TC03530

Appeal number: TC/2013/01822

INCOME TAX & NIC - PAYE- whether appellant's salary for 2007/08 paid by company of which he was sole director under deduction of PAYE and NIC as included in self-assessment return – no – whether appellant personally liable for PAYE and NIC unpaid on basis that he received relevant payments knowing that employer wilfully failed to deduct tax and NIC – yes – whether sums allocated to director's loan account as consultancy fees and dividends impliedly for others for 2005/06 and 2006/07 in fact such fees and dividends – no – sums held to be income of appellant – whether appellant personally liable for tax and NIC on such sums again on basis that he received them knowing that employer wilfully failed to deduct tax and NIC – yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

M J FEBREY **Appellant**

- and -

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

TRIBUNAL: JUDGE DAVID DEMACK
MR MICHAEL BELL ACA CTA

Sitting in public in London on 20 and 21 February 2014

Robin Haigh, chartered accountant of Trenfield Williams Ltd, Bristol, for the Appellant

Paul Shea, of the Appeals and Reviews Section of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. To recover income tax and National Insurance contributions ("NIC") HMRC believed to be underpaid in respect of the appellant, Mr Michael John Febrey, on employment income he received from Febrey Ltd ("the Company"), a Febrey family company of which he was sole director but not a shareholder, HMRC:

A) assessed him to income tax for 2005/06 and 2006/07, and amended his self-assessment income tax return for 2007/08;

B) made a direction under regulation 72(5) of the Income Tax (PAYE) Regulations 2003 ("ITPR") that the Company, as Mr Febrey's employer, was not liable to account for the PAYE that it should have deducted from relevant payments to him; and

C) served a notice under section 8 of the Social Security Contributions (Transfer of functions etc) Act 1999 ("SSCTFA") assessing Mr Febrey to the primary Class 1 NIC due on relevant earnings from the Company between 6 April 2005 and 5 April 2008 incorporating a decision under reg 86 of the Social Security (Contributions) Regulations 2001 ("SSCR") that the Company was not liable to account for the primary Class 1 NIC that should have been deducted from his earnings.

2. On 30 March 2011, HMRC raised the following income tax assessments on Mr Febrey personally:

Table 1 – Income tax assessments

Year	Additional income assessed £	Total income tax assessed £	Allowed deducted at source (PAYE) £	Net income tax due £
2005-06	115,100	47,247.58	39,959.10	7,288.48
2006-07	230,950	86,132.50	86,132.50	NIL

3. Following further enquiries made after raising those assessments, on 25 June 2012 HMRC informed Mr Febrey that they proposed to reduce them. And, on 10 October 2012 they confirmed that they had reduced them, at the same time amending his return for 2007-08 and determining that the Company was not required to account for underdeducted tax and NIC on relevant payments to him in all three years in point. As a result Mr Febrey faced assessments in the following sums:

Table 2 – Reg 72 (PAYE) direction & Section 8 NIC Decision

Year	Relevant payments/earnings £	Tax underdeducted £	NIC £
2005-06	103,000	33,157.50	3,767.00
2006-07	172,000	60,532.40	4,520.15
2007-08	365,000	137,412,80	6,559.25

4. The enquiry into Mr Febrey's tax return for 2007/08 was closed on 21 December 2012, effectively confirming his liability to tax and NIC in that year in the same sums as were included in the letter of 10 October 2012:

Table 3 – Enquiry closure notice

Year	Revised earnings (total) £	Total income tax assessed £	Allowed deducted at source (PAYE) £	Net income tax due £
2007-08	365,000	137,414.40	0	137,414.40

5. Before us, HMRC accepted that the figure of £365,000 included in Tables 2 and 3 as constituting Mr Febrey's earnings in 2007/08 should be reduced to £300,000, with a consequent reduction in tax underdeducted to £111,414. The NIC figure must also be reduced, but HMRC were unable to tell us to what figure.

6. In a comprehensive notice of appeal, given on 8 March 2013 by Mr Febrey's accountants Trenfield Williams Ltd, they gave his reasons for appealing all the decisions HMRC had made as:

> "HMRC has assessed its own estimates of Mr Febrey's employment income for the 2005/06, 2006/07, and 2007/08 tax years at amounts that are at variance with and greatly in excess of the figures contained in his tax returns. It also seeks to deny cre[d]it for the amounts of tax that would have been deducted by his employer had the amounts assessed actually been paid to him and impose personal liability for associated national insurance contributions. He believes that these assessments and the personal liabilities that arise from them are unfounded and inequitable."

7. We also find it helpful to note Mr Febrey's case on the amendment to his self-assessment return for 2007/08. As developed before us, his case on liability in that year was essentially:

a) that the self-assessment return for the year correctly recorded his employment income for that year;

b) that he believed his salary for that year was paid to him net of PAYE and NIC, so that he was entitled to a credit in his self-assessment return for the PAYE

that the Company should have deducted, and he should not personally be assessed for the primary NIC due; and

c) if he did receive salary without deduction, he did not do so knowing that the Company had wilfully failed to account for the deductions; he was not a tax expert and relied on his payroll staff.

8. Before us, Mr Febrey was represented by his accountant, Mr Robin Haigh. Mr Haigh is a chartered accountant and director of Trenfield Williams Ltd, and was formerly the Company's independent accountant. Mr Paul Shea of the Appeals & Reviews section of HMRC appeared for them. The representatives produced an agreed bundle of copy documents, and presented us with a bundle of authorities. They called three witnesses to give oral evidence: Mr Febrey himself, Mrs Susan Jane Elston, the officer of HMRC responsible for the issue of the PAYE direction and s.8 NIC decision notice, and Mr Paul Henry, another officer of HMRC, who issued a closure notice under s.28A (1) and (2) of the Taxes Management Act 1970 ("TMA") following the enquiry into Mr Febrey's self-assessment return for 2007/08, and amended his self-assessment return for that year.

Background

9. For completeness and to assist the reader, we propose to set out the background to the appeal. It may quite shortly be described in the following way. In his self-assessment tax return for 2007/08, Mr Febrey returned income from employment with the Company of £300,000, and tax deducted therefrom of £111,414.40. In the section of the return requesting "any other information", he said:

> "My only income in 2007/08 was a very substantial salary from Febrey Ltd, of which I was a director but in which I was not a shareholder … Febrey Ltd went into administration in March 2008 and all its records are in the hand of the administrators.
>
> Unfortunately, I have been unable to procure a P60 from them and so I do not have precise pay and tax deducted figures to include in this Return. I do know, however, that my pay was taxed fully at source using the appropriate PAYE code (522L) and so, as it was my only source of income for the year, I will have been taxed fully and correctly at source and there will not be a balance of tax either owing or overpaid arising from this return. Therefore, there will be no tax consequences because of any error in the figures I have included here."

