# TC03981

**Appeal number: TC/2012/09272**

***Income Tax – relationship between enquiry and disclosure – whether discovery requires new information of fact or law – insufficiency of assessment – contemporaneous closure of enquiry – validity of assessments – yes***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**MICHAEL S K YIP** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ANNE SCOTT, LLB, NP**
**DR HEIDI POON, CA, CTA, PhD**

**Sitting in public at George House, 126 George Street, Edinburgh on Tuesday 27 May 2014**

**Michael Feng for the Appellant and Chris Cowan, Officer of HMRC, for the Respondents**

## Background

1. There are six appeals outstanding relating to assessments issued on 3 August 2011 for the years 2003/04 to 2008/09 inclusive and amounting in total to an additional liability of £175,704.19. All of the assessments in question were issued in terms of Section 29 Taxes Management Act ("TMA") 1970.

2. At a Case Management Hearing in Birmingham on Friday 20 September 2013, amongst other issues, the Appellant made an application to HMCTS for a preliminary hearing on the validity of the assessments issued by HMRC for tax years 2004/05 to 2006/07 inclusive.

3. Having heard submissions from both parties Judge Poole issued Directions (the "Directions") on 21 October 2013. In particular, whilst staying all other issues in the appeals, he directed that there should be a preliminary hearing as to whether or not the requirement in Section 29(1) TMA for a discovery had been satisfied in relation to the assessments for 2004/05 to 2006/07 inclusive. The full terms of that Direction are to be found at paragraph 12 below.

## Preliminary issues at this hearing

4. Mr Feng had tabled a request that read:- "Eight days before the preliminary hearing I learned from HMRC's skeleton argument that HMRC's discovery under section 29(1) is that there was NO APPEAL. 5.22 … As HMRC's rely on NO APPEAL pursuant to section 29(1) I respectfully ask the judge to give a decision at the start of the hearing in accordance to Rule 2(1)".

5. Whilst it is certainly true that paragraph 5.22 of HMRC's skeleton argument did state that no appeal had been received against the Regulation 72 Direction and that there was then a Section 29(1) TMA discovery, the Tribunal certainly would not give a decision in regard to discovery under Section 29(1) at the start of the hearing. Rule 2(1) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") reads:- "The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly". It would be the opposite of dealing with matters fairly and justly to proceed without hearing any evidence or submissions.

6. At the foot of the Appellant's skeleton argument on page 17 Mr Feng requested that if the First-tier Tax Tribunal found in favour of HMRC on the day then the Tribunal should give permission to appeal to the Upper Tribunal. We explained to Mr Feng the appeal procedure and referred him to the Rules. In any event no decision was given on the day.

7. Mr Feng tabled a request for Alternative Dispute Resolution that had been refused by HMRC on 30 May 2013. That refusal is not a decision which is appealable to this Tribunal.

8. Mr Feng requested that the Tribunal consider the HMRC document "Resolving Tax Disputes" which is a commentary on the litigation and settlement strategy. Mr Feng also tabled a letter dated 5 March 2013 relating to a complaint lodged by Mr Yip with HMRC. We explained that our only remit at this hearing is to consider

whether or not, in terms of the relevant facts and law, discovery had been made for the three years in question.

9. HMRC had intended to advance arguments on Sections 29(4) and (5), and indeed Mr Feng had also referred thereto. It was made explicit that the only issue for the Tribunal at this hearing was the application of Section 29(1). Sections 29(4) and (5) are inextricably bound up with the substantive matter of the appeals.

