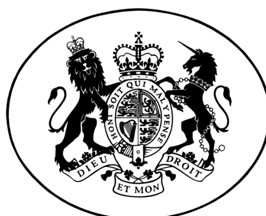
[2016] UKFTT 722 (TC)



TC05451

Appeal number: TC/2014/06737

INCOME TAX – Failure to comply with directions – Whether appeal should be struck out – No – Discovery assessments and penalties – whether these were valid – Yes – No evidence adduced to displace assessments – Whether liability to penalties established – Yes – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ILYAS AHMAD **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
WILLIAM SILSBY

Sitting in public at Eastgate House, Newport Road, Cardiff on 30 September 2016

Martyn Arthur of Martyn F Arthur Limited, for the Appellant

Simon Foxwell of HM Revenue and Customs, for the Respondents

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DECISION

Introduction and application

1. Mr Ilyas Ahmad appeals against the 'discovery' assessments issued under s 29 of the Taxes Management Act 1970 ("TMA") and penalties imposed under s 95 TMA and schedule 24 to the Finance Act 2007 in the amounts set out in the table appended to this decision.

2. In *Burgess & Brimheath Developments Ltd v HMRC* [2015] UKUT 0578 (TCC) the Upper Tribunal held that it is for HM Revenue and Customs ("HMRC") to establish the relevant conditions for the issue of a discovery assessment under s 29 TMA have been met. Similarly, HMRC bear the burden of proof in relation to the penalty determinations. However, if HMRC establish the validity of a discovery assessment s 50(6) TMA then applies, as it does for in-date assessments, and the assessment "shall stand good" with the burden resting on the taxpayer to establish that it is wrong (see eg *Johnson v Scott* (*Inspector of Taxes*) [1978] STC 48 at 53).

3. Although the appeal was not made within the statutory time limit, there was no objection to it being admitted out of time. Therefore, having regard to the overriding objective of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (the "Procedure Rules") to deal with cases "fairly and justly" (see rule 2) we allowed the appeal to proceed notwithstanding it was late.

4. Mr Martyn Arthur, who appeared for Mr Ahmad, conceded that if HMRC were able to establish that the discovery assessments had been validly made, as Mr Ahmad was unable to adduce any evidence to displace those assessments (which were based on his alleged deliberate and/or negligent conduct), the appeal must fail.

5. It was also accepted by Mr Arthur that there was a failure to comply with the Tribunal's directions, in particular those which required the appellant to produce a hearing bundle and a bundle of authorities and bring copies of these to the hearing. No explanation was offered for this failure. In the circumstances, Mr Simon Foxwell, of HMRC, who had taken the trouble to prepare a hearing bundle and had provided copies for Mr Arthur and the Tribunal, made an application that the appeal be struck out.

6. Under rule 8(3)(b) the Procedure Rules an appeal may be struck out if:

> the appellant has failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly.

7. Mr Foxwell referred to the overriding objective of the Procedure Rules and the obligation of the parties, under rule 2(4), to help the Tribunal to further the overriding objective and co-operate with the Tribunal. He submitted that because of the failure by Mr Ahmad to comply with directions the Tribunal could no longer deal with the proceedings fairly and justly.

8. Having heard from Mr Arthur and Mr Ahmad, who said that he had fully co-operated with HMRC and was willing to pay the correct amount of tax (which he considered was less than that assessed) for the years under appeal and subsequently, we dismissed the application to strike out the proceedings. Although there was clearly a failure to comply with the directions of the Tribunal, we did not consider it to be such that it prevented the Tribunal from dealing with the proceedings fairly and justly especially as the burden of establishing the validity of the discovery assessments and penalties was on HMRC.

9. Although we declined to strike out the appeal, we concluded that by failing to comply with directions for no apparent reason Mr Ahmad had acted unreasonably in the conduct of the proceedings. As such we were minded to award HMRC their costs of and incidental to this appeal in any event. However, under rule 10(5) of the Procedure Rules before a costs order can be made the "paying person" must be given an opportunity to make representations and if an individual the Tribunal must consider that person's financial means. We therefore directed Mr Ahmad to provide, by 14 October 2016, any representations to the Tribunal together with details of his financial means.

10. Turning to the substantive appeal, before considering the relevant statutory provisions, it is first convenient to explain the factual background.

Facts

11. Mr Foxwell referred to the notes of two meetings that HMRC had had with Mr Ahmad and his then accountant, Mr S Butt of Butt & Co, at the accountant's office. The first of these was on 16 February 2012 and the second on 26 September 2013. One of the HMRC officers present at the second of these meetings was Mr John Metcalfe. Mr Metcalfe was called as a witness by Mr Foxwell and was cross-examined by Mr Arthur.

12. It was not disputed that, during the meeting with HMRC on 16 February 2012, Mr Ahmad admitted that his tax returns which he had filed since 2001-02 were neither correct nor complete as profits from the sale of properties he had owned had not been included. Mr Ahmad said that he wanted to fully co-operate with HMRC and provided a schedule obtained from the Land Registry of properties that he had owned and sold and other properties that he retained and let. Mr Ahmad had accepted that there were properties missing from the list but had said that he was unable to provide further details. While it was also accepted that there was the probability that properties had been let and rents received, Mr Ahmad said that that there was no rent book. He recorded the rents received "on papers" which he handed to his accountant to produce the accounts.

