[2021] UKFTT 252 (TC)

TC08198

INCOME TAX – discovery assessment – was tax return completed carelessly – was the existence and relevance of RTI information known to hypothetical officer – s29 Taxes Management Act 1970

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/09341/V

BETWEEN

ALAN LOUGHREY **Appellant**

-and-

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

TRIBUNAL: JUDGE ALEKSANDER
CHRISTOPHER JENKINS

The hearing took place on 24 May 2021. With the consent of the parties, the form of the hearing was V (video) using the Tribunal's Video Hearing servicer. A face-to-face hearing was not held because of the COVID-19 pandemic. The documents to which I was referred was an electronic bundle of documents comprising 229 pages.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

The Appellant in person

Rose Granger, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal by Alan Loughrey against a review concerning discovery assessments raised by HMRC for the tax year ending 5 April 2014 under s29 Taxes Management Act 1970 ("TMA") totalling £15,518.00:

Tax Year	Date of Issue to Appellant	Amount
2013-2014	19 April 2018	£15,000.00
2013-2014	22 November 2018	£518.00

2. Mr Loughrey also applied for permission to make a late appeal to Tribunal. The application was supported by HMRC, and we granted permission.

3. Mr Loughrey does not dispute the calculation of tax by HMRC, but rather whether HMRC have satisfied the requirements to be able to make a discovery assessments

4. Mr Loughrey represented himself. HMRC were represented by Ms Granger. We heard evidence from Mr Loughrey and from Tracy Forbes, the HMRC officer responsible for raising the assessments. An electronic bundle was produced in evidence.

5. The bundle of authorities and HMRC's skeleton argument were not received by the Tribunal panel. Ms Granger told us that they had been sent to the Tribunal centre two weeks before the hearing. Unfortunately, given the skeleton staffing of the Tribunal centre due to the COVID pandemic, there is a backlog in the filing of correspondence, which meant that these documents did not reach us before the hearing. However, Mr Loughrey had copies, and we were able to access the caselaw online during the course of the hearing.

6. It also transpired that the hearing bundle did not include a complete copy of Mr Loughrey's SA102 – namely the pages of the self-assessment tax return dealing with employment income. However, we accepted the oral evidence of Mr Loughrey and Ms Forbes as to the contents of the SA102 (which was not in dispute).

7. Mr Loughrey attended the hearing by video link from the Republic of Ireland. Confirmation was given prior the commencement of the hearing by the Foreign Office that the Republic of Ireland did not object to individuals attending UK hearings voluntarily by video link from the Republic of Ireland.

PROCEDURAL MATTERS

8. The fact that Mr Loughrey had relocated from the UK to the Republic of Ireland only became apparent at a late stage during the course of case management. I gave directions that Mr Loughrey must provide his new address both to the Tribunal and HMRC. Because of his repeated failure to comply with this direction, I made an "unless direction" that his appeal would be struck out if he failed to give his current address to the Tribunal and to HMRC before the commencement of the hearing. Mr Loughrey complied with this direction at the start of the hearing, and the Tribunal directed that the hearing be reinstated.

BACKGROUND FACTS

9. The background facts are not in dispute, and we find them to be as follows.

10. On 23 November 2013, Mr Loughrey was made redundant by his former employer, Symantec.

11. Symantec provided electronic payslips to its employees. Following his redundancy, Mr Loughrey no longer had access to his emails and files, including the electronic payslips.

12. Mr Loughrey had always paid income tax under PAYE and had never been required by HMRC to file a tax return. However, as he believed that too much tax had been deducted from his pay in 2013-14, he filed a tax return electronically for the 2013-14 tax year on 21 March 2016.

