[2017] UKFTT 728 (TC)

TC06142

Appeal number: TC/2016/02446

INCOME TAX – PROCEDURE - Discovery Assessment - Section 29(1) Taxes Management Act 1970 - Interlocutory issues - Whether assessment made in time? - Yes: in the absence of a tax return, appropriate time limit is 20 years - Whether further disclosure should be ordered? - No: disclosure relates to the timing of the assessment and not to liability - Whether witness summonses should be issued? - No: evidence of the witnesses goes to timing of the assessment and not liability

FIRST-TIER TRIBUNAL
TAX CHAMBER

PAUL HARRISON **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

Sitting in public at Taylor House on 21 September 2017

The Appellant appeared in person

Mr Keith Golder, HMRC Litigator, instructed by the Solicitor's Office for HMRC, for the Respondents

DECISION

1. These are case management decisions which relate to an appeal against a discovery assessment for the year ending 5 April 2008, made by HMRC pursuant to section 29(1) of the *Taxes Management Act 1970* ('TMA 1970') and communicated to the Appellant on 25 September 2015: 'the Assessment'.

2. The discovery assessment was made in the absence of any return made and delivered by the Appellant for that financial year.

3. The case management hearing was convened in order to deal with several issues, namely:

(1) Issues raised by the Appellant in relation to HMRC's disclosure;

(2) The Appellant's application dated 14 March 2017 for witness summonses to be issued in relation to three named Officers of HMRC;

(3) The Respondent's application dated 17 March 2017 for the hearing of a preliminary issue (namely, whether the assessment was in time or not); and

(4) The Respondent's application dated 17 May 2017 to strike-out the appeal.

4. I have been assisted by helpful Skeleton Arguments (HMRC's dated 17 May 2017, and Mr Harrison's Reply dated 4 September 2017). I also heard oral submissions and argument about all these aspects for just under 2 and a half hours.

5. In my view, this appeal pivots on the issue of whether the assessment is in time:

(1) Paragraph 3 of the Grounds of Appeal says: "*HMRC were in possession [of two specified emails] by, at the latest, 9 November 2012 ... and under section 29 TMA 1970 should have raised the assessment within twelve months of that date and not almost three years later on 25 September 2015*';

(2) The result sought by the Appellant in his Notice of Appeal is a decision "*That HMRC are not legally empowered to raise an assessment so far out of time as stipulated in section 29 TMA 1970. Such assessment should have been raised by the end of November 2013 and not on 25 September 2015.*"

6. The issue of the timing of the assessment is the logically and practically anterior issue. It is the issue upon which the other matters depend. As such, it is the issue with which I must first come to grips.

7. On the issue of the timing of the assessment, the parties adopt radically different stances.

8. In summary, the appellant argues that the assessment is out of time. He argues that HMRC knew sufficient information as long ago as (at the latest) 9 November 2012 so as to enable it to raise an assessment against him, but did not do so. He argues that the clock was running against HMRC, and that the assessment is '*massively out of time*'.

9. In summary, HMRC argues that the Appellant did not notify it of his chargeability to income tax, or filed a self-assessment return, for the year ended 5 April 2008. It argues that he was obliged to notify HMRC or his receipt of chargeable income and/or file a self-assessment return under section 7 of the *Taxes Management Act 1970* ('TMA 1970'), and that his failure to have done so is therefore a failure to have complied with an obligation under section 7. As such, it argues that section 36(1A)(b) TMA 1970 applies, giving HMRC 20 years after the end of the year of assessment to make an assessment.

The Law

10. Section 7 of TMA 1970 provides:

"***Notice of liability to income tax and capital gains tax.***

(1) Every person who—

(a) is chargeable to income tax or capital gains tax for any year of assessment, and

(b) falls within subsection (1A) or (1B), shall, subject to subsection (3) below, within the notification period, give notice to an officer of the Board that he is so chargeable.

(1A) A person falls within this subsection if the person has not received a notice under section 8 requiring a return for the year of assessment of the person's total income and chargeable gains.

(1B) A person falls within this subsection if the person—

(a) has received a notice under section 8 requiring a return for the year of assessment of the person's total income and chargeable gains, and

(b) has received a notice under section 8B withdrawing the notice under section 8.

(1C) In subsection (1) "the notification period" means—

(a) in the case of a person who falls within subsection (1A), the period of 6 months from the end of the year of assessment, or

(b) in the case of a person who falls within subsection (1B)—

(i) the period of 6 months from the end of the year of assessment, or

(ii) the period of 30 days beginning with the day after the day on which the notice under section 8 was withdrawn,

whichever ends later.

