TC04924

Appeal number: TC/2012/01210
TC/2012/01213
TC/2012/01215
TC/2012/01218
TC/2012/01221
TC/2012/01227
TC/2012/06836

Income Tax –PAYE – National Insurance – best judgment - hotel space occupied by seven different companies- employees working for different companies – which entities are "employer" for PAYE and NI purposes – careless behaviour – penalties - held – HMRC's allocation reasonable other than for 2005 -7 tax years– lack of trade does not prevent Appellant from being treated as an employer – carelessness accepted – penalties increased.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Grand UK Limited **Appellants**
Keppels Limited
Keppels Cuisine Limited
Kentish Cuisine Limited
Michael and Doris Stainer
The Grand Folkestone Limited
Kentish Estates Limited

- and -

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

TRIBUNAL: JUDGE Rachel Short
Gill Hunter

Sitting in public at the Royal Courts of Justice, the Strand, London on 11 June 2015

Mr Brown of Temple Tax Chambers for the Appellants

Miss Bartup, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This appeal concerns the PAYE and NI liabilities of each of the Appellant entities, all of whom were involved in businesses carried out in the premises of the Grand Hotel Folkestone ("the Grand") from 5 April 2006 to 5 April 2011. For each of those periods HMRC's case is that one or more of the Appellant companies are liable to account for income tax through pay as you earn ("PAYE") and National Insurance contributions in respect of a number of employees. The Appellants' case is that none are liable for any of the periods up to 5 April 2009. For the period after April 2009 it is accepted that Grand Hotel Folkestone Limited is liable to PAYE and National Insurance ("NI"), but the quantum of that liability is in dispute.

2. The assessments for each of the entities have been made on the basis of HMRC's best judgment under Regulation 80 of the PAYE Regulations SI 2003/2682 and s 8 of the Social Security Contributions (Transfer of Functions) Act 2009 in the face of a lack of detailed information provided on behalf of any of the Appellants. The assessments for the 2005-2006 and 2006-2007 years have been made on the basis that the Appellants have been careless in not making PAYE and NI payments so that the extended time limits for making assessments at s 36 Taxes Management Act 1970 ("TMA 1970") apply.

3. Fixed rate penalties for the failure to make PAYE returns have been charged by HMRC for the periods 5 April 2006 to 5 April 2010 under s 98A(2)(a) TMA 1970. Tax geared penalties for the failure to make PAYE returns have been charged for the periods 5 April 2006 to 5 April 2008 under s 98A(2)(b) TMA 1970.

4. **Background Facts**

(1) During the relevant period the Grand in Folkestone was run through six companies and the partnership of Mr and Mrs Stainer who were also the director and or company secretary of each of the six companies.

(2) In each year approximately 100 employees worked at the Grand, all of their employment contracts were in the name of "The Grand" and did not stipulate which of the six companies operating at the Grand or the partnership they were employed by.

(3) The employees were mainly paid in cash weekly, with a small number being paid by cheque. Cheque payments were made from the Kentish Estates Limited account. That company was set up to manage credit card payments for the rental business at the Grand.

(4) There was a payroll system covering all of the employees. Employees' pay slips were generated in the name of a company known as Heritage Hotels UK Limited until 2009 when it was realised that that entity had been dissolved in January 2007. Thereafter payslips were produced in the name of The Grand Folkestone Hotel.

(5) Mr and Mrs Stainer lived at the Grand and let out apartments in the hotel space for which they collect the rent. They also managed the freehold of the whole building.

(6) Mr Stainer is a chartered accountant. His wife is an IT expert.

(7) No returns or payments have been made to HMRC in respect of any employment income paid to employees at the Grand for the periods under appeal and it is agreed that there has been a failure to make returns and pay the tax due.

(8) The activities carried out at the Grand by each Appellant are:

(a) The Grand Folkestone Limited – Catering

(b) Kentish Estates Limited – Rental collection

(c) Grand UK Limited – Catering

(d) Keppels Cuisine – Keppels restaurant

(e) Keppels Limited– Bar and refreshments

(f) Kentish Cuisine – Tea room

(g) Mr and Mrs Stainer (partnership) – Rental apartments

(9) The matter in dispute is which of the six entities which operate from the Grand and the partnership business of Mr and Mrs Stainer are responsible for making these returns and payments. The total quantum of the PAYE and NI payable is not in dispute.

