TC01462

Appeal number TC2010/3541

INCOME TAX & NATIONAL INSURANCE – ***Assessment – whether employer failed to account for income tax and class 1 National Insurance Contributions – yes – quantum of the assessment too high – assessment reduced – Appeal allowed in part.***

FIRST-TIER TRIBUNAL

TAX

MR SAJAAD HUSSAIN **Appellant**

- and -

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

TRIBUNAL: MICHAEL TILDESLEY OBE (JUDGE)
ALBAN HOLDEN

Sitting in public at Phoenix House, 1-3 Newhall Street, Birmingham B3 3NH on 27, 28 and 29 June 2011

Mohammad Yousaf of Malick & Co, Chartered Certified Accountants for the Appellant

Philip Oborne, Presentation Officer of the Appeals and Review Unit for HMRC

DECISION

The Appeal

1. The Appellant appealed against determinations by HMRC under section 8 of Social Security Contributions (Transfer of Functions etc) Act 1999 and regulation 80 of Income Tax [Pay As You Earn] Regulations 1999 in respect of his liability as an employer to pay the income tax and national insurance contributions for his employees.

2. The original determination dated 2 September 2009 was in the amount of £56,968.30.

Year/Period	Description of Determination	Date of Issue	Amount Due (£)
2005/06	PAYE	2/09/09	4,999.50
2006/07	PAYE	2/09/09	14,872.00
2007/08	PAYE	2/09/09	14,026.10
1/12/2005 to 18/02/2008	Class 1 National Insurance Contributions	2/09/09	23,070.00

3. On 30 October 2009 HMRC issued a revised calculation of the amounts due without formally amending the determinations. The revised total amount was £23,103 which was broken down as follows:

Year/Period	Description of Determination	Date of Issue	Amount Due (£)
2005/06	PAYE	30/10/09	2,266.00
2006/07	PAYE	30/10/09	7,138.56
2007/08	PAYE	30/10/09	6,732.00
1/12/2005 to 18/02/2008	Class 1 National Insurance Contributions	30/10/09	6,967.44

4. The Appellant was the proprietor of a food takeaway named The Balti King situated in Market Street, Ely between 1 December 2005 and 18 February 2008. On 8 September 2006 the Appellant registered as an employer with HMRC for PAYE and

national insurance contributions. On 25 May 2007 HMRC opened an enquiry into the Appellant's P35 returns and potential failure to register for VAT. On 27 June 2007, Officers Kiwerski and Gaynor held a meeting with the Appellant and his accountant in respect of the enquiry into the Appellant's business. On 18 October 2007 the same Officers made an unannounced visit of the Appellant's business premises. They also carried out a surveillance of the premises on 12 November 2007 between 16:35 and 23:25 hours. Officers March-Killen and Shadbolt undertook a further surveillance on 13 November 2007 between 16:35 and 19:06 hours.

5. The Appellant argued that HMRC's determinations were speculative wholly based on casual observations of his premises. The determinations had no regard to the commercial realities of the Appellant's business as a food takeaway. HMRC disagreed, pointing out that the Appellant held inadequate business records to substantiate the payments made by way of wages to his employees. HMRC contended that the determinations were made to best judgment derived from the information given to it by the Appellant, and its observations of the Appellant's business.

The Evidence

6. The Tribunal heard evidence from the Appellant, Mr Shifait Miran, an employee, and from the Appellant's brothers in law, Mr Mohammed Mahboob Yousaf, Mr Mohammed Mansha Yousaf, and Mr Habib Yousaf. The Appellant also tendered witness statements from Mohammed Pazeer, an employee, and Mr Manib Yousaf, one of the Appellant's brothers in law.

7. Mrs Yvonne Gaynor and Ms Lorraine March Killen gave evidence for HMRC. The Tribunal received a bundle of documents in evidence.

8. The Tribunal heard the Appeal over three days, at the end of which the Tribunal reserved its decisions but issued directions for HMRC to provide additional information by 8 July 2011 with a right of reply to the Appellant by 22 July 2011.

