TC01879

Appeal number: TC/2010/08766

INCOME TAX – self assessment – enquiry – closure notice disallowing claimed expenditure – discovery assessments raised for earlier years – whether evidence to support claim for greater level of expenditure – no – assessments to stand under s 50(6) TMA 1970 – whether discovery assessments appropriate – held, yes, on basis of assumed continuity – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN VERSCHUEREN **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN CLARK
ELIZABETH BRIDGE

Sitting in public at 45 Bedford Square on 16 January 2012

Tania Paicnyk, of PK Financial Services, for the Appellant

Paula O'Reilly, Presenting Officer, HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Mr Verschueren appeals against notices of assessment in respect of his income as a self-employed carpenter for the years 2003-04, 2004-05, 2005-06, and against a closure notice in respect of 2006-07.

2. As neither Mr Verscheuren nor any person representing him had arrived by 9.45 am (15 minutes before the hearing was due to start), our clerk contacted the Tribunals Service office in Birmingham to ask them to contact Mr Verschueren's agents, L Wilson & Co, to find out whether anyone from that firm was intending to appear on his behalf at the hearing.

3. As our clerk had heard nothing by approximately 10 minutes after the hearing was due to start, we decided that the hearing should go ahead in the absence of Mr Verschueren or any representative. As we were about to go to the hearing room, our clerk informed us that a representative, Ms Paicnyk, had arrived. We therefore decided to allow a few minutes for her to prepare for the hearing, and then went ahead with the hearing.

4. As Ms Paicnyk appeared to have Mr Verschueren's authority to appear on his behalf, we continued with the hearing. Later, in the course of her explanation in general terms of Mr Verschueren's case, Ms Paicnyk explained that her firm had been appointed by him three weeks before the hearing to deal with his tax affairs for recent years, and she had asked him about the previous history of his tax position. He had explained that a dispute was outstanding relating to the assessments for the years mentioned above. Ms Paicnyk had undertaken some unpaid work to check the position.

5. We concluded that as Ms Paicnyk's firm was dealing with Mr Verschueren's current tax affairs, there was no objection to us continuing with the hearing and accepting her as his representative for the purposes of the hearing. In any event, appellants before these Tribunals are often represented by persons other than the agents whose names are on the Tribunal Service's records (normally because those records are derived from the Notice of Appeal). Agents may prefer someone else to carry out the task of appearing for their client. The Tribunal hearing the appeal on the day cannot be expected to embark on an investigation to establish whether a person stating that he or she is appearing as a representative of the appellant has authority from the agent appearing on the Tribunal Service's records.

6. We therefore continued with Ms Paicnyk as Mr Verschueren's representative for the purposes of the hearing.

7. Immediately after the end of the hearing (shortly after 12 noon) our clerk handed to us a copy of an email message from the Tribunal Service's Birmingham office. This had been attached to an email sent by the Birmingham office at 11.45 am

to the Bedford Square office. The attachment was a copy of a message sent by L Wilson & Co at 10.22 am to the Tribunals Service. The (unidentified) author stated:

> "I apologise for the oversight regarding the hearing date for Mr John Verschueren.
>
> Please note:
>
> 1. The principal person dealing with the case died in a coach crush [*sic*] in Zambia. We had to go to the funeral.
>
> 1. My work colleague who took over the case load is abroad on emergency (**death in the family**).
>
> **I am asking the Court to adjourn the case to another date, to enable us to reorganise**."

8. Although we noted this message, we concluded that it did not justify setting aside the proceedings which had just taken place. As already mentioned, we had been proposing to go ahead with the hearing in the absence of any person appealing on Mr Verschueren's behalf, and we had then found ourselves taking a different course as a result of Ms Paicnyk's arrival. We were also aware of the less than satisfactory history (considered below) of the conduct of the matter while in the hands of L Wilson & Co.

9. Further, we did not consider that the message from L Wilson & Co should be taken at its face value. We are aware, from the documents copied for us from the Tribunal Service's file relating to this appeal, that L Wilson & Co had emailed the Tribunals service on 15 August 2011 requesting the postponement of the hearing listed for this appeal (due to be heard on 7 September 2011) ". . . due to the following reasons:

> "1. The case worker who was dealing with the case had a couch [*sic*] accident and died on the spot on the 27th July 2011 and she was buried on the 1st August 2011.
>
> 2. We are re-organising the case load as she was the one dealing with Mr John Verschueren's case. We hope you will bear with us at this time when our organisation is going through the loss of our excellent and brilliant member of staff.
>
> We would like to settle out of court if we can reach an amicable agreement with HMRC."

