[2019] UKFTT 0369 (TC)

TC07197

Keywords Income tax – discovery assessment – deliberate conduct admitted in Contractual Disclosure Facility – whether taxpayer can resile - penalties

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/04215

BETWEEN

BARRY WILLIAM MCCOLGAN **Appellant**

-and-

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

TRIBUNAL: JUDGE MALEK
MRS DE ALBUQUERQUE

Sitting in public at Taylor House 88 Rosebery Avenue, London EC1R 4QU on 28 May 2019

Mr. McColgan appearing in person

Mr. David Street, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. The Appellant appeals against the following assessments issued under section 29 Taxes Management Act ("TMA") 1970:

Tax Year Ended	Amount	Date of issue	Appeal to HMRC
5 April 2006	£6,066.90	15 Nov 2017	11 Dec 2017
5 April 2007	£11,218.80	15 Nov 2017	11 Dec 2017
5 April 2008	£8,064.90	15 Nov 2017	11 Dec 2017
5 April 2009	£7,598.20	15 Nov 2017	11 Dec 2017
5 April 2010	£7,487.80	15 Nov 2017	11 Dec 2017
5 April 2011	£10,652.52	15 Nov 2017	11 Dec 2017

2. The Appellant appeals against the following penalty assessments issued under section 93(5) TMA 1970:

Tax Year Ended	Amount	Date of issue	Appeal to HMRC
5 April 2006	£2,730.10	9 Jan 2018[1]	2 Feb 2018
5 April 2007	£5,048.46	9 Jan 2018	2 Feb 2018
5 April 2008	£3,629.20	9 Jan 2018	2 Feb 2018
5 April 2009	£3,419.00	17 Jan 2018	8 Feb 2018
5 April 2010	£3,369.00	17 Jan 2018	8 Feb 2018

3. The Appellant appeals against the following penalty assessments issued under Schedule 55 Finance Act 2009:

Tax Year Ended	Amount	Date of issue	Appeal to HMRC
5 April 2011	£5,219.73	16 Jan 2018	8 Feb 2018
5 April 2012	£8,885.56	16 Jan 2018	8 Feb 2018
5 April 2013	£4,088.16	16 Jan 2018	8 Feb 2018
5 April 2014	£3,077.88	16 Jan 2018	8 Feb 2018

4. At the hearing we had before us bundles of documents and we heard witness evidence on oath from Mr. Scott Alison, the HMRC Officer who dealt with the enquiries into Mr. McColgon's tax affairs and made the assessments. Mr. McColgon was asked by us whether he was going to give evidence. He replied that he was not, but wanted to make submissions. He made his submissions by reading from pre-prepared notes and gave a copy of these notes to us so that we could more easily follow what he had to say. Mr. McCoglan was provided with an opportunity to ask Mr. Allison questions and he did so. No such opportunity was afforded to the Respondents as the Appellant had declined to give evidence. Mr. McColgon was warned by us that as he had chosen not to give evidence before us we would most likely only have regard to the evidence provided by Mr. Allison when it came to factual matters in dispute. However, we would, naturally, consider any submissions that he chose to make.

5.

THE LAW

Discovery assessments

6. Section 29(1) TMA 1970 provides that an officer of the board can make an assessment if they discover one of the following:

> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,

7. Sections 29(2) and 29(3) TMA 1970, provide restrictions for making assessments, in circumstances where a taxpayer has delivered a return to HMRC under section 8 or 8A TMA 1970.

8. Section 29(3) TMA 1970 provides that a taxpayer shall not be assessed unless one of the conditions of Section 29(4) or Section 29(5) TMA 1970 is met. The relevant condition for this appeal is section 29(4) TMA 1970, which provides that the situation was brought about carelessly or deliberately by the taxpayer.

9. Section 34 TMA 1970 provides that ordinarily "an assessment to income tax or capital gains tax may be made at any time not more than 4 years after the end of the year of assessment to which it relates".

10. Section 36(1) TMA 1970 extends the assessing time limit to 6 years where the loss of tax is brought about carelessly.

11. Section 36(1A)(a) TMA 1970 extends the assessing time limit to 20 years in cases where the loss of tax is brought about deliberately.

