[2012] UKUT 416 (TCC)

Appeal number
FTC/95/2011

Income tax – self-assessment – self-employment – whether appellant's returns fictitious

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

JOSEPH OKOLO **Appellant**

- and –

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

Tribunal: The Hon Mr Justice Arnold

Sitting in public in London on 9 November 2012

Charles Bradley, instructed by OA Solicitors, for the Appellant

Christiaan Zwart, instructed by the Solicitor for HM Revenue & Customs, for the Respondents

MR JUSTICE ARNOLD:

Introduction

1. This is an appeal from the First-Tier Tribunal (Tax) (Geraint Jones QC and Anthony Hughes) ("the Tribunal") dated 19 April 2011 [2011] UKFTT 258 (TC). By its decision the Tribunal dismissed Joseph Okolo's appeal against decisions of the Commissioners for Her Majesty's Revenue and Customs ("HMRC") to issue a closure notice dated 1 August 2007 amending his self-assessment return for the tax year 2003/04 to show an increase in tax due of £32,193.89 and a discovery assessment dated 31 July 2008 in respect of the tax year 2002/03 in the sum of £28,875.12.

2. This is on any view a rather unusual case. As the Tribunal observed at [15], the Tribunal was faced with a strange appeal, the essence of which was that Mr Okolo claimed that four self-assessment returns which he had submitted were completely fictitious. The Tribunal rejected that claim as incredible. Mr Okolo's primary ground of appeal is that the Tribunal's decision was one that was not open to it on the evidence before it. In the alternative, Mr Okolo contends that the Tribunal wrongly failed to consider whether the assessments were excessive.

3. Before proceeding further, it is important to note three points. The first is that Mr Okola represented himself before the Tribunal, whereas on the appeal to this tribunal he has been represented by counsel. The second is that, presumably because he was not professionally represented at the time, Mr Okolo did not produce a witness statement for the hearing before the Tribunal. His case was, however, set out in considerable detail in a letter dated 5 November 2007 written on his instructions by the well-known firm of chartered accountants Grant Thornton UK LLP ("the Letter"). The third is that, as I shall explain, much of what was stated by Mr Okola in the Letter was never challenged, still less disproved, by HMRC.

Background

4. Mr Okolo was born in Nigeria. He arrived in the UK in 1996, and has been resident here since then. He married his wife Venice in 1997 and they had two children in 1998 and 2000 respectively.

5. During the tax year 2000/01 Mr Okolo had six jobs. Most of these were of relatively short duration. From 17 July 2000 to the end of the tax year, however, he was employed full-time by Rail Track (subsequently Network Rail). This employment lasted until 31 December 2003, when he was made redundant. It is common ground that his income from this employment, and the tax and NIC deducted at source, were as follows:

Tax year	**Taxable income £**	**Tax & NIC deducted £**
2000/01	12,131	1,520.61

2001/02	21,711	3,030.49
2002/03	24,949	3,711.66
2003/04	22,855	4,065.42

6. In addition to this employment, during part of this period, Mr Okolo was studying for an MBA at Southbank University, sponsored by Rail Track. Mr Okolo said in the Letter that, what with work, studying and normal family commitments, he had little spare time.

7. During this period Mr Okolo lived with his family at Flat 15, Pelier Street, London SE17 3JG. He owned this property jointly with his wife, they having purchased it from the council with the benefit of a mortgage in about 1998/99.

8. On 5 January 2005 Mr Okolo simultaneously and on his own initiative submitted self-assessment returns for the four tax years 2000/01 to 2003/04 declaring self-employment income from a business of "property development". The business name was given as "Rinato Property Services" and its address as Mr Okolo's home address. For each of these tax years, Mr Okolo declared a substantial amount as turnover, against which he claimed deductible expenditure also of a substantial amount, leaving him with a small taxable profit. The largest amounts of expenditure claimed were for "Construction industry subcontractor costs". For example, for the tax year 2003/2004 he declared a turnover of £107,109, expenses of £100,802, including subcontractor costs of £35,580, and a profit of £6,307. Each of the self-assessment returns included a statement of truth signed by Mr Okolo.

9. HMRC opened an enquiry into Mr Okolo's 2003/04 return on 16 January 2006. It soon became clear that he could provide no credible evidence to substantiate the figures for either turnover or expenditure. Such information as he provided to HMRC suggested that he was at most a jobbing builder rather than a property developer. But Mr Okolo was not registered for the HMRC Construction Industry Scheme, he was unable to explain why neither the Scheme nor PAYE had been operated or provide proper details of payments made.

