determination under this regulation may—
>
> (a) cover the tax payable by the employer under regulation 68 for any one or more tax periods in a tax year, and
>
> (b) extend to the whole of that tax, or to such part of it as is payable in respect of—
>
> (i) a class or classes of employees specified in the notice of determination (without naming the individual employees), or
>
> (ii) one or more named employees specified in the notice.
>
> (5) A determination under this regulation is subject to Parts 4, 5 (other than section 55) and 6 of TMA (assessment, appeals, collection and recovery) as if—
>
> (a) the determination were an assessment, and
>
> (b) the amount of tax determined were income tax charged on the employer,
>
> and those Parts of that Act apply accordingly with any necessary modifications.

6. Section 8 of the Social Contributions (Transfer of Functions) Act 1999 is headed "Decisions by officers of Board" and states:

> (1) Subject to the provisions of this Part, it shall be for an officer of the Board—
>
> > (a) to decide whether for the purposes of Parts I to V of the Social Security Contributions and Benefits Act 1992 a person is or was an earner and, if so, the category of earners in which he is or was to be included,
> >
> > (b) to decide whether a person is or was employed in employed earner's employment for the purposes of Part V of the Social Security Contributions and Benefits Act 1992 (industrial injuries),
> >
> > (c) to decide whether a person is or was liable to pay contributions of any particular class and, if so, the amount that he is or was liable to pay,
> >
> > (d) to decide whether a person is or was entitled to pay contributions of any particular class that he is or was not liable to pay and, if so, the amount that he is or was entitled to pay,
> >
> > (e) to decide whether contributions of a particular class have been paid in respect of any period,

7. Section 98A(4) Taxes Management Act 1970 applies to the submission of end of year PAYE returns. For the relevant periods it stated:

> (4) Where this section applies in relation to a provision of regulations, any person who fraudulently or negligently makes an incorrect return of a kind mentioned in the provision shall be liable to a penalty not exceeding the difference between—
>
> > (a) the amount payable by him in accordance with the regulations for the year of assessment to which the return relates, and
> >
> > (b) the amount which would have been so payable if the return had been correct.

Background and facts

8. We find the background facts to be as follows:

9. Mr Moran is the sole proprietor of two pub businesses, one at The Fountain Inn and the other at The Cherry Tree.

10. In 2004 Mr John McConville visited the Citizens' Advice Bureau for advice because he had not received a correct P60 and had received no holiday pay from his employer Mr Moran. Mr McConville had worked at The Fountain Inn, Chichester. When his employment terminated in May 2004, he had been given a P60 only after he had requested it and the document showed incorrect (and greatly reduced) earnings. It was because of this anomaly that he went to the CAB. The CAB suggested that he should report the matter to the (then) Inland Revenue. Mr Ullyatt became involved with this matter and commenced an investigation into Mr Moran's PAYE compliance.

11. On 11 February 2005, Mr Ullyatt (accompanied by a Mr Finn) made an unannounced visit to The Fountain Inn with the intention of interviewing Mr Moran.

Mr Moran was not there, but he saw three members of staff, including the manager, Mr Chris Rudwick. On that same day (11 February 2005), Mr Hughes (accompanied by a Mr Hammond) made an unannounced visit to The Cherry Tree with the intention of interviewing Mr Moran. He met Mr Moran and gave him booklet COP3 and interviewed Mr Moran about his PAYE and NICs compliance. During the course of the enquiries, Mr Ullyatt and his colleagues subsequently interviewed Mr Moran and representatives from his accountants (DaVal Consultancy Services) on a number of occasions, both in face-to-face interviews and on the telephone. Mr Ullyatt also uplifted and reviewed Mr Moran's accounting and payroll records. In addition Mr Ullyatt interviewed various employees and former employees of Mr Moran.

12. During the initial meetings, Mr Moran described his payroll procedures and gave details of his employees. He consistently claimed that he complied with all PAYE and NICs requirements and had paid all tax due on the wages that he paid.

