Case No: CH/2007/APP/0375

NEUTRAL CITATION NUMBER: [2007] EWHC 2966 (Chy)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice

Strand

London WC2A 2LL

Thursday, 1 November 2007

BEFORE:

MR JUSTICE HENDERSON

BETWEEN:

DAVID TOMLINSON

Appellant

- and -

COMMISSIONERS FOR HM REVENUE & CUSTOMS

Respondents

MR TOMLINSON appeared in person

MR A NAWBATT (instructed by HM Revenue & Customs Solicitors Office) appeared on behalf of the Respondents

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Judgment
Approved Judgment

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1. MR JUSTICE HENDERSON: This is an appeal by case stated brought by the taxpayer, Mr David Tomlinson, against a decision of the General Commissioners for the division of Epsom, Reigate and Tonbridge on 22 May 2006 when they dismissed his appeal against a penalty of £100 imposed upon him for failure to comply with a notice under section 8 of the Taxes Management Act 1970 to make and deliver a personal tax return for the tax year 2003 to 2004. The notice in question was in the familiar form SA100 that is delivered to most taxpayers in April of each year. It is generally referred to as a tax return, and, indeed, is headed with those words, but, strictly speaking, it is a notice requiring completion of a return. The form which is sent only becomes a return once it has been completed and signed by the taxpayer.

2. Section 8(1) provides as follows:

> "For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the board
> (a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may reasonably be required in pursuance of the notice, and
> (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required."

3. Subsection (1A) then says that the day referred to in subsection (1) is the 31 January next following the year of assessment or, where the notice under the section is given after 31 October, the last day of the period of three months beginning with the day on which the notice is given.

4. I should also mention subsection (2), which provides that every return under the section is to include a declaration by the person making the return to the effect that it is, to the best of his knowledge, correct and complete.

5. All references in this judgement to statutory provisions are to legislation as it stood in the tax year 2003 to 2004.

6. The obligation to make a return in response to a notice under section 8(1) has at least two important consequences. First, by virtue of section 9(1), every return under section 8 has to include a self-assessment by the taxpayer of the amounts in which he is chargeable to income tax and capital gains tax on the basis of the information contained in the return. The section goes on to provide that an officer of the Board will make the assessment on the taxpayer's behalf if he submits his return before a specified date, usually 30 September in the ensuing tax year, and that an officer of the Board may do so in any other case where the taxpayer does

not perform his own self-assessment. Any assessment so made by an officer of the Board is, by virtue of subsection (3A), treated for the purposes of the Taxes Management Act as a self-assessment and as included in the return.

7. For present purposes, the important point is that a tax return under section 8 will either include a self-assessment made by the taxpayer or will, in all normal circumstances, lead to an assessment made on the taxpayer's behalf. Once tax has been assessed the taxpayer is then liable to pay it in the usual way. It is the assessment which founds the liability in the sense of a sum which is recoverable at the suit of the Revenue.

8. The second important consequence is that section 9A empowers the Revenue to open an enquiry into a return under section 8 within specified time limits. In general, an enquiry may extend to anything contained in the return, or required to be contained in it, and it may lead, in due course, to an amendment of the taxpayer's self-assessment.

9. I now need to describe a different type of form, which is used when a taxpayer wishes to claim repayment of income tax which has been deducted at source or otherwise treated as paid by him in respect of dividends and investment income of various kinds. Claims of this sort may be made within a period of up to approximately six years following the end of the relevant tax year. The Revenue has specified a form R40 for this purpose, in which the taxpayer is asked to give details of his total taxable income for the year in question under a number of headings, so that the officer who issues the form can decide whether a repayment is due. The form, therefore, bears a certain similarity to a return of income and chargeable gains under section 8 in that it requires details of the taxpayer's total income to be given.

10. But there are, nevertheless, some important differences. First, the purpose of the form is to support a claim by the taxpayer to repayment of tax. It is, in that sense, a purely voluntary form. There is no requirement to fill it in and it does not form part of the machinery of tax collection. Secondly, it does not lead to an assessment of tax in the same way as a section 8 return does. If anything, it leads to a repayment of tax. Thirdly, it does not enable the Revenue to open an enquiry into matters disclosed on the form. If the Revenue wish to do so, their remedy is to require the submission of a return under section 8 and then to open an enquiry pursuant to section 9A.

