



Neutral Citation: [2022] UKFTT 188 (TC)

Case Number: TC08513

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

video hearing

Appeal reference: TC/2020/01131

INCOME TAX – alleged suppression of takings – whether suppression established – no – appeal allowed

Heard on: 17 January 2022
Judgment date: 17 June 2022

Before

**TRIBUNAL JUDGE ANNE SCOTT
MEMBER NORAH CLARKE**

Between

RUHAL ISLAM

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: **Laurent Sykes, QC**

For the Respondents: **Alex Costello, litigator of HM Revenue and Customs’ Solicitor’s Office**

DECISION

INTRODUCTION

1. This is an appeal against discovery assessments issued for the years 2007/08 to 2014/15 inclusive and closure notices for the years 2015/16 and 2016/17. The discovery assessments for 2012/13 and 2014/15 were issued on 15 March 2019 and were only appealed with all of the others on 18 October 2019. The total tax is £293,403.90.

2. In summary, HMRC argue that Mr Islam has overstated his sales by in excess of £1.3 million over a ten year period with in excess of £584,000 being spent on unrecorded purchases leaving him with additional profit of more than £782,000. They say that was achieved by using two tills and recording the sales from only one.

3. HMRC rely on till receipts covering the period 29 November 2015 to 30 January 2016 which were compared with declared sales for that period.

Preliminary issue

4. HMRC made no objection to the late appeals for the discovery assessments.

The hearing

5. We had a bundle for Mr Islam extending to 760 pages and a bundle for HMRC extending to 513 pages. We also had an Authorities bundle for HMRC extending to 181 pages and for Mr Islam, extending to 112 pages. We had Skeleton Arguments for both parties. We heard evidence from Officers Bagley and Matthews for HMRC. We had Mr Islam's own evidence, and evidence from Mr Hart, his accountant, Mr Pink an employee, his wife, his cousin and two individuals who had considered purchasing the business.

Post Hearing

6. In Mr Islam's bundle there was a professionally produced transcript of a recording of a meeting with HMRC on 25 July 2018. At the end of the hearing, because it had not proven possible to listen to the recording in the course of the hearing, it was agreed that Mr Islam would produce the recording of that meeting. Having listened to the recording, I issued Directions on 4 February 2022 pointing out that it was clear to the Tribunal that HMRC's Notes of meeting "are not wholly consistent with the transcript and recording". I directed that the parties should lodge with each other and the Tribunal Closing Submissions.

7. In the interim, when producing the recording, Mr Sykes identified the fact that there was what was described as "a jump in the audio" and advanced a number of arguments in that regard. HMRC addressed those in their Closing Submissions. HMRC also produced what they described as Officer Bagley's handwritten Notes of the meeting. Mr Sykes also lodged a supplementary Authorities bundle extending to 98 pages, including three authorities.

Factual background

8. Mr Islam has operated a fast food takeaway business as a sole trader in Cambridge since 21 June 2007. On 15 June 2007, he and two of his cousins had purchased the business and signed an Agreement for Sale of Assets. That agreement narrated the fact that the business was being purchased as a going concern and the purchasers had agreed to enter new leases for two leasehold premises at 15 and 18 Broadway.

9. Mr Islam ran the restaurant from 15 Broadway and his cousins managed 18 Broadway. One of the cousins managed an unfurnished flat at 16 Broadway.

10. Included in the sale agreement were two Samsung tills which had been used by the previous owners. They are described hereafter as Tills 1 and 2. Mr Islam's menu was very

similar to that of the previous owners and he did not have the programming changed. The tills were never reset by Mr Islam.

11. In addition, a further two tills (Tills 3 and 4) which had been retained in storage in 18 Broadway were also handed over. Three of the tills had the same programming and menu items but the fourth till was a different model (Omron). Following the purchase, Mr Islam used Tills 1 and 2 in his premises. 18 Broadway was converted into a Bangladeshi takeaway in December 2007 and Tills 3 and 4 were not programmed for that menu so Mr Islam's cousin, Mr Hussain, stored them in his home and did not use them.