10. Thus the death of the relevant individual working at L Wilson & Co had been a number of months before the new date fixed for the hearing before us. Clearly, the firm had been able to allocate another individual to take over Mr Verschueren's case. Once a firm has had an opportunity to re-allocate the work related to an appeal on behalf of one of its clients, that firm can be expected to take all necessary steps in relation to that appeal, including notifying the Tribunals Service in plenty of time in advance of a hearing that there is some reason preventing the firm from sending someone to represent its client at the prearranged date and time.

11. In the absence of sufficient notice, or even of any details of the individual whom the firm had intended to send as Mr Verschueren's representative, or any specific information as to the timing and overseas destination of that individual's "emergency" travel and as to the relationship of that individual to the deceased person, we consider that there is no basis for setting aside the proceedings which had already concluded by the time that L Wilson & Co's message (sent to Birmingham at 10.22 am on the day of the hearing, and therefore 22 minutes after the hearing was due to start) reached us.

The facts

12. The evidence before us consisted of two bundles of documents, together with a supplementary bundle containing a witness statement given by Nial Browne, the HMRC officer dealing with the enquiry into Mr Verschueren's return, together with copies of the correspondence referred to in Mr Browne's statement. In addition, Mr Browne gave oral evidence, and was cross-examined by Ms Paicnyk.

13. From the evidence we find the following background facts; these were not disputed.

14. Mr Verschueren is a self-employed carpenter. He began deriving income from this source in 2001-02. For 2002-03, he received a tax repayment. Subsequently, in his returns for all years to 2009-10 except 2008-09, he claimed repayments of tax deducted from payments to him as a sub-contractor under the "CIS" scheme. There had been a period of 12 months during which he had been outside the UK.

15. On 28 August 2008, Mrs Nodwell, an Inspector of Taxes of the Respondents ("HMRC"), wrote to Mr Verschueren to inform him that she was proposing to enquire into his 2006-07 return. She indicated that she was sending a copy of her letter to his advisers, L Wilson & Co. She attached to her letter a schedule of information required for the purposes of her enquiry.

16. Following a further letter to him dated 30 September 2008 (not included in the evidence), she received a telephone call from L Wilson & Co on 21 October 2008. Her note of the conversation recorded that the person at L Wilson & Co had been contacted by a friend of Mr Verschueren; that friend had informed the agent that Mr Verschueren had returned home to Eastern Europe in the summer. As a result, he might not have seen Mrs Nodwell's letter.

17. Mrs Nodwell asked L Wilson & Co whether it was known whether Mr Verschueren would return to the UK. L Wilson & Co did not know whether its client had returned for a holiday or for good. It mentioned that the client was due for a repayment from HMRC. Mrs Nodwell pointed out that HMRC could not pay Mr Verschueren if they did not know where he was. She agreed to wait until after Christmas 2008 to see whether he returned.

18. On 12 December 2008, Mr Bliss of HMRC wrote to L Wilson & Co stating that he had taken over the enquiry from Mrs Nodwell. He had been informed that Mr Verschueren had telephoned HMRC on 12 November 2008 to enquire about a

repayment. Mr Bliss had therefore assumed that Mr Verschueren was now back in the UK. Mr Bliss enclosed a copy of a letter to Mr Verschueren stating that if he did not within 14 days provide information as required by a notice dated 30 September 2008 under s 19 of the Taxes Management Act 1970 ("TMA 1970"), penalties would be charged.

19. On 20 December 2008 L Wilson & Co responded with faxed comments (on a copy of the letter to them from Mr Bliss dated 12 December 2008):

> "Please note:-
>
> (1) Mr J. Verschueren has not yet seen the original request for information, therefore the daily penalty should not apply.
>
> (2) I have passed the letter to his friend to trace his whereabouts.
>
> You will be contacted in due course."

20. On 29 December 2008 Mr Bliss replied. He commented that no correspondence had been returned from Mr Verschueren's address, and that Mr Verschueren would certainly be aware of the enquiry following his telephone request for repayment. Mr Bliss was prepared to allow a further 30 days for the production of the information required for the purposes of the enquiry.

