



TC03398

Appeal number: TC/2013/02335

Income tax - s95 TMA 1970 - penalties for inaccuracies in tax returns - appeal against notice of assessment, closure notice and penalty assessments - whether profits correctly assessed by HMRC - yes - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

WAYNE GREEN

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL S CONNELL
MR JOHN WILSON**

Sitting in public at Phoenix House, Bradford on 30 January 2014

Mr Wayne Green in person

Ms Nadine Newham officer of HM Revenue and Customs for the Respondents

DECISION

The Appeal

1. This is an appeal by Mr Wayne Green (“Mr Green”) against HMRC’s decision to issue the following notices:
- i. Closure Notice and amendment in respect of the year ended 5 April 2008.
 - ii. Notice of Assessment for the year ended 5 April 2007.
 - iii. Notice of Assessment for the year ended 5 April 2006.
 - iv. Notice of Assessment for the year ended 5 April 2005.
 - v. Penalty determinations totalling £4,400.00 in respect of all years.

The penalties were imposed under paragraph 1 of Schedule 24 to the Finance Act 2007 (“Schedule 24”) in respect of inaccuracies in Mr Green’s self-assessment tax returns for the years in question, resulting in an understatement of his liability to tax in the amount of £11,554.92.

2. Mr Green does not dispute the fact that during the tax years under appeal he fabricated the source of his income. Nor does he dispute that he received monies from the sale of items (mainly DVD’s) which he had purchased for resale. However he does not agree that HMRC’s should include and assess, as income, the proceeds of sale of a private collection of comics, videos and DVDs which were not part of his stock in trade which he sold during the same period. He says the monies derived from the sale of those items were not earnings and that HMRC should not have included them in their computation of his profits
3. Mr Green contends that the figures that he originally returned, albeit from a fabricated source, are correct.
4. In respect of the years under appeal, the returned net profits, revised net profits as assessed, additional duties due and penalties are as follows:

Tax	Returned Net Profit	Turnover	Revised Net Profit	Original Duties Due	Revised Duties Due	Additional Duties Due	Penalty
2007/08	£10,128.00	£166,095	£22,676.00	£1,202.30	£ 4,967.00	£3,764.40	£1,317.00
2006/07	£11,104.00	£161,423	£22,034.00	£1,562.70	£ 4,841.70	£3,279.00	£1,148.00
2005/06	£8,543.00	£160,024	£21,873.00	£843.60	£ 4,842.60	£3,999.00	£1,400.00
2004/05	£5,841.00	£58,014	£7,919.00	£197.28	£709.80	£512.52	£179.00
Total						£ 11,554.92	£ 4,044.00

Evidence and findings of fact

5. The evidence consisted of three bundles of documents containing copy correspondence between Mr Green and HMRC from 2009 to 2011, copy tax returns, notices of assessment and closure notice for the tax years under appeal, together with copies of Mr Green's bank, credit card, and post office statements. Also included were PayPal reports and other financial records of Mr Green. Both Mr Green and the investigating HMRC officer Mr Summerscales gave oral evidence to the Tribunal.

6. The following facts were admitted or proved to our satisfaction.

7. Mr Green was self-employed as a window cleaner up until late 2002 when he sold his window cleaning round. Shortly afterwards he began selling off a private collection of comics and video tapes in order to raise income. He says that this began in a small way but as he realised the potential to generate profit he started to buy items for resale. However he continued to submit returns on the basis that he was still a self-employed window cleaner. He said that he was unsure how to report the profit he was making (given that part of the 'income' represented monies received from the sale of part of his private collection and he had not been keeping detailed records). In an effort to simplify matters he continued filing returns showing his source of income as that of a window cleaner. He says however that the yearly income figures returned to HMRC were nonetheless a correct statement of his earned income.

8. HMRC say that Mr Green's Self-Assessment record for the period April 1989 to February 2008 showed the following sources of income:

Comic Dealer 22 April 1989 to 5 April 1998.
Window Cleaner 6 April 1998 to 21 December 2007.
DVD retailing from 4 February 2008.

9. An enquiry was opened into Mr Green's tax return for the year ended 5 April 2008 on 18 March 2009. The tax return completed by Mr Green for that year showed that he was a window cleaner for the period 6 April 2007 to 21 December 2007, returning a net profit of £7,605, and from 4 February 2008 to 5 April 2008, a DVD Retailer, returning a net profit of £2,523.13.

10. In July 2009, during enquiries, Mr Green stated that he had sold his window cleaning round in late 2007 for which he received a £200 in cash. He said he had been paid in cash by his window cleaning customers. He forwarded to HMRC a hand written schedule of his window cleaning round and the income that he received from each customer. He stated that for the majority of his customers he cleaned their windows fortnightly. There were a few properties where he cleaned the windows monthly. He advised HMRC that for the year under enquiry and previous tax years he kept no records for his window cleaning business. He did not keep a rounds book. The only record that he kept was of those customers that owed him money and these were not retained.

