[2019] UKFTT 0526 (TC)

TC07322

Appeal number: TC/2017/08539

INCOME TAX – Whether certain alleged agent and webmaster expenses of self-employment as an adult entertainer deductible? - In the absence of evidence, no - Penalty Assessments - Schedule 24 Finance Act 2007 - Whether conduct leading to inaccuracy deliberate? - Yes, but not in relation to a return with figures which are expressly said to be provisional and subject to amendment - Whether deductions applied for disclosure should be adjusted? - Yes - Appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

LD **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

Sitting in public at Tribunals House, Parsonage, Manchester on 14 June 2019

Dr David Oates, of D J Oates & Co, for the Appellant

Mr Matthew Mason, an Officer of HMRC, of HMRC's Solicitors Office and Legal Services, for the Respondents

DECISION

1. This decision is anonymised, and no-one shall promulgate this decision in any form which compromises the anonymity of the Appellant. I have decided to anonymise the decision because to identify the Appellant would potentially lead to identification of her children. This is relevant since some of the evidence which I was invited to consider, and which I set out below, concerns the well-being and circumstances of the Appellant's children at certain times. The Children Act 1989 applies to all civil proceedings, including these. But even if it did not, it would not, in my view, be in the best interests of the children to allow them to be identified.

2. This is my decision in relation to an appeal, brought by way of a Notice of Appeal dated 28 November 2017, against the following:

(1) **In relation to 2013/14**: a Notice of Further Assessment, amounting to £9,707.55, under section 29 of the Taxes Management Act 1970, issued on 27 April 2017;

(2) **In relation to 2014/15**: an Assessment, amounting to £16,988.17, under sections 28A(1) and (2) of the Taxes Management Act 1970, also issued on 27 April 2017;

(3) **In relation to 2015/16:** a Notice of Further Assessment, amounting to £9,024.35 (being adjusted from £17,054.66), under section 29 of the Taxes Management Act 1970, also issued on 27 April 2017;

(4) Penalty Assessments for each of these years, in the total amount of £23,734.57, made under Schedule 24 of the Finance Act 2007, and issued on 1 June 2017, being:

(a) £5,266.34 for 13/14;

(b) £9,216.08 for 14/15;

(c) £9,252.15 (but on the unadjusted figure of £17,054.66) for 15/16

3. Although the Notice of Appeal ostensibly refers only to a sum of £1710.98, that is an obvious mistake, and I have treated the Notice of Appeal as lying against all of the above.

4. Insofar as the Notice of Appeal was filed out of time, I extend time.

5. The following matters are not in dispute:

(1) LD entered the self-assessment regime on 19 April 2012;

(2) Her first year of assessment would therefore have been 2012/13;

(3) She had originally been a freelance make-up artist, but later became a glamour model and an entertainer on an adult TV channel;

(4) LD's self-assessment return for 2013/14 had a latest filing date of 31 January 2015 and was filed electronically on that day. It declared turnover of £37,793, with total allowable expenses of £33,274, leading to a net profit of £4,519;

(5) LD's self-assessment return for 2014/15 had a latest filing date of 31 January 2016 and was filed electronically on 11 March 2016. It showed turnover of £48,000, expenses of £41,000, and profit of £7,000 (i.e., all the figures given were round figures);

(6) LD's self-assessment return for 2015/16 had a latest filing date of 31 January 2017 and was filed electronically on that day. The return was not in the papers presented to me at the hearing. In response to a query from the Tribunal, those were provided on 24 July 2019. It declared turnover of £62,000 and business expenses of £25,000, leading to a net profit of £37,000. As for the preceding year, all the figures were round figures, but the return noted that the figures were provisional, and that 'an amendment will be submitted on receipt of further information';

(7) On 24 October 2016, Officer Hagain, a Higher Compliance Officer of HMRC's Individuals and Small Business Compliance Team opened an in-time enquiry under TMA section 9A 1970 in relation to LD's 2014/15 return;

(8) On 16 January 2017, HMRC received accounts and a revised tax computation for 2014/15, under cover of a letter from LD's then-accountant, dated 10 January 2017. These showed a turnover figure of £61,294 (an uplift of 129.68% on the originally declared figure) and a gross profit of £42,981 rather than £7,000 (an uplift of over 800% on the originally declared figure);

