Neutral Citation: [2024] UKFTT 00890 (TC)

Case Number: TC09307

FIRST-TIER TRIBUNAL
TAX CHAMBER

Manchester

Appeal reference: TC/2021/02587

INCOME TAX – anonymisation – risk to safety of family overseas - failure to notify – assessments – whether fair estimate – yes – whether displaced – no – penalties – deliberate behaviour – no reasonable excuse – appeal dismissed

Heard on: 5 February 2024
Judgment date: 7 October 2024

Before

TRIBUNAL JUDGE ANNE FAIRPO
TRIBUNAL MEMBER SUSAN STOTT

Between

Mr E

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: the Appellant appeared in person

For the Respondents: Mr Singh, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

Anonymisation

1. The appellant (Mr E) made an application for the appeal to be heard in private and the decision to be anonymised. This was on the basis that the appellant's grounds of appeal included contentions that the appellant was financially assisted by family in a country with a poor record regarding human rights and which has been known to take action against residents who provide support to family members in countries such as the UK. Mr E was concerned that there would be significant risk to his family in that country if the decision was not anonymised.

2. We are conscious that the starting point for applications such as these is that of open justice: justice must be done in public. However, case law has made it clear that derogations from this principle are available where, for example, a public hearing and decision would be likely to lead to a breach of the European Convention on Human Rights.

3. In this case, we accepted Mr E's argument that there would be a clear and significant risk to the safety of his family overseas if this appeal was held in public and the decision was not anonymised. In the circumstances of this particular case we considered that this risk outweighed the principle that justice should be done in public. We therefore directed that the hearing should be in private, and the decision should be anonymised.

Introduction

4. This is an appeal by Mr E against discovery assessments issued by HMRC on 4 March 2020 under s29 Taxes Management Act 1970 (TMA 1970) for the tax years 2000/01 to 2018/19 and associated penalties issued on the same day under s7(8) TMA 1970 and Schedule 41 Finance Act 2008 (FA 2008). The aggregate amount under appeal was £204,775.93.

5. Following ADR and the provision of documentary evidence by Mr E, and written submissions as to additional deductions to be allowed, HMRC requested that the Tribunal reduce the assessments and associated penalties to an aggregate amount of £158.979.39.

Summary

6. Mr E failed to notify HMRC that he was chargeable to tax and kept no business records for almost two decades. We concluded that the behaviour was deliberate, as he chose not to file tax returns with HMRC. We concluded that there was no reasonable excuse for this and no special circumstances applied. The amounts assessed (as amended, following written submissions) are upheld; the penalties are also upheld, amended to reflect the amendments to the assessments.

Background

7. Mr E operated a takeaway food business which commenced business at some point around 2000/2001; the exact date was unclear. As there was no dispute between the parties that he had begun the business during the 2000/2001 tax year, we have not considered it necessary to make any detailed findings on this point.

8. Mr E initially rented the first property from which the business operated. He purchased it in February 2002 for £20,000; Mr E explained that approximately £6,000 of this figure was paid in settlement of unpaid rent. In November 2009 he acquired a second property in the same town for £60,000 and opened a second takeaway at those premises. He continues to own both properties, together with the family home. He explained that his family overseas had assisted with money to purchase these properties.

9. There was no dispute that Mr E did not notify HMRC that he was liable to income tax for any of the tax years under appeal, nor has he filed an income tax return for any of those years. He was not issued with a notice to file for any of the relevant tax years.

10. HMRC opened an investigation into Mr E's tax affairs in June 2018. Following correspondence, Mr E appealed to HMRC on 16 March 2020 and, following correspondence, a review conclusion letter was issued on 11 June 2021. The review concluded that the penalty for the 2009/10 tax year should be cancelled and otherwise upheld the assessments and remaining penalties. Mr E appealed to this Tribunal on 8 July 2021.

11. We have summarised Mr E's position here for context. His grounds of appeal were (in summary):

(1) the licensing hours of the trading premises were only 29.5 hours per week;

(2) the shop was only open for 15-20 hours a week because he was a single parent to three children with no relatives in the country;

(3) the trading premises are run down and are not in a good location, and there were other similar takeaways near by;

(4) it is not possible for any takeaway of this nature in the UK to make the profits that HMRC say have been made;

(5) the shop has no employees and no delivery service;

(6) the local health inspector believed the assessments to be excessive;

(7) Mr E received money from relatives overseas, and this had been included in the turnover assessed by HMRC. This money from his relatives had to be sent in secret to avoid government reprisals against his family;

(8) Mr E did not want to be a burden on the state and believed that if he filed a self-assessment return, he would receive state benefits, so he had not submitted any tax returns;

(9) Mr E believed that if his turnover was below the VAT threshold there was no obligation for him notify HMRC that he was liable to income tax.