11. Despite these differences, however, a form R40 is a convenient means of informing the Revenue of details of a person's income in simple cases. In practice it is often used as a substitute for a section 8 tax return, when coupled with an undertaking by the taxpayer to pay the appropriate amount of tax due. This is, however, a matter of administrative convenience and should not be allowed to obscure the very real differences between a tax return under section 8 and a claim form in form R40.

12. With this background, I can now turn to the facts of the present case. They could hardly be simpler. I take them from paragraph 5 of the case stated. Sub - paragraphs 5.1.3 and following record that a form R40 was issued to the taxpayer Mr Tomlinson at some time during the 2003/2004 tax year, and a completed form R40 for that year was handed by him to an inspector of taxes on 6 April 2004. The Revenue then mislaid that form.

13. The Revenue also required Mr Tomlinson, by a notice served under section 8 on form SA100, to deliver a return for 2003/2004. That form was dated 6 April but was not received by Mr Tomlinson until 17 April. The case goes on to record that the form SA100 has not been submitted by Mr Tomlinson to the Revenue. It can be seen, therefore, in summary, that Mr Tomlinson completed a form R40 for 2003/2004 and

submitted it on 6April, but it was unfortunately then lost by the Revenue. On that same day, 6 April, the Revenue issued a notice under section 8, a form SA100, which was received by Mr Tomlinson on 17 April but he did not complete it or return it by the statutory deadline of 31 January 2005 or at all.

14. It is convenient at this point to refer to section 93 of the Taxes Management Act, which is headed "Failure to make return for income tax and capital gains tax." I shall read subsections (1) and (2):

> "(1) This section applies where -
> (a) any person (the taxpayer) has been required by a notice served under or for the purposes of section 8 or 8A of this Act … to deliver any return, and
> (b) he fails to comply with the notice.
> (2) The taxpayer shall be liable to a penalty which shall be £100."

15. Subsection (8) provides:

> "On an appeal against the determination under section 100 of this Act of a penalty under subsection (2) … above, neither section 50(6) to (8) nor section 100B(2) of this Act shall apply but the Commissioners may -
> (a) if it appears to them that, throughout the period of default, the taxpayer had a reasonable excuse for not delivering the return, set the determination aside; or
> (b) if it does not so appear to them, confirm the determination."

16. A notice of determination of a penalty in the sum of £100 and dated 23 February 2005 was served on Mr Tomlinson. There is no dispute about this (although a copy of it is not, in fact, in the bundle) and he then appealed against it by a letter dated 20 March 2005. The question for the General Commissioners, therefore, in terms of section 93(8), was whether Mr Tomlinson had a reasonable

excuse for non-delivery of the return throughout the period of default, that is to say from 1 February 2005 onwards. Unless he could satisfy them that he did have such a reasonable excuse, the Commissioners were obliged to confirm the penalty.

17. Mr Tomlinson's grounds of appeal before the General Commissioners were three in number, as recorded in the case stated at paragraph 2. They were, firstly, that the Revenue had received a return for the purposes of section 8 which contained all the necessary information to enable them to calculate his tax for the year ended 5 April 2004. I interpose to say that the reference there to receiving a return must be a reference to the receipt of the form R40.

18. The second ground is that if the Revenue did have power to require him to submit a further return, it was a misuse of their discretion to do so. Such discretion has to be exercised reasonably and requiring a further return under section 8 when they had been given all the necessary information already was unreasonable and disproportionate.

19. The third ground was that the notice requiring Mr Tomlinson to deliver a return was not validly given because it was not given either by an officer of the Board authorised to do so or by the Board itself; and, if made by an officer of the Board, that officer was not named as required, according to this ground, by section 113(1A) of the Taxes Management Act.

