Neutral Citation: [2024] UKFTT 00826 (TC)

Case Number: TC09285

FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal reference: TC/2023/09678

INCOME TAX – discovery assessments for four tax years – issue relates to travel and subsistence expenses – witness statement from assessing officer who did not attend – uncertainty of the identity of the officer who purported to make the discovery – insufficient evidence that the discovering officer satisfied either the subjective or objective tests for the making of a valid discovery – appeal allowed

Heard on: 28 August 2024
Judgment date: 12 September 2024

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL
MS GILL HUNTER

Between

JULIAN LOWE

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: In person assisted by Mr Lance Middleton

For the Respondents: Mr Jordan Ness litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This is an income tax case the focus of which is on the validity of discovery assessments ("**the assessments**") issued to the appellant on 11 April 2023 in respect of the tax years 2017/2018, 2018/2019, 2019/2020, and 2020/2021 ("**the relevant tax years**").

2. The assessments are in the amounts, respectively, of £4,798.14, £2,356.40, £3,255.17, and £2,578.

3. For the reasons given later in this decision, we find that HMRC did not make a valid discovery and so we allow the appeal against the assessments.

THE LAW

4. The relevant statutory provisions relating to the assessments are set out in the Taxes Management Act 1970 ("**TMA**") and are set out below.

5. Section 29 TMA provides:

> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
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> > (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
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> > (b) that an assessment to tax is or has become insufficient, or
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> > (c) that any relief which has been given is or has become excessive, the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.
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> (2) …
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> (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—
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> > (a) in respect of the year of assessment mentioned in that subsection; and
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> > (b) in the same capacity as that in which he made and delivered the return, unless one of the two conditions mentioned below is fulfilled.
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> (4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
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> (5) The second condition is that at the time when an officer of the Board—
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> > (a) ceased to be entitled to give notice of his intention to enquire into the

taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer …; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

6. Section 34 TMA provides:

34. Ordinary time limit of 4 years

(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax, capital gains tax or to tax chargeable under section 394(2) of the Income Tax (Earnings and Pensions) Act 2003 may be made at any time not more than 4 years after the end of the year of assessment to which it relates.

(2) An objection to the making of any assessment on the ground that the time limit for making it has expired shall only be made on an appeal against the assessment.

7. Section 50 TMA provides:

(1)– (5) . . .

(6) If, on an appeal notified to the tribunal, the tribunal decides—

(a) that, . . ., the appellant is overcharged by a self-assessment;

(b) that, . . ., any amounts contained in a partnership statement are excessive; or

(c) that the appellant is overcharged by an assessment other than a self-assessment, the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

(7) If, on an appeal notified to the tribunal, the tribunal decides—

(a) that the appellant is undercharged to tax by a self-assessment . . .;

(b) that any amounts contained in a partnership statement . . . are insufficient; or

(c) that the appellant is undercharged by an assessment other than a self-assessment, the assessment or amounts shall be increased accordingly.

THE EVIDENCE AND FINDINGS OF FACT

8. We were provided with a bundle of documents which included authorities. The appellant gave oral evidence. HMRC had tendered a witness statement for Officer Nwanpka ("**the assessing officer**") which includes a statement of truth, but the assessing officer did not attend the hearing (notwithstanding that it was clear that the officer was on notice to do so) and gave, therefore, no oral evidence.

9. From this evidence we find as follows:

(1) The appellant was employed in the water industry in the relevant tax years. He undertook extensive business mileage and incurred other business subsistence expenses on such items as dining and hotels.

(2) He would pay these from private resources and would claim them back from his employer. He completed an expenses sheet for his employer which he would submit to that employer. The employer sometimes asked for justification of those expenses such as petrol and hotel bills.

(3) Following a discussion with a colleague at work, it became apparent to the appellant that the employer was not repaying him all the expenses which the appellant had incurred from his personal funds. His colleague recommended that he took accountancy advice.

(4) The appellant wanted to instruct somebody local to him and after a Google search, settled on Apostle.

(5) He would send Apostle the completed expense sheets that he had sent to his employer. He had instructed Apostle to compile his tax returns for the relevant tax years. Apostle would do this and would also tell him whether or not there were expenses which were not tax deductible.

(6) Once Apostle had completed the tax return it would be sent to the appellant for sign off. The appellant assumed that Apostle had got things right and undertook only a cursory review. He was comforted that Apostle knew what they were doing as he had had evidence that an enquiry into Apostle's affairs in 2019 had given them effectively a clean bill of health (the only adjustment having been made to professional fees incurred for personal rather than

business purposes).