11. Purchased stock in respect of the DVD business in the 2008 Return were shown as £4000.36, but a statement of expenditure subsequently provided by Mr Green showed only £2732.92. The difference he said was an estimate of the cost price of that part of his private DVD collection, which had also been sold. However he had no receipts for the private purchases. He explained that items in his private collection had been bought many years previously when he had no intention of reselling.

12. After reviewing Mr Green's Barclays Bank current account and Barclaycard credit card statements, the investigating officer formed the opinion that the turnover and profit shown on the 2008 return was understated. The statements showed significant deposits and payments and these were not consistent with the income and expenditure included in the 2007/08 Return. The takings were substantially more than reflected in the return and after taking account of identifiable business expenses, the profit was also greater.

13. In September 2010 Mr Green disclosed that he had in fact sold his window cleaning round in September/October 2002 and not in 2007 and that he had continued to submit tax returns declaring that he was still a window cleaner. Mr Green also admitted that the records provided were fictitious and that there were customer addresses on the list that he had 'plucked from thin air'. When asked why he continued to return his income as a window cleaner and not a DVD retailer Mr Green told the Inspector that he did not wish to 'open a can of worms'.

14. Mr Green explained that when he started to sell his private collection of comics and videos in 2002 he never thought that it would become a full time job. He sold his window cleaning business when he realised how much interest there was in his private collection of American comics. He thought that he could make more money out of selling comics and videos through eBay than by window cleaning. When the business started to flourish, he started to buy items to order for resale to customers. He did not start retailing DVDs sometime after 2002. He sold items through eBay and was paid by PayPal. He maintained no detailed record of expenses but was able to produce some copy monthly PayPal statements showing the income received from the sale of the DVD's and the fees that he paid.

15. Mr Green said that once he had made the decision to disguise his profits from DVD sales he had to stick with this and felt that in his own mind he had done nothing wrong. He said that once he sold all of his private collections in 2007/08 he decided to show income as a DVD retailer on his returns. He closed down his account with eBay and opened a new account with effect from February 2008. He says that from then on he kept a weekly running total of the money received and paid out. However he destroyed these records once he had put the entries on his tax returns.

16. When asked about the value of his private collections Mr Green originally advised HMRC that he estimated that his comic collection sold for £13,000 and his DVD collection for £15,000. However several months later, Mr Green estimated that his comics collection sold for £21,000 and the DVD collection for £17,000. Mr Green said that these figures were based on detailed recalculations which were much more accurate than those given earlier.

17. During the early stages of the enquiry HMRC also made enquiries into Mr Green's assets and in March 2010 Mr Green said that the property in which he resided, 20 Warwick Road, Cleethorpes, was owned by his father. HMRC informed Mr Green that H M Land Registry records showed that in fact he was the owner of the property and that he had purchased it on 12 April 2006. Mr Green then admitted that he owned the property and that he had purchased it for £105,000 with the aid of a mortgage of £91,000 and a bank loan of £14,000.

18. Mr Green also disclosed that he purchased a second property, 36 Coniston Avenue, Grimsby, in August 2007 for £125,000 with the aid of a mortgage of £96,855 and a loan for £25,000 He said that purchased the property as a long term investment and for his mother to live in rent free.

19. It subsequently transpired that the loan Mr Green had obtained from Barclays Bank was for £20,000 and that he had borrowed the monies much earlier than he originally said. He had used the loan to buy premium bonds. He purchased 20 Warwick Road and cashed in the premium bonds to pay the deposit. This lead HMRC to conclude that Mr Green was not being entirely truthful about either his income or assets.

20. In order to assess the actual profits received by Mr Green, for the 2007/08 tax year HMRC examined his bank statements. Total sales were calculated from the deposits into his bank accounts. Expenditure was calculated from his credit card statements, copy eBay statements and information regarding the postal charges. Deductions were allowed for Mr Green's incidental business costs such as a proportionate part of his internet connection costs (he had a package with Virgin Media, which included telephone calls, internet & television.)

21. Mr Green's 2008 return showed his turnover and profit for the period 6 April 2007 to 21 December 2007 as £7,605 with original sales returned for the period 4 February to 5 April 2008 of £6523. However his Barclays Bank statements revealed deposits totalling £159,572. Purchases were made by credit card totalling £112,406. The revised profit for the year ended 5 April 2008 as calculated by HRMC, is set out in paragraph 4 above.

