TC07125

[2019] UKFTT 286 (TC)

INCOME TAX - individual tax return - penalties for late filing - whether properly imposed – whether notice given "for the purpose of establishing the amounts in which a person is chargeable to income tax ... " (s 8 TMA)

APPEALS - principles of precedent - previous decisions of the First-tier Tribunal

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/02378

BETWEEN

SIMON HURST **Appellant**

-and-

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER

The Tribunal determined the appeal on 15 April 2019 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the Notice of Appeal dated 26 March 2018 (with enclosures), HMRC's Statement of Case (with enclosures) dated 16 May 2018 and the Appellant's Reply dated 2 October 2018 (with enclosures) and the other papers in the case.

DECISION

INTRODUCTION

1. A number of recent decisions of this Tribunal have considered whether HMRC may appropriately use the self-assessment system to collect unpaid tax from a person within the PAYE system, and to impose penalties on such a taxpayer for not submitting a return in such circumstances. Although these decisions are not uniform, the Appellant in this case relies on previous case law giving a negative answer to that question.

APPLICABLE LEGISLATION

2. Section 8(1) TMA relevantly provides that "For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, … he may be required by a notice given to him by an officer of the Board … to make and deliver to the officer, a return containing such information as may reasonably be required in pursuance of the notice".

3. Schedule 55 to the Finance Act 2009 provides for penalties to be imposed for failure to deliver such a return within the specified time limits.

BACKGROUND

4. The Appellant appeals against penalties for the late filing of his 2015-16 tax return.

5. HMRC contends, and has provided evidence in support, and the Appellant has not disputed, that a document in the form of a notice to file was sent to the Appellant on 27 March 2017 to the address then held on record by HMRC.

6. The Appellant has not disputed that if was a valid notice to file under s 8 TMA, then the due date for filing was 6 July 2017 for an electronic or a non-electronic return.

7. HMRC contends, and the Appellant has not disputed, that as at the date of the HMRC statement of case, a return had still not been submitted.

8. Subject possibly to any issue of reasonable excuse or special circumstances, the Appellant has not argued that the penalties have not been imposed in accordance with the legislation, or that they have been incorrectly calculated, if the document sent to him on 27 March 2017 was a valid notice to file.

9. It is accordingly unnecessary to deal in further detail with the background facts and applicable legislation.

THE APPELLANT'S CASE

10. The Appellant's case is as follows. It was not necessary for the Appellant to file a return as he has been in full time employment since 2012 and has had no income other than salary and benefits from his employment, details of which are available to HMRC from his P60 and P11D, and sundry interest, details of which are available to HMRC via financial institutions. HMRC have not issued a notice to file for 2016-17. HMRC should therefore either cancel the penalty or withdraw the notice to file. Any underpayment of tax in the year in question could

be dealt with by way of a P800. Reliance is placed on *Goldsmith v Revenue and Customs* [2018] UKFTT 5 (TC) ("*Goldsmith*").

THE HMRC CASE

11. The HMRC case is as follows. The legal obligation to make a return is created when a notice to file under s 8 TMA is issued. In the year in question, the Appellant did not pay enough tax through his tax code. On 2 October 2016, HMRC issued the Appellant's agent with a PAYE calculation (a P800) advising how the underpayment arose. The underpayment could not be collected through the Appellant's coding so voluntary payment letters were sent to the Appellant 2 October 2016 and 27 December 2016. The Appellant did not contact HMRC to arrange payment, so a self-assessment record was set up for him. This is the usual process and only a 2015-16 return is required.

THE APPELLANT'S REPLY

12. In a response to the HMRC statement of case, the Appellant's agent denies that any P800 was received. The Appellant's agent also maintains that HMRC have the power to withdraw a notice to file, and contend that it is possible for HMRC to collect the underpayment by adjusting a later year tax code number. The Appellant also relies on *Groves v Revenue & Customs* [2018] UKFTT 311 (TC) ("*Groves*"); *Lennon v Revenue and Customs* [2018] UKFTT 220 (TC) ("*Lennon*").

