TC03946

Appeal number: TC/2012/10877

TYPE OF TAX – keywords - Income tax - Re-computation of income for a four-year period - Whether and when adjustments could be made - whether Appellant was an independent contractor, an employee or whether his company was rendering services to contractors, with the Appellant receiving director's fees out of the profits - Appeal dismissed on two issues and allowed, with HMRC's agreement, on a third issue

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN PARTRIDGE **Appellant**

- and -

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

TRIBUNAL: JUDGE HOWARD NOWLAN
MR NIGEL COLLARD

Sitting in public at Eastbrook, Shaftesbury Road in Cambridge on 30 July 2014

The Appellant in person, assisted by Michael Partridge, the Appellant's brother

Martin Foster and Ivan Allen on behalf of the Respondents instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This was an involved case, though we eventually concluded that we could reach our Decision by addressing three distinct points. Whilst the confusion and complication is now of less central concern, in order to explain the background and the context, we should give the following short summary. In this, where relevant, we will refer to evidence given on oath by the Appellant and Mrs. L. Maggs, Compliance Higher Officer of HMRC.

2. The Appellant came to the UK from South Africa at some time prior to 2006. It seems that his brother who assisted him in the hearing, Michael Partridge, already lived in the UK. The Appellant said that he had worked in the past in Johannesburg in the security industry, either marketing security systems or supervising and administering their installation.

3. When he arrived in the UK he sought work in the same industry. We will mention some of the detail below but, in short, he had engagements with four or five different companies in the period from February 2006 to June 2010, the first certainly being in the house security industry, the second as a marketing consultant or field representative for a bedding company, and the last two being as a marketing consultant or designer for kitchen supply companies. Such engagements are of the type where "field representatives" can commonly either be employees, or independent contractors, and it is also relatively common for people to perform such services through special purpose companies, then receiving director's fees out of, or out of some of, the company profits. Depending on a proper analysis of the facts, the particular engagement structure will govern whether the ultimate "employer" should deduct tax and account for the appropriate NIC contributions in respect of the individual when he is strictly an employee, or whether the worker is an independent contractor such that he is responsible for his own tax and NIC contributions. The two different structures also affect the deductions for expenses that can be claimed for tax purposes. Further complication (most of which was not raised in this Appeal) can arise when the services are indirectly provided, via a special purpose services company.

4. The confusion in this case stemmed largely from the fact that the Appellant was understandably unaware of most of the relevant tax points when he arrived in the UK. There was also great confusion as to how receipts and payments had all been booked and, although he filed a tax return for the year 2006/07 on 26 February 2008, he later sought to rationalise matters and to sort out his treatment for a much longer period by filing, on 1 September 2010, a return for a four-year period to 5 April 2010.. In this return, *inter alia*, he was seeking to recover tax allegedly wrongly paid in 2006/2007. During this four-year period all three structural ways of rendering services that we mentioned in the previous paragraph had been adopted at one time or another, the use of a company allegedly being based on advice, claimed in the hearing to have been ignorant and bad advice, that he should not have followed. In the four-year period, there were several occasions when it was simply not clear which structure was meant to apply, which structure did apply, and even whether the trading activity had or had not still been conducted by the company that we will mention below.

5. Having perhaps created a picture of some confusion, we will now address the three relatively self-contained points that were principally in dispute.