13. Mr Ullyatt (accompanied by Mr Hammond) interviewed Mr McConville on 15 July 2004 and subsequently (accompanied by Mr Hughes) on 28 June 2006. A formal statement was taken from Mr McConville at the June 2006 meeting on Form ECIT1. This statement and an authority to disclose were signed by Mr McConville, and copies were included in the Tribunal bundle. Mr McConville stated (and we find) as follows: Mr McConville commenced employment with Mr Moran at The Fountain Inn in June 2002 and his employment finished in May 2004. He worked for 45 to 50 hours per week. His basic pay was £260 net per week – but in busy weeks (such as Goodwood week) it could increase to £300 or £310 for the extra hours he worked. When he was dismissed in May 2004, he had been given a P60 only after he had requested it and the document showed incorrect (and greatly reduced) earnings. It was this anomaly that prompted him to go to the CAB for advice. In addition Mr McConville had applied for unemployment benefit, but was told he was not eligible as he had not paid NICs for the previous two years. In January 2006 Mr McConville applied for a job with Southern Railways and was asked to supply a reference. However Mr Moran refused to provide a reference unless Mr McConville withdrew the allegations made to the Inland Revenue. However Southern Railways then told Mr McConville that providing he could provide a character reference from someone else, they would not need a reference from Mr Moran.

14. Mr Ullyatt interviewed Mr Mark Pearce on 16 February 2005. A formal statement was taken from Mr Pearce on form ECIT1. This statement and an authority to disclose were signed by Mr Pearce, and copies were included in the bundle. Mr Pearce stated (and we find) as follows: Mr Pearce had been employed by Mr Moran as a barman/cellarman at The Fountain Inn from 27 June 2002 until 24 July 2004. He initially worked 55 hours per week and was paid £5 per hour (net) and received £275 per week net cash in hand. When Mr Moran acquired The Cherry Tree, Mr Rudwick took over as manager of The Fountain Inn. At that point his hours were reduced to 52.5 hours per week. He left the job following four days sickness, and when he returned he was told that his services were no longer required. He was given a letter and £500. Mr Pearce stated that the staff employed at The Fountain Inn were:

Darren – part-time barman

Colin – part-time barman and relief manager

Andy – full-time second chef

AN Other – chef

Chris Rudwick – chef and subsequently manager

John McConville – barman and waiter

15. Mr Ullyatt interviewed Mr Douglas White on 26 February 2005. A formal statement was taken from Mr White on form ECIT1. This statement and an authority to disclose were signed by Mr White, and copies were included in the bundle. Mr White stated (and we find) as follows: Mr White had been employed by Mr Moran as head chef at The Fountain Inn from 21 June 2003 until 4 July 2004. He worked 45 hours per week and received £300 per week net cash in hand. He said that he did not receive a payslip, no form P60 for 2003/4 and his P45 on leaving was incorrect. Mr White said that he worked with a chef called Andrew Clarke and a part-time kitchen porter. He left because he wasn't getting payslips which he needed to obtain a mortgage.

16. On 2 February 2006 Mr Ullyatt (accompanied by Mr Hammond) had a further meeting with Mr Moran and Mr Wade of DaVal Consultancy Services. Mr Ullyatt asked Mr Moran to explain inconsistencies in his payroll records as it appeared that payments had been made to staff that had not been properly accounted for in the payroll records. One example was that on 2 September 2001 the daily takings sheet showed £350 as being paid to Mr Rudwick as holiday pay, whereas only £75 was put through on the payroll. Mr Ullyatt also showed Mr Moran an unsigned chit kept with the daily takings records showing £85 being paid to "Marianne" for cleaning – but no such payment was recorded in the payroll. Mr Ullyatt questioned various other payments. Mr Moran denied that there had been any payments made to employees that had not gone through the payroll. Mr Ullyatt then asked Mr Moran about the P45/P46 procedure and referred to the 630T code used for Mr Rudwick. Mr Ullyatt noted that the 630 code used to apply to married couples and was last used in 2000/01. Mr Ullyatt told Mr Moran that HMRC records suggested that the PAYE procedures had not been properly followed, as the HMRC record of live employees did not show the employees engaged by Mr Moran. In particular Mr Rudwick's employment by Mr Moran had only come to light following a claim by Mr Rudwick for Tax Credits. Mr Ullyatt warned Mr Moran might be liable for penalties, and advised him of his rights under the Human Rights Act. He provided Mr Moran with a copy of leaflet IR109. Mr Ullyatt invited Mr Moran to co-operate with his review and the potential for abating penalties if he co-operated and gave full disclosure. Mr Moran then had to leave the meeting to deal with customers, and Mr Ullyatt continued the meeting with Mr Wade, going through other anomalies, including the number of hours apparently worked by staff during the week. Mr Ullyatt had prepared a spreadsheet illustrating the hours being paid for by Mr Moran, which showed that The Fountain Inn had required some 200 hours per week, but this had dropped over time to as low as 24 hours per week, even though this was a busy city centre pub open 84 hours per week. Although The Fountain Inn advertised, and was recommended in a pub guide, as known for its food, live music and friendly staff, according to the wage records its staff amounted only to Mr Rudwick and a cleaner.