12. In the hearing, Mr E relied on the information already provided in correspondence with HMRC and the Tribunal.

13. Mr E explained that he had started the business in around 2001 after failing to find full-time employment for a number of years, during which time he had (in his words) resorted to social security and unemployment benefit. He did not consider that it was reasonable for him to be expected to have business records after all this time, and that it was not reasonable to have expected him to keep business records given his family obligations and situation.

14. Mr E explained that "things went wrong in 2012, 2013" as the local council had promised that the premises could have a late-opening licence but then failed to grant the licence. Mr E believed that this was because there was insufficient funding for police. He therefore had to close the business at 1:30am and considered that he was missing out on later trade as people left other places at 2am.

15. Mr E contended that HMRC should have come to look at the properties and his family situation. He also contended that, as he had bought the two premises from which the business operated using gifts from his father, he had saved the government over £400,000 as the government did not have to support the rent he would otherwise have paid on a family home.

He contended that he was being punished for deciding not to rely on social security, having saved taxpayers from having to support him and his children.

Discussion

16. Mr E contended that he wanted HMRC to help him, to make debt management suggestions, rather than enforcing the assessments and penalties. The Tribunal has no power to order HMRC to provide assistance to a taxpayer in that way; in the context of this appeal, our jurisdiction is limited to considering the validity of the assessments (and their quantum) and the penalties.

17. We considered the oral evidence and the documentary evidence to which we were referred. All findings of fact were made on the civil standard of proof. That means that they were reached on the basis that they are more likely to be true than not. The following is not intended to address every point of evidence or resolve every contention made by the parties. We have made the findings necessary to resolve the legal dispute before us. Where findings have not been made, or are made in less detail than the evidence presented, that reflects the extent to which those areas were relevant to the issues and the conclusions reached.

Validity of assessments

Whether there was a discovery

18. Given that Mr E agrees that he filed no tax returns for the relevant periods, and that he was conducing a business in those periods, s29(1) TMA 1970 enables HMRC to raise an assessment if they discover that income which ought to have been assessed has not been assessed, or that existing assessments are insufficient. Mr E did not challenge this aspect of the assessments but the burden of proof remains on HMRC to show that they have made a relevant discovery in order to be able to raise the assessments.

19. Case law has established “discover” simply means “to come to the conclusion” from any information received by an officer of HMRC (Charlton [2012] UKUT 770 (TCC) at [37]). Officer Allison’s evidence was that he discovered that income which ought to have been assessed had not been so assessed once he had analysed the bank information obtained using the bank mandates.

20. Considering the evidence before us, we consider that HMRC have met the burden of proof on them with regard to the requirement that a discovery had been made in order for an assessment to be raised.

Whether the assessments were raised within the relevant time limits

21. The assessments were raised on 4 March 2020.

22. The ordinary time limit for raising assessments is four years from the end of the relevant tax year (s34(1) TMA 1970). The assessments for the years 2015/16 to 2018/19 (inclusive) were made within four years after the end of the years of assessment to which they related. We find that these assessments were therefore made within the relevant time limits.

23. For the assessments for the years 2009/10 to 2014/15 (inclusive), s36(1A) TMA 1970 provides that an assessment may be made at any time not more than 20 years after the end of the year of assessment to which it relates if the loss of income tax was attributable to a failure by that person to comply with an obligation under s7 TMA 1970. As Mr E accepts that he did not file tax returns for those periods, we find that this time limit applies in respect of these tax years and that the assessments were therefore made within the relevant time limits.

24. For the assessments for the years 2000/01 to 2008/09 (inclusive), s36(1) TMA 1970 (as it applied before 1 April 2010) provides that an assessment may be made at any time not later

than 20 years after the 31 January following the year of assessment to which it relates if the loss of tax is attributable to conduct of that person which is at least negligent.

25. Officer Allison's evidence was that he concluded that Mr E's behaviour was at least negligent as he had failed to declare tax in respect of a business which had operated for almost two decades and had been resident in the UK for over forty years, having come to the UK as a student in 1978. He concluded that it was not credible that Mr E had not known that he had to register with HMRC and declare his income and expenditure.

26. Mr E provided various explanations for his failure to file tax returns, including his belief that he did not need to register for income tax because he was below the VAT threshold, and also his belief that he would be paid state benefits if he did file tax returns and he did not want to be a burden on the state. He also referred to his family obligations being onerous, which meant that he did not have the time or resources to keep business records. Although he did not specifically say that this was also a reason for his failure to register for tax and file tax returns, we have taken it into account.