12. After the purchase, Till 2, which was situated next to the telephone, was used for calculating the value of the telephone orders and for training. When payment was received, whether for a telephone order or not, the order was entered into Till 1 where all payments were taken. No money was taken on Till 2. The printout from Till 2 was used to give the order to the chef. That was the system used by the previous owner.

13. From 2012, the printer for Till 1 did not work well and created significant spaces between items, but Mr Islam continued to use it. In February 2015, Mr Islam explained his problem with Till 1 to Mr Hussain who gave him Till 3 because it had the same menu etc. Till 1 was removed to Mr Islam's home for storage. Till 3 simply replaced Till 1 in the business premises.

14. The business did not thrive and in late 2015 Mr Islam attempted to sell it but that proved to be abortive. The turnover had fallen significantly.

15. In November 2015, two prospective buyers decided not to proceed with a purchase.

16. Mr Islam decided to produce inflated till receipts to show to prospective buyers. His wife did so for him, on his instructions, using Till 1. Those are the till rolls for the period 29 November 2015 to 30 January 2016 ("the disputed period").

17. Those till rolls were handed to HMRC voluntarily by Mr Islam when HMRC visited him on 28 June 2017.

18. The copy till rolls show clearly that the Till 1 receipts for the disputed period look radically different to those for Tills 2 and 3.

19. The lease agreement for 15 Broadway shows that Mr Islam paid £10,000 per annum for the business premises.

20. The lease agreement for 16 Broadway shows that he paid £500 per calendar month to the landlord for the flat above the business. Mr Islam sub-let that flat for £6,000 per year and was paid for that in cash.

21. On 24 May 2017, HMRC opened an enquiry into Mr Islam's Self-Assessment Tax Return (SATR) for the year ending 5 April 2016 under Section 9A Taxes Management Act 1970 ("TMA"). The letter informed Mr Islam that HMRC would visit the business premises on 28 June 2017. On that date Officers Pledger and Allen visited the premises and reviewed Mr Islam's SATR for the year ending 5 April 2016 and the VAT returns for the previous four years.

22. On 28 July 2017, HMRC wrote to Mr Islam intimating that they needed time to examine the records which they had collected. They compiled two spreadsheets derived from:-

- (a) the till rolls that they had been given by Mr Islam showing sales between 4 April 2015 to 9 April 2016. This summarised the daily gross takings (Z1 total) and the weekly gross takings (Z2 total),

(b) cash book entries showing weekly gross takings made between 1 April 2015 to 31 March 2017. The total gross sales in 2015/16 were £96,217.69. After deducting VAT, the net sales were £80,181.41. The net sales declared in the 2015/16 SATR was £79,654.

23. On 19 February 2018, Officer Bagley took over the case and on 18 March 2018, the officer wrote to Mr Islam to say that he would be in contact within 30 days.

24. In fact, on 18 April 2018, Officers Bagley and Farrow made an unannounced visit to the premises and noted that there were two tills in operation. With Mr Islam's consent and assistance till reports were taken from both tills.

25. On 25 July 2018 ("the July meeting") Officer Bagley met with Mr Islam to discuss what he believed were till discrepancies and rental income. That is the disputed meeting which we discuss further below.

26. On 7 August 2018 a further meeting was held.

27. On 28 September 2018, Officer Bagley issued a letter to Mr Islam explaining that it was his view that Mr Islam had suppressed sales from Till 2 and had not declared the rental income from the flat above the business premises.

28. For an unknown period HMRC conducted covert observations of the premises but no evidence has been produced.

The issues

29. HMRC articulated the issues as follows:

(1) Whether sales were suppressed by Mr Islam in the tax years 2007/08 to 2016/17 (inclusive), resulting in a loss of tax.

(2) Whether the closure notices for the tax years 2015/16 and 2016/17 are valid and correctly issued.

(3) Whether the discovery assessments issued by the Officer of HMRC for the tax years 2007/08 to 2016/17 (inclusive) are fair and reasonable. For the discovery assessments to be valid, HMRC must establish that a loss of tax had been caused either carelessly or deliberately.

