[2020] UKFTT 0138 (TC)

TC07630

INCOME TAX – information notice under paragraph 39 of Schedule 36 to Finance Act 2007 – failure to comply with notice – penalty – claim for subsistence and training expenditure – principles to be applied – penalties for careless inaccuracies in 2016/17 self-assessment return under Schedule 24 Finance Act 2007 – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/03743

BETWEEN

NEIL PHILLIPS **Appellant**

-and-

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

TRIBUNAL: JUDGE GUY BRANNAN
MR LESLIE BROWN

Sitting in public at Manor View House, Newcastle upon Tyne on 26 November 2019

The Appellant did not appear and was not represented

Paul Hunter, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against a closure notice in respect of the income tax year 2016/2017 issued under section 28A(1B) and (2) Taxes Management Act 1970 ("TMA") issued on 15 March 2018. The appeal against a closure notice relates to two issues: the claim for a deduction in respect of subsistence expenses and for a deduction with regard to the costs of a training course. In addition, Mr Phillips ("the Appellant") appeals against two penalties: the first is a penalty for failure to comply with an information notice under paragraph 39 Schedule 36 to the Finance Act 2008 ("FA 2008") and the second is a penalty for careless inaccuracies in his self-assessment tax return for the tax year 2016/17 under paragraph 1 Schedule 24 to the Finance Act 2007 ("FA 2007").[1]

2. The Appellant and his agent, Mr Malcolm Dixon of CIS Tax Savers Ltd, did not attend the hearing. Mr Dixon had previously notified HM Courts and Tribunals Service that neither the Appellant nor Mr Dixon intended to attend the hearing on the grounds of cost.

3. Having satisfied ourselves that the Appellant had been duly notified of the date and place of the hearing and in the light of the above notifications from Mr Dixon, we considered it to be in the interests of justice to proceed with the hearing in the absence of the Appellant and his agent.

THE FACTS

4. HMRC opened an enquiry into the Appellant's self-assessment tax return for the tax year 2016/17("the tax return") by a letter dated 11 August 2017. The HMRC received the Appellant's tax return on 24 April 2017. The letter stated:

> "I'm checking your tax return. I can do this under section 9A of the Taxes Management Act 1970."

5. It was clear to us that this letter constituted a valid notice of HMRC's intention to enquire into the Appellant's tax return.

6. The letter of 11 August 2017 contained a list of information which the Appellant was asked to provide by 10 September 2017.

7. Although some of the information contained in the list was or had been provided by or behalf of the Appellant, some of the information requested had not been provided.

8. Accordingly, on 15 September 2017, HMRC issued an information notice for the documents and information previously requested, requiring a response by 14 October 2017.

9. This information notice was said by HMRC to have crossed in the post with a letter from Mr Dixon dated 7 September 2017, with which we were not provided. However, it is clear from a letter dated 19 September 2017 from Officer Williams of HMRC (the HMRC Officer dealing with the Appellant), that Mr Dixon's letter of 7 September was received by HMRC on 13 September 2017 but was only reviewed after the information notice had been dispatched. HMRC informed us that Mr Dixon's letter of 7 September provided some of the information requested but, since we have not had sight of this letter, we cannot confirm this.

10. On 19 September 2017 HMRC issued a revised information notice to take account of the documents and information already provided. This information notice required a response by

[1] Strictly, the Appellant's notice of appeal referred only to the penalty in respect of the information notice, but HMRC and we have treated the appeal as being in respect of all three matters.

18 October 2017. The schedule to this information notice listed the documents and information which HMRC required:

> "For the tax year 6 April 2016 to 5 April 2017
>
> - Details of how the turnover figure of £15,689.00 was calculated and the records from which it was derived.
> - An explanation as to why the turnover was reduced from £30,708.00 on 3/08/2017.
> - A breakdown and evidence of the £7632.00 claimed for total allowable expenses. An explanation as to why the original CIS being claimed of £6142.00 has been reduced to £2968.00
> - All bank and/or building society books or statements, cheque-book stubs and deposit book counter foils for any account into which any income from the business or from which any expenditure from the business was paid during the period of accounts.
> - Credit card statements for any cards used in the business."