10. On 7 March 2007 Mr Okolo attended a meeting with HMRC. The two HMRC inspectors present prepared a detailed note of the meeting. The accuracy of the note as a record of the meeting is not challenged. It is plain from the note that Mr Okolo had considerable difficulties in explaining his claims. For example, he had stated in correspondence that he had worked on three sites in 2004. When asked about these, he said that he had painted the outside, and worked on the pavement and garden, at 108 East Street, Sittingbourne; a job in Rainham had in fact fallen through; and he had painted the outside of a house

in Maidstone. When asked how much he been paid for these jobs, he said hundreds of pounds. When asked where, if that was the case, the turnover figure of £107,109 had come from, all he could say was that "other jobs had come up here and there". In addition, Mr Okolo contradicted himself. At one point he said that mostly he was paid cash, but sometimes by cheque, and that "all income was either banked or used for expenses incurred". Later he said that all income received was paid into his bank accounts.

11. On 1 August 2007 HMRC issued a closure notice for the 2003/04 tax year disallowing £74,660 of the expenditure, but leaving the figure for turnover as stated in the return, thereby assessing Mr Okolo on taxable profits of £80,967.

12. On 5 November 2007 Grant Thornton sent the Letter to HMRC. Having explained Mr Okolo's background and circumstances, the Letter went on to say the following. Prior to May 2004 Mr Okolo had never been engaged in property development of any kind. In April 2004 he had acquired the Sittingbourne property, with finance from an interest only mortgage, as an investment. Since it was in a state of disrepair, he had worked on the house from May to September 2004, and had also spent money on material and labour. (It may be noted that this is consistent with receipts for DIY-type expenditure during this period which Mr Okolo had previously produced.) Having been refused a loan in about September 2004, he had prepared false profit and loss accounts, and submitted the four tax returns, in order to create the impression that he had a substantial trading history, in the hope that this would improve his ability to obtain a loan.

13. Grant Thornton enclosed with the Letter the available bank statements for Mr Okolo and his wife for the period 6 April 2000 to 5 April 2004. A small number of these statements were missing (a total of seven for the years relevant to this appeal). Grant Thornton also enclosed an analysis of the bank statements showing that Mr Okolo's unidentified credits and cash deposits for the four years totalled £35,662.41. They said that Mr Okolo believed that some, if not all, of these amounts had been taken from credit cards. Various other financial information was also provided.

14. On 19 December 2007 HMRC wrote asking for provision of the missing bank statements and also credit card statements. The letter also pointed out that the implication of the Letter was that everything Mr Okolo had previously told HMRC was a fabrication.

15. On 29 January 2008 Mr Okolo sent HMRC copies of most of the missing bank statements. On 12 February 2008 HMRC asked for the two remaining statements to be provided. These were provided by Mr Okolo on 10 March 2008. In addition, Mr Okolo provided copies of a set of documents which, as he explained in a letter dated 28 April 2008, showed that he had obtained a series of personal loans from his credit card issuers during the relevant period in amounts exceeding the figure of £35,662.41.

16. It is important to note that counsel for HMRC expressly accepted before me that Mr Okolo had provided a complete run of his UK bank statements for the

relevant period and that Mr Okolo's only Nigerian bank account had been closed well before then.

17. On 25 June 2008 HMRC issued discovery assessments disallowing the same proportion of expenditure for the years 2000/01 to 2002/03 as for the year 2003/04, but later withdrew the assessments for 2000/01 and 2001/02 as being out of time.

18. In due course Mr Okolo appealed against the closure notice and the outstanding discovery assessment.

The hearing before the Tribunal

19. As noted above, Mr Okolo represented himself at the hearing before the Tribunal. He also gave evidence before the Tribunal. The only record of the hearing is a note prepared by HMRC, the accuracy of which is not challenged. The following points should be noted.

20. First, after Mr Okolo had been sworn, he was questioned by the Tribunal. He made it clear that he was saying that all of the figures in his tax returns were fictitious. Furthermore, he admitted that he had intended to use the fictitious figures to deceive others in the future, in particular people in Nigeria. He also accepted that he had compounded one lie with another during the investigation prior to the Letter.

