



TC07729

Appeal number: TC/2017/01812

INCOME TAX – failure to deduct PAYE – whether determinations properly made – yes – whether penalty assessments correctly made – yes – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

INDIAN DELUXE LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE FAIRPO

Sitting in public at London on 11 March 2019

Mr Ahmed, accountant for the Appellant

Ms Biney, presenting officer, for the Respondents

DECISION

1. This is an appeal against PAYE determinations under Regulation 80, Income Tax (Pay As You Earn) Regulations 2003 and an associated penalty assessment under Schedule 24, Finance Act 2007.
2. The determinations were for the following amounts:
 - (1) 2012-13: £2,572.92
 - (2) 2013-14: £4,216.28
 - (3) 2014-15: £4,470.16
 - (4) 2015-16: £5,621.04
3. The penalty assessment of £7,680.58 and covered the tax years 2012-2016.
4. The notice of appeal referred additionally to a disputed VAT liability that was awaiting internal review by HMRC. It was agreed at the hearing that this was not a matter that was to be dealt with by this Tribunal and that only the PAYE determinations and penalty assessment were relevant for this hearing.

Background

5. At the relevant time, the appellant operated an Indian restaurant which has since been sold. The appellant was registered with HMRC for PAYE purposes.
6. On 14 January 2016, HMRC made an unannounced visit to the restaurant premises. Following the visit, HMRC wrote to the appellant seeking further information. No reply was received and HMRC issued the PAYE determinations on 4 November 2016. A penalty notice was issued on the same day, but later cancelled and replaced with a new penalty notice on 1 February 2017.
7. The appellant appealed to HMRC on 6 December 2016. HMRC reviewed the decision to issue the PAYE determinations and penalty assessment and upheld the decision on 1 February 2017. The appellant appealed to this tribunal on 27 February 2017.

Submissions and evidence

Appellant's submissions

8. The appellant's case was, in summary, that HMRC based the PAYE assessment on incorrect information as some of the information related to people who did not exist, to people who had unsuccessfully approached the appellant for a job, and to people who had given false documents when recruited and had left the job after one week.

9. The appellant's representative submitted that HMRC had not informed the appellant that they were going to visit the premises, so that the appellant did not have time to prepare for the visit. The director of the appellant, Mr Chowdhury did not speak English well and had to ask for the assistance of his wife and an English-speaking staff member.

10. HMRC had interviewed the staff member for two hours and had produced the assessments on the basis of that interview, without confirming whether or not the information related to physical persons rather than fictitious persons. The size of the business would not support the staff alleged by HMRC, as the turnover in 2013/14 was only £80,956.

11. It was explained that the staff at the restaurant were primarily from Bangladesh and would work for less than minimum wage because they had no paperwork. Some staff provided false documentation and disappeared when asked for their papers; some worked only for two weeks until they were asked to provide documentation.

12. This information was included in the box of staff documents taken by HMRC, so that the information in that box related not only to regular staff but also to those who provided false documents and worked for only a short time.

13. Further, staff were not always busy and Mr Chowdhury allowed them to use the interest and talk to friends when customers were not present.

14. It was also submitted for the appellant that one person may have been self-employed, and it was not illegal to take on a self-employed person.

15. Finally, the appellant submitted that it was not reasonable to treat a small Indian restaurant in the same way as a multinational, and that the national minimum wage was devastating to small businesses.

HMRC submissions

16. HMRC confirmed that the visit was an authorised unannounced visit, and that the papers confirming the authorisation were provided to Mr Chowdhury at the time of the visit. Prior visits had taken place at which the visible staff were noted, and more staff were present than were reported for PAYE purposes.

17. During the visit, HMRC had asked for details of a typical working week and the number of staff on site. A staff rota was provided to them. They were advised that there were three kitchen workers at the time as well as the front of house staff. The business was open from 5pm until 11pm each day.

