TC02531

Appeal number: TC/2010/07175

ASSESSMENT – was Appellant employed or self-employed – appeal against penalty determinations – negligence – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LANCE COLIN MEYNELL-SMITH **Appellant**

- and -

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

TRIBUNAL: JUDGE J. BLEWITT
MR M. BLAIN

Sitting in public at Prestatyn on 18 October 2012

Mr Meynell-Smith, the Appellant was unrepresented

Mr O'Grady, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Appeal

1. By Notice of Appeal dated 6 September 2010 the Appellant appealed against an assessment for the tax year 2003/04 which was issued by HMRC under Section 29 of the Taxes Management Act 1970 ("TMA").

2. Additional profits were assessed by HMRC in the sum of £36,015 which gave rise to additional duties of £12,910.84.

3. On 21 April 2010 a penalty determination was issued to the Appellant under Section 100 (1) TMA 1970 and was charged under Section 95 (1) (a) TMA 1970 in respect of the negligent submission of incorrect returns for the tax years 2002/03, 2003/04, 2004/05 and 2005/06.

4. The appeals dated 6th September 2010 before this Tribunal are twofold:

- An appeal against the 2003/04 assessment; and
- An appeal against that part of the penalty determination which has been calculated on the additional duties of £12,910.84 which HMRC contend are due for the tax year 2003-2004.

Facts

5.(a) In the period 6 April 2003 to 10 November 2003 ("the Relevant Period") the Appellant was working as a tool maker at Jaguar car plant in the Midlands. During this period the Appellant lived in Chirk, Wrexham travelling each working day from home to Jaguar and return, an approximate trip of 180 miles a day.

5.(b) Following the opening of an enquiry by HMRC the Appellant initially maintained that he was employed by a Dutch company called Polynorm at the Jaguar plant (as an employee). Subsequently through his accountant he maintained and at the hearing further maintained that he was actually employed by an agent who had introduced Polynorm to him called Drew Simmons Design Limited ("Drew Simmons").

5. (c) During the enquiry by HMRC, HMRC concluded that the Appellant was in fact self-employed and not an employee and had failed to disclose the gross fees of £36,015 paid to the Appellant during the Relevant Period. In the Notice of Appeal the Appellant, notwithstanding maintaining his employed status, seeks if a determination is made that he was self-employed, that his travelling expenses for the Relevant Period of £11,300 be deducted from the gross fees of £36,015.

6. During the enquiry by HMRC undeclared further taxable income was disclosed as a result of which penalty determinations for the tax years 2003/04, 2004/05, 2005/6

were issued on the basis of the negligence of the Appellant. The Appellant has not challenged the issue as to negligence or the percentage discount of 70% applied by HMRC in determining the penalties.

The issues for the Tribunal

7. (a) Was the Appellant employed or self-employed during the Relevant Period?

(b) If the Tribunal determine the Appellant was self-employed should the 2003/04 assessment be reduced by the sum of £11,300 in respect of the claim for motoring expenses?

(c) In respect of the penalty determinations is the Tribunal satisfied that the Appellant was negligent during the relevant tax years in not making formal disclosure and/or should the penalty determinations be reduced if the claim for £11,300 motoring expenses is accepted by the Tribunal as a deductible expense for the tax year 2003/04.

Legislation

Section 9A of the Taxes Management Act 1970 ("TMA"):

[(1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so ("notice of enquiry")—

(a) to the person whose return it is ("the taxpayer"),

(b) within the time allowed.

(2) The time allowed is—

(a) if the return was delivered on or before the filing date, up to the end of the period of twelve months [after the day on which the return was delivered];

(b) if the return was delivered after the filing date, up to and including the quarter day next following the first anniversary of the day on which the return was delivered;

(c) if the return is amended under section 9ZA of this Act, up to and including the quarter day next following the first anniversary of the day on which the amendment was made.

For this purpose the quarter days are 31st January, 30th April, 31st July and 31st October.

(3) A return which has been the subject of one notice of enquiry may not be the subject of another, except one given in consequence of an amendment (or another amendment) of the return under section 9ZA of this Act.

