[2014] UKUT 0324 (TCC)

Appeal number: FTC/113/2013

INCOME TAX – relief for error or mistake – Section 33 Taxes Management Act 1970 – jurisdiction of the Upper Tribunal – whether decision of the First-tier Tribunal gave rise to a right of appeal – no – appeal dismissed

IN THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

PHILIP GRAHAM TINDALE **Appellant**

- and -

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

TRIBUNAL: Judge Timothy Herrington
Judge Nicholas Aleksander

Sitting in public in London on 3 June 2014

Bernard Rice, Accountant, for the Appellant

Aparna Nathan, Counsel, instructed by the Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

Introduction

1. The Appellant ("Mr Tindale") appeals against a decision ("the Decision") of the First-tier Tribunal (the "FTT") released on 22 May 2013 which dismissed Mr Tindale's appeal against the decision of the Respondents ("HMRC") that Mr Tindale was not entitled to a claim for relief under section 33 Taxes Management Act 1970 ("TMA") in respect of the years 1997-98 to 2001-02 inclusive.

2. The claim was made on the basis that Mr Tindale's income had been incorrectly returned as arising from self-employment rather than employment so that tax was paid on an incorrect basis and therefore Mr Tindale should be given credit for tax that the employer company deducted or should have deducted under PAYE.

3. The FTT was unable to establish the exact amount that Mr Tindale was paid nor the amount deducted from that pay nor whether the full amount deducted was used to fund the liability Mr Tindale declared on his self-assessment returns which were made on the basis that he was self-employed. However, the FTT was clear that the PAYE liability would have exceeded the tax paid on the self-assessment claims. Therefore, on the basis that if Mr Tindale succeeded on his claim he would have received a windfall of the amount of the tax he had paid the FTT concluded that it would be just and reasonable to deny relief altogether and dismissed the appeal.

4. Mr Tindale contends that there is no evidence to support the FTT's finding that the amount of tax paid by Mr Tindale was less than any liability to tax on employment income and that in the absence of any findings of fact as to the level of emoluments for the years in question or the amount of tax deducted the only reasonable and safe way to proceed is to assume that the amount deducted from the payments made to Mr Tindale was equal to the liability on those earnings and therefore Mr Tindale should be repaid the amounts he previously paid under the self-assessment regime.

5. HMRC contend that the Upper Tribunal has no jurisdiction to hear an appeal on the merits of the FTT's decision because of the limited right of appeal given in section 33(4) TMA. HMRC invited us to decide this as a preliminary issue, its contention being that if the preliminary issue is accepted by the Upper Tribunal it disposes of the appeal in HMRC's favour.

6. We decided at the outset of the hearing to deal with the jurisdiction point as a preliminary issue pursuant to our power in Rule 5(3) (e) of the Tribunal Procedure (Upper Tribunal) Rules 2008. As we have decided the preliminary issue in favour of HMRC, it has not been necessary to deal with the merits of the appeal and accordingly this decision is confined to our determination on the preliminary issue

Relevant Legislation and Preliminary Issue

7. The Decision refers to s 33 TMA in the form in which it existed before it was amended by the Transfer of Tribunal Functions and Revenue and Customs Appeals

Order 2009. We have based our decision on the section as amended by that Order, the amended section applying to appeals notified after the Order came into force, which is clearly the case here. There is no material difference in effect between the earlier and later versions of the provision.

8. Section 33 TMA as amended provides:

> "(1) If a person who has paid income tax or capital gains tax under an assessment (whether a self-assessment or otherwise) alleges that the assessment was excessive by reason of some error or mistake in a return, he may by notice in writing at any time not later than five years after the 31st January next following the year of assessment to which the return relates, make a claim to the Board for relief.
>
> (2) On receiving the claim the Board shall inquire into the matter and shall, subject to the provisions of this section, give by way of repayment such relief … in respect of the error or mistake as is reasonable and just …
>
> (2A) No relief shall be given under this section in respect of –
>
> (a) an error or mistake as to the basis on which the liability of the claimant ought to have been computed where the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made; or
>
> (b) an error or mistake in a claim which is included in the return.
>
> (3) In determining the claim the Board shall have regard to all the relevant circumstances of the case, and in particular shall consider whether the granting of relief would result in the exclusion from charge to tax of any part of the profits of the claimant, and for this purpose the Board may take into consideration the liability of the claimant and assessments made on him in respect of chargeable periods other than that to which the claim relates.
>
> (4) If any appeal is brought from the decision of the Board on the claim, the tribunal shall determine the appeal in accordance with the principles to be followed by the Board in determining claims under this section.
>
> (4A) The determination of the tribunal of an appeal under subsection (4) shall be final and conclusive (notwithstanding the provisions of sections 11 and 13 of the TCEA 2007) except on a point of law arising in connection with the computation of profits.
>
> (5) in this section "profits"-
>
> (a) in relation to income tax, means income, and
>
> (b) in relation to capital gains tax, means chargeable gains,
>
> …"