The Facts

Background

9. The Appellant started the food takeaway business on 1 December 2005 from scratch, purchasing second hand equipment using his savings and money loaned from relatives. The business was located in the market town of Ely with a population of 15,000, and encountered intense competition with nine other Indian takeaways and restaurants in the vicinity. The Appellant had no previous experience in the catering industry. The premises was formerly a record shop which had been converted to a takeaway business. The Appellant rented the shop but was unable to provide details of the lease including its term. The Appellant sold a range of meals including burgers, pizzas, kebabs and curries and provided a home delivery service. On 18 February 2008 the Appellant sold the business as a going concern for £25,000 to a Mr Asad.

Takings for the Business

10. The Appellant declared takings of £49,539, employee's costs of £9,100 and a net loss of £2,210 in his 2006/2007 tax return for the accounting year ending 30 November 2006. His tax return for the following year which was made up to 18 February 2008 showed takings of £61,923, staff costs of £26,918 and a loss of £20,573. The 2007/2008 return was based on estimated figures as the original records had been lost. The bundle included records of takings kept by Appellant which were served on the HMRC. The record for the period 10 December 2006 to 28 April 2006 showed a takings figure of £19,742.50. The record from 22 July 2007 to 18 August 2007 gave a takings figure of £3,659.30. The average weekly takings for this period were £975.04.

HMRC Dealings with the Appellant

11. At the meeting on 27 June 2007 the Appellant informed HMRC Officers Kiwerski and Gaynor that the business was open 5-11pm Sunday to Thursday, and 5pm-3am Friday and Saturday. He employed five part-time members of staff who worked 16-17 hours per week, and were paid weekly in cash at an hourly rate of £5.35. The Appellant kept no records of the shifts worked by the part-time members of staff. He would inform the members of staff the day before when they were required to perform a shift. The Appellant would bring the part-time members of staff to work from Peterborough except one member of staff who was resident in Ely.

12. The Appellant said that there were at least three persons including himself engaged in the takeaway on Monday to Thursday. The busy period was Friday to Sunday when there would be at least four persons including himself in the shop. The Appellant was also assisted by his wife and four brothers-in-law in the takeaway who did not receive payment for their services. Two members of staff were mostly employed on home deliveries.

13. At the meeting Officer Gaynor requested the Appellant to provide the names, addresses and national insurance details of all persons working in the takeaway, whether paid or unpaid. The Appellant did not comply with the request which resulted in Officer Kiwerski on 21 August 2007 issuing a formal notice for the information including forms P45 and P46 by 6 September 2007.

14. On 19 September 2007 the Appellant's accountants supplied HMRC with the names and addresses of current employees but not the P45 and P46 forms which had been archived.

15. On Thursday 18 October 2007 at 22:50 hours Officers Kiwerski and Gaynor carried out an unannounced visit on the Appellant's premises. Officer Gaynor observed five men working behind the counter. When the Appellant saw the Officers he spoke to one of the five men who was preparing vegetables at the preparation table. The man put on his coat and hat and left the takeaway. The Appellant advised Officer Gaynor that the other men in the shop were Shakeel Mohammed, Faraz Aslam, and his brother-in-law, Habib Yousaf. According to the Appellant the man who left was a friend of Shakeel Mohammed. The Appellant had not kept timesheets for each

employee which was in contravention of the instruction given by Officer Gaynor at the 27 June 2007 meeting.

16. Mr Kiwerski followed up the meeting with a letter dated 19 October 2007 reminding the Appellant of his obligation to produce within 14 days forms P45 or P46 for all members of staff from the date of commencement of business, and to keep records of the working hours of each member of staff.

17. Officer Kiverski received authorisation to carry out covert surveillance of the Appellant's business which was done on Monday 12 and Tuesday 13 November 2007. Officers Kiverski and Gaynor undertook the surveillance on the 12 November 2007 between the hours 16.35 and 23:25 hours. Officers March-Killen and Shadbolt were involved with the surveillance on 13 November which took place between 16:35 and 19:06 hours. The purposes of the surveillance were to count the number of customers entering the premises, the number of home deliveries made, and the number of persons working at the premises.

