TC04253

Appeal number: TC/2014/02150

Income Tax - discovery assessment - penalty for 'prompted careless inaccuracy' in tax return submitted electronically - Appellant asserted that discovery assessment was incorrect – finding that assessment correct - appeal dismissed - penalty confirmed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANTHONY KOLEK **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL S CONNELL
MR MOHAMMED FAROOQ

Sitting in public at Ministry of Justice, Priory Courts, 33 Bull Street, Birmingham on 7 November 2014

The Appellant appearing in person.

Mr Tony O'Grady, Officer of HM Revenue and Customs, for the Respondents.

DECISION

The Appeal

1. This is an appeal by Mr Anthony Kolek against a discovery assessment made under the provisions of Section 29(1)(4) and (5) of the Taxes Management Act 1970 of £7,093 for 2008-09 and against a penalty assessment of £1,063.95 under Schedule 24 Finance Act 2007 for a prompted careless inaccuracy in his tax return. The penalty was assessed at 15% of the under declared duties.

2. The discovery assessment also gave rise to two surcharges under s 59C (2) and (3) TMA 1970, because of the late payment of tax for 2008-09. These have not been appealed, but would lapse if the penalty assessment is correct because HMRC cannot seek surcharges and penalties on the same tax.

Background

3. Mr Kolek submitted his 2007-08 tax return on 31 January 2009, in which he reported a tax liability of £9,851.31.

4. On 13 February 2009, Mr Kolek made a payment of £9,851.31, and of this sum £15.06 was set off against interest still owing from the 2006-07 tax year, with the balance of £9,836.25 being set off against the 2007-08 liability of £9,851.31. This left a balance due for 2007-08 of £15.06.

5. The submission of the 2007-08 return gave rise to two payments on account for 2008-09, the first being £4,925.65, and the second being £4,925.66.

6. On 10 July 2009, Mr Kolek made a payment to HMRC in the sum of £5,011.43, and of this sum, £85.78 was allocated to the remaining small arrears for 2007-08. The balance of £4,925.65 was set against the first payment on account for 2008-09 due in the same sum. So, as at 10 July 2009, the arrears for 2007-08 had been cleared and the first payment on account for 2008-09 had also been paid.

7. The second payment on account due for 2008-09, in the sum of £4,925.66 plus interest of £48.98, would have fallen due to be paid by 31 January 2010 but Mr. Kolek had calculated his tax liability to be £6,623.07 and so on 23 December 2009 he made a claim to reduce the payments on account for 2008-09 to £3,500 for the first payment on account, and £3,500 for the second payment. That is, £7000.00 in total.

8. Also on 23 December 2009, Mr Kolek made a further payment to HMRC in the sum of £2,082.25. Added to the £5,011.43 paid in July 2009, the total payments he made were therefore £7,093.68.

9. On 31 January 2010 Mr Kolek submitted his 2008-09 tax return. In the ‘tax deducted from all employments’ box, he entered a figure of £49,871, whereas the PAYE tax actually deducted as per form P14 submitted by his employer was £42,778. Mr Kolek had not only included the tax deducted of £42,778 as shown on his form

P60 (which is the duplicate of form P14 the employer submits to HMRC), but he also included the payments of £5,011.43 and £2,082.25 which he had already made to HMRC on account of his 2008-09 liability. Therefore the 'tax deducted from all employments' was overstated by £7,093.

10. The submission of what was an incorrect 2008-09 return resulted in income tax being apparently overpaid in the sum of £469.93, rather than the correct position which was that further tax was due in the sum of £6,623.07.

11. Consequently, HMRC's computer calculated that a repayment of £469.93 was due and also showed two unallocated payments of £4,983.93 (part of the payment of £5,011.43 made on 10 July 2009) and £2,082.25 (made on 23 December 2009).

12. On 30 January 2011, Mr Kolek submitted his 2009-10 tax return, which showed a total liability of £6,514.92, against which HMRC's computer allocated the unallocated payments of £4,983.93, and £1,530.99 of the payment of £2,082.25 made on 23 December 2009, leaving £551.26 unallocated.

13. Mr Kolek's return for 2010-11 showed a liability of nil, and therefore the still unallocated, i.e. £551.26, was refunded to Mr Kolek, along with the overpayment of £469.93 (wrongly) reported on the 2008-09 tax return.

