[2019] UKFTT 35 (TC)

TC06931

Appeal number: TC/2017/02771

Income tax - s29 TMA 1970 - discovery assessments relating to undisclosed self-employment income - whether assessments correct - yes - penalties - s7 TMA and Schedule 41 FA 2008 - whether appropriate and correct - yes - appeal dismissed and penalties confirmed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MAMUN ALI **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER IAN ABRAMS

Sitting in public at Tribunal Hearing Centre, Kings Court, 5a New Walk, Leicester on 10 July 2018

The Appellant did not attend and was not represented

Mrs Savita Mistry, Officer of HMRC, for the Respondents

DECISION

The Appeal

1. This is an appeal by Mr Mamun Ali ('the appellant') against:

   (i) Discovery assessments made under s 29(1)(a), (4) and (5) TMA 1970 for the years ended 2009-10 to 2014-15;

   (ii) Penalty determinations under Schedule 41 Finance Act ('FA') 2008 for the years 2009-10 to 2013-14.

2. Revenue Assessments were raised in respect of tax/NIC due following the failure of the appellant to register for Self-Assessment and notify liability to Income Tax under s 7 of the Taxes Management Act ('TMA') 1970.

3. Penalty Assessments were raised due to the failure of the appellant to notify chargeability to tax for the years from 2009-10 to 2013-14.

4. The table below shows the Discovery assessments, tax/NIC due and penalties charged.

Year	Net Profit	Tax/NIC Due	Penalty Due
2009-2010	£9,299	£851.52	£342.73
2010-2011	£15,564	£2,630.92	£1058.94
2011-2012	£10,245	£825.80	£332.38
2012-2013	£23,273	£4,443.72	£1788.59
2013-2014	£51,077	£13,477.89	£5424.85
2014-2015	£53,943	£14,497.57	£0.00
	Total	£36,727.42	8947.49

5. The matters at issue are:

   i. whether HMRC have correctly raised the Discovery Assessments under s 29 TMA 1970, and

   ii. whether HMRC have correctly raised penalties under s 41 FA 2008 for failure to notify chargeability.

Preliminary matters

6. On 27 January 2018, by its own motion, the Tribunal issued pre-listing Directions which included Directions inter alia that:

- *Not later than 26th February 2018, both parties shall provide to the Tribunal and each other a statement detailing dates to avoid for a hearing for the period*

of 16 April 2018 and ending 13 July 2018 and that shortly after 26 February 2018 the Tribunal will fix the date of the hearing.

- *HMRC shall provide to the appellant not later than 3 April 2018, a paginated and bound document bundle ("the bundle") to include:*

    i. all documents (on the Lists of Documents referred to above);
    ii. any notices, assessments or amendments under appeal;
    iii. any notices or letters of appeal under consideration;
    iv. copies of the correspondence relating to the matter under appeal.

- *Not later than 5pm on the 14th day before the date of the hearing HMRC shall deposit with the Tribunal two copies of the bound bundle.*

- *Both parties shall provide to the Tribunal and each other not later than the 14th day before the date of the hearing, a statement containing details of any legislation and case law authorities along with copies of any upon which that party intends to rely.*

7. The hearing was listed for 10 July 2018.

8. On 8 June 2018, HMRC deposited the bundle (late) with the Tribunal. HMRC was also late providing its Skeleton argument which was deposited with Tribunal one day late on 28 June 2018. HMRC had served its Statement of Case on the appellant on 15 December 2017 and included the Statement with the bundle deposited on 8 June 2018.

9. The appellant applied for a postponement of the hearing on the basis that HMRC was late depositing the bundle and its Skeleton argument with the Tribunal, and that he would be prejudiced if the hearing went ahead, as he had insufficient time to prepare.

10. Judge Poole refused the appellant's postponement application on the basis that the appellant had not made a sufficiently persuasive case for the hearing to be postponed, noting that the appellant was entitled to renew his application on the day of the hearing.

11. The appellant did not attend the hearing and was not represented. He had earlier stated in an email to the Tribunal that he would not be attending, as he had not been allowed sufficient time following receipt of HMRC's skeleton and bundle to adequately prepare for the hearing.

12. At the hearing, HMRC submitted that the appellant had had enough time to review the documents within the bundle, as the correspondence was all the correspondence between the parties and there was nothing new to the appellant. The Skeleton argument was one day late, but in any event the information contained within the Skeleton was also in the Statement of Case which had already been submitted to the Tribunal and the appellant in December 2017.

