Neutral Citation: [2024] UKFTT 00615 (TC)

Case Number: TC09236

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2019/01539

INCOME TAX-penalties-prompted or unprompted disclosure-what constitutes disclosure?-whether rental income received from property occupied by Appellant's brother

Heard on: 3 July 2024
Judgment date: 09 July 2024

Before

TRIBUNAL JUDGE MARILYN MCKEEVER
MR MOHAMMED FAROOQ

Between

MR G N KHAN

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Nadeem Khan, solicitor, of Eden Solicitors.

For the Respondents: Ms Beverley Levy, litigator of HM Revenue and Customs' Solicitor's Office.

DECISION

INTRODUCTION

1. The form of the hearing was V (video). All parties attended remotely on the Tribunal's VHS platform. The documents to which we were referred are a Document Bundle of 491 pages, a Legislation and Authorities Bundle of 187 pages, HMRC's Skeleton Argument, an Application to adjourn the hearing and further documents which were admitted in the course of the hearing and to which we refer below.

2. 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.

3. To avoid confusion, we will refer to Mr G N Khan as "the Appellant" and Mr Nadeem Khan as "Mr Khan".

THE APPEAL

4. The Appellant appeals against income tax assessments and penalties for failure to notify his tax liabilities for the tax years 2004/5 to 2012/13 inclusive. The tax and penalties relate to rent received from a number of investment properties owned by Appellant.

5. The assessments are discovery assessments under section 29 Taxes Management Act 1970 (TMA) and the penalties were assessed under section 7 TMA for the tax years 2004/5 to 2008/9 and under Schedule 41 Finance Act 2008 for the remaining years.

6. The total tax originally assessed was £49,620.52 and the penalties totalled £33,887. The assessments were subsequently reduced and the amount of tax now subject to the appeal is £36,005.50 and the penalties are £24,450.40.

7. The Appellant did not attend the hearing and there was no oral evidence.

THE ADJOURNMENT APPLICATION

8. Eden Solicitors sent an email to the Tribunal timed at 17.28 2 July, the evening before the hearing, applying for the hearing to be adjourned as Eden Solicitors had only just been instructed and were unable to prepare properly for the hearing. HRMC objected to the application.

9. We heard submissions at the start of the hearing.

10. Mr Khan explained that the Appellant had contacted his office on the Friday evening, 28 June, a few days before the hearing, when Mr Khan had been out of the country. He had picked up the message on his return on Monday, 1 July and made contact with the Appellant on Tuesday, the day before the hearing. Given the lateness of his instructions he had not been able to review all the documents or fully consider the case or prepare to represent him at the hearing. He had been told by the Appellant that he, the Appellant, had approached a number of law firms to represent him. One had accepted but informed him, at short notice, that they were unable to assist at the hearing. Mr Khan did not know when the other firm had been instructed or when or why they withdrew. He submitted that it was in the interests of justice to adjourn the hearing to allow proper preparation for the hearing.

11. Ms Levy, for HMRC, objected to the adjournment given the long history of this case. The current application is the fourth application for adjournment, the previous three having been granted on grounds of the Appellant's ill health. All the applications were made at short notice.

12. The present Tribunal heard the application for the third adjournment on 16 November 2023. The application was made the day before the hearing and medical evidence produced only on the morning of the hearing. The Tribunal issued directions allowing the application on condition that the Appellant obtained representation for a future hearing as it was unclear when he would be well enough to pursue the appeal himself.

13. We noted that the Appellant had had seven months to obtain representation and appeared to have left it until the last minute to do so. We had no evidence about the agent appointed before Mr Khan or the circumstances in which they had withdrawn.

14. Having taken all the circumstances into account, we considered that the balance of fairness and justice required us to proceed with the hearing and we refused the adjournment application.

15. We recognise that Mr Khan had had a limited opportunity to prepare for the hearing and we are grateful to him for his assistance in putting the Appellant's case.

THE ISSUES

16. Two issues which were argued before us.

17. First, had the Appellant received rent from the property at Gaviots Close, which was occupied by the Appellant's brother and his family?