Section 93 TMA 1970 Penalties (Tax years ended 5 April 2006 to 2010)

12. Sections 93(1) and (2) TMA 1970 provide that where a taxpayer has been served a notice under section 8 TMA 1970 to deliver a return, and they fail to comply, they are liable to a £100 penalty.

13. Section 93(3) TMA 1970 permits HMRC to charge daily penalties of up to £60 per day for a continuing failure to deliver a return.

14. Section 93(4) TMA 1970 permits a further £100 fixed penalty to be charged if the taxpayer has still not delivered a return by 6 months after the 'filing date'.

15. Section 93(5) TMA 1970 provides that if the failure to comply with the s 8 notice exceeds1 year from the filing date, and there would have been a tax liability shown in the return, "the taxpayer shall be liable to a penalty of an amount not exceeding the liability to tax which would have been shown".

16. Section 100(1) TMA 1970 provides that an officer of the Board may make a determination imposing a penalty under s 93(5) TMA at such amount as, in his opinion, is correct or appropriate.

17. Section 100B(1) TMA 1970 provides that an appeal may be brought against the determination of a penalty. Section 100B(2) provides that the FTT may, set the determination

aside, confirm the determination, or reduce or increase the determination amount "as it considers appropriate".

Schedule 55 FA 2009 Penalties (Tax years ended 5 April 2011 to 2014)

18. Paragraph 1(1) Schedule 55 FA 2009 provides that a penalty is payable by a person where they fail to make or deliver a return before the filing date.

19. Item 1 in the table at paragraph 1(5) Schedule 55 FA 2009, provides that the references to return, include a SA return under section 8(1)(a) TMA 1970.

20. Paragraph 3 Schedule 55 FA 2009 provides that where a taxpayer fails to deliver a return before the filing date, they are liable to fixed penalty of £100.

21. Paragraph 4 Schedule 55 FA 2009 provides that if the taxpayer's failure to deliver a return continues for a 3 month period from the penalty date, they are liable to a daily penalty of £10, for a maximum of 90 days.

22. Paragraph 5 Schedule 55 FA 2009 provides that if the return is delivered more than 6 months after the penalty date, a taxpayer is liable to a penalty of 5% of the tax due (or £300 if greater).

23. Paragraph 6 Schedule 55 FA 2009 provides that if the return is delivered more than 12 months after the penalty date the taxpayer is liable to a further penalty.

24. Paragraphs 6(4) and 6(4A) Schedule 55 FA 2009 provide that if the taxpayer deliberately withheld the information (but did not conceal it), they are liable to a penalty of 70% of the tax liability that would have been shown in the return, or £300, whichever is greater.

25. Paragraph 6(5) Schedule 55 FA 2009 provides that if the taxpayer did not deliberately withhold the information, they are liable to a penalty of 5% of the tax liability that would have been shown in the return, or £300, whichever is greater.

26. Paragraphs 14 and 15 Schedule 55 FA 2009 provide that HMRC can reduce penalties issued under paragraph 6(4), depending on the quality of the Appellant's disclosure.

27. Paragraph 15(2) Schedule 55 FA 2009 provides that in the case of a prompted disclosure, the minimum penalty is 35% of the tax liability that would have been shown in the return, with a maximum of 75%.

28. Paragraph 16 Schedule 55 FA 2009 provides that if there are special circumstances, HMRC may reduce a penalty accordingly.

29. Paragraph 23 Schedule 55 FA 2009 provides that liability to a penalty does not arise if the Appellant satisfies HMRC and/or the Tribunal that they have a reasonable excuse for the failure.

Burden and standard of proof

30. The burden of proof is on the Respondents to show that the assessments and penalties have been validly made and issued. The burden then moves to the Appellant to show that the quantum of the assessment and penalties is not correct.

31. The standard of proof is the balance of probabilities.

THE FACTS

32. The facts are relatively uncontroversial and can be briefly stated. On 23 March 2015 HMRC wrote to the Appellant to advise him that they would be opening a compliance check to review his tax position and requested certain information.

33. On 16 April 2015 the Appellant wrote to HMRC providing the information requested, including a breakdown of income he received but had not included in a SA return.

