TC02749

Appeal number: TC/2012/03897

Income Tax – relief for error or mistake – section 33 Taxes Management Act 1970 – self assessment return made on basis of self-employment – Appellant an employee -claim for relief by way of repayment of tax – is repayment just and reasonable – no - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PHILIP GRAHAM TINDALE **Appellant**

- and -

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

TRIBUNAL: JUDGE JUDITH POWELL
MR A HUGHES

Sitting in public at Bedford Square, London on 14 November 2012

Mr Bernerd Rice, accountant, for the Appellant

Mr A Hall, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

The Appeal

1. This is an appeal against a decision of the Respondents made in a letter of 11 October 2011 not to allow the Appellant's claim for relief under section 33 Taxes Management Act 1970 ("TMA") in respect of the years 1997-98 to 2001–02 inclusive. The claim was made on the basis that the Appellant's income had been incorrectly returned as arising from self-employment rather than an employment so that tax was paid on an incorrect basis and therefore the Appellant should be given credit for tax that the employer company deducted or should have deducted under PAYE. The reason given by the Respondents for refusing the claim for relief was that it would not be just and reasonable to allow credit for tax since there was insufficient evidence that the company operated PAYE or had a UK presence that would have obliged it to deduct PAYE.

2. At the request of the Appellant the decision was reviewed by the Respondents and the review decision was given by letter dated 17 February 2012. The outcome of the review was to uphold the original decision. The basis for this was that there was no evidence that the company deducted tax or had a presence in the UK sufficient to bring it within the scope of PAYE, HMRC had no effective means of enforcing the liability and so the Appellant would have been responsible for paying his own income tax and national insurance contributions direct to HMRC. The reviewer commented that the Appellant had "done this, albeit on the wrong basis because of the way [you] have completed [your] self-assessment income tax returns". As a result the reviewer concluded it would be neither reasonable nor just to allow the claim. The reviewer informed the Appellant of his rights to appeal to this tribunal which he has done.

3. This Tribunal's jurisdiction in respect of the Appeal is set out in section 33(4) TMA which provides that we shall determine the appeal in accordance with the principles to be followed by the Board in determining claims under section 33. Our jurisdiction is not limited to a supervisory role.

The relevant statutory provision

4. It is appropriate at this stage to set out the relevant provisions of section 33 TMA.

5. Section 33:

> *(1) If a person who has paid income tax or capital gains tax under an assessment (whether a self-assessment or otherwise) alleges that the assessment was excessive by reason of some error or mistake in his return, he may by notice in writing at any time not later than five years after the 31st January next following the year of assessment to which the return relates, make a claim to the Board for relief*

(2) On receiving the claim the Board shall inquire into the matter and shall, subject to the provisions of this section, give by way of repayment such relief … in respect of the error or mistake as is reasonable and just.

(2A) No relief shall be given under this section in respect of –

(a) An error or mistake as to the basis on which the liability of the claimant ought to have been computed where the return was in fact made on that basis or in accordance with the practice generally prevailing at the time when it was made; or

(b) An error or mistake in a claim which is included in the return

(3) In determining the claim the Board shall have regard to all the relevant circumstances of the case and in particular shall consider whether the granting of the relief would result in the exclusion from charge to tax of any part of the profits of the claimant and for this purpose the Board may take into consideration the liability of the claimant and the assessments made on him in respect of chargeable periods other than that to which the claim relates

(4) If any appeal is brought from the decision of the Board on the claim the [Special Commissioners] shall hear and determine the appeal in accordance with the principles to be followed by the Board in determining claims under this section; and neither the appellant nor the Board shall be entitled to appeal under section 56A of this Act against the determination of the [Special Commissioners] except on a point of law arising in connection with the computation of profits

Facts

6. The years to which the claim relates are 1997–98 to 2001-02 inclusive. The decision against which the appeal is brought was made in October 2011 and reviewed in February 2012. The passage of time makes it impossible to establish all facts which might have been relevant. The way in which HMRC conducted this case caused understandable frustration to the Appellant and his advisers. The bundle of documents (including correspondence) was very substantial. Against this unsatisfactory background we found the following facts from the evidence before us.

7. We heard evidence from Ms Carter who is responsible for deciding a taxpayer's status and whether he is employed or self-employed. We also heard oral evidence from the Appellant.

8. Before the Appellant started work for Dynaudio A/S (we deliberately leave the nature of the Appellant's relationship with the company unanswered at this stage) he had been unemployed for about nine months but before that he had been an employee of several other companies including Tunbridge HIFI, Bryant's HIFI and Sevenoaks HIFI.