(9) On 7 April 2017, Officer Hagain considered LD's Self Assessment return for 2013/14 (which declared turnover of £37,793 and expenses of £33,274, leaving a gross profit of £4,519). Given that the 2013/14 return was filed on time, then the enquiry window had closed on 31 January 2017. Any assessment could only therefore be made on the basis of a discovery. Taking 14/15 as the index year, she increased the turnover to £49,012, and altered the expenses to produce a mean revised gross profit of £42,100;

(10) On 7 April 2017, Officer Hagain also considered the SA return for 2015/16 (which declared provisional figures as turnover of £62,000 and expenses of £25,000, leaving a gross profit of £37,000). Again, taking 14/15 as the index year, she altered the expenses to produce a mean revised gross profit of £60,500;

(11) On 28 April 2017, HMRC issued a Closure Notice for 2014/15, which has been treated as the index year;

(12) HMRC have treated the assessments for 2013/14 and 2015/16 as discovery assessments.

6. On the day of the hearing, the parties reached agreement on certain matters for 2014/15. They agreed that certain items were allowable for 2014/15: stagewear; subsistence; travel; accommodation; flights; telephone; "printing, etc"; and train travel.

7. The parties remained at issue in relation to the following items claimed for 2014/15:

(1) 'Webmaster' : £16,500;

(2) 'Agent fees' : £2,300;

(3) Accountancy : £1,200

Note of my conclusions

8. For the detailed reasons which follow, I have decided to dismiss LD's appeal against HMRC's treatment of "webmaster and agent fees" for 2014/15, which are disallowed in their entirety. But I allow the appeal in relation to accountancy fees for 2014/15, and doing the best on the basis of the information and materials before me, I assess "accountancy fees" for 2014/15 at £320.

9. This means that the assessment for 2014/15 is to be recalculated in line with (i) the parties' agreement on the day of the hearing; and (ii) my findings as to webmaster, agent fees, and accountancy.

10. The discovery assessment for 2013/14 (which was calculated on the basis of the presumption of continuity, taking 2014/15 as the index year) stands, but requires such recalculation as called-for in the light of my findings for the index year 2014/15.

11. The assessment for 2015/16 also stands, but requires such recalculation as called-for in the light of my findings for the index year 2014/15.

12. I agree with HMRC that LD's behaviour was deliberate and prompted for in relation to 2014/15, and 2013/14, but not in relation to 2015/16.

13. The appeal against the penalty for 2015/16 is allowed, and that penalty is dismissed.

14. The penalties for the 2014/15 and 2013/14 are upheld, but subject to the remarks below.

15. I have decided to increase the deductions applied by HMRC in relation to the quality of disclosure (i.e., 'telling', 'helping' and 'giving') which were imposed by HMRC at 20% (telling), 15% (helping), and 10% (giving). I consider the right figures to be 25% telling, 30% helping, and 15% giving.

16. Therefore, the two Penalty Assessments which I have upheld must also be adjusted (i) to take account of the amounts of the revised assessments; and (ii) to take account of the increased discounts which I have given for co-operation.

The parties' cases

17. The gist of HMRC's position is that LD failed to provide credible documentary evidence of the expenditure claimed. Its position is that LD had failed to provide evidence that she either had an agent (or, if she did, that a particular individual, SR, was that agent) or that she paid any fees for webhosting.

18. The Notice of Appeal, submitted by Dr Oates (giving this specifically the reason for lateness, but also raising matters more generally applicable to this appeal) says:

> "LD was escaping from an abusive relationship at the time the enquiry was being undertaken. She was no longer at the address to which correspondence was being sent and her ex partner used the same accountant and so she was unsure that her new address would be kept confidential. Her current address is the address of her new accountant because of her fear of further abuse".

19. That was expanded on in Dr Oates' letter in support of the appeal, dated 18 October 2017:

> "The reason she did not receive the documentation was because her manager was also her partner with whom she resided and therefore she was in effect escaping an abusive relationship. The fact that her ex-partner and father of her children was also represented by he same accountant compounded matters."

