[2018] UKFTT 670 (TC)

TC06818

Appeal number: TC/2017/05200

Income tax – self-assessment – subsistence claims erroneously included – amended assessments – resulting penalties

FIRST-TIER TRIBUNAL
TAX CHAMBER

KEVIN FEARON **Appellant**

- and -

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

TRIBUNAL: JUDGE ALASTAIR J RANKIN
MR TONY HENNESSEY

Sitting in public at Hearing Room 2, Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA on Monday 5 November 2018 at 10:00 AM

The Appellant in person

Miss Pallavka Patel, Presenting Officer, HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by the appellant against the following additions to his self-assessment tax liabilities raised on 13 May 2016:

(a) £2,498.00 for the tax year 2010/11 under section 29 of the Taxes Management Act 1970 (TMA 1970);

(b) £2,598.00 for the tax year 2011/12 under sections 29/36 TMA 1970;

(c) £2,992.40 for the tax year 2012/13 under section 28 TMA 1970; and

(d) £5,722.62 for the tax year 2013/14 under section 28 TMA 1970.

2. The appellant is also appealing against the following penalties charged at 56% under schedule 24 of the Finance Act 2007 (FA 2007) raised on 6 April 2016:

(a) £1,398.88 for the tax year 2010/11;

(b) £1,454.88 for the tax year 2011/12;

(c) £1,675.74 for the tax year 2012/13; and

(d) £3,204.66 for the tax year 2013/14.

Preliminary Issues

3. The appellant sent his Notice of Appeal to this Tribunal dated 17 June 2017. The Notice was therefore over one year outside the time limit of 30 days in which to appeal to this Tribunal. However as HMRC did not object to the appeal proceeding the Tribunal granted the appellant permission to proceed with his appeal.

4. The appellant had sent an email to Mr Nicholas Smith of Teesside HMRC Office on 30 September 2018 requesting his attendance at the hearing of this appeal. The appellant has received no response. Miss Patel advised the Tribunal that Mr Smith no longer worked for HMRC. The appellant informed the Tribunal he wished to ask Mr Smith several questions concerning how he had carried out the review into his self-assessment tax returns and in particular a paragraph in Mr Smith's letter dated 6 April 2016 when Mr Smith stated that he

> "will be settling the matter by amending your Self Assessment tax returns because your CT returns are not currently under enquiry, even though there will be less additional tax and penalties due to HMRC using this method".

As Mr Smith had not stated the legal basis on which he had made this decision the appellant wanted to question him about the legality of his decision.

5. Miss Patel informed the Tribunal that as Mr Smith had now left HMRC's employment, HMRC could not supply his current address and in any event Mr Smith would have discussed the contents of his letter with his manager before sending it. The Tribunal informed the appellant that sending an email to a proposed witness was not sufficient – he should have applied to the Tribunal to issue a witness summons under rule 16 of The Tribunal Procedure (First-tier Tribunal)(Tax Chamber Rules 2009. However as HMRC was unable to inform the Tribunal of Mr Smith's address the Tribunal would be unable to issue a witness summons. The Tribunal did not consider that the absence of Mr Smith would prejudice the hearing of the appeal and in any event

considered HMRC was entitled to assess the appellant in a manner more advantageous to the appellant than to HMRC . The appellant did not object to the hearing proceeding.

Background

6. The appellant traded as a director and employee of IRK River IT Ltd (IRK) as an IT consultant. He had submitted self-assessment tax returns by the due dates for each of the 2010/11, 2011/12, 2012/13 and 2013/14 tax years. HMRC opened an enquiry under section 9A TMA 1970 on 8 October 2014 into his 2012/13 tax return and extended the enquiry into his 2011/12 tax return on 17 March 2015. HMRC opened an enquiry into his 2013/14 tax return on 29 December 2015.

7. As a result of these enquiries HMRC determined that various amounts treated in IRK's accounts as drawings in the appellant's Director's Loan Account should in fact be treated as under-declared benefits of the appellant in the relevant years.

8. HMRC accepts that for the tax years 2010/11 and 2011/12 the onus is upon them to show that there is a discovery leading to a loss of tax and that this was due to the deliberate action of the appellant. Once this is satisfied the onus shifts to the appellant to provide evidence to displace HMRC's figures.