10. Prior to the hearing, the Tribunal administration had raised with Mr Feng the question as to whether or not an interpreter was required for the hearing since it had been noted from the bundle that the Appellant had required an interpreter when discussing matters with HMRC on 14 May 2009. An interpreter fluent in Cantonese had been arranged. However, on the morning of the hearing Mr Feng stated that an interpreter was not necessary. The explanation proferred was that when discussing matters with HMRC the issues discussed were technical whereas Mr Yip understood the matters which were due to be raised at this hearing. Mr Feng then said that perhaps he would require the assistance of the interpreter when Mr Yip gave evidence. On reflection, he decided that Mr Yip would not be giving evidence at this juncture. The interpreter remained until it became clear that Mr Yip and Mr Feng did not require her services notwithstanding the technical issues being advanced by HMRC.

**The issue**

11. The Direction issued by Judge Poole relating to this hearing reads as follows:-

"The following issue shall be determined as a preliminary issue, proceedings on all other issues in this appeal being stayed pending the outcome of the preliminary issue:

Whether, in the circumstances of this case, and on the assumption (though, for the avoidance of doubt, not deciding) that one or other of the conditions contained in sections 29(4) and (5) Taxes Management Act 1970 ("TMA") is satisfied in relation to the section 29 TMA assessments the subject of this appeal, the requirement in section 29(1) TMA for a discovery has been satisfied in relation to the assessments for 2004/05 , 2005/06 and 2006/07, being the discovery assessments issued on 3 August 2011 that followed the issue of the Closure Notices for those years on 2 June 2011.

In particular, and by way of explanation, the Appellant asserts that, on the basis of the following sequence of events, it could not properly be said that the officer making the relevant assessments "discovered" the relevant circumstances in such a way as to entitle him to raise the assessments:

- Enquiries under section 9A TMA had been opened into the relevant returns.

- PAYE enquiries led to the making by HMRC, on 27 May 2011, of directions under Regulation 72(5) of the Income Tax (Pay as you Earn) Regulations 2003 ("the PAYE Regs") whereby the Appellant's employer was relieved of the obligation to account for unpaid PAYE; the Appellant's liability for income tax on the relevant earnings was accordingly confirmed.

- The open enquiries into the Appellant's returns were ended by the issue of Closure Notices on 2 June 2011 but HMRC did not reflect the liabilities referred to in the previous paragraph in the amendments made to the Appellant's self–assessment returns by such Closure Notices.

- HMRC subsequently issued assessments, purportedly pursuant to section 29 TMA, in respect of the income tax which they had not included in the earlier closure notices"

**Agreed facts**

12. In compliance with Direction 4 of the Directions a Statement of Agreed Facts was lodged with the Tribunal and that is annexed hereto at Appendix 1.

**The oral evidence and facts found therefrom**

13. We heard evidence from Mr John Lawrence who gave a clear and commendably honest account of the progress of the enquiries into these three years. The factual position was not challenged. It is clear that having commenced an enquiry into Blue Diamond Restaurants Limited (the company) in October 2007, it became abundantly obvious that there were numerous apparent irregularities. Accordingly the three enquiries into the Appellant's personal returns, for the years 2004/05 to 2006/07 inclusive were instigated (in March 2008 for the first year and January 2009 for the other two years).

14. Prior to the commencement of these appeal proceedings there had been little or no meaningful cooperation with HMRC from the Appellant or his representatives. There was a meeting between the Appellant, his then accountant and HMRC on 14 May 2009, by which time the company was in liquidation. The outcome of that meeting was a reiteration that there were grave concerns about the accuracy of the records and whether all sales and profits had been returned. The Appellant was warned that if there were additional liabilities then HMRC might take action against the Appellant.

15. At a meeting on 4 March 2010, which was not attended by the Appellant, it was made clear that there was a considerable amount of information still outstanding and the Appellant's new representative requested that HMRC quote the relevant legislation in order to "push" the Appellant into cooperating. They did so. There was no response and that led to the issue of the pre-closure notice referred to at Item 14 in the Statement of Agreed Facts. That related to the enquiries into the years 2004/05 to 2006/07 inclusive but enclosed a further letter, which made it explicit that unless representations were received from the Appellant, HMRC would seek payment from him instead of the company in respect of unpaid PAYE Income Tax and primary Class 1 National Insurance Contributions (NIC) for the years 2003/04 to 2008/09 inclusive. He was asked to provide written representations and/or attend a meeting within one month. He did neither. There was no response until 11 April 2011 when his then representative undertook to provide further information by 22 April 2011. That was not provided. He also offered to meet HMRC at 11 am on 11 May 2011 and that offer was accepted. Thereafter, he did not respond to emails, did not attend the meeting and did not make contact in that regard.

