[2017] UKFTT 0665 (TC)

TC06092

Appeal number: TC/2016/01266

INCOME TAX – doctor providing locum services via agency - whether income earned by self-employed individual or company - whether income tax or corporation tax chargeable - whether HMRC were entitled to make a discovery assessment - time limits: whether the taxpayer was careless- whether penalties were properly charged on the basis of deliberate inaccuracies in tax return.

FIRST-TIER TRIBUNAL
TAX CHAMBER

DR MAQBOOL BALOCH **Appellant**

- and -

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

TRIBUNAL: JUDGE MARILYN MCKEEVER

MS RUTH WATTS DAVIES

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 7 and 8 August 2017

Mr Jamal Khan, tax advisor, for the Appellant

Ms Karen Powell, presenting officer, for the Respondents

DECISION

Introduction

1. This case concerns the correct tax treatment of the income generated by Dr Baloch's activities as a locum GP for the tax years 2008-9 to 2013-14 inclusive.

2. It is common ground that between April 2006 and March 2008, Dr Baloch worked for an agency, Harmoni (which was subsequently taken over by Care UK) ("the Agency").

3. Dr Baloch submits that from April 2008 he conducted his professional practice through a limited company, KSM Medics Ltd, so that the company is liable to corporation tax on its profits and Dr Baloch is liable to income tax and National Insurance Contributions ("NICs") on his salary paid by the company and to income tax on dividends received from the company.

4. HMRC contend that Dr Baloch has continued to work for the Agency as a self-employed individual and, accordingly, income tax and NICs should be payable on his earnings.

5. HMRC's contend that they are able to raise assessments for the tax years 2008-9 to 2011-12 outside the normal "enquiry window" as they "discovered" a loss of income tax and in relation to the years 2008-9 and 2009-10 they contend that the loss of income tax was brought about, at the very least, by carelessness on the part of the Appellant.

6. If HMRC are correct, Dr Baloch's tax returns contained inaccuracies and HMRC have assessed penalties on the basis that these inaccuracies were brought about by Dr Baloch's deliberate behaviour.

7. There is a question as to whether the appeals to the Tribunal in respect of the year 2012-13 were in time. The appeals to HMRC in respect of the assessments and penalties were all made within the time limits. The last appeal, for the years 2011-12 and 2012-13, were appealed on 3 September 2015. The Appellant then entered the ADR process, but it was not possible to reach agreement and this process ended on 18 February 2016. The appeal to the Tribunal was made on 26 February 2016. In part 6 of the appeal form dealing with late appeals, it stated that the appeal ought to have been notified by 27 February 2016 (i.e. after the appeal had been made) but the box for reasons why the appeal is notified late was completed with the statement "the appeal deadlines were extended as he case went through HMRC ADR process.". The issue was not raised at the hearing and HMRC's statement of case stated that "HMRC do not object to the late appeal". We consider that it is in the interests of justice for the appeal to proceed and to the extent that it was notified late, we give permission to appeal out of time.

8. We had before us extensive bundles of documents and correspondence and we also had the benefit of oral evidence from both Dr Baloch and Mr Davies, the HMRC officer who dealt with the enquiry.

The facts

9. Dr Baloch is a GP. He trained abroad and completed a conversion course when he came to the UK. He then trained in the NHS for three or four years, working as a House Officer in a hospital. He decided to become a GP and for a time considered whether to join a practice and become a partner. In the event, he decided not to join a practice but to become a locum as a full time job.

10. On 1 April 2006 Dr Baloch commenced work as a self-employed, full time, locum with Harmoni, the Agency. He signed a document headed "GP Appointment Form" on 18 June 2006. The form set out his personal details, emergency contact, bank account details, confirmed that he did not require a work permit and stated that he had provided or had attached to the form his passport, evidence of NIC number, GMC registration certificate, Hepatitis B status certificate, and indemnity insurance certificate.The form also had boxes showing options for different employed statuses or self-employed status. The "self-employed" box was ticked.

11. The bank account details were those of the personal account which Dr Baloch held jointly with his wife.

12. Mr Khan made much of this distinction and submitted that the Agency recognised only two categories of doctors: employed or self-employed and he submitted that if one fell into the self-employed category no further distinction was made as to whether the services were provided by an individual or by a company.

13. Dr Baloch stated that the GP Appointment Form was the only document that he had ever signed, he had never signed a contract and that there was no contract between him and the Agency governing the provision of his services to them. The doctors "know the rates" [of pay] although there was some room for negotiation e.g. for working at very short notice and the Agency informed the doctor of any change to the standard rate. Locums are paid on an hourly basis.

14. At the outset, the Agency did not require invoices from its self-employed doctors. The Agency would state online what shifts were available and a doctor would "sign up" for the shifts he wanted to do. The bookings were usually a week to ten days ahead, but sometimes up to a month ahead. Occasionally bookings were offered at short notice by text or phone call. Bookings were confirmed by email.The Agency sent monthly time sheets showing the hours worked. We saw time sheet relating to the period 2008-10 which showed that Dr Baloch regularly worked night and weekend shifts of nine to ten or more hours. These records named Dr Baloch and stated his "team" was "self-employed GP".