21. On 30 January 2009 Mr Browne took over the enquiry from Mr Bliss, in order to complete the enquiry. On 3 February 2009, Mr Browne sent a penalty notice (in the sum of £50) to Mr Verschueren. L Wilson & Co faxed Mr Browne, on a copy of his covering letter to them, the following note:

> "Please note:
>
> (1) The Client stated that he could not find documents you requested, at that time.
>
> (2) The Client is abroad and has been abroad for some time due to economic situation in UK.
>
> (3) The penalty notice will not be received by him for his response.
>
> (4) We can provide working documents (if you have not yet received them).You can make recommendations thereafter.
>
> (5) We appeal against the £50 penalty, on his behalf."

22. On 10 February 2009, a letter appearing to be from Mr Verschueren was sent to Mr Bliss in response to the latter's letter dated 12 December 2008. After acknowledging that letter, this letter continued:

> "I am sorry for the delay but I was sure that L Wilson & Co, the company dealing with my tax, would reply to you.
>
> As I lost all contact with them, could you please confirm what information do you want me to produce and I will send it to you as soon as possible."

The letter was signed "Verschueren" under the typed name "J Verschueren". (We consider below the possible authorship of this letter.)

23. Mr Browne replied to Mr Verschueren on 24 February 2009, enclosing copies of all the correspondence sent to him and to L Wilson & Co since the start of the enquiry. Mr Browne also enclosed a copy of a letter which he had sent that day to L Wilson & Co raising the question whether that firm wished to withdraw the appeal which it had made against the £50 penalty. Mr Browne emphasised that the information and documents originally requested in August 2008 were well overdue, and should be provided immediately.

24. In a letter dated 16 March 2009, L Wilson & Co stated that they were withdrawing the penalty appeal, and that their client had no additional documents to forward to Mr Browne.

25. Mr Browne replied on 23 March 2009. As no business documents were available, he would need to see Mr Verschueren's personal bank statements and credit card statements, and also business documents where copies of these (such as business bank account documents) could be obtained. He also enclosed a schedule of information which he required relating to the figures provided on Mr Verschueren's 2006-07 return.

26. On 5 May 2009, Mr Browne sent Mr Verschueren a notice under Schedule 36 of the Finance Act 200 ("FA 2008") requiring the production of information and documents required for the purposes of establishing whether the figures entered on Mr Verschueren's 2006-07 return were correct. Mr Browne stated that he had not received all the items for which he had asked; he attached a list of what he still needed. He copied his letter to L Wilson & Co.

27. L Wilson & Co replied by fax, with a further handwritten annotation on a copy of Mr Browne's covering letter to them:

> "We are writing to confirm that:
>
> (1) We spoke to the person representing Mr J. Verschueren (a personal friend). He stated that Mr J. Verschueren is out of UK [*sic*] on holiday. He does not know when he is coming back – may be soon.
>
> (2) Mr J. Verschueren did not see your letter dated 5/5/09 as he was already out of UK. That means he will not comply with your requested information/documents, within the time specified in your letter.
>
> (3) We suggest that we close this case based on any adjustments that may be done to the allowable expenses declared in the return.
>
> (4) We will contact the personal friend of Mr J. Verschueren when you have given your opinion on this suggestion. Thank you."

28. In a meeting note dated both 23 and 25 June 2009, Mr Browne recorded that while at a meeting on a case involving a different taxpayer, he had briefly discussed with Mr Sisimayi of L Wilson & Co (incorrectly referred to by Mr Browne in his note as "Mr Wilson") the progress in Mr Verschueren's case. Mr Sisimayi explained that

he had been "having trouble with" Mr Verschueren and was unsure as to whether his firm was currently acting. Mr Browne pointed out that Mr Verschueren was aware of the enquiry, and showed Mr Sisimayi the letter of 10 February (see above) which demonstrated this. Mr Browne stated that recently HMRC had been corresponding with Mr Verschueren at two known addresses to increase the likelihood that he would receive correspondence.

29. On 26 June 2009 Mr Browne sent to Mr Verschueren at both addresses a penalty notice under Schedule 36 FA 2008, charging an initial penalty of £300.

30. On 15 July 2009 and again in a fax message dated 17 July 2009 but sent on 24 July 2009, L Wilson & Co informed Mr Browne that Mr Verschueren was abroad and might not be returning to the UK.

31. Mr Browne sent to both of Mr Verschueren's addresses on 3 August 2009 a further penalty notice under Schedule 36 FA 2008, charging daily penalties totalling £525.

