[2016] UKFTT 0142 (TC)

TC04927

Appeal number: TC/2013/03058
TC/2013/03061

INCOME TAX AND NATIONAL INSURANCE – Recovery of PAYE income tax and Class 1 National Insurance from employee/shareholder/ director of company – reg 72(5) Income Tax (Pay As You Earn) Regulations 2003 – s 8(1)(c) Social Security Contributions (Transfer of Functions, etc.) Act 1999 – Whether moneys were salary or dividends – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

VINOD PARMAR **BHAWNA PARMAR**	**Appellants**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MS AMANDA DARLEY

Sitting in public at London on 6 August 2014 and 10 February 2016

Mr D Doshi of Doshi & Co Accountants and Tax Consultants for the Appellants

Mrs G Millward, Presenting Officer, for the Respondents

DECISION

Introduction

1. The Appellants appeal against HMRC determinations under regulation 72(5) of the Income Tax (Pay As You Earn) Regulations 2003 (the "2003 Regulations") and decisions under s 8(1)(c) of the Social Security Contributions (Transfer of Functions, etc.) Act 1999 (the "1999 Act"), in respect of tax years 2005-06 to 2008-09.

Background

2. By way of general background, the Appellants' representative, Mr Doshi, stated as follows.

3. The Appellants are husband and wife. At some point they started a small business together. This business was a newsagent shop, which sold newspapers and also other items such as confectionary. Originally the business was run as a partnership. At that time, the business did not operate PAYE as the Appellants took all of the profits as partnership profits rather than as salary.

4. Pursuant to professional advice that there would be advantages to running the business through a company including tax efficiency, the Appellants incorporated a company called Whitford (UK) Ltd (the "Company") on 15 December 2004. The Appellants were the sole shareholders and directors of the Company. They were also employees of the company. They each took a basic salary from the Company that was just below the income tax threshold. As a result, the Company had to operate PAYE in the sense that it was registered for PAYE and submitted PAYE returns, but was in fact required to deduct no PAYE tax and submitted nil returns. The intention was that all other profits of the business would be taken by the Appellants from the Company as dividends.

5. During the period of the Company's existence, the partnership also continued to exist. The partnership owned the business assets, including the premises from which the Company's business traded, so that the Company paid the partnership rent and service charges for use of these assets. The Appellants therefore ultimately had three sources of income from the Company: salary, dividends, and rent and service charges.

6. The Appellants sold the business on 6 June 2009. Subsequently, on 15 June 2010, the Company was dissolved.

7. At the hearing on 10 February 2016, Mr Doshi made a frank admission on behalf of the Appellants. He said that the business takings were all in cash. The Appellants' practice was simply to retain the cash, and to pay so much of it into the Company's bank account as was necessary to pay the Company's liabilities. The Appellants also took some of the Company's stock for their own use.

8. The main background events giving rise to the present appeals are as follows.

9. On 7 January 2009, HMRC opened an enquiry into the Company's return for the accounting period ended 31 December 2007 and into the partnership return for the year ended 5 April 2007. The documents relating to the opening of the enquiry are not before the Tribunal, nor are any other documents relating to the enquiries prior to the 2 August 2011 letters referred to below.

10. In letters dated 2 August 2011, HMRC advised the Appellants that HMRC intended to raise discovery and penalty assessments against the Appellants for the year ended 5 April 2010. These letters noted that (1) the Appellants' representative had confirmed in a letter dated 10 August 2010 that the Appellants sometimes settled their credit cards with cash from shop takings, and these sums had not been taken into account when the Company's accounts were prepared; (2) the Appellants' representative had confirmed that an amount shown in the company accounts as "capital introduced" in fact related to takings of the Company; and (3) the Appellants' representative had confirmed that no adjustment had been made in the Company's accounts in respect of items taken from the business for the Appellants' own use. These letters added that in the light of the unreliability of the business records (including lack of cash control and lack of till rolls), HMRC believed that similar losses occurred also in earlier and later years.