(10) HMRC made a formal determination of the PAYE and NI obligations of each of the Appellants under Regulation 80 SI 2003/2682 and s 8 of the Social Security Contributions (Transfer of Functions) Act 2009 on 14 June 2011. Appeals were made against those determinations to this Tribunal by all of the Appellants except Kentish Estates Limited on 4 January 2012. Kentish Estates Limited made its appeal on 9 December 2011.

5. The periods and entities' tax liabilities in dispute can be split into three main periods:

(1) *Tax years April 2005 – April 2007.*

For this period the Appellants argue that Heritage Hotels UK Limited was the employer of all of the employees until it was dissolved in January 2007.

For this period HMRC argue that Heritage Hotels UK Limited could not be an employer since it did not have a trade and therefore the employers were Mr Stainer and his wife, acting in partnership, since they were the people with overall control of the property and the businesses in it.

Employee tax obligations for this period should be split between Mr and Mrs Stainer and the other businesses then operating at the Grand by reference to the information provided by Mr Stainer and the companies' 2008 accounts.

Tax years April 2007 – April 2009

(2) For this period the Appellants argue that the hotel was run on a day to day basis by firstly a Mr Puchault and then a Mr Silk, who should be treated as the employer of all of the employees for these purposes.

For this period HMRC argue that Mr and Mrs Stainer should be treated as the employer on the same basis as for the 2005 – 2007 period with the employee tax obligations split between them and the other businesses operating at the Grand on the basis of the information provided by Mr Stainer and the companies' 2008 accounts.

(3) Tax years April 2009 – April 2011

For this period the Appellants accept that the company which was introduced to take over the responsibilities of Heritage Hotels UK Limited when it was realised that it had been dissolved, The Grand Folkestone Limited, should be treated as the employer, but the amount for which that company is liable for that period is disputed.

For this period HMRC argue that the employer tax liabilities should be split between the seven Appellants on the basis of the information provided by Mr Stainer and the companies' 2008 accounts.

6. After the hearing the Tribunal requested further submissions from both parties to clarify the basis on which Regulation SI 2003/2682 and s 4 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") had been applied to each of the entities to treat them as the relevant "employer" or "other payer" by the parties. Those submissions were received from the Appellants on 15 July 2015 and from HMRC on 14 August 2015.

7. On 1 August 2015 the Appellants made an urgent application for a stay of proceedings before the Tribunal made its decision because Mr and Mrs Stainer had been arrested on suspicion of defrauding the public revenue on 23 July 2015. That application was rejected at an oral hearing on 27 January 2016.

The Law

8. The definition of what it means to be an employer for PAYE and NI purposes is set out in the PAYE Regulations at SI 2003/2682 which refer to the definition of employment at s 4 – 5 ITEPA which states that "employer" and "employee" have corresponding meanings :

9. s 4 ITEPA defines "employment" as:

"4(1) *In the employment income Parts "employment" includes in particular –*

(a) any employment under a contract of service

(b) any employment under a contract of apprenticeship, and

(d) any employment in the service of the crown"

4(2) In those Parts "employed", "employee" and "employer" have corresponding meanings."

10. s 712 ITEPA defines an employee and employer as:

"712(1*) In this Part –*

"*employee" means a person who holds or has held employment with another person.*

"employer" means-

(a) in relation to an employee, a person with whom the employee holds or has held an employment, and

(b) in relation to any PAYE income of an employee, the person who is the employer of the employee in relation to the employment in respect of which the income is or was provided, or, as the case may be, by reference to which it falls to be regarded as PAYE income"

11. Regulation 68 of the PAYE Regulations SI 2003/2682 stipulates that it is an employer's obligation to deduct tax from relevant payments made by an employer.

12. A "*relevant payment*" is defined at Regulation 4 as "*payments of, or on account of, net PAYE income*".

13. PAYE income is defined at Regulation 2 – "Interpretation" as "*PAYE Income has the meaning given by section 683 ITEPA"*.

14. S 683(1) ITEPA refers to:

"683(1) For the purposes of this Act and any other enactment (whenever passed) "PAYE income" for a tax year consists of-

(a) any PAYE employment income for the year

(b)....."

S 683(2) defines PAYE employment income for a tax year as

"s 682(2)(a) any taxable earnings from an employment in the year.....and

(b) any taxable specific income from an employment for the year ....."

15. An extended definition of an "employer" for PAYE purposes is set out at Regulation 12 of the PAYE Regulations which refers to "*other payers*", defined as any person making "relevant payments" who is not an employer.