18. On Monday 12 November 2007 the Officers observed seven Asian males, one of whom was the Appellant, arriving at the premises in two vehicles at 16:50 and 17:00 hours respectively. The first group of three Asian males to arrive opened the premises. The Appellant was in the second group. At around 17:25 hours one of the Asian males drove off with two passengers to make a delivery, returning at 18:01 hours without the two passengers. At various times during the evening the Officers observed three Asian males working in the takeaway with two additional persons out on delivery. At 20:30 hours the Officers noticed a fourth Asian male working behind the counter. At 23:00 hours the Appellant closed the premises. At 23:20 hours four Asian males left the premises in a vehicle driven by the Appellant. The driver of the other vehicle had left previously at 23:11 hours to make a delivery. The Officers did not record the driver returning to the premises.

19. On Tuesday 13 November 2007 at 17.01 hours the Officers saw a vehicle with five Asian males arrive at the premises. The Officers observed four younger Asian males get out and open up the premises. The driver who was older than the others entered the takeaway some ten minutes later. At 17.35 hours an Asian male attended the premises in another vehicle with four bags for deliveries. At 18:28 hours the Officers witnessed at least two persons working behind the counter. The Officers were required to terminate their surveillance at 19:10 hours because their observation post had been compromised.

20. On 26 November 2007 Officer Gaynor repeated the request in writing for forms P45 and P46 plus details of the Appellant's brothers in law and wife. This information to be provided within three weeks of the letter. The Appellant did not comply with the request resulting in further correspondence from Officer Gaynor dated 6 February 2008 demanding a response by 4 March 2008.

21. On 12 February 2008 the Appellant's accountants supplied forms P46 for current and past employees covering the period from 1 September 2006. The details of which together with the information on the form P 14 were as follows:

Name	Commencement of Employment	Earnings as stated on P14 for tax year 2006/07 (£)	Earnings as stated on P14 for tax year 2007/08 (£)
Mohammad Pazeer	2 April 2007		4,607.52
Muhammed Shakeel	9 December 2006	1,455.20	4,607.52
Shafhit Miraon	4 September 2006	2,771.10	4,607.52
Christopher Jones	4 September 2006	2,548.80	4,607.52
Faraz Aslam	4 December 2006	1,455.20	4,607.52

22. On 25 February 2008 Officer Gaynor responded requesting from the Appellant forms P46 for the period from December 2005 to 1 September 2006, and at the same time requested information about the brothers-in-law.

23. On 29 April 2008 the Appellant's accountants supplied the names and addresses of the brothers-in-law, stating that the Appellant could not recall the average time worked by his brothers-in-law at the take-away. The Appellant believed they worked regularly between 20 to 40 hours a week and sometime more depending on requirement.

24. On 24 November 2008 Officer Gaynor sent the Appellant a letter with his estimated liability for PAYE and Class 1 National Insurance Contributions in the sum of £62,792 which included interest, and requested his comments. Officer Gaynor received no response. She decided not to issue penalties but issued the PAYE and National Insurance determinations on 2 September 2009 in the sum of £56,968.30.

25. On 30 September 2009 the Appellant appealed against the determinations. On 26 October 2009 HMRC met with the Appellant and his representatives with a view to reaching a settlement. The Appellant's representative offered £9,000. Officer Hendley said that if it was £9,000 plus interest plus a fixed penalty of £1,200 he would put it forward for consideration. The Appellant did not agree with HMRC's suggestion and withdrew his offer.

26. On 30 October 2009 Officer Gaynor reconsidered the information and issued a revised determination which was the subject of this Appeal.

The Revised Determination

27. Officer Gaynor's revised determination used the following assumptions which were derived from the information supplied by the Appellant and from HMRC's observations of the business premises:

(1) The food takeaway was open for 50 hours a week.

(2) Six people were working each day at the takeaway.

(3) The Appellant advised that there were five employees on the payroll, and each worker was employed for 16 hours a week.

(4) An allowance of 50 hours a week for the Appellant, and 50 hours a week for his brothers-in-law. The Appellant had supplied no evidence when and for how long the brothers-in-law worked at the take-away.

(5) According to Officer Gaynor this left a shortfall of 120 hours not covered by the employees.

(6) The hourly rate for the said 120 hours was at the rate of the national minimum wage.