9. When he started work for Dynaudio A/S (a Danish company) in June 1994 he was told (we are not sure by whom at Dynaudio) to "sort out his tax". Dynaudio A/S had taken local advice about the consequences for them of taking on an English employee. We were shown a translation of advice given by Price Waterhouse to Dynaudio A/S in May 1994 concerning the employment of salesmen in England; this concentrated on local Danish issues and upon the risks of a salesperson causing Dynaudio A/S to have a taxable presence in the UK which they advised could be avoided so long as he did not have any authority to conclude contracts. The advice did not mention UK liabilities in relation to the salary either for Dynaudio A/S or for the Appellant.

10. The Appellant was unsure about how to "sort out his tax" and so he consulted a family friend who advised him that he was an employee. He had entered into an employment contract with Dynaudio A/S in June 1994 which we were shown together with a letter from his solicitor (we believe this to be the family friend) which showed that he had taken advice and that she had drafted him a letter to send Dynaudio "covering the points we discussed". We did not see a copy of the letter his solicitor drafted to send to Dynaudio and do not know whether it was sent nor whether it addressed the employment and related tax concerns although it was submitted at the hearing that it did not do so.

11. The employment contract stated in terms that he was an employed person and that his employer was Dynaudio A/S. He was to be paid a fixed salary of £14,000 pa plus 6% commission on total UK sales and his line of reporting was to Markus Wahl in Hamburg. His targeted sales were £400,000 in year 1 rising by £100,000 pa to £600,000 in year 3. The contract dealt with the provision of a car, land line and mobile telephones, demonstration equipment and the payment of travel and subsistence expenses.

12. The Appellant prepared a daily report of his work which was submitted each month to Germany and, later, to Denmark. His duties were to promote products in the UK. Initially he promoted HIFI speakers and some car audio speakers. He did this by calling retailers and arranging to go and see them, going to shows and seeing the press. He was responsible for some but not all UK sales. At the beginning he held demonstration models and any orders were delivered direct from a warehouse in Harwich. On the rare occasion a speaker failed to operate the customer would be sent a new drive from London. Other manufacturers also used the drive units and they also obtained these from the London branch.

13. The Appellant thought the London branch was only in operation in the first few years of his association with Dynaudio. An undated press release which mentions the Appellant by name shows a London address for "Dynaudio" in Park Street London SE1 and gives a London phone and fax number as well as the Appellant's contact details with instructions to contact him for a demonstration. A signed statement by a Mr O'Malley in March 2006 records that he worked for Dynaudio Acoustic at that address in London and that the administrator also based at those offices was responsible for taxing the car used by the appellant and also handled consumer telephone calls to the "HiFi division" and passed messages to the Appellant.

14. He was paid in sterling and at least initially he was paid without any deductions. Later on amounts were deducted which he thought was related to UK tax but which he said may have been currency exchanges. He was unable to recall the amount that was deducted. He became concerned that the deductions were incorrect. He found his direct German bosses unapproachable and so he reported the advice on his employment status to the Danish managing director who he found friendly and approachable and told the Appellant that he (the Danish managing director) would deal with this issue. We were not clear when his concerns about tax were first raised with the Danish MD, Allan Jensen, but it was certainly taken seriously by him in October 2000. We find it unlikely that the Appellant raised serious concerns with anyone at Dynaudio A/S in the first years after he started work with them. It was around the end of 2000 that he first made contact with Simon Dent, an accountant, who seems to have been acting for Dynaudio Acoustic (UK), a company based in the UK. He was introduced to Mr Dent by Mr Jensen and the Appellant formed the impression they knew each other quite well.

15. Following discussions with Mr Dent, he was presented with tax returns to sign which he says he didn't check since he relied upon Mr Dent and the Danish MD for their accuracy. They seem to have been submitted in 2002 and, according to HMRC records, the first tax payments for 1996/97 onwards were made in October 2002. At that time he signed the returns he was told that the amount of tax due was £30,000 more than the amounts which had been deducted from his pay. He was shocked to learn this but was told that Dynaudio A/S would lend him sufficient to cover the shortfall which would be recovered from payments due to him in future. He recalls that deductions from his pay did increase after this. We did not get the impression he questioned his self-employment status but was simply relieved that something was being done in relation to his tax affairs.

16. The Appellant was not clear what payments he received from Dynaudio A/S over the years nor the deductions that were made although he remembered that the deductions were higher in later periods than in the earlier years and he speculated that some of these may have been loan repayments. The Appellant thought that for the first 6 to 18 months he received only a basic salary and that he received it without deduction for tax. In the early days he paid his expenses in cash but in later years he used a credit card. He remembers that he always received less than the amount he had claimed and was told that the difference was tax deductions and he assumed that this was UK tax. He was provided with a car and the first two cars he used were hired by Dynaudio Acoustic (UK) while the third car was lease hired by Dynaudio A/S in Denmark. He was unable to remember how his commission was calculated but he did say that he never had a disagreement over his claims. He was very vague about UK tax liabilities in general and although he had previously been an employee he showed no knowledge of even the basic tax forms that an employee receives such as the year end Form P60.

