



**TC03110**

**Appeal number: TC/2013/02093**

*INCOME TAX- whether Tribunal has jurisdiction concerning HMRC's refusal to exercise discretion for an out of time claim for overpayment of tax – yes – taxpayer aware of position and should have appealed in time - case dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**DR OMOWONUOLA NWISI**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE DAVID S PORTER  
LESLIE BROWN**

**Sitting in public at King's Court, North Shields on 11 November 2013**

**The Appellant in person**

**Mr Aidan Boal, an inspector, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.**

## DECISION

1. The Appellant, Dr Omowonuola Nwisi (Dr Nwisi), appeals against the Respondents' (HMRC) refusal, contained in a letter dated 28 January 2013, to allow an out of time appeal for overpayment relief in relation to the tax year 2006/7. She says that her then accountants, Barnes Roffe of Dartford, have provided her with her tax return for that year which shows a loss. Barnes Roffe had not filed that return and she does not know where the return obtained by HMRC and produced to the Tribunal came from. She should therefore be allowed to submit the return, which revealed the losses and thereby claim the overpayment relief. HMRC say that the return for 2006/7 was filed on line and that Dr Nwisi was out of time to claim overpayment relief. HMRC are unable to exercise any discretion as the tax liability for that year had arisen from the tax return and was not based on a determination. HMRC says that the Tribunal has no jurisdiction to hear the appeal

Aidan Boal (Mr Boal), an Inspector of Taxes, appeared on behalf of HMRC and provided a bundle of documents for the Tribunal. Dr Nwisi represented herself and appeared with her husband. We were referred to the cases of

- *Steibelt (HM Inspector of Taxes) v Paling* [1999] BTC 184.
- *Kelsall (HM Inspector of Taxes) v Investment Chartwork Ltd* [1994] BTC 16.
- *Privet v IR* [2001] Sp C 279.

### The Law

2. The Taxes Management Act 1970 (the Act) provides at sections:-

- 9ZA (1) A person may amend his return under section 8 or 8A of this Act by notice to an officer of the Board
  - (2) An amendment may not be made more than twelve months after the filing date.
  - (3) In this section “the filing date”, in respect of a return for a year of assessment (year1) means
    - (a) 31 January of year 2, or
    - (b) if the notice under section 8 or 8A is given after 31 October of year 2, the last day of the period three months beginning with the date of the notice.
- 43 (1) Subject to any provisions of the Taxes Acts prescribing a longer or shorter period, no claim for relief in respect of income tax or capital gains tax

may be made more than 4 years after the end of the year of assessment to which it relates.

- 28C (1) This section applies where:-

5 (a) a notice has been given to any person under section 8 or 8A of this act (the relevant section)and

(b) the required return is not delivered on or before the filing date.

(An officer of the board may make a determination within the terms of the section. No determination has been made for the year 2006/7 the subject of  
10 this appeal)

Schedule 1AB- Recovery of Overpaid Tax for claims after 1 April 2010

- Special Rules 3A(1)This paragraph applies where:-

(a) a determination has been made under section 28c of an amount that a  
15 person is liable to pay by way of income tax or capital gains tax, but the person believes that the tax is not due or, if it has been paid, was not due.

(b) relief would be available under this Schedule but for the fact that-

(i)...

(ii)...

(iii) more than 4 years have elapsed since the end of the relevant tax  
20 year...

### **The Facts**

3. Mrs Nwisi told us that her affairs had been the subject of an investigation in the years 2003/4 and 2004/5 and as a result her tax repayment claim had been amended to a tax liability of £844.34 for 2003/4 and £1,387.34 being an overpayment for the year  
25 2004/5. Mrs Nwisi had owned a large number of properties. She had been unable to maintain the mortgage repayments which resulted in all the properties being repossessed in April 2008. Messrs Barnes Roffe of 16-17 Copperfield, Spital Street, Dartford had been instructed to deal with her tax affairs for the previous years and to prepare her return for the year 2006/7. She had become very distressed by her  
30 situation and she and her family decided to move to Atlanta USA.

4. She had returned to the United Kingdom by January 2012 as she received a Statutory Demand for a tax liability of £130,062.60 based on a mixture of returns already filed for 2003/04, 2004/05, and 2006/07 along with determinations for the years 2005/06 and 2007/08 to 2009/10. Accounts of the years 2007/8 to 2010/11 were  
35 filed by her on 23 March 2012 which gave rise to an adjustment, these at the hearing amounted to a reduced liability of £18,877.25, being the amounts due on the

adjustments above of £844.34 and £1387.34 due for the years 2003/4 and 2004/5 and £11,635.09 the tax returned on the self-assessment return for the year 2006/7 together with interest and penalties.

5. Mrs Nwisi produced to the Tribunal a copy of her tax return for the year 2006/7, unsigned, which she had obtained from Barnes Roffe, and which she alleges was never filed. If it had been filed it would have revealed the losses arising from the repossession of her properties. She expressed concern that HMRC had made no attempt to contact Barnes Roffe to ascertain how the tax return, which HMRC had obtained from its computer, had been lodged with HMRC. Mr Boal produced to the Tribunal a copy of the tax return filed on line which showed a tax liability of £11,635.09.