32. Mr Verschueren sent an undated letter to HMRC, received by them on 11 August 2009. He explained that he had been out of the country for more than a year and had returned a few days ago to find the penalty notice. He did not understand why he had to pay the £525 penalty. He had not seen HMRC's previous letters. His affairs were dealt with by his adviser at L Wilson & Co, but recently Mr Verschueren had not been able to contact his adviser. He continued:

> "If I understood correctly, my advisor keeps 20% of the tax returns, so it might be possible he somehow increased the calculations to receive a bigger sum in the end."

He suggested that HMRC should contact his adviser to resolve the matter, and enable the penalty decision to be reconsidered.

33. Mr Browne responded on 13 August 2009. He was treating Mr Verschueren's letter as an appeal against the imposition of the £525 penalty, but in the light of the facts as set out in Mr Browne's response, he could not see a basis for Mr Verschueren's appeal. Mr Browne requested Mr Verschueren to contact him in order to progress the outstanding items and to progress the case. He enclosed a copy of the list of information required, and warned that further daily penalties might be charged if Mr Verschueren did not provide that information.

34. Meanwhile, L Wilson & Co wrote to HMRC on 7 August 2009, giving headings under which expenses might have been incurred. The information supplied was very brief. As Mr Browne stated in evidence (which we accept), they did not give detailed breakdowns, and did not provide any receipts supporting the expenses claimed in arriving at Mr Verschueren's taxable income.

35. Mr Browne responded on 13 August 2009. He indicated that he required a full response to the Schedule 36 information notice which had been sent to Mr Verschueren on 5 May 2009.

36. As Mr Browne received no response to that letter, he wrote on 1 September 2009 to Mr Verschueren explaining that he had arranged for assessments disallowing or restricting claims to expenses.

37. On 24 August 2009, Mr Verschueren wrote in reply to Mr Browne's letter dated 13 August 2009 confirming that he would pay the £525 penalty. He explained that he could not produce most of the documents requested, as these were the type of document relevant to an entrepreneur or a business. He was not within either of these descriptions; he was simply a carpenter working for DMB Construction, and did not have this information. He had not previously understood the nature of the information required from him, and had tried to seek guidance from his adviser, whom he had been unable to contact for some time.

38. Mr Verschueren also explained that he had taken a year off from July 2008 until recently, and had been abroad. His son, who had still been in London in February, informed him of HMRC's letters, and Mr Verschueren had instructed him to contact HMRC on his behalf and also to contact his adviser. Despite several attempts, his son had been unable to contact the adviser. The only documentation which Mr Verschueren had was his pay slips, which were still with the adviser. He did not have any of the documents or information requested by HMRC.

39. On 1 September 2009 Mr Browne wrote to Mr Verschueren, copied to L Wilson & Co, indicating that he had not received a reply nor received any contact from Mr Verschueren. We find that Mr Browne had not at that stage seen Mr Verschueren's letter dated 24 August 2009. Mr Browne said that in the absence of any replies to his enquiries he had arranged for assessments to be raised against Mr Verschueren disallowing his claims to direct costs, repairs, general administrative expenses, other finance charges and capital allowances. In addition Mr Browne had restricted the motor expenses to £1,000 for 2003-04, the travel and subsistence to £1,000 for both 2005-06 and 2006-07, and 'other expenses' to £100 for 2005-06 and 2006-07.

40. On 2 September 2009 Mr Browne responded to Mr Verschueren's letter, reiterating that as there was no documentation to evidence Mr Verschueren's claims to deductions, those claims should be withdrawn. Mr Browne stated that he would continue with formal assessments in the figures previously mentioned.

41. On 28 September 2009 Mr Verschueren contacted HMRC from a new address. On 13 October 2009 Mr Browne responded, asking which address he should use.

42. Assessments on Mr Verschueren for the years 2003-04 to 2005-06 and a closure notice in respect of 2006-07 were issued on 6 and 7 October 2009; we do not find it necessary to set out the amounts in this decision.

43. On 9 October 2009 L Wilson & Co informed Mr Browne that they would be faxing proposals in respect of the expenses claimed and requesting copies of all correspondence sent to Mr Verschueren since 1 September 2009. Mr Browne did so on 13 October 2009.

44. Meanwhile, L Wilson & Co set a fax to Mr Browne on 10 October 2009 stating that they would be appealing against the assessments raised and that the reasons for appeal would be forwarded in due course. Mr Browne replied on 15 October 2009 stating that full appeals including the grounds of appeal needed to be submitted within 30 days of the notices of assessment, which would be by 5 November 2009.

45. On 4 November 2009 Mr Browne received a fax from L Wilson & Co dated 31 October 2009. This was by way of handwritten annotations on a copy of Mr Browne's letter dated 15 October 2009. They stated that their comments had been posted to HMRC on 30 October 2009. Nothing further in respect of the required full appeals including the grounds reached HMRC.