17. By the time of his discussions with Simon Dent, the Appellant's work load had become "colossal" and although he initially asked Dynaudio A/S to pay his wife to help him and they did so (paying her on the basis she was a self-employed administration assistant) she was unable to cope and asked him to take on someone

else. The Appellant was using his house as an office and to store demonstration models and a person was taken on to help with office duties. Around this time a UK company Tindek Ltd was established and this seems to have been on the advice of Mr Dent and, possibly, Mr Jensen. The Appellant believed that the company was required in connection with the recruitment of an assistant to help him with his increasing workload and following the acquisition of the company, there was no change in his duties nor any change in the way in which he worked; the only change was that payments were made to a Tindek account rather than to his personal account. Up until that point he had sent all paperwork to Denmark but after the returns were submitted and Tindek was established he sent copies to Simon Dent.

18. Payments were made to the assistant through Tindek Ltd although it seems from documents we saw that she always considered herself an employee of Dynaudio A/S. We shall not dwell further on the activities of Tindek Ltd since it has been agreed by all concerned in March 2004 that the company was not trading and should be ignored.

19. The person taken on to assist the Appellant left her employment in February 2003 and the Appellant parted company with Dynaudio A/S sometime towards the end of August 2003. The parting was acrimonious and the Appellant commenced proceedings in the employment tribunal. These proceedings were settled before a hearing although the Appellant was unable to tell us on what basis the settlement was reached except that he had no further liabilities to Dynaudio A/S as a result. During the preparation for the hearing before the employment tribunal the Appellant was advised to take advice concerning his tax position and he consulted Mr Rice the accountant representing him at the hearing.

20. Mr Rice approached HMRC in August 2003 to explain that Mr Tindale was concerned his tax affairs were not up to date and that he wished to take steps to remedy this. Mr Rice spoke first to Mr Collard. Mr Collard was a specialist in corporation tax rather than personal employment tax matters and so when he made a note of his conversation with Mr Rice he recorded that the matter would have to be referred to one of his colleagues who did deal with these matters. It is not clear if it was he who referred the question of Mr Tindale's status to Ms Carter but by September 2003 the matter had been referred to her as a status inspector. Ms Carter explained at the hearing that a status inspector is required to be completely impartial and look at the picture as a whole to determine whether the arrangements between the parties was one of a contract of service (employment) or a contract for services (self-employment).

21. Ms Carter met Mr Tindale and Mr Rice on 15 September 2003 and although she produced notes of that meeting they seem not to have been agreed with Mr Tindale or Mr Rice. The notes refer to the history of Mr Tindale's relationship with Dynaudio A/S, his increasing concerns over his tax liabilities in the UK and the involvement of Mr Dent in preparing self-assessment returns on a self-employed basis and recorded that Mr Rice pointed out Mr Dent claimed deductions for expenses which was incorrect because, in fact, they were reimbursed to Mr Tindale by Dynaudio A/S. Some documents were handed to Ms Carter at the meeting and some were supplied to

her after the meeting; there was some disagreement over exactly what had been supplied. She confirmed she had received the original contract of employment, sample copies of time sheets identifying days worked and a breakdown of expenses and some magazines containing reference to and advertisements for the products in question. Ms Carter's expertise was in matters of employee/self-employed status. One unusual aspect of Ms Carter's meeting note was that she recorded a need to establish whether Dynaudio A/S had a representative in the UK.

22. Following the meeting there was a delay of many months before a status decision was made. For some reason Ms Carter referred in most of the relevant correspondence (and in the eventual decision letter about status) to "Dynaudio Ltd" – a company which so far as we can tell did not exist. As part of her enquiries Ms Carter approached DMH, a firm of solicitors who acted for Dynaudio (we are not clear which company in the group), and made various attempts through them to speak to Mr Jensen to discuss two matters – the terms of Mr Tindale's engagement and whether "Dynaudio Ltd" had a UK presence. There were numerous records of telephone calls between Ms Carter and DMH and eventually a letter was written by Ms Carter to DMH in February 2004 requesting a meeting with a representative of DMH to which she received a reply that they would prefer to deal with matters in correspondence. No meeting ever took place.

