[2017] UKFTT 534 (TC)

TC05983

Appeal number: TC/2015/06895

Income tax – s 29 TMA 1970 – discovery assessments – whether assessments correct – yes – penalties s 7 TMA and Schedule 41 FA 2008 – whether appropriate and correct – yes – appeal dismissed and penalties confirmed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GARRY LEWIS **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER MRS GAY WEBB

Sitting in public at City Exchange, Albion Street, Leeds on 10 April 2017

The Appellant in person

Mr P Oborne, Officer of HMRC, for the Respondents

DECISION

1. This is an appeal by Mr Garry Lewis ('the Appellant') against:

(i) Discovery assessments made under s 29 TMA for the years ended 2006-07, 2011-12, 2012-13, and 2013-14;

(ii) Penalty determinations under s 95 TMA for the same years.

2. The increased tax due under the Assessments and Penalties are:

Year	Income	Tax	Penalties
2006-07	£8,749	£856.20	£128
2011-12	£9,162	£511.73	£179.10
2012-13	£28,459	£5,947.66	£2,081.68
2013-14	£20,776	£3,439.09	£1,203.68

3. The matters at issue are:

i. Whether the Appellant received previously undisclosed rental income.

ii. Whether losses made on investments are allowable against the rental income.

iii. Whether the assessments are correct and competent as to discovery.

iv. Whether the penalty determinations are correct and appropriate.

Appeal Background

4. The Appellant owns properties in Grimsby, Cleethorpes and Louth, which are let out as furnished accommodation to tenants under Shorthold Tenancy Agreements. The Appellant failed to disclose the income he received from the properties for the years 2003-04 to 2013-14.

5. On 29 April 2015 HMRC wrote to the Appellant informing him that information had been received indicating that he had been receiving previously undisclosed income.

6. The Appellant appointed Lindsay Henson Ltd as his agents to deal with matters. The agents agreed that the Appellant owned fourteen properties on which he received rental income. Each property was in his sole ownership. The agents conveyed the Appellant's apologies for failing to disclose the income, saying that rent on the properties only covered expenses and mortgage payments. The Appellant was unable to produce evidence of expenses as one of his commercial premises contained his paper records which had been lost when the premises were repossessed.

7. The Appellant's agents prepared and submitted a schedule of properties owned by the Appellant to show expenditure incurred, mortgage payments and net income received.

8. HMRC explained that some of the expenses incurred were capital in nature, for example, capital repayments under the mortgages, and were therefore specifically excluded for the purposes of computing accounting profits. Otherwise the amounts disclosed were accepted. It was also agreed that tax was due only for years 2006-07, 2011-12, 2012-13 and 2013-14.

9. HMRC indicated that they would agree to settle the matter to include outstanding tax interest and penalties by a contract settlement.

10. The Appellant was unable to settle the matter by a contract settlement because of financial difficulties. Consequently HMRC issued Notices of Assessment and Penalty Determinations.

Penalties

11. HMRC advised the Appellant that he had potentially rendered himself liable to Penalties under s 7 TMA 1970 for the tax year 2006-07 and under Schedule 41 Finance Act 2008 for tax years 2011-12 to 2013-14, for failing to notify a chargeable source of income.

Year 2006-07

12. The maximum penalty under s 7 TMA is 100% of the additional duties, but mitigation of the penalty was considered under the headings of disclosure, co-operation and seriousness.

13. Under s 7 TMA there is a maximum abatement of 20% for disclosure. The Appellant had made a full disclosure of his rental income accompanied by profit and loss accounts supplied by his agents and therefore full abatement was allowed.

14. The maximum abatement for co-operation is 40%. There had been full co-operation from the Appellant and therefore full abatement was allowed.

15. The maximum abatement for seriousness is 40%. The adjustments under the discovery assessments were considered to be significant given the potential lost revenue and because the income in year 2006-07 should have been declared no later than 5 October 2006. On that basis, an abatement of 25% was allowed.

16. The overall abatement applied by HMRC for year 2006-07 was therefore 85%, resulting in a penalty loading of 15% which, when applied to the culpable duties of £856.20, produced a penalty of £128.43.

Years 2011-12 to 2013-14

17. Under Schedule 41 FA 2008, there are three different types of failure to notify. These are: non deliberate; deliberate; deliberate and concealed.

18. HMRC considered the Appellant's behaviour to have been deliberate and the disclosure had been prompted by HMRC.

19. The maximum penalty chargeable under Schedule 41 is 70% and the minimum is 35%. When calculating the level of penalty chargeable, HMRC take into account the quality of disclosure for "telling" for which 30% percent mitigation can be given, "helping" for which 40% mitigation can be given and "giving access" for which 30% mitigation can be given. HMRC allowed 100% mitigation of the difference between 70% and 35%, and therefore the penalty loading was 35%, which when applied to the culpable duties in years 2011-12 to 2013-14, resulted in penalties £179.10, £2,081.68 and £1,203.68.

20. HMRC issued the Appellant with the s 29 TMA notices of assessment and penalty notices on 9 December 2015.

21. The Appellant lodged a notice of appeal with the tribunal on 17 February 2016.

Evidence before the Tribunal

22. The evidence before the Tribunal consisted of :

- copy correspondence with the Appellant and his agent;
- a schedule of properties owned by the Appellant, which included details of loan payments on mortgages secured on the properties and expenditure;
- notices of assessment and penalty determinations for the relevant years.

