[2018] UKFTT 253 (TC)

TC06489

Appeal number: TC/2017/05990

INCOME TAX – strike out application – late appeal or no appealable decision – strike out application allowed as no jurisdiction

FIRST-TIER TRIBUNAL
TAX CHAMBER

ELVIS YANKUBA KUTEH **Appellant**

- and -

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

TRIBUNAL: JUDGE VICTORIA NICHOLL

Sitting in public at Taylor House, Rosebery Avenue, London on 27 March 2018
Further submissions made by Mr Kuteh on 28 March, 3 and 24 April 2018

The Appellant in person

Miss Joanna Bartup, of the Solicitor's Office and Legal Services of HM Revenue and Customs, for the Respondents

DECISION

1. This is an application by the Respondents ("HMRC") under rule 8(2) of the Tribunal (First-tier) (Tax Chamber) Rules 2009 ("the Tribunal Rules") for the appeal by the Appellant ("Mr Kuteh") to be struck out.

Background

2. Mr Kuteh filed a self-assessment tax return ("SATR") for 2002-03 in May 2005. The return included an error in the amount of Mr Kuteh's earnings from a second employment. Mr Kuteh was in correspondence with HMRC about the error in his 2002-03 SATR until 2010. On 3 January 2008 HMRC obtained a judgment in default ("the 2008 judgment") for tax due, including an amount due in respect of 2002-03. HMRC registered a restriction over Mr Kuteh's home ("the property") in 2011 for recovery of the 2008 judgment debt.

3. In 2017 the property was sold and HMRC collected an amount subject to the 2008 judgement from the sale proceeds. Mr Kuteh has since applied to set aside the 2008 judgment, but those County Court proceedings were stayed as it was determined that the debt related to the underlying tax assessment that could only be appealed in the Tax Tribunal. Mr Kuteh appealed to the Tribunal on 3 August 2017. HMRC consider that there is no decision that can be appealed as the tax due was pursuant to Mr Kuteh's self-assessment and so they have applied for the appeal to be struck out as the Tribunal has no jurisdiction.

4. HMRC delivered their Skeleton Argument to Mr Kuteh with the Application to Strike Out in October 2017, but their bundle was not received by Mr Kuteh until three days before the hearing. The bundle includes HMRC's self-assessment return information, notes and a statement that Mr Kuteh referred to in his Skeleton Argument and so, notwithstanding that he was ready to make submissions in his case at the hearing, I allowed him to make further submissions after the hearing.

Evidence and findings of fact

5. I was provided with a bundle of papers by HMRC, including HMRC's Application for Strike Out and Skeleton Argument. Mr Kuteh provided a Skeleton Argument in advance of the hearing. At the hearing Mr Kuteh provided a copy of the 2008 judgment and a copy of a recent letter from HMRC about overpayments of working tax credit and child tax credit. I heard oral evidence from Mr Kuteh and he made three further written submissions after the hearing as noted above. Given the elapse of time since 2002-03, many of the records that could have assisted the Tribunal have been destroyed or lost over the last 15 years and it was not possible for either party to produce documentary evidence of many of the key figures of earnings, tax or credits involved. Mr Kuteh was however articulate about the reasons why he considers that he has been unfairly treated. On the basis of the evidence provided I make the following findings of fact:

5.1 Mr Kuteh was employed full time as a mental health staff nurse at Bowden House Clinic throughout the tax year 2002-03. He also worked as an agency staff nurse with Ambition 24 Nursing Agency to supplement his income, although his family commitments precluded him from working more than two agency shifts per week in addition to his full-time work. The hourly rate of pay for Mr Kuteh's agency work was considerably higher than the rate of pay from his full time employment.

5.2 Mr Kuteh completed his self-assessment tax return for 2002-03 on 10 May 2005. Mr Kuteh claims that the delay was due to the delay in providing him with a duplicate return, but HMRC's notes show that Mr Kuteh requested duplicate returns in January and March 2004 and he was sent duplicate SATRs for 2001-02 and 2002-03 on 26 April 2004. HMRC's self-assessment notes show that Mr Kuteh made a number of calls to HMRC as he was not happy about having to complete these tax returns given that his income was all paid under PAYE and he had thrown away his P60s. HMRC informed him that the returns issued had to be completed. HMRC's notes show that further duplicate SATRs, including ones for 2002-03, were issued on 23 August 2004, 18 November 2004 and 16 December 2004. Mr Kuteh filed his SATR for 2002-03 on 10 May 2005 after a number of further calls about their completion.