22. Mr Green provided HMRC were with copies of his Barclays Bank statements for the years 2004-05, 2005-06 & 2006-07. HMRC computed Mr Green's sales in those years by reference to the deposits made into his account. Mr Green was unable to provide Barclaycard statements for earlier years and it was not possible for HMRC to obtain these directly from the bank.

23. As it was clear to HMRC that Mr Green had deliberately shown his income from an incorrect source for 2007/08, discovery assessments were raised under Section 29 Taxes Management Act 1970, for the tax years 2004/05 to 2006/07 inclusive. In order to assess the net profits for those years, HMRC totalled the deposits into Mr Green's bank accounts and used this figure as the total income for each year. They then took the figures in the 2008/09 tax return which was the first full year in which Mr Green has returned income from DVD sales and calculated the net profit percentage. The

profit figure obtained from the calculation was 13.37% and this was used to calculate the net profit for the previous tax years as follows:

	2004-05	2005-6	2006-07
Income	£58,105	£160,023	£161,423
Net Profit (Income x13.65%)	£7,919	£21,873	£22,034

24. No additions were sought by HMRC in respect of the profits returned for 2002-03 & 2003-04.

25. HMRC then issued a penalty determination under Section 95 Taxes Management Act 1970, covering all of those tax years. The maximum statutory penalty chargeable is 100% of the additional tax & national insurance arising.

26. In calculating the net penalty loading the investigating officer allowed an abatement of 10% for disclosure on the basis that Mr. Green had not made any disclosure of irregularities in his returns, but accepted that his returns were incorrect and adjustments were necessary. However, Mr. Green did not agree the officer's calculations of the revised profits. In particular, he did not agree with the scaling back for earlier years.

27. HMRC considered that he had been untruthful regarding monies received into his bank accounts, credit card payments loans and properties owned. However HMRC allowed an abatement of 25% for co-operation, as Mr. Green had provided the information asked of him.

28. For seriousness HMRC allowed an abatement of 30%. The omitted profits were large in relation to the returned profits but the period over which they arose was relatively short.

29. The net penalty loading charged was therefore 35% (100% - 65%).

30. A formal Closure notice was issued for 2007-08 on 13 November 2012. The additional tax payable being £3764.40. HMRC then issued discovery assessments for years outside the normal time limits. These were issued under S29 TMA 1970 on 13 November 2012 in the sum of £512.52 for 2004-05, £3999.00 for 2005-06 and £3279.00 for 2006-07.

31. A formal penalty determination was issued on 15 November 2012. The overall penalty chargeable is £4044, (£179 for 2004-05, £1400 for 2005-06, £1148 for 2006-07 and 2007-08 £1317).

Relevant legislation

32. Relevant legislation in respect of inaccurate returns due to be filed before 1 April 2009 is contained in Section 29 Taxes Management Act 1970 which makes provision for assessment by HMRC where loss of tax is discovered. Section 12B TMA 1970 provides details of records that must be maintained and the period for which there

must be retained. With regard to the penalties imposed the relevant provisions are set out in ss 95 TMA:

95 Incorrect return or accounts for income tax or capital gains tax

(1) Where a person fraudulently or negligently--

- 5 (a) *delivers any incorrect return of a kind mentioned in [section 8 or 8A of this Act (or either of those sections)]³ as extended by section 12 of this Act ...²), or*
 (b) *makes any incorrect return, statement or declaration in connection with any claim for any allowance, deduction or relief in respect of*
10 *income tax or capital gains tax, or*
 (c) *submits to an inspector or the Board or any Commissioners any incorrect accounts in connection with the ascertainment of his liability to income tax or capital gains tax,*

15 *he shall be liable to a penalty not exceeding [the amount of the difference specified in subsection (2) below]*

(2) The difference is that between--

- (a) *the amount of income tax and capital gains tax payable for the relevant years of assessment by the said person (including any amount of income tax deducted at source and not repayable), and*
20 (b) *the amount which would have been the amount so payable if the return, statement, declaration or accounts as made or submitted by him had been correct.*

25 *(3) The relevant years of assessment for the purposes of this section are, in relation to anything delivered, made or submitted in any year of assessment, that, the next following, and any preceding year of assessment; ...^{3, 4}*

HMRC's case

30 33. In respect of the year under enquiry, 2007/08, where a Closure Notice and amendment has been issued the onus is on the appellant to satisfy the Tribunal that HMRC's figures are incorrect.

35 34. In respect of the 2006/07 tax year the onus is on HMRC to show the Tribunal that the actions taken by Mr. Green during the year, with regard to returning his correct income were careless. Once HMRC has shown that he was careless the onus reverts back to the appellant to satisfy the Tribunal that the revised figures used by HMRC are incorrect.