18. Secondly, did the Appellant make a disclosure before HMRC opened an enquiry such that penalties should be calculated on the basis of an "unprompted" disclosure, or was his disclosure "prompted"?

THE FACTS

19. HMRC opened an enquiry into the Appellant's tax affairs on 2 January 2014.

20. They had information that the Appellant had purchased four properties in addition to his residence: Richmond Crescent, Gaviots Close, and two properties in Longmead. HMRC's intelligence also suggested that the Appellant had received rental income.

21. The Appellant had not registered for self-assessment and had not submitted any tax returns.

22. The enquiry letter of 2 January 2014 stated that HMRC believed the Appellant had received rental income which had not been declared. He was asked for information including a list of properties acquired and sold, statements of income and expenses for each relevant tax year and capital gains tax computations.

23. There was extensive correspondence between HMRC and the Appellant, but the Appellant did not provide the information requested, even though HMRC eventually issued formal information notices under schedule 36 Finance Act 2008 on 19 June 2014 and subsequently charged penalties for non-compliance.

24. On 4 June 2015, HMRC wrote to the Appellant pointing out his failure to provide information, despite numerous extensions of time. The letter set out the details of the Appellant's four properties and enclosed estimated rental schedules and tax computations based on them. The rents were calculated on the basis of rents currently achievable on similar properties according to Zoopla and rents for previous years were calculated by discounting the current rents by the Retail Prices Index. Expenses were estimated at 15% of the gross rents. The Appellant was asked to respond by 6 July 2015, failing which HMRC would raise assessments and might charge penalties. Assessments were issued on 9 July 2015. The assessments were discovery assessments under section 29 TMA. It is not disputed that they were validly raised and we are satisfied that this was the case.

25. HMRC also charged penalties for the Appellant's failure to notify his liability to income tax as required by section 7 TMA.

26. On 7 October 2015 HMRC issued a penalty determination for the tax years 2004/5 to 2008/9 inclusive. The penalties were issued under section 7(8) TMA (now repealed but which applied for those years) which, by virtue of section 100 TMA empowered an officer of the Board to determine the penalty "setting it at such amount as, in his opinion, is correct or appropriate". The penalty was set at 75% of the tax which should have been charged.

27. Also on 7 October 2015, HMRC sent a penalty explanation letter to the Appellant for the tax years 2009/10 to 2012/13 inclusive. These penalties were charged under Schedule 41 Finance Act 2008 which superseded section 7(8) TMA and provides a framework for setting penalties depending on the taxpayer's behaviour and co-operation. The penalty explanation letter explained that the penalties were calculated on the basis that the Appellant had deliberately failed to notify his liability and that his disclosure of his liability was prompted. The penalty range, in these circumstances, was between 35% and 70% of the Potential Lost Revenue (PLR). A 10% reduction was given for "telling" on the basis that "you made a general enquiry to Let Property Campaign but failed to make a disclosure". This was subsequently increased to 15%. No reduction was given for "helping" or "giving" because of the lack of co-operation and failure to provide any documentation or information. The penalty percentage applied was ultimately 64.75% of the PLR.

28. The Appellant responded to HMRC following the issue of the assessments and penalty notices. This was his first communication in the more than two years since HMRC opened the enquiry (other than asking for extensions of time to provide information). In his letter of 24 August 2016, he disputed HMRC's tax calculations on two grounds:

(1) One of the properties was occupied by his family and did not generate income.

(2) The actual mortgage interest maintenance costs and other allowable expenses were higher than the 15% HMRC had allowed for expenses.

29. On 18 October 2016, the Appellant provided a schedule of rent and expenses relating to Richmond Crescent and the two Longmead properties but reiterated that Gaviots Close was occupied by his family and there was no rental income. He did not provide any supporting documents. HMRC replied on 8 November 2018 asking for the documents they had previously requested including bank statements and mortgage interest statements.

30. The Appellant eventually provided mortgage interest statements for the Richmond Crescent and Longmead properties and evidence of some other expenses. In view of his lack of records, he accepted HMRCs calculations of the rent. The mortgage interest and other expenses for which evidence was provided were taken into account in reaching the final amount of rent assessed.