16. We were also directed to the tax law re-write project document; "Commentary on The Income Tax (PAYE) Regulations 2003 SI 2003/2683" at paragraph 41 stating that the PAYE Regulations have always defined employer and employee in the widest possible terms as anyone paying or receiving PAYE income; "*Anyone paying PAYE income is an employer as defined*".

17. We were directed to a number of case authorities including *Booth v Mirror Group Newspapers plc* ([1992] STC 615) stressing that the PAYE regulations were intended to have a broad ambit "*the regulations are clearly intended to be comprehensive and to provide a scheme which covers all emoluments which are taxable under Schedule E and involve the payment of money to the relevant employee*" (pg 619).

18. It was accepted that all of the payments in question were made to employees and were payments made as part of their employment for these purposes.

19. Regulation 80 of the PAYE Regulations sets out the basis on which HMRC can make assessments for PAYE which they consider to be due but unpaid, by reference to the best of their judgment as was done here:

> "*80(2) HMRC may determine the amount of tax to the best of their judgment, and serve notice of their determination on the employer*"

20. Section 8 of the Social Security Contributions (Transfer of Functions etc) Act 2009 "Decisions of Officers of Board" state that it is for an officer of the Board

> S 8(1)(c) "*to decide whether a person is or was liable to pay contributions of any particular class and, if so, the amount he is or was liable to pay*".

21. The assessments made by HMRC for the periods 2005-2006 and 2006-2007 have been raised outside the normal four year time limit for making assessments on the basis that the loss of tax was due to "carelessness" so that the extended time limit under s 36 TMA 1970 applies.

22. HMRC have charged "special penalties" under s 98A(2)(a) TMA 1970 including tax geared penalties under s 98A(2)(b) TMA 1970 for the failure to make PAYE returns on time.

The Evidence

Witness statements

23. We saw written witness statements of (i) Mr Stainer dated 19 November 2013, (ii) Mrs Stainer dated 19 November 2013 (iii) Mrs Kobylarz dated 19 November 2013.

24. We heard oral evidence from:

Mrs Stainer

25. Mrs Stainer was a director of Heritage Hotels UK Limited. Mrs Stainer told us that she had no day to day involvement with any of the Appellant entities. Her expertise was in IT; she helped install new IT software including for the accounting team at the Grand, but had no other accounting expertise. Mrs Stainer said that neither she nor Mr Stainer were responsible for operating PAYE at the Grand.

Mr Stainer

26. Mr Stainer described himself as the manager of the freehold at the Grand, and in charge of the rental apartment side of the business. He ensured rents were paid, filled vacancies, dealt with leases and maintained the building as a whole.

27. Mr Stainer said that he had no day to day involvement in the running of any of the Appellant entities which had been set up by him but with the intention that the businesses should be run by the employees. He did not set the wages or make other day to day decisions and was not in direct control of payroll. The businesses had been run by Mr Silk and Mr Puchault and Mr Stainer got involved in 2009 on learning of Heritage Hotels UK Limited's dissolution only to protect the position of the existing employees. He had an interest in ensuring the Grand as a whole was kept in good repair and that the businesses within it were profitable.

28. The poor economic circumstances of the locality of the Grand and the continued litigation with the local council over planning and other issues meant that the trading operations failed to produce sufficient revenue to cover payroll taxes. Indecision about how to account for payroll taxes had resulted in them not being submitted. Since The Grand Folkestone Limited assumed responsibility for payroll taxes in 2009 the records have been properly prepared and retained.

29. Mr Stainer said that he was not involved with the accounting team other than to sign cheques which he did when asked. For much of the relevant time he was fully engaged in his work with Eurotunnel. When The Grand Folkestone Limited was set up to replace Heritage Hotels UK Limited he left the day to day running of this to Mr Richardson, who held a share in that company on behalf of the other members of staff. He had meetings with Mr Richardson only once a week. Both Heritage Hotels UK Limited and The Grand Folkestone Limited were set up by Mr Stainer but they were intended to be run as "employee co-operatives" on behalf of the Grand's

employees. The contracts for employees at the Grand did not specify which entity employees worked for, but referred to "the Grand".

30. Mr Stainer described Kentish Estates Limited as a management entity, but accepted that he signed the cheques which it issued and was in control of its bank account.

31. Mr Stainer said that he did not see or sign the notes of the meetings between himself and others at the Grand with HMRC produced by HMRC. He produced his own manuscript notes of some of these meetings.

Mrs Kobylarz.