13. On 29 March 2016 HMRC paid Mr Loughrey a tax refund of £14,043.63.

14. The following description of what then happened is taken from HMRC's review letter:

> **Contentions**
>
> Below is a summary of those contentions as set out by the HMRC caseworker in their View of the Matter in Question letter and by you in your correspondence with HMRC:
>
> (i) On 22 January 2018 HMRC wrote to you explaining that they had information that suggested that your 2013-2014 Self-Assessment Tax Calculation was incorrect and that they intended to carry out a check in respect of the employment and redundancy payments that were returned in relation to your employment with Symantec UK Limited and the medical benefits declared. It was explained that any assessment for additional tax due would be made under Section 29 Taxes Management Act 1970.
>
> (ii) On 26 March 2018 HMRC wrote to you explaining that it was unable to reconcile the figures in your return with those shown on the P45 and P11D. The Medical Benefit declared in your return was £573, which differed to the P11D which showed £363.
>
> (iii) In respect of pay and tax you entered £42,573 and £40,463 respectively. You explained that the figures were taken from the P45, but the figures sent to you on the P45 were £120,040 and £40,598.10.
>
> (iv) On 19 April 2018 the Notice of Assessment was issued to you amounting to £15,000 to protect the HMRC position.
>
> (v) It was established from reviewing the month 12 payslip from Symantec (UK) Ltd that your employer had deducted £30,000 for the exemption: the payslip showed gross pay of £150,218 and the total taxable pay of £120,218. As your former employer had allowed the £30,000 exemption from your gross pay you should not have made a claim for this exemption on your return.
>
> (vi) Your tax calculation showed that you had overpaid tax by £14,043.63 and that this had been repaid to you on 29 March 2016. The revised calculation showed that you were due to pay £1,475.17 tax, therefore a tax liability of £15.518.80.
>
> (vii) As you used the P60 / Redundancy Agreement to complete your return HMRC can see why you were not aware that the £30,000 exemption had already been deducted by Symantec (UK) Limited and in a letter to you dated 22 November 2018 it was explained to you that HMRC were not going to charge a penalty for the inaccuracies in your return.

15. The assessments were upheld following a statutory review by a decision letter dated 15 February 2019. Mr Loughrey now appeals against the review conclusion.

16. Mr Loughrey's evidence was that he did not use payslips to complete his tax return, as these were provided to him electronically, and since the termination of his employment, he no longer had access to the computer system on which the payslips were recorded. So, he used his P45 and the figures in his redundancy agreement to complete his tax return. The P45 issued to Mr Loughrey by Symantec shows total pay to date of £120,040.57, and total PAYE deducted of £40,598.10.

17. As this was the first time that Mr Loughrey had completed a UK tax return, and as he did not know the system, he made extra sure to understand the HMRC process as best as he could. Mr Loughrey therefore studied information provided by HMRC online and on HMRC websites. Mr Loughrey included in the bundle a screenshot from HMRC's "help" function for completing the online tax return, which states:

> Enter the pay figure from the 'In this employment' box on your P60 or the figure from the 'total pay in this employment' box on your P45 for each employment you had. If you had more than one job in the tax year your P60 may include the pay and tax details of an earlier employment. You must include each employment on a separate 'Employment' page. The figure entered here is the pay figure after any contributions to your employer's pension scheme (sometimes described as superannuation). Take care when copying this figure from your P60.
>
> You should deduct the following payments (before tax is taken off) from the P60 or P45 figure as these should be included in the 'Other UK Income' section of your return: lump sums, benefits paid, termination of employment, retirement or death payments or benefits from a former employer paid for agreeing to restrict your activities.
>
> If your employer has reported the amount of a benefit from your employment on your form PllD and taxed that amount through your payroll, you should deduct that amount (before tax is taken off) from the P60 or P45 figure. You should enter the amount you've deducted from the P60 or P45 figure in the required fields as appropriate. Refer to any specific advice issued by your employer if you are unsure what figures to enter.

18. Mr Loughrey followed HMRC's instructions in completing his tax return and entered £30,000 in the box "compensation and lump sum £30,000 exemption" – having obtained this figure from his redundancy agreement. He then deducted £30,000 from the P45 figure and recorded his total pay from all employments as being £90,218.

19. During the course of HMRC's enquiries, Mr Loughrey asked Symantec to send him copies of his payslips, and he forwarded these to HMRC. From looking at the figures on the payslips, it appears that (i) the statutory redundancy payment of £4500 and (ii) £25,500 of the termination payment were treated by Symantec as non-taxable income. The payslips include a section showing accumulated "tax year to date" figures. The final payslip shows gross pay to date of £150,218.24, taxable pay to date of £120,218.24, and tax paid to date of £40,462.50.

