



TC05248

Appeal number: TC/2014/04108

INCOME TAX – whether substantial sum of money received by the taxpayer was a gift, or payment for a service – found on the evidence that it was payment for a service – assessment under section 29 TMA 1970 upheld in part – penalty under section 95 TMA 1970 upheld in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DANIEL DALY

Appellant

- and -

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

**TRIBUNAL: JUDGE JOHN WALTERS QC
 DR CHRISTINA HILL WILLIAMS DL**

Sitting in public at Cambridge County Court, Cambridge on 14 March 2016

David Bruch, Bruch & Co. Ltd., Chartered Accountants, for the Appellant

Mrs Rosalind Oliver, HMRC, for the Respondents

DECISION

1. The Respondents (“HMRC”) applied by a letter to the Tribunal dated 9 March
5 2016 for this appeal to be struck out on the grounds that certain Directions made by
the Tribunal on 21 August 2015 had not been complied with by the Appellant, Mr
Daly. In particular, HMRC had not received a witness statement setting out Mr
Daly’s intended evidence (contrary to the Direction requiring that to be sent or
10 delivered by 23 October 2015), HMRC had not received the bundle of authorities
directed to be served not later than 7 days before the hearing, and the bundle of
documents received by HMRC on 3 March 2016 did not comply with the
requirements of the relevant Direction.

2. HMRC’s application followed the release on 22 February 2016 of Directions by
the Tribunal that Mr Daly may not now give evidence at the hearing of the appeal
15 without permission of the Tribunal and unless Mr Daly provided a bundle of
Documents complying with the relevant Direction (4) of the Directions released on 21
August 2015, the appeal ‘may be struck out without further reference to the parties’.

3. The Directions released on 22 February 2016 had been made following an
application by HMRC dated 16 February 2016 for a direction that ‘unless the
20 Appellant provides the bundles for hearing and the witness statement to the
Respondent by 5 pm on 26 February 2016 then the appeal *will* be struck out’
(emphasis added).

4. We considered the application but decided to refuse it because it appeared to us
that the overriding objective of the Tribunal Procedure (First-tier Tribunal) (Tax
25 Chamber) Rules 2009 to deal with cases fairly and justly would be best applied by
continuing to hear the appeal. We also gave permission for Mr Daly to give evidence
at the hearing. We adjourned for a short time to enable Mrs Oliver to prepare her
cross-examination of Mr Daly.

5. The appeal was brought by Mr Daly against an assessment made under section
30 29 Taxes Management Act 1970 (“TMA”) on 6 February 2014 for the year 2005/2006
assessing profits of £101,801 and charging tax of £38,357.51 and a penalty
determination made under section 95 TMA on 20 March 2014 for the year 2005/2006
in the sum of £19,179.

6. The notice of appeal, dated 29 July 2014, mentions only the amount of the
35 penalty, but it is clear that Mr Daly intended to appeal against both the assessment and
the penalty and HMRC presented their case on this basis. We conducted the hearing
on the basis that both the assessment and the penalty were in issue, and we proceed in
this Decision on the same basis.

7. Mr Daly produced a document headed “Our Case” which functioned as a
40 witness statement. He gave oral evidence and was cross-examined by Mrs Oliver.

8. We had before us two bundles of documents. From that evidence and the evidence of Mr Daly, we find the following facts.

9. Mr Daly and Charles Love (sometimes called “Ben”) had been friends for some time with a mutual love of horses. Mr Daly had several horses which, in around 2005
5 to 2006, he kept on land at 96 Westfield Road, Manea, Cambridgeshire (“the Land”). Mr Daly’s ambition was to breed the best foal or horse that he could. He did breed a foal that he was proud of, and he wanted to show this to Mr Love and to others.

10. Mr Daly used the Land for grazing. It was ideal for that purpose, there being water to hand and maintained fencing. There was a derelict bungalow in the middle
10 of the Land. There were developed residential properties near the Land.

11. Mr Daly had sold two horses to Mr Love and he invited Mr Love to come to the Land to view the foal that Mr Daly was proud of.

12. The Land had belonged to a lady who had died and Mr Daly knew that the ownership of it would be affected by the administration of the estate of the deceased
15 owner.