11. Because the letter of 7 September 2017 was not supplied to us it is impossible to determine whether some of this information was supplied prior to the issue of the information notice. It is clear from a letter of 19 September 2017 sent by Officer Williams to Mr Dixon that at least one CIS statement had already been sent to her and she had overlooked it (a matter for which she apologised).

12. Attached to a letter dated 7 October 2017, Mr Dixon provided a schedule of expenses for the Appellant in relation to the tax year 2016/17 totalling £7,631.50. Following receipt of this letter, an extension to the period for provision of the documents and information required by the information notice of 19 September 2007 until 7 November 2017 was agreed (in a letter from HMRC dated 23 October 2017). In that letter HMRC noted, however, that the Appellant had not supplied evidence of that expenditure. In addition, HMRC also drew attention to the fact that the request for bank/building society books or statements, cheque-book stubs and deposit book counter foils at and credit card statements for credit cards used in the business had not been provided.

13. Mr Dixon's letter of the 7 October 2017 confirmed that his firm had no involvement in the submission of the Appellant's tax return for the year 2016/17. The letter stated:

> "Mr Phillips had been unspecific about this for the reason, he has now informed us, of his acute embarrassment about the affair. We are informed that Mr Phillips's initial 2016/17 Tax Return was submitted in April 2017 by a 1/3 party without Mr Phillips's knowledge or agreement. Mr Phillips was approached by telephone by a person recommended to him whom he knew only as 'Baggy' but whom he was assured was a Tax Agent. This person proceeded to register himself as Mr Phillips' Tax Agent online with Mr Philips' agreement. However he then submitted a Tax Return for Mr Phillips without any recourse to Mr Phillips and without any input from Mr Phillips on the amounts contained therein. In other words the Return was seemingly fabricated by the person known as 'Baggy'. Mr Phillips informs us that the first occasion when he became aware that a return had been submitted on his behalf was when he received your initial letter, which we believe was dated 24 May 2017.
>
> Mr Phillips is embarrassed about this and in particular that he agreed to use an untested Agent just because he had low fees on the basis of a recommendation. He is very clear that he had no involvement beyond the Agent becoming

> authorised. Whilst his action might be thought foolish, he could not have foreseen that 'Baggy' would falsify a Tax Return and that he would become a victim of what appears to be an attempted fraud.
>
> We trust this explains where the initial figures came from and if you wish to make further enquiries, Mr Phillips has provided us with 'Baggy's' phone number which is [a 12 digit number]. Mr Phillips has no further details about 'Baggy', such as address or email. We would expect that you already have this information of course and are no doubt aware that 'Baggy' wildest return and who he is. We can only record that it is a shame that HMRC did not see fit to share this with our office which would also have saved wasted time and work."

14. No details were given concerning the person who recommended "Baggy" to the Appellant.

15. The tax return made no reference to "Baggy" or any other person being nominated as an agent. The mobile telephone number for "Baggy", provided by Mr Dixon, was one digit too long and it was not possible to make contact using that number. No email address, website or personal address exists for "Baggy". HMRC ran security checks on the Appellant's account in May 2017. HMRC found no evidence of any attempted fraud on the Appellant's self-assessment record.

16. We were provided with a copy of a letter from Mr Dixon which bore the date of "16 October 2017" providing, inter alia, an expenses breakdown. The date on the letter is evidently a typographical error because the letter refers to a letter from HMRC dated 23 October 2017 and is date stamped as having been received by HMRC on 21 November 2017. We consider, on balance, that Mr Dixon's letter was sent after 7 November 2017 and, in fact, probably not before 19 November 2017 (given the date of receipt in the ordinary course of post).

17. As regards bank statements, Mr Dixon's letter of "16 October 2017" stated that the only bank or credit card account used by Mr Phillips for the purposes of his business was a Nationwide bank account. A more detailed breakdown of expenses was contained in the letter but there was no supporting evidence of this expenditure, save as regards mileage logs which had already been provided by Mr Dixon.