15. In the course of the enquiry which HMRC subsequently conducted and which we consider below, Mr Davies sought information about from Care UK Limited (Harmoni's successor) about the contract which the Agency entered into with Dr Baloch. Mr Davies spoke to a Ms Heyes at Care UK on 28 October 2014 during which she said that Dr Baloch had a self-employed contract with the Agency. By an email of the same date to Ms Heyes, Mr Davies requested a copy of "the self-employment contract that Dr Baloch completed". Ms Heyes replied that she had been unable to locate the contract but offered to send Mr Davies a copy of their standard form contract. Mr Davies asked for her to do so.

16. There was further correspondence with Care UK in May 2015 and Mr Davies asked for a sample contract between the Agency and a company. Care UK said they would send some. There were two pro forma contracts in our bundle, one for Harmoni and one for Care UK which appeared to be the individual self-employment contracts. Both agreements provided for the doctor to provide services to the Agency as a GP. The agreements provided that the doctor had self-employed status and included tax indemnities in favour of the companies. They provided for fees to be paid and arrangements for payment of them. They required that the doctor maintained his registration with the GMC and was able to practice and that he maintained professional medical indemnity insurance. The doctor was required to provide a Criminal Records Bureau Certificate/ Disclosure and Barring Service Check. There were provisions for termination of the agreement, health and safety requirements and a variety of other terms.

17. Dr Baloch's position was that he had never signed a contract and there was no agreement between him and the Agency. He had been appointed by the GP appointment form on a self-employed basis and after that, each shift was a one-off arrangement, arranged online and confirmed by email.

18. We do not find Dr Baloch's position credible. It is clear from Mr Davies' correspondence with the Agency that the Agency required the doctors with whom it worked to enter into a contract and that it was assumed that Dr Baloch had done so, although the original could not be located. We would have been surprised if the Agency had said a written contract was not needed. The Agency would wish to protect its own position by imposing obligations on the doctors working for it to comply with legal requirements and maintain standards and to ensure that it was not exposed to tax or other liabilities itself.

19. We find, as a fact that Dr Baloch entered into a contract with the Agency to provided his services to them as a self-employed individual GP in or around 2006.

20. These arrangements continued for two years. During this period, payments were made by the Agency to Dr Baloch's personal bank account (whose details were given in the GP Appointment Form). Invoices were not required, but a form was submitted monthly setting out hours worked and the location of the work. All costs and expenses were made out of Dr Baloch's personal account. We note that all payments were into and out of Dr Baloch's personal joint account and he

does not seem to have operated a separate business account, although he is, of course, entitled to do that as long as he can distinguish business entries from personal entries.

21. Dr Baloch had engaged an accountant, I A Kay & Co to deal with his accounts and tax affairs. Mr I Khan, the sole principal was a qualified and, we were informed, experienced chartered accountant. Some time around 2007-8 the accountant advised Dr Baloch to incorporate his business as "a more legally safe and tax efficient method". Dr Baloch did not know how a company would be more tax efficient and in evidence he said he did not ask what the efficiencies would be. He said that his lifestyle-working long, unsocial, hours away from home left him exhausted with no time for leisure or administrative matters. That was why he left everything to his accountant whom he regarded as "the expert".

22. Dr Baloch also stated that he did not really understand what his liabilities and responsibilities were as a director of a company, nor did he ask.

23. A company, KSM Medics Limited, was duly incorporated on 31 March 2008. Dr Baloch and his wife were the shareholders and directors.

24. From 1 April 2008 I A Kay & Co prepared accounts and submitted the company and personal tax returns on the basis that the company was the entity providing the services to the Agency. The accounts showed dividends paid to the shareholders and salaries paid to the directors and a growing and overdrawn shareholder's loan account.

25. Neither Dr Baloch's nor the company's compliance record was good. The personal tax returns for the years ending 5 April 2009, 2010, 2011 and 2012 were all submitted on 6 November 2012, so the first three returns were significantly late. The company's return for the accounting period ending 31 March 2009 was submitted on 2 November 2010. Those for the accounting periods ending in March 2010, 2011 and 2012 were submitted on 31 December 2012.

26. The company also failed to submit Annual Returns to Companies House and was dissolved via compulsory strike-off on 26 July 2011. Mr Khan submitted that Dr Baloch did not deal with this immediately as he had neither the knowledge or the time, but left it to his accountant (then I A Kay & Co). Dr Baloch said Mr I Khan told him it would all be sorted out and because he wanted to carry on his business through a company, an application was made to reinstate the company and it was reinstated on 9 November 2012.

27. The personal tax returns for years up to 2011-12 did not show any dividends although they did show salary.

28. The company accounts showed an overdrawn participator's loan account, but no corporation tax had been paid as should have been the case under section 455 Corporation Tax Act 2010.

29. Mr Davies' colleague opened an enquiry into the company's returns in October 2013. In response I A Kay & Co wrote to HMRC on 29 November 2013, providing a statement of the director's loan account for the three accounting periods up to March 2012 which showed interest charges for each year. Mr I Khan also sent copies of dividend vouchers and company Minutes for each of those years. The dividend vouchers were dated 31 March in each of 2010, 2011 and 2012. The Minutes of a meeting of the company held on 20 October 2012 included resolutions to approve the payment of directors' remuneration and dividends for the year to 31 March 2010 The Minutes of a meeting held on 23 October 2012 included resolutions to approve payments of remuneration and dividends for the year ended 31 March 2011 and Minutes of a meeting held on 23 December 2012 included resolutions to approve payment of remuneration and dividends for the year ended 31 March 2012. There was a dispute as to whether the dividends had all been received by Dr Baloch in the. 2012-13 tax year or whether they had been received in the years to which they related (when the dividends at least had not been shown on Dr Baloch's tax return and the 2012-13 return showed only the 2012-13 dividends). Further, Dr Baloch's time sheets showed that on 23 December 2012 when he was supposed to be holding a company meeting in North London, he was working in North Somerset (though this did not emerge until later). The relevance to the current issues is that there was a poor compliance record for both the company and Dr Baloch personally, there were discrepancies between the company's returns and records and Dr Baloch's The records appeared unreliable and to have been prepared some time after the event and HMRC had concerns which led them to look more closely at the activities of the company.

