[2019] UKFTT 0199 (TC)

TC07047

Appeal number: TC/2017/08044

PROCEDURE – voluntary returns rejected by HMRC – whether Tribunal has jurisdiction over the rejection – no – whether appeal should be stayed pending new retrospective legislation – no, as would serve no purpose – appellant can make application to HMRC under s 12D when it becomes law

FIRST-TIER TRIBUNAL
TAX CHAMBER

STEPHEN RAISON **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Taylor House, Rosebery Avenue, London on 9 November 2018

Mr P Beare, accountant, for the Appellant

Mr Vallis, HMRC officer, for the Respondents

DECISION

1. Mr Raison was employed and paid tax under deduction at source operated by his employer ('PAYE'). He had never been given notification by HMRC under s 8 Taxes Management Act 1970 to file a tax return. In the course of his employment, he incurred deductible expenses which HMRC had not allowed for when calculating the PAYE code which his employer used to deduct tax from his gross income. The effect was that for many years, Mr Raison paid too much tax.

2. On 14 September 2016, his accountant, Mr Beare, submitted to HMRC tax returns for Mr Raison for years 2007/8, 2009/10, 2010/11 and 2011/12, and on 21 September 2018 a tax return for year 2008/9. In fact, revised versions of these returns were re-submitted by Mr Beare in March 2017. Each of these returns calculated Mr Raison's tax liability and 'assessed' an amount of tax owing to Mr Raison. The total in dispute, being the total shown as overpaid tax in all these returns, was £4,887.80.

3. By letter dated 14 December 2016, HMRC replied to state that they would take no action in respect of those five tax returns because the time limit for making self-assessments or claiming a repayment of tax in respect of those tax years, had all expired before the date of submission: they had all expired, said HMRC, four years after the end of each tax year concerned.

4. There was some correspondence between HMRC and Mr Beare after this date, with Mr Beare trying to persuade HMRC that as a matter of law they were obliged to accept and process the tax returns and make the claimed repayment to Mr Raison. HMRC were not persuaded. A letter from HMRC dated 3 October 2017 suggested that if Mr Beare was not happy with their response, an appeal should be lodged with this Tribunal

5. On 2 November 2017, Mr Beare on behalf of Mr Raison, lodged a notice of appeal with this Tribunal.

6. On 2 February 2018, HMRC, having been notified of the appeal by the Tribunal, wrote to the tribunal asking for the appeal to be struck out on the basis that the Tribunal had no jurisdiction as HMRC had not made an appealable decision; HMRC applied in the alternative for the appeal to be stayed behind the appeal to the Upper Tribunal in the case of *Patel and Patel* [2018] UKFTT 185 (TC)).

The scheme of the legislation

7. Before considering the question of whether there was an appealable decision, it might be helpful to summarise the legislation on tax returns for individuals.

8. S 8 Taxes management Act 1970 provides that HMRC may require a person to submit a tax return (as defined). S 9 requires such returns to include 'self-assessments': in other words, they must not only state the person's income they must calculate the person's liability to tax. In Mr Raison's case, of course, his liability to tax was negative in the sense he was *owed* a repayment of tax.

9. S 34A contains a time limit providing a date after which a self-assessment cannot be made. The normal time limit is 4 years after the end of the year of assessment to which the return related. The rejected returns in these proceedings were all submitted more than 4 years after the end of the year of assessment to which they related. However, s 34A(4) provided a different time limit for any returns for years 12/13 or earlier and therefore applied to all of Mr Raison's returns. That required the returns to be submitted before 5 April 2017. All of the returns (original or revised) were submitted before that date and under this provision were in time.

10. So Mr Raison's returns appeared to be in time; in practice, the original returns were submitted just at the time that s 34A was coming into force (September 2016). HMRC's original rejection of them may have been because up to that point in time, HMRC's understanding of the law was that the time-limit in s 34 applied and that was a straight four year time limit without any equivalent to s 34A (4).

11. But that is history; the reason which HMRC now maintain for refusing to accept the returns is not that they were out of time, but that they were not tax returns at all. HMRC's position was that they were 'voluntary' returns; returns which Mr Raison had made by choice and not returns HMRC had required of him under the terms of s 8 of the Act. Voluntary returns are not recognised as tax returns in the Act; s 34A does not apply to them, says HMRC. They rely on the recent decision in *Patel and Patel* which reached the conclusion that the Act does not apply to tax returns made voluntarily and without a notice to file issued by HMRC.

Was there an appealable decision?

