[2017] UKFTT 0527 (TC)

TC05976

Appeal number: TC/2016/02585

Income tax – section 222 Income Tax (Earnings and Pensions) Act 2003 – did the appellant make good his employer within 90 days? – held: no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PHILIP DEEKS **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS ("HMRC") **Respondents**

TRIBUNAL: JUDGE ZACHARY CITRON
JOHN CHERRY

Sitting in public at Fox Court, London on 1 March 2017

The Appellant in person

Mr Neil Nagle, Officer of HMRC, for the Respondents

DECISION

1. The appellant was awarded shares in his employer company, initially subject to restrictions. When the restrictions were lifted, the relevant tax legislation deemed the appellant's employer to have made a notional payment of employment income and required the employer to account for tax (PAYE) on this notional payment. The payment of such tax by the employer was deemed by the relevant tax legislation to be a taxable benefit for the appellant unless, within 90 days, he made good his employer for this sum. The appellant made payment of this sum to his employer; this issue in the case was whether he had done so within the 90 day time limit.

The appeal

2. On 7 July 2015 HMRC issued a closure notice under s28A(1) and (2) Taxes Management Act 1970 in respect of the appellant's income tax return for the 2008-09 tax year, charging additional tax of £9,201.60. The additional tax arose due to an additional £23,004 being included in the tax computation under the heading "benefits and expenses received".

3. The appellant appealed; he accepted HMRC's offer of a statutory review; the review concluded in a letter from HMRC dated 8 April 2016 upholding the original decision.

4. The appellant appealed to the tribunal by notice of appeal dated 6 May 2016.

Evidence

5. We had a document bundle containing copies of correspondence between the parties. The appellant gave oral evidence at the hearing and also produced a written "statement of case". We had a signed witness statement from Ms Emma Siddons, the appellant's wife, although Ms Siddons did not attend the hearing.

6. Evidence contained in the correspondence included:

(1) A letter from the appellant's employer, National Australia Bank Ltd ("NAB"), to the appellant, dated 20 November 2008, stating that certain restrictions attaching to shares he had been awarded, had been lifted.

(2) The appellant's letter to HMRC of 21 February 2014, in which he said: "This payment [on his P11D for 2008-09] relates to an amount of tax of £23,004 which my employer DID unilaterally and mistakenly pay on my behalf during the year ended 5 April 2009, however I had immediately rectified the situation by giving a cheque to my employer for £23,575.15 before the year end on 26 March 2009." The letter enclosed a copy of a single-page bank statement

covering the period 16-30 March 2009. This showed £23,579.15 being paid out from the appellant's bank account on 26 March 2009 in respect of cheque 200092 (the "Cheque"). The opening balance on the page was £12,838.82. The balance on the account immediately after the Cheque was cashed was £8,719.62. Two amounts were paid in to the account prior to the Cheque being cashed: £16,300 on 16 March 2009 as an "internal transfer" from another account at the same bank; and £8,826.49 on 20 March 2009 "from sole account Deeks PJ".

(3) NAB's letter to HMRC of 29 August 2014, enclosing a form P11D for the 2008-09 tax year for the appellant as an employee of NAB, showing £23,004 as "tax on notional payments not borne by the employee within 90 days of receipt of each notional payment".

(4) The appellant's letter to HMRC of 12 December 2014, which included the following:

> "I have to admit that I am quite surprised by HMRC's stance on this. I agree that I was chargeable to tax on the shares – my employer paid the tax directly to HMRC, then I reimbursed my employer, all before the relevant fiscal year end. I was never told by my employer that there was a 90 day time limit for the reimbursement to them. I can now see from what you have sent me that such a time limit exists in certain circumstances.
>
> I do not know as a matter of fact whether I settled this amount within 90 days. I know that I received a letter on 20 November 2008 telling me to (sic) about the tax liability of £23,004. The letter does not mention any risk of further tax penalty, nor does it mention section 222 or any 90 day time limit. In fact it was accepted at the time that £23,004 was a lot of money to find in 30 days (as required by the letter of 20 November 2008), particularly as this (sic) shares were not sold and so did not realise money to pay this tax; I recall a verbal arrangement with the tax manager at the time where we agreed that I would settle the tax liability before the year-end on 5 April 2009. I can see from my own bank records that the cheque was debited from my bank account on 26 March 2009, but I do not recall on what date I presented my cheque to my employer (I may have presented it before 18 February 2009, being the date required by section 222; I do not recall)."