30. Mr Davies' colleague went on long term sick leave at this point, and he took over the enquiry. He had a telephone conversation with Mr I Khan on 19 May 2014. His note of the call states "MK [Mr I Khan] confirmed that he had told his client that tax was due under CTA 2010 S455 on the loan shown, but the director had insisted that this was not due if interest was paid on this. I asked for confirmation that I had understood what MK had told me and he said Dr Baloch had been told tax was due but the director did not agree to it being shown on the return. I went over [the point] a third time…". It is correct that if appropriate interest is paid on a director's loan the director himself will not be subject to tax on a "benefit in kind" but this does not affect the company's position under section 455 CTA 2010. The exchange indicates to us that Dr Baloch has some knowledge of tax.

31. At about this time Dr Baloch appointed Churchill Tax Advisers and Mr Jamal Khan (Mr Khan) as his tax advisors in place of Mr I Khan of I A Kay & Co. Mr Jamal Khan provided Mr Davies with information requested by Mr Davies including bank statements and invoices. These showed that payments from the Agency were made into Dr Baloch's personal account and that invoices for expenses such as indemnity insurance, course fees and BMA membership were addressed to Dr Baloch personally and paid by him out of his personal account.

32. There was also correspondence about the company's bank account. The company did not have an account for the first two years of its existence. At the hearing Dr Baloch indicated that he was told to open an account at the outset but failed to do so through pressure of work. The company ultimately opened an account on 1 April 2010. The only credit to that account was £500 paid into it from Dr Baloch's personal account (and a small amount of interest) and the only debits were bank charges. Dr Baloch's evidence, consistent with statements by Mr Khan in correspondence, was that there were administrative problems with the Agency paying money into the company's account. As set out below, the Agency did not know about the company or the bank account.

33. The account was closed on 21 September 2011 when the company was struck off and after it was reinstated it proved impossible for Dr Baloch to open a new company bank account with the same or another bank.

34. Mr Khan also indicated he was proposing to re-write the accounts and they should have shown that drawings were paid out as dividends and salary and there would then be no overdrawn loan account. Mr Davies resisted this on the basis that the proposed changes were not because of a "fundamental error" in the accounts but were seeking to change the nature of the payments which had as a matter of fact been made, because they could have been made in a more tax efficient way had Dr Baloch had better advice.

35. As a result of the information received, Mr Davies' also began to enquire whether the Agency in fact contracted with Dr Baloch personally or with the company.

36. Dr Baloch provided authorities for Mr Davies to contact the Agency and Mr Davies subsequently spoke and wrote to several individuals before the matter was taken over by Mr Rob Verguld, the Group Tax Manager of Care UK. Mr Davies was informed by telephone that Dr Baloch was on a "self-employed contract". Another member of the accounts team, Hilary Munsen, confirmed in a separate telephone conversation that payments were made on a self-employed basis and payment was made to the individual. Mr Davies' note of the conversation records "HM was not aware of any corporate entity in respect of Dr Baloch".

37. As noted above, the Agency was unable to produce a copy of the contract which Dr Baloch was entered into but it was assumed that a contract had been entered into with him and we have found that there was a contract between Dr Baloch and the Agency for him to work as a locum on a self employed basis.

38. Dr Baloch told us that he had telephoned the Agency at some time in 2008 to inform it that he was now working through a company. He did not keep any note of the conversation and was unable to say when he phoned or to whom he spoke. He said he did not contact them again although the correspondence indicates that payment was not made to the company bank account (opened two

years later) because of unspecified "administrative problems". He did not write to the company.

39. Mr Davies emailed Mr Verguld on 10 November 2014 with various questions including "You have told me that Dr Baloch signed a self-employed agreement and that the terms are that he is paid gross. Did he ever vary that agreement to indicate that he had set up his own personal company and ask for payments to be made to that company?" Mr Verguld replied on 11 November "Not that we are aware of".

40. Following further discussions with Mr Khan, Mr Davies emailed Samar Farooq (who worked with Mr Verguld) on 11 May 2015 with some further questions. Mr Farooq replied on 13 July 2015. The questions and answers were as follows.

(1) Q "Is it possible that there was a contract between Care UK (or Harmoni) and a close company (KSM Medics Limited) formed by Dr Baloch rather than Dr Baloch personally?" A "Based on a sample check of invoices, it appears that Dr Baloch was proving (sic) [presumably providing] services in personal capacity and not via a close company."

(2) Q "Are you able to supply a sample copy of an agreement or contract between Care UK (or Harmoni) and a company?" A "Please find attached sample agreements for both Care UK and Harmoni."