9. The preliminary issue for consideration is whether Mr Tindale's appeal is "on a point of law arising in connection with the computation of profits" it being clear from the wording of section 33(4A) TMA that the Upper Tribunal has no jurisdiction to

hear an appeal on any other issue. In particular we have no power to interfere with the FTT's determination as to whether it was just and reasonable to grant relief.

The Authorities

10. Ms Nathan referred us to a number of authorities on the interpretation of what is now section 33(4A) TMA.

11. In *Carrimore Six Wheelers Ltd v IRC* (1944) 26 TC 301, the taxpayer received rent for an advertisement hoarding on its business premises. For many years it had included the rents received as trading receipts with the gross annual value of the factory and land being allowed as a deduction, the taxpayer being assessed to Income Tax under Schedule D Case I accordingly. The correct basis for assessment however, should have been under Schedule A but the taxpayer did not wish to make the detailed apportionment of outgoings which that Schedule required. In due course, however, the taxpayer submitted a claim for relief under the predecessor provision to s 33 TMA on the grounds the income should not have been assessable under Schedule D Case I. Relief was refused and the Special Commissioners held there had been no error or mistake in the taxpayer's returns and that if there had been, the damage to the taxpayer was nil.

12. The Court of Appeal considered whether the taxpayer's further appeal against the Special Commissioners' decision was on a point of law arising in connection with the computation of profits.

13. Lord Greene MR observed at page 306 of his judgment that:

> "The right to require a case to be stated on a point of law is not the same right as is given under the ordinary provision of the Income Tax legislation under which any point of law can be raised; it is strictly circumscribed."

14. Accordingly at page 307 of his judgment Lord Greene MR referred to the fact that for a number of years the taxpayer had deliberately included the income concerned under the wrong Schedule and that the question was whether such deliberate wrong entry was an "error or mistake" within the meaning of the provision. His answer was as follows:

> "The question is undoubtedly a question of law. It is a question of the true construction of Sub-section (1), and may be formulated in this way: Whether or not, on the true construction of the words "error or mistake" in that Sub-section, the Appellants are entitled to maintain a claim; but the fact that it is a question of construction, and therefore a question of law, did not entitle the Appellants to ask for a Case unless the question of law arose in connection with the computation of profits or income. It was argued by Mr Burrows that the question did so arise, but, in my opinion, that argument will not bear examination. The question has nothing to do with the computation of profits or income. There was no dispute as to the proper method of computation of profits or income with regard to this item at all. The profits under Schedule D, as computed for Income Tax purposes, were not in dispute. The inclusion of this particular item was wrong, and I cannot see how any point of law in connection with the computation of profits or income can be said to arise. It is a pure question of construction of the Sub-section in relation to

> the admitted fact that a wrong entry was made with full knowledge that it was wrong, and deliberately."

15. It is clear from Lord Greene MR's reasoning that in order to come within the scope of the right of appeal there must be a dispute as to the proper method of computation of profits or income.

16. This reasoning was followed by the Court of Appeal in Northern Ireland in *Arranmore Investment Co Ltd v IRC* (1973) STC 195. After referring to *Carrimore* Lord Lowry CJ said at pages 204-205.

> "Quite independently of authority, I must state that the mere fact that a point of law will or may, when decided, affect the amount of profits which a taxpayer is found, or deemed, to have earned does not, to my mind, turn that point into a point of law arising in connection with the computation of profits. For this to happen, the point for decision must itself relate to the method of computation. One would naturally expect, as Curran LJ put it in the course of the argument, that the decision of a point of law "arising in connection with the computation of profits" would affect the computation of these profits. I do not think that a point of law can be said to arise in connection with the computation of profits, merely because its decision will ultimately affect the existence or extent of the taxpayer's liability. One may concede that the words "in connection with" are in most contexts, and possibly in the context of s 33(4), of wider range that the words "in" or "on", but it requires a further step to justify the proposition that either of the points of law arising in these cases is a point arising in connection with the computation of profits."