(5) NAB's letter to HMRC of 1 April 2015. This stated: "Unfortunately we do not hold evidence of when [the appellant's] cheque was received, however cheques are usually banked within 48 hours."

(6) The appellant's letter to HMRC of 20 August 2015, which included the following:

> "I do not know as a matter of fact whether I settled this amount within the requisite 90 days. You have kindly provided me with a letter dated 20 November 2008 telling me to [sic] about the tax liability of £23,004 that I should pay to my employer. An appendix explains that I may be due to pay tax on this £23,004 if I do not pay within a 90 day period. I recall a verbal agreement with the tax manager at the time … where we agreed that I would settle the tax liability before the year-end on 5 April 2009. I can see from my own bank records that the cheque was debited from my bank account on 26 March 2009, but I do not recall on what date I presented the cheque to my employer. I may have presented

it before 18 February 2009, being the date required by section 222; I do not recall. Equally I was not given a receipt or similar by my employer …"

7. Ms Siddons' witness statement said this:

"I recall when Philip was asked to pay the tax due on the "Above Target Shares" in November 2008. Philip and I were having some garden work done at the time, and there was much discussion between myself and him about how we would find the money to pay the tax. The garden work finished before Christmas 2008, and then I recall Philip writing the cheque for the tax in the new year of 2009."

8. In the grounds for appeal in his notice of appeal, the appellant asserted that he gave the Cheque to his employer "before the 90 day deadline". At the hearing, the appellant told us that he gave the Cheque to his employer "on time". He said he could remember handing over the Cheque. He said there was no reason for him to have waited until 26 March 2009 to give the Cheque to his employer. He said he "would have known" that the Cheque was due within 90 days; and that he "could not believe [he] would have left it so late" to make the reimbursement payment. He said he had been paid a bonus at the end of 2008 and that enabled him to make the payment. He did not produce cheque book stubs or evidence of the dates of which other cheques of his with numbers close to 200092 were encashed.

Findings of fact

9. On 20 November 2007, whilst the appellant was employed by NAB, he was awarded 6,924 NAB shares as part of his employer's "Above Target Share Award". Those shares were initially subject to certain restrictions (the shares could not be sold); those restrictions ended on 20 November 2008. The value of the shares at the end of the restriction period was AUD 133,094.50, which translated to £57,510.13.

10. NAB's letter to the appellant of 20 November 2008, informing him of the lifting of the restrictions, said that the appellant now had to pay his tax and NIC liability to NAB by 20 December 2008, and said this could be done either via payroll or by cheque. The appendix to the letter indicated that the "tax now payable at 40%" was £23,004.05; the "NI now payable at 1%" was £575.10; such that the "total liability now payable" was £23,579.15.

11. The appellant wrote the Cheque in favour of his employer and in the amount of £23,579.15. He hand-delivered the Cheque to a member of NAB's tax department. The Cheque was cashed on 26 March 2009. When exactly the appellant gave his employer the Cheque is the question of fact on which this appeal turns, and is considered in our discussion below.

The law

Statutory references in what follows are to the Income Tax (Earnings and Pensions) Act 2003

12. Section 222 (Payments by employer on account of tax where deduction not possible) falls within chapter 12 (Other Amounts Treated as Earnings) of Part 3

(Employment Income: Earnings and Benefits etc Treated as Earnings). The section applies if three conditions are met (s222(1)(a) to (c).

13. The first condition (s122(1)(a)) is that an employer is a treated by virtue of certain other sections in Part 11 (PAYE) as having made a payment of income of an employee (called the "notional payment").

(1) Those other sections include s698 (PAYE: special charges on employment-related securities). Section 698 falls within Chapter 4 (PAYE: special types of income) of Part 11.