27. The test of negligence is essentially whether the person failed to do something that a reasonable taxpayer would have done, or did something that no reasonable taxpayer would have done.

28. We have considered Mr E's explanations in more detail below, in relation to penalties in particular. In the context of whether his behaviour was negligent, Mr E did not suggest that he had made any enquiries as to the validity of these beliefs, other than to say that he had been told by an unspecified person that he did not need to register for income tax if trading under the VAT threshold. He did not speak to or engage an adviser and there was no evidence that he had obtained any advice as to his obligations with regard to tax or confirmed the suggestion that he did not need to register.

29. We agree with HMRC that it is not credible that a person who has been in the UK for several decades would reasonably believe that there was no need to register with HMRC when starting a business, even if trading below the VAT threshold (noting that this has been consistently substantially higher than the personal allowance for income tax). We consider that a reasonable taxpayer would have made enquiries when starting the business to ensure that they understood and complied with their tax obligations. We do not consider that his family obligations were such that he was unable to make such enquiries.

30. In summary, we consider that Mr E made no attempt to confirm and comply with his income tax obligations when starting the business and subsequently. In the circumstances, we consider that this amounts to negligent behaviour. We find that the assessments for 2000/01 to 2008/09 were therefore validly raised.

31. Having concluded that the assessments were validly raised, the burden of proof is therefore on Mr E to displace the amounts assessed.

Quantum of assessments

Turnover

32. The turnover was established from bank statements obtained by HMRC with a mandate provided by Mr E. There were no records of turnover kept by the business.

33. It was agreed that the business only accepted cash payments from customers. The bank statements showed cash deposits in the relevant tax years, generally being deposits of a few hundreds of pounds several times a month.

34. HMRC stated that they had reviewed the statements in detail to remove items that were not obviously business income, including amounts transferred which appeared to relate to the purchase of the two business premises.

35. Mr E contended that some of these deposits were loans from family overseas which had been smuggled out of the country by family and friends when travelling to the UK. A letter was provided to the Tribunal from a person describing themselves as a neighbour of Mr E. This letter stated that a “foreign looking gentleman” had asked the neighbour to give Mr E a small brown bag four or five times during 2010 and 2013. The neighbour had asked Mr E what was in the bag and stated that Mr E had replied that each package contained £5-6,000 from his family overseas.

36. Mr E also explained in correspondence that some of the amounts were loans from the Halifax bank. Evidence of a £7,500 loan from Halifax Bank in 2014 was obtained by HMRC with the use of a bank mandate. HMRC confirmed that this loan amount had not been included in the assessed income. Mr E referred in correspondence loans of £40,000 being obtained in 2010/11 and 2014.

37. Mr E also said that the business was poor, and the shops were not in a good state, such that the turnover assessed was far too high for such shops.

Whether HMRC made a fair estimate

38. Provided that HMRC have made a fair estimate of turnover, the burden of proof is on the taxpayer to show what the correct amount to be assessed should be.

39. Given the lack of records, we consider that HMRC were entitled to use the bank statements, with adjustments to exclude amounts which were not consistent with deposits of takings, to draw inferences and produce a fair estimate of the amounts to be assessed. We find that the assessments were fair estimates of turnover based on the material available to them.

40. As noted above, Mr E disputed the amounts assessed and had a number of explanations for funds in the accounts which he said were not turnover although he did not link these explanation to any specific transactions in the statements included in the Tribunal bundle.

Income from family

41. To the extent that Mr E contends that a significant proportion of the assessed income was loaned to him from his family overseas, we do not consider that this is supported by the evidence. No specific deposits in the bank statements were identified by Mr E as being loans from family. The neighbour who provided a letter was not present in the hearing to give evidence and we have placed limited weight on his correspondence. Nevertheless, we note that the amounts deposited at the bank are not explained by gifts of the described amounts.

42. The bank statements show several cash deposits most months and we do not consider that it is plausible that there was a monthly stream of cash being smuggled to the UK by Mr E’s family and friends. On the balance of probabilities, we consider these amounts are more likely to reflect takings from the shops.

43. HMRC did not include within turnover large amounts which were transferred to Mr E around the time of the property purchases. We note these amounts were transferred to his account, and were not cash deposits, although Mr E indicated that money from his family could not be paid to him by bank transfer.

44. In correspondence with HMRC, Mr E stated that his family had lent him £180,000 by November 2018. In correspondence with the Tribunal, he stated that he had been given £230,000. There was no explanation as to how these amounts were arrived at. In other

correspondence, the funds from family are described by Mr E as funds to enable him to buy the two shops rather than being small amounts paid regularly.