(3) Q "What are the insurance implications if an agreement is made with a company (indeed what are the insurance arrangements with a self-employed individual)? If a company is engaged by Care UK (Harmoni) can it use substitutes or will the contract specify that a particular individual has to undertake the work and have the appropriate level of insurance?" A "The contract agreement would say that the company/self-employed individual is responsible for ensuring that all/any GPs it provides to deliver the services will carry their own PI insurance…and that evidence of such will be provided on demand. As far as named GPs and substitutes is concerned we would normally expect the intended GP to be specifically named in the agreement however we would also expect that the services company would want to include provisions to the effect that the named GP could be substituted in certain circumstances, albeit that we would normally insist on having the final say as to the suitability of any proposed substitute."

(4) Q "Dr Baloch has said that he asked the agency to pay his company, KSM Medics Limited,, but due to some internal administration issues this did not happen. Is this true or likely…? In order to make payment to a company what requirements would Care UK (Harmoni) require to be in place (e.g. a signed contractual agreement, written notification of accounts changes etc)?" A "We can confirm that Dr Baloch never put in writing the above claim and all invoices were submitted in his own name. In order for Care UK to pay a company, we would need the

request in writing from the GP and they would be issues (sic) [presumably issued] with a new contract."

41. On 13 November 2014, Mr Davies wrote to Dr Baloch, sending a copy to Mr Khan. Based on the correspondence with Care UK, his discussions with Mr Khan and the information received, Mr Davies came to the conclusion that KSM Medics Limited had never traded and that Dr Baloch had continued throughout to operate his business as a self-employed individual. Dr Baloch had signed the company tax returns as director and his own personal tax returns. Mr Davies considered that both sets of returns were inaccurate and he considered that the inaccuracies were the result of deliberate behaviour. He recalculated Dr Baloch's tax liabilities on the basis of what he considered to be the true position i.e. that Dr Baloch continued to be engaged in a personal capacity with Care UK/Harmoni for all tax years from 2008-9 to 2012-13. Mr Davies invited Dr Baloch to attend a meeting to provide evidence to rebut these conclusions. The invitation was declined.

42. Following the correspondence with the Agency set out above, Mr Davies wrote to Mr Khan on 10 August 2015 stating that he would now make assessments based on what he believed to be the correct position for the tax years 2011-12 and 2012-13 and also provided a detailed explanation of his reasoning and findings.

43. Other assessments had been issued earlier. The assessments raised are as follows.

44. On 23 March 2015, HMRC raised "discovery" assessments under section 29 Taxes Management Act 1970 ("TMA") for the tax years 2008-9, 2009-10 and 2010-11. The assessments were in respect of additional income tax and Class 4 National Insurance Contributions. The amounts for those years respectively were £49,361.44, £45,786.88 and £77,291,11.

45. On 10 August 2015, HMRC issued an assessment under section 29 TMA in respect of the tax year 2011-12 in the amount of £60,540.80.

46. Also on 10 August 2015, HMRC issued a closure notice under section 28A(1) and (2) TMA for the tax year 2012-13. The assessment was for £59,753.28.

47. On 11 July 2016 HMRC issued a closure notice under section 28A TMA in respect of the tax year 2013-14 with an assessment for further tax and NICs of ££44,010.77.

48. On 9 May 2016, HMRC issued penalty notices under Schedule 24 Finance Act 2007 ("Schedule 24") on the basis of "deliberate" inaccuracies in Dr Baloch's self assessment tax returns for the tax years 2008-9 to 2012-13. A further penalty assessment was issued on 14 July 2016 relating to inaccuracies for 2013-14. The respective amounts of the penalties were £19,867.97, £18,429.21, £31,109.67, £24,367.67, £24,050.69 and £17,714.33.

49. In total, HMRC are seeking additional tax and NICs and penalties of £576,047.87.

50. We now summarise our findings of fact, based on the documentary evidence in the bundles and the oral evidence of Dr Baloch and Mr Davies.

51. In 2006, Dr Baloch entered into a contract with the Agency to provide out of hours locum services as a self-employed GP. No further contracts were entered into by Dr Baloch or KSM Medics Limited ("KSMM") so the arrangements were governed throughout by the original contract.

52. KSMM was formed in 2008. It had no bank account until 2010. No funds flowed through the account except for an initial sum of £500 paid in by Dr Baloch which was used to pay bank charges.

53. For a 15 month period KSMM did not exist, having been struck off in July 2011 and reinstated in November 2012.

54. The Agency was unaware of the existence of KSMM and made clear that if a doctor wished to change from providing his services personally to providing his services through a company, a new and different contract would be required.

55. Dr Baloch may have telephoned the Agency to tell them about the company but we do not know whether he contacted an appropriate person and, in any event, it is clear that this was not followed up. Even had he informed the right person, that was not sufficient of itself to change the existing arrangements.

56. All payments due from the Agency were paid into Dr Baloch's personal bank account; the joint account with his wife, the details of which were given to the Agency at the outset in 2006. Dr Baloch never had a separate business account and the money paid in was dealt with as he wished throughout.

57. Mr Khan said, in correspondence, that the payments were made to Dr Baloch's personal account because of internal administrative difficulties at the Agency. We do not accept that. The Agency were unaware of the existence of the company or the bank account, which in any event was not opened until two years after the company was formed. In evidence, Dr Baloch said that he had contacted the Agency only in 2008 and had not told them about the bank account.

58. The Agency did not initially require invoices for the work done. They were introduced after KSMM had been formed. All invoices were completed and submitted by Dr Baloch personally.

59. Business expenses were invoiced to, and paid by, Dr Baloch personally.

60. The company had no assets. The accounts wrongly showed a car as a company asset, but this, in fact, belonged to Dr Baloch personally.