14. The errors in Mr Kolek's 2008-09 return came to light in late 2012, and on 29 January 2013 HMRC wrote to Mr Kolek and pointed out that his 2008-09 return had been submitted with incorrect figures.

15. On 18 March 2013, a discovery assessment was issued under the provisions of s 29(1)(4) and (5) Taxes Management Act 1970, in order to recover the over repaid sum of £469.93 plus further tax due of £6,623.07, that is duties of £7,093.00 in total.

16. On 16 April 2013, a penalty assessment was issued under Schedule 24 of the Finance Act 2007. The penalty charged was £1,063.95, which is 15% of the total potential lost revenue of £7,093.

Relevant legislation

17. Under s 29(1) Taxes Management Act 1970, if an officer of the board or the board discover as regards any person and a year of assessment, 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, or that any assessment to tax is or has become insufficient, or that any relief which has been given is or has become excessive, the officer, or as the case may be the board, may subject to subsections (2) and (3) make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

18. Under s 29(3) Taxes Management Act 1970, where the taxpayer has made and delivered a return under s 8 or 8A TMA 1970 in respect of the relevant year of

assessment, he shall not be assessed under subsection (1) in respect of the year of assessment mentioned in that subsection and in the same capacity as that in which he made and delivered the return, unless one of the two conditions mentioned below is fulfilled:

(1) Under s 29(4) Taxes Management Act 1970, the first condition is that the situation mentioned in subsection (1) was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(2) Under s 29(5) Taxes Management Act 1970, the second condition is that at the time when an officer of the board ceases to be entitled to give notice of his intention to enquire into the taxpayer's return, under s 8 or 8A in respect of the relevant year of assessment, the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1).

19. Section 29(6) Taxes Management Act 1970 sets out the meaning of 'information made available' mentioned in s 29(5).

20. Under Schedule 24 of the Finance Act 2007 Paragraph 1, a penalty is payable by a person (P) where, P gives HMRC a document of a kind listed in the table below (includes a return under s 8 TMA 1970) and conditions 1 and 2 are satisfied:

(1) Condition 1 is that the document contains an inaccuracy which amounts to, or leads, to an understatement of liability to tax, a false or inflated statement of a loss, or a false or inflated claim to repayment of tax.

(2) Condition 2 is that the inaccuracy was careless or deliberate on P's part. Paragraph 3 defines 'careless' as a failure by P to take reasonable care.

21. Paragraph 4 of Schedule 24 provides that the standard penalty tariff for careless action is 30% of the potential lost revenue. However under Paragraph 10 a prompted disclosure of an error adjudged to be careless, may be reduced to a minimum penalty percentage of 15%, but no less than this.

22. Under Paragraph 5, the potential lost revenue in respect of an inaccuracy in a document, or a failure to notify an under assessment, is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

23. Under s 59C(2) TMA 1970, where any of the tax remains unpaid on the day following the expiry of 28 days from the due date, a 5% surcharge will be levied upon the unpaid tax.

24. Under s 59C(3) TMA 1970, where any of the tax remains unpaid on the day following the expiry of six months from the due date, a further 5% surcharge will be levied upon the unpaid tax.

25. Under s 59C(4) TMA 1970, where the taxpayer has incurred a penalty under s 7, 93(5), 95, or 95A of the Act, then no part of the tax by reference to which that penalty was determined shall be regarded as unpaid for the purposes of subsections (2) or (3). In other words, HMRC cannot impose a tax-geared penalty for an incorrect

return, carelessly submitted and also a late payment surcharge, on the same amount of tax.

26. The year in this appeal is 2008-09.

27. Section 59C TMA 1970 applies to 2008-09 in respect of surcharge for late payment.

28. Schedule 24 FA 2007 also applies to 2008-09 in respect of tax-geared penalties for a careless inaccuracy which leads to an understatement of tax.

29. Although s 59C TMA 1970 does not mention Schedule 24, the same principle of double jeopardy applies, i.e. if HMRC charges a penalty under Schedule 24 in respect of the £7,093 which was carelessly understated on the return, then it cannot also charge surcharge in respect of the late payment of this amount.

