TC04911

Appeal number: TC/2014/06480

INCOME TAX & NATIONAL INSURANCE CONTRIBUTIONS – amounts deducted under Ch 3 Pt 3 FA 2004 – whether evidence to show tax was deducted on some payments received – yes – whether turnover "grossed up" for deductions – no – repayment made on self-assessment – reduced amount becoming repayable but more than on amended self-assessment – what determination the Tribunal can make under s 50 TMA.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ERIC WALKER **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
LESLIE HOWARD

Sitting in public at 11 Albion St, Leeds on 18 January 2016

Mr Matthew McConnell of Certax for the Appellant

Mrs Rosalind Oliver, Presenting Officer, for the Respondents

DECISION

This is a corrected version of the decision in this case issued on 22 February 2016. The only corrections appear in paragraph 25 and are made by virtue of Rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

1. This was an appeal by Mr Eric Walker ("the appellant") against the conclusion stated in a closure notice given to him by an officer of the Commissioners for Her Majesty's Revenue and Customs ("HMRC") and against the amendments to his self-assessment for the tax year 2011-12 notified in that closure notice.

2. The sole question for us as presented by the parties was what was the amount of deductions from payments made to him by contractors that the appellant was entitled to treat as satisfying any income tax charge and any Class 4 National Insurance Contributions ("NICs") charge on his trading profits for 2011-12, and to have the excess repaid to him. But it was also agreed that the amount of turnover and hence the amount of the trading profit was affected by the answer to the question.

3. We have decided that the appellant is entitled to treat as mentioned in the previous paragraph the full amount which he entered on his tax return. Because of amendments to the amount of his deductible expenses agreed between the parties and of the consequential effect on his turnover of our decision (something which was not taken into account in his return) the calculations we have made show that the appellant was entitled to a smaller repayment than the one actually made to him. That amount is however larger than the amount of repayment shown as due on the amended self-assessment or on HMRC's subsequent amendments to that figure.

4. In their Statement of Case HMRC asked the Tribunal to "determine the appeal against the closure notice in the sum of tax and Class 4 NIC due of £5184.83". For reasons we explain in the Discussion section of this decision, we do not consider that we have the power to do that or to determine the appeal in any other sum of tax and NIC due. Because of this doubt which we explained to HMRC at the hearing, we issued directions permitting HMRC to make any submissions they wished on the question of the Tribunal's powers. HMRC did so and we have taken them into account.

Evidence

5. We had oral evidence from Mr Walker. We consider that Mr Walker was a straightforward, honest and credible witness. His evidence about the circumstances in which he obtained a statement of payments and tax deduction from one of his contractors was challenged by Mrs Oliver. The appellant answered robustly, rejecting what were in effect insinuations about his honesty, and we accept his evidence on this and other less contentious points.

6. HMRC had produced a bundle of documents and correspondence, and this included a couple of documents put forward by the appellant. Some documents we would have expected to see were not in the bundle. The most important of these was the amended self-assessment showing the figures in issue. Mrs Oliver informed us that the figures would have been identical to those in a tax calculation issued to the appellant before the closure notice and we have assumed that this is correct. We do not think it is satisfactory for the very matter which HMRC asks us to make our decision on not to be before us.

Law

7. The only substantive law relevant to the precise issue between the parties is in sections 61 and 62 Finance Act ("FA") 2004 which form part of Chapter 3 (Construction Industry Scheme ("CIS")) of Part 3 of that Act. They provide (relevantly):

> **"61 Deductions on account of tax from contract payments**
>
> (1) On making a contract payment the contractor (see section 57(3)) must deduct from it a sum equal to the relevant percentage of so much of the payment as is not shown to represent the direct cost to any other person of materials used or to be used in carrying out the construction operations to which the contract under which the payment is to be made relates.
>
> (2) In subsection (1) "the relevant percentage" means such percentage as the Treasury may by order determine.
>
> …
>
> **62 Treatment of sums deducted**
>
> (1) A sum deducted under section 61 from a payment made by a contractor—
>
> (a) must be paid to the Board of Inland Revenue, and
>
> (b) is to be treated for the purposes of income tax or, as the case may be, corporation tax as not diminishing the amount of the payment.
>
> (2) If the sub-contractor is not a company a sum deducted under section 61 and paid to the Board is to be treated as being income tax paid in respect of the sub- contractor's relevant profits.
>
> (3) If the sum is more than sufficient to discharge his liability to income tax in respect of those profits, so much of the excess as is required to discharge any liability of his for Class 4 contributions is to be treated as being Class 4 contributions paid in respect of those profits.
>
> …"