13. Mr Love came to the Land and viewed the foal. He also looked round about and saw the houses which had built on developed land nearby. He asked Mr Daly who owned the Land. Mr Daly told him about the deceased owner and advised him to speak to the Manea Parish Council. He said to Mr Love: “Don’t lose my grazing for
20 me” and Mr Love assured him that he would not lose his grazing.

14. The Land was eventually sold. Mr Daly had no part in the negotiation for the sale or purchase of the Land. The first he knew about the impending sale was when a man in a Mercedes motor car came to the Land. Mr Daly met him and it became apparent that this man was going to develop the Land. Mr Daly asked him if he could
25 stay on the land until the development started. The Land was sold in May 2005 and Mr Daly vacated it in 2006.

15. Mr Love contacted Mr Daly to arrange a meeting in June 2006. At the meeting, Mr Love told Mr Daly that he had a “big surprise for him”. He said that he did not forget his mates and he had not forgotten Mr Daly. He gave Mr Daly a cheque for
30 £90,000, which was in evidence at the hearing. The cheque was dated 26 June 2006. Mr Daly told us that ‘alcohol was consumed’ at the meeting.

16. There was also in evidence a form of invoice, receipt or acknowledgement with Mr Daly’s signature on it. Mr Daly accepted at the hearing that it was his signature. The document is styled “Invoice”, is dated 16 May 2005 (which we find is a mistake
35 for 2006), is addressed to Mr Daly at an address in Wisbech (not his address at the time) and is apparently issued by Mr Love of another Wisbech address. The handwritten details of the document are as follows: “As Agreed 50% of Profit Achieved at Westfeild [sic] Rd Manea. Total: £101,801”.

17. The evidence from the Land Registry which was in our papers disclosed that 96
40 Westfield Road, Manea had been sold for £250,000 on 19 July 2002, and again for

£775,000 on 4 May 2005. Although we may assume (and we find) that the sale in May 2005 prompted the payment to Mr Daly, it is not clear what the profit achieved on that sale was. Presumably the Land had been purchased by the deceased owner in July 2002 for £250,000. A planning application for the erection of 8 dwellings on the Land was considered by Manea Parish Council at a meeting on 11 May 2004. A planning application was made to Fenland District Council for the erection of 4 dwellings on the Land on 17 March 2004. Planning permission was granted on 11 May 2004 and Manea Parish Council noted the planning permission at a meeting on 20 June 2004.

18. Mr Daly's evidence was that he could not remember being given the invoice although he accepted that he had signed it. He suggested that he might have been induced, possibly while intoxicated, to sign a blank piece of paper which was then added to. He accepted, however, that he had received the cheque for £90,000 and he said that he was shocked when it cleared.

19. Mr Daly asked various people, including a solicitor, if the payment was taxable. He told the people he asked about this that it had been a gift and that he had done no work for it. He was told that on that basis it was not a taxable receipt.

20. He accepted that he had not returned the payment on his tax return. He said that his tax return had contained all his taxable income.

21. HMRC's Officer Mrs Pinborough wrote to Mr Daly on 19 April 2012 informing him that she believed that his self-assessment tax return for the year ended 5 April 2006 was inaccurate, and that she had information to suggest that he had received income during the year from Mr Love, which had not been returned.

22. Mr Bruch, on behalf of Mr Daly, responded by letter to HMRC on 18 May 2012 saying that Mr Daly had advised him that the monies received from Mr Love in the year to 5 April 2006 had been a gift.

23. On 24 May 2012 Officer Mrs Pinborough and Mr Bruch spoke on the telephone. Officer Mrs Pinborough told Mr Bruch that she was in possession of an invoice showing "for profit achieved". Mr Bruch asked for a copy of the invoice, but Officer Mrs Pinborough said she would not give him a copy at that time, but that he should go back to Mr Daly and ask for his comments.

24. On 7 June 2012, Mr Bruch wrote to HMRC. He referred to the telephone conversation and had spoken to Mr Daly. Mr Bruch reported as follows: "It is our client's continued opinion that as a result of him being made aware of a house and hay field surrounded by larger residential properties that he had advised Mr Love of the situation. Mr Love then advised Mr Daly that if a development was to go ahead on that property he would "look after me" by giving him half of the profit achieved. Mr Daly had no way of knowing what the profit was nor how it had been calculated."

