TC03531

Appeal number: TC/2013/04683

Income tax and NICs – determinations/decision issued in respect of undeclared employer liabilities arising from employment of workers – issued on reasonable basis – no evidence that they were overstated (except in one minor respect) – appeals allowed in part, to adjust for earlier termination date, otherwise HMRC determinations/decision upheld

FIRST-TIER TRIBUNAL
TAX CHAMBER

KOK YEE LAI & YOKE YING LAU trading in partnership as GOURMET HOUSE — **Appellants**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
MR NICHOLAS DEE

Sitting in public at Priory Court, Bull Street Birmingham on 12 March 2014

David Fisher of Indirect Sales Limited for the Appellants

Joanna Bartup, Presenting Officer, for the Respondents

DECISION

Introduction

1. This decision concerns an appeal against (a) determinations issued under Regulation 80 of the Income Tax (PAYE) Regulations 2003 (in respect of allegedly unpaid PAYE income tax) and (b) a decision under section 8 Social Security Contributions (Transfer of Functions, etc) Act 1999 (in respect of allegedly unpaid National Insurance Contributions), in each case relation to earnings supposedly paid to employees of the Appellants during the tax years 2009-10, 2010-11 and 2011-12.

2. A summary decision was issued on 20 March 2014 and this full decision is issued in response to a request for full findings of fact and reasons received on 26 March 2014.

The facts

3. The Appellants carried on business in partnership, trading as the "Gourmet House" takeaway at 98 Wellingborough Road, Northampton, from 1 February 2010 until 17 or 18 March 2012.

4. On 29 March 2012, UKBA carried out an unannounced visit at the business premises, attended also by Officer Edward Smart and a colleague from HMRC, and by a representative of Northampton City Council.

5. Officer Smart spoke to the second Appellant, who told him that 4 individuals worked at the premises for the business, two of them part time (nine hours per week each, spread over three evenings) and two of them full time (39 hours per week each, spread over six evenings). She said the part time workers were paid in cash at the end of each shift. We are satisfied that there were no difficulties in communication between Officer Smart and the second Appellant caused by any language barrier.

6. The second Appellant said, when asked about payroll compliance, that the first Appellant dealt with all such matters.

7. After making informal enquiries about employees and payroll matters in a letter dated 8 June 2012. HMRC issued a formal notice dated 27 June 2012 to the Appellants, requiring production of copies of forms P45 or completed forms P46 for all employees of the business. In reply to that letter, a letter dated 30 June 2012 was received from Indirect Sales Limited, who have acted as representative of the Appellants throughout since at least 2 April 2012. In that letter, for the first time, it was stated that the Appellants had no employees but "had a policy only recruit through employment agencies." In reply to a request for evidence, the representative stated, in a further letter dated 3 August 2012, that "It is an oral agreement with the agency. Workers are self-employed and invoices were presented by the agency."

8. In spite of further requests for evidence, the Appellants were unable to produce any documentary evidence to support their assertion that the workers were engaged through an agency. It was stated that "invoices were presented by the

agency", but no such invoices could be produced. At the hearing, the first Appellant gave vague and contradictory evidence about the existence of any invoices, but no explanation was offered as to why, if invoices existed, they had not been made available to HMRC in reply to their enquiries.

9. In reply to further HMRC enquiries, the representative wrote on 22 January 2013, finally giving a name and address for the agency and stating that "there are no payments made due to unsatisfactory services". No explanation was given either before or at the hearing as to the unsatisfactory nature of the services supplied, and we find it incredible that an agency relationship would have continued for a period of two years with the agency receiving no payment. The first Appellant's evidence on this point was again vague and contradictory. We do not consider him a reliable witness.

10. HMRC, with the Appellants' agreement, wrote to the employment agency identified by the Appellants' representative (Okafor Employment Agency) on 14 May 2013 with a formal third party notice requiring it to deliver copies of invoices rendered in respect of the supply of workers to the Appellants' premises. That notice was returned undelivered by another company called M River Limited, which stated that Okafor Employment Agency was not the current occupier of the premises.

11. The Appellants' representative appears to suggest that HMRC's failure to obtain any evidence from Okafor means that they are unable to disprove the Appellants' assertions about using it as an employment agency. Any such suggestion is wholly misconceived. HMRC have satisfied us that the employees were paid by the Appellants. The burden then lies on the Appellants to satisfy the Tribunal that the payments, though made direct to the workers, were made to them on behalf of the employment agency pursuant to agency arrangements as they allege, and their failure to produce any evidence to demonstrate the existence of such arrangements means they have failed to discharge that burden. The first Appellant's evidence at the hearing on this point was vague, contradictory and wholly unconvincing. We find that no such agency arrangement existed.