28. Officer Gaynor's assumptions were summed up in the following table:

	Hours worked (open 50 hours per week
The Appellant	50
Brothers-in-law	50
5 employees on the payroll working 16 hours per week	80
Total hours accounted for	**180**
Total hours to be covered from observations 6 workers x 50 hours	300
Hours not covered by known workers	**120**

29. Based on the above assumptions Officer Gaynor decided that the 120 hours should be split between four unknown employees with the result that the additional hours were taxed at the basic rate of 22 per cent with no personal allowance. She considered that the unknown employees would have used their personal allowance in the recorded hours. She, however, decided to give the employees the benefit of the lower earnings limit for the purposes of calculating the national insurance arrears.

30. The resulting calculation was as follows:

Year	Gross (£)	Tax 22% (£)	Ees NI (£)	Ers NI (£)	Total(£)
2005/06	10,300.00	2,266.00	429.76	500.48	3,196.24
2006/07	32,448.00	7,138.56	1,348.88	1,571.44	10,058.88
2007/08	30,600.00	6,732.00	1,440.40	1,676.48	9,848.88
Grand Total	**73,348.00**	**16,136.56**	**3,219.04**	**3,748.40**	**23,104.00**

The Appellant's Evidence

31. The Appellant stated that Muhammed Shakeel, Mohammed Pazeer, Christopher Jones and Faraz Aslam were the only employees working with him during the time he ran his business at the Balti King. He stated that most of his employees worked 16 hours or less, with their wages paid in cash from the takings. The Appellant also confirmed that his four brothers in law and his wife assisted him with the running of the business. The Appellant's brothers in law said that they helped out regularly in the takeaway without payment. Three brothers-in-law were holding down full time jobs, whilst the other one ran a property business. Mr Miran confirmed that he worked 16 hours a week in the take-away as a kitchen assistant. His witness statement, however, said that he worked 18 hours a week, which apparently was typographical error.

Consideration

32. Under regulation 80 of the PAYE Regulations 2003 if it appears to HMRC that there may be tax payable for a tax year under regulation 68 by an employer, HMRC may determine the amount of that tax to the best of its judgment, and assess the outstanding tax on the employer as if it is income tax charged on the employer.

33. Under section 8 of the Social Security Contributions (Transfer of Functions) Act 1999, an HMRC Officer can decide whether a person is or was liable to pay national insurance contributions of any particular case, and if so, the amount he is or was liable to pay. A section 8 decision must be made to the best of the information and belief of the HMRC Officer.[1] Under paragraph 3 schedule 1 of Social Security Benefits Act 1992 the employer is liable in the first instance to pay the earner's primary Class I National Insurance contribution as well as the employer's secondary contribution.

34. In this Appeal HMRC concluded that the Appellant had not been fulfilling his responsibilities as an employer under PAYE and the National Insurance Scheme by not deducting the required amount of income tax and NI contributions from his

[1] See regulation 3 of Social Security Contributions (Decisions and Appeals) Regulations 1999

employees' wages, and remitting those deductions together with the employer's NI contribution to HMRC. In those circumstances HMRC decided to recover the outstanding amounts from the Appellant in his capacity as an employer rather than from his employees by means of the regulation 80 determination and the section 8 decision.

35. The Tribunal's powers on Appeal against a regulation 80 determination and a section 8 decision are governed by different legislative provisions. Section 50 of the Taxes Management Act 1970 defines the Tribunal's powers on Appeal in respect of a regulation 80 determination. Essentially if the Tribunal considers on the evidence that the Appellant is overcharged by the determination it shall reduce the determination accordingly, but otherwise the determination shall stand good. The Tribunal, however, has the power to increase the determination if it considers that the Appellant has been undercharged by the determination. The Appeal against a section 8 decision is governed by regulation 10 of the Social Security Contributions (Decisions & Appeals) Regulations 2003 which states that if the Tribunal on the evidence determines that the section 8 decision should be varied in a particular manner, the decision shall be varied in that manner but otherwise shall stand good.

36. The Appellant has the burden of proving on the balance of probabilities that the amounts assessed for income tax and National Insurance were incorrect. In this respect the Appellant misunderstood the legal requirements regarding burden of proof with one of its grounds for Appeal, which stated that the tax officers had not adequately or satisfactorily discharged the burden of proof in respect of the disputed decisions.

37. The Appellant's case was that the assessments were not made to best judgment (or best of information and belief in respect of the section 8 decision), and that in any event they were wrong. The Appellant asserted that he had fulfilled his responsibilities as an employer, and that there were no arrears of income tax and Class 1 National Insurance contributions.