32. Mrs Kobylarz was an employee who worked initially as a receptionist and then, in May 2009, in the accounts department at the Grand. She said that she was interviewed by Mr Stainer and he offered her the job in autumn 2008. She reported to Mr Stainer in her accounting role. Payslips were prepared by the accounting team in the name of Heritage Hotels UK Limited until 2009. She was paid in cash through the accounts office. She was aware that PAYE returns were not being made for employees, she assumed that Mr Stainer was responsible for these.

Other evidence seen

33. We also saw the HMRC's notes of (i) a meeting held between HMRC Officers Small and Osborne and Mr Stainer and Mr Puchault at the Grand on 15 April 2009, (ii) a meeting between HMRC Officers Small and Osborne and Mr Stainer, Mr Puchault and Mrs Kobylarz on 21 April 2009 (iii) a meeting between HMRC Officers Small, Barden and Hadler and Mr Stainer and Mrs Kobylarz on 10 March 2010 (iv) a meeting between HMRC Officers Small and Green and Mr Stainer of 22 September 2010 and (v) a meeting between HMRC Officers Small and Green and Mr Stainer, Mrs Kobylarz and Mrs Phillips of 29 September 2010.

34. We also saw Mr Stainer's manuscript notes of his meetings with HMRC on 10 March 2010, 29 March 2010, 22 September 2010 and 11 March 2011.

35. The HMRC note of the meeting on 15 April 2009 records that

> "*Small asked how many employees there currently were, Mr Stainer replied about 30, including part-timers, Small asked who paid these employees. Mr Stainer replied that he paid about 12 of these as they were sub-contractors involved in building work and maintenance. The catering operations paid all other workers including key workers. Mr Stainer believes this is just taken from the takings for wages of these workers.*"
>
> "*Mr Stainer left the meeting and allowed Small to speak to Mr Puchault alone. Mr Puchault is the assistant manager of the Grand. Small asked who was the manager. Mr Puchault replied that Mr Stainer was..... Small explained that Mr Stainer had stated he was involved in the engaging of employees, Mr Puchault confirmed that this was correct..... Small asked*

what the rate of pay was or who decided it. He replied minimum wage or as decided by Mr Stainer."

36. The note of the meeting on 21 April 2009 records that

"*Small asked who was in charge of payments to staff and such things as bank accounts. Mr Stainer explained that he controlled the bank accounts, but cash wages were controlled by the payroll department, Margaret Wickens and predecessors".*

37. We also saw the report and accounts of each of the Appellant entities for the year ended March 2008, which included details of the average number of employees which each entity had for that year and a list of all employees at the Grand for the years 2005-6 to 2009-10.

38. We saw a manuscript schedule provided by Mr Stainer for 2010/11 setting out how the payroll at the Grand was split between the various business areas, The Grand Folkestone Limited's summary payroll for weeks 1 – 25 of 2010/11 and HMRC's schedule allocating the payroll per Appellant based on those two documents.

39. We saw various correspondence between HMRC and the Appellants including HMRC's letter of 22 September 2009 asking for details of how the activities at the Grand were split between the Appellant entities.

Arguments for the Appellants

Carelessness 2005-6 and 2006-7 tax years

40. The Appellants did not specifically dispute the basis on which HMRC had raised assessments for the 2005-6 and 2006 -7 tax years outside the normal four year time limit under s 36 TMA 1970.

Basis for best judgment assessments

41. Mr Brown argued that none of the Appellants could properly be treated as employers liable for PAYE for the period up to April 2009. For the period after April 2009 only The Grand Folkestone Limited was the employer of all the staff at the Grand and liable for PAYE and NI. The person who physically paid the employees should be treated as the employer for these purposes.

42. Heritage Hotels UK Limited should be treated as the entity liable for PAYE and NI until January 2007 because it was the entity in whose name payslips were generated and the entity which made physical payment to the employees. Mr Stainer was not involved with these arrangements and can give no further details of how employees were managed during this period. Heritage Hotels UK Limited was the entity which paid cash wages and so should be treated as liable for PAYE and NI for this period.

43. Mr Puchault and Mr Silk should be treated as employers liable to pay PAYE and NI for the period from 2007 – 2009 because each of them had day to day responsibility for running the relevant businesses at the Grand.

44. Any cheque payments made by Kentish Estates Limited were made on behalf of Heritage Hotels UK Limited and/or for those who were making the cash payments to staff and Kentish Estates Limited should not therefore be liable for PAYE or NI on those cheque payments.

