TC06404

Appeal number: TC/2017/02853

INCOME TAX – Discovery assessment – whether appellant careless for purposes of s29(4) of Taxes Management Act 1970 – no – whether hypothetical officer could have been aware of insufficiency when enquiry window closed – no – discovery assessment validly issued – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

YOCHEVED BLUM **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS

Sitting in public at Taylor House, Rosebery Avenue, London on 9 March 2018

Simon Blum for the Appellant

Kate Murphy, HMRC Solicitor's Office, for the Respondents

DECISION

1. The appellant is appealing against a discovery assessment that HMRC issued charging additional tax of £558.20. Her sole ground of appeal is that the preconditions necessary for HMRC to issue a discovery assessment were not met. She is not disputing HMRC's determination of the additional tax that they consider she owes.

2. Neither party put forward any witness evidence and both made submissions by reference to a bundle of contemporaneous documents. Mrs Blum did not herself attend the hearing, although she was represented by her husband who was her duly appointed representative.

Relevant background facts

3. None of the relevant background facts was in dispute and my findings on these are set out at [4] to [14] below.

4. In the 2012-13 tax year, Mrs Blum had two consecutive employments. The first employment was with Bnos Beis Yaakov Primary School Ltd ("BBY") and Mrs Blum earned a gross salary of £6,167.81 from that employment in that tax year. Mrs Blum's employment with BBY ended during the 2012-13 tax year and Mrs Blum then started a second employment with London Jewish Girls High Ltd ("LJGH"). Mrs Blum's gross salary from her employment with LJGH in 2012-13 was £8,379.12.

5. BBY deducted £557.80 by way of PAYE from the salary that it paid Mrs Blum. HMRC produced evidence, in the form of a Form P14, that indicated that LJGH deducted £729.60 from the salary that it paid Mrs Blum in 2012-13. Mrs Blum did not expressly accept that was the amount that LJGH had actually deducted. However, she produced no evidence to suggest that it deducted a different sum. I have therefore accepted HMRC's evidence and conclude that LJGH deducted £729.60 from Mrs Blum's salary in 2012-13 by way of PAYE.

6. On 18 April 2013, BBY submitted to HMRC a Form P14 showing details of Mrs Blum's salary and PAYE deductions as it was required to do under applicable PAYE regulations. On 24 April 2013, LJGH submitted its Form P14. The Forms P14 contained correct details on Mrs Blum's employment income and on deductions of tax that her respective employers had made from that income.

7. Mrs Blum submitted her self-assessment return for 2012-13 on 12 January 2014, within the applicable deadline. She used the P45 that she received from BBY after her employment ceased to fill in relevant figures on that tax return and correctly recorded that she received a gross salary of £6,167 under deduction of £558 of PAYE from BBY[1].

8. To fill in details of her income from her employment with LJGH, Mrs Blum did not use a form P60 received from LJGH, recording her total pay during the year. Rather, she used her 12-month payslip that she received from LJGH which recorded that her

[1] HMRC's instructions are that, when completing a tax return, taxpayers should not include pence and should round income down and tax credits and payments of tax up.

gross salary for the year was £8,258.93 plus statutory sick pay of £120.19 but wrongly recorded that LJGH had deducted PAYE of £1,287.40 from her gross salary. The figure of £1,287.40 that appeared on the 12-month payslip from LJGH in fact represented the total PAYE deductions that BBY and LJGH and had between them made, not just the PAYE deductions that LJGH had made.

9. Mrs Blum made a minor mistake when calculating the total income from her employment with LJGH. The aggregate of her salary and statutory sick pay was £8,379.12. However, in her tax return, Mrs Blum recorded a gross salary from LJGH of only £8,378 thereby, no doubt because of an arithmetic or rounding error, inadvertently understating her gross salary from LJGH by £1. More significantly, Mrs Blum recorded that LJGH had deducted £1,288 of tax from her salary (by rounding up the figure of £1,287.40 that LJGH had included on her 12-month payslip). She should only have included £730 in respect of deductions that LJGH had made. Therefore, on her tax return, Mrs Blum overstated the total amount that LJGH had deducted from her salary by £558. Put another way, on her tax return, Mrs Blum claimed credit twice for the £558 that BBY had deducted from her salary. Because of the mistakes referred to in this paragraph, Mrs Blum understated her tax liability for 2012-13 by £558.20.

10. The deadline for HMRC to open an enquiry under s9A of the Taxes Management Act 1970 ("TMA 1970") into Mrs Blum's tax return for 2012-13 expired on 12 January 2015. HMRC opened no enquiry into that return by that deadline.

11. On 6 May 2016, by which time the "enquiry window" within which HMRC could open an enquiry into Mrs Blum's return had closed, HMRC wrote to Mrs Blum to say that they were "checking" her return for the 2012-13 tax year. HMRC explained that they were concerned that she may have understated the amount of her employment income by £1 and overstated the amount of tax deducted from that income by £558. HMRC explained that they were contemplating making a discovery assessment under s29 of TMA 1970.

