



TC06674

Appeal number: TC/2017/05843

PROCEDURE – strike out application – grounds of appeal are that HMRC are out of time to raise an assessment – whether no reasonable prospect of succeeding – similar case under appeal – strike out not allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

IAN MATTHEWS

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE ANNE FAIRPO

Sitting in public at Manchester on 2 August 2018

Mr Westall, representative for the Appellant

Ms Clissold, presenting officer for the Respondents

DECISION

Introduction

- 5 1. This is an application by HMRC to strike out the appellant's appeal under Rules 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) (the Tribunal Rules).

Background

- 10 2. The substantive appeal is in relation to a discovery assessment for the tax year 2011/12, issued on 1 March 2017 in respect of an unauthorised payment charge.

3. The appellant appealed on the basis that the discovery assessment was made out of time as it was made more than four years after the assessment.

HMRC's submissions

- 15 4. HMRC submitted that the discovery assessment was made within time as the loss of tax had been brought about by carelessness and so the time limit for a discovery assessment was six years after the end of the year of assessment, under s29 and s36(1) Taxes Management Act (TMA) 1970.

- 20 5. HMRC submitted that it was agreed that the appellant had transferred his pension funds to a SIPP, authorised the investment of those funds into a particular investment, and then received a loan which was conditional on that investment. In doing so, the appellant had relied only upon a statement by the loan provider that no tax would be due, and had not completed a self-assessment tax return for the relevant tax year in which he might have disclosed the payment.

- 25 6. HMRC noted that it was not disputed that the payment gave rise to an unauthorised payment charge nor that the arrangement was intended to circumvent legislation and gain access to pension funds without paying tax.

- 30 7. HMRC submitted that a reasonable and prudent taxpayer would have made further enquiries to determine whether or a tax liability was due and that the appellant's failure to do so was clearly careless such that they were entitled to raise a discovery assessment within a six year time limit and not a four year time limit.

- 35 8. HMRC submitted that the discovery was not stale as they were waiting for information between 2014 and 2017, and that whilst they accepted that the appellant's case was one of a larger group of cases in relation to the same arrangement which would have given rise to some delays, but that they were still within the time limit allowed by statute for the assessment to be raised.

9. HMRC therefore submitted that the appeal should be struck out as it had no reasonable prospect of success.

Appellant's submissions

10. For the appellant, it was submitted that HMRC must have known and therefore discovered by 2014 that the appellant had taken out the relevant loan and that it was part of the relevant arrangements. It was submitted that by that date they had all relevant information needed to find that there had been a loss of tax.

11. It was submitted that HMRC have given no good reason why they waited until March 2017 to raise the assessment and therefore that, in effect, any discovery had gone "stale" such that HMRC were not entitled to raise an assessment.

12. Further, it was submitted that the appellant had not been careless in relying upon the loan provider's information and that in any case he could not afford to take independent advice.

13. It was submitted that HMRC's clear guidance setting out when a tax return should be filed do not include any reference to the need to file a return on receipt of an unauthorised payment, so that the appellant's failure to file a return could also not be regarded as careless.

Discussion

14. In the course of the hearing it became clear that two material aspects of this case, being the question of staleness and the question of whether HMRC are entitled to raise an income tax charge under s29 in relation to an unauthorised payment, were the subject of a decision against HMRC in the case of *Monaghan* [2018] UKFTT 156 (TC). HMRC confirmed that they had received permission to appeal *Monaghan* to the Upper Tribunal but that the appeal had not yet been heard by that Tribunal.

15. HMRC further submitted that they considered that *Monaghan* was not relevant to this case as the grounds of appeal in this case related only to the validity of the assessment and not to the question of whether an income tax charge could be raised at all.

16. However, it is clear that the First-tier decision in *Monaghan* was that a discovery assessment made in 2017 in relation to a discovery in 2014 was "stale" and so could not have stood.

17. The appellant's representative also indicated that they may apply to amend the grounds of appeal to take account of the question of whether an income tax charge can be raised in relation to an unauthorised payment. It was noted that the Tribunal Rules contain details of the procedure which must be followed in relation to such an application.

Decision

18. Although a First-tier Tribunal decision is not binding on another First-tier Tribunal, I consider that the case of *Monaghan* raises sufficient doubts as to the validity of the discovery assessment in particular that the appellant cannot be

considered to have no reasonable prospect of success. The fact that HMRC have appealed in *Monaghan* does not change that position as there has been no decision of the Upper Tribunal in relation to that appeal.

19. The application to strike out is therefore not allowed and

5 IT IS DIRECTED that

20. The substantive appeal shall be stayed pending the decision of the Upper Tribunal in *Monaghan*; and

21. HMRC shall provide the Appellant with a copy of the Upper Tribunal decision in *Monaghan* within fourteen days of that decision being made public; and

10 22. the Appellant shall provide HMRC and the Tribunal with further and better particulars of their grounds of appeal within 28 days of receipt of that Upper Tribunal decision unless, in the meantime, the Appellant has applied for and received permission in accordance with the Tribunal Rules to amend their grounds of appeal and complied with such permission in such a manner that they have already provided
15 further and better particulars of the grounds of appeal.

23. 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
20 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.

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**ANNE FAIRPO
TRIBUNAL JUDGE**

RELEASE DATE: 22 AUGUST 2018

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