



[2019] UKFTT 613 (TC)

TC07397

Appeal number: TC/2017/00913

INCOME TAX – enquiry – absence of any accounting records – appellant's evidence on amount of trading income and expenditure not credible – appeal dismissed – s28A Taxes Management Act 1970

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ANDREW ADELEKUN

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ALEKSANDER

Sitting in public at Taylor House, London EC1 on 15 February 2019

The Appellant in person

Alexander Barrett, an officer of HM Revenue & Customs, for the Respondents

DECISION

1. This is an appeal by Mr Adelekun against a closure notice dated 21 December 2016 in respect of an enquiry into his self-assessment tax return for 2014/15. The tax payable in accordance with Mr Adelekun's self-assessment was £884.75. The revised liability as set out in the closure notice was £40,251.07, resulting in additional tax and class 4 NICs payable of £39,356.32
2. Mr Adelekun appeared in person. HMRC were represented by Mr Barrett.

10 **Procedural issues**

3. This appeal has had a difficult procedural history. It was originally listed to be heard by me on 6 June 2018. However, I had to adjourn the hearing because of the late delivery by HMRC of an incomplete hearing bundle. I gave detailed directions at the hearing on 6 June in order to ensure the efficient progress of the appeal (these directions were released in written form on 12 June). In addition I indicated that I was minded to make an order in respect of costs incurred in relation to the adjourned hearing under Rule 10(1)(a) or (b) of the Tribunal Procedure (First tier Tribunal) (Tax Chamber) Rules 2009 and gave directions for the making of written submissions by the parties. In consequence of an application made by Mr Adelekun on 21 August 2018 relating to HMRC's non-compliance with those directions, I directed that HMRC be given a final extension until 26 October 2018 to comply with the outstanding requirements of the 6 June directions, and notified HMRC under Rule 8 of the Tribunal Procedure (First tier Tribunal) (Tax Chamber) Rules 2009 that they may be barred from taking further part in these proceedings they failed to comply with those directions.
4. Although HMRC substantially complied with the directions, they failed to comply with the directions relating to submissions on costs incurred by Mr Adelekun on the adjourned hearing on 6 June. I therefore have had to consider whether to bar HMRC from taking any further part in the hearing in consequence of their failure to comply with the directions relating to costs.
5. Mr Barrett apologised for HMRC's failure, and explained that this had occurred because it was HMRC's policy to address costs after the appeal had concluded. However, he accepted that HMRC had not complied with the costs' direction, and undertook that HMRC would pay Mr Adelekun's costs as set out in his costs' application in the amount of £2640.
6. In the light of HMRC's substantial compliance by the extended due date with the directions (thus enabling the hearing to go ahead as planned), their apology, and their undertaking to pay Mr Adelekun the costs for which he had applied, I decided that it was in the interests of justice for the hearing to proceed, and that it would be disproportionate to bar HMRC from taking any further part.

7. I heard evidence on oath or affirmation both from Mark Symons, an officer of HMRC who was responsible for the enquiry, and from Mr Adelekun. In addition, a bundle of documentary evidence was produced.

5 8. Included in the bundle were copies of the following witness statements, all of which were sworn or affirmed in some form: two statements by Ezekiel Ogunkoya (one sworn before a notary public in Lagos, Nigeria and the other sworn before the High Court Registry in Lagos, Nigeria), a statement by Stephen Odunlami (sworn before the High Court Registry in Lagos, Nigeria), a statement by Mayo Salam (sworn before a commissioner of oaths in Pretoria, South Africa), and a statement by Mr Adelekun himself (sworn before a solicitor in London) (this statement by Mr Adelekun dated 10 August 2017 was separate to the witness statement that was treated as his evidence-in-chief at the hearing).

9. The Tribunal had given directions on 16 November 2017 in relation to witness attendance at hearings as follows:

15 8 – Witness attendance at hearing: At the hearing any party seeking to rely on a witness statement may call that witness to answer supplemental questions (but the statement shall be taken as read) and must call that witness to be available for cross-examination by the other party (unless notified in advance by the other party that the evidence of the witness is not in dispute).

10. These directions were repeated in the directions I made following the adjourned 6 June hearing and which were released in writing on 12 June 2018.

