[2015] UKFTT 0615 (TC)

TC04757

Appeal number: TC/2012/00013

INCOME TAX/CAPITAL GAINS TAX – Discovery Assessments – Whether valid – Yes – Whether evidence to displace assessments – No – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

BRIAN PEPPER **Appellant**

- and -

THE NATIONAL CRIME AGENCY **Respondent**
(Successor to The Serious Organised Crime Agency)

TRIBUNAL: JUDGE JOHN BROOKS
JULIAN SIMS, FCA, CTA

Sitting in public at the Royal Courts of Justice on 17 November 2015

The Appellant did not appear and was not represented

David Yates, counsel, instructed by the National Crime Agency, for the Respondents

DECISION

Introduction

1. Mr Brian Pepper appeals against the following discovery assessments made, under s 29 of the Taxes Management Act 1970 ("TMA"), by the Serious Organised Crime Agency ("SOCA") on 17 August 2011:

(1) 1998-99: £18,478.90 (income tax) and £1,074.20 (Class 4 NICs);

(2) 1999-00: £37,412.25 (income tax) and £1,108.20 (Class 4 NICs);

(3) 2000-01 - £95,299.38 (income tax) and £1,640.45 (Class 4 NICs);

(4) 2001-02: £212, 646.42 (income tax) and £1,775.55 (Class 4 NICs);

(5) 2002-03: £506,546 (income tax) and £1,806 (Class 4 NICs);

(6) 2003-04: £1,274,730 (income tax) and £33,850.48 (Class 4 NICs);

(7) 2004-05: £881,730.40 (income tax) and £24,078.87 (Class 4 NICs); and

(8) 2005-06: £73,311 (capital gains tax).

2. Under s 317 of the Proceeds of Crime Act 2002 the enforcement authority, designated under Part 6 of that Act, may serve a notice on HM Revenue and Customs ("HMRC") that it intends to carry out the "Revenue functions" specified in the notice that are vested in it as an enforcement authority if it:

> … had reasonable grounds to suspect that income arising or a gain accruing to a person in respect of a chargeable period is chargeable to income tax or is a chargeable gain (as the case may be) and arises or accrues as a result of the person's or another's criminal conduct (whether wholly or partly and whether directly or indirectly).

The "Revenue functions" include the power to assess and charge income tax, capital gains tax and national insurance contributions (see s 323 of the Proceeds of Crime Act 2002).

3. In this case the then designated enforcement authority, the Asset Recovery Agency ("ARA"), served a s 317 SOCA notice on HMRC on 17 April 2007 because, inter alia, Mr Pepper held a large amount of property and cash and had no credible explanation as to how he had accumulated such wealth.

4. The ARA was abolished by s 74(1) of the Serious Crimes Act 2007 and its functions transferred to SOCA on 1 March 2008. On 7 October 2013 s 15 of the Crimes and Courts Act 2013 ("CCA") abolished SOCA. Its functions were assumed by the National Crime Agency (the "NCA") which had been established by s 1 CCA. Under Part 1 of schedule 8 to CCA anything in the process of being done by SOCA at the time it was abolished may be continued by the NCA which automatically replaced SOCA as a party in any ongoing litigation including that, such as in this case, before the Tribunal.

5. Therefore, notwithstanding the assessments were made by SOCA, the original respondent, the NCA is now the respondent in this case. Although throughout this decision we have referred to the respondent as the NCA this should be read, where appropriate, as a reference to SOCA.

Absence of Appellant and Adjournment Application

6. Although the NCA was represented by counsel, Mr David Yates, Mr Pepper was not present at the hearing. However, at 16:37 on 16 November 2015 the day before his appeal was due to heard, Mr Pepper made an application by email for the hearing to be adjourned on the basis that he would not be available as he lives in the United States and would be applying for "judicial review of this case". Perhaps not surprisingly, Mr Yates objected to the adjournment application and submitted that the case should proceed in Mr Pepper's absence.

7. Under rule 33 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (the "Tribunal Procedure Rules") a hearing may proceed in the absence of a party if the Tribunal:

> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
>
> (b) considers it in the interests of justice to proceed with the hearing

8. In order to properly consider the Mr Pepper's application for an adjournment and whether to proceed in his absence it is necessary to set out the procedural history of this appeal.