13. Mr Metcalfe on reviewing and analysing Mr Ahmad's tax returns from 2001-02 to 2011-12 (inclusive) found evidence that, in addition to property sales, bank interest had also been omitted. Suspecting fraud, an intervention under HMRC's Code of Practice 9 (COP 9) was commenced on 10 July 2012.

14. The note of the meeting of 26 September 2013, which was not disputed, states that Mr Ahmad accepted that bank interest had not been included in the returns and that the only records he had produced to HMRC were bank statements. He had also said that there were no other business records. The note also records that Mr Ahmad did not keep a diary or any books, neither did he have an office but worked out of a room from his home. In addition to trading on his own account, Mr Ahmad has also been a director of eight companies and company secretary of three others. When asked about this at the meeting and in particular about one company, Mr Ahmad said that he might have had a dream about a religious figure and then set up a company in that name and, as the meeting progressed Mr Ahmad declined to co-operate further.

15. In addition to the omitted items Mr Metcalfe was unable to find any correlation between the payments shown in bank statements provided by Mr Ahmad with expenses shown in the accounts produced by Butt & Co (other than in respect of accountancy fees). He therefore raised the assessments, the subject matter of this appeal, on 13 March 2014.

16. Mr Metcalfe explained that in making these assessments he had used the rental figure from the accounts prepared by Butt & Co where this was shown to have been obtained from bank records but had, with the exception of accountancy fees, not allowed the expenditure recorded in those accounts. He had also allowed an estimated £10,000 of expenditure against each property to allow for the costs of sale (eg legal fees etc). Bank interest that had been omitted from the returns was also included in the assessments with figures being obtained from third party sources under HMRC's powers. Information in relation to the purchase prices and disposal proceeds from the sale of the properties was based on the schedule provided by Mr Ahmad himself with further information from Land Registry and Stamp Duty Land Tax records.

17. Penalties were issued on 31 March 2014 under s 95 TMA, for the years 2001-02 to 2007-08 (inclusive) on the basis of Mr Ahmad's "negligence" in submitting incorrect tax returns and schedule 24 to the Finance Act 2007 for 2008-09 and subsequent years on the basis that he had "deliberately" filed inaccurate tax returns. The penalties to 2007-08 have been abated from a possible 100% of the outstanding tax to the amounts shown in the table in the appendix to reflect the extent of Mr Ahmad's disclosure and co-operation and the size and seriousness of the omissions. There has also been a reduction in penalties (to the amounts shown in the appended schedule) from 2008-09 onwards by reference to the quality of the disclosure by Mr Ahmad.

18. On 17 December 2014 Mr Ahmad appealed to the Tribunal on the grounds that "HMRC's decision is excessive, estimated and unsustainable."

Law

19. 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.
>
> (5) The second condition is that at the time when an officer of the Board—
>
>> (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.

20. 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,
>
> …

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.

21. 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."

22. Up to and including 2007-08, penalties in this case were imposed under Section 95 TMA which provided that where a person "fraudulently or negligently delivers any incorrect" return to HMRC he shall be liable to penalty of up to 100% of the tax assessed. However, HMRC had a system of abatement of penalties by up to 20% for disclosure (or exceptionally 30%); up to 40% for co-operation; and up to 40% for "seriousness" which is based on the size of omissions and seriousness of the "offence".

23. The provisions of schedule 24 to the Finance Act 2007 apply in relation to penalties imposed on Mr Ahmad from 2008-09. Subsequent references to paragraphs are, unless otherwise stated, to paragraphs of that schedule.

24. A penalty is payable, under paragraph 1, by a person who gives HMRC a document (which includes a self-assessment tax return) if that document contains an inaccuracy which amounts or leads to an understatement of a liability to tax and the inaccuracy was careless or deliberate on that person's part.

25. The amount of a penalty, payable under paragraph 1, is set out in paragraph 4. Insofar as it applies to the present case, paragraph 4(2) provides that a penalty arising as the result of a careless action is 30% of the potential lost revenue; for deliberate but not concealed action, 70% of the potential lost revenue; and for deliberate and concealed action 100% of the potential lost revenue. The "potential lost revenue" is defined by paragraphs 5 – 8 but for present purposes is, as set out in paragraph 5(1):

> … the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

26. Under paragraph 10(1) HMRC "must" reduce the standard percentage of a person who would otherwise be liable to a penalty, in accordance with the table in paragraph 10(2), to one that reflects the quality of the disclosure

Discussion

27. Mr Arthur contends that Mr Ahmad, who relied on his accountant, Mr Butt, did not understand the seriousness of his position. Neither, he said, did HMRC demonstrate that the failures were Mr Ahmad's as, for the main part, HMRC had corresponded with the accountant not Mr Ahmad. However, Mr Arthur did accept that Butt & Co had been properly appointed by Mr Ahmad.