17. As with *Carrimore*, the judgment emphasised the point that the decision in question must itself relate to the method of computation and the fact that the decision might affect the existence or extent of the taxpayer's liability will not be sufficient.

18. In *Eagerpath v Edwards* [2001] STC 26, the Court of Appeal explained the rationale for the restricted right of appeal. Delivering the first judgment Robert Walker LJ said at [19]:

> "The special restriction on the right of appeal under s 33(4) of the Taxes Management Act 1970 has had a long history, going back at least to s 24 of the Finance Act 1923, and it has been considered by the court on a number of occasions. Apart from authority, it might be thought that the likely purpose of the restriction was to exclude any appeal on either of two points which were regarded as peculiarly within the expertise and judgment of the Special Commissioners: first, whether a return was made 'on the basis or in accordance with the practice generally prevailing at the time when the return was made'; and second, what relief was in all the circumstances 'reasonable and just …".

19. We therefore approach the circumstances of this case against the background of the above principles.

Relevant Facts

20. The FTT made its findings of fact in paragraphs 6 to 30 of the Decision. As we are only dealing with the preliminary issue, we need not refer to the FTT's findings in any detail but we would highlight the following:

(1) Mr Tindale started work for Dynaudio A/S (a Danish Company) in June 1974 promoting Dynaudio's products under an employment contract (paragraphs 9 to 12 of the Decision);

(2) Some material showed Dynaudio having a London address at some point during Mr Tindale's employment (paragraph 13 of the decision);

(3) Some deductions were made from the payments made by Dynaudio to Mr Tindale. He was concerned about the correctness of the deductions but he was presented with self-assessment tax returns to sign (which he did not check) for the years 1996/7 to 2001/2 which were submitted in October 2002 (paragraphs 14 to 15 of the Decision);

(4) After leaving Dynaudio in acrimonious circumstances he took advice on his tax position from Mr Rice in 2003. Mr Rice approached HMRC in August 2003 to explain that Mr Tindale was concerned his tax affairs were not up to date (paragraphs 19 to 20 of the Decision);

(5) HMRC investigated Mr Tindale's employment status. It concluded that Mr Tindale had an employment contract with Dynaudio (although the conclusion was that he was employed by Dynaudio Limited). HMRC also concluded that "Dynaudio Limited" had no UK base. HMRC's decision referred to the fact that where a foreign employer with no UK base had engaged an employee on an employed basis income tax and national insurance would be collected from the employee (paragraphs 25 to 26 of the Decision);

(6) Between 2004 and October 2011 there was a substantial amount of correspondence but very little progress in resolving Mr Tindale's tax position. Mr Rice argued vehemently during this period that Dynaudio did have a UK presence and should have operated PAYE and put forward error and mistake claims under section 33 TMA. HMRC argued variously that Mr Tindale should have operated PAYE and that he had, essentially, done that by paying tax shown as due on the return, that as Dynaudio was not liable to operate PAYE there was no liability for which Mr Tindale was able to claim credit and justify a repayment of the tax he had erroneously paid on a self-employed basis and that the error or mistake claim had not been quantified (paragraph 29 of the Decision).

The Decision of the FTT

21. The basis of the claim for relief was that Dynaudio did have a taxable presence in the UK; was bound to operate PAYE and therefore Mr Tindale was entitled to repayment of the whole of the tax paid by him in respect of the income he had returned as self-employed income in the relevant years. Mr Rice is recorded as stating there was no need to submit computations in the context of claiming relief and

indeed it would not be possible to do so; the whole of the amount of tax should be repaid. Mr Tindale lacked the necessary information about the payments made to him (paragraph 35 of the Decision).

22. The FTT records in paragraph 41 of the Decision that the claim for relief is properly quantified as being for repayment of the whole of the tax and national insurance paid in respect of the income returned as arising from self-employment.