31. The Appellant continued to assert that Gaviots Close was occupied by his brother and the brother's family. He produced various documents which demonstrated that the brother and his family occupied the property. This is not disputed. However, despite many requests, he did not provide mortgage interest statements relating to this property or copies of his bank statements which would have shown receipts and payments.

32. On 27 September 2017, the Appellant's brother spoke to HMRC on the telephone (at the Appellant's request). The brother acknowledged that he was making payments to cover the mortgage and bills. In a conversation between HMRC and the Appellant on 5 October 2017, the Appellant said his brother paid the mortgage on Gaviots Close, the money being paid into a bank account. He was asked for bank statements and mortgage statements. He did not produce them.

33. HMRC accepted a late appeal against the assessments. The Appellant produced no further information.

34. On 6 March 2019, the Appellant appealed to the Tribunal. To the extent the appeal was late, HMRC did not object and we grant permission to appeal out of time.

35. The Appellant and HMRC subsequently engaged in the Alternative Dispute Resolution process. The issues outstanding following ADR were the position regarding Gaviots Close and the income and expenditure of the rental properties. Some further information was provided regarding the rental properties.

36. In summary, for the properties other than Gaviots Close, the Appellant accepted the rental figures calculated by HMRC and HMRC allowed as deductions the mortgage interest and other expenses which had been evidenced and a wear and tear allowance of 10%. No information was provided for Gaviots Close and HMRC calculated the rent in the same way as for the other properties.

37. We also refer to further findings of fact in the discussion below.

DISCUSSION

The income tax assessments

38. We are satisfied that the discovery assessments raised by HMRC are valid.

39. On 19 May 2021, HMRC wrote to the Appellant with the final figures for rent and expenses. These were based on estimated rentals but took account of the actual expenses incurred by the Appellant so far as he had provided evidence of them.

40. The Appellant did not provide any further information in relation to any of the properties.

41. It is acknowledged that the Appellant's brother and family occupied Gaviots Close. The Appellant has stated that his brother paid him the amount of the mortgage. Despite multiple requests, the Appellant has not provided the mortgage statements or the bank statements which would evidence the arrangement and the amounts received and paid. In the absence of any evidence, HMRC have assessed a full rent on Gaviots Close, subject to a wear and tear allowance.

42. The burden is on the Appellant to prove, on the balance of probabilities, that he has been overcharged by the assessments. He provided some evidence to show he was overcharged on the Richmond Crescent and Longmead properties and HMRC took this into account. He has failed to provide any evidence to displace the assessment relating to Gaviots Close.

43. Accordingly, the assessments must stand good.

The penalties

44. The remaining issue relates to the penalties charged under schedule 41 Finance Act 2008 (schedule 41).

45. HMRC determined the Appellant's behaviour was "deliberate". We are satisfied that the Appellant did deliberately fail to notify his liability to income tax. It is simply not credible that he received rental income from several properties over a period of eight years and did not realise he was liable for tax on the net rents and should have reported this to HMRC. This is supported by his failure to keep records and his lack of cooperation with HMRC following the opening of the enquiry. No substantive information was provided for two years despite the issue of formal information notices and the issue of penalties for non-

compliance. The Appellant only engaged with HMRC once they had issued assessments and penalty notices.

46. The question we must decide is whether the Appellant's disclosure was "prompted" or "unprompted".

47. The Appellant insisted from the outset that he had made a voluntary disclosure as a result of HMRC's Let Property Campaign (LPC).

48. The enquiry was opened on 2 January 2014.

49. The Appellant wrote to HMRC on 27 January 2014 stating:

> "I would like to bring to your attention, that I have already made a voluntary notification prior to receiving any communication from yourself. I had discussed my situation with the HMRC voluntary disclosure helpline a couple of months before. At the point of my discussion, I was told that I would be given an initial three months to gather any information required.
>
> I would like to fully co-operate in order to bring my tax affairs up to date and I will be seeking professional help to resolve this matter as soon as possible."