[(4) An enquiry extends to—

(a) anything contained in the return, or required to be contained in the return, including any claim or election included in the return…

(5) If the notice of enquiry is given as a result of an amendment of the return under section 9ZA of this Act—

(a) at a time when it is no longer possible to give notice of enquiry under subsection (2)(a) or (b) above, or

(b) after an enquiry into the return has been completed,

the enquiry into the return is limited to matters to which the amendment relates or which are affected by the amendment.

(6) In this section "the filing date" [means, in relation to a return, the last day for delivering it in accordance with section 8 or 8A].]

Section 28A TMA 1970:

[(1) An enquiry under section 9A(1) of this Act is completed when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions…

(2) A closure notice must either—

(a) state that in the officer's opinion no amendment of the return is required, or

(b) make the amendments of the return required to give effect to his conclusions.

(3) A closure notice takes effect when it is issued.

(4) The taxpayer may apply to the [tribunal] for a direction requiring an officer of the Board to issue a closure notice within a specified period.

[(5) Any such application is to be subject to the relevant provisions of Part 5 of this Act (see, in particular, section 48(2)(b)).]

(6) The [tribunal] shall give the direction applied for unless . . . satisfied that there are reasonable grounds for not issuing a closure notice within a specified period.]

Section 29 TMA 1970:

[(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 [years of assessment]; 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…

(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…

<u>Section 49G TMA 1970:</u>

[(1) This section applies if—

(a) HMRC have given notice of the conclusions of a review in accordance with section 49E, or

(b) the period specified in section 49E(6) has ended and HMRC have not given notice of the conclusions of the review.

(2) The appellant may notify the appeal to the tribunal within the post-review period.

(3) If the post-review period has ended, the appellant may notify the appeal to the tribunal only if the tribunal gives permission.

(4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question…

Section 34 Income Tax (Trading and Other Income) Act 2005:

(1) In calculating the profits of a trade, no deduction is allowed for—

(a) expenses not incurred wholly and exclusively for the purposes of the trade, or

(b) losses not connected with or arising out of the trade.

(2) If an expense is incurred for more than one purpose, this section does not prohibit a deduction for any identifiable part or identifiable proportion of the expense which is incurred wholly and exclusively for the purposes of the trade.

Authorities:

- ***Blyth v Birmingham Water Works** (1856) EWHC Exch J65*
- ***Newsom v Robertson (Inspector of Taxes)** (1952) 2 All ER 728*
- ***Jackman (Inspector of Taxes) v Powell** (2004) STC 645*
- ***Horton v Young** (1971) 2 All ER 351 (Chancery Division)*
- ***Horton v Young** (1971) 3 All ER 412 (CA)*
- ***Sargent and Barnes** (1978) STC 322*
- ***Manders v HMRC** UKFTT 313*

Disputed Issues

8. HMRC submitted that the Appellant is not entitled to claim any motoring expenses in respect of the remuneration earned during the Relevant Period at the Jaguar car plant.

9. It is the case for HMRC that the additional duties assessable on the Appellant for the Relevant Period should be £12,9120.84, calculated on the basis of gross fees of £36,015.

10. In respect of the penalty determination, the Appellant accepts the principle upon which the determination was made, namely the negligent submission of incorrect returns, however the amount of the penalty, calculated with reference to the further duties calculated by HMRC for 2003/04, is disputed on the basis that the amount of the duties is not accepted.

Background

11. HMRC selected the Appellant's tax return for the year 2005/06 for enquiry on 12 September 2007 due to the fact that information was received by HMRC which suggested that the Appellant held one or more offshore bank accounts which yielded interest which had not been included on his tax returns.

12. On 4 October 2007 the Appellant's accountants, Morris Cook, provided HMRC with information in respect of one offshore bank account which had been closed in approximately 2004. It was asserted that all monies deposited into that account prior to its closure was earned whilst living outside of the UK.

13. On 24 October 2007 the Appellant's accountants provided the bank statements in relation to the offshore account which had been requested by HMRC.

14. At a meeting which took place on 9 November 2007 it was established by HMRC that the Appellant had operated an offshore bank account with Lloyds TSB. Interest on this account had not been declared and there were also deposits into the account from Drew Simmons. Throughout the Relevant Period the Appellant confirmed that he had been engaged by Polynorm and based at the Jaguar plant near Birmingham. When his contract finished, the Appellant registered as a self employed person and he continued to work for Jaguar as an independent contractor. A return of self employment income was made by the Appellant on his 2003/04 return covering the period 1 November 2003 to 5 April 2004 in respect of his work for Jaguar. The income received from his engagement with Polynorm for the Relevant Period was not included on the Appellant's 2003/04 return.