20. Mr Tomlinson's submissions to the Commissioners are then set out in paragraph 6 of the case. I need not refer to all of those submissions but I should mention paragraph 6.5 which records that, when he was told by the Revenue that his form R40 could not be traced, he then prepared a spreadsheet of his income and capital gains and submitted that spreadsheet to the Revenue. He apparently signed a letter accompanying those details but could not recall whether he had signed the spreadsheet and admitted there was no declaration contained in the form equivalent to that on page 10 of the SA100. Apparently a second spreadsheet was also submitted by him in January 2005.

21. The submission then goes on that the Revenue had all the information they needed on the form R40 on 6 April and they therefore had no power under section 8 to require a further return as that was not "for the purpose of establishing the amounts in which he was chargeable to income tax and capital gains tax". Mr Tomlinson submitted that there was a discretion on the part of the relevant officer of the Board to require a return under section 8, but that discretion had to be exercised proportionately and had, in the present case, been exercised unreasonably. He also pointed out that the Revenue do often accept forms R40 where tax is payable, even though the form is intended as one for use in claims for repayment.

22. The case for the Revenue was supported by the evidence of Mr Anthony Brett, a compliance manager of the South London Area, who gave oral evidence and was

cross-examined by Mr Tomlinson. The Commissioners say that he verified a witness statement which he had prepared, dated 16 May, and, clearly, the Commissioners accepted the evidence contained in that statement although they do not set it out in the case itself. So I think I may properly refer to it. In that statement, Mr Brett dealt essentially with two matters. First of all, he briefly described the internal organisation at HMRC on the basis of which he said:

> "- the notice to Mr Tomlinson would have been issued on the instruction of an officer of HMRC, appropriately authorised, equipped and located to perform that function."

23. Secondly, he referred to an internal Revenue document SCS045/04 which set out the criteria for requiring a self-assessment return to be submitted, with effect from 6 April 2004, and he exhibited a copy of that document. Two of the criteria as set out therein are: firstly, that the taxpayer is self-employed, and, secondly, that he is an employee or pensioner with savings or investment income from which tax has been deducted of £10,000 or more before tax.

24. The submissions for the Revenue at the hearing were put forward by the Inspector of Taxes, Mr Chivers. They are recorded in paragraph 7 of the case. Again, I do not need to refer to all of them, but I shall mention a few. Mr Chivers submitted firstly that the Revenue had published internally the criteria required for completion of a section 8 tax

return; that is to say, the document to which I have just referred. He pointed out that one of the criteria was self-employment and that Mr Tomlinson had admitted in his form R40 for 2002/2003 that he did have an income from self-employment in that year. The self-employment in question was, in fact, some part-time work which I understand he does as a lay member of disciplinary tribunals established by the Bar Council.

25. Mr Chivers then submitted that the notice under section 8 was issued for the purpose of establishing an amount of tax and was designed to assist HMRC in a process of risk analysis, based upon the information supplied. He said that the format of the SA100 assists the processing of the information for that purpose, and because Mr Tomlinson had changed his source of income when he became self-employed, he was issued with the SA100 form for the purpose of establishing the amount of tax due.

26. He then pointed out some of the differences, to which I have already drawn attention, between a form under section 8 and the form R40. In relation to the question of discretion, he submitted that the Revenue are not bound to accept a form R40, even if they have done in previous years, where the circumstances of the taxpayer have altered. Nor is there any requirement in the legislation that a section 8 notice should be issued in the name of the officer of the Board.

27. These submissions and the evidence to which I have referred were considered by the General Commissioners, who set out their conclusions in paragraph 9 of the case stated. Again, I will not read those paragraphs but I will summarise the conclusions which they reached.

28. On the first issue, they accepted that the Revenue had received a form R40 which they then mislaid and they also accepted that Mr Tomlinson had subsequently submitted further evidence of his income and capital gains for the year but not on a prescribed form. Regardless of the receipt of that information, however, the Revenue were nevertheless permitted to require Mr Tomlinson by notice under section 8 to deliver a further return. The form R40 is a return, but is not covered by section 8, which deals with returns for the express purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax. Although it is the clear intention of the legislation and indeed of HMRC that nobody should be required to submit more than one return for any tax period, it will not always be possible to adhere to that intention and there is nothing in the legislation which says that only one notice to deliver a return may be given in any one year.