17. Mr Ullyatt also referred Mr Wade to Mr Hughes' notes of the meeting he had with Mr Moran in February 2005, showing that Mr Moran had said that a Ms Foster was paid £138 per week, but the payroll records showed gross pay of only £90 per week. Mr Rudwick had been heard to claim that he earned £400 per week, but the payroll records showed only £135. Mr Ullyatt said that he would normally be cautious about claims like these, but they were consistent with the information received from three other former employees that their earnings were greater than the figures recorded in the payroll. Mr Ullyatt asked Mr Wade to review the accuracy of the payroll with Mr Moran and reminded him about the abatement process with regard to penalties for disclosure and co-operation. Provision of the real payroll records and rotas by Mr Moran would assist in reducing any penalty.

18. Mr Wade then left to talk to Mr Moran. Mr Moran then returned with Mr Wade. Mr Moran denied that there were any errors, and said that he could obtain statements to show that the employees were not telling the truth. At the conclusion of the meeting Mr Moran made a payment of £500 on account of tax.

19. Following that meeting, Mr Ullyatt supplied Mr Moran's accountant with copies of the spreadsheets. There were then a series of telephone calls and correspondence between Mr Ullyatt and Mr Moran's accountants. Eventually in April 2006, the accountants faxed to Mr Ullyatt some notes explaining some of the anomalies. In brief these were that the catering at The Fountain Inn was initially contracted out to "Dave and Carol" and Mr Moran's staff (S Twine) waited at tables. S Twine left and was replaced by Mr McConville and Mr Pearce. Catering was subsequently taken back and Mr White engaged as head chef. Mr McConville was eventually fired, and both Mr Pearce and Mr White left to be replaced by "Colin and Karen" a team – who mistakenly thought they were self-employed, but that this error was rectified and PAYE paid to HMRC. They worked about 50 hours per week between them. The £7.50 hourly rate quoted for Mr Rudwick in one of Mr Ullyatt's spreadsheets was wrong. Before taking over The Cherry Tree, Mr Moran worked approximately 50 hours per week. After The Cherry Tree opened, Mr Moran spent approximately 26 hours per week at The Fountain Inn. Mr Moran conceded that he would not have been able to cover the bar and restaurant at The Cherry Tree with the wages recorded as paid, and this was explained by the use of part-time help. Mr Moran used to do the cleaning himself at The Fountain Inn, but when The Cherry Tree opened he engaged a cleaner paid £80 per week.

20. Further correspondence and discussions followed. Mr Ullyatt repeatedly asked Mr Moran and his accountant to provide a breakdown of staff employed and the hours worked, so that determinations and decisions could be prepared on the basis of actual figures rather than using best judgment. However as these were not forthcoming, in October 2006 Mr Ullyatt issued "best judgment" Determinations and Decisions in respect of underpaid PAYE and NICs on the following basis:

(1) Staff received net pay of £5.00 per hour – based on the information received from the former staff who claimed they received this net hourly rate

(2) The £5.00 was grossed up for income tax and NICs

(3) The employees were paid for working 25 hours per week – based on business records which indicated Mr McConville and Mr Pearce worked these hours, even though when interviewed they said they worked significantly more

(4) The kitchen and bar required these hours to be worked throughout the year in addition to those employees recorded on the payroll – based on the numbers of additional staff reported by the former employees and using his best judgement as to the hours that might reasonably be needed

(5) There were three kitchen staff and three bar staff not shown in the payroll records

(6) Each member of staff was entitled to full personal allowances calculated on a "week 1" basis

(7) Full allowances would be allowed to the additional staff – on the basis that they might work less hours than estimated and also some might not have allowances available – to arrive a reasonable and proportionate estimate.