18. The expenses included £895.31 (under the heading "Training/Courses") in respect of "A Site Management training course – Total cost over £2000 is being paid monthly 20 months starting October 16". In the body of the letter Mr Dixon wrote:

> "Training and Courses
>
> As can be seen from the above the major element of this is for Mr Phillips's Site Management course which is run by "The Learning People" with instalments financed by RRS Zebra 4 commencing 4 October 2016 with a payment of £230.33 and subsequent monthly payments of £110.83. The total cost is spread over approx two years. These payments are on his bank statements. The total for the year in question is therefore £230.33 + (£110.83 ×6), i.e. £895.31. The expenses offset for this item work £700 and this was unfortunately under-claimed. We would therefore be obliged if you would increase the expenses claimed by this amount, namely £195.31.
>
> Mr Phillips can get hold of some paperwork for this course if you need it but hopefully the bank statements will suffice."

19. We were able to identify some payments to RRS Zebra 4 but because of the poor quality of the photocopies of the Appellant's bank account statements it was not possible to do this for every month.

20. Mr Dixon's letter of 17 January 2019 enclosed a witness statement from the Appellant (although we note it was dated "22-01-2019") which related to the training course claimed as an expense:

> "The training course attended by me and the subject of part of this appeal was directly related to my work as a foreman bricklayer with the intention of providing a high quality qualification to enable me to focus more on this area of my work. The course was run by The Learning People and they describe it as a general qualification that could be used in construction. The course included site management which was directly relevant to my work. The fact that the course was titled 'Project Management' is commonplace in construction and does not mean that the subject was solely concerned with Project Management in the narrow sense of the word relating to the work of the role of a Project Manager. The course included diverse areas of site management, including foreman management, site management and contract management as well as some of the areas of expertise of Project Managers. I believe that the titling of this course has led to a misunderstanding or a misrepresentation as to the training course content. The course also included site-based skills of the sort that I need daily and included a broader skill set to enable me to enhance and reinforce those existing skills more effectively and thereby increase my competence and ability to win contracts in my area of work."

21. Because he did not attend the hearing, it was not possible for HMRC to cross-examine the Appellant on his witness statement.

22. We saw no invoice or any documentary material from The Learning People. In particular, we saw no documentary material concerning the contents of the course. In addition, we did not see any evidence that the payments to RRS Zebra 4 related to the training course.

23. HMRC contacted The Learning People who advised that they did not offer a Site Management course – the closest course they would offer would be a project management course.

24. As already noted, the deadline in respect of the information notice was extended to 7 November 2017. Officer Williams was on annual leave in the period 8-10 November 2017.

25. On 15 November 2017, Officer Williams called Mr Dixon to check whether he had responded to her letter of 23 October 2017. Officer Williams reported that Mr Dixon said that he was not sure whether he had responded and would call back. Officer Williams had an informal discussion with other members of HMRC who advised her to continue with issuing the fixed penalty of £300 in respect of the failure to comply with the information notice. Officer Williams' decision to issue the penalty was authorised by her manager.

26. On 16 November 2017 the penalty charge letter had been processed and was sent by recorded delivery. Mr Dixon then called HMRC and spoke with a colleague of Officer Williams, stating he would reply to her letter that day and did not need a return call.

27. Subsequently, Officer Williams and Mr Dixon discussed the appeal against the £300 fixed penalty and he advised her that the Appellant was still looking into and trying to obtain the required information. Mr Dixon also said that he had tried to notify Officer Williams but was unable to get through to her by telephone. Officer Williams said that she had no evidence of any attempts to try and contact her prior to the deadline of 7 November 2017.

28. Apart from the expenses in relation to the alleged training course run by The Learning People, the remaining item on the Appellant's return which was in dispute related to his claim for £1250 in respect of subsistence.

29. The amount claimed was £5 per day. There were no receipts or invoices to support the claim.

APPELLANT'S CASE

30. We have examined the letters and emails sent by Mr Dixon on behalf of the Appellant, together with the enclosures to that correspondence, and we summarise below the main arguments put forward on the four main issues (the information notice penalty, the subsistence claim, the training course expenditure and the penalty for careless inaccuracy in respect of the tax return).