11. These letters noted that HMRC could not pursue the Company for these company debts due to the dissolution of the Company, but said that HMRC believed that the Appellants were personally liable as directors of the Company. The letters set out a computation of the assessments that HMRC proposed to make, with an explanation of the methodology, and invited further information from the Appellants.

12. In a letter dated 11 August 2011, the Appellants' representative responded that the Company had been dissolved, and that the Appellants could not be made liable to pay taxes of the dissolved company.

13. In letters to the Appellants dated 31 January 2012, HMRC then proposed to adopt a different methodology to that previously outlined in the 2 August 2011 letters. HMRC now concluded that the Appellants had taken cash extractions from the Company in its accounting period ended 31 December 2007 totalling £38,195. HMRC concluded on the basis of this that similar cash extractions were taken in other years. The letters stated that the Company should have deducted PAYE and Class 1 National Insurance on these amounts but did not do so, and that HMRC now proposed to make the Appellants personally liable for these amounts unless the Appellants made representations by 2 March 2012.

14. On 28 March 2012, HMRC issued discovery assessments for 2005-06 for both Appellants. These were nil tax assessments.

15. In letters to the Appellants dated 28 August 2012, HMRC advised as follows. The Company was required by the 2003 Regulations and the 1999 Act to pay to HMRC all of the tax deductible from the Appellants' employment income together with primary Class 1 National Insurance contributions. The Company did not do this. As the Appellants were the only directors and officers of the Company, they must

have been aware of the Company's wilful failure to operate PAYE on all the remuneration received. In the circumstances, the Regulations permitted HMRC to recover these amounts from the Appellants personally, and HMRC proposed to make the Appellants personally liable unless the Appellants made representations by 1 October 2012. A summary of the amounts of tax and National Insurance underpaid, together with interest due, was set out in sheets attached to the letters.

16. In letters to the Appellants dated 27 September 2012, HMRC made formal decisions under s 8(1)(c) of the 1999 Act ("s 8(1)(c)") in respect of tax years 2006-07, 2007-08 and 2008-09.

17. In a letter to the Appellants' representative dated 24 October 2012, HMRC stated as follows. The Appellants could only appeal against the assessments under s 8(1)(c) after HMRC had advised the Appellants of HMRC's most recent view of the matter. HMRC's view was as stated in the letters of 28 August 2012. Money had been taken out of the Company by the directors, and this could be treated as undisclosed employment income from the Company, paid out of evaded profits. Unpaid tax and Class 1 National Insurance contributions on these amounts could be recovered under regulation 72(5) of the 2003 Regulations ("regulation 72(5)") and s 8(1)(c). If the Appellants disagreed with this decision they could request an independent HMRC review or appeal directly to the Tribunal.

18. By a letter to HMRC dated 31 October 2012, the Appellants' representative requested an independent review of the matter.

19. The HMRC review decisions are dated 30 January 2013. They find as follows. The matters under appeal were the discovery assessments for 2005-06 and the 27 September 2012 decisions under s 8(1)(c). Each Appellant was a director of the Company. Moneys were extracted from the Company without being recorded in the Company's records. None of these moneys suffered PAYE or National Insurance contributions. Each Appellant as director was in a position of responsibility and would have been aware of the Company's failure. Because of this HMRC had made the decision to recover the National Insurance contributions from the Appellants personally. The nil tax assessment for 2005-06 was incorrect and would be cancelled. If the Appellants disagreed, they could appeal to the Tribunal.

20. By two separate notices of appeal received by the Tribunal on 25 April 2013, the Appellants instituted the present two appeals. Each notice of appeal states that the appeal is against the 24 October 2012 HMRC decision, as reviewed in the 30 January 2013 HMRC decision. In each notice of appeal, the grounds of appeal are as follows:

> Mr and Mrs Parmar were employees of Whitford (UK) Ltd. They both have a separate entity from that of Whitford (UK) Ltd. The responsibility to pay tax PAYE and NI liability rests upon the company. The company however does not exist anymore. Therefore, Mr and Mrs Parmar are not able to make payment from the company.