21. Secondly, Mr Okolo was then cross-examined by HMRC's representative. As counsel for Mr Okolo pointed out, the note shows that it was not put to Mr Okolo that the account given in the Letter was false. Nor was that account challenged in any material respect. In particular, Mr Okolo was asked "Can you confirm if you developed, refurbish[ed] or redecorated any properties other than your own residence". He replied "I did not". That answer was not challenged at all.

22. Thirdly, after Mr Okolo had given evidence, Karen Hurley, the inspector with responsibility for Mr Okolo's case, gave evidence on behalf of HMRC. Mr Okolo asked her "Why did you not reconcile [the] bank [statements] and [the] alleged taking[s]". She replied that the "bank statements [were] incomplete". As counsel for Mr Okolo pointed out, that answer was inaccurate.

The Decision

23. The Tribunal's reasons for rejecting the appeal can be seen from the following passages in the Decision:

> "8. A meeting took place between the appellant and Ms Hurley on 7 March 2007. Ms Hurley prepared a note of that meeting which the appellant refused to sign because he thought that if he signed it, that would add legitimacy to it. He has not identified any significant parts of the note which he says either misrepresent or mis-record what had passed between him and Ms Hurley. The note records that the appellant stated that he

had set up a company in 2004 but prior to that had traded informally on a self-employed basis. The note records that Ms Hurley asked the appellant to explain how he could have a turnover in excess of £107,000 for the year ended 5 April 2004 if, as he was then saying, he had only done small jobs for a few hundred pounds a time. Later during the discussion the appellant discussed his expected profit margin on each job that he undertook and went on to say that he was usually paid in cash but sometimes by cheque with all monies either been [sic] banked or being used for expenses incurred. The last comment is, in our judgement, important. That is because the appellant has argued that there is no correlation between the sums banked by him and the turnover which he claimed to have enjoyed. The difficulty with that argument is twofold. The first difficulty is that, as we find, the appellant represented that he was often paid in cash and some, if not all of that cash, was used to pay expenses or for labour, rather than being banked. The second difficulty is that the bank statements which are relied upon in support of the correlation argument, are incomplete. On page 5 of the Note (bundle page 51) the appellant is recorded as saying that his turnover figure had been calculated by his agent on the basis of information provided by him throughout the year. At that stage he is recorded as saying that all income received was paid into a bank account, contrary to what he had said earlier during the interview or discussion.

…

16. We accept that there is no persuasive correlation between the appellant's disclosed bank accounts and the sums referred to as turnover in the tax returns that he has submitted. However, for the reasons which we have given above, we do not consider that to be a significant indication of wherein lies the truth. It is for the appellant to satisfy us that, as a matter of probability, he was not self-employed and was not earning taxable sums from that employment. That has only become the appellant's case since November 2007. Prior to the letter from Grant Thornton the appellant was putting forward assertions to the effect that he had been self-employed at identified locations employing identified tradesman [sic] or labourers. We consider it wholly improbable that the appellant would have made up such an elaborate lie for the first reason that he has given. We should also record that the appellant later gave a different reason for his supposed lies, being that he wished to impress certain generals in Nigeria so that, in turn, they might assist him in gaining business both in this country and, possibly, in Nigeria.

17. We do not accept the truth of the case now being asserted by the appellant. Whilst he appeared to give his evidence

> earnestly, that evidence has to be judged against a background where, on the appellant's case, he has lied to his erstwhile accountants, lied to HMRC and done that in a bid to deceive others into believing that he has a business record or business credibility that, in truth, he now says he did not possess. We find it beyond credence that the appellant would have overstated his income knowing that that would result in him having to pay tax on sums which, according to him, he did not earn. We completely reject the evidence that the appellant engaged in such dishonesty simply to boost his credit rating or, as latterly alleged, to deceive unspecified people, including Generals, in Nigeria into believing that he had a particular business profile. In circumstances where we entirely discount the reasons advanced for the appellant declaring income which he now says he did not have, we readily arrive at the conclusion that his case, to the effect that he has fabricated this story about self-employment and earnings therefrom, should be roundly rejected."

The nature of an appeal to this tribunal

24. Section 11(1) of the Tribunals, Courts and Enforcement Act 2007 provides for a right of appeal to the Upper Tribunal "on any point of law arising from a decision made by the first tier tribunal other than an excluded decision". It was common ground before me that the principles established under section 11(1) of the Tribunals and Inquiries Act 1992 and its predecessors were equally applicable under section 11(1) of the 2007 Act.