The Appellant's case

30. In his notice of Appeal to the Tribunal the Appellant says:

> (a) The allegation is that income tax for the year 2008-09 was not paid by 31 January 2010, and therefore a tax penalty of £1,063.95 is payable.
>
> (b) HMRC were requested in April 2013 to provide a statement of account identifying all payments to/from HMRC. This was received in August 2013, which showed the £7,093 had been paid in two instalments in July and December to HMRC prior to the end of 2009.
>
> (c) In correspondence in May 2013, HMRC admit the money was received by HMRC in 2009 but claim it was re-allocated to other liabilities due in 2009-10. HMRC have repeatedly failed to show the claimed liabilities were anything other than SA estimates.
>
> (d) It was pointed out to HMRC that in the tax period of 2009-10, I worked only until the first week of May 2009, i.e. 5 weeks for which tax was deducted properly. The remaining 47 weeks of the tax year, I was not employed or receiving benefits.
>
> (e) In the tax period 2010-11, I was unemployed until the last week of November 2010, meaning I had been without income from May 2009 for 18 months, so it was not possible to have any other liabilities within that period.
>
> (f) HMRC in correspondence dated 4 September 2013 stated that the penalty decision would not be reviewed until I had paid the £7,093 outstanding.
>
> (g) HMRC have accepted that the tax was paid in 2009, therefore the penalty is incorrect.
>
> (h) The test is, who actually held the benefit of that £7,093.

(i) The calculation of the penalty is based on non-payment of tax by 31 January 2010.

HMRC's case

31. Mr Kolek clearly knew that his total liability for 2008-09 would be roughly £7,000, given that he had applied for the 2008-09 payments on account to be reduced to £3,500 per payment. He made payments totalling £7,093 to cover his liability for 2008-09.

32. However, Mr Kolek entered the wrong tax credit on his 2008-09 return. He should have entered £42,778, but he added to this sum the £7,093 that he had already paid to HMRC against his final liability for 2008-09. Consequently, he submitted a 2008-09 return which showed a refund of £469.93 due rather than what should have been the true position, i.e. a liability of £6,623.07.

33. HMRC admits that it received two payments totalling £7,093. HMRC also admits that of this sum, £6,514.92 was set against 2009-10. HMRC also admits that the balance of the £7,093 after set offs, i.e. £551.26, was refunded to Mr Kolek.

34. HMRC says that all of this was reasonable at the time, because Mr Kolek had submitted a 2008-09 return showing that he had no liability for the year, (and showing a refund due of £469.93 due).

35. HMRC's computer took Mr Kolek at his word, and re-allocated the £7,093 originally paid against 2008-09 (insofar as it was possible to do so) against the liability reported for 2009-10, and as stated the balance of £551.26 still unallocated was repaid to Mr Kolek along with the refund of £469.93 incorrectly shown on the 2008-09 return.

36. Notwithstanding what Mr Kolek says, HMRC can demonstrate that his 2009-10 return included pay of £76,446, benefits of £8,863, and an overall tax liability of £6,514.92.

37. HMRC defends the 2008-09 discovery assessment under both s 29(4) and s 29(5) TMA 1970.

38. Under s 29(5) TMA 1970, HMRC argues that, at the time when an officer of the board ceased to be entitled to give notice of his intention to enquire into the 2008-09 return, that officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware that the self-assessment was insufficient.

39. In this case, the 2008-09 return was submitted by internet on 31 January 2010, which meant that HMRC had until 31 January 2011 to make enquiries under s 9A TMA 1970.

40. As at 31 January 2011, HMRC would have been in possession of the form P14 from the employer, showing gross pay of £112,937 and tax deducted of £42,778. This

information would have been held separately from Mr Kolek's personal record in another department of HMRC.

41. In examining Mr Kolek's 2008-09 return on or before 31 January 2011, it would not have been obvious that anything was wrong.

42. HMRC submits that an assessment under s 29(5) TMA 1970 is legally justified. Under s 29(4) TMA 1970, HMRC further argues that the situation brought about as described in s 29(1) was brought about carelessly by Mr Kolek.

43. In claiming a credit for the £7,093 which he had paid to HMRC, in addition to the £42,778 deducted by his employer, Mr Kolek had failed to take reasonable care. He submitted the 2008-09 return via the internet, and having submitted it and examined his tax calculation he should have realised that there was something wrong.

44. In reducing the payments on account to £7,000 in total, Mr Kolek clearly had a good idea what his liability for 2008-09 would be, so he should have realised his mistake when the calculation showed a refund due to him in the sum of £469.93.

