



**TC07679**

*INCOME TAX – directions to recover PAYE income tax from individuals – whether Appellants were aware that employer had wilfully failed to deduct PAYE – whether 20 year extended time limit for assessments applied – Regulation 72, Income Tax (PAYE) Regulations 2003*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2017/07343  
TC/2017/07327  
TC/2017/08071**

**BETWEEN**

**SHAMIR PRAVIN BUDHDEO  
AMARJIT SINGH HUNDAL  
JOSHY MATHEW**

**Appellants**

**-and-**

**THE COMMISSIONERS FOR  
HER MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE ALEKSANDER  
CATHERINE FARQUHARSON**

**Sitting in public at Taylor House, London EC1 on 24 and 25 September 2019**

**Mr Hundal, in person**

**Simon Livingstone, counsel, instructed by Noviscom, for Mr Budhdeo and Mr Mathew**

**Simon Foxwell, litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents**

## DECISION

### INTRODUCTION

1. These three appeals by Mr Budhdeo, Mr Hundal, and Mr Mathew were directed to be heard together by the Tribunal. The three appellants were all directors of Intecare Homecare Limited (renamed IH Realisations 2008 Limited on 22 December 2008) ("IHL").
2. The appeals relating to Mr Budhdeo and Mr Hundal relate to assessments under s29, Taxes Management Act 1970 ("TMA") following directions under regulation 72, Income Tax (PAYE) Regulations 2003 ("the Regulations") to recover tax that IHL, according to HMRC, should have deducted from payments of employment income made to these Appellants in 2008/09.
3. The appeal relating to Mr Matthew relates to a closure notice issued under s28A TMA, following a corresponding direction under the PAYE Regulations to recover unpaid PAYE.
4. In addition, the appeals extend to late payment surcharges levied under s59C, TMA on the basis that the tax was not paid, nor any appeal filed, within 28 days of the due date for payment of the tax arising on the assessment or closure notice.
5. The amounts of tax subject to these appeals are as follows:

Date	Legislation	Appellant	Amount
28 Feb 2017	Section 29 TMA & Regulation 72 PAYE Regulations	Hundal	£120,000
28 Feb 2017	Section 29 TMA & Regulation 72 PAYE Regulations	Budhdeo	£120,000
28 Feb 2017	Section 28A TMA & Regulation 72 PAYE Regulations	Matthew	£36,000

### PROCEDURAL BACKGROUND

6. There is a long and convoluted procedural background to this hearing. HMRC had commenced a COP9 enquiry against Mr Budhdeo in 2013. That meant that HMRC had told him that they suspected him of tax fraud but would agree not to prosecute if he agreed to full disclosure. He was warned if he did not, HMRC might carry out a criminal investigation into the suspected tax fraud. Mr Budhdeo did not agree to full disclosure and denied any wrongdoing.
7. Mr Budhdeo, Mr Hundal, and Mr Mathew and a number of other companies, not including IHL, had brought appeals in this Tribunal against the issue of information notices to them and (as regards Mr Budhdeo, Mr Hundal and the companies) against penalties imposed for their non-compliance with the notices. These appeals were reported as *Gold Nuts Ltd and others* [2016] UKFTT 82 (TC), *Gold Nuts Ltd and others* [2017] UKFTT 84 (TC), *Gold Nuts Ltd and others* [2017] UKFTT 354 (TC), *Hundal* [2018] UKFTT 469 (TC) and *Mathew* [2015] UKFTT 139 (TC).
8. In July 2018, following a case management hearing, the Tribunal gave directions for the future conduct of this appeal, including that the parties would exchange lists of documents by 28 September 2018, and would serve witness statements by no later than 31 October 2018.
9. When chased by the Tribunal for his list of documents, Mr Budhdeo applied for the appeal to be stayed on the basis (a) he was a party to a judicial review proceedings against HMRC and (b) he was subject to a COP9 enquiry which amounted to a criminal charge and engaged his right not to self-incriminate. HMRC objected to the application and the application was set down for hearing. That application was refused by the Tribunal following a hearing on

12 December 2018 ([2019] UKFTT 216 (TC) released on 29 March 2019). The reasons given by Judge Mosedale in her decision speak for themselves, but we note that she held that, although Mr Budhdeo could not be compelled to give oral evidence in this appeal, it was far from obvious that doing so would prejudice Mr Budhdeo's defence in any criminal proceedings – and indeed Mr Budhdeo was unable to identify any specific prejudice to him if he gave oral evidence in civil proceedings, but was later prosecuted. The deadline for the service of lists of documents and witness statements had expired, but as Mr Budhdeo informed the Tribunal that he did not wish to serve a witness statement, the Tribunal decided that there was no need to make directions to now allow him to do so. However, he was warned that it may harm his case if he did not give evidence, and that unless he served a written witness statement well in advance of the hearing and was given permission to rely on it, the hearing judge may not permit him to give any oral evidence at the hearing and may refuse to adjourn the hearing to allow him to serve a witness statement. The Tribunal gave directions that the parties provide their listing information (including dates to avoid) by no later than 13 April 2019. No listing information was ever provided on behalf of Mr Budhdeo.

10. Mr Budhdeo sought permission to appeal against that decision, which was refused by this Tribunal, and then refused on the papers by the Upper Tribunal.

11. On 4 June 2019, this appeal was set down for hearing on 24-25 September 2019.

12. On 6 June 2019, Mr Budhdeo made an application to postpone the hearing date on the grounds that he was not available, and on 10 June 2019, HMRC made a similar application on different grounds. Both applications were refused.

13. On 29 July 2019, HMRC renewed their application to postpone the hearing date, which was refused.

14. On 1 August 2019, HMRC wrote to Mr Budhdeo closing their COP9 investigation and confirming that they would not proceed with any criminal charges. We were told that this letter was only received by Mr Budhdeo on 6 August.

15. Mr Budhdeo applied for his application for permission to appeal be considered at an oral hearing before the Upper Tribunal, and on 15 August 2019, he was informed that this hearing was listed for 15 October 2019.

16. On 16 August 2019, Mr Budhdeo renewed his application to postpone the hearing date on the grounds that the permission to appeal against the 29 March 2019 decision was set down for an oral hearing before the Upper Tribunal on 15 October, and on the grounds that he was on leave on the FTT hearing dates. That application was refused.

17. On 22 August 2019, Mr Hundal applied for the hearing to be postponed, and on 27 August 2019, HMRC renewed their application to postpone the hearing.

18. On 4 September 2019, the Tribunal issued written reasons explaining why the further applications to postpone the hearing were again refused: Mr Budhdeo had not given good grounds for the postponement – without good reason he had not provided the Tribunal with dates to avoid, and did not explain why he was unavailable before any of the prior postponement applications. As regards the Upper Tribunal hearing, the Tribunal noted that his application had been refused on the papers, and that Mr Budhdeo had renewed his application orally. Although there was a theoretical risk that the Upper Tribunal could grant permission following the oral hearing, the Tribunal held that it was unlikely that permission would be given (or even if permission was given, that the appeal would be decided in his favour), a view reinforced by the Upper Tribunal's refusal to give leave on the papers. The Tribunal noted that if it became the Tribunal's practice to postpone hearings in circumstances where a party appealed against a case management decision to refuse a postponement, then the effect would

be to make Tribunal decisions to refuse postponements worthless. The Tribunal directed that none of the parties may renew their application at the hearing on the same grounds on which it had already been refused.

19. At the opening of the hearing before us, Mr Livingstone, on behalf of Mr Budhdeo, renewed the application to postpone the hearing, this time on the grounds that Mr Budhdeo wanted to give evidence (and file a witness statement), but until now had been unable to do so pending the resolution of the COP9 enquiry. We refused the application to postpone the hearing. There was no good reason advanced on behalf of Mr Budhdeo why he could not have provided a witness statement in accordance with the directions previously given, and there was no good reason given why the hearing should now be postponed to allow him to now prepare one.

20. We noted that:

(1) as stated in the Tribunal's decision of 29 March, providing a witness statement for the purposes of this appeal would not have prejudiced Mr Budhdeo's defence, even if a criminal trial had arisen from the COP9 enquiry;

(2) Mr Budhdeo was aware that HMRC had concluded their COP9 enquiry, at the very latest, on 6 August – yet the application he made on 16 August to stay these proceedings did not mention that now wanted to file a witness statement and that he needed time to prepare it; and

(3) he was warned in the 29 March decision of the risk that failure to supply a written witness statement well in advance of the hearing may result in him not being able to give oral evidence, and that the hearing judge might refuse to allow an adjournment to allow him to serve a witness statement.

21. As Mr Budhdeo had not provided a witness statement in accordance with the Tribunal's directions, we did not permit Mr Budhdeo to give oral evidence.