31. In the course of the correspondence, Mr Dixon frequently complained about the manner in which HMRC had conducted the enquiry into the Appellant's tax return. These matters lie outside our jurisdiction and we have not dealt with them. Complaints about HMRC's handling of a taxpayer's affairs must be dealt with through HMRC's own internal complaints procedure, after which a complaint can be made to the Adjudicator's Office https://www.gov.uk/government/organisations/the-adjudicator-s-office.

Information Notice penalty

32. Mr Dixon argued (in a letter dated 17 February 2018) that the Appellant had been working in The North Yorkshire National Park where the phone signal was weak (or "non-existent"). In reality, therefore, the Appellant was only able to respond to HMRC's messages on a weekly basis. In practice, the Appellant was contactable on six out of forty days. The Appellant was working away from home did not have access to any records for extended periods of time. In any event, where a person was only at home at weekends there would "always be a great deal of urgent, some extremely so, matters to be attended to in that short timeframe".

33. HMRC's letter dated 19 September 2018 requested documentation to be provided by 18 October 2018. Mr Dixon and the Appellant had already been put to considerable inconvenience, extra cost and wasted time in having to provide documentation to HMRC due to the absence or incompleteness of their own [i.e. HMRC's] records and their inability to adequately administer their own system of CIS Tax.

34. The Appellant had been as helpful as he could be.

35. Mr Dixon had tried to contact Officer Williams on a number of occasions but had been unable to speak to her and there was no one deputised to deal with the matter. Mr Dixon complained that Officer Williams was often unavailable during ordinary office hours during the period before 18 October 2018.

36. No loss had been suffered by HMRC as a result of the failure to comply with the information notice.

Subsistence expenditure

37. Mr Dixon highlighted HMRC guidance at paragraph 47705 of the Business Income Manual:

> "**Occasional journeys outside the normal pattern and itinerant trades**
>
> A deduction is, however, allowable for reasonable expenses on food and drink for consumption by the trader either at a place to which the trader travels in the course of trade or while travelling in the course of the trade, if certain conditions are satisfied.
>
> A deduction must be allowable for the cost of travelling to the place, or would be if the trader incurred any such costs, and either:

- the trade is an itinerant trade at the time the expenses are incurred; or
- the trader does not travel to the place more than occasionally in the course of the trade and either
    1) the travel concerned is not part of the trader's normal pattern of travel in the course of the trade; or
    2) the trader does not have such a normal pattern of travel."

38. Mr Dixon submitted that on this basis (which reflected section 57A of Income Tax (Trading and Other Income) Act 2005) the Appellant's subsistence claim should be allowed.

Training course expenditure

39. Mr Dixon explained that the Appellant worked as a foreman and that the course was required to update his skills. He wanted to go into site management and the course was a vocational course which was related to his existing area of work with a view to progressing in his career.

40. The course was directly related to the Appellant's work. His work as a bricklaying foreman required him to update his knowledge base with contemporary practices and regulations etc. Being a bricklaying foreman may require actual manual bricklaying or masonry but always required management activity. In a changing work environment it was necessary to update skills just to keep standing still. By being up-to-date this allowed the Appellant to improve his negotiating power and, hopefully, his charge out rate. At some point in the future, the Appellant wished to move into management, but the Appellant confirmed that this course was about maintaining and updating his management skills for his existing role as a bricklaying foreman.

Penalty for careless inaccuracy

41. Essentially, Mr Dixon argued that the Appellant's previous agent – "Baggy" –, registered himself online as the Appellant's tax agent with the Appellant's approval. "Baggy", however, submitted the Appellant's tax return without his agreement and without any input from him. The Appellant became aware that his return had been submitted only when he received a security check letter from HMRC dated 24 May 2017.

42. Mr Dixon argued that the Appellant could not have foreseen that "Baggy" would falsify the Appellant's tax return and that the Appellant appeared to have been the victim of an attempted fraud. Mr Dixon suggested that HMRC were aware of "Baggy's" identity.