25. Thus, without having seen the document styled "Invoice", which was the basis of the information which HMRC had, Mr Daly had confirmed that the payment was supposed to represent half of the profit achieved. Officer Mrs Pinborough had not

previously told Mr Bruch that the invoice had specified that it was in respect of half of the profit achieved.

26. Although it was at one stage alleged by HMRC that the balance of £11,801 (to make up the figure of £101,801, after taking into account the cheque for £90,000 which was in evidence) was paid to Mr Daly by a cheque from another of Mr Love's bank accounts, Mrs Oliver told us that she had not seen a cheque for £11,801.

27. Mr Daly told us that he had fallen out with Mr Love since the events in question. We received no evidence at all from Mr Love.

28. Mrs Oliver put it to Mr Daly that he did know that Mr Love had promised him 50% of the profit and that that payment was made as a result of an agreement that it should be paid. Mr Daly denied this.

29. From the evidence we are required to decide on the balance of probabilities, whether a payment was made by Mr Love to Mr Daly as consideration for something done by him (a service provided by him), or whether the payment was simply a gift. We also have to decide whether the payment was £90,000 or £101,801.

30. In our judgment, Mr Daly's evidence is not reliable on the main issue. There is no corroboration from Mr Love, who may well have sought to claim a tax deduction on the basis of the document styled "Invoice" issued to Mr Daly. We consider that the document styled "Invoice" is *prima facie* evidence of an agreement between Mr Love and Mr Daly that a payment of 50% of the profit which Mr Love achieved at, or in respect of, the Land would be made by him to Mr Daly. We consider that the only reasonable explanation for such an agreement is that Mr Daly in some way put the Land Mr Love's way, thus enabling him to make a profit by dealing in it in some way. This is supported by the contents of Mr Bruch's letter to HMRC dated 7 June 2012. We therefore find – on the balance of probabilities – that the sum paid by Mr Love to Mr Daly was consideration for a service rendered by Mr Daly to Mr Love and therefore subject to income tax, as contended for by HMRC, under section 687 to 689 Income Tax (Trading and Other Income) Act 2005 ("ITTOIA").

31. Section 687(1), ITTOIA imposes a charge to income tax on 'income from any source that is not charged to income tax under or as a result of any other provision of [ITTOIA] or any other Act'.

32. As to the amount of the payment, we have seen evidence that £90,000 was paid, but no evidence, apart from the document styled "Invoice" that a further £11,801 was paid. Given the evidence (which we accept) of Mr Daly's state of intoxication at the meeting with Mr Love, and the fact that Mrs Oliver accepted that she had not seen a cheque for the balancing amount of £11,801 (and nor was any bank statement evidence for such a payment produced), we find that the payment received by Mr Daly was £90,000, and not £101,801.

33. We find that Mr Daly's self-assessment for the year 2005/2006 was inaccurate in that it omitted the income of £90,000 in issue. We also find that this omission was deliberate on Mr Daly's part. Mr Daly cannot be relieved of the responsibility for the

inaccuracy by his having asked for advice on the taxability of the payment on the basis that it was a gift. We have found that it was not a gift. HMRC have satisfied the burden of proof on them of showing that an assessment under section 29 TMA 1970 may be made (assessment where loss of tax discovered).

5 34. The appeal against the assessment is therefore allowed in respect of the amount of £11,801, which we have found was not received by Mr Daly, but otherwise the assessment is upheld.

10 35. As to the penalty imposed under section 95 TMA 1970, we find that Mr Daly fraudulently or negligently delivered his self-assessment tax return for 2005/2006, which was, as we have found, incorrect. However, the penalty will need to be recalculated to take account of the fact that we have reduced the assessable income from £101,801 to £90,000. The appeal against the penalty is therefore also allowed in part, but the penalty (though not its amount) is in principle upheld.

15 36. 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)”
20 which accompanies and forms part of this decision notice.

**JOHN WALTERS QC
TRIBUNAL JUDGE**

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RELEASE DATE: 13 JULY 2016