(2) Section 698 applies where, by reason of the operation of certain other sections in Part 7 (Employment income: income and exemptions relating to securities) – including s426 (Chargeable events in relation to restricted securities and restricted interests in securities) - in relation to employment-related securities, an amount counts as employment income of an employee.

(3) Section 426 falls within Chapter 2 (Restricted securities) of Part 7. It provides that if a chargeable event occurs in relation to employment-related securities, the taxable amount counts as employment income of the employee for the relevant tax year. "Chargeable events", under s427, include the employment-related securities ceasing to be restricted securities, in circumstances in which an associated person is beneficially entitled to the employment-related securities after the event. "Associated persons" include the person who acquired the employment-related securities on the acquisition, and the employee (s421C).

(4) Section 698 provides that certain other sections of Part 11 (including s684, authorising the making of PAYE regulations) shall have effect as if the employee were provided with PAYE income in the form of the employment-related securities by the employer on the relevant date (meaning the date on which the chargeable event occurs, where s426 is in point).

14. The second condition (s122(1)(b)) is that the employer is required by virtue of s710(4) to account to HMRC for an amount of income tax (called the "due amount") in respect of the notional payment.

(1) Section 710 (Notional payments: accounting for tax) is within Chapter 6 (Miscellaneous and supplemental) of Part 11.

(2) Sub-section 710(1) provides that if an employer makes a notional payment of PAYE income of an employee, the employer must, subject to and in accordance with the PAYE regulations, deduct income tax at the relevant time from any payment or payments the employer actually makes of, or on account of, PAYE income of the employee. "Notional payment" here means a payment treated as made by virtue of certain sections, including s698 (s710(2)(a)).

(3) Under s710(3), s710(4) applies if, because the payments actually made are insufficient for the purpose, the employer is unable to deduct the full amount of the income tax as required by s710(1).

(4) Sub-section 710(4) then requires the employer, subject to and in accordance with PAYE regulations, to account to HMRC for an amount of income tax equal to the amount of income tax the employer is required, but is unable, to deduct.

15. The third condition (s122(1)(c)) is that the employee does not, before end of the period of 90 days beginning with the relevant date, make good the due amount to the employer.

(1) The "relevant date" is the date on which the employer is treated as making the notional payment.

(2) A notional payment under s698(1)(a) – which applies by reason of the operation of s426 – takes place on the "relevant date" for the purposes of s698, which, in relation to an amount counting as employment income under s426, is the date on which the "chargeable event" in question occurs (s698(6)(a)).

16. This third condition was amended by Finance Act 2014 in relation to payments of income treated as made on or after 6 April 2014 so that the 90 day period starts at the end of the tax year in which the relevant date falls. Apart from this change, the provisions of s222 summarised here remain in effect.

17. The effect of s222 is that the due amount is to be treated as earnings from the employment for the tax year in which the date on which the employer is treated is making the notional payment falls (s222(2) and (4)(b)).

18. In *Chilcott and Others v HMRC* [2011] STC 456, the Court of Appeal considered the predecessor legislation to s222 (s144A Income and Corporation Taxes Act 1988 – the only relevant difference was that s144A had a 30 day limit rather than 90 days as found in s222). The court found that the statutory provision was clear and unambiguous in its terms and said it was understandable why there should be such a provision. Lord Neuberger MR (as he then was) said (at [31-32]):

> "Section 144A of the Taxes Act is … clear in its terms and has the meaning for which the Revenue contends, as the Special Commissioner and Proudman J held. It is true that its meaning could at least in some circumstances be regarded as penal, as it applies even if 'the due amount' is 'made good' on the thirty-first day, but that does not enable this court to rewrite such a clear statutory provision. The fact that some might regard the operation of s144A, according to its terms, as penal merely emphasises that the court should construe it with care and if there is a narrower construction less beneficial to the Revenue, but more beneficial to the taxpayer, available then the court should at least seriously consider it and, if appropriate, adopt it.
>
> The fact that there is a time limit, as there is in sections of many Acts, merely carries with it the inevitable consequence that if an event occurs just before the time limit expires, it will produce a different result (sometimes a radically different result) from that which applies if the event happens just after the time limit expired. Neither of these two points, taken on their own or together, entitles this court to rewrite what is, and as is accepted by the appellant, to be a clearly drafted provision."