10. Whilst Mr Febrey stated that he had "been unable to procure a P60 from [the administrators of the Company]", before us he admitted, and we find, that he never asked Grant Thornton, the administrators and subsequently liquidators of the Company, for a form P60. For reasons which appear later in our decision, even had he made such a request, Grant Thornton could not have supplied the form.

11. Following receipt of the return for 2007/08, HMRC's actions and Mr Febrey's response to them took the following form.

12. Not being satisfied with the statement of "any other information" contained in Mr Febrey's tax return for 2007/08, and since there was no form P14 or any entry on the Company's form P35 for that year for him, on 7 January 2010 HMRC in the form of Mr Henry decided to open an enquiry into the return.

13. On further investigation, HMRC found what they considered to be underdeclarations of tax by Mr Febrey for 2005/06 and 2006/07, so that on 30 March 2011 they raised the assessments for the tax allegedly underdeclared in those years. He appealed the assessments on 28 April 2011.

14. On 10 October 2012 HMRC made a direction under reg.72(5) of ITPR and issued a s.8 NIC decision whereby the Company was not required to account for underdeducted tax and NIC on relevant payments to Mr Febrey in all three years in point. He appealed the direction and decision on 7 November 2012.

15. On 14 December 2012 HMRC withdrew the PAYE tax credit in accordance with the reg.72(5) direction of 10 October in relation to the 2005/06 and 2006/07 assessments.

16. On 21 December 2012 HMRC closed the 2007/08 enquiry, and amended Mr Febrey's tax return for that year. He appealed the closure notice and amendment notice on 5 January 2013, at the same time requesting a review of the closure and amendment notices.

17. HMRC acted on his review request but, on 8 February 2013, issued a statutory conclusion upholding the closure notice and amendment to his 2007/08 return, whereupon his appeal to the tribunal against all the assessments, return amendments, decisions and notices then in place proceeded.

Legislation

18. The legislation in point in the appeal, in so far as it relates to matters in dispute, is that referred to in para 1(B) and (C) above.

19. Before turning to it, we think it appropriate to mention at this stage that under self-assessment there are formal procedures for an enquiry into a tax return, s.9A TMA. HMRC cannot commence an enquiry into a taxpayer's affairs more than 12 months after the due date for submission of a return, unless the return was submitted late, in which case the 'enquiry window' closes 12 months after the end of the calendar quarter in which the return was actually submitted, ss.28A(7) and 59B(1) TMA. If an enquiry is not raised within the specified time limit, HMRC are not able to collect any tax subsequently found to be due unless the conditions for a 'discovery' are fulfilled, s.29 TMA. And, by s.29(3) TMA, if an officer 'discovers' that an assessment has become insufficient, he may make a discovery assessment.

20. In the present case, HMRC accepted that Mr Febrey filed all his tax returns on time, so that by the time the enquiry into his return for 2007/08 was filed they were out of time to deal with matters relating to his tax affairs for 2005/06 and 2006/07 by way of amendment of his tax return. Consequently, they were forced to use the

'discovery' provisions in s. 29 TMA. Mr Haigh made no claim that HMRC had not made a 'discovery' which led them to raise the tax assessments for 2005/06 and 2006/07, and we are satisfied that the requirements of TMA for the two assessments in question were met.

21. In relation to the contentious income tax aspects of the appeal, the relevant legislation is to be found in reg. 72 of ITPR. It provides for HMRC to direct recovery from an employee of tax not deducted by the employer if certain conditions are met. The relevant parts of the regulation read as follows:

> "(1) This regulation applies if-
>
> (a) it appears to the Inland Revenue that the deductible amount exceeds the amount actually deducted, and
>
> (b) condition A or B is met.
>
> (2) In this regulation and regulations 72A and 72B-
>
> 'the deductible amount' is the amount which an employer was liable to deduct from relevant payments made to an employee during that tax period;
>
> 'the amount actually deducted' is the amount actually deducted by the employer from relevant payments made to that employee during that tax period;
>
> 'the excess' means the amount by which the deductible amount exceeds the amount actually deducted
>
> …
>
> (4) Condition B is that the Inland Revenue are of the opinion that the employee has received relevant payments knowing that the employer wilfully failed to deduct the amount of tax which should have been deducted from those payments.
>
> (5) The Inland Revenue may direct that the employer is not liable to pay the excess to the Inland Revenue.
>
> (5A) Any direction under paragraph (5) must be made by notice ('the direction notice'), stating the date the notice was issued, to-
>
> …
>
> (b) the employee if condition B is met."

22. The tribunal's powers in relation to an appeal against a reg. 72 decision are to be found in reg.72C:

> "(1) An employee may appeal against a direction notice under regulation 72(5A)(b)-
>
> (a) by notice to the Inland Revenue,

(b) within 30 days of the issue of the direction notice,

(c) specifying the grounds of the appeal.

(2) For the purpose of paragraph (1) the grounds of appeal are that-

(a) the employee did not receive the payments knowing that the employer wilfully failed to deduct the amount of tax which should have been deducted from those payments, or

(b) the excess is incorrect.

(3) On an appeal under paragraph (1) that is notified to the tribunal, the tribunal may-

(a) if it appears that the direction notice should not have been made, set aside the direction notice; or

(b) if it appears that the excess specified in the direction notice is incorrect, increase or reduce the excess specified in the notice accordingly".

23. In relation to the NIC aspects of the appeal, two sections of primary legislation and one of secondary legislation are in point. By para.3(1) of the Social Security Contributions and Benefits Act 1992 ("SSCBA") an employer is required to account for the primary NIC due on an employee's earnings.

24. By s.8(1)(c) of SSCTFA an officer of the Board shall "decide whether a person is or was liable to pay contributions of any particular class and, if so, the amount that he is or was liable to pay".

25. And by reg.86 (1)(a)(ii) of the SSCR, where HMRC are satisfied that an employee knew that his employer had failed to pay the primary NIC, the employer is not required to account for them. That sub-regulation is in the following terms:

"As respects any employed earner's employment

(a) where there has been a failure to pay any primary contribution which a secondary contributor is, or but for the provisions of this regulation would be, liable to pay on behalf of the earner and

…

(ii) it is shown to the satisfaction of any officer of the Board that the earner knows that the secondary contributor has wilfully failed to pay the primary contribution which the secondary contributor was liable to pay on behalf of the earner and has not recovered that primary contribution from the earner; or

the provisions of paragraph 3(1) of Schedule 1 to the Act (method of paying Class 1 contributions) shall not apply in relation to that contribution."