34. On 13 August 2015 HMRC wrote to the Appellant to advise that they have reason to suspect that he had committed tax fraud. A copy of Code of Practice 9 (COP9) was enclosed. HMRC offered the Appellant the opportunity to make a full disclosure under the Contractual Disclosure Facility (CDF).

35. On 15 October 2015 the Appellant wrote to HMRC enclosing the signed CDF disclosure form. Part 2, signed by the Appellant on 3 September 2015 states:

> "On 3 September 2015 I signed the Contractual Disclosure Facility (CDF) letter to accept HMRC's offer to enter into their CDF. Under the terms of the CDF, I admit that my deliberate conduct has brought about a loss of tax and/or duty."

36. Following receipt of the disclosure form, the Appellant met HMRC on 20 January 2016 with correspondence exchanged over the subsequent months.

37. On 4 November 2016 the Appellant sent HMRC a Draft Disclosure Report in which he supplied a brief business history, description of all tax irregularities and quantification of irregularities and amounts of tax outstanding.

38. On 21 April 2017 HMRC wrote to the Appellant with tax calculations and penalty figures.

39. On 15 November 2017 HMRC raised discovery assessments for tax years ended 5 April 2006 to 5 April 2012. The assessment for 5 April 2012 has since been withdrawn.

40. On 9 January 2018 HMRC issued penalty assessments under section 93(5) TMA 1970, for tax years ended 5 April 2006 to 5 April 2008.

41. On 16 January 2018 HMRC issued penalty assessments under Schedule 55 FA 2009, for tax years ended 5 April 2011 to 2014.

42. On 17 January 2018 HMRC issued penalty assessments under section 93(5) TMA 1970, for tax years ended 5 April 2009 and 2010.

43. Following appeals from the Appellant, HMRC offered to review the matter by letter to the Appellant dated 19 February 2018.

44. On 27 February 2018, the Appellant accepted offer of the review. On 16 May 2018, HMRC sent the Appellant review conclusion letter upholding the determination and penalties (with the exception of the penalty assessments for year ended 5 April 2009 and 2010).

45. On 13 June 2018, the Appellant notified his appeals to the Tribunal.

DISCUSSION

Discovery assessment

46. The Respondents submit that by letter dated 16 April 2015 the Appellant disclosed income which had been hitherto undisclosed, in response to HMRC's letter dated 23 March

2015 [TAB B, pp 60-62]. The Appellant made further disclosures outlining the income he received on 15 October 2015 [TAB B, pp 79-88] and 4 November 2016 [TAB B, pp 178-184]. The Respondents submitted that, on receipt of this information, Mr Allison discovered the that income which ought to have been assessed to income tax had not so been assessed as required by section 29(1) TMA 1970 and accordingly that HMRC had made a "discovery". This point was not seriously in dispute and nor could it be.

47. Sub-sections 29(2) and (3) of the TMA 1970 provide restrictions for making assessments, in circumstances where a taxpayer has delivered a return to HMRC under section 8 or 8A TMA 1970. As we have found above, the Appellant did not delivered any returns for years ended 5 April 2006 to 2010, and therefore the restrictions do not apply.

Deliberate conduct and time limits

48. The usual time limits for raising assessments apply and there are no special provisions for discovery assessments. Section 36(1A)(a) of the TMA 1970 extends the time limit to make assessments from four years to 20 years in cases where it can be shown that the loss of tax is brought about deliberately. It is accepted that the assessments in question cannot be raised if HMRC cannot show that the loss of income tax was brought about deliberately by the Appellant and this was the key issue which we were asked to decide. HMRC contended that the Appellant's actions were deliberate whereas the latter argued that whilst he may have been careless, stupid and incompetent his actions fell short of being deliberate.

49. HMRC relied upon the CDF form which the Appellant signed on 3 September 2015, and in which he agreed that "*I admit that my deliberate conduct has brought about a loss of tax…*" [TAB B, p 81]. In addition at part 4a of the outline disclosure form the Appellant sets out a description of his "deliberate conduct" [TAB B, p84].

50. The Appellant has variously argued that the form was a template that he could not change and that he felt under pressure to sign the CDF. He further argues that his motivation in signing and accepting HMRC's offer was to show co-operation and a willingness to disclose all material facts about his income in the period under review and to prevent his clients from becoming aware of HMRC's interest.

