[2018] UKFTT 91 (TC)

TC06349

Appeal number: TC/2017/02427

INCOME TAX & NATIONAL INSURANCE CONTRIBUTIONS – application for postponement of tax and NICs of c£900,000 – whether applicant has real rather than fanciful arguments for having been overcharged –postponement allowed in full.

FIRST-TIER TRIBUNAL
TAX CHAMBER

RAJU POPAT	**Applicant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE RICHARD THOMAS

Sitting in public at Taylor House, London EC1 on 6 February 2018

The Appellant in person

Christopher Vallis, Solicitor's Office and Legal Services HM Revenue and Customs, for the Respondents

DECISION

1. This was a reference to the Tribunal of an application by Mr Raju Popat ("the applicant") to postpone income tax and Class 4 National Insurance Contributions ("NICs") totalling £885,696.29, the application having been refused by the respondents ("HMRC").

Facts

2. From the written and oral evidence of Ms Elizabeth Bray, an officer of HMRC, and of the applicant, I set out the facts I find about the events which led up to the assessments which gave rise to the tax in issue in this case.

3. Because of the nature of a reference of this sort much evidence was given about Mr Popat's affairs the truth of which I do not need to decide upon. That will be for any hearing of the appeals should they be notified to the Tribunal.

4. Ms Bray, who works in Fraud Investigation in HMRC, received an "Evasion Referral Form" from a Local Compliance Office in September 2015. The reason for the referral was that they had discovered that a company hitherto unknown to HMRC, Ilford Hill Ltd ("IH") had been trading from an address in Ilford, Essex but had not notified itself to HMRC for corporation tax ("CT"), Value Added Tax or PAYE.

5. The applicant appeared to be the sole signatory on the bank account of IH, but was not a director or shareholder as at the date of incorporation (22 July 2009), becoming a director on 14 December 2011.

6. Ms Bray, with her team, researched the affairs of the applicant and his wife over a 20 year period, and this included self-employed businesses and all companies where they were shareholders or directors.

7. On the basis of this research she recommended that under Code of Practice 9 ("COP9") the applicant and his wife would be offered an opportunity to enter the Contractual Disclosure Facility ("CDF"). CDF gives a person the opportunity to make a complete and accurate disclosure of all irregularities in their tax affairs in return from immunity from prosecution. They are given 60 days to make an outline disclosure of their fraud.

8. At the same time as the CDF was offered, Ms Bray came to the conclusion that it was necessary to take steps to prevent a loss of tax to the Exchequer. She recommended that in the case of one tax year where a return was under enquiry that a jeopardy amendment under s 9C Taxes Management Act 1970 ("TMA") be made and that discovery assessments should be made under s 29 TMA, both for tax years where a return had not been made and where she had evidence of under-declarations on returns that had been made.

9. The assessments (including I assume the jeopardy amendment) were made, she says, to the best of her judgment. I did not need to decide whether that was so, but I have considered the question later.

10. The assessments covered three areas where she said the applicant had failed to notify receipt of income.

11. The first area covered the period 2005/06 to 2012/13. The assessments she made for these years all show "profits from self-employment" in the amount of precisely £84,008 on which both income tax and Class 4 NICs are charged.

12. Ms Bray says that these assessments represent the profits the applicant made personally from running the bar in Ilford, the same premises from which IH was trading.

13. Based on the evidence she had that the applicant was the licensee of these premises from 2005 onwards, that he was the sole signatory on the IH bank account from 2009 and was a director only from 2011, she drew the inference that he was operating the bar's business in his own name from 2005. Despite IH, a limited company, being on the scene, she based her assessments after 2009 on the fact that the applicant had no legal rights to the income of the company and was only made a director at the latter stages of its existence (it was wound up in 2014).

14. Although she suspected that significant sums had been extracted from the business, she said she calculated the omitted profits on a conservative basis. She used deposits into IH's bank account (of it seems credit/debit card payments) as a proxy for takings, doubling the amount to account for unbanked cash takings. She aggregated the estimated takings over four years and applied a net profit rate of 11% based on HMRC Information Packs for this kind of business (ie a business economics exercise). The operating profit was divided by four for the four years where bank statements were held and this amount, £84,008, was used as the estimate, both for those four years and for years before the bank statements were available.

15. The second area concerned the ability of the applicant to fund two property purchases, as there was a gap of £899,000 between the costs of the properties and the mortgage funds and there was SDLT of £149,000 to be accounted for. Because of this gap which she inferred must have been amassed from undeclared income over a period Ms Bray made an assessment.