46. On 10 November 2009 Mr Browne wrote to L Wilson & Co, with a copy to Mr Verschueren, explaining that valid appeals had still not been received and that he required these by 24 November 2009. Mr Verschueren wrote to HMRC on 18 November 2009 referring to Mr Browne's letter. He did not mention the appeals against the assessments which had been raised, but commented that he had no further information to provide.

47. Mr Browne wrote to Mr Verschueren on 25 November 2009 offering him a review of the case.

48. Meanwhile, L Wilson & Co wrote to HMRC on 20 November 2009, again by handwritten annotations on HMRC's letter dated 10 November 2009 and on the "schedule of information and documents required" originally attached to Mr Browne's letter dated 23 March 2009. Mr Browne responded on 10 December 2009 stating that he considered their responses to the questions lacked detail and did not fully answer the questions posed. On the same date he wrote to Mr Verschueren to repeat the offer of a review of the case.

49. On 12 November 2009 HMRC received from L Wilson & Co a copy of a message dated 7 August 2009 which they had faxed on 9 August 2009 as their response to Mr Browne's letter dated 3 August 2009. The attachments were formal appeals dated 24 October 2009. They also enclosed proposed figures for adjustments to the assessments. They did not provide any evidence to support the suggested figures. Mr Browne indicated in evidence that he had continued to feel that the claims appeared higher than would be reasonable in the light of the details which had been provided in respect of Mr Verschueren's business. We accept his evidence on this point.

50. On 23 December 2009 L Wilson& Co sent a fax to HMRC for Mr Browne's attention; as previously, this was by way of handwritten annotations on a copy of HMRC's letter dated 10 December 2009. They stated:

> "(1) There is no chance of settling this enquiry based on type of questions you ask.
>
> (2) We are asking for a review by an independent person."

51. Mr Browne noted that, on the same date, Mr Verschueren had appointed a new accountant, RG Services. He therefore considered the request made by L Wilson & Co on that date to be invalid.

52. Mr Browne wrote to Mr Verschueren on 4 January 2010 explaining that he had had notification of the new accountant and requesting an active telephone number for them as he had been unable to contact them. Mr Browne received no response and therefore on 25 January 2010 he wrote again to Mr Verschueren to explain that neither he nor his new agent had responded to Mr Browne's offer of a review and that therefore Mr Browne therefore considered that the offer of a review had lapsed. This meant that the assessments raised were final and that Mr Verschueren should make arrangements for payment to be made.

53. Further correspondence sent by HMRC to the new accountants and to Mr Verschueren at the two current addresses known to HMRC went unanswered.

54. On 20 March 2010 L Wilson & Co faxed, on a copy of Mr Browne's letter dated 25 January 2010 to Mr Verschueren, an indication that their client had asked them to continue acting for him until the matter in question had been completed. The referred to a letter which they had sent to HMRC on 2 February 2010, confirming that they had requested a review, and commented that HMRC had not informed them that HMRC were now dealing with a new agent. L Wilson & Co requested an update.

55. Mr Browne replied on 31 March 2010 enclosing a form 64-8 for Mr Verschueren to sign in order to authorise HMRC to correspond in respect of his tax affairs with L Wilson & Co. Mr Verschueren subsequently completed the form, which was received by HMRC from L Wilson & Co on 10 May 2010.

56. On 13 May 2010 Mr Browne copied to L Wilson & Co all the correspondence in the case for the period during which they had not been acting as Mr Verschueren's agents.

57. On 15 May 2010 L Wilson & Co made a request that collection of all tax and National Insurance Contributions ("NICs") in respect of the relevant years should be postponed. Mr Browne acceded to this request, despite there being no open appeals at that point. On 22 May 2010 he wrote to L Wilson & Co to ask whether they would be making a late request for a review of the case. They sent in two notes dated 26 May 2010 and 10 June 2010, but did not state how they wished to proceed or whether they would be applying for a late review of the case.

58. Mr Browne wrote to them on 14 June 2010 indicating that there were no open appeals and that he would arrange for the collection of the tax and NICs due unless by 28 June 2010 they could provide him with a full and satisfactory explanation as to why he should consider there to be open appeals against the assessments.