5.3 The return showed the following employment income for 2002-03:

Employer	Gross earnings	Tax deducted
Bowden House Clinic	£23,406	£4,006.64
Ambition Recruitment	£70,331	£14,651.02
Thornbury Nursing	£1,482	£326.04
Harmony	£179	£39.38
TOTALS	£95,398	£19,023.08

5.4 It is agreed by the parties that Mr Kuteh made an error in completing his SATR for 2002-03 as the figure entered for the gross earnings paid by Ambition Recruitment is incorrect.

5.5 After Mr Kuteh had filed his tax return for 2002-03 he called HMRC on 15 June 2005 to query a statement. He was told that the statement would be adjusted once his return had been processed. However the next contact is a call from Mr Kuteh on 20 February 2006 regarding recovery action taken by HMRC for the underpayment of tax for 2001-02 and 2002-03. HMRC sent Mr Kuteh their calculations on 20 February 2006, explaining that the figures for the tax due were based on the information that he had entered in the returns. There were then a number of calls between HMRC and Mr Kuteh, with HMRC allowing Mr Kuteh a short period in March 2006 to check the calculations before they continued their recovery action.

5.6 On 14 June 2006 Mr Kuteh attended HMRC's office in Gravesend and submitted an amendment to his SATR for 2002-03. HMRC dealt with the amendment on 3 July 2006 by creating a free standing credit for £5,356.16. Mr Kuteh was advised that there was still outstanding tax due for 2002-03 because he was liable to pay tax at 40% on a proportion of his income given his total earnings.

5.7 Mr Kuteh disputed the amount owed and there was a series of calls and a further visit to Gravesend tax office on 9 January 2007 to deliver a letter again seeking to amend the 2002-03 tax return, but HMRC responded that evidence in the form of P45/P60s would be required.

5.8 Mr Kuteh had a number of significant personal and professional issues from October 2007, as a result of which he left the family home in October 2007 until late January 2008. This resulted in his either not receiving or not opening important correspondence during this period. HMRC's notes show that its debt recovery proceeded to County Court action on 11 December 2007 and the 2008 judgment was given in default by Dartford County Court on 3 January 2008. Mr Kuteh was not aware of the hearing in January 2008 and was therefore not there to raise the fact that his liability for 2002-03 was the subject of discussions with HMRC.

5.9 It is noted in this context that Mr Kuteh provided the Tribunal with evidence about these personal, professional and health issues that affected him between 2007 and 2017. The evidence records that Mr Kuteh was involved in litigation, including in the Court of Appeal, between 2009 and 2014. I find from this that Mr Kuteh was distracted by litigation during this period. I also find that this litigation demonstrates that he was familiar with litigation and the concepts of time limits and making appeals during this period. I do not consider that I need to record in this published decision the details of the evidence that led to my findings. The issues post-date the final date on which Mr Kuteh could request an amendment to his SATR (in respect of which he seeks to make a late amendment and refers to these circumstances).

5.10 On 10 January 2008 Mr Kuteh attended HMRC's Woolwich office and provided copies of P60s for 2002-03 and copies of his letters asking HMRC to amend his 2002-03 return. On 8 and 18 April 2008 HMRC told Mr Kuteh that they were dealing with the figures that he had submitted with his letters about 2002-03. On 20 August 2008 Mr Kuteh made an appointment to visit HMRC's Woolwich tax office. He noted that the County Court had asked him for details of his earnings to recover the 2008 judgment debt, but he had thought that the matter was being resolved by HMRC as a result of his previous visit to HMRC's offices.

5.11 On 28 October 2008 HMRC informed Mr Kuteh that they had revised the amounts due for 2002-03 based on the information that he had provided, and there is also reference to non-declaration of other earnings for 2002-03 which may explain the difficulty is reconstituting how the amounts were calculated. These calculations resulted in HMRC cancelling a second free standing credit had been wrongly credited on 29 January 2008. The cancellation of this duplicated credit resulted in a tax due figure of £5,655.14. Mr Kuteh was unhappy with the outcome as he believed that he should owe no tax as he was employed and tax was deducted. However he asked

HMRC for a letter confirming that 2002-03 had been finalised, and was told that HMRC could only confirm that it reflected the income details that Mr Kuteh had given HMRC.