45. Looking at the situation in its widest context, as suggested in the *Andrews v King* ([1991] STC 481) decision, neither Mr nor Mrs Stainer played any real part in the businesses employing staff at the hotel so could not be liable for PAYE or NI. The entity which actually made the payment should be liable for PAYE and NI, not Mr and Mrs Stainer.

Penalties

46. In respect of the tax geared penalties charged for the failure to make returns under s 98A(2)(b) TMA 1970, the levels of mitigation should be increased both by reference to the co-operation provided by Mr Stainer in his capacity as partner and director of each of the Appellant entities, who attended meetings with HMRC and provided answers to questions and he should not be penalised for not providing documents which had been destroyed in a flood (see *Colin Moore v HMRC [2010]* UKFTT 271 (TC)). He had been distracted by other obligations during this period (his work for Eurotunnel and planning issues with the local council) and in any event did not have the cash to pay the tax outstanding.

HMRC's Arguments

Carelessness - 2005-6 and 2006 -7 tax years

47. HMRC said that Mr Stainer was an accountant and prepared the accounts for each of the Appellant entities. He should have been familiar with the PAYE process. Failing to account for PAYE and NI and make returns for someone in Mr Stainer's position was careless and so the extended period for assessment under s 36 TMA 1970 should apply.

Basis for best judgment assessments

48. Accounting records had not been maintained on a per company basis. HMRC have based their assessments on the limited information which they have seen: The Grand payroll lists; Mr Stainer's allocation of employees per business area; the summary payroll for 2010-11 and the companies' 2008 accounts, which has allowed them to allocate employees to business areas and so to the relevant company, based on the description of what each company did provided by Mr Stainer.

49. In the face of a lack of information provided by Mr Stainer about which employees were employed by which entity, HMRC had no choice but to use their best judgment based on the information which they had. HMRC had always made clear that they would consider re-allocating the PAYE and NI costs if Mr Stainer could provide evidence of how it should be split, but that had never been provided.

50. For the pre-2007 period HMRC did not accept that Heritage Hotels UK Limited could be treated as an employer because it was not carrying on a trade. This was supported by the fact that nothing changed in the Grand business after Heritage Hotels Limited was struck off. Its activities were actually carried on by Mr and Mrs Stainer who managed the staff and payroll prior to the use of The Grand Folkestone Limited. Employment contracts were not in the name of Heritage Hotels UK Limited, but the Grand.

51. Miss Bartup explained how HMRC had used the information provided by Mr Stainer about the split of the Grand's profits across businesses for 2010–11 to allocate employees to the Appellants depending on the business carried on, but struggled to explain some of those allocations in detail.

52. In their written submissions of 14 August 2015 HMRC explained how they had allocated the PAYE and NI obligations between the Appellants by reference to the information which they had seen:

April 2005 –January 2007

(1) Heritage Hotels UK Limited cannot be treated as an employer during the period. No accounts were submitted and it did not carry on a trade. 34.51% of the wage bill which would otherwise have been allocated to Heritage Hotels Limited for this period has been allocated to an incorporated association represented by Mr and Mrs Stainer operating in partnership. A further 17% of the wages have been allocated to Mr and Mrs Stainer's existing partnership reflecting the staff used for the letting business run by the partnership (housekeeping, reception staff and night porter) and based on the partnership's 2008 accounts and the deductions for wages contained in those accounts.

(2) The remainder of the wages for this period have been split between the other entities operating at the Grand based on estimates of the activities carried out by each of the Appellant companies:

(a) Grand UK Limited 20%

(b) Keppels Limited 6.5%

(c) Keppels Cuisine Limited 7.5%

(d) Kentish Cuisine Limited 11.9%

(e) Kentish Estates Limited 2.7%

January 2007 to April 2009

(3) For this period wages were split between all of the Appellants other than The Grand Folkestone Limited, giving the same split as for the April 2005 to January 2007 period. HMRC do not accept that either Mr Silk or Mr Puchault can be treated as "employers" during this period because they were themselves employees, even if they had responsibility for actually making payments. It was Mr Stainer who was the employer at this time, as made clear by the evidence of Mrs Kobylarz.

April 2009 to April 2011

(4) Although PAYE records were in the name of The Grand Folkestone Limited, this entity cannot be treated as the only employer of staff at the Grand. Each Appellant should be treated as the employer of the staff working in their business; the accounts of each company show a deduction for wages and Mr Stainer's own evidence makes clear that each entity paid its staff from its own cash takings.

