[2019] UKFTT 400 (TC)

TC07215

Appeal number: TC/2017/00406

Income tax - ss 29 & 36 TMA 1970 - discovery assessments - disputed expenditure - whether assessments appropriate and correct - yes - appeal dismissed and assessments confirmed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MICHAEL GALBALLY **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER NOEL BARRETT

Sitting in public at Taylor House, 88 Rosebery Avenue, London on 11 October 2018

Ms Maria Howard for the Appellant

Ms Beverly Levy, Officer of HMRC, for the Respondents

DECISION

The Appeal

1. This is an appeal by Mr Michael Galbally ('the appellant') against:

   i. discovery assessments made under ss 29 and 36 TMA 1970 for the tax years ended 5 April 2010, 2011 and 2012.

   ii. closure notices for the tax years ended 5 April 2013 and 2014 under s 28A TMA 1970 following an enquiry into the self-assessment tax returns of the appellant, as provided for by s 9A TMA 1970.

2. The table below shows the amount of the assessments.

Tax Year Ending	Decision	Date of Issue	Amount Charged
05/04/2010	Discovery Assessment	31 March 2016	£627.80
05/04/2011	Discovery Assessment	5 August 2016	£3,423.69
05/04/2012	Discovery Assessment	5 August 2016	£2,312.72
05/04/2013	Closure Notice	8 August 2016	£1,445.35
05/04/2014	Closure Notice	8 August 2016	£1,706.08

3. HMRC raised assessments and made amendments to the appellant's tax returns on the basis that he had not provided sufficient evidence to support expenditure claimed in his returns.

4. The expenditure in dispute related to motoring, materials, protective clothing, use of the appellant's home as an office and telephone costs. Sums for expenditures have now been agreed for all areas except motor and materials costs, which remain in dispute and are the subject of this appeal.

5. The matters at issue are:

   i. Whether HMRC's decision to disallow expenses claimed in the years ending 5 April 2010, 2011, 2012, 2013 and 5 April 2014 is correct.

   ii. Whether HMRC discovered that assessments to tax were insufficient for the tax years ending 5 April 2010, 5 April 2011 and 5 April 2012 and whether the loss of tax for these years was brought about carelessly.

iii. Whether HMRC have correctly raised the discovery assessments under ss 29 and 36 TMA 1970.

Background

6. The appellant is self-employed, running a general cleaning business, although in the main he carries out window cleaning. He was also the 50% owner with his wife Carol Galbally of Magic Mop Limited. The company was dissolved in March 2018. They were both directors. He undertook work for the company and expenses generally were of a similar nature, that is they included motor vehicle costs and cleaning materials. The appellant says that the company expenditure was separately identified in the company's accounts, but copies of the accounts were not provided to the Tribunal.

7. The appellant submitted his personal tax return for year ending 5 April 2013 on 30 January 2014.

8. On 10 September 2014, a check was opened into the appellant's 2013 return. HMRC asked to arrange a visit to his business premises and to have sight of the business records.

9. The appellant's agent Ms Maria Howard of Guildway Accountants Limited explained that there were no business premises and that the business records were somewhat limited. A meeting was arranged for 4 November 2014 at her offices.

10. Following the meeting, records were taken by the HMRC officers for further review.

11. Following an exchange of correspondence and further information being provided by the appellant, HMRC on 2 October 2015 made proposals to settle matters which reduced the total 2013 year expense claims from £21,798 to £12,276, which increased the appellant's net profit from £4,736 to £14,258. HMRC asked for records relevant to earlier years and issued a copy of Factsheet FS/CC9 which deals with penalties for inaccuracies.

12. On 24 December 2015 HMRC opened a check into the appellant's self-assessment tax return for the year ended 5 April 2014, received by HMRC on 26 January 2015.

13. A letter to HMRC from the agent dated 11 January 2016 included a copy of a letter dated 16 October 2015, which HMRC say they had not previously received. The letter agreed that certain materials had been incorrectly claimed, but maintained that the original claims stood in respect of other categories of expenditure.

14. On 31 March 2016, HMRC issued a notice of discovery assessment for the year ending 5 April 2010 .

15. On 20 April 2016 the agent submitted an appeal to HMRC against all the assessments.

16. HMRC issued their proposals to settle matters on 24 May 2016.

17. On 30 June 2016 HMRC set out their proposals for the years ending 5 April 2010 to 5 April 2014 inclusive, to disallow 35% of the expenses claimed in line with their findings from the enquiry into the 2012-13 return.

18. On 5 August 2016 HMRC issued notices of discovery assessment for the years ending 5 April 2011 and 2012 and a notice of amended assessment for the year ending 5 April 2010.