26. Where HMRC consider reg.86 to apply, the normal method of the employer paying Class1 NIC contributions does not apply. Consequently, HMRC issue a decision notice under s. 8(1)(c) of SSCTFA to assess the unpaid primary contributions on the employee personally.

27. The tribunal's jurisdiction in cases such as the present one is to be found in s.50 of TMA, the relevant subsections whereof read as follows:

> "(6) If, on an appeal notified to the tribunal, the tribunal decides-
>
> (a) that the appellant is overcharged by a self –assessment;
>
> (b) …
>
> (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.
>
> (7) If, on an appeal notified to the tribunal, the tribunal decides-
>
> (d) that the appellant is undercharged to tax by a self-assessment;
>
> (e) …
>
> (f) that the appellant is undercharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be increased accordingly.
>
> (7A) If, on an appeal notified to the tribunal, the tribunal decides that a claim or election which was the subject of a decision contained in a closure notice under section 28A of this Act should have been allowed or disallowed to an extent different from that specified in the notice, the claim or election shall be allowed or disallowed accordingly to the extent that the tribunal decides is appropriate, but otherwise the decision in the notice shall stand good.
>
> …
>
> (10) Where an appeal is notified to the tribunal, the decision of the tribunal on the appeal is final and conclusive.
>
> (11) But subsection (10) is subject to-
>
> (g) sections 9 to 14 of the TCEA [Tribunals, Courts and Enforcement Act] 2007,
>
> (h) Tribunal Procedure Rules, and
>
> (i) the Taxes Acts."

The facts

28. We then turn to the factual aspects of the appeal, and should first mention that we were provided with a statement of facts said not to be in dispute. With one exception, we accept it. We shall introduce the exception at para.30 below and, notwithstanding it is said to be agreed, shall substitute our own finding of fact for it at para.43.

29. The Company was incorporated on 11 May 1988, and traded as a construction company. Its issued share capital consisted of 100 £1 ordinary shares. Ninety nine of those shares were at all relevant times held by Ms Ann Rogers, Mr Febrey's partner of over twenty years and the mother of his children. The remaining share was held by Mr Febrey as bare trustee for Ms Rogers. On 1 July 2001, when Ms Rogers resigned as a director of the Company, Mr Febrey became its sole director. He described Ms Rogers as having no active role in the Company in the period with which the appeals were concerned.

30. In the agreed statement of facts, it was said that Mr Febrey and Ms Rogers separated in "autumn 2006 after 22 years together". That statement contrasts with an admission in a letter from Trenfield Williams to Mr Henry of 16 November 2010 in which Mr Haigh said, "In fact the 'separation' was in April 2006". It also contrasts with a claim made by Mr Febrey in his evidence in chief (see para.32 below) that the relationship "failed irreparably" in spring 2007. We shall deal with that conflicting evidence at para.43 below.

31. In 1988 Mr Febrey and Ms Rogers formed a second company, Febrey Concrete Structures Ltd ("FCS"). Each of them held 50 per cent of its issued share capital. Ms Rogers was the only director of FCS until she resigned on 25 April 2007, and Mr Febrey was appointed to replace her. Mr Febrey's evidence was that FCS was formed to take up contracts which were "risky", and which might have imperilled the Company.

32. In his witness statement, which formed his evidence in chief, Mr Febrey explained that "before 2007/08 it had always been our practice to have minimal salaries from what I regarded as "our" business [i.e. the Company] and to take any further reward for our activities as a function of the Company's varying profitability. In other words, Ms Rogers, as the Company's sole shareholder was allocated dividends in accordance with the Company's legitimate ability to recognise them…[T]his principle and practice remained in force until spring 2007 at which time our relationship, which had been floundering, failed irreparably." Mr Febrey added that FCS "evolved to become the conduit through which Ms Rogers and I could share equally some of the income generated by [the Company]. Straightforwardly, since Ms Rogers was [the Company's] only shareholder, there would be more higher rate personal tax to pay if all the dividend income were hers than if dividend income was shared with me and FCS allowed dividends to be shared in this manner".

33. Consequently, Mr Febrey went on to claim that neither he nor Ms Rogers received any significant "employment income" from the Company before spring 2007. He further claimed that there was no change to the arrangements in place before 6 April

2005 in the following two tax years. For all the reasons indicating to the contrary set out, below, we do not accept that further claim.

34. As a result of his changed circumstances following separation from Ms Rogers, Mr Febrey said that he used his "executive authority" as the Company's director to create a service contract for himself "to provide some redress if I were to be dismissed". Significantly in our judgment, he added, "I knew the fact that I was to receive a substantial salary meant, of course, that there would be commensurate tax and national insurance deductions and liabilities. I was well aware of this but not of the associated administrative protocols and did not involve myself with these because, at this stage [the Company] employed relevant, qualified, administrative staff as indeed it had done for some years. My expertise lies in technical construction matters. I have never had any training as a payroll or tax administrator and my knowledge of these matters is superficial. Therefore, I simply gave instructions that my new salary should be handled correctly."

35. In his evidence, Mr Henry said that at a meeting with the Company's in-house accountant, Mr Hope, he was told that Mr Febrey did not personally operate the Company's Sage accounting system, but that he, Mr Hope, dealt with accounting matters on the basis of instructions from Mr Febrey. From Mr Febrey's oral evidence and all the documents before us, we find that Mr Hope and the other member of the Company's accounts staff did not act on their own initiative, at least in so far as Mr Febrey's personal finances were concerned. We might add that all the documentary evidence adduced pointed to the in-house staff having dealt competently and correctly with matters entrusted to them.

36. The substantial salary Mr Febrey awarded himself was £300,000 per annum. He explained that he included that sum in a written service contract he himself prepared using as a basis a precedent downloaded from the internet. He said he was unable to locate his copy of the service contract, believing it to have been amongst the documents seized by Grant Thornton on their appointment as administrators of the Company. Mr Henry sought to obtain a copy of the contract from Grant Thornton, only to be told that they had never seen one. On the basis of the evidence presented to us we have some doubt as to whether Mr Febrey ever prepared a written service contract but, as its existence was an agreed fact, we proceed on the basis that he did so. We further find that Mr Febrey never informed the in-house accounts staff of the terms of the service contract, or even of its existence, and it necessarily follows from that finding that they were never instructed how to deal with his salary under the contract. Following on from our finding that Mr Febrey and Ms Rogers separated in April 2006, for the reasons set out at para 43 below we also find that Mr Febrey entered into his service contract with the Company in the spring of 2006.