(5) The 34.51% which was allocated to Mr and Mrs Stainer prior to 2009 has been reallocated to The Grand Folkestone Limited for this period. The amount allocated to Mr and Mrs Stainer for this period is 17%. The remainder of the wages have been allocated based on estimates of the activities carried out by each of the Appellant companies as for the earlier periods.

53. HMRC referred to the decision in *Bi-Flex Caribbean Ltd v The Board of Inland Revenue (63 TC 515)*, referring to the *N Ltd* v *Commissioners of Taxes* ([1962] 24 S.A.T.C 655) decision that in these circumstances the onus was on the Appellant to demonstrate that HMRC's assessments were incorrect: "*The onus is upon the appellant, by satisfactory evidence, to show that the assessment ought to be reduced or set aside, that is, the appellant has to attain the standard of proof in a civil suit to prove his case".(pg 658)*

54. Miss Bartup pointed out that in his correspondence Mr Stainer had accepted that he was in control of the Grand at least from 2009. Mr Stainer had written in his letter of 11 March 2010 "*The non-payment of NI contributions since I took direct control following your visit a year ago has been entirely due to insufficient revenue".*

55. Miss Bartup said that she had relied on the statements in the entities' accounts to determine which entity should be treated as an employer and Mr Stainer's acceptance that the staff were employed across the various entities and paid with cash from the takings of each of the entities.

56. Miss Bartup said that HMRC had approached this case on the basis that it was the question of who was technically the employer of the staff in question which triggered the PAYE obligation, rather than the person or entity which actually made the payments.

Penalties

57. HMRC explained that fixed penalties had been charged for the 2006 – 2010 tax years under s 98A(2)(a) TMA 1970 at the minimum level (less than 50 employees) totalling £1,200 per year. For the tax years April 2006 to April 2008 additional tax geared penalties have been charged under s 98A(2)(b) TMA 1970. Those penalties have been abated by (i) 10% for disclosure; the Appellants had admitted that returns had not been made; (ii) 20% for co-operation; information had been provided but only after HMRC had used their information gathering powers; and (iii) 15% for seriousness; large amounts of tax were at stake and non-payment of NI had serious implications for employees, giving a 45% abatement overall.

58. HMRC said that none of the arguments put forward by Mr Stainer about why penalties should be mitigated in this case were acceptable. They did not consider that any of the Appellants had a reasonable excuse for the failure to make returns under s 118(2) TMA 1970.

Decision

Findings of Fact

59. Mrs Kobylarz believed that she reported to Mr Stainer and treated him as her employer when she was employed in autumn 2008.

60. Mr Puchault described Mr Stainer as the manager of the Grand in 2009 and as the person who engaged employees.

61. Employees' wages were mainly paid in cash from the takings of the various catering operations.

62. A small number of employees were paid by cheque.

63. Each of the Appellant entities claimed deductions for the cost of wages in their accounts for the 2008 period for which accounts were seen.

64. Until 2009 payslips were generated in the name of Heritage Hotels UK Limited.

65. Employment contracts which existed were in the name of "The Grand".

The earlier years –Assessments for 2005-6 and 2006-7

66. The Appellants did not raise any arguments about HMRC's contentions that the Appellants, through the person of Mr Stainer, had been careless in failing to account for PAYE and NI for these periods so that the condition at s 36 TMA 1970 was satisfied, allowing HMRC to raise assessments beyond the usual four year time limit.

67. The onus of proof in raising assessments under s 36 TMA 1970 is on HMRC to demonstrate carelessness. In the absence of any contrary arguments from the Appellants, we have accepted, on the basis of Mr Stainer's evidence, that he was aware of the requirement to make PAYE and NI payments and returns but decided not to complete and submit them. Our view is that his failure to ensure that this was done does amount to carelessness and that the condition in s 36 TMA 1970 is therefore satisfied.

Basis for best judgment assessments

68. HMRC based their best judgment assessments on information provided by Mr Stainer, in correspondence and at the meetings held with him and his staff at the Grand, and on information provided in each of the Appellants' accounts for 2008 giving the number of employees they employed. They also relied on the different description of the businesses carried out by each entity provided by Mr Stainer to allocate payments between these entities. We have accepted that in the face of a lack of any alternative evidence provided by the Appellants, this is a reasonable basis for making those assessments subject to our conclusions below about which entities can properly be treated as an "employer" for these purposes. As HMRC stated, the burden of proof in this case is on the Appellants to demonstrate why HMRC's assessments are not correct and advance positive reasons for making any changes to those assessments.