61. The records of the Agency throughout the period show that Dr Baloch was engaged by them as a self-employed GP.

The Law

62. The law is straightforward, and not in dispute.

63. The profits of a company are charged to Corporation Tax under section 2 of the Corporation Tax Act 2009. Income tax is charged on the person receiving the profits of a trade profession or vocation (sections 5 and 6 Income Tax (Trading and Other Income) Act 2005.

64. HMRC have an "enquiry window" of one year from the submission of a tax return in which to open an enquiry. If an enquiry is opened in this period, section 28A TMA provides for the issues of a "closure notice" on completion of an enquiry under which HMRC can assess any further tax they consider to be due. The assessments for 2012-13 and 2012-14 were made under section 28A TMA.

65. Once the enquiry window has closed, HMRC may only make additional assessments if they make a "discovery" within section 29 TMA, that is, if an officer of HMRC discovers that *"as regards any person and a year of assessment- (a) that any income that ought to have been assessed to income tax…[has] not been assessed…*". Where a discovery is made, *"the officer… may, subject to subsections (2) and (3) below make an assessment in the amount…which ought in his… opinion to be charged in order to make good to the Crown the loss of tax…*".

66. Section 29(3) provides that where a taxpayer has delivered a return, he cannot be assessed under section 29 unless one of two conditions is met. The relevant condition in this case is that in section 29(4): "*…that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf…*".

67. So HMRC must prove, on the balance of probabilities that Dr Baloch was, at the least, careless in submitting erroneous tax returns (if they were indeed erroneous) before they can make the assessments for 2008-9 to 2011-12.

68. The normal time limit for making an assessment, including a discovery assessment is four years from the end of the year of assessment to which it relates (section 34 TMA). On this basis, the assessments raised in March 2015 would be in time only in respect of the tax years 2010-11 and 2011-12.

69. Section 36(1) TMA provides for an extended time limit for making an assessment of six years after the end of the relevant year of assessment where a loss of income tax has been brought about "carelessly". So if HMRC have proved that Dr Baloch was "careless", which they would need to do to make the discovery assessments in the first place, this would bring the tax years 2008-9 and 2009-10 into scope.

70. Section 15 of the Social Security and Benefits Act 1992 provides for the payment of Class 4 contributions in respect of the profits derived from exercising a profession or vocation. Section 15(2) provides "*Class 4 contributions in respect of profits shall be payable-(a) in the same manner as any income tax which is, or would be, chargeable in respect of those profits…and (b) by the person on whom the income tax is…charged, in accordance with assessments made from time to time under the Income Tax Acts.*" The "Income Tax Acts" include the TMA so the same rules about assessments apply to the Class 4 NICs as to the income tax.

71. Schedule 24 Finance Act 2007 ("Schedule 24") imposes penalties where there is an inaccuracy in a self-assessment tax return (among other documents) and that leads to an understatement of a liability to tax (paragraph 1 of Schedule 24).

72. The penalties are tax geared and depend on the degree of culpability. Paragraph 3 of Schedule 24 provides that an inaccuracy is "careless" if "i*f the inaccuracy is due to failure by P* [the taxpayer] *to take reasonable care*". An inaccuracy is "deliberate but not concealed" if "*the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it*".

73. Paragraph 4 of Schedule 24 provides that the penalty for a "careless" inaccuracy is 30% of the "potential lost revenue" and for a deliberate but not concealed inaccuracy is 70% of the potential lost revenue. HMRC may reduce the amount of the penalty within certain limits depending on the degree of assistance provided by the taxpayer in the enquiry and whether the discovery of the inaccuracy was "prompted" by HMRC or not (paragraph 9 Schedule 24).

74. Paragraph 15 of Schedule 24 gives the taxpayer a right of appeal against HMRC's decision that a penalty is payable and/or the amount of the penalty. Under paragraph 17 of Schedule 24, the Tribunal may affirm or cancel a decision as to whether a penalty is payable and may affirm HMRC's decision concerning the amount of the penalty, or substitute another decision that HMRC had power to make.

75. In the present case, HMRC have charged penalties on the basis that Dr Baloch's behaviour was deliberate but not concealed. The maximum penalty was reduced on the basis of the quality of disclosure and co-operation so that the penalty actually charged was 40.25% of the potential lost revenue.

76. Mr Khan appealed the penalties to HMRC on Dr Baloch's behalf, but the penalties were not included in the notice of appeal given to the Tribunal, nor did Mr Khan offer any submissions on the amount of the penalties at the hearing. However, Mr Khan's focus at the hearing was on the substantive issue of whether the Agency payments were taxable on Dr Baloch or KSMM and did not contemplate that we might find for HMRC. We are treating the appeal as an appeal against both the assessments to income tax/NICs and the penalties.

The onus of proof

77. The onus is on HMRC to prove that they are entitled to make a discovery assessment and that they are entitled to assess all years on the basis of the Appellant's careless behaviour.

78. The onus then moves to the Appellant to show that he has been overcharged by the assessments.

79. In relation to the penalties, the onus is on HMRC to prove that the Appellant's behaviour was deliberate.

80. In all matters, the ordinary civil standard of proof, on the balance of probabilities, applies.

The Appellant's submissions

81. From 2008 onwards, the Appellant was operating through KSMM and fulfilled all the requirements for a limited company both with Companies House and HMRC.