9. As we have already noted assessments (for income tax, capital gains tax and Class 4 NICs) were issued by SOCA on 17 August 2011. On 1 September 2011 Mr Pepper appealed to SOCA and on 9 December 2011 the appeals were notified to the Tribunal. In essence the grounds of appeal advanced were that:

> (1) SOCA had no right to raise the assessments which were consequently invalid; and alternatively
>
> (2) if SOCA was entitled to raise the assessments the amounts assessed were incorrect.

10. With the consent of the parties the Tribunal gave directions for the determination of the first broad ground of appeal to be heard as preliminary issue. This came before the Tribunal (Judge Cannan and Mr Farooq) in Manchester on 1 and 2 July 2013 and its decision, *Pepper v SOCA* [2013] UKFTT 654 (TC), was released on 11 October 2013. The Tribunal found that as there had not been any agreement between Mr Pepper and SOCA in 2009 on the tax assessment issue or any abuse of process on its part, SOCA did have the right to raise the assessments which were therefore valid.

11. On 5 December 2013 Mr Pepper unsuccessfully applied to the Tribunal for permission to appeal against its decision. His subsequent application to the Tax and Chancery Chamber of the Upper Tribunal for permission to appeal was also refused

and arrangements commenced for the second ground of his appeal, namely the quantum of the assessments, to be listed for a hearing.

12. In an application to the Tribunal of 28 May 2015 (repeated on 31 July 2015) Mr Pepper sought directions for the issue of summons compelling witnesses to appear at this hearing. The application was dismissed by Judge Mosedale as these witnesses were only able to give evidence in relation to the existence or otherwise of an agreement between Mr Pepper and SOCA in 2009, an issue that had been determined against him in 2013 and which was not relevant to the outstanding issue before the Tribunal.

13. Mr Pepper was notified that his application had been unsuccessful by a letter from the Tribunal (sent by email) dated 1 September 2015. He responded, by email, on the same day and this was treated by the Tribunal (Judge Mosedale) as an application to set aside and/or appeal against her decision not to issue witness summons. That application was dismissed on 2 October 2015.

14. On 20 October 2015 the Tribunal wrote to the parties to notify them that the appeal would be heard on 17 and 18 November 2015 at the Royal Courts of Justice in London. Mr Pepper responded by email on 20 October 2015 saying that the date was not acceptable to him as he would be appealing to the Upper Tribunal "within the next week" against Judge Mosedale's refusal to issue witness summons. This email was treated as an application to postpone the hearing and was dismissed on 23 October 2015 as it was for the Upper Tribunal to decide whether it was appropriate for the hearing listed for 17-18 November 2015 to be postponed on receipt of any application for permission to appeal.

15. Mr Pepper made such an application to the Upper Tribunal on 23 October 2015 together with a further application to postpone the hearing listed for 17-18 November 2015. Mr Pepper's email of 23 October 2015 states:

> I have already appealed to the upper tier (sic) tribunal for them to allow the 3 witness statement and I will certainly not be attending any hearing in November … I do not see the point of a hearing when I am contesting her [Judge Mosedale's] decision [not] to grant the 3 witness statements. This would be a complete waste of time.
>
> I live in the United States of America and will only attend a hearing when the first tribunal allows for the 3 witness to be made available. I know this will not happen before the 17 of November.

16. On 26 October 2015 the Upper Tribunal turned down Mr Pepper's application for permission to appeal on the papers and he applied, as he is entitled to do, for an oral hearing of that application.

17. On 6 November 2015 Mr Pepper sent an email to the Tribunal to say he would not be attending the hearing on 17-18 November 2015, which suggested that he was happy for the matter to proceed as it would speed his opportunity to appeal further.

18. The Upper Tribunal heard Mr Pepper's oral application for permission to appeal on 13 November 2015 with Mr Pepper attending by telephone. The application was dismissed by Judge Bishopp and Mr Pepper was sent a Decision Notice confirming Judge Bishopp's decision by email at 17:07 the same day.

19. Later that day, at 19:04, Mr Pepper sent an email to HMRC, which was copied to the Tribunal, in the following terms:

> NOTICE OF INTENT FOR JUDICIAL REVIEW IN THE HIGH COURT
>
> Dear Sir
>
> Further to my conversation with the European Court of Human Rights, Please find enclosed a notice of intent for Judicial Review. I await your comments before I lodge this with the High Court. I will be taking this to the High Court and if I am unsuccessful I will be taking this to the ECHR. As you are aware before I do take it to the ECHR I need to have gone through the Judicial review.