28. As a properly appointed agent Butt & Co clearly had the authority to act on Mr Ahmad's behalf. This includes writing to and receiving correspondence from HMRC. As such, it was for Butt & Co, not HMRC, to not ensure that Mr Ahmad was fully appraised of the situation (and it is clear from ***HMRC v Hok Ltd*** [2012] UKUT 363 (TCC) that we do not have the jurisdiction to supervise HMRC's conduct even if that had not been the case). Mr Ahmad's understanding of his position in such circumstances cannot have a bearing on the validity or otherwise of the s 29 TMA assessments.

29. For the assessments under s 29 TMA to be valid, HMRC must to establish that there has been a discovery and, as Mr Ahmad filed tax returns for 2001-02 to 2011-12, that the condition in s 29(4) TMA has been fulfilled (Mr Foxwell did not rely on the alternative condition in s 29(5) TMA).

30. We consider that a discovery of income which ought to have been, but was not, assessed to income tax was made by Mr Metcalfe following his review and analysis of Mr Ahmad's returns from 2001-02 to 2011-12. We are also of the view that Mr Ahmad, who must have been aware of profits from his property transactions, rental income and bank interest, deliberately omitted to include this in his returns. As such, not only is the condition in s 29(4) TMA satisfied but the time limit in which HMRC may make assessment is extended to 20 years under s 36(1A) TMA.

31. It therefore follows that the discovery assessments were validly made within the statutory time limits. It was accepted that, in the absence of any evidence to displace them, these assessments must "stand good".

32. The penalties for 2001-02 to 2007-08 (under s 95 TMA) were based on the negligent conduct of Mr Ahmad in submitting incorrect returns and the penalties for subsequent years (under schedule 24 to Finance Act 2007) on his deliberate behaviour in submitting returns he knew to be inaccurate. Having found the omission of income from profits of property transactions, rental income and bank interest to be deliberate on the part of Mr Ahmad the only possible conclusion we can reach is that the penalties were properly imposed by HMRC.

33. In the absence of any submissions from Mr Arthur in relation to quantum, the level of Mr Ahmad's co-operation with HMRC or the quality of his disclosure, we

accept Mr Foxwell's submission that, having regard to all the circumstances of the case, the level of penalties is appropriate.

Costs

34. The ability of the Tribunal to make a costs order is derived from s 29 of the Tribunals Courts and Enforcement Act 2007 ("TCEA"). This provides:

> (1) The costs of and incidental to—
>
> (a) all proceedings in the First-tier Tribunal, and
>
> (b) …,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules.

35. As is clear from s 29(3) TCEA, the power of the Tribunal to award costs is also subject to the Procedure Rules. Insofar as it applies to cases, such as the present, allocated to the 'standard category', rule 10 of the Procedure Rules provides:

> (1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses) –
>
> (a) …
>
> (b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings; …
>
> (c) …
>
> (2) The Tribunal may make an order under paragraph (1) on an application or of its own initiative.

36. The Upper Tribunal (Judge Berner and Judge Powell) in *Market & Opinion Research International Ltd v HMRC* [2015] UKUT 12 (TCC) ("*MORI*") observed, at [15], that:

> "The condition in rule 10(1)(b) is a threshold condition. It is only if the tribunal considers that a party has acted unreasonably in a relevant respect that the question of the exercise of a discretion can arise.

37. In the written submissions received in accordance with the directions made at the hearing (see paragraph 9, above) it was submitted that Mr Ahmad was not unreasonable in taking his appeal to the Tribunal and therefore costs should not be awarded against him. Clearly it was not unreasonable for Mr Ahmad to have brought his appeal. However, the failure to comply with directions thereafter, for no apparent reason, is in our judgment unreasonable conduct by a party or his representative in conducting the proceedings.

38. In the circumstances, and having considered the details of Mr Ahmad's financial means, also provided in accordance with the directions, we consider it appropriate to award HMRC their costs of and incidental to the appeal.

Conclusion

39. Therefore, for the above reasons, the appeal is dismissed with the appellant to pay the respondents' costs of and incidental to the appeal with such costs to be subject to detailed assessment if not agreed. Accordingly, the assessments and penalties are confirmed in the amounts stated in the appended table.

Appeal Rights

40. 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: 25 OCTOBER 2016

Appendix

Amounts of tax assessed and penalties

Year	Tax £	Penalty £
2001-02	24,005.90	12,002.00
2002-03	78,322.75	39,161.00
2003-04	89,456.75	44,541.00
2004-05	21,447.74	11,105.00
2005-06	130,903.54	65,451.00
2006-07	79,323.57	39,661.00
2007-08	61,190.99	30,595.00
2008-09	25,898.55	13,596.00
2009-10	36,030.70	18,916.00
2010-11	34,257.75	17,985.00
2011-12	45,582.70	23,930.00
Total	**626,420.94**	**316,943.00**

Penalties 2001-02 to 2007-08 (inclusive) imposed under s 95 TMA
Penalties 2008-09 to 2011-12 (inclusive) imposed under schedule 24 to Finance Act 2007