The "relevant percentage" in this case is 20% (article 2(a) of the Finance Act 2004, Section 61(2), (Relevant Percentage) Order 2007 (SI 2007/46))

8. The right to repayment of the excess of the amounts given by s 62(2) and (3) over the amount deducted is to be found, if anywhere, in s 59B Taxes Management Act 1970 ("TMA") which relevantly says:

> "(1) Subject to subsection (2) below, the difference between--
>
> (a) the amount of income tax and capital gains tax contained in a person's self-assessment under section 9 of this Act for any year of assessment, and
>
> (b) the aggregate of any payments on account made by him in respect of that year (whether under section 59A of this Act or otherwise) and any income tax which in respect of that year has been deducted at source,
>
> shall be payable by him or (as the case may be) repayable to him as mentioned in subsection (3) or (4) below …
>
> …
>
> (4) … the difference shall be payable or repayable on or before the 31st January next following the year of assessment.
>
> (5) An amount of tax which is payable or repayable as a result of the amendment or correction of a self-assessment under—
>
> (a) section … 28A of this Act …, or
>
> (b) …,
>
> is payable (or repayable) on or before the day specified by the relevant provision of Schedule 3ZA to this Act.
>
> (7) In this section any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income."

Facts

9. The facts set out in this paragraph were not in dispute and are taken primarily from the document bundle together with statements made by the appellant in evidence, and they are part of our findings of fact in this case.

(1) In the tax year 2011-12 the appellant was engaged as a sub-contractor in the construction industry. He worked for three contractors, S Dubickiutilities Ltd ("Dubicki"), D & G Group and Euco Ltd, the last two being related in some way (they apparently had the same principals, Denise Loche and Grant Craw).

(2) Payments to the appellant by all three contractors were made by bank transfer to the appellant's bank account. The appellant did not supply materials to the contractors.

(3) The appellant made a tax return for the year on 28 June 2012. The only entries on the main part of the return (as taken from the HMRC screen printout in the bundle) were on the self-employment pages as follows:

Turnover (Box 8)	£33,136

Net profit (Box 20)	£10,175
Annual Investment Allowance (Box 22)	£750
Net profit and total taxable profits (Boxes 27 & 30)	£9,425
Deductions on payment and deduction statements from contractors (Box 37):	£6,627.25

The only entries on the self-assessment part of the return was:

Class 4 NICs due	£198
Total tax, Student Loan repayment & Class 4 NICs overpaid: (Box 2)	£6,040

(Box 1 "Total tax, Student Loan repayment & Class 4 NICs due before any payments on account" was empty.)

(4) The appellant was not included in any return made by Euco Ltd of payments and amounts deducted under the Construction Industry Scheme.

(5) The returns by Euco Ltd in our bundle had all the names redacted on the basis that none of them was the appellant. Mrs Oliver said that she had the unredacted documents available which she could show the Tribunal: we accepted her word that the appellant's name was not included. We had no returns for the other two contractors.

(6) On 14 March 2013 HMRC (Mrs Jo Boulton) began an enquiry under s 9A TMA into the appellant's tax return for 2011-12. Two grounds for the enquiry were given. One which concerned expenses does not concern us, except for any effect on the final figures for our decision. The other ground was that despite the appellant's including tax suffered figures on his return, HMRC's CIS system had no record of any deductions from payments to the appellant having been returned and paid to HMRC. Accordingly HMRC asked for documents to verify the amounts returned by the appellant.

(7) On 29 November 2013 Fisher Tait Accountants Ltd ("Fisher Tait"), the appellant's agent, provided certificates of deduction of amounts from payments made to the appellant by Dubicki.

(8) On 13 December 2013 Mrs Boulton set out proposals for settlement of her compliance check. They included reducing the amount of the deductions to be allowed from £6,627 to £3,379, on the basis that only £3,379 was vouched for.

