[2017] UKFTT 0872 (TC)

TC06267

Appeal number: TC/2015/05472

Income tax - Discovery Assessment - Redundancy payment paid under compromise agreement - employer had gone into administration - records not available - whether tax had been deducted at source under PAYE at 20% or 40% - burden of proof - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

HEATHER JONES **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER: CAROLINE DE ALBUQUERQUE

Sitting in public at Fox Court, Brooke Street, London on 14 April 2016

The Appellant in person

Mr Tony Burke, Officer of HMRC, for the Respondents

© CROWN COPYRIGHT 2017

DECISION

The Appeal

1. This is an appeal by Heather Jones ('the Appellant') against a decision on 2 April 2015 by the Respondents ('HMRC') to raise a discovery assessment in the sum of £1,351.20 representing outstanding tax for the 2010-11 tax year.

2. The sole issue for determination by the Tribunal is whether a redundancy payment received by the Appellant from Doubletake Studios Limited was taxed at the basic rate of 20% or the higher rate of 40%.

3. HMRC say that the unpaid balance of tax due on the redundancy payment is £1,340. The balance which makes up the £1,351.20, is an agreed under-deduction of £310.40 less an agreed credit due to the Appellant to £299.20 (see below).

Background

4. The Appellant left Doubletake Studios Limited on 31 October 2010. A compromise agreement was entered into whereby she would receive a redundancy payment of £36,700 from the company. It was agreed that the sum would be paid in four equal instalments of £9,175.

5. The first £30,000 of this payment was exempt from tax under s 401 ITEPA 2003, which left the balance of £6,700 liable to tax.

6. The end of year details supplied to HMRC by Doubletake Studios Limited shows that tax was deducted on the £6,700 at 20% from the final £9,175 amounting to £1,340, which was the basic rate of tax in force for that year.

7. The Appellant says that tax was deducted at 40% because the amounts received into her bank account were as follows:

- 24 November 2010 - £9,175
- 03 December 2010- £9,175
- 21 December 2010 - £9,175
- 22 February 2011 - £6,515.04

8. The Appellant says that tax of £2,659.96 was deducted from the final payment of £6,700, which equates to a 40% deduction. She accepts that 40% of £9,175 is in fact £2,680, but is unable to explain the difference. No documentation was received from her employer to show how the £6,515.04 was made up.

9. The Appellant was not able to provide any documentary evidence to show that tax was deducted from the redundancy payment at 40%.

10. The Appellant's P45 shows the following details :

Pay: £72,906.26 - Tax £23,311.73 Code 323T - Month 7. This is however an incorrect calculation of tax at the date Miss Jones left Doubletake Studios.

11. The correct calculation should be :

Pay: £72,906.26 - Tax £24,043.06 - Code 323T - Month 7

12. There is an under-deduction of £733.33. Therefore part of the underpayment arises from this under-deduction.

13. HMRC approached the liquidators of Doubletake but have been unable to determine how the £6,515.04 was made up or what deductions had been made to arrive at the amount paid.

14. HMRC state that tax should have been deducted at 20% from the taxable part of the redundancy payment and so the deduction by Doubletake of £1,340 is correct. The guide for employers states that if they make a payment to an employee and they have already given them a form P45, including an employee that they have given a redundancy payment exceeding £30,000 to, then the employer should use a code BR and deduct only 20%. The BR code gives no personal allowances, but taxes an employee at firstly the basic rate and then at the higher rate if the payment made goes into the higher rate income bracket. The final payment was made after the P45 was issued and could not therefore have included (at least) that payment.

15. The income shown on the P45 when the Appellant left her employment shows that she was paid £72,906.26 and paid tax amounting to £23,311.73. The P45 shows that her employer operated a code of 323T.

16. The end of year details submitted to HMRC show that for the year she was paid a total amount of £79,606.26 and paid tax amounting to £24,651.73. The end of year form P14 shows a code of BR Ml.