19. In *Manning* [2013] UKFTT 252 (TC) the tribunal cited Lord Neuberger's words as quoted above and found, on a careful reading of the rules of a securities options

scheme operated by the employer in question, that "the date on which the employer is treated as making the notional payment" (which starts the 90 day clock running under s222) was not, under the legislation relevant to that case, the date when the taxpayer in that case purported to exercise his options, but rather, the date his employer informed him of the details of PAYE tax due on exercise of his options. Consequently, on the facts of that case, the taxpayer had "made good the amount due" to his employer well within 90 days of the latter date – and so his appeal was allowed.

Appellant's arguments

20. In the grounds for appeal in his notice of appeal, the appellant acknowledged that he was unable to produce documentary evidence (such as a receipt) of when he gave the Cheque to his employer. However, he asserted that HMRC had not considered how long the Cheque "may have 'sat' with [his] employer's tax department or its HR department before being passed to whomever was responsible for banking the cheque". He stated that his employer did not have good administrative procedure and did not act in a timely fashion (and illustrated this by the time taken by NAB to respond to enquiries made of it by HMRC as part of its enquiries into the appellant's 2008-09 tax return). He pointed out that his employer provided no evidence of when it received the Cheque. The appellant asserted that he, by contrast, did have good administrative procedure and acted in a timely fashion (and again illustrated this by the time he took to respond to HMRC's enquiries). He said that HMRC have no documentary evidence that he gave the Cheque to his employer after the 90 day deadline. He said that it could not be right that his assertion that he refunded his employer in good time is not taken at face value and is outweighed by a general statement by his employer (that cheques were usually banked within 48 hours).

21. At the hearing, the appellant contended that the law was being used in a way it was not intended. This was effectively "tax on tax" and the only basis of its being charged was a form P11D which he contended was inaccurate. He said there was no evidence that the Cheque was given to NAB after 18 February 2009. The appellant further said that it was an unfair presumption that his then employer was orderly in its affairs, but he was not orderly in his affairs.

HMRC's arguments

22. HMRC submitted that the 90 day period under s222 commenced in this case on 20 November 2008 and ended on 18 February 2009. Reimbursement to the appellant's employer of the tax and national insurance should therefore have been made by 18 February 2009 to avoid a charge under s222.

23. On the contested questions of fact, HMRC contended that:

(1) It is more than likely that the Cheque was banked within 48 hours of it being presented to NAB; and

(2) the appellant made an arrangement with the tax manager of NAB to make the payment before the end of the tax year

24. Thus, HMRC contended that the appellant did not reimburse his then employer within the 90 day time period.

25. HMRC submitted that the tribunal has no jurisdiction over whether the legislation and HMRC's enforcement of it was unfair: such unfairness would be a matter for judicial review and so outside the remit of the tribunal: they cited the tribunal's decision in *Manning* at [14]:

> "We, in common with Lord Neuberger MR (as he then was) in *Chilcott* … acknowledge of the effect of s222 that 'in some circumstances its meaning could at least … be regarded as penal …'. That does not, however, enable us to rewrite the statutory provision. Nor do we have authority to 'judicially review' the manner in which HMRC have exercised their powers to assess …"

Discussion

26. This case concerns the application of s222, a provision whose predecessor was subject to judicial scrutiny in *Chilcott*, where the Court of Appeal decided that the clear and unambiguous terms of the statute must be given effect. This was so even in a case where (as here) there was no association with tax avoidance and the employee did "make good" the "due amount" to the employer, albeit that he did so a relatively short time after expiry of the deadline set in statute (30 days under the law as it was in *Chilcott*; 90 days under the law as it was at the relevant time for this appeal). In such cases it appears that the employee is being charged to tax on a "benefit" of employment that ceased to exist once the taxpayer had "made good" the "due amount" to the employer. It was to such cases that Lord Neuberger was referring when he said that s122 could be regarded as penal – and, accordingly, that care must be taken in construing it and serious consideration given to (and, if appropriate, adoption of) any available narrower construction of the section that is less beneficial to HMRC.