50. On 6 February 2014 Ms Pankhania (the HMRC officer who originally dealt with the matter) spoke to Ms Buxton at the Let Property Campaign helpline and also to the Voluntary Disclosure helpline. Neither had any record of a contact by the Appellant. Ms Buxton informed Ms Pankhania that a taxpayer who contacted them would be advised of a reference by email or letter to confirm their voluntary disclosure.

51. On 7 February 2014 Ms Pankhania wrote to the Appellant saying she could not locate any reference concerning the voluntary disclosure and asking for any confirmation he had from HMRC.

52. The Appellant called the Voluntary Disclosure helpline on 10 February 2014 giving his contact number and stating rental income commenced in April 2009.

53. On 14 February the Appellant spoke to Ms Pankhania and said that he had received correspondence from the Voluntary Disclosure team confirming his contact with them. He was asked to send a copy of whatever notification he had received to Ms Pankhania.

54. On 17 March 2014 the Appellant telephoned HMRC to say he had spoken to a Ms Buxton of the Let Property Campaign on 14 February and had been told the details of his contact would be transferred internally. He asked Ms Pankhania to contact Ms Buxton.

55. In a letter to the Appellant dated 19 March 2014 Ms Pankhania stated that his first contact with the LPC was on 6 February 2014.

56. The Appellant replied on 3 April 2014 disputing this and enclosing a copy of a letter dated 13 January 2014 from the LPC, confirming his contact in December 2013 following a telephone contact some time before. The 13 January letter stated:

> "Thank you for telling us that you wish to make a disclosure under the Let Property Campaign (LPC) as requested in your letter of 11 December 2013. Please can you let me have the following information so that I can set up a record for you
>
> 1 The date the Let property commenced
>
> 2 A contact telephone number"

57. There were some doubts about the letter. Ms Pankhania spoke to a manager at the LPC on 10 April 2014. The manager suggested they would not issue a letter with no reference (the only reference was "Let Property Campaign" not the Appellant's UTR or National Insurance Number or a LPC reference). The manager also said there was no record of the letter on the system nor of the Appellant's letter of 11 December 2013. The letter had the digital signature of the Head of Campaigns. Ms Levy submitted that letters sent by HMRC were generated by computer and were not signed.

58. The Tribunal noted that the letter of 11 December 2013 was not in the bundle. Mr Khan said that he had a copy of the 11 December letter and applied for it to be admitted in evidence. Ms Levy objected. Having considered the matter carefully, the Tribunal decided to admit the letter. Whilst we would not normally admit new evidence halfway through a hearing, in the light of Mr Khan's late instructions and the obvious importance of the document to the Appellant's case we considered that it was in the interests of fairness and justice that it be admitted. We took an extended lunch adjournment to allow all parties to consider the letter and ancillary documents.

59. The letter of 11 December 2013 was addressed to the Let Property Team Campaign. It stated:

> "Further to calling the 'Let Property Campaign Hotline', I would like to inform you that I would like to come on the Let Property Campaign".

60. The letter set out the Appellant's details: his name, address, date of birth and National Insurance Number.

61. In addition, Mr Khan provided a copy of a Post Office certificate of posting dated 11 December 2013 and a "track and trace" printout showing that the letter was delivered and signed for on 16 December 2013. There was also a note, written by the Appellant, dated 8 January 2014, of a telephone conversation with a Leigh Callaghan of HRMC. This stated:

> "Did a search on system using NI number, surname and first name. Couldn't find anything. Did a search for the letter written to HMRC. Confirmed that the letter was received on 17th December 2013. Therefor notice of intent has been received. Provided her name as reference, as she couldn't email confirmation. Will write back once processed."

62. We find as a fact that the Appellant made a disclosure to HMRC that he had undeclared taxable rental income. This is the clear implication of his statement "I would like to come on the Let Property Campaign". This disclosure was made on 11 December 2013, received by HMRC on 16 December 2013 and processed by them on 17 December.