9. For the tax years 2012/13 and 2013/14 the onus is on the appellant to show that the assessments amended under section 28 TMA 1970 are incorrect.

10. For the penalties levied under Schedule 24 FA 2007 the onus is on HMRC to show that for each year the appellant delivered an incorrect return deliberately or without care. Once this is satisfied the onus reverts to the appellant.

Evidence on behalf of the appellant

11. The appellant had informed the Tribunal that he had been accused of a serious criminal offence in August 2015. Defending this matter occupied all his available time until he was acquitted in November 2016. Thereafter in conjunction with his accountant he had prepared amended company accounts correctly dealing with all the entries in his director's loan account. He believes these amended accounts have been submitted to HMRC though he was unable to state when this had occurred. Miss Patel advised the Tribunal that she was not aware of any proposed amendments to the self-assessment tax returns which in any event would now be out of time.

12. In his Notice of Appeal the appellant states:

> "I believe that HMRC's assessment of overdue tax was flawed in that they refused to treat the items in question as Director's Loan account entries and that they assumed that turnover/profits for the three years were similar, when in fact in the earlier years there was significantly less than in the final year of re-assessment.
>
> HMRC also advised in February 2015 that they were happy with the way in which expenses were being recorded, as proven by the special dispensation notice. That

adds to the notion that HMRC have been duplicitous or careless and negligent in concluding their assessment in the manner in which they have.

I believe that HMRC's self-assessment tax amendment argument is further flawed by the fact that this is, in fact, a company accounts issue for IRK River IT Ltd. HMRC's claim should therefore be declared null and void.

I believe that this case should be treated in the same was (sic) as that of Patel v Revenue & Customs [2015] UKFT 445 (TC). On that basis my accountant and I should therefore be allowed to resubmit the accounts for the years in question and, assuming that the expenses referenced to in document "item 15 – K Fearon HMRC Court Tribunal Appeal Grounds" are allowed, adjust the returns accordingly.

There has been a period of two years accounts submitted since the initial assessment by HMRC and they have accepted these are in good order, thereby proving that these errors in communication have been rectified.

However, I am happy for HMRC to continue to monitor the accounts submissions in line with the time period referenced in the Patel vs HMRC case referenced above."

Evidence on behalf of HMRC

13. The records provided by the appellant to HMRC show that a number of drawings and expenses have not been included in the Director's Loan Account or declared elsewhere for tax and NIC purposes. There is a pattern of shortfall in the declarations and repayments to the company which is further evidenced by the data supplied by the appellant.

14. In applying the figures HMRC used the presumption of continuity as the level of work undertaken across the relevant years appears to have continued at the same level in the absence of any evidence to the contrary.

15. HMRC further states that the reason for rejecting belated amendments to IRK's company accounts and returns and making good the self-assessment returns as a result of such amendments is to assist the appellant in avoiding additional charges for submission of incorrect company returns, additional costs of rewriting the director's loan account and amending the company's accounts, incorrect submission of P11ds and other charges and penalties.

Evidence at the hearing

16. HMRC referred the Tribunal to correspondence between the appellant's agent and Mr Smith of HMRC and in particular to a letter dated 21 July 2015 from the agent where under the heading "Subsistence" the agent stated:

> "Mr Fearon is in agreement that you disallow the £3,478 subsistence paid by the company in 2012-13 and that you without prejudice and without further scrutiny

accept the whole of the mileage allowance of [figure unclear] and parking costs of £1,488."

HMRC accepted this proposal and used these figures as part of their amendment to the appellant's 2012/13 self-assessment tax assessment.

17. Miss Patel maintained that the appellant could not now seek to amend his self-assessment tax returns on the basis that he had accepted the position in 2015 and he was now out of time to do so.

18. The appellant informed the Tribunal that he had been visited by debt collectors on behalf of HMRC after he had lodged his appeal with this Tribunal. He had lodged a complaint with HMRC and eventually received a cheque as compensation as once his appeal had been lodged HMRC should have suspended collection. The appellant was at pains to point out typing errors in various letters from HMRC.