15. At the meeting with HMRC on 9 November 2007 the Appellant stated that for the Relevant Period he had assumed that tax had been deducted from the payments made to him by Drew Simmons however he could not produce any payslips to confirm this. HMRC had no records to suggest that any deductions had been made from Polynorm's payments to the Appellant. It was subsequently accepted that the payments had been made gross.

16. The issue between the Appellant and HMRC, in essence, is that the motor expenses claimed in the sum of £11,300 should be allowed by HMRC thereby leading to additional tax in the sum of £8,231.69 as opposed to the sum of £12,910.84 charged by HMRC's discovery assessment which disallows travelling expenses.

Grounds of Appeal

17. The grounds of appeal relied upon by the Appellant as set out in the Notice of Appeal can be summarised as follows:

- The travelling expenses were incurred during self employment as the Appellant travelled to his customer's site in the West Midlands;
- The expenses were incurred wholly and exclusively for the purpose of self employment;
- The Appellant was instructed to open an offshore bank account through which he obtained his wages;
- The contract with Polynorm through Drew Simmons lasted from March until November 2003. When the contract ended Drew Simmons offered a contract at Jaguar cars and the Appellant was told to register as self employed by Drew Simmons.

The Hearing

18. We were provided with three bundles; two from HMRC and one from the Appellant. The bundles were voluminous and we will not refer to each and every document in this decision, but all were considered carefully.

19. We heard evidence on behalf of HMRC from Ms Killen who provided the Tribunal with a witness statement setting out her involvement in this case. Ms Killen was responsible for issuing the assessments in this case on the following basis:

- Following her meeting with the Appellant Ms Killen had obtained information that Drew Simmons had ceased trading;
- No payslips or record of contract was produced by the Appellant;
- No PAYE records were held by HMRC in respect of the Appellant's earnings;
- The Appellant had done the same work for Polynorm as he subsequently did for Jaguar yet for the latter role he had registered as self employed despite no apparent difference in the roles;
- Payments were paid via Drew Simmons for work undertaken for both Polynorm and Jaguar;

- Ms Killen concluded that the Appellant was self employed whilst working for Polynorm for the Relevant Period.

20. Ms Killen explained that she had reviewed the case following information provided by the Appellant's accountants in a letter to HMRC dated 5 November 2009 in which it was stated:

"...if Mr Meynell-Smith had a shop premises or a warehouse/workshop that he rented or owned in connection with this self employment income then he would not be able to claim the cost of travel to that property from home, however this does not apply in this case. As Mr Meynell-Smith had to travel to customer's premises in the Midlands to carry out the services Morris Cook considered that it was wholly and exclusively for the purpose of his self employment."

21. Ms Killen had responded by referring Morris Cook to the case of *Newsom v Robertson* (1952) 33 TC 452 (more about which we will say later) which provided the basis for her disallowance of the motor expenses claimed.

22. In cross examination Ms Killen explained the steps she had taken to reach a conclusion as to the Appellant's employment status which included complying with internal procedures and consulting with HMRC's employment compliance team. Ms Killen had also spoken to KPMG – the accountants for Drew Simmons – due to the fact that Drew Simmons had ceased trading and Ms Killen was unable to locate anyone from Drew Simmons with whom she could clarify the Appellant's status. Mr Day at KPMG had contacted Mr Drew of Drew Simmons and subsequently informed Ms Killen that Polynorm had contacted Drew Simmons as a toolmaker was required, whereupon Drew Simmons had suggested the Appellant.

23. Ms Killen confirmed that the indicators of self employment which led to her decision to disallow motoring expenses were the lack of payslips, lack of contract, payments into the offshore account of which many were in round figures which suggested no tax had been deducted and the fact that the Appellant had continued in the same role at Jaguar on a self employed basis when he ceased working for Polynorm.

24. Ms Killen queried the need for an offshore account given that Drew Simmons, who paid the Appellant both during Relevant Period and after, was a UK based company.