23. Eventually Ms Carter spoke direct to Mr Dent in May 2004 when he established contact with her saying "he had heard through the grapevine and not from DMH" that Ms Carter wanted to speak to him. He confirmed he had prepared accounts and returns for Mr Tindale and for Dynaudio Acoustics (UK) Ltd (owned by another Danish Company) which had ceased to trade and had been struck off. He said that he was aware of how Mr Tindale had worked and he had "accepted self-employment", on the basis that Mr Tindale worked from home, was paid a retainer and recharged expenses and had full control over how he worked. He said that Mr Tindale had not liked the director, had left on acrimonious grounds, had been well treated and had been lent money to pay his tax. He speculated that Mr Tindale was now "looking for a way to get back at the company". He also stated that Mr Tindale had not acted as UK agent for the company.

24. Ms Carter followed up that call with a letter to Mr Dent on 13 May 2004 asking various questions specifically about Mr Dent's relationship with "Dynaudio Ltd", "Dynaudio UK", the relationship between the two companies, whether "Dynaudio Ltd" had a UK presence or UK agent acting for them and asking for any relevant information concerning Mr Tindale's engagement with "Dynaudio Ltd". Mr Dent replied on 11 June 2004. He clarified the name of Dynaudio A/S, and confirmed he did not act for them but also stated they had no taxable presence in the UK and specifically that they have no UK office holding stock or other operation in the UK apart from the UK company which had by the time of the letter in 2004 been dissolved. He confirmed that Mr Tindale represented Dynaudio A/S by generating sales, leads and provisional orders all of which had to be authorised by the Danish company before acceptance and had no contracting powers over Dynaudio A/S. He held stock for display and demonstration purposes, installed equipment after it had been shipped from Denmark and dealt with technical issues. Mr Dent stated he

considered Mr Tindale was self-employed as he operated from his home address, bore the risk of the enterprise, recharged expenses and received fees for his services. He stated there was no signed employment contract with either Danish company and "no employment benefits whatsoever", his accounts were filed up to the 2002 return and he subsequently set up Tindek Ltd to provide his services and Mr Dent continued to be engaged until May 2003.

25. When Ms Carter had a conversation with Mr Tindale on 19 July she recorded she had not yet had an opportunity to study Mr Dent's letter. Less than a week after this conversation Ms Carter had reached a conclusion. She accepted what Mr Dent told her in reaching a conclusion that Dynaudio Ltd did not have a UK presence. It is not clear what other investigations she carried out into this other than, possibly, enquiries of Companies House and if she did make any such enquiries we wonder if she used the correct name of Dynaudio A/S. She disagreed with his conclusions about Mr Tindale's status as self-employed. On 26 July 2004 Ms Carter rang Mr Dent and also wrote him a letter to say she could accept that, on the information Mr Dent had supplied, "Dynaudio Ltd" had no UK base. In that letter she also stated that where a foreign employer with no UK base engages an employee on an employed basis any income tax or national insurance will be collected from the employee under Regulation 102 and 103 Income Tax (Employments) Regulations 1993 and Regulation 50 Schedule 1 Social Security (Contributions) Regulations 1979 and that she would be closing her review. In her telephone call she had said that she was unable to tell Mr Dent the outcome of her review since he was no longer acting for Mr Tindale. In view of this her reference to the Income Tax (Employments) Regulations and so on in her letter surprising and also gave a strong pointer to the way she had concluded her status review. She wrote in similar terms to DMH although in her letter to them she expressed disappointment at their lack of cooperation (a suggestion they disputed in their reply to her).

26. On the same day she wrote to Mr Tindale and Mr Rice with her decision. The decision letter set out the reasons for the conclusion that he had an employment with Dynaudio Ltd. This is confusing since elsewhere in the letter she refers to Dynaudio A/S and to its relationship with its immediate subsidiary Dynaudio Acoustics A/S and that company's subsidiary Dynaudio Acoustics (UK) Ltd. Mr Dent had been careful in his letter to set out clearly the names of the companies and the way in which they were related to each other. Although her role within HMRC is normally confined to status issues on this occasion she was also asked (we don't know by whom or why) with making enquiries about whether "Dynaudio Ltd" had a base in the UK. Her decision letter actually opens with her findings about that and that she had been unable to find that such a company did have a UK base. Having completed her review she returned her papers to Mr Collard, the inspector to whom Mr Rice had first spoken in August 2003.

27. After she reached her decision she closed her file and sent the papers to the Maidstone office. She was involved again in this case in 2006 when she wrote to Mr Rice after he made a complaint.

28. By late August 2004 it seems that Mr Tindale's tax affairs had been passed within HMRC to a Mr Setterfield who rang both Mr Rice and Mr Tindale on 26th and 27th of that month ; it seems that the inspector had suggested that his outstanding returns for the period of his employment with Dynaudio should be submitted on a self-employed basis – a suggestion with which Mr Rice was unhappy although he recognised it might be a pragmatic solution. This suggestion seems to have been abandoned.