45. HMRC says that this is a straightforward failure to take reasonable care, and that therefore an assessment under s 29(4) TMA 1970 is also legally justified.

46. With regard to the penalty charged under Schedule 24 FA 2007, Mr Kolek says that a penalty should not be due because the tax due for 2008-09 was fully covered by the two payments totalling £7,093. However HMRC says that those payments are not relevant to the question of the penalty.

47. Schedule 24 FA 2007 provides for a penalty where a person gives HMRC a document, (including a personal return) which contains an inaccuracy that leads to an understatement of liability to tax, and where the inaccuracy was either careless or deliberate.

48. The penalty is calculated with reference to the potential lost revenue, which is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

49. HMRC submits that all of those ingredients are present in this case. The Appellant has submitted a 2008-09 return which is clearly incorrect because of the inflated tax credit claimed, and HMRC says that this error, which resulted in an underpayment of tax in the sum of £7,093 was careless on the part of the Appellant.

50. A careless error, the disclosure of which has been prompted, attracts a maximum tariff of 30%, and in this case HMRC has allowed the maximum reduction of 15% permitted by the legislation, leaving a net penalty loading of 15%.

51. If the Tribunal upholds the penalty assessment under Schedule 24 FA 2007, then HMRC will waive the surcharges which were also levied.

Conclusions

52. With regard to the 2008-09 discovery assessment, under the provisions of s 29(4) TMA 1970, it is for HMRC to show that the understatement of tax discovered by HMRC was brought about either carelessly or deliberately by the Appellant or by someone acting on his behalf.

53. Under the provisions of s 29(5) TMA 1970, HMRC must be able to show that at the time when an officer of the board ceased to be entitled to give notice of his intention to enquire into the Appellant's 2008-09 return "....the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the understatement of tax …" caused in this case by the inclusion, in the Appellant's 2008-09 return, of an inflated tax credit.

54. The Appellant's 2008-09 Self-assessment employment pages contained a deduction for PAYE tax of £49,871, which led to a repayment of £469.93 for that year. However, the actual P14 tax deducted for 2008-09 was only £42,778. A copy of the P14 and P14 Summary record confirms this.

55. This meant that tax had been under-deducted for 2008-09 of £6,623.07 and added to the repayment of £469.93 that had already been made on 13 February 2012, resulting in the overall increased tax liability of £7,093. The 2008-09 repayment was included in the total repayment of £5,906.38.

56. Once HMRC has established the right to raise a discovery assessment, as in our view it has, it is then for the Appellant to show that he has been overcharged by this assessment, by adducing evidence which demonstrates that HMRC's figures should either be reduced or set aside completely - (s 50(6) TMA 1970). In our view the facts of the matter speak for themselves and the Appellant has not shown that HMRC's calculations are incorrect.

57. With regard to the penalty, it is for HMRC to show that the underpayment of tax arising for 2008-09 occurred because of an inaccuracy in the return for that year which was caused by the Appellant's carelessness. The standard of proof is the ordinary civil burden, on the balance of probabilities.

58. As HMRC say, in claiming a credit for the £7,093 which he had paid to HMRC, in addition to the £42,778 deducted by his employer, Mr Kolek had failed to take reasonable care. Having submitted his return electronically and examined his tax calculations, which showed that a refund was due, he should have realised that there was something wrong.

59. Consequently we uphold the penalty assessment of £1,063.95 under Schedule 24 Finance Act 2007, for a prompted careless inaccuracy in his tax return.

60. An initial surcharge is imposed on any tax outstanding 28 days after the due date, which was 31 January 2010, at 5% of the outstanding balance of tax, with a further surcharge imposed if the balance remains outstanding 6 months after the due date for payment. (i.e. £7,093 @ 5% = £354.65).

61. It is therefore clear that the surcharges were also correctly imposed. However as referred to above, these lapse if the penalty assessment is confirmed because HMRC cannot seek surcharges and penalties on the same tax.

62. At the conclusion of the hearing and for the above reasons we confirmed the discovery assessment of £7,093 for 2008-09 and dismissed the appeal against that assessment.

63. We also confirmed the Schedule 24 penalty assessment of £1,063.95, and dismissed the appeal against that assessment.

64. 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

MICHAEL S CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 27 January 2015