(9) On 28 January 2014 Mrs Boulton made contact with a company Blow Abbott Ltd (Chartered Accountants) who through their payroll services division acted as agents for Euco Ltd in the operation of the CIS deduction scheme. Blow Abbott sent Mrs Boulton information they had been given by Grant Craw about payments to the appellant, information they described as "sketchy".

(10) Mrs Boulton analysed the information and came to the conclusion that only £500 tax deducted by Euco Ltd could be verified. She therefore increased the deductions allowed to £3,879.

(11) On 11 April 2014 Fisher Tait sent to Mrs Boulton a statement from Euco Ltd of tax deductions of £3,845 made in the four months to 5 April 2012. Mrs Boulton sought more detailed information about the Euco payments but none was forthcoming.

(12) On 24 June 2014 Mrs Boulton stated in a letter to the appellant that she had competed her check of his return and that the letter was a closure notice given under s 28A TMA. The conclusions included that turnover should be increased and the amount of tax or NIC treated as paid reduced to £3,879. She amended the self-assessment to reflect these changes, and as a result the amount repayable to the appellant was now £821.07 as against £6,040 on the original self-assessment. Thus, according to the letter, the appellant owed HMRC £5,218.93 and his Self Assessment Statement showed a new charge to tax of that amount, which, after giving credit for certain payments, was shown as due and payable.

(13) Mr McConnell, formerly of Fisher Tait and now part of Certax Accounting, appealed against the closure notice, its conclusion and amendments on behalf of the appellant.

10. As we stated at §2 and as will be apparent from the undisputed facts we have found, there is only one issue that divides the parties: what is the amount that should have appeared in Box 37 in the return?

Further findings of fact

11. We turn now to the issue mentioned in the previous paragraph, a matter about which there was dispute or at least no agreement.

12. The appellant gave oral evidence in which he said that it was standard practice in the construction industry for sub-contactors to be engaged on the basis that the payment for job was say £100 per day. That meant, and was universally recognised to mean, that £100 was the amount that would be paid into the sub-contractor's bank account, and that the amounts in his account shown as received from the three contractors was intended to be and was the amount after the contractor had deducted any amounts due.

13. He had no knowledge of whether the contractors had made a return to HMRC or paid the tax. He had not received monthly pay and deduction statements from Euco Ltd though he had asked for them.

14. Mrs Oliver asked him how he managed to obtain the statement from Euco Ltd that Fisher Tait sent to HMRC in April 2014. Mr Walker explained that after the year concerned he was still working for one of the principals in Euco, Denise Loche. He knew that she and Grant Craw were no longer together, but Denise said that she would do what she could. One day he was told that Denise had managed to get a statement from Grant Craw and that this was what he had sent in.

15. He strongly disagreed with Mrs Oliver's suggestions that it was suspicious that this statement had only come to light years after the enquiry started, and insisted he

was telling the truth. Mrs Oliver queried how, given that Euco Ltd had gone into liquidation, Grant Craw was able to provide the figures. The appellant said he did not know and that he had not given Denise or Grant the figures to enter on the statement.

16. Mr Walker did not understand the figures given by Blow Abbott. He had in fact never heard of that firm.

17. In the grounds of appeal Mr McConnell had stated that the appellant always worked on a "day" basis agreeing the net payment and leaving the contractor to determine the deductions. That he said was Mr Walker's unchallenged evidence. He had emphasised in his grounds of appeal that HMRC had accepted the Dubicki statements at face value even though they had apparently found no evidence of deductions on the appellant's CIS record and it appeared that Dubicki (now in liquidation) may not have paid anything to HMRC. It was therefore illogical not to accept the statements given by Euco or Mr Craw, where the arrangements were the same. He accepted that net payments needed to be "grossed up".

18. For HMRC Mrs Oliver argued in her statement of case ("SOC") and before us that the Blow Abbott information showed that with the exception of a few payments for which she had given credit it appeared that the appellant was paid gross. She had said in the SOC that the appellant had not been able to provide verifiable documents for the Euco deductions. She referred to the document given Mr Craw in her SOC only to point out that Euco was in liquidation at the time of the statement and that Mr Craw had no right to act on behalf of that company. Before us she doubted the reliability of the Craw figures.

