Neutral Citation: [2024] UKFTT 867 (TC)

Case Number: TC09297

FIRST-TIER TRIBUNAL
TAX CHAMBER

Sitting in public in Taylor House, London

Appeal reference: TC/2020/00015

INCOME TAX - CAPITAL GAINS TAX – Assessment procedure – discovery assessment - whether an assessment can assess both income tax and capital gains tax on the same sum - no

Heard on: 6 September 2024
Judgment date: 26 September 2024

Before

TRIBUNAL JUDGE MALCOLM FROST
MOHAMMED FAROOQ

Between

MARK STEWART WYATT

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ronald Wyatt (Father of the Appellant)

For the Respondents: Paul Marks litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This decision relates to a preliminary question as to the validity of certain discovery assessments raised by HMRC.

2. For the reasons set out below, we have decided that the assessments are not valid.

3. We have set out directions for the resolution of the appeal at the end of this decision.

THE FACTS

4. The substantive dispute relates to a number of assessments raised by HMRC in respect of income or gains said to have been realised by the Appellant on certain property matters. A number of the assessments relate to rental income said to have been received, other assessments relate to property development activities said to have been carried out by the Appellant.

5. This decision relates to the assessments raised for tax years 2007/08 and 2009/10 (the "Relevant Assessments").

6. In both of those tax years, HMRC consider that the Appellant realised a profit from property development activities.

7. On 16 March 2016 Officer Paul Sanders of HMRC wrote to the Appellant issuing what was referred to as a 'protective' assessment for tax year 2009/10. The cover letter on 14 March 2016 stated:

> "I propose to issue an estimated assessment for the tax year 2009/10 to cover potential lost duties for Income Tax and / or Capital Gains, in respect of the disposal of the two properties referred to above."

8. Following further correspondence, on 31 July 2018 Officer Sanders wrote to the Appellant's then agent setting out in detail as to why he considered that the Appellant had undertaken developments of various properties as a trading venture. That letter was accompanied by two tax calculations for each property: an income tax calculation, and a capital gains tax calculation.

9. On 28 September 2018 Officer Sanders wrote to the Appellant enclosing all the assessments which are now under appeal (noting that the 2009/10 year had already been assessed and remained under appeal). In that letter, Officer Sanders restated his view that the relevant disposals were part of a trading venture. However, Officer Sanders also went on to make it clear that assessments would be issued on an alternative basis. He said:

> "However in the event that we are unable to reach agreement and if the subsequent appeals are listed for Hearing, I feel that it would be prudent to arrange for assessments to be issued on the alternative basis i.e. to include property disposals as both, on trading account and on capital account.
>
> The estimated assessments and amendments referred to below are being issued to recover potential lost duties for Income Tax / NIC and / or Capital Gains Tax."

10. Unfortunately however, the Relevant Assessments did not set out separate assessments for the tax due (i) if the disposals were considered to be trading transactions and (ii) if they were considered capital disposals. Instead, the Relevant Assessments each contained a single figure which was the sum of the amount that would be due on a trading transaction and the amount that would be due on a capital disposal. The assessments therefore purported to tax the same disposal proceeds twice – once as a trading disposal and once as a capital disposal.

11. In particular, in relation to the Relevant Assessments:

(1) For 2007/08, the assessment was for £184,586.98, when an assessment purely on the basis of a trading disposal would be for £90,360.18

(2) For 2009/10, the assessment was for £228,544.05, when an assessment purely on the basis of a trading disposal would be for £123,595.22

12. The appeal against the assessments was made on 12 December 2019, and has therefore been ongoing for some time.

13. On 27 August 2024 – nine days before the date of the present hearing, HMRC wrote to the Appellant pointing out the issue and issuing a fresh assessment for each of the two years of the Relevant Assessments. Those fresh assessments set out only the trading figure.

THE ISSUE

14. The issue before us, which we have decided to consider as a preliminary matter, is whether or not the Relevant Assessments were validly issued.

15. Having noticed the potential issue, HMRC quite properly put the matter before the Tribunal and invited the Tribunal to express a view.

THE LAW

16. The key legislative provision governing the making of a discovery assessment is s 29 Taxes Management Act 1970 (TMA), which provides (so far as is relevant)[1]:

> 29 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
>
> (c) 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.
>
> ...

DISCUSSION

17. The key point that HMRC make is that s 29 provides that an officer can only make an assessment in the amount which "in his opinion" is to be charged to make good to the Crown the loss of tax. In the present case the Relevant Assessments effectively charge the underlying disposals to tax twice – exceeding the amount that the officer considered was needed to make good the loss of tax.

18. Having spotted the issue, HMRC raised the point with the Tribunal, noting that there appears to be no binding authority on the point. We are grateful for Mr Marks' assistance in fairly and properly setting out the issue for consideration.

[1] We note that retrospective amendments have been made to this section, but these are not material to the present issue

19. The Appellant was represented by his father (who we shall refer to as RW). RW was understandably frustrated at the lack of substantive progress and was keen to go ahead with the hearing of evidence. However, he was understanding of the procedural difficulties and assisted to the extent that he could. We are grateful for his patience and assistance.