63. Mr Khan submitted that this showed the Appellant had made an unprompted disclosure and this should be reflected in the penalty assessment under schedule 41 Finance Act 2008.

64. HMRC considered that this made no difference to HMRC's position. Ms Levy submitted that the 11 December 2013 letter was insufficient to constitute a disclosure so as to make the disclosure "unprompted" as the Appellant was required to provide full details of the rental properties, the amount of the rent, the dates of the tenancies and so on.

65. "Disclosure" is dealt with in paragraphs 12 and 13 of schedule 41. They provide, so far as material:

> "**12**—
>
> (1) Paragraph 13 provides for reductions in penalties under paragraphs 1 to 4 where P [the taxpayer] 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

(1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table [in subsection (3)] (a "standard percentage") has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it—

(a) for a prompted disclosure, in column 2 of the Table, and

(b) for an unprompted disclosure, in column 3 of the Table."

66. Paragraph 11(2) of schedule 41 defines a "relevant act or failure" as meaning (among other things) "a failure to comply with a relevant obligation". A "relevant obligation" is defined in paragraph 1 of schedule 41 as "an obligation specified in the Table below [in paragraph 1]". The Table specifies, in relation to income tax and capital gains tax "Obligation under section 7 of TMA 1970 (obligation to give notice of liability to income tax or capital gains tax)".

67. For a disclosure to be unprompted, it must be a disclosure of a "relevant act or failure" and it must be made when the taxpayer has no reason to believe HMRC are about to take action. The relevant failure is the failure to comply with a relevant obligation. In the present case, the relevant obligation is the obligation to give notice of liability to income tax under section 7 TMA. By his 11 December 2013 letter, the Appellant disclosed that he had failed to give notice of his liability to income tax on his rental properties. This was the disclosure of a relevant failure within paragraph 12(3) of schedule 41 and it was made before HMRC opened their enquiry.

68. In our view, an approach to HMRC can constitute a "disclosure" if the taxpayer informs HMRC that they have not complied with the relevant obligation. It is not necessary at that point, to provide full details of the liability.

69. Taking all the circumstances into account, we find that the Appellant's disclosure was unprompted.

70. The amount of detail provided, including the timing, nature and extent of the disclosure goes to the "quality" of the disclosure, which feeds into the possible reduction to be allowed under paragraphs 12(2) and 13 of schedule 41. The mere act of telling HMRC about a relevant failure is a disclosure. The reduction in penalty depends in how much more the taxpayer tells HMRC.

71. In summary, we find that the Appellant made an unprompted disclosure of his failure to notify his income tax liability in relation to his rental income.

72. HMRC allowed a 10% reduction in the penalty, later increased to 15%, for "telling" HMRC. Given the Appellant's subsequent lack of cooperation we see no reason to interfere with the percentage reduction. However, as we have found that the disclosure was unprompted, the applicable range of penalties in accordance with the Table in paragraph 13 of schedule 41 is between 20% and 70%. The 15% reduction is applied to the difference ie 50% which is 7.5% and this reduction is applied to the maximum penalty (70%). Accordingly, the penalties should be reduced to 62.5% of the Potential Lost Revenue.

DECISION

73. We have found that HMRC made valid discovery assessments of unpaid income tax relating to the Appellant's rental income for the tax years ending 5 April 2005 to 2013 inclusive, that the assessments were made to "best judgement" and that information eventually provided by the Appellant has been taken into account in the quantum of the assessments. The Appellant has failed to provide any further evidence to show he has been overcharged by the assessments and accordingly, we uphold the assessments to income tax.

74. We have found that the Appellant deliberately failed to notify HMRC of his liability to tax and that the penalties were appropriately calculated save that HMRC had calculated the penalties under schedule 41 on the basis that the Appellant's disclosure was prompted, and we have found that it was unprompted.

75. We therefore dismiss the appeal except in relation to the penalty assessments under schedule 41 which shall be amended to reflect the fact that the Appellant's disclosure was unprompted.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

76. 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.

MARILYN MCKEEVER
TRIBUNAL JUDGE

Release date: 09th JULY 2024