11. There was no notification by HMRC that the evidence of these witnesses was not in dispute, and accordingly these witnesses should have been made available at the hearing for cross-examination, and I mentioned this expressly at the hearing. Accordingly, I place no weight on these statements (other than that given by Mr Adelekun), notwithstanding the fact that they appear to be sworn or affirmed under local law.

Background facts

30 12. Mr Adelekun carries on business as a sole trader of providing project and business advisory services. He is based in the UK, but his clients are based around the world – particularly in Nigeria and South Africa. Mr Adelekun has a network of contacts around the world that he is able to use to provide advice to his clients. That network of contacts, located in a variety of countries, is a key part of his business offering. The nature of his business activities was considered in some detail in *Adelekun v HMRC* [2016] UKFTT 107 (TC), and the Tribunal in that decision reached the conclusion that Mr Adelekun carried on two separate trades. The first was the provision of consultancy services (project advisory services – PAS) and the second was the leasing of machinery (oil water separation plant - OWS) – with the consequence (amongst other things) that losses from the OWS business could not be set-off against profits from his PAS trade.

13. Mr Adelekun operates through what he describes as "in country" agents and consultants. Mr Adelekun does not personally provide all of the services that his clients require: he says that he draws extensively on his network of contacts who will often provide services directly to his clients.

5 14. In addition to his business, Mr Adelekun stated that he carried out errands for some of his clients on a "non-profit" basis, in order to maintain goodwill with the client and enhance his business relationship with them. In the Tribunal's 2016 decision, these were described as follows:

10 [14] The appellant's clients occasionally need help with administrative matters in the UK. While his business is not that of providing administrative support, he considers that it is important to be obliging to his international clients and therefore occasionally helps them out with administrative matters, such as helping them to find suitable "buy to let" properties when they are considering making investments in the UK.

15 15. In the hearing before me, Mr Adelekun described this somewhat differently. In his witness statement, these are described as:

20 6. From time to time, I assist [my] clients to carry out errands as a gesture of goodwill. Sometime such errands involve assisting with the client's own business dealings or personal matters. Any money received during the said process is held on trust for my client and is not my own money. In certain circumstances, the client and I may agree a set off between the monies which I am due to be paid by them and the sums being held. As there is no intention to make a profit on these errands (ie they are goodwill gestures to retain the client's business), I do not include such receipts in my profit and loss account. These transactions are on an in-out basis.

16. In his oral evidence, he said that there were:

"things I do for clients outside the main line of business that I do to maintain the client [relationship]".

30 17. An example given by Mr Adelekun was buying a wristwatch for a client. Undertaking these transactions was, he said, a "unique selling point" and preserved goodwill with the client. As these transactions were undertaken at no profit, and done to preserve goodwill with the client, Mr Adelekun said the amounts involved were not recorded as income or expenditure when working out his taxable profits. However,
35 although Mr Adelekun said that these amounts are held "on trust" for his clients, and "is not my money", he made no attempt to segregate these funds from his own money – the amounts were paid into one of his own bank accounts. Mr Adelekun also stated that he was only ever given instructions in relation to these goodwill transactions verbally, and never by email or otherwise in writing – so he had no written record of
40 these transactions.

18. The background to this hearing is the opening of an enquiry by HMRC into Mr Adelekun's self-assessment tax return for 2014/15. HMRC sent Mr Adelekun a letter

on 26 May 2016 opening the enquiry, and requested copies of Mr Adelekun's invoices, receipts, and bank statements in support of the amounts returned in his self-assessment.

19. Mr Adelekun replied on 6 June 2016 with copies of bank statements from two personal accounts, two business accounts, and a business loan account. A schedule of
5 declared sales totalling £158,776 was also sent, together with copies of invoices in the names of Capital Development Consultants and Hamilton Enterprise Development (Mr Adelekun's trading names). In addition, Mr Adelekun supplied copies of receipted invoices addressed to him from his overseas representatives, these invoices totalled £108,096.

10 20. On 10 June 2016, HMRC wrote to Mr Adelekun asking that he submit revised tax returns to reflect the decision of this Tribunal in 2016 that his PAS and OWS activities were separate trades (and that losses incurred in the OWS trade could not be carried forward under s83 Income Tax Act 2007 and offset against the later profits of the PAS trade).