12. The appellant seeks to appeal the rejection of the returns; HMRC's position is that the Tribunal has no jurisdiction to consider the matter, or if it does, following the decision in *Patel and Patel*, which is now under appeal, this appeal should be stayed pending the outcome of that case.

13. So I need to consider jurisdiction. This Tribunal was established by statute and has no inherent jurisdiction: it only has jurisdiction in so far as an Act of Parliament has conferred jurisdiction on it. One of the provisions conferring jurisdiction, and the one relevant here, is s 31 Taxes Management Act 1970 ('TMA'). That provides as follows:

> (1) An appeal may be brought against -
>
> (a) any amendment of a self-assessment return under s 9C of this Act (amendment by Revenue during enquiry to prevent loss of tax);
>
> (b) any conclusion stated or amendment made by a closure notice under s 28A or 28B of this Act (amendment by Revenue on completion of enquiry into return).
>
> (c) any amendment of a partnership return under s 30B (1) of this Act (amendment by Revenue where loss of tax discovered), or
>
> (d) any assessment to tax which is not a self-assessment.

14. HMRC's position was that their decision to reject Mr Raison's tax returns did not fall into any of these sub-sections. S 31(1)(a) was not applicable: HMRC had not amended a self-assessment return during an enquiry; there was no amendment and no enquiry. S 31(1)(c) was

clearly inapplicable as it related to partnership returns. S 31(1)(d) was inapplicable as HMRC had not assessed Mr Raison to tax.

15. The only potentially applicable sub-section was s 31(1)(b) which applied if HMRC amended a self-assessment tax return on completion of an enquiry. HMRC's position was that they had neither opened an enquiry into any of Mr Raison's returns nor had they amended them: they had simply refused to accept that Mr Raison's returns were valid. They considered them to be voluntary and outside the scope of the Act.

16. Mr Beare suggested this could not be right as it left a taxpayer, such as Mr Raison, who had had his return rejected, without any legal means to challenge whether that rejection was correct.

17. That is not the position. The scheme of the Act is that self-assessments create enforceable liability, either owing to or by HMRC. This can be seen from s 59B TMA which provides that the balance owing to (or from) a taxpayer shall be repaid to him (or paid by him) by a certain date.

18. In other words, if Mr Raison had submitted a valid in-time self-assessment under the provisions of the Act, into which HMRC did not open an enquiry (and HMRC's position is that they did not), HMRC would owe Mr Raison the money claimed, to be paid to Mr Raison no later than the date provided in s 59B TMA.

19. Having said that, this Tribunal has not been given jurisdiction to decide whether HMRC were correct to reject the returns as invalid. If Mr Raison thinks his returns were correct, and that HMRC owe him money under s 59B TMA, he would have to take enforcement proceedings in the County Court.

20. Mr Beare was reluctant to accept that this Tribunal had no jurisdiction. He suggested various other routes by which HMRC's rejection of his voluntary self-assessment returns would be justiciable in this Tribunal.

Could the rejection of the return be treated as opening and closing an enquiry?

21. One suggestion was that the Tribunal should view the rejection of the return as if HMRC had opened an enquiry into the return and closed it by amending the claim to 'nil'. The appellant's position was that if HMRC had done that, then Mr Raison would have a right of appeal to this Tribunal under s 31(1)(b).

22. I do not agree. I consider that there is a clear legal distinction between rejecting a return and opening an enquiry into the return. A cursory understanding of tax might indicate that they are much the same thing in respect of a return in which a repayment claim is made as they often lead to the same result: rejection of the repayment claim. But in law they are not the same at all.

23. A rejection of a valid in-time self-assessment return is ineffective: the return creates a debt under s 59B TMA. A rejection of an invalid and/or out of time self-assessment return must be effective to reject it: it remains a legal nothing.

24. As a matter of law, in any event HMRC has no power under s 9A to enquire into personal returns which were not made under s 8 or 8A:

> '**9A Notice of enquiry**
>
> (1) An officer of the Board may enquire into a return under s 8 or 8A of this Act if he gives notice of his intention to do so…
>
> (a) to the person whose return it is….,
>
> (b) within the time allowed.

25. There is no other potentially applicable power of enquiry which would allow HMRC to enquire into a voluntary return.

26. In conclusion, there was no return within s 8 TMA and HMRC could not enquire into it under s 9 TMA; even if I am wrong on that, there was in fact no enquiry and no amendment of the return. There is no right of appeal under s 31(1)(b).