20. The point was not fully argued before us as Mr Wyatt was not legally represented. Furthermore, the point was raised by HMRC but is plainly not a point in their favour.

21. Notwithstanding the lack of full and detailed submissions from opposing parties having the benefit of full legal advice, we have nonetheless set out our view in a published decision so that it may offer some assistance to others.

22. The use of the phrase "in his opinion" in s 29 allows an officer a wide discretion. An officer may make assumptions in order to arrive at their view the amount of tax to be assessed. If a taxpayer considers that the figure is too high, then their normal remedy is to bring an appeal in the normal way.

23. It may be that a taxpayer considers that the relevant officer has acted unreasonably or unlawfully in forming their opinion as to the amount of tax to assess. Such unreasonableness or unlawfulness might give rise to public law issues, but these issues would most likely be outside the jurisdiction of this Tribunal.

24. The issue raised by HMRC in the present case is not that they now consider that the officer's opinion was wrong, nor that there are public law reasons to challenge that opinion. Instead, HMRC say that the assessment did not (as a matter of fact) reflect the officer's opinion.

25. The assessment must not exceed the amount which, in the officer's opinion, makes good the loss of tax. In the officer's opinion the tax due was at most the amount due on the basis of a trading transaction (or, if higher, the amount due on a capital transaction, but not both). Because the Relevant Assessments in each case exceeded that figure, they fall outside the boundaries of the assessment power.

26. It might be suggested that the overassessment is something that can be properly dealt with through the normal appeal process. Section 50 TMA provides that, where on an appeal to the tribunal, the tribunal decides that an assessment overcharges the appellant, then the assessment is to be reduced accordingly. We are conscious that Parliament is unlikely to have wished to encourage collateral attacks on assessments beyond the normal appeal process covered by s 50.

27. However, to take such an approach overlooks a point of fairness noted by HMRC.

28. By making an assessment that exceeds the amount that the officer actually believes to be due, HMRC deprives the taxpayer of the option of simply accepting the assessed figure. The taxpayer is instead compelled to enter into an appeals process even if they agree with the officer's view.

29. We therefore consider that s 29 TMA should be read as constraining the power of an officer to raise an assessment to be no more than the maximum amount which in their opinion needs to be charged to make good the loss of tax.

30. This is not to say that the officer cannot make assumptions, possibly very generous assumptions, in order to ensure that the assessment is not insufficient to cover the loss of tax. But where the officer has clearly expressed their opinion as to the maximum possible tax liability then they are not entitled to assess for more than that figure.

DECISION AND DISPOSAL

31. For the reasons set out above, we consider that the Relevant Assessments were not validly made.

32. We cannot simply determine the appeal in the Appellant's favour as there are other matters under appeal yet to be determined. In addition, HMRC have issued fresh assessments in relation to the periods covered by the Relevant Assessments.

33. We consider the best course of action would be to strike out the Relevant Assessments, and allow a period of time for the necessary procedural steps to be completed to join any appeal against the new assessments to the present appeals. This means that when the matter next comes before the Tribunal (which may be differently constituted to the present one) it should be possible for all the assessments to be considered together.

34. HMRC have also issued further penalty assessments to go alongside the fresh assessments. We do not express a view on the validity of the existing penalty assessments or the new penalty assessments. These can be considered by the Tribunal that considers the substantive appeals in due course.

35. We therefore:

(1) Exercise our powers under rule 8 of the Tribunal Rules to bar HMRC from taking further part in the appeal against the Relevant Assessments (effectively striking that part out).

(2) Direct that the appeal against the remaining assessments be stayed for sixty days from the date of this Decision. The intention being that, should the Appellant decide to appeal against the new assessments, the stay will provide time for that appeal to be joined to the present one.

36. After sixty days, the parties are to write to the Tribunal informing them of the position in relation to the fresh assessments.

37. At the hearing we asked that HMRC write to the Appellant to explain to him the procedural steps necessary to appeal against the new assessments and to join that appeal to the present one.

38. We also made observations as to the time requirements likely to be necessary for any further hearing and the desirability of providing documents to the appellant in hard copy. RW also noted his caring responsibilities and how they might fit in with a hearing timetable. We trust that HMRC will take those points on board in agreeing arrangements for the final hearing.

39. We also mention a point about costs. HMRC raised invalid assessments many years ago and only spotted the issue and sought to remedy it in the fortnight prior to the hearing. This potentially engages the Tribunal's powers under rule 10 to make an order for costs against HMRC for acting unreasonably in defending the proceedings.

40. Under rule 10(5) the Tribunal may not make an order under rule 10 against a person without first giving that person an opportunity to make representations.

41. We do not wish to prolong proceedings so at this stage we direct that HMRC be prepared at the next hearing of this matter to make representations as to costs so that the Tribunal (which may be differently constituted to the present Tribunal) can make any order that it sees fit. We note that before us HMRC offered to pay RW's costs of attending today's hearing.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

42. 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.

MALCOLM FROST
TRIBUNAL JUDGE

Release date: 26th SEPTEMBER 2024