37. The Company traded profitably until 2007 when it ran into difficulties with its bank, Bank of Scotland. (We are unable to say whether that was a reference to the Royal Bank of Scotland or to what is now HBOS, as we were given no more detailed information as to its identity). The Company called in PwC to prepare a report on it. In it PwC recommended that the Company be allowed a period of 12 months in which to obtain alternative banking facilities. The bank was not prepared to act on that

recommendation and, on 15 February 2008, called in Grant Thornton as administrators. They considered the Company to be insolvent. On 21 November 2008, the bank put the Company into liquidation, and two partners in Grant Thornton were appointed joint liquidators.

38. In his tax return for 2005/06 Mr Febrey returned a salary from the Company of £4,900, less tax of 10p; and for 2006/07 he returned £5,050, less tax of £1.50. In both returns he untruthfully said he was not a director of the Company. The return for 2007/08, as we earlier mentioned, disclosed his salary as £300,000 with "tax taken off pay" of £111,414.40. Yet again he untruthfully stated that he was not a director of the Company.

39. Mr Febrey was included in the form P35 returned by the Company for 2005/06. However, his name did not appear in the form for 2006/07, nor in that for 2007/08, the latter being returned by Grant Thornton. In those circumstances, even had Grant Thornton been asked to produce a form P60 for him (see para 10 above), they could not have done so.

40. Mr Henry visited Grant Thornton on 1 April 2010 to inspect the Company's financial records. Amongst the documents they produced to him was a copy of the director's loan account for the period from 1 April 2007 to 15 February 2008. It showed Mr Febrey's cumulative drawings in the period to have been £395,792, but that figure to have been reduced by 11 journal credits totalling £365,000. The journal credits consisted of a single one of £235,000 accompanied by the narrative "M Febrey salary to 6 April 2007", followed by ten credits each of £13,000 described as "MF [Michael Febrey] salary m/e [months ended] 5 May 2007 to 5 February 2008". Mr Henry was unable to ascertain when the journal credits were made, but from the Sage transaction numbers he deduced that they were made between 17 December 2007 and sometime in January 2008.

41. Mr Febrey claimed not to know who had made the journal entries referred to above, but maintained that he himself had not made them. We are satisfied that they were not made by members of the Company's in-house accounts staff and, since the only other person who had access to the records was Mr Haigh, by a process of elimination we conclude that it was he who made the entries. In so concluding, we have taken particular note of a submission he made that the staff were not party to confidential information about Mr Febrey's income (see para 62 below).

42. In a letter of 15 October 2009 to the liquidators of the Company, dealing with the reduction in the director's loan account, Mr Febrey said:

> "I had simply drawn the remuneration that I was contractually entitled to when I provided services to the Company and so relevant transactions took place over an extended period, not during the six weeks running up to 15 February 2008."

and

> "I provided services to the company and was entitled to indeed draw appropriate remuneration for those services as time went by over the entire period since September 2005."

43. As Mr Febrey confirmed in evidence that he did not enter into the service contract with the Company providing for his salary of £300,000 p.a. until after he separated from Ms Rogers, and the journal entry showing his salary in the year to 5 April 2007 of £235,000 represents approximately five-sixths of £300,000, in our judgment the entry bears out Mr Haigh's statement in correspondence that the separation of Mr Febrey and Ms Rogers occurred in April 2006 (see para. 36 above). We find that the separation did occur in that month; that Mr Febrey was paid approximately five-sixths of his agreed salary in the year to 5 April 2007, and that payment was made gross.

44. The director's loan account further revealed that in each of the 38 weeks commencing with that beginning 2 April 2007 a payment of £600 was made to Ms Rogers and one of £400 to Mr Febrey.

45. Mr Henry had two meetings with Mr Febrey, one on 9 April 2010 and the other on 17 May 2011. In them, Mr Febrey claimed that, following the separation and in order to provide security for himself, he had drawn up his service contract with the Company which entitled him to £150,000 (sic) per annum. Mr Febrey further said that he had been paid two years' salary, presumably at the rate just mentioned, but was unable to explain why, since he claimed to have been paid in accordance with his service contract, PAYE had not been operated on the payments made to him. In reliance on the note included in his return for 2007/08 (see para 9 above), Mr Henry enquired how Mr Febrey knew that his salary for that year had been taxed, only to be told that, although he had given no instructions to the Company's in-house accountant, he "assumed" the Company's accounts staff would have dealt with it under the PAYE system. In reliance on the contents of Mr Febrey's tax return for 2007/08 and his oral evidence, we find that the annual salary he awarded himself was £300,000.

46. In order to obtain certain missing documents he required, Mr Henry paid a further visit to Grant Thornton on 30 January 2012. He was told that the firm had written to Mr Febrey on 7 October 2008 asking why the director's loan account had been reduced in the period leading to the firm's appointment as administrator. (We shall return to the matter of that reduction shortly – see para. 51 below). Following a reminder, Mr Febrey responded saying that he had drawn a salary for his services. Although the liquidators subsequently threatened to bring proceedings to recover the amount of the reduction in the director's loan account, they did not carry out that threat.

47. In a written response of 20 July 2009 to a further letter from Grant Thornton about the loan account, Mr Febrey claimed to have withdrawn money from the Company as remuneration for the services he provided. He admitted that the tax treatment of the withdrawals may have been incorrect at the times the monies were withdrawn, and stated that the adjustments made to the director's loan account were to remedy the earlier incorrect treatment of the withdrawals.

48. At para. 45 above, we recorded that Mr Febrey told Mr Henry that, although he had given no instructions to the Company's in-house accountant, he "assumed" that his salary would have been dealt with under the PAYE and NIC system. He offered no basis for that assumption beyond his recognition that the accountant was competent and knew how to deal with such matters. We then have the letter of 20 July 2009, referred to in the last preceding paragraph, in which Mr Febrey admitted that the tax treatment of the monies he withdrew from the Company "may have been incorrect at the time the monies were withdrawn". It was thus plain, and we find, that Mr Febrey was aware that the salary paid to him by the Company should have been paid under deduction of tax and NIC, but was not so paid.

49. The last corporation tax return and accounts made by the Company covered the 12 month period ending on 30 September 2005, so that HMRC did not have any direct information as to how Mr Febrey's drawings and salary were treated in the accounts for subsequent accounting periods.

50. In the period after events with which we have just dealt, Grant Thornton produced to Mr Henry a copy of the Company's draft accounts for the 18 month period ending 31 March 2007, as prepared by Trenfield Williams. They included the director's loan account, and Trenfield Williams' end of period journal adjustments. Mr Haigh later told Mr Henry that those accounts were based on information extracted from the trial balance on the Company's Sage accounts system and were prepared solely for presentation to the Bank of Scotland; they should not be relied on for any other purpose. However, in the absence of any other records or evidence, Mr Henry did rely on the accounts for the purpose of assessing Mr Febrey to tax. In our judgment, in those circumstances he was entitled to do so.