6. We were surprised that Mrs Nwisi had not interrogated Barnes Roffe herself as to the return, which has been filed on line. Mrs Nwisi was unable to explain to Mr Brown (the Member) how she thought that HMRC could have an electronically filed tax return for the year 2006/7 other than from Barnes Roffe. She suggested that HMRC should not have accepted the return as she had not given authority to Barnes Roffe to submit it and HMRC had produced no evidence to the effect that Barnes Roffe had been authorised to submit the return. We understand that accountants have to set up an electronic connection before they can register accounts on line. Barnes Roffe had lodged the accounts on line for the previous years 2003/4 and 2004/5. We are satisfied on the balance of probabilities that the return obtained by HMRC and produced to the Tribunal is Dr Nwisi's tax return for the year 2006/7.

### **The Submissions**

7. Mr Boal submitted that the Special Relief provided by Schedule 1AB paragraph 34A(3) is of no assistance for the 2006/7 return because the 2006/7 liability is based on the return submitted on line on 6 February 2008 by Dr Nwisi's authorised agent. HMRC wrote to Dr Nwisi to that effect on 28 January 2013. Dr Nwisi's appeal is based on that decision refusing to exercise HMRC's discretion. There is no statutory provision in Schedule 1AB of the Act for any appeal arising from HMRC's decision as Dr Nwisi's claim has been made outside the four year time limited. Mr Boal submits that the Tribunal has no jurisdiction over how and when HMRC should use their discretion and he referred us to the cases.

8. Dr Nwisi submits that there is no tax liability due to HMRC as she made substantial losses in the subsequent years. HMRC cannot rely on the tax return ostensibly lodged by Barnes Roffe as they never filed a return and the copy, which she has of that return, reveals losses of £30,947. HMRC has a duty to collect and to be seen to be collecting the right amount of taxes. She submitted that it was not fair, equitable or reasonable to demand monies based on returns that are at the least questionable, if not outright invalid, when no tax was clearly due.

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## The decision

9. We have considered the law and the facts and we dismiss the appeal. We do not accept that this Tribunal has no jurisdiction in this matter. Schedule 1AB section 9(2) provides:

“For the purposes of this schedule, a claim is not finally determined until it, or the amount to which it relates, can no longer be varied (whether on appeal or otherwise).”

10 The fact that no claim can be heard after four years does not necessarily mean that there are not grounds upon which an appeal could be heard. The three cases we have been referred to deal with the discretionary or concessionary powers which HMRC have. This case depends on whether Dr Nwisi dealt with her tax affairs in time and if she did not do so whether there was any basis on which that time could be extended by this Tribunal.

15 10. The relief in this case depends on the tax liability being a ‘determination’ by HMRC under section 28C (1) above. Dr Nwisi has referred us to SACM12240 relating to Overpayment Relief where it is unconscionable for HMRC to seek to recover tax where a determination might be excessive. This relief again refers to a determination not a tax liability raised by a tax payer. This Tribunal is entitled to hear the facts to decide whether such a determination has been made.

25 11. We accept that had Dr Nwisi claimed the overpayment in time then the loss of £30,947 would have been allowed and no tax liability would have arisen. The legislation requires that there is certainty in tax matters and states in the present circumstances that an individual can have four years in which to raise any reliefs. A claim for the Special relief anticipates that such a request arises out of a determination raised by HMRC. That is where the Taxpayer has not lodged a return and HMRC have made a ‘best judgment’ as to the amount of tax raised. It is likely in those circumstances that the tax liability will be incorrect. The legislation allows that taxpayer to apply for Special Relief when subsequent losses arise.

30 12. The position is different where the Taxpayer has made a return, as in this case. We are satisfied that Barnes Roffe, with the authority of Dr Nwisi, filed the 2006/7 tax return on line. We are also satisfied that Dr Nwisi was aware of Messrs Barnes Roffe’s action in this case, as the losses now recorded would not have been known about at that time. Dr Nwisi has agreed that there had been an earlier tax investigation into her affairs. Given that, we would have expected her to have paid more attention to her subsequent tax affairs. We have no doubt that she must have been distressed when she went to Atlanta, but four years is more than enough time for her to have taken action, which she has chosen not to do.

35 13. Section 2(1) of Schedule 1AB provides:-

“The Commissioners are not liable to give effect to a claim under this Schedule to the extent that a claim falls within a case described in this paragraph..

2(4) Case C is where the claimant-

- 5 (a) should have sought relief by taking such steps within a period that has now expired, and
- (b) knew, or ought to reasonably have known, before the end of that period that such relief was available.

10 On that basis and the facts in this case, we do not believe that Dr Dwisi would have been successful in her appeal even if she had applied within the time limit. In the circumstances there are no special circumstances which can give rise to the relief she seeks, we dismiss the appeal and we confirm the tax liability penalties and interest.

15 14. 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.

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**DAVID S PORTER  
TRIBUNAL JUDGE**

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**RELEASE DATE: 5 December 2013**