29. Between 2004 and the 11 October 2011 decision letter against which this appeal is brought there was a substantial amount of correspondence but very little progress was made in resolving the Appellant's tax position. Correspondence passed back and fro between Mr Rice and various members of HMRC for years. It is quite apparent that no one was able to bring matters to any satisfactory conclusion. Mr Rice made formal complaints to the chairman of the Board of the Inland Revenue and to the Adjudicator. Even after this was done there was confusion who had responsibility for resolving which issues. The Adjudicator and the inspector both attributed responsibility for the section 33 claim to the other. Some apologies were given. Throughout the period Mr Rice argued vehemently that Dynaudio did have a UK presence and should have operated PAYE and he also put forward error and mistake claims under section 33 and there was some early debate about the timing of this claim. HMRC did not engage in the discussion about whether Dynaudio had a taxable presence but essentially regarded the position on this as finally determined. As a result of their stance on this they argued variously that Appellant should have operated PAYE and that he had, essentially, done that by paying tax shown as due on the return, that as Dynaudio was not liable to operate PAYE there was no liability for which the Appellant was able to claim credit and justify a repayment of the tax he had erroneously paid on a self-employed basis and that the error or mistake claim had not been quantified. To add further to the confusion the adjudicator appears to have been under the impression that a PAYE procedure had been set up for the Appellant to operate which was not correct and caused further irritation to Mr Rice.

30. By the time of the hearing it had been agreed that the section 33 claim related to 1997/98 to 2001/02 inclusive. The question for us is whether it is fair and reasonable to grant the Appellant relief for the tax paid according to his self-assessment returns and which was paid on the basis he was self-employed and not employed.

The Submissions

31. Mr Hall's submissions were directed first at the relevant legislation dealing with self-assessment returns, the Appellant's possible liabilities if a direction had been issued under the PAYE Regulations for him to operate PAYE and the effect if his self-assessment return had been amended to reflect his status as employee. Secondly and by reference to what might have happened, he concentrated on the scope of section 33 and the question of fair and reasonableness coupled with the question of whether a valid section 33 claim had been made in view of there being, in his submission, no computation of the relief claimed. Mr Hall accepted that there was now no question of the self-assessment returns being the subject of a formal enquiry and that it was too late for them to be amended. He accepted that the self-

employment income shown on the returns was excessive on the basis that HMRC claim the Appellant was not self-employed. It was agreed there was no tax due in respect of the declared income on that basis. He argued that the relief which was claimed should have been quantified and suggested that there should be a set off for the tax which would have been due if he had submitted his return on the basis of being an employee.

32. Mr Hall referred us to correspondence about the qualification issue between HMRC and the Appellant's accountant Mr Rice. He pointed out that requests had been made in correspondence dated 22 November 2007 and 3 January 2008 from HMRC asking for details of deductions and a request at that time for the Appellant to complete the employment pages of a return for the periods in question.

33. He turned finally to the question whether it was just and reasonable to allow the relief which he submitted it would not be in view of the probable liability to employment income tax if the Appellant's liability had been computed on the basis of him being an employee with fewer allowable deductions and with the additional benefit in kind in the form of the provision of a car.

34. In his submissions for the Appellant, Mr Rice dealt with the quantification issue. He pointed out that, in response to the requests for quantification made by HMRC, he had written to them in April 2008 in a letter which covered several matters including the UK presence of Dynaudio but, in essence, said that the Appellant was not in a position to quantify payments, that he had suffered some deductions, that some of the papers he handed to HMRC at the initial meetings in 2003 had not been returned and amongst the missing papers were those showing deductions. Mr Rice speculated a loss to HMRC in the order of £250,000 in the form of "PAYE obligation that has been avoided". In December 2007 Mr Rice, in response to a further request for quantification of the section 33 claim described this as "simply the removal of the self-employed entries from the tax returns for 1996/97 to 2001/02." (It was agreed at the hearing that a claim for the year 1996/97 would not be pursued). He repeated this several times during the hearing; the claim was for relief in the form of repayment of the whole amount of tax and NIC paid in respect of the self-employment income on the relevant returns.

35. Mr Rice, in justifying the claim for relief, argued forcibly that Dynaudio did have a taxable presence in the UK, was bound to operate PAYE and therefore his client was entitled to repayment of the whole of the tax paid by him in respect of the income he had returned as self-employed income in the relevant years. He said there was no need to submit computations in the context of claiming the relief and indeed it would not be possible to do so; the whole amount of tax should be repaid. He submitted that the employer had deliberately failed to deal with the Appellant's tax on the proper basis and so it could not be collected from the Appellant. The Appellant was not in a position to submit employment pages even if it would have been appropriate for him to do so since he lacked the necessary information about his payments. He also submitted that the comments made about his obligation to operate PAYE himself were misplaced since those comments were made after the end of the relevant years and no direction was ever made. He submitted that the case is

restricted to a claim under section 33 and the provisions of the legislation dealing with direct assessment are irrelevant.

