



[2019] UKFTT 692 (TC)

TC07465

INCOME TAX – Discovery Assessment – Section 29 Taxes Management Act 1970 - whether HMRC made a discovery of an insufficiency to tax – whether it was “stale” – Beagles applied – duty of candour – obligation on HMRC to assist the Tribunal in furthering the overriding objective of dealing with cases fairly and justly

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/03178

BETWEEN

BASHIR AHMED JAFARI

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: JUDGE JAMES AUSTEN

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 2 August 2019

Mr Abdus Salam for the Appellant

Mrs Paula O’Reilly, Litigator of HM Revenue and Customs’ Solicitor’s Office, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against closure notices and discovery assessments in respect of income tax for the tax years 2008/9 to 2013/14 (inclusive). If upheld, the notices and assessments would require the appellant to pay additional tax amounting to £143,234.56.

2. After hearing Mr Salam and Mrs O'Reilly and with the agreement of the parties (pursuant to Rule 35(3) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009) (the "Rules"), having given my decision orally at the conclusion of the hearing, I gave a short written decision, without reasons. That: (1) set aside the discovery assessment relating to the tax year 2009/10; and, subject to that, (2) dismissed the appeal. That Decision Notice was released on 6 August 2019.

3. HMRC has now requested full reasons for my decision.

BACKGROUND

1. The appellant was issued with closure notices and discovery assessments as follows:

(1) A discovery assessment dated 24 February 2016 in respect of the tax year 2008/9;

(2) A purported closure notice dated 24 February 2016 in respect of the tax year 2009/10 (HMRC subsequently acknowledged that this was invalid);

(3) A purported discovery assessment dated 15 August 2018 in respect of the tax year 2009/10;

(4) A closure notice dated 25 February 2016 in respect of the tax year 2010/11;

(5) A discovery assessment dated 26 February 2016 in respect of the tax year 2011/12;

(6) A discovery assessment dated 26 February 2016 in respect of the tax year 2012/13; and

(7) A discovery assessment dated 26 February 2016 in respect of the tax year 2013/14.

2. In each case, the closure notices and discovery assessments related to the under-declaration of income from the appellant's property interests.

3. I was told that HMRC had additionally issued the appellant with related penalties. The appellant had not appealed those penalties and I was not required to consider them. The deliberate nature of the appellant's non-disclosure underpinned – in HMRC's view – the timeliness of each discovery assessment.

CLOSURE NOTICE AND DISCOVERY ASSESSMENTS OTHER THAN 2009/10

4. Following preliminary exchanges between the Tribunal and the parties' representatives at the beginning of the hearing (including a short adjournment to allow Mr Salam to take the appellant's instructions), the appellant decided to offer no case in respect of the closure notice and discovery assessments. With the agreement of the Tribunal, the appellant withdrew his evidence and submissions. It is not necessary in this decision to review the appellant's motivations for doing so: they have no relevance to the outcome, which is that he must pay the tax due. Save as follows, I make no findings of fact in respect of the closure notice and the discovery assessments or the circumstances that led to them.

5. As a result of the above, I dismissed the appellant's appeal in respect of the 2010/11 closure notice and each of the discovery assessments except for the discovery assessment relating to the tax year 2009/10, which is dealt with separately below.

2009/10 DISCOVERY ASSESSMENT

6. Having indicated in the hearing that I was minded to make the decision summarised above – but before confirming that decision – I gave the appellant and HMRC an opportunity to discuss settling the dispute (and other matters not before the Tribunal) during a short adjournment.

7. Prior to that adjournment, I asked HMRC for details of the purported discovery assessment for the tax year 2009/10.

8. Mrs O'Reilly told me that:

(1) HMRC had erroneously issued a closure notice on 24 February 2016 in respect of the 2009/10 tax year, not at that time having identified that there was no enquiry open into that tax year; and

(2) HMRC belatedly realised that the 24 February 2016 closure notice for 2009/10 was invalid and purported to cure the defect by issuing a s.29 discovery assessment on 15 August 2018.

