[2012] UKUT 338 (TCC)

Appeal number: FTC/75/2011

INCOME TAX - appeal against closure notices with amended self-assessment returns - whether amendments fair - whether appellant established from his evidence that assessments should be reduced or set aside - whether First-tier Tribunal erred in law by failing to take proper account in reaching its decision to dismiss the appellant's appeal of evidence before it as to appellant's allowable expenditure - First-tier Tribunal's decision reasonable having regard to evidence - appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

CHRISTOPHER ANTHONY REID **Appellant**

- and -

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

TRIBUNAL: JUDGE EDWARD SADLER

Sitting in public in London on 19 July 2012

Stephen Harvey of Diverse Management for the Appellant

Ruth Jordan, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by Christopher John Reid ("Mr Reid") against a decision of the First-tier Tribunal (Judge Brooks) released on 26 April 2011 ("the Decision") in which the Tribunal dismissed certain appeals made by Mr Reid against assessments to income tax and national insurance contributions and penalty determinations made by The Commissioners for Her Majesty's Revenue and Customs ("the Commissioners").

2. The details of the relevant assessments and penalty determinations are set out in full in the Decision, and it is not necessary to repeat them here. In summary, the Commissioners assessed Mr Reid for the tax years 1989-90 to 1991-92 and 1993-94 to 2003-04 (Mr Reid was resident outside the United Kingdom for the tax year 1992-93). As set out in the Decision, those assessments were made under the relevant statutory provisions: for the earlier years under the "discovery assessment" procedures of section 29 Taxes Management Act 1970, and for the years falling within the self-assessment regime (that is, from 1996-97 onwards), by way of closure notices amending the self-assessment returns made by Mr Reid. Penalty determinations were issued for the years 1996-97 to 2003-04.

3. The Tribunal allowed Mr Reid's appeals against the assessments for the years 1989-90 to 1991-92 and 1993-94 to 1995-96. However, it dismissed Mr Reid's appeals against the assessments for the years 1996-97 to 2003-04. It also dismissed his appeals against the penalty determination for those years. As a result Mr Reid was held liable to pay, in aggregate for those years, further income tax and national insurance contributions of £21,185.07 and penalties of £9,533.26, as itemised year by year in the Decision. Mr Reid's appeal to this Tribunal is against that part of the Decision which dismissed his appeals in respect of those years.

Mr Reid's business, his dispute with the Commissioners, and the resulting assessments

4. During those years Mr Reid was prominently involved in the particular world of popular music known as "Garage" music, where he acted as an "MC", specifying and introducing the music played at clubs and other venues and events which featured this type of music, and "rapping" over the music. In the early years, as this type of music was establishing itself, Mr Reid received no fees, but merely reimbursement of his expenses. By 1997 "Garage" music was an established genre reaching its peak, and from thereon Mr Reid was paid performance fees for acting as an MC. Those fees were based on the "sets" which Mr Reid performed (a "set" being a one or two hour period for which Mr Reid acted as an MC). Mr Reid's prominence in this field (in the industry he was known as "the Godfather of Garage") resulted in his being invited to appear on television shows and at award ceremonies, for which he received appearance fees. He released two discs where he was the performer, and they had some commercial success. As a separate venture in 1999 he established a company which acted as an agency/manager for MCs. In advance of that company being established Mr Reid incurred expenditure in preparation for its business which was represented by a debt due to him from the company. By 2002 the popularity of

Garage music had begun to wane and Mr Reid's income from his performance work in this field gradually reduced, and he took up other work in unrelated fields.

5. There is a long history of Mr Reid's engagement with the Commissioners, as recounted in the Decision. It began in April 2001 when the Commissioners asked Mr Reid to complete self-assessment returns for the six years to 5 April 2001. Such returns were eventually submitted by Mr Reid, but on the stated basis that they were not an accurate return for each individual year, but "an overview" of Mr Reid's finances for the period as a whole as his financial records were uncertain, having passed between various accountants. An investigation was then undertaken by the Commissioners. Mr Gannon, the inspector in charge of that investigation and responsible for the assessments and amending closure notices eventually issued, has specialist experience in the popular music business. In the course of that investigation Mr Gannon asked for all the business and accounting books and records maintained by Mr Reid. Mr Reid was able to supply only very limited business records and information supported by papers or other written evidence. Mr Reid explained that many of his key documents, including his diary, appointment books and invoices had been stolen. A series of meetings were held between Mr Gannon and his colleagues for the Commissioners and Mr Reid and his advisers (in particular, Mr Harvey, who represented Mr Reid before the Tribunal and before me). The aim of those meetings was to establish, in the absence of records, a methodology for reaching an estimate of Mr Reid's taxable income.

6. It proved to be not possible for the Commissioners and Mr Reid to reach a settlement, notwithstanding that the investigation and related negotiations continued until July 2007. Therefore, in July 2007 the Commissioners issued the assessments and amending closure notices against which Mr Reid appealed to the Tribunal. In March 2008 the assessments were reduced to take account of certain proposals put forward on Mr Reid's behalf by Mr Harvey to reduce the estimate of the number of weeks during which Mr Reid was engaged as an MC.