25. Ms Killen explained that although the case had previously been adjourned in order for a status review to be completed by HMRC, inquiries subsequently revealed that Drew Simmons had ceased trading. Ms Killen exhibited a letter dated 27 August 2003 with the Company's address at the head of the letter which read:

"Dear Sir

I have decided to close the above company. The company has been dormant from day one. I did not get the work that was promised me."

The letter was handwritten and signed although it must be noted that there is no indication as to who signed the letter.

26. Ms Killen explained that the Appellant had not referred to Drew Simmons at his meeting with HMRC on 9 November 2007 but had stated that he worked for Polynorm. Notes of the meeting (at which we note the Appellant was unrepresented) had been sent to the Appellant following the meeting which had gone unchallenged. Ms Killen stated that by the time Drew Simmons was mentioned by the Appellant she was unable to locate the directors and consequently a status review could not take place as input was required from Drew Simmons as well as the Appellant.

27. Ms Killen explained that she had tried to resolve the Appellant's case on a pragmatic basis which led to her sending a without prejudice letter to the Appellant on 7 February 2012, however this was not indicative that HMRC accepted the Appellant's case.

28. We also heard evidence from Mr Meynell-Smith who expanded on the information contained within his statement and the bundle he had provided to the Tribunal. Mr Meynell-Smith explained that he was contacted by Drew Simmons in 2003 when he was offered work based in the Birmingham area.

29. Mr Meynell-Smith stated that he met Mr Simmons for the first time in November 2003 when he was told by Mr Simmons that he would need to register as self employed after his work for Polynorm for the Relevant Period had ceased. His only other document demonstrating contact with Drew Simmons was exhibited in his bundle of documents which contained a note on Drew Simmons' letter headed paper which stated:

"Lance,

You will be working for the above co. Look forward to meeting you soon.

M"

30. Mr Meynell-Smith explained that he had received the overseas account application form which had already been filled out for him. He stated he did not fill in the section relating to self employment as he considered himself employed. He did not question opening an offshore account as he was told that Mr Simmons had an offshore account and that his earnings would be paid from that account to his own.

31. Mr Meynell-Smith stated that he worked for Drew Simmons until 2006 and could not explain the letter dated August 2003 produced by HMRC which stated that Drew Simmons had ceased trading at that date.

32. We were referred to the questions contained on HMRC's website relating to employed or self employed status and Mr Meynell-Smith submitted that he fulfilled the criteria for employment.

33. In cross examination Mr Meynell-Smith stated that he was told by Mr Simmons that that the papers for a bank account would be sent to him and it was only when he received them he saw that they said "overseas" but he did not particularly consider this issue.

34. Mr Meynell-Smith stated that he had received payslips from Drew Simmons but he had not read them, although he recalled deductions. He confirmed that he had no contract and that his entire dealings with Drew Simmons consisted of a fax, telephone calls and the banking documents.

35. He confirmed that he continued to be paid by Drew Simmons when he became self employed at Jaguar and that there was no change to the actual work that he did.

36. Mr Meynell-Smith stated that he had been ignorant as to how to fill in his self assessment return and agreed that although the self employed earnings were included, he had not included his earnings from the Relevant Period as employed earnings as he did not know that employed earnings had to be included on the return.

37. In response to questions from the Tribunal, Mr Meynell-Smith stated that he often did not open his payslips as he did not believe that they showed anything incorrect in the payments received. When asked to explain this apparent inconsistency Mr Meynell-Smith reiterated that he did not look at payslips or bank statements.

38. In a typical week Mr Meynell-Smith worked 55 hours in 5 days. He left home at 2.45am to start work at 6am. He finished work at approximately 6.30pm and arrived home at approximately 8.45pm. He stated that he had a unit where he kept his work van/tools and where he would occasionally undertake Jaguar work as the Jaguar plant did not have the correct equipment. When Mr Meynell-Smith was asked why he had not made reference to this unit at his first meeting with Ms Killen he stated that he had not been asked and that he provided the information he believed relevant. Mr Meynell-Smith agreed that the unit had not been mentioned by him throughout the enquiry or within his Notice of Appeal. He explained that most days he would travel to the unit to collect his van which he would drop off before he returned home in the evening. When referred to the letter from his accountants dated 5 November 2009 (referred to at paragraph 20 above) Mr Meynell-Smith stated that the accountants were aware of his unit and that he read the letter as meaning the accountants were pointing out that he had not claimed expenses for the unit.