16. Accordingly, on 2 June 2011 Mr Lawrence wrote to the Appellant detailing the lack of co-operation from the Appellant's representative and highlighting the fact that no evidence had been provided to deal with the issues and queries raised earlier in the year.

17. We believed Mr Lawrence when he stated that it was in a bid to extract further information from Mr Yip relating to the period when he was the sole director of the company, that authorisation for both the Direction Notice under Regulation 72(5) Condition B Income Tax (Pay As You Earn) Regulations 2003 ("the Direction") and the Notice of Decision under Section 8(1)I Social Security Contributions (Transfer of Functions) Act 1999 ("the NIC decision") was requested on 27 May 2011. Authorisation was granted and they were issued on 2 June 2011.

18. In his letter dated 2 June 2011, Mr Lawrence stated that he had been left with no option but to bring the enquiries to closure on a formal basis. As can be seen from the Statement of Agreed Facts the three closure notices for the Appellant, in respect of the open enquiry years 2004/05 to 2006/07 inclusive, were issued on the same date. All carried rights of appeal but no appeal was made.

19. The Direction was issued on the basis that the company was deemed to have made payments, in the years 2003/04 to 2008/09 inclusive, amounting to £494,046 on which there was PAYE under deducted of £150,407.38. The NIC decision was issued on the basis that the company had failed to pay sufficient Primary Class 1 NIC in respect of those said earnings and did not recover the contributions from the Appellant by way of deduction in the years 2005/06 to 2008/09 inclusive. The total NIC under deducted amounted to £14,263.46. Both the Direction and the NIC decision carried rights of appeal. Neither was appealed.

20. As at 2 June 2011, although Mr Lawrence suspected that there was a strong possibility that the Appellant would not provide any further information, nevertheless his objective in issuing the Direction was to make a final attempt to obtain information.

21. If the Appellant had either furnished relevant information or successfully appealed, then some or all of any liability might have been transferred back to the company and HMRC could not have raised assessments to recover the tax from him personally. It was only when the days of appeal expired that the deemed payments became finally quantified as employment income in the hands of the Appellant. That income had not been assessed so the only route to bring the tax due thereon into charge is Section 29 TMA. Until the assessments were raised the tax was not recoverable.

22. As at 2 June 2011 (and of course 27 May 2011) HMRC could not have raised assessments because that would have been premature. The amount of under assessed income was only finally ascertained and therefore "discovered" on the expiry of the days of appeal without the provision of further information.

23. In point of fact, although the Appellant did <u>not</u> furnish the requisite information to HMRC before the assessments were raised, nevertheless since then the Appellant has produced some bank statements and other information about his financial affairs (see paragraph 33 below).

## The arguments

*The Appellant*

24. In summary, it was argued that there was no discovery after 27 May 2011, which was the date when Mr Lawrence applied for authorisation of the Direction and NIC decision. No argument was advanced in regard to their validity. The primary thrust of Mr Feng's argument was that when they were issued on 2 June 2011, HMRC were in possession of all relevant facts. They issued the closure notices on the same day. Therefore, in his submission, the assessments issued on 3 August 2011 were invalid.