The decision of the First-tier Tribunal

7. The findings of the Tribunal with regard to the assessments and closure notices are in these terms in the Decision:

> "[21] …The Closure Notices were issued on 23 July 2007 and the assessments were made on 24 July 2007. These were not based on Mr Reid's income from actual performances as there was no record of these but on the basis of the information provided to Mr Gannon, such as, for example, the number of weeks that Mr Reid was engaged as an MC during the tax year, how many sets he would perform and the amount he would be paid for each set.
>
> [22] In making the assessments Mr Gannon also drew on his experience of the music business and the trends relating to MCs and DJs during the 1980s, the 1990s up to 2004-05 in relation to a number of venues which would promote the genre of music where MCs and DJs would perform."

8. With regard to the years 1989-90, 1990-91 and 1991-92 the assessments had been made, in effect, on the assumption that Mr Reid had been active as an MC, relating back to those years his activities from 1993 onwards (for much of the tax year 1992-93 Mr Reid was living in Canada, and no assessment was made for that year). The Tribunal accepted Mr Reid's evidence that he did not become active in the Garage music business until his return from Canada, and that accordingly the assessments had been made on an incorrect premise. It allowed Mr Reid's appeal against the assessments for those years.

9. With regard to the years 1993-94 to 1995-96 the Tribunal, in the absence of any business records, accepted the oral evidence of Mr Reid to the Tribunal that "he was not paid during this period as the UK Garage scene was in its infancy without any structure" (see [34]). The Tribunal on balance considered that Mr Reid's evidence "is just about sufficient to discharge the burden of proof for the years concerned" (see [36]). It therefore allowed Mr Reid's appeal against the assessments for those years.

10. With regard to the years 1996-97 to 2003-04 the Tribunal accepted the submissions made on behalf of the Commissioners that Mr Reid's income was understated in the tax returns he made, and that Mr Reid had not, in the evidence before the Tribunal, demonstrated that the level of profit he had earned was below that which the Commissioners had assumed in making the amendments to the self-assessments. It dismissed Mr Reid's appeals against the assessments for those years.

11. As to the penalties, the Commissioners had imposed them in relation to the unpaid tax for 1996-97 to 2003-04, on the grounds that Mr Reid had been negligent in that he failed to maintain the records necessary to enable him to submit accurate tax returns. Penalties of 100% of the unpaid tax were abated by the Commissioners to 45% to take account of the disclosures made by Mr Reid and his co-operation in the investigation, and the amount of unpaid tax. The Tribunal held that Mr Reid had acted negligently in delivering an incorrect self-assessment return, and that accordingly he was liable to a penalty under section 95 Taxes Management Act 1970. The ground of negligence was that Mr Reid had not acted to the standard of a reasonable taxpayer in that he had not maintained records, or otherwise paid sufficient attention to his tax affairs, such that he was unable to submit accurate self-assessment returns on time for the relevant tax years. The Tribunal accepted the bases on which the penalty had been abated, and held that the penalty determinations in the amounts stated should stand.

Mr Reid's appeal to this Tribunal and the grounds of his appeal

12. Mr Reid applied to the First-tier Tribunal for permission to appeal against its decision to this Tribunal. The grounds of appeal, stated at some length were, in summary, that the First-tier Tribunal had applied the law incorrectly; it had conducted the proceedings in breach of the proper procedures and with a lack of independence and impartiality; and it had failed to give adequate reasons for its decision. In the section dealing with the incorrect application of the law it is stated:

> "The decision made does not allow our client to bring in allowable and receipted expenditure against the Self Assessment income estimated by

> HM Revenue. This is clearly inconsistent: if HM Revenue is seeking to bring in Self Assessment income, then all proven expenditure should also be allowed. In this instance, approximately £24,000 of Self Assessment expenditure HAS been proven, as set out in detail on Appendix B of our closing submissions"

13. The reference to closing submissions is to the written closing submissions made by both parties – at the hearing before the Tribunal there was insufficient time, following the giving of evidence, for the parties to make their closing submissions and the Tribunal directed the parties to make them in writing after the hearing.

14. Permission was refused by the First-tier Tribunal, and Mr Reid then applied to this Tribunal for permission to appeal. There was some correspondence between this Tribunal and Mr Reid's representative as to the matters which constituted proper grounds of appeal to this Tribunal, and Mr Reid was invited to expand on the statement above, as to allowable expenditure which had been disregarded by the Tribunal, so that a judge of this Tribunal could consider whether that matter could amount to a justifiable ground of appeal.

15. In response to that invitation Mr Harvey wrote on 6 September 2011 to this Tribunal. That letter refers to "our client's allowable self-assessment expenditure, totalling £30,450", and continues:

> "To be clear, this expenditure is part of our client's self-assessment tax returns, as submitted for the years in question, and has been made clear to HM Revenue throughout the duration of this tax investigation. These are not new claims. All of these items of expenditure have been detailed throughout this investigation and were part of the evidence submitted to the First Tier Tribunal hearing of February 2011. These details were again set out in our closing submissions after the above hearing.
>
> It would appear that Judge Brooks, in reaching his sweeping decision in favour of HM Revenue and Customs, has neglected to consider that our client does have some legal entitlements despite the decision going against him.
>
> Hence, we now provide information by way of 'Schedule B' from our closing submissions, which sets out these expenses in detail, and we would re-iterate that, firstly, all of these items are allowable and, secondly, the self-assessment income for the years these expenses were incurred has been brought in by HM Revenue and Customs and included by Judge Brooks in his final decision."

