Appeal number: FTC/82/2010

[2011] UKUT 239 (TCC)

INCOME TAX —discovery assessment — TMA s 29 — taxpayer setting capital losses against income — workings sent with return but net figures entered on return — First-tier Tribunal's finding that taxpayer negligent — whether finding of fact — yes — whether susceptible of challenge in Upper Tribunal — appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

COLIN MOORE **Appellant**

- and –

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

Tribunal: Judge Colin Bishopp

Sitting in public in London on 9 June 2011

The Appellant in person

Mr Michael Jones, counsel, for the Respondents

DECISION

1. This is an appeal, with permission, against part of a decision of the First-tier Tribunal (Judge Brooks and Mr Haarer) released on 14 June 2010. The tribunal dismissed Mr Moore's appeal against three discovery assessments, for the years 2000-01, 2001-02 and 2002-03, and against an amendment to his 2003-04 self-assessment return. There were two areas of dispute before that tribunal: whether the assessments and the amendment were properly made and, assuming they were, whether the amounts of tax were correct. The tribunal decided both of those issues against Mr Moore, the former on the ground that his conduct had been negligent within the meaning of s 29(4) of the Taxes Management Act 1970, the latter because it concluded that he had not discharged the burden of showing, as he must in order to succeed, that the amounts were incorrect. Mr Moore does not now challenge the second conclusion, but he does dispute the finding that the assessments and the amendment were correctly made.

2. The tribunal also dismissed in principle his appeal against penalties imposed upon him in accordance with s 95 of the 1970 Act in respect of each of the relevant years, but went on to reduce them. Mr Moore maintains before this tribunal that penalties were not exigible, but only upon the footing that he was not negligent; in other words, he does not challenge the proposition that if the assessments were properly made by reason of his negligent conduct, he was for the same reason liable to the penalties. Neither party asked me to reconsider their amounts should I find against Mr Moore on the principle.

3. The tribunal found that, save for a short period, Mr Moore was in continuous employment from 1971 until he decided to retire in December 2003. Throughout that period he paid tax through the PAYE system, although he was in addition sent a tax return for completion each year, no doubt because he also had some investment income. In December 2004, about a year after Mr Moore retired, he received a letter from the then Inland Revenue stating that they did not intend to send him returns in future. Mr Moore was at the time in the process of moving house and, believing from the letter that his past tax affairs were all in order, he discarded those records which he had. The tribunal also accepted that evidence.

4. In June 2005 HMRC began an enquiry into Mr Moore's 2003-04 return, prompted by information they had received from his bank which showed that the interest paid to him was greater than the amount shown on the return. That enquiry evidently prompted closer examination of his returns for the preceding three years. As the tribunal found, Mr Moore had been deducting capital losses on his investments from the interest paid to him by his bank. He did so in accordance with what the tribunal recorded was "informal advice given at a social occasion." Mr Moore, who represented himself before me, said that this record did not truly reflect the circumstances in which the advice was given; he had in fact struck up an acquaintance with an accountant who, like Mr Moore himself, was living in an hotel for lengthy periods while working away from home, and the advice was given over dinner rather than at the accountant's office. However one views the circumstances in which the advice

was given, the tribunal found that it had indeed been given, that Mr Moore believed it was correct, and that he followed it. He now recognises that it was wrong.

5. In accordance with what he understood was the correct course, Mr Moore entered understated figures in the relevant boxes on the returns—in which he was required to record the "amount after tax deducted" (box 10.2), the "tax deducted" (box 10.3) and the "gross amount before tax" (box 10.4)—but he sent with each return a sheet of paper on which he set out exactly how he had calculated the figures he had entered. As the tribunal recorded, HMRC do not contend otherwise, although they are unable to find the sheets, of which Mr Moore too no longer has copies. The tribunal also found that Mr Moore did not follow the guidance provided with the returns, or avail himself of the working sheet attached to the return itself. One must assume, although it does not say so, that the tribunal concluded that, had he done so, he would not have made the error he did, or at the least would be less likely to have done so.

