TC04410

Appeal number: TC/2013/07935

INCOME TAX –discovery assessment –HMRC officer completed tax return - was there insufficient information available – no – was the tax payer careless –no - did the HMRC officer act on behalf of the taxpayer - no – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

KEITH JAYNES **Appellant**

- and -

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

TRIBUNAL: JUDGE SARAH ALLATT
MR NIGEL COLLARD

Sitting in public at Northampton on 22 April

The Appellant in person

Mr Burke, Officer of HMRC, for the Respondents

DECISION

1. This appeal was made out of time. Permission was sought to admit the appeal out of time. HMRC having no objection, and in the interests of justice, permission was given to admit the appeal.

2. This is an appeal against an assessment under s29 TMA 1970. The assessment is for the year 2010-11 and is for £3,551.00. This assessment is a result of withdrawing relief for partnership losses claimed on Mr Jaynes's tax return.

3. The grounds of appeal are that the discovery assessment is not valid, and that, in any case, this is such an unusual set of circumstances that ESC A19 should be applied by the Respondents.

The Facts

4. The facts are surprising, and the following is undisputed:

(1) Mr and Mrs Jaynes entered into a partnership and started trading on 25 November 2009. The first year for which this partnership was required to submit a tax return was 2009-10. The partnership made a loss in the first period.

(2) This loss was allocated entirely to Mrs Jaynes on the partnership tax return.

(3) In 2010-11 the partnership made a profit. The profit was allocated wholly to Mr Jaynes.

(4) Mr Jaynes's tax return for 2010-11 also contained a claim for £13,235 of losses brought forward, from the 2009-10 partnership losses. Neither Mr Jaynes nor Mr Burke could explain how this figure was derived.

(5) The claiming of this loss was incorrect.

(6) The return had been signed by Mr Jaynes.

(7) The return had, however, been completed by an officer of HMRC.

(8) This officer took the details Mr Jaynes had given him, made calculations, and completed the return himself, by hand, in front of Mr Jaynes.

(9) He did this for the partnership return, and the returns of both Mr and Mrs Jaynes.

(10) He had also done the same for the tax returns for 2009-10.

(11) After the period for enquiry had closed, another officer of HMRC became aware that the losses for 2009/10 had been allocated to (and claimed by) Mrs Jaynes, and should not have been claimed by Mr Jaynes against the profit for 2010/11.

(12) They therefore issued a discovery assessment under s29 TMA 1970.

Evidence

5. We heard evidence from Mr Jaynes. We found him to be a clear and credible witness. He explained that, a few years before the partnership commenced, he had phoned HMRC asking for help to complete his tax return, having previously attended a self assessment education session but 'having forgotten some of the information'. HMRC had suggested that he make an appointment at the Leicester office, which he duly did. An officer (not the officer in question for the tax year 2010-11) offered to complete his tax return for him, and duly did so. In subsequent years this was repeated, and, for every year after the first, Mr Jaynes's return, that of his wife and, after its establishment, that of the partnership, were completed by the officer who completed the 2010-11 returns.

6. Mr Jaynes explained that at the meeting in question, on 11 June 2011, he and his wife had turned up with a one page summary, an excel spreadsheet of the whole year's trading in printed and electronic forms, and all documentation including invoices and bank statements. The officer asked questions, which they answered, made calculations, filled in the tax returns by hand himself, and asked Mr and Mrs Jaynes to sign. Although Mr Jaynes could not remember the exact words when he was asked to sign, he was certain 'it was nothing profound, nothing about responsibility'.

7. As far as Mr Jaynes understood, the completion of tax returns was a service that HMRC offered, and had offered for a number of years. This service had never been solicited by him, but had been offered by HMRC. Mr Burke accepted that this was the case but assured us that this was against departmental guidance.

8. At no point was Mr Jaynes told that, although the return was being completed by HMRC, he was ultimately responsible.

The Law

9. The sub-sections of section 29 TMA that are relevant to these Appeals are as follows:

> 29(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, or
> (b) that an assessment to tax is or has become insufficient, or
> (c) 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) below, 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."