The information included with Mr Harvey's letter as "Schedule B" is headed "Business Expenditure" comprising office rent for the 25 months September 1997 to September 1999 inclusive, totalling £6,500 and, for each tax year 1997-98 to 2003-04, an amount described as "Receipted expenditure from Self Assessment Tax Return", those amounts together totalling £23,950.42.

16. This Tribunal decided to give permission for Mr Reid to appeal on the basis that the essence of his ground of appeal was that the Decision had not taken account of Mr Reid's allowable expenses and, by inference, the Tribunal had provided inadequate reasons for its decision. It was considered that there was an arguable case for this Tribunal to consider such ground on appeal since the apparent focus of the Tribunal in giving its decision was on income without specific reference to allowable expenses.

17. The issue for me to decide, therefore, is whether the Tribunal erred in law by failing to take proper account in reaching its decision of evidence before it as to allowable expenditure incurred by Mr Reid in his business as an "MC" performer for the tax years 1996-97 to 2003-04 inclusive.

Various matters arising from Mr Reid's original grounds of appeal

18. I mention here, as Miss Jordan (who appeared for the Commissioners before me) pointed out, that Mr Harvey, in writing to this Tribunal on 6 September 2011, correctly referred to the expenditure in question as being taken into account by Mr Reid in preparing his self-assessment tax returns, and to the items of expenditure having been submitted to Mr Gannon in the course of his investigation and then as part of the evidence submitted to the Tribunal. However, he was not correct to identify such expenditure in that letter as "receipted expenditure" – the point of dispute between the Commissioners and Mr Reid as to allowable expenditure was that Mr Reid could not substantiate his claims for expenditure, whether by producing receipted items or otherwise. To that extent, therefore, this Tribunal had, in her submission, been misled when it came to consider whether or not Mr Reid should have permission to appeal – it was not the case that the Tribunal had failed to take account of receipted expenditure in reaching its decision.

19. I also mention that Mr Reid's original grounds of appeal made reference to improper procedures on the part of the Tribunal, and a lack of independence and impartiality by the Tribunal. This Tribunal has given Mr Reid permission to appeal solely on the question of whether the Tribunal took proper account of the evidence as to allowable expenditure. Mr Harvey, however, repeated the points in his skeleton argument produced for the hearing before me (although he did not make reference to them in his oral submissions). As to the matter of procedure his complaint is that the Tribunal panel had had limited opportunity to read the bundle before the hearing (and delayed the start of the hearing by 45 minutes to allow them to complete that task). As to the matter of independence, his complaint is that the Tribunal agreed with the Commissioners for the years 1996-97 to 2003-04 in the face of Mr Reid's case. Additionally he mentions that in listing the appeal for hearing the Tribunal showed favouritism to the Commissioners. Since these matters have been raised again by Mr Harvey, and since they principally relate to the competence and integrity of the Tribunal judge and member I think it right to deal with them here notwithstanding that they are outside the ambit of the ground of appeal for which Mr Reid has permission to appeal.

20. The extent to which and the manner in which a Tribunal judge and member will prepare for a hearing is a matter for their discretion – it is not prescribed by any rules

of procedure. In the normal case they will come to the hearing with an overview of the facts and law germane to the appeal and the particular issue which the parties have identified as the matter which the Tribunal has to decide. They will rely on the parties, as the parties make their respective cases, to take them in the course of the hearing to the detail of the evidence and of the applicable law. After the hearing the judge and the member will together review the case and reach their preliminary decision. In the course of writing the reserved decision of the Tribunal the judge will invariably refer back to the evidence bundle and legal authorities, as well as his notes of the hearing, as he gives further consideration to the matters of evidence and submissions presented at the hearing. The judge will submit his written decision in draft to the member for his comments before the decision in its agreed form is released.

21. There is nothing to suggest that in the present case the Tribunal's procedures or conduct were other than along these lines. The Tribunal postponed for 45 minutes the start of the hearing, but that was to enable the judge and the member to complete their preliminary reading of the papers to ensure that they had that overview of the case before hearing the detailed evidence and submissions. The case was listed for one day, and by the end of that day the evidence had been heard but the parties had not made their submissions in closing. The Tribunal proposed that it would be more expeditious to have the parties make those submissions in writing than to list the case for a further half day hearing. The Decision records that the parties agreed to that course, and timings were agreed to ensure that the submissions on behalf of Mr Reid could be made after he had had the opportunity to consider the submissions made on behalf of the Commissioners. Such a course of action is a common practice when a case overruns, and on occasion is adopted at the request of the parties even where there are no time constraints, as it gives the parties the opportunity to reflect on the evidence (particularly matters which have emerged in cross-examination) and to have the advantage of formulating their comments and submissions in a more structured and considered manner. I see nothing in the manner in which the Tribunal conducted the hearing or related proceedings which justifies any complaint or forms any basis for an appeal.