5.12 At the same time as Mr Kuteh was raising queries in relation to 2002-03 he was also raising queries in relation to other tax years, including 2006-07 in particular. On 28 October 2009 Mr Kuteh faxed an appeal to HMRC in respect the figures for 2002-03 and 2006-7. HMRC responded that they had dealt with his claim to amend 2002-03 by giving the free standing credit in June 2006 and that a free standing credit would be added to amend 2006-07. HMRC noted on 18 March 2010 that they were not able to reconstitute how the credit figure of £5,356 had been arrived at, but that the correspondence from October 2009 (presumably the letter of appeal) had been dealt with. There are no further notes relating to 2002-03 until 2017. Neither HMRC nor Mr Kuteh have retained copies of Mr Kuteh's P45s/P60s for 2002-03.

5.13 In January 2017 Mr Kuteh was told that HMRC had registered a restriction to secure recovery of the 2008 judgment debt. As the property was to be sold he asked HMRC for confirmation of the amount outstanding and received a reply dated 30 January 2017 that stated that "there is no outstanding tax owed from previous years". On 27 April 2017 he asked HMRC to contact the Land Registry to remove the charge over the property as there was no tax owed. On 4 May 2017 HMRC's Debt Management office wrote to Mr Kuteh to apologise that he had been misinformed, but the amount to which the charge related had been "remitted" after the 2008 judgment and remained outstanding. HMRC had decided that, in view of Mr Kuteh's financial circumstances after the County Court case, they would register the charge and wait for the property to sell and then obtain payment of the debt due. The charge was registered on 12 July 2011. The letter explained that the amount required to remove the charge was £27,335.97 and that it related to self-assessment arrears from 2002-03 to 2005-06.

5.14 HMRC's online statement shows that £3,157.68 was credited towards the outstanding balance due for 2002-03 on 20 July 2017, leaving a balance of £4,073.30 marked 'not currently being pursued'. This credit of £3,157.68 was part of total payment of £27,521.44 made on that date (presumably shortly following the sale of the property).

5.15 HMRC's notes show that there was some discussion between HMRC officers as a result of which a class 10 – non statutory concession was given on 15 August 2017 to reduce the tax outstanding balance for 2002-03 from £4,073.30 to nil. It is not clear if this means that no further tax is due in respect of 2002-03 or whether HMRC is again choosing not to collect it at this time given that the entry noted in paragraph 5.14 above (that the tax is 'not currently being pursued') is on a print-out of HMRC's SA Statement as at 15/03/18.

Conclusions on income from Ambition Recruitment

5.16 As this appeal has been made more than twelve years after the tax return for 2002-03 was filed neither HMRC nor Mr Kuteh have any of the relevant PAYE

documents. HMRC have put forward the following calculations to show what they consider Mr Kuteh's income from Ambition Recruitment must have been in order for him to claim credit an amount of income tax deducted under PAYE of £14,651.20:

Pay	£55,278
Personal allowance	£4,619
	£50,659

£1,920 @10% £192

£27,980 @22% £6,155

£20,759 @ 40% £8,303.60 = £14,651.20 tax deducted

HMRC's revised 2002-03 tax calculation based on pay of £55,278 is as follows:

	Pay	Tax
Ambition Recruitment	£55,278	£14,651
Bowden House	£23,106	£4006
Harmony	£179	£39
Thornbury	£1482	£326
Totals	£80,045	£19,023
Less personal allowance	£4,619	
Taxable earnings	£75,426	

£1,920 @10% = £192
£27,980 @ 22% = £6,155
£45,526 @ 40% =£18,210
£24,557
Less tax deducted £19,023
Tax underpaid £5,534

5.17 Mr Kuteh has questioned the exactness of the figures, but the figures simply reflect HMRC's reverse calculation using the tax deducted under PAYE by Ambition Recruitment, as claimed by Mr Kuteh, as the starting point. If this is used in a calculation that assumes that Mr Kuteh was given the benefit of a standard tax code of 461L (which includes a personal allowance), his income must have been about £55,278 in order for the tax deducted to amount to £14,651.20. This compares favourably for Mr Kuteh with the position that would result if it were assumed that a BR (basic rate) code had been applied, as is usual for a second employment, as this calculation would have resulted in gross earnings of over £66,000. If Mr Kuteh's income had been £70,331, as incorrectly shown in his SATR, and the standard personal allowance 461L code had been applied, a total of £20,672 would have been deducted under PAYE.