25. In *Edwards v Bairstow* [1956] AC 14 Viscount Simonds said at 29:

> "… though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the court should take that course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained."

Lord Radcliffe said at 36:

> "If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene."

26. In *Georgiou v Customs and Excise Commissioners* [1996] STC 463 Evans LJ, with whom Saville and Morritt LJJ (as they then were) agreed, said at 476:

> "There is a well-recognised need for caution in permitting challenges to findings of fact on the ground that they raise this kind of question of law. … It is all too easy for a so-called question of law to become no more than a disguised attack on findings of fact which must be accepted by the courts. As this case demonstrates, it is all too easy for the appeals procedure to the High Court to be abused in this way. Secondly, the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled.
>
> It follows, in my judgment, that for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of the evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong."

27. In *Procter & Gamble UK v Revenue and Customs Commissioners* [2009] EWCA Civ 407, [2009] STC 1990 Jacob LJ, with whom Mummery and Toulson LJJ agreed, said:

> "9. Often a statutory test will require a multi-factorial assessment based on a number of primary facts. Where that it [sic] so, an appeal court (whether first or second) should be slow to interfere with that overall assessment – what is commonly called a value-judgment.
>
> 10. I gathered together the authorities about this in *Rockwater v Technip* [2004] EWCA Civ 381:
>
> [71] … In *Biogen v Medeva* [1997] RPC 1 at p. 45 Lord Hoffmann said when discussing the issue of obviousness:
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> 'The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because

> specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, *la vérité est dans la nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation. It would in my view be wrong to treat *Benmax* as authorising or requiring an appellate court to undertake a *de novo* evaluation of the facts in all cases in which no question of the credibility of witnesses is involved. When the application of a legal standard such negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation.'

[72] Similar expressions have been used in relation to similar issues. The principle has been applied in *Pro Sieben Media v Carlton* [1999] 1 WLR 605 at pp. 613-614 (*per* Robert Walker LJ) in the context of a decision about 'fair dealing' with a copyright work; by Hoffmann LJ in *Re Grayan Building Services* [1995] Ch 241 at p.254 in the context of unfitness to be a company director; in *Designer Guild v Russell Williams* [2000] 1 WLR 2416 in the context of a substantial reproduction of a copyright work and, most recently in *Buchanan v Alba Diagnostics* [2004] UKHL 5 in the context of whether a particular invention was an 'improvement' over an earlier one. Doubtless there are other examples of the approach.

[73] It is important here to appreciate the kind of issue to which the principle applies. It was expressed this way by Lord Hoffmann in *Designer Guild:*

> 'Secondly, because the decision involves the application of a not altogether precise legal standard to a combination of features of varying importance, I think that this falls within the class of case in which an appellate court should not reverse a judge's decision unless he has erred in principle.'

11. It is also important to bear in mind that this case is concerned with an appeal from a specialist Tribunal. Particular deference is to be given to such Tribunals for Parliament has entrusted them, with all their specialist experience, to be the primary decision maker, see per Baroness Hale in *AH (Sudan) v*

> *Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678 at [30] ….”

28. What Baroness Hale said in *AH (Sudan)*, which has since been approved by Sir John Dyson SCJ giving the judgment of the Supreme Court in *MA (Somalia) v Secretary of State for the Home Department* [2007] UKSC 49, [2011] 2 All ER 65 at [43], was this:

> “ … This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279, para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently. … ”

The primary ground of appeal

29. The Tribunal was faced with the familiar situation of a person who says “I lied before, but now I am telling the truth”. Such persons always face credibility problems. Thus the Tribunal was entitled to approach Mr Okolo’s case with considerable scepticism. Furthermore, on his own account, Mr Okolo had behaved dishonestly. But it was not the Tribunal’s function to punish Mr Okolo for that dishonesty. What it had to decide was whether Mr Okolo had discharged the burden on him of demonstrating that he had not generated the trading profits assessed by HMRC. That required the Tribunal dispassionately to consider the evidence before it. Counsel for Mr Okolo submitted that, if the evidence was properly assessed, it was not open to the Tribunal to reach the conclusion it did.

