[2017] UKFTT 456 (TC)

TC05919

Appeal number: TC/2016/04037

Income tax - closure notice - HMRC amendments to self-assessment return in respect of profits of self-employment - whether HMRC had incorrectly disallowed a negligible value claim - yes - incorrect assessment - appeal allowed - penalties discharged

FIRST-TIER TRIBUNAL
TAX CHAMBER

RICHARD STEVEN WARD **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER TOBY SIMON

Sitting in public at Fox Court, Brooke Street, London on 27 March 2017

Mr Richard Steven Ward the Appellant in person

Mrs Gill Carwardine, Officer of HM Revenue and Customs, for the Respondents

DECISION

The Appeal

1. This is an appeal by Richard Steven Ward ("the Appellant") against HMRC's closure notice and assessment in the sum of £91,888.30 issued on 23 December 2015, for the tax year ended 5 April 2011 in respect of capital gains and the profits of his self-employment, and also a penalty assessment issued on 16 May 2016 in the sum of £27,566.49.

2. The point at issue is whether the Appellant has made an eligible 2010-11 Negligible Value Claim ("NVC")

Background

3. The Appellant's self-assessment tax return for the year 2010-11 declared income received of £325,863, less losses of £261,735, which included £194,500 in respect of a NVC. HMRS assert that the Appellant failed to lodge his NVC correctly, within the relevant time period.

4. The NVC related to losses suffered by the Appellant on the disposal of 28,250 shares in Ticktock Entertainment Limited on its liquidation in 2010, 19,500 shares having been acquired for £19,500 in 2007 and 8,750 shares acquired in 2008 for £175,000, totalling £194,500.

5. The Appellant's declared income tax and class 4 NIC due after allowances was £29,538.18. HMRC calculated income tax and class 4 NIC at £121,471.48, after disallowing the NVC.

6. The Appellant asserts that on 12 May 2011 he emailed HMRC (from his solicitor's office, where he was arranging the disposal of his shares in the company, as explained in para 12 below) via the HMRC website, lodging a claim for share loss relief. His narrative was not particularly clear, but HMRC acknowledge that he made reference to the allowance and relief he was seeking when he said "the tax allowances and reliefs have gone up". He told us - see para 27 - that he made this claim before signing the transfer of the shares. The Appellant did not specifically make reference to a NVC, nor did he include with his claim calculations or supporting evidence to quantify the claim. However, his claim was accompanied by a postponement application in an amount equivalent to the £194,500 share loss allowance being claimed.

7. On 8 January 2013 HMRC issued a letter advising of a check of the Appellant's 2010-11 return in accordance with s 9A TMA 1970.

8. As the requested information was not supplied, on 19 February 2013 HMRC issued a Notice to provide information and produce documents in accordance with paragraph 1, Schedule 36 FA 2008.

9. On 30 May 2013 HMRC issued a Penalty notice in accordance with paragraphs 39 and 46 of Schedule 36 FA 2008 in the sum of £300.

10. On 19 August 2013 HMRC issued a further Penalty notice in accordance with paragraphs 40 and 46 Schedule 36 FA 2008 in the sum of £750.

11. On 8 October 2013 HMRC received a letter from the Appellant dated 19 April 2013 including (inter alia) a copy of a Tomlin Order issued by the High Court in March 2011, evidencing an agreement reached by the Appellant and his co-shareholders with a principal creditor of Ticktock Entertainment Limited, following the Company's insolvency in 2010.

12. As part of a separate agreement with a co-shareholder, John Twiggs, the Appellant agreed to surrender his residual interest in the Company on the basis that his shareholding was totally valueless. That transaction was completed on 12 May 2011 and gave rise to the NVC claim which HMRC now assert was not properly made.

13. On 30 January 2014, after a further exchange of correspondence, HMRC advised that a response regarding the shares loss relief claim would be forwarded as soon as a share valuation review had been concluded.

14. On 12 June 2014 HMRC wrote to the Appellant acknowledging that on 12 May 2011 the Appellant had disposed of his 28,250 shareholding in Ticktock Entertainment Ltd but advised that for a NVC claim to be properly made, the asset of negligible value had to be owned at the time the claim was made. HMRC requested a copy of the stock transfer agreement, but advised that they proposed to disallow the NVC claim.

15. HMRC's view was that the Appellant had disposed of the asset to Mr Twiggs on 12 May 2011, and the NVC had not been properly quantified at the time it was made. Therefore, the claim was not valid. No claim could be made after that date as he was no longer the owner of the asset.