(3) A person shall not be required to give notice under subsection (1) above in respect of a year of assessment if for that year

(a) the person's total income consists of income from sources falling within subsections (4) to (7) below,
(b) the person has no chargeable gains, and
(c) the person is not liable to a high income child benefit charge.

(4) A source of income falls within this subsection in relation to a year of assessment if—

(a) all payments of, or on account of, income from it during that year, and
(b) all income from it for that year which does not consist of payments,

have or has been taken into account in the making of deductions or repayments of tax under PAYE regulations.

(5) A source of income falls within this subsection in relation to any person and any year of assessment if all income from it for that year has been or will be taken into account—

(a) in determining that person's liability to tax, or
(b) in the making of deductions or repayments of tax under PAYE regulations

(6) A source of income falls within this subsection in relation to any person and any year of assessment if all income from it for that year is—

(a) income from which income tax has been deducted; or
(b) income from or on which income tax is treated as having been deducted or paid

and that person is not for that year liable to tax at a rate other than the basic rate the dividend nil rate, the Scottish basic rate, the dividend ordinary rate, the savings nil rate, or the starting rate for savings

(6A) A source of income falls within this subsection in relation to any person and any year of assessment if for that year—

(a) all income from the source is dividend income (see section 19 of ITA 2007), and
(b) the person—
(i) is UK-resident,
(ii) is not liable to tax at the dividend ordinary rate,
(iii) is not liable to tax at the dividend upper rate,
(iv) is not liable to tax at the dividend additional rate, and

(v) is not charged to tax under section 832 of ITTOIA 2005 (relevant foreign income charged on remittance basis) on any dividend income.

(7) A source of income falls within this subsection in relation to any person and any year of assessment if all income from it for that year is income on which he could not become liable to tax under a self-assessment made under section 9 of this Act in respect of that year.

11. Section 29 of TMA 1970 provides:

"***Assessment where loss of tax discovered***

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed...

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax"

12. Section 36 of TMA 1970 provides (insofar as material):

"**Loss of tax brought about carelessly or deliberately**

(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period.

(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax -

[...]

(b) attributable to a failure by the person to comply with an obligation under section 7,

[...]

may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period)"

The facts

13. The Appellant was registered in the self-assessment system on 13 October 1996. In 2002, his self-assessment record was made dormant.

14. The Appellant did not notify HMRC that he was chargeable for the year ending 5 April 2008. Nor did he file a self-assessment return for that year. Nor did his wife file a partnership return for that year.

15. The Appellant has also accepted (in his letter of 28 November 2014) of being in receipt of income for the year ended 5 April 2008.

16. In his letter of 20 October 2015, he accepted that he was in receipt of £200,000, being made up of '*£65,050 by cheque or bank transfer and/or in value*', received as a finder's fee for the sale of a property known as Bearsted, although I should add he qualified that by saying (i) that the payment had not been received by him solely, but by him and his wife as partners (a proposition which HMRC now accepts); (ii) that there were partnership trading losses from earlier years to set against this amount; and (iii) that expenses had been incurred which should have been deducted. In his Reply, the Appellant puts the sum as £135,950 '*made up of cash payments of £52,550 and the balance in kind*'. The discrepancies in the sums do not affect the overarching principles I must consider and apply.

Discussion

17. In the circumstances as described by the Appellant relating to the finder's fee, he was, for the year ending 5 April 2008, a person chargeable to income tax or capital gains tax for any year of assessment: TMA 1970 s 7(1)(a)

18. He had not received a notice under TMA section 8 requiring a return for the year of assessment of his total income and chargeable gains: TMA 1970 s 7(1A). This satisfies TMA 1970 s 7(1)(b). Accordingly, the Appellant met both limbs of TMA 1970 s 7.

19. The only way in which the Appellant was exempt from giving notice under s7(1) TMA was if his total income consisted of income from sources falling within ss 7(4) to 7(7), he had no chargeable gains, and was not liable to a high income child benefit charge: TMA s 7(3).

20. Even though the Appellant has not sought at any point to invoke TMA 1970 s 7(3), and has never sought to argue that his income was received exclusively from the sources described in TMA 1970 ss 7(4) to 7(7) inclusive, I consider that I should, given the very narrow way in which HMRC puts its case, and its exclusive reliance on s 36(1A)(b) TMA 1970, have regard to the point. Having done so, in my view, the 'finder's fee', as described by the Appellant in his letter of 20 October 2015, does not fall within TMA 1970 ss 7(4) to 7(7). Therefore, the Appellant was not exempt from notifying HMRC of his chargeability.