22. As to the allegation that in reaching its decision the Tribunal lacked independence and impartiality, Mr Harvey refers to two matters. He says, first, that the Tribunal was not independent because in reaching its decision it agreed with the Commissioners in relation to the years 1996-97 to 2003-04, despite the evidence and submissions (including the written submissions) of Mr Reid. Secondly he says that in the management of the appeal proceedings favouritism was shown to the Commissioners by the Tribunal in that it initially listed the case for hearing on a date that was convenient for the Commissioners but not for Mr Reid and his representative.

23. Mr Harvey's first point is no more than a simple complaint that the Tribunal, in dismissing Mr Reid's appeals for the years in question, decided the matter in favour of the Commissioners rather than in favour of Mr Reid – a complaint which is self-evidently absurd and which as an allegation of bias in any event flies in the face of the fact that the Tribunal decided, in the same case, to allow Mr Reid's appeals for the earlier years assessed. No specific matter is mentioned which might suggest, on any

objective basis, that in the conduct of the case or in reaching their decision the Tribunal judge and member were biased or acted in a manner which might give the impression that they were biased. Nor can I see anything in the Decision to suggest such a thing. As to the second point, I understand that the listing office initially, and mistakenly, listed the hearing for a date for which Mr Harvey had previously indicated that he was not available, but when this was pointed out to the office it listed the hearing for a later date when both parties were available. This was nothing more than an administrative oversight which was promptly and effectively rectified without detriment to either party. Neither of these points comprises any basis whatsoever for any complaint or appeal.

Admissibility of further evidence

24. Before turning to the principal issue I have to decide, I must deal with a question related to the principal issue concerning certain evidence of the expenditure incurred by Mr Reid for the purposes of his business.

25. After the Decision was released, and following the decision notice of this Tribunal giving Mr Reid permission to appeal, Mr Harvey on Mr Reid's behalf wrote to the Commissioners providing them with further material which, he claimed, evidenced certain expenditure Mr Reid was claiming as allowable. Mr Harvey stated that the expenditure evidenced by this material was expenditure claimed in Mr Reid's self-assessment returns, and that the information comprised in the material "was present at the hearing of February 2011 [the hearing before the First-tier Tribunal] but, due to time constraints and Judge Brook's decision not to go into second day of hearing, this information was not used". (At the hearing before me Mr Harvey said that this material "was not necessarily in the First-tier Tribunal hearing bundle", but that it supported the tax returns which themselves were included in that hearing bundle.) The appeal proceedings before this Tribunal were stayed at the parties' request to enable the Commissioners to consider this material to see if the dispute could be settled. The Commissioners set out their response in detail in a letter to Mr Harvey in which they concluded that the material in question advanced matters no further in terms of substantiating the expenditure claims made by Mr Reid, and so the appeal proceedings were resumed.

26. In the bundle prepared for the hearing before me Mr Reid had included this material, which comprises some 75 pages. The Commissioners object to its inclusion at this stage of the proceedings on the grounds that it is inadmissible. They also argue that it adds nothing to the evidence before the Tribunal in that it is little more than unsubstantiated statements as to expenditure purportedly incurred by Mr Reid; that much of the expenditure in question has previously been claimed as expenditure incurred by the agency/artist management company he had established; and that in the cases where copy bills have been provided (principally for telephone and for re-spraying and repairing a car) it is not clear whether the expenditure relates to Mr Reid's performance business. Mr Harvey, on behalf of Mr Reid, submitted that the material should be admitted as evidence, and that either I should review it and take it into account in the appeal proceedings, or remit the case back to the Tribunal for it to consider by way of review of its decision.

27. Miss Jordan argued that in principle the material is inadmissible before this Tribunal, which is not a fact-finding tribunal, and whose function is to review the Decision. She argued that it is inadmissible in any event (and so the proceedings should not be referred back to the Tribunal) because the material has been produced too late in the day. She pointed out that in no sense was the material "new" evidence, in terms of documents or information previously unavailable to Mr Reid; and that Mr Reid had, over the course of an investigation begun in 2001, followed by Tribunal appeal proceedings, had plenty of opportunity to supply this material to the Commissioners and to include it in his evidence before the Tribunal.

28. I agree with Miss Jordan. Once matters of evidence and fact have been heard and found by the fact-finding tribunal (the First-tier Tribunal in these proceedings) it requires exceptional circumstances for the case to be, in effect, re-heard to review and take account of evidence which a party brings forward and wishes to adduce after that tribunal has reached its conclusions and handed down its decision on the evidence before it at the time the appeal was heard. The circumstances have to be exceptional in order to justify the tribunal setting to one side the principle of legal finality which is a matter of fairness to the parties – if the parties have argued their respective cases on the evidence they have respectively put before the tribunal, and the tribunal has, acting reasonably, reached its findings of fact on the evidence as presented and the submissions as to that evidence as made by the parties, then that determines the matter, giving the parties the certainty which comes from the finality of that aspect of the proceedings.