23. Having considered all the relevant circumstances the FTT concluded in paragraph 57 of the Decision as follows:

> "57. We have not been able to establish the exact amount that the Appellant was paid nor the amount deducted from that pay nor whether the full amount deducted was used to fund the self-assessment liabilities. We are as clear as we can be that the PAYE liability would have exceeded the tax paid on the self-assessment returns. If the Appellant succeeds in this Appeal he will receive a windfall in the amount of the tax he paid. If he fails he will have paid tax on the basis of income returned by him in returns signed by him and computed on a basis likely to have been more generous than if that same income had been computed on the basis he was an employee. We have concluded that it is just and reasonable to deny relief altogether. This is because there is such uncertainty over the facts of this case, the amounts the Appellant was paid, the presence or otherwise of Dynaudio, delays on both sides at relevant times and the probability that the tax paid was less than it might have been (possibly far less). All this makes it just and reasonable to deny relief. We dismiss the appeal."

24. As we have observed, we are not concerned with the FTT's reasoning on why it considered it was just and reasonable to deny relief. Our concern is whether it can be said that any part of the Decision concerned any point of law arising in connection with the computation of Mr Tindale's income for the years in question.

Discussion

25. Mr Rice submitted that the FTT erred in failing to compute Mr Tindale's income. That was an error of law in connection with the computation of profits and therefore the Upper Tribunal had jurisdiction to hear Mr Tindale's appeal. He submitted that the FTT gave no reasons why making a refund would amount to an unjust windfall. This was an error of law concerning the computation of profits.

26. We cannot accept Mr Rice's submissions. It is clear that the FTT's decision is not in any sense based on the quantification of Mr Tindale's income. That is apparent from its acceptance in paragraph 41 of the Decision that the claim for relief is quantified as a claim for repayment of whatever tax has been paid, regardless of quantification. Paragraph 57 of the Decision therefore proceeds on the basis that quantification of the tax paid, and therefore by implication the principles under which the income on which that tax payment was based to be applied, was not an issue to be determined. Indeed, the FTT made it clear that in the absence of information that would enable the calculation to be made, quantification of the income concerned would not be possible. Mr Rice did not dispute that such a calculation would not now be possible.

27. As Ms Nathan submitted, in the absence of any evidence to show how Mr Tindale's income would be calculated, there could be no computation of that income and consequently no error of law "in connection with the computation of profits".

28. It is absolutely clear to us that, as the authorities demonstrate, in order for an appeal to lie to this tribunal there must be a dispute as to the method of computation of profits employed, that is what principles should be applied to the computation of those profits. The dispute in this case may indeed concern the amount of Mr Tindale's taxable income, and in particular what adjustments should be made to his returns to take account of the fact he should have been taxed as an employee rather than treated as self-employed, but there was no dispute before the FTT as to the principles to be applied in calculating such income.

29. We also accept Ms Nathan's submission that under section 33(3) TMA the computation of profits is just one of the factors that the FTT may take into account in deciding whether it is reasonable and just to grant relief. As it is a discretionary factor, the failure to carry out an exercise to compute the profits cannot be an error of law in this case where it is clear from the way the claim for relief was put (that is a claim for repayment of all of the tax paid) that the question as to how to calculate the amount of the income concerned was not in issue.

Conclusion

30. As was indicated in *Carrimore*, the right of appeal in section 33 TMA is strongly circumscribed. We therefore have reluctantly to conclude that we have no jurisdiction to hear Mr Tinsdale's appeal and the preliminary issue is determined in HMRC's favour. That is sufficient to dispose of the appeal.

31. As we indicated to Mr Rice at the hearing that does not necessarily mean that Mr Tindale is entirely without remedy. In *Eagerpath v Edmunds* Brooke LJ made the following observations at [38]:

> "On the interpretation of s 33(4), however, I have read the judgment of Robert Walker LJ and I have nothing to add to his reasons for upholding the decision of the judge, with which I agree. This does not mean that an aggrieved taxpayer has no potential right of redress. One of the reasons for the overhaul in the procedures for judicial review was to facilitate access to the supervisory jurisdiction of the High Court in cases where inferior tribunals, such as the Special Commissioners, were said to have made errors of law in relation to which no statutory rights of redress were available. The judges of the Administrative Court now adopt a benevolent approach to the interpretation of the time limits for judicial review applications in cases where the taxpayer was concerned first with exhausting his statutory remedies. There is also, as I have made clear, a private law action available through the ordinary courts, although this seems a less than ideal forum for complicated disputes about tax law."

32. In this case Mr Tindale has now exhausted his statutory remedies but other routes to pursue may still be open.

Disposition

33. The appeal is dismissed.

TIMOTHY HERRINGTON **NICHOLAS ALEKSANDER**

JUDGES OF THE UPPER TRIBUNAL
RELEASE DATE: 10 July 2014