45. In the hearing Mr E stated that his father had sent him £15,000 and £45,000 in connection with the property purchases. This was not disputed and HMRC confirmed that the amounts of this nature shown in the bank account at the time of the property purchases were not included in the assessments.

46. On balance, we do not consider that Mr E has shown that any of the amounts assessed by HMRC were income provided by his family.

Loans and transfers between accounts

47. Mr E suggested that some of the amounts assessed were bank transfers and loans. HMRC confirmed that they also did not include within their turnover calculations any amounts transferred between Mr E's bank accounts, nor amounts which were evidenced as loans.

48. No evidence of the £40,000 loans stated to have been taken out in 2010/11 and 2014 was provided by Mr E. The bank statements obtained by HMRC using the mandate provided by Mr E do not show any such amounts deposited or transferred in either of those years; there is a deposit of £25,000 in 2010, which HMRC confirmed was not included in the turnover assessed.

49. Mr E seems to suggest in the correspondence that £10,000 of one of these loans was used to pay off a Halifax loan. In addition to the lack of evidence in support in the bank statements noted above, the statement provided for the Halifax loan of £7,500 shows that it was paid off in consistent monthly instalments between April 2014 to September 2016.

Poor performance of shops

50. Mr E stated that the shops were not financially successful because they had short licensing hours, and because he did not have time to open given his parental responsibilities, and due to the location and condition of the premises. He had no employees and no delivery service.

51. It was not quite clear what Mr E meant when he said that the shops had no delivery service: he had provided a list of statements from customers who confirmed that they had had food delivered from his business. To the extent that he meant that he did not operate through any online third-party delivery service, it does not appear to us that this would have had any significant effect on turnover in the years under appeal (indeed, for many of those years no such services existed).

52. Mr E's evidence as to the ability of the shops to generate turnover was not consistent: for example, he regularly referred to "the shop" despite operating two premises for over half of the tax years assessed. He also referred to "the shop" as being derelict and indicated photographs as part of his contention that he could not have made the profits assessed.

53. These photographs were provided to HMRC, included in the bundle, and separately also attached to correspondence sent to the Tribunal. The photographs show some premises which appear to be in poor condition. It is not clear when they were taken. There were inconsistencies in the handwritten descriptions of these photographs - one particular photograph is described as "Year 2000" in the photograph in the bundle but is described as "Year, 2019" in the version sent to the Tribunal.

54. Despite the continued references to "the shop" generally as being in poor condition, Mr E referred to the second shop as being "perfect premises" and in a good commercial area. Mr E also stated that he was refused a late-night hot food licence for these premises, which he

contended substantially reduced the possible turnover of the business as he could not sell hot food after 11pm. He explained that the council had initially stated that the licence would be granted but then refused to do so. In a letter in a supplementary bundle provided at the hearing, this was said to be in 2010 and an application for a premises licence variation (but not the outcome) was included in the main bundle. In the hearing, Mr E said that this took place in 2012/13. In that letter he also states that he was eventually granted a licence to sell hot food until 2am (and in the supplementary bundle there is a photograph of an undated licence for sales of hot food until 2am at the premises) although in earlier correspondence Mr E had stated that he had never been able to sell hot food at the second store.

55. Finally, Mr E also provided a letter from his local council senior environmental health officer dated 21 November 2023, addressed to "to whom it may concern". This referred the officer having known Mr E and the shops since 2000. The letter describes the first shop as being "generally maintained in a good condition", and states that the officer made a number of visits in relation to food hygiene in the period. The officer states that he made fewer visits to the second shop but does not indicate that there was any particular issue with the condition of this shop. The officer notes that the second shop was licensed with the local council until 2017, although Mr E states in the letter in the bundles that it was closed in 2014/15. In the documents provided by Mr E, there is a receipt of payment of a licensing fee for this second shop in December 2015.

56. The description of the first shop in this letter from the environmental health officer is therefore entirely inconsistent with Mr E's description of the shop as derelict and the photographs described above. Although the environmental health officer was not present to be cross-examined, given his occupation we see no reason not to accept his letter as an accurate description of the condition of the shop. We prefer his evidence to that of Mr E in this context.

57. For these reasons, we do not consider that we can rely on any of Mr E's evidence that the shops were not capable of generating the turnover assessed. We do not consider that the evidence supports his contentions that unspecified amounts assessed were not business income. Accordingly, we do not consider that Mr E has met the burden of proof on him to displace HMRC's assessment of turnover for the periods under appeal.

Overheads

58. Mr E provided his own calculations of overheads for the relevant periods. HMRC's evidence, which was not disputed, was that Mr E had provided them with very limited documentation, as he did not keep business records in any sustained or organised manner. Mr E agreed that he had not kept business records to any useful extent.