27. There was no argument in the papers or at the hearing as to the application of what we summarised above as the first two conditions necessary for s222 to apply (subsections 222(1)(a) and (b)) – both parties presented their cases on the basis that these two conditions were satisfied. On the evidence before us, that appears to be correct: the shares in question were employment-related, restricted securities, and the restrictions were lifted on 20 November 2008. NAB is treated by virtue of s698 as having made a "notional payment" (of the value of the shares - £57,510) to the appellant. The first condition is therefore satisfied. NAB was unable to deduct PAYE tax from that notional payment because no payment was actually made. NAB was therefore required under s710(4) to account to HMRC for an amount of income tax equal to the amount of income tax it was required, but was unable, to deduct (being £23,004). The second condition is thus also satisfied.

28. This appeal therefore turns on whether the third of the conditions in s222 (s222(1)(c)) is satisfied – did the appellant "make good" the "due amount" (£23,004) to his employer, within 90 days of the shares becoming unrestricted on 20 November

2008 (therefore, by 18 February 2009). The appellant had clearly made good that amount to NAB by 26 March 2009, the date on which the Cheque was cashed. The question is whether he had given the Cheque to NAB by 18 February 2009.

29. We now turn to the question of the burden of proof in this appeal. The burden of proof in tax appeals is normally on the appellant. There is an exception to this general rule in appeals against tax penalties: in such appeals, the burden of proof lies with HMRC. This appeal is not of course a tax penalty appeal as such; but because s222 could be regarded as penal, we have considered whether the normal rule in tax appeals – that the burden of proof lies with the appellant – should be displaced in this appeal.

30. The tribunal recently considered the rationale behind these rules as to the burden of proof in tax appeals: in *Hilden Park LLP v HMRC* [2017] UKFTT 217 (TC), Judge Mosedale said (at [54]):

> "The normal rule in common law is that the burden of proof is on the person who makes the allegation. It might be thought, therefore, that because HMRC raise assessments, they are making the allegation of tax liability and should bear the burden of proof, but it is well established and beyond dispute that in appeals concerning liability to tax (such as appeals against assessments or refusals to repay tax) that common law rule is displaced and the burden of proof ordinarily lies on the appellant taxpayer, who alleges that he is not liable to the assessment. There are many statements of this principle …"

31. Judge Mosedale cited a number of authorities, including *Grunwick Processing Laboratories Ltd* [1987] STC 357, where the Court of Appeal said (at 360)

> "Before us counsel for the taxpayer company accepted (as was accepted below) that the burden of proof rested on the taxpayer company, in the sense that the taxpayer company had to show that the assessment was wrong… At no time do the commissioners have any burden to prove anything before the tribunal. Neither its case nor any aspect of the matter, factually or evidentially, carries any burden imposed on the commissioners. It is throughout, in my judgment, up to the taxpayer company, if it can, to attack the assessment in whole or in part…."

32. At [58], Judge Mosedale concluded that "fundamentally, the reason that the burden is on the appellant to disprove the assessment is because the appellant exclusively has control of the evidence. The tax system could not function effectively if HMRC had to prove assessments as the taxpayer could simply lose the necessary evidence of liability."

33. Turning to the exception for penalty appeals, Judge Mosedale said this at [60-63]:

> "60. It is well established that penalties are not like assessments: the burden of proof lies on HMRC. The reason for this rule is not that the allegation involves criminal conduct. While penalties are imposed for dishonest behaviour, they are also imposed for careless behaviour, which is not criminal. Indeed, liability to a penalty may not

depend on any particular state of mind at all: many tax penalties are imposed merely because a taxpayer does something late.

61. It seems to me that the reason for the rule is that, because penalties are penalties, and not (alleged) liability to tax, the normal common law on burden of proof that the person who makes the allegation must prove it, is not displaced.

