TC06734

Appeal number: TC/2017/07284

INCOME TAX – appeal against an assessment to recover an over-repayment of income tax following the failure by the Respondents properly to record information contained in a paper return -reliance placed on the terms of an extra-statutory concession and, more generally, on the behaviour of the Respondents' officers and the fact that the repayment has been spent – jurisdiction of the First-tier Tribunal considered – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LEROY HAUGHTON **Appellant**

- and -

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

TRIBUNAL: JUDGE TONY BEARE

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 19 September 2018

The Appellant represented himself

Ms S Brown, Officer of the Respondents, for the Respondents

DECISION

1. This decision relates to an appeal by the Appellant against an assessment in the amount of £1,285.20 which was made to recover an over-repayment of income tax in respect of the tax year of assessment ending 5 April 2016.

2. The Appellant alleges that the Respondents should have waived the liability to income tax in question because either:

(a) he is entitled to the benefit of Extra-statutory Concession A19 ("ESC A19"); or

(b) more generally, the present circumstances have arisen as a result of an error on the part of the Respondents which has caused him great distress and he has spent the amount received by way of repayment.

3. ESC A19 potentially applies where various conditions are met, one of which is that, before being notified of the over-repayment, the taxpayer in question must have formed the reasonable belief "that his or her tax affairs were in order" and another of which is that the taxpayer in question must have been notified of the over-repayment after the end of the tax year following the year in which the repayment was made.

The facts

4. There is no dispute between the parties as to the facts in this case. These are as follows:

(a) On 28 October 2016, the Appellant filed, in paper form, his self-assessment return in respect of the tax year of assessment ending 5 April 2016. That tax return contained the details of a car benefit that the Appellant had received in respect of the relevant tax year of assessment;

(b) However, the Respondents did not properly record in their system the information contained in the relevant tax return. Instead, they omitted to record the car benefit, with the result that, on 17 November 2016, the Appellant was issued with a repayment of £1,284.20 in respect of the relevant tax year of assessment;

(c) On 30 May 2017, the Respondents notified that Appellant that they intended to enquire into the relevant tax return because, according to the Respondents' system, there was a discrepancy between the information contained in the relevant tax return and the information provided to the Respondents by the Appellant's employer;

(d) On 4 July 2017, the Respondents amended the relevant tax return to reflect details of the car benefit and, on 5 July 2017, the Respondents issued a closure notice to the Appellant, explaining that, because of the error made by the Respondents, they had made an over-repayment of income tax in respect of the relevant tax year of assessment and therefore £1,285.20 of tax was now due;

(e) On 31 July 2017, the Appellant appealed against the Respondents' decision, claiming that, as the repayment was the result of an error made by the Respondents and the Appellant had spent the money, the Respondents should waive the tax liability in question;

(f) On 31 August 2017, the Respondents issued a letter to the Appellant setting out their view of the matter in question. The Appellant was advised that, although the Respondents had made an error in making the repayment in question, a cursory review of the tax calculation that was sent with the repayment would have alerted the Appellant to the fact that the car benefit had been omitted and that therefore the repayment was made in error; and

(g) On 28 September 2017, the Appellant notified the First-tier Tribunal that he wished to appeal against the assessment in question.

The arguments of the parties

5. The Appellant's position is straightforward. He accepts that the tax liability has been calculated correctly but says that he properly provided all relevant information to the Respondents in respect of the relevant tax year of assessment and that he was therefore entitled to expect that the Respondents would correctly assess his tax liability in respect of the relevant tax year of assessment accordingly. The Respondents' failure to do that means that he is now being asked to pay money that he no longer has. The dispute over the assessment has caused him unnecessary stress and financial worry.

6. The Respondents contention is equally straightforward. They say that, except in circumstances where the terms of ESC A19 apply, they are not permitted by UK law to give up tax which is legally due and payable. In this case, the tax which is the subject of the tax assessment in question is legally due, even though the situation which has arisen is attributable to an error made by the Respondents, and the terms of ESC A19 have not been satisfied.

7. In relation to ESC A19, Ms Brown pointed out that the Respondents consider that the Appellant should have noticed the error when he received the calculation stipulating that the repayment was to be made. A cursory check of the calculation by the Appellant would have revealed that the car benefit had not been taken into account. It was therefore difficult for the Appellant to claim that it was reasonable for him to believe that his affairs were in order. In addition, the assessment was made within the same tax year of assessment as that in which the repayment had been made. Thus, the conditions necessary for ESC A19 to apply had not been met in this case.