21. It is unclear why two separate appeals were instituted at the same time against the same HMRC decision. It may be that each of the Appellants was intending to

submit a separate appeal, but in fact both notices of appeal name both Appellants as the appellants.

22. On 22 May 2013, HMRC issued to each Appellant the following:

(1) directions under regulation 72(5) Condition B for the years 2005-06 to 2008-09;

(2) decisions under s 8(1)(c) for the years 2006-07 to 2008-09;

(3) a closure notice in respect of the year 2006-07; and

(4) discovery assessments in respect of the years 2005-06, 2007-08 and 2008-09.

23. On 15 July 2013, the Tribunal directed that the two appeals be joined and heard together.

Applicable legislation

24. Regulation 72 of the 2003 Regulations provides:

> **72.— Recovery from employee of tax not deducted by employer**
>
> (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 in a 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–
>
> (a) the employer and the employee if condition A is met;
>
> (b) the employee if condition B is met.

...

(7) If condition B is met, tax payable by an employee as a result of a direction carries interest, as if it were unpaid tax due from an employer, in accordance with section 101 of the Finance Act 2009.

25. It was common ground between the parties that if a direction is made under regulation 72(5), the employee becomes personally liable to pay the tax that the employer was liable to, but did not, deduct under PAYE from payments to the employee.

26. Regulation 72C of the Regulations provides:

72C.— Employee's appeal against a direction notice where condition B is met

(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.

27. Section 8(1) of the 1999 Act relevantly provides:

8.— Decisions by officers of Board.

(1) Subject to the provisions of this Part, it shall be for an officer of the Board—

…

(c) to 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, …

28. It was common ground between the parties that the effect of the s 8(1)(c) decision in the present case, unless overturned on appeal, is that the Appellants are personally liable to pay the Class 1 National Insurance to which the decision relates.

Sections 11-12 of the 1999 Act give the Appellants a right of appeal to the Tribunal against a s 8(1)(c) decision.

The hearing of the appeal

29. These appeals were originally listed for hearing on 24 April 2014. That hearing was cancelled, and the matter was then heard on 6 August 2014. At that hearing, the Appellants were represented by Mr Doshi and HMRC was represented by Mrs Millward. At that hearing, each side produced a separate bundle of documents, and no witnesses were called. In the course of that hearing, Mr Doshi raised new information. As a result, with the consent of the parties and in order to give HMRC the opportunity to consider the new information, the hearing was adjourned part heard to be relisted before the same Tribunal on the first available date after 3 September 2014. Regrettably, for various reasons the resumed hearing did not take place until 10 February 2016. At that hearing, the parties were represented by the same representatives, each of whom presented supplementary bundles and arguments, but no witness evidence was called by either party. Mrs Millward also provided to the Tribunal a written speaking note.

30. The Tribunal noted that the notices of appeal include applications for permission to bring late appeals. Neither party could point to a formal decision of the Tribunal giving a decision on those applications, but Mrs Millward indicated that HMRC had no objection to a late appeal. For the avoidance of doubt, the Tribunal granted permission.

31. The Tribunal also noted that both notices of appeal state that the appeals are against the 24 October 2012 HMRC decisions, which were upheld in the 30 January 2013 review decisions. However, as is noted in the 30 January 2013 review decisions, the matters under appeal at that stage were only the discovery assessments for 2005-06 and the 27 September 2012 decisions under section 8(1)(c), which related to Class 1 National Insurance contributions in respect of 2006-07, 2007-08 and 2008-09. No regulation 72 determinations were issued until 22 May 2013, after the notices of appeal in these cases had already been filed.

