[2019] UKFTT 0543 (TC)

TC07337

Income tax – fair inferences - no – assessments "in terrorem" – yes.

FIRST-TIER TRIBUNAL **Appeal number: TC/2018/05468**

TAX CHAMBER

BETWEEN

SEBASTIAN CUSSENS **Appellant**

-and-

THE COMMISSIONERS FOR

HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE GERAINT JONES QC.

MR. CHARLES BAKER.

Sitting in public at Taylor House, London on 09 August 2019.

The Appellant in person, assisted by his father.

Ms E. Edley, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents.

DECISION

INTRODUCTION

1. On 18 January 2018 the respondents issued income tax assessments against the appellant, pursuant to s29(1) & 36(1A)Taxes Management Act 1970, for the fiscal years ended 5 April 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015 and 2016. They cumulatively totalled £272,840.87p. On the same date penalty assessments were issued but in respect of the fiscal years ended only 2010, 2011, 2012, 2013, 2014, 2015 and 2016. They cumulatively totalled £114,842.02p. Ms Edley informed us that HMRC had withdrawn many of these penalties.

2. Then, on 30 November 2018, the respondents issued a further series of penalty assessments in respect of the fiscal years ended 5 April 2005, 2006, 2007, 2008 and 2009. They cumulatively totalled £70,102.24p.

3. Thus the total amount at stake in this appeal is £342,943.11p. We say that notwithstanding that Ms Edley correctly points out that the appellant has not actually appealed against the penalties referred to in paragraph 2 above.

4. The basis for the assessments referred to in paragraph 1 above was that the respondents alleged that they had made a discovery, that is to say, that the appellant had failed to declare trading profits for each of the fiscal years mentioned above.

5. On 5 April 2017 the respondents began to check the appellant's tax position for each of the foregoing years and requested details from him. It is not putting it too bluntly to say that the appellant was less than co-operative, failed to produce any significant documents and/or narrative and certainly did not put forward the explanation which was put forward to us today. The explanation provided to us was, in part, provided by the appellant's father who accompanied him at the appeal hearing. During this initial period, the appellant's then accountants wrote three brief letters. It is most unfortunate that they did not explain the appellant's health difficulties and/or the matters that have been put to us.

6. We should therefore identify that the basis of the assessments seem to have rested upon the well-known *Johnson v Scott* [1978] STC 48 approach from the judgment of Mr. Justice Walton:

> "It is quite impossible to see how the Crown, in cases of this kind, could do anything else but attempt to draw inferences. The true facts are known, presumably, if known at all, to one person only - the Appellant himself. If once it is clear that he has not put before the tax authorities the full amount of his income … what can then be done? Of course all estimates are unsatisfactory; of course they will always be open to challenge in points of detail; and of course they may well be under-estimates rather than over-estimates as well. But what the Crown has to do in such a situation is, on the known facts, to make reasonable inferences … the Inspector's figures … ought to be - fair. <u>The fact that the onus is on the taxpayer to displace the assessment is not intended to</u>

> give the Crown carte blanche to make wild or extravagant claims. Where an inference, of whatever nature, falls to be made, one invariably speaks of a `fair' inference. Where, as is the case in this matter, figures have to be inferred, what has to be made is a `fair' inference as to what such figures may have been. The figures themselves must be fair".

7. Section 29 Taxes Management Act 1970 s29 provides that HMRC may:

> "… make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax."

8. The respondents claim that the assessments are fairly based upon inferences that flow from the fact that the respondents had information to the effect that the appellant had been trading, as a sole trader, in buying and selling low end, cheap second hand cars. It seems that the respondents relied upon information emanating from Worldpay which had a heading "Waltham Cars," with the appellant described as the "principal". It also contained a mobile telephone number which, we heard, is the appellant's father's mobile telephone number (he being the alter ego of Waltham Builders Ltd – see below).