8. More significantly, the Respondents allege that the First-tier Tribunal does not have the jurisdiction to consider either the question of whether or not the Respondents have acted erroneously or unreasonably in failing to apply an extra-statutory concession or, more generally, whether the Respondents are acting unreasonably in pursuing the tax in question. This is because the remit of the First-tier Tribunal is confined to the appropriate application of the tax legislation.

9. Thus, if a taxpayer wishes to challenge the Respondents' refusal to waive, whether pursuant to ESC A19 or for any other reason, a tax liability which is due in accordance with the tax legislation, the appropriate manner for him or her to do so is by way of the Respondents' complaints process and, ultimately, by way of proceedings for judicial review, assuming that he or she is not prevented from doing so by the application of any applicable time limits. It is not a matter which can be addressed by the First-tier Tribunal because it is outwith the powers conferred on the First-tier Tribunal by statute. (The First-tier Tribunal was created by Section 3 of the Tribunals, Courts and Enforcement Act 2007 "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act".)

Discussion

10. I should start by saying that the Appellant appears to have a justifiable grievance in relation to the manner in which his tax affairs have been handled by the Respondents. I consider that, having properly included the details of his car benefit within his tax return, he was entitled to expect that the Respondents would assess him accordingly. Moreover, it appears that there have been some other failings by the Respondents in dealing with his case. For example, the Appellant alleges that, when he first telephoned the Respondents to discuss the assessment, the officer of the Respondents with whom he spoke initially put it to him that, after submitting his tax return, he had amended his retained copy of the tax return. If that allegation is correct, then that is not an acceptable way for an officer of the Respondents to have behaved, particularly given that the fault for the error lay, in fact, at the Respondents' door. In addition, the Appellant claims that he has repeatedly been sent demands to discharge the assessment even though the assessment was the subject of an appeal and he has made several efforts to stop the demands from being sent. The Appellant says that this has caused him considerable distress. Finally, I was shown at the hearing correspondence from the Respondents' Complaints Team which indicates that, in their first response to the Appellant's complaint, they omitted to enclose the compensation which they had decided to give to him and therefore had to send a second letter with an increased amount of compensation.

11. However, none of this assists the Appellant in relation to this appeal because, unfortunately for him, in determining this appeal, I do not have the jurisdiction to determine whether or not he has satisfied the conditions necessary for ESC A19 to apply or, more generally, whether the Respondents' have acted reasonably in refusing to waive the tax liability in question.

12. There is no dispute between the parties that, following the submission by the Appellant of his tax return in respect of the relevant tax year of assessment, the Respondents opened an enquiry into the tax return within the 12 month window allowed by Section 9A(2)(a) Taxes Management Act 1970 and that the closure notice which has given rise to this appeal was issued in accordance with Section 28A Taxes Management Act 1970. In addition, the Appellant accepts that the tax in question has been calculated correctly. The sole basis for his challenge to the assessment is that the Respondents have acted unreasonably in that they should have waived the tax liability

in question either by applying ESC A19 or on the basis that the situation has arisen as a result of the Respondents' own error and he has spent the repayment.

13. It is well-established that the First-tier Tribunal does not have a judicial review function and therefore does not have the power to consider whether the Respondents have acted erroneously or inappropriately in refusing to apply an extra-statutory concession. At the hearing, Ms Brown referred me to the decision of Judge Bishopp in the First-tier Tribunal in *Prince and Others v The Commissioners for Her Majesty's Revenue and Customs* [2012] UKFTT 157 (TC) ("*Prince*") as support for this proposition. Whilst that decision is not technically binding on me because it is a decision of the First-tier Tribunal, I agree with the views set out in it in relation to the powers of the First-tier Tribunal judicially to review a decision by the Respondents to refuse to apply an extra-statutory concession.

14. More significantly, although it was not cited to me at the hearing, there are decisions by the Upper Tribunal and the Court of Appeal to the same effect – see *Trustees of the BT Pension Scheme v The Commissioners for Her Majesty's Revenue and Customs* [2015] EWCA Civ 713 ("*BT*") at paragraphs [125] et seq. (see paragraph [132] in particular) – and those are binding on me. In that case, both the Upper Tribunal and the Court of Appeal held that the jurisdiction of the First-tier Tribunal (and the Upper Tribunal for that matter) did not extend to a common law challenge to the fairness of the treatment afforded to a taxpayer by the Respondents' refusal to apply an extra-statutory concession.