38. The Higher Courts have examined the concept of best judgment in assessments for VAT under section 73 of the VAT Act 1994. The Tribunal considers that the principles decided by the Higher Courts in VAT assessments are equally applicable to best judgment or best information under section 80 PAYE determinations and section 8 decisions.

39. Woolf J in *Van Boeckel v Customs and Excise Comrs* [1981] STC 290 decided that the exercise of best judgment by HMRC officers involved three elements: (i) they had to perform their functions honestly and bona fide; (ii) they had to have some material upon which they could base their judgment; (iii) they were not required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which in their best judgment was due.

40. Lord Justice Carnwath in *Customs and Excise Commissioners v Pegasus Birds Ltd* [2004] STC 1509 stated that the Tribunal's primary task on an Appeal against an assessment to VAT was to find the correct amount of tax. Lord Justice Carnwath

offered the following advice (per curiam) to Tribunals when dealing with issues of best judgment:

> "When faced with 'best of judgment' arguments in future cases the tribunal should remember the following four points. (i) Its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the tribunal should not allow itself to be diverted into an attack on the commissioners' exercise of judgment at the time of the assessment. (ii) Where the taxpayer seeks to challenge the assessment as a whole on 'best of their judgment' grounds, it is essential that the grounds are clearly and fully stated before the hearing begins. (iii) In particular the tribunal should insist at the outset that any allegation of dishonesty or other wrongdoing against those acting for the commissioners should be stated unequivocally; that the allegation and the basis for it should be fully particularised; and that it is responded to in writing by the commissioners. The tribunal should not in any circumstances allow cross-examination of the Customs officers concerned, until that is done. (iv) There may be a few cases where a 'best of their judgment' challenge can be dealt with shortly as a preliminary issue. However, unless it is clear that time will be saved thereby, the better course is likely to be to allow the hearing to proceed on the issue of amount, and leave any submissions on failure of best of their judgment, and its consequences, to be dealt with at the end of the hearing".

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41. In order to complete the picture Chadwick LJ in *Pegasus Birds* at paragraph 80 rejected the submission that where a Tribunal has substantially reduced an assessment it must inevitably follow that the assessment was not made to best of judgment:

> "In *Rahman* (*No 2*) the tribunal had made their own assessment of the correct amount of VAT due from the taxpayer. They had reduced the Commissioners' 73(1) assessment by about 50%. The submission that I was addressing in paragraph 32 of my judgment in that appeal was to the effect that, where there has been a substantial reduction by the tribunal in the assessments made by the Commissioners on the same material, it must inevitably follow that the Commissioners' assessment was not made to the best of their judgment. In rejecting that submission I said this:
>
> '[32] ... But non sequitur: on a true analysis all that can be said is that the fact that, on considering the same material, the tribunal has reached a figure for the VAT payable which differs from that assessed by the commissioners requires some explanation. The explanation may be that the tribunal, applying its own judgment to the same underlying material at the second, or "quantum", stage of the appeal, has made different assumptions--say, as to food/drink ratios, wastage or pilferage--from those made by the commissioners. ... Or the explanation may be that the tribunal is satisfied that the commissioners have made a mistake--that they have misunderstood or misinterpreted the material which was before them, adopted a wrong methodology or, more simply, made a miscalculation in computing the amount of VAT payable from their own figures. In such cases--of which the present is one--the relevant question is whether the mistake is consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable; or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have

made it. Or there may be no explanation; in which case the proper inference may be that the assessment was, indeed arbitrary".

42. The Appellant in this Appeal did not make explicit at the outset of the Appeal his case in respect of HMRC Officers not exercising best judgment. Essentially the Appellant's case on best judgment comprised inferences from his perception about the unreliability of the determinations. In this respect, the Appellant's failure to keep proper records was the principal cause for why Officer Gaynor had to resort to other sources of information for arriving at the figures in her determinations of unpaid income tax and National Insurance contributions. Thus the Appellant's criticisms of Office Gaynor were in a reality a reflection of his own shortcomings in not keeping proper records.

43. The Tribunal is satisfied that Officer Gaynor exercised best judgment in respect of the regulation 80 determination and the section 8 decision. There was no evidence that she acted dishonestly or capriciously in determining the income tax and National Insurance contributions due. She based her assessments on the information supplied by the Appellant and the observations conducted of the Appellant's business operations. Finally Officer Gaynor revisited her determinations when provided with fresh information by the Appellant.