20. Mr Loughrey did not query the refund as he believed that he was due a refund and that was why he had voluntarily completed the tax return in the first place. Mr Loughrey believed that he had significantly overpaid tax through PAYE. As his employment had ceased, he believed that he was entitled to the balance of his tax-free allowance for the remainder of that year (as credit for these would not have been given under PAYE). So, the repayment did not surprise him when it came.

21. Ms Forbes evidence was that HMRC's systems recorded a discrepancy between the figures entered by Mr Loughrey on his 2013-14 tax return and the figures on their systems. In consequence she was asked to review his return. One of the first things Ms Forbes did when she was allocated the file was to review the real time information ("RTI") held on HMRC's computer systems relating to Mr Loughrey's pay. She saw that £120,000 (approx.) was recorded as taxable pay, yet only £98,000 (approx.) was declared on Mr Loughrey's tax return. In addition, there was a discrepancy relating to medical expenses benefits of £363 shown on the P11D but the amount declared on the tax return was £573.

22. Ms Forbes evidence was that Mr Loughrey was careless in completing his tax returns. If he found completion to be complicated – because this was the first time he completed a return

- he should have sought guidance from the HMRC helpline or from a professional advisor. As Mr Loughrey did not have access to his payslips, he should have asked Symantec to provide them before completing his tax return.

THE LAW

23. The assessments under appeal were made after the end of the "enquiry window". They were made under s29 TMA which provides for assessments to be made in the event that an HMRC officer "discovers" that any assessment to tax (including a self-assessment in a tax return) is insufficient.

24. The relevant provisions of s29 are 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) 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.

25. As regards Mr Loughrey's return, the key points arising out of the requirements of s29 are as follows:

(1) First, an officer of HMRC must "discover" an insufficiency of tax.

(2) Secondly, at least one of the following two conditions must have been satisfied. These are either:

(a) Mr Loughrey was careless in completing his tax return; or

(b) At the time when the enquiry window closed, HMRC could not reasonably be expected to be aware of the insufficiency on the basis of the information

(i) contained in the tax return, or

(ii) the existence and relevance of which could be inferred from the information in the tax return.

26. There is no dispute that there was an insufficiency of tax self-assessed by Mr Loughrey in his tax return. He does not dispute that (in effect) he claimed the £30,000 tax relief for termination payments twice.

27. The issue is whether the HMRC have satisfied the requirements to be able to make a discovery assessment under s29.

28. The first issue is whether HMRC made a "discovery" for the purposes of s29(1). This is a very low bar, and we have no doubt, and find, that HMRC did make a discovery.

29. The issue in dispute is whether either or both of the conditions in s29(4) or (5) are met. In other words, was Mr Loughrey careless in completing his tax return. Alternatively, would a hypothetical HMRC officer have been aware of insufficiency on the basis of the information in the tax return, or on the basis of other information, the existence and relevance of which could be inferred from the information in the tax return. In this case, the relevant information is that available in HMRC's Real Time Information ("RTI") systems.

DISCUSSION

30. There is an unexplained discrepancy between the total [taxable] pay of £120,040.57 shown on the P45, and the "year to date" taxable pay shown on Mr Loughrey's final payslip

(and Symantec's P14 return) of £120,218.24. We cannot reconcile this amount to any item of pay included in the evidence before us.

31. Ms Granger submits that Mr Loughrey was careless in completing his tax return. She submits that if he had retained his payslips, he would have realised that the benefit of the £30,000 tax relief on termination payments had already been given to him, and it should not have been claimed again on filing his tax return. If he had any doubts about how to complete his tax return, he should have contacted HMRC.

32. Ms Granger acknowledged that HMRC had not levied a penalty for carelessness, but that decision was made under HMRC's discretion, not because HMRC accepted that Mr Loughrey was not careless. Ms Forbes submitted that he had not taken reasonable care in completing his tax return.