32. However, the representatives for both parties said that it was their firm understanding that the present appeals were against both the regulation 72 determinations as well as the current s 8(1)(c) determinations. Nevertheless, the parties could not point to any decision of the Tribunal allowing an amendment to the scope of the appeals. On the basis of the parties' express consent, the Tribunal granted permission to the Appellants to amend the notices of appeal to include a challenge to the regulation 72 determinations and s 8(1)(c) decisions of 22 May 2013, and granted permission to bring a late appeal against those determinations and decisions.

33. Two days after the hearing, the Appellants' representative sent to the Tribunal a written submission. The Appellants should not have filed a post-hearing written submission without seeking permission to do so. The Tribunal has nevertheless taken it into account.

Outline of the issues in the appeal

34. At the 10 February 2016 hearing, Mr Doshi explained the issues in the appeal in the following way.

35. At page D12 of the Appellants' bundle is a table showing HMRC's calculations of the additional profits made by the Company that were not included in its returns for the accounting periods ended 31 December 2005, 2006, 2007, 2008 and 2009.

36. According to this table, the additional profits of the Company in the accounting period ended 31 December 2007 were £39,977, made up as follows:

(1) £4,195 in cash used to pay personal credit cards of the Appellants;

(2) £20,000, recorded in the Company's accounts as capital introduced by the Appellants, but in fact profits from the Company's business;

(3) £14,000, again recorded in the Company's accounts as capital introduced by the Appellants, but again in fact profits from the Company's business;

(4) £1,000 of Company goods taken by the Appellants for their own use;

(5) £157, representing the Appellants' personal use of the Company telephone;

(6) £625, representing the Appellants' personal use of the Company car.

37. At the 10 February 2016 hearing, Mr Doshi ultimately said that the Appellants do not dispute the above HMRC findings of and figures for additional Company profits in accounting period ended 31 December 2007. Mr Doshi explained that items (2) and (3) were cash takings of the Company's business, which had been retained by the Appellants and then subsequently paid into the Company account in order to enable the Company to meet its liabilities (see paragraph 7 above). In the Company's accounts, these amounts had then been treated as new capital introduced by the Appellants, when they were in fact the Company's own profits.

38. The table at page D12 of the Appellants' bundle shows the amount of additional profits the Company is treated by HMRC as having made in the other years referred to in paragraph 35 above. These were calculated by HMRC as follows. Under the principle of continuity, the Company was deemed to have made similar profits to those referred to in paragraph 36(1) and (2) above in each of the other years. The amount of those items was adjusted for inflation when applied to the other years.

39. The closure notices, discovery assessments, regulation 72(5) determinations and s 8(1)(c) decisions treat all of these additional profits in all of these years as having been paid by the Company to the Appellants as employment income, such that they are liable to income tax and National Insurance which should have been deducted by the Company under PAYE.

40. Although the Appellants do not dispute any of the figures in paragraph 36 above in relation to the year 2007, it is the Appellants' case that:

(1) the amounts referred to in paragraph 36 above should be treated as having been received by the Appellants from the Company as dividends rather than as salary, and regulation 72(5) and s 8(1)(c) do not permit HMRC to make the Appellants personally liable for tax on dividends that should have been paid by the Company as corporation tax on its profits; and

(2) the principle of continuity cannot apply in this case, so that the Appellants cannot be treated by HMRC as having received similar amounts in years other than 2007.

The arguments of the Appellants

41. On behalf of the Appellants, Mr Doshi argued as follows.

42. The Appellants' business was very small, and was previously run as a partnership. The mindset of the Appellants was that they were a married couple who were sharing profits together and they never regarded themselves as employees of the Company. The intention was always that the only salary that the Appellants would be paid by the Company would be below the income tax threshold. The intention was always that any additional profits would be taken out of the Company by the Appellants as dividends. The Company was required to pay corporation tax on such profits. Given that the Appellants were not higher rate taxpayers, they would then have not been required to pay any further tax on these dividends when they received them.