13. The Tribunal was satisfied that the appellant had been provided with all necessary documentation in reasonable time prior to the hearing date, that it was in the interests of justice to proceed and that he would not thereby be unfairly prejudiced.

Appeal Background

14. On 15 May 2015, HMRC commenced a Compliance check into the appellant's tax affairs as the last Income Tax record held for the appellant had ceased several years previously. HMRC discovered that the appellant had failed to return his income from a double glazing sales commission business. He had been working for Everest Double Glazing as a commission agent, on a self-employed basis, from 2008-09 onwards but failed to register for Self-Assessment.

15. On 21 August 2015, HMRC issued a Notice under Schedule 36 FA 2008 for information and documents in order to check the appellant's tax position.

16. On 20 September 2015, in an email, the appellant provided figures from 6 April 2008 to 5 April 2015, showing monies received from Everest Double Glazing.

17. HMRC wrote to the appellant on 23 September 2015 requesting details of any business expenditure incurred in respect of the commission payments received. HMRC enclosed factsheets informing the appellant of the Human Rights Act CC/FS9, CC/FS11 Compliance Checks - Penalties for failure to notify, CC/FS13 Publishing Serious Defaulters and CC/FS14 Managing Deliberate Defaulters.

18. The appellant had indicated that in addition to the double glazing self-employment income he was also trading in a family business. Details of this were requested in the letter of 23 September 2015, together with any income and expenditure incurred for that business. The letter asked the question why the appellant had not informed HMRC of the self-employment and whether any professional help was sought.

19. On 30 October 2015, the appellant, by email, provided details of the family business, being 'The Spice Hut' trading from 19 May 2009 to 25 November 2013.

20. On 2 November 2015, HMRC wrote to the appellant providing estimated figures for profits and tax due from the self-employment for all years from 2009-10 to 2014-15 and requesting information relating to the income and expenditure for The Spice Hut business and any expenditure for the double glazing business to be provided within 30 days. The letter notified the appellant that a Penalty of 47.25% would be charged on the tax due for each of the years from 2009-10 to 2013-14 and explained the Penalty abatements and what percentage would be given for Telling - 30%, Helping - 20% and Giving - 15%.

21. As no information was forthcoming, by 2 December 2015, an email was sent informing the appellant that Discovery Assessments for the tax years 2009-10 to 2014-2015 would be issued.

22. On 3 December 2015, the appellant provided expenditure details for both the businesses. The expenses claimed were all round sum amounts.

23. On 4 December 2015, HMRC wrote to the appellant informing him that the person liable for business rates for The Spice Hut business had been Mr Rohom Ali (father of the appellant) from 20 May 2009.

24. The appellant replied on 7 December 2015 saying that due to 'substantial losses in this stressful period', a full disclosure would be made when the appellant made a taxable profit. The appellant added that he planned to do this by 31 January 2016.

25. On 9 December 2015, further information was requested from the appellant in respect of both businesses in order to issue more accurate Assessments for the tax liability due.

26. On 15 February 2016, HMRC wrote to the appellant explaining the basis of the Assessments raised and why the figures for The Spice Hut could not be accepted. The letter also explained that failure to notify Penalties under Schedule 41 FA 2008 would be charged and enclosed factsheets of how the Penalty would be calculated.

27. Notice of Assessments for all years from 2009-10 to 2014-15 were issued for the double glazing commission income together with a Penalty notification explanation. The appellant was informed that HMRC could not accept The Spice Hut details as no supporting records had been supplied and there was no evidence to suggest that he was a proprietor of The Spice Hut or had any connection to the business. The Penalties to be charged were £14,584.97 @ 40.25% (and not as previously informed of 47.25%), based on Potential Lost Revenue ('PLR') of £36,236.

28. The appellant appealed the decision on 16 March 2016, explaining that he was using the traditional accounting method, not the cash basis. He said that his double glazing business was promoted by his father through distribution of personalised leaflets and advertisements on The Spice Hut premises. He said that his father had charged him over that period of time to cover his losses, stating that the figures he had provided were generally very conservative estimates.

29. 0n 1 April 2016, HMRC requested evidence of the expenses paid to his father and also documentary evidence from the appellant's father to show he had received such amounts from the appellant. The letter suggested a meeting to move matters forward.