39. When asked what attempts he had made to contact Drew Simmons, Mr Meynell-Smith stated that he had worked for the company until 2006 then the day after he received HMRC's first letter to him (presumably relating to the enquiry) he had made contact and was told not to worry. Following Mr Meynell-Smith's meeting with HMRC he stated he had telephoned Drew Simmons but the call went to answerphone. Since that time, Mr Meynell-Smith has had no contact with the company.

HMRC's Submissions

40. Having outlined the oral evidence in general terms, it may be helpful at this point to summarise the arguments made by the parties.

41. HMRC's submissions were contained within a lengthy skeleton argument, the contents of which will not be repeated in their entirety in this decision.

42 In summary, HMRC submitted that during the Relevant Period the Appellant attended the Jaguar plant in the Birmingham area on a daily basis. Each day of working the Appellant travelled from his home in Wrexham to the Jaguar plant and home again – approximately 187 miles.

43. The Appellant has claimed motoring expenses of £11,300 for the journey from Wrexham to Birmingham and back.

44. The legislation applicable, which was not in dispute, is found in Section 34 of the Income Tax (Trading and Other Income) Act 2005 which provides:

> *(1) In calculating the profits of a trade, no deduction is allowed for*
>
> *(a) Expenses not incurred wholly and exclusively for the purposes of the trade, or,*
>
> *(b) Losses not connected with or arising out of the trade.*

45. HMRC submitted that it is the word "exclusively" which is the crux of this case. The question to be asked is whether, in travelling from Wrexham to Birmingham and back each day in order to attend the Jaguar plant, the Appellant incurred motor expenses exclusively for the purpose of attending the Jaguar plant or whether there was another purpose also.

46. The Tribunal was referred to a number of helpful cases; more about which we will say later.

47. HMRC submitted that the cases cited support the proposition that between April and November 2003 the Appellant's base of operations was the jaguar plant. The expenditure incurred in travelling enabled him to attend the Jaguar plant but also allowed him to love at a distance from his base of operations and was therefore not expenditure incurred exclusively for the purpose of his profession.

48. HMRC referred to the letter dated 5 November 2009 from the Appellant's accountant (referred to at paragraph 20 above) in which it was suggested that a base of operations must comprise of permanent or static premises. HMRC did not accept this to be the case, relying on ***Jackman v Powell***. It must be noted that HMRC's submissions on this point did not initially address the Appellant's later contention that he had such a unit, as this assertion was not made until the adjourned Tribunal hearing on 12 May 2011 (which was heard before a different panel). In response to this later submission, HMRC did not accept that the Appellant ran a business premises in connection with the work undertaken for Polynorm on the basis that the letter dated 5 November 2009 from the Appellant's accountant specifically stated that "this does not apply to the situation in question". A water features business started by the Appellant

on 1 June 2004 did use a business premises, the expenses for which were claimed as a deduction in later accounts (2004/05 and 2005/06), however no such expenses were claimed in respect of the period with which this Tribunal is concerned which, HMRC submitted, corroborates the fact that no such premises were used in connection with the Appellant's work for Jaguar. Furthermore, HMRC noted the fact that the unit had only been mentioned by the Appellant at a meeting with HMRC on 16 September 2008 in relation to his water features business.

49. Even if the Tribunal were to find that the business premises was connected to his work during the relevant period, HMRC relied on the case of ***Sargant v Barnes*** for the contention that it cannot be said that the Appellant was, in any relevant sense, carrying on his profession from such premises.

Appellant's Submissions

50. The Appellant submitted that he had been truthful with HMRC throughout the enquiry and had provided answers to the limited questions asked.

51. The Appellant relied on HMRC's website as support for his assertion that he was, at the relevant time, employed on the basis that the criteria set out to assist in establishing whether a person was employed was satisfied.

52. It was submitted by the Appellant that he was not aware that the return had been completed incorrectly.

53. At no point had HMRC informed the Appellant that Drew Simmons had ceased trading in 2003; he had received wages from the agency until 2006 and cannot provide any answers on behalf of Mr Simmons.

54. The Appellant explained that he is much wiser now and believed that sufficient information had been provided to show that he was employed at the relevant time.

