[2018] UKFTT 760 (TC)

TC06893

Appeal number: TC/2017/8298

INCOME TAX – taxpayer who received notices to file but failed to file tax returns assessed under s 29 TMA (discovery assessments) – taxpayer's appeal against assessments unsuccessful – in meantime taxpayer filing tax returns covering same years – HMRC refusing to accept or process tax returns – purported appeal against that decision – whether Tribunal has jurisdiction - no

FIRST-TIER TRIBUNAL

TAX CHAMBER

JOHN HUNTLEY **Appellant**

-and-

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

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at Taylor House, Rosebery Avenue, London on 3 December 2018

Ms F Francis, of Taylor Allen, for the Appellant

Ms P O'Reilly, HMRC officer, for the Respondents

DECISION

Introduction

1. The following summary of the facts does not appear to be in dispute between the parties.

2. The appellant has been in business as a shop proprietor since 1996/97 or before. For most of the years since and including 1996/7 HMRC sent the appellant notices to file (in the form of blank tax returns). He did not send completed tax returns back to HMRC (save as set out in §§8-9 below). He did not pay any tax.

3. HMRC caught up with the situation in 2012. Having written on a number of occasions to the taxpayer and failed to elicit information or returns from him, an HMRC officer issued him with 'discovery' assessments made under s 29 Taxes Management Act 1970 ('TMA') on 13 September 2013 for the years 1996/7 through to 2011/12.

4. Mr Huntley (via his then representatives) was very prompt in appealing the assessments, lodging an appeal with HMRC on 18 September 2013. In November 2013, he was then assessed to penalties under s 93 TMA. On this occasion, he failed to make an in-time appeal against them.

5. In 2014, HMRC offered the appellant a review of the tax assessments. Mr Huntly accepted the offer. He also lodged a late appeal against the penalties, which was accepted by HMRC and the penalties were then included in the review. The review conclusion, issued by letter of 11 September 2014, upheld the assessments. It discharged most of the penalty assessments on the basis they were issued under the wrong legislation; it upheld the penalties for the years for which no notices to file were issued (2005/6 – 2008/9) but reduced them to 75%.

6. The appellant took no action in response to the review conclusion letter although the letter had, as required by law, notified him that he had only 30 days in which to lodge an appeal with the Tribunal. As might be expected in these circumstances, HMRC then proceeded to initiate enforcement action against the appellant, which culminated in a bankruptcy petition against the appellant for some £154K. It appears that petition is now stayed pending these proceedings.

7. On 22 June 2016, nearly two years' late, and possibly prompted by the enforcement action against him, the appellant lodged an application with the Tribunal to accept out of time an appeal against the assessments and the remaining 4 penalties.

8. Shortly afterwards, on 26 July 2016, the appellant lodged with HMRC four tax returns for the years 2008/9 to 2011/12. HMRC did not accept them. He also lodged a tax return for 2012/13 which was not a year in respect of which he had been assessed, and HMRC accepted and processed that return.

9. On 15 November 2016, the appellant lodged with HMRC 12 tax returns for the years 1996/7-2007/8. As with the later years to and including 11/12, HMRC did not accept the returns and did not process them. In effect, by these two lodgements, Mr

Huntley filed sixteen tax returns for all the years for which HMRC had raised discovery assessments against him. His returns showed significantly less tax to be owing than HMRC had assessed.

10. On 15 December 2016, the Tribunal heard the appellant's application to be allowed to appeal the discovery assessments and remaining penalties out of time. The appellant did not appear nor was represented at that hearing. By decision dated 20 December 2016, Judge John Brooks dismissed the application. That decision has not been appealed.

11. On 16 November 2017 (nearly a year later), Mr Huntley lodged an application with the Tribunal to be allowed to make a late appeal against HMRC's refusal to accept or process his tax returns.

12. The Tribunal was uncertain whether to accept this as a valid appeal. It pointed out by letter that the Tribunal had already determined his late appeal application in respect of tax years 1996/7-2011/12. It later pointed out it had no jurisdiction against a decision by HMRC to refuse to process tax returns. Nevertheless, in the end, the Tribunal decided to accept lodgement of the proceedings. HMRC then applied for the proceedings to be struck out on the basis that the Tribunal had no jurisdiction. It was that application that this hearing was called to determine.

Can the Tribunal strike out the proceedings?