(7) On 8 February 2023, HMRC wrote to the appellant opening an enquiry into his tax returns. HMRC thought that the appellant had claimed deductible expenses to which he was not entitled.

(8) In response to that letter, the appellant telephoned HMRC. That call took place on 15 February 2023 and was with the assessing officer. We were provided with a note of that call ("**the telephone note**"). The appellant's evidence was that this was a far-ranging discussion and the telephone note does not reflect all of the matters discussed. One of the things that the appellant raised was in respect of a personal company which he was considering setting up as a fallback to his employment in the water industry. He had been made redundant on a number of occasions and thought that he might do better as a self-employed consultant acting through a company.

(9) The telephone note is not easy to follow but reflects a pro forma questionnaire which the assessing officer went through, and to which certain answers are recorded as having been given. In response to the question "what expenses do you understand you are claiming?", The appellant is reported to have said mileage and working.

(10) In response to a question "Why do you think you were due expenses?" He is reported to have responded "I didn't think I could claim but Apostle said I could. But it was not for my day job; it was for a business I was trying to set up. I now understand that the accountants gave me wrong advise".

(11) The appellant sent no documents to HMRC nor did Apostle.

(12) In a letter dated 11 April 2023, the assessing officer told the appellant that they did not think that the tax returns for the relevant tax years were correct and that assessments would be issued. The assessments were issued on the same date.

(13) The appellant appealed against the assessments, to HMRC, on 24 April 2023 and asked for a review. In response to that appeal, HMRC wrote to the appellant stating their conclusions. In that letter dated 30 May 2023, HMRC indicated that they thought that Apostle had either deliberately or carelessly made incorrect expense claims on behalf of the appellant.

(14) Having been offered a review which the appellant accepted, HMRC's review conclusion letter upheld the conclusions. It did so on the basis that HMRC considered that Apostle had made carelessly inaccurate claims for deductible expenses and no evidence of the business expenses had been provided to substantiate the claims.

(15) On 28 September 2023 the appellant appealed to the tribunal.

DISCUSSION

Burden of proof

10. As HMRC accept, the burden of establishing that they made a valid discovery and pursuant to that discovery issued valid in time assessments which were properly served on the appellant, lies with them. They must establish this on the balance of probabilities.

11. If so established, the burden of showing that those assessments overcharge the appellant lies with the appellant. The standard of proof is, again, the balance of probabilities.

Submissions

12. In summary Mr Ness submitted as follows:

(1) HMRC have made a valid discovery.

(2) The appellant's agent, Apostle, have acted carelessly in that they failed to check the information provided by the appellant on the expense claim forms. They did not seek to verify the information on those forms by asking for, or checking, the primary material on what the claim forms were based (for example hotel bills, receipts for petrol etc).

(3) The appellant was careless in that he provided no material either to HMRC or to Apostle to justify the claims.

(4) He was also careless in that he did not check Apostle's calculations, something which he confirmed in the February 2023 telephone call.

(5) Furthermore, he failed to keep adequate records which is further evidence of carelessness.

(6) The hypothetical assessing officer would not have been aware of the insufficiency at the time of closure of the enquiry window for each of the relevant tax years. It was only when information subsequently provided was reviewed, that a potential shortfall was discovered.

(7) The evidence of the telephone note shows that the appellant agreed that the expense claims would need to be amended.

(8) The appellant has not challenged the quantum of the assessments which should be upheld.

13. In summary the appellant (and Mr Middleton) submitted as follows:

(1) No information was sought from the appellant prior to the issue of the assessments. HMRC have not made a valid discovery. The discovery appears to have been made on the basis of what was discussed on the February 2023 telephone call.

(2) No admission was made on that call in relation to the expense claims made by the appellant in his capacity as an employee. The telephone note clearly shows that the answer to the question regarding allowable expenses was in relation to a new company the appellant was considering setting up.

(3) The appellant has not behaved carelessly. He has kept records for as long as he was statutorily required to do. He incurred expenses personally for business mileage travel and subsistence without all of these having been reimbursed by the employer. These personal expenses were discussed with Apostle who then validly claimed the difference between the expenses incurred and those reimbursed in the appellant's tax returns.

(4) HMRC might have had misgivings about Apostle and the legitimacy of expense claims made by them on behalf of other clients but that should not affect the appellant in this case.

(5) There is no evidence of carelessness on the part of either Apostle or the appellant.