43. Mr Dixon also submitted that once the Appellant realised his mistake, he appointed Mr Dixon's firm and provided all necessary documents. Mr Dixon also argued that it would be unreasonable to punish the Appellant further.

DISCUSSION

Information notice penalty

44. It is clear that the Appellant failed to provide all the information required by the Information Notice issued on 19 September 2017. For example, a full breakdown of expenses claimed in the tax return was only provided after the (extended) deadline of 7 November 2017.

45. We do not consider any of the reasons put forward for the failure to comply with the 7 November 2017 deadline as a reasonable excuse within paragraph 45 Schedule 36 FA 2008.

46. We would have expected a reasonable taxpayer to have attended to the provision of the information required by the information notice promptly. No details were provided of the allegedly "urgent" other matters to which the Appellant had to attend when he was at home.

Moreover, we accept Officer Williams' evidence that mobile phone coverage in the The North Yorkshire National Park was patchy but not non-existent.

47. As to the alleged unavailability of Officer Williams, there is no evidence to indicate that this HMRC officer was unduly absent or failed to reply to telephone calls. We note that an internal HMRC complaints procedure exonerated Officer Williams. We also note that in Mr Dixon's letter of 7 October 2017 no complaint is made of Officer Williams' unavailability. We also note that Mr Dixon indicated that it was his practice only to telephone HMRC in the afternoon. There is no explanation as to why this unusual practice should have been adopted. In any event, there is only one instance in which it is recorded that Mr Dixon telephoned Officer Williams at shortly after 4.30 p.m. and was unable to establish contact.

48. In answer to our questions, Officer Williams confirmed that she worked on a flexi-time basis.

49. We consider that there is no reason why Mr Dixon could not speak to or get hold of Officer Williams and we consider his complaints on this subject to be entirely without foundation.

50. Accordingly, we consider that there was no reasonable excuse for the Appellant's failure to provide the information required by the information notice and we, therefore, uphold the penalty.

Subsistence expenditure

51. In our view, the Appellant has failed to demonstrate that he incurred expenditure on subsistence. Instead, the Appellant claimed a flat rate of £5 per day and produced no supporting evidence of his expenditure.

52. Under section 12B TMA a taxpayer must keep business records to support the entries in their tax return. Accordingly, it seems to us that the Appellant has simply failed to keep these records and to demonstrate that he incurred the expenditure claimed in his return.

53. We disagree, however, with the conclusion expressed by HMRC in its review letter dated 14 June 2018. This indicated that the claims for £5 daily costs did not appear to be wholly for business purposes, quoting HMRC guidance which indicated that subsistence costs associated with overnight stays were allowable but did not indicate that daily lunch costs were allowed.

54. Section 57A Income Tax (Trading and Other Income) Act 2005 provides:

> "57AExpenses incurred by traders on food and drink
>
> (1) In calculating the profits of a trade, a deduction is allowed for any reasonable expenses incurred on food or drink for consumption by the trader at a place to which the trader travels in the course of carrying on the trade, or while travelling to a place in the course of carrying on the trade, if conditions A and B are met.
>
> (2) Condition A is met if—
>
> (a) a deduction is allowed for the expenses incurred by the trader in travelling to the place, or
>
> (b) where the expenses of travelling to the place are not incurred by the trader, a deduction would be allowed for them if they were.
>
> (3) Condition B is met if—
>
> (a) at the time the expenses are incurred on the food or drink, the trade is by its nature itinerant, or

> (b) the trader does not travel to the place more than occasionally in the course of carrying on the trade and either—
>
> (i) the travel in connection with which the expenses are incurred on the food or drink is undertaken otherwise than as part of the trader's normal pattern of travel in the course of carrying on the trade, or
>
> (ii) the trader does not have such a normal pattern of travel."

55. Section 57A provides no basis for HMRC's restrictive view which is, in our judgment, simply incorrect. It was not in dispute that the Appellant was an itinerant trader. Regrettably, it typifies HMRC's reflex reaction that it must apply its own non-statutory guidance rather than to apply the statutory provisions.