29. I see no exceptional circumstances whatsoever which would justify any decision or direction on my part which would result in this material being adduced as evidence at this stage of proceedings. Mr Harvey could point to no such circumstances.

30. For the most part the papers comprise copy spreadsheets headed "expenses summary" with items of apparent expenditure entered by date under generic headings ("Motor", "Stationery and supplies", "Telephone", etc). There is no indication as to the business to which they purportedly relate. Even if they relate to Mr Reid's business (and leaving aside the point that they are only spreadsheet entries and are not supported by invoices, receipts or other evidence of actual expenditure), one must assume that they are matters which Mr Reid had to hand, or they record information he had the means to obtain, well before his appeal reached the Tribunal.

31. This is equally true of the papers in the bundle (numbering less than 25 pages out of the total of 75) which comprise copies of bills or receipts: in so far as any bear a customer's name (telephone bills and two garage bills for car re-spraying and repairs) it is that of Mr Reid (in the case of the telephone bills, also with the name "Vocal Fusion", which was the name of the agency company he established, although it may also have been a trade name Mr Reid used prior to incorporation). These, therefore, are documents which it must also be assumed were available to Mr Reid at the time he was preparing his appeal to the Tribunal.

32. There is no reason to allow further evidence where that evidence could have been made available in the course of the proceedings before the First-tier Tribunal.

33. Nor is there anything exceptional about the nature of the information in this material. As I have indicated, for the most part it comprises unidentified spreadsheets, which are no more than an assertion that expenses have been incurred, when the issue underlying this case is whether Mr Reid can substantiate the amounts of income and expenses claimed in his self-assessment returns. As I have also mentioned, where there are specific bills or receipts it is not clear that they relate to Mr Reid's business as an "MC" performer, or if they do, whether the expenditure was wholly and exclusively incurred for that purpose, or whether there was some duality of purpose.

34. Thus no case can be made out that the evidence is so compelling and conclusive that it would be unjust to refuse, even at this late stage, to take it into account in determining Mr Reid's appeal.

The issue to be decided and the First-tier Tribunal's task

35. I now turn to the principal issue I have to decide, namely whether the Tribunal erred in law by reaching its decision without regard to the evidence before it as to the allowable expenditure incurred by Mr Reid for the purposes of his performance business.

36. It is necessary first to understand the task which the Tribunal was required to undertake in this case (in relation to the tax years 1996-97 to 2003-04).

37. For those tax years Mr Reid filed self-assessment returns. The Commissioners were not satisfied with those returns and made an enquiry under section 9A of the Taxes Management Act 1970 ("TMA 1970"). That enquiry was treated as completed when the Commissioners issued a closure notice on 23 July 2007, as provided in section 28A TMA 1970. That closure notice informed Mr Reid that the officer conducting the enquiry had completed his enquiries and stated the conclusions he had reached as a result of those enquiries. It also made amendments to the returns filed by Mr Reid, being the amendments required to give effect to the officer's conclusions, as required by section 28A(2) TMA 1970.

38. The result of this process is that the Commissioners' officer (Mr Gannon in this case) substituted his estimate of the taxable income of Mr Reid for each of the tax years in question for that returned by Mr Reid, that estimate being based on the conclusions he had reached on completion of, and as a result of, the enquiries he had conducted into Mr Reid's business affairs over the preceding five or six years. The amended returns showed Mr Gannon's estimate of the income from Mr Reid's business and his estimate of the allowable expenditure for that business, in order to arrive at the estimate of Mr Reid's taxable income.

39. It is necessary to add here that Mr Gannon was faced with the situation that Mr Reid was able to provide to Mr Gannon few, if any, records relating to Mr Reid's business, and no books of account. The Decision records that Mr Reid informed Mr Gannon that his diary, appointments book and invoices had been stolen. The amendments which Mr Gannon made to Mr Reid's tax returns were based on such

information as Mr Reid could provide at meetings and Mr Gannon's own experience of this sphere of business, and the inferences which he made from those matters (see [5] and [6] above).

40. The Tribunal, in the Decision, set out the approach which a tribunal must follow when a taxpayer appeals against an assessment raised in these circumstances:

> "6. With regard to assessment, in *Johnson v Scott (HM Inspector of Taxes)* (1978) 52 TC 383, Walton J, in a passage approved by the Court of Appeal (at 403) in that case, said at 394:
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> > 'Of course all estimates are unsatisfactory; of course they will always be open to challenge in points of detail; and of course they may well be under-estimates rather than over-estimates as well. But what the Crown has to do in such a situation is, on the known facts, to make reasonable inferences. When, in paragraph 7(b) of the case stated, the commissioners state that (with certain exceptions) the inspector's figures were "fair" that is, in my judgment, precisely and exactly what they ought to be, fair. The fact that the onus is on the taxpayer to displace the assessment is not intended to give the Crown carte blanche to make wild or extravagant claims. Where an inference of whatever nature falls to be made, one invariably speaks of a "fair" inference. Where, as is the case in this matter, figures have to be inferred, what has to be made is a "fair" inference as to what such figures may have been. The figures themselves must be fair.'
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> ….
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> 8. Section 50(6) TMA provides that if, on an appeal, it appears to the Tribunal that an appellant is overcharged by an assessment the assessment shall be reduced accordingly but *"otherwise the assessment … shall stand good"*. In the decision of the Court of Appeal in *T Haythornwaite & Sons v Kelly (HM Inspector of Taxes)* (1927) 11 TC 657 Lord Hanworth MR, referring to a previous incarnation of this enactment, said, at 667:
>
> > 'Now it is to be remembered that under the law as it stands the duty of the Commissioners [and from 1 April 2009 the Tribunal] who hear the appeal is this: Parties are entitled to produce any lawful evidence, and if on appeal it appears to a majority of the Commissioners by examination of the Appellant on oath or affirmation, or by other lawful evidence, that the Appellant is over-charged by any assessment, the Commissioners shall abate or reduce the assessment accordingly; but otherwise every assessment or surcharge shall stand good. Hence it is quite plain that the Commissioners are to hold the assessment as standing good unless the subject – the Appellant – establishes before the Commissioners, by