20. Clearly this was not an application to postpone the hearing listed for 17-18 November 2015 but, for the avoidance of doubt, on 16 November 2015 the Tribunal sent the following email to the parties:

> "The First-tier Tribunal has been copied into Mr Pepper's notice to HMRC that (it seems) he intends to apply for judicial review of the First-tier Tribunal's decision in *Pepper v SOCA* [2013] UKFTT 654 (TC) in which the Tribunal decided that there was no settlement of Mr Pepper's tax liabilities.
>
> This email from Mr Pepper does not appear to contain an application for an adjournment of the hearing due to take place tomorrow and the Tribunal does not treat it as such. The hearing will take place tomorrow as notified to all parties"

However, at 16:37 on 17 November 2015 a further application to postpone the hearing was received from Mr Pepper.

21. This application was considered by the Tribunal at the commencement of the hearing and, as it had previously been made clear that a further adjournment was inappropriate given that the parties had been informed of the date of the hearing over a month previously; that Mr Pepper had exhausted his appeal rights in respect of the preliminary issue which he appeared to be attempting to re-litigate rather than address the outstanding issue (ie the quantum of assessments); and having regard to the overriding objective contained in rule 2 of the Tribunal Procedure Rules which require us to deal with cases "*fairly and justly*" and in particular rule 2(2)(e) which refers to "*avoiding delay, so far as compatible with proper consideration of the issues*" we refused Mr Pepper's application for an adjournment.

22. It is clear from his correspondence with the Tribunal, which refers to the date of the hearing, that Mr Pepper had been notified, and was aware, that the hearing was listed for 17-18 November 2015. Given his lack of engagement with the outstanding

issue, a matter of which he would have been aware since filing his Notice of Appeal in September 2011, we considered it to be in the interests of justice to proceed with the hearing in his absence.

Evidence and Facts

23. We were provided with a bundle of documents from the NCA which contained the witness statement of Mr Richard La Roche, an officer of HMRC who was seconded to SOCA between September 2009 and April 2013 and who was the officer that raised the assessments with which this appeal is concerned; copies of the assessments; Mr Pepper's Notice of Appeal; correspondence between the parties; and financial information including bank statements and property information. There were also eight bundles from Mr Pepper however, these did not address the issue before us as they were the same bundles that had been prepared for preliminary issue hearing.

24. In addition to the documentary evidence we heard the oral evidence, on oath, of Mr La Roche.

25. It is on the basis of this evidence that we make our findings of fact.

26. Until he became of director of a property management company, DCD Limited, on 26 February 1998 Mr Pepper did not own any properties in the United Kingdom or hold office as a director of any United Kingdom company. However, in the seven years between 1998 and 2005 he acquired a substantial personal property portfolio with a then market value of £1.3m in addition to other properties obtained through business ventures with others. During 2005-06 Mr Pepper disposed of four properties in the Manchester area.

27. HMRC records indicate that self-assessment tax returns have been issued to Mr Pepper since 1999-00 but that none of these have been filed. Data provided to the NCA by HMRC showed that Mr Pepper received net remuneration of £40,000 from DCD Limited between 1999-00 to 2001-02. The financial statements of DCD Limited do not record any directors' remuneration for the years ended 30 June 2003 and 2004 respectively.

28. As noted above (in paragraph 3) on 17 April 2007 the ARA served notice on HMRC under s 317 of the Proceeds of Crime Act 2002 because of, amongst other things, the large amount of property and cash held by Mr Pepper. As part of the initial review an analysis of 11 bank accounts held either in Mr Pepper's own name or by him trading as Brian Pepper Developments or in a similar name (eg BG Pepper Properties Business Term Loan, Brian Pepper Finance Direct and BG Pepper Business Investment Property) found that deposits of £9.5m had been made. Although some of these deposits were identified as being from a non-taxable source such as gambling receipts and transfers, which were disregarded, over £7.5m could not be identified and it was concluded that these had derived from an unknown or unidentified source.