20. On 26 March 2018, Dr Oates wrote:

> "...it is my contention that, because the abusive relationship with the man who was acting as her agent and webmaster... LD was misled both as regards her income, legitimate expenses and the submission of her accounts because her accountant at the time also acted for the abusive partner referred to above. It has also transpired that he had full access to her bank account and in effect raided it regularly to pay what he described as 'on going' costs. I will contend that this was all legitimately recoverable by LD as commission or services rendered as agent/webhost or manager."

21. In summary, LD's case is this:

> (1) She had originally been a make-up artist, but, during the relevant period, she was also working as a self-employed entertainer; principally appearing on an adult television channel;
>
> (2) She had become and was associated with SR, who, as well as being the father of two of her children, was also her manager/agent and/or webmaster;
>
> (3) That relationship was physically and mentally abusive and SR pressurised LD into the adult entertainment industry. SR controlled and exploited her. LD eventually left SR, going into hiding, but the circumstances of their relationship and separation led to court intervention and the making of a 'restraining order' against SR;
>
> (4) She was informed by SR, wrongly and misleadingly, that she should declare her net income as her turnover, rather than her gross income, but she had no intention of falsely declaring her income;
>
> (5) She was informed by SR - again, wrongly or misleadingly - as to the expenses which were allowable, and the evidence which she would be required to keep in order to demonstrate her expenses to HMRC;

(6) The accountant initially instructed was also SR's accountant, and was biased in favour of SR;

(7) LD paid SR substantial sums of money for website hosting and agents' fees, which were properly deductible;

(8) LD did not respond to HMRC's queries because she was frightened for her own and her childrens' safety, and instances of LD being "terrorised" by SR were still happening in June 2018;

(9) SR was using the legislative structure to penalise LD in a dispute about child access;

(10) The penalties are disproportionate and punitive;

(11) In any event, LD has no assets and no savings.

22. Dr Oates put this case forcefully and succinctly at the beginning of the hearing.

Preliminary matters

23. The first matter with which I should deal at this point is the Appellant's suggestion that SR was using the legislative structure, and the tax code, to penalise LD in a dispute about their children. Dr Oates made it clear that he was no longer pursuing that allegation. Nonetheless, it was a serious and emotive allegation to have made. Although it was not pursued before me, I consider that I should address the point lest this appeal should fall to be reconsidered, or if any doubt or suspicion should linger. There is no absolutely no evidence that HMRC's involvement with LD's tax affairs had been instigated, prompted and/or encouraged by SR. When asked by me, Officer Hagain denied the point, and I accept her evidence on this matter without reservation. I have no further regard to it.

24. Secondly, LD did not attend any part of the hearing. Dr Oates explained that she did not mean any disrespect, and I accept that explanation. He explained that LD, even now, found the matters distressing and would not be in a position to speak openly even though she was "fully cognisant" of the importance of the appeal hearing.

25. At the beginning of the hearing, I made clear my provisional view that the burden of displacing the assessment - at least, insofar as it went to the assessment for the index year 2014/15 - lay on the Appellant, and that, in not attending to give evidence she was potentially placing the prospects of her appeal against that assessment at some disadvantage. This was accentuated by the factual nature of parts of LD's case, set out above, being matters in relation to which the most cogent evidence would and could only come from her.

26. Dr Oates assured me that he and LD were aware of the burden, but that he nonetheless wished to continue with the hearing and was content for the Tribunal to make its decision on the basis of the materials before it at the hearing. Immediately before the lunch adjournment, I again expressed the view that I was troubled, given the nature of some of the matters in issue, that I had not heard from LD directly. After the lunch break, Dr Oates said that he had spoken to LD. He did not make any application for an adjournment for LD to attend.

27. There was no witness statement from LD. But there was one from Dr Oates. He was apprehensive about relying on it, on the basis that he had been given to understand that he could not both represent LD and be a witness. I took a different view. In the interests of fairness and justice, I swore Dr Oates in, and explained to him that I would thereafter treat everything he told me as evidence, thereby avoiding any need to sift out evidence from submissions. In due course, he was cross-examined by Mr Mason.