18. It was noted that one of the names listed on the hygiene certificates displayed in the restaurant was not on the payroll; the appellant had explained that he helped out in the restaurant and was occasionally paid in money or with meals. During the visit, the manager, Mr Faruque, had confirmed also that those who provided false documents and later disappeared were paid for the hours which they had worked. Mr Chowdhury and Mr Faruque had admitted that not all payments to the staff whose details were in the

box provided to HMRC had been reported under PAYE because they had not worked for long.

19. The total number of staff hours was calculated from the information recorded by HMRC and the information provided by the appellant during the visit: Mr Faruque had confirmed that there were three kitchen staff present, one front of house and one driver. The information provided was compared with the information declared for PAYE purposes.

20. HMRC stated that the staff reported on payroll at the time amounted to three employees and Mr Chowdhury each working 24 hours per week, although higher figures had been reported in earlier years. It was submitted that these were insufficient to cover the opening hours of the restaurant, and not all staff had been reported to the agents dealing with the PAYE reporting. Payments to staff were made in cash.

21. HMRC explained that, on 24 June 2016, they wrote to the appellant with a summary of the information obtained and details of the calculated total employee hours. The appellant was advised that HMRC considered that the number of hours declared for PAYE purposes was understated. Accordingly the PAYE accounted for was also understated, using the national minimum wage to calculate the payments and PAYE. No substantive response was received. A follow-up letter was sent on 12 September 2016 and, again, no substantive response was received.

22. With regard to the penalty, HMRC submitted that the appellant was aware of their responsibilities with regard to PAYE as they were making returns. There had been no disclosure by the appellant of the understatements and so the matter was regarded as promoted. In the interview, it had been made clear that payments to individuals had been omitted. On this basis, HMRC considered that the understatement was deliberate rather than careless, and the assessment was made accordingly. Credit had been given as follows: 25% for telling, 20% for helping and 25% for the provision of records, so that a total reduction of 70% had been provided.

23. In cross-examination, Officer McFadden of HMRC was asked a number of questions and replied as follows:

(1) The calculation allocated 42 hours per week for Mr Chowdhury; as he was the owner of the appellant, he would have been paid by way of dividend. Why had this been increased from the 24 hours declared for PAYE purposes?

(2) Officer McFadden responded that the 42 hours was the opening hours of the restaurant: even if Mr Chowdhury was elsewhere, for example purchasing supplies, someone else would have been in the restaurant. In addition, the 42 hours allocated to Mr Chowdhury had been taken to be hours which were correctly accounted for in respect of PAYE and so had reduced the total hours understated. The calculation had, similarly, allocated 45 hours to Mr Faruque as correctly accounted for in place of the 24 hours declared for PAYE purposes. Mr Faruque was the manager and Mr Chowdhury's brother-in-law. This further reduced the number of understated hours.

- (3) Officer McFadden noted that HMRC had calculated the understatement on the basis of whether opening hours were covered by staff, rather than attempting to allocate hours to specific individuals in detail.
- (4) It was inappropriate to assess working hours on the basis of Friday or Saturday opening, which were busy periods.
- (5) Officer McFadden responded that the information as to front of house staff had been gathered on Tuesday and Wednesdays as well as Fridays and Saturdays. In addition, the appellant had been given the opportunity to respond to the calculations in the letter of June 2016 and had chosen not to do so.
- (6) Why had HMRC not asked to see a staff list?
- (7) Officer McFadden explained that they had asked Mr Faruque for the information and, as he was the manager, he would know who was working. In addition, HMRC had had the information declared for PAYE purposes as well as the additional information observed during prior test visits.
- (8) Why had HMRC not taken into account the fact that staff were permitted to do other things in non-productive time?
- (9) Officer McFadden responded that the staff were nevertheless still on the premises to work.