59. Mr Browne considered that further notes from L Wilson & Co dated 18 and 25 June 2010 did not provide him with any additional substantive detail on which to proceed. He therefore wrote to them on 7 July 2010 with a history of the recent correspondence, and stated that he had arranged for the tax and NICs charged on the

assessments to be collected. He explained that if they did appeal, the appeal would be late, and needed to be in writing, to be sent to HMRC, and to contain the grounds of appeal. It would also be necessary to provide their client's reasonable excuse for the appeal not being made within the time limit, to confirm when that excuse ceased, and to confirm also that the appeal had been made without unreasonable delay after that excuse had ceased.

60. On 7 July 2010, the same date as Mr Browne's letter, L Wilson sent a fax to confirm that the appeals and proposed amendments were in the post. HMRC received these shortly after that date. Mr Browne decided to accept the late appeals and on 26 July 2010 he wrote to Mr Verschueren and to L Wilson & Co again offering a review of the case. This offer was accepted by L Wilson & Co on 20 August 2010 and Mr Browne's file was then referred to HMRC's Appeals and Reviews Team.

61. On 13 October 2010 Mr McKinley of that team wrote to Mr Verschueren with the results of his review. He upheld the decisions made. His review considered whether it had been reasonable to make assessments for all the years under consideration, and whether, respectively, the restriction of and removal of some expenses had been reasonable.

62. He was satisfied that the assessments had been raised correctly. He believed that it had been reasonable for the caseworker to raise revised assessments for all years, as no books and records nor any documentary evidence had been forthcoming to substantiate the expenses claimed. In respect of the amounts allowed by the caseworker for expenses, Mr McKinley was satisfied that some allowance had been made, for example with regard to motor and travel and subsistence, in many ways reflecting the reality of the situation.

63. On 1 November 2010 L Wilson & Co indicated that they did not agree with Mr McKinley's conclusions, and that they would appeal to the Tribunals Service within the time limit.

64. On the same date, they sent Notice of Appeal to the Tribunals Service. [To the extent necessary, we refer below to the subsequent history of the appeal.]

Arguments for Mr Verschueren

65. Ms Paicnyk explained that the purpose of her appearance before us was to represent the client (Mr Verschueren). During the relevant years he had been a general builder/sub-contractor. He had not been aware of any liability. Due to lack of knowledge, he had asked L Wilson & Co to represent him; he had been introduced to them by his son, who had now left the UK. Mr Verschueren had not kept any record of the amounts he had spent. He was therefore asking for a reasonable figure by way of allowance for the expenditure. He was happy to pay the tax based on such allowance.

66. On behalf of Mr Verschueren, Ms Paicnyk was disagreeing in principle with the general disallowance of expenses, and asking for a statistically reasonable amount.

What Mr Verschueren was asking for was an allowance of 10 per cent of total turnover per year. He felt he had had some allowance; however, the period under review was approximately six years ago, and he could not find anything to give more specific details of the expenditure which he had incurred.

67. He had recently asked for a new agent to look at his allowable expenses; her firm had been appointed three weeks ago and she had asked about his previous tax history. She had carried out unpaid work to check this history.

Arguments for HMRC

68. Mrs O'Reilly indicated that the matter under consideration was whether the decision to disallow the claims had been correct. In formal terms, the appeal covered the amendment made to Mr Verschueren's self assessment return for the year 2006-07 following the issue of the closure notice, and discovery assessments for the years 2003-04, 2004-05 and 2005-06. The issues were:

(1) Whether the tax and NICs charged on the increase made by the amendment to the self assessment for 2006-07 following the issue of the closure notice were excessive, it having been accepted by Mr Verschueren and his accountants that the original self assessment had not been correct, and thus the only open issue in respect of that year being the quantum of the amended assessment;

(2) Whether the tax and NICs charged in respect of the years covered by the discovery assessments were excessive;

(3) Whether the discovery assessments were valid.

69. She emphasised that the burden fell on Mr Verschueren and his advisers to demonstrate that the amounts assessed were excessive. She referred to the grounds of appeal as set out in the Notice of Appeal (considered below), which differed from the matters raised in the appeals made to HMRC.

70. She relied on three cases: *Jonas v Bamford* 51 TC 1, *Nicholson v Morris* 51 TC 95, and *Everest Eze v HMRC* TC 00851 [2010] UKFTT 610 (TC).