21. On 15 November Mr Ullyatt wrote to Mr Moran with his decision as regards penalties – which was that penalties be levied at the rate of 45% of the culpable income tax and NICs. An abatement of 10% was given for disclosure – on the basis that although some documents were provided, there were discrepancies when compared with the payroll records, and despite being presented with strong evidence of discrepancies, no disclosure had given in relation to any of the concerns raised. An abatement of 25% was given for co-operation – on the basis that although there had been some co-operation, a payment on account had been made, and PAYE codes had been rectified, when asked questions about the business or payroll, the answers given were often inconsistent or implausible. An abatement of 25% was given for seriousness – on the basis that there had been a serious failure to operate PAYE, and pressure had been placed on employees to withdraw statements given by them to HMRC. The total abatement was 55%, giving a penalty rate of 45%, and the resulting penalty of £28,459.00.

The Appellant's submissions

22. Although Mr Moran did not attend the hearing and was not represented, the correspondence in the bundles sets out the reasons why Mr Moran challenges the Determinations, the Decisions and the penalty.

23. The comments raised by and on behalf of Mr Moran in correspondence with Mr Ullyatt were ultimately as follows:

(1) Mr McConville had been dismissed from various employments for a variety of reasons, including theft, and was not therefore a reliable source of information

(2) The position as set out in Mr Ullyatt's spreadsheet for 2001/2 was agreed

(3) Two additional notional staff members for kitchen and bar cover were accepted on a "without prejudice" basis and on the basis that no adjustments were made to the earnings paid to Mr White and Mr Pearce for the relevant periods

(4) That no additional income tax and NICs were due in respect of Mr Clarke

24. Letters were obtained by Mr Moran and his accountants from Mr Pearce, Mr Clarke and Mr McConville, which were forwarded to Mr Ullyatt.

25. The letter from Mr Pearce, dated 23 April 2006 is addressed to Mr Scollay of DaVal Consultancy Services. It says that he (Mr Pearce) had not been interviewed by the Revenue, that he had not "given any statements to anyone that would lead them to believe that my wages were in any way incorrectly dealt with my Mr Moran".

26. The letter from Mr Clarke, is as follows:

> "6, Yardbrook
> Lavent
> Nr Chichester
> West Sussex
>
> 02/11/2009
>
> To whom it may concern
>
> This is to state that when I worked at the fountain inn in the kitchen it was mostly at lunchtime's approx 5 mornings per week and I earned about £5.50 per hour.
>
> I was never head chef, and never wanted to be. This was the job of Mr Chris Rudwick.
>
> Yours sincerely
>
> [signed] A Clark"

27. As regards this letter, Mr Ullyatt told the Tribunal that according to official databases available to HMRC a "Clarke" (not "Clark") lives at "11 Yarbrook" (not "6 Yardbrook"). But importantly, Mr Ullyatt noted that the letter confirmed that Mr Clarke worked at The Fountain Inn (there was no reference to Mr Clarke in any of the business's payroll records) and that Chris Rudwick was the head chef. This was consistent with the evidence of Mr Pearce and Mr White.

28. The letter from Mr McConville was undated but annotated in manuscript as "received by Mr Moran June 2008". In the letter Mr McConville apologises for causing Mr Moran trouble. The core paragraphs read as follows:

> "Unfortunately that visit to the CAB resulted in my being contacted by Inland Revenue but at the time I was still very angry with Mr Rudwick and therefore repeated my allegations which I now realise I should not have done. Having subsequently received compensation and checked my final tax forms received from you some while ago, I am satisfied that the weekly wages previously paid to me have indeed been fully reflected in my forms. I am very sorry that my allegations implied otherwise.

> On a related matter I confirm that Andrew Clarke was never a main chef at the pub, while I was working there, and everyone knew that he was just a lunchtime kitchen assistant."