59. In summary, Mr E contended that HMRC had not fully taken into account the overheads incurred by the business in arriving at their assessments. He argued that it was well known that successful takeaway shops of a similar nature had overheads of between 80% and 98% of turnover; he said that SAGE software indicated that a business such as his would generally have between 2% and 6% profit, so that overheads would be 94% of turnover. He considered that the overheads involved included ingredients, wages, insurance, and many other necessities. He also stated that his costs were higher than others as he had limited space and could not bulk-buy.

60. He agreed that the deduction allowed by HMRC for the telephone usage was appropriate but argued that not enough had been deducted in respect of electricity. He contended that the amount allowed was only just over the level of the standing charges, although he did not provide any further explanation of this contention.

61. Mr E provided schedules of amounts that he considered should be deducted for overheads. These are discussed further below.

62. HMRC contended that they had taken into account the overheads for which evidence had been provided, or which could be established from the bank statements. However, many of the overheads of the business appeared to be paid from the cash taken by the business as there was very little evidence of such overheads in the bank statements.

63. HMRC contended that deductions for overheads had therefore been taken into account generally because the turnover assessed was based on the deposits into the bank statements and that these deposits appeared to reflect net income of the business, being the surplus cash in the business after payment of many of the overheads.

64. They had also specifically allowed deductions for expenditure for which there was some evidence; given that none of the evidence provided covered the entire period for which assessments were raised, this had been done by extrapolating available information across the period using the Retail Price Index (RPI) published by the Office for National Statistics. Where information was available for one shop, it was doubled on the basis that similar expenditure should be allowed for the second shop.

65. For example, an invoice was available from the electricity utility company for November 2015, for one of the shops. This showed expenditure of £125. HMRC had doubled this, to reflect the second shop, so that the monthly expenditure of the business was estimated to be £250. This gave an annual expenditure on energy of £3,000. This was then adjusted by RPI for all of the other years in the period and the resulting figures allowed as a deductible expense for the relevant years.

66. A similar approach had been taken for:

(1) telephone charges, where an invoice of £80 for one month's use in one shop was available;

(2) trading licence costs for which an invoice of £70 was available for one shop for the 2015/16 year;

(3) waste disposal costs, based on the available evidence of £565 for 2016/17; and

(4) water and sewerage, based on the available evidence of £120 for April to July 2016.

67. Having considered the limited documents available, we consider that these were reasonable figures on which to base estimated overheads of this nature.

68. The business use of gas was more difficult to estimate; a number of invoices were available, but these showed very varied amounts (we note from the documents available, which covered a short period, that it appears that the bills were based on estimated readings, and some also included unpaid amounts carried forwards from previous bills). HMRC had therefore rounded up the largest annual amount that could be established, to £500, and had then adjusted this by reference to the RPI for each year in the period.

69. HMRC had also allowed deductions for expenditure on vehicles used in the business. The available information showed that two Ford Fiestas had been used for business purposes, the first in use from November 2006 until January 2011. The second vehicle had been disposed of in May 2017. Evidence of payment of an insurance premium for the first vehicle was available, showing a cost of £267.75 in October 2009; evidence of an insurance premium for the second had also been provided, at a cost of £428 in October 2014. HMRC had used these costs, together with an assumed road tax per year of £200. The fuel cost had been

estimated on the basis of the average price of petrol in 2016, at £1.039 per litre, at £983 per year on the basis of assumed average annual mileage. HMRC had assumed 50% business use of the vehicles as evidence of the actual business was available. These figures had been used as the basis for all other years in the period.

70. HMRC contended that a fair and reasonable estimate of the costs had been allowed as a result.

Discussion

71. In the hearing, Mr E stated that he believed HMRC should have investigated more closely to find information: however, it is well established that HMRC are not required to do the work of the taxpayer.

72. The burden of proof is on the taxpayer to show that they are entitled to deductions for tax purposes and taxpayers are required to keep records to support such deductions.

73. Mr E's contention that third party sources (such as SAGE) provide support for higher overheads does not assist; as he also stated in correspondence "the circumstances differ significantly from one [shop] to another". It is not possible to give deductions based on generalities such as those sources and these alone cannot not discharge the burden of proof on Mr E.

74. As with turnover, the evidence provided to the Tribunal in respect of overheads was relatively minimal; Mr E accepted that he did not generally keep these documents, that he had not had time to keep records because he was a single parent, but that he had provided what he could find. The documents provided were a mixture of "random bills" (to use Mr E's description) for both shop premises and correspondence from dates in the later years of the periods under appeal.

