[2016] UKFTT 727 (TC)

TC05456

Appeal number: TC/2015/01959

INCOME TAX and NATIONAL INSURANCE – employment status – whether self-employed partner or employee -

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR REMI ASHTON **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE FAIRPO
MRS RUTH WATTS DAVIES

Sitting in public at Bristol on 8 March 2015

Mr Felton of Baldwin Berkley Hamilton for the Appellant

Mrs Millward, presenting officer for the Respondents

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DECISION

Introduction

1. This is an appeal against the Respondents' ('HMRC') decision to treat the appellant as a self-employed partner of Karate World, a martial arts instruction business, rather than as an employee of Karate World for the tax years 2008/09, 2009/10 and 2010/11.

2. The appeal arises in the context of assessments raised by HMRC totalling £16,021.74 in respect of overstated business expenditure for the periods 2008/09, 2009/10 and 2010/11. The appeal is in respect of the status of the appellant and so as to whether the basis of the assessments is correct rather than specific amounts included within the assessments.

Background

3. Karate World is a martial arts instruction business; it began an unspecified number of years ago as a sole trader business with, eventually, a number of employees including the appellant.

4. In October 2003, the proprietor of the business considered options for growing the business and set up a partnership with a number of the employees as partners, including the appellant.

5. From 2003 onwards the partnership submitted partnership returns on which the appellant was shown as a partner; from 2003 until 2011, when he left the business (on 30 April 2011), the appellant submitted self-assessment returns as a partner and claiming overlap relief. He registered for and paid Class 2 National Insurance Contributions. No employment pages were completed in his self-assessment returns.

6. An enquiry was opened into the appellant's 2011 self-assessment return as the profit share included in that return did not match the amounts declared by the partnership. Following correspondence, HMRC raised assessments for understatements of tax in each of the appellant's returns for the periods 2008/9 to 2010/11 (earlier years were considered to be outside the time limits for assessment). The understatements arose as a result of a mismatch of basis periods and disputed expenses.

7. Following the issue of the assessments, the appellant appealed on the basis that he was not a partner in Karate World but was, instead, an employee. The quantum of the assessments was not disputed.

Relevant law

8. Section 1 of the Partnership Act 1890 provides that:

> "Partnership is the relation which subsists between persons carrying on a business in common with a view of profit."

9. Section 9 of the Partnership Act 1890 provides that:

> Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts.

10. Under section 8(1B), Taxes Management Act (TMA) 1970 a partner in a partnership is required to include their share of partnership "income, loss, tax, credit or charge" for the relevant tax year.

Appellant's evidence

11. The appellant gave oral evidence to the tribunal. He had been an employee of the predecessor sole trade, run by Mr Thompson who continued to run Karate World after the partnership began in 2003.

12. The appellant believed that the impetus for the change in the business had been the adoption of the "Lee Childs" system of operating a martial arts business; this was a substantial shift in the way the business operated, both in how classes were taught and how memberships were operated. The appellant and most other staff, not just those described as partners, were sent to seminars run by Lee Childs to learn the way in which they were to operate sales, run the schools, operate membership incentives and so on.

13. Initially, in 2003, the appellant explained that only four people were involved in the business: Mr Thompson, the appellant, and two others. The appellant was told he was to be self-employed; the term "partner" was not mentioned until another school was set up, in London Road, and two other individuals joined the business.

14. The appellant explained that he had been told, when the business changed, that he was to be self-employed from the following month. The appellant explained that he trusted Mr Thompson: he had started training with Mr Thompson at the age of 10, had gone on to compete in World Championships with him, and was accustomed to following Mr Thompson's lead. At the time of the change in the business, the appellant was around 21/22 years old. Accordingly, the appellant did not question Mr Thompson's decision that the appellant should be self-employed, rather than an employee – he accepted Mr Thompson's view that this was the best way to run the school, and had no reason to question otherwise.

15. The appellant further explained that the partnership documentation was provided to him, and the others described as partners, together and they were advised as to how to fill out the form by the business' accountant; he had been advised that he would need to save monthly to pay his taxes as no taxes would be deducted from payments. The business had arranged for the business' accountants to also deal with accounts and tax returns for the individuals involved but the appellant considered that their fees were too high and, after the first year, found alternative accountants.

