[2021] UKFTT 167 (TC)

TC08136

Income Tax – alleged under-declaration of income – presumption of continuity – discovery assessments

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/06340

BETWEEN

ROGER WHITLOCK **Appellant**

-and-

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

TRIBUNAL: JUDGE GUY BRANNAN
MS SUSAN STOTT

The hearing took place on 15 April 2021. The form of the hearing was a video hearing on the Tribunal's video platform. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. Therefore, the hearing was held in public.

The Appellant appeared in person

Paul Hunter, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. Mr Whitlock appeals to this Tribunal against “discovery” assessments and a closure notice issued by the HMRC for income tax years ended 05/04/2011 to 05/04/2016. The assessments and the closure notice were issued on 27 July 2018, and appealed on 6 November 2018. HMRC do not contest the lateness of Mr Whitlock’s appeal and at the beginning of the hearing the Tribunal consented to the late appeal.

2. Essentially, HMRC argue that Mr Whitlock has under-declared cash receipts from his business for the six tax years concerned. Mr Whitlock accepts that he did not fully declare all cash receipts but argues that the amounts of income tax which HMRC seek to charge are excessive.

3. There is no appeal in respect of penalties.

EVIDENCE

4. Mr Whitlock and his mother, gave informal witness statements. Mr Whitlock was cross-examined on his evidence. Mr Whitlock read out his mother’s statement. His mother was unable to attend on the grounds of ill-health, for reasons which we accept. For HMRC, two officers, Ms Elizabeth McLachlan-Pinder and Mr John Jenkins, produced witness statements. Ms Elizabeth McLachlan-Pinder gave oral evidence but was not cross-examined.

ASSESSMENTS AND CLOSURE NOTICE

Year ended	Tax return submitted	Total tax now charged	Original tax paid	Legislation
05/04/2011	30/01/2012	£8,419.04	£556.80	S29/36 TMA 1970 “Discovery” assessment
05/04/2012	30/01/2013	£10,177.54	£1,393.00 (overpaid)	S29/36 TMA 1970 “Discovery” assessment
05/04/2013	26/01/2014	£9,938.13	£51.45 (overpaid)	S29/36 TMA 1970 “Discovery” assessment
05/04/2014	26/01/2015	£10,527.50	£1,050.95 (overpaid)	S29/36 TMA 1970 “Discovery” assessment
05/04/2015	30/01/2016	£10,497.81	£106.96	S29/34 TMA 1970 “Discovery” assessment
05/04/2016	12/01/2017	£11,017.33	£320.20	S28A TMA 1970 Closure Notice

THE FACTS

5. On or around 31 January 2005 Appellant commenced his self-employed business of removing household and garden rubbish from domestic properties, builders and other businesses.

6. On 9 March 2017, HMRC (Ms McLachlan-Pinder) opened an enquiry into Mr Whitlock’s self-assessment tax return for the tax year 2015-2016. Her enquiry was prompted by the fact that Mr Whitlock’s return contained round figures (to the nearest £1,000) for income, expenses and profits. The expenses were very high, in HMRC’s view, compared with

other businesses. The profits chargeable to tax were always just above or occasionally just below the personal allowance limit.

7. After being provided with and having reviewed Mr Whitlock's records, Ms McLachlan-Pinder and Mr Jenkins met Mr Whitlock on 24 November 2017. We were provided with a note of that meeting.

8. A number of issues arose at that meeting, which were developed through correspondence in the subsequent enquiry.

9. First, Mr Whitlock had provided receipts totalling £32,463.88 which indicated that they had been paid by Mr Whitlock in cash. These payments had been claimed as deductible expenditure on Mr Whitlock's return. However, Mr Whitlock's bank statements indicated that only £13,688.96 had been withdrawn from the banking cash. Therefore, there was a cash shortfall of £18,774.92 ("the cash shortfall"). At the meeting, Mr Whitlock initially claimed that all the cash received by his business was banked the following day and that he did not retain cash. He also said that he paid most of its expenses by cheque or by card. However, Ms McLachlan-Pinder suggested that the "cash shortfall" indicated that Mr Whitlock had not banked all the cash received but had, instead, used it to pay expenses. Mr Whitlock then accepted that it was possible that not all cash had been banked. Accordingly, Ms McLachlan-Pinder indicated that the "cash shortfall" needed to be added to Mr Whitlock's turnover figure.

10. Secondly, Mr Whitlock confirmed that he did not issue invoices to his customers.

11. Thirdly, Mr Whitlock claimed that he usually worked alone. Sometimes, he said, he was helped by friends on specific jobs and the friends were paid directly by the customers. Subsequently, Ms McLachlan-Pinder showed him reviews of his "team" on social media in 2014 and 2015. Mr Whitlock then accepted that he engaged other individuals to assist him in his business and that a number of payments from his bank account were payments to these team members, rather than to friends and family as he had originally claimed. This was supported by the fact that payments from Mr Whitlock's bank account to insure multiple vehicles.