51. We found the Appellant's above arguments to be implausible. The answer to the template form is that the Appellant was not obliged to sign it in the form that it was presented to him, or indeed at all. We are satisfied that there was no undue pressure put on him to sign the CDF form or make the declarations that he did. This was confirmed in evidence by Mr. Allison when he said "*I did not ask Mr. McCoglan to sign the form. He did not have to sign it*". This evidence was not challenged in any way. The Appellant signed the CDF in the knowledge that he might well have faced criminal prosecution if he did not sign the form. He now submits that this was not his motivation for signing it, but of course did not give evidence to this effect. Even if he had given evidence to this effect; to the extent that he felt that his motivation was to show co-operation and willingness to disclose all material facts, that is, with respect, the intended purpose of the CDF. To the extent that Mr McCoglan had other motives for signing the form, it seems to us that, these are largely irrelevant. Provided that Mr. McCoglan was not put under undue pressure by HMRC and he understood what he was signing his motivation for doing so are academic. Accordingly, we find that the Appellant accepted, by reason of entering into the CDF, that he deliberately failed to deliver the relevant returns and he is now estopped from seeking to go behind that agreement.

52. Given our findings at paragraph 50 above we do not need to go on to look at whether, apart from his admittance on the CDF form, the remaining evidence shows that the Appellant's

failure to declare his income was deliberate. Suffice it to say that we are wholly unconvinced that a company director (irrespective of whether or not he was an accountant) could on the one hand be aware of the need for the company to submit tax returns and do so without fail or mishap and on the other hand be so careless as to repeatedly fail to deliver personal tax returns when notified of his liability to do so.

Penalties

Section 93 Late Filing Penalties

53. Section 93(1) TMA 1970 provides that the section applies where a taxpayer has been required by a notice served under section 8 of 8A TMA 1970, and they fail to comply with the notice.

54. The evidence shows that the Appellant was issued with notices under section 8 TMA as follows:

Tax Year Ended	Date s8 Notice Issued
5 April 2006	6 April 2006
5 April 2007	6 April 2007
5 April 2008	6 April 2008
5 April 2009	6 April 2009
5 April 2010	6 April 2010

55. Section 93(5) TMA 1970 provides that if the failure to comply with a section 8 notice continues after the anniversary of the filing date and there would have been a liability to

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tax shown in the return, the taxpayer "*shall be liable to a penalty of an amount not exceeding the liability to tax which would have been so shown*".

56. Further the evidence shows that HMRC issued penalty determinations and calculated the penalty determinations as 45% of the Appellant's tax liability for each year as follows:

Tax Year Ended	Penalty Amount	Date of issue
5 April 2006	£2,730.10	9 Jan 2018
5 April 2007	£5,048.46	9 Jan 2018
5 April 2008	£3,629.20	9 Jan 2018
5 April 2009	£3,419.00	17 Jan 2018
5 April 2010	£3,369.00	17 Jan 2018

57. The reasoning behind HMRC's decision to abate the penalties by 55% is set out at paragraph 19 of Mr. Allison's statement. During cross examination it was put to Mr. Allison by Mr. McCoglan (and the former accepted) that following challenge a large amount of information had been requested by Mr. Allison during the course of an enquiry spanning some four years and Mr. McCoglan had provided all information requested of him. Accordingly, we feel that HMRC gave insufficient weight to the abatement provided for disclosure and consider that this should have been in the order of 20% and not 10%. Accordingly, we revise the penalties for the years set out at paragraph 55 above to 35% in accordance with 100B(2) of the TMA 1970.

Schedule 55 Late Filing Penalties

58. Paragraph 1(1) Schedule 55 FA 2008 provides that a penalty is payable by a taxpayer if they fail to make or deliver a return on or before the filing date. Item 1 in the table at paragraph 1(5) Schedule 55 FA 2008, provides that paragraph 1(1) applies to a failure by a taxpayer to deliver a return under section 8(1)(a) TMA 1970.

59. The evidence shows that the Appellant was issued with notices under section 8 TMA as follows:

Tax Year Ended	Date s8 Notice Issued	Filing Date
5 April 2011	6 April 2011	31 January 2012
5 April 2012	6 April 2012	31 January 2013
5 April 2013	6 April 2013	31 January 2014
5 April 2014	6 April 2014	31 January 2015

60. Paragraph 6(1) Schedule 55 FA 2009 provides that if the taxpayer delivers a return more than 12 months after the penalty date the taxpayer is liable to a penalty.