The law – who is an employer for PAYE and NI purposes

69. The PAYE legislation has, as Mr Brown pointed out, a potentially wide ambit and places obligations not only on the person who is legally the employer of a particular individual but also on a person who acts in some kind of intermediary capacity and makes payment to an employee of employment income. This is made clear in the *Booth v Mirror Group* decision to which we were referred and in the extended definition of "employer" provided by Regulation 12 of the PAYE Regulations.

70. HMRC have approached this case on the basis that it is only necessary to establish who can legally be treated as the employer, who describes themselves as an employer in respect of these employees, or who is in overall control of the business; relying on accounting statements and statements by Mr Stainer.

71. The Appellants have approached this case by asking who in substance was acting as employer, undertaking the day to day management of the staff and making the physical cash payments to staff, suggesting that it is this, rather than any contractual or other obligation, which gives rise to the PAYE obligation.

72. With respect, neither the Appellants' nor HMRC's arguments are an accurate reflection of the approach of the PAYE Regulations which impose an obligation both on the person who is an employer under a contract of service or any person who pays to an employee (not necessarily their own employee) any taxable employment income. The parties did not advance any arguments to suggest, in circumstances

where more than one entity could be treated as an employer, which entity should be liable for the tax payments. Taking account of the fact that it is for the Appellants to demonstrate that HMRC's assessments are not correct, we have approached the question by asking whether in each case the Appellants have demonstrated why the entity which HMRC has treated as the employer should not be so treated.

73. As suggested in the *Booth v Mirror Group* decision to which the Appellants referred, the PAYE regulations are directed primarily "at an actual employer and employee relationship" and we have taken this to mean that only if such an actual relationship cannot be identified is it legitimate to treat the person physically making payment as the employer who is liable to PAYE and NI.

The tax years 2005-6 and 2006 -7 Heritage Hotels

Payments by an employer

74. For this period the Appellants argued that Heritage Hotels UK Limited was the de facto employer of all staff at the Grand. HMRC's justification for not treating Heritage Hotels UK Limited as the employer was that it did not carry on any trade or file accounts. We do not agree with HMRC that this is sufficient to mean that Heritage Hotels UK Limited cannot be treated as an employer for this period; there is nothing in the definitions in ITEPA which would prevent Heritage Hotels UK Limited from being an employer for these purposes whether or not it is carrying on a trade. Our view is that by reference to the PAYE code's broad definition of an employer, HMRC have not reasonably explained why an appropriate share of payments made to staff prior to January 2007 cannot be treated as made on behalf of that entity. On this basis we accept the Appellants' arguments that Heritage Hotels UK Limited can be treated as an employer for this period.

75. Even if Heritage Hotels UK Limited cannot be treated as an employer for these purposes, it was at least, on the basis of the evidence provided by Mr Stainer, the entity which made cash payments to its share of the employees and is therefore an "other payer" under the PAYE Regulation definitions and treated as an employer for these purposes under Regulation 12.

76. Our conclusion is that Heritage Hotels UK Limited should be treated as an employer for this period but only of an appropriate share of the total number of employees at the Grand prior to its dissolution in 2007, on the basis of the allocation method applied by HMRC, being the 34.4% of the employees subsequently taken over by The Grand Folkestone Limited. Mrs and Mrs Stainer's share of the PAYE and NI obligations and any related penalties for this period should therefore be reduced accordingly to 17%.

Payments by Kentish Estates

77. The Appellants argued that Kentish Estates Limited was acting in an agency capacity when paying employees by cheque and so should not be liable for PAYE or NI in its own right. However, as the entity which actually made payments where cheque payment was required, our view is that unless the Appellants can clearly

demonstrate that its payments were on behalf of another entity, which they have not, it is the entity which should be treated as obliged to operate PAYE for those employees who are paid by cheque for this and all other periods. We accept HMRC's allocation of PAYE and NI obligations to this entity as reasonable either on the basis of its allocated share of employees based on its 2008 accounts and the business allocations provided by Mr Stainer or as the entity which actually made payment of the employment income (under Regulation 12 of the PAYE Regulations).