The claim to a repayment of tax allegedly suffered in the period 2006/07

6. The claim for the repayment of tax related to the circumstances of the first engagement entered into on 1 February 2006 with a security company called Wolvin Fire & Security ("Wolvin"). We were shown the initial contract for this role, and it was clear, and not disputed by the Appellant, that he was initially engaged as an employee, with a basic salary of £3,000 "net" a month, and with various other benefits. Something went wrong with this engagement because the Appellant said that he was never paid the amounts that were owing to him by Wolvin. Notwithstanding this, he still seemed to work (indeed after just one month, with the changed role commencing on 1 March 2006) on a perhaps more casual basis for the same organisation, whereupon he claimed that he had become an independent contractor, rather than an employee. The Appellant said, however, that there was no discussion with either Wolvin or the company Aine Ltd, which somehow became involved at this point, so that there was no evidence that Wolvin agreed to any change in status. We were shown various invoices that he rendered against Aine Ltd in the period between March and September 2006, although HMRC did not accept that these were genuine invoices rendered at the time. Aine Limuited was based at the same address as Wolvin, though the Appellant had no knowledge to support HMRC's claim that they were associated companies. Although he worked in this manner until 30 September 2006, claiming that he was now an independent consultant, and although he invoiced Aine Ltd for approximately £13,000 for his services, on invoices that described him as an independent contractor, but simultaneously asserted that Aine Ltd was responsible for deducting tax and paying NIC contributions, we were told that he only received a fraction of the amounts claimed and invoiced. He received those payment from Aine Ltd and not from Wolvin.

7. In due course, the Appellant brought proceedings in the Employment Tribunal for £18,000 said to be owed by Wolvin; Wolvin failed to appear at the hearing; judgment was given in favour of the Appellant, but the Appellant never received any part of the claimed £18,000.

8. The Appellant's accountant then produced what purported to be a pay-slip from Wolvin, showing pay of £18,000 and tax deducted of £5,400. The Appellant was not claiming that this was a genuine pay-slip produced by, or even known to exist by, Wolvin. It is simply something that the accountant had typed out.

9. It was these facts that gave rise to the claim made by the Appellant to a repayment of tax in the four-year composite return that he filed in 2010, and it was this claim that was the subject of the first dispute between the parties.

10. The ground on which the Respondents refused the repayment of tax was that the Appellant had failed to amend his 2006/2007 tax return within the one-year period given for amending the return, and he had failed to make a claim for overpayment relief under Schedule 1AB Taxes Management Act 1970 within the four-year period for the making of such a claim. The Respondents conceded that his composite return had been made within the four-year period but they contended that paragraph 3(4) of Schedule 1AB precluded a claim for recovery of wrongly paid tax being made by an entry in another return as distinct from a separate claim.

11. We accept that the Respondents' contention is correct, albeit that the Appellant was naturally very indignant that he had made his claim (albeit possibly in the wrong form) within the four-year time period for overpayment relief claims being made, and HMRC had not indicated that there was simply a procedural error in the way in which the claim was made.

12. While we do not dispute HMRC's timing point and procedural point referred to in paragraph 10 above, there appear to be other sounder bases on which the claim for a tax repayment was rightly rejected by HMRC, even though they did not mention the further points that we will now address.

13. The claim, as made, was for a repayment of tax, namely the tax referred to in the document mentioned in paragraph 8 above which was produced by the Appellant's accountant. There was, in fact, no evidence that Wolvin had actually deducted any tax or accounted to HMRC for any tax, and in view of the fact that it had failed to pay any of the salary that it was said to owe the Appellant, and that it had failed to satisfy the judgment against it in respect of the £18,000 referred to in paragraph 7 above, it seems distinctly improbable that Wolvin would have accounted to HMRC for any tax in respect of salary owed to the Appellant. The amounts paid by Aine Limited were also said to be very modest amounts, not approaching the amounts for which the Appellant had invoiced Aine Limited, and there was certainly no ground for supposing that the Appellant's accountant had been referring to tax deducted by Aine Limited when he fabricated the payment slip. As we have already said, the fake payment slip showed salary of £18,000, and tax of £5,400, and those figures bear no relationship to the allegedly small amounts paid by Aine Limited.

14. We accordingly conclude that any claim for a repayment of tax for the year 2006/07 was not a proper claim since there was no evidence at all that any tax had been paid or suffered. The very opening words of paragraph 1 of Schedule 1AB make it clear that the adjustments dealt with by the Schedule are simply claims for the repayment of tax wrongly paid, or claims that demands for tax are themselves erroneous such that the claims should be discharged.