16. Ms Bray explained that she knew that the applicant was involved in businesses between 2000 and 2008 and she held evidence of "properties/business premises (pubs)/companies acquired and or operated during that time" She said that these enterprises were either directly owned by the applicant, suspected of being indirectly owned and controlled by him through family members of close associates. In many cases neither "the companies nor the self-employment (sic) had ever reported any activity/profits from sales/rents/trading" to HMRC.

17. The amount of the assessment was £1,048,000 and was assessed entirely for the year 2007-08. In the discovery assessment for that year this figure is shown with the description "profit from UK land and property".

18. The third area of concern was the applicant's inability to fund his monthly mortgage payments. Ms Bray says that

> "the monies reported via Self-Assessment and the undeclared income detailed and assessed above would have been used to meet the expected costs of this type of lifestyle. On this basis, I suspected that there would have been further, as yet unidentified, untaxed sources of income available to Mr Popat to sustain mortgage payments."

19. She assessed "the amounts that would have been necessary to fund mortgage payments and these amounts have been treated a separate income to (sic) those [justifying the £84,008 amounts]". The amounts assessed here cover the tax years 2007-08 to 2014-15. The amounts involved are £68,988 in each year and they are described in the assessments as "Other income".

20. All the assessments were issued on 8 September 2016.

21. On 5 October 2016 Ms Bray received appeals and postponement applications in relation to all assessments, and a confirmation that a full disclosure of fraud was to follow.

22. On 12 October 2016 Ms Bray informed the applicant's agent that the postponement application would be considered when the Outline Disclosure was received.

23. On 4 November 2016 Ms Bray received the Outline Disclosure. It admitted that the applicant had a share of the rental income from residential properties in Ilford and Chigwell. Associated mortgage costs and other expenses meant there was unlikely to be any income tax payable. No other admissions of tax irregularities were made.

24. On 20 February 2017 Ms Bray informed the applicant's agent that she was rejecting the postponement applications.

Law

25. Section 55 Taxes Management Act 1970 covers postponement applications and relevantly provides

> "(1) This section applies to an appeal to the tribunal against—
>
> (a) an amendment of a self-assessment—
>
> (i) under section 9C of this Act, …
>
> …
>
> (b) an assessment to tax other than a self-assessment,
>
> (2) Except as otherwise provided by the following provisions of this section, the tax charged—
>
> (a) by the amendment or assessment, or
>
> …
>
> shall be due and payable as if there had been no appeal.
>
> (3) If the appellant has grounds for believing that the amendment or assessment overcharges the appellant to tax … the appellant may—
>
> (a) first apply by notice in writing to HMRC within 30 days of the specified date for a determination by them of the amount of tax the payment of which should be postponed pending the determination of the appeal;
>
> (b) where such a determination is not agreed, refer the application for postponement to the tribunal within 30 days from the date of the document notifying HMRC's decision on the amount to be postponed.

> An application under paragraph (a) must state the amount believed to be overcharged to tax and the grounds for that belief.
>
> …
>
> (6) The amount of tax the payment of which shall be postponed pending the determination of the appeal shall be the amount (if any) in which it appears ... that there are reasonable grounds for believing that the appellant is overcharged to tax; …
>
> (6A) Notwithstanding the provisions of sections 11 and 13 of the TCEA 2007, the decision of the tribunal shall be final and conclusive."

26. The heading to s 55 as it has stood since 1975 is "Recovery of tax not postponed". As originally enacted in 1970 the heading to the section read "Recovery of tax not in dispute". It follows that whereas before 1975 HMRC would not be able to enforce recovery of any of the tax in this case, as it is all in dispute, under the current version it is possible to enforce recovery of tax that is in dispute.

27. The leading case on s 55 cited to me by HMRC is *Williams (HM Inspector of Taxes) v Pumahaven Ltd* 75 TC 300. In that case Peter Gibson LJ said