51. The director's loan account showed that towards the end of that period sums were credited to Mr Febrey totalling £355,281, whereas the balance on the account as per the draft Company accounts, following various period end journal adjustments including an inter-Febrey company transfer of £80,083, stood at a mere £947. The adjustments also included £120,000 posted as consultancy fees to FCS, and £173,000 posted as a dividend. Mr Henry deducted £80,083 from £355,281 to arrive at unexplained drawings of £275,198, which he rounded down to £275,000.

52. In relation to the consultancy fees, we were told and accept that the last tax return submitted by FCS covered the year ending on 31 July 2004. Consequently, FCS never returned to HMRC the consultancy fees said to have been paid to it by the Company in the 18 month period ending on 31 March 2007. Nor did Mr Febrey declare any consultancy fees as income in his self-assessment returns for either the tax year 2005/06, or that of 2006/07.

53. Mr Henry was unable to find a minute of a board meeting or any other evidence in the Company's records to show that it declared a dividend in the period covered by the draft accounts. Nor was he able to discover any evidence of a dividend being paid to Ms Rogers or, assuming it to have been declared, of her authorising it to be credited to Mr Febrey. No evidence was adduced at the hearing as to any of those matters and, in its absence, viewed against the background of the whole of the accountancy

evidence adduced, we find that no dividend was declared, and thus could not have been paid to Ms Rogers.

54. It was on that basis that Mr Henry concluded that Mr Febrey had drawn remuneration from the Company for his services, and that the aggregate amount of that remuneration was included in the journal credits of £275,000 in the director's loan account in the period to 15 February 2008. In the absence of any evidence to show that that conclusion was incorrect, we agree with Mr Henry, and thus find, that in the period covered by the draft accounts, Mr Febrey drew remuneration from the Company as shown in the journal credits as consultancy fees and dividend. Mr Henry further noted that the director's loan account for the period to 31 March 2007 showed there to be a continuous pattern in Mr Febrey's drawings from the Company, a pattern which continued throughout the later period during which Mr Febrey claimed to have been remunerated under his service contract.

55. Having considered all the evidence before him, on 21 December 2012 Mr Henry decided to close the enquiry into Mr Febrey's 2007/08 self-assessment return, and to amend the return by increasing Mr Febrey's employment income from £300,000 to £365,000 to reflect the figure in the Company's own records. (As we mentioned earlier, at the hearing HMRC did not pursue the matter of that increase, so that we need not consider it further).

56. As the time limit for the issue of a notice under s.9A of TMA had passed for Mr Febrey's returns for 2005/06 and 2006/07, Mr Henry proceeded to raise discovery assessments on Mr Febrey for those years under s. 29 TMA based on the director's loan account balance of £355,281. Initially, he allocated £120,000 of that sum to the earlier year, and £236,000 to the later one. However, since the figure of £355,281 included payments totalling £80,083 made by the Company on behalf of The Bentley (Clifton) Ltd, another company owned by Mr Febrey, Mr Henry subsequently decided that the Company could have posted those payments to an inter-company account, and therefore reduced the basis of the assessments to a total of £275,000, allocating £103,000 to the earlier year and £172,000 to the later one. He then raised the s.29 assessments for 2005/06 and 2006/07 in the sums of £33,157.50 plus NIC of £3,767, and £60,532.40 plus NIC of £4,520.15 respectively. And to collect the tax for 2007/08 underdeclared in Mr Febrey's self-assessment return, he amended the return to show tax underdeducted of £137,412.80, at the same time closing the enquiry into the return. As we mentioned earlier, the last mentioned figure was later reduced to £111,414. That figure carried a liability to NIC which, as we also mentioned earlier, was not disclosed to us. We are satisfied that the allocation of the income to the two years in question was fair and reasonable.

57. Using the figures determined by Mr Henry, Mrs Elston determined the arrears of PAYE and NIC due to HMRC and, on 9 June 2011, wrote to Mr Febrey informing him that the PAYE tax and NIC underdeducted by the Company might be sought from him personally through a direction under reg.72(5) and a decision under s.8 of SSCTFA. He was invited to provide evidence as to why that course should not be pursued.

58. Mr Febrey responded by denying all knowledge of the Company's failure to account for PAYE tax and NIC due in respect of monies he had been paid by it. In the absence of any evidence showing that appropriate deductions of tax and NIC had been made on each occasion Mr Febrey had drawn money from the Company which appeared on the director's loan account, and there were no P11 working sheets, payslips, and forms P60, Mrs Elston considered the requirements of the ITPR had not been met. She also noted that (1) many of the sums shown in the director's loan account as withdrawals were round figure sums – an unlikely fact if PAYE and NIC had been applied to them; and (2) in the period to 15 February 2008 11 round sum journal credit entries totalling £365,000 had been made which did not appear to her to represent net amounts of salary. That led Mrs Elston to conclude that Mr Febrey had received the payments knowing that his employer, the Company in which he had a controlling position as its only director, had wilfully failed to deduct the correct amount of income tax and NIC. She therefore recommended that a PAYE direction and a s.8 decision notice be issued. Her recommendation was accepted and the direction and decision issued on 10 October 2012.

Submissions for the Appellant

59. Mr Haigh dealt with events concerning the tax years 2005/06 and 2006/07 separately from those concerned with 2007/08. In relation to the two earlier years, he submitted that HMRC alleged that Mr Febrey received taxable income which he simply did not receive; his employment income was shown fully and correctly on his self-assessment returns and was below the thresholds for any liability to PAYE and NIC. Since there was no liability, there could be no question that the Company failed to make appropriate deductions, or that liability should attach to Mr Febrey personally.

60. In relation to the year 2007/08, Mr Haigh contended that in that year entirely different business and personal circumstances prevailed from those in the earlier two years, and that Mr Febrey did receive substantial employment income which he dealt with on his tax return as best he could, providing estimated figures and an explanatory note. The Company was in liquidation before his return for the tax year was filed, and neither the administrator nor the liquidator provided him with a form P60. The estimated entries in the tax return were made in the belief that, since correct PAYE deductions had been made at source, there would have been no significant error in any personal tax liability revealed by the return.