30. On 6 October 2016, HMRC wrote to the appellant with a current view of the matter, informing him that the figures for expenses would be amended in view of the fact that the appellant was claiming an estimated expenditure figure of £28,000 for 2014-15, which was 34.17% of the turnover of £81,943. This percentage was used to amend all Assessments from 2009-10 to 2014-15 to reduce the taxable profits.

31. On 5 January 2017, HMRC issued Penalty Assessments for years 2009-10 to 2013-14 showing total penalties chargeable of £14,584.97 under Schedule 41 FA 2008 for failure to notify. The letter explained that as the action of the appellant was a deliberate failure to notify and was also prompted by the compliance check, the penalty

percentage would be 40.25% of the charge. A penalty explanation was issued showing how the penalty had been calculated.

32. On 2 February 2017, an Appeal against the Penalty Determination was received and an Independent Review requested.

33. On 28 February 2017, a Review Conclusion was sent to the appellant upholding HMRC's Decisions relating to the Discovery Assessments and Penalty Determinations.

34. On 31 March 2017, an HMRC Officer further revised the figures on the Assessment and Penalty Determinations. These are the figures shown in the table at paragraph 4 above.

35. On 29 March 2017, the appellant applied for an Alternative Dispute Resolution ('ADR') meeting. The appellant's application was accepted.

36. Numerous attempts were made by the ADR facilitator to arrange a meeting: however as no response was received from the appellant the case was withdrawn from the ADR process on 11 July 2017.

37. On 18 October 2017, HMRC issued a letter asking the appellant if he agreed with the revised figures which reduced the liability from £54,977.14 to £36,727.42, with a view to concluding the Appeal without further recourse to the Tribunal in view of the reduced liability now due.

38. On 17 November 2017, HMRC received an email from the appellant stating he wished to continue with his Appeal.

Legislation

39. The relevant Legislation is as below:

Income Tax (Trading & Other Income) Act 2005 (ITTAOI 2005)

Chapter 2 - Part 5 - Charge to tax on trade profits

- Income tax is charged on the profits of a trade, profession or vocation

Chapter 2 - Part 6 - Territorial scope of charge to tax

6 (1) Profits of a trade arising to a UK resident are chargeable to tax under this Chapter wherever the trade is carried on.

7 Income Charged

7(1) Tax is charged under this chapter on the full amount of the profits of the tax year.

7(2) for the purpose the profits of a tax year are the profits of the basis period for

the tax year.

8 Person Liable

The person liable for any tax charged under this chapter is the person receiving or entitled to the profits.

ITTAOI 2005 - Part 2- Chapter 4

34 Expenses not wholly and exclusively for trade and unconnected losses

34 (1) In calculating the profits of a trade, no deductions is allowed for -

(a) Expenses not incurred wholly and exclusively for the purposes of the trade, or

(b) Losses not connected with or arising out of the trade

34 (2) If an expense is incurred for more than one purpose, this section does not prohibit a deduction for any identifiable part or identifiable proportion of the expenses which is incurred wholly and exclusively for the purposes of the trade.

Section 7 of the Taxes Management Act 1970 requires:

1 every person who -

(a) is chargeable to Income tax or Capital Gains Tax for any year of assessment, and

(b) Falls within subsection (1A) or 1B

Shall, subject to subsection (3) below, within (the notification period), give notice to an officer of the Board that he is so chargeable.

1(A) A person falls within this subsection if the person has not received a notice under Section 8 requiring a return for the year of assessment of the persons total income and chargeable gains (to file under section 8 for the year of assessment).

1(C) In subsection (1) “the notification period” means...

(a) in the case of a person who falls within subsection (1A), the period of 6 months from the end of the year of assessment, or

(b) in the case of a person who falls within subsection (16)...

(i) the period of 6 months from the end of the year of assessment, or

(ii) the period of 30 days beginning with the day after the day on which the notice under section 8 was withdrawn.

Whichever ends later.

Section 29 TMA 1970 - Assessments where loss of tax discovered

(1) If an officer of the Board discovers, 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 ...

The officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment of 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.

(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.

Section 36 (1A) (B) TMA 1970 - The appellant's failure to notify HMRC of his chargeability triggers the 20-year assessing time-limit of section 36 (1A) (b).

Section 34 TMA 1970 - Ordinary Time Limits

Section 36 TMA 1970 - Extended Time Limits

Loss of Tax brought about carelessly or deliberately etc.