> "19. I accept that the formula 'it appears to the Commissioners' is the same in s 55(6) as it is in s 50(6), but I do not accept that that in any way lessens the formula's significance. Parliament has entrusted to the Commissioners, and to no one else, the functions specified in those sections, subject to the provisions for appeal and to what the appellate tribunal is authorised to do by s 56A(4). In relation to the postponement of tax, the Commissioners are the tribunal to which the taxpayer assessed to tax can apply, and they must have regard to the representations made to them and to the evidence adduced to them in reaching their decision whether it appears to them that there are reasonable grounds for believing that the taxpayer is overcharged to tax and in what amount. In *Kelsall (Inspector of Taxes)* v. *Stipplechoice Ltd.* (1995) 67 TC 349 …, in a judgment with which Sir Thomas Bingham M.R. and Saville L.J. agreed, I called the language of the formula 'familiarly subjective'. Provided that the specified matter does appear to the designated person and provided that that is not a perverse conclusion, it is irrelevant that it might reasonably appear otherwise to another person. There is a significant difference between s 50(6) and s 55(6), in that what must appear to the Commissioners on a substantive appeal against an assessment is that the taxpayer is overcharged by the assessment, whereas under s 55(6) what must appear to the Commissioners is that there are reasonable grounds for believing that the taxpayer is overcharged to tax in some specified amount.
>
> 20. In the course of argument Tuckey L.J. aptly described the latter test as not being hard-edged. It requires an evaluation exercise by the Commissioners, applying a less precise test; and it is a matter on which reasonable Commissioners may reasonably differ. …"

28. That passage was not referred to by HMRC, but they referred to these passages from the judgment of Park J in the High Court on appeal from the Special Commissioners at [10]

> "the phrase 'reasonable grounds for believing that the appellant is overcharged to tax' taken as a whole does not require the Commissioners to conduct a mini trial of what will be the main appeal."

and at [11]

> "I think that the sense of the subsection is that the Commissioners do not have to decide, or form a view on the balance of probabilities, whether the taxpayer has been overcharged. They have to form a view on whether the taxpayer has reasonable grounds for arguing that he (or it) has been overcharged. If they think that the taxpayer's 'grounds' (which I equate, at least in the context of this case, to its arguments) are not reasonable ones, they will reject the application for a postponement, but if and to the extent that their view is that the taxpayer's arguments are reasonable, then, even if the Commissioners can see the possibility that on a full hearing of the appeal the arguments may not succeed, the Commissioners should make an order for postponement."

and at [17] [emphasis added by HMRC]

> "Pumahaven submitted that the Commissioner's role was not to consider whether she believed that the appeal was likely to succeed, but rather **to consider whether there were real and not fanciful grounds for appeal**. That formulation does not reproduce the words of the statute, but I would broadly agree that it adequately indicates the effect."

29. What I take from these extracts is that the bar to be surmounted by the applicant is not high, certainly lower than in an appeal where s 50(6) TMA requires the tribunal to be satisfied that it is more likely than not that the applicant was overcharged. The phrase "real and not fanciful" is a familiar one in cases where the issue is whether to strike out an appeal as having no reasonable prospect of success (in Tribunals) or if a party has a "real prospect of successfully defending the claim" further to CPR Part 13.3(1)(a).

30. Indeed HMRC's other case from which they quote, *E D & F Man Liquid Products Ltd v Patel and another* [2003] All ER (D) 75 (Apr) ("*E D & F Man*") was about such a case. But what HMRC cite this for is for a passage where the defendant had made clear and unambiguous admissions in writing. Potter LJ held at [53]

> "I consider that the judge was entitled to reject as devoid of substance or conviction such explanation as was advanced for the making of those admissions and **in my view he was entitled to conclude that the first defendant lacked any real prospect of successfully defending the claim.**" [HMRC's emphasis]

The applicant's grounds

31. In his grounds of appeal and representations to the tribunal the applicant said

> (1) The bar in Ilford was operated successively by two companies, the later being IH Ltd. Although he was the sole signatory on the account that was simply because the company was his and he returned dividends from it.
>
> (2) As to the earlier period the premises had been acquired from Wetherspoon's and needed a lot of time and expense to convert to a very different type of bar.

(3) Being a licensee for licensed premises does not mean that the business is that of the licensee. In the Outline Disclosure the applicant said that "the licence must be in the name of an individual person and not a company, hence Raju Popat being the licensee".

(4) He did not at any time operate the bar as a self-employed person. Just because the company's profits were not returned to HMRC does not mean that they were not the company's profits.

(5) The gap in funding of the properties came from additional mortgage funding and extracting equity by remortgaging an existing property, details of which were in the Outline Disclosure.

(6) In relation to HMRC's connections about large numbers of properties from which he could have amassed income, he asked Ms Bray to name one which was in his own name. She named one which the applicant said was the subject of the disclosure.

(7) The mortgage interest was funded by property rental income as outlined in the Disclosure report.

32. In a letter attaching the Outline Disclosure, the applicant's agent said that "there are also alleged sources of income, gains and profit which have been fabricated by HMRC and which bear no resemblance to any reality whatsoever."

HMRC's objections

33. The applicant has admitted in his Outline Disclosure that his "deliberate conduct brought about loss of tax and/or duty" during the period of time when assessments were raised. It is therefore submitted that the applicant's grounds are not reasonably arguable.