19. Our finding of fact on this matter is that the appellant received all the payments he did from Euco on an agreed net basis. We accept Mr Walker's evidence that this is standard practice in the construction industry. We assume that HMRC are satisfied that this was the arrangement with Dubicki which they have not queried. We note also that the first payment listed by Blow Abbott for 4 December 2011 clearly shows a gross payment of £1000, tax of £200 and a figure net of £800 and this is the figure shown in Mr Walker's bank account. There are similar entries for 12 and 19 February 2012. Other entries in the Blow Abbott statements show what appear to be gross payments or payments where the tax and payment figures do not match. We find it inconceivable that the arrangements for payment might be net one week, gross another and something in between on another. The figures given by Blow Abbott depend, as their representative said to HMRC, on them being able to correctly interpret confusing and sketchy information given to them by Grant Craw. They also added that they had not sent returns to HMRC because they were unable to reconcile the figures.

20. In view of this finding it is probably unnecessary for us to make any findings about the Grant Craw statement covering four months. But we have no reason to doubt that it is a genuine record of the amount of net of tax payments made to the appellant, and of the amount of deductions that Euco made from the appellant's payments. Mrs Oliver did not put it squarely to Mr Walker, nor did she submit to us,

that the certificate was not genuine, and we find on the balance of probabilities that it was.

Discussion

21. We have already recorded the parties' submissions in relation to the only disputed matter. We add that Mr McConnell also raised a point about regulation 9 of the Construction Industry Scheme Regulations 2005 (SI 2005/2045) ("the CIS Regulations") and how, although that regulation applied to contractors, it should also be applied by analogy to sub-contractors. We do not think there is anything in this point as the regulation itself is irrelevant to Mr Walker's circumstances.

22. HMRC also mentioned penalties. This was because HMRC had imposed penalties under Schedule 24 FA 2007 (incorrect returns) for two different matters. One was the overstatement of expenses and the other the overstatement of tax deducted. As to the first, the penalty had not been appealed and had been paid. The penalty for the second matter had been suspended. HMRC said that if the outcome of the appeal was that the "potential lost revenue" was reduced, the penalty would also be reduced accordingly. We told Mrs Oliver that from the papers it appeared that the suspension period had expired and that HMRC had said that they would, if the conditions had been met in that period, cancel the penalty, but it was not apparent what had happened. Mrs Oliver undertook to find out and take any necessary action.

23. We have found that the appellant received payments from Euco after deductions under s 61 FA 2004. Since the amount of deductions shown in Box 37 of the return other than the Euco deductions had been accepted in the conclusions of the enquiry, it follows that the amount in the appellant's return should stand as there shown.

24. We now turn to the disposal of the appeal, where we have encountered some difficulties. It follows from our finding on the amounts deducted that the correct amount of turnover must be found by adding back the tax shown in Box 37. This is because of the effect of s 62(1)(b) FA 2004.

25. It is accepted by the appellant that the actual turnover leaving aside s 62(1)(b) is the amount in his bank account for the year. HMRC's analysis shows that to be £35,313. But Mrs Oliver pointed out something which we too had noticed which was that the list prepared by Mrs Boulton included one payment made after the year end of £790. The turnover for the tax year from the banking records is therefore £34,523. To this must be added the amounts that we have found were deducted from payments made to the appellant. These are £3,379 deducted by Dubicki and £3,845 by Euco (calculated by grossing up the payments from Euco by 20%, the rate of deduction) totalling £7,724 so making the turnover £41,747. The expenses agreed amounted to £20,000 with AIA of £750 making the net profit £20,997. After personal allowances of £7,475, the taxable income is £13,522, and basic rate tax on that amount is £2,704. Class 4 NICs are due at 9% on the profit in excess of £7,225 which comes to £1,239. Thus the income tax chargeable is £2,704 and the Class 4 NICs £1,239. Income tax is treated as paid of £2,704 (s 62(2) FA 2004 first sentence) so that the income tax payable becomes nil, and Class 4 NICs are treated as paid of £1,239 (s 62(2) FA 2004

second sentence) so that the Class 4 NICs payable becomes nil. That leaves £3,781 of the s 61 deductions repayable.