71. She submitted that there was no evidence to support the claimed expenditure. The information from L Wilson & Co had been vague. HMRC accepted that some allowance for expenditure was appropriate. She submitted that HMRC had made the assessments using their best judgment on very limited evidence to arrive at the amounts to be assessed. She emphasised that under s 12B of the Taxes Management Act 1970 (TMA 1970"), records were required to be kept. Mr Verschueren had not kept documents. HMRC had had to use their formal powers three times. It had not been until March 2009 that HMRC had been advised by Mr Verschueren that there were no documents. It was not clear what records had been used in arriving at the amounts claimed as expenditure in Mr Verschueren's self assessments. She referred to the statutory authority for deduction of expenditure in computing profits; there had been no indication provided to HMRC on how any expenses had been incurred.

72. Mr Verschueren's letter sent in August 2009 had suggested that the documents were with his accountants. Mr Browne had decided that some allowance was appropriate. His only adjustments had been to disallow some of the expenses claimed and to increase turnover based on vouchers which were in HMRC's possession. It would have been normal in such a case to check for "outside" work, but Mr Browne had not sought (or been able) to do this. The absence of bank statements had meant that it had not been possible to make adjustments by reference to these. Mrs O'Reilly pointed out that HMRC had not sought any penalties for incorrect returns in Mr Verschueren's case.

73. In respect of the discovery assessments, she referred to *Jonas v Bamford* at p 25, in which Walton J had referred to "the usual presumption of continuity" applicable to the making of discovery assessments, and to *Nicholson v Jones* at p 118, in which Goff LJ had agreed with the inference that there had been "a continuing course of conduct".

74. In *Everest Eze*, involving the same accounting firm as had been involved on Mr Verschueren's behalf, but in respect of expenses claimed by an employee, the Tribunal had commented at paragraph 46:

> "However, the evidence before us was insufficient for us to be able to conclude that the sums claimed had been incurred on these items, and indeed we thought it possible that these claims were excessive. We therefore do not find that the allowance for these items should be increased above that determined by HMRC."

75. HMRC contended that the position was similar in Mr Verschueren's case. He had not discharged the burden of proof falling on him to establish that the amounts assessed should be reduced. HMRC asked for confirmation that the assessments were correct and for the appeal to be dismissed.

Discussion and conclusions

76. This appeal relates both to the closure notice in respect of 2006-07 and to assessments for the other years mentioned above. For simplicity, we use the word "assessments" as covering all the years, as the closure notice has the effect of amending the self assessment for 2006-07.

77. Mrs O'Reilly referred to the burden falling on Mr Verschueren to show that the assessments were not correct. She did not refer in terms to s 50(6) TMA 1970, but this states what the Tribunal's powers are in respect of a disputed assessment where the taxpayer seeks to reduce the amount assessed:

> "(6) If, on an appeal notified to the tribunal, the tribunal decides—
>
> (a) that, the appellant is overcharged by a self-assessment;
>
> (b) . . . or
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment,

> the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good."

78. Put simply, the effect of s 50(6) TMA 1970 is that the taxpayer who is arguing that the assessment is excessive has to prove that this is the case. Unless the taxpayer can satisfy the Tribunal that he has been overcharged, the Tribunal is unable to adjust the assessments in the amounts which have been determined by HMRC. For the Tribunal to be satisfied that assessments should be reduced, there must be evidence to support that conclusion.

79. We do not consider that there is any evidence to support Mr Verschueren's argument that the assessments should be reduced. The absence of any documentary records of expenditure incurred is a major obstacle to a claim for the deduction of expenditure. It does not necessarily prevent some form of allowance for expenditure, but any claim has to be supported by some form of more general evidence, such as reliable general statistics for the level of expenditure likely to be incurred by comparable taxpayers engaged in the same trade or business.

80. We do not consider the claims made in the course of the correspondence between L Wilson & Co and Mr Browne to have been based on reliable statistics of that nature. Similarly, we did not feel that there was sufficient basis for the generalised estimate of 10 per cent of turnover suggested by Ms Paicnyk at the hearing. It occurred to us that if in the course of negotiations, well before the matter reached the stage of being referred to the Tribunal, an offer of that type had been made, it might well have led to a finally negotiated figure agreed by the parties in the interests of bringing the matter to a close and avoiding a contested appeal. However, it is clear from the history of the correspondence that this possibility was never properly explored.

81. Although *Everest Eze* related to claims to expenditure made by an employee, we consider that the position as set out in paragraph 46 of that decision is equally applicable in the context of a self-employed trader such as Mr Verschueren.