Could the rejection of the returns be treated as a rejection of a Sch 1AB claim?

27. S 31 TMA is not the only provision which gives taxpayers a right of appeal to this Tribunal. There was some discussion in the hearing over whether the returns amounted to Sch 1AB claims. That Schedule permits a taxpayer to make a claim for overpaid tax. The 'returns' submitted by Mr Raison were claims for repayment of overpaid tax.

28. ¶2 of Sch 1AB contains a list of situations in which HMRC are not obliged to accept the claim for overpaid tax, which, with one possible exception I mention below at §35, do not appear to be applicable. I note that 4 deals with whether, when PAYE is concerned, HMRC is liable to repay the taxpayer or employer. In a case such as this, where it appears the employer has operated PAYE correctly, the claim should be made by the taxpayer.

29. So bar that one exclusion, it would appear possible for the appellant to make a claim under Sch 1AB, were it not for paragraph 3 which provides:

> **3 Making a claim**
>
> (1) A claim under this schedule may not be made more than 4 years after the end of the relevant tax year.

30. That is a problem for the appellant as all five returns, even if seen as claims under Sch 1AB, were lodged with HMRC more than 4 years after the tax year to which they related. They were out of time under Sch 1AB. It is now clearly established that the Tribunal has no jurisdiction to extend time: *Raftopoulou* [2018] EWCA Civ 818.

31. There is a right of appeal against a rejection of a claim made under Sch 1AB. This is because ¶1(4) of Sch 1AB brings into the schedule certain provisions of Sch 1A and in particular the appeal provisions set out in ¶9 of Sch 1A. However, like s 31 TMA there is no right to appeal a rejection of a claim: there is only a right of appeal where HMRC have opened an enquiry into the claim and reduced the claim in whole or part. The logic is that no right of appeal is otherwise required because if there is no enquiry within the stated time, HMRC must give effect to the claim (¶4(1)).

32. So the position appears to be that if Mr Raison's tax returns were valid, in-time claims under Sch 1AB, they would be effective because there was no enquiry into them, but this Tribunal would have no jurisdiction to enforce them. If they were not valid and in-time claims under Sch 1AB, they are a legal nothing and this Tribunal similarly still has no jurisdiction in respect of them.

33. I note in passing that claims under Sch 1AB are required to be in a prescribed form: see ¶2(3) of Sch 1A which applies to Sch 1AB claims by virtue of ¶1(4) of Sch 1AB. This therefore appears to be a second reason why Mr Raison's five returns could not be treated as claims under Sch 1AB, although I am not certain to what extent it would be lawful (in a public law sense) for HMRC to reject a claim merely for being in the wrong format it if otherwise contained all the necessary information.

34. In any event, the Tribunal has no jurisdiction under Sch 1AB in respect of HMRC's rejection of the returns, and it appears even if it did have jurisdiction, it would agree that HMRC was right not to treat them as valid Sch 1AB claims.

Could the rejection of the returns be treated as a rejection of notice under s 711 ITEPA?

35. I mentioned in §28 above that one exclusion to a Sch 1AB was potentially applicable. That exclusion was contained in ¶2(3) Case B:

> Case B is where the claimant is or will be able to seek relief by taking other steps under the Income Tax Acts….

The Income Tax Acts is defined (Sch 1 Interpretation Act 1978) as referring to all enactments relating to income tax. In my view this would include Income Tax (Earnings and Pensions) Act 2003 ('ITEPA'). S 711 ITEPA provides:

> **S 711 right to make a return**
>
> (1) a person who has PAYE income for a tax year in respect of which deductions or repayments are made under PAYE regulations may by notice require an officer of Revenue and Customs to give that person a notice under section 8 of TMA 1970 …for the tax year.
>
> (2) a notice to an officer of Revenue and Customs under subsection (1) must be given no later than 3 years after the 31 October next following the tax year.

36. So what Mr Raison could have done (but did not do) was require HMRC to give him a notice to file. If he had filed his tax returns in response to a notice to file, they would have been s 8 self-assessments and valid as such. The existence of this remedy may mean that Sch 1AB was not available to Mr Raison but I do not need to decide that as it was clear for other reasons – primarily that of timing – that Mr Raison was unable to treat his five tax returns as Sch 1AB claims. They were too late.

37. But should they be seen as notices under s 711? I think Mr Raison would have a good case that filing voluntary returns in his situation should have been seen as a notice under s 711(1) but for the fact that they were too late. They were all filed long after the expiry of 3 years after the 31 October following the relevant tax years. (For instance, in respect of 11/12, the notice should have been given by 31 October 2015: the tax return was not filed until 2016.