19. Closure notices were issued on 8 August 2016 to close the enquiries into the 2013 and 2014 tax returns.

20. On 5 September 2016 the agent appealed against the assessments and closure notices. HMRC responded on 23 September 2016 that their view of the matter had not changed.

21. Following a review request, HMRC upheld their decision on 24 November 2016.

22. The appellant submitted an appeal to the Tribunal Service dated 22 December 2016.

23. An application to enter HMRC's Alternative Dispute Resolution ('ADR') process was accepted in February 2017. The process was unsuccessful in resolving matters. However, following the ADR meeting further correspondence and documentation was received from the agent.

24. Following a further exchange of correspondence, sums for expenditure were agreed for all areas except motor vehicle and materials, which remain in dispute.

Motor vehicle expenses

25. The appellant says that he undertakes window cleaning services which involves travelling from his home in South Woodham Ferrers, Chelmsford, Essex to London W1. The journey is between 44 and 55 miles each way depending on the route taken, and therefore is a minimum of 88 miles per day, not allowing for traffic diversions etc. He says that a daily average of 100 miles would be reasonable. The window cleaning work is carried out for the customers and on the days shown below:

- Modelzone - Mondays Wednesdays Fridays and Saturdays
- Knottnews - Fridays
- Pizza express - Tuesdays and Thursdays

- Ask Electronics - Mondays and Thursdays
- David and Goliath - Mondays and Fridays

26. The appellant also undertakes work for Magic Mop Limited, which similarly includes window cleaning and the general cleaning of buildings. Costs are calculated entirely independently as its customers have different locations and a different time structure. The appellant agrees that some of his visits to London were linked to the limited company although he has not provided any details in that regard.

27. The vehicle used by the appellant for his own personal trade was a Vauxhall Corsa. He claimed the following expenses:

- Fuel - £15 per day x 6 days per week x 48 weeks per year = £4,320 which equates to £90 a week.

- Parking – (no receipts because expenditure was mainly parking meters), £14 per day x 5 days per week x 48 weeks = £3,360. Parking charges had only been charged for five days as there were occasions when the appellant was able to park at non-chargeable times. Parking fines had not been claimed.

- Service and repairs (as per invoices provided) £968.44

- AA membership = £258

- Road Fund Licence = £125

The total claimed motor expenses were £9,031.44.

28. HMRC could not agree the appellant's figures, mainly because it was not accepted that the appellant drove from his home to London six days a week.

29. The investigating HMRC officer, Officer Valladares, noted that invoices for the appellant's vehicle repairs showed that the Vauxhall Corsa had done 16,122 miles on 26 June 2012 and 23,576 miles on 15 November 2012, that is a total of 7,456 miles in 142 days. This equated to 367.55 miles per week. As it is 88 miles from the appellant's home to Oxford Circus and back, he could only be averaging less than four return journeys per week.

30. Officer Valladares said that £90 a week fuel as claimed by the Appellant equates to between £1,440 and £1,830 during the period from 26 June 2016 to 15 November 2016, a period of 142 days which implied an average fuel cost of £1.38 per litre (based on the invoices supplied) and the fuel consumption of between 25.5 and 32.1 mpg, whereas the average fuel consumption of a Vauxhall Corsa is up to 65 mpg depending on the make and model, suggesting that the appellant's mileage was less than claimed.

31. Furthermore, some of the journeys would have related to work undertaken by the appellant on behalf of the limited company, Magic Mop Limited.

32. Officer Valladares therefore suggested that the appellant had made five journeys per week, two of which related to the limited company and that the fuel cost of the journey was:

> 88 miles divided by 65 mpg x £6.27 = £8.49. (Mileage per day divided by average fuel consumption x fuel cost per gallon)

33. Officer Valladares therefore proposed that as a rounded up figure of £8.50 x 48 weeks per annum x three journeys per week, the fuel claim should be £1,224, not £4,320 as claimed.

34. The parking fees claim should also be reduced pro-rata i.e. 48 x 3 x days per week x 14 = £2,016 per annum not £2,800 as claimed.

35. Also, the sum of £144 relating to repairs to a Vauxhall Meriva 1.4 VVT Turbo had been included in the repairs/servicing figure of £968.44 claimed by the Appellant, whereas only the Vauxhall Corsa had been used in the business. Therefore £144.00 would be disallowed.

36. Taking all of the above into account the claimed motor expenses were reduced from £9,031.44 to (£1,224, £2,016 and £824) £4,064.

37. The appellant argues that he often works on bank holidays, when shops are open and need their windows cleaned. The average fuel claimed of £15 per day was correct. He also had to travel between shops when fuel efficiency was less. He maintained that he was travelling six days a week, not five, and sometimes had to use the Vauxhall Meriva for the business as the Vauxhall Corsa was too small to carry some of the materials and equipment he needed. The appellant did not address the point made by Officer Valladares that some of the mileage must have related to work undertaken for Magic Mops Limited.