43. It is accepted that the Company did not pay corporation tax on these undeclared profits that were taken by the Appellants as dividends. However, this does not justify HMRC treating these amounts as if they were salary paid by the Company to the Appellants. There is no basis for treating these amounts as salary. From the outset, the HMRC enquiring officer treated this as a case of undeclared company profits, not as a case of undeclared salary. HMRC only decided to change course and consider this as salary when the Company was dissolved. This was a device by which HMRC sought to avoid the need to apply to restore the Company, in order to proceed against the Company for unpaid corporation tax. When shareholders take profits out of a company, this is a dividend. In a small company with no company secretary, a resolution to pay a dividend can be taken by a show of hands.

44. The cases relied upon by HMRC are distinguishable from the present case, as they involved a payment to a single shareholder without any corresponding payments to other shareholders in proportion to their shareholding. A payment to only one of several shareholders cannot be a dividend. Furthermore, none of the cases relied on by HMRC involved situations where the employer was a company that had been dissolved, and where the company at the time of dissolution had no outstanding assessed PAYE liabilities. None involved husband and wife 50:50 partnerships. None involved situations where company accounts showed capital introduced that HMRC considered to be an extraction of profits. Furthermore, in all of these cases, HMRC knew the exact amount of the PAYE sums concerned.

45. In the present case, once the Company was dissolved on 15 June 2010 with no outstanding assessed PAYE or other tax liabilities, there was no longer any employer or employees, such that regulation 72 and s 8(1)(c) could no longer apply. Furthermore, for regulation 72 to apply, either the employer must have filed PAYE returns and there must be an amount outstanding, or HMRC must have assessed a PAYE liability not declared.

46. The principle of continuity cannot apply in this case. The Company's accounts for accounting period ended 31 December 2007 showed capital introduced by the Appellants of £70,000 (of which £34,000 was found by HMRC to have been undeclared Company profits). The Company's accounts for the other years contain no items of capital introduced by the Appellants. It must be concluded that the amounts in the Company's accounts for accounting period ended 31 December 2007 were cumulative profits from all previous years, not profits made regularly by the Company on an annual basis.

The arguments of HMRC

47. The Appellants extracted cash from the Company prior to its dissolution, but made no PAYE income tax or National Insurance deductions from it. The Appellants, as sole shareholders and directors, received the payments knowing that the Company had wilfully failed to deduct the amounts due from those payments. HMRC rely on *David A Marshall Jeweller Ltd v Revenue & Customs* [2012] UKFTT 262 (TC), *Blanche v Revenue & Customs* [2011] UKFTT 164 (TC), *James v Pope (HM Inspector of Taxes)* (1969-1973) 48 TC 142, *Murphy v Elders (HM Inspector of Taxes)* (1965-1975) 49 TC 135 ("*Murphy v Elders*"), *R v Inland Revenue Commissioners, ex parte Sims* [1987] STC 211, *R v Inland Revenue Commissioners, ex parte Chisholm* [1981] 2 All ER 602, *R v Inland Revenue Commissioners, ex parte McVeigh* [1996] BTC 35, and *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159.

The Tribunal's findings

48. The Tribunal recalls the acknowledgement made on behalf of the Appellants, referred to in paragraph 7 above. It is not disputed that cash takings of the Company were taken by the Appellants, some of which they then kept for their own use, without these being recorded as profits in the Company accounts, and without these being returned as income by the Appellants in their own tax returns. The result of this is, inevitably, that it cannot now be known exactly how much money the Company made, or how much of that money was ultimately taken by the Appellants for their own use.

49. The Appellants argue that such sums must be treated as dividends received from the Company, rather than salary paid by the Company. The Tribunal does not accept that argument for the following reasons.

50. For the Appellants, Mr Doshi accepted that there had not been any directors' meetings at or resolutions in which any of these amounts had been declared as

dividends. There were accordingly no minutes of any such directors' meetings, no records of any such resolutions and no dividend vouchers issued by the Company to the Appellants in respect of these amounts.