36. Turning to section 33 itself Mr Rice dealt with the provisions of section 33(2A) and explained why he felt they did not apply to deny relief; in particular it could not be said that there was a practice to include the income as arising from a self-employment. As far as section 33(3) is concerned he argued that if relief was given it did not mean that profits were excluded from charge; Dynaudio should have operated PAYE and it was the fault of the Respondents that they had not pursued the company for this. The profits did not fall out of charge – the Respondents had failed to collect from the appropriate person. He accepted that if liability for tax was calculated on the basis that the Appellant was an employee the amounts payable probably did exceed the amounts shown on the self-assessment returns but says that HMRC should have quantified the liabilities. They had questioned the entries and nobody now knows what the Appellant received and HMRC have not said how they believe the relief should be restricted.

37. In answer to comments made about the repayment not being fair and reasonable he said that HMRC had failed to quantify what other liabilities of the Appellant should be set off against the repayment claim. It was not correct to say that he had, in a practical sense, operated PAYE nor that he was now liable to account for tax on the basis that the income was employment income even if such a liability could have existed at an earlier stage. In his submission it is for HMRC to show that the restriction is just and reasonable and they cannot restrict purely on the basis that he "must have owed far more". He criticised Ms Carter's handling of the case as "appalling" and in particular the delay and her conclusions about whether Dynaudio A/S had a taxable presence in the UK.

38. In conclusion he invited us to allow the appeal and grant relief for the full amounts paid in respect of the income declared as originating from self-employment and suggested that if the appeal failed it would acknowledge that HMRC need not "abide by the law".

39. **Our decision**

40. We must decide whether to allow the claim made by the Appellant for relief under section 33 by way of repayment of the tax and NIC paid in respect of income declared as arising from a self-employment in his self-assessment returns for 1997/98 to 2001/02 inclusive. It is agreed that there was an error in all these returns and that the income arose from an employment rather than from self-employment. We have to decide whether to allow the appeal against the decision that it is not just and reasonable to grant relief and repayment.

41. We will deal first with the validity of the claim. In case there is any remaining doubt about this we record that we are satisfied the claims are properly quantified as being for repayment of the whole of the tax and NIC paid in respect of the income returned as arising from self-employment. This is consistent with the stance taken

by Mr Rice from the outset that Dynaudio A/S had a taxable presence in the UK and was liable to operate PAYE.

42. Next we confirm that we do not believe relief is denied because of section 33 (2A). We agree with what the Appellant says about this. There is a mistake in the Appellant's returns. It was not appropriate for him to return the amounts he was paid as if he was self-employed. We agree with the Appellant that a section 33 claim can include NIC. On that basis the possibility of a successful claim exists and having considered the relevant circumstances (including but not limited to whether relief would result in the claimant's profits being excluded from charge to tax and so on in accordance with section 33(3)) we must determine what relief by way of repayment would be just and reasonable.

43. In considering events after Mr Rice first contacted them in 2003, it is quite clear that the Respondents handled this case badly. They accept this. Mr Rice started matters very properly when he first became involved in 2003 and drew his concerns about the Appellant's tax position to the attention of HMRC. It might well have been handled better if Ms Carter had limited her enquiry to determining the Appellant's status and if the consequences of that had then been analysed carefully by someone with a full understanding of the issues. We suspect that the original decision was delayed because Ms Carter was tasked with looking into matters with which she was unfamiliar. We are sure that this aspect of her enquiry meant that her discussions with Dynaudio's solicitors were protracted and ultimately unproductive.

44. No-one apart from Mr Dent seems to have had doubts over the Appellant's status; the Appellant was originally advised that he was an employee, his claim against Dynaudio was taken to an employment tribunal, the Appellant's representative at that Tribunal felt he was an employee, Mr Rice concluded he was an employee and Ms Carter's enquiries led her to that conclusion as well. Indeed, Ms Carter must have formed that conclusion fairly early on since it would otherwise have been pointless for her to examine whether Dynaudio had a UK presence. The decision took months for Ms Carter to reach and her decision letter was poorly written and referred to employment with a company that did not exist. Having reached her decision she returned the papers to the district with the comment that she had concluded "Dynaudio Ltd" did not have a base in the UK and the Appellant was responsible for operating PAYE.