82. The company did trade.

83. HMRC cannot dictate how a person operates his business, whether as a sole trader or through a limited company.

84. All income has been fully declared.

85. There was no contract in place with the Agency.

86. The Appellant intended to run a company.

87. There is no legislative requirement for a company to have a bank account or to use its account, if it has one, for its trading activities.

88. The Appellant did not deliberately intend to submit an inaccurate company tax return (and by implication an inaccurate self-assessment tax return) as he believed he was working for his company.

89. Dr Baloch issued invoices in his own name, because no-one advised him to do otherwise. Whilst the Appellant had notified the Agency that he was working through his company, he was not advised to change the invoices to reflect his company name.

90. The Companies (Trading Disclosures) Regulations 2008 SI2008/495 requires a company to disclose its registered name on, among other things, its invoices and other business correspondence and documentation. Regulation 10 makes it an offence to fail to do so, but does not render the invoices etc invalid. Mr Khan's contention was that the fact that the invoices were issued in Dr Baloch's name and not the name of KSMM does not make them invalid as company invoices.

91. Expenses incurred by the director were entered in the company name.

92. All the income paid by the Agency had been declared.

The Respondent's submissions

93. The evidence indicates that Dr Baloch, as an individual, was the person entitled to the income received from the Agency in respect of his locum services and accordingly, the profits should have been charged to income tax and Class 4 NICs rather than Corporation Tax.

94. KSMM did not trade and generated no taxable profits.

95. The discovery assessments were properly made and HMRC was entitled to assess all tax years back to 2008-9 on the basis that the inaccuracies in the returns were the result, at the least, of careless behaviour.

96. The penalties have been properly charged on the basis of deliberate behaviour as Dr Baloch set up a company to reduce his tax bill, but made no changes to his to his way of working to ensure that the purported new status reflected reality. He chose to declare the income through a company knowing that the company had not earned it.

97. The amount of the penalty is appropriate as HMRC reduced that penalty to reflect the quality of disclosure and there were no special circumstances which might justify a further reduction.

Discussion

The status issue

98. As Mr Khan says, a taxpayer is entitled to carry on his business through whatever medium he wishes, whether that is as a sole trader, a company, a partnership or any other entity. It is not for HMRC to dictate how an individual is to conduct his profession. Mr Davies entirely agreed with this, as do we.

99. The way in which a person carries on his business may have an impact on the amount of tax payable. A business conducted through a company may well result in less tax being payable than if the business is operated by a sole trader. It is entirely legitimate and proper for an individual to decide to exploit that difference by carrying on his business through a company.

100. However, it is not sufficient for an individual to form a company and tell his accountant that "all income should be declared in the company" as Dr Baloch says he did. If the tax advantages are to be obtained, reality must follow the intention; the business must, in fact, be carried on by the company, not the individual in his personal capacity. Of course, the individual, as an employee or officer of the company may actually carry out the work, but the individual is

working for the company and the entity providing the services to the third party must be the company.

101. The facts found at paragraphs 58 to 68 above point to Dr Baloch providing the services as an out of hours GP to the Agency personally as a self-employed individual and not to to the services being provided by the company, KSMM.

102. Each of those facts, taken on its own, is not, as Mr Khan points out, necessarily inconsistent with the company having traded. We have reviewed all the facts and evidence as a whole including the points mentioned below.

103. The relationship between the Agency and Dr Baloch was contractual and one party to a contract cannot unilaterally substitute another party to the contract. The Agency was unaware of the existence of the company and had no contract with it. We accept the statements in correspondence by the Agency that had they been aware that Dr Baloch wished to provide his services through a company they would have required a new contract and that would have contained different terms from that in a self-employed contract (e.g. as to the ability to substitute a different GP to carry out the work). We do not accept Mr Khan's contentions that if a GP was self-employed (as opposed to employed under PAYE), the Agency did not distinguish between an individual and a company.

104. All the arrangements in connection with the payment of remuneration, the payment of business expenses, the receipt of the money into the personal account and the issue of invoices to the Agency in Dr Baloch's name (especially as invoices were not required until after the company was formed) are not just consistent with, but are evidence of, the fact that Dr Baloch was carrying on the business as a self-employed individual.

105. Moreover, nothing changed when the company was formed. It did not even have a bank account for two years. Dr Baloch said he had been told to open one at the outset but owing to his exhausting lifestyle it was overlooked until much later.

106. Nor did anything change during the fifteen month period when the company did not exist after it was struck off. We note that the company tax returns for the periods ended 31 March 2011 and 2012 (which overlapped this period) both showed the full year's earnings from the Agency. We also note that the Minutes of the meeting of the company (which were signed after the purported events) approving salary and dividends for the accounting period ending 31 March 2012, appeared, by comparison with earlier years, to be of amounts applicable to a full year. We did not have the Minutes relating to the accounting period ending 31 March 2012, but Dr Baloch's personal tax return for the year 2011-12 shows salary from the company of £36,000, similar to a full year's salary in other years. Although a company which has been struck off and reinstated is treated for company law purposes as having continued in existence throughout, the fact of the matter is that it did not exist for a period and could not have

traded and earned profits whilst struck off. We would have expected the returns and Minutes to reflect this.

107. Having considered all the facts and evidence, our conclusion is that Dr Baloch provided his services to the Agency as a self-employed GP and that KSMM did not provide any services to the Agency.

108. Accordingly, the profits earned by Dr Baloch should be subject to income tax and Class 4 NICs and not to Corporation Tax.