P14 details: Pay: £79,606.26 - Tax £24,651.73

P45 details: Pay: £72,906.26 - Tax £23,311.73

Differences: Pay: £6,700 x 20% = Tax £1,340

17. This code means that the employer deducted tax at the basic rate of 20% from the balance of the redundancy payment the Appellant received after leaving her employment on 31 October 2010.

18. The deductions would have included tax at 20% amounting to £1,340 and a deduction for employee National Insurance contributions but it has not been possible to determine what the other deductions related to. The information submitted by Doubletake Studios to HMRC shows that the redundancy payment was taxed at the basic rate of 20% and there is no evidence to suggest that these details are incorrect.

19. When submitting her SA return the Appellant failed to declare the redundancy payment in excess of the £30,000 allowed under s 401 ITEPA 2003, that is, the £6,700.

20. Consequently HMRC raised a Discovery Assessment on 2 April 2015 in which the final calculation of the tax due was £1,650.40. It is this amount which is under appeal although since the appeal that sum has since been amended to £1,351.20 (see below).

HMRC's Reconciliation

21. The difference in the tax of £1,340 due on the redundancy payment and the tax on the assessment is due to Miss Jones' income exceeding £100,000 and the subsequent reduction in her personal allowances as a result:

Original personal allowances were	£6,475	
Revised personal allowances due	£5,699*	
Difference	£776 x 40% =	£ 310.40
Tax on redundancy payment	£6,700 x 20% =	£1,340.00
Assessed		£1,650.40

[*Total income is £101,553 for the purposes of reducing personal allowances. For each £2 income exceeds £100,000 the personal allowance is reduced by £1.The excess is £1,553, reduction is therefore £1,553/2 = £776 Personal allowance due £6,475 - £776= £5,699].

22. The Appellant made a late claim for expenses in the sum of £748, which was accepted by HMRC. (The Appellant failed to make the claim on her SA return.) A credit is therefore due of: £748 x 40% = £299.20, resulting in a final balance due to HMRC of £1,351.20

Appellant's case

23. The Appellant's grounds of appeal as stated in her Notice of Appeal are:

> "I have already paid the 2010/11 tax which HMRC is chasing for via PAYE deduction by my previous employer, Doubletake Studios, now in liquidation. In the absence of a payslip to support this (my previous employer failed to provide a final payslip to me) I have provided a copy of my bank statement to HMRC together with a signed declaration that the information I have provided is correct. In addition I tried to secure a copy of the payroll records from the administrators, FRP Advisory, to support my claim. FRP refused to provide this information for me. I forwarded FRP's details to HMRC who were also told providing this information would "not be possible".
>
> HMRC has stated that the discrepancy between the net payment I received (evidenced by my bank statement) and the (lesser) amount of PAYE deduction they claim was made could be:

- NI, though at 1% (I would have been on the upper limit when the payment of £6,700 was made) the NI would have been £67 so this cannot explain the discrepancy

- Amounts I owed to Doubletake Studios. I have provided HMRC with a copy of my compromise agreement to show that no amounts were owed and 1 have also provided a signed a declaration to this effect.

- Pension contributions. Doubletake Studios did not operate a pension scheme and I did not have a personal scheme that they paid in to

The only explanation for the discrepancy therefore has to be a 40% deduction of PAYE which I am claiming my previous employer made".

Discussion and findings

24. Under common law the onus of proof rests with the person making the assertion and this is reinforced by s 50(6)/s 100B TMA. HMRC accept that the onus is upon them to show that there is a discovery, leading to a loss of tax and that this was brought about by the carelessness or deliberate action of the Appellant under ss 29 and 36(1)/36(1A)(a) TMA.

25. Once this is satisfied, the onus reverts to the Appellant to provide evidence, to either reduce or set aside HMRC's figures, otherwise the assessment shall stand good.