5.18 On the balance of probabilities I find that Mr Kuteh's was paid the lower amount of £55,278 and that he had the benefit of a second 461L tax code as suggested by HMRC because this calculation (in 5.16 above) results in the tax deducted of £14,651 being the same as the amount claimed by Mr Kuteh at a time when he had access to

his P60 and P45 information. This suggested figure is also supported by the fact that this gross figure of £55,278, plus the tax deducted of £14,651, makes a total of £69,929, which is only some £400 less than the figure of £70,331 entered by Mr Kuteh on his SATR. The small differences in these figures may reflect expense, benefit or other earnings adjustments and that is why I have referred to earnings of "about £55,278". I also note that the amount of tax that HMRC calculated to be due in 2008 based on Mr Kuteh's revised figures was £5,655.14 (as noted in paragraph 5.11 above) and this broadly reflects HMRC's calculation of the £5,534 tax underpaid based on earnings of £55,278 (in paragraph 5.16 above). Again, the small difference in these figures may reflect expense, benefit or other earnings adjustments. It is therefore not inconceivable, as Mr Kuteh suggests, that he could have earned this amount working long agency shifts and this argument is not sufficient to outweigh the evidence provided by HMRC's suggested figures.

Conclusions on free standing credits given and uncertainty of amount remitted

5.19 It has not been possible for either party to reconstitute the calculation of the free standing credits, but the following represent key figures that are relevant to this decision. First, Mr Kuteh's tax return claims credit for £19,023 deducted at source under PAYE. This figure includes £14,651 deducted under PAYE in respect earnings from Ambition Recruitment. Second, the total tax outstanding for 2002-03 based on these figures in Mr Kuteh's tax return was £11,677.72. It seems likely, but is not certain, that this figure was included within the debt subject to the 2008 judgment as it the amount of the assessment. Thirdly, free standing credits of at least £4,387.86 and £58.88 were allowed against the liability of £11,677.72 for 2002-03, reducing the amount outstanding at 31 January 2008 to £7,230.98 according to HMRC's latest statement. The amounts of these free standing credits cannot be matched with the higher free standing credit amounts noted in the SA notes and the outstanding tax due of £5,655 noted in October 2008, but they reflect the position after the numerous reviews by HMRC with the benefit of P60 figures as noted in paragraphs 5.10-5.12 above. Fourthly, as only £3,157.68 of the £27,521.44 collected in July 2017 was paid towards the debt for 2002-03, there is a balance for 2002-03 is the £4,073.30 that is shown as 'not currently being pursued' as noted in 5.15 above.

Appeal

5.20 Mr Kuteh appealed to the Tax Tribunal on 3 August 2017. His claim is stated to be in respect of 2002-03 only and to relate to £27,550 income tax.

Submissions

6. HMRC submit that as Mr Kuteh's appeal is in respect of 2002-03 and HMRC have not issued an 'appealable decision' in respect of that tax year, the Tribunal does not have jurisdiction to hear the appeal. The appeal relates to Mr Kuteh's self-assessment and there is no right for a taxpayer to challenge the amount due under self-assessment. Mr Kuteh made a claim under section 33 Taxes Management Act 1970 in 2006-07 and his tax for 2002-03 was revised with the result that no further claims may be made.

7. Mr Kuteh's appeal is against HMRC's failure to amend his return for 2002-03. He claims that he does not owe the money that HMRC are alleging in respect of 2002-03 and that, as a matter of common sense, earnings of over £95,000 in one tax year is not in line with what one would expect a nurse to earn. HMRC have accepted that he made a mistake in his 2002-03 self-assessment tax return and so it was unlawful for HMRC to enforce the 2008 judgment debt on the sale of the property. He understood that the matter had been resolved following his visits to HMRC's offices. Indeed, HMRC wrote to him on 30 January 2017 to confirm that no tax was outstanding. The Tribunal has allowed him to make an appeal and in the interests of fair play and justice the circumstances of the case should be heard by a judge.