56. Be that as it may, we accept HMRC's submission that the Appellant simply has not provided evidence that he incurred the expenditure in respect of subsistence which he claimed on the return. Accordingly, those expenses are not deductible.

Training course expenditure

57. We have noted the entries on the Appellant's bank account in respect of payments to RRS Zebra 4. However, there is nothing in the documentary records which indicates that these payments related to a course provided by The Learning People. Moreover, HMRC's enquiries indicated that The Learning People did not run such a course.

58. We have borne in mind the Appellant's witness statement (referred to at paragraph 20 above). We note, however, that the Appellant did not make himself available for cross-examination.

59. In our view, therefore, there is insufficient evidence to show that the Appellant incurred expenditure in relation to this course. Accordingly, we disallow this expenditure.

60. HMRC also argued that the nature of the training expenses incurred did not qualify for deduction. Although it is not strictly necessary for us to address this issue, in the light of our conclusion that there was insufficient evidence of the expenditure on this course, we shall consider the point briefly.

61. We do not accept HMRC's restrictive view on what expenses qualify as allowable trading deductions in respect of training courses.

62. In its review letter dated 14 June 2018, HMRC stated:

> "Expenditure incurred by the proprietor of the business on training courses for themselves is revenue expenditure if the course merely updates existing expertise or knowledge. Expenditure on a course which provides new expertise or knowledge is capital."

63. In our view, that statement cannot be correct and is too broadly stated. In this connection, we also note that in HMRC's Business Income Manual it is stated:

> "Training courses
>
> You can claim allowable business expenses for training that helps you improve the skills and knowledge you use in your business (for example, refresher courses).
>
> The training courses must be related to your business.
>
> You cannot claim for training courses that help you:
>
> - start a new business

- expand into new areas of business, *including anything related to your current business"*

64. Again, we consider that the italicised words are too general and require some qualification.

65. In HMRC's review letter of 14 June 2018 the reviewing officer relied on the authority of the High Court decision of Lightman J in *Dass v Special Commissioner & Ors* [2006] EWHC 2491 (Ch). In that case the taxpayer traded as a tutor in English and as an adviser in relation to the bringing of appeals before various tribunals. He took a course which would have led to a diploma in law qualification and claimed a deduction for re-sit examination fees (having missed the original examinations due to illness). In his findings of fact, the Special Commissioner (Mr Howard Nowlan) stated:

> In [the taxpayer's] own words, the description of his trade and activities prior to enrolling on the Holborn course was as follows. 'My services included moderation and examination in English, translation and word processing, settling and marking of written and oral exams, reporting any malpractice of examination regulations, also admin and evaluation work, producing examination reports'. It also included 'Giving advice and guidance to clients about statutory and human rights; self-assessment, personal development, presentation and communication skills, drafting witness statements and complaints, advice about dealing with discriminatory and detrimental treatment with reference to payment, pay advice, promotion, equal opportunities in the field of education, employment and training; taking notes, acting as a witness, making representations at a tribunal'.
>
> …
>
> Whilst Mr Dass's pre-existing activities in part involved work in preparing people for hearings before tribunals, it appears to have been predominantly related to English, translation and education. The LL Dip course was clearly going to enable Mr Dass 'to advocate (clients') causes in respective tribunals and Exam Boards', and equally clearly it was going to increase Mr Dass's legal knowledge and capabilities.

66. The Special Commissioner decided that the fees were capital expenditure and were therefore not allowable.

67. On appeal, Lightman J upheld the decision of the Special Commissioner in the following terms:

> "5. I turn now to the issue as to entitlement to relief. The relief claimed is for relief of £46 (not £80 as stated in the Decision). The critical passages in the Decision are paragraphs 15 and 16 which read as follows:
>
> "15. It was never disputed by Mr Dass that the qualification he was seeking constituted either a NVA or SVQ qualification. As it was not disputed that the course at Holborn College was a two year course, it inevitably follows that one of the requirements for relief in section 589 Taxes Act was not met. The fact that a very short explanatory pamphlet explaining the nature of the relief under these sections did not refer to all the conditions for the relief is perhaps unfortunate, but this cannot change the entitlement to the relief.
>
> 16. I agree with HMRC that the particular course was one to equip Mr Dass with a new qualification that would have enabled him to venture into new areas of practice, and it was not merely a 'refresher' in relation to his existing expertise. This seems to me to be a correct way of distinguishing between the costs (in relation to courses) that constituted capital as distinct from revenue