26. The question that then arises is what the Tribunal can do with these figures. HMRC's SOC had asked us to "determine the appeal in the sum of tax and Class 4 due of £5134.83", a slight variation on the amount in the amendment to the SA which was explained to us by Mrs Oliver. The Tribunal's powers in an appeal against an amendment to a self-assessment of income tax are to be found in, and only in, s 50 TMA. That section provides relevantly:

> "(6) If, on an appeal notified to the tribunal, the tribunal decides—
>
> (a) that, ... the appellant is overcharged by a self-assessment;
>
> (b) … ; or
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.
>
> (7) If, on an appeal notified to the tribunal, the tribunal decides
>
> (a) that the appellant is undercharged to tax by a self-assessment
>
> (b) …; or
>
> (c) that the appellant is undercharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be increased accordingly.
>
> (7A) If, on an appeal notified to the tribunal, the tribunal decides that a claim or election which was the subject of a decision contained in a closure notice under section 28A of this Act should have been allowed or disallowed to an extent different from that specified in the notice, the claim or election shall be allowed or disallowed accordingly to the extent that the tribunal decides is appropriate, but otherwise the decision in the notice shall stand good.
>
> (8) Where, on an appeal notified to the tribunal against an assessment (other than a self-assessment) which—
>
> (a) assesses an amount which is chargeable to tax, and
>
> (b) charges tax on the amount assessed,
>
> the tribunal decides as mentioned in subsection (6) or (7) above, the tribunal may, unless the circumstances of the case otherwise require, reduce or, as the case may be, increase only the amount assessed; and where any appeal notified to the tribunal is so determined the tax charged by the assessment shall be taken to have been reduced or increased accordingly.
>
> …"

By virtue of paragraph 8 of Schedule 2 to the Social Security Contributions and Benefits Act 1992 ("SSCBA"), section 50 TMA applies to class 4 contributions as it applies to income tax, with any necessary modifications.

27. Section 50(6) and (7) was amended by FA 1994 so as to apply properly to the self-assessment provisions introduced by that Act. In *D'Arcy v HMRC* [2006] SPC00549 the Special Commissioner, Dr John Avery Jones, remarked at [10] that:

> "Sections 31(1)(b) (that an appeal may be brought against the conclusion or amendment in a closure notice) and s 50(6) and (7) (that the appeal Commissioners' jurisdiction is to determine whether the appellant is over- or undercharged by the self-assessment) [TMA] do not appear to fit together well. What, for example, is the procedure for an appeal against a conclusion that does not lead to an amendment? And if there is an appeal against both the conclusion and the amendment the appeal Commissioners are apparently not required to adjudicate on the reasons for the amendment; they must either reduce or increase the assessment or allow it to stand good."

and later in that paragraph:

> "Accordingly, I consider that s 50(6) (and similarly with (7)) should be read in the context of s 31(1)(b) in this way:
>
> > If, on an appeal [against a conclusion or amendment to a self-assessment stated in a closure notice], it appears to the majority of the Commissioners present at the hearing, by examination of the appellant on oath or affirmation, or by other ...evidence,—
> >
> > (a) that, ...the appellant is overcharged by a[n amended] self-assessment [so far as concerns matters appealed against];…
> >
> > the assessment… shall be reduced accordingly, but otherwise the assessment …shall stand good."

28. Looking at this case in the light of those passages we have first to consider what is the amount by reference to which we have to decide whether the appellant is overcharged or undercharged, because if neither is the case then the amount stands good. This depends on what precisely a self-assessment is an assessment of. Section 9(1) TMA gives us the answer:

> " … every return under section 8 … of this Act shall include a self-assessment, that is to say--
>
> > (a) an assessment of the amounts in which, on the basis of the information contained in the return and taking into account any relief or allowance a claim for which is included in the return, the person making the return is chargeable to income tax and capital gains tax for the year of assessment; and
> >
> > (b) an assessment of the amount payable by him by way of income tax, that is to say, the difference between the amount in which he is assessed to income tax under paragraph (a)

> above and the aggregate amount of any income tax deducted at source …
>
> but nothing in this subsection shall enable a self-assessment to show as repayable any income tax treated as deducted or paid by virtue of [*irrelevant provisions*]…"

By virtue of s 16(1)(a) SSCBA provisions as to assessment in the Income Tax Acts apply to Class 4 NIC with any necessary modifications, and TMA is part of the Income Tax Acts. We assume that the paragraph goes as far as to permit a self-assessment to include an assessment of the Class 4 contributions payable: HMRC plainly assume so as Class 4 contributions are included in the income tax returns to be made under s 8 TMA.