29. The total deposits for each year is set out in table below:

Year	Total Deposits	Total deposits disregarded	Unexplained deposits
1998-99	£62,363	£992	£61,371
1999-00	£256,954	£160,306	£96,648
2000-01	£296,903	£49,943	£246,960
2001-02	£695,527	£154,312	£541,215
2002-03	£1,533,745	£248,734	£1,285,011
2003-04	£3,835,934	£630,546	£3,205,388
2004-05	£2,893,981	£670,174	£2,223,807
Total	**£9,575,407**	**£1,915,007**	**£7,660,400**

30. Mr La Roche undertook a review of this information and wrote to Mr Pepper on 17 August 2011 setting out his concerns regarding the apparent receipt of substantial amounts of income that has not been declared to HMRC. The letter also enclosed assessments for the years 1998-99 to 2004-05 which were based solely on the unidentified deposits. As the letter explains:

> The assessments that I have raised are best upon my best judgement of the information currently available to me [ie the bank deposits]. At this stage, as I have no breakdown of the amount of income arising from each source, I have calculated the tax and national insurance due as if all the income had arisen under schedule D trading income. This is for simplicity only and you will note the assessments themselves describe the income assessed in a number of alternatives. Clearly as more information is received from you the tax and National Insurance can be amended as appropriate. The exception to this is 2005-06 where all income is assessed to capital gains tax. My calculations for all years are attached.

The letter concludes with an invitation to Mr Pepper if he disagreed with the assessments to provide any documentary evidence or further information to support his position.

31. Mr Pepper responded with a Notice of Appeal to SOCA on 1 September 2011 which was subsequently notified to the Tribunal. Although it is clear from these documents that Mr Pepper disputes the assessments on the grounds that they are estimated, do not take account of what capital gains actually occurred or income actually accrued, make no distinction between income and capital gains and fail to take account of any acquisition costs he did not provide any further information in relation to their quantum.

Law

32. Section 29 TMA, insofar as it applies to this appeal, provides:

> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (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,
>
> 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.
>
> (2) …
>
> (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—
>
> (a) in respect of the year of assessment mentioned in that subsection; and
>
> (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.
>
> (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.

33. Under s 34 TMA an assessment to income tax or capital gains tax may not be made "more than 4 years after the end of the of the year of assessment to which it relates". However, s 36 TMA provides:

> (1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).
>
> (1A) An assessment on a person in a case involving a loss of income tax or capital gains tax—
>
> (a) brought about deliberately by the person,
>
> (b) attributable to a failure by the person to comply with an obligation under section 7, or
>
> …
>
> may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period).

> (1B) In subsections (1) and (1A), references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person.

34. The Upper Tribunal summarised the test for discovery in *HMRC v Charlton Corfield & Corfield* [2013] STC 866 at [37] as being:

> "In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself. If an officer has concluded that a discovery assessment should be issued, but for some reason the assessment is not made within a reasonable period after that conclusion is reached, it might, depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment."

35. In *Burgess & Brimheath Developments Ltd v HMRC* [2015] UKUT 0578 (TCC) the Upper Tribunal held that it was for HMRC (and therefore the NCA in the present case) to establish the relevant conditions for the issue of a discovery assessment under s 29 TMA have been met and whether the assessments were in time by reference to s 36 TMA.

36. The following position in relation to burden of proof on HMRC (or the NCA) as set out by Park J in *Hurley v Taylor (Inspector of Taxes)* [1998] STC 202 at 219 (was approved by the Court of Appeal in that case [1999] STC 1 at 9):

> "I will first set out certain propositions of law, and then I will relate them to the facts of the case. My propositions of law are as follows.
>
> 1. By s 36(1) of the Taxes Management Act 1970 an assessment to income tax can be made on a person outside the normal six years period (but subject to a maximum 20 years cut-off) 'for the purpose of making good to the Crown a loss of tax attributable to his fraudulent or negligent conduct'.
>
> 2. This requires the Revenue to show: (1) fraudulent or negligent [now careless or deliberate] conduct by the taxpayer; and (2) a loss of tax attributable to it.
>
> 3. On appeal to the commissioners the burden rests on the Revenue of establishing para 2(1) and (2). If they do not discharge the burden the appeal should be allowed (see eg *Hillenbrand v IRC* (1966) 42 TC 617 at 623 per the Lord President (Clyde)). I will call this 'the s 36 burden'.
>
> 4. The burden does not rest on the Revenue to any greater extent than the s 36 burden. If they establish some fraudulent and negligent conduct and some loss of tax attributable to it they have satisfied s 36. From then on s 50(6) takes over and applies as it does for in-date assessments: that is to say, thereafter the burden rests on the taxpayer

> to establish that the assessment is wrong (see eg *Johnson v Scott* (*Inspector of Taxes*) [1978] STC 48 at 53)."

37. Section 50(6) TMA, to which Park J referred in *Hurley v Taylor*, provides:

> 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.