Discussion

28. In my remarks which follow, and although I have made findings which are adverse to Dr Oates' client, I should make it very clear that I have no doubt at all about Dr Oates' sincerity or honesty. I have no doubt that his evidence was given sincerely and honestly. I have no doubt that he genuinely wants to believe that what he has been told by his client is true. As he said: "I can only tell you what I believe to be true".

29. However, the evidential basis for his belief is - and was shown to be - very thin. Dr Oates has no real way of knowing whether what he has been told by LD is in fact true. He was not LD's accountant at the time the returns in question were submitted. Moreover, and as was drawn out by Mr Mason in cross-examination, some of the matters which LD told Dr Oates cannot in fact have been true. They were objectively falsified by consideration of documents produced at the relevant time.

30. For example:

(1) Dr Oates had produced an income and expenditure account for LD for the period ending 5.4.14, but only for the last 6 months of that tax year (the document at page 383 of the bundle) - i.e., for the 6 months from 6.10.13. He did not know that LD had been in the self-employment system since 2012. He had been told that by LD that she had only been trading for 6 months in 2014/15;

(2) He had been told by LD that, in relation to 13/14, she had not been working before 6.10.13. But he had not (for example) been told by LD about her income from 'K*** Consulting' in May 2013 (appearing at page 327 of the bundle). He did not know whether that was employment income, or income from self-employment. HMRC's view is that it was income from self-employment;

(3) He did not know anything about LD's Paypal account (the existence of which can be deducted from her bank statements);

(4) He did not know anything about LD's Liverpool Victoria Budget Account (likewise).

31. Dr Oates said that he did not believe that LD had consciously told him lies. His evidence was that "maybe her recollection was not quite accurate".

32. Despite HMRC's invitation to do so, I cannot and will not go so far as to find that LD was lying to Dr Oates (whether in the narrow sense of telling him something which she positively did not know was true, or in the more expanded sense of telling

him something where she was indifferent as to whether it was true or not). Nonetheless, I agree with the wider point being made by Mr Mason that, if LD had told Dr Oates particular things which were not factually true, and which could be shown not to be true, then how could Dr Oates be sure that anything which he had been told was factually true. It threw a shadow of considerable doubt over the whole of Dr Oates' evidence.

33. Dr Oates eventually accepted (as, in my view, inevitably he had to) that it must have been the case that he had not been told everything truthfully or completely by LD.

34. This comes back to the over-arching point advanced by LD. Her case - put simply - is that she was in an abusive relationship, being exploited by SR, who was also the father of her children, and who was in receipt of a considerable proportion of her earnings. The key issue in this appeal is the capacity in which SR received those moneys.

35. With these factors in mind, these are my findings in relation to the items still in dispute.

'Accountancy Fees'

36. These are claimed at £1,200 for 2014/15.

37. LD bears the burden of establishing that she incurred those costs in that year. She did not have an accountant during the 2014/15 year. I am satisfied that LD did not have an accountant (which, to avoid any doubt, was not Dr Oates, but was a sole practitioner in another practice) before October or November 2016. There is no evidence that LD had incurred any liability to that accountant during 2014/15.

38. However, I do agree with Dr Oates' position - set out in his letter of 8 June 2018 - that the preparation of the accounts should be allowed on an accruals basis rather than on a cash basis.

39. But £1,200 is not the right sum. The best evidence - indeed, the only evidence - is the figure for 'accountancy' appearing in the accounts for the year ended 5 April 2015, prepared on 6 January 2017. That sum is £320. That sum can only reflect the work done by that accountant in preparing the accounts for that year. It is the sum included in the accountants, prepared by a professional, and with whom Officer Hagan was in contact. It is the sum I allow.

40. In adopting this figure from the January 2017 accounts, I am disagreeing with Dr Oates' argument that the January 2017 accounts were made without any attempt at accuracy and that no reliance can safely be placed on them. In the absence of direct evidence from LD, I must assess this objectively using what extrinsic evidence is available, or drawing such inferences from lack of evidence as appear proper. Here, there is no evidence of any complaint to the earlier accountant - whether as to the fee charged, or to the accuracy of the accounts themselves; nor of any reference to a professional body or regulator.