29. From s 9(1) TMA it is clear that the self-assessment is of the amount chargeable to income tax *and* of the amount payable by way of income tax, that being the same as the former amount less any "income tax deducted at source". That term is defined for s 9 in s 8(5) TMA:

> "In this section and sections 8A, 9 and 12AA of this Act, any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income."

30. HMRC also act on the assumption that the amounts deducted under s 61 FA 2004 fall within s 8(5) TMA. We proceed on the basis that they are correct and that the amounts so deducted can, in whole or in part depending on the circumstances, contribute to or constitute an amount repayable.

31. By using variations on the word "charge", s 50 TMA seems to be referring only to the first of the self-assessed amounts, that in s 9(1)(a) TMA. But to limit it to applying to that amount would be somewhat strange. It would mean that the Tribunal had no power to vary an amendment to a self-assessment where the sole point in issue was the amount of the income tax deducted etc and included in the part of the self-assessment described in s 9(1)(b) TMA. We considered whether the amount of tax deducted, treated as deducted or treated as paid in other cases might in fact never be in dispute, but quickly came to the conclusion that cannot be right. PAYE is an obvious example of cases where the correct amount of PAYE to be deducted can be in issue, for example where the employer fails to deduct the right amount of PAYE so that paragraph (b) of the definition of "tax treated as deducted" in regulation 185(6) of the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682) applies. And even in straightforward cases of basic rate deduction from annual interest etc there can be issues (see in this regard *Rebecca and Sarah Thomas v HMRC* [2014] UKFTT 980 (TC)).

32. However a consequence of this interpretation of "charge" as covering s 9(1)(b) TMA points is that there is no scope for saying that any amount is "charged" if the tax deducted at source exceeds the amount in which the person is chargeable to income tax. It seems to us irrelevant as far as s 50 is concerned that a self-assessment (including as amended) may show an amount repayable. Such an amount is given

effect to under s 59B TMA and that section is not justiciable before this Tribunal, whether it provides for an amount to be payable or repayable.

33. In this case there was no net amount of tax chargeable or payable on the original self-assessment and HMRC's amendments made under s 28A TMA did not alter that position. It seems to us then that the amount in which the appellant was charged by the amended self-assessment was nil. We have, on the basis of our findings in this case, decided that the amount in which the appellant ought to be charged was also nil. Accordingly in terms of s 50(6) TMA the assessment stands good (at nil).

34. HMRC obviously do not agree with this view, as they added to the appellant's Self Assessment Statement the difference between the repayment shown in the self-assessment and the amount in the calculations attached to their closure notice and have stated that that amount is payable, and carries interest until paid. That amounts it seems in their view to a closure notice taking effect (s 28A(3) TMA).

35. It is certainly true that s 59B(5) TMA provides for the treatment of an amount "payable" as a result of an amendment of a self-assessment under s 28A TMA, and it is such an amendment which we have in this case, but that subsection is, it seems to us, simply a way of ensuring that the correct due and payable date by reference to which interest or penalties may be charged is found, and is clearly intended to apply in the vast majority of cases where the s 28A TMA amendment increases the amount of the tax payable above that shown on the original self-assessment. But we have been unable to see anything in s 50 TMA or anywhere else to suggest that s 50(6) can apply where the amendment is of an amount repayable to a lesser such amount.