*HMRC*

25. HMRC stated that the Direction was issued because it was the only mechanism available to HMRC to recover the unpaid tax because the company was in liquidation. It was conceded at the hearing that it would have been open to Mr Lawrence to have awaited the expiry of the 30 days for appeal of the Direction (and NIC Decision) before issuing the closure notices and that in retrospect he wished that he had done so. Nevertheless he had not done so and he was faced with having to make a decision on what he could do to recover the loss of tax. It was argued that the fact that closure notices had been issued did not preclude the raising of assessments under section 29 TMA. The two are not mutually exclusive.

## The Law

26. Excerpts of the relevant legislation are at Appendix 2. We were provided with an extensive "joint bundle of case law authorities" (which included Judge Poole's Direction and copies of legislation); they are listed at Appendix 3 with the citations furnished to us. Where we refer to a case the conventional citation has been added in italics. At the hearing Mr Feng indicated that he relied only on items 1-10, although (see paragraph 28 below) he subsequently wrote to the Tribunal citing *Cenlon*. Not all of the authorities are relevant.

27. We should make it clear at the outset, as we did in the course of the hearing, that we do not accept the argument advanced by Mr Feng at the Hearing that *Cenlon* was of no application since it related to the legislation which obtained prior to self-assessment. That quite simply is not the case.

28. The Tribunal made their decision immediately following the hearing and did not intimate it to the parties, who had left the building, but rather commenced the draft of a summary decision. Mr Feng subsequently wrote to Judge Scott quoting from *Cenlon*. He referred her to the penultimate paragraph of the judgment of Upjohn LJ in the Court of Appeal which was quoted in the House of Lords judgment and to the penultimate paragraph of the judgment of Viscount Simonds in the House of Lords. Mr Feng stated that:- "The Appellant's case preliminary issue on a point of law is different to the question before the House of Lords of the Cenlon's case." It is a matter of agreement that the facts of the two cases are quite different.

29. The proceedings were complete and our decision taken by then so it was too late to make unsolicited further submissions. However, it was not material as we were

aware of the detail of *Cenlon*. In any event, Viscount Simonds' judgment had been referred to at some length in the Hearing.

**Reasoning**

*The relationship between an enquiry under Section 9 and Section 29 TMA*

30. Mr Feng argued that the Appellant should have had a legitimate expectation that he would be taxed in terms of the relevant statute; the issue of the closure notice in terms of Section 28A should have been an end to the matter. It is undoubtedly the case that the Tribunal must consider the relevant statutory provisions but of course the case law is also relevant.

31. We were not referred to, but entirely agree with, the reasoning of Judge Hellier in *Corbally-Stourton* at paragraph 79 which reads:- "What seems clear to me is that for there to be a fair balance, the legislation must provide to an honest and careful taxpayer a period after which, if he provides all the required information, he will know the limit of his tax liabilities. **The enquiry procedure and Section 29 provides those limits in overlapping ways. But the existence of one procedure is not to be judged against the other; rather the two are to be considered together.** And it seems to me that the combined picture is not one in which the balance in favour of the state is oppressive. A taxpayer who makes a completely full and frank disclosure achieves certainty at the end of the enquiry window or on completion of the enquiry. A taxpayer who makes a non-negligent partial disclosure may have to wait a few more years. That is not an unfair balance."

32. We have highlighted, in bold, two of the sentences in that passage because they make it quite clear that in certain circumstances there can be both a closure notice and a section 29 discovery with consequential assessment(s).

33. In this case it is clear that there was not a full disclosure in the tax returns (some of the financial information now provided in regard to rental income supports that), there was not a full disclosure in the course of the enquiry, there was not a full disclosure in regard to the Direction and there has not been cooperation with HMRC. Accordingly Mr Feng's argument that because the enquiries had been closed there could not be a discovery since the broad parameters of what was then discovered were already known to HMRC does not sit well.

*What is a discovery?*

34. Both parties referred to *Hankinson.* We agree with both parties that, as it states at paragraph 23:- "The Officer must, of course, have made a discovery. Unless he has done so he cannot raise an assessment…".