9. The appellant has appealed the assessments and associated penalties (save for those which we have identified above), without any kind of expert assistance from either a lawyer or accountant. He has simply asserted that he has had no income over the relevant fiscal years, which would result in him paying or owing any income tax. He does not deny that he has had some modest income from a part share in a rental property, but maintains that this has been nowhere near to taking over and above the single persons annual tax allowance in any of those years.

10. At the outset, the appellant displayed a large bundle of documents which we did not examine. He said that these were his medical records and that they demonstrated that he suffered from permanent and debilitating ill health which preventing him from working. Later in the hearing Ms Edley drew our attention to the appellant's bank statements for the tax years 2014/15 and 2015/16 and listed the different types of receipt. These included, until 16 June 2014, EESA paid by the Department for Work and Pensions. We understand that EESA stands for Enhanced Employment and Support Allowance. The Department for Work and Pensions paid this allowance to persons who were unfit to work because of physical or mental impairments.

11. It was apparent to us from our own observations at the outset of this appeal that the appellant lacked the skill, ability and perhaps the understanding to deal with this appeal properly.

12. Accordingly, we initially turned our attention to an issue that troubled each of us upon independently pre-reading the documents made available to us prior to the hearing.

Fair Inference

13. In the respondents' Statement of Case it is correctly identified upon whom lies the onus of proof on the various matters set out in paragraph 1 thereof. However, what is missing is any reference to who bears the onus of establishing that the assessments were made

based upon fair and proper inferences being drawn from established facts. In our judgement that onus undoubtedly lies upon the respondents, at least where the assumption to which we refer below, is displaced.

14. Each of the assessments was subject to a Review. The Review was undertaken by Corey Yuill, who issued the Review Conclusion Letter dated 17 July 2018. It upheld the various assessments and associated penalties. The Review Conclusion Letter makes it perfectly clear that "best judgement" was the basis for the several assessments, but failed to consider what, if anything, had been taken into account or ought to be taken into account in arriving at best judgement. The Review did not consider whether the judgement arrived at by the assessing officer was indeed "best" and/or upon what basis, if any, it might properly be said to amount to best judgement. The Review Officer said in terms "The assessments have been raised by HMRC using best judgment after they were unable to gather any evidence from yourself " (sic).

15. Whilst "best judgement" is essentially a concept taken from VAT legislation, we regard it as a "first cousin" to the approach adumbrated by Mr Justice Walton (see paragraph 6 above).

16. When considering whether one or more assessments have been made based upon fair inferences being drawn from established facts, or to best judgement, we take guidance from the decision of Woolf J in *Van Boeckel v C & E* [1981] STC 150 and *Rahman (No. 2) v HMRC* [2003] STC 150 – albeit decisions relating to VAT legislation. It is plain from a consideration of those decisions that six distinct principles emerge. They are that :

    a. The respondents must be in possession of some material upon which a best judgement assessment can properly be based,

    b. The respondents are not required to undertake the work which the taxpayer would ordinarily undertake so as to arrive at a conclusion about the exact amount of tax due,

    c. The respondents are entitled to exercise their best judgement power by making a value judgement on the material available,

    d. This Tribunal should not treat an assessment as invalid simply because it takes a different view as to how the best judgement could or should have been applied to the material available to the respondents. Before the Tribunal interferes, it needs to be satisfied that the purported best judgement assessment was wholly unreasonable.

    e. The Tribunal is to start by assuming that the respondents have made an honest and genuine attempt to arrive at a fair assessment.

    f. It is for the Tribunal to arrive at the proper sum for the tax payable in the event that it decides that the assessment(s) fail to satisfy the best judgement criteria.

    g. We should add that in *Homsub Ltd v HMRC* [TC/2017/00168] this Tribunal held that in addition to the factors mentioned above, any assessment said to be to best judgement will, of necessity, have to be methodologically sound or, at least, not methodologically flawed. It may well be that that principle is subsumed into (d) above.