21. Hence, and notwithstanding the points made by the Appellant in his representations to HMRC in October and November 2015, the Appellant (a former - now retired - accountant) should have complied with section 7 by notifying HMRC

that he was chargeable to income tax. The notification period ended in 2009. The Appellant did not notify HMRC of his chargeability within that period. I reject the Appellant's bare assertions that there was no chargeable income.

22. His failure to have done so is a breach of section 7(1) of TMA 1970. It is a clear omission to fulfil an obligation laid down by the legislation.

23. That failure therefore engages section 36(1A)(b) of TMA 1970, which furnishes HMRC with a period of up to 20 years after the end of the year to which the assessment relates. HMRC could therefore assess at any time up to 2029. In the absence of any notification to chargeability within the statutory notification period, it makes absolutely no difference whether HMRC made a discovery in 2014 or 2012.

24. The ordinary time limit of 4 years after the end of the year of assessment provided for by section 34(1) TMA 1970 (and which, if applicable, would render the assessment out of time) does not apply in this case, since section 34 is expressly made subject to section 36, which allows a longer period.

25. It is proper for me to note that HMRC did, on 3 December 2015, mistakenly state that the discovery period was 12 months. That was unfortunate, and potentially played some part in the overall trajectory which this appeal subsequently took, but it was a mistake which was corrected in HMRC's Statement of Case (1 July 2016) at the latest.

26. In his Reply, the Appellant advances, albeit as bare assertions, the propositions (i) that there was no chargeable income in relation to the Bearsted transaction, and (ii) there is no loss of tax to the Crown.

27. As to the former, there is nothing before me to show that the Appellant was under no obligation to notify HMRC that he had received income. I find that the true position was that, having received moneys as a finder's fee for Bearsted, the Appellant should have notified HMRC of his chargeability to income tax. The Appellant accepted, in his letter dated 20 October 2015, that £200,000 was received (as described above).

28. As to the latter, once HMRC discharges the burden that the statutory condition in section 29(1) justifying the issue of a discovery assessment have been met (and I did not understand this to be in dispute) then the assessment 'stands good' and the burden of showing that the assessment is wrong moves to the Appellant. It is down to the Appellant to attack the assessment, in whole or in part. It is not enough to defeat the Assessment for the Appellant to simply assert - as he does - that *'there is no loss of tax to the Crown'*.

29. In summary: The assessment was made in time. The Appellant's arguments in relation to timing of the assessment are misconceived, and must be dismissed.

Disclosure and Witness Summonses

30. I address the Applicant's two applications together. Both of these applications relate exclusively to the issue of timing. Both applications seek to challenge the date upon which HMRC first became aware of a state of affairs entitling it to assess, and are predicated on the argument that HMRC was just too late.

31. The application for disclosure focuses on Items 57, 58, and 59 of HMRC's Amended Disclosure Schedule dated 23 February 2017. Those items deal (in summary) with documents relating to internal communications between various named HMRC officers concerning two emails sent in March 2008.

32. However, given, as I have found, HMRC had 20 years to assess, then the arguments as to timing are entirely redundant. It makes absolutely no difference whether HMRC - taking the case most advantageous to Mr Harrison - knew as early as 2012. It had until 2029 to assess.

33. Whilst I have the case management powers to order disclosure and issue witness summonses, it is simply not appropriate, fair, or just for me to do so in relation to an issue which is, as a matter of law, determined.

34. I reject the Appellant's argument that neither he nor I can properly deal with the issue of witness summonses, timing, or striking-out until disclosure has been ordered, as the Appellant requests, and the Appellant has had the opportunity to consider whatever emerges in the course of that disclosure exercise.

35. Mr Harrison argues that it is not possible to have a fair hearing, compliant with Article 6 of the ECHR, unless and until disclosure is given. I disagree. The argument is not a good one. The logically anterior issue - the timing of the assessment - is one of law, and in particular the combined operation of sections 7, 34 and 36 TMA 1970. In my view, Mr Harrison is simply wrong on the point. Resolution of the issue of the timing of the assessment does not depend on the further disclosure which is sought. There will be nothing of relevance to the issue of the timing of the assessment in the disclosure which is now sought. Those documents are not 'crucial' to the hearing, as Mr Harrison alleges. They are irrelevant. The allegations of collusion and concealment are irrelevant. I will not order disclosure in relation to issues which are not relevant.