35. HMRC relied on *Charlton* and Mr Feng advanced no argument thereon. We agree with and adopt the reasoning at paragraph 37:- "In our judgement, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the Officer, but to the

conclusion itself." We believe that that is a particularly clear and concise summary of the meaning of a discovery.

36. The Upper Tribunal goes on to confirm at paragraph 44 that:- "The First-tier Tax Tribunal was in our view correct to conclude as it did…that a discovery assessment can be made merely where the original officer of HMRC changes his mind….".

37. We found Mr Lawrence to be both honest and reasonable. He was clear that he saw the closure notices and the Directions (and NIC decision) as being two quite different matters. The latter two had been issued in an attempt to elicit information from the Appellant. They could have been challenged both in their entirety and in regard to quantum. If the Appellant is correct in the information that he has very belatedly suggested exists in regard to his assets then both might and/or should have been capable of challenge. HMRC concede as much in their Statement of Case, which includes revised, and significantly lower, figures for every year that is the subject matter of the substantive appeal.

38. We accept his argument that the closure notices were issued since the enquiries into the returns had run their course. All the Direction and NIC decision achieve is to state that the company will not have to bear the PAYE Income Tax or NIC burden. If not appealed, the consequence is that it is the employee who will do so if HMRC then raise assessments etc. The PAYE Income Tax and NIC due as a result of the Direction and NIC decision did not crystallise until then.

39. We agree with two of the arguments raised by HMRC based on *Cenlon*. The first is where Viscount Simonds, in his penultimate paragraph, states: - "I can see no reason for saying that a discovery of undercharge can only arise where a new fact has been discovered. The words are apt to include any case in which for any reason it newly appears that the taxpayer has been undercharged, and the context supports rather than detracts from this interpretation." As we indicate previously, until the 30 days of appeal had expired the Appellant could have produced all manner of information, as he has subsequently done in the course of these appeal proceedings, which might have clarified the extent to which, if any, there was an undercharge of tax.

40. The second argument arising from this case is the point made in the final paragraph of the judgment of Lord Denning. He makes it very clear that a discovery can include a discovery that the law has been wrongly applied or that one is mistaken about the law. In this case Mr Lawrence discovered, after the closure notices had been issued, that perhaps issuing the closure notices, the Direction and the NIC decision on the same day had not been the best course to adopt, given the relevant law.

41. Neither party referred to paragraph 24 of *Hankinson* but we consider it pertinent. That states:- "The purpose of the new section 29 is to protect the taxpayer who has made an honest, complete and timely return from a late assessment". That is not the case in this instance.

42. In summary, the purpose of the Direction was to try and elicit information that had not been forthcoming. It failed in that objective. Meanwhile there had been no progress in the enquiries and Mr Lawrence sought to bring those to a conclusion since if the Direction was appealed that would continue to delay matters, perhaps

indefinitely. He knew that he could use section 29 TMA in due course, if required. We find that on 2 June 2011, although he might have suspected that the quantum of the missing income was correct he did not and could not have known that since further information might have come to light, as he hoped. Accordingly when the days of appeal expired he did make a discovery, within the meaning of that word, for the purposes of section 29 TMA. In any event as we indicate above, a discovery can be a simple change of mind. It does not require a new fact.

43. For all these reasons we find that the requirement in Section 29(1) TMA for a discovery has been satisfied in relation to the assessments for 2004/05, 2005/06 and 2007/08.

44. Accordingly the appeal in regard to all six years will now proceed to a substantive hearing where, *inter alia*, the other provisions of section 29 TMA will be canvassed. Further Case Management Directions will be issued in due course.

45. 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.

**ANNE SCOTT**
**TRIBUNAL JUDGE**

**RELEASE DATE: 3 September 2014**

**APPENDIX 1**

## STATEMENT OF AGREED FACTS

1. Appellant - Mr Michael Shu Kin Yip

2. Address - 11 Seton View
Port Seton
East Lothian
Edinburgh EH32 0TX

3. Blue Diamond Restaurant Ltd incorporated in June 2000 and commenced trading on 1 November 2003.

4. Mr Michael Shu Kin Yip was a sole Director of Blue Diamond Restaurants. He was appointed sole Director on 1 January 2004 and resigned as a Director on 30 June 2008.