17. We must also refer to the decision in *Pegasus Birds Ltd v HMRC* [2004] EWCA Civ 1015. We note that in the judgement of Lord Justice Carnwath he referred, with approval, to the two-stage test adumbrated in *Rahman (No. 1) v C & E* [1998] STC 826 where it had been common ground between the taxpayer and the Commissioners that the Tribunal should adopt a two-stage approach, which had been described thus:

> "…. The practice is to consider these cases into stages: (1) consideration whether the assessment was made according to the "best judgement of the commissioners"; if not, the assessment fails and stage (2) does not arise; (2) if the assessment survives stage (1), consideration whether the amount of the assessment should be reduced by reference to further evidence of further argument available to the Tribunal ……"

18. This latter decision is of importance because if we conclude that the instant assessments were not based upon inferences that could be fairly made (akin to best judgement), by analogy, that is the end of our function in the instant appeal. It is not for us to then to attempt to arrive at some kind of alternative assessments or even to find facts which might be relevant if the respondents choose to re-visit the appellant's position for the tax years to which we have referred.

19. In this appeal the respondents have chosen to adduce no witness evidence whatsoever. Thus, we have no way of knowing what, if anything, was relied upon by either the assessing officer or the Review officer (identified above) in and about making a decision upon which each of the assessments was based.

20. Our immediate concern was triggered by the fact that upon reading the papers relevant to this appeal, it could be seen that the assessments against the appellant are based upon the proposition that he purchased cheap second-hand motor cars which he then advertised and sold at a profit. We make no finding that that is what happened – we simply summarise that that is the position taken by the respondents. The Review Conclusion Letter stated that HMRC had taken their estimate of the sales for 2015-16 and deducted 50% for expenses. HMRC then scaled back the result for the previous eleven years using the RPI. When we invited Ms Edley to tell us how she submitted that this figure of 50% for "expenses" had been arrived at, so as to allow a net profit figure to be ascertained, she told us that there was nothing that she was able to say about that figure or how it had been arrived at. She said that she had no details whatsoever appertaining thereto.

21. We keep in mind that within the context of this appeal, it is not for this Tribunal to second-guess what proper inferences could/should have been drawn or what result would have resulted if best judgement, objectively speaking, had been exercised; and there was a proper basis for believing that it had been "best".

22. The jurisprudence, referred to above, indicates that we should start by assuming that the respondents have made an honest and genuine attempt to arrive at a fair assessment, which may suggest, when it speaks about an assumption, that there is no onus upon the respondents to prove that an assessment was made in accordance with the approach adumbrated by Mr. Justice Walton and/or to best judgement. Even if that analysis is correct, it cannot obtain beyond giving rise to a rebuttable presumption/assumption

which, if credibly called into question, will still require us to be satisfied that the inferences drawn were/are fair and reasonable and/or akin to best judgment. It is for the party (HMRC) asserting that fair inferences have been relied upon, to demonstrate that that was/is so.

23. We also keep in mind that before the Tribunal interferes, it needs to be satisfied that the purportedly fair inferences or best judgements were/are wholly unreasonable.

24. It is not uncommon in this Tribunal to find the respondents submitting that either a particular enquiry has been opened because figures put in by taxpayer do not meet the norm for a stipulated trade or activity or that it is proper, in arriving at fair inferences, to adopt the norms (known to the respondents through their extensive database) within a particular trade sector or line of business. Within this specialist jurisdiction we are entitled to take note of the fact that the respondents have a vast database of such information available to them. There has been no suggestion before us that either the assessing officer or the Review officer undertook any research into, or relied upon, internally held material indicating the normal net profit margin achieved by those who engage in selling low-end cheap second-hand cars (whether trade or retail), or even those who engage in selling second-hand cars generally.

25. The appellant's father, Mr Cussens, told us, and we had no reason to doubt, that all the trading in vehicles that has taken place (and which has been attributed to the appellant), has been undertaken by Waltham Builders Ltd. He informed us that the company sells on the vehicles "trade" and, on average, makes around £200 per vehicle. We make no findings about that assertion because it would be wrong of us to make findings in circumstances where we did not proceed to take evidence which was subject cross examination in the context of appropriate documents being available. However, Mr Cussens' account chimed with what we would reasonably have expected to be the position. If second-hand cars were being purchased, as he stated, from British Car Auctions and then sold on "trade", as opposed to retail, it is unthinkable that a net profit margin of 50% was either achieved or achievable, in such a highly competitive second hand car market. We doubt that even that level of net profit margin would have been achieved if the cars were being sold retail.