61. The Appellant delivered returns on the following dates, all of which are in excess of 12 months after the respective penalty dates:

Tax Year Ended	Return received
5 April 2011	5 Oct 2016
5 April 2012	10 Aug 2016
5 April 2013	21 June 2016
5 April 2014	5 May 2016

62. The Respondents submitted that the Appellant's failure to deliver returns amounted to deliberately withholding information which would have enabled Mr Allison to assess his tax liability. For the reasons set out above we accepted and found that the Appellant's conduct was deliberate. Where there is a deliberate withholding of information the starting point is a penalty of 70%. This penalty can be reduced depending on the quality of the Appellant's disclosure. The Respondents applied a penalty of 49% and notified the Appellant of the additional liabilities as follows:

Tax Year Ended	Penalty Amount	Date of issue
5 April 2011	£5,219.73	16 Jan 2018
5 April 2012	£8,885.56	16 Jan 2018
5 April 2013	£4,088.16	16 Jan 2018
5 April 2014	£3,077.88	16 Jan 2018

63. For the reasons set out above we are of the view that, given the nature and extent of the disclosure together with the co-operation provided thereafter, the Appellant was entitled to a

reduction in penalties such that a rate of 35% was applied and we revise the penalties set out in paragraph 61 above accordingly.

64. Although not expressly raised by the Appellant we consider, for the sake of completeness, whether or not the Appellant had a reasonable excuse under paragraph 23 Schedule 55 FA 2009 or some special circumstances existed under paragraph 16. Given the Appellant's decision not to give evidence, but to rely solely on submissions, we can identify no evidential basis upon which the Appellant could advance a case that he had a reasonable excuse or some special circumstance existed.

Type of income

65. HMRC contend that following further examination of its case, it now consider that the discovery assessments for years ended 5 April 2006 to 2011, should be assessed as employment income from the Appellant's remuneration as a director of Financial Management for Schools Ltd. This is so notwithstanding the fact that the discovery assessments issued on 15 November 2017 assess the Appellant's income as "Profit from Self-Employment". The Respondents now invite us to conclude that the tax should be assessed for years ended 5 April 2006 to 2011 as employment income. In support of this contention HMRC rely upon the Supreme Court's decision in *HMRC v Tower MCashback LLP1 & Anor [2011] UKSC 19*.

66. This point was not fully argued before us (perhaps for obvious reasons as we note below) and we are not convinced that the "*amount and nature of the tax assessed remains the same*" in the event that it is reclassified as employment income, as submitted by HMRC. Whilst *Mcashback* may entitle this Tribunal to form its own views on the law without restricting itself to what HMRC states in its conclusion or the taxpayer states in the notice of appeal, it can only do so in the context of providing a fair hearing to both sides (see par 18 of Lord Walker's judgment). The "type of income" point was not taken by HMRC in its assessment or statement of case and no mention is made of it in the statement of Mr. Allison (for obvious reasons as this is a legal rather than factual argument). It was first raised as a point in HMRC's skeleton argument which in all likelihood was sent to the Appellant days before the hearing. In the circumstances there would be a real risk of unfairness to the unrepresented Appellant if we allowed the Respondents to take this new point at this late stage. Accordingly, we decline to conclude that the relevant income of the Appellant was derived from employment as opposed to self-employment.

CONCLUSION

67. We conclude that the discovery assessments for the years ended 5 April 2006 – 2011 were validly and properly made on the basis that the loss of tax was brought about by the Appellant's deliberate conduct.

68. We further confirm the penalties issued under section 93(5) TMA 1970 and Schedule 55 FA 2009, for tax years ended 5 April 2006 to 2014, subject to the reduction that we have set out in the body of our decision.

69. Accordingly we dismiss the Appellant's appeal as against the discovery assessments, but allow it, to the limited extent we have set out in our decision, in relation to the penalties charged by the Respondents.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

70. 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.

ASIF MALEK
TRIBUNAL JUDGE

RELEASE DATE: 11 JUNE 2019