[2016] UKFTT 0728 (TC)

TC05457

Appeal number: TC/2015/03323

INCOME TAX, CAPITAL GAINS TAX, NATIONAL INSURANCE – whether to stay proceedings – whether penalties due and apply to national insurance contributions element

FIRST-TIER TRIBUNAL
TAX CHAMBER

STEPHEN ENGLAND **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS
AMANDA DARLEY

Sitting in Chambers following release of an earlier decision in principle on 8 September 2016

DECISION

1. On 8 September 2016, we released a decision on a number of issues that were treated as preliminary issues (the "Preliminary Decision"). Defined terms used in the Preliminary Decision have the same meaning in this decision. At [75] and [76] of the Preliminary Decision, we indicated that, based on the findings of fact we had made, we were minded simply to uphold assessments that HMRC had made in respect of income tax and Class 4 NIC. However, during the preliminary hearing, HMRC stated that they did not oppose the idea of a stay of these proceedings pending the resolution of a civil dispute between Mr England and Mr Jenner. We had reservations as to whether a stay would be the best course of action and we indicated that we would consider further submissions as to whether such a stay should be granted.

2. At [55] and [61] of the Preliminary Decision, we explained why we had concerns as to whether Class 4 NIC constituted "potential lost revenue" for the purposes of calculating penalties chargeable (under Schedule 41 of the Finance Act 2008) for a failure to comply with s7 of TMA 1970 and invited further submissions on this issue.

3. At the same time as releasing the Preliminary Decision, we made directions requesting submissions on the above two points. By letter dated 21 September 2016, HMRC made submissions. Mr England has not submitted any submissions within the time limit stipulated. We will, therefore, decide the two outstanding issues by reference to those submissions that we have received.

Whether to grant a stay

4. In their written submissions, HMRC opposed a further stay. In deciding whether to stay proceedings against HMRC's wishes, we will apply the approach set out in *Coast Telecom Limited v HMRC* [2012] UKFTT 307 (TC) where Judge Berner stated at paragraph 5:

> I start by reminding myself of the proper approach to be adopted in considering whether to grant a stay in the absence of agreement between the parties. Although neither party referred to it, I consider that the correct approach is to be derived from *Revenue and Customs Commissioners v RBS Deutschland Holdings GmbH* [2007] STC 814 where the Court of Session as the Court of Exchequer in Scotland held (at [22]) that a tribunal or court might sist, or stay, proceedings against the wish of a party if it considers that a decision in another court would be of material assistance (not necessarily determinative) in resolving issues before the tribunal or court in question, and that it is expedient to do so.

5. We are by no means satisfied that there will ever be a determination by a court of the dispute between Mr England and Mr Jenner that makes findings of fact that would enable this Tribunal to determine Mr England's tax liabilities. Given that Mr Jenner is bankrupt, there must be a real prospect that the dispute will not proceed to trial or will be settled in some way with one party agreeing to pay an undifferentiated net sum to the other (or even by the parties agreeing that no sum is payable). We therefore doubt whether the dispute will be determined by a court engaging in a forensic examination of the amounts that Mr Jenner and Mr England either owed each other, or paid each other, in connection with the Cars4All business of the kind that might shed a light on Mr England's tax liability arising in connection with that business. It follows that we

are not satisfied that there will be a decision that "will be of material assistance" to this Tribunal.

6. Nor are we satisfied that it would be "expedient" to stay proceedings. As we note at [70] of the Preliminary Decision, HMRC are seeking to assess Mr England on taxable income arising from all sources in circumstances where he has provided HMRC only limited information on his financial position. Of course, income from the Cars4All business is an element in that assessment. However, even if it were established that Mr England had not received the full amount he was owed in connection with the Cars4All business (so that a claim for bad debt relief could in principle be made), the Tribunal could only be satisfied that this should result in the assessments being reduced in the light of full information as to Mr England's income. For example, even if Mr England could establish that he had not received £100,000 that he was owed in connection with the Cars4All business, there would be no overall effect on his tax liability if he had an additional £100,000 of taxable income from another source that he had failed to declare. As we note in the Preliminary Decision, Mr England has to date been far from transparent in his dealings with HMRC. There is no reason to suppose that he would become more transparent if we stayed these proceedings.