51. In the circumstances, the Tribunal sees no basis for treating the undeclared amounts taken out of the Company by the Appellants as dividends. The Tribunal cannot accept the argument as to the Appellants' intentions or "mindset" (paragraph 42 above). Apart from anything else, the Appellants did not give evidence in the appeal, and there is therefore no evidence of the Appellants' intentions. Furthermore, intentions alone cannot determine the tax liability of a transaction. It the Appellants' argument was correct, then even the small salaries that they were paid by the Company would have to be treated as dividends because their "mindset" was that they were not employees. However, Mr Doshi did not seek to argue that this was the case. It may be that the Appellants formed the Company because of certain advantages offered by that legal structure. However, that does not mean that the Appellants are free to take the advantages offered by this arrangement, but otherwise to conduct their affairs as if the Company did not exist. Having incorporated the Company, the Appellants were subject to all the legal consequences of that particular arrangement.

52. The present case has some analogies to *Murphy v Elders*. The appellant in that case appealed against a finding that he had received undisclosed remuneration from a company under his control. One of the arguments of the appellant in that case was as follows:

> If the Commissioners were entitled to find that money was wrongly diverted from any one or more limited companies to the Appellant, he has at all material times held it as trustee in view of the fiduciary obligation imposed on him as a director to preserve the assets of any such company, and that money held in trust for a company cannot constitute emoluments therefrom.

53. The court in *Murphy v Elders* rejected this argument in the following terms:

> In effect, the Appellant is saying that, although he has admittedly been wilful in default, he is not assessable because he has misapplied moneys and the company has a right to them. This submission has recently been dealt with by Walton J. in *Jonas v. Bamford* [1973] S.T.C. 519, where the learned Judge says this, at page 537:
>
> > 'But the point is a troublesome one, and it has given me greater difficulty than anything else in this appeal. In the entire absence of evidence that the moneys in question were abstracted rightfully by [Mr. Jonas] from the company, can it be correct, nevertheless, to treat them as additional remuneration for [Mr. Jonas], and not merely as sums for which he is accountable to the company (and on which the company ought, if additional assessments are made, to pay tax)? I think the answer in in the affirmative.'

54. If the sums taken from the Company by the Appellants were not dividends, they were either the Appellants' personal earnings from the Company's business, or were

sums extracted from the Company in circumstances in which they are to be treated as earnings, in accordance with what was said in *Murphy v Elders*.

55. As to the years other than 2007, once it is accepted that the Appellants took profits from the business for their own use, without these profits being declared in the Company's accounts or these amounts being declared in the Appellant's own returns, it must be concluded that there was material from which an assessing officer could rationally form the opinion that there was an insufficiency of tax paid.

56. Once the assessing officer has reached that conclusion, in accordance with general principles, the burden then passes to the Appellants to show that the assessments actually made are excessive. The Tribunal finds that the Appellants have not discharged that burden. On the material before the Tribunal, it cannot be known how much money the Appellants took from the business for their personal use. The Appellants themselves did not attend the hearing to give evidence. Nor was documentary evidence put before the Tribunal by the Appellants as to their finances during the years in question. Essentially, nothing has been put before the Tribunal by way of evidence to support the Appellants' argument that the assessments are excessive.

57. It is merely argued on behalf of the Appellants as follows. The amounts shown in the 2007 Company accounts as capital introduced by the Appellants consisted of business takings of the Company that were ultimately put back into the Company by the Appellants. This was not money extracted from the Company by the Appellants for their own personal purposes.