#### **REPRESENTATIVES AND EVIDENCE**

22. Mr Livingstone represented both Mr Budhdeo and Mr Mathew. Mr Hundal appeared in person. Mr Foxwell represented HMRC.

23. Mr Hundal, Mr Mathew, and Mr Goater provided witness statements, and each gave oral evidence. In addition, bundles of documentary evidence were produced (Mr Goater is an officer of HMRC and was responsible for issue of the assessments and closure notice).

#### **BACKGROUND FACTS**

##### **The Appellants and others**

24. IHL was founded by Mr Budhdeo and Mr Hundal in 2002. At all times they were both employees, directors, and shareholders of IHL. According to the administrators' final report, at the time the company went into administration, IHL had 180 ordinary shares in issue, of which Mr Budhdeo and Mr Hundal each owned 90 shares.

25. Mr Budhdeo was the CEO of IHL. Mr Hundal is a pharmacist, and his role in IHL was to be responsible for logistics, sales, and operational support.

26. Mr Mathew is an accountant and was employed within the IHL group since 2004. He was appointed as IHL's finance director from May/June 2008. Mr Mathew's evidence was that became a shareholder in IHL, but the administrator's final report does not list him as one of the shareholders.

27. Sanjay Budhdeo is Mr Budhdeo's brother. He was the sole director of Blackbay Ventures Limited ("BVL") at the time it (and its subsidiaries) acquired IHL's business and assets.

28. Dewanis are a firm of chartered accountants, of which Ragesh Dewani is the principal. They were responsible for IHL's audit and dealt with its tax affairs. In addition, Dewanis prepared Mr Hundal and Mr Budhdeo's personal tax returns. The audit of BVL was undertaken by a different firm of chartered accountants, Ripe LLP, but Dewanis dealt with BVL's tax affairs.

### **The underlying events**

29. The following background facts are largely undisputed, and we find them to be as follows:

30. IHL was incorporated in 2002 to provide pharmacy homecare, particularly to haemophiliacs. The business supplied medicines, medical equipment on loan, medical training, and medication system audits directly to patients in their homes. The business expanded to include the provision of pharmacy services to care homes. From 2006 to 2008, IHL established multiple depots and other physical locations – with a central site in St Albans, and multiple satellite sites throughout the UK, to achieve nationwide coverage to serve a larger number of care homes. From 2008, IHL serviced patients with multiple sclerosis, incontinence, and HIV.

31. At its peak, IHL employed over 100 staff, had a turnover of between £8m and £9m, and had an overdraft with HBOS/Bank of Scotland of approximately £850,000. However, the company's draft accounts for the year ended 31 December 2007 reported a net loss of £311,204.

32. On 2 October 2008, HBOS instructed Menzies Corporate Restructuring ("MCR") to review IHL's financial position following the return unpaid by the bank of several significant cheques, payment of which would have caused IHL to exceed the limit of its overdraft facility.

33. MCR's report identified a working capital funding gap of between £700,000 and £800,000, which had arisen because of the trading losses.

34. According to MCR's reports, IHL's funding shortfall, its heavily insolvent balance sheet, and the need for significant additional capital, were fully acknowledged by the directors, who advised HBOS that discussions were ongoing with third parties to raise capital, through a trade sale of the business, an equity injection, or a refinancing of the bank facility.

35. Following a meeting on 5 November 2008 with GlaxoSmithKline ("GSK"), a key supplier, GSK withdrew its credit facilities. Mr Hundal's evidence was that GSK withdrew its credit because it was unhappy with IHL sourcing GSK products through the "grey market", not because of IHL's solvency.

36. Although IHL sought to accelerate the capital raising exercise, it was not able to obtain further funding for the company.

37. In parallel with the directors' attempts to raise additional capital, Hilco Appraisal Limited were instructed by MCR to prepare a valuation of IHL's assets, and Clearwater Corporate Finance LLP were instructed to assist MCR in a search for potential purchasers of the business.

38. IHL went into administration on 4 December 2008, and two partners of MCR were appointed as administrators.

39. By the time the company went into administration, at least six cheques in respect of PAYE and NICs had been dishonoured. As regards the 2008/09 tax year, in the period from 6 April 2008 to 4 December 2008 IHL made payments of PAYE and NICs to HMRC for April, May and June only. Cheques for PAYE and NICs in respect of July, August and September 2008 were dishonoured by HBOS.

40. On 4 December 2008, immediately after the commencement of the administration, the business and assets of IHL were sold to BVL and its subsidiaries Venture Pharmacies Limited and Intecare Direct Limited.

41. None of the Appellants became directors of BVL at the time of the purchase. We note however that Venture Pharmacies Limited was incorporated on 27 September 2006, and Mr Budhdeo was a director from incorporation until 7 September 2009 and Mr Hundal was a director from 24 September 2008 until 7 September 2009. Mr Hundal became a director of Gold Nuts Limited (which became the ultimate parent of BVL) in late 2009, although at the time BVL acquired IHL's business, the two companies were under separate ownership. At some point (probably in 2012), all the Appellants became directors of BVL and Venture Pharmacies Limited.

42. The sale was governed by an agreement dated 4 December 2008 between Intecare Pharmacy Services Limited (in administration), IHL (in administration), Intecare Limited (in administration), the administrators, BVL, Zanrex Limited, and Sanjay Budhdeo.

43. Intecare Pharmacy Services Limited (in administration), IHL (in administration), and Intecare Limited (in administration) were the sellers under the contract and BVL was the purchaser. Zanrex and Sanjay Budhdeo were guarantors of BVL's obligations.

44. The consideration payable was stated to be £500,000 – of which £370,000 related to the benefit of an inter-company debt. The price was payable in instalments, being £1 on signing, and the balance over the following 11 months. Under the contract, BVL was required to offer employment to all of the sellers' employees, and BVL agreed to employ all the employees with effect from 4 December and be responsible for payment of all wages, salaries, holiday pay, and related PAYE, NICs and deductions arising after that date. The employees of IHL became employees of BVL or one or other of its subsidiaries. Mr Budhdeo, Mr Hundal and Mr Mathew became employees of Venture Pharmacies Limited, a subsidiary of BVL. We address the impact of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") below.

45. Other than assuming the burden of customer contracts, BVL did not assume any of the liabilities of the sellers.

46. On 26 January 2009, the administrators filed a written report to creditors. This discussed the reasons for the sale of the IHL's business to BVL, which we discuss below. The report noted that the directors had been asked to provide a statement of affairs, but as at the date the report was prepared, no such statement had been received. There was attached to the report a schedule of unsecured creditors. The report noted that there were no secured creditors, and that the administrators were not aware of any preferential creditors (such as employees). There were no liabilities to any employees (including the Appellants) shown on the list, nor any liabilities to HMRC. The total amount owed to the creditors listed was £3,224,508.39. The administrators reported that it was likely that there would be insufficient realisations to enable any distribution to be made to non-preferential creditors.

47. On 2 March 2009, MCR filed online a P35 PAYE return for IHL for the tax year 2008/09 together with P14s for 101 employees. The P35 and P14s were in respect of the period up to the commencement of the administration on 4 December 2008, at which point the employment of the employees with IHL terminated, and they became employees of BVL and its subsidiaries. The P14s showed the amount of earnings paid by IHL to each of the employees in the 2008/09 tax year down to the point that their employments transferred to BVL, and the associated PAYE and NICs liabilities.

48. The P14 for Mr Budhdeo showed total earnings for the tax year 2008/09 of £305,000 and PAYE income tax of £118,002 and £44,800 NICs (employee and employer) arising in respect of that income. The P14 for Mr Hundal showed total earnings for the tax year of £305,000 and PAYE income tax of £115,781 and £44,800 NICs (employee and employer). The P14 for Mr Mathew showed total earnings for the tax year of £113,333 and PAYE income tax of £40,224

and £18,350.47 NICs (employee and employer). The P14s all stated that the employment of the Appellants with IHL ended on 4 December 2008.

49. On 2 March 2009, the administrators filed the directors' statement of affairs at Companies House. The statement of affairs was signed by Mr Mathew, and each of Mr Budhdeo, Mr Hundal and Mr Mathew signed a statement of truth confirming that the statement of affairs was a full, true, and complete statement of the affairs of IHL as at 4 December 2008, when the company went into administration. The statement showed non-preferential unsecured creditors totalling £3,224,508.39. We note that this exactly equals the total amount for unsecured creditors scheduled to the administrators' report of 26 January 2009. We find that the creditors listed in the administrator's schedule correspond to the non-preferential unsecured creditors as stated in the statement of affairs.

50. On 29 June 2009, the administrators filed a progress report to creditors. This notes that in addition to the overdraft with HBOS, the company had an invoice discounting facility, which was personally guaranteed by Mr Budhdeo, and that Mr Budhdeo had met the shortfall on the facility. As regards creditors, no preferential creditor claims (which would include claims for arrears of income owed to employees) had been received. The report notes that non-preferential claims had been received totalling £2,556,079 from trade creditors, and £330,080 from HMRC (£89,611 for VAT and £240,469 for PAYE income tax). Based on the then current information, the administrators reported that it was unlikely that there would be sufficient realisations to enable any distribution to be made to non-preferential creditors.