Decision

55. The issue for us to determine is whether, during the Relevant Period, the Appellant was employed or self employed. The appeal in respect of the penalty determination as to that part which is the subject of the Appeal, namely an allowance for these motoring expenses of £11,300, stands or falls with our conclusion on the employment status issue.

56. The onus rests with the Appellant in respect of the assessment issued by HMRC to satisfy the Tribunal that he was employed during the relevant period. The onus rests with HMRC to demonstrate that the returns were negligently submitted for the four years ended 5 April 2006.

57. We considered the evidence of the Appellant, both oral and documentary, very carefully.

58. The Appellant did not challenge the fact that he had been unable to provide payslips for the relevant period which would have provided conclusive evidence of deductions of tax made to his earnings, nor was a contract of employment was produced. We noted that, on the Appellant's own evidence, his role at Jaguar did not change (in the sense of tasks carried out by him) between his engagement by Polynorm/Drew Simmons and thereafter when he registered as self employed. Throughout the Relevant Period and after, the Appellant received his fees from Drew Simmons. We found all of these factors indicative of the fact that the Appellant was self employed during the relevant period. We find that the Appellant during the Relevant Period was self employed. Our reasons for coming to this conclusion are:

a) The Appellant has contended that during the Relevant Period he was employed yet he has been unable to provide any payslips or contract of employment;

b) HMRC has no record of him being the subject of the PAYE tax system during the Relevant Period;

c) The evidence obtained by HMRC from KPMG following their discussions with Drew Simmons demonstrates that he was not employed by Drew Simmons.

59. Further we found the evidence of the Appellant to be vague and contradictory and at times, evasive and implausible. We rejected his evidence that he had received payslips which he had never opened or examined. We found as a fact that any reasonable person working on an hourly rate would ensure that the payment received was correct. Furthermore, we found it implausible that a person who had in the past been employed would not question why no P45 was provided when his employment ceased, yet the Appellant's evidence was that he did not recall receiving a P45. The Appellant maintained for a considerable period of time that he was employed by Polynorm but subsequently changed his employer to Drew Simmons. Through his accountant he initially maintained that income during the Relevant Period was earned while outside the United Kingdom when clearly it was not.

60. We considered the Appellant's evidence that in applying HMRC's guidance, taken from its website, on the criteria applied to determine employment status he was employed. We found as a fact that the criteria was no more than guidance offered to assist taxpayers and was not conclusive of the issue.

61. We noted that HMRC did not conduct as status review of the Appellant's case. We found as a fact that the reasons for not undertaking a review were entirely reasonable; we accepted Ms Killen's evidence that such a task involved obtaining information from all parties, which in this case would have been Drew Simmons as well as the Appellant. At the point of HMRC's investigations, Drew Simmons had stopped trading and we found as a fact that HMRC had done all that it could to obtain all relevant information but was prevented from carrying out a full status review as the director of Drew Simmons could not be located.

62. The Appellant offered no explanation as to how Drew Simmons continued to pay him until 2006 when it appeared that they had ceased trading in 2003. We found as a fact that the Appellant's evidence that he had only met Mr Simmons once in November 2003 (after he had purportedly been paid by the company since April 2003) and had only one document from the company signed "M" which was vague to say the least, was insufficient to substantiate his assertion that he was employed.

63. Mr Maynell-Smith's evidence as to why he opened an offshore bank account was contradictory and unconvincing. At first he seemed to suggest that the reason was that Mr Simmons had told him that he had an offshore account from which he would transfer the Appellant's wages, however later in his oral evidence the Appellant stated that he was not aware that the account was offshore until he received the application form. We could not understand why Drew Simmons, a UK based and registered company, would have or require the Appellant to have an offshore bank account. Had the Appellant received his wages from Polynorm, a Dutch based company, then perhaps this would be less concerning, but in the absence of any explanation from the Appellant, we found as a fact that any reasonable taxpayer would have questioned (or sought advice on) the necessity and the tax implications of opening such an account.

64. On the evidence before us we were wholly satisfied that the Appellant had not discharged the onus of proof and we found as a fact that he was self employed in the relevant period for the reasons outlined above.

65. We then turned to the issue of any deductions that could be allowed for travelling expenses during the Relevant Period. We found the authorities cited by HMRC were helpful on this point.