44. The question, therefore, is the quantum of the determinations. The Appellant argued that the employee details in the form P46 were correct as were the amount of earnings declared in the form P14 for each employee. If that was the case the earnings in the disputed years were below the threshold for the charging of income tax and National Insurance contributions. The Appellant submitted that his assertion that family members helped him with the business was supported by the evidence from his brothers-in-law. The Appellant expressed strong doubts about the reliability of HMRC's surveillance of the business premises. He contended that HMRC's view of the inside of the premises was obscured by the frosted glass. Finally the amounts demanded by HMRC had no relationship to the economic realities of the take away business. HMRC had not enquired into the Appellant's tax returns for the years in question, and, therefore, HMRC was not in a position to challenge the size of the takings declared for the business. According to the Appellant, HMRC's calculation of the outstanding arrears presupposed a level of employees' earnings which was equivalent to the total takings from the business, and in those circumstances made no sense.

45. The Tribunal considers the Appellant's claim about the authenticity of the information in forms P14 and P46 must be treated with circumspection. The Appellant was tardy with complying with HMRC's requests for the form P46. The figures and dates recorded in the forms P14 and P46 were not substantiated by supporting records. The Appellant's reason for not keeping employees' records was lame and unconvincing, particularly as he ignored Officer Gaynor's requirement which was made on at least two occasions to keep timesheets for each employee. The Appellant's method of paying the wages from cash in the till ensured that no record of payments could be traced.

46. The evidence from the Appellant's employees was equally unconvincing. The Appellant adduced witness statements from just two of his five employees, only Mr Miran gave oral testimony. The Tribunal was not impressed with Mr Miran's testimony. The Appellant prepared his witness statement and told Mr Miran what was in it. Mr Miran was unsure when he commenced employment at the Balti King. Mr Miran said in his witness statement that he worked 18 hours per week but changed this to 16 hours in his oral testimony. He stated that the 18 hours was a typographical mistake.

47. The Tribunal considers the outcomes of HMRC's unannounced visit and surveillance of the Appellant's business relevant in that they contradicted the Appellant's assertions about the number of people working at the takeaway. The Appellant stated that there were at least three members of staff including himself working at the takeaway at any one time and at least four persons including himself on Friday and Saturday. The visit and the surveillance took place on weekdays when the HMRC Officers identified at least five people working at the establishment. Also on the unannounced visit one of the members of staff left the premises after being spoken to by the Appellant when he saw the HMRC Officers entering the takeaway, which suggested that the Appellant had something to hide.

48. HMRC did not challenge the fact that Appellant was dependent upon the unpaid help from family members to run his business. Officer Gaynor allowed in her calculation 50 hours of unpaid help attributable to the Appellant's brothers-in-law. HMRC's disagreement with the Appellant was about the extent of that help. In this respect the Appellant did not give a clear account of the help received from members of his family. In a letter dated 29 April 2008 his accountant said that the Appellant was unable to recollect accurately the average time worked by his brothers-in-law at the takeaway. However, he went on to state they were working regularly between 20 to 40 hours a week, and sometime more depending on requirement. The accountant in a further letter dated 18 August 2009 contradicted the information in earlier correspondence when he said that the Appellant's two brothers-in-law and his wife made up the remaining 50 hours per week. The Tribunal heard evidence from three brothers-in-law who all said they worked regularly in the takeaway business. There was also a witness statement from the fourth brother-in-law.

49. The Tribunal accepts that the Appellant received unpaid assistance from members of his family, and that the family's input was probably considerable at the beginning of the business, and more evident on the busy days of Friday and Saturday. The Tribunal, however, has reservations about the extent of that help during the week. Three brothers-in-law were in full time employment, whilst the fourth ran a relatively extensive property business. In the Tribunal's view, the commitments of the brothers-in-law to their own jobs and immediate family would place restrictions on the extent of their help to the Appellant's business. The accountant's letter of 18 August 2009 interestingly mentioned two not four brothers in law. Whilst the Tribunal considers that Officer Gaynor's assessment of 50 hours unpaid assistance was about right for business as usual, the Tribunal decided that some additional recognition should be given for the extra help from members of family during the start of the business and on the busy days of Friday and Saturday.