34. Furthermore, the applicant has not proffered any evidence during the course of HMRC's investigations to contradict Ms Bray's calculations, despite multiple requests and the issue of Schedule 36 Information Notices.

35. HMRC therefore submit that there are no reasonable grounds for believing that the applicant has been overcharged to any tax.

Discussion

36. In my opinion the applicant would at any appeal against the assessments have a real and not fanciful basis for the following arguments.

(1) All the profits of the bar in Ilford belong to the two companies referred to by the applicant, and that his role as licensee and bank account signatory are irrelevant. He has in any event received substantial dividends from IH Ltd.

(2) Even if that were not so, the assessments for the period in which the bar was being converted are substantially overstated if there was any profit at all.

(3) The funding gap is explicable on the basis of the facts in the Outline Disclosure.

(4) The mortgage repayments were funded by rental income which has been disclosed

(5) There are no properties which were beneficially owned by the applicant from which he had derived income except as disclosed.

37. The "admission" made in this case has no relevance to the application, so the quotation from *E D & F Man* is not relevant.

38. I also consider that there are real, indeed strong, arguments that the applicant could deploy to show that the assessments were not made to Ms Bray's best judgment.

39. This applies particularly to the assessment of over £1 million made for one year when Ms Bray agreed that the income she says was amassed must have been amassed over many years.

40. It is also arguable on a non fanciful basis that the assessments on "other income" on the mortgage repayment deficit are invalid as not disclosing a source.

41. It is also arguable that the conditions in s 29(4) and (5) TMA 1970 have not been met in relation to the discovery assessments. There is nothing in the papers I have seen that indicates that any thought was given to whether those conditions were met, and certainly there appears to have been nothing said to the applicant about whether the conditions were met.

42. Ms Bray's level of understanding about the requirements for assessments and appeals is illustrated by a statement in a letter of 20 February 2017 in response to the applicant's acceptance of the CDF offer and the supply of the Outline Disclosure. This was at a time when the assessments had been made, appealed against and postponement sought. In rejecting the postponement application she gave a correct statement of the applicant's rights in relation to the rejection. She went on:

> "However, I would remind you that although you can appeal to the tribunal during an enquiry for a decision on the amount of tax to be postponed, you cannot request a review or appeal to the tribunal during an enquiry in respect of the basis of the amendment"

43. If she had stopped there that would have been a correct but odd statement in relation to the one year in which there was a s 9A TMA enquiry and a jeopardy amendment under s 9C. During a s 9A enquiry a review cannot be requested because there is at that stage no appeal, no matter in question, to be reviewed, and equally there can be no appeal notification to the Tribunal for the same reasons. Nothing in s 9C affects that.

44. But she did not stop there because the final three words of the sentence were

> "… the assessment itself."

45. The sentence part I have quoted in §42 was not then just about the s 9A enquiry or the jeopardy amendment (that is the only thing that a postponement application can apply to during a s 9A enquiry, rather strangely to my mind given the purpose of a s 9C amendment) but about the discovery assessments. HMRC did not offer a review when the appeal was received, so the applicant is at perfect liberty to request one at any time. And whether or not a review is requested, the applicant was at liberty to notify an appeal to the Tribunal at any time, providing that, if a review was requested, he met the 30 day deadline after the conclusions are notified.

Decision

46. Under s 55(6) TMA (including as applied by paragraph 8 Schedule 1 Social Security Contributions and Benefits Act 1992 in relation to Class 4 NICs) the amount of income tax and Class 4 NICs postponed pending determination of the appeals is £885,696.29.

Appeal rights

47. In *David Kent & Victoria Kent v National Crime Agency* [2016] FTT 228 (TC) (Judge Jonathan Richards and Elizabeth Bridge) the Tribunal said

> "We note that s 55(6A) of TMA 1970 quoted at [16] above suggests that there is no right of appeal against our decision. However, s 55(6A) was purportedly enacted under authority delegated to the Treasury, and the Tribunal in *Dong v National Crime Agency* [2014] UKFTT 369 (TC) has suggested that the Treasury were not actually given the power to enact s 55(6A) and that, accordingly, the provision is of no effect. Moreover, the Tribunal made that decision having decided that it was bound by the reasoning of the judgment of the Court of Appeal in ToTel Ltd [2013] QB 860. We will not in this decision go over the question of whether s 55(6A) of TMA 1970 has been validly enacted. Instead we will direct that any party dissatisfied with this decision should make an application that complies with Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009."

48. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision should make an application that complies with 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 20 FEBRUARY 2018