6. The discovery assessments were made in accordance with s 29 of the Taxes Management Act 1970, which is entitled "Assessment where loss of tax discovered". The material parts of s 29, as it was in force throughout the relevant years, are as follows:

> "(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
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> (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
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> (b) that an assessment to tax is or has become insufficient, or
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> (c) that any relief which has been given is or has become excessive,
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> 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—
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> (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,
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> 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 is attributable to fraudulent or negligent conduct on the part of 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) informed the taxpayer that he had completed his enquiries into that return,

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 …."

7. Mr Moore's returns were made in accordance with s 8, and s 29 is accordingly in point. It was evidently common ground before the First-tier Tribunal that HMRC made a "discovery" within the meaning of s 29(1) when they received the interest details from the bank. The tribunal found, even though they could not be produced, that the sheets of paper Mr Moore sent with his returns contained sufficient explanation of what he had done, so as to satisfy s 29(6), and that in consequence HMRC could not rely on s 29(5), and there is no appeal by HMRC against that conclusion. The question which remains is whether the tribunal was right to find that Mr Moore was guilty of the "negligent conduct" to which s 29(4) refers (it was at no time suggested his conduct was fraudulent). It found that he was, and accordingly dismissed the appeals against the assessments.

8. The tribunal referred at [8] to the observation by Judge Berner in *Anderson (deceased) v Revenue and Customs Commissioners* [2009] UKFTT 206 at [22]. After remarking that "[t]he making of an innocent error, and negligent conduct, are not mutually exclusive" he said:

"The test to be applied, in my view, is to consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done."

9. The First-tier Tribunal in this case then went on to say, at [9],

"We consider that, viewed objectively, such a taxpayer would, unlike Mr Moore, have referred to the guidance provided to him, made use of the

working sheet to which he was directed and not have relied on informal advice received in a social context as the basis for completing his returns."

10. Mr Moore disputed that finding, arguing that he had exercised considerable care in following what he believed to be correct advice and in providing the Inland Revenue, as it then was, with an accurate statement of what he had done. His error could not be described as the product of negligent conduct or, as s 29 now put it (following amendment by the Finance Act 2008), to have been "brought about carelessly". There was, he said, plainly no want of care on his part because, as the tribunal found, he had taken the trouble to provide all the information which was needed with his return, even if he had put the wrong amounts in the boxes. That is an attractive argument, not readily dismissed.

11. However, Mr Moore's supplementary argument that what he did—which had been his habit over several years—was a "generally prevailing" practice which brought him within the protection of s 29(2), does not have the same merit and I should perhaps deal with it immediately. The "generally prevailing" practice at which sub-s (2) is aimed is quite obviously one commonly adopted by taxpayers in general at any given time, and not an idiosyncratic practice adopted by a single taxpayer, however frequently he may have done so. It was described by Henderson J in *Revenue and Customs Commissioners v Household Estate Agents Ltd* (2007) 78 TC 705 as one which is

> "relatively long-established, readily ascertainable by interested parties, and accepted by HMRC and taxpayers' advisers alike".

12. Although Henderson J made it clear he was not attempting to provide an exhaustive definition, it seems to me that he has nevertheless come very close to succeeding. I respectfully agree with what he said, which does not allow Mr Moore's approach to be brought within sub-s (2) and the protection it offers.

13. Michael Jones, counsel appearing before me for HMRC, argued that a determination of negligence required a two-stage approach. First, one must consider whether a person whose conduct is under scrutiny had a duty of care and, if so, the nature of the duty. That, he said, was a question of law. Once a duty of care has been identified, it is necessary to go on to decide whether the person has satisfied the duty. That, he said, is a question of fact. I agree with that analysis, which is consistent with authority, particularly *Qualcast (Wolverhampton) Ltd. v Haynes* [1959] AC 743, a decision of the House of Lords. At p 757 Lord Somervell observed that

> "Whether a duty of reasonable care is owed by A to B is a question of law. … When negligence cases were tried with juries the judge would direct them as to the law as above. The question whether on the facts in that particular case there was or was not a failure to take reasonable care was a question for the jury."