12. We find that HMRC's determinations and decision, being based on the information provided to them at the initial visit to the business premises and using the national minimum wage, were based on their best judgment. We find that in one respect, however, they should be amended rather than upheld. This is in relation to the end date for the period to which they relate. We find this should have been 17 or 18 March 2012 rather than 5 April 2012, as there was no evidence before us to suggest that the termination of the business (which was reported to HMRC by way of the application for cancellation of the VAT registration before the visit took place) did not indeed take place as alleged by the Appellants.

13. Mr Fisher (on behalf of the Appellants) pointed to the fact that UKBA had written to the Appellants' representative on 24 September 2013, confirming that "a Notification of Liability penalty notice for employing illegal workers was subsequently served to a third party limited company". This, he said, showed that the Appellants had never employed the workers in question. He also pointed out that there was no mention on UKBA's "name and shame" website of the Appellants as

having employed illegal workers, which tended to the same conclusion. He also submitted that a similar conclusion could be drawn from the fact that Northampton City Council had taken no action in relation to the Appellants, and he further submitted that the absence of any witness statements from the workers in question was fatal to HMRC's case. We reject all these submissions. The fact that UKBA chose to proceed against some third party for reasons which were not explained, and the fact that they have not included any details of the Appellants on their website does not affect our view of the facts emerging from the evidence before us, namely that the Appellants employed the workers and made the payments to them. The apparent absence of any action by Northampton City Council, without further explanation, gives rise to no inference of the type contended for by Mr Fisher and the absence of any witness statements from the workers themselves is a matter which the Appellants themselves should have addressed, if they wished to bring forward evidence from the workers in support of their case.

14. In short, we are satisfied that there is no evidence to support the agency story.

15. We do however consider that the notification from the appellants to HMRC, before the unannounced visit took place, of their cessation of business has not been adequately addressed by HMRC; whilst there are some doubts about its veracity (in light of the fact that the second Appellant was still in charge of operations at the premises on 29 March 2012 and the first Appellant did not, at that time, refer to the cessation of his involvement in the business which had supposedly taken place shortly before), that evidence was not specifically tested at the hearing before us. We therefore consider it appropriate to recalculate the determinations on the basis of the earlier business termination date.

The law

16. Section 8 of the Social Security Contributions (Transfer of Functions, Etc) Act 1999 ("the Transfer Act") confers on any "officer of the Board", the power to "decide whether a person is or was liable to pay contributions of any particular class and, if so, the amount that he is or was liable to pay".

17. Under regulation 10 of the Social Security (Decisions and Appeals) Regulations 1999 (in relation to appeals in relation to decisions under section 8 of the Transfer Act), if "it appears to the Tribunal that the decision should be varied in a particular manner, the decision shall be varied in that manner, but otherwise shall stand good."

18. Regulation 80 of the Income Tax (PAYE) Regulations 2003 empowers HMRC, where it appears to them that PAYE income tax has not been properly accounted for, to "determine the amount of that tax to the best of their judgment, and serve notice of their determination on the employer".

19. Under regulation 80(5) of the same Regulations, any such determination is subject to appeal "as if (a) the determination were an assessment, and (b) the amount of tax determined were income tax charged on the employer" and the relevant

provisions of the Taxes Management Act 1970 ("TMA") relating to appeals are stated to apply.

20. Section 50(6) TMA provides that:

> "If, on an appeal notified to the tribunal, the tribunal decides –
>
> (a) that the appellant is overcharged by a self-assessment;
>
> …
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be reduced accordingly, but otherwise the assessment…. shall stand good."

Conclusion

21. We are satisfied that the decision of Officer Smart (in relation to Class 1 national insurance contributions) notified on 21 March 2013 was made in accordance with section 8 of the Transfer Act, but should be varied to take out of account the period from 17 March to 5 April 2012.

22. We are satisfied that the determinations made by HMRC under Regulation 80 (in relation to unpaid PAYE income tax) were made to the best of their judgment, but the determination in relation to the year 2011-12 should similarly be varied to take out of account the period from 17 March to 5 April 2012.

23. Rather than simply make findings in principle to that effect and require the parties to agree the figures, with all the attendant difficulty and delay likely to be caused, we considered it appropriate to recalculate an appropriate figure ourselves which allows some margin for error in favour of the Appellants. In recognition of the fact that the cessation is supposed to have occurred a little under three weeks before the end of the tax year, we consider it appropriate to reduce the income tax and NIC figures for the final year to 49/52nds of the figures claimed by HMRC. This results in the following adjusted figures.

	NICs		**PAYE**	
Year	**Amount originally determined**	**Amount upheld**	**Amount originally determined**	**Amount upheld**
2009-10	£544	£544	£1,050	£1,050
2010-11	£3146	£3,146	£6,070	£6,070
2011-12	£2674	£2,519	£6,070	£5,719

Totals	£6,364	£6,209	£13,190	£12,839

24. To the extent of these reductions, the appeal is therefore allowed but it is otherwise dismissed and the decision and determinations are upheld in the amounts set out in the third and fifth columns in the above table.

25. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 30 April 2014