41. No sum for accountancy expenses can be allowed for 2013/14 because there is no evidence of any accountant being engaged for that year.

42. In the absence of evidence to the contrary, I allow the same sum - £320 - for 2015/16.

'Webmaster'/webhosting and Agent fees

43. These are now claimed at £18,800 for 2014/15 (being £16,500 for webhosting and £2,300 for agents fees: see the Table at page 393 of the bundle). £18,800 is itself an adjusted figure, being £26,600 minus the sum of £7,800 alleged to have been paid by LD to SR in relation to rent.

44. I have decided not to allow anything for these sums.

45. The key issue which I have to decide is why these sums moved from LD to SR: whether he was her agent, and these sums were attributable to his role(s) as her agent, and/or webmaster, or whether they were attributable to some other reason.

46. In this regard, LD bears the burden.

47. I am not satisfied that the evidence shows that SR was LD's agent so as to permit deduction of agent's fees.

48. On the contrary, the impression which I derive from my consideration of the totality of the evidence put before me is that, on the balance of probabilities, SR was in receipt of a significant proportion of LD's earnings because of their domestic relationship.

49. For the purposes of this analysis, it does not matter whether SR took the money due to coercion on his part, acquiescence or agreement on LD's part, or some mixture of the two.

50. I am not persuaded that the payments to SR were genuinely pursuant to any contract of agency between SR as agent and LD as principal.

51. In arriving at this conclusion, I do not place any reliance on HMRC's evidence that adult entertainers very seldom, if ever, have an agent. This is interesting, but irrelevant. I decline to draw any inference that, because adult entertainers are said by HMRC to seldom have agents, that LD cannot have had one. This appeal does not concern what generally happens. It concerns what actually happened in relation to LD.

52. I accept Dr Oates' point that an agency contract (in common with many species of contract) does not need to be created in writing, but can be created orally. Insofar as HMRC would seek to argue the contrary, it would be wrong: the non-existence of a contract *in writing* does not mean that there was no contract *at all*. But the absence of a written contract does mean that the surrounding circumstances and evidence have to be looked at and assessed with particular care in order to establish whether the elements of a contract - for example offer and acceptance - are present.

53. The obvious starting point would have been oral evidence from either of the parties to this alleged contract: SR and LD. I have not heard evidence from either of them. That is a significant obstacle to LD proving her case in this regard.

54. Dr Oates told me that LD had told him that SR was a 'dream-seller' who had "promised the earth" to LD and who had told her that he would "make her rich, would be able to buy her own house, would do so well as to have a big fancy car." In theory, I agree that these are the sort of things which an agent could tell their principal. But (even if true) they not necessarily inconsistent with things which might have been said in a domestic (i.e., non-professional) relationship. I have already made my views as to the overall reliability of Dr Oates' evidence about what he has been told by LD. The difficulties which this evidence encounters is (i) it is not coming directly from LD, but is coming second-hand; (ii) although Dr Oates may well believe it to be true, it is subject to the same observations I have made above; and (iii) it is not corroborated by any contemporary documents / communications such as text-messages. These remarks, as they are put before me, are simply of insufficient evidential weight to support a conclusion that the relationship was one of agency.

55. Credible evidence was placed before me that SR is in business as a glamour photographer and modelling agent. However, this evidence is of no real weight in this appeal. It does not tell me (i) whether he was doing the same thing in 2014/15, or earlier; (ii) even if he was, whether he was doing the same thing for LD; (iii) even if he was, what his terms were. Against this, it seems to me that one obvious feature which could differentiate SR's work with other people now from his work formerly with LD is that SR and LD have children together.

56. LD is said to have lived in a property owned by SR and to have paid him rent. Dr Oates said he did not know whether they had ever co-habited. The payment by LD of money now described as rent to SR is not a decisive feature in assessing whether he was her agent or not. There is no tenancy agreement, and the figures are inconsistent and unreliable. The deduction of £7,800 (or £650 a month) made by Dr Oates to the £26,600 known to have been paid to SR in 2014/15 is arbitrary. Moreover, it is inconsistent with Dr Oates' oral evidence that the rent being paid was £1200 or £1300 per month. In the absence of evidence from LD, who bears the burden, she cannot displace the assessment in that regard.