Sub-section (2) is irrelevant to this appeal. It provides that where a taxpayer's return is shown to have contained some insufficient assessment, no discovery assessment can be made if the understatement was due to an error as to the basis on which tax liability ought to have been computed, and the basis adopted in making the return was *"in accordance with the practice generally prevailing at the time when it was made"*.

"29(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above-

(a) in respect of the year of assessment mentioned in that subsection; and
(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

29(4) The first condition is that the situation mentioned in subsection (1) above is attributable to careless or negligent conduct on the part of the taxpayer or a person acting on his behalf.

29(5) The second condition is that at the time when an officer of the Board-

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or
(b) informed the taxpayer that he had completed his enquiries into that 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 situation mentioned in subsection (1) above.

29(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if-

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;
(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or
(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above-

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or
(ii) are notified in writing by the taxpayer to an officer of the Board.

29(7) In subsection (6) above –

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes-

(i) a reference to any return of his under that section for either of the two immediately preceding years of assessment; and
(ii) where the return is under section 8 and the taxpayer carries on a trade, profession or business in partnership, a reference to any partnership return with respect to the partnership for the relevant year of assessment or either of those periods; and

(b) any reference in paragraphs (b) to (d) to the taxpayer includes a reference to a person acting on his behalf."

10. The burden of proof is on HMRC to show that subsection 3 is met, ie 'one of the two conditions mentioned below [subsections 4 and 5] is fulfilled'.

11. HMRC contended that both conditions mentioned in subsections 4 and 5 were fulfilled. We deal first with subsection 5.

12. The contention here is that an 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) above.*

13. Subsections 6 and 7 stipulate what information is deemed to have been made available to the hypothetical officer in question. In this case, this includes Mr Jaynes's return for 2010/11 (claiming partnership losses), the partnership return for 2010/11 (showing profits, not losses), the partnership return for the year 2009/10 (showing that this was the first year of the partnership, and that all losses were allocated to Mrs Jaynes).

14. HMRC contend that this information is not sufficient to be aware that the relief for the losses should not be given by Mr Jaynes. This contention was based mainly on practicalities, their view being that as it took HMRC 17 months to work out that the losses should not be claimed, therefore it was not to be reasonably expected that they should be able to do it within 12 months.

15. We disagree. We feel that the information made available is such that an officer ought to have been aware that Mr Jaynes should not have claimed the losses. There is no contention that any other information was actually required to come to that conclusion, nor that anyone looking at the information came to a different conclusion, there is only the fact that HMRC took their time to do so.

16. We therefore decide that the discovery assessment is not valid if it relies on s29 (5) TMA 1970.

17. Therefore we turn to subsection 4 *'the situation mentioned in subsection (1) above is attributable to careless or negligent conduct on the part of the taxpayer or a person acting on his behalf.'*

18. We ask ourselves the following questions 'Was Mr Jaynes careless to act as he did?' and 'Was the HMRC officer a 'person acting on behalf of Mr Jaynes'?'

19. The contention of HMRC is that Mr Jaynes was careless. They do not contend negligence. They base this on the fact that he signed the tax return under the typed declaration 'I declare that the information I have given on this tax return and any supplementary pages is correct and complete to the best of my knowledge and belief'. They therefore contend that, as he is responsible for making a correct tax return, and as this was not made, his conduct was careless.

20. We were shown 3 cases by HMRC – Sloan v HMRC (summary decision only), Moore v HMRC [2011] UKUT 239 (TCC), and Williams (HMI) v Trustees of WW Grundy [1934] 18 TC 271. Unsurprisingly none dealt with the extremely unusual situation where the taxpayer's return had been completed by HMRC.

21. *Sloan* is a summary decision only. The judge said 'there is a duty on a taxpayer to take reasonable care....Should his return turn out to be inaccurate, then *in the absence of any explanation as to how the error arose*, we consider the taxpayer must have breached that duty and accordingly must have acted fraudulently or negligently' (Our emphasis). In the case of Sloan, the taxpayer could not offer an explanation other than (his own) human error. That is distinguishable from this case, where the taxpayer did not complete his own return.