45. We can see it was surprising to the Appellant when Ms Carter concluded that Dynaudio did not have a UK presence – and at that time he did not know the extent of her enquiries and on what she based her conclusion. It does now seem that she made quite limited enquiries and was mainly influenced by Mr Dent who stated he did not represent the company (but asserted that the company did not have a UK presence). Whatever the accuracy of the conclusion her statements about the consequences for the Appellant created a separate line of argument that continued fruitlessly for several years. Having looked through this voluminous correspondence fairly quickly we cannot see (nor was our attention drawn to) any examination in simple terms of what should be done in a case where an individual who was an employee had submitted self-assessment returns on the basis he was self-employed where he was an employee,

and whether it made any difference if the employer was or was not liable to operate PAYE and what the position was if his employment had terminated by the time of the conclusion about his status.

46. Various attempts were made by HMRC to resolve the position. These included Ms Carter's initial suggestion that he should operate PAYE directly, the inspector's suggestion that he might bring his affairs up to date by putting in later returns on a self-employed basis and the further suggestion that he should complete employment pages by way of amendment to his returns. These suggestions were made against the background that Dynaudio A/S did not have any liability to operate PAYE; a contention that Mr Rice consistently rejected as wrong. The attempts to resolve the situation failed because of this fundamental difference of opinion. It is perfectly understandable that Mr Rice, feeling as he did about Dynaudio's position, should reject these attempts at resolution particularly since they could have exposed his client to further liability and so he rejected the basis on which the suggestions were made. By the time of the hearing it was agreed that the Appellant would not submit amended returns, put in employment pages or account for tax under the PAYE regime but the essential difference over Dynaudio's position continued to influence the relief claim.

47. We are not in a position to conclude that difference between them. We can see there was an arguable case either way and that is all we can find. If Dynaudio had a taxable presence then we can see that it would have been liable to operate PAYE so that if relief was given to the Appellant the profits would not have fallen out of charge whatever the position over collection from Dynaudio might have been. We agree with Mr Rice it is unlikely that any unpaid PAYE could be recovered from the Appellant in those circumstances. If Dynaudio did not have a taxable presence as the Respondents have concluded they did not, then remedies were available to HMRC to deal with the tax liabilities of its employees but those depended upon them progressing matters in a way in which they did not do. The case for profits being excluded from charge would possibly be stronger if Dynaudio was not liable to operate PAYE but that would not conclude matters in favour of the Respondents in these circumstances although it would be particularly relevant because that is what section 33 says. We have concluded that the matter is unclear.

48. We have looked at the way that the Respondent carried out its enquiries after 2003. We shall now examine the position of the Appellant. The Appellant was not blameless. He was advised at a very early stage in his relationship with Dynaudio – as early as 1994 - that he was probably an employee. His income from that employment was not returned until 2002. We are sure that he was not in an equal position with his employers when it came to dealing with his tax position and we are equally sure he would not have been anxious to antagonise his new employers having been unemployed for some months before he started working for them. He was also busy building a business in the UK and quickly became overwhelmed by his workload. He displayed vagueness over his finances and his tax liabilities. However vague he was about such things he must have been aware that his tax affairs were not being dealt with properly since in his early years of employment with the company he recalls being paid on a gross basis and he was not completing tax returns and whatever his (understandable) commercial reservations may have been about forcing

the issue with the company he had a clear duty to ensure he was paying tax on his income which he should have known.

49. He might have sought advice about his position and his reporting obligations in view of the warning he had been given about his status at the outset. If he was in doubt about what deductions were being made from his payments (and whether they were on account of tax) he could have taken his own advice without antagonising his employers. By the time he eventually forced the issue with Mr Jensen it seems that he was overwhelmingly busy and his tax affairs were years out of date. We saw no contemporaneous explanation from Mr Dent why he had prepared returns on a self-employed basis for the Appellant and there is no evidence that the Appellant questioned him about this or any other aspect of the return. Mr Dent's letter to Ms Carter why he thought that the Appellant was self-employed was unconvincing and, to the extent it referred to him recharging his expenses, conflicts with the Appellant's returns. The establishment of Tindek suggests that Mr Dent thought the Appellant's tax position could be improved. We can see that the Appellant relied on Mr Dent; it is not unusual for a person to rely on his accountant but we are surprised that the Appellant did not question the conclusion he was self-employed. We conclude he was relieved to see his returns being brought up to date.