30. In support of this submission, counsel for Mr Okolo made two main points. The first was that the Tribunal had wrongly disregarded the key evidence in the case, namely the bank statements. The Tribunal gave two reasons at [8] for disregarding the bank statements. The first reason was that Mr Okolo had said in the interview on 7 March 2007 that he would have been paid in cash and that some, if not all, of that cash was used to pay expenses or labour rather being banked. Leaving aside the fact that (as the Tribunal itself noted) Mr Okolo contradicted that statement later in the same interview, the Tribunal went on to conclude that Mr Okolo had incurred little in the way of expenses and no expenditure at all on labour. Counsel for Mr Okolo submitted that this

was a clear *non sequitur*. The second reason was that the bank statements were incomplete. As he pointed out, that was simply wrong.

31. Counsel for HMRC attempted to defend the reasoning in [8] on the basis that the Tribunal was only considering the position as at 7 March 2007. I cannot accept that. The four sentences of [8] starting "This is because the appellant has argued" are plainly directed to Mr Okolo's argument before the Tribunal. Furthermore, that reading is confirmed by the words "for the reasons we have given above" in [16]. In any event, this submission does not excuse the *non sequitur* identified by counsel for Mr Okolo. Nor does it excuse the fact that nowhere in the Decision does the Tribunal acknowledge that, by 10 March 2008, Mr Okolo had produced all the missing bank statements. Nor does the Tribunal acknowledge that, upon analysis of the bank statements and loan documents, it can be seen that there are no cash credits which cannot be accounted for and which could represent receipts from a business or trade.

32. The second main point made by counsel for Mr Okolo was that, in dismissing Mr Okolo's account as implausible at [17], the Tribunal had failed to consider the far greater implausibility of the only alternative possibility. That was that that Mr Okolo, a person with no apparent experience of the building industry and employed full-time in a completely unrelated sector, should have carried on a substantial and highly profitable contractor's business in his spare time; that the turnover of that business should have been generated entirely in cash and the profits hidden in some unexplained manner; that he should then have abandoned that profitable business entirely despite its being far more lucrative than his normal employment; and that he should have decided to evade tax on the profits, not by the simple expedient of failing to declare the income, but by volunteering in one batch, and under no pressure from HMRC, tax returns for all four years complete with invented figures for expenditure.

33. Counsel for HMRC had no real answer to this point other than to submit that it was for the Tribunal to assess Mr Okolo's credibility. In my judgment that is not a sufficient answer. The Tribunal did not base its rejection of Mr Okolo's case on his demeanour when giving evidence. On the contrary, it recorded that Mr Okolo "appeared to give his evidence earnestly". Rather, the Tribunal based its decision on the objective implausibility of Mr Okolo's case. I agree with the Tribunal that, at first blush, it appears implausible; but I agree with counsel for Mr Okolo that the alternative is even more implausible. Furthermore, when considering the credibility of Mr Okolo's account, the Tribunal failed properly to test it against the documentary evidence, namely the bank statements and loan documents. Yet further, the essence of HMRC's case is that Mr Okolo has not produced any credible evidence to substantiate his claimed expenses; but it is equally true to say that he has not produced any credible evidence to substantiate his claimed turnover either. In short, there is simply no credible evidence that Mr Okolo carried on any business or trade as either a property developer or a builder during the four years in question.

34. Finally, I would add that, in the absence of any challenge to Mr Okolo's evidence to the Tribunal that he had not developed, refurbished or redecorated any properties other his own residence, it was not open to the Tribunal to disbelieve that evidence: see *Phipson on Evidence* (17th ed) at §12-12 and the

authorities cited in footnote 32, in particular *Markem Corp v Zipher Ltd* [2005] EWCA Civ 267, [2005] RPC 31 at [50]-[61]. Counsel for HMRC submitted that this rule of evidence did not apply in the First Tier Tribunal. I do not accept that submission. This rule of evidence is simply an application of the principles of natural justice which apply in all courts and tribunals.

The secondary ground of appeal

35. Since Mr Okolo has succeeded on his primary ground of appeal, it is not necessary for me to deal with his secondary ground of appeal. It suffices to say that, had I not accepted the primary ground, I would not have accepted the secondary ground either.

Conclusion

36. The appeal is allowed. Accordingly, I shall set aside the Tribunal's decision and re-make the decision pursuant to section 12(2)(b)(ii) of the 2007 Act so as to reduce the assessments for the tax years 2002/03 and 2003/04 to nil.

Mr Justice Arnold

Release date: 19 November 2012