16. His inclusion of the NVC figure of £194,500 in his tax return submitted on 27 January 2012 could not be considered a valid claim and was considered to be a careless inaccuracy in respect of which a penalty would be payable.

17. On 28 July 2014 the Appellant wrote to advise he was taking further specialist advice.

18. As nothing further had been heard from the Appellant, on 19 October 2015 HMRC reminded him that in their view the NVC was invalid and would have to be disallowed.

19. On 23 December 2015 HMRC issued a Closure Notice for 2010-11 in accordance with s 28A (1) and (2) TMA 1970 reflecting additional tax due of £91,888.30, along with an inaccuracy penalty of £27,566.49 that would be sought in accordance with Schedule 24, FA 2007.

20. On 21 January 2016 the Appellant appealed HMRC's decision to disallow his NVC.

21. On 25 January 2016 HMRC offered a Review of their decision to issue a closure notice and penalty, but having undertaken a review on 23 February 2016, upheld the earlier decision.

22. On 25 July 2016 the Appellant notified an appeal to the First-tier Tribunal.

Legislation

23. Section 24 Taxation of Capital Gains Act 1992 - Disposals where assets lost or destroyed, or become of negligible value.

Section 24(1A) allows the owner of an asset to make a NVC subject to certain conditions. A claim can be made at any time after the asset has become of negligible value, provided that the taxpayer still owns the asset. If the asset becomes extinct, once the taxpayer ceases to own it he loses the right to make a NVC.

24. Section 42 TMA 1970 states:

> "42 (1) Where any provision of the Taxes Acts provides for relief to be given, or any other thing to be done, on the making of a claim, this section shall unless otherwise provided, have effect in relation to the claim.
>
> (1A) Subject to subsection (3) below, a claim for a relief, an allowance or a repayment of tax shall be for an amount which is quantified at the time when the claim is made.
>
> (2) Subject to subsections (3) to (3ZC) below, where notice has been given under section 8, 8A or 12AA of this Act, a claim shall not at any time be made otherwise than by being included in a return under that section if it could, at that or any subsequent time, be made by being so included."

Helpsheet HS 286 – Negligible Value Claims states:

> "If you own an asset which has become of negligible value, you may make a claim to be treated as though you had sold the asset and immediately reacquired it at the time the claim is made for an amount equal to its value (a negligible value claim), which should be specified in the claim. Please note that you must still own the asset when you make the claim and that the asset must have become of negligible value while you owned it. An asset is of negligible value if it is worth next to nothing
>
> If you are making a negligible value claim for shares or securities, it is possible that the Shares and Assets Valuation Office will already have considered their value. …The negligible value list gives a tax year or a specific date at which Shares and Assets Valuation Office has accepted that the share or security is of negligible value. It also shows if the company has since been struck off the Register of Companies and been dissolved. You cannot make a negligible value claim after the company has been dissolved,…..you may be able to reduce your Income Tax liability where you have allowable capital losses available provided certain conditions are met.
>
> The loss must have been made on a disposal by way of either:
>
> - a negligible value claim
> - an arm's length bargain
> - a distribution made in the course of winding up the company the dissolution of the company
>
> When you make a negligible value claim you may specify an earlier time falling in the 2 previous tax years, at which you should treat the deemed disposal as occurring. You

have to meet all the necessary conditions for the claim at that earlier time as well as at the time you make the claim.

The relief has to be claimed within 1 year of 31 January following the year in which the loss was made.

The relief is given by deducting the allowable loss from your total income from all sources, before any deduction for your personal Income Tax allowances."

The Appellant's case

25. In his Notice of Appeal, the Appellant's Grounds for Appeal are that HMRC and the Appellant agree that the Appellant made a notification to HMRC via the HMRC website on 12 May 2011 and that he was entitled to the share loss relief if a NVC was properly made. HMRC also agree that any claim made on or before 12 May 2011 would have been a valid claim. The Appellant disagrees with HMRC's assertion that his NVC was not quantified. He asserts that his postponement application effectively quantified the claim which was self-evident, being the total value of the share loss.

26. The Appellant refers to Helpsheet 286 and says that the guidance given in the Helpsheet does not specifically state that the election needs to be made by way of an election on a tax return.

27. At the hearing the Appellant said that, whilst at his solicitor's office and prior to the transfer of his shares in Ticktock Entertainment Ltd to Mr Twigg, he logged into his account on HMRC's portal, and provided the figures necessary to submit and calculate a tax postponement application with regard to the NVC. He said that he then received an electronic payment confirmation, which took into account his individual tax rates, and thereafter payment over a period of two years. Therefore there could not be any doubt that a valid NVC claim had been made. HMRC must have had the claim in order to deal with the postponement application and process the repayment. It is possible that the person who dealt with the application did not recognise the claim as an NVC claim, and perhaps dealt with it as a capital gains tax loss claim.