50. When the returns were brought up to date the Appellant found and however reluctantly, accepted, that he owed more tax than had been deducted from him over the years. If he thought the deductions related to tax at all he must have entertained serious doubts about the sufficiency of those deductions since he agreed that he owed a sum of £30,000 in tax over and above any amounts retained from his pay. Although he must have been relieved to bring his affairs up to date we find it scarcely credible that he did not check his income and related deductions for the years in question once he was told he had such a significant additional tax liability and so we conclude that his income for those years (declared on the basis that it derived from self-employment) is most unlikely to have been overstated in the returns. We cannot get to the bottom of what documents were provided to Ms Carter and whether they showed deductions or not.

51. And so, it is agreed that it is too late to amend the Appellant's returns and that an enquiry is not appropriate. The Respondents have formed the view that Dynaudio A/S has no taxable presence in the UK and have declined to pursue matters any further. The Appellant disagrees. If tax had been accounted for on the basis the Appellant was an employee throughout the period it is very likely that the total amounts of tax payable in respect of his income would exceed the amounts paid by the Appellant on the basis of his returns. Although there was no available evidence to show what was deducted from the Appellant's pay and in what periods the deductions were made, he certainly did not demonstrate to us that the net amounts he actually received would have been greater. The Appellant's representative said this on a number of occasions.

52. The basis of section 33 relief is that the repayment is just and reasonable. The fact that the tax paid by the Appellant is less than it might have been does not necessarily mean that relief is not available. On the one hand we find the

Respondents delaying decisions about the Appellant's status, and then failing to deal with the consequences of that and their finding that Dynaudio did not have a taxable presence in the UK. On the other hand we find the Appellant drawing the problems over his status to the attention of HMRC after his employment had ceased and only making a return on the wrong basis some eight years after it commenced.

53. Just as the Appellant says that HMRC could have pursued the company employer and claimed the appropriate tax from that company then we can see that if the Appellant had approached HMRC early in his relationship with the company then his status would have been confirmed and either HMRC would have had an early opportunity to claim that the employer should operate PAYE or, if they formed the view they did in 2004 that it did not have a taxable presence, they might have made a direction for the Appellant to operate PAYE. They are both at fault. It is impossible to judge precisely what tax is lost as a result. We find it unlikely that the Appellant overstated his income on the relevant returns nor overpaid tax on that basis; indeed he probably underpaid even on that basis if what Mr Rice says about deductions is correct.

54. Both the Respondents and the Appellant put forward a (different) scientific approach to section 33 relief. The Respondents say that the Appellant should give credit for tax that would have been due if his income had been computed on the basis of an employment status. The Appellant says that he is entitled to claim back the entire amount of tax and NIC paid in accordance with his returns on the basis that he is entitled to credit for the (greater) amount which the company (which he says had a UK presence) is liable to pay or should have paid; that is an unfortunate result but is the consequence of the Respondents failure to ensure the employer discharged its duties to operate PAYE. The question which party is correct depends on the status of Dynaudio which we regard as uncertain.

55. We do not regard section 33 as being dependant on a scientific approach. Section 33 requires us to determine what relief by way of repayment is just and reasonable. One of the relevant circumstances we must consider in particular is whether profits will be excluded from charge. If Dynaudio A/S did have a taxable presence in the UK we can see that this would not be the case but first, the presence or otherwise of Dynaudio cannot now be determined and secondly, even if we were to accept what the Appellant says, that is not the only matter to be taken into account otherwise section 33 would have said so. It is an important but not decisive factor and in this case we cannot say whether profits would be excluded if relief is given.

56. If relief is granted by way of repayment the Appellant will benefit from a windfall. This might be a just and reasonable result if the only persons at fault were the Respondents. That is not the case. We have said that we can see why the Appellant did not force the issue but he failed to deal with his tax affairs at all for years after he started work for the company. The Appellant does not say that his income was overstated on the returns; he does not remember what he was paid and what was deducted and while it is possible that the deductions did exceed the tax due on his income it is very unlikely that is the case.

57. We have not been able to establish the exact amount that the Appellant was paid nor the amount deducted from that pay nor whether the full amount deducted was used to fund the self-assessment liabilities. We are as clear as we can be that the PAYE liability would have exceeded the tax paid on the self-assessment returns. If the Appellant succeeds in this Appeal he will receive a windfall in the amount of the tax he paid. If he fails he will have paid tax on the basis of income returned by him in returns signed by him and computed on a basis likely to have been more generous than if that same income had been computed on the basis he was an employee. We have concluded that it is just and reasonable to deny relief altogether. This is because there is such uncertainty over the facts of this case, the amounts the Appellant was paid, the presence or otherwise of Dynaudio, delays on both sides at relevant times and the probability that the tax paid was less than it might have been (possibly far less). All this makes it just and reasonable to deny relief. We dismiss the appeal.

58. 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.

JUDITH POWELL
TRIBUNAL JUDGE

RELEASE DATE: 22 May 2013