75. Mr E provided his own calculation of overheads which were included in the bundle. We reviewed the calculations and the documents provided and find that Mr E's contentions that the deductions allowed by HMRC were insufficient, and his alternative calculations, were not supported by the available evidence.

76. Mr E's calculations of overheads do not show overhead costs significantly in excess of the amounts allowed by HMRC in respect of certain key overheads, even where he disputed the amounts in the hearing: for example, for 2005/06 he estimated that electricity usage was £1500; HMRC allowed a deduction of £2,256. The deduction for waste given by HMRC is the same as that calculated by Mr E (£410).

77. Other costs included by Mr E were unsupported figures and it was unclear how they had been arrived at; for example, Mr E lists two 'BT' costs £109.61 and £66 in 2005/06; HMRC allowed telephone costs of £756 for 2005/06. "Other costs and overheads" included by Mr E in the schedule for 2005/06 have no explanation, being simply a series of numbers with no date or description as to what the number relates to. The position was similar for other years for which Mr E provided calculations.

78. Mr E contended that HMRC had not taken into account wages costs: however, his own calculations do not include any deductions for wages and in a letter in the supplementary bundle provided at the hearing stated that he could not afford to hire any employees. No evidence of any payment of wages was provided, other than an estimate of cumulative amounts for his son which Mr E described as unpaid in 2018. The business was not registered for PAYE. We do not consider that any deduction for wages costs is appropriate.

79. Mr E also stated that deductions should be available for substantial unspecified capital costs of equipment for the shops; no invoices for these costs were provided and Mr E could

only provide a generic list of the type of equipment that might have been purchased. The bank statements do not include any clear indication of significant capital expenditure at the time of the acquisition of the properties. Without further detail, we do not consider that it is possible to allow any deduction for capital allowances in respect of such purchases.

80. Having reviewed the evidence and the submissions made, we find that Mr E has not satisfied the burden of proof on him such that the deductions given by HMRC should be displaced by his own calculations.

81. We consider that HMRC have allowed appropriate deductions for the overheads of the business, using the information available to them. Given the limited evidence provided by Mr E, we consider that it was reasonable for HMRC to take a representative figure for expenses that could be established from the documents provided and apply the RPI to that figure to extrapolate for the rest of the periods of assessment. We note that the estimates calculated by HMRC may even be over-generous, given that HMRC appear to have doubled the relevant figures to account for two shops throughout the entire period, even though the second shop was only acquired in 2009. This is an observation only: we do not consider it necessary to reduce the allowed deductions for overheads.

Conclusions as to quantum

82. For the reasons set out above, we find that the amount assessed by HMRC as to turnover and (following the written submissions after the hearing) the amended amounts of overheads has not been displaced by Mr E. The assessments in the amended amounts set out in the attached schedule are therefore upheld.

Penalties

83. The penalties were issued in respect of Mr E's failure to notify HMRC that he was chargeable to tax. Mr E's explanations were focussed more on whether or not he had filed tax returns, rather than whether or not he had notified HMRC of changeability to tax.

84. Given that Mr E is not a tax professional, we have taken the view that, in these specific circumstances, explanations regarding filing of a tax return should be considered to be explanations for the failure to file. Given the contents of the relevant statute, filing a tax return in the earlier years would also generally eliminate liability to a penalty. Accordingly, where we refer to "failure to file" in Mr E's explanations below, we have taken these to be contentions in respect of "failure to notify".

85. A penalty issued for 2009/10 was cancelled on review because it had been incorrectly issued under s7(8) TMA 1970.

Penalties for 2000/01 to 2008/09

86. For these tax years, s7(8) TMA 1970 provided that a penalty was due for any year of assessment in which a person, who was chargeable to income tax and had not received a notice to file a tax return, failed to notify HMRC that they were chargeable to income tax within six months of the end of the tax year. The maximum penalty chargeable under these provisions is 100% of the income tax due and unpaid by the due date for the relevant tax year.

87. There was no dispute that Mr E had failed to notify HMRC of his chargeability to tax: the question for this tribunal was whether the level of the penalties was correct.

88. HMRC charged penalties for these years at 65% of the tax assessed, taking into account the extent to which Mr E co-operated with the enquiry, the disclosures made during the enquiry, and the seriousness of the failure to notify.

89. On balance and considering all of the circumstances, we consider that the mitigation given was appropriate. The failure to notify was serious and persistent; although Mr E eventually co-operated with HMRC and provided bank mandates, he took some months to respond to the opening correspondence of the enquiry. The "random bills" in support of overheads were not provided until the parties entered into ADR; we do not consider that the provision of these limited documents supports any further reduction in the penalty rate.