50. The Appellant placed weight on the fact that HMRC had not enquired into his tax returns for 2006/07 and 2007/08 with the effect that HMRC was stuck with the figures declared for the takings of the business. In those circumstances the Appellant argued that the determinations and the assessed sum for employees' wages were out of all proportion to the takings and for that reason the determinations should be struck out as being totally unrealistic. The Appellant also adduced evidence about general trends on the profitability of food takeaway businesses, and the proportion of business income allocated to salaries and wages.

51. The Tribunal did not consider the size of the declared takings pivotal to the outcome of this Appeal. The central issue in the Appeal was whether the Appellant had undeclared his expenditure on wages. In this respect the supposed accuracy of his declared takings was not relevant. The fact that employees' expenditure may be disproportionate with the takings from the business may be due to other factors. The Appellant may not be good at running a business or his business may be beset with trading difficulties. The evidence showed that this was the Appellant's first business venture in the United Kingdom. Also the business suffered a significant trading loss in its final year.

52. The Tribunal finds that the Appellant was evasive in his dealings with HMRC on the level of employees' wages during the disputed years. Further the Tribunal is satisfied that the Appellant's failure to keep adequate records on his employees was deliberate, which together with the payment of wages in cash established that the Appellant was concealing the true extent of his liability under PAYE and National Insurance contributions. Thus the Tribunal decides that the Appellant has not paid the correct amount of tax and national insurance contributions due under his responsibilities as an employer of the Balti King.

53. The issue for the Tribunal is, therefore, to determine the correct amount of the underpayment without the benefit of accurate records. The Tribunal's sole reference point for its examination was the methodology adopted by Officer Gaynor. The Appellant made no alternative suggestions since his case was based on the grounds of no liability. Officer Gaynor determined that the total number of unaccounted hours was 120 hours per week. The Tribunal decides that number of unaccounted hours should be reduced to 70 hours per week. The reason for the reduction is that on the evidence the Tribunal considers that there were on average five people not six people working each day at the take-away. Thus the Tribunal makes the following adjustment to the table at paragraph 28:

Total hours accounted for	**180**
Total hours to be covered from observations 5 workers x 50 hours	250
Hours not covered by known workers	**70**

54. The Tribunal agrees with Officer Gaynor's allowance of 50 hours per week each for the Appellant and the unpaid help from members of his family. The Tribunal's decision to fix the number of people at five, however, gives some recognition to the fact that family members may give extra assistance on the busy days of Friday and Saturday, which would take the number of people working on those days to six. The Tribunal determines that the additional help on Fridays and Saturdays from the sixth person was unpaid.

55. Officer Gaynor treated the unaccounted hours as attributable to four additional unknown workers who would not be entitled to a personal allowance for income tax purposes but would have the benefit of the lower earnings rate for National Insurance contributions. The Tribunal considers Officer Gaynor used different premises for the respective calculations of income tax and National Insurance contribution arrears, which resulted in an inherent contradiction in the methodologies applied. Essentially she was giving a personal allowance for National Insurance contributions but not for income tax. Also the Tribunal considers her assumption of four additional workers did not fit with her finding of five known employees.

56. The Tribunal decides that the more appropriate allocation of the unaccounted hours was to apportion the 70 hours between the five known employees resulting in them working 30 hours per week as opposed to the 16 hours alleged by the Appellant. By adopting this approach the calculation of the Appellant's tax liability was more accurate with the application of the personal allowance and the 10 per cent tax rate to the calculation of the income tax arrears, which also eliminated the inconsistency between the income tax and National Insurance contribution liabilities. The Tribunal adopts the minimum wage hourly rates as used by Officer Gaynor in her calculation.

57. The Tribunal decides upon an effective start date of the five employees as the 5 April 2006. This acknowledges the Tribunal's finding that the Appellant required a start up period to set up his business, and during that time he would have relied upon the unpaid help from family members. The effect of this decision is that the Appellant incurred no liability for income tax and National Insurance contributions in 2005/06.