14. At p 759 Lord Denning added

> "In the present case the only proposition of law that was relevant was the well-known proposition—with its threefold sub-division—that it is the duty of a master to take reasonable care for the safety of his workmen. No

> question arose on that proposition. The question that did arise was this: What did reasonable care demand of the employers in this particular case? That is not a question of law at all but a question of fact. To solve it the tribunal of fact—be it judge or jury—can take into account any proposition of good sense that is relevant in the circumstances, but it must beware not to treat it as a proposition of law."

15. There can, I think, be no doubt that any taxpayer completing a self-assessment return has a duty to take care when doing so: the obligation upon him is plainly to submit an accurate return. Mr Moore did not suggest otherwise; his argument was that he endeavoured to do so, and that, taken together, the return and the added sheet discharged the obligation. The First-tier Tribunal evidently did not accept that proposition, preferring the view that the duty of care required Mr Moore to enter accurate figures in the boxes.

16. It seems to me that in order to test that conclusion it is necessary to look closely at what sub-s (4) provides. It allows an officer to assess where "the situation mentioned in subsection (1) … is attributable to … negligent conduct on the part of the taxpayer". The "situation mentioned in subsection (1)" includes, among others, that "an assessment to tax is … insufficient". The assessments in this case—Mr Moore's self-assessments—were based not upon what he wrote on the additional sheets, but on what he entered in the boxes. In my judgment it follows, despite the initial attraction of Mr Moore's argument to which I have referred, that the tribunal's evident conclusion about what the duty of care entailed was right. His setting out the information on an additional sheet would have given Mr Moore the protection of sub-s (5), but not of sub-s (4) and, as sub-s (3) makes clear, an assessment may be made if either one of the two conditions is fulfilled.

17. The finding that Mr Moore was negligent in the completion of his return was, as I have said, a finding of fact with which this tribunal may interfere only if it is shown to be irrational, in the sense described in *Edwards v Bairstow* [1956] AC 14. Mr Moore plainly considered the finding incorrect, but he did not attempt to persuade me that the finding was one at which a tribunal, properly considering the facts before it and correctly applying the law, could not reasonably arrive, and in my view he was right not to do so as it would have been an impossible task.

18. It follows that the appeal against the First-tier Tribunal's decision in respect of the three assessments must be dismissed.

19. The tribunal seems, however, to have overlooked that what was in issue for the year 2003-04 was not an assessment but an amendment to Mr Moore's return, made in the course of an open enquiry preceded by a notice issued in accordance with s 9A(1) of the 1970 Act, an amendment to which s 29 has no application. They simply dismissed the appeal against the amendment without further comment. Mr Jones recorded the difference between that year and the others in his skeleton argument, but neither he nor Mr Moore developed the point in their skeletons or orally. It is nevertheless a short and simple point with a clear answer, and I can deal with it even in the absence of argument. The power to amend a return is contained in s 9C, sub-ss (1) and (2) of which provide that

"(1) This section applies where an enquiry is in progress into a return as a result of notice of enquiry by an officer of the Board under section 9A(1) of this Act.

(2) If the officer forms the opinion—

(a) that the amount stated in the self-assessment contained in the return as the amount of tax payable is insufficient, and

(b) that unless the assessment is immediately amended there is likely to be a loss of tax to the Crown,

he may by notice to the taxpayer amend the assessment to make good the deficiency."

20. HMRC had no need to, and did not, resort to the s 29 power; and it is immaterial to s 9C whether Mr Moore was or was not negligent. All that is necessary is that the self-assessed tax is insufficient. As Mr Moore does not dispute that that is the case, it necessarily follows that his appeal against the amendment of his 2003-04 return must also fail.

21. The appeal is, therefore, dismissed. I direct that Mr Moore pay HMRC's costs of this appeal, to be the subject of detailed assessment by a costs judge of the High Court if they are not agreed.

Colin Bishopp
Upper Tribunal Judge

Release date: 16 June 2011