> expenditure. It is noteworthy that it was on this basis that relief was initially disputed for the first exam fee dealt with, and the contrary decision was only made on a 'one off' basis. I think that HMRC applied the test correctly and, I was told, in a manner consistently with the treatment of all other taxpayers."
>
> 6. The claim for vocational relief was plainly rightly refused by the Commissioner for the reasons which he gave and the contrary was not argued before him or me. The live legal issue is whether the fee for the examination on the course constitutes a capital or revenue expenditure. There is apparently no authority providing guidance on how the cost of courses should be treated for Schedule D purposes. The issue must accordingly be decided as a matter of principle. As Miss Diya Sen Gupta submitted to me some guidance may be obtained from the speech of Viscount Cave in *Atherton v. British Insulated Helsby Cables Ltd* 10 TC 155 at 192:
>
> "[W]hen an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."
>
> 7. This was the approach adopted by the Commissioner. He held that the course was not a "refresher" course to brush up or "hone" Mr Dass's existing expertise, but was directed at equipping Mr Dass with a new qualification enabling him to enter into a new area of practice. The line between the two may often be difficult to draw, but in this case the Commissioner was fully entitled on the material before him to draw the line where he did. Indeed I think that, far from his decision being open to challenge, it was clearly correct.
>
> 8. Accordingly, I dismiss the appeal."

68. The decision in *Dass* is, of course, binding upon us. Nonetheless, we think it is best understood as a decision where, on the facts, the expenditure incurred by the taxpayer in that case would have been expenditure on a new or different trade or, at least, on an activity which was sufficiently different from his existing trade that it could not legitimately be said to be an expense of the organic expansion of that trade.

69. It seems to us that understanding *Dass* in that way is more consistent with the overall context of the taxation of trading activities. It is well-established that a trade can expand[2] organically into related areas (see, for example: *Rolls-Royce Motors Ltd v Bamford* [1976] STC 162 per Walton and J at 185) and that there is a difference between organic expansion and a sudden and dramatic change in activities – the difference between the two being a matter of fact and degree. It seems to us that where expenditure is incurred on a training course which provided training on an activity which would represent an organic growth in the trade then, in principle, that expenditure should be allowable unless it was otherwise clearly capital expenditure.[3] In *Dass*, properly understood, the legal qualifications sought by the taxpayer could not be said to be an organic expansion of his existing trading activities.

70. Notwithstanding our misgivings on HMRC's technical analysis of the Appellant's alleged expenditure in respect of the training course, for the reasons given above concerning the absence of proof of expenditure on the course, we disallow that expenditure.

---

[2] and indeed, as in that case, contract. In the case of an organic expansion or contraction there need be neither the commencement of the new trade nor the cessation of an existing trade.

[3] of course, even the organic expansion of a trade can involve capital rather than revenue expenditure e.g. the acquisition of goodwill of a related business.

Penalty for careless inaccuracy

71. The relevant legislation is found at Schedule 24 Finance Act 2007 and is summarised below.

> " 1(1) A penalty is payable by a person (P) where -
>
> (a) P gives HMRC a document of a kind listed in the Table below, and
>
> (b) Conditions 1 and 2 are satisfied.
>
> (2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to -
>
> (a) an understatement of [a] liability to tax,
>
> (b) …
>
> (c) …
>
> (3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.
>
> (4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.
>
> 3(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is-
>
> (a) "careless" if the inaccuracy is due to failure by P to take reasonable care,
>
> (b)…
>
> (c)…
>
> 4(2) If the inaccuracy is in category 1[4], the penalty is
>
> (a) for careless action, 30% of the potential lost revenue,
>
> (b) for deliberate but not concealed action, 70% of the potential lost revenue, and
>
> (c) for deliberate and concealed action, 100% of the potential lost revenue.
>
> 5(1) "The potential lost revenue" in respect of an inaccuracy in a document... is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.
>
> 9(1) A person discloses an inaccuracy or a failure to disclose an under-assessment by-
>
> (a) telling HMRC about it,
>
> (b) giving HMRC reasonable help in quantifying the inaccuracy or under-assessment, and
>
> (c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy or under-assessment is fully corrected.
>
> (2) Disclosure-
>
> (a) is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy or under-assessment, and