12. Some correspondence ensued in which Mrs Blum explained that she did not consider that HMRC were entitled to make a discovery assessment. However, HMRC did not agree and on 10 November 2016, Officer Nicola French of HMRC issued Mrs Blum with a discovery assessment under s29 of TMA 1970 charging Mrs Blum additional income tax of £558.20.

13. Also on 10 November 2016, HMRC issued Mrs Blum with a penalty on the basis that she had made a careless inaccuracy in her 2012-13 tax return. However, on 30 November 2016, they withdrew that penalty.

14. On 21 November 2016, Mrs Blum appealed against the discovery assessment. HMRC offered a review of their decision and, on 15 March 2017, wrote to Mrs Blum to say that, following that review, their decision to make a discovery assessment for £558.20 was unchanged. Mrs Blum notified her appeal to the Tribunal on 2 April 2017, within applicable time limits.

The legislation and relevant authorities

15. As in force in relation to the assessment in dispute, section 29 of TMA 1970 provided, relevantly, as follows:

> **29 Assessment where loss of tax discovered**
>
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.
>
> …
>
> (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—
>
> (a) in respect of the year of assessment mentioned in that subsection; and
>
> (b) …in the same capacity as that in which he made and delivered the return,
>
> unless one of the two conditions mentioned below is fulfilled.
>
> (4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
>
> (5) The second condition is that at the time when an officer of the Board—
>
> (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or
>
> (b) informed the taxpayer that he had completed his enquiries into that return,
>
> the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.
>
> (6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—
>
> (a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer …; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

The parties' respective positions

16. It was common ground that HMRC bore the burden of establishing that they were entitled to make the discovery assessment.

17. HMRC's position was that they were entitled to make a discovery assessment because an officer of HMRC had discovered that Mrs Blum had paid insufficient tax so the condition in s29(1) of TMA 1970 was satisfied. Additionally, HMRC argue that Mrs Blum was careless in filling in her tax return, so the requirement of s29(4) of TMA 1970 was met. Alternatively, HMRC argued that, when the window for enquiring into Mrs Blum's 2012-13 tax return ended, a hypothetical officer of HMRC could not have been expected to realise that Mrs Blum had paid insufficient tax.

18. Mr Blum submitted that Mrs Blum had taken reasonable care when completing her tax return. She had verified the figures that she used by referring to documents that BBY and LJGH had provided her and it was not her fault if the information provided by LJGH was incorrect. He also argued that a hypothetical officer of HMRC should have realised that Mrs Blum had paid insufficient tax before the enquiry window closed. A reasonable officer would have realised that both employers would have filed a Form P14 and an inspection of LJGH's Form P14 would have revealed the difference between the numbers that Mrs Blum had included on her tax return and LJGH's figures.

19. In response to Mr Blum's specific argument on the Form P14, Mrs Murphy submitted that, since Mrs Blum had not herself provided HMRC with the Form P14 (but rather LJGH had provided it), it was not information "made available to" an officer of the Board and so was not relevant to the state of knowledge of the hypothetical officer referred to in s29(5).

Discussion

20. I am satisfied that an officer of HMRC made a "discovery" of the kind set out in s29(1) of TMA. On or around 6 May 2016, an officer of HMRC realised that there was

a discrepancy between the figures that Mrs Blum had included in her return and those that LJGH had included in its form P14. HMRC invited Mrs Blum to explain the discrepancy, but no information that Mrs Blum provided indicated to HMRC that the figures on Mrs Blum's tax return were correct and those on LJGH's Form P14 were incorrect. On or around 10 November 2016, Officer Nicola French correctly formed the view that Mrs Blum had paid insufficient tax and this amounted to a "discovery" for the purposes of s29(1).

21. I do not consider that Mrs Blum was careless when she filled in her tax return for 2012-13. Mrs Murphy pointed out that HMRC's standard form tax return directed employed taxpayers to obtain details of their employment income for a tax year from their end of year P60. Mrs Blum did not do this, and instead obtained figures from her 12-month payslip. However, I do not consider this was careless. Mrs Blum realised that she needed to verify the figures on her return by reference to information provided by her employer. I do not consider that a reasonable taxpayer would attach much significance to whether that verification was by reference to a P60 or by reference to some other document provided by an employer. Moreover, Mrs Blum was entitled to assume that information that LJGH provided her on her 12-month payslip was correct. Therefore, while there was an "insufficiency" in Mrs Blum's tax return for 2012-13 that insufficiency was not brought about carelessly or deliberately by Mrs Blum and so the condition in s29(4) was not satisfied. It follows that HMRC are entitled to raise the discovery assessment only if the condition in s29(5) is met.

22. Mrs Murphy submitted that LJGH's Form P14 was completely irrelevant to the requirement of s29(5) because it was provided by LJGH and not by Mrs Blum herself. I have not accepted that submission.