12. Fourthly, Ms McLachlan-Pinder discussed with Mr Whitlock the bank account in his mother's name which recorded payments to and from Mr Whitlock's bank account. Mr Whitlock claimed that these were loans from his mother to assist him financially. Ms McLachlan-Pinder pointed out that the sum of the payments from Mr Whitlock to his mother's bank account was greater than the sum of the payments from his mother's bank account to him. That appeared to undermine his contention that these were loans from his mother. Furthermore, in some transactions the same amount of money was transferred back and forth between the accounts in the same amount on the same day. Mr Whitlock was asked how his mother made the payments. He claimed that she had made them using telephone banking, but none of the bank statements showed any sign of telephone banking having been used.

13. Mr Whitlock was cross-examined about payments to and from his mother's bank account. It was noted that in the bank statements of his mother's account there were payments in respect of commercial vehicle insurance and payday loans. Mr Whitlock was unable to explain these payments. In addition, there was no sign of Mr Whitlock's mother's pension (her only source of income) being paid into this account or of any normal day-to-day living expenses being paid from the account.

14. It was suggested to Mr Whitlock in cross-examination that he had control over his mother's account and that this was effectively a "ghost" account which he operated for the purposes of his business. Mr Whitlock denied this, maintaining that these were loans from his mother to help him out financially. Ms McLachlan-Pinder, however, decided to include all

payments to Mr Whitlock from his mother's bank account as additional trading income. In our view, she was justified in doing so.

15. We considered that it was clear that Mr Whitlock controlled his mother's account and used it for the purposes of his business so that many of the cheques paid into the account represented income from customers.

16. Fifthly, Mr Whitlock said that he paid approximately £50 per week in cash to his partner for PA work relating to his business.

17. Finally, at the meeting on 24 November 2017, Ms McLachlan-Pinder discussed with Mr Whitlock his ordinary household expenses. Ms McLachlan-Pinder noted that Mr Whitlock's bank account included no items for ordinary shopping and regular day-to-day expenses. She concluded that she needed to add a further figure to Mr Whitlock's turnover to represent the fact that he was likely to have paid for his ordinary household expenses in undeclared cash generated by his business. Eventually, the figure for undeclared cash in respect of household expenses was estimated to be £100 per week which was added to Mr Whitlock's turnover.

18. Ms McLachlan-Pinder therefore amended Mr Whitlock's 2015 – 2016 tax return by adding to his originally declared turnover of £55,000: £18,774.92 (representing the "cash shortfall"), £11,805 in respect of payments from his mother's bank account, £5,200 representing personal expenses defrayed out of undeclared cash receipts and £2,630 in respect of wages paid to his partner for PA services (which was offset by a corresponding deduction for that payment).

19. Ms McLachlan-Pinder's evidence was that Mr Whitlock's business showed no sign of growth or contraction. His earlier returns tended to be in round numbers and there was, therefore, nothing to suggest that the same under-declarations had not occurred in earlier years. Therefore, Ms McLachlan-Pinder issued "discovery" assessments under section 29 Taxes Management Act 1970 ("TMA") on the basis that Mr Whitlock's under-declaration of his trading income was "deliberate". According to the "presumption of continuity" it could be inferred that similar under-declarations had occurred in earlier tax years. Therefore, Ms McLachlan-Pinder issued assessments under section 29 TMA in amounts based on the enquiry year ended 5 April 2016, adjusted for inflation in accordance with the RPI.

20. Mr Whitlock recognised that he had made mistakes. However, he said that he was poorly educated and not very good at business. He simply wanted to settle the whole thing and had offered HMRC £20,000 to conclude matters. He felt he could not pay more and he would otherwise have to go bankrupt with consequences for himself and his family. Mr Whitlock maintained that his mistakes had not been deliberate and that the money received from his mother's bank account constituted loans. He found it embarrassing at his age to have to borrow money from his mother to make ends meet.

21. Although he disputed the figures in HMRC's discovery assessments and the closure notice, Mr Whitlock could not put forward any reliable alternative figures. He had very little in the way of business records and, apparently, no method of recording the receipt of cash. He had offered HMRC £20,000 to settle his liabilities and could not understand why this was not acceptable.

22. After the hearing on 15 April 2021 and in the process of preparing a decision, the Tribunal observed that in the Appellant's self-assessment tax return for the tax year ended 5 April 2012, the Appellant claimed a loss arising from his business of £229,000. The following Table shows the Appellant's turnover, expenses and profits in accordance with his tax return for the relevant years:

Y/e 5 April	Turnover	Expenses	Profit
2010	£14,424.00	£10,738.00	£3,686.00
2011	£30,000.00	£19,000.00	£11,000.00
2012	£35,000.00	£264,000.00	£0.00
2013	£32,000.00	£0.00	£10,000
2014	£29,000.00	£0.00	£10,000
2015	£32,000.00	£0.00	£10,500
2016	£55,000.00	£0.00	£10,000

23. The focus of HMRC's enquiry, the discovery assessments and the closure notice was on the alleged under-declaration by the Appellant of his trading income. At the hearing our attention was not drawn to any challenge to the deduction of £264,000 (page 273 of Bundle 2), resulting in a loss of £229,000 (page 274 of Bundle 2). If this deduction was correct, there would be no taxable profits in the tax year ended 5 April 2012, even allowing for the extra profits assessed for that year by the "discovery" assessment and there would be a trading loss available to be carried forward in subsequent years, subject to a carry-forward claim being made within four years after the end of the tax year in which the loss arose (section 83 (1) Income Tax Act 2007 and section 43 (1) TMA, but subject to the provisions of section 36 (3) TMA which gives effect to any relief or allowance to which the taxpayer would have been entitled in respect of the relevant chargeable period).

