TC02341

Appeal number: TC/2011/09840

Income tax—Taxes Management Act 1970 ss. 29, 31 and 50(6)—Appeal against notice of further assessment—burden of proof—Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GAVIN POULTER **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MS HELEN MYERSCOUGH ACA

Sitting in public in Colchester on 8 October 2012

The Appellant in person, accompanied by Mr M Tyler, accountant

Ms K Weare for the Respondents

DECISION

Introduction

1. This is an appeal by Mr Gavin Poulter (the "Appellant") against a notice of further assessment for the year ended 5 April 2007, dated 14 March 2011. This notice assessed the Appellant to an additional amount of £29,622 of tax for the year in question. The HMRC position is that this additional amount is tax due on self-employment profits of £72,375 that the Appellant had failed to return in his self-assessment, these profits being the proceeds of sale by the Appellant of quantities of scrap metal in May and June 2006. In evidence are 19 sales to two different scrap metal dealers showing that they purchased various amounts of scrap metal for various sums, totalling £72,375. All but three of these sales were evidenced by invoices found on the Appellant's premises. The three others were ascertained by HMRC from one of the scrap metal dealers.

2. The Appellant admits that various loads of scrap metal were transported to the scrap metal dealers in one of his business's vehicles, driven by a driver sub-contracted by his business. However, his case is that the scrap metal belonged to a third party (referred to below as the "**owner**"), and that an employee of the owner was present each time that a load of scrap metal was transported to the scrap metal dealer. The Appellant says that his business was paid £200 by the owner for transporting each load, and that he had no other involvement. He admits that he failed to include these £200 payments in his tax return. The Appellant says that when each load was transported, the scrap metal dealer paid the owner's employee for the load, and that the Appellant's business's driver only took the £200 payment for transporting the load. However, the Appellant says that his driver took the invoices evidencing the payments by the scrap metal dealer for the scrap, and that these invoices were subsequently given to and retained by the Appellant.

3. At the hearing, the Appellant attended and gave evidence and presented his case in person, and was accompanied by his accountant, Mr Tyler. HMRC were represented by Ms Weare, and Ms L Turner, Inspector of Taxes, was called as a witness for HMRC. The Appellant and Ms Turner were both cross-examined, and the Tribunal asked them some questions. The Appellant and Ms Weare presented submissions. The Tribunal also had before it the bundle of documents prepared for the hearing.

The relevant legislation

4. Section 29 of the TMA relevantly provides:

> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

...

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above is attributable to fraudulent or negligent conduct on the part of the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (*a*) to (*c*) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) In subsection (6) above—

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes—

(i) a reference to any return of his under that section for either of the two immediately preceding chargeable periods; and

(ii) where the return is under section 8 and the taxpayer carries on a trade, profession or business in partnership, a reference to any partnership return with respect to the partnership for the relevant year of assessment or either of those periods; and

(b) any reference in paragraphs (*b*) to (*d*) to the taxpayer includes a reference to a person acting on his behalf.

...

5. Section 31 of the TMA relevantly provides:

(1) An appeal may be brought against—

...

(d) any assessment to tax which is not a self-assessment.

6. Section 50 of the TMA relevantly provides:

(6) If, on an appeal notified to the tribunal, the tribunal decides—

...

(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.

The evidence and submissions

7. The documentary evidence before the Tribunal indicates amongst other matters as follows. On 19 November 2009, HMRC opened an enquiry into the Appellant's 2008-09 tax return. On 19 November 2009, HMRC informed the Appellant's accountants that it had received information suggesting that the Appellant had additional income in 2006-07 from the sale of scrap metals that had not been returned,

and requested comments. A letter from the Appellant's accountants dated 23 November 2009 responded that as far as the Appellant was aware "the metal sales you refer to was probably that from the greenhouses that were originally on his property which he demolished and the metal from this was sold as scrap", and that this was not included on his tax return as it was not considered to be trading income. On 14 October 2010, the Appellant and his accountant attended a meeting with Ms Turner, the notes of which were sent by HMRC to the Appellant's accountant with an invitation to make any corrections.