29. On the second issue, they said it was reasonable and proportionate for the Revenue to require a further return from Mr Tomlinson for the tax year in question because of the differences in format and purpose of the two forms and because, in particular, the form SA100 established the liability of the taxpayer and effectively created a legal debt due to HMRC. That is not something which could happen under form R40. They then also pointed out that a section 8 notice will lead in due course to an assessment and said that although the Revenue may on occasion exercise their discretion to accept the form R40 where a tax liability for the tax year has arisen, it is not common to do so except in cases of one-off payments of income tax or capital gains tax. I pause to say that that may be a little too narrowly stated, at least on the basis of the information in the papers before me, but I think for present purposes nothing turns on the frequency or otherwise with which that particular practice is followed.

30. They then also said there is no reason why the Revenue should not lay down guidelines for their employees to follow. In this case there was no evidence to suggest that the liability for income tax which had arisen was limited to the one tax year in question, which I take to be a reference to the year 2002/2003 in which Mr Tomlinson’s earnings from his new part-time self - employment had first been disclosed.

31. Finally, on the third issue, the Commissioners concluded that there was no reason to suppose that the individual name of the officer of the Board had to be stated for a notice under section 8 to be valid.

32. In his appeal to this court, Mr Tomlinson has concentrated on two main points, which he says led the General Commissioners to err in law in reaching the

conclusions that they did. I interpose to say that the appeal to this court lies only on questions of law, as is well known and as is provided by section 56(6) of the Taxes Management Act.

33. Mr Tomlinson's first point was that, on the true construction of section 8(1), a notice is invalid unless the particular officer who gives it is named. In support of this submission he argued that this is the natural interpretation of the words "a notice given to him by an officer of the Board". It is true that the wording does not say "a named officer" but, says Mr Tomlinson, that is really so obvious that Parliament would have regarded it as going without saying and not as something that had to be spelt out. He also submitted that the contrary construction involves anonymity in a way which would be sinister and contrary to British traditions and values.

34. These submissions were advanced vigorously by Mr Tomlinson but I am afraid I am unable to accept them. My first reason is simply that that is not what the section says. The only requirement in section 8(1) is that the notice in question should be given by "an officer". Where the draftsman wishes to refer to a named officer, he is perfectly capable of doing so, as one can see by reference to section 20(2)(a) and (b). It is true that the context of section 20 is very different (it is a section dealing with information-gathering powers), but for present purposes the important point is that where the draftsman wishes to make it clear that it is a named officer who is to take a particular step, that is made clear in the way one would expect it to be made clear, namely by use of those particular words.

35. I should also say it was not disputed in the present case by Mr Tomlinson that the section 8 notice which he received was, indeed, given by an officer of the Board. He accepted, rightly, that an officer may be a junior officer and that all that matters for this purpose is that he is duly authorised to take the step in question in the course of his or her employment.

36. My second reason is that this is, anyway, not a case of anonymity at all. The notice sent to Mr Tomlinson was ostensibly issued in the usual way by the area director of the relevant area; which, in this case, was the Leicester and Northamptonshire area, the address of which was then given. It is true that the area director was not named but, nevertheless, the director is, I assume, an actual and identifiable person, albeit here referred to by his office rather than by his name. But, in principle, the area director could be ascertained and held accountable if any questions of that nature arose. I cannot, therefore, see anything sinister in the use of the description of the office rather

than the actual name to describe the officer by whom the notice is issued and to whom it has to be returned. We are far away from any Orwellian shades of 1984.

37. But thirdly, and in any event, the subsection has to be read with section 113(1A) of the Taxes Management Act, which I shall now quote:

> "Any notice or direction requiring any return to be made under the Taxes Acts to an inspector or other officer of the Board may be issued or given in the name of that officer, or as the case may be in the name of the Board, by any officer of the Board, and so as to require the return to be made to the first-mentioned officer."