(6) The hypothetical officer would have been aware of the insufficiency at the time of the closure of the enquiry window for each of the relevant tax years. The only additional information was that in the February 2023 telephone call. This has clearly been misconstrued by HMRC and it is difficult to see what additional information in that call prompted the issue of the assessments.

(7) The fact that the appellant telephoned HMRC in February 2023 in response to HMRC's opening enquiry letter demonstrates that the appellant has engaged with HMRC and has not behaved carelessly. He has conducted himself properly, appointed an agent to assist and has relied on that agent. He has behaved carefully and diligently throughout.

Our view

14. It is our view that HMRC have not made a valid discovery. The reasons that we have reached this conclusion are set out below.

15. The Upper Tribunal in *Jerome Anderson v HMRC* [2018] UKUT 0159 ("***Anderson***") undertook an extensive review of the legislation and case law relating to the making of a discovery which they summarised at [24] of that decision.

16. They concluded that the concept of an officer discovering something involves an actual officer having a particular state of mind in relation to the relevant matter which involves the application of a subjective test; and it also involves that officer's state of mind satisfying an objective test.

17. The Upper Tribunal said this:

> *"The subjective test*
>
> 25. It is clear that before an officer makes a discovery assessment, he must have formed a certain state of mind. The question raised on this appeal is: what must the officer think or believe? The three judges in the Divisional Court in *R v Kensington Income Tax Commissioners* all agreed that it was not necessary for the officer to reach a conclusion which was justified by sufficient legal evidence. However, when describing what was required for this purpose, the three judges expressed themselves in different terms which do not appear to us to describe the same test.
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> 26. Any test which is devised as to the necessary subjective belief on the part of the officer must be a practical and workable test. The expression of the test has to recognise that at the time when an officer thinks that it is desirable to make a discovery assessment, the officer may appreciate that in certain respects he may not be in possession of all of the relevant facts. Further, the officer may foresee that a discovery assessment might give rise to questions of law some of which might not be straightforward.
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> 27. In *Revenue and Customs Commissioners v Lansdowne Partners Ltd Partnership*, when considering the meaning of "be aware of" for the purposes of s 29(5), it was said that "awareness" was a matter of perception not conclusion and that it was possible to say that an officer was "aware of" something even when he could not at that stage resolve points of law and even though he was not then aware of all of the facts which might turn out to be relevant. Although the word "discover" and the phrase "be aware of" cannot be treated as synonyms, we consider that if it is possible to be aware of

something when one does not know all of the relevant facts and one cannot foretell how relevant points of law will be resolved, it cannot be said to be premature for an officer to "discover" that same something even when he knows he is not in possession of all of the relevant facts and does not know how relevant points of law will be resolved.

28. In *Sanderson*, Patten LJ described the power under section 29(1) in this way:

> "The exercise of the section 29(1) power is made by a real officer who is required to come to a conclusion about a possible insufficiency based on all the available information at the time when the discovery assessment is made".

We consider, with respect, that this test is in accordance with the earlier authorities. This passage describes the test somewhat briefly because, of course, that case concerned s 29(5) rather than s 29(1). Having reviewed the authorities, we consider that it is helpful to elaborate the test as to the required subjective element for a discovery assessment as follows:

> "The officer must believe that the information available to him points in the direction of there being an insufficiency of tax".

That formulation, in our judgment, acknowledges both that the discovery must be something more than suspicion of an insufficiency of tax and that it need not go so far as a conclusion that an insufficiency of tax is more probable than not.

The objective test

29. The authorities establish that there is also an objective test which must be satisfied before a discovery assessment can be made. In *R v Bloomsbury Income Tax Commissioners*, the judges described the objective controls on the power to make a discovery assessment. Those controls were expressed by reference to the principles of public law. In *Charlton* at [35], the Upper Tribunal referred to the need for the officer to act "honestly and reasonably".

30. The officer's decision to make a discovery assessment is an administrative decision. We consider that the objective controls on the decision making of the officer should be expressed by reference to public law concepts. Accordingly, as regards the requirement for the action to be "reasonable", this should be expressed as a requirement that the officer's belief is one which a reasonable officer could form. It is not for a tribunal hearing an appeal in relation to a discovery assessment to form its own belief on the information available to the officer and then to conclude, if it forms a different belief, that the officer's belief was not reasonable".