Penalties for 2010/11 onwards

90. For these years, the provisions of s7(8) TMA 1970 were replaced but not materially altered in the context of this appeal by provisions in paragraph 1 of Schedule 41 FA 2008. A penalty is due for any year of assessment in which a person, who was chargeable to income tax in respect of a business and had not received a notice to file a tax return, failed to notify HMRC that they were chargeable to income tax by 5 October following the end of the tax year. The penalty amount is based on the potential lost revenue and the behaviour which led to the penalty. The potential lost revenue for each tax year is (in summary) the amount of tax assessed which remained unpaid on 31 January following the end of the relevant tax year. No payments of the tax assessed have been made.

91. HMRC assessed the penalties for these years on the basis that the behaviour which led to the penalty was "deliberate but not concealed". As such, the maximum penalty is 70% of the potential lost revenue (paragraph 6(2)(b) Schedule 41 Finance Act 2008). As Mr E did not advise HMRC of his chargeability before they enquired into his tax affairs, the penalty was calculated on the basis that any disclosure was "prompted" such that the minimum penalty was 35% of the potential lost revenue (paragraph 13 Schedule 41 FA 2008).

92. HMRC allowed mitigation of 10% for "telling", as Mr E had not accepted that he had failed to comply with his tax obligations; 10% for "helping" as very little assistance had been provided" and 10% for "giving" as mandates had been provided on request but no other documents had been provided by the date of assessment. This totalled 30% mitigation: mitigation for penalties in these years is calculated by applying the mitigation rate to the difference between the minimum and maximum penalties and deducting this from the maximum penalty to give the overall penalty rate. In this case, the overall penalty rate was therefore 59.5%.

Whether behaviour leading to the loss of tax was deliberate

93. Case law (such as *Tooth* [2021] UKSC 17) has considered what amounts to deliberate behaviour. In summary, this behaviour includes not only actively deliberate behaviour, where a taxpayer simply decides not to comply with tax obligations, but also the situation where a taxpayer suspects that a matter is not correct but then without good reason chooses not to confirm the true position. The suspicion must be more than fanciful.

94. In this case, Mr E has provided inconsistent explanations as to why he did not notify his chargeability to HMRC.

95. Firstly, he stated that he believed that he was not required to file tax returns because he was trading well below the VAT threshold. This explanation indicates that he knew what the VAT threshold was, which indicates clear knowledge of his tax obligations.

96. However, Mr E also stated in the hearing that he did not file tax returns because he thought that he would be paid state benefits if he did so and he had decided not to file because he did not want to be a burden on the state.

97. We also note that Mr E's description of his background was that he was well-educated, having undertaken several courses of university study in the UK.

98. Given these inconsistencies we find that Mr E knew that he was required to comply with tax obligations and chose not to do so for his own reasons. If he had genuinely believed that he was not required to file tax returns or notify chargeability because he was trading below the VAT threshold, there would be no reason to also state that he did not file returns in order to avoid being paid state benefits.

99. His statement in the hearing that he chose not to file tax returns to avoid being a burden on the state is a clear statement that he knew of his tax obligations and chose not to comply with them. Even if Mr E's reason for the failure was because he did not want to receive state benefits, it remains the case that he chose not to comply with what he knew to be his tax obligations. Case law such as *CF Booth Ltd* [2022] UKUT 217 (TCC) has established that deliberate behaviour requires intention but not necessarily dishonesty.

100. As such, we find that the behaviour which led to the loss of tax was deliberate. Any disclosure was clearly prompted by HMRC's enquiry and, as there was no suggestion that action was taken to conceal matters, we find that the penalty was corrected assessed as "deliberate and unconcealed".

101. With regard to mitigation, we do not see any reason to disturb the mitigation given by HMRC. Although Mr E eventually provided some documents, these were very ad hoc and of limited assistance, and so we find that the penalty rate of 59.5% was correctly calculated.

Reasonable excuse

102. Where a taxpayer has a reasonable excuse for a failure no penalty is payable provided that, if the reasonable excuse has ceased, the failure is remedied without unreasonable delay once it ceases.

103. The approach to be taken as to the question of whether or not a person has a reasonable excuse was set out by the Upper Tribunal in *Perrin* [2018] UKUT 156 (TC) at [81]:

> "(1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times."

104. Mr E's explanations for the failure were (in summary):

(1) that he was a single parent to two (sometimes three) children, some of whom had health issues, and substantially in debt. As such, he had neither the time nor funds to be able to engage additional staff to allow him time to maintain his records and comply with his tax obligations;

(2) he believed that he did not need to file tax returns if he was trading below the VAT threshold;

(3) he believed that if he filed tax returns he would receive state benefits and did not want to be a burden on the state.