8. Mr Kuteh did not have a tax adviser or representative for the hearing. He has carried out his own research in order to prepare for the hearing and made submissions about the application of a number of provisions and case law. These submissions are summarised and addressed in paragraphs 11 to 17 below.

Law

9. Section 8 Taxes Management Act 1970 ("TMA") provides that a taxpayer may be required by a notice given to him to make and deliver a tax return. This applies if a person is sent a self-assessment tax return to complete. HMRC may require a person to complete a tax return for a number of reasons, but in this case it was because Mr Kuteh had underpaid tax for 2001-02.

10. Section 9 TMA provides that a return required under section 8 TMA must include a self-assessment of the amount in which, on the basis of the information contained in the return and taking into account any relief or allowance claimed in the return and any amount deducted at source, the person is chargeable to income tax for the year of assessment.

11. Section 9ZA TTMA provides that a taxpayer may amend his return by notice to HMRC, but an amendment may not be made more than 12 months after the filing date. The filing date is defined for this purpose by reference to the date of issue of the original notice to file the return. If a notice is issued after 31 October following the end of the tax year concerned, the filing date is 3 months after the date of the notice. There is no record in the Tribunal's papers of the date on which the return for 2002-03 was issued, but duplicates were issued on 26 April 2004. The latest possible date of issue is therefore 26 April 2004 and so the filing date is no later than 26 July 2004. This means that the return could not be amended under section 9ZA TMA after 26 July 2005.

12. Section 31 TMA sets out the taxpayer's right to appeal against an amendment made by HMRC to a self-assessment or following closure of an enquiry. There is no right of appeal against the self-assessment as confirmed in *Ashley Byrne v HMRC* [2017] UKFTT 144 (TC) ("*Byrne*"). The taxpayer's appeal in that case concerned a claim that he should not be assessed on income that he had included in his self-assessment tax return that ought properly to have been returned on a corporation tax return. At paragraphs 37 and 39 Judge Mosedale states:

"As we have already stated, there was and is no appeal against an amount of tax shown as owing on a self-assessment. The law in that respect is not surprising: tax is self-assessed so a taxpayer cannot expect to have a right to challenge his own actions."

"We note that while a taxpayer has no right to challenge his own self-assessments, he does have a right to amend them. The amendment must be made in accordance with the terms of s9ZA TMA which requires the amendment to be made within 12 months of the filing date."

13. Section 33 TMA gives a person who has paid income tax under self-assessment the right to claim repayment if the assessment was excessive by reason of some error or mistake. A claim under this section must be made not later than 5 years after 31 January following the year of assessment to which it relates. HMRC must inquire into the matter and then give by way of repayment such relief in respect of the error or mistake as is reasonable and just.

14. Schedule 1AB was introduced by the Finance Act 2009 ("Schedule 1AB") to provide relief for overpaid tax. These provisions replace those in section 33 TMA and so a claim cannot be made under both section 33 TMA and Schedule 1AB in respect of the same relief. Neither section 33 TMA nor Schedule 1AB provides for a tax return to be amended as Mr Kuteh suggests. A claim cannot be made under Schedule 1AB more than 4 years after the end of the relevant tax year, being 5 April 2007. Mr Kuteh has submitted that he was in time to make this claim given his early contact with HMRC and he now wishes to claim on these grounds. This ignores the fact that Mr Kuteh had already been given relief, in the form of the free standing credits, by 1 April 2010 which was the earliest date for a claim under Schedule 1AB. He therefore had no grounds to apply for relief under these provisions when they commenced and he cannot now make such a claim out of time.

15. Mr Kuteh also submitted that paragraph 3A of Schedule 1AB is in point and referred me to cases concerning 'special relief', but these provisions are not applicable because the taxpayer has not delivered a return. These provisions cannot apply where the assessment is based on the taxpayer's self-assessment tax return.