16. The appellant described Mr Thompson as having an 'iron grip' over what was done by those involved in the business, including where and when they worked. For example, the appellant could be moved to work at another school if someone was not available to work although he was generally required to work at a specific site. The times which the appellant worked were set down by Mr Thompson; not only to take classes but also to be on site at specific times. The syllabus for the schools was set by Mr Thompson; if there were problems in class implementing the syllabus, staff had to go back to Mr Thompson for instructions on how to proceed. Staff were provided with documentation on how to teach classes to various levels of students, including a schedule of how the classes should be run on a minute by minute basis.

17. The appellant further explained that there were no partnership meetings as such. There were staff training sessions which would take place on Monday mornings, with Mr Thompson teaching the staff the techniques that he wanted them to teach that week, and how to implement the techniques, as well as personal development and life skills that they were to teach. These meetings were never referred to as "partner meetings".

18. The appellant also explained that the enrolment procedure was drafted by Mr Thompson, who had worked with third parties on the processes which were to be followed in enrolling new clients for the schools.

19. The appellant confirmed that he was paid £1,333 each month and would receive a bonus payment based on the performance of the school where he worked. The appellant received a smaller basic pay than staff at other schools, but received a better bonus as the school did better than other schools in the business. The bonus was paid if the school met certain targets for the month, both financial targets and enrolment targets. The bonus structure had been modified about 4-5 years before the appellant left Karate World as the original structure was not working for other schools in the business. The plan had been for the appellant and another member of staff at the school to receive bonuses if the other schools in the business achieved particular targets but, as those targets had never been achieved, the appellant had never received such a bonus.

20. The appellant explained that requests for holidays originally had to be submitted in January each year, because cover had to be arranged between the schools and so two people could not be away at the same time. After a while this became too difficult to arrange and so the schools all shut down for two weeks in the summer and two weeks at Christmas, and all staff had to take their holidays at that time. It was sometimes possible to take a couple of days at other times, but it was difficult to organise cover. At least two weeks' notice had to be given for any requests for days off in order to be able to organise cover.

21. When staff were sick, the appellant explained that cover would be arranged. For example, when the appellant had had to have his appendix removed, Mr Thompson had arranged cover. Staff and some advanced students had covered classes as the appellant was away for two weeks. The appellant explained that he had received full pay for those two weeks, receiving both basic pay and bonus payments.

22. When asked whether he could send a substitute to take classes, the appellant explained that this would be difficult as the appellant was the chief instructor and any substitute would need similar qualifications. If the appellant was ill, another person would take over classes for him, arranged by Mr Thompson: classes would occasionally be cover by Mr Thompson himself, but more usually it would be one of the other senior staff.

23. The appellant explained that he took no financial risk in the business; he had no access to partnership bank accounts. He accepted that he was a signatory on a partnership savings account, which he believed had been set up to take the profits split from the various schools. A percentage of profits from each school was paid into the account in order to pay bonuses to the chief instructor in a school if that school met its targets. The appellant explained that he had nothing to do with the account and that he didn't know why he was a signatory.

24. The appellant confirmed that he was not provided with copies of the partnership accounts, although he acknowledged that he had not specifically asked to see them until problems arose with taxes, and had not received a copy of the partnership agreement. The appellant had given his bank statements to his accountants each year, who used these to compile his tax return for each accounting period.

25. The appellant said that he was paid 'wages' by Mr Thompson who ran the operation effectively as his own business. Partners did not have to paid money into the partnership when they joined, and did not receive any money from the partnership when they left as they had been paid their 'wage' for their work.

26. The appellant, together with other staff, was expected to provide his own uniforms, training shoes, and weapons for particularly types of martial arts. As the appellant was an instructor, he was expected to buy high quality weapons. General equipment was provided in the schools by then business

27. He had also been expected to buy his own car, and had been told he had to buy a BMW in order to ensure that the school projected a particular image; he had been advised that he should aim to acquire status symbols such as the BMW and a Rolex to support the image of a successful instructor in a successful school. The appellant had asked whether the car could be purchased through the business, but had been told that he could only claim for mileage incurred on school business and could not claim for the cost of the car from the business. When questioned, the appellant confirmed that he had not been aware that claims had been made for vehicles on the partnership return.