The Appellant's contentions

23. The Appellant's grounds of appeal, as stated in his Notice of Appeal to the Tribunal, was that his agents had not made it clear when producing the schedule of rental income that he had not actually received any income from his property portfolio as it had been used for various investments and repayments to people that he had borrowed money from. He said that over the last eight years he had not made any money and had been living off his personal bank overdraft. He had borrowed monies from other sources and provided guarantees in excess of £1 million which he was having to repay. He had made substantial losses on the investments and considered that the losses should be set against the net profit income from the rental properties. Whilst he had received a small return on the properties, it had been mainly used to carry out repairs and repay debts.

24. The rent had been collected from the tenants by Mint Ltd, a management company set up by the Appellant and his business partner, Mr Miller. The intention was that the Appellant would buy into Mr Miller's roofing company, Miller Hills Roofing, and for that purpose 50% of the rent had been paid to his business partner. A brief form of contract had been prepared by his accountants, but he did not have a

copy of the agreement, nor any records of the exact amount paid to Mr Miller. The agreement and the Appellant's purchase of a share in Miller Hills Roofing was never formally completed.

25. Unfortunately, due to the passage of time and having lost most of his records, he had been unable to provide his agents with information and evidence to substantiate the losses he had made and the full cost of expenditure on the properties. There had also been void rental periods on some of the properties, but he was unable to verify these with his agents and therefore they had not been taken into account. Although he appeared to have made a paper profit from the rental income, he was certain that in reality he had not. Under cross examination the Appellant said that he had not used a bookkeeper or accountant and that he had maintained his own records of income and expenditure. Although he had been able to supply his agents with enough information to prepare the schedule of properties and net income, a lot of detail had been lost.

26. The Appellant said that prior to 2008 he had been running a successful roofing company. Unwisely he had become involved in various investment opportunities which resulted in him losing everything and incurring substantial personal debt. He was owed money by certain individuals which resulted in bitter disputes, costly court proceedings and ultimately death threats to him and his family. On police advice he had ended up having to move into a safe house and live under a different name.

27. He said that he had been suffering severe depression and this had affected his ability to manage his own affairs. Some of the proceedings he was involved in were still ongoing.

HMRC's contentions

28. Mr Oborne for HMRC said that the onus of proof rests with HMRC to show that the Discovery Assessments and Penalty Determinations were validly made. Once that onus has been discharged the onus of proof passes to Mr Lewis to show that he has been overcharged by the Discovery Assessments and Penalty Determinations. The standard of proof is the ordinary civil standard of the balance of probabilities.

29. The Appellant had a duty to maintain records in order to comply with his obligation to make full and accurate returns of his income. He had failed to provide any primary evidence to substantiate his assertion that he had not made a profit from his rental properties.

30. Mr Oborne said that the assessments were based on information and figures the Appellant himself had provided and these had been accepted by HMRC. If the Appellant was now saying that those figures were incorrect, then it was for him to produce evidence to support any necessary adjustments.

31. Under ITTOIA 2005, s 271 ('Person liable'), 'the person liable for any tax charged (on the rental profits) is the person receiving or entitled to the profits'. It is immaterial that the Appellant did not draw on or actually receive the rental income and instead applied the income elsewhere.

32. Although the Appellant claimed to have made losses on various ventures, he had not supplied any substantive evidence, and in any event any entitlement to make a claim for loss relief had long since expired.

33. Section 50(6) TMA places the ultimate onus on the Appellant to show that the assessments are incorrect and he has failed to do that.

Conclusions

34. The Appellant failed to declare rental income that he received from his rental properties in the years in question. He and his agents have provided a property schedule setting out information, including income and expenditure, in enough detail for HMRC to raise discovery assessments.

35. Under s 29(3) TMA 1970, if HMRC discover that any profits which ought to have been assessed to tax have not been assessed, or that an assessment to tax is or has become insufficient, they may make an assessment in the amount which ought in their opinion to be charged.

36. No evidence has been provided by the Appellant to show that the assessments should be reduced. His argument that, for example, expenditure has been incurred on capital costs or on failed ventures and investments in years gone by is clearly flawed.

37. The Appellant has failed to provide any documentary evidence or meaningful information, whether in the form of business records or otherwise, to show that the property schedule and the discovery assessments are in anyway incorrect.

38. The primary onus of proof is on the Appellant. He must prove that the assessments are excessive (s 50(6) TMA 1970). If the Appellant cannot prove, on the balance of probabilities, that an assessment is excessive, the assessment must stand good. We agree with HMRC that the Appellant has not discharged that burden.

39. We find that:

i. The Appellant received previously undisclosed rental income.

ii. Losses made on investments are not allowable against the income unless claimed within Statutory time limits. No such claim has been made.

iii. The discovery assessments were competent and the Appellant has not provided any evidence to displace HMRC's figures. Indeed the assessments were based on information provided by the Appellant.

iv. The Appellant failed to notify his chargeability to income tax and submitted incorrect returns for the years in question.

v. The penalty determinations are correct and appropriate.

40. For the above reasons the appeals are dismissed and the penalty determinations confirmed.

41. 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: 29 JUNE 2017