TC06681

Appeal number: TC/2017/07759

INCOME TAX *– Discovery assessment – s 29 TMA 1970 - underdeclared employment income – whether discovery made – whether information made available to HMRC – whether assessment cancelled by repayment of disputed tax*

FIRST-TIER TRIBUNAL
TAX CHAMBER

Ms ELIZABETH STATHAM **Appellant**

-and-

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

TRIBUNAL: **Judge Peter Kempster**
Mr Mohammed Farooq

Sitting in public at Centre City Tower, Birmingham on 16 July 2018

Mr Kenneth Wilson (chartered accountant) for the Appellant

Ms Savita Mistry (HMRC Appeals Unit) for the Respondents

DECISION

1. The Appellant (Ms Statham) appeals against a discovery assessment (s 29 Taxes Management Act 1970 refers) in the amount of £583.40 issued by the Respondents ("**HMRC**") on 24 June 2015.

Facts

2. Ms Statham was previously employed by EMC Computer Systems UK Ltd ("**the Old Employer**") and left that employment on 10 August 2011. She received a form P45 from the Old Employer showing income from the employment of £56,639.04 and tax deducted of £18,937.33. In October 2011 the Old Employer made a further payment to Ms Statham in respect of commissions of £5,101, from which the Old Employer deducted tax of £1,457. Ms Statham accepts that the Old Employer correctly complied with the PAYE Regulations (by deducting basic rate tax from the payment), but that this resulted in the PAYE deducted at source being less than her income tax liability on the commission income, because she is a higher rate taxpayer.

3. By a notice issued in April 2012 HMRC required Ms Statham to submit a self-assessment tax return for the tax year 2011-12 (s 8 TMA 1970 refers). Ms Statham filed that return electronically on 17 January 2013. On the return she declared employment income from the Old Employer as shown on the form P 45. She did not include the further payment of £5,101 received in October 2011. HMRC did not open an enquiry into the return during the 12 month window, ended 16 January 2014, permitted by s 9A TMA 1970.

4. HMRC received on 30 May 2012 the form P14 submitted by the Old Employer in respect of Ms Statham. The form P14 (correctly) showed the aggregate of the earnings during employment (as shown on the form P 45) together with the further payment in October 2011. On 17 March 2015 HMRC commenced a compliance check into employment income discrepancies.

5. After some correspondence, including a decision by HMRC not to grant relief under Extra Statutory Concession A19, on 24 June 2015 HMRC issued a discovery assessment in the amount of £583.40 ("**the Disputed Assessment**"), which in effect represents the additional income tax due on the October 2011 commission payment.

6. Ms Statham accepts that her employment income from the Old Employer for the tax year 2011-12 should have been declared at £61,740 but was incorrectly reported on her self-assessment return at £56,639.

7. HMRC have accepted that the error was neither deliberate nor careless.

8. On 3 July 2015 Ms Statham appealed to HMRC against the Disputed Assessment and applied for postponement of all the tax charged. On 17 August 2015 HMRC wrote agreeing the postponement, and noted that Ms Statham had paid the disputed tax on 27 July 2015. In February 2016 the disputed tax (plus repayment supplement) was repaid to Ms Statham.

9. Ms Statham appealed the Disputed Assessment to this Tribunal.

Law

10. Section 29 Taxes Management Act 1970 provides:

> "**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.
>
> (2) Where—
>
> (a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and
>
> (b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,
>
> the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.
>
> (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) in a case where a notice of enquiry into the return was given—

(i) issued a partial closure notice as regards a matter to which the situation mentioned in subsection (1) above relates, or

(ii) if no such partial closure notice was issued, issued a final closure notice,

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.

(7) In subsection (6) above—

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes—

(i) a reference to any return of his under that section for either of the two immediately preceding chargeable periods;

(ia) a reference to any NRCGT return made and delivered by the taxpayer which contains an advance self-assessment relating to the relevant year of assessment or either of the two immediately preceding chargeable periods; and

(ii) where the return is under section 8 and the taxpayer carries on a trade, profession or business in partnership, a reference to any partnership return with respect to the partnership for the relevant year of assessment or either of those periods; and

(b) any reference in paragraphs (b) to (d) to the taxpayer includes a reference to a person acting on his behalf.

(7A) The requirement to fulfil one of the two conditions mentioned above does not apply so far as regards any income or chargeable gains of the taxpayer in relation to which the taxpayer has been given, after any enquiries have been completed into the taxpayer's return, a notice under section 81(2) of TIOPA 2010 (notice to counteract scheme or arrangement designed to increase double taxation relief).

(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

(9) Any reference in this section to the relevant year of assessment is a reference to—

(a) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) above, the year of assessment mentioned in that subsection; and

(b) in the case of the situation mentioned in paragraph (c) of that subsection, the year of assessment in respect of which the claim was made."

Appellant's case

11. Mr Wilson submitted as follows for the Appellant.

12. The shortfall of income tax deducted at source arose because of a shortcoming in the PAYE Regulations; 20% tax was deducted when Ms Statham was in fact a 40% taxpayer. Ms Statham had assumed that as payments were made to her net-of-tax, all her obligations had been met. HMRC had accepted that Ms Statham's error was not due to carelessness.

13. HMRC had the form P14 from the Old Employer shortly after the end of the 2011-12 tax year. They were therefore in a position at that time to identify the error on the return but had done nothing until March 2015. The information as to the

correct amount of employment income was available to HMRC in May 2012, which was before the end of the enquiry window. No enquiry had been opened and therefore HMRC were unable to use a discovery assessment to put matters right.