5. Blue Diamond Restaurant Ltd traded as a licensed restaurant operating a takeaway.

6. Blue Diamond Restaurants Ltd ceased trading on October 2008 and was put into compulsory liquidation on 29 January 2009.

7. Blue Diamond Restaurants Ltd traded from premises at 10d Bath Street, Portobello, Edinburgh.

8. Mr M S K Yip who rented the premises to Blue Diamond Restaurants Ltd owned the premises at 10d Bath Street, Portobello, Edinburgh.

9. HMRC opened a full enquiry into the company accounts of Blue Diamond Restaurants Ltd for the accounts period ended 30 June 2006 on 23 October 2007.

10. The enquiry was opened under Paragraph 24(1) Schedule 18 Finance Act 1998.

11. A full enquiry was opened into the personal Return of Mr M S K Yip for the tax year ended 5 April 2005 on 19 March 2008 under Section 9A Taxes Management Act 1970.

12. An enquiry was opened into the personal Return of Mr M S K Yip for the tax year ended 5 April 2006 on 16 January 2009 under Section 9A Taxes Management Act 1970.

13. An enquiry was opened into the personal return of Mr M S K Yip for the tax year ended 5 April 2007 on 16 January 2009 under Section 9A Taxes Management Act 1970.

14. On 28 January 2011, Mr Lawrence issued his pre closure notice letter to the Appellant.

15. On 27 May 2011 an approved Officer of HMRC authorised a Direction under Regulation 72(5) Income Tax (Pay as You Earn) Regulations 2003.

16. On 27 May 2011, an approved Officer of HMRC authorised a Decision under Section 8(1)(c) Social Security Contribution (Transfer of Functions) Act 1999 in respect of Regulation 86 Social Security (Contributions) Regulations 2001.

17. A Closure Notice was issued under Section 28A(1) & (2) Taxes Management Act 1970 for the tax year ended 5 April 2005 on 2 June 2011.

18. No appeal was received in respect of the Closure Notice within the statutory 30-day appeal period as Mr Yip accepted the amendment and conclusion.

19. A Closure Notice was issued under Section 28A(1) & (2) Taxes Management Act 1970 for the tax year ended 5 April 2006 on 2 June 2011.

20. No appeal was received in respect of the Closure Notice within the statutory 30-day appeal period as Mr Yip accepted the amendment and conclusion.

21. A Closure Notice was issued under Section 28A(1) & (2) Taxes Management Act 1970 for the tax year ended 5 April 2007 on 2 June 2011.

22. No appeal was received in respect of the Closure Notice within the statutory 30-day appeal period as Mr Yip accepted the amendment and conclusion.

23. An assessment was issued under Section 29(5) Taxes Management Act 1970 for the tax year ended 5 April 2008 on 2 June 2011.

24. No appeal was received in respect of the assessment within the statutory 30-day appeal period as Mr Yip accepted the assessment and conclusion.

25. On 2 June 2011, a Direction was issued to Mr M S K Yip as a Director and Employee of Blue Diamond Restaurants Ltd under Regulation 72(5) Condition B Income Tax (Pay as You Earn) Regulations 2003 for tax years 2003/2004 to 2008/2009 inclusive.

26. On 2 June 2011, a Decision was issued to Mr M S K Yip as a Director and Employee of Blue Diamond Restaurants Ltd under Section 8(1)(c) Social Security Contribution (Transfer of Functions) Act 1999 for Primary Class 1 National Insurance Contributions for tax years 2005/2006 to 2008/2009 inclusive.