For the tax years 2007 - 2008 and 2008 - 2009

Payments by an employer

78. For this period while payments were stated to be made by Heritage Hotels UK Limited, that entity no longer existed and so could not be treated as an employer. In default of that entity, and in reliance on the evidence provided by Mrs Kobylarz and HMRC's records of their meetings with Mr Puchault and Mr Stainer in 2009, our view is that it is reasonable for HMRC to treat Mr Stainer as the de-facto employer of staff at the hotel who were treated as employed by the defunct entity and that in his capacity as a partner in the partnership with his wife, he should be liable for PAYE and NI as the employer for all payments made during that time other than those which can be specifically allocated to other entities, amounting to 34.4% of the total liabilities for this period.

79. We do not accept that, having identified Mr Stainer and Mrs Stainer's partnership as the "employer" for these purposes, there is any reasonable basis on which either Mr Puchault or Mr Silk, who were themselves employees, could be treated as the "employer" under the PAYE Regulations in place of any of the other entities operating at the Grand as the Appellants suggest. However wide the scope of the definition of an "employer" for PAYE purposes under Regulation 12 might be, it cannot extend to employees in their personal capacity. If either Mr Puchault or Mr Silk were making taxable employment payments to employees that was in the capacity as employees and representatives of their employing entity, not in a personal capacity.

For the tax years from April 2009 – 2010 and 2010 -2011

Payments by an employer.

80. For this period although The Grand Folkestone Limited is operating the payroll for this period, we accept HMRC's allocation of the employees between entities based on the information provided by Mr Stainer about the split of profits of the various hotel businesses and particularly the deductions claimed for wages in each of the entities' 2008 accounts and the manner in which wages were paid out of cash takings for that period, as providing a reasonable assessment to the best of HMRC's judgment and in the face of a lack of further information from Mr Stainer about a more accurate allocation.

Conclusion

81. HMRC's best judgment assessments are confirmed for each of the Appellants for the tax years 2007-8, 2008-9, 2009-10 and 2010-11. Assessments for the 2005-6 and 2006-7 tax years are confirmed for each of the Appellants other than that on Mr and Mrs Stainer which should be reduced by the 34.4% of the tax which should be allocated to Heritage Hotels UK Limited, reducing their allocation to 17%.

Penalties

Reasonable Excuse

82. We agree with HMRC that none of the grounds advanced by Mr Stainer in his correspondence with HMRC amount to a "reasonable excuse" under s 118 TMA 1970. There is no statutory definition of a reasonable excuse for these purpose but it is generally accepted that lack of ability to pay does not amount to a reasonable excuse unless the reason for a lack of funds would itself amount to such an excuse. Mr Stainer did not provide any evidence that the Appellants' lack of funds arose from any exceptional or unexpected circumstances which might form the basis of such a reasonable excuse.

83. We accept that Mr Stainer had a number of issues to deal with at the Grand during this period, including his issues with the local council and his role with Eurotunnel. However, we have to consider whether a reasonably prudent businessman in his position would have behaved as he did throughout this period and failed to make any returns or payments of PAYE or NI. We do not accept that the persistent and on-going failures by the Appellants to make any such returns or payments can be excused by Mr Stainer's preoccupation with other issues.

84. For these reasons the penalties for the periods 2005-6 to 2009-10 are confirmed on each Appellant.

Tax Geared Penalties

85. HMRC explained the basis on which tax geared penalties for the 2006-7 and 2007-8 periods had been abated to 40% for the Appellants taking account of Mr Stainer's co-operation with HMRC, the seriousness of the offences and the levels of disclosure.

86. (i) *Co-operation*; we do not accept Mr Brown's arguments that penalties should be abated any further for co-operation; our view is that Mr Stainer has co-operated no more than he has been legally obliged to with HMRC's enquiry, forcing HMRC to issue information notices to obtain even the basic information on which they have based these assessments. For this reason we have concluded that this aspect of the penalty determination should be increased, reducing the level of mitigation for co-operation to 10%.

87. (ii) *Seriousness*; we accept HMRC's level of mitigation for seriousness taking account of the impact on employees of PAYE and NI not being paid by their

employer on their behalf and this element of HMRC's penalty determination is confirmed.

88. (iii) *Disclosure*; we accept this element of HMRC's penalty determination for disclosure and the level of mitigation applied by HMRC, taking account of the Appellants' difficulties with lost documents.

89. The resulting tax geared penalty determination is therefore confirmed as 65% of the total tax due in respect of each Appellant for the 2006-7 and 2007-8 periods, taking account of the allocation of tax liabilities which we have determined above.

90. 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.

RACHEL SHORT
TRIBUNAL JUDGE

RELEASE DATE: 25 FEBRUARY 2016