The discovery issue

109. We are satisfied that HMRC made a "discovery" that tax had been underpaid in or around November 2014 when Mr Davies' enquiries into KSMM's accounts and returns produced evidence that suggested that the income declared by the company in fact belonged to Dr Baloch.

110. HMRC assert that the condition in section 29(4) TMA which allows them to raise the assessment is satisfied as Dr Baloch had brought about the under - declaration carelessly. In fact, HMRC assert that Dr Baloch acted deliberately, but they are entitled to make the assessments and to make them in relation to the previous six years (under section 36 TMA) by satisfying the lower threshold of proving a lack of reasonable care.

111. Dr Baloch admitted in evidence that owing to his exhausting lifestyle, he may have made mistakes and overlooked things. He said he did not understand anything about tax and that he left it all to his professional advisors. He did not know what his obligations were as a director and he did not ask about them.

112. Dr Baloch signed the company's Minutes, accounts and tax returns (and his own self-assessment returns) without checking them. He carried on his business, after forming the company, exactly as he had done up to then because, he said, no one told him he should change things. His accountant did tell him to open a company bank account but he failed to do so for two years. He had little knowledge of tax or time to deal with his personal affairs and he relied on his accountant and did not query the accounts or returns.

113. A reasonable taxpayer, mindful of his fiscal obligations, could be expected to check the documents which he signs, to consider whether they at least appear to be correct and to query anything which he does not understand with his advisors.

114. Dr Baloch failed to do any of this.

115. We conclude that the inaccuracies in the returns arose, at the least, because Dr Baloch failed to take reasonable care to ensure they were correct. Accordingly, the discovery assessments were validly made, beginning in the tax year 2008-9

The deliberate penalty issue

116. Although, as we have found, Dr Baloch was careless in completing his tax returns, HMRC go further and assert that the inaccuracies were the result of his deliberate behaviour. This results in higher penalties than would be the case if the behaviour were merely careless.

117. There is no statutory definition of what constitutes "deliberate" behaviour.

118. Mr Davies said that HMRC had guidelines which were part of the penalty assessment procedure and that the fundamental question was whether the taxpayer knew that the return he had submitted was wrong. He considered that inaccuracies could be deliberate where there was a failure to check the returns. Mr Davies asserted that Dr Baloch would have known that the income did not belong to the company. Dr Baloch signed the company accounts and tax returns as director and signed a declaration that the returns were complete and correct. Mr Davies submitted that, having signed such a statement without checking the returns could amount to deliberate behaviour. Ultimately, it is a subjective decision on the basis of the evidence and HMRC submit that Dr Baloch chose to declare income in the company knowing that that did not reflect the reality.

119. Mr Davies also said he had taken advice from an HMRC accountant and had been advised that a deliberate penalty was appropriate.

120. Mr Khan submitted that Dr Baloch had, from 2008, intended to run the business through a company and whilst mistakes may have been made, Dr Baloch had not acted deliberately. Mr Khan submitted that all the income had been declared and that was not disputed by HMRC. The issue is that, as we have found, it was declared by the wrong taxpayer.

121. There are a number of First Tier Tribunal decisions on the meaning of "deliberate" which provide helpful guidance although they are not binding on us.

122. The recent case of *Dorothy Lyth v HMRC* [2017] UKFTT 0549 (TC) considered the earlier authorities. Judge Raghavan said:

"As to the meaning of deliberate HMRC referred to various FTT decisions. From these it can been there are two broadly differing conceptions of the definition of "deliberate". In Auxilium Project Management v HMRC [2016] UKFTT 249 (TC) the tribunal, noting that the legislation did not further define the word "deliberate", took the view (at [62]) that "a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document". The tribunal emphasised this was a subjective test and that the question was not whether a reasonable taxpayer might have made the same error or even whether the taxpayer failed to take all reasonable steps to ensure that the return was accurate, "it is a question of knowledge and intention of the particular taxpayer at the time." In Salim Miah v HMRC [2016] UK FTT 644 (TC) put the meaning in a similar way (at [44]); something was "deliberate" if it had been "thought about". The penalty there (which concerned a

sale which should have been reported on a VAT return was deliberate if the appellant "knew that the sale should been reported on…the…return but decided that it should not be". Similarly in Bhagya Raj Subbrayan t/a Swiss Cottage Diet Clinic v HMRC [2013] UKFTT 161 (TC) the tribunal, in finding the taxpayer's conduct there had been deliberate because "she must have known that the amount of taxable income shown on her return was less than her actual income…", used a test of knowledge of the inaccuracy.

24. However in Anthony Clynes v HMRC [2016] UKFTT 644 (TC) the tribunal considered (at [86]) that an inaccuracy "may also be held to be deliberate where it is found that the person consciously or intentionally chose not find out the correct position, in particular where the circumstances are such that the person knew that he should do so."

123. We agree with the approach in *Auxilium Project Management* that in order for the taxpayer to have acted deliberately, he must, first have submitted an incorrect document knowing that it did not represent the true position and, secondly he must have intended HMRC to accept the incorrect position as being correct.

124. Dr Baloch is not, and is not expected to be, an expert in tax matters and, as was reasonable, he engaged the services of a qualified accountant to assist him with his tax affairs. However, an individual cannot abdicate all responsibility by claiming that he is ignorant about such matters and left everything to his accountant. If an individual signs documents and declares that they are correct and complete, he should check them to the best of his ability and satisfy himself as far as possible that they are indeed correct. If he is unsure about something, he should ask his advisor.