That is not disputed by Mr Islam

Overview of Mr Islam's arguments

30. Mr Islam argues that HMRC's contention that he has made a very substantial undeclared profit on a continuous basis since 2007 is erroneous and that no such undeclared profits were ever made.

31. The problem arises because there are, what he describes as, "certain anomalous receipts" for the period between November 2015 and 26 January 2016.

32. Mr Islam's argument is that those receipts were "invented" for the purpose of inflating reported takings in anticipation of the sale of the business. They were intended to mislead prospective purchasers only and did not reflect actual sales. They can be distinguished from the actual receipts from the same periods and were only provided accidentally to HMRC.

33. There is a small issue in relation to a failure to disclose rental income. There was no profit in that regard and HMRC have included only rent receivable without giving any deduction for rent and other expenses payable, yet Officer Bagley conceded in his witness statement that "...it was established that there was no tax loss".

Overview of HMRC's arguments

34. On reviewing the till reports HMRC had decided that Mr Islam had under-declared the gross daily sales on his tax return and there was therefore a shortfall in tax. The till interrogations of the two tills show that identical items were sold for the same prices on the same days, therefore showing that both tills were being used in conjunction with each other for business purposes. That behaviour on the part of Mr Islam was deliberate in relation to both the under-declaration of sales and the failure to declare property income.

35. HMRC have applied the presumption of continuity.

Discussion

The typewritten notes of the meeting, the handwritten notes of meeting and the transcript

36. This was not a satisfactory case and these issues are at the heart of that. HMRC argue that what they call the handwritten notes are a true and accurate reflection of what was discussed at the July meeting and they accurately reflect the fact that the meeting lasted 45 minutes. We cannot agree.

37. We will refer to them as the "Brief" because they are headed up "Interview brief". We are a specialist Tribunal and know from experience that a well prepared HMRC officer visiting a taxpayer will have prepared a brief in advance. It is precisely that; an *aide memoire*.

38. It is blindingly obvious that the handwritten notes on the Brief were written up after the event. In cross-examination Officer Bagley conceded that his notes of the July meeting "were not verbatim". We can see that they are derived from, and closely mirror, the Brief. They are not complete.

39. We say that because, for example, the Brief records HMRC's prior assumption that the rental for the flat above the business was £562 per month but it does not include Mr Islam's refutation where he points out that it was only £500.

40. Furthermore, that figure of £500 is supported by the Letting Agreement, as Mr Islam points out in his witness statement.

41. In regard to the rental of £475 per month for the other flat it does not record Mr Islam saying that it varied, depending on the tenant or, indeed, Officer Bagley saying "absolutely" in response!

42. It seems more likely to us that the type of notes that are to be found on the reverse of the third (and last) page of the Brief may have been the sort of minimalist note that the officer took since those items are expanded upon in the handwritten notes in the actual Brief. Indeed they may be the only notes taken at the time.

43. In summary, we really cannot place great reliance on either the Brief or the notes derived from that given the wording in the transcript, even although it is not complete.

The witness evidence

44. Mr Sykes rightly points out that many of the witnesses were not challenged in cross-examination and that therefore their evidence should be found as facts. We have done so.

45. Mr Pink had worked for Mr Islam from 30 August 2009 until 8 September 2018. He very fairly pointed out that he only worked part-time so he could not confirm exactly what happened but he confirmed that no money passed through Till 2 and it contained no money. It was not put to him that he was lying or mistaken about how he saw Till 2 being used or that Till 1 had been replaced by Till 3 in 2015. He was a credible, straightforward witness and it seems inherently unlikely that he would not have been aware of sales being processed through Till 2 if that was the case. He was clear that he had never seen that.