16. Mr Kuteh referred me to the provisions of section 118(2) TMA that a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time as HMRC or the Tribunal may have allowed; and that where a person has a reasonable excuse for not doing anything required to be done he shall be deemed to have not failed to do it if he did it before the excuse ceased or without unreasonable delay after the excuse ceased. Mr Kuteh claims that he should be given the benefit of the provisions in section 118(2) and allowed to make a late appeal (although not specifying what decision the appeal would be against) on the authority of the application of section 118(2) to a late appeal by the Upper Tribunal in *Dr Raftopoulou*. I have considered this decision but concluded that section 118(2) TMA cannot assist Mr Kuteh's claim because it is not a time extension provision. The Upper Tribunal's decision was overturned by the Court of Appeal in *Customs and Revenue Commissioners v Raftopoulou* [2018] EWCA Civ 818 and I

therefore apply the following clear and binding guidance given by Lord Justice David Richards:

"I accept the submission of [HMRC] that Parliament has set down in the self-assessment system carefully defined time limits for enquiries, assessments and claims which balance the need to give finality and certainty to taxpayers and the Exchequer, with the need to provide sufficient flexibility to ensure fairness in the system. It has created a specific statutory procedure for the extension of certain of those time limits where it has considered it appropriate. The [Upper Tribunal's] construction cuts across this balance without a clear warrant for doing so in the section."

17. Mr Kuteh also referred me to the judgment of the Court of Appeal in *Littlewoods Retail Ltd and others v HMRC* [2015] EWCA Civ 515 ("*Littlewoods*"). This case considered whether the payment of interest on repayments of overpaid VAT should be paid on a compound or a simple basis. The claims for overpayment in point were under the specific right to claim repayment under section 80 Value Added Tax Act 1994. This right is not relevant to Mr Kuteh's circumstances, but Mr Kuteh relies upon the following paragraph:

"It is obvious that, under a system of self-assessment, tax will from time to time be paid in error and that that tax will have to be repaid. That is an inherent risk of a system of self-assessment. Statistically a certain percentage of tax receipts will have to be repaid, and we consider that government should not be able to discharge its obligations in restitution to the taxpayer by choosing to take a course which would dilute its repayment obligations."

18. HMRC's application is under the provisions for striking out proceedings in Rule 8 of the Tribunal Rules. Rule 8(2) (a) provides as follows:

"(2) The Tribunal must strike out the whole or a part of the proceedings if the Tribunal —

(a) does not have jurisdiction in relation to the proceedings or that part of them;"

Rule 8(4) provides that the Tribunal may not strike out the whole or a part of the proceedings under paragraphs 8(2) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.

19. The Tribunal must seek to give effect to the overriding objective when it exercises any power under the Tribunal Rules. The overriding objective is set out in rule 2 of the Tribunal Rules ("rule 2") as follows:

"(1) The overriding objective of these [Tribunal Rules] is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues."

Discussion

20. The Tribunal's jurisdiction is conferred by the statutory provisions which provide for an appeal, application or reference to be made to the Tribunal. A case can be filed with the Tribunal before it has been established whether it has jurisdiction to hear the proceedings because it is for the Tribunal to consider in each case, on it facts, whether it has jurisdiction and if so the nature of its jurisdiction, regardless of whether this is raised by the parties. I have therefore considered the facts of this case in order to determine whether a right to appeal to the Tribunal arose in relation to Mr Kuteh's liability for 2002-03. If the Tribunal does not have jurisdiction in relation to the proceedings, rule 8(2) of the Tribunal Rules provides that the appeal must be struck out.

21. The time that has elapsed since the relevant events took place has resulted in difficulties for both parties in producing evidence to establish the underlying facts, but I have been able to make the necessary findings of fact set out in paragraph 5 above. Based on these findings, the application of the findings to the relevant law and time limits set out in paragraphs 9 to 19 above and the overriding objective in rule 2, I have considered each of the claims made by Mr Kuteh below in order to consider whether the Tribunal has jurisdiction in relation to the proceedings.

Earnings for 2002-03 less than amount assessed

22. Although HMRC and Mr Kuteh agree that he made an error in recording the amount of his earnings from Ambition Recruitment in his 2002-03 SATR, neither party has documentary evidence that is conclusive as to the actual amount of the earnings. However, as this case centres on whether HMRC made an appealable decision in relation to Mr Kuteh's tax liability for 2002-03, it is necessary to reach a conclusion on the amount of the earnings in order to determine if and how relief was given for the error. As noted in paragraph 5, I have reached the conclusion that as Mr Kuteh had tax deducted under PAYE of £14,651 from his earnings from Ambition Recruitment, his gross earnings must have been about £55,278.