62. So this is not really an exception: it is just that penalties do not involve tax liability and so the rule explained in *Grunwick* does not apply. The rule in *Grunwick* was established, in my view, for the practical reason that the taxpayer exclusively controls the evidence of his own tax liability: but that is not really true where penalties are concerned, where HMRC ought to have the information necessary to know whether there has been, for example, a late payment of tax. Therefore, there was no need so far as penalties are concerned for the *Grunwick* exception to the normal rule that he who makes the allegation must prove it.

63. And as with the 'normal' rule, the appellant has the burden to prove any potentially applicable defence, such as a reasonable excuse for the default."

34. We (respectfully) agree with Judge Mosedale's analysis cited above. Applying it to s222, it is clear that the provision imposes a liability to tax (by treating the "due amount" as earnings from employment) rather than a penalty; and that the information relevant to the liability is held by the taxpayer rather than by HMRC. In particular, the third condition of s222, which imposes the time limit and gives rise to what could be seen as a penal effect, relates to an interaction between the taxpayer and his employer, to which HMRC is not party – whereas a tax penalty will invariably arise as a result of an interaction between the taxpayer and HMRC (such as an inaccurate, or late, tax return). The burden of proof in this appeal should therefore lie, as it normally does in tax appeals, with the taxpayer.

35. We have also considered whether article 6(2) of the European Convention on Human Rights (made effective in domestic law by the Human Rights Act 1998), which provides that "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law," is relevant here (as it can have implications for the burden of proof). The Upper Tribunal recently set out the basic principles as to the application of Article 6 thus in *Personal Representative of Michael Wood v HMRC* [2016] UKUT 346 (TCC) at [25-28]:

25. It is well-established that the assessment of tax and the imposition of surcharges fall outside the scope of Article 6 under its civil head as these matters fall outside the scope of civil rights and obligations: see the judgment of the European Court of Human Rights ("ECtHR") in *Ferrazzini v Italy* (Application 44759/98) [2001] STC 1314 at [20] to [29]. This was affirmed in the domestic sphere recently by the Court of Appeal in *R (APVCO 19) v HMRC* [2015] STC 2272 at [68].

26. However, it is also well-established by a number of cases in the ECtHR that tax penalties can, depending on the circumstances, come within the concept of a "criminal charge" for the purposes of Article 6.

27. The principles to determine whether that is so in any particular case were succinctly summarised in the ECtHR in its judgment in *AP and others v Switzerland* (Application 19958/92) [1997] ECHR 19958/92 at [39] as follows:

> 'The Court reiterates that the concept of "criminal charge" within the meaning of Article 6 is an autonomous one. In earlier case-law the Court has established that there are three criteria to be taken into account when it is being decided whether a person was "charged with a criminal offence" for the purposes of Article 6. These are the classification of the offence under national law, the nature of the offence and the nature and degree of severity of the penalty that the person concerned risked incurring…'
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> 28. These criteria are commonly referred to as the "*Engel* criteria" after the ECtHR judgment in *Engel v Netherlands* [1976] 1 EHRR 647…"

36. In this case, as in *Wood*, the provision in question was civil rather than criminal under national law and so the first criterion was not met. At [58], the Upper Tribunal in *Wood* stated what it regarded the essence of the second and third criteria:

> "In our view the authorities demonstrate that it is the character or nature of the legislative provision that is said to be of a penal nature, which is the key determining factor. The key issue is whether the provision can be regarded as imposing a punishment to deter offending by those to whom it is directed."

37. Whilst the Court of Appeal in *Chilcott* observed that the operation of s222 could be penal, we think this is quite different from saying that it imposes a "punishment to deter offending." The "penal" aspect of s222 is the heavy financial consequences it imposes on the taxpayer who does not "make good" his employer (for the PAYE tax the employer is required to pay to HMRC) within 90 days. It does not, however, necessarily follow from this that the character or nature of s 222 is to punish an offence: first, the legislation does not positively require the taxpayer to "make good" his employer (so it is difficult to say it is an "offence" not to do so); and, second (and related), "making good" the employer is not an obligation of the citizen to the state (so that, again, it is difficult to say that failure to do so is an "offence"). A tax penalty is clearly distinguishable from s222 on both these grounds: it is imposed a result of the failure of a citizen (the taxpayer) to satisfy an obligation owed by him to the state (HMRC). In our view, therefore, s222 is not a "criminal charge" and so article 6 – which may require the burden of proof to fall on HMRC – is not engaged.