15. In the interests of enabling the Appellant to see that we were not seeking to disregard the unfortunate circumstances in early- and mid-2006 when he seemed to have incurred very considerable expenditure (some of it almost certainly not being deductible for tax purposes) without receiving the income that was owing to him, we gave consideration to whether he might have incurred some form of tax deductible loss in 2006 that might be eligible for off-set against later profits. In this context, we concluded that there were three hurdles that the Appellant would have to surmount in order to establish such a loss, and he failed to surmount all three.

16. The first point that the Appellant would need to sustain to be able to establish any sort of deductible loss was that he was an independent contractor, rather than an employee, from March 2006 onwards. If he remained an employee, the feature that he might have incurred numerous expenses but failed to receive his promised salary would occasion no sort of tax-deductible loss.

17. The Appellant did admittedly claim that his status changed one month after the Wolvin contract was signed, when he did not receive the amount he was due for his first month's employment. While he claimed this, he also said that there was no discussion of any sort with Wolvin or Aine Limited about his status and, as HMRC pointed out, the award that he sought and obtained in relation to the £18,000 claimed from Wolvin was claimed in an Employment Tribunal. Furthermore the fabricated pay-slip that supposedly evidenced tax suffered that we mentioned at paragraph 8 above clearly related to the claimed £18,000, and the tax said to have been suffered can only have been PAYE tax ostensibly deducted and paid by Wolvin, in other words tax attributable to an employee.

18. Accordingly we fail to see that the Appellant can demonstrate a trading loss in the period 2006/07.

19. Were we wrong in that conclusion, and were he to have become an independent contractor in March 2006 (as he claimed), he would then face the second hurdle of having to demonstrate the quantum of any resultant loss. No indication of any sort was given as to how much Aine Limited had actually paid though it was said to be not very much, and something well short of the invoiced amounts. Although a schedule of deductions was provided, there was no doubt that, being ignorant of how to compute trading profits for tax purposes, the relevant schedule included numerous purely personal items, for which no tax deduction would be admissible. Accordingly, at best, the loss would have consisted of the excess of non-disallowed deductions over the totally unspecified amounts paid by Aine Limited, i.e. a figure that we could not ascertain.

20. We then turn, however, to the third hurdle in that, even if we had felt able to calculate some tax deductible trading loss, that could only have been set against other income of the period or carried forward against later trading profits, and there was no other such income, and the trade ceased. The reason why the trade ceased was that, on 1 October 2006, the Appellant had formed a company, namely FLCS Limited, and the intention was that the company would provide the Appellant's services, paying the Appellant director's fees in whatever amount was decided. For at least one whole year and probably two years, the trading activity was conducted, and reflected in the accounts and tax returns as a company activity. Accordingly the sole trading activity, that may have occasioned an allowable loss in the period ending 30 September 2006, ceased, and once the trade has ceased the loss cannot be carried forward even if the trade re-commenced at some later date. We note that the personal "non-employee" trading activity almost certainly did re-commence at a later date, but we certainly conclude that the gap in trading was not the temporary suspension of trading that may not undermine the carry-forward of any trading loss. The trade ceased, and therefore, even if the first two hurdles, of establishing that there had been a trade, rather than a continuance of the Wolvin employee relationship, and that an allowable loss could be calculated, had both been satisfied, there were still no later profits against which the loss could be set.

21. On these rather more substantial grounds, we therefore decide that the Appellant cannot claim any sort of tax repayment or loss in respect of the very unfortunate events between February and September 2006. No evidence (other than a near fraudulently produced tax slip created by the Appellant's accountant) demonstrates that any tax was actually paid, and for the three reasons now given, the Appellant cannot claim an allowable loss against any other profits for tax purposes.

The claim to a tax repayment in respect of the year 2008/2009

22. The second matter in dispute was considerably simpler. In the period from 1 October 2006 onwards, the Appellant provided his services through the company FLCS Limited, and FLCS paid Corporation Tax on its profits. There was considerable dispute as to when the company trading ceased, in that the Appellant produced a form designed to be sent to Companies House, requesting that FLCS Limited be struck off. While the form was dated 31st October 2007 and signed by the Appellant, the Companies House stamp, which we assumed recorded the date on which the form was received by Companies House, contained the date 2 April 2009. Furthermore the company also provided accounts for the period ending at the end of October 2008, in which there was a profit of approximately £7,900.