Materials

38. The appellant claimed £3,471 for materials in his 2013 return. Office Valladares took the view that from the evidence supplied many of the items claimed were non-allowable as they did not appear to relate to window cleaning. He originally proposed to disallow 80% of the items claimed, but following an analysis of the expenditure by the appellant's agent had disallowed 20%. In addition HMRC reduced the appellant's claim in respect of materials to £2,617 on the basis that £241.99 was either uninvoiced or illegible and £412.01 was worthy of challenge as disallowable.

Burden of proof

39. Under common law the onus of proof rests with the person making the assertion. HMRC therefore bear the burden to the ordinary civil standard for showing the competence for the discovery assessments. Once that onus has been discharged the onus of proof passes to the appellant to show that he has been overcharged by the assessments. Section 50(6) TMA places the ultimate onus on the appellant to show that the assessment is incorrect.

40. The onus of proof rests with HMRC to show that they have made a discovery under s 29 TMA 1970. The onus is on HMRC to show that any such failure was due to the appellant acting carelessly, thus allowing HMRC to raise extended time limit assessments in accordance with s 36 TMA 1970.

41. Once this has been shown, the onus reverts back to the appellant to provide evidence to show that the assessments for the years ending 5 April 2010, 2011 and 2012 are excessive. Otherwise the assessments issued under s 29 TMA 1970 shall stand good.

Legislation

42. The relevant legislation at the relevant time, in pertinent parts as follows:

43. **Section 12B (1) TMA 1970 -**

> "Any person who may be required by a notice under Section 8, 8A or 12AA of this Act to make and deliver a return for a year of assessment or other shall - (a) keep all such records as may be requisite for the purpose of enabling him to make and deliver a correct and complete return for the year or period, and (b) preserve those records until the end of the relevant day, that is to say, the day mentioned in subsection (2) below."

44. **Subsection 2 of Section 12B TMA 1970 -**

> "The day referred to in subsection (1) above is (a) in the case of a person carrying on a trade, profession or business alone or in partnership or a company, the fifth anniversary of the 31st January next following the year of assessment or (as the case may be) the sixth anniversary of the end of the period."

Section 29 Taxes Management Act 1970 - 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 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.

(2) [not applicable]

(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) 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.

36 Loss of tax brought about carelessly or deliberately etc.

(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).

(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax-

(a) brought about deliberately by the person,

……..

may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period).

Section 34 Income Tax (Trading and Other Income) Act 2005 - Expenses not wholly and exclusively for trade and unconnected losses.

HMRC's contentions

45. In this case the appellant did not keep the records required by legislation to support the figures in his self-assessment tax return for the year ending 5th April 2013 as required by the legislation at s 12B (2) TMA 1970. The appellant says that any of his records were destroyed by his wife during a period of illness.

46. HMRC recognises that the appellant would have incurred expenses during the year in question, therefore they have applied what they believe are fair reductions taking into account the limited evidence the appellant has provided in support of the amounts.

47. When completing his Self-Assessment Tax Return for the year ending 5 April 2013 the appellant used estimated figures for expenses claimed. Furthermore there were very few records available and insufficient evidence to support the expenses claimed for motor expenses and materials.

48. HMRC were therefore correct to reduce the various expenditure claims in the returns resulting in an increase in profit and income tax due, which had failed to be returned.

49. Following the completion of the ADR process which the appellant entered into, both parties attempted to settle matters by reaching a compromise on all items of expenditure save for motor expenses and materials.

50. HMRC are sympathetic to the appellant's wife's illness and the effect this had on his health, but the onus is on the appellant to provide evidence to support all figures submitted in his tax returns.

51. HMRC were correct to enquire into the appellant's 2014 tax return based on their findings with regard to the appellant's 2013 return because of the limited records which had been provided.

52. HMRC assert that they were also correct to issue discovery assessments for the years ending 5 April 2010, 2011 and 2012, because during the course of the enquiry into the year ending 5 April 2013 they discovered that expenditure claimed in the tax return was excessive.

53. HMRC submit that the onus is on the appellant to show that the amendments to the self-assessment tax returns for the years ending 5 April 2013 and 2014 are excessive.

54. HMRC say that in order to show that the assessments are excessive the appellant has to show that the expenditure claimed in the returns is correct and provide documentary evidence in support. HMRC say that he has not done this.

55. In the *Verschueren* case, at paragraph 89 Judge Clark says:

> "In the absence of any evidence to persuade us that the amounts assessed ... should be reduced, the assessments stand..."