125. We do not accept HMRC's submission that a failure to check without more amounts to deliberate behaviour, though it may well indicate careless behaviour; that is a failure to take reasonable care to avoid inaccuracy.

126. Dr Baloch claims he knows nothing about tax. In his witness statement he says "I have no knowledge of the requirements for accounts and taxation system in the country" (sic). According to Mr Davies, whom we found to be a straightforward and credible witness, Dr Baloch's previous accountant said that Dr Baloch had overriden him when advised that Corporation Tax was payable on the overdrawn director's loan account and that Dr Baloch had told him, the accountant, that there was no tax as long as interest was paid. Dr Baloch was partly correct. The payment of interest on a loan to an employee from his employer would prevent a benefit in king charge on the employee, but would not affect the tax chargeable on a company under the "loans to participators" rules. This is referred to at paragraph 34 above. Mr Davies' note of that conversation

127. Mr Davies indicated that he found Mr I Khan's statements astonishing. He asked him to repeat himself three times to make sure he had not misunderstood.

Dr Baloch stated in his Witness Statement that he was not aware that there was a director's loan issue. We do not accept this.

128. In any event the purported payment of interest which was shown in the statement of the director's loan account was a fiction. All the payments from the Agency for Dr Baloch's services went into his personal account and no actual payments of interest were made to the company. The money never moved and Dr Baloch must have been aware of this.

129. It is not clear when the idea of a company was first mooted, but Dr Baloch stated that "I incorporated my sole trader business based on advice from my accountant as a more legally safe and a tax efficient method." (Sic). In evidence, Dr Baloch said that he did not know how or why a company was more tax efficient and he did not ask. He also said that he was not aware of the responsibilities of a company director and he did not ask about them.

130. We do not find it credible that an intelligent, professional person like Dr Baloch who is advised to change the way in which he conducts his business would not enquire as to the benefits of doing so, and if he decided to take the advice, that he would not have ascertained what he needed to do in order properly to implement the advice. Indeed, we would have expected the accountant to advise him without being asked and there is some evidence that he did. We were told that Mr I Khan told Dr Baloch to open a company bank account, which he failed to do for two years.

131. Dr Baloch said he had no time for administering his personal affairs, yet we heard that he had made significant investments in property in Dubai which must have taken a significant amount of time and indicates an understanding of business matters.

132. Dr Baloch signed Minutes of company meetings, at least one of which could not have taken place when it was supposed to have done. He signed company accounts and tax returns and his own personal tax returns and even if he did not check them, it would have been immediately apparent that their contents did not match the reality of the situation. They referred to profits that the company could not have earned because it had no relationship with the Agency. The figures for salary, dividends and director's loans appear to have been determined arbitrarily; all the money went into the personal account and Dr Baloch used that money as he wished. Dr Baloch must have known this.

133. He also knew that all other aspects of the business including the payment of expenses, the issue of invoices and the ownership of assets were in his personal name and that nothing changed when the company was formed. Dr Baloch used a telling expression in evidence saying that he intended that "all income should be *declared* through the company". That might indeed have been the intention, but that is not the same as carrying on the business in the company.

134. We find it particularly significant that nothing changed in the period when the company did not exist between July 2011 and November 2012. The company and personal tax returns for the overlapping periods/tax years were prepared on the basis that the company had made all the profits and Dr Baloch had received a modest salary. Dr Baloch must have known that that was not correct and could not be correct.

135. In general we do not consider that Dr Baloch could have believed that the income would become that of a company if he simply incorporated a company but took no steps actually to carry on the business in the company.

136. Dr Baloch's tax returns showed only his salary. They did not even show (until 2012-13) the dividends which were purportedly paid during the relevant years and approved in the Minutes. So his returns would have been inaccurate even if the company's operations had had any reality.

137. In conclusion, having reviewed all the written and oral evidence we consider that Dr Baloch must have been aware that the returns he signed and declared to be correct did not represent what had actually happened. He might have intended that the income should be treated as if it had been earned by the company, but it is not credible that he believed that the profits had in fact been earned by the company. Accordingly, we find that he submitted documents to HMRC, namely his self-assessment tax returns, knowing that they were inaccurate in that they did not include the profits he had earned as a self employed GP. He intended that HMRC should accept his returns and the company returns as correctly declaring that the company had received the income and paid him only a salary and dividends.

138. We do not need to consider the wider test of deliberateness suggested in the *Anthony Clynes* case. We find that, on the balance of probabilities, the inaccuracies in Dr Baloch's tax returns were deliberate in the sense that he knew that the income disclosed in the returns did not reflect the reality of the way in which the business was conducted and he intended HMRC to rely on the returns as correctly stating the position.

Decision

139. For the reasons set out above, we have decided that the assessments to income tax and Class 4 NICs made on Dr Baloch are correct and that HMRC were entitled to make discovery assessments. We find that Dr Baloch was at the very least careless so that HMRC were entitled to assess all years beginning with 2008-9.

140. In relation to the penalties, we find that they were correctly assessed on the basis of deliberate behaviour and we heard nothing to suggest that we should alter the amount of the penalties.

141. Accordingly, we affirm HMRC's decisions and dismiss the appeal.

142. 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.

MARILYN MCKEEVER
TRIBUNAL JUDGE

RELEASE DATE: 5 SEPTEMBER 2017