15 21. Mr Symons reviewed the various bank statements, and noted that transactions from business clients had been credited from time to time to Mr Adelekun's personal bank accounts. Mr Symons analysed each of the entries in the bank accounts, and eliminated transfers between the accounts. A schedule of all bank deposits in all
20 accounts (after eliminating inter-account transfers) was provided to Mr Adelekun under cover of a letter dated 30 August 2016 with a request for an explanation as to the source of the deposits – but none was forthcoming. Mr Symons noted that a number of payments made into the account were regular in nature and the description in the bank statement was "rent" (even though Mr Adelekun had no declared letting business, and during the course of giving evidence before this Tribunal, he said that he did not own
25 any property other than his own private residence). In the absence of any satisfactory explanation, Mr Symons assumed that all of the unexplained deposits (including, but not limited to, those described as "rent") were business income. Likewise, as there were no records evidencing the destination of many payments from these bank accounts, Mr Symons assumed that these payments were not allowable business expenses, unless and
30 until information was provided by Mr Adelekun to the contrary. No such explanations or information was provided by Mr Adelekun to Mr Symons.

22. Mr Symons also noted that Mr Adelekun's overseas representatives had all provided Mr Adelekun with receipted invoices in respect of their own fees for acting as his representative. However, there was no evidence of these fees having been paid
35 from any of Mr Adelekun's bank accounts. There were no withdrawals from Mr Adelekun's various accounts that corresponded or could be reconciled in any way with the amounts the overseas representatives had invoiced.

23. Mr Adelekun explained why there were no corresponding withdrawals in his witness statement as follows:

40 9. Payment for my services has been innovative due to the exchange control issues in the countries I operate. My local reps normally have a network of people who may have the UK £, and require the local currency in the country of operation. The network in most cases pay into

my UK account in exchange for having the local currency at a pre-determined rate.

24. During the course of his oral evidence, Mr Adelekun gave additional evidence about the payment arrangements. His evidence was that, in addition to the exchange control issues identified in his witness statement, access to international banking services was not widely available in Africa. Accordingly, payments were discharged through an informal value transfer system – in the simplest of cases, a customer that owed fees to Mr Adelekun would (instead of paying Mr Adelekun in pounds sterling) discharge Mr Adelekun's debt to the local representative in the local currency. In more complex cases, the chain of payment might be longer and more fragmented – so an individual who owed fees to Mr Adelekun might pay an amount to a third party, and the third party would discharge the debt to the local representative (in whole or in part, depending on the amount received).

25. Similarly, Mr Adelekun said that payments might be made to him through these informal value transfer systems, and this explained why some receipts into his bank account were identified as "rent", as the underlying payment might well have been rent owed by a third party in the UK to one of his clients, but which was paid to him in partial discharge of one of his fee invoices.

26. Mr Adelekun says that he does not have any documents to identify payments or receipts made through these informal value transfer systems. In his letter of 1 August 2016 to Mr Symons he says

I do not document these transactions, but monitor the payments in my brain as they occur. It is for this reason that I continued to advise the Revenue that I am the sole person who fully understands the payment process.

27. In the course of giving oral evidence, I asked Mr Adelekun how he knew whether an invoice had been paid. He initially answered that he "had a piece of paper", but then quickly corrected himself to say that he "kept accounts in his brain". When asked how did he know how much he was owed, he said that he did a calculation monthly – not on paper but "mentally", and that he "kept a running total in my head". As the bulk of his fees were due from one client – Lubbe Construction – Mr Adelekun said that "that is why it is easy to track".

28. As there were no entries in Mr Adelekun's bank statements corresponding to the invoices of his local representatives, and there was no evidence linking entries to particular invoices, Mr Symons assumed that the payment of the expense of the local representatives must have been met through the informal value transfer system out of unrecorded business income.

29. On 7 December 2016, Mr Symons wrote to Mr Adelekun with a schedule setting out his calculation of Mr Adelekun's businesses income and expenses. Notwithstanding the absence of supporting documentation for major overhead costs, Mr Symons allowed expenses as claimed in Mr Adelekun's latest tax return for 2014/15 filed on 31 August 2016, save that costs of goods was restricted to the original amount claimed (£76,560). There was an overall profit of £126,003, which Mr Symons split between the two

businesses in the same ratio as the turnovers of the two businesses. He allowed the loss relief brought forward in respect of the oil/water separator of £15,665. A calculation of Mr Adekun's revised income tax liability for 2014/15 of £40,564.37 was included with the letter – this was an increase in the amount of income tax payable of £39,669.62.
5 As no formal reply was received, Mr Symons issued a closure notice on 21 December 2016 for these amounts.