36. The same argument applies to the application for witness summonses. I do not need 'to understand why the assessment was issued so far out of time' since the assessment was not issued out of time at all. HMRC's position is that none of the three officers were involved in any way whatsoever with the Assessment, and can offer no evidence in relation to the Assessment.

37. Whilst the matters raised by Mr Harrison obviously rankle him - bound up, as they seem to be, with his son's conviction in the Crown Court - his undoubted strength of feeling that HMRC deliberately suppressed information that could have assisted his son in defending the charge against him is not a material feature in the exercise of my case management powers.

38. I am bound to observe that, even had section 36 not been determinative of the issue of timing, nonetheless both applications face a significant hurdle. Both applications, to some degree, seek to impeach the actions of HMRC and/or HMRC's involvement in the prosecution of the Appellant's son in the criminal courts. There are allegations of prosecutorial misconduct, and of perverting the course of justice.

39. But the trial of Mr Harrison's son, and the manner in which it was conducted, is not a matter in relation to which this Tribunal has any jurisdiction. Moreover, the Appellant's son pleaded guilty in the Crown Court. I do not see any way in which the Appellant, or this Tribunal, can now go behind the fact of his conviction. This must apply with all the more force when the person convicted was not the Appellant, but someone else.

40. In my view, the Appellant's determined assault on the bona fides of the investigation and prosecution of his son, which has absorbed extremely substantial amounts of the parties' - and the Tribunal's - time and resources, was entirely misconceived.

The Preliminary Issue

41. The substance of the application for the hearing of a preliminary issue - namely, the time within which the assessment could be raised, and whether this assessment was out of time - is now dealt with. The assessment is not out of time.

Striking-out

42. HMRC's cross-application to strike out the Appeal leant heavily on the way in which the Appellant puts his appeal in this Grounds of Appeal. The application was withdrawn by HMRC during the course of the hearing. That was a pragmatic and sensible approach for the Respondent's representative to take. It was also fair, since it recognised that although this appeal was although ostensibly or formally framed, in the Notice of Appeal, as one solely against the timing of the assessment, as I have set out above, it was, in substance, also one, at least to some degree, as to the amount of the assessment. That much can be derived from the correspondence. That is to say, the Appellant says that, even if the assessment was in time, it is nonetheless too high. That is a matter which falls squarely within the Tribunal's ordinary jurisdiction in relation to assessments.

43. I was not persuaded by HMRC's submission that, even if it is accepted that the issue of liability remains at large between the parties, I should nonetheless exercise my discretion to dismiss the appeal under Rule 8(3)(c) - namely, that the Appellant enjoys no reasonable prospect of succeeding on the issue of liability. This submission was put on the footing that the Appellant's evidence as to the deductions which he seeks to apply is, as matters stand, insufficient to discharge the evidential burden on him.

44. I reject the submission since, in my view, there is sufficient evidence before me to raise, just about, a triable issue as to the amount of the assessment, and it is

therefore fair and just that the issue of the amount of the assessment should be tried in the conventional way rather than determined summarily. Naturally, I express no view as to the ultimate merits of that triable issue. That will be a matter for the Tribunal, in due course, to determine.

45. In this regard, the Appellant also referred to the 'agreed schedules' - the present whereabouts of which are not known - but accepted that he could 'have a go' at reconstructing them. Nothing stands in the way of his doing so. That is especially so when the Appellant is a retired accountant who, with his wife, specialised in forensic accounting investigation work. He must on any view, be a person well-versed in financial documentation.

46. It would be unfair to treat the Appellant's evidence, as it presently stands, and advanced largely in relation to the issue of timing, which I have now dismissed, as the only admissible evidence. It is only fair that the Appellant be given the opportunity to advance such further evidence as he sees fit going to the amount of the assessment, and the amount of the expenses and deductions which the Appellant claims.

47. Given that the Appeal, hitherto, has concentrated on the issue of timing, the disclosure and evidence hitherto has related to timing. Accordingly, I shall give further directions for the further management of this appeal, on the issue of liability.

Conclusion

48. For the above reasons:

(1) The assessment was issued within the time allowed to HMRC by TMA 1970 section 36(1A)(b);

(2) The Appellant's applications for disclosure and witness summonses are dismissed.

49. 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.

Dr Christopher McNall
TRIBUNAL JUDGE

RELEASE DATE: 3 October 2017