8. The notes of that meeting indicate amongst other matters as follows. The Appellant has at different periods been a director of GMP Civil Engineering Ltd, a director of AMCO Engineering Ltd, an employee of Appleby's construction, and a director of GMP UK Ltd. For a period he had a contract working on the Blackwall Tunnel with Fitzpatricks. The Appellant said that he had never run a metal recycling business and that metal recycling was not any part of his business. The Appellant said that he had taken the scrap metal from the glasshouses to one of the scrap metal dealers. When asked if he had ever had dealings with the other scrap metal dealer, he said that "he had taken stuff to scrap metal dealers for Fitzpatricks but ... he would then return the money to the site foreman or agent it wouldn't be his money", and that "all his vehicles are insured for anyone over 25 to drive so and he does lend them to family and friends so one of them could have been there in one of his vehicles".

9. The Appellant provided HMRC with authorisations for the two scrap metal dealers to provide HMRC with any records relating to him. On 10 December 2010 HMRC sent a further query to the Appellant's accountants enclosing one of the invoices from a scrap metal dealer, to which they responded on 16 March 2011 that the Appellant "has not been involved in the trade of selling metal" that "his vehicles were available and used by numerous people due to the nature of their work and it could have been any number of these who sold the materials", and that "As far as our client is aware the only metals he sold were those which were from the dismantling of the glasshouses and a few odd bits around his yard at his private residence". Similar statements were made in a letter from the Appellant's accountants dated 19 April 2011.

10. In response to a further letter from HMRC dated 5 May 2011, the Appellant's accountants stated in a letter dated 12 August 2011 as follows. The Appellant has always maintained that he sold scrap metal on behalf of third parties and this was discussed at his interview. The metal on the invoices was extracted from Woods, where the Appellant was engaged to remove the scrap and sell it on behalf of a third party. The Appellant's vehicle was used by various people and not just himself. None of the invoices bore the Appellant's signature. The Appellant kept the invoices in case a third party queried the amounts of money he received relating to the sale of the scrap. The Appellant was paid £200 for the load of scrap sold. The Appellant did not receive the proceeds of the sale of the scrap and therefore it should not be assessed as his income. There is no evidence that the Appellant received these sums.

11. In the documents bundle there is also a statement from the Appellant dated 9 November 2011, and an e-mail from the Appellant to HMRC dated 1 May 2012.

12. In his evidence at the hearing, the Appellant said amongst other matters as follows.

13. What the Appellant said at his interview with HMRC was correct. He had never run a scrap metal business. When he was later asked at the interview about the scrap metal dealers, he said that he had transported scrap metal from Woods for a third party. In the period to which the invoices relate, the Appellant was working on the Blackwall Tunnel. He has worked very hard to maintain his family, has sold possessions in order to manage financially, has always paid his taxes and never gone on benefits, and his only mistake was not to declare the £200 per load that he was paid for transporting the scrap metal. He kept the invoices for the payment of the scrap metal in order to be able to show how much was paid for each load, in the event that there was any query by the owner. The invoices were not kept in a safe, as such, since the safe was open and was merely being used as a cupboard.

14. In cross-examination the Appellant said, amongst other matters, as follows. He bought his home in about Easter 2004, and would have completed the demolition of the greenhouses by about the end of 2004. In the period to which the invoices relate he was working on the Blackwall Tunnel contract for Fitzpatricks. He cannot recall whether at the time he was working via the GMP company or the AMCO company. Woods had a factory site that they sold. All of the plant was sold by auctioneers. After the auction he went to the site to see if any remaining pieces were available. When he was there, he saw some workers cutting up bits of cable. They were working for the owner who had purchased everything left over after the auction. The Appellant subsequently spoke to the owner and entered into an agreement that he would transport the scrap to the scrap metal dealers for £200 a load. The Appellant was not involved in the stripping out of the cable from the factory. The Appellant cannot recall the name of the owner who purchased the cable. When asked which of his workers drove the truck, the Appellant at first responded that he was unwilling to divulge that, and then subsequently said that it could have been any one of 8 or 10 workers that he subcontracted.

15. In her evidence, Ms Turner said as follows. The Appellant's initials are "GMP". The scrap metal dealer has informed her that the information on the invoices was input from handwritten tickets from the weighbridge, so that mistakes may have occurred. The explanation now given by the Appellant, about being paid to transport scrap metal from Woods, was not given by him at the meeting with HMRC. At the meeting with HMRC he only mentioned the scrap from the greenhouses and scrap being transported for Fitzpatricks.