51. A final report to creditors was filed by the administrators on 17 November 2009. This stated that no preferential creditor claims had been received. As regards non-preferential claims, trade creditors' claims totalled £2,560,493, and HMRC's claims totalled £330,079. As the company had no assets available to non-preferential creditors and nothing could be paid to creditors, IHL was moved from administration to liquidation on 17 November 2009, and was dissolved on 20 February 2010.

52. On 15 June 2010 (after the company had been dissolved), a further P35 was filed online on behalf of IHL, together with supporting P14s for the Appellants (but for no one else). We discuss below who filed these returns.

53. These second P14s for Mr Budhdeo and Mr Hundal each showed additional earnings for the tax year of £300,000. The tax and NICs (employees and employers) reported on the P14s was £120,000 (income tax) and £41,400 (employees and employers NICs). The amounts for Mr Mathew were earnings of £90,000, PAYE of £36,000 and NICs (employees and employers) of £12,420. These amounts of PAYE and NICs were not paid to HMRC. The P14s all stated that the employment of the individuals with IHL ceased on 4 December 2008.

54. Mr Hundal and Mr Budhdeo filed their 2008/09 income tax returns on 31 January 2010 – after the filing date of the first P35/P14s, but before the filing date of the second P35/P14s. The returns included the income shown on both sets of P14s (namely £605,000), and claim credit for the PAYE income tax declared as having been withheld on the both P14s – even though IHL had only accounted to HMRC for some of the PAYE shown on the first set of P14s and for none of the PAYE shown on the second set of P14s.

55. Mr Mathew had not been required by HMRC to file self-assessments tax returns prior to 2012. He became a director of BVL in 2012, and was then asked to file self-assessment tax returns – he received a paper return form from HMRC, and was asked to file returns for prior years. He filed a tax return for 2008/09 on 30 March 2013. It declared total pay from IHT for the tax year of £113,333 and claimed credit for £40,224 income tax having been deducted under PAYE. This corresponds to the amount of earnings and PAYE shown on the first P14. However, it omitted the earnings shown on the second P14 (in contrast to Mr Budhdeo and Mr

Hundal). HMRC opened an enquiry into the 2008/09 self-assessment return within the enquiry window time limit.

56. In June 2013 there was correspondence between Dewanis and HMRC relating to the tax affairs of the Gold Nuts Limited group, including a claim by BVL relating to the impairment of goodwill shown in its accounts for the year ended 31 December 2010. Attached to Dewanis' letter of 27 June 2013 was a schedule analysing the amount claimed as goodwill impairment. This schedule included the following line items:

**Salary liability from previous business taken over by [BVL]**

		£	£
4/12/2008	Shamir P Budhdeo	£177,322.45	
4/12/2008	Amarjit S Hundal	£178,572.05	
4/12/2008	Joshy Mathew	£51,458.33	
			£407,352.83

57. We note that the amounts set out in this schedule correspond approximately to the earnings shown in the second set of P14s, less the PAYE and employee's national insurance shown on those P14s.

58. Included in the bundles were the abbreviated accounts of BVL for the period from 31 October 2008 to 31 December 2008. However full audited accounts for the year ended 31 December 2009 were provided, and which included comparative information from the previous financial statements. The notes to the accounts state that the company was a wholly owned subsidiary of Gold Nuts Limited, which was in turn controlled by Budhdeo Holdings Limited, a company incorporated in Guernsey, and that as at the balance sheet date, the company was controlled by Mr Sanjay Budhdeo, Mr Budhdeo and Mr PD Budhdeo, by virtue of their shareholdings in Budhdeo Holdings Limited.

59. Note 19 deals with related party disclosures as follows:

d) At the balance sheet date, included within Other Creditors on the balance sheet were the following loan account balances:

	31/12/09	31/12/08
	£	£
SP Budhdeo	17,531	169,073
AS Hundal	94,795	173,572
J Mathew	46,458	51,458

The above loan account balances did not have any specific repayment date and were non-interest bearing.

At the balance sheet date, SP Budhdeo and AS Hundal were directors in the parent company, Gold Nuts Limited, and J Mathew was an employee of Venture Pharmacies Limited, a fellow subsidiary of the company.

60. It is not disputed that the reference to "SP Budhdeo" in Note 19 is to Mr Budhdeo.

61. We note that the balances as at 31 December 2008 are only a little less than the amounts scheduled to Dewanis' letter, and in the case of Mr Mathew, the amount is exactly the same.

62. HMRC wrote to each of Mr Budhdeo, Mr Hundal and Mr Mathew on 30 October 2015 asking for information, and warning of likely Regulation 72 directions, and suggesting a



meeting, Mr Budhdeo responded on 28 November 2015 threatening legal action for defamation. Mr Hundal responded on 28 November 2015 accusing HMRC of harassment.

63. As there was no response received from Mr Mathew, HMRC wrote to him again on 26 January 2016, but received no response to this letter either.

64. Following further correspondence, including a comprehensive request for information dated 29 July 2016 (which was not complied with), HMRC issued the directions, assessments and the closure notice that are the subject of this appeal on 28 February 2017. Appeals to HMRC were made on 29 March 2017.

65. Mr Hundal and Mr Mathew requested reviews, which were completed on 25 August 2017, upholding the relevant assessment and closure notice. Mr Budhdeo did not seek a review.

66. Appeals were lodged with the Tribunal on 19 September 2017 by Mr Budhdeo, on 20 October 2017 by Mr Hundal and Mr Mathew. HMRC did not object to the late filing of the appeals, and the Tribunal gave consent to the late filing.

### **Mr Hundal's evidence**

67. Mr Hundal's evidence was as follows.

68. Mr Hundal qualified as a pharmacist approximately 25 years ago. His role in IHL was to be responsible for logistics, sales, and operational support. He says that his role divorced him from the finance side of the business, and that he was out of his depth when it came to finance. Although he was a director of IHL, his evidence was that IHL did not produce management accounts, and had no formal or structured meetings of directors at which finance was discussed. Mr Hundal said that as regards finance, the finance director (latterly Mr Mathew) reported to Mr Budhdeo as chief executive.

69. Mr Hundal's wife was pregnant with their first daughter at the relevant times, which took his attention. He says that he was therefore entirely ignorant of the financial difficulties faced by IHL until a meeting the directors had with HBOS in London when the bank notified them that they were withdrawing the overdraft facility.

70. When pressed during cross-examination, Mr Hundal conceded that he was aware in general terms that IHL was in financial difficulty, but he had no knowledge of the details. In particular he was not aware that any amounts were owed to HMRC in respect of unpaid PAYE and NICs, and was fully expecting IHL to have been making payments to HMRC for all of its taxation obligations, and had no reason to think otherwise as his focus was purely on operational matters.

71. Mr Hundal confirmed that at the time he was a director of IHL, he was a director of eight other companies, and that he had been a director of 33 companies over a period of 25 years. However, many of these were, says Mr Hundal, dormant, inactive, or low turnover entities in which he played no active part. He also confirmed that from 2002 to 2004 he was director and company secretary of Zanrex Limited (one of the guarantors of BVL under the business sale agreement), and was reappointed as a director in 2012. Zanrex Limited was a retail pharmacy company owned by Mr Budhdeo's family. Mr Hundal confirmed that he became a director of Gold Nuts Limited in late 2009. Gold Nuts became a holding company for BVL, but at the time of the administration, BVL was free-standing. Mr Hundal confirmed that he was a director of Venture Pharmacies Limited from September 2008 to September 2009.

72. Mr Hundal's said that he was paid a salary well below market rates by IHL, and this was to allow IHL to retain cash within the business to allow for its growth. Mr Hundal says that he was paid the equivalent of £30,000 per annum by IHL (by comparison, a pharmacist working in the NHS or in a high street pharmacy would earn £40,000 to £50,000). Mr Hundal's evidence was that the IHL accounts department maintained a running total of the difference between the

amount he and Mr Budhdeo were actually paid, and the amounts to which they would have been paid, had they not allowed the cash to be retained by the company to fund its growth. The expectation was that IHL would ultimately be sold, and on the exit the notional accrued balance would be paid to Mr Hundal and to Mr Budhdeo.

73. Mr Hundal's evidence was that at the time IHL went into administration, the amount notionally accrued to Mr Hundal over the 8/9 years of the company's existence was approximately £300,000.

74. In addition to working for IHL, Mr Hundal also owned a "high street" family pharmacy, where a manager was employed to run the pharmacy. However, Mr Hundal's evidence was that he worked in the family pharmacy from time-to-time on a self-employed basis at weekends (earning £200 to £300 per weekend) because he needed to supplement his income from IHL in order to make ends meet.