7. For those reasons, we will not stay this appeal. It follows that, for reasons set out in the Preliminary Decision, the assessments summarised in paragraph 1 of that decision should stand.

Whether the penalties have been correctly calculated

8. The statutory provisions relevant to the penalties are set out in the Preliminary Decision and we will not repeat them here.

9. As we noted in the Preliminary Decision, we were initially troubled by the fact that the definition of "potential lost revenue" in Schedule 41 does not specifically include Class 4 NIC. We have not been referred to, nor have we been able ourselves to find any provision that specifically includes Class 4 NIC for these purposes.

10. In their written submissions, HMRC relied only on s16 of the Social Security (Contributions and Benefits) Act 1992 ("SSCBA") which is set out at [60] of the Preliminary Decision. As noted in the Preliminary Decision, our initial impression was that s16 could not apply as an aid to the construction of the definition of "potential lost revenue" contained in paragraph 7 of Schedule 41 as s16(1)(a) of SSCBA applies only for the purposes of provisions as to "assessment, collection, repayment and recovery" and Schedule 41 is not such a provision and relates, instead, to penalties. That impression was strengthened by the fact that s16(1)(b) refers to specific penalty provisions (in Part X of TMA 1970) and does not refer to penalty provisions in Schedule 41. Still further support appeared to come from the fact that there are other penalty provisions in which Parliament had taken care to spell out that NIC does count as "potential lost revenue" (see, for example paragraph 5(3) of Schedule 24 of Finance Act 2007). Therefore, the failure to make similar provision in Schedule 41 seemed consistent with a parliamentary intention that Class 4 NIC should not form part of "potential lost revenue" for the purposes of Schedule 41.

11. However, having reflected on the matter, we consider that the correct starting point is s7 TMA 1970. That is plainly a provision relating to "assessment, collection,

repayment or recovery". Therefore, by virtue of s16 of SSCBA, s7 of TMA 1970 applies in relation to Class 4 NICs as if those Class 4 NICs were income tax. Paragraph 7(2) of Schedule 41 then defines "potential lost revenue" as:

> So much of any income tax or capital gains tax to which P is liable in respect of the tax year as by reason of the failure [to comply with s7 of TMA 1970] is unpaid on 31 January in the following year.

12. Because Class 4 NIC count as income tax for the purposes of s7 of TMA 1970, it follows that Mr England had an obligation to notify HMRC of his liability to Class 4 NIC in just the same way as he had an obligation to notify them of his liability to income tax and capital gains tax. As we found in the Preliminary Decision, he did not do so. By reason of that failure, the Class 4 NIC (which is treated as income tax for the purposes of s7) remained unpaid. Under that construction, which focuses on s7 of TMA 1970 and the effect of Mr England's failure to comply with that provision, the unpaid Class 4 NIC would count as income tax and so be brought within the definition of "potential lost revenue" for the purposes of Schedule 41.

13. We recognise that the statutory words are somewhat unclear. However, Parliament has set out an intention that Class 4 NIC should count as income tax for the purposes of s7 of TMA 1970. It follows, in our view, that there is a clear reason why Class 4 NIC should count as income tax for the purposes of penalising a breach of s7 of TMA 1970. We have therefore concluded that HMRC were correct to include Class 4 NIC within "potential lost revenue" for the purposes of the penalties they have charged Mr England. When put together with the conclusions we reached in the Preliminary Decision, our overall conclusion is that the penalties as charged should stand.

Conclusion

14. As between this decision and the Preliminary Decision, we have now determined all aspects of Mr England's appeal. That appeal is, accordingly, dismissed in its entirety.

15. This document contains full findings of fact and reasons for the decisions we have made (which are in addition to the decisions contained in the Preliminary Decision). Any party dissatisfied with a decisions recorded in this document 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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 27 OCTOBER 2016