Section 1 & 1A (a) & (b) applies in this case.

Finance Act 2008 - Failure to Notify Penalties

Schedule 41 FA 2008 - Failure to Notify and certain VAT and Excise Wrongdoings

Section 41 (1) - A penalty is payable by a person (P) where P fails to comply with an

obligation specified in the table below (a "relevant obligation").

Obligation -

Obligation under Section 7 of TMA 1970 (obligation to give notice to income tax or capital gains tax).

5 Degree of Culpability

Section 41 (5) (1) - A Failure by P to comply with a relevant obligation is -

(a) “Deliberate and concealed” if the failure is deliberate and P makes arrangements to conceal the situation giving rise to the obligation, and

(b) “Deliberate but not concealed” if the failure is deliberate but P does not make to conceal the situation giving rise to the obligation.

6 Amount of Penalty: Standard amount

Section 41 (6) (1) the penalty payable under any of paragraphs 1, 2 3(1) and 4 is -

(a) for a deliberate and concealed act or failure, 100% of the potential lost revenue (PLR),

(b) for a deliberate but not concealed act or failure, 70% of the PLR, and

(c) for any other case, 30% of the PLR,

(2) The penalty payable under Paragraph 3(2) is 100% of the PLR.

(3) Paragraphs 7 to 11 define “Potential Lost Revenue”.

7 Potential Lost Revenue (PLR)

(7) (1) “PLR” in respect of a failure to comply with a relevant obligation is as follows,

(2) In the case of a relevant obligation relating to income tax or Capital Gains tax

(CGT) and a tax year, the PLR is so much of any income tax or CGT to which P is liable in respect of the tax year as by reason of the failure is unpaid on 31 January following the tax year.

(7) (7) “The Relevant Period” is-

(7)(b) in relation to a failure to comply with an obligation under any other provision, the period beginning on the date with effect from which P is required in accordance with that provision to be registered and ending on the date on which HMRC received notification of, or otherwise became fully aware of, P's liability to be registered.

12 Reduction for Disclosure

(12) (1) Paragraph 13 provides for reductions in penalties under Paragraph 2 to 4 where P discloses a relevant act or failure

(2)P discloses a relevant act or failure by -

(a) telling HMRC about it,

(b) giving HMRC reasonable help in quantifying the tax unpaid by reason of it, and

(c) allowing HMRC access to records for the purpose of checking how much tax is so unpaid.

(3) Disclosure of a relevant act or failure -

(a) is “unprompted” if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure, and

(b) Otherwise is “prompted”.

(4) In relation to disclosure “quality” includes timing, nature and extent.

(13) (4) Where a person who would otherwise be liable to a 70% penalty has made a prompted disclosure, HMRC shall reduce the 70% to a percentage, not below 35%, which reflects the quality of disclosure.

14 Special Reductions

(14) (1) if HMRC think it right because of special circumstances, they may reduce a penalty under any of paragraphs 1 to 4.

(2) in sub-paragraph (1) “special circumstances” does not include -

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a

reference to -

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

16 Assessment

(1)Where P becomes liable for a penalty under any of paragraphs 1 to 4 HMRC shall -

(a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed

(2) A penalty under any of paragraphs 1 to 4 must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.

(3)An assessment -

(a) shall be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Act),

(b) may be enforced as if it were an assessment to tax, and

(c)may be combined with an assessment to tax.

(4) An assessment of a penalty under any of paragraphs 1 to 4 must be made before the end of the period of 12 months beginning with -

(a) the end of the appeal period for the assessment of tax unpaid by reason of the relevant act or failure in respect of which the penalty is imposed, or

(b) if there is no such assessment, the date on which the amount of tax unpaid by reason of the relevant act or failure is ascertained.

(5) In sub-paragraph (4)(a) "appeal period" means the period during which –

(a)an appeal could be brought, or

(b) an appeal that has been brought has not been determined or withdrawn.

(6) Subject to sub-paragraph (4), a supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of potential lost revenue.

(7)The references in this paragraph to "an assessment to tax" are, in relation to a penalty under paragraph 2, a demand for recovery.

17 Appeal

(1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

18(1) An appeal is to be brought to the First-tier Tribunal.

(2) An appeal shall be treated for procedural purposes in the same way as an appeal against an assessment to the tax concerned (except in respect of a matter expressly provided for by this Act).

19(1) On an appeal under paragraph 17(1) the First-tier Tribunal may affirm or cancel HMRC's decision.