13. The appellant's representative pointed out that the Tribunal had (after some expressing initial concern) accepted the proceedings (see §12); she did not think that it could then strike out the proceedings, effectively changing its mind.

14. I do not agree. By accepting the proceedings and notifying them to HMRC there had been no judicial decision on the question of whether or not the Tribunal has jurisdiction. It was entirely possible for the Tribunal to then make a judicial decision (as I am now doing) on whether there was jurisdiction and, if there is not, to strike out the proceedings.

15. Indeed, unless and until proceedings were accepted by the Tribunal, it was not possible for them to be struck out. In other words, the Tribunal needed to accept the proceedings in order for a judge to make a decision on jurisdiction. While it is true that if the Tribunal had refused to accept lodgement of any proceedings there would be nothing to strike out, accepting lodgement of proceedings does not prevent the proceedings being struck out for lack of jurisdiction.

Must the Tribunal strike out the proceedings?

16. This Tribunal is a statutory body and therefore only has jurisdiction to the extent that Parliament has conferred it. There are a number of provisions under which jurisdiction is conferred on this Tribunal but neither party was able to point to a provision, nor am I aware of a provision, which gave this Tribunal jurisdiction over HMRC's refusal to accept and process tax returns.

17. The normal provision conferring jurisdiction in matters concerning individual tax returns is s 31 Taxes Management Act 1970 ('TMA'). But that provision does not confer any jurisdiction over a refusal by HMRC to accept and/or process tax returns. On the contrary, it gives jurisdiction over assessments made by HMRC, and over amendments of tax returns made by HMRC. It is the provision under which Mr Huntley was entitled to, and did, appeal the assessments referred to in §3 above.

18. The Tribunal Procedure (First-tier) (Tax Chamber) Rules 2009 ('the Rules') provide at Rule 8(2)(a) that the Tribunal must strike out proceedings if the Tribunal does not have jurisdiction in respect of them. I am satisfied that the Tribunal has no jurisdiction over HMRC's refusal to accept and/or process the 16 tax returns the subject of these proceedings and therefore these proceedings must be struck out.

Comment

19. There is some confusion it seems to me, on the appellant's part, as to what he can do to challenge the discovery assessments and although I have no jurisdiction, in order to be helpful, but without giving advice, I make the following comments that form no part of this decision.

Which court has jurisdiction over HMRC's failure to accept and/or process the 16 tax returns?

20. As there is no express provision in any legislation conferring jurisdiction on a court or tribunal over HMRC's refusal to accept and/or process the appellant's tax returns, it seems to me that the appellant can only challenge them by taking 'judicial review' proceedings in the administrative division of the High Court. This is what Mr Higgs did in the case *Higgs* referred to below (although the circumstances were different).

What is the real objective of the proceedings?

21. But the issue is not (it seems to me) identifying the right court in which to bring the proceedings to challenge HMRC's refusal to accept the returns, but recognising the status of the discovery assessments made in 2013.

22. Fundamentally, Mr Huntley wishes to challenge those discovery assessments and it seems his advisers think he can do so by filing tax returns which relate to the years assessed. But in my view (not that I have any jurisdiction over this matter) the tax returns cannot displace the assessments.

23. I think the appellant is confused between 'determinations' and 'assessments'. I will explain the difference. The law provides that where a taxpayer does not file tax returns by the due date despite having been given notice to file, as happened here, HMRC have a right to raise 'determinations' under s 28C TMA. Such a determination has effect as if it were a self-assessment (in other words, it stands in place of a self-assessed tax return and can be enforced by HMRC). There is no appeal against such a determination but it can be displaced by filing a tax return. A determination, or a tax return displacing a determination, must be made/filed within 3 years from the due date for the tax return.

24. However, it appears HMRC did not issue determinations. This may well have been because for most years they would have been too late to do so. But the important fact is that HMRC issued, not determinations, but discovery assessments under s 29(1) TMA.

25. Unlike determinations, there is a right of appeal against such assessments. It is that right of appeal which Mr Huntley unsuccessfully exercised (see §10 above). But there is no provision which allows a s 29(1) assessment to be displaced by a tax return. Nor would there be any logic to such a provision. Determinations can be displaced by a tax return but cannot be appealed; assessments can be appealed but (it logically follows) cannot be displaced by a tax return. The legislation does not give two bites at the cherry.