75. Mr Hundal produced a letter prepared by Lawrence Grant, a firm of accountants, dated 17 September 2019. The letter states as follows:

The purpose of this letter is to validate the income of Mr Hundal as his personal tax return for 2008/09 shows a salary of £605,000.

I have received the original banks statements of the following which Mr Hundal confirms to be his only bank account at that time:

[Bank account details redacted]

The total bank receipts received from Intecare Homecare Limited was £67,000 for the tax year ended 5th April 2009. We are unable to verify if this related to salary or director's current account repayments.

We have also confirmed that no bank receipts were received directly from Intecare Homecare Limited from 6 April 2009 to 4 January 2010 in relation to the above bank account.

In my opinion (without reviewing all the information as this was not provided) I have doubt with regards to the accuracy of the claim by HMRC as to the amounts that have actually been paid to Mr Hundal.

[...]

I am a fully qualified accountant under the Association of Chartered Certified Accountants (ACCA). We have not prepared an audit on these bank receipts.

76. In the course of cross-examination, Mr Hundal was asked why he took such a small salary from IHL over the years, from a business that was turning over £8m to £9m, and had to work at weekends in a family pharmacy to keep things together. Mr Hundal's response was that this was shocking, but true. He worked out of a misplaced sense of loyalty, to allow for the future growth of the business. It was not something he would do again.

77. As regards the sale process, Mr Hundal's evidence was that this was an arm's length process, and that he recalls meeting prospective buyers of the business. However, when cross-examined, he could only name one prospective purchaser that he met – being Healthcare at Home. But he never got to hear of any bids for the business, other than that of BVL.

78. Mr Hundal said that in October or November 2008 (prior to the purchase of IHL's assets by BVL), he met Sanjay Budhdeo to discuss the financial terms Sanjay Budhdeo was prepared to offer to incentivise him to stay with the business in order that BVL retained the goodwill associated with IHL. He was offered a role as a homecare pharmacist operating the pharmacy service, but he was not appointed as a director of BVL, and did not have any involvement in the leadership, strategy, or direction of BVL. In his witness statements, Mr Hundal said that he did not know Sanjay Budhdeo prior to the BVL transaction, and that Sanjay Budhdeo had no

business dealings with IHL prior to the BVL transaction. Mr Hundal's evidence was that he was offered a signing-on bonus by Sanjay Budhdeo equivalent to the salary accrued by IHL, less the PAYE and NICs arising on the accrual, as such amounts were deemed to be the obligation of, and met by, IHL. So, the amount of the signing-on bonus would be £180,000. This, says Mr Hundal, explains the amount shown as the balance of the loan account in the BVL accounts, and is the amount shown in the schedule to Dewanis' June 2013 letter.

79. Mr Hundal said that he did not recall having received a contract for his employment with BVL or its subsidiaries, and the agreement for the signing-on bonus was unwritten.

80. Dewanis, a firm of chartered accountants, were responsible for the audit of IHL's accounts, and were the tax agents for the group and for Mr Hundal and Mr Budhdeo. Ragesh Dewani – the principal of Dewanis – prepared Mr Hundal's tax returns, based on information he obtained in the course of managing the tax and accounting affairs of IHL.

81. Dewanis prepared Mr Hundal's tax return for 2008/09 and filed it online. Mr Hundal says that he does not recall ever reviewing for accuracy the self-assessment tax return prepared by Dewanis prior to its submission. His evidence was that he met Dewanis after the return was submitted, but that he did not query the £605,000 income shown on the return once he had seen it. This was because Dewanis confirmed that the amount was correct, and that it represented amounts owed to him by IHL. Dewanis explained that the £605,000 employment income had accrued over the time that he had worked for IHL (some nine years), but was only paid in 2008/09. Mr Hundal submitted that this must have been an error, as he had never been paid anything like this amount, and referred us to the letter from Lawrence Grant as evidence of the amounts earned by him. Mr Hundal says that he made a grossly stupid mistake in allowing this amount to be included in his tax return.

82. Mr Hundal said that he did not understand that by filing his self-assessment tax return he was making a declaration that he had received the amounts shown as income on the return.

83. When asked about the P35s and P14s, Mr Hundal said that he was not familiar with these returns, and knew nothing about them. He said that the amounts shown on his P14s were far removed from reality, and pharmacists only earned around £40,000 to £50,000 per annum.

84. Mr Hundal confirmed that he signed the statement of truth in relation to IHL's statement of affairs, but he said that he was not involved in any way in compiling the statement and had no way of verifying its accuracy – he was completely reliant on Mr Mathew as the former finance director of IHL, who prepared the statement.

85. Mr Hundal said that he met Binesh Kharel in August 2019. Mr Kharel is an accountant that worked for Dewanis from 2008 to 2009, and was familiar with the affairs of IHL and the Appellants. Mr Kharel currently works for one of Mr Budhdeo's businesses. In one of his witness statements Mr Hundal says that Mr Kharel explained that the £178,572.05 shown as owing to him in Dewanis' July 2013 schedule related to the net amount (after withholding of PAYE and other deductions) of the liability calculated as being owed to him by IHL in respect of accrued (but unpaid) salary. Mr Hundal said that he was not involved in the calculation of this amount, and did not know how BVL were informed of the amount, and that it must have been taken by BVL from IHL's records in some way.

86. Mr Hundal said that he was paid the amount shown in the July 2013 schedule by BVL over a period of time. His understanding was that as PAYE had already been paid on this amount, no further deduction on account of PAYE needed to be made when the amounts were paid to him. Mr Hundal says that he was not involved in BVL's finance function.

### **Mr Mathew**

87. Mr Mathew's evidence was as follows.

88. Mr Mathew is an accountant. He had been employed within the IHL group since 2004, and was promoted to the position of finance director in May/June 2008 – he says that this was the first time that he had held a directorship. In cross examination it was pointed out that he had been appointed in April 2007 as a director of both Zanrex Limited (BVL's guarantor under the business sale agreement) and Chemistree Limited (a subsidiary of Gold Nuts Limited).

89. Mr Mathew said that he was responsible for preparing IHL's accounts to trial balance stage. The external accountants – Dewanis – prepared IHL's annual financial statements based on the information provided by Mr Mathew. IHL's payroll was administered internally by the finance department (which was under Mr Mathew's overall supervision), and was not outsourced.

90. Mr Mathew was aware that the business was in financial crisis and had a cashflow problem since before the time of his appointment as finance director. Mr Mathew confirmed that he was responsible for the management of payroll and taxes prior to IHL going into administration, but he was not 100% sure whether the company was up to date with its payments to HMRC.

91. Mr Mathew confirmed that his only involvement with the administration was to provide financial information to the administrators. He was not involved, for example, with the filing of the first set of P35/P14s, other than to provide the administrators with back-up data. Mr Mathew says that he was not aware of the second set of P35/P14s.

92. Mr Mathew's evidence was that he had accrued salary of £113,333 at the time IHL went into administration, of which only £16,000 approx. had been paid. So, the amount owed to him by IHL was £51,458 after deduction of PAYE income tax and employee NICs, and that he was out of pocket by this amount when the company went into administration. This was the amount shown in the first set of P14s filed in respect of Mr Mathew. Mr Mathew said that he was not sure whether the £40,224 shown on the P14 as tax deducted had ever been paid to HMRC.

93. According to Mr Mathew, the £133,333 liability was accrued in the books of IHL, and was recognised by the administrators by virtue of their filing of the first P14. The liability to pay the outstanding balance was, says Mr Mathew, passed to BVL – but Mr Mathew was not aware of BVL ever filing a P35 or P14s for the arrears assumed by BVL.

94. Like Mr Hundal, Mr Mathew said that he reached an informal agreement with the owners of BVL that he would be paid the "net" accrued salary owed to him by IHL (£51,458) if he stayed with BVL for three years. This explains the amount shown as the balance of the loan account in the BVL accounts, and is the amount shown in the schedule to Dewanis' June 2013 letter. This agreement was not documented. In his witness statement, Mr Mathew said that this amount was credited to his current account and paid to him over three years, but in his oral evidence he said that he received the whole amount as a lump sum in 2012. During cross examination, he was asked why this amount was not declared in his self-assessment tax return, to which Mr Mathew's reply was that it was included in the £129,524 declared as salary income in his 2008/09 return.

95. Mr Mathew signed the Statement of Affairs, and the associated statement of truth in his capacity as a director of the company. This was signed on 27 February 2009, about one month before the first P35/P14s were filed. Mr Mathew was asked why the statement of affairs did not include the accrued salary owed to the appellants or the PAYE and NICs owed to HMRC in respect of those amounts. Mr Mathew's response was that he is not sure how he missed that, as it should have been included.

96. Mr Mathew was appointed as a director of all companies within the BVL group by May 2012.

97. Mr Mathew also said that he had provided all information requested by HMRC – what information HMRC asked for, he gave.