57. Also, it is striking that the revised account for 2014/15 submitted by the previous accountant on 10 January 2017, and dated 6 January 2017 (and to which I have already referred in the discussion of accountant's fees above) makes no mention of, or deduction of, as an expense, agent or webmaster fees, or anything which could be read as that. That revised account is apparently signed by LD (the date is 16th January 2017, but I consider that to be an obvious mistake for 6th January 2017).

58. It is an obvious point that, if agents' fees of the sort of size now being alleged were indeed payable (and which would, on their own, have exceeded the entire expenses claimed in the January 2017 account for 14/15, which were £14,733) then they would have been mentioned in the account, and they were not.

59. Moreover:

(1) There is nothing in the contemporary documents which supports the existence of a contract of agency or (insofar as may be different) the existence of terms reflective of the existence of a contract of agency;

(2) There is nothing from which the existence of a contract of agency can even safely be inferred: for example, consistent regularity of payment; payment of a particular sum, or percentage of earnings. Here, on the contrary: the payments were irregular (11 were made on dates between the 10th and 12th of a month, but the others were made on a 1st and a 26th); and were not of a particular sum or percentage. This is made clear by the table at page 393, which shows payments (always in round figures) to SR ranging from £300 to £4000;

(3) There is nothing reflective of reciprocal rights and duties of a contractual nature;

(4) There is nothing to support Dr Oates' assertion in his letter of 8 June 2018 that 'all of [LD's] income came from sources introduced by SR ...';

(5) There is nothing from which a finding could safely be made that LD had (either expressly or by implication) conferred authority on her behalf in relation to any particular matter: e.g., the obtaining of work; or the negotiation of fees;

(6) There is nothing from which a finding could safely be made that SR had done things on LD's behalf which she had subsequently, and as a principal, ratified: see Bowstead and Reynolds on Agency, §2-01.

60. As to webmaster fees, Dr Oates' evidence was (i) that SR hosted (and is still said to host) an adult website; (ii) that images or videos of LD appeared on that website (although Dr Oates told me that they had since been removed, at his insistence); and (iii) that the arrangement originally was that LD would be paid if images or videos of her were downloaded.

61. This submission encounters the same difficulties as above. There is no real evidence - oral or documentary - on which I can safely make any such findings, even on the balance of probabilities. The table at page 393 splits £26,600 said to have been paid to SR in 14/15 as to £7,800 rent, £16,500 webhosting, and £2,300 agents' fees, but Dr Oates was not able to explain how (for example) the split or break-down between webhosting and agent's fees had been arrived at. In cross-examination, he was driven (fairly) to accept that the information given to him was not complete. His explanation was that the mere fact of the payments to SR "illustrates how LD had no control over what SR took". But there is no evidence for this, and, even if true, it still does not answer why LD paid and/or SR received the money.

62. Even if I were found to be mistaken about the above, I nonethelesss accept Officer Hagain's evidence that webmaster fees would not be deductible in the absence of any evidence that LD had actually received any income from her videos and photos on the web. I agree. To my mind, this is no more than the articulation of the conventional principle that expenses are deductible only where they can be shown to have been incurred wholly, necessarily and exclusively for the purpose of the generation of income. In the absence of proof as to income, then the expenses cannot be allowed.

63. The outcome of this discussion is that the 2014/15 assessment has to be recalculated to take account of (i) the items upon which the parties reached agreement at the hearing; and (ii) my findings in relation to accountancy fees, agent and webmaster fees.

The Discovery Assessments

64. On behalf of LD, it is accepted that the Discovery Assessments were lawfully made - that is, in accordance with the legislation - albeit subject to dispute as to the figures. It is accepted that Officer Hagain correctly engaged the presumption of continuity, albeit likewise subject to challenge on the figures.

65. In the absence of any issue as to the timing of the Discovery Assessments, and the application of the presumption of continuity, then the assessments - for 2013/14 and 2015/16 stand, but fall to be recalculated in accordance with the above findings.