[4] for present purposes, it can be assumed that the inaccuracy is in category 1 for the purposes of paragraph for A Schedule 24 to FA 2007.

(b) otherwise, is "prompted".

(3) In relation to disclosure "quality" includes timing, nature and extent.

15(1) A person may appeal against a decision of HMRC that a penalty is payable by the person.

(2) A person may appeal against a decision of HMRC as to the amount of a penalty payable by the person.

(3) A person may appeal against a decision of HMRC not to suspend a penalty payable by the person.

17(1) On an appeal under paragraph 15(1) the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 15(2) the tribunal may-

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 11-

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed.

72. The penalty notice was dated 15 March 2018. The amount of the penalty exacted under Schedule 24 FA 2007 was £286.13. There was no suspension of the penalty – apparently Mr Dixon did not reply to questions about suspension. The penalty was exacted in relation to the inaccuracies resulting from the claims for deductions in respect of subsistence and the training course in site management as discussed above.

73. Much of the reasons given for the penalty related to the alleged carelessness of the Appellant in selecting "Baggy" as his agent. We have no doubt that the Appellant was foolish in selecting "Baggy" and careless in doing so. Indeed, we consider the existence of "Baggy" to be extremely doubtful – the only reference to "Baggy" is in Mr Dixon's letter of the 7 October 2017 quoted at paragraph 13 above – for the reasons given in paragraphs 14 and 15 above. In any event, we considered the Appellant's case to be confused. On the one hand, Mr Dixon appeared to be arguing that the tax return had been submitted by Baggy without any input from the Appellant and without his knowledge. On the other hand, Mr Dixon submitted that the subsistence and training course expenditure reflected in the tax return was genuine. It is hard to see how such genuine expenditure could be included in the tax return without some participation in the preparation of the return or supply of information for the purposes of the return by the Appellant. The notion that "Baggy" simply conjured these figures out of the air and accidentally hit upon the correct amounts seems most improbable.

74. The statute requires us to consider the inaccuracy in the return which led to an understatement of a liability tax (paragraph 1(2) of Schedule 24 to FA 2007). That is so whether the source of the figures was the Appellant, as we believe, or this mysterious figure called "Baggy" who, it is claimed, operated entirely without reference to the Appellant.

75. We have already held that the claims for a deduction in respect of subsistence and the training course were unjustified because there was no proof that the expenses were actually incurred. The question, therefore, is whether those inaccuracies were careless within the meaning of paragraph 3 Schedule 24 to FA 2007. Those claims will be "careless" for that

purpose if the inaccuracy was due to a failure by the Appellant to take reasonable care. In our view, the claims were careless because the Appellant simply was unable to provide or retain evidence of the expenditure allegedly incurred. In short, the Appellant could not evidence the fact that he had incurred the expenditure which he claimed on his tax return. To make a claim for deductible expenditure in those circumstances is clearly careless.

76. In our view, there was no reasonable excuse for this inaccuracy. In particular, as indicated above, we have doubts as to whether "Baggy" existed.

77. As regards the quantum of the penalty, the penalty range was between 15%-30% of the potential lost revenue (as defined). A 95% reduction was given for the quality of disclosure resulting in a penalty percentage of 15.75%. We see no reason to interfere with the calculation of the penalty.

78. HMRC considered whether there were any "special circumstances" which would lead to a further reduction of the penalty and concluded that there were none. Again, there is no basis for us to interfere with that conclusion.

79. For these reasons, we uphold the penalty for careless inaccuracy.

CONCLUSION

80. For the reasons given above, this appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

81. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 09 MARCH 2020