### **Mr Goater**

98. The decision maker in respect of the directions, assessments and closure notice under appeal was Mr Goater, an officer of HMRC.

99. One of the difficulties Mr Goater faced was the allocation of the payments made by IHL in respect of PAYE and NICs to individual employees. IHL was not up to date with its payments at the time it went into administration, and there was no prescribed method of allocating the shortfall between the individual employees. He therefore decided not to pursue the Appellants for the unpaid tax shown on the first set of P35/P14s, as it would be difficult to address the allocation of payments. He decided only to pursue the Appellants for the tax declared on the second set of P35/P14s, as it was clear that the tax due on that income had not been paid.

100. Mr Goater confirmed that at the time IHL went into administration, it was in arrears of £249,000 for PAYE/NICs – and this amount was claimed by HMRC in the administration.

101. Mr Goater confirmed that no P14s/P35s had been filed by BVL in respect of the amounts shown as owing to the Appellants by BVL on Dewanis' July 2013 schedule or in BVL's financial statements.

102. Mr Goater noted that Mr Budhdeo and Mr Hundal must have been aware of the additional pay declared in the second set of P35/P14s, as it was included in their self-assessment tax returns. Indeed, they must have been aware of this income before HMRC, as they filed their self-assessment tax returns before HMRC received the P35/P14s.

103. Mr Goater said that the Appellants must have been aware that IHL was insolvent and was in arrears with payments of PAYE/NICs, and so was not able to pay (and had not paid) the additional PAYE/NICs declared on second set of P14s. Yet, as Mr Budhdeo and Mr Hundal declared the income shown in the second set of P35/P14s, and had claimed credit for the PAYE shown on those returns, they must have known about these amounts. Further, they must therefore have made a claim for credit for the PAYE, knowing that the PAYE had not been paid by IHL to HMRC.

104. As regards Mr Mathew, he was the finance director of IHL, and was aware that IHL was in financial difficulty at the time he was appointed. He must have been aware that IHL was in arrears with its payments of PAYE to HMRC. He must also have been aware that IHL could not pay (and did not pay) the tax shown on the second set of P14s.

105. Mr Goater noted that both sets of P14s had leaving date of 4 December 2008 – so the income declared in those returns must have been earned before IHL went into administration. These amounts are not shown as outstanding in the schedule of creditors annexed to the administrators' report, nor recognised in the statement of affairs. The income shown in the P14s must therefore have been paid by IHL before it went into administration.

106. Mr Goater stated that information had been sought by colleagues from the Appellants and the various companies. Bank statements had been requested, but had not been provided. Although bank statements had been obtained from banks following third-party information requests, the banks did not provide statements for 2008/09. We note from the decision of this Tribunal in *Gold Nuts Limited and others* [2017] UKFTT 84 (TC) that information requests under Schedule 36 Finance Act 2008 were issued on 2 April 2014 which included requests for information relating to the salary credited to the Appellants' loan accounts with BVL. These requests were upheld on appeal, but the information request was not complied with.

107. Mr Goater noted that a late payment surcharge had been levied against the Appellants. This was because they had not paid the amounts assessed (or in the case of Mr Mathew, the amount shown on the closure notice) within 28 days of the due date for payment, and had not appealed against the assessments or closure notice within 28 days of the due date. As they were late in paying the tax, the surcharge applied.

## **THE LAW**

### **PAYE**

108. The Regulations require employers to deduct income tax (calculated in accordance with the Regulations) from payments of earnings, and account to HMRC for the amounts so withheld. However, Regulation 72 allows HMRC to recover unpaid PAYE obligations from an employee in certain circumstances. Regulation 72 is as follows:

#### **72 Recovery from employee of tax not deducted by employer**

(1) This regulation applies if—

- (a) it appears to the Inland Revenue that the deductible amount exceeds the amount actually deducted, and
- (b) condition A or B is met.

(2) In this regulation and regulations 72A and 72B

“the deductible amount” is the amount which an employer was liable to deduct from relevant payments made to an employee in a tax period;

“the amount actually deducted” is the amount actually deducted by the employer from relevant payments made to that employee during that tax period;

“the excess” means the amount by which the deductible amount exceeds the amount actually deducted.

(3) Condition A is that the employer satisfies the Inland Revenue—

- (a) that the employer took reasonable care to comply with these Regulations, and
- (b) that the failure to deduct the excess was due to an error made in good faith.

(4) Condition B is that the Inland Revenue are of the opinion that the employee has received relevant payments knowing that the employer wilfully failed to deduct the amount of tax which should have been deducted from those payments.

(5) The Inland Revenue may direct that the employer is not liable to pay the excess to the Inland Revenue.

(5A) Any direction under paragraph (5) must be made by notice (“the direction notice”), stating the date the notice was issued, to—

- (a) the employer and the employee if condition A is met;
- (b) the employee if condition B is met.

(5B) A notice need not be issued to the employee under paragraph (5A)(a) if neither the Inland Revenue nor the employer are aware of the employee's address or last known address.

(6) If a direction is made, the excess must not be added under regulation 185(5) or 188(3)(a) (adjustments to total net tax deducted for self-assessments and other assessments) in relation to the employee.

(7) If condition B is met, tax payable by an employee as a result of a direction carries interest, as if it were unpaid tax due from an employer, in accordance with regulation 82 (interest on tax overdue).

(8) The tax payable carries interest from the reckonable date until whichever is the earlier of—

- (a) the date on which payment is made, or
- (b) the date (if any) immediately before the date on which it begins to carry interest under section 86 of TMA.

### **Discovery Assessments**

109. The assessments against Mr Budhdeo and Mr Hundal were made under s29, TMA. As the transitional provisions in Article 10(2) of the Finance Act 2008, Schedule 39 (Appointed Day, Transitional Provision and Savings) Order 2009 do not apply (the discovery assessment was made more than one year of the end of the 2008/09 tax year), it is the provisions of s29 as amended by Finance Act 2008 that apply. These provide as follows:

#### **29 Assessment where loss of tax discovered**

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—

- (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
- (b) that an assessment to tax is or has become insufficient, or
- (c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, 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.

(2) Where—

- (a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and
- (b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,

the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

- (a) in respect of the year of assessment mentioned in that subsection; and
- (b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) In subsection (6) above—

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes—

(i) a reference to any return of his under that section for either of the two immediately preceding chargeable periods; and

(ii) where the return is under section 8 and the taxpayer carries on a trade, profession or business in partnership, a reference to any partnership return with respect to the partnership for the relevant year of assessment or either of those periods; and

(b) any reference in paragraphs (b) to (d) to the taxpayer includes a reference to a person acting on his behalf.

(7A) The requirement to fulfil one of the two conditions mentioned above does not apply so far as regards any income or chargeable gains of the taxpayer in relation to which the taxpayer has been given, after any enquiries have been completed into the taxpayer's return, a notice under section 81(2) of TIOPA 2010 (notice to counteract scheme or arrangement designed to increase double taxation relief)



(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

(9) Any reference in this section to the relevant year of assessment is a reference to—

(a) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) above, the year of assessment mentioned in that subsection; and

(b) in the case of the situation mentioned in paragraph (c) of that subsection, the year of assessment in respect of which the claim was made.

110. The time limits for the making of assessments are governed by s36, TMA. The provisions in force for the 2008/09 tax year are as follows:

An assessment on any person (in this section referred to as “the person in default”) for the purpose of making good to the Crown a loss of income tax or capital gains tax attributable to his fraudulent or negligent conduct or the fraudulent or negligent conduct of a person acting on his behalf may be made at any time not later than 20 years after the 31st January next following the year of assessment to which it relates.

111. Section 59C, TMA makes provision for late payment surcharges. These are levied at 5% of the tax due if the payment is 28 days late.

## **TUPE**

112. TUPE operates to protect the employment rights of employees when there is a relevant transfer of a business or part of a business. If TUPE applies, the transferee of a business takes over the employment-related obligations of the transferor, including liability for certain arrears of salary.

113. But TUPE Regulation 8(7) provides that where the transferor is the subject of insolvency proceedings with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner, the transfer provisions of TUPE do not apply. In such circumstances, employees do not automatically transfer to the new owner.

114. At the time that IHL went into administration, it was unclear whether TUPE applied to the sale of a business by administrators. The administrators' reports note that TUPE *might* (our emphasis) apply. The application of TUPE to sales of businesses by administrators was only resolved in 2011 by a decision of the Court of Appeal in *Key2Law (Surrey) LLP v De' Antiquis* [2011] EWCA Civ 1567 (not cited to us), which held that TUPE did apply to sales by administrators, as the primary statutory objective of an administrator is to preserve the company as a going concern (even if that might subsequently prove to be impossible). This decision is in line with a later decision of the CJEU in *FNV and others v Smallsteps BV* [2017] EUECJ C-126/16, which related to the Acquired Rights Directive 2001/23 which TUPE implemented into UK law.