28. The appellant confirmed that he had given 'one or two months' notice before leaving Karate a World as Mr Thompson had to get things in place with the other schools; the location where the appellant worked was the main school. The appellant said that he knew he had to give a month's notice as others had given a month's notice. In addition, Mr Thompson had asked him to give a month's notice.

HMRC evidence

29. For HMRC, Mrs Millward explained that HMRC had received information that the appellant was an originating partner in the partnership documentation. The partnership annual returns all showed the appellant as a partner. All documentation received by HMRC supported the view that the appellant regarded himself as self-employed; he paid income tax and Class 4 National Insurance Contributions on a self-employed basis.

30. The appellant accounted for Class 2 National Insurance Contributions each month. His tax returns and calculations referred to "profit from partnerships" And he had claimed overlap relief. No employment pages had been completed in the relevant tax returns. The expenses claimed in those returns had included expenses not available to employees, as the expenses had not been incurred "necessarily" in the performance of the appellant's duties, as required by s336 ITEPA.

31. HMRC had had a meeting with Mr Thompson, his wife (also described as a partner in Karate World) and their advisers, in order to discuss the status of individuals engaged by Karate World. In this meeting, the appellant had been described as being responsible for running one of the schools and as fundamental to the business. He had been also described as influencing the founder, Mr Thompson, in adopting new martial arts techniques, and was to receive a percentage of profits from the schools. The appellant explained, in reply, that he had been asked by Mr Thompson to learn and teach the new techniques. He had not influenced Mr Thompson to adopt them.

Other evidence

32. Substantial correspondence between HMRC, Mr Thompson and his accountants was referred to.

33. In addition to oral evidence, a witness statement of Mr Davis was submitted by the appellant. Mr Davis was not at the Tribunal to confirm his witness statement, but HMRC raised no objection to the witness statement being introduced as evidence. The witness statement focussed on the operation of the Karate World partnership savings account to which the appellant was a signatory. Mr Davis confirmed that he was also a signatory to the account but that he had no control over the funds in the account: when the account was closed, Mr Davis stated that Mr Thompson had taken him to the bank to co-sign for the balance of the funds to be paid out from the account, and that such funds were kept by Mr Thompson.

Appellant's submissions

34. For the appellant, Mr Felton submitted that the appellant could not be regarded as a partner in Karate World: the appellant took no financial risk in the partnership, had never seen copies of the partnership accounts, and had not entered into a written partnership agreement. The draft partnership agreement provided to HMRC by Mr Thompson was a blank template that had no details – it did not include a business name, nor any details of the business or partners. Partnership accounts for the relevant

tax years have still not be been supplied to the appellant despite requests made of Mr Thompson and his accountant.

35. It was submitted that any bonuses were based on the turnover of the school, rather than profits, and that there was no expectation that any losses were to be shared; in fact, the remuneration structure precluded any possibility of a loss for the appellant. Payments were described by Karate World in the transactions that appeared in the appellant's bank statements as "wages". Similarly, the appellant was required to deal with his own expenses, in a manner inconsistent with operating in partnership with others.

36. Considering case law, there is no single determining factor which specifically distinguishes between employment and self-employment: it is necessary to consider the overall picture (per *Turnbull* [2011] UKFTT 388 (TC), and *Hall v Lorimer* [1993] EWCA Civ 25)).

37. Mr Felton submitted that the appellant relied upon and followed Mr Thompson's advice and that, in reality, nothing changed in the relationship between the appellant and the business at the time that the partnership was said to have been created, further:

(1) There was significant control over what was done by the appellant: the lesson plans showed that lessons were structured in five minute intervals, and the appellant was required to follow this regimented approach. It was submitted that he had no ability to make changes to classes, and that Mr Thompson controlled all elements of the school and lessons. The appellant was also required to attend other schools to cover for staff absence.