14. Ms Statham had paid the tax shown on the Disputed Assessment on 23 July 2015. In February 2016 HMRC refunded that tax, together with repayment supplement. That represented acceptance by HMRC that the tax was not due, and that the Disputed Assessment was cancelled. If HMRC wished to contend that the tax was still due then they would need to raise a fresh, second assessment

15. HMRC should have applied ESC A19, as Ms Statham had reasonably believed that her tax affairs were in order. HMRC's behaviour was not in accordance with the statements in their own guidance, including Statement of Practice 1/06.

Respondents' case

16. Ms Mistry submitted as follows for the Respondents.

17. The Disputed Assessment was validly made under s 29 TMA 1970. At the end of the enquiry window (January 2014) an officer could not have been reasonably expected to be aware of the error, because s 29(6) was explicit that only information made available by the taxpayer was to be considered. The form P14, and other PAYE compliance records of the Old Employer, were not made available to HMRC by the taxpayer. The results of the compliance check had been communicated to Ms Statham promptly upon HMRC commencing the check, and the Disputed Assessment was raised within the four year ordinary time limit imposed by s 34 TMA 1970.

18. The explanation for the repayment of the tax paid by Ms Statham in response to the Disputed Assessment was that the assessment had been appealed by Mr Wilson, together with a request for postponement of the full amount of the tax in dispute. HMRC granted that postponement which, because Ms Statham had already paid the tax, necessitated a repayment to the taxpayer, which was done. HMRC had not changed their view on the Disputed Assessment or in any way withdrawn it. That was made clear in a letter from HMRC to Mr Wilson on 22 April 2016, including the statement "There has been no adjustment to the assessment for 2011/12 which currently remains under appeal."

19. The application of ESC A19 was not a matter within the Tribunal's jurisdiction.

Consideration and Conclusions

Is the Disputed Assessment valid under s 29?

20. On her 2011-12 self-assessment return Ms Statham declared employment income from the Old Employer of £56,639 when she should have declared £61,740. The failure to declare the correct amount of employment income on the 2011-12 return resulted in income which ought to have been assessed to income tax not being assessed. HMRC did make a discovery of unassessed employment income, and the

Disputed Assessment was made in order to make good the loss of tax: s 29(1). The discovery was made during the course of HMRC's compliance check in March 2015 and the outcome was communicated to Ms Statham promptly; therefore we are satisfied that this is not a case where the discovery suffered from any "staleness" in the issue of the resulting assessment.

21. Ms Statham made a self assessment return and thus is protected from a discovery assessment unless one of two stipulated conditions is satisfied: s 29(3). HMRC have accepted that the error was neither deliberate nor careless; therefore the first condition is not satisfied: s 29(4). The second condition requires that on 16 January 2014 (being the end of the enquiry window) an officer of HMRC could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the unassessed employment income: s 29(5). Ms Statham's argument is that HMRC should have been so aware because the Old Employer had supplied the relevant PAYE information (including a form P14) in May 2012. However, s 29(6) provides an explicit definition of what "information is made available to an officer" means for the purposes of s 29(5), and it is confined to information furnished or notified to HMRC *by the taxpayer*.

22. The relevant information derived from the Old Employer, not the taxpayer, and thus cannot be taken into account in assessing the awareness of the officer under s 29(5). We do not accept the argument that information provided by a third party (here, the Old Employer) should be treated for s 29(6) the same as information provided by the taxpayer; the only extension conferred by the legislation is in s 29(7)(b) which includes "a person acting on behalf" of the taxpayer – we consider that is confined to authorised agents and does not include the Old Employer.

23. Finally, the Disputed Assessment was issued within the "ordinary time limit" prescribed by s 34 TMA 1970.

24. We conclude:

(1) In conducting their employment compliance checks in March 2015 HMRC made a discovery that part of Ms Statham's 2011-12 employment income had not been assessed to income tax. On making the discovery they acted promptly to alert Ms Statham, and issued a s 29 assessment on 24 June 2015. The assessment was made within the time limit prescribed by s 34.

(2) At 16 January 2014 (being the date when the enquiry window closed) HMRC could not have been reasonably expected, on the basis of information made available to them by that time *by the taxpayer*, to be aware of the insufficiency of income tax assessment on the employment income.

(3) Accordingly, the Disputed Assessment is valid.

Was the Disputed Assessment cancelled by the repayment of the tax assessed?

25. On 3 July 2015 Ms Statham appealed to HMRC against the Disputed Assessment and applied for postponement of all the tax charged. On 17 August 2015

HMRC wrote agreeing the postponement, and noted that the Appellant had paid the disputed tax on 27 July 2015. In February 2016 the disputed tax (plus repayment supplement) was repaid to the Appellant.

26. We find that the repayment of £583.40 by HMRC was in recognition of the granting of Ms Statham's postponement application. It cannot be interpreted as any cancellation or abrogation of the Disputed Assessment. HMRC made that clear to the Appellant in their letters dated 22 June 2016 and 13 July 2016. The correct position is that the Disputed Assessment remains current and under appeal to this Tribunal.

HMRC's refusal to apply an extra statutory concession

27. It is settled law that this Tribunal has no jurisdiction over:

(1) HMRC's application of extra-statutory concessions: see *Prince & others* [2012] SFTD 786.

(2) HMRC's alleged failure to satisfy taxpayers' legitimate expectations arising from HMRC publications: *Noor* [2013] STC 998.

(3) Requests to supervise HMRC's conduct generally: *Hok* [2013] STC 225.

28. Accordingly, we cannot determine any complaints Ms Statham may have concerning the disputed application of ESC A19 or Statement of Practice 1/06.

Decision

29. The appeal is DISMISSED.

30. This document contains full findings of fact and reasons for the decision. It replaces the summary decision issued to the parties on 18 July 2018. 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.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 24 AUGUST 2018