9. I asked Mrs O'Reilly to explain the date and circumstances of the discovery for 2009/10. She told me that the discovery had been made on or around 24 February 2016 when the purported closure notice had been issued. I enquired whether there had been any subsequent fresh discovery, for example at or near the date on which the discovery assessment was issued on 15 August 2018. Mrs O'Reilly confirmed that there had not.

10. This accorded with HMRC's written pleadings, which I had read in advance of the hearing (and which had prompted my questions to Mrs O'Reilly), and with the documents in my bundle, which I was able to review after the hearing. HMRC's skeleton argument included the following relevant paragraph:

The year 2009/10 was closed on 24 February 2016 by issuing of a closure notice under S28A (1) & (2) TMA 1970. When preparing the Statement of Case, it became apparent that this was incorrect. The reason being that although a return for 2009/10 was initially received on 16 July 2013 this was not captured and was returned as unsatisfactory on 28 October 2013. The S9A TMA 1970 enquiry notice was issued on 26 July 2013 however no return had been captured at that time. It follows that the enquiry notice and the resulting closure notice issued under S28A (1) & (2) TMA 1970 were invalid. To rectify that situation HMRC issued an assessment on 15 August 2018 under S29 Taxes Management Act 1970. As the taxpayer had already appealed the decision HMRC treated the assessment to have been issued and appealed on the same day. It is this assessment HMRC will be requesting the Tribunal to determine.

11. On the basis of the documents before me, HMRC's written pleadings and Mrs O'Reilly's responses to my questions, I make the following findings of fact:

(1) HMRC discovered an insufficiency to tax in respect of the 2009/10 tax year no later than on 24 February 2016 (and in view of my decision predicated on that date, it is unnecessary to ascertain any earlier date on which the insufficiency was discovered);

(2) There was no new discovery when HMRC issued the s.29 discovery assessment on 15 August 2018, or at any time between 24 February 2016 and then.

12. I reminded Mrs O'Reilly that the Upper Tribunal in *Beagles v HMRC* [2018] UKUT 380 (TCC) and both the Upper Tribunal and the Court of Appeal in *Tooth v HMRC* [2018] UKUT 38 (TCC); [2019] EWCA Civ 826 had recently confirmed that to be valid, a discovery of an

insufficiency to tax pursuant to s.29 TMA 1970 must retain its essential “newness”, which is to say that it must not be “stale”.

13. I did not have the benefit of any substantive legal submissions on this point. They would have been superfluous. The relevant authorities were well known to me and, I gathered from our exchanges, to Mrs O’Reilly. Mr Salam did not contribute to the discussion. There was no disagreement as to the principles involved. The relevant authorities include: *Cenlon Finance Co. Ltd. v Ellwood* [1962] AC 782; *Langham v Veltema* [2002] STC 1557; *Corbally-Stourton v Revenue and Customs Commissioners* [2008] STC (SCD) 907; *Hankinson v Revenue and Customs Commissioners* [2012] STC 485; *Charlton v Revenue and Customs Commissioners* [2013] STC 866; *Pattullo v Revenue and Customs Commissioners* [2016] STC 2043; *Tooth*; and *Beagles*.

14. In the interests of brevity, I do not propose to examine the above-mentioned authorities any further in this decision. We did not explore them in any detail at the hearing. They are reviewed in *Beagles*, especially at [34] to [61] (and applied to the facts of that case at [62] to [75] and at [76] to [87]) and I gratefully adopt and apply the Upper Tribunal’s approach and conclusions, which conveniently set out the law as it presently stands. They are, after all, binding on this Tribunal.

15. I considered whether it was appropriate for the Tribunal to raise the “staleness” issue given that Mr Salam had not seen fit to do so on behalf of the appellant. I decided that it was. The issue went to the essential validity of the 2009/10 discovery assessment. In that regard, it was akin to the “competence” issue in *Burgess and Brimheath v HMRC* [2015] UKUT 578 (TCC) – another discovery assessment case. It follows, in my view, that HMRC had the burden of establishing the validity of the 2009/10 assessment irrespective of whether or not the appellant had pleaded its invalidity. In that context, it was appropriate for the Tribunal to require HMRC to do so.