> evidence satisfactory to them, that the assessment ought to be reduced or set aside.'"

41. Thus the Tribunal has a responsibility to judge whether an assessment based on an inspector's estimate is "fair", that is, based on the known facts and reasonable inferences drawn from those facts, and not extravagant or capricious. Subject to that the burden is on the taxpayer to establish from any lawful evidence he may put forward to the Tribunal that the assessment is incorrect and should be reduced or set aside. If the taxpayer does not discharge that burden the assessment must be upheld – it "shall stand good".

The First-tier Tribunal's decision

42. It is clear to me from the Decision that the Tribunal in this case understood its responsibilities and the approach it should take. Thus at [28] the Decision, after referring to the citation of the passages above, states:

> "… it is clear that the principles to be derived from these [cases], which are still very much applicable as can be seen from our outline of the law (in paragraphs 3 to 9 above) is that, providing the figures in the assessments and amendments are 'fair', the onus is on the taxpayer to displace them. As the assessments and amendments in this case were based on information that had been provided to Mr Gannon by Mr Reid and Mr Harvey we find that, subject to our comments below, he drew reasonable inferences in making the assessments and amendments and, as such unless it can be shown that Mr Reid is over-charged by any particular assessment or amendment is 'shall stand good.'"

43. The Tribunal went on to hold, as I have mentioned, that for the tax years 1989-90 to 1991-92 and 1993-94 to 1995-96 the estimated assessments should not stand: it accepted Mr Reid's oral evidence that he was not paid for his appearances or performances during those years (so that he had no income) – this was so notwithstanding the lack of business records or other written evidence: " … we accept his evidence and on balance consider that it is just about sufficient to discharge the burden of proof for the years concerned." (at [36]).

44. With regard to the tax years 1996-97 to 2003-04 the Tribunal summarises the submissions made by the respective parties, noting the submissions made on behalf of Mr Reid as to financial assistance he claimed to have received from his mother and his agency company and also the submission that the Commissioners had not taken into account that Mr Reid must have incurred business expenditure and business development costs during this period. The Tribunal concludes in its decision:

> "42. Having carefully considered the evidence advanced by and on behalf of Mr Reid in relation to this period we do not find it to be sufficient to displace the amendments which therefore 'stand good'.
>
> 43. As such we dismiss the appeals against the amendments for 1996-97 to 2003-04."

The parties' submissions

45. Mr Harvey's case before me was that the Tribunal had accepted the assessments as fair without proper consideration of the evidence presented by Mr Reid and in particular the evidence as to the expenditure incurred by Mr Reid for the purposes of his business, which expenditure should be allowed as a deduction in calculating his taxable income, in accordance with the self-assessment returns made by Mr Reid. That evidence, he says, was included in the papers before the Tribunal and in particular in the written submissions made after the hearing. Over the tax years in dispute that allowable expenditure totalled £27,286. He refers to the Decision, where no mention is made of Mr Reid's case as to the expenditure he incurred or the evidence he presented in support of that case.

46. In more detail, Mr Harvey argues that in reaching their assessments the Commissioners have regarded expenses of Mr Reid's business as expenses of his agency company, Vocal Fusion Ltd, even expenses incurred prior to the time that company commenced its business, when Mr Reid was using the trading name Vocal Fusion. He argues that the Commissioners should show flexibility in allowing expenses to be allocated as between the company and Mr Reid, provided that they are not claimed twice over, since the company should be regarded as an entity through which Mr Reid carried on his business. In this regard, he says, the spreadsheet summaries of expenses produced in negotiations with the Commissioners and then in evidence showed expenditure made by both Mr Reid and the company and only at a later stage were items attributed to one or the other, according to whether eventually the expenditure was funded by the company (if it was not, it was assumed to be expenditure of Mr Reid).

47. For the Commissioners Miss Jordan made submissions under three heads: that the Tribunal in reaching its decision gave proper consideration to the question of expenditure in considering whether the assessments were "fair" or should be reduced; that there was sufficient material before the Tribunal to enable it to conclude that the expenditure aspect of the Commissioners' assessments – including the inferences made in relation to expenditure – was "fair"; and that there was sufficient material before the Tribunal to enable it to conclude that the expenditure claimed by Mr Reid was not allowable.

