[2019] UKFTT 78 (TC)

TC06962

Appeal number: TC/2018/1503

Income Tax – assessments – time limits – s 36 TMA

FIRST-TIER TRIBUNAL
TAX CHAMBER

ADRIAN OMAR **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER
MICHAEL BELL ACA CTA

Sitting in public at Taylor House London on 1 February 2019

The Appellant in person

Michael Skazich for the Respondents

DECISION

1. Mr Omar appeals against assessments under section 29 Taxes Management Act 1970 ("TMA") for 2010/11 and 2011/12. Each of these assessments was made on the basis that Mr Omar claimed an excessive deduction in his tax returns for those years in respect of pension contributions.

2. Section 29 TMA at the relevant time provided that if an officer of the Board discovered that any income which ought to have been assessed had not been assessed or that any relief which has been given was excessive the officer could, subject to subsections (2) and (3) of that section, make an assessment in the amount which ought in his opinion to be charged in order to make good the loss of tax. Subsection (2) is not relevant; subsection (3) provided that where the taxpayer has delivered a tax return (as Mr Omar had for the years concerned) an assessment could not be made unless one of the two conditions mentioned in subsection (4) or (5) was fulfilled. Those subsections provided

> "(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 [HMRC]-
>
> > (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return [for the relevant year] , or
> >
> > (b) informed the taxpayer that he had completed his enquiries in to the return
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> the officer could not have been reasonably be 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.

3. Mr Skazich said that HMRC relied on (4) or (5) in the alternative. In relation to (4) HMRC asserted that Mr Omar had been careless in the completion of his tax return in each year. No allegation of deliberate conduct was made.

4. Section 34 TMA provides for an ordinary time-limit for making assessments. It provides that subject to other provisions of the Act no assessment may be made more than four years after the end of the year of assessment to which it relates. But section 36 provides for an extension of that time-limit where a loss of tax is brought about carelessly or deliberately. That subsection 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 and assessment to which it relates ..."

5. There is further provision in relation to loss of tax brought about deliberately which is not relevant in this case.

6. The assessments were made more than 4 years after the end of the relevant tax years. As a result unless Mr Omar was careless in the completion of his tax returns the assessments made are invalid.

7. Mr Omar was also assessed with a penalty under schedule 24 FA 2007 in respect of both years on the basis that he had carelessly provided inaccurate returns to HMRC.

8. In an e-mail of 13 June 2017, sent after having received the penalty notices, Mr Omar said:

> "The penalty I am shocked at. ... I have not been careless, have not wilfully completed my tax form incorrectly. I have acted on information supplied to me and have completed my forms as I was guided. I cannot believe that I have been careless and hence any penalty should be applied.

9. Following further discussions with HMRC, HMRC agreed to suspend the penalty on conditions. Mr Omar accepted those conditions. He therefore considered that there was no need to appeal against the penalties.

The Evidence and Our findings of fact.

10. There was very little documentary evidence before us. The documentary evidence was limited to (i) the tax calculations stemming from Mr Omar's tax returns, (ii) statements from the pension fund for the periods 22 March 2011 to 21 March 2012 and 21 September 2012 to 20 September 2013, and (iii) the statements made by the parties in correspondence. Mr Omar gave us his recollection of how he had completed his tax returns for the relevant years and the advice he had received in relation to the deduction of pension contributions. Mr Omar's payslips for the relevant years were not available – Mr Omar told us, and we accept, that they had been lost in a move of house.

11. Mr Omar submitted tax returns for 2010/11 and 11/12. In those returns he made claims for relief for pension payments. He had claimed payments of £8,744 in 2010/11 and £12,704 in 2011/12.

12. Mr Skazich told us that there had been an enquiry into Mr Omar's 2011/12 tax return but the bundle contained no detail of the opening of the enquiry or the information which had been made available during it.

13. Mr Omar had been given advice in two meetings with pension providers (one in or around 2008/9 and the other a few years later) that the contributions he would make to the schemes would be tax deductible. He decided to put about £15,000 in to his pension in 2012 and £11–15k into his pension later years.

14. Mr Omar's employer contributed to the pension scheme a proportion of the regular contributions which Mr Omar made

15. Mr Omar's income consisted of a basic salary plus variable bonuses. The bonuses between 2008 and 2014 varied between £60,000 and £20,000. His (somewhat hazy) recollection was of making lump sum contributions of some £8,000 in 2011/12 and £5,000 in 2010/11 and of asking his employer to pay part of his bonus in making these payments.

16. Following a takeover in August 2012, Mr Omar's employer changed its policy in relation to the operation of pension payments. Prior to the takeover Mr Omar's evidence was that his employer did not permit bonuses to be sacrificed under salary sacrifice arrangements for pension contributions. After the takeover bonuses could be sacrificed in whole or part in return for the employer making pension contributions.

17. Mr Omar obtained the figure he used for calculating the amount of the pension payments by looking at his payslips for the relevant years. Those payslips showed gross income followed by deductions for national insurance and tax to give net income. From that pension payments were deducted to give the net sum which was paid to him. To obtain the sum which he entered in his tax return for pension payments he summed the amount of the pension payments shown on those payslips.

18. The pension fund's summary of the transactions which had been undertaken in the period 22 March 2011 to 21 March 2011 showed regular contributions by Mr Omar of £437.50, contributions by his employer described as "Your employer's regular contribution" of £291.67 and, on 9 March 2012, a payment of £8,018 described as "Your employer's single contribution". There was a summary showing "Pension payments made by you or on your behalf" of £5,302, and "Contributions by your employer" of £11,532. Mr Omar did not use this summary to complete his tax returns.

HMRC's arguments

19. Section 188 ITEPA provides that an individual who is an active member of a registered pension scheme is entitled to relief in respect of pension contributions paid during the year, but that such contributions do not include -

> "(3)… (b) any contributions paid by an employer of the individual ..."