38. The implication of our finding that the burden of proof is on the appellant in this case is that his appeal fails unless the evidence before the tribunal is sufficient to persuade us, on the balance of probabilities, that the appellant gave the Cheque to NAB by 18 February 2009.

39. We had no documentary evidence that the appellant gave the Cheque to NAB by that date; and we find that the appellant himself could not remember when he gave the Cheque to NAB - he stated as much twice in letters to HMRC, of 12 December 2014 and 20 August 2015. In his grounds of appeal, the appellant made the bolder statement that he did deliver the Cheque before 18 February 2009, but our assessment of his oral evidence is that his statements in his letters to HMRC were more accurate and thus that he had no distinct memory of the date.

40. The appellant's wife, Ms Siddons, stated in her witness statement that she recalled the appellant writing a cheque "in the new year of 2009" – which hints, but does not quite state, that he gave the Cheque to his employer prior to 18 February 2009. We cannot place any material weight on this statement, given its lack of precision and the fact that Ms Siddons was not present at the hearing to be cross-examined on it.

41. We thus find the evidence insufficient to persuade us on the balance of probabilities that the appellant gave the Cheque to NAB by 18 February 2009. This means the third condition in s222 is satisfied and so the appeal fails.

42. We have gone on to consider the position if, contrary to our view of the law as to the burden of proof, the burden of proof lay on HMRC. This would mean that the appeal succeeds unless the evidence before the tribunal is sufficient to persuade us, on the balance of probabilities, that the appellant gave the Cheque to NAB some time after 18 February 2009.

43. The relevant evidence here includes:

(1) The fact that the Cheque was cashed on 26 March 2009;

(2) NAB's statement in a letter to HMRC that it usually cashed cheques within 48 hours;

(3) the transfers of £16,300 and £8,826.49 into the appellant's bank account on 16 and 20 March 2009, coupled with the fact that the balance on the appellant's account after encashment of the Cheque on 26 March 2009 was £8,719.62;

(4) the appellant's statements in letters to HMRC that he had a verbal arrangement with the tax director at NAB to make the reimbursement payment before the tax year end (5 April 2009);

(5) the appellant's and Ms Siddons' statements that NAB's administration was imperfect; and

(6) the appellant and Ms Siddons's statements that the amount of the Cheque was significant in relation to the appellant's ordinary cash flow.

44. We find that there is a connection between the significant amounts of money paid in to the appellant's bank account 10 and 6 days (respectively) before the Cheque was cashed, and the cashing of the Cheque. We also find that, without these cash movements, the balance on the appellant's account was insufficient to cover the Cheque; and that the amount of the Cheque was such that the taxpayer needed to plan his finances with some care to ensure he had enough money in the bank to pay it. It is on the basis of these facts that we find, on the balance of probabilities, that the Cheque was given to NAB some time after 16 March 2009 (when the first cash movement was made in to the appellant's bank account). In coming to this view, we have put no weight on the evidence regarding the efficiency of NAB's administration (because the evidence was insufficiently linked to the cashing of the Cheque); we have also put little weight on the appellant's verbal arrangement with the NAB tax

manager to make the payment before 5 April 2009 (because it does not speak to the question of whether the Cheque was given to NAB after 18 February 2009) and on the statement in NAB's letter that cheques were usually cashed within 48 hours (as no-one was present from NAB to be cross-examined on this very general statement).

45. This means that, even if, contrary to our findings on the law, the burden of proof were on HMRC, we would still find that the third condition of s222 is satisfied and so the appeal would again fail.

Conclusion

46. The appeal is dismissed.

47. 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.

ZACHARY CITRON
TRIBUNAL JUDGE

RELEASE DATE: 27 JUNE 2017