48. As to the question of whether the Tribunal gave proper consideration to the matter of expenditure, Miss Jordan pointed out that since the assessments made by the Commissioners were assessments of taxable income, they took account of both Mr Reid's estimated income and his estimated allowable expenditure. In reaching the estimate of allowable expenditure required to determine estimated taxable income Mr Gannon was supplied with no documentary proof of expenditure claimed, and in so far as expenditure was claimed, it was unclear whether it was properly regarded as expenditure of Mr Reid or of the company (including preparatory expenses, in the period before the company began trading). This was confirmed, Miss Jordan argued, by the oral evidence given to the Tribunal: Miss Jordan (who did not appear for the Commissioners before the Tribunal) referred to the written closing submissions of the Commissioners which refer to the matters covered in cross-examination of Mr Reid and Mr Harvey at the hearing dealing with expenditure claimed, where it was

conceded that the expenses claimed by Mr Reid against his earnings were not evidenced by any documentation, and from which it appeared that matters were confused as to whether items of expenditure were those of Mr Reid or of the company. The Tribunal therefore was fully aware of the basis on which the expenses had been dealt with in the assessments, and of the two essential features of this case in relation to expenses – that the expenses claimed could not be substantiated by Mr Reid, nor could Mr Reid demonstrate that all the expenses claimed related to his business. Therefore the Tribunal's conclusion (at [42]) that having considered the evidence by and on behalf of Mr Reid it did not find it to be sufficient to displace the amendments made to the assessments by the Commissioners is a proper and adequate finding as to the relevant matters relating to expenditure in this case based on the evidence before it.

49. As to the issue of whether the amended assessments were "fair" in relation to the inferences made by the Commissioners as to expenditure, Miss Jordan referred to extracts from the extensive and detailed discussions and correspondence between the parties during the investigation period, all of which were included in the bundle of evidence at the hearing. From that material it was clear that no proof of expenditure was provided to the Commissioners; that the Commissioners took account of such information as Mr Reid provided to them; that full reasons were given explaining why amounts claimed were not considered allowable by the Commissioners; and that the estimated expenditure which was allowed (and therefore deducted from the estimated income in reaching the taxable income shown in the assessments) was justified.

50. In the assessments for each year as amended, allowance was made for motor travel and telephone expenses by way of a fixed reduction in the fees per set which it was estimated that Mr Reid had earned. For each of 1996-97 and 1997-98, although no proof of expenses was provided, an estimated allowance of £200 was allowed to reflect incidental expenditure. No expenditure was allowed for the following three years. For 2001-02 expenditure totalling £1,854 was allowed; for 2002-03, £266; and for 2003-04, £644. These amounts were estimated on the basis that, after direct expenses (dealt with by the reduction in fees), the nature of Mr Reid's income was such that there was likely to be little or no matching expenditure, although for the later years a percentage of the fees paid for television appearances was allowed as expenditure.

51. As to the question of whether the expenditure claimed by Mr Reid was in principle allowable (assuming it could be proved that such expenditure had been incurred), Miss Jordan referred to the confusion as to whether actual expenditure was that of the agency/artist management company or that of Mr Reid in relation to his performance business, and whether, in the period before the company began trading, expenditure was by way of development costs of setting up the company and its business or expenditure of Mr Reid's business. The investigation correspondence and meeting notes, and also Mr Harvey's submissions in the present appeal, show that in some way Mr Reid and Mr Harvey regard expenses as fungible across the businesses of Mr Reid and the company – they must be capable of being claimed for the tax purposes of one or the other. But the question which has to be answered for tax purposes is whether in fact expenditure has been incurred by a particular person and if

so, whether it was incurred wholly and exclusively for the purposes of the trade carried on by that person. Mr Reid, in Miss Jordan's submission, even if he could have proved that expenditure had been incurred, failed to show that it had been incurred by him, and that it had been incurred wholly and exclusively for the purposes of his business as an "MC" performer.

52. In summary, the Commissioners argue, the Tribunal fulfilled its role, which was to determine whether the Commissioners' estimated figures in the amended assessments were fair, and if so, whether Mr Reid had nevertheless proved that they should be reduced or set aside. The Tribunal had sufficient material before it to reach the conclusions which it did, namely that the amended assessments were fair, and that they should stand good since Mr Reid had failed to show from the evidence before the Tribunal that they should be reduced. Mr Reid's appeal to this Tribunal should therefore fail.

Conclusion

53. I have already concluded that the Tribunal was aware of the course it should take in reaching its decision in a case such as this (see [40] to [41] above): to decide whether the assessments made on the basis of such evidence as was available were "fair" (and not "wild or extravagant claims"), and if so, whether nevertheless the taxpayer can establish from his evidence that they should be reduced or entirely set aside. In reaching its decision the Tribunal sought to follow that course. Mr Reid's complaint is that the Tribunal may have known what it had to do, but it failed to carry out its task fully and fairly since it did not take proper account of his evidence as to allowable expenditure.