36. HMRC's stance on the matter is understandable, but they may have overlooked the fact that there is a provision of TMA under which they might have sought to bring the difference in the amounts repayable into charge, and that that section was, like many provisions of TMA amended for the purposes of self-assessment by FA 1994. That provision is section 30 TMA. Before self-assessment it had a sidenote saying "Recovery of tax repaid in consequence of fraud or negligence". After amendment by FA 1994 it merely says "Recovery of overpayment of tax, etc" (the "etc" is there because s 30 also allows for the recovery of overpaid repayment interest). Section 29(2) to (8) TMA is incorporated into s 30 so it became necessary for HMRC to show either that the overrepayment arose as a result of carelessness or deliberate conduct (that was the only ground – having regard to the change in terminology from fraud or negligence – on which it could be invoked before self-assessment), or (newly) that the "deficiency" was not disclosed to the officer in the case. Since in this case HMRC has sought a penalty under Schedule 24 FA 2007 for the errors in the appellant's return there would seem to be no obvious bar to a s 30 TMA assessment on the "careless" ground and even less of a bar to an assessment on the "disclosure of deficiency" ground. The amendments to s 30 in FA 1994 seem to have made with a view to ensuring that s 30 could operate in a wider range of cases than before, and this case seems tailor made for that section to operate.

37. We stress however that we are not deciding and indeed we have no power to decide whether HMRC can legitimately seek to recover the amount that they have

added to the appellant's self-assessment statement (which no doubt they will amend to show the lesser figure derived from our decision) without issuing an assessment under s 30 TMA.

38. Readers of this decision so far might legitimately be wondering why s 50(7A) TMA does not apply to allow us to give a decision on the amount of repayment due. The answer is to be found in s 62 FA 2004. The amount deducted is treated as income tax (and Class 4 NIC) paid on the relevant profits, that is the trading profits of the sub-contractor. Section 62 does not require a claim and does not involve an election so for that reason s 50(7A) TMA does not apply. This is also the reason why s 29(1)(c) TMA does not apply and why paragraph 8 Schedule 1A TMA could not apply if the deduction was notified to HMRC outside a return.

Decision

39. In accordance with s 50(6) and (7) TMA (including those subsections as applied by paragraph 8 Schedule 2 SSCBA) we consider that the appellant is neither overcharged nor undercharged by a self-assessment as amended by a s 28A closure notice, so the self-assessment charging the sum of nil stands good.

Further observations

40. When Mrs Oliver read out the legislation in s 62 FA 2004 to us in presenting her case we asked her if it was HMRC's case that the amounts deducted had to be paid to HMRC before they could be treated as income tax by the sub-contractor. This question arose because the legislation she read says:

> "a sum deducted under section 61 and paid to the Board is to be treated as being income tax paid in respect of the sub-contractor's relevant profits." [our emphasis]

41. We asked the question because it was evident to us that HMRC had no record of payments being made in respect of the appellant by Euco (the contractor whose deductions were questioned) or Dubicki (whose deductions were not questioned). She did not have a satisfactory answer to this point.

42. We have since discovered that HMRC have a policy of not insisting on payment over before allowing a set-off or repayment, especially in a case where the contractor is in liquidation. But there is a more practical objection to requiring payment to be made before the deduction is treated as income tax and Class 4 NICs paid. That is that the sub-contractor cannot know and has no means of finding out whether the contractor has paid the amounts deducted to HMRC. It is to us telling that there is no such requirement in PAYE: see for example regulation 185(5) and (6) of the Income Tax (Pay As You Earn) Regulations 2003 (SI 2003/2682). And we can see by looking at previous incarnations of s 62 FA 2004 that it was not always thus. Section 29 FA 1971, the original provisions, said:

> "… and the sum so deducted shall be paid to the Board *and* shall be treated for the purposes of income tax—
>
> (a) as not diminishing the payment; but

> (b) as being income tax paid in respect of the profits or gains of the trade, profession or vocation of the person for whose work the contractor makes the payment." [our emphasis]

43. This puts an obligation on the contractor to pay, and gives a right to the sub-contractor to treat as income tax, the sum deducted. We do not read it as linking the two or making the first a condition of the second.

44. This is also the way that s 559(4) Income and Corporation Taxes Act 1988 (consolidating s 29 FA 1971) reads. The change came about in s 62(2) FA 2004 itself. That act was not a consolidation act as such, but in this particular case there seems no reason for interpreting the subsection as making a change which imposes an impossible burden on the sub-contractor. The Explanatory Notes for Clause 62 in the Finance Bill of 2004 (which became s 62 FA 2004) do not mention any change and are worded consistently with the previous provisions.

45. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 22 FEBRUARY 2016