22. In *Moore* we were referred to the Upper Tribunal case. This case confirmed the decision of the First Tier Tribunal, particularly that the finding of fact by the First Tier Tribunal, that Mr Moore was negligent, was not irrational. Turning to the First Tier Tribunal case [2010] UKFTT 271 (TC), we can see that in that case the taxpayer relied on informal advice given by a (indisputably) third party. The judge, John Brooks, said at para 9:

> 'We consider that, viewed objectively, such a [reasonably diligent] taxpayer would, unlike Mr Moore, have referred to the guidance provided to him, made use of the working sheet to which he was directed and not have relied on informal advice received in a social context as the basis for completing his returns.'

23. That case is clearly distinguishable from this one, where the taxpayer was not receiving 'informal advice in a social context'.

24. Finally, we were referred to a case from 1934 – Williams (HMI) v The Trustees of WW Grundy (Deceased) 18 TC 271. That case was deciding the meaning of 'discover' (which has been examined many times since) but since carelessness (or negligence or fraudulent conduct) was not alleged, nor was the discovery based on information deemed to have been made available (since this was well before self assessment), we do not consider this case to have particular relevance.

25. The contention of Mr Jaynes is firstly that, as far as he was aware, he was discharging his responsibility by giving the officer of HMRC all the information needed to complete the tax return. He was not made aware, after the completion of the return, that the ultimate responsibility still remained with him. Secondly, (given that he thought that this was a service genuinely and legitimately offered by HMRC) he knew of no-one better to assist him.

26. We do not believe Mr Jaynes was careless. He took the best route he knew of to make an accurate tax return. It is not contended that he was careless with any of the records he brought to HMRC. It is not contended that they were, for example, inaccurate or incomplete.

27. We believe it would not be sensible, as a matter of public policy, to require taxpayers to be suspicious when dealing with HMRC. If a service is offered, and nothing else alerts a taxpayer to the fact this may not be an official service, a taxpayer should not be required to enquire whether it is offered legitimately.

28. It is well established that the taxpayer is responsible for his or her tax return. If he relies on someone else to complete it on his behalf, and that individual is careless, the taxpayer still bears the responsibility.

29. In this case, the careless individual was the HMRC officer.

30. Was the HMRC officer 'a person acting on behalf of Mr Jaynes'?

31. We believe 'A person acting on behalf of' implies, in the set of circumstances we are looking at, a third person in the relationship between Mr Jaynes and HMRC. In normal circumstances this would either be a layperson (where it could be alleged the taxpayer was careless to rely on someone with insufficient knowledge) or a professional (who has a duty of care, and whose letter of engagement would make clear where responsibilities lie). In this case, the third person can only be the officer of HMRC.

32. But can an officer of HMRC act 'on behalf of' Mr Jaynes' in a relationship between Mr Jaynes and HMRC? We do not believe he can, and in this specific case, we do not believe he did. We do not believe he can, because as an employee of HMRC he cannot act on behalf of another person in a transaction with HMRC. And we do not believe he did, because Mr. Jaynes viewed this as 'a service offered by HMRC' rather than 'a service offered by this particular person'. This was all the

more reasonable a belief because this officer had offered this service in the past, when there had been no issues, and because the same service had been offered by a different HMRC officer in the same office previously.

33. We conclude that, therefore, subsection 4 of s29 TMA 1970 does not apply.

34. We did therefore not need to look at the second ground of appeal, namely that this was a case where ESC A19 ought to have been applied. For the sake of completeness we note that we could not in any case have looked at this ground of appeal, as the First Tier Tribunal does not have jurisdiction in this area, as is made clear in the case of Michael Prince, Susan Bunce and Kevin Coaker v HMRC [2012] UKFTT 157 (TC).

The Decision

35. For the reasons given above, we allow this appeal.

36. We wish to make it very clear that the facts in this case are extremely unusual. We are unable to be sure they are unique, because this 'service' was offered in this office for several years and by more than one person. However, they may well be unique in their particulars. We therefore wish to make it clear that this case turns on its facts, and even small differences in those facts may have led to a different conclusion.

37. We have not named the HMRC officer in this case. This is because from what we have heard he was not unique in this HMRC office in 'offering this service'. We did not hear from the officer in question.

38. 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.

SARAH ALLATT
TRIBUNAL JUDGE

RELEASE DATE: 13 May 2015