The legislation

19. Section 9A(1) TMA 1970 states that HMRC may enquire into a return if notice is given to the person whose return it is within the time allowed. Section 9(2) states that the time allowed is, if the return was delivered on or before the filing date, up to the end of the period of twelve months after the date on which it was delivered. As a result the enquiry into the 2012/13 return was commenced within the requisite time period. Likewise the extension of the enquiry into the 2013/14 return was also commenced within the requisite time period.

20. Section 28A TMA 1970 requires HMRC to inform the appellant when the enquiry has been completed and to state reasons. HMRC wrote to the appellant on 13 May 2016 to advise that the letter was a closure notice under section 28A in relation to the enquiries into the 2012/13 and 2013/14 returns. HMRC was amending the appellant's tax returns as outlined in a previous letter dated 8 April 2016 to show additional tax of £2,992.40 for 2012/13 and £5,722.62 for 2013/14.

21. Where HMRC have discovered that an assessment to tax is or has become insufficient Section 29 TMA 1970 allows HMRC to make an assessment of such further amount which ought to be charged in order to make good to the Crown the loss of tax. The section goes on to provide that such further assessment may only be made where the original return was completed carelessly or deliberately.

22. Section 34 TMA 1970 provides a normal time limit of four years after the end of the year of assessment for the making of an assessment. Section 36 extends this time limit to six years where the error was brought about carelessly and to twenty years where the error was deliberate.

23. Sections 29 and 34 TMA 1970 enabled HMRC to issue amended assessments for the tax years 2010/11 and 2011/12.

Decision

24. HMRC issued a closure notice to the appellant on 13 May 2016 in respect of the tax years 2012/13 and 2013/14 and assessed the additional tax as £2,992.40 and £5,722.62 respectively. Notices of amended tax for the tax years 2010/11 and 2011/12 were also sent on 13 May 2016 assessing additional tax of £2,498.00 and £2,598.00. These latter two assessments were made on the presumption of continuity.

25. By penalty explanation dated 8 April 2016 HMRC explained to the appellant how they were going to calculate penalties arising as a result of the four amended assessments. The penalties were calculated on the basis that the errors in the appellant's returns were too numerous to be careless. Every item of subsistence chosen for spot checks was found to be incorrectly claimed and on this basis HMRC decided the errors were deliberate rather than careless. This Tribunal agrees with the view taken by HMRC. While one or two errors may be characterised as careless where every item claimed is found through spot checks to be in error HMRC is entitled to characterise the errors as deliberate.

26. The assessments under enquiry are for the tax years ending 5 April 2011 to 5 April 2014. This was all before the appellant was accused of a serious criminal offence in August 2015 of which he was subsequently acquitted. The appellant and his agent proposed in a letter dated 21 July 2015 that all subsistence claims be rejected in return for all mileage and parking charges being allowed. This proposal was accepted by HMRC and formed the basis on which the amended assessments were calculated.

27. While the Tribunal sympathises with the appellant concerning his difficulties during the period April 2015 to November 2016 he cannot now over two years later try to correct errors which he made in his four tax returns which errors were the subject of considerable correspondence between his agent and HMRC. Although the appellant claimed during the hearing that his agent had submitted amended accounts for IRK which he believed would show that his personal self-assessments should be amended to show no additional tax liability he was unable to state when these had been submitted or to produce copies of the amended accounts and statements to show how his personal self-assessments should be amended.

28. The Tribunal accepts HMRC's arguments that the assessments are valid. When they carried out random testing of the expenses claimed by the appellant for the years in question every item turned out to be incorrectly claimed. As already stated in paragraph 25 where every item is incorrectly claimed HMRC is entitled to treat the errors as deliberate. HMRC has therefore correctly calculated the penalties at 56% for each tax year.

29. While the Tribunal accepts the appellant's claim that a further two years' accounts have been submitted since the initial assessment by HMRC and have been accepted as being in good order thereby proving that the previous errors have been rectified this argument cannot be used to justify allowing appeals against amended assessments for previous incorrect returns. The decision in *Patel* is not binding on this Tribunal and to ask HMRC to monitor the appellant's accounts and those of IRK would place a considerable burden on HMRC.

30. The appeal is therefore dismissed and the additional assessments and penalties referred to in paragraphs 1 and 2 remain due for payment.

31. 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.

Alastair J Rankin
TRIBUNAL JUDGE

RELEASE DATE: 14 November 2018