33. In consequence, she submitted that the first condition in s29(4) TMA was met.

34. We disagree. We find that Mr Loughrey took reasonable care in completing his return. Mr Loughrey followed the instructions given in the help function on HMRC's online tax return system, which told him to deduct the amount of any termination payment from the P45 figure. The online guidance gave no indication that amounts for which £30,000 relief had been given should be treated differently.

35. And even if Mr Loughrey had access to his payslips, we do not consider that this would have made any difference, as the narrative on the payslip does not make it clear that £30,000 of the termination payments made to Mr Loughrey have already benefited from tax relief for termination payments. Further, there is nothing in the online guidance that states how the difference between cumulative "gross pay" and cumulative "net pay" should be disclosed in a tax return – indeed – unless you were a tax expert - it is not obvious on the face of the payslip that the £30,000 relief on termination payments was recognised in the calculation of the PAYE deducted from the payments made to him.

36. Nor do we consider that Mr Loughrey ought to have obtained advice from a tax professional or the HMRC helpline. He looked at the online guidance, and he did what the guidance told him to do. There was nothing in the guidance that suggested that he needed additional advice, or that what he was doing was particularly complicated and that he ought to have obtained additional advice beyond that in the online guidance.

37. Indeed, we believe that HMRC in reality knew that Mr Loughrey was not careless, and they said as much in paragraph (v) of the "Contentions" section of HMRC's review letter, and we believe that is why HMRC did not seek to levy a carelessness penalty on Mr Loughrey.

38. We find that the first condition in s29(4) was not satisfied.

39. As regards the second condition, Ms Granger submits that there was no information available to HMRC that would make the hypothetical inspector aware of the insufficiency of tax. Ms Granger submits that "RTI is simply information provided by the employer to HMRC with regard to an employee". Ms Granger submits that Ms Forbes (and the hypothetical officer) would not have been aware of the insufficiency of tax from a review of the information on the tax return.

40. We were referred by Ms Granger to the decision of the Court of Appeal in *Langham v Veltma (HM Inspector of Taxes)* (2004) 76 TC 259, which held that the test in s29(5) requires the hypothetical reasonable tax inspector to be aware of the insufficiency of tax from the available information, not merely be put on notice that such an insufficiency might exist. We were also referred to *Nicholson v Morris (H M Inspector of Taxes)* (1976) 51 TC 95 in which the High Court held that HMRC were not required to search through their vaults to find information that they might have which might reveal that there was an insufficiency of tax.

41. She submitted that RTI was therefore not information within s29(6)(d)(i), and therefore the second condition was satisfied.

42. We disagree. The information within the scope of s29(6)(d)(i) includes information whose existence and relevance could reasonably be inferred from information contained in Mr Loughrey's tax return. We find that RTI information is such information. The fact that:

(1) HMRC's computer systems identified a discrepancy between the amounts returned on Mr Loughrey's tax return and the RTI data; and

(2) Ms Forbes turned first to RTI data when asked to review Mr Loughrey's tax return

evidences that HMRC (and a hypothetical officer) would have been aware of the existence and relevance of RTI data from the fact that Mr Loughrey had declared UK employment income on his tax return. The information available through RTI is not of the kind discussed in *Nicholson v Morris* that HMRC might have discovered by going through the records relating to other taxpayers. We find that RTI data falls within s29(6)(d)(i) as its existence and relevance would be obvious to a hypothetical inspector considering UK employment income declared on a tax return.

43. We find that any insufficiency of tax would be obvious to a hypothetical officer from a comparison of the RTI information with the amount of income declared on the tax return. As indeed it was both to Ms Forbes and HMRC's computer systems. This is not a case of the kind discussed in *Langham v Veltma* where the hypothetical officer would merely be on notice that further enquiries might be necessary.

44. We therefore find that the second condition in s29(5) was not satisfied.

45. As neither condition was satisfied, we find that HMRC were not entitled to make an assessment under s29 TMA.

46. Finally, as regards the medical benefits provided to Mr Loughrey by his employer - ss Mr Loughrey declared a larger amount for the benefit than the cost his employer declared on the P11D, there is no insufficiency of tax within the scope of s29.

DISPOSITION

47. The appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

48. 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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

RELEASE DATE: 07 JULY 2021