23. Mr Kuteh has challenged this figure on the basis that it is simply inconceivable that he earned this much from agency work. He claimed at the hearing that he believes that his earnings were roughly £20,000, but did not provide an explanation of how the PAYE deducted was £14,651 based on these earnings. I have considered this claim, but noted that Mr Kuteh admits that the hourly rate for agency work is considerably higher than the rates for full time NHS staff nurses that Mr Kuteh referred me to. In reaching my conclusion Mr Kuteh's claim was outweighed by the fact that earnings of about £55,278 is consistent with the amount of tax deducted, the fact that the credit allowed by HMRC at a time when they had access to Mr Kuteh's P60 and P45 records

reflects this amount and the fact that the addition of this amount to the tax deducted may explain how Mr Kuteh made the error. I have therefore considered Mr Kuteh's case on the basis that his earnings from Ambition Recruitment were about £55,278 as suggested by HMRC.

Relief / reduction of liability for 2002-03

24. Mr Kuteh asked HMRC to make an amendment to his return for 2002-03 to reflect the actual amount of his earnings on 14 June 2006 and again on later occasions. This was not possible because, as noted in paragraph 11 above, the return could not be amended under section 9 ZA TMA after July 2005. HMRC therefore treated Mr Kuteh's request for an amendment as a repayment claim, although it is not clear if it was strictly under section 33 TMA as the income tax had not been paid and it may well have been under HMRC's care and management powers. This resulted in the relief being given by free standing credits after a period of discussion between the parties, and this relief reduced Mr Kuteh's liability in the same amount as an amendment made under section 9ZA based on the same facts would have done. There is no basis for a claim under Schedule 1AB in these circumstances as noted in paragraph 14 above.

25. Notwithstanding the relief given by the free standing credits Mr Kuteh has continued to ask for an amendment to be made because he believes that this will reduce his liability and assist him to challenge the 2008 judgment. As HMRC have told Mr Kuteh, an amendment could not be made to his SATR in 2006 and it cannot be made this stage. The question is whether HMRC's decision in calculating the free standing credit to reduce the liability for 2002-03 could be the subject of this appeal, and I have concluded that this is not the case for the following reasons.

26. Mr Kuteh had not paid the outstanding income tax due when he made his claim in 2006 and HMRC reduced his liability based on his figures by giving a credit against the outstanding liability. Mr Kuteh is therefore in a different position to the facts in *Byrne* as his claim relates to a self-assessment liability that has been reduced by HMRC. If a decision was made by HMRC was under section 33 TMA it would have been an appealable decision, but if it was simply an amendment under HMRC's care and management powers to put Mr Kuteh into the same position as he would have been in if his SATR had been initially completed with the amended earnings figure, there is no appealable decision for the reasons set out in *Byrne* (paragraph 12 above). HMRC revised Mr Kuteh's self-assessment liability based on his figures and he was told in October 2008 that his "2002-03 pay and tax figures had been revised to the amounts he had told [HMRC]". Mr Kuteh appears to have accepted this revision at the time.

27. One year later, in October 2009, Mr Kuteh filed an appeal in respect of 2002-03 and 2006-07. There is no record of the decisions that were the subject of this appeal, whether it was a valid appeal or of what the grounds of the appeal were, but in March 2010 HMRC told Mr Kuteh that his claim to amend 2002-03 had already been dealt with. There was then no contact in relation to 2002-03 until January 2017 when Mr Kuteh found out about the restriction on the property. I conclude from this that even if Mr Kuteh made an appeal in 2009 against an appealable decision under section 33

TMA, the matter was either agreed or the appeal was not pursued after 2010 and so HMRC had every right to close their files on this issue. In reaching this conclusion I have considered the possible effect of the distraction of other litigation on Mr Kuteh (referred to in paragraph 5.9 above), but find that this is outweighed by the evidence that he continued in discussions with HMRC about 2006-07 until 2012. In these circumstances I do not give permission to make a late appeal if there is an appealable decision as any possible appeal has been made and closed. It is not in any event possible to deal with a claim fairly and justly after such a considerable delay and the anticipated costs and resources required of HMRC are not proportionate to the case given Mr Kuteh's inaction over the years and the points made in paragraph 28 below.