30. On 17 January 2017, Mr Symons wrote to Mr Adekun with a penalty explanation letter and supporting schedule. Mr Symons considered that Mr Adekun's actions were deliberate, as no attention had been made in preparing the tax return to the
10 previous Tribunal decision that there were two separate businesses. The disclosure adjustments in the penalty schedule took account of the fact that Mr Adekun had failed to supply business records and information that would have given a better indication of the exact nature of his businesses. In the light of all of these factors, and the additional tax liability of £39,356.32, a penalty of 45.5% was proposed, being
15 £17,907.12.

31. On 16 January 2017, Mr Adekun filed an appeal against the closure notice of 21 December 2016. The penalty is not the subject of this appeal.

32. At around this time (January 2017) various of Mr Adekun's in-country agents issued invoices to Mr Adekun relating to work done in the calendar year 2014.

20 33. On 30 January 2017, Mr Adekun filed a further tax return for 2014/15, in which he claimed bad debt relief of £111,067. On 7 February 2017, Mr Symons replied noting that the previous Tribunal had decided that no claims in respect of bad debts had been made before 10 February 2016 at the earliest (being the date on which Mr Adekun had instructed accountants to review aged debts on his books). Accordingly, any claim
25 for bad debt relief could not be made in 2014/15. On 10 February 2017, Mr Adekun wrote to HMRC claiming an increase in his direct costs, and submitting revised invoices addressed to him for work done by his agents relating to 2014, but only dated in January 2017. Mr Symons in his reply dated 14 February 2017 questioned the accuracy of these invoices. More importantly, as there was no evidence that these invoices were paid from
30 Mr Adekun's bank account, Mr Symons stated that it must follow that they were paid through the informal value transfer system out of unrecorded business income. There would therefore be no change to the assessed profit of £110,338 and the liability of £39,356.32.

34. Mr Adekun, during the course of his evidence and submissions before me,
35 accepted that he had additional income as calculated by Mr Symons. However, this acceptance was on the basis that there was a corresponding increase in his underlying cost of sales. Mr Adekun explained that the additional income related to his goodwill activities, and he would have incurred expenses on the errands he did for clients to maintain goodwill – such as buying a wristwatch for a client, and there would be a
40 corresponding increase in his cost of sales. But Mr Adekun did not provide any evidence that payments made out of his bank accounts were attributable such goodwill purchases made on behalf of his clients.

35. Mr Adelekun's evidence was that he kept track of income and expenses in his brain (on a running total basis), and that the reason why amounts passing through his bank accounts could not be readily reconciled to items of income or expenditure was because of his extensive use of informal value transfer systems – the payments passing through these systems were for relatively small amounts which needed to be aggregated to reconcile with the invoices he issued to clients, or received in respect of his expenses.

Discussion

36. This is an expert tribunal, well versed in matters of international trade, and I am aware that both Nigeria and South Africa have exchange control laws, which would require exchange control consent or which regulate the exchange rate when someone in Nigeria or South Africa pays money to someone in the UK. I am also aware that both South Africa and Nigeria have a substantial and sophisticated banking networks.

37. Mr Adelekun said in his witness statement that the informal value transfer system was used in order to deal with "exchange control issues". I infer from Mr Adelekun's evidence that Mr Adelekun assists his clients in evading local exchange control laws through his use of informal value transfer systems.

38. Although I have no direct evidence on the point, given that Mr Adelekun assists his clients in evading foreign exchange controls as regards payment of his fees, it would follow that he would also be assisting his clients to evade foreign exchange controls with his other "goodwill" purchases or UK property investments on which he advises his clients, where the payments relating to those activities are funnelled through an informal value transfer system.

39. One of Mr Adelekun's biggest clients is Lubbe Construction, which is well known as one of the larger construction and development companies in South Africa. It is inconceivable that Lubbe would not have access to a full suite of international banking services (including foreign exchange and international cross-border payment services).