66. In ***Newsom v Robertson*** Lord Denning stated:

"A distinction must be drawn between living expenses and business expenses. In order to decide into which category to put the cost of travelling, you must look to see what is the base from which the trade, profession, or occupation is carried on. In the case of a tradesman, the base of his trading operation is his shop. In the case of a barrister, it is his chambers. Once he gets to his chambers, the cost of travelling to the various courts is incurred wholly and exclusively for the purposes of his profession. But it is different with the cost of travelling from his home to his chambers and back. That is incurred because he lives at a distance from his base. It is incurred for the purposes of his living there and not for the purposes of his profession, or at any rate not wholly or exclusively; and this is so, whether he has a choice in the matter or not. It is a living expense as distinct from a business expense."

67. In applying the principle set down by this case, we were satisfied on the evidence before us that Jaguar was the Appellant's base of operations, it being the place where the Appellant carried out his work on a daily basis. We found as a fact that the expenditure incurred by the Appellant in travelling to and from his base was not exclusively for the purpose of trade because of the duality of purpose by allowing the Appellant to live away from his place of work or as Romer LJ succinctly explained in ***Newsom v Robertson***:

"In other words, the object of the journeys, both morning and evening, is not to enable a man to do his work but to live away from it."

68. We must address the additional submission of the Appellant that he held business premises near to his home where his van and tools were stored and which, he submitted, should be viewed as his base which would have the effect of making the travelling expenses from that premises to the Midlands allowable (but not those incurred from the Appellant's home to the nearby premises.)

69. The Tribunal found the facts in the case of ***Sargent and Barnes*** to be analogous with those in the present case. The facts of that case are well known and will not be rehearsed here; suffice it to say that it was found that a dentist was not carrying on his practice at a laboratory where the making of dentures/repairs took place. The Court held that the taxpayer (the dentist) was simply availing himself of the facility and utilising the journey between his residence and his base of operations (his practice) by calling at the laboratory on his way to and from work.

70. Putting aside the letter from the Appellant's accountants to HMRC dated 5 November 2009 which we found, on the face it, confirmed that there was no business premises used by the Appellant in conjunction with his work at Jaguar, we were sceptical as to the evidence given by the Appellant regarding his daily journey (getting up at 2.45am and returning home at 8.45pm daily). Giving the Appellant the benefit of doubt that this was accurate, we inferred that this left little time for the Appellant to attend the premises where his van and tools were stored.

71. We found, in applying the principles laid down in ***Sargent and Barnes*** to the facts in the present case, that the premises purportedly used by the Appellant during the relevant time was no more than a facility where the Appellant called to pick up and store his van/tools on his way to and from his base of operations at the Jaguar plant in the Midlands.

72. For all of the reasons set out above, we concluded that the travelling expenses incurred by the Appellant in travelling from his home to the Jaguar plant and back were not incurred wholly and exclusively for the purposes of trade and therefore are not deductible expenses.

73. In respect of the penalty declaration the Appellant, having previously not challenged the issue of negligence, appeared to suggest that he was naive rather than negligent. We rejected this contention for the following reasons. The Appellant was aware that he had an offshore bank account into which his wages from UK based work were paid. The Appellant failed to disclose this account to HMRC until the enquiry was opened.

74. The Appellant stated that his accountant was responsible for preparing his tax returns. It is a well established principle that the onus rests with a taxpayer to ensure that returns are accurate; indeed a declaration to that effect is signed on the return. We found as a fact that this burden cannot be shifted to the Appellant's accountant. We found as a fact that any reasonable person seeking to comply with his tax obligations

would have raised the issue of an offshore account and queried whether the monies paid in should be declared on the return.

75. In the circumstances, and on the decided facts we were satisfied that HMRC had discharged the burden of proof on this issue and had made the appropriate discount. We found as a fact that the Appellant was negligent having failed to take reasonable care in submitting inaccurate returns and failing to act in the manner in which a reasonable and prudent man would have seen fit.

Conclusion

76. The appeal after considering all the evidence is dismissed and we make the following orders:

- The 2003/04 discovery assessment issued on 21 October 2009 is determined as

  (i) Additional net profit from self employment £33,207

  (ii) Additional duties chargeable thereon £11,759.56.

5. The penalty determination issued on 21 April 2010 is amended to £3,647 following representations from HMRC.

6. 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.

J. BLEWITT
TRIBUNAL JUDGE

RELEASE DATE: 11 February 2013