29. As regards this letter, Mr Ullyatt commented to the Tribunal that Mr McConville approached the Inland Revenue on the advice of and following his meeting with the CAB – rather than the Inland Revenue contacting him. In addition, when interviewed by Mr Ullyatt, Mr McConville had stated (at both interviews) that on leaving The Fountain Inn he had been paid £260 and given a tax form (he said P45 at one interview and P60 at the other). Mr Ullyatt said that it was odd that, having been sacked from The Fountain, he received pay that he was due at the time and considering the comments made subsequently, he should now receive compensation in a sum to his satisfaction. Mr Ullyatt noted that nothing in this letter retracted anything said by Mr McConville when interviewed by him or in his written statement. The letter also confirms that Mr Clarke was employed at The Fountain Inn.

HMRC Submissions

30. Mr McMeeken submitted that there was extensive evidence that Mr Moran had not properly accounted for income tax and NICs. Employees had been paid cash, they had not been given payslips and their employments actually started before they appeared in the payroll records. There were admissions that the payroll records were wrong. An analysis of the hours worked (according to the payroll records) showed that there was insufficient staff to run the pubs, and that therefore there must have been additional undeclared staff.

31. The evidence included: (a) employees not recorded on the payroll – Mr Clarke; (b) incorrect pay given on the payroll – Barbara Foster; (c) a part-time cleaner – Marianne; (d) holiday pay not being recorded – Mr Rudwick; (d) start dates not being as shown in the payroll records – Mr Pearce. In correspondence, Mr Moran's accountant had admitted that there had been *ad hoc* payments made to employees that had not been paid through the payroll, and that cover staff had been engaged and who had not been recorded in the payroll.

32. Mr McMeeken submitted that whilst Mr Ullyatt's calculation may have been crude, it was made to his best judgment on the basis of the information available to him. The onus of proof was on Mr Moran to show that these calculations were incorrect.

Conclusions

33. We have no hesitation in finding that Mr Moran's payroll records did not show all payments made to employees. In particular we note:

(1) The content of the statements of Mr McConville, Mr Pearce and Mr White which were included in the bundles

(2) The spreadsheet prepared by Mr Ullyatt from Mr Moran's payroll records, showing the amounts recorded as paid to employees

(3) Mr Clarke not appearing on the payroll records, although his employment is mentioned in correspondence from Mr Moran's accountants, in the statements of Mr Pearce and Mr White, and in the letters from Mr Clark (sic)

(4) The discrepancy between the amount Mr Moran said that Barbara Foster was paid when interviewed by Mr Hughes on 11 February 2005 and the amount recorded in the payroll

(5) A copy "chit" included in the bundles in respect of a payment to the part-time cleaner "Marianne"

(6) The discrepancy between the start date of Mr Peirce's employment as given in his statement and as it appears in the payroll records

(7) Mr Ullyatt's spreadsheets analysing the payroll and hours worked, and his conclusions that the hours impliedly worked were not sufficient to operate the pubs.

34. We considered whether the statement of Mr McConville should be disregarded because of his alleged history of dishonesty. However we note that these are only allegations, and there is nothing to corroborate this. We also note that Mr McConville's statement is consistent with the other statements given and other evidence. We therefore have no reason to doubt it.

35. We considered the letters from Mr Clarke and Mr McConville, and are satisfied that there is nothing in them which would cause us to come reach any different conclusion. Indeed, the discrepancies in the letter from Mr Clarke suggest that it might be forged. The letter from Mr Pearce also adds little to the analysis, and we have no hesitation in preferring his statement given on 16 February 2005 over the letter dated 23 April 2006. The statement is consistent with the statements given by Mr White and Mr McConville.

36. Accordingly we find:

(1) Employees received net pay of £5.00 per hour

(2) They were paid for working 25 hours per week

(3) The kitchen and bar required these hours to be worked throughout the year in addition to those employees recorded on the payroll

(4) There were three kitchen staff and three bar staff not shown in the payroll records

37. Although not cited to us, we note that in the case of *Johnson v Scott* (1977) 52 TC 383 at 393 in the High Court, Walton J observed:

> The true facts are known, presumably, if known at all, to one person only - the Appellant himself. If once it is clear that he has not put before the tax authorities the full amount of his income, as on the quite clear inferences of fact to be made in the present case he has not, what can then be done? Of course all estimates are unsatisfactory; of course they will always be open to challenge in points of detail; and of course they may well be under-estimates rather than over-estimates as well.