26. At the hearing of the appeal the parties agreed that the evidence was inconclusive, because the amount that appeared to have been deducted from the £6,700 did not amount to 20%. It was, in the Tribunal's view, in all probability not evidence of such deduction. It was agreed that the Appellant should be allowed a further opportunity of providing evidence to show that 40% tax had been deducted, failing which the Tribunal would have to conclude that only 20% tax had been deducted and confirm the discovery assessment.

27. The Tribunal's decision was therefore reserved for a period of 56 days prior to the expiration of which the parties were at liberty to present any further representations they may have. The Appellant was advised that the burden of proof rested with her and that if evidence was not provided that 40% tax had been deducted from the £6,700 the Tribunal would in all likelihood conclude that HMRC's discovery assessment is correct.

28. On 15 April 2016 the Appellant wrote to FRP Advisory LLP once again requesting a breakdown, with supporting information, of the figure £6,515.04.

29. FRP responded by saying that the liquidators of Doubletake had obtained their release on 29 January 2016 and all the company's records had been archived. HMRC had earlier been informed that these were held in 740 boxes which would be retained for a 12 month period following dissolution of the company. FRP said that they had no information as to what was contained in the boxes and therefore did not propose to

spend the substantial amount of time that would be required to review the records and answer the Appellant's query.

30. The Appellant wrote to the Tribunal Service to explain the position. She requested that the appeal be relisted and a witness summons issued to the liquidator Philip Armstrong of FRP Advisory LLP, requiring him to attend the hearing and explain the deduction of £2,659.96 from the final payment of £9,175 made to the Appellant under the compromise agreement.

31. A further detailed re-examination by the Tribunal of the bank statements provided by the Appellant, showed that in addition to the payments referred to in paragraph 7 above, a fourth payment of £9,175 had also been made on 24 January 2011. This additional payment had not been referred to by either party during the course of the hearing and it inevitably led to the conclusion that four payments of £9,175 had been made to the Appellant and tax deducted from none of them.

32. That could possibly mean that the payment of £6,515.04 on 22 February 2011 was an entirely separate payment to the Appellant, possibly relating to non-taxable expenses due to her or something similar.

33. Rule 16 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides that on the application of a party or on its own initiative the Tribunal may by summons require any person to attend as a witness at the hearing at the time and place specified in the summons and order any person to answer any questions or produce any document in that person's possession or control which relate to any issue in the proceedings.

34. In a normal case no application for a witness summons should be made by a party unless that party has first requested a witness to attend and any of the following apply:

i. The witness has refused to attend.

ii. The witness has not indicated willingness to attend despite being requested to do so.

iii. The witness has agreed to attend but the applicant has reason to believe that the witness will not do so, or,

iv. The witness has agreed to attend but only on condition that the summons was issued.

35. In order for a witness summons to be issued, the Tribunal must be satisfied that the evidence sought to be obtained is relevant to the issues in the proceedings and that there is a real likelihood the evidence will materially assist the Tribunal in its determination of the appeal. The application must include a statement setting out what provision is to be made in respect of payment of any necessary expenses of the witness in attending the Tribunal hearing and any other work involved in preparing or

producing the information requested, together with proposals as to who is to pay those expenses.

36. The issue of a witness statement is in the discretion of the Tribunal and must take all material factors into consideration. One of those factors is proportionality. On the basis of the information provided by FRP and given the fact that they have to be mindful that any costs incurred by them, even if successful in producing the information required, would be out of all proportion to the amount involved in this appeal and necessarily be borne by other creditors of the company or the Appellant. It is also possible that the information they provide may show the position to be as asserted by HMRC. On that basis the Tribunal concludes that there is no proportionate merit in issuing a witness summons to FRP.

37. As stated above the onus of proof rests with the person making the assertion. HMRC have shown that prima facie, there is a 'discovery' leading to a loss of tax and therefore the burden of proof reverts to the Appellant to provide evidence to either reduce or set aside HMRC's figures, otherwise the assessment must stand good. The Appellant has failed to discharge that burden of proof and accordingly the appeal must be dismissed and the discovery assessment for 2010-11 confirmed.

38. 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: 13 DECEMBER 2017