61. Until 5 April 2007, Ms Rogers and Mr Febrey deliberately drew minimal salaries from the Company, and took the majority of the personal income that it provided for them as dividends. In order to achieve personal tax efficiency, some of their income was paid first as a consultancy fee to another company in which Mr Febrey was an equal shareholder. After 30 September 2005, Mr Febrey and Ms Rogers continued to draw from the Company as their needs and its resources allowed and their drawings were always identified as dividends, exactly as before. HMRC appeared to accept what had gone before as being acceptable. The Company's draft accounts to 31 March 2007 showed that it had ample dividend paying capacity throughout that period. The accounts were prepared on what Mr Haigh described as the usual "going

concern" assumption and, in his submission, there was no reason during the period they covered and some months afterwards for the Company to suspect that that assumption might be inappropriate. Neither the Company's propriety nor its legitimate ability to pay dividends up to 1 April 2007 had ever been questioned, nor was Mr Febrey aware of the Company's liquidator ever having raised the matter.

62. Mr Haigh further submitted that there were no grounds whatsoever to distinguish Mr Febrey's and Ms Rogers' behaviour in 2005/06 and 2006/07 from what had been their identical behaviour during the preceding 17 years. The Company's in-house accountant had always been restricted to recording their joint and individual drawings on a single account, the "family account", otherwise designated as the director's loan account, at the time of extraction. They regarded the amount and definition of their incomes as a confidential matter, details of which should be withheld from the Company's accounts staff. It was, however, necessary for the staff to deal with the very modest payroll entries that were appropriate to their small salaries. Mr Haigh observed that Mr Febrey's salary appeared to have been dealt with correctly for 2005/06. Why his name was omitted from the 2006/07 year-end return he could not say, but maintained that it was an easy oversight when the amount involved was so small and did not affect the Company's PAYE liability.

63. Following the irretrievable breakdown of the relationship between Ms Rogers and Mr Febrey, Mr Haigh maintained that Mr Febrey made arrangements intended to afford him greater protection in adverse business and personal circumstances. That affected his tax liability in 2007/08. He arranged to be paid a large salary, and gave instructions to the Company's professionally qualified accounting staff that it should be dealt with correctly.

64. Mr Haigh further explained that both Ms Rogers and Mr Febrey continued to draw monies from the Company as they had before, although then separated. Monies extracted from the Company as drawings were just that; they did not constitute income at that stage. In their eyes, the Company continued to be profitable. Indeed, the administration statement prepared by Grant Thornton indicated that, on a going concern basis, the Company had positive net worth of £1,195,305 when the Bank of Scotland withdrew its support. (We find that as an additional fact). The going concern basis became inappropriate because of withdrawal of that support. Mr Febrey was now aware that money Ms Rogers drew after 31 March 2007 continued to be debited to the "family account", even though it was obvious that the account was identified as "AR current account" in the trial balance, the basis of the draft accounts prepared by Mr Haigh.

65. It was clear, in Mr Haigh's submission, that HMRC had overstated the money Mr Febrey extracted from the Company between 1 April 2007 and Christmas 2007 by at least the £600 a week the Company records patently identified with Ms Rogers. What was more, the "director's account" prepared by the administrator clearly associated £41,400 extractions from the Company by Ms Rogers with Mr Febrey; HMRC should not seek to identify that sum as his income.

66. HMRC had sought to attribute meaning to certain credit entries to the "director's loan account". Mr Haigh maintained that Mr Febrey did not understand, and could offer no explanation for the credit of £235,000 shown on 6 April 2007 (in the 2007/08 tax year) identified as "M Febrey salary to 6 April 2007". The entry was not made by Mr Febrey nor on his instruction; it had no relationship with any reality that he was aware of. Mr Febrey never received a net salary payment of that amount.

67. Mr Haigh further contended that Mr Febrey gave explicit instructions to the Company's accounts department that, from 6 April 2007, he should receive a salary of £300,000 a year, and that the relevant net pay should be credited to his account with the Company. The monthly credits each of £13,000 evidenced that. In Mr Haigh's further submission it followed that if Mr Febrey drew "too much" and failed to come to an accommodation with Ms Rogers that would have been to their mutual benefit, he might have had a residual debt to the Company, even after Ms Rogers's extractions were attributed correctly to her.

68. It had been put to Mr Febrey that, as the Company's sole director, even though not its shareholder, he was required to understand, be fully aware of, and play an active part in the Company's PAYE operation and detailed compliance. That suggestion was based in reliance on the judgment of Nolan J (as he then was) in *The Queen v CIR ex parte Cook and Keys* [1987] CO 1357 and 8/85. The facts in that case were that in each of the relevant accounting periods the taxpayers, as directors of a company, drew sums on account of salary to which the PAYE system was applied. Then, when the year end accounts were drawn up, they awarded themselves additional remuneration which was credited to their current accounts in the company's books. In the event the employer company went into liquidation and failed to account for tax on the director's remuneration. HMRC sought to recover the tax from the directors personally on the basis that they knew that the company had wilfully failed to deduct the tax which should have been deducted from those payments. Mr Haigh submitted that Nolan J contradicted HMRC's assertion in the present case that Mr Febrey knew that tax and NIC had not been accounted for on sums paid to him. The judge observed that "I said that, …, the word 'knowing' means what it says and does not mean 'ought to have known' or 'should have been suspicious' or any other weakening of knowledge." Mr Haigh observed that, with hindsight, it might be said that Mr Febrey was insufficiently careful about matters of tax compliance and should have treated this as a priority. But at the time business and personal pressures were overwhelming him. That was very different from suggesting that Mr Febrey was guilty of any wilful or intentional default. Furthermore, Mr Haigh submitted, the circumstances in *Cross and Keys* could very easily be distinguished from the present case. In the former, there had been an extended dialogue over some years between the company, its advisers, and the Inland Revenue, about tax underdeductions. In the present case, there was simply an allegation of knowledge levelled some years after the event when Mr Febrey no longer had access to any information that could help him rebut it.

69. With regard to the omission of Mr Febrey from the Company's forms P35 for 2006/07 and 2007/08, Mr Haigh acknowledged that that was a material, rather than an insignificant, error. But since Mr Febrey had nothing to do with production of either form, had no supervision of the associated returns, was not invited to be involved, and

since they were dealt with long after he had access to any relevant records, Mr Haigh contended that he could hardly be expected to comment further.

70. In Mr Haigh's further submission, Mr Febrey did not have actual knowledge that the Company had wilfully under declared his liability to tax and NIC; he left administrative matters to the Company's in-house accountant. He simply did not have time to deal with PAYE matters, and took on trust that they had been properly dealt with.

Submissions for HMRC

71. Mr Shea opened his submissions by claiming that the amount of £355,281 shown as drawn from the Company in the 18 month period to 31 March 2007, i.e. that covered by the draft accounts, less £80,083 discounted by HMRC, represented Mr Febrey's salary, on which he was liable to tax and NIC. HMRC had rounded down the resultant figure of £275,198 to £275,000 for present purposes. Mr Febrey had produced no evidence to show entitlement to the sum described as consultancy or to that called dividends.