58. However, this argument of itself cannot establish that the HMRC assessments are excessive. The supplementary bundle of HMRC for the 10 February 2016 hearing contains a note prepared by the HMRC officer setting out his reasoning. According to this, "Neither the personal bank or credit card statements reviewed, show how the Parmar family were paying for normal everyday expenditure such as food, clothes, household items, presents for children, holidays etc etc". The note refers to amounts in the directors' loan accounts, and notes that substantial amounts from this source were available to the Appellants only in 2008. The note refers to amounts of partnership drawings in the years in question, and notes that substantial amounts from this source were available to the Appellants only in 2006. The bundle includes the minutes of a meeting on 24 February 2011 that the HMRC officer had with the Appellants' agents, according to which the agents were advised at that meeting that it could not be seen from private bank and credit card statements where the family were purchasing food, clothes and household items. The Appellants have not addressed any of this in the present appeals. The Appellant argues that "Funding of lifestyle etc is a matter that is not in front of the Tribunal at this hearing". However, the burden is on the Appellants to show that the assessments are excessive.

59. It is also argued on behalf of the Appellants that it was only in 2007 that the Company accounts show significant amounts as capital introduced by the Appellants. Given that there are no similar entries for capital introduced in the accounts for other

years, it is said by the Appellants that the entry in the 2007 accounts cannot give rise to a presumption of continuity.

60. The Tribunal cannot accept that this argument demonstrates that the assessments are excessive. In view of the Appellants' own admission referred to in paragraph 7 above, there seems to be little doubt that the Appellants took undeclared profits out of the company for their own use during each of the years in question. The only unknown is how much was taken out in each of those years. Even if the Appellants could demonstrate that the methodology used by HMRC was unsatisfactory in certain respects, that would not be sufficient to succeed in these appeals unless the Appellants could point to a more satisfactory methodology that shows that the HMRC assessments are excessive. The Appellants have not done this.

61. Mr Doshi also argued that it was no longer possible to give notice to the Company under regulation 72 since the Company had been dissolved. However, regulation 72(5A)(b) only requires notice to be given to the employee.

62. The Appellants suggest that for purposes of Condition B in regulation 72(4), the Appellants did not know that the Company "wilfully failed to deduct the amount of tax which should have been deducted from those payments", because their entire mindset and intentions (and therefore the mindset and intention of the Company itself) were that any takings from the Company above the income tax threshold would be dividends rather than salary. This has already been addressed in paragraph 51 above. There is no evidence before the Tribunal of the Appellants' intentions or of the Company's intentions. However, the inference must be drawn that the Appellants knew that they were taking money out of the business when no dividend had been declared.

63. Mr Doshi suggested that it was contrary to HMRC guidance to pursue the Appellants for tax on these amounts rather than the Company, but the Tribunal is not persuaded that he has shown any inconsistency with HMRC guidance. In any event, in the event of any inconsistency, the Tribunal would be required to apply the legislation, not the HMRC guidance.

64. Mr Doshi suggested that HMRC initially saw this as a case of undeclared company profits, and changed strategy only in 2011 to seek to recover unpaid tax from the Appellants under regulation 72(5) and s 8(1)(c). Again, however, this appeal falls to be determined in accordance with the legislation. The Appellants have not established how any change in strategy by HMRC would take this case outside the scope of regulation 72(5) and s°8(1)(c).

65. The Tribunal does not accept the Appellants' argument that regulation 72 and s°8(1)(c) could no longer apply once any employer company is dissolved. Regulation 72(2) and (4) speak in the past tense about what the employer did at the point in time in the past when the employer was required to deduct amounts of PAYE. The practical operation of regulation 72 does not depend on the employer continuing to exist at the time that a regulation 72(5) determination is made. Indeed, it seems likely that in practice regulation 72(5) determinations will commonly be made in cases

where the employee no longer works for the employer and/or the employer no longer exists. It also seems likely that in practice regulation 72(5) determinations will commonly be made in cases where the employer failed to file PAYE returns and/or HMRC has not assessed the employer to a PAYE liability not declared.

66. The Appellants have not advanced any other basis for challenging the decisions under appeal.

Conclusion

67. For the reasons above, these appeals are dismissed.

68. 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: 29 FEBRUARY 2016