(2)On an appeal under paragraph 17(2) the First-tier Tribunal may -

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the First-tier Tribunal substitutes its decision for HMRC's, the Tribunal may rely on paragraph 14 -

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the Tribunal thinks that HMRC's decision in respect of the application of paragraph 14 was flawed.

(4)In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

HMRC's case

40. The appellant started self-employment as a double glazing salesman in 2008-09 year onwards, but did not register for Self-Assessment or file any returns in respect of income received.

41. As the appellant failed to notify chargeability within 6 months of receiving the income/profits, HMRC were entitled to raise Discovery Assessments under s 29 TMA 1970.

42. The appellant's failure to notify HMRC of his chargeability triggers the 20-year assessing time limit of s 36 (1A)(b) TMA 1970.

43. HMRC have been provided with details of income received, but no bank/building society statements have been provided to substantiate the figures provided and no reasons have been given for this, despite HMRC's numerous requests.

44. No actual accounts have been submitted for the double glazing business despite the appellant asserting that he is using the traditional accounting method and not a cash basis.

45. The appellant has claimed expenses without any actual evidence of those expenses being incurred.

46. No evidence has been supplied to substantiate the appellant's claim that he was connected to The Spice Hut business and that any advertising costs paid to R Ali to advertise the double glazing business were actually incurred.

47. The appellant asserts that he did not complete Self-Assessment returns as he was going to claim/set off losses from The Spice Hut business. The appellant has attempted to claim losses from The Spice Hut business, which he claims was a family business. However checks made by HMRC shows that this business was owned by his father, Rohom Ali, on a sole trader basis.

48. HMRC have been fair and reasonable in allowing 34.17% in expenses against the turnover figures and not the round sums claimed by the appellant, particularly in the absence of accounts and any breakdown of the expenses claimed.

49. No reasons have been given by the appellant for his failure to notify chargeability and as a result, penalties charged under Schedule 41 FA 2008 are correct.

The appellant's case

50. The appellant's grounds of appeal (as stated in his notice of appeal) are:

i. He was going to notify Self-Employment to HMRC when he started making a profit from the self-employment and was going to claim losses from The Spice Hut of which he was a partner.

ii. The expenses which were conservative and referable to his business.

iii. The information from The Spice Hut could not be supplied because his father who owned the business was ill and the appellant did not know how much he had been charged for advertising the double glazing business at The Spice Hut premises.

Conclusion

51. Under common law the onus of proof rests with the person making the assertion. HMRC accept that the onus is upon them to show that there is a 'discovery' leading to a loss of tax, and that this was brought about by the deliberate action of the appellant.

52. The onus also rests with HMRC to demonstrate that extended time limits apply under s 36 TMA 1970. Once this is satisfied, the onus reverts to the appellant to provide evidence to either reduce or set aside HMRC's figures. Otherwise the assessment shall stand good. (Section 50(6) TMA 1970)

53. Having determined the above, the onus of proof falls to the appellant to produce evidence to show that he has been overcharged by such assessment as appropriate.

54. The onus is also on the appellant to demonstrate that HMRC has not been fair and reasonable in their assessment by providing the necessary records of evidence.

55. For the penalties levied under s 41 FA 2008, the onus is on HMRC to show that the appellant failed to notify chargeability which led to the loss of tax. The standard of proof is the ordinary Civil Standard of the balance of probabilities.

56. Having considered the parties' submissions and available supporting evidence, we are satisfied that the appellant failed to notify his chargeability to income tax from self-employed earnings for the period 2009-10 to 2014-15.

57. The Tribunal find that the appellant has failed to notify chargeability of his profits received from double glazing sales income, and that there is a loss of tax to the Crown which HMRC have correctly charged under the Discovery Provisions at s 29 TMA 1970.

58. The appellant has not provided any persuasive evidence to show that the Discovery Assessments are incorrect. Based on the information available to HMRC, the Assessments are fair and reasonable and have been properly raised in accordance with statutory regulations.

59. HMRC have also correctly charged penalties under s 41 FA 2008 for the failure to notify chargeability within the timeframe specified by the Taxes legislation and on the basis that the deliberate actions of the appellant led to the failure to notify.

60. We dismiss the Appeals and confirm the Revenue Assessments and the Penalty Determinations for all years from 2009-10 to 2014-15.

61. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 14 JANUARY 2019