105. We accept that Mr E was a single parent. No evidence was put forward to support any of his statements in correspondence as to their various health issues and we conclude that these are not proven. Some of the descriptions of the health issues are clearly at best exaggeration (for example, his statement that he found his son unresponsive with 7% blood oxygen levels on several occasions. Noting that blood oxygen levels below approximately 90% are considered to require immediate medical attention, a person with 7% blood oxygen level seems unlikely to survive that once, let alone several times and certainly would not be in a position to be operating Mr E's second shop, as also stated in correspondence). No medical reports were provided.

106. Given our findings as to the assessments, we do not agree that Mr E has demonstrated that he could not afford any assistance to enable him to comply with his tax obligations throughout the period of default.

107. We do not consider that being a single parent lacking in funds is an objectively reasonable excuse for Mr E's failure to comply with his tax obligations. There are many single parents also lacking funds who successfully keep the required records and comply with their tax obligations. We also note that Mr E's children were all born before the periods under appeal and so were not minors throughout the period of failure of almost two decades. Accordingly, even if this could amount to a reasonable excuse, the failure was not remedied without delay once his parental obligations reduced as his children became older.

108. For the reasons set out above with regard to deliberate behaviour, we also do not agree that Mr E has satisfied the burden of proof on him with regard to the beliefs underlying the second two explanations. Accordingly, we do not consider that these assertions can amount to a reasonable excuse.

109. Even if these assertions could potentially amount to a reasonable excuse, we note that Mr E had been in the UK since the 1970s and had undertaken years of university education and was aware of his VAT obligations as he knew that he was trading under the VAT threshold. We consider that a reasonable taxpayer in his circumstances would have taken steps to verify the accuracy of such beliefs. Mr E did not suggest that he had taken any steps to check whether either of these assertions was accurate. Accordingly, even if the assertions could amount to a reasonable excuse, we find that they did not objectively do so in these circumstances.

Special circumstances

110. A penalty may be reduced if there are special circumstances which merit a reduction. These are not defined but case law has established that special circumstances must be something which operate on the taxpayer specifically, rather than a class of taxpayers. HMRC considered whether any of the information put forward by Mr E could constitute special circumstances. They concluded that none of the explanations gave a good reason for the decades-long failures. Our jurisdiction in this area, where HMRC have considered special circumstances, is supervisory and we find that HMRC's conclusion was not unreasonable.

Conclusion as to penalties

111. We find that the penalties were correctly raised, that the penalty rates applied are appropriate, that there is no reasonable excuse for the failures and that no special circumstances apply to reduce the penalties.

112. Given that we have concluded that the quantum of the assessments should be amended as requested by HMRC, the amount of penalties will also need to be amended to reflect the amendments to the assessments. Our findings as to the amount of the penalties to be upheld is in the schedule attached to this decision.

Conclusion

113. For the reasons set out above, the assessments and penalties are upheld as amended and set out in the schedule hereto. The appeal is dismissed.

Right to apply for permission to appeal

114. 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 FAIRPO
TRIBUNAL JUDGE

Release date: 07th OCTOBER 2024

SCHEDULE OF ASSESSED AMOUNTS & PENALTIES

Year	Revised Profit	s29 Assessment	Revised amount	s7 penalty	Sch 41 penalty
2000/01	14,503	3,835.63	2,751.82	1788.68	
2001/02	29,821	7,918.23	7,107.34	4619.77	
2002/03	8,426	1,995.71	874.79	568.61	
2003/04	4,602	960.01	0	0.00	
2004/05	6,016	1,371.63	228.78	148.71	
2005/06	28,861	8,155.95	6,939.00	4510.35	
2006/07	34,596	9,649.43	8,536.38	5548.65	
2007/08	26,217	7,539.89	6,030.00	3919.50	
2008/09	47,014	14,398.76	12,269.74	7975.33	
2009/10	41,065	11,621.95	9,746.00		--
2010/11	49,676	15,266.25	12,911.21		7746.73
2011/12	47,494	14,798.80	12,280.48		7368.29
2012/13	31,182	8,526.05	6,737.33		4042.40
2013/14	12,757	2,945.22	1,113.58		668.15
2014/15	17,853	4,309.21	2,461.33		1476.80
2015/16	30,366	7,832.69	5,960.74		3576.44
2016/17	28,361	7,236.49	5,299.29		3179.57
2017/18	11,744	2,133.04	371		222.60
2018/19	6,115	303.84	0		0.00
Totals	**476,669**	**130,798.78**	**101,618.81**	**29,079.60**	**28,280.98**

Total assessments and penalties **£158,979.39**