> But what the Crown has to do in such a situation is, on the known facts, to make reasonable inferences. When, in para 7(b) of the Case Stated, the Commissioners state that (with certain exceptions) the Inspector's figures were 'fair", that is, in my judgment, precisely and exactly what they ought to be - fair. The fact that the onus is on the taxpayer to displace the assessment is not intended to give the Crown *carte blanche* to make wild or extravagant claims. Where an inference, of whatever nature, falls to be made, one invariably speaks of a "fair" inference. Where, as is the case in this matter, figures have to be inferred, what has to be made is a "fair" inference as to what such figures may have been. The figures themselves must be fair. So far from representing an inference that the Commissioners did not appreciate the Inspector's figures fully, this demonstrates that they did. I think the point can be put conversely in another way. At times during Mr. Hall's address to me it almost appeared as if what he was requiring by way of his "lawful proof" was a duly audited certificate as to the Appellant's undisclosed expenditure. Of course, this was not what he was seeking; but once it is clear that this is not, and in the nature of things cannot be, available, then it follows as night follows day that some form of estimate must be made.

38. Although that decision related to income tax on trading income, its essence is of broader application. We are of the view that the estimates of the amounts paid to employees made by Mr Ullyatt in this case were fair and were reasonably based on the information before him at the time the Determinations and Decisions were made. The onus is on Mr Moran to show otherwise. This he has failed to do.

39. Subject to one caveat, we therefore agree that the determinations and decisions relating to PAYE and NICs were made by Mr Ullyatt to his best judgment and we uphold them.

40. The caveat relates to the determination relating to Mr Rudwick. PAYE was operated by Mr Moran on the basis of a 630T code. Had the proper P45/P46 procedures been followed by Mr Moran, it is likely that this code would have been updated by HMRC in line with the changes to personal allowances. The Determinations made by Mr Ullyatt in respect of Mr Rudwick's employment were calculated on the basis of the PAYE code that would probably have been issued had the correct P45/P46 procedures been followed.

41. We consider that this is wrong. Under the PAYE Regulations, PAYE has to be operated by the employer on the basis of the PAYE code given to him. The PAYE code given to Mr Moran was the 630T code.

42. If the P45/P46 procedure had been properly operated, it is likely HMRC would have issued an updated PAYE code for Mr Rudwick. However Regulation 80 does not allow HMRC to determine tax on the basis of a hypothetical PAYE code that is likely to have been issued had the correct P45/P46 procedure been followed. It only allows HMRC to determine the tax that is correctly due under Regulation 68 of the PAYE Regulations. This in turn refers back to the amount of tax deductible from earnings – in other words the amount of tax computed in accordance with the earnings

paid and the PAYE code. The fact that Mr Moran was deducting from Mr Rudwick's earnings on the basis of an incorrect code should have been apparent to HMRC from the end-of-year returns filed by Mr Moran (and of course there is a separate regime for addressing late and/or incorrect filings of these returns which we deal with below).

43. As regards the Determinations relating to Mr Rudwick, these should be recomputed on the basis of the P630T code.

44. As regards penalties, the onus of proof is on HMRC to show that penalties are due, and that the amount of the penalties are appropriate in all the circumstances.

45. We are satisfied that Mr Moran was negligent in the preparation of his end of year PAYE return, and therefore that penalties are due under section 98A(4) Taxes Management Act 1970. We do not propose to adjust the penalty of £28,459.00 to address any reduction in the Determination in respect of Mr Rudwick, as we consider that the abatement of 55% given by Mr Ullyatt in his calculation of the penalties is generous. We appreciate that this means that there will therefore be a consequential reduction in the percentage abatement.

Decision

46. We uphold all of the Determinations and Decisions, save as regards the Determination relating to Mr Rudwick.

47. The Determination relating to Mr Rudwick should be adjusted to take account of the fact that his PAYE code was 630T. We give leave to apply to this Tribunal to determine the amount of the adjustment if the parties cannot agree.

48. The penalty determination is upheld at £28,459.00 - and should not be further adjusted, even if the Determination in respect of Mr Rudwick is reduced.

49. This document contains full findings of fact and reasons for the decision. The hearing having taken place in the absence of the Appellant, the Appellant has a right to apply for this decision to be set aside. 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.

NICHOLAS ALEKSANDER

TRIBUNAL JUDGE
RELEASE DATE: 30 August 2011