The Penalty Assessments

66. It was accepted that each of the three returns contained inaccuracy. Had it not been accepted, I would nonetheless have found that the returns contained inaccuracy:

(1) For 2013/14, the figures contained deductions for webmaster and agent's fees which were, as a matter of fact, not properly deductible, and hence produced inaccuracy;

(2) For 2014/15, the figures were all given as round figures, and contained deductions for webmaster and agent's fees which were not properly deductible, and hence (on either footing) were inaccurate;

(3) For 2015/16, the figures were all given as round figures, and contained deductions for webmaster and agent's fees which were not properly deductible, and hence (on either footing) were inaccurate.

67. It was accepted that the inaccuracies were made at least carelessly. Therefore, the sole issue for me to decide is whether these inaccuracies were deliberate.

68. I remind myself that HMRC bears the burden in relation to penalties, albeit that the standard of proof is still the civil standard - namely, the balance of probabilities, or whether something is likelier than not. It is down to HMRC to prove deliberate; not for LD to disprove it.

69. The question of whether something is done deliberately is one which is not always easy to answer. It cannot be fully answered in the abstract, but must depend on the facts of the particular case.

70. In *Auxilium Project Management v HMRC* [2016] UKFTT 249 (TC) the Tribunal (Judge Greenbank and Mr Bell) said (at [63]) 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

same approach has been taken in many other Tribunal judgments (such as, for instance, *Anthony Leach v HMRC* [2019] UKFTT 352 (TC): Judge Redston and Mr Robinson)).

71. Applying this test, I am satisfied that HMRC has succeeded in discharging the burden in relation to 2013/14 and 2014/15.

72. In relation to 2013/14, the Appellant's case is that she was declaring her net income as her turnover rather than her gross income because SR was telling her to do so. But that was not LD's first year in the self-assessment regime. I am satisfied that HMRC has established that LD knowingly provided HMRC with her 2013/14 return knowing that it contained an error (that error being the declaration of a net figure as turnover rather than a gross figure) and did intend that HMRC rely on it as an accurate document.

73. In relation to 2014/15, I am satisfied that HMRC has discharged the burden of demonstrating that LD's conduct in this case leading to the inaccuracies for 2014/15 was deliberate.

74. On 10 January 2017, LD's then accountant wrote to HMRC in relation to its enquiry for 2014/15 as follows:

> "LD completed her tax return herself and as she had only recently become self-employed" [I note in passing that was incorrect] "and because of her lack of knowledge as to what her responsibilities were, she had not kept records, as she had not sought any professional help with regards to what she needed to do.
>
> LD did not keep adequate records due to lack of knowledge.
>
> LD cannot remember how she arrived at (the figures of £48,000 and £41,000), and as she had left it late to submit her return. She thinks she guessed it, as she did not have the bank statements to hand. The expenses were again as per memory, with no records kept.
>
> (LD) can't remember her start-date of self employment ... she thinks it was sometime during 2013-14".

75. I have to accept that letter at face value. In the absence of any direct evidence from LD, I cannot find that it was written otherwise than in accordance with, or contrary to, LD's instructions. The accountant obviously had some information available to them, because the figures given in the letter are accurate.

76. I consider that letter describes conduct which is deliberate within the meaning of *Auxilium*.

77. For 2014/15, I do not know how the figures were arrived at. The impression is that the figures were plucked out of the air. It is inherently implausible, and I simply do not believe that LD can, from memory, have arrived at the figure of £41,000. This would involve LD keeping mental track of tens of thousands of pounds worth of

expenses, down to the nearest thousand. In my view, the figures were just made up. They were very inaccurate.

78. The self-assessment return does not indicate that the figures were estimates or provisional. To guess at figures, and not to have indicated that these were provisional or estimated, reinforces my conclusion that this was done deliberately.

79. Nothing of a factual nature was advanced to me showing that this was conduct likelier to have arisen carelessly as opposed to deliberately. The furthest that Dr Oates was able to take it, by way of submission, was to draw my attention to the round figures and to ask whether someone who was deliberately intending to do something would have done that - that is to say, it is so obvious as to positively invite HMRC's scrutiny.