72. The director's loan account in the Company's accounts was just that – an account for Mr Febrey as the sole director of the Company. Any withdrawal entries in that account must, in Mr Shea's submission, relate to monies paid to Mr Febrey, and to no one else. It was significant that Ms Rogers' name appeared nowhere in the forms P35 submitted to HMRC by the Company; it confirmed that she was a mere investor, and entitled to nothing but dividends.

73. There was no evidence to show that the journal entries relating to the director's loan account in the Company's books had been credited to that account without the authority of Mr Febrey as director.

74. Nor was there any evidence of the voting of the dividend credited to the director's loan account or, assuming a dividend was declared, of Ms Rogers authorising the amount thereof being credited to the loan account.

75. Mr Shea disclosed that HMRC had some difficulty in understanding the nature of the entry "consultancy fees" in the journal entries, but contended that it was reasonable to infer that it was Mr Febrey's income; it was nothing more than a book entry.

76. In relation to year 2007/08, Mr Shea noted that, in the director's loan account for the period between 1 April 2007 and 15 February 2008, Mr Febrey was shown as having received payments from the Company of £395,792, and towards the end of the period there were a number of journal entries including 11 items crediting salary of £365,000 to the account.

77. In response to questions contained a letter from the liquidators of the Company, about the reduction in the director's loan account, Mr Febrey said that he had "simply drawn the remuneration that I was contractually entitled to", that the relevant transactions took place over a period of time, and not merely during the period shown

in the journal entries. Mr Shea submitted that Mr Febrey's response coupled with the journal entries made plain that Mr Febrey considered he had received a salary of £365,000 from the Company. However, HMRC were prepared to proceed on the basis that he should only be assessed in the sum of £300,000.

78. The fact that HMRC chose not to consider a possible liability to tax in years earlier than 2005/06 should not be accepted as indicating that Mr Febrey had correctly disclosed his liability to tax in those years.

79. In treating the directions relating to income tax and NIC as one, Mr Shea further submitted that Mr Febrey did receive his salary from the Company knowing that it had wilfully failed to deduct the appropriate sums from its payments. In reliance on a number of passages in the judgment of Nolan J in *Cook and Keys*, to which we shall refer in our discussion and conclusion, he maintained that companies could not for the purpose hide behind their professional advisers. Mr Febrey had admitted in evidence that he was aware that his salary should have been paid to him under deduction of tax and NIC; he claimed to have given instructions that he be paid through the payroll

80. In *Cook and Keys*, Nolan J accepted that "wilfully" meant "intentionally or deliberately". The judge rejected argument by the taxpayers, that, as they had little knowledge of tax themselves and relied on instructions given to their accountants and bookkeepers, they should not be held accountable for the PAYE not deducted by the company from their salaries, concluding on the basis of their state of knowledge and their responsibilities and relationship to the company, that HMRC's decision to seek unpaid tax and NIC from them was reasonable. Mr Shea submitted that, as sole director and chief executive of the Company, which ran a payroll for its employees, Mr Febrey had ultimate responsibility for ensuring that PAYE and NIC were deducted from all relevant earnings, including his own, and he was aware of that requirement. And, just as in *Cook and Keys*, the fact that Mr Febrey employed others to deal with the practical administration of the payroll did not reduce his duty as a director to ensure that the Company fulfilled its obligations. Further, he must have known that he was receiving sums from the Company which had not been the subject of deduction as he did not receive payslips showing the payments and appropriate deductions; the round nature of the payments and the irregular pattern of payment were themselves indicative of their not representing net weekly or monthly salary.

81. Mr Febrey was sole director of the Company, and he was responsible for its day to day operation. That included the operation of the payroll. The shareholder was not the employer; the Company was. Mr Febrey had power to influence how money was withdrawn from the Company. In Mr Shea's yet further submission, it was a deliberate act on Mr Febrey's part that no payroll entries for the payments made to him were prepared; if his name did not appear on the payroll, he had the power to put the matter right. He did not have to have a detailed knowledge of the operation of the payroll for that purpose. Further, the withdrawal of round sums from the Company indicated incorrect operation of PAYE.

82. In closing, Mr Shea invited us to confirm the assessments in the sums at which they stood, and to direct that the correct amount of NIC for 2007/08 be calculated. He

also submitted that we should confirm liability to the tax as assessed and the NIC as calculated fell on Mr Febrey.

Discussion and conclusion

83. In summary, HMRC's case in support of the assessments raised for 2005/06 and 2006/07 is that the amount shown as withdrawn in the director's loan account in the Company's records for the 18 month period ended on 31 March 2007 represented his salary. Consequently, they allocated the net amount withdrawn, approximately £275,000, between the two years in question in the sum of £103,000 in the earlier year and £172,000 in the later year.

84. It will be recalled that Mr Febrey claimed FCS to be the "conduit through which Ms Rogers and I could share equally some of the income generated by [the Company] (see para 32 above)". Mr Haigh explained the use of that "conduit", saying that Mr Febrey and Ms Rogers took some of their income from the Company via FCS as consultancy fees, but took the majority as dividends to "achieve personal tax efficiency". Mr Haigh further claimed that Mr Febrey had no access to financial information that would have enabled him to prove that he had accounted for the tax and NIC on all his income. We accept that Mr Febrey would not have had access to the Company's financial records following Grant Thornton's appointment as administrators, but we know of no reason why he could not have produced those of FCS. Had he done so he should have been able to satisfy us, at least in part, that the tax and NIC on the consultancy fees and dividend had been accounted for.

85. In the absence of any FCS records, we can only deal with the "consultancy" fees and the "dividend" on the basis of the evidence put before us. We are satisfied that neither item qualified for the description attributed to it in the Company's records, and since both items represented withdrawals from the director's loan account – an account for Mr Febrey as director of the Company - we find that the sum applied to each item constituted remuneration in the hands of Mr Febrey in respect of which he was liable to income tax and NIC; each ought to have been paid to him under deduction of tax, and he should have been provided with tax deduction certificates. It follows that we confirm the assessments for 2005/06 and 2006/07 in the amounts raised. We further find that no one accounted to HMRC for the tax and NIC due on the "consultancy" fees and "dividend" assessed on Mr Febrey.