27. No appeal was received in respect of the Direction issued to Mr M S K Yip under Regulation 72(5) Condition B Income Tax (Pay as You Earn) Regulations 2003 for tax years 2003/2004 to 2008/2009 inclusive within the statutory 30 day appeal period.

28. No appeal was received in respect of the Decision issued under Section 8(1)(c) Social Security Contribution (Transfer of Functions) Act 1999 for tax years 2005/2006 to 2008/2009 inclusive within the statutory 30-day appeal period.

29. Assessments were raised on Mr M S K Yip under Section 29(4) Taxes Management Act 1970 on 3 August 2011 for tax years 2003/2004 to 2008/2009 inclusive to collect the tax due under Regulation 72(5) Condition B of the Income Tax (Pay as You Earn) Regulations 2003.

30. On 25 August 2011, appeals were received against the assessments raised by HMRC on 3 August 2011.

31. The statutory review was concluded on 14 September 2012 and the Review Officer upheld all Decisions in full.

32. On 3 October 2012, a Notice of Appeal was lodged with HM Courts & Tribunals Service.

**Appendix 2**

## 1. Discovery

### 29 Assessment where loss of tax discovered

29(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. Closure Notice

### 28A Completion of enquiry into person or trustee return

(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.

In this section "the taxpayer" means the person to whom notice of enquiry was given.

(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.

## 3. The Direction

### 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.]

**APPENDIX 3**

**Joint bundle of case law authorities**

| | Content |
|---|---|
| **1** | **Judge K Poole's Directions 21 October 2013** |
| **2** | **The Law and (Pay As You Earn) Regulations 2003** |
| | Section 9A Taxes Management Act 1970 |
| | Section 28A Taxes Management Act 1970 |
| | Section 29 Taxes Management Act 1970 |
| | Section 34 Taxes Management Act 1970 |
| | Section 38 Taxes Management Act 1970 |
| | Section 118 Taxes Management Act 1970 |
| | Section 72 Income Tax (Pay As You Earn) Regulations 2003 |
| | Section 72C Income Tax (Pay As You Earn) Regulations 2003 |
| | Schedule 36 Finance Act 2008 |
| **3** | **Colin Moore v HMRC [2011] UKUT 239 (TCC)** |
| **4** | **Mrs Lavinia Frances Corbally-Stourton v HMRC SpC00692** |
| **5** | **The Argosy Company Limited (In Voluntary Liquidation) v Inland Revenue Privy Council Appeal No. 24 of 1968 The Court of Appeal of the Supreme Court of Judicature of Guyana** |
| **6** | **HMRC v Mr Imtiaz Ali [2011] EWHC 880 (Ch)** |
| **7** | **HMRC v Tower MCashback LLP1 [2011] UKSC 19** |
| **8** | **The Cape Brandy Syndicate v Inland Revenue [291] K.B.64** |
| **9** | **R v Inland Revenue Commissioners, ex parte MFK Underwriting Agencies Ltd [1989] STC 873** |
| **10** | **Alletta Nash v Chelsea College of Art and Design [2001] EWHC Admin 538** |
| **11** | **Cenlon Finance Co Ltd v HMRC 40TC176** |
| **12** | **Langham v Veltema 76TC259** |
| **13** | **Dr Samuel Easow(1) Mrs Mercy Samuel(2) Tammys Ltd(3) v CHMRC TC02882** |
| **14** | **Derek William Hankinson v CHMRC FTC/14/2010** |
| **15** | **Charlton and others v RCC [2012] UKFTT 770 (TCC)** |

**4.** ***Corbally-Stourton v RCC [2008] STC 907 ("Corbally-Stourton")***

***11. Cenlon Finance Co Ltd v Ellwood [1962] 40 TC 176 ("Cenlon").***

***14. Derek William Hankinson v HMRC [2010] UKUT 361 ("Hankinson")***

***15. Charlton & Others v RCC [2013] STC 866 ("Charlton")***