40. If the payments to and by Mr Adelekun are wholly legitimate, there is no good reason why a substantial company, such as Lubbe, would need (or want) to circumvent exchange control laws by using informal value transfer systems. I can only speculate as to the reasons. Given that I have no direct evidence on the point, I do not propose to take this further, and this decision is in no way dependent on why Mr Adelekun is engaged in assisting his clients with evading foreign exchange controls in their own countries.

41. I do not regard Mr Adelekun's evidence as at all credible.

42. The increase in Mr Adelekun's turnover, as calculated by Mr Symons, was approximately £90,000, and that this represents about one-third of Mr Adelekun's overall adjusted turnover for the tax year in question. In his oral evidence, Mr Adelekun attributed this additional income to his "goodwill" errands. It seems to me highly unlikely that income on this scale (which amounts to approximately one-third of Mr

Adelekun's overall economic activities) could have related to errands undertaken on a goodwill basis.

43. Approximately 90 (A4) pages of bank statements were provided by Mr Adelekun to Mr Symons during the course of the enquiry. I do not believe Mr Adelekun when he
5 says that he was able to keep track of his business payments and receipts "in his brain" – particularly where the amounts of the receipts into Mr Adelekun's bank accounts do not correspond to the amounts owed to him. There are just too many small deposits for Mr Adelekun to be able to keep track of payments and receipts without some paper or computer record (even if all he tracks is running totals). And in addition to what he
10 describes as his business income, he would have needed to track the substantial cash-flows relating to the goodwill errands.

44. I am supported in this view by the initial answer that Mr Adelekun gave to my question - how he knew whether an invoice had been paid. He initially answered that he "had a piece of paper", but then quickly corrected himself to say that he "kept
15 accounts in his brain". In my view, his initial answer was the truth, and I so find.

45. Mr Adelekun could give no credible explanation for the payments identified by Mr Symons that passed into or out of his bank accounts. I asked Mr Adelekun to show how payment of a particular fee or expense was reflected in the entries in the bank statements, and he was unable to do so – and this supports my view that Mr Adelekun
20 does not maintain accounts mentally.

46. Whilst I appreciate that given the elapse of time, it might not be possible to identify particular items of expenditure, there was one withdrawal of £90,000 which stood out in his bank statements, and which I asked Mr Adelekun to identify. He asked for five minutes to recollect what it might be – and eventually said that it was "a
25 machine", but could give no further details about what kind of machine it might be, or why he had purchased it. Given that Mr Adelekun claims to be able to keep an accurate track of his income and expenditure "in his brain", it is not credible that he is not able to identify an item of expenditure amounting to roughly one-third of his assessed income for that year.

47. I therefore find that the deposits made into Mr Adelekun's accounts are trading income, and withdrawals are not trading expenses. I agree with Mr Symons that as the discharge of his overseas agents' invoices could not be reconciled to payments out of Mr Adelekun's bank accounts, they must have been paid from undeclared income via an informal value transfer system, and I so find. I therefore agree with the adjustments
30 made by Mr Symons to Mr Adelekun's trading income and expenses and the calculation of tax payable in the closure notice.

48. As regards Mr Adelekun's claim for bad debt relief, this cannot be allowed against trading income for the tax year under appeal. This is because (for the reasons found previously by the Tribunal) the claim could not have been made before 10 February
40 2016, when Mr Adelekun instructed his accountants to review aged debtors. I make no finding as to whether the amount claimed by Mr Adelekun is justifiable, and this will need to be addressed if the tax return in which the claim is made is subject to an enquiry.

5 There are also various credit notes which Mr Adekun has adduced as evidence to support a reduction in the assessed income. However I agree with Mr Symons that these must have been issued after the end of the relevant tax year, as the correspondence with Mr Adekun's accountant relating to these credit notes is 10 May 2016, and the correspondence with Lubbe Construction produced does not confirm the dates on which the credit notes were issued.

49. Although the appeal is not concerned with penalties, I would record that I agree with Mr Symons determination that Mr Adekun's behaviour was deliberate, and so find.

10 **Conclusion**

50. The burden of proof is on Mr Adekun to displace HMRC's determination of his income in the closure notice. He has failed to do this, and I therefore dismiss his appeal.

15 51. 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.

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**NICHOLAS ALEKSANDER
TRIBUNAL JUDGE**

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RELEASE DATE: 4 OCTOBER 2019