46. Mr Hussain was also credible and confirmed that Till 3 had been given to Mr Islam by him in early 2015 to replace Till 1 since it had the same programming.
47. Mrs Begum confirmed that her husband had replaced Till 1 with Till 3 in early 2015 and that Till 1 had thereafter been kept at home. Her evidence that she had printed the till rolls for the disputed period and that she and her husband had always struggled financially was not challenged.
48. Mr Islam had said in his first witness statement that his business had struggled and Mr Hart corroborated that. It was not put to either of them that that was untrue. Indeed, Mr Hart was unchallenged in stating that the downturn in the business had been significant, falling from £146,000 in 2009 to £116,000 in 2012 and £85,000 in 2015.
49. The evidence of Mr Tajul Islam and Mr Hoque was not challenged. Both explained that they had not proceeded with a possible purchase of the business in 2015 because both had noted that there was a very low footfall. Both had visited the property to observe the business in operation. Both were concerned about the level of turnover and potential profitability.
50. Mr Tajul Islam said that in around November 2015, he had asked for till receipts but that after seeing the premises he had withdrawn his offer without sight of those. Mr Hoque also visited in November 2015 and asked for sight of till rolls but withdrew before they were produced.
51. On the balance of probabilities, we accept that the till rolls for the disputed period were produced by Mr Islam's wife on Till 1. Frankly, we are surprised that HMRC have not addressed the very physical and abundantly clear, in our view, evidence that the till rolls were very different.
52. HMRC, whether Officer Bagley or Officer Matthews, appear to have had a very blinkered and entrenched approach to this. We say that for a number of reasons. In cross-examination, Officer Matthews freely admitted that she had relied on Officer Bagley's evidence when coming to her decisions.
53. Both officers conceded in cross-examination that HMRC had executed covert activity. Indeed at paragraph five of her witness statement, Officer Matthews stated explicitly that her review had encompassed the two interrogations of the tills and the covert operations. Absolutely no evidence of the covert operations has been produced.
54. The discovery assessments and Closure Notices (apart from rental income) are based only on the alleged till evidence.
55. If HMRC had evidence from covert activity, particularly since Mr Sykes had lodged the witness statements of Messrs Hart, Tariq Islam, Hoque and Mr Islam and his wife saying how poorly the business was trading, we would have expected that evidence to be lodged. It was not. We therefore derive the adverse inference that it would not have assisted HMRC.
56. Bluntly, there are issues with both Officer Bagley's and Mr Islam's evidence. We were not enthused by Officer Bagley's evidence-in-chief when asked the question – "did he [Mr Islam] say that the rent covered the rent he paid" – and he answered "no". It is clear from the transcript that he said the opposite.
57. HMRC did not take us to it but Mr Islam is not covered in glory because there are undoubted contradictions in, for example, his letter of 28 May 2018 to Officer Farrow referring to her notes of meeting and that does not square with his witness evidence.
58. He failed to co-operate with HMRC for a significant period after the July meeting. That may be because he was unrepresented, and as Mr Sykes suggests, stressed. We do not know.

59. We do not weigh that in the balance since the issue for us is whether HMRC have established whether there was a loss of tax which is the starting point.

The till records

60. HMRC bear the burden of proof. We have huge difficulties.

61. As we indicate, the disputed period was the foundation of HMRC's case. Firstly, it is a tiny period in the context of the assessments.

62. Secondly, the witness evidence casts serious doubt on whether the evidence from Till 2 is even relevant, and thirdly there is a lack of evidence on covert activity.

63. We can see clearly that the till receipts are very different; in many cases inappropriate to give to a customer because of the printing issues. On the balance of probability it is unlikely that they would have been so used.

64. We are simply not persuaded that HMRC have discharged the burden of proof.

The rental income

65. The onus of proof, for all but the last two years, is on HMRC to show a loss of tax. Officer Matthews conceded in oral evidence that she accepted that she estimated that there was neither a profit nor a loss but she simply did not have the evidence to support that view. As indicated above at paragraph 33, Officer Bagley conceded that there was no loss of tax.

66. On the evidence before us we cannot find that there is a loss of tax in any year. The appeal succeeds to that extent.

Conclusion

67. At the outset we indicated that this was not a satisfactory case. It was not. Neither party "proved" their case. It came down to the burden of proof and HMRC have not established a loss of tax because of deliberate or careless behaviour in the years for the discovery assessments. For the Closure Notices, we do not find that there is a loss of tax in regard to the rental income. Because we do not accept that the till receipts in the disputed period were "sales" the appeal must succeed in that regard.

68. The appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

69. 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 SCOTT
TRIBUNAL JUDGE**

Release date: 17 June 2022