54. Mr Reid's real difficulty, throughout the investigation and the appeal proceedings, is that he can provide scant substantiated evidence of expenditure incurred during the relevant years for the purposes of his business. (I would add that he provided scant evidence as to his income also - that also had to be estimated by Mr Gannon from such information as he was given by Mr Reid, but that aspect of the assessment is not challenged in the present proceedings.) Mr Reid had no business records or books of account, and although in applying to this Tribunal he justified his grounds of appeal by referring to "receipted expenditure", Miss Jordan is right to point out that there is no such expenditure which relates clearly and solely to Mr Reid's business.

55. The Decision records (at [40]) Mr Harvey's submission that "HMRC have not taken into account that Mr Reid must have incurred business expenditure and business development costs during the period of the assessments and closure notices". That, it seems to me, captures the essence of the case argued by Mr Reid throughout the investigation and the subsequent appeal proceedings - he could not demonstrate that expenditure had been incurred - he had no evidence to that effect - and so he was forced to argue that if he had income from his MC performances there must be some allowance for the expenses which might be expected from a business which produced such income.

56. To an extent this line of argument was accepted by the Commissioners: they allowed a deduction for estimated direct costs of performances (travel and telephone) by netting them against estimated gross fees. In most of the years we are concerned with they also allowed a modest fixed sum as estimated overhead or indirect costs. Beyond that they allowed nothing because although Mr Reid asserted that he had incurred costs in carrying out his business, he had no evidence - invoices, receipts, or other proof of payment - of such costs, or no evidence that any costs which had been incurred had been incurred wholly and exclusively for the purposes of his business. It seems clear that the Commissioners were prepared to consider anything which Mr Reid had to offer by way of evidence of his business expenditure, even after the Tribunal had released the Decision and proceedings had begun before this Tribunal. But they were not prepared to accept generally that Mr Reid was entitled to a deduction for expenses on the ground that "he must have incurred" such expenses.

57. The Tribunal in coming to its decision took the view that the Commissioners had reached a fair estimate of Mr Reid's taxable income - estimated gross income less an estimate for direct costs and some overhead costs - from his business for the years in question by following this approach. I see no basis for disagreeing with the Tribunal's decision in this regard.

58. The Tribunal then had the benefit of Mr Reid's evidence at the hearing, and the subsequent written submissions made on his behalf as to the evidence. The Tribunal did not find that that evidence was such as to establish that the assessments ought to be reduced or set aside. That the Tribunal approached this issue with care and an open mind is apparent from its decision with regard to the earlier years of assessment where Mr Reid's evidence was accepted as establishing that the assessments should be set aside.

59. It is the case, as Mr Harvey asserts, that the Decision does not include a detailed review of such evidence as Mr Reid had to offer in relation to the question of the expenses of his business, and to that extent the Decision may be open to some criticism: it was for that reason that this Tribunal gave Mr Reid permission to appeal. It remains the case, however, that, as the Tribunal found, Mr Reid had no business records or accounts to support his case, so that, one must conclude, such evidence as he offered was little more than unsubstantiated assertion. From the submissions made to me by Mr Harvey, it would seem that, in addition, Mr Reid had little sense of distinction between the quite separate matters (in tax terms at least) of the business carried on by Mr Reid himself and the business carried on by the company with which he was associated. I entirely agree with Miss Jordan that what is required of Mr Reid is that he must have credible evidence that he incurred the expenditure claimed, and that he incurred that expenditure wholly and exclusively for the purposes of the business he carried on.

60. The Tribunal had before it all the evidence on which Mr Reid based his case. It had the benefit of written submissions of the parties on that evidence. In the course of the hearing before me both parties made extensive reference to the evidence before the Tribunal (both the documentary evidence and the oral evidence, as that is to be discerned from the subsequent written submissions on evidence). I can illustrate the

nature of the evidence offered by Mr Reid by reference to his claim that he incurred expenditure of £250 per month, for 25 months, on office rent from September 1997 to September 1999. The evidence for such claim comprises a manuscript note on plain and un-headed paper which reads: "24 September 1997 - £260 received from Vocal Fusion for September rent", followed by an unidentified signature. The inadequacy of this note as convincing evidence is readily apparent. Even accepting that "Vocal Fusion" is a trade name of Mr Reid's business, there is no identification of the premises or of the landlord; there is no lease or rental agreement or proof of payment; and this "receipt" relates only to one month.

61. The Tribunal concluded that Mr Reid's evidence was not sufficient to displace the amendments made by Mr Gannon to Mr Reid's self-assessment returns for the years in question, which should therefore "stand good". I consider that that was an entirely reasonable conclusion for the Tribunal to reach, and accordingly I can see no error on the part of the Tribunal in reaching its decision to dismiss Mr Reid's appeal with regard to amended self-assessment returns for the tax years 1996-97 to 2003-04 inclusive. Further, there is no basis to disturb the Tribunal's decision to dismiss Mr Reid's appeal against the related penalty determinations.

62. I therefore dismiss Mr Reid's appeal to this Tribunal.

63. The Commissioners have permission to apply in writing for an order as to their costs.

EDWARD SADLER
UPPER TRIBUNAL JUDGE

Decision Released: 27 September 2012