80. I disagree. The point has superficial attraction, but is not well-founded. I do not see why someone who deliberately states a round figure, not knowing whether it is accurate or not, should be treated differently, or more favourably, from someone who deliberately states a figure which is not round, not knowing whether it is accurate or not.

81. To avoid any doubt, I accept Officer Hagain's evidence that the conduct which she had assessed as deliberate, and giving rise to the penalty, was the submission of the self-assessment return, and not the subsequent failure to co-operate with HMRC.

82. In her oral evidence, Officer Hagain stood by the deliberate penalty and made the point, to my mind fairly, that she and HMRC still do not know for sure what LD's income was. Those points are well-taken for 2013/14 or 2014/15. This is because the disclosure of documents given is still not wholly adequate. There is an incomplete run of bank statements for one account (account 499) which statements in turn refer to another bank account.

83. However, in my view the situation for 2015/16 is different. The tax return contained round figures, but expressly stated (which the return for 2014/15 had not done) that the figures were provisional and subject to amendment. This satisfactorily explains the round figures. The submission of this return does not meet the *Auxilium* test, because HMRC cannot demonstrate that LD intended that HMRC should rely on the 2015/16 return as an accurate document. On the contrary, the use of provisional figures, stated to be such, made it clear that the document was not intended to be relied upon as accurate.

84. Whilst I do not disagree with the detailed descriptions of the 'telling', 'helping', 'giving' set out in the Penalty Explanation, nonetheless, it seems to me that this is a case, looked at in the round, and applying my knowledge and experience of other cases, where the discounts applied for disclosure and co-operation are too modest.

85. LD had spoken with HMRC on the phone, at least once and perhaps twice, fairly soon after the inquiry had been opened. On 27 October 2016, LD had confirmed to Officer Hagain that her turnover and expenses figures were round sums, "and not 100% accurate". That was a sensible concession to have made. The accountant's letter

of 10 January 2017 was, taken at face value, disarmingly candid and not evasive. Information (albeit, as explained, incomplete) had been provided.

86. In relation to the amount of the penalty, I have the power to substitute for HMRC's decision another decision that HMRC had the power to make: Schedule 24 Paras 15(2) and 17(2)(b). I adjust the discounts from 20% (telling), 15% (helping), and 10% (giving) to 25% telling, 30% helping, and 15% giving.

87. Given my finding that the inaccuracies for 2013/14 and 2014/15 were deliberate and not careless, then the Penalties cannot be suspended: Schedule 24 Paragraph 14(1). Nonetheless, and even if these had been careless and not deliberate, it still does not seem to me as if there could be any measurable or achievable conditions upon which the penalties could be suspended. I do not even know if LD is still in the self-assessment system. As the Tribunal (Judge Brannan and Ms O'Neill) remarked in *Anthony Fane v HMRC [2011] UKFTT 210 (TC)* at Paragraphs [60]-[61]:

> "....it is clear from the statutory context that a condition of suspension must be more than an obligation to avoid making further returns containing careless inaccuracies over the period of suspension ... If the condition of suspension was simply that, for example, the taxpayer must file tax returns for a period of two years free from material careless inaccuracies, Paragraph 14(6) would be redundant"

88. The issue of whether the penalties are proportionate is one which lies outside the scope of the Tribunal's jurisdiction. The penalty scheme was laid down by Parliament, which has a wide discretion in devising a suitable scheme for penalties. Therefore, a high degree of deference to the will of Parliament must be paid by courts and tribunals when determining the legality of penalties. Given the State's wide margin of appreciation, the Tribunal must be astute not to substitute its own view of what is fair for the penalty which Parliament has imposed.

89. It was submitted that LD has no assets and no savings. Inability to pay a penalty is not a matter which I can consider in this context. In cases where a taxpayer cannot pay, HMRC has Care and Management Powers.

Decision

90. For the above reasons:

(1) The Assessment for 2014/15 shall be recalculated;

(2) The Assessments for 2013/14 and 2015/16 shall be recalculated;

(3) The Penalty Assessment for 2015/16 is quashed;

(4) The Penalty Assessments for 2013/14 and 2014/15 shall be recalculated.

91. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later

than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

Dr Christopher McNall

TRIBUNAL JUDGE
RELEASE DATE: 09 AUGUST 2019