(2) Mr Thompson controlled the way in which training was given; the appellant had not influenced Mr Thompson in the adoption of new martial arts techniques; he had been asked by Mr Thompson to learn a technique and teach it.

(3) There was no right of substitution; Mr Thompson arranged cover if the appellant was away or on sick leave.

(4) The payment of holiday pay and sick pay was not consistent with self-employment.

38. Accordingly, it was submitted that the appellant was not a partner in Karate World for the periods in question and instead, on the balance of probabilities, should be regarded as an employee of Karate World.

39.

HMRC submissions

40. HMRC submitted that the appellant had been represented by accountants throughout the periods in question and had completed a form CWF1 registering as self-employed. He had completed each of his self-assessment tax returns on the basis that he was a partner in Karate World. The appellant had also claimed expenses on the

basis of self-employment. In addition, the appellant had confirmed that the arrangement was that he was to receive payment of a percentage of amounts from other schools in the business if they achieved certain targets.

41. Further, throughout the enquiry period, until the assessments had been issued, no dispute as to the status of the appellant had been raised. A person taking reasonable care would have made enquiries as to their employment status at an earlier stage, either by speaking to their accountant or by contacting HMRC.

42. HMRC submitted that the use of the word "wages" to describe the payments by Karate World to the appellant could be a payroll system default and should not be regarded as evidence that there was an employment relationship.

43. HMRC submitted that the evidence showed that the appellant took an active part in the partnership rather than being a worker engaged by Karate World. There is no definition of employment or self-employment in tax statute; the determination of status is based on case law, and all factors must be considered with judgement made as to the overall effect. In this case, it was submitted that the following points should be taken into consideration:

(1) Whilst a right of control is indicative of employment, the extent of the right needs to be considered: martial arts are a disciplined form, and the school documentation could be regarded as a helpful structure.

(2) The appellant was a chief instructor in the school, described as self-employed and without any right to sick pay.

(3) The requirement to work particular hours should be regarded as having only marginal importance.

(4) It appeared that some substitution was permitted when the appellant was away or on sick leave.

(5) The provision of equipment by Karate World was not a definitive indicator of employment (per *Hall v Lorimer* [1993] EWCA Civ 25).

(6) Paid holidays should not be regarded as a conclusive indication of employment.

(7) The intention of the parties was important, not the name given to the relationship.

44. As the appellant registered as self-employed and submitted his tax returns on the basis that he was a partner, the burden of proof is with the appellant to demonstrate, on the balance of probabilities, that he was an employee.

45. Accordingly, it was submitted that the appellant's status was that of a self-employed partner of Karate World for the periods in question and that the assessments should stand.

Findings of fact

46. We find that:

(1) The appellant had been an employee of the predecessor business operated by Mr Thompson

(2) The appellant completed his tax returns for the relevant tax years on the basis that he was a partner in Karate World.

(3) The appellant did not receive partnership accounts or a copy of the partnership agreement for Karate World. The appellant did not take part in any partnership meetings.

(4) The appellant was paid a basic amount each month and would receive a bonus amount for each month in which the school in which he taught achieved a particular turnover figure.

(5) The appellant was expected to meet business expenses on his own account, other than mileage, rather than having such expenses met by the partnership as a whole.

(6) The appellant was a signatory on a partnership savings account but did not have any control over the operation of that account.

(7) The Karate World partnership business was controlled by Mr Thompson, setting both the content of classes and the way in which classes were to be taught.

Discussion

47. The issue to be addressed is whether the appellant's status for tax purposes was that of a partner in a partnership,. If not, was his status that of an employee of the business which purported to be a partnership?

48. The principal legal question as to whether a person is a partner is whether they carrying on a business in common with one or more other persons with a view to profit (s1 Partnership Act 1890). Whether or not a person is a partner therefore is to be determined by looking at the facts of the case to consider whether or not they are "carrying on business in common" with one or more other persons "with a view of profit".