THE TRIBUNAL'S FINDINGS

13. The Tribunal finds as follows.

14. In *Goldsmith*, the Tribunal held that using the self-assessment system to collect unpaid tax from a person within the PAYE system was inappropriate, and penalties imposed on a taxpayer for not submitting a return in such circumstances were invalid. The Tribunal held that the notice to file in such circumstances does not meet the requirements of s 8 TMA because it is not "for the purpose of establishing" the amounts by which the taxpayer was chargeable to tax. Rather, it is for the purpose of enforcing payment of tax, the amount of which is already known to HMRC. Because a notice to file in such a situation is invalid, penalties cannot be imposed for failure to submit a return pursuant to such a notice. Similar conclusions were reached in *Griffiths v Revenue & Customs* [2018] UKFTT 527 (TC); *Mansoor v Revenue & Customs* [2018] UKFTT 288 (TC); *Lennon* and *Groves*.

15. On the other hand, in *Crawford v Revenue and Customs* [2018] UKFTT 392 (TC), the Tribunal disagreed with *Goldsmith*, and declined to follow it. In *Crawford*, the Tribunal held that the words "for the purpose of establishing" in s 8 TMA do not mean merely "for the purpose of calculating", but rather, "for the purpose of calculating and assessing". It was said that an assessment "fixes or settles a person with liability to the tax as calculated", and that a notice under s 8 TMA may validly be issued simply to assess a known liability to tax.

16. There is thus a conflict of authorities at First-tier Tribunal level. This Tribunal is not aware of any consideration of this issue at the level of the Upper Tribunal or higher level.

17. The issues discussed in the cases referred to above have not been argued at length by the parties in the present case. The Tribunal has given consideration to whether it should give directions for the parties to make detailed submission on these issues. The Tribunal considers that there would be no point in doing so. The issues are discussed at length in the cases referred to, and it is unlikely that submissions from the parties would add much. In any event, they have had the opportunity to make what submissions they wish.

18. The conflict between the decisions at First-tier Tribunal level can only be resolved by a decision at Upper Tribunal level or higher. The predominant case law of the First-tier Tribunal is to the effect referred to in paragraph 14 above.

19. The principle of binding precedent does not apply to decisions of the First-tier Tribunal. In a case before the First-tier Tribunal, previous decisions of this Tribunal are of persuasive authority only.

20. Nevertheless, the persuasive strength of previous decisions of this Tribunal may increase where there is a series of previous decisions to similar effect, especially where there are no or only limited previous Tribunal decisions to contrary effect.

21. The reality is that taxpayers, their advisors, and even HMRC itself, do give a certain weight to the case law of this Tribunal when determining the content of tax law. Publishing decisions of this Tribunal would be pointless if no weight could be placed on them at all.

22. Particularly in default paper cases, it will not be uncommon for appellants simply to refer to and rely on a previous Tribunal decision or series of Tribunal decisions, without presenting detailed submissions on the reasoning in those previous decisions, or detailed arguments as to why those previous decisions were correctly decided.

23. Where an appellant does this, it is of course open to HMRC to submit a statement of case setting out detailed arguments as to why the previous case law of the Tribunal is incorrect, and as to what HMRC contend is the correct legal position. In that event the Tribunal will be required to undertake its own careful analysis of the matter.

24. However, where a legal point has already been considered in some depth in previous case law, the Tribunal should not be expected to undertake its own comprehensive analysis of the previous case law and the competing views on the law, when the parties themselves have not done so in their submissions. This is so, especially in default paper cases. In such situations the Tribunal is entitled simply to follow a previous line of authority, even if it is not bound to do so.

25. The Appellant in his appeal expressly relied on *Goldsmith*. HMRC in response did not present submissions on the line of authorities referred to above. The Appellant in his reply then referred additionally to *Groves* and *Lennon*. HMRC could at that point have requested permission to file an additional submission, if HMRC considered that new matters had been raised by the Appellant in reply that could not have been anticipated by HMRC. HMRC did not do so.

26. In this case, in the absence of any detailed engagement by the parties, the Tribunal finds it appropriate to follow the line of authority in paragraph 14 above.

27. The HMRC statement of case indicates that HMRC were aware of the underpayment of tax when it issued the P800. Accordingly, it was not possible for HMRC validly to issue a notice of assessment. The appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

28. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 01 MAY 2019