16. With those considerations in mind, I expressed to Mrs O’Reilly my view that on the information available to me it was plain that the discovery for the 2009/10 tax year in this case was “stale” when the discovery assessment was issued on 15 August 2018 – it was then at least 30 months old.

17. In response, Mrs O’Reilly confirmed HMRC’s view that the doctrine of “staleness” was unsound and devoid of statutory authority.

18. It is clearly open to HMRC to consider that certain decisions of the Tribunals and Courts mis-state tax law. That includes whether or not the concept of “staleness” should pertain to s.29 discovery assessments. HMRC is a party to each such case and can exercise its appeal rights if it wishes. But as I said to Mrs O’Reilly, subject to any extant appeals, the law to be applied by this Tribunal is that authoritatively promulgated by the Tribunals and Courts.

19. It follows that I rejected HMRC’s view on “staleness” and decided to apply the law as stated in *Beagles*.

DISPOSITION

20. On the basis of the law as it presently stands, I have no difficulty in deciding that the s.29 discovery assessment raised by HMRC in respect of the 2009/10 tax year was invalid due to “staleness”. It is therefore of no effect and the appellant is discharged from any liability arising in respect of it.

21. For completeness, whilst the penalty relating to the purported 2009/10 assessment is not before this Tribunal (and I have no powers in respect of it), it seems logical that if the assessment is void then by extension the penalty attaching to it must also fall. I would expect HMRC to re-calculate the penalties accordingly.

22. As noted at [5] above, in the absence of a case by the appellant in respect of the other years subject to appeal, I confirm the remaining closure notice and discovery assessments.

FURTHER COMMENTS

23. Having reflected after the hearing, I am disappointed that HMRC's pleadings failed to deal with the "staleness" issue dealt with in this decision. I have no doubt that had I not raised the invalidity of the 2009/10 assessment at the hearing, it would have escaped scrutiny altogether and the appellant would have paid tax (and penalties) not properly due.

24. It is true that the paragraph from HMRC's skeleton argument quoted at [10] above was sufficient to alert the Tribunal to the possibility that the 2009/10 assessment was invalid – but only because I had carefully read the papers in preparation for the hearing and was already familiar with the relevant cases.

25. No attempt was made to bring to the Tribunal's attention the relevant jurisprudence on discovery assessments, which undoubtedly incorporates the concept of "staleness" as matters stand. HMRC must have been aware that the 30-month delay between the discovery being made and the assessment being issued would – most probably – have led the Tribunal to conclude that the 2009/10 discovery was "stale" (absent any subsequent new discovery), making that assessment invalid.

26. That HMRC has pending appeals which might give rise to a future change in the law is immaterial. The options open to HMRC in a case such as this are either: (1) to make an application to stay affected proceedings in this Tribunal pending the outcome of the relevant appeals; or, failing which, (2) candidly to acknowledge the position, accept the inevitable adverse decision, and apply for permission to appeal.

27. It is one thing for HMRC to take a principled stance that certain decisions of the Courts and Tribunals contain errors of law and to argue accordingly (but frankly) in affected cases. But it is quite another thing to gloss over decisions which HMRC knows but dislikes and to proceed as if they do not exist. Doing so obscures the true position and risks the Tribunal coming to a legally insupportable conclusion.

28. The latter course of action was not properly open to HMRC. In my view, in adopting it in this case, HMRC did not act with the necessary candour. In fact, regrettably, I would say that HMRC failed to meet its obligation to "help the Tribunal to further the overriding objective" of dealing with cases fairly and justly under Rule 2(4)(a) of the Rules.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

29. 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.

**JAMES AUSTEN
TRIBUNAL JUDGE**

Release date: 13 November 2019