18. We ask ourselves whether, tested against the principles set out above, HMRC have made a valid discovery.

19. It is not clear (and indeed it was not clear to Mr Ness) whether the assessing officer was also the officer who made the discovery. The assessing officer's reference appears on the assessments. But the assessing officer's statement (to the extent that it is admissible or has any probative value) makes no reference to the officer making a discovery nor the date on which it was made. The only reason that we think the assessing officer might also be the

officer who made the discovery is our experience in these cases which is that the discovery officer usually provides a witness statement.

20. All that statement says is that, by way of background, no evidence was provided to support the expense claims made in the tax returns for the relevant tax years; an enquiry was opened on 8 February 2023; and that on 11 April 2023 the assessing officer wrote to the appellant to advise that the officer would be issuing the assessments which were issued on the same date.

21. No mention is made of the making of a discovery nor the basis on which it was made.

22. Evidentially, HMRC are in considerable difficulty. Even though the witness statement contains a statement of truth, the general rule is that unless its contents are agreed, it is not admissible unless and to the extent that the witness gives oral evidence. No such oral evidence was given in this case.

23. One reason for this is that without the witness being present in person, the appellant has no opportunity to cross examine the witness. In the circumstances of this case, that would have been extremely important. The assessing officer, if indeed it was the discovery officer, could have been asked questions about the basis on which any discovery had been made. And we would then have been able to consider whether the subjective and objective criteria had been met.

24. In the absence of any such oral evidence, we are not prepared to accept that the assessing officer's witness statement is any evidence that a discovery was made. So what evidence is there?

25. It seems the only evidence is the fact that the assessments were issued. And although HMRC have not put it quite like this, I suspect they would ask us to imply that because the assessments were issued, a valid discovery had been made.

26. We are not prepared to make such an inference. All that we can say is that the assessing officer issued the assessments on 11 April 2023. We can make no inference that that reflects an earlier valid discovery.

27. We ask ourselves what evidence is there of an officer satisfying the subjective limb of the two-stage discovery assessment test. What evidence is there that the officer believed that the information available to them pointed in the direction of there being an insufficiency of tax.

28. It seems from the witness statement as well as the correspondence that HMRC base the assessments on the fact that no supporting documents were provided to justify the expense claims.

29. Yet there is no evidence that HMRC made any attempt to obtain such evidence. Although the opening enquiry letter indicated that the appellant should provide such evidence, HMRC did not wait until it was so provided. They simply (apparently on the basis of the telephone conversation in February 2023) proceeded from the opening enquiry letter to the issue of the assessments.

30. There is no obligation for a taxpayer to provide corroborating evidence at the same time as submitting self-assessment tax returns. That is the whole point of self-assessment. It is a

process now check later regime. It is usual for HMRC to request information and to defer the making of an assessment until either that information is forthcoming or it proves to be unavailable.

31. One obvious reason for this is that the information might justify the self-assessment, in which case there is no need for a discovery assessment.

32. But no such regime was adopted in this case.

33. We have been provided with no evidence that the discovery officer (whoever that might be) had formed any belief that the information available to that officer pointed in the direction of there being an insufficiency of tax. But in our view there was simply nothing on which that officer could go on to come to any subjectively or objectively justifiable conclusion that there was an insufficiency.

34. We turn now to the objective test. When considering this we are effectively considering, on judicial review principles, whether the discovery officer's decision was objectively reasonable i.e. one which a reasonable officer could form.

35. It will be apparent from our foregoing comments that we do not think that whoever the discovery officer was, had reached an objectively reasonable conclusion. There was no objective evidence on which to reasonably conclude that there was an insufficiency of tax. It was a capricious and irrational decision.

36. In our view the objectively reasonable officer in the position of the discovery officer would have sought further information about the expense claims. That officer would then have information on which to base an objectively reasonable decision. But the officer does not appear to have done this.

37. It is clear from the telephone note that the information provided by the appellant to the assessing officer related to a new business which he was intending to set up and not the expense claims made in the tax returns for the relevant tax years. It would, therefore, be wholly objectively unreasonable for a discovery to be based on this information. Yet it seems, given the timeline, that this might well be what happened.

Conclusion

38. It is for HMRC to demonstrate that on the balance of probabilities a valid discovery has been made.

39. They have failed to provide us with evidence of primary facts from which we can either directly conclude, or infer, that either the subjective or the objective tests for making a discovery have been satisfied.

40. Accordingly, we find that no valid discovery has been made and thus we allow the appeal.

41. In light of the above, there is no need for us to consider whether either the appellant or Apostle have been careless, nor HMRC's submissions regarding the hypothetical officer.

DECISION

42. We allow the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

43. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 12th SEPTEMBER 2024