24. After the hearing, therefore, we asked for written representations from the Appellant and HMRC in respect of this issue and its effect on the validity of the assessments and closure notice in respect of the tax year ended 5 April 2012 and subsequent years.

25. HMRC submitted that the expense figure of £264,000 was simply a typographical error and that the correct figure was more likely than not to be £26,400. It was inconsistent with all the other expense figures in relation to the Appellant's business and the scale of that business. Accordingly, HMRC submitted that the assessments remained valid. The Appellant said that he could not recall a loss of this amount from his business. He was unaware of any trading loss to be carried forward. The only thing that the Appellant could think of was that he was in an Individual Voluntary Arrangement but he did not think that this was related.

26. On balance, we consider that the expense figure of £264,000 was simply a typographical error and that the correct amount was £26,400. The amount of £264,000 was out of all proportion to the size of the Appellant's business. Therefore, the expense figure for the year ended 5 April 2012 did not invalidate the assessment in respect of that tax year.

THE RELEVANT STATUTORY PROVISIONS

27. Section 29 TMA relevantly provides:

> "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) in a case where a notice of enquiry into the return was given—

(i) issued a partial closure notice as regards a matter to which the situation mentioned in subsection (1) above relates, or

(ii) if no such partial closure notice was issued, issued a final closure notice,

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 …5; 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]2 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;

…

(ii) …

(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.

(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."

28. Section 34 TMA so far as relevant provides:

"34 Ordinary time limit of 4 years

(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains tax may be made at any time not more than 4 years after the end of the year of assessment to which it relates

…

(2) An objection to the making of any assessment on the ground that the time limit for making it has expired shall only be made on an appeal against the assessment.

(3) In this section "assessment" does not include a self-assessment."

29. Section 36 TMA so far as relevant provides:

"36 Loss of tax brought about carelessly or deliberately etc

(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it

relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).

(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax—

(a) brought about deliberately by the person,

(b) attributable to a failure by the person to comply with an obligation under section 7.

…

may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period).

(1B) In subsections (1) and (1A), references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person.

…

(3) If the person on whom the assessment is made so requires, in determining the amount of the tax to be charged for any chargeable period in any assessment made in a case mentioned in subsection (1) or (1A) above, effect shall be given to any relief or allowance to which he would have been entitled for that chargeable period on a claim or application made within the time allowed by the Taxes Acts.

…"

DISCUSSION

30. Mr Whitlock accepted that he had made mistakes on his return. He also accepted that not all the cash receipts generated by his business were recorded as income. Furthermore, it was clear from Mr Whitlock's tax returns that the income generated by his business had neither expanded nor contracted over the years. The figures on his tax returns for the years under appeal in respect of profits and turnover were all round numbers. It was clear that Mr Whitlock had carried out no detailed analysis of his income and expenses.

31. It was also clear that at the meeting on 24 November 2017, a number of statements made by Mr Whitlock initially were false. For example, he claimed initially that all cash receipts were bank the following day but it was clear from the evidence of the cash receipts and the cash drawings from his bank account that this was not true. He then accepted that not all cash receipts were banked. He also attempted to conceal the size of the business by claiming that he usually worked alone only to concede, when challenged, that he had a team of men working with him in the business. Furthermore, it was clear to us that that he controlled and operated a bank account which was in the name of his mother for the purposes of his business.

32. We accept Ms McLachlan-Pinder's evidence. We have concluded that Mr Whitlock under-declared his income for the six tax years in question.

33. For the reasons given in paragraphs 30 and 31 above, we have also concluded that Mr Whitlock's behaviour was deliberate for the purposes of section 29 and section 36 TMA.

34. We are also satisfied that Ms McLachlan-Pinder made a "discovery" for the purposes of section 29 TMA when she enquired into Mr Whitlock's tax return for the year ended 4 April 2016 and the previous five years.

35. Furthermore, we see no reason why the usual "presumption of continuity" should be displaced. Walton J said in *Jonas v Bamford (Inspector of Taxes)* [1973] STC 519 on the nature of that presumption as follows:

> "But, so far as the discovery point is concerned, once the inspector comes to the conclusion that, on the facts which he has discovered, Mr Jonas has additional income beyond that which he has so far declared to the Inspector, then the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly on the taxpayer."

36. Accordingly, we consider that HMRC were entitled to assume that Mr Whitlock had under-declared his income in the five tax years prior to the year ended 5 April 2016. There seemed no material difference in the circumstances existing in those years from the year under enquiry which would exclude the application of the presumption of continuity – which is in effect simply an inference which this Tribunal is entitled to draw from the facts before it.

37. These reasons, we dismiss Mr Whitlock's appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

38. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 21 MAY 2021