Relevant law

24. s6 of the Income Tax (Earnings and Pensions) Act 2003 provides that general earnings from employment are subject to income tax.
25. Regulation 21 of the Income Tax (Pay As You Earn) Regulations 2003 provides as relevant that on making a relevant payment to an employee during a tax year, an employer must deduct or repay tax in accordance with these Regulations by reference to the employee's code, if the employer has one for the employee. Regulation 50 of the same Regulations provides that, where no code has been provided, the 0T code should be used on a non-cumulative basis for calculating deductions.

Discussion

26. The burden of proof in this case is on the appellant to show that the PAYE determinations are incorrect, and on HMRC to show that the penalty assessments have been correctly made.

PAYE determinations

27. The appellant's representative has accepted that payments were made to individuals which were not reported for PAYE purposes: these are the payments made to those who provided false documentation and disappeared once pressed for proper identification documents. The appellant's submission was that it is inappropriate to pursue the appellant for PAYE in respect of these payments as they were not a multinational. No evidence or submissions were made to suggest that the payments should be regarded as outside the scope of PAYE.

28. It is clear from the legislation that any payment of general earnings is subject to income tax, and that the employer is required to deduct tax from such payments in accordance with the PAYE regulations. To that extent, it is clear that there has been understatement of PAYE in relation to those employees who ceased working at the restaurant within a short period of time.

29. The appellant submitted that HMRC had calculated the PAYE on the basis of fictitious employees but provided no evidence to support this. We consider that HMRCs calculations were in fact undertaken on the basis of the hours required to operate the restaurant and a payment of minimum wage, rather than on the basis of any specific individuals. The appellant did not provide any evidence to show that HMRCs assessment of the hours required was excessive.

30. The appellant also submitted that the staff were permitted to use the internet and to talk to friends when they were not busy. However, no evidence was presented to show that there was any reduction in pay for periods when staff were not busy and, in correspondence, the staff were described as working defined hours.

31. There was also no evidence submitted to show how, when the restaurant was open six hours daily (that is, for 42 hours per week), the declared staff hours for PAYE purposes (being 96 hours in total) were sufficient to cover the necessary roles, of which there were at least three: kitchen, front of house, and delivery driver. Similarly, no evidence was provided to explain how, when the restaurant was staffed with five people on the date of the visit, payments to only four people in total were declared for PAYE purposes.

32. On the basis of the evidence provided, we consider that the appellant has not discharged the burden of proof upon them: they have not satisfied us that the PAYE determinations were incorrect and have not satisfied us that the PAYE declarations were correctly made. The appellant did not submit that any alternative figure should be substituted for the PAYE determinations other than the PAYE declarations made, which the appellant's own evidence shows did not include all payments made to employees.

Penalty assessment

33. HMRC submitted that the behaviour which led to the understatement was deliberate, on the basis that the appellant's director was aware of his obligations under PAYE and nevertheless failed to provide all relevant information to the accountants who dealt with the appellant's payroll. The director had also admitted that there were individuals who had been paid without deduction of tax under PAYE. HMRC stated that they did not consider that there had been any attempt to conceal the under-deductions and so had calculated the penalty on the basis of "deliberate but not concealed".

34. It was admitted for the appellant that tax had not been deducted under PAYE for all payments. We consider that it was clear that the appellant's director was aware of the need to comply with PAYE. No evidence was put to us that the appellant had any

reason to believe that PAYE did not apply to such payments and so we agree that the behaviour should be regarded as deliberate but unconcealed. There was no unprompted disclosure and so the penalty should be assessed on the basis that the information provision was prompted.

35. We considered the reduction given by HMRC for telling (25%), helping (20%) and access to records (25%) and considered that it was reasonable in the circumstances, particularly as no further substantive information was provided to HMRC following the visit.

36. Accordingly, we consider that HMRC has satisfied the burden of proof upon them in respect of the penalty assessments.

Decision

37. The appeal is dismissed and the PAYE determinations and penalty assessments are upheld in full.

38. 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.

**ANNE FAIRPO
TRIBUNAL JUDGE**

RELEASE DATE: 05 JUNE 2020