56. HMRC say that as in the *Verschueren* case, there has been a lack of evidence in this case and that the assessments for the years ending 2010, 2011, 2012, 2013 and 2014 should stand.

57. In the absence of any evidence to the contrary, a 'presumption of continuity' must be made. Therefore, the insufficiency of records to support expenses claimed in the years ending 5 April 2013 and 5 April 2014 would apply to earlier years and the expenses claimed would also have been excessive.

58. HMRC relies on the definition of 'discovery' given at paragraph 37 in the case of *Charlton v HMRC*:

> "In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment."

59. The loss of tax in the 2009-10, 2010-11 and 2011-12 tax years was brought about at the very least due to carelessness and they were therefore correct to raise the discovery assessments in accordance with legislation at s 29 (4) TMA 1970.

60. The term "negligent conduct" has been replaced by "brought about carelessly". At paragraph 22 in *Anderson (Deceased) v HMRC* Judge Berner says with regards negligence:

> "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."

61. In order to show that the assessments are excessive the appellant has to show that the expenditure claimed in the returns is correct and provide documentary evidence in support. HMRC say that he has been unable to do this.

62. In the case of *Verschueren v HMRC*, Judge Clark says at paragraph 78:

> "Unless the taxpayer can satisfy the Tribunal that he has been overcharged, the Tribunal is unable to adjust the assessments in the amounts which have been determined for HMRC. For the Tribunal to be satisfied that assessments should be reduced, there must be evidence to support that conclusion."
>
> and at paragraph 89
>
> "In the absence of any evidence to persuade us that the amounts assessed should be reduced, the assessments stand..."

Appellant's Contentions

63. Regarding motor expenses, the appellant's arguments are set out in paragraph 37 above. At the hearing, he reiterated those arguments. With regard to both motor vehicle costs and material costs he said that almost all his primary records had been destroyed by his wife and that he disagreed with HMRC's reasoning and figures. He was not however able to offer any explanation as to why he had not made any attempt to reconstitute his motoring and materials expenditure, or in particular identify the similar expenditure claimed by Magic Mop Limited so as to show that there had been no duplication.

Conclusion

64. The primary onus of proof is on the appellant to prove that the assessment is excessive (s 50(6) TMA 1970). If the appellant cannot prove that on the balance of probabilities, the assessment must stand good.

65. Judge Clark said at paragraph 79 of the case of *HMRC v John Verschueren* [2012] UKFTT 184 (TC 01879):

> "...The absence of any documentary records of expenditure incurred is a major obstacle to a claim for the deduction of expenditure. It does not necessarily prevent some form of allowance for expenditure, but any claim has to be supported by some form of more general evidence..."

66. In this case, the appellant has also acted carelessly. He did not take the care expected by a reasonable person running a business to keep receipts in support of the expenditure figure claimed in the tax returns for the years ending 5 April 2013 and 2014, as required by the legislation at s 12B TMA 1970. HMRC submit that this would have more likely than not been the case for earlier years.

67. Where it is discovered that income assessment of tax is insufficient, then s 29 TMA 1970 provides authority for HMRC to make an assessment of tax in order to make good to the Crown the loss of tax which ought to have been assessed.

68. HMRC, by virtue of s 29(3) TMA, shall only make an assessment where the failure to include income in the tax return was brought about carelessly or deliberately by the tax-payer or someone acting on his behalf.

69. S 36 TMA 1970 allows HMRC to assess the tax due outside of the ordinary time limits at s 34 TMA 1970. The legislation at s 36 (1) TMA 1970 extends the time limit to 6 years after the end of the year of assessment to which it relates in a case when the loss of tax was brought about carelessly which HMRC say is the case in this case.

70. Because HMRC discovered that assessments for tax for the years ending 5 April 2010, 2011 and 2012 were insufficient, they were entitled to raise assessments to make good to the Crown the loss of tax by disallowing amounts for expenses. This in turn increased the tax liability for these years.

71. In the case of *Verschueren v HMRC*, Judge Clark says at paragraph 78:

> "Unless the taxpayer can satisfy the Tribunal that he has been overcharged, the Tribunal is unable to adjust the assessments in the amounts which have been determined for HMRC. For the Tribunal to be satisfied that assessments should be reduced, there must be evidence to support that conclusion."

72. HMRC's assessments and conclusions as set out in paragraphs 28 – 37 are in our view reasonably arrived at. The assessments were lawfully made and in our view are correct.

73. The assessments for the years ending 2010, 2011, 2012, 2013 and 2014 should therefore stand.

74. The Tribunal accordingly dismisses the appeal and upholds the assessment amounts as set out in paragraph 2 above.

75. 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: 19 JUNE 2019