82. In any event, some allowance for expenditure was made, although this was less than Mr Verschueren had sought. We find that adjustments to the amounts of taxable profits were made to take account of the expected level of expenditure, as there was no means of establishing what the actual expenditure had been. Mr Browne stated in his evidence that without evidence to the contrary, he believed that the amounts of expenses which he had decided to allow were reasonable and would cover any likely expenditure that would have been incurred by Mr Verschueren. We accept Mr Browne's evidence on this point.

83. Although it makes no difference to our conclusions as to the expenditure, we think it appropriate to deal with the subject of the letter dated 10 February 2009 which appeared to have come from Mr Verschueren. The signature on that letter is not the same as on Mr Verschueren's letter received by HMRC on 11 August 2009. We find that the February letter must have been written by Mr Verschueren's son, as Mr Verschueren had been away from the UK for a year up to later July or early August 2009, and had requested his son to make contact with HMRC. However, we find it

reasonable for Mr Browne to have assumed that the February letter had come from Mr Verschueren himself, rather than from someone on his behalf.

84. In the grounds of appeal set out in the Notice of Appeal, L Wilson & Co stated that out of eight items of expenditure claimed, HMRC had only allowed two, that the amount allowed excluded accountancy fees, and that it did not allow an amount to cover health and safety expenditure required by law. The review officer had agreed without question everything stated by the caseworker (Mr Browne). L Wilson & Co had offered, by way of a compromise, alternative figures lower than those originally claimed on Mr Verschueren's returns; these had been rejected without full explanation. They stated that they were still open for a compromise up to the Tribunal hearing. Finally, Mr Browne had looked at previous years on the basis of the discovery principle; this was not applicable.

85. On the basis of the principles considered above relating to the need for evidence to support claims for deduction of expenditure in computing taxable profits, we find that there is no basis (and in particular, no evidence) to support the grounds of appeal relating to expenditure.

86. Further, we do not accept that there is any question of Mr McKinley, the review officer, having simply agreed without question everything stated by Mr Browne. We find that Mr McKinley's review was properly carried out as a fresh and independent review of the decisions taken by Mr Browne and the circumstances of Mr Verschueren's case. L Wilson & Co did not offer any basis for their contention, which we therefore reject as unsupported by any evidence.

87. Finally, we do not consider that Mr Browne's application of the discovery principle was in any way incorrect. Having established (or "discovered") in the course of the enquiry into Mr Verschueren's return for 2006-07 that the amounts claimed in respect of expenditure were higher than would be expected for a trade or business of the type carried on by Mr Verschueren, it was reasonable to assume that the levels of expenditure claimed in respect of the other years in question were also higher than would be expected. As confirmed in *Jonas v Bamford* and *Nicholson v Jones*, a state of affairs may be assumed to have continued. This is all the more the case where, as here, there is no specific evidence to support the level of expenditure claimed in Mr Verschueren's returns, or to suggest that there had been any changes in the nature of his business or in the way he was carrying it on during the period under consideration.

88. We referred briefly above to the unsatisfactory progress of this appeal. We have set out in detail the correspondence leading up to the point of Notice of Appeal having been lodged with the Tribunal. Our objective in doing so is to illustrate what we consider to have been the failure of Mr Verschueren's advisers L Wilson & Co to engage fully and properly with the process of agreeing with HMRC the appropriate amounts to be assessed on Mr Verschueren. This has left his tax affairs for the relevant years unresolved for an unduly extended period, necessitating the involvement of another adviser, namely PK Financial Services, in respect of his liability for those years. Without setting out in detail the history of the appeal since the service of the Notice of Appeal, we record that we find this to have been as

unsatisfactory as the history before that Notice was lodged. In the light of this, we are reinforced in our decision not to postpone the hearing as a result of the belated request from L Wilson & Co.

89. In the absence of any evidence to persuade us that the amounts assessed on Mr Verschueren for the relevant years should be reduced, the assessments stand and Mr Verschueren's appeal must be dismissed.

90. This decision contains the following standard paragraph explaining the right of any party dissatisfied with the decision to apply for permission to appeal to the Upper Tribunal. In case the information sent with this decision does not explain this, we should add that, if permission to appeal to the Upper Tribunal on a point of law were to be granted, the person seeking to appeal should be aware that the costs regime in the Upper Tribunal is entirely different from that in the First-tier Tribunal. Unlike a basic or standard appeal before the First-tier Tribunal, an appeal to the Upper Tribunal carries the risk that the losing party in that appeal may become liable to the costs suffered by the other party.

Right to apply for permission to appeal

91. 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.

JOHN CLARK
TRIBUNAL JUDGE

RELEASE DATE: 9 March 2012