SATR amendment requested instead of free standing credits

28. Mr Kuteh claims that the 2008 judgment debt did not reflect his reduced liability for 2002-03 and he believes that this is because the reduction was given by way of free standing credits rather than an amendment. His appeal is that he should be allowed to amend his return so that he can then challenge the amount of the 2008 judgment. While I have sympathy with Mr Kuteh in relation to action taken by HMRC in relation to the 2008 judgment and have addressed this in paragraph 30 below, the amount of his liability is not affected by the method used to reduce it. In other words, even if Mr Kuteh were able and allowed to make a late appeal the amount of his liability would not change given my findings on paragraph 5. His appeal would therefore have no reasonable prospect of succeeding and would be struck out under rule 8(3)(c) if it had not already been struck out under rule 8(2).

29. Mr Kuteh has questioned whether it is fair and just to strike out his claim in these circumstances. I have concluded that it is in accordance with rules 2 and 8 of the Tribunal Rules. Mr Kuteh has been given the opportunity to make representations in accordance with rule 8(4), but I have found that, on the balance of probabilities, the free standing credits given reflect Mr Kuteh's earnings of about £55,278 from his agency work with Ambition Recruitment as these figures are consistent with the tax deducted under PAYE and they explain the error in his return. The fact that neither party can reconstitute the credit figures some ten years later does not create jurisdiction for the Tribunal to consider an appeal or a late repayment claim. HMRC have given Mr Kuteh relief and in this respect they have "discharged their obligations", to use the language in *Littlewoods*. The fact that HMRC are able to recover overpaid tax credits from Mr Kuteh under other legislation cannot override the procedure, time limits and provisions that Parliament put in place for self-assessment and the amendment of SATRs.

Complaints concerning HMRC's conduct in obtaining the 2008 judgment, communicating that no debt was outstanding in January 2017 and then collecting and applying the 2008 judgment debt

30. The underlying reason for Mr Kuteh's appeal is that HMRC have collected £27,521.44 or more on the sale of the property. He has a number of serious complaints about HMRC's care and management of his initial request to amend the error in his SATR, the obtaining of the 2008 judgment without taking account of the

relief given in respect of the error and the enforcement of the 2008 judgment debt, but for the reasons noted in paragraph 20 above this Tribunal does not have jurisdiction to set aside or change the amount of the 2008 judgment nor to reply to Mr Kuteh's complaints concerning HMRC's conduct. I appreciate that this is not a satisfactory outcome for Mr Kuteh, but I have set out below my findings in this case that are relevant to these complaints as they may assist those required to consider them.

31. HMRC obtained the 2008 judgment on 3 January 2008 in Mr Kuteh's absence by reference to his liability for 2002-03 and other tax years. Mr Kuteh believes that the amount of the 2008 judgment debt for 2002-03 reflects his liability according to his SATR, notwithstanding that the contemporaneous discussions with HMRC resulted in a reduction of his liability for 2002-03 by free standing credits. The County Court claim form should identify whether the amount of tax claimed in respect of 2002-03 was in excess of the reduced liability (see paragraph 5.19 above). Further, the 2008 judgement amount recovered by HMRC in 2017 was applied in reducing Mr Kuteh's liability for all outstanding years, leaving a balance of outstanding tax for 2002-03 even though this was included in the secured debt.

32. HMRC have not made it clear to Mr Kuteh whether the outstanding balance of £4,073.30 for 2002-03, shown as 'not currently being pursued' in HMRC's notes, has now been written off given the collection of the tax due for 2002-03 under the 2008 judgment.

33. HMRC's letter to Mr Kuteh's of 30 January 2017, stating that he owed no outstanding tax for previous years, was a mistake that reflects the problems caused by HMRC's failure to communicate what it means if tax is 'remitted'. Mr Kuteh understood in October 2008 that there was some outstanding tax due for 2002-03 but he was not aware, or did not understand, that HMRC had made a decision in 2011 to remit the 2008 judgment debt and secure its collection from the sale proceeds of the property. There is no record in HMRC's notes that this was made clear to Mr Kuteh before May 2017.

Decision

34. For the reasons set out above, HMRC's application to the Tribunal to strike out Mr Kuteh's appeal is allowed. The appeal is struck out in accordance with rule 8(2) of the Tribunal Rules.

35. 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.

VICTORIA NICHOLL
TRIBUNAL JUDGE

RELEASE DATE: 8 May 2018