115. But at the time IHL went into administration, the application of TUPE to administrations was uncertain, and it would have been unclear whether BVL would automatically assume, by operation of law, liability for any arrears of salary owed to IHL's employees. Given this uncertainty, we would expect that employees to whom IHL owed salary would claim for that salary in the administration.

## **DISCUSSION**

### **The PAYE in dispute**

116. The assessments and closure notice under appeal do not relate to the PAYE shown on the first set of P14s. The tax sought by HMRC in the assessments and closure notice is the PAYE shown on the second set of P14s only.

### **Burden of Proof**

117. The burden of proof is on the Appellants to displace the assessments and the closure notice.

### **Appellants' submissions**

118. Mr Livingstone submits, on behalf of Mr Budhdeo and Mr Mathew, that there is no evidence that the amounts shown on the second set of P35/P14s was ever paid to them by IHL. Rather amounts were made available to them by BVL in the form of a loan account as an informal signing-on bonus. This was an entirely new arrangement between BVL on the one part and Mr Budhdeo and Mr Mathew on the other part, respectively. To the extent that any PAYE arose in respect of these signing-on bonuses, it is a liability of BVL and not of IHL. It therefore follows that a direction under Regulation 72 is incorrect, and their appeals should be allowed.

119. Mr Hundal's submissions are virtually identical.

### **Credibility**

120. One thing that is clear to this Tribunal is that we have not been told the whole story by the Appellants.

121. Mr Budhdeo decided not to provide a witness statement. The Appellants chose not to call Sanjay Budhdeo, Mr Dewani, or Mr Kharel to give evidence.

122. Information requested by HMRC has not been provided, and there has been a failure to comply with information notices issued under Schedule 36, Finance Act 2008.

123. In the circumstances we must draw inferences from the limited evidence before us.

124. We note that the information notice that was subject to the appeal in *Gold Nuts and others* [2017] UKFTT 84 (TC) included a request for an analysis by BVL of the loan accounts of the Appellants, including Mr Budhdeo's payslips. This information, we were told, remains outstanding. If the amounts shown in the second set of P14s really represented a signing-on bonus payable by BVL (and not IHL) we would have expected the Appellants to have provided the relevant evidence, including payslips and an analysis of the book entries to the Appellants' loan accounts. We would have expected BVL to comply with the Schedule 36 information notice. Although they may not have been directors of BVL at the time IHL went into administration, they were directors of BVL by the time HMRC issued their assessments and closure notices, and would therefore have had access to BVL's records.

125. We find that Mr Hundal is not a credible witness. We do not believe him when he says that he was unaware of the financial difficulties that IHL was in. This is just not credible given that his evidence was that IHL was unable to pay him a sufficient wage to allow him to make ends meet, and he had to work on a self-employed basis at weekends at his family pharmacy to supplement his income. Indeed, when pressed in cross-examination, he admitted that he was aware in general terms of IHL's financial difficulty, although he says he was not aware of the details.

126. Whilst we can believe that IHL may not have had regular formal board meetings to review its financial position, it is not credible that Mr Hundal, as a director and 50%

shareholder, was not kept aware by his colleagues of the financial difficulties faced by the business.

127. Nor do we believe Mr Hundal's claims as to innocence and naivety in matters financial. Although he may not previously have been a director of a company with a turnover as large as that of IHL, he had been a director of 33 companies over a period of 25 years. He was an owner of a family pharmacy, and must have had some familiarity – however basic – of accounting. He is clearly no fool.

128. We do not believe that Mr Hundal when he says he was not given his 2008/09 self-assessment tax return to check before it was submitted by Dewanis. Dewanis are a firm of chartered accountants, and must be well aware of the requirement that they provide their clients with a draft of the tax return for approval before they file it. Nor is it credible that Mr Hundal would not have asked Dewanis about the £605,000 entry for his employment income – in circumstances where he believed that his earnings from IHL were less than £40,000.

129. We place no evidential weight on the letter from Lawrence Grant. It was prepared only a few days before the hearing, and no one from Lawrence Grant attended the hearing to be cross-examined on it. We note also that the opinion expressed in the letter is highly qualified. The letter confirms that Lawrence Grant have not audited Mr Hundal's bank statements, and that in addition, they were not provided by Mr Hundal with all relevant information – for example, Mr Hundal did not provide Lawrence Grant with his payslips.

130. It is also not credible that Mr Hundal was paid about £30,000 each year by IHL. Even if the amounts stated in Lawrence Grant's letter are correct, they state that IHL deposited £67,000 (presumably after deductions) into Mr Hundal's bank account over the eight months that he was employed by IHL in 2008/09. This implies an annualised net income of over £100,000 – which equates to annualised gross income of the order of £150,000. Whilst £40,000 to £50,000 might be the annual salary of a pharmacist employed in a high street pharmacy or by the NHS, these were not Mr Hundal's circumstances. He was the joint founder, director, and 50% shareholder of IHL – a business employing over 100 staff, and with a turnover of between £8m and £9m. Mr Budhdeo does not dispute that IHL paid him the amounts returned in the first set of P14s, and we consider that it is unlikely that Mr Hundal (as a director and equal shareholder) would have received significantly less than Mr Budhdeo in salary.

131. We do not believe Mr Hundal when he says that he did not know Sanjay Budhdeo prior to the sale of the IHL business to BVL, given that he was a director and secretary of Zanrex Limited (the guarantor of BVL's obligations under the sale agreement with IHL) between 2002 and 2004, and was a director of Venture Pharmacies Limited from September 2008 to September 2009. Mr Hundal says that he did not have any involvement in the leadership, strategy, or direction of BVL. But he was a director of one of BVL's subsidiaries at the time of the acquisition, and was a director of one of BVL's guarantors. We consider that it is highly unlikely that BVL would be prepared to pay a signing-on bonus of nearly £180,000 to someone who was not in a leadership position. We also note that shortly after the acquisition (certainly by the time the 2009 accounts were produced), BVL had become a subsidiary of Gold Nuts Limited, a company of which Mr Hundal was a director.

132. We find that Mr Mathew is not a credible witness. He was the finance director of IHL, and acknowledges that he was aware of the financial difficulties faced by IHL from the time of his appointment. His evidence that he was not aware that cheques paid to HMRC in respect of PAYE were dishonoured by HBOS is not credible. As finance director, he must have been aware that there were amounts outstanding to HMRC.

133. In his evidence, Mr Mathew claims complete ignorance of the second set of P35/P14s. He said that only the amount shown in the first set of P14s (£113,333.36) represents his

earnings from IHL, he says that he was paid only £16,000 by IHL, so that there was £51,458 (net of tax) outstanding at the time IHL went into administration. We do not believe Mr Mathew's explanation. This would mean that for the eight months in which IHL was trading in the tax year 2008/09 (6 April to 4 December) he was paid only £2000 per month (say £460 per week). This is not believable.

134. We note that nothing is shown as owing to Mr Mathew in the schedule of creditors to the Administrators' report (nor in the directors' statement of affairs), and it beggars belief that Mr Mathew would not have noticed that the schedule omitted pay outstanding to him. Mr Mathew did not make any claim in the administration for arrears of pay. But crucially, the amount shown as owing to Mr Mathew in Dewanis' June 2013 schedule and in the audited accounts of BVL is £51,458. This corresponds more closely to the net of tax amount shown on the second P14, and not the first.

135. We note that Mr Mathew prepared his self-assessment tax returns himself, and did not use Dewanis to prepare his returns. As we find (below) that it was Dewanis who must have filed the second set of P14s, this explains the discrepancy between the returns filed by Mr Hundal and Mr Budhdeo (which include the amounts on the second set of P14s) and Mr Mathew's return (which does not).

136. Mr Budhdeo chose not to provide a witness statement, and did not give evidence to us. He has failed to comply with statutory information requests under Schedule 36, Finance Act 2008. He was the chief executive of IHL, and Mr Mathews, the finance director of IHL, reported to him. He must have been aware of IHL's financial situation, and that its cheques to HMRC had been dishonoured. Like Mr Hundal, he was a director of Gold Nuts Limited, which became the parent company of BVL within a year of its purchase of the IHL business.

### **First set of P14s**

137. Both Mr Mathew and Mr Hundal deny having received from IHL the amounts shown in the first set of P14s. We do not believe them. We note that Mr Budhdeo does not dispute that he received from IHL the amount shown in the first P14. These returns were prepared and filed by the administrators, and must have been based on the accounting records of IHL which would have been in their possession. We consider that it is highly unlikely that the administrators made a mistake in the calculation of the amounts paid by IHL to its employees. If amounts of pay had been outstanding, then the outstanding pay would have been shown in the schedule of creditors, and the individuals would have made claims in the administration. We find that the amounts shown in the first set of P14s were paid to the Appellants by way of earnings by IHL prior to the company going into administration.