HMRC's submissions

28. A NVC under s 24 (2) TCGA 1992 is designed to allow the owner of an asset that has become of negligible value to recognise a loss in respect of that asset without actually disposing of it. Section 24 (1A) TCGA 1992 allows the owner of an asset to make a NVC subject to certain conditions. A claim can be made at any time after the asset has become of negligible value, provided that the taxpayer still owns the asset. Once the taxpayer ceases to own the asset he loses the right to make a NVC. In the Appellant's case, he sold the asset to Mr Twigg on 12 May 2011. Therefore it follows that from that date the Appellant lost the right to make a NVC.

29. There is no definition of the term "negligible", but HMRC accepts the term to mean "worth next to nothing", that it is practically worthless as opposed to being actually worthless. HMRC do not dispute that the shares were valueless.

30. HMRC assert that the claim was made in the Appellant's tax return on 27 January 2012, when the shares were no longer owned by him.

31. HMRC acknowledge that the Appellant lodged a postponement application on 12 May 2011, saying that "The Tax Allowances and reliefs have gone up". However, he did not specifically make a NVC, nor did he include any calculations or supporting evidence to quantify the claim.

32. Section 42 (1A) TMA 1970 requires that at the time any claim is made, it must be for an amount which is quantified at the time. At the time the Appellant submitted his 2010-11 return (on 27 January 2012) he no longer held the asset and therefore this cannot be a valid claim.

33. In terms of the claim said to have been made on 12 May 2011, quite clearly the definition of quantified cannot be satisfied and the claim must fail.

34. HMRC's position is as supported by the First-tier Tribunal decision in the case of *Michael E Robins and The Commissioners for HM Revenue & Customs* [2013] UKFTT 514 (TC). The decision contains the following definition of the term "quantified":

> "The legislation is quite specific in requiring claims to be quantified and, as a matter of the normal use of language, we do not see that 'quantified' can be read as meaning 'capable of being quantified'. In this case, it is true that the calculation needed was easy and obvious, but it may not always be the case of taxpayers whose affairs are not as straightforward as Mr Robins's are, and the legislation is in terms which require certainty so that it can be ascertained without difficulty and debate what the taxpayer's entitlement is."

35. Where an amendment is made to a return following an enquiry, the burden of proof is on the Appellant to show that the amendment is wrong and the amount by which it is wrong.

36. As regards penalties, it is for HMRC to show that an incorrect return was submitted negligently and to show that the inaccuracy in the return was a result of careless behaviour. If this is established the onus of proof reverts to the Appellant to show that the quantum of the penalty is wrong. HMRC assert that the Appellant has not discharged that onus.

37. At the hearing, Mrs Carwardine for HMRC accepted that it was possible that when the Appellant logged into his account with HMRC and submitted the postponement application, the accompanying NVC was not recognised as such by the person who dealt with it. She conceded that the claim must have been quantified to enable HMRC to have processed the repayment that the Appellant subsequently received. In any event, the correct way forward had there been any doubt about the validity of the NVC, would have been for HMRC to contact the Appellant to discuss the claim. Had that happened, the NVC claim would have been recognised as such and allowed.

38. Mrs Carwardine further accepted that if the closure notice assessment did not stand then the penalties were automatically expunged.

Conclusion

39. A NVC is designed to allow the owner of an asset that has become of negligible value to recognise a capital loss in respect of that asset and to set that loss off against his income.

40. In order for a claim under s 24 (2) TCGA 1992 to be made, an asset must have become of negligible value whilst owned by the taxpayer claimant.

41. It is not in dispute that the shares in Ticktock Entertainment Limited were of 'negligible value'.

42. The Appellant sold the asset to Mr Twigg on 12 May 2011. However we accept that immediately prior to that he made a NVC claim, by way of an online request to reduce payments on account saying that "The Tax Allowances and reliefs have gone up". He did not specifically make reference to a NVC, but it was clear that he was referring to his share loss relief claim and he provided the figures in his postponement application. The NVC was therefore quantified. He followed the procedure set out in Help sheet 286.

43. We therefore find that the Appellant made a valid NVC prior to the disposal of his shares in Ticktock Entertainment Limited, which satisfied the provisions of ss 24 TCGA 1992 and 42 TMA 1970.

44. We therefore allow the appeal, set aside the closure notice assessment and discharge the penalties.

45. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 1 JUNE 2017