58. The Tribunal's revised computation based on the above findings is set out in **Appendix one** attached. The Appellant's total liability for unpaid tax and National Insurance contributions for the disputed periods is **£11,175.20.** This represents a reduction in the Appellant's assessed liability for income tax but as small increase in the National Insurance contributions which arises from the Tribunal's decision to allocate the unaccounted hours to five employees rather than four unknown employees.

Decision

59. The Tribunal decides that the Appellant has not paid the correct amount of tax and national insurance contributions due under his responsibilities as an employer of the Balti King. The Tribunal, however, for the reasons given above reduces the regulation 80 determinations and varies the assessment for unpaid class 1 National Insurance contributions as follows:

(1) Regulation 80 determination for 2005/06 is reduced to nil.

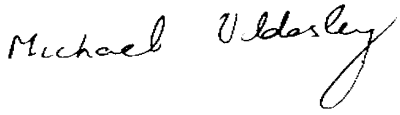
(2) Regulation 80 determination for 2006/07 is reduced to £2,094.70.

(3) Regulation 80 determination for 2007/08 is reduced to £1,907.66.

(4) The section 8 decision in respect of primary and secondary Class 1 National Insurance contributions for the period 1 December 2005 to 18 February 2008 in respect of the earnings of workers shall be varied to £7,172.84.

60. The Tribunal's decision results in an overall reduction in the Appellant's liability for income tax and National Insurance contributions, and in that respect the Tribunal allows the Appeal in part.

61. 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.



TRIBUNAL JUDGE
RELEASE DATE: 14.09.2011

APPENDIX ONE
HUSSAIN 2010/3541

2006/07

	30hrsx£5.05x26wks	30hrsx£5.35x26wks	Total Earnings	PA £5,035	10% Tax	22% Tax	Tax Due	Ees NI	Emp NI
Employee 1	£ 3,939.00	£ 4,173.00	£ 8,112.00	£ 3,077.00	£ 215.00	£ 203.94	£ 418.94	£ 338.47	£ 393.86
Employee 2	£ 3,939.00	£ 4,173.00	£ 8,112.00	£ 3,077.00	£ 215.00	£ 203.94	£ 418.94	£ 338.47	£ 393.86
Employee 3	£ 3,939.00	£ 4,173.00	£ 8,112.00	£ 3,077.00	£ 215.00	£ 203.94	£ 418.94	£ 338.47	£ 393.86
Employee 4	£ 3,939.00	£ 4,173.00	£ 8,112.00	£ 3,077.00	£ 215.00	£ 203.94	£ 418.94	£ 338.47	£ 393.86
Employee 5	£ 3,939.00	£ 4,173.00	£ 8,112.00	£ 3,077.00	£ 215.00	£ 203.94	£ 418.94	£ 338.47	£ 393.86
			£ 40,560.00	£ 15,385.00			£2,094.70	£1,692.35	£ 1,969.28
2007/08									£ 3,661.63
	30hrsx£5.35x26wks	30hrsx£5.52x21wks	Total Earnings	PA £4,700					
Employee 1	£ 4,173.00	£ 3,477.60	£ 7,650.60	£ 2,950.60	£ 223.00	£ 158.53	£ 381.53	£ 324.57	£ 377.68
Employee 2	£ 4,173.00	£ 3,477.60	£ 7,650.60	£ 2,950.60	£ 223.00	£ 158.53	£ 381.53	£ 324.57	£ 377.68
Employee 3	£ 4,173.00	£ 3,477.60	£ 7,650.60	£ 2,950.60	£ 223.00	£ 158.53	£ 381.53	£ 324.57	£ 377.68
Employee 4	£ 4,173.00	£ 3,477.60	£ 7,650.60	£ 2,950.60	£ 223.00	£ 158.53	£ 381.53	£ 324.57	£ 377.68
Employee 5	£ 4,173.00	£ 3,477.60	£ 7,650.60	£ 2,950.60	£ 223.00	£ 158.53	£ 381.53	£ 324.57	£ 377.68
			£ 38,253.00	£ 33,553.00			£1,907.66	£1,622.83	£ 1,888.38
									£ 3,511.21
	Assumptions								
	Min wage £5.05 ph/			PA =				Yr 2006/07	£ 5,756.33
	£5.35ph for 2006/7			47 wks @ £100				Yr 2007/08	£ 5,418.87
	£5.35ph/£5.52 for 2007/8								**£11,175.20**