### **Sale Process**

138. Mr Hundal's evidence was that there was a formal sale process, and he recalls that a competitor (Homecare At Home) and various private equity funds looked at purchasing the business, and so he was confident that the ultimate sale of the business was on open market terms.

139. The administrators' report of 26 January 2009 provides a different perspective. MCR had been advised that the healthcare market was dominated by a small number of dominant parties, and the majority of these were contacted and information given to them. In addition, several distressed private equity funders were approached. While some initial interest in acquiring IHL's assets was expressed by prospective purchasers, the administrators report that the acquisition of the business by a third party was complicated by the following matters:

- (1) IHL's unique selling point was its information technology platform – but it was owned outside the group and was not available for sale as part of any purchase. The

platform was owned by Mobisol Ltd, a company whose directors were Mr Budhdeo and Mr Hundal.

(2) IHL's business was highly dependent on skills and relationships of the management team, and prospective purchasers were concerned that these managers may not stay with business.

(3) Some of the potential purchasers were not acceptable to NHS – and so assignment of some of the customer contracts could be difficult.

(4) The majority of IHL's equipment was subject to hire-purchase financing and had no value to IHL.

(5) IHL's only material tangible assets were drug stocks, of which a proportion were sold on consignment basis, and remainder subject to retention of title claims by the suppliers.

(6) None of the potential purchasers contacted decided to pursue a purchase.

140. The only offer received by the administrators for the business was from BVL.

141. Although Mr Hundal described the sales process as being arm's length in his evidence, he could only give one example where he provided information to a prospective purchaser, namely Healthcare at Home.

142. We prefer the description in the administrators' report to the evidence of Mr Hundal as regards the sales process.

#### **Who filed the second set P35 and P14s?**

143. The second set of P35/P14s were filed electronically. HMRC's systems at the time did not record the name of the individual or business that made the filing. However, Mr Goater's unchallenged evidence was that anyone filing these returns would require access to IHL's online account with HMRC. The only persons who would have such access would be (a) the administrators, (b) IHL's finance team (led by Mr Mathew), (c) the Appellants (as the directors of IHL), and (d) Dewanis (as the tax agents of IHL and two of the directors).

144. MCR were acquired by Duff & Phelps, and Mr Goater wrote to Duff & Phelps on 11 May 2016 and asked them if they had filed the second set of P35 and P14s. Duff & Phelps confirmed, following subsequent correspondence, that IHL's employees were transferred to BVL and its subsidiaries immediately following the appointment of the administrators, and no payments were made to former employees by them. The administrators had ceased to undertake any activities on behalf of the companies once the administration had been concluded in November 2009, when IHL was moved from administration to dissolution. It is not disputed by any of the parties, that the administrators did not file the second set of P35/P14s.

145. Mr Mathew, when questioned as to whether he, or anyone in IHL's finance team, filed the P35/P14s, confirmed that neither he, nor anyone in the finance team, made such filings. His evidence was unchallenged, and we so find.

146. Mr Hundal's unchallenged evidence was that he had not filed the P35/P14s, and we so find.

147. The most likely person making these filings is Dewanis, who would have access to IHL's online account with HMRC by virtue of acting as IHL's tax agent. And this is consistent with the fact that the individual self-assessment tax returns of Mr Hundal and Mr Budhdeo (which were prepared by Dewanis), both include the earnings included in the second set of P14s and claim credit for the PAYE income tax shown as having been paid in the P14s – particularly in the light of the fact that the P35/P14s were filed after the filing of the self-assessments. It is

also consistent with the fact that the income shown in Mr Mathew's self-assessment tax return omits the income shown in the P14s, as his tax return was not prepared by Dewanis, but by himself. All of this suggests that the underlying information leading to the declaration of additional earnings in the second set of P14s was in the possession of Dewanis, and was included by them in the self-assessment tax returns that they prepared, and that they subsequently filed this same information by way of the second set of P35/P14s. We find that it was Dewanis who filed the second set of P35/P14s.

### **Signing-on bonus with BVL**

148. We do not find the explanations given by either Mr Hundal or by Mr Mathew of the signing on bonus to be credible, and we do not believe them. Mr Hundal's evidence was that he did not have a leadership role within BVL. If Mr Hundal was not involved in the management of BVL, we consider that he would have wanted the arrangements for his signing-on bonus documented, as he would otherwise have had no means of demonstrating his entitlement to the bonus or enforcing its payment. We consider that it is unlikely that Mr Hundal, as a mere homecare pharmacist, would not have documented his agreement with Sanjay Budhdeo as to the signing-on bonus, given the amounts involved. It also strikes us as bizarre and unbelievable that the signing-on bonus was an agreement to pay an amount corresponding to the amount owed to Mr Hundal by IHL, after the deduction of PAYE – which would in consequence be subject to a further deduction of PAYE by BVL when paid.

149. Mr Mathew says that BVL assumed the outstanding liability owed to him by IHL. But there is no liability shown as owing to Mr Mathew in administrators' schedule of creditors, nor is it accrued in the directors' statement of affairs. We do not believe Mr Mathew would have missed the salary owing to him when he prepared the statement of affairs. And if Mr Mathew is correct in his explanation, then the amount that should have been scheduled in Dewanis' July 2013 letter would have been the gross amount owed (before deduction of PAYE and NICs), and BVL would have accounted to HMRC for this tax when the amounts were eventually paid to him.

150. The fact that no further deductions on account of PAYE were made when the loan account balances were paid by BVL to the Appellants indicates that BVL took the view that the balances did not represent earnings from the Appellants' employment with BVL.

151. Mr Livingstone submits that the amounts shown in the first set of P14s represent earnings of the Appellants whilst employed by IHL. Mr Livingstone submits that there is no evidence that the amounts shown in the second set of P35 and P14s were ever paid by IHL. He submits that as regards Mr Budhdeo these amounts represent funds made available to his clients by BVL in the form of a loan account to reflect a theoretical amount in respect of goodwill and expertise that he brought to BVL to IHL, and which would be paid to Mr Budhdeo as and when BVL had the cash to be able to do so.

152. Mr Hundal puts it slightly differently. But the submissions made on behalf of both Mr Budhdeo and Mr Hundal are that the amounts shown in Dewanis' schedule and in the BVL accounts represent what was effectively a signing-on bonus, which was a new arrangement with BVL, and in respect of which BVL, and not IHL, was accountable and responsible for PAYE and NICs.

153. In contrast, Mr Mathew's submission is that the amount shown in Dewanis' schedule and in the BVL accounts represents arrears of salary owed to him by IHL but which was assumed by BVL.

154. The amounts stated in the schedule to Dewanis' letter of 27 June 2013 correspond to the amounts shown in the P14s, net of PAYE and employee NICs. But Mr Livingstone submits (and we agree) that under the terms of the sale agreement dated 4 December 2008, BVL did

not assume any of IHL's liabilities, including any liabilities for unpaid earnings – and at the time it was unclear whether such amounts would have been assumed by BVL by operation of TUPE. Further, there were no amounts included in the administrators' schedule of creditors in respect of unpaid earnings owed to the Appellants. So, the statement that these amounts are liabilities "taken over" by BVL from IHL must be incorrect.

155. The audited accounts of BVL state that these amounts (or amounts slightly less than those shown in Dewanis' schedule) are loan account balances. We also note that BVL did not record the crediting of these amounts to the Appellants' loan accounts as being earnings (as the amounts were not returned on any P14 filed by BVL).

156. We consider that the most likely explanation is that (and we find that) the amounts shown on the second set of P14s were paid to the Appellants as earnings immediately before IHL went into administration, and were then immediately lent by the Appellants to BVL, to enable it to pay the consideration it owed to IHL for the purchase of the business, and to provide BVL with working capital. This could have been achieved through book entries, settled by a direct transfer of cash of the net amount from IHL to BVL. And if the payment was made directly by IHL to BVL, this would explain why it does not show up in Mr Hundal's bank statements, and was not seen by Lawrence Grant.

157. We find that the reason why the loan account balances shown in BVL's accounts (as at 31 December 2008) are slightly less than the amounts shown in Dewanis' schedule (as at 4 December 2008) is because BVL made payments to Mr Hundal and Mr Budhdeo, thus reducing the balance owed to them.

158. We therefore find that the payments of the amounts shown in the second set of P14s were made directly to BVL, but IHL did not account to HMRC for the PAYE shown as having been deducted on the P14s.

159. It seems probable that these amounts represent unpaid earnings accrued over the Appellants' entire employment with IHL. In the course of cross-examination, Mr Hundal said that he was told by Dewanis that it was correct that the amounts shown in both P14s needed to be included in his earnings for 2008/09, and that Mr Kharel had confirmed to him that the amounts in the second P14s represented earnings accrued over his entire period of employment with IHL.