23. The second dispute may have been occasioned by the confusion in relation to whether the Appellant's activity was one as an employee, an independent contractor, or indeed one performed indirectly through the company, whereupon he would have received some director's remuneration from the company. In the self-assessment return for the period 2008/2009, the Appellant returned various amounts of self-employment income and salary

paid by the company, and he then claimed a credit, and a resultant repayment for tax ostensibly deducted by the company. The tax in question, in the amount of £4,506 was, however, simply Corporation Tax, for which the individual was entitled to no credit, repayment or deduction. Since, however, it had been claimed in the return as income tax suffered, HMRC's computer had automatically repaid the amount claimed, and the second dispute was therefore a claim by HMRC to recover the £4,506 that they had mistakenly paid to the Appellant, when no such payment ought to have been made.

24. There was no particular contention from the Appellant that he should be able to retain the wrongly repaid £4,506 and certainly no claim by HMRC that the entry on the return initially demanding credit or repayment had been in any way fraudulent. It was simply a mistake, made in error, and there was no dispute to the proposition that the Appellant should repay the £4,506.

25. It appears that the claim for credit for the tax amount of £4,506 was actually made in the tax returns for two different periods, i.e. 2008/2009 and 2009/2010. While we were told that, at least in one year, there had actually been a repayment to the Appellant of the relevant amount, we consider it rather clearer to express our decision in relation to the £4,506 amount, so far as both years are concerned, simply to be that no sort of credit or deduction is due in the Appellant's income tax self-assessment returns for this amount of Corporation Tax, and the outcome should be that, insofar as any personal tax calculations (whether reductions in personal tax owing, or actual repayments made) have wrongly and mistakenly been made, they should be reversed.

The tax due for the year 2009.2010

26. The third matter in dispute was the relatively simple point that the Appellant's figures for tax owed in 2009/2010, a period when both parties accepted that he was performing his services as an independent consultant, and on any basis the company was no longer operating, showed tax and NIC owed in the amount of £4,039.11 HMRC's figure was the higher amount of £5,181, the difference of £1,142 resulting from the disallowance of certain expenses.

27. HMRC conceded that, on the basis that we had decided that no repayment of tax or allowable loss was due in respect of the first matter, i.e. the 2006/7 dispute, and that no credit, deduction or repayment was due to the Appellant in respect of the Corporation Tax figure of £4,506, being the amount involved in the second dispute, HMRC would accept the Appellant's figure of £4,039.11 as the correct amount of tax owing in respect of the period 2009/2010.

The overall conclusion

28. Our overall decision is accordingly that no repayment or allowable loss of any sort is due to the Appellant in respect of the year 2006/2007. No credit, deduction or repayment should be made to, or retained by the Appellant in respect of the wrong claim that some sort of credit, deduction or repayment should be made in his personal calculations for Corporation Tax in either of the years 2008/2009 and 2009/2010. The Appellant's claimed figure for tax owed in respect of 2009/2010 is confirmed in the amount of £4,039.11. It will obviously follow that, insofar as interest and any surcharge is owed for late filing of returns, these amounts will also be owing. The interest will automatically be reduced by the reduction of HMRC's claim in the light of the acceptance that the tax owing for the period 2009/2010 is to be reduced from HMRC's original claim by the figure of £1,142.

29. We should perhaps make it clear that no penalties have been sought against the Appellant, and that HMRC plainly accepted that any errors resulted simply from confusion and no remote fraud on the part of the Appellant.

Right of Appeal

30. This document contains full findings of fact and the reasons for our decision in relation to each appeal. Any party dissatisfied with the decision relevant to it 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.

HOWARD M. NOWLAN
TRIBUNAL JUDGE

RELEASED: 20 August 2014