15. As noted by Judge Bishopp in *Prince*, the fact that the First-tier Tribunal is unable to perform a judicial review function is not, in and of itself, determinative of the jurisdictional question. That is because there is a considerable body of case law which sets out the extent to which the First-tier Tribunal is entitled to take into account matters of public law in exercising its jurisdiction – see, principally, *Wandsworth LBC v Winder* [1985] AC 461, *Rhondda Cynon Taff BC v Watkins* [2003] 1 WLR 1864, *Oxfam v The Commissioners for Her Majesty's Revenue and Customs* [2009] EWHC 3078 ("*Oxfam*"), *Hok Limited v The Commissioners for Her Majesty's Revenue and Customs* [2012] UKUT 363 (TCC), *The Commissioners for Her Majesty's Revenue and Customs v Noor* [2013] UKUT 71 (TCC) and *BT*. There is an excellent and thorough summary of the effect on this question of all of the above decisions in the Upper Tribunal decision in *R & J Birkett v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKUT 0089 (TCC) ("*Birkett*") at paragraphs [24] and following.

16. I will not rehearse in this decision all that is said about this question in the above decisions but I will confine myself to stating the conclusions that should be drawn from them, as stated by the Upper Tribunal in *Birkett*, which are that:

(a) the First-tier Tribunal has no general judicial review jurisdiction;

(b) However, it may in certain cases have to decide questions of public law either in the course of exercising the jurisdiction that it does have or to determine whether it has jurisdiction in the first place;

(c) In each case, therefore, in assessing whether a particular public law point is one that the First-tier Tribunal can consider, it is necessary to consider the specific jurisdiction that the First-tier Tribunal is exercising and then to determine whether the particular public law point that is sought to be raised is one that falls to the First-tier Tribunal either in exercising that jurisdiction or in determining whether it has jurisdiction; and

(d) Since the First-tier Tribunal is a creature of statute, this is ultimately a matter of statutory construction.

17. Applying the above principles in the present case, it is clear that the dispute between the parties does not relate to the amount of tax which is due. That has been agreed. Instead, the dispute relates to whether or not the Respondents ought to have exercised a discretion to waive the tax in view of their prior error and the fact that the Appellant had spent the repayment before he received the assessment. There is nothing in the tax legislation which suggests that the proper exercise of that discretion is a matter which falls within the ambit of the First-tier Tribunal. As Judge Bishopp put it in *Prince*:

"The position here is very different. The tribunal is not being asked, as in *Oxfam*, to determine how much tax is due—that has already been agreed—but whether HMRC should be required to exercise their discretion not to collect the tax. That is not a tax dispute at all, but a matter governed by public or administrative law, and precisely the kind of issue which must be determined by judicial review. Nothing in the legislation could be construed as conferring any jurisdiction to determine such an issue on this tribunal, nor do I see any basis on which an argument of legitimate expectation that a statutory duty (as HMRC's obligation to collect tax which is due is) will, or should, be waived could properly be regarded as the province of a tribunal whose task is to determine the amount of tax which is due: in that, there is a clear distinction to be drawn between this case and *Oxfam*."

18. The above means that the Appellant's appeal must necessarily fail on the grounds that I have no jurisdiction to hear his appeal. His sole remedy in this case is to seek to rely on the process that exists for making complaints about the behaviour of the Respondents. That means pursuing this issue initially with the Complaints Team within the Respondents – which he has already done - and then, if he is not satisfied with the outcome of that process, asking the Adjudicator for an independent review of his situation. Ultimately, subject to his compliance applicable time limits, he might be able to make a claim for judicial review.

19. For the reasons set out above, I must dismiss this appeal.

20. Given the reasoning set out above, it is, strictly speaking, unnecessary for me to express any view on whether or not I believe that the terms of ESC A19 are satisfied in this case. However, I can see that there may be some force in the Respondents' contention that, when the Appellant received such a significant repayment of income tax, it was incumbent on him to try to understand why that was the case and not simply to spend the repayment. If the Appellant had looked at the calculation which gave rise to the repayment or had telephoned the Respondents to confirm that the repayment had validly been issued, then he would have discovered that the repayment

was based on an error by the Respondents and the present situation would not have arisen. So there may be some merit in the Respondents' contention that it would have been unreasonable for the Appellant to have held the belief, prior to his receiving the assessment in question, "that his or her tax affairs were in order". In any event, even if that is not the case, the Respondents notified the Appellant of the over-repayment within the same tax year as that in which the repayment was made and therefore one of the other conditions for ESC A19 to apply appears not to have been satisfied in this case.

21. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 26 September 2018