160. This would explain why the amounts are shown in the accounts of BVL as amounts owed to the Appellants as loan creditors. It would also explain why the amounts correspond to the earnings shown on the second P14s less PAYE – as this would be the net amount paid to the Appellants after deductions. It also provides an explanation of how BVL knew about these balances, as we find that it is unlikely that these amounts would have been provided by the administrators to BVL. It also explains why BVL did not account for PAYE and NICs when it made payments in respect of these amounts to the Appellants.

161. This also provides an explanation as to why the administrators' schedule of creditors (and the Appellants' statement of affairs) shows that nothing is owed to them in the way of unpaid salary.

162. And we find that this explanation applies to Mr Budhdeo and to Mr Mathew in the same way as it applies to Mr Hundal.

163. We also find that the Appellants were negligent or careless in omitting HMRC as a creditor from the statement of affairs. They were aware that cheques had been dishonoured by HBOS, and at the very least should have been on enquiry to verify whether any of the dishonoured cheques had been payable to HMRC.

## CONCLUSIONS

### Regulation 72

164. We have no hesitation in finding that the amounts shown in the second P14s were earnings of the Appellants from their employment with IHL. We have found that it is likely that these amounts were never paid into the bank accounts of the Appellants, but were instead paid (at their direction) to BVL, by way of loan, to provide BVL with working capital and the wherewithal to fund the purchase consideration.

165. We also find that all the Appellants would have been aware that IHL was insolvent, and was unable to pay (and did not pay) any of the PAYE or NICs shown on the second set of P14s. This is self-evident from the knowledge they must have had, as directors, of the state of the finances of IHL. They all approved a statement of affairs showing that the company was hopelessly insolvent. Whilst we believe that Mr Hundal may well have relied on work done by Mr Mathew in preparing the figures shown on the face of the statement, it is obvious from the face of the statement that IHL was insolvent, and could not account to HMRC for any outstanding PAYE obligations.

166. The Appellants received relevant payments of earnings knowing that IHL did not have the resources to be able to account to HMRC for the PAYE due on those earnings. The failure by IHL was "wilful", because IHL made the payments to BVL in circumstances where its directors (the Appellants) knew that IHL would not account to HMRC for the PAYE due on those payments. In the case of *Marsh and Price* [2016] UKFTT 539 (TC) the Tribunal said:

67. The Appellants maintain that all payments of PAYE tax and NIC were deducted, but they are not able to produce any evidence of actual deductions and payment to HMRC. The burden of proof is on the Appellants. Referring to a liability for PAYE and National Insurance Contributions in the Employer's Annual Return is not the same thing as actually making the deductions and accounting to HMRC. Regulation 72(1)(a) specifically refers to liability arising where the deductible amount exceeds the amount actually deducted.

68. The word 'knowing' does not mean 'ought to have known'. Knowing means knowing. 'Wilfully' means 'intentionally' or 'deliberately' and may in the context of the PAYE scheme and the collection of tax import a measure of blameworthiness, at least in the sense that it is blameworthy not to deduct tax that is due [*Chisolm* JR decision 04/03/1981].

69. The question is whether HMRC have reasonable grounds for forming the opinion that the two directors did wilfully procure the company to pay their remuneration without deduction of tax knowing that tax should have been deducted. In *Cook and Keys* (JR decision 1/05/87) the judge said he found it hard to separate the requirements of wilfulness and of knowledge because both go to the intentions and knowledge of the two directors. Here, both directors were responsible for the payroll and the operation of it and were in a position to know the full practices of operation of deduction on wages and salaries. We do not accept that "the unforeseen issues that led to the rapid deterioration of the company financial position were simply not on the horizon". On the Appellants' own admission, the company was struggling financially prior to their decision to take salaries rather than a dividend and the situation only got worse after that.

[...]

72. However although the onus of proof falls to HMRC show that the Appellants received payments from their employer, knowing that the employer had wilfully failed to deduct PAYE and NI, it also falls on the



Appellants to demonstrate that the deductions have actually been made and that the assessments are therefore excessive. The Appellants have not provided any evidence to show that actual deductions were made and paid to HMRC.

73. The company was persistently in arrears with its PAYE liability and quite evidently never in a position to pay the sums calculated when they fell due. The company was clearly in financial difficulties. That in our view is the real reason why dividends could not be awarded; distributions can only be made out of profits. Otherwise they would be ultra vires and unlawful. A dividend cannot be in excess of retained profits.

74. The Appellants' failure to make deductions from their salaries were deliberate and the Tribunal is satisfied that they come within the definition of "wilful" for the purpose of Regulation 72(5) and s 81(1)(c) mentioned above

75. We conclude that the Direction under Regulation 72(5) Condition B Income Tax (Pay As You Earn) Regulations 2003 and the Decision under s 8(1)(c) Social Security Contributions (Transfer of Functions) Act 1999 were properly made. Assessments for the tax year 2010-11 to recover tax/under-deductions from relevant earnings paid to the Appellants by their employer Maypole Contracts Limited made under the provisions of s 29 Taxes Management Act 1970 were correct.

167. It is not disputed that the PAYE shown on the second set of P14s was not paid to HMRC. The burden of proof is on the Appellants to show that amounts representing PAYE were actually deducted from their earnings. They have not discharged that burden. We find, to quote May J in *R v Inland Revenue Commissioners, ex parte McVeigh* (1995) 68 TC 121 at 131, that there was a wilful failure by IHL and the Appellants to do anything relating to the tax obligations arising in respect of the earnings shown on the second set of P14s, beyond making some internal paper entries.

168. We have found, as in the case of *Marsh and Price*, that IHL was persistently in arrears with its PAYE liability, and was never going to be able to pay HMRC the PAYE shown on the second set of P14s. We are satisfied and find that the failure of IHL to make deductions was "wilful" for the purposes of Regulation 72 and that the Appellants knew that IHL was unable to account to HMRC for the PAYE due. We find that HMRC properly made the directions under Regulation 72.

### **Discovery assessments**

169. The assessments made against Mr Budhdeo and Mr Hundal were made under s29 TMA.

170. We are satisfied that a "discovery" was made within the scope of s29(1).

171. In consequence of s29(3), as the Appellants had filed self-assessment tax returns, one or other of the conditions in subsections (4) or (5) must be satisfied. The relevant conditions are that:

- (a) The situation was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf; or
- (b) At the time when HMRC ceased to be entitled to open an enquiry into the taxpayer's return, an HMRC officer could not have been reasonably expected, on the basis of specified information made available to him before that time, to be aware of the situation.

In the circumstances of this case we are satisfied that both conditions are met.

172. The first condition is met because we have found that the Appellants knew that IHL had not accounted to HMRC for the PAYE due on the earnings shown on the second set of P14s, and that they had no entitlement to any credit. The claim by Mr Budhdeo and Mr Hundal for credit in their self-assessment tax returns was therefore made "carelessly or deliberately" either by themselves or by Dewanis (being "someone acting on their behalf"). The second condition is also met because a hypothetical HMRC officer could not have been expected to know that PAYE credit had been improperly claimed based on the information specified in s29(6).

173. We have found that the claims for PAYE credit in the self-assessment tax returns were made by Mr Budhdeo and Mr Hundal in circumstances where they knew that IHL had not paid the PAYE to HMRC. This is, at the very least, negligent conduct either of these two Appellants, or of Dewanis who were acting on their behalf in preparing the returns.

174. We find that the extended 20-year time limit for assessments applies, pursuant to s36 TMA, as the conduct of the Appellants (or of Dewanis acting on their behalf) was, at the very least, negligent.

175. We therefore find that the discovery assessments made by HMRC against Mr Hundal and Mr Budhdeo were properly made, and they are therefore upheld.

#### **Closure notice**

176. It is not disputed that HMRC opened an enquiry into Mr Mathew's return within the enquiry window time limits.

177. As we have found that the directions under Regulation 72 were properly made, it follows that Mr Mathew is liable to the tax payable pursuant to the Closure Notice.

#### **Late Payment Surcharge**

178. Late payment surcharges arise automatically if tax is not paid within 28 days of it becoming due. It is not disputed that the appeals against the assessments and closure notice were made more than 28 days after the tax became due, and that this tax has not been paid. We therefore find that the late payment surcharges therefore have been properly levied.

#### **DISPOSITION**

179. The appeals by the Appellants are all dismissed.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

180. 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.

**NICHOLAS ALEKSANDER  
TRIBUNAL JUDGE**

**RELEASE DATE: 17 APRIL 2020**

The following cases were cited in skeletons but were not referred to in the decision:

*R v IRC ex parte Cook and Keys* (1987) 60 TC 405

*R v IRC ex parte Chisholm* (1981) 54 TC 722

*Parmar* [2016] UKFTT 142 (TC)

*Moran* [2008] [2008] STC (SCD) 787

*Vincent and Gillian Ten Bouwhuis* (2011) First tier Tribunal (Unreported)

*Ventura UK* [2017] UKFTT 585 (TC)

*Bolton Engineering v TJ Graham* [1957] 1 QB 159