86. In relation to the assessment for 2007/08, it will be recalled that Mr Febrey accepted that although he had given no instructions to the Company's in-house accountant about his new service contract, he "assumed" that the accountant (or other members of staff) would have dealt with it under the PAYE system. We regard it as implicit in that statement that Mr Febrey knew that his salary under the contract was liable to tax and NIC under the PAYE system. How the accountant was expected to know that the contract had been created without, as we earlier found, being told of its existence and terms we are unable to say. Suffice it to say that the evidence adduced clearly shows, and we find, that no tax or NIC was accounted for on the sums drawn from the Company by Mr Febrey as salary under the contract.

87. The director's loan account showed the sum of £600 per month to have been paid by the Company to Ms Rogers in 2007/08, as it had been in 2005/06 and 2006/07. Mr Haigh submitted that the sum so paid should not be taxed in the hands of Mr Febrey: it was not his income. No satisfactory explanation was offered as to why the payments in question were debited to the director's loan account. It was not the "family account" claimed by Mr Haigh, and should not have been used for anything other than its true purpose. As we earlier said, Ms Rogers was not an employee of the Company; she was its shareholder and her entitlement to income from it was restricted to receiving dividends. Any dividends should, of course, have been paid under deduction of tax, and the tax accounted for to HMRC. Since Mr Henry could find no evidence of the Company having declared a dividend or, assuming it had, of Ms Rogers having authorised to be credited to Mr Febrey, not surprisingly he concluded that it was Mr Febrey's income, and not Ms Rogers'. And it was on that basis that he amended Mr Febrey's tax return for 2007/08. In our judgment, he was correct to do so. We confirm the amendment in its entirety.

88. Having confirmed the quantum of the assessments to tax and NIC, and the amendment to Mr Febrey's 2007/08 return, we then turn to deal with the question whether, in the particular circumstances of the case, liability to the tax and NIC should fall on Mr Febrey personally. For their claim that it should do so, HMRC essentially rely on the judgment of Nolan J in *Cook and Keys*. We earlier summarised the facts of that case, and need not repeat them. We should, however, record that we have taken heed of the judge's observations that, in the context of the legislation with which we are concerned, "knowing" means what it says, and must not be read as a weakening of that meaning; and that "wilfully" can properly be applied where "there is evidence of culpability or blameworthiness or wrong, deliberately or intentionally carried out…"

89. On the facts of *Cook and Keys*, the judge held that HMRC's decision to hold the directors of the company in point in that appeal personally liable for the tax due was not so unreasonable that no reasonable body of Commissioners could have reached the conclusion they did. In so deciding, he made a number of observations and findings that are helpful to us in arriving at our decision. First, the judge noted that although it was not irrelevant that there was a "degree of insufficiency" in the discrepancies found by HMRC, they were far from showing a deliberate or wilful failure to deduct tax at the critical time. Next, he considered he could not fault HMRC's method of asking whether there was a prima facie case to answer, and then looking to see whether there was evidence to displace it. Then, in referring to "the crux of the case", Nolan J continued:

> "… the essential question, and the only one for me, is whether the Revenue had reasonable grounds for forming the opinion that the two directors did wilfully procure the company to pay their remuneration without deduction of tax, knowing the tax should have been deducted. I find it hard in the context of this particular case to separate the requirements of wilfulness and of knowledge because both seem to me to go to the intentions and knowledge of the two directors."

90. The two directors in *Cook and Keys* were described by the judge as "businessmen busily engaged in their business of selling punch-cards for computers. They were not book-keepers or accountants, still less tax experts. They instructed professional accountants to deal with the books, the accounts and the taxation liabilities of the company and of its employees and so far as the [taxpayers] were aware at tall material times their instructions were properly carried out."

91. Indeed, somewhat similarly to Mr Febrey's claim in the present context to have had no involvement in the financial affairs of the Company, Mr Cook explained his role as being purely that of a salesman, visiting customers and securing orders. Counsel for the Revenue in *Cook and Keys* submitted that claims by the taxpayers to have engaged professional accountants was not enough to exclude them from personal liability to tax. There was no suggestion that the accountants authorised the additional remuneration assessed, or arranged for the manner or time at which it should be credited to the taxpayers' accounts in their company's books, and drawn by them; those were matters in the direct control of the taxpayers, and they had provided no explanation for their failure to deduct tax from their drawings.

92. To Nolan J what was important was "the question whether there was evidence of a deliberate failure to deduct tax irrespective of precisely when it should have been deducted. I think that the Revenue were entitled to form the opinion that there was on the grounds advanced by [counsel for the Revenue as set out in the last preceding paragraph]… I think that the Revenue were right to consider the whole of the evidence before them as to the system or systems or lack of system which had been adopted over the years during which the under-declarations took place before they could form a view on the questions of wilfulness and knowledge".

93. Finally, dealing with a submission, by counsel for the taxpayers, that HMRC had failed to distinguish between Mr Cook as a pure salesman and Mr Key's close involvement in the running of the company, Nolan J observed: "The substance of the case against both Mr Keys and Mr Cook is the same, namely the continuous drawing of large sums of untaxed remuneration … I do not think that the Revenue can be faulted for failing to draw [a distinction between the two taxpayers]". It was on that basis that the judge found for HMRC

94. As did Nolan J in *Cook and Keys*, in the present case we find it difficult to separate the questions of wilfulness and knowledge because both go to the intentions and knowledge of Mr Febrey. We do not regard the engagement of professional accountants by the Company as sufficient to exclude Mr Febrey from personal liability to tax. He advanced no claim that the accountants authorised the remuneration on which he has been assessed, or arranged for the manner or time at which it should be credited to the director's loan account in the Company's records, and drawn by him. As sole director had full control of the Company, and he provided us with no explanation for its failure to deduct tax from the sums shown in the loan account as paid to him. We find that there was a deliberate failure to deduct tax on the payments made, and Mr Febrey knew of that failure. The fact that he was not responsible for maintaining the Company's records, and entrusted that matter to its in-house accountant, avails him nothing.

95. In reaching that conclusion, we have considered the whole of the evidence before us. We should particularly record that we have taken into account all the submissions of Mr Haigh, but are unable to accept that those with which we have not dealt in detail advance Mr Febrey's case.

96. We hold that Mr Febrey received payment from the Company of the sums at issue in the appeal knowing that the Company wilfully failed to deduct the amount of tax and NIC which should have been deducted from those payments. Subject to the matter mentioned in the next following paragraph, we dismiss the appeal in its entirety.

97. In the event that the parties are unable to agree the NIC payable by Mr Febrey on his income for 2007/08 within one month of the release date of this decision, we direct that either party be at liberty to apply to the tribunal to restore the appeal to the hearing list for determination of the contributions in question.

98. 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.

DAVID DEMACK
TRIBUNAL JUDGE

RELEASE DATE: 2 May 2014