49. HMRC's evidence and submissions focus on the partnership returns which show the appellant as a partner, and the appellant's CWF1 self-employment registration and self-assessment returns which were prepared on a self-employment basis as a partner in Karate World. They also point out that the appellant was a signatory on a Karate World partnership savings account.

50. The burden of proof is, of course, with the appellant to demonstrate that he was not a partner in Karate World.

51. The appellant's evidence is that he had simply done what he was told to do. He had not entered into a partnership agreement and had initially been told only that he

was to become self-employed, having previously been an employee. The term "partner" had not been used until later. He received a basic pay and a bonus amount based on the financial performance of the school in which he was an instructor. There appears to have also been an incentive amount related to the performance of other schools in the business, although this did not apparently result in any payments.

52. The bonus payment amounts may be capable of being regarded as sharing in the profits of the business, although the description given by the appellant suggests that the bonuses were based on turnover rather than profits. However, in addition to receiving a share in profits, a partner is liable jointly with other partners for all debts and obligations of the partnership incurred whilst that person is a partner. From the evidence, it does not appear that the appellant would have any liability for the burden of losses in the business: for example, there was no indication that his basic pay award would not be made, or that any element would be repayable if the business had a bad year.

53. The appellant's evidence is that he did not enter into a written partnership agreement, and that there were no partnership meetings to discuss the business of the partnership. The appellant was not provided with partnership accounts, nor with the necessary partnership financial information to complete his tax return – as a result of which, it would appear, the discrepancies occurred which gave rise to the enquiry into the appellant's tax returns in the first place.

54. Taken together, these points indicate that the appellant was not involved in the running of the business as a whole, and so was not "carrying on business in common" with others as required for a partnership to exist.

55. Further, the appellant was expected to deal with his own expenses, rather than such expenses being borne by the partnership as a whole. This is not specifically indicative one way or the other as to status, but together with the other points above adds to the overall pattern of evidence indicating that the appellant was not a partner in Karate World.

56. On the balance of probabilities, therefore, we find that the appellant was not a partner in the Karate World partnership as he was not carrying on business in common with other persons with a view to profit.

57. Turning then to consider the question of the appellant's status, if not a partner, it is necessary to consider the evidence to determine whether the appellant was an employee of Karate World.

58. We agree that there is no single test of employment status for these purposes: all factors must be taken into account and the decision reached on the basis of the overall effect.

59. The documentation available describes the appellant as self-employed; we regard this factor as inconclusive as it has been well-established in case law that the substance of the relationship and the intention of the parties is more important than the description of the relationship in documentation.

60. In this case, there was clear mutuality of obligations between the parties.

61. Considering particular factors:

(1) There was substantial control over the appellant as to when he should work and how the work was to be carried out, as Mr Thompson would demonstrate techniques and set the content of classes. The appellant was not free to operate classes as he considered most appropriate. However, martial arts are a disciplined form and schools would generally want to ensure consistency between classes and teachers. Nevertheless, we consider that the degree of control exerted by the business over the content and structure of classes went beyond that required for consistency and this tends towards a finding of employment status.

(2) The school provided the necessary general equipment for classes, although the appellant was expected to provide his own uniforms and weapons. This factor is not particularly indicative of either employment or self-employment.

(3) The payment of holidays is inconsistent with self-employment, as is payment for periods of illness.

(4) The appellant did not organise his own cover when he was away or sick; cover was provided by other instructors or advanced students. In the circumstances, we do not consider this factor to be indicative of either employment or self-employment.

(5) We consider from the evidence that there was no significant change in the relationship between the parties in 2003, at the point at which the appellant was told that he was to be self-employed rather than an employee as he had been previously. We accept the appellant's evidence that he followed what he was told to do, relying on Mr Thompson, and therefore that it has not been demonstrated that the intention of the parties was that the relationship from that point onwards should be one of self-employment.

62. On balance, considering all the factors, we find that the appellant was an employee of Karate World.

Decision

63. The appeal is upheld, and we find that the appellant was an employee of Karate World and not a partner in that business for the tax years in question.

64. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE FAIRPO
TRIBUNAL JUDGE

RELEASE DATE: 27 OCTOBER 2016