16. On behalf of HMRC, Ms Weare submitted that the invoices bore the Appellant's initials and vehicle details, that he has provided no details or evidence of any third party owner of the scrap, that he admits transporting the scrap, and that the only income on which he has been assessed by HMRC consists of the specific amounts shown on the invoices. Reference was made to *Langham v. Veltema* [2002] EWHC 2689 (Ch); *Corbally-Stourton v Revenue & Customs* [2008] UKSPC SPC00692, [2008] STC (SCD) 907; *Norman v Golder* 26 TC 295; *Hurley v Taylor* 71 TC 268

and *Haythornthwaite & Sons Ltd v Kelly* 11 TC 657. Ms Weare submitted that the appeal should be dismissed.

17. The Appellant submitted as follows. He has provided all of the information he can. HMRC cannot prove that what he says is incorrect and HMRC has no concrete evidence that he was the owner of the scrap. He answered all of HMRC's questions truthfully. He has not been dealt with justly. The signatures on the invoices are not of anyone who works for him. The appeal should be allowed.

Findings

18. The Tribunal has considered all of the material before it and all of the arguments of the parties. Failure to mention particular items or details of the evidence does not mean that the Tribunal has not considered them.

19. By virtue of s.29 of the TMA, the HMRC officer was entitled to make the assessments if the officer "discovered" that as regards the relevant year of assessment, any income which ought to have been assessed to income tax has not been assessed.

20. The Tribunal finds that there is a burden on HMRC to establish that the conditions for making a discovery assessment are satisfied. If so, under s.50(6) TMA the burden is then on the appellant to satisfy the Tribunal that the assessment is excessive.

21. As to the meaning of the word "discover" in s.29(1) TMA, it was said in *Corbally-Stourton*, at [42] (citing earlier case law) that:

> ... the legislation do[es] not require the inspector to be certain beyond all doubt that there is an insufficiency; what is required is that he comes to the conclusion on the information available to him and the law as he understands it, that it is more likely than not that there is an insufficiency. I shall call this a conclusion that it is probable that there is an insufficiency.

It was added in that case at [43] that "mere suspicion, something short of a conclusion that it is probable that there is an insufficiency is not enough". It was further added at [44] that "a 'discovery' is something newly arising, not something stale and old" and that "The conclusion that it is probable that there is an insufficiency must be one which newly arises (from fresh facts or a new view of the law or otherwise)".

22. The circumstances of the present case are:

(a) all of the invoices (except three) from the scrap metal dealers evidencing the sale of the scrap metal were found at the Appellant's premises;

(b) details of the three transactions where invoices were not found at the Appellant's premises were supplied by the scrap metal dealer pursuant to the authorisation signed by the Appellant;

(c) the invoices bear the Appellant's name, or the initials "gmp" which are the Appellant's initials (and the name of two of the companies of which he has

been director), and/or registration number of a vehicle associated with the Appellant's business;

(d) most importantly, however, the Appellant admits that each of the invoices relates to the sale of a load of scrap metal that was transported to the scrap metal dealer in a truck belonging to the Appellant's business, driven by a driver from the Appellant's business;

(e) while the Appellant claims that the scrap belonged to a third party, there is no evidence of this other than the Appellant's own oral evidence;

(f) the Appellant has not provided the name, nor indeed any other details, of the person who is said to be the owner of the scrap.

23. The scrap was sold for a significant sum: the total value of all of the loads was £72,375. The Appellant's evidence was that his vehicle and driver were merely transporting the scrap for a fee of £200 per load, and that one of the owner's employees travelled in the vehicle to the scrap metal dealer when each load was delivered. However, the Appellant says that it was the Appellant's driver and not the owner's employee who took the invoice. The Appellant said in his oral evidence that no receipt or invoice was given by the scrap metal dealer to the owner's employee, and that the Appellant kept the invoices in case the owner subsequently queried how much was paid for the load by the scrap metal dealer. The Tribunal finds this to be implausible. Given the amounts involved, it would have been expected that the owner of the scrap would have wanted appropriate paperwork for its own accounts and records, and would have wanted the paperwork to have been made out in the owner's name. If an employee of the owner accompanied each load to the scrap metal dealer and received the payment, it would be expected that the owner's employee would at the same time have attended to completing the paperwork in the owner's name, and would have kept the paperwork. The Appellant has suggested that the scrap metal dealer, in completing the paperwork, just took the initials "GMP" from the side of the vehicle, or used the vehicle registration number. Given the value of the scrap involved, the Tribunal does not find it plausible that the owner would have been content for paperwork to be completed in this way. The Appellant's explanation for keeping the invoices is not plausible. Clearly the owner would have been concerned to have the actual invoice, to check how much was paid for each load. The suggestion that the owner would have been content to receive payment in cash from its own employee, and to call the Appellant in the event of any query as to how much the scrap metal dealer actually paid, makes no sense, especially in view of the relative significance of the amounts of money involved. The Tribunal also notes that the Appellant had no documentary evidence to show that he had been paid £200 for transporting each load.