38. In the decision of the Court of Appeal in *T Haythornwaite & Sons v Kelly (HM Inspector of Taxes)* (1927) 11 TC 657 Lord Hanworth MR, referring to a previous incarnation of s 50(6) TMA, said, at 667:

> "Now it is to be remembered that under the law as it stands the duty of the [Tribunal] who hear the appeal is this: Parties are entitled to produce any lawful evidence, and if on appeal it appears to [the Tribunal] by examination of the Appellant on oath or affirmation, or by other lawful evidence, that the Appellant is over-charged by any assessment, the [Tribunal] shall abate or reduce the assessment accordingly; but otherwise every assessment or surcharge shall stand good. Hence it is quite plain that the [Tribunal is] to hold the assessment as standing goods unless the subject – the Appellant – establishes before the [Tribunal], by evidence satisfactory to them, that the assessment ought to be reduced or set aside."

39. With regard to assessments, as Walton J said, in *Johnson v Scott (HM Inspector of Taxes)* (1978) 52 TC 383 at 394, in a passage approved by the Court of Appeal (at 403) in that case:

> "Of course all estimates are unsatisfactory; of course they will always be open to challenge in points of detail; and of course they may well be under-estimates rather than over-estimates as well. But what the Crown has to do in such a situation is, on the known facts, to make reasonable inferences. … The fact that the onus is on the taxpayer to displace the assessment is not intended to give the Crown carte blanche to make wild or extravagant claims. Where an inference of whatever nature falls to be made, one invariably speaks of a 'fair' inference. Where, as is the case in this matter, figures have to be inferred, what has to be made is a 'fair' inference as to what such figures may have been. The figures themselves must be fair."

Discussion and Conclusion

40. As the first of Mr Pepper's two broad grounds of appeal, namely whether SOCA had the right to raise the assessments, was determined against him by the Tribunal as a preliminary issue following a two day hearing in July 2013 the sole

issue before us is whether the quantum of the assessment is correct. However, before considering the issue of quantum it is first necessary to ascertain whether the NCA has established that the relevant conditions for the issue of a discovery assessment under s 29 TMA have been met and whether the assessments were in time by reference to s 36 TMA as required by *Burgess & Brimheath Developments Ltd v HMRC*.

41. We accept the unchallenged evidence of Mr La Roche, who assumed responsibility for Mr Pepper's tax affairs in September 2010, that he made a discovery notwithstanding the delay, which was described as "woeful" by the Tribunal that heard the preliminary issue (see paragraph [89] of that decision), between the time the information was obtained by SOCA and the issue of assessments. We agree with the submission of Mr Yates that the observation of the Upper Tribunal in *Charlton* regarding the "essential newness" of a discovery was obiter and is not supported by the words of the statute.

42. Although in the absence of the provision of any tax returns by Mr Pepper it is not necessary for the NCA to establish the condition in s 29(4) TMA is satisfied it must nevertheless demonstrate either negligent or deliberate conduct by Mr Pepper in order to take advantage of the extended time limits of s 36 TMA as all of the assessments in the present case were made more than four years after the end of the relevant tax year to which they relate. It is clear from *Hurley v Taylor* that provided the NCA can establish that at least some loss of tax is attributable to either careless or deliberate conduct (for 2004-05 and 2005-06) and deliberate conduct (for 1998-99 to 2003-04) the burden will shift to Mr Pepper to show the assessments are wrong.

43. We agree with Mr Yates that on the evidence of the unexplained deposits (summarised at paragraph 29, above), particularly the size of these deposits and the absence of any explanation of them from Mr Pepper, that Mr Pepper clearly received some income and/or made capital gains during each of the years in question on which some loss of tax arose and that, given the amounts involved such loss is attributable to his deliberate conduct, in not declaring such sums. As such we are satisfied that the NCA have established that the conditions for a discovery assessment under s 29 TMA have been met and that the assessments were made within time under s 36 TMA.

44. We are also satisfied that the assessments were made on what Walton J in *Johnson v Scott* described as "reasonable inferences" on the known facts. The onus is therefore on the Mr Pepper to produce evidence to displace the assessments. However, he has chosen not to do so and therefore the assessments must "stand good".

45. We therefore dismiss the appeal and confirm the assessments in the sums stated at paragraph 1, above.

Right to apply for Permission to Appeal

46. 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.

JOHN BROOKS

TRIBUNAL JUDGE
RELEASE DATE: 30 November 2015