20. Mr Skazich argued that in both years Mr Omar had included in the figure in his return for pension contributions amounts contributed by his employer. That was evidenced in 2011/12 by the description in the pension fund statement of £8,018 as being his employer's single contribution, and the distinction between amounts paid by him or "on his behalf". The payments made by his employer were not deductible. It was careless to have put them in the return.

21. For 2011/12 the payment of £8,018 evidenced in the schedule from the pension fund indicated that that sum was paid, not by deduction from Mr Omar's net after-tax

salary, but before determining his taxable income and therefore was to be treated as paid by his employer for the purposes of section 188(3) with the result that a deduction was not available. It was likely that the deduction of £12,704 which Mr Omar had claimed that year included that sum. Disallowing that sum left allowable contributions close to the amount of regular contributions shown in the statement of £5,302 – the sum on which the assessment was based.

22. For 2010/11 Mr Omar had claimed pension payment deductions of £8,744. It was reasonable to suppose that he had made the same error in that year as he made in 2011/12. It was therefore reasonable to conclude that his payments in that year were also £5,302, rather than the amount claimed. The assessment had been made on that basis.

23. In their statement of case HMRC say that they were entitled to assess under section 29(4) by virtue of section 29(4) and also by virtue of section 29(5).

24. We asked Mr Skazich about the time limit provision of section 36 TMA. He told us that he had not been provided with instructions to argue that the carelessness condition in section 36 was satisfied, but he made a very good job of deploying such information as was available to him and of grappling with the tribunal's questions.

Mr Omar's arguments

25. Mr Omar argues that if HMRC are correct then his marginal rate of tax for 2010/11 and 2011/12 was significantly higher than it is in surrounding years and that, given relatively similar gross taxable income in those years, such a change could not be explained by changes in the personal allowance and tax bands., and that that indicates that the sums he claimed were deductible.

26. Mr Omar says that he cannot provide any more documentary evidence about his payments but neither can HMRC.

Discussion.

27. We were not able fully to assess Mr Omar's argument in relation to his marginal rate of tax because we did not have calculations showing what that rate would have been on income unaffected by pension contribution deductions. As a result we were not able to draw from the exercise the conclusion that the adjustments HMRC sought were wrong.

28. The burden of showing carelessness is on HMRC. Mr Skazich gallantly made the following submissions that Mr Omar had been careless.

> (1) Mr Omar had not appealed against the penalties. The penalties were exigible only if Mr Omar had been careless. Therefore by implication he had admitted that he had been careless and it did not need to be proved.
>
> We do accept this argument. Mr Omar's appeal is on the basis that he put the right amount in his tax return. It therefore must be implicit in his argument that

he was not careless. Further it is clear that to us that Mr Omar did not appeal against the penalties because he was content with the suspension of the penalty. That was not an admission of the basis of the penalty. His email of 13 July quoted above makes his view clear.

(2) Mr Omar acted on the advice of two advisers who had said that he could deduct pension contributions. That was not enough to avoid being careless. In order to avoid being careless he should have looked at HMRC's published material.

We do not agree with this. Although at this distance Mr Omar's recollection of what was said and when it was said to him was somewhat sketchy, the advice was received from persons who it was reasonable to expect to be experts. We see no reason why it should be carelessness to rely upon the advice of a person who reasonably appears to be expert.

(3)Mr Omar may have misunderstood what he was told. Such misunderstanding was carelessness.

We do not agree. If advice which was provided by someone on whom it would be reasonable to rely, misunderstanding that advice is not carelessness..

29. It is clear to us that there could have been carelessness only if what Mr Omar did was wrong. Therefore in order to discharge the burden of proof HMRC had to show that the wrong figures were put in his tax returns.

30. As regards 2011/12 the only evidence on which HMRC relied that the returns were wrong was that in the statement from the pension fund. They argued that that showed that it was wrong to include in the deductible amounts the £8,018. However Mr Omar's evidence is that this amount (or something like it) was shown on his payslip as a deduction from his after-tax income. If that is right, then it was correct it was not careless to treat it as a sum paid by him and not by his employer.

31. On balance we did not find that the statement from the pension fund was adequate to convince us that it is more likely than not that the £8,018 payment had not been made on behalf of Mr Omar rather than "by" the company: given that regular payments were made by deduction from Mr Omar's net income and paid through the company, it seemed quite possible that the pension fund had wrongly assumed that a large payment coming from the company was a payment by it rather than a payment on behalf of Mr Omar.

32. We therefore find that it was not shown that the 2011/12 return had been incorrectly completed, and as a result that it was not shown that Mr Omar had been careless in its completion.

33. As regards 2010/11 Mr Skazich contended that the presumption of continuity would apply. If Mr Omar had been careless in 2011/12 then it was likely that he had also been careless in 2010/11. In this respect Mr Skazich nicely distinguished between being careless as to the law and being careless as to a particular fact. If Mr Omar had carelessly misunderstood the law in 2011/12 it was likely that he had carelessly

misunderstood in 2010/11. It might, he agreed, be different if there was carelessness as to a particular entry on his return in 2011/12.

34. However we do not consider that Mr Omar was careless in relation to 2011/12. As a result even if it were correct to conclude that it was likely that a person who had been careless in one year had been similarly careless in an earlier year, we would not find that he was careless in the earlier year. A there was no other evidence we do not find that HMRC have proved that Mr Omar was careless in 2010/11.

35. Accordingly we find that neither in respect of 2010/11 nor in respect of 2011/12 was Mr Omar careless in the preparation of his tax return.

36. As a result the assessments were not validly made.

Conclusion

37. We therefore allow the appeal.

38. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 06 FEBRUARY 2019