26. In conclusion, therefore, it does not seem to matter whether or not HMRC chose, or are obliged, to accept and process the sixteen tax returns: the tax returns could not displace the assessments, which are valid and now beyond challenge, an appeal against them having been unsuccessful.

27. One of the appellant's complaints was that HMRC's initial response to him on receiving the tax returns was to pass them to the compliance officer to consider. He considered this amounted to acceptance of the returns. But it seems to me that whether or not it did amount to acceptance of the returns is not only a question out of my jurisdiction to decide, but also one which is quite irrelevant to Mr Huntley. The point is, as I have said, that filing valid tax returns would not displace the assessments.

Were the tax returns filed in time?

28. HMRC's letter rejecting the returns indicated that they were outside the statutory time-limit for filing tax returns. This was unfortunate as it was both wrong and misleading. It misled the appellant's advisers to believe that HMRC would have accepted the returns if they had been filed in time. I think, for the reasons already given, that whether or not the tax returns were accepted by HMRC was irrelevant as they could not displace the assessments. Nevertheless, HMRC's initial response created a red herring in the form of the question of whether the returns were too late to be processed.

29. At the hearing, therefore, Ms Francis was keen to point out that the returns were all within the statutory time limit. And I agree with her that HMRC was wrong about the time limit in respect of 12 of the returns for the following reasons. S 34 TMA gives a four year time limit for assessments but it was made clear in the case of *Higgs* [2015] UKUT 92 (TCC) at [46] (in agreement with the earlier case of *Morris* [2007] EWHC 1181 (Ch)) that that time-limit did not apply to self-assessments contained in tax returns. (I note in passing that the 16 assessments back to 1996/7 were not out of time because HMRC relied on the extended time limit of 20 years under s 36(1A) TMA).

30. In any event, the law as interpreted by *Higgs* was that tax returns could not be filed too late to be processed as there was no time limit. Parliament rectified this with

legislation (s 34A TMA) with effect from 15 September 2015; the first four returns were filed before that date and were therefore unaffected by it. The last 12 tax returns, as they were for periods before 12/13, fell into s 34(4) which gave a later commencement date of 5 April 2017 and therefore they too were unaffected by the new legislation.

31. Four of the returns, however, were not returns at all. As explained above at §§2 & 5, four of the returns were unsolicited in the sense that Mr Huntley had not received a notice to file for those four years. There is no obligation on HMRC in any event to accept and process such unsolicited returns by any date: they are simply unrecognised under the TMA (see *Patel & Patel* [2018] UKFTT 185 (TC)). This makes no real difference in this case as even the 12 returns which were filed 'in time' were too late in the sense that HMRC had already issued s 29 assessments in respect of the same years. Such assessments could not be displaced by filing tax returns, even tax returns which were not out of time to be accepted and processed.

32. At root, the appellant's objective in these proceedings is to challenge the 16 discovery assessments. But tax returns filed after the date of the assessments were too late to do so. His only option was to appeal the assessments, but that appeal has failed (see §10).

Appellant's personal position

33. Ms Francis urged the Tribunal to allow her client to file tax returns to displace the assessments. She said he suffered with ill-heath, had not understood the assessments, and should be allowed to be taxed on his real, rather than estimated, earnings.

34. Putting aside the fact that HMRC do not, it appears, accept that the returns were likely to be more accurate than their assessments, even if I agreed with the appellant's position, there is nothing I could do as I have no jurisdiction. But I don't agree with the appellant's position. There is real public interest in taxpayers making timely tax returns and therefore it is necessary to have an effective system whereby those taxpayers who do not cooperate, who do not provide their books and accounts, and who do not file their tax returns, can be made to pay tax. Moreover, there is real public interest in ensuring disputes are not unduly protracted; Mr Huntley had the chance to file his tax returns from 1996/7 onwards on the due date or at any time up to the making of the assessments in 2013. He did not do so. The letters before the Tribunal make it clear that his representatives were in correspondence with HMRC over some time before the assessments were made and had refused to provide HMRC with any information. It is not surprising, therefore, that HMRC made estimated assessments. The law gave Mr Huntley the right to challenge those estimated assessments but his challenge was unsuccessful as explained at §10 above. It is right that he has no second opportunity to challenge the assessments.

35. The proceedings are struck out as the Tribunal does not have jurisdiction in respect of them.

36. 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.

Barbara Mosedale
TRIBUNAL JUDGE

RELEASE DATE: 20 December 2018