Accordingly, this provision expressly provides for a notice such as that under section 8 to be issued by any officer of the Board in the name of, in the present case, the area officer, and requiring the return to be made to the area officer. That, as a matter of procedure, is no doubt what happened in the present case with the notice being issued in the name of the area officer by a junior official, no doubt together with many thousands of other similar notices. I cannot find anything in the wording of subsection (1A) which requires the name of the officer in question to be specified rather than described by some description such as "area officer". I find some additional support for this view in a point made by counsel for HMRC, namely that the notice could indeed have been issued in the name of the Board as a whole, which does suggest that the draftsman was not here regarding the individual name of the particular officer in question as important.

38. I now turn to Mr Tomlinson's second point, which he put in various ways but I think the nub of it may be expressed as follows. He admitted that the initial issue of the section 8 notice in the present case was justifiable. It was done on the same day as he delivered his R40 but in the nature of things was probably issued before anyone was aware of the contents of his R40. It appears to have been issued within the guidelines for self-assessment to which I have already referred. However, says Mr Tomlinson, the position changed once the contents of his R40 had been received and digested. The Revenue should then have realised, even if they did not before, that they had all the information they needed to work out his tax liability for 2003/2004 and they should therefore have withdrawn the notice. Alternatively, they have no right to complain if he did not complete it and did not deliver it to them. Either way, he had a reasonable excuse for the non-delivery, so the penalty should be discharged.

39. Mr Tomlinson also suggested that any exercise of discretion under section 8 was vitiated because proper consideration had not been given to the particular circumstances of his case, or alternatively because there was no real exercise of discretion at all and this was a case where junior staff simply did what they were told and any discretion was, effectively, fettered.

40. Again, I have listened carefully to what Mr Tomlinson had to say but I am unable to accept his submissions. As I pointed out at the start of this judgment, the form R40 is a very different animal from a section 8 return. Mr Tomlinson's circumstances, as disclosed in his R40 for 2002/2003, were such as to justify the Revenue in requiring him to fill in a section 8 tax return, together with a self-assessment, for either or both of the reasons which I have already mentioned: firstly, his new source of income, and,

secondly, the fact that his investment income exceeded the £10,000 threshold. That could only be done if a section 8 notice was issued to him and a return was made by him, leading, as I have said, to a self-assessment in the extended sense that section 9 attributes to for that term, and also leading to the possibility of an enquiry if there were any points that the Revenue thought required further investigation. Accordingly, and, as I have said, this is not in dispute, the initial issue of the notice was justified.

41. However, was the position then altered by the receipt of the R40 for the year in question? The answer in my judgement is plainly not, because an R40, for the reasons which I have given, is in no way a substitute for a proper return, except in cases where the Revenue decides that it is prepared to accept it as a substitute. This case was not within that category because of the change in circumstances to which I have referred. It is unfortunate that Mr Tomlinson was sent a blank form R40 for 2003/2004 and, therefore, would have had to duplicate the effort of filling it in if he had, in fact, returned his section 8 return. However, at the very highest, that was an administrative error or oversight and is nowhere near sufficient to lead to the conclusion that the section 8 notice should have been withdrawn once the R40 had been received. The receipt of the R40 did not change the underlying rationale for the issue of the section 8 notice, and, in those circumstances, it seems clear to me that Mr Tomlinson at no stage had any acceptable excuse for not filling it in in the usual way.

42. Mr Tomlinson argued his case before me clearly and courteously but the result is that I must dismiss his appeal for reasons which are substantially the same as those given by the General Commissioners.

43. This is a case where the amount at stake was very small, £100. There was a full hearing before the Commissioners and a careful decision, which I have effectively upheld, although not for precisely the same reasons. It seems to me that by taking the matter to this court, Mr Tomlinson was inevitably taking upon himself the risk that if he lost he would have to pay for the legal representation against him. Obviously there had to be representation if only because some of his submissions were very far-reaching. If, for example, I had concluded that the tax return sent to him was invalid, that would have had obvious repercussions across the board. The fact is that the Revenue had to be here. I have been assisted by their submissions and, for the reasons I have given, I have concluded that they are right.

44. Their bill of costs for summary assessment, as modified because the hearing took rather less time than anticipated, amounts to £3,520. In the context of High Court litigation, I have to say that is not a large sum and I can see no reason for saying either that Mr Tomlinson should not pay it, or, indeed, for reducing it. I will summarily assess the costs in that figure.