23. In part, Mrs Murphy relied on s29(6)(d)(ii) of TMA 1970 as indicating that s29(6)(d) is concerned only with information that the taxpayer notifies to HMRC in writing. However, I consider that Mrs Murphy was misreading this provision. Section 29(6)(d)(ii) is preceded by the word "or" (and not by the word "and"). It follows that, while information notified in writing by a taxpayer is capable of falling within s29(6)(d)(ii), information can fall within s29(6)(d)(i) even where it emanates from someone other than the taxpayer.

24. Section 29(6) of TMA 1970 (when read together with the rest of s29) contains an exhaustive list of information that is capable of being "made available" to the hypothetical officer for the purposes of applying the test in s29(5). The categories of documents and information set out in s29(6)(a) to s29(6)(c) are limited to documents and information that emanate from the taxpayer. However, s29(6)(d)(i) is not so limited. Information that can reasonably be inferred from information falling within s29(6)(a) to s29(6)(c) falls within s29(6)(d)(i) and thus is "made available" to the hypothetical officer. I do not consider that it is implicit that s29(6)(d)(i) is referring only to documents provided by the taxpayer. The evident purpose of s29(6)(d)(i) is to fix the hypothetical officer with knowledge of information that the taxpayer has not <u>actually</u> provided, but which can reasonably be inferred from other information that the taxpayer has provided. In those circumstances, Parliament cannot have intended that s29(6)(d) could apply only to information provided by a taxpayer. Confirmation of this

interpretation can be found in the Upper Tribunal's decision in *HMRC v Charlton and others* [2013] STC 866 which determined that the hypothetical officer in that case was fixed with knowledge of a "Form AAG1" submitted in connection with tax avoidance arrangements implemented by a taxpayer even though the promoter of the avoidance arrangements, rather than the taxpayer, submitted that form to HMRC.

25. I consider that a hypothetical officer reasonably experienced in the kind of return that Mrs Blum submitted would have realised that Mrs Blum had completed the employment pages of that return. The hypothetical officer would, therefore, have realised that, before the enquiry window closed, Mrs Blum's employers would have submitted Forms P14 setting out the amount that they paid Mrs Blum and the amount of PAYE that they deducted from her salary.

26. However, I do not accept Mr Blum's submission that, since the hypothetical officer was fixed with knowledge of the existence of the LJGH's Form P14, s29(5) of TMA 1970 operates to shut HMRC out from making a discovery assessment.

27. In *Langham v Veltema* [2004] EWCA Civ 193, the Court of Appeal considered the scope of s29(5) TMA 1970. It is clear from the Court of Appeal's decision that s29(5) only operates to shut out HMRC from making a decision if the information "made available" to the hypothetical officer would have made that officer aware of an <u>actual insufficiency</u> of tax. As Auld LJ said:

> More particularly, it is plain from the wording of the statutory test in section 29(5) that it is concerned, not with what an Inspector could reasonably have been expected to do, but with what he could have been reasonably expected to be aware of. It speaks of an Inspector's objective awareness, from the information made available to him by the taxpayer, of "the situation" mentioned in section 29(1), namely an actual insufficiency in the assessment, not an objective awareness that he should do something to check whether there is such an insufficiency…

28. Therefore, the hypothetical officer referred to in s29(5) would certainly have inferred that LJGH would have submitted a Form P14. The officer would also have realised that LJGH's Form P14 would provide a useful cross-check of the numbers that Mrs Blum had put on her return and that, if there was a difference between Mrs Blum's numbers and LJGH's numbers as set out in the P14, HMRC should ask questions. However, while a hypothetical officer would have inferred that the P14 existed, there is no reason why that officer should infer that the numbers on LJGH's Form P14 would be different from those on Mrs Blum's tax return. Still less could a hypothetical officer have inferred that LJGH's numbers would be correct and Mrs Blum's would be wrong. I do not, therefore, accept information "made available" to HMRC would have alerted the hypothetical officer referred to in s29(5) to an actual insufficiency of tax. I have not, therefore, accepted Mr Blum's argument that s29(5) shuts HMRC out from making a discovery assessment.

29. Mr Blum submitted that the duty on taxpayers to keep records pursuant to s12B of TMA 1970 was relevant. He argued that, since Mrs Blum was not carrying on a trade, profession or vocation, s12B required her to keep records for 2012-13 until 31 January

2015. In those circumstances, he argued that it would be unfair if HMRC could make a discovery assessment as late as November 2016 since, by that time, there was no reason why Mrs Blum would still retain documents necessary to dispute that assessment. I recognise that taxpayers may find it difficult for defend themselves against discovery assessments if they no longer have records. However, I do not consider that can alter the conclusions set out above which follow as a matter of statutory construction and from authority that is binding on me.

Conclusion and application for permission to appeal

30. HMRC have discharged their burden of demonstrating that the discovery assessment was validly made. In that circumstance the burden shifts to Mrs Blum to demonstrate the true amount of her tax liability for the year. Mr Blum accepted that Mrs Blum was not putting forward any evidence to establish that her tax liability was lower than HMRC had calculated. It follows that she has not discharged her burden. The appeal is accordingly dismissed.

31. 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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 21st MARCH 2018