40 35. For the tax years 2004/05 and 2005/06 the onus is on HMRC to show the Tribunal that the actions taken by the appellant during those two years were deliberate with regard to him returning incorrect income to HMRC. Once HMRC has shown that the appellant's actions were deliberate the onus reverts back to the appellant to satisfy the Tribunal that the revised figures used by HMRC are incorrect.

36. With regard to the penalty raised by HMRC under Section 95(2) of the Taxes Management Act 1970 the onus is on HMRC to show that the appellant was negligent in respect of his income tax affairs during the 4 years under appeal.

5 37. The standard of proof is the ordinary civil standard of the balance of probabilities

38. HMRC say that it is clear Mr. Green has been negligent in the completion of his tax returns for the tax years 2004/05 to 2007/08 inclusive.

39. Profits have been returned by Mr. Green purporting to have been from window cleaning when they were in fact from DVD sales.

10 40. There was an initial failure to disclose a Barclays bank account and Barclaycard account. The undisclosed bank and credit card statements revealed trading activities far in excess of the income and profits reflected on returns.

15 41. Misleading information was provided in respect of the two properties which Mr. Green owned. Following a challenge, ownership of the properties was admitted. During April 2006 and August 2007 Mr. Green was able to purchase the two properties and was able to take out a loan to pay the deposits and mortgages, both of which he would have had to fund from a relatively modest income as a window cleaner.

20 42. Ms Newham for HMRC said that Mr Green had no record whatsoever of his private collections, which he claimed to have owned, and therefore it is difficult to see how so many years after the event, he was able to estimate the amounts received for those items as distinct from DVDs and items specifically purchased for resale. In correspondence with Mr Green the investigating officer had found a wide variance between original and revised figures put forward by Mr Green. Ms Newham suggested that he did not really know how much his collection was sold for, or indeed when. It was questionable in any event how Mr Green had been able to amass such a valuable collection in any event given his modest level of income in the earlier years. HMRC do not accept Mr Green's explanation that significant amounts paid into his bank account related to the sale of items from his private collection without supporting evidence.

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35 43. Ms Newham said that section 12B TMA 1970 imposes an obligation on an individual to maintain records and stipulates period for which they should be retained in order to support entries on tax returns. HMRC were unable to accept that the profits returned were correct. The investigating officer's computations had been based on bank and credit card statements which were the only records available. Mr Green at the very least had been negligent in submitting his returns and as such HMRC were entitled to raise assessments for additional tax to and impose penalties under section 95 TMA 1970.

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The Appellant's case

44. Mr. Green said that he started collecting comics when he was five years old. He said that he had over one thousand and that he also had a large video collection. He conceded that he was unable to provide any evidence of this. At one stage he had
5 made enquiries about insurance cover for its collection, but the premiums were too expensive. Mr. Green conceded that he had no evidence to substantiate his assertion that much of his turnover for the years in question, reflected sales of comics, videos and DVDs from his private collection.

45. Mr. Green accepted that he had not been honest about his business, but said that it was unfair he was being taxed on the sale of items that he had been collecting since
10 childhood. He said he never expected his business to take off as it did. He had to work very hard and had a high turnover for not a great deal of return. It was because he was so busy that he had not had time to keep detailed records of income and expenditure. Nonetheless, he said that the returns made to HMRC were a reasonably accurate
15 reflection of his profits. He said that was little more he could add.

Conclusion

46. The issues for the Tribunal to decide are whether Mr Green was careless in the completion of his returns, and if so whether the assessments and penalties imposed are correct.

47. Mr Green failed to take reasonable care in both maintaining records and
20 submission of his tax returns. Indeed he initially misrepresented the source of his income. He is not able to produce any evidence whatsoever to show that profits from his business were not entirely derived from stock purchased for resale. There is no evidence to support his contention that some of the deposits were from the sale of a
25 private comic video and DVD collection. Even assuming that Mr Green had a private collection of 1000 comics and a similar collection of videos which he said in evidence sold at up to £10 per item, that does not produce a figure which can be reconciled with his proven turnover. In the absence of any evidence to show that part of Mr Green's turnover related to a private collection we have to conclude that it represented profits
30 from the resale of stock and that HMRC have accurately computed those profits and the additional tax due.

48. The penalty has been assessed as 35% of the underpaid tax which is within the penalty range for careless behaviour. The penalty has been assessed entirely in line with the legislation which ensures that the amount of a penalty is proportionate to the
35 inaccuracy.

49. For the above reasons we find that the assessments, additional duties and penalties as set out in paragraph 4 above are payable and the appeal is dismissed

50. 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
40 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.

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**MICHAEL S CONNELL
TRIBUNAL JUDGE**

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RELEASE DATE: 10 March 2014

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