24. There was conflicting evidence as to whether the Appellant did at the October 2010 meeting with HMRC explain that he had transported scrap from the Woods factory. The Appellant says that he did. Ms Turner was clear in her evidence that he did not. The Tribunal prefers Ms Turner's evidence in this respect. There is no record in the notes of this meeting that the Appellant mentioned transporting scrap

metal from the Woods factory. According to the notes, he only mentioned the scrap metal from the glasshouses at his property, and mentioned taking scrap to a dealer on behalf of Fitzpatricks. The Tribunal prefers the evidence of Ms Turner in this respect. First, the papers indicate that the notes of the October 2010 meeting with HMRC were sent to the Appellant's accountants under cover of a letter dated 18 October 2010, with an invitation to send back any corrections to them. There is no record of the Appellant seeking to amend the notes to mention scrap from the Woods factory. Furthermore, subsequent letters from the Appellant's accountants dated 16 March 2011 and 19 April 2011 do not mention transporting scrap from the Woods factory. The Tribunal considers that even at the time of the October 2010 meeting with HMRC, it must have been abundantly clear to the Appellant that HMRC was interested in any connection that he or his business had with the sale of scrap metal. The Appellant mentioned the sale of scrap from his greenhouses that occurred much earlier in 2004. At the meeting he mentioned transporting scrap for Fitzpatricks, while maintaining that he was never the owner of that scrap. He mentioned that other people used his vehicles and may have used them to transport scrap. The Tribunal finds that there is no reason why, if it were the case, the Appellant would not also at the October 2010 meeting have mentioned that his vehicles transported some £72,375 of scrap over several weeks from the Woods factory in May-June 2006. The Tribunal finds that the Appellant's failure to mention this earlier goes to the credibility of his claim about transporting scrap from the Woods factory.

25. The Tribunal therefore finds that the HMRC inspector was entitled to come to the conclusion, on the information available to her and the law as she understands it, that it is more likely than not that there is an insufficiency. On the basis of the material before it, the Tribunal would come to the same conclusion.

26. Despite this conclusion, by virtue of s.29(3) of the TMA, there being no suggestion that the Appellant did not file his return on time for the year in question, he cannot be assessed under s.29 unless two conditions are satisfied.

27. The first condition is that the reason for the officer's "discovery" of non-assessed income must be attributable to fraudulent or negligent conduct on the part of the Appellant or a person acting on his behalf (s.29(4)). The Tribunal finds that this condition is satisfied. The Appellant admits that even on his own account, he failed to include in his tax return the fact that he earned £200 for each load of scrap that was transported. The Appellant's failure to include these details relating to the sale of the scrap in his tax return must have been at the least negligent.

28. The second condition is that the officer could not have been reasonably expected, on the basis of the information made available to her before that time, to be aware that income which ought to have been assessed to income tax had not been assessed (s.29(5)). The Tribunal finds that there is nothing to suggest that, on the basis of the information provided by the Appellant to HMRC, the latter should have been aware any earlier of any earnings of the Appellant in connection the scrap metal taken from Woods.

29. The amount of additional tax to which the Appellant has been assessed is based solely on the amount of the actual transactions of which HMRC now have details. This is not a case where HMRC has sought to extrapolate from newly discovered evidence that the Appellant also had other undeclared income. Once it is concluded on a balance of probabilities that the Appellant was the owner of the scrap, nothing presented as part of the Appellant's case suggests that the amount of the further assessment was wrong. For instance, the Appellant did not seek to produce evidence of the amount that he paid for the scrap, which could have been deducted from the amount for which it was sold. In the absence of any further evidence of argument of the Appellant directed to establishing that the amount of the assessment was wrong, under s.50(6) of the TMA the assessment stands good.

Conclusion

30. For the reasons above, the Tribunal finds that the appeal must be dismissed.

31. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 27 October 2012