38. There is in any event no right of appeal to the Tribunal if HMRC did not issue a notice to file in response to a taxpayer notice under s 711. Clearly if HMRC did not respond as required by law, the taxpayer would have a good claim for judicial review of HMRC but that is outside the jurisdiction of this Tribunal.

Could the operation of the PAYE system be treated as appealable decisions?

39. Fundamentally, Mr Raison's overpayment of tax arose because the coding notices issued to his employer did not take account of his expenses. That led to too much tax being deducted.

Mr Beare suggested that Mr Raison should have a right of appeal against what he saw as assessments to tax inherent in the PAYE system.

40. To consider this point requires some consideration of the PAYE system. The relevant legislation is the Income Tax (Pay as you earn) Regulations 2003. That legislation requires HMRC to determine a code for an employee; the code must be notified to employee and employer. The employee has a right of appeal against the coding notice (article 18 of the regulations).

41. The first point that should be stated is that an appeal against the various coding notices would *now* be pointless. Even if an appeal would have succeeded if made during the tax years in issue, it is pointless now. This is because the regulations provide that the code notified by HMRC is the code that the taxpayer's employer must use unless and until the code is amended by HMRC or by the Tribunal. As the relevant tax year has now ended, the code for that year is effectively set in stone. There is no provision to retrospectively change a tax code. There is no need for such a provision: retrospective amendments are catered for by submission of a tax return. The mechanism for Mr Raison to correct his tax code would have been to give HMRC notification under s 711 ITEPA. He had three years to do so.

42. The second point is that I do not accept that there was any assessment of tax owing by HMRC as part of the process of giving the coding notice in the relevant years. While the Regulations require HMRC to calculate 'free pay', which is the amount a taxpayer can earn without tax, this is neither a calculation of his total tax liability nor final. If a PAYE coding notice was meant to be a final calculation of tax liability there would be no need for s 711 ITEPA.

43. Nothing in the legislation refers to an assessment being a part of the process of establishing a PAYE coding. There is therefore nothing in the PAYE coding process that gives rise to an appealable matter within s 31. I reject the appellant's case on this.

The Limitation Act

44. Mr Beare argues that there is no time limit on taxpayers making claims to recover overpaid tax because the Limitation Act 1980 does not contain one. That may or may not be true but it is irrelevant: the right of action to reclaim overpaid tax is statutory. It is implicit in the Taxes Act that any common law rights to recover overpaid taxes (such as the right to restitution of monies paid under mistake of law) is overridden by the express provisions of various Taxes Act, but principally the Taxes Management Act 1970, which provide for recovery of tax overpayments. That means that Mr Raison is restricted by the time limits which apply to Sch 1AB claims and s 711 claims.

45. In any event, this Tribunal certainly does not have the jurisdiction to consider any common law claim to the restitution of overpaid taxes.

46. In conclusion, on the law as it stands, the Tribunal has no jurisdiction to hear the appeal as it is accepted that the returns were voluntary returns. Even if the Tribunal had jurisdiction, it would appear that it would have to reject the appeal as it appears that (at the time of rejection and even at the time of the hearing) HMRC were right to reject the returns as they were voluntary returns. And if they were to be seen as s 711 notifications or Sch 1AB claims they were rightly rejected as out of time.

Application to stay the decision

Original stay application

47. HMRC originally applied to stay the decision if the Tribunal was uncertain on the question of whether voluntary returns fell within Taxes Management Act 1970. The FTT in *Patel and Patel*, as the appellant recognised, had decided that voluntary returns were a legal nothing, but HMRC were appealing that decision and the outcome might be that such returns were within the Act.

48. I do not agree that I should stay the appeal pending *Patel and Patel.* Even in the event that a higher court decides s 8 TMA does apply to voluntary returns, that would not give this Tribunal jurisdiction for all the reasons stated above. In particular, if the voluntary returns were valid as returns under s 8 TMA, it would appear that they were in time (see §9); they would therefore appear to have been effective to establish a liability to Mr Raison under s59B TMA. But that is a matter of enforcement and not liability and is beyond the jurisdiction of this Tribunal (see §19).

49. I would have refused HMRC's stay application had it been necessary to decide it: it is not as I have already rejected the proceedings on the basis of lack of jurisdiction.