26. We have seen nothing whatsoever in the documentary evidence to suggest that any thought, consideration or analysis whatsoever was undertaken by either the assessing officer and/or the Review officer to decide whether taking a net profit figure of 50% of supposed turnover was or was not a reasonable basis upon which to proceed. We are firmly of the view that that figure was simply "plucked from the air". Furthermore, the HMRC officer seems to have given no consideration to the plausibility of the absolute level of the net income figure. It seems in no way conceivable that an individual classified by the Department of Work and Pensions at the start of 2014/15 as unfit to work on account of their physical or mental impairment could earn £81,594 from their own efforts.

27. In setting out the foregoing we are very mindful of the fact that this appellant has done nothing whatsoever to assist his own cause or case. He has behaved ostrich-like and buried his head in the sand rather than engaging with the issues involved in this appeal. We therefore pointed out to him that it would be in his best interests to engage far more

seriously because, if, as has been asserted, all the trading in second-hand cars took place by Waltham Builders Ltd, it should be feasible for that to be demonstrated upon an analysis of the accounts, bank statements, invoices and usual accounting/sales records maintained by a body corporate. Indeed, that is something upon which one would expect that company's accountants to be able to assist. However, in saying this, we are conscious that the appellant has his own medical difficulties. His father is eighty one years of age and is limited in the assistance he can give.

28. In our judgement when the figure of 50% net profit margin was adopted by the respondents, that could not possibly have been a fair inference and/or a judgement which could properly be characterised as "best". We are entirely satisfied that if any judgement whatsoever was brought to bear upon this issue, it certainly cannot be described as "best". It smacks of being a situation where, because the appellant had been uncooperative and was sticking his head in the sand, the respondents decided to issue assessments almost "*in terrorem",* in a bid to persuade the appellant to engage properly in the matters under review. The assessments would certainly meet that description if the appellant's assertion that he is in receipt of DWP benefits and is somebody without any or any significant means, proves to be true. In our judgment the amounts charged by the assessments are so unreasonable that (a) no reasonable officer could hold that opinion when issuing the assessments, and/or (b) that same would properly make good the loss of any tax that was properly due. Rather the primary purpose was to frighten the taxpayer into responding to requests for information. It follows that the assessments were not authorised by s29 TMA.

29. Everything we heard during the appeal hearing fortified and confirmed our independently held preliminary views to the effect that the assessments supposedly based upon fair inferences were wholly unreasonable and anything but "best judgment" (per the Review Officer). In saying that we keep firmly in mind that it can often be difficult for an assessing officer when a taxpayer has failed to cooperate in and about providing information, but even in such circumstances a proper exercise must be undertaken to arrive at a fair and reasonable assessment, rather than inflated assessments being issued with a view to bringing a particular taxpayer to heel.

30. In conclusion, we have formed the opinion that the assessments raised on the appellant are so wild, extravagant and unreasonable that they were not raised for the purpose of making good to the Crown a loss of tax and so were not authorised by s29 TMA. It follows that we allow this appeal against each of the assessments and their associated penalties.

31. Following the decisions referred to in paragraph 16 above, it is not for us to proceed to try to re-work these assessments. It will be a matter for the respondents as to whether they choose to revisit the situation, making any appropriate adjustment for the appellant's medical condition. If they do so, the appellant would do well not to behave ostrich-like and to bury his head in the sand any further, but to respond, to the best of his ability, with the respondents' need for reliable information.

Decision

Each of the assessments referred to in paragraph 1 above is set aside and quashed, along with the penalties associated therewith.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

GERAINT JONES QC.
TRIBUNAL JUDGE

RELEASE DATE: 20 AUGUST 2019