Second stay application

50. On 11 December, Mr Beare made an application for the Tribunal to defer deciding HMRC's strike out application until legislation currently in the Finance Bill became law with Royal Assent in the New Year. The provision he referred to was the new s 12D TMA 1970. It appeared to be Mr Beare's understanding that this new legislation would give HMRC the power to accept his client's voluntary returns and treat them as returns in response to a notice to file.

51. HMRC opposed the application; they had drawn Mr Beare's attention to this prospective legislation in the hearing (even if Mr Beare had not grasped the full import of it during the hearing) and they did not consider that it would have any possible affect on the subject matter of Mr Raison's appeal.

52. The legislation will be, if passed into law, retrospective. This is very unusual. (It will not be retrospective in respect of any return, if an appeal was lodged with this Tribunal before 29 October 2018 in respect of it and one of the grounds of which was that the return was a voluntary return. That would not appear to apply here).

53. The draft legislation currently before the House of Lords provides as follows:

> **12D Returns made otherwise than pursuant to a notice**
> (1) This section applies where—
> (a) a person delivers a purported return ("the relevant return") under section 8, 8A or 12AA ("the relevant section") for a year of assessment or other period ("the relevant period"),
> (b) no notice under the relevant section has been given to the person in respect of the relevant period, and
> (c) HMRC treats the relevant return as a return made and delivered in pursuance of such a notice.
> (2) For the purposes of the Taxes Acts—
> (a) treat a relevant notice as having been given to the person on the

day the relevant return was delivered, and

(b) treat the relevant return as having been made and delivered in pursuance of that notice (and, accordingly, treat it as if it were a return under the relevant section).

(3) "Relevant notice" means—

(a) in relation to section 8 or 8A, a notice under that section in respect of the relevant period;

(b) in relation to section 12AA, a notice under section 12AA(3) requiring the person to deliver a return in respect of the relevant period, on or before the day the relevant return was delivered 15(or, if later, the earliest day that could be specified under section 12AA).

(4) In subsection (1)(a) "purported return" means anything that—

(a) is in a form, and is delivered in a way, that a corresponding return could have been made and delivered had a relevant notice been given, and

(b) purports to be a return under the relevant section.

(5) Nothing in this section affects sections 34 to 36 or any other provisions of the Taxes Acts specifying a period for the making or delivering of any assessment (including self-assessment) to income tax or capital gains tax."

54. Mr Beare's position is that once this legislation becomes law, HMRC will have the power to treat the returns the subject of this application as s 8 returns; those returns will be in time because of s 34A.

55. He recognises that the Finance Bill is not yet law; so he does not want the Tribunal to dismiss the appeal when (he considers) once the Finance Bill is law, the Tribunal will have jurisdiction and will be able to decide the appeal in his client's favour.

56. Without deciding the point, as I cannot as the law is not (yet) in force and may never be, it does appear that this new provision will apply to Mr Raison's returns. However, it is clear that the law simply gives HMRC discretion to treat voluntary returns as if they were compulsory returns; whether HMRC will choose to exercise that discretion in Mr Raison's favour is something that it is very unlikely that this Tribunal will have any jurisdiction over. In any event it is clear that the Tribunal has no jurisdiction at the moment, as this legislation is not in force and HMRC have not yet taken a decision to reject the returns under it.

57. I consider that no purpose would be served by staying this appeal pending this new retrospective legislation. All I am deciding is whether currently the Tribunal has jurisdiction over HMRC's rejection of the returns. It does not.

58. If and when the Finance Bill becomes the Finance Act, the appellant can apply to HMRC to treat his returns as compulsory returns. My rejection of this appeal will not affect that. HMRC will either accept the returns under the new legislation, or reject them. That rejection can be appealed, although it is likely that such appeal must be made to the High Court rather than to this Tribunal. (I cannot actually decide the jurisdictional point unless and until the legislation actually becomes law.)

59. Staying this appeal serves no purpose, as either way, whether stayed or not, once this new legislation is brought into force, the appellant must approach HMRC again for a new decision.

Conclusion

60. I do not stay the appeal because it serves no purpose for the reasons given in the immediately preceding paragraphs. I strike out this appeal as this Tribunal has no jurisdiction over HMRC's decision to reject the appellant's voluntary returns.

61. However, as indicated in §59, if and when the new s12D is enacted, it appears Mr Raison has the right to approach HMRC to ask them to accept the returns the subject of these proceedings as returns under s 8. Nothing in this decision precludes him from so doing and nothing in this decision contains anything that constrains HMRC's decision on such an application if it is made.

62. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 16 FEBRUARY 2019