Neutral Citation: [2023] UKFTT 360 (TC)

Case Number: TC08784

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/14537

Discovery assessments – time limits – extended limits for offshore matters – interaction with requirement to correct time limits

Heard on: 17 January 2023
Judgment date: 04 April 2023

Before

TRIBUNAL JUDGE MCGREGOR
SONIA GABLE

Between

JAMES SCOTT

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ross Birkbeck, of counsel

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

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was V (video) via Tribunal video hearing system. A face to face hearing was not held because a remote hearing was appropriate. The documents to which we were referred are a bundle of 272 pages, accompanied by skeleton arguments for both parties and an authorities bundle.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

3. This case concerns two discovery assessments that were raised in respect of the tax years 2013-14 and 2014-15 on Mr Scott.

4. However, the scope of the appeal is a narrow legal question, since there was no dispute about:

   (1) The facts;

   (2) The existence of a discovery by HMRC; or

   (3) Mr Scott's behaviour, which was accepted to have been neither careless nor deliberate.

5. The question for us to decide concerns the time limits for HMRC to raise the assessments, in particular how the general time limits, the extended time limits for offshore matters and the time limits from the requirement to correct legislation interact.

FACTS

6. As noted above, there is no dispute about the background facts, but we rehearse them briefly here to aid understanding of the legal question in dispute.

7. Mr Scott was the beneficiary of loans from a trust. From 2013-14 onwards, no interest was payable on the loans and this gave rise to a taxable benefit charge under the chargeable gains legislation. However, this tax was, erroneously, not included on Mr Scott's tax returns.

8. On 21 December 2018, he made a disclosure under the worldwide disclosure facility for tax payable in respect of tax years 2014-15 to 2016-17.

9. HMRC opened an enquiry. At the closure of the enquiry, it transpired that tax was also due in respect of 2013-14.

10. HMRC raised discovery assessments in respect of the years 2013-14 through to 2016-17 on 9 March 2021.

11. It is agreed that these assessments included the wrong figures and that the revised figures were agreed between the parties.

12. The Appellant appealed to HMRC against the 2014-15 assessment on 8 April 2021 (in time) and the 2015-16 assessment late on 19 April 2021.

13. HMRC accepted the late appeal.

14. The appeal was rejected on 7 May 2021.

15. On 16 July, the Appellant disputed the decision again and requested that the question be raised with the technical team at HMRC.

16. On 27 July 2021, HMRC informed the Appellant's of the view of the technical team and on 24 August 2021, HMRC issued their view of the matter letter, including the offer of an HMRC review.

17. The Appellant's accepted the review and offered further information to be considered on 22 September 2021.

18. On 5 November 2021, the outcome of the review was communicated to the Appellant – the decisions were upheld.

19. On 1 December 2021, the Appellant's appealed (in time) to this Tribunal.

LAW

20. There are three standard time limits within which HMRC must make a discovery assessment:

> (1) Under section 34 of Taxes management Act 1970 (TMA 1970), within 4 years in any circumstances;
>
> (2) Under section 36(1) of TMA 1970, within 6 years, if the taxpayer (or their agent) was careless; and
>
> (3) Under section 36(1A) of TMA 1970, within 20 years, if the loss of tax was brought about deliberately by the taxpayer.

21. There are however two sets of provisions which may alter some of those standard provisions in specific circumstances.

22. Firstly the "Requirement to correct" provisions were introduced in Finance (No 2) Act 2017. Paragraph 26 of Schedule 18 to Finance (No.2) Act 2017 provides:

> (1) This paragraph applies where
>
> > (a) at the end of the tax year 2016-17 a person has relevant offshore tax non-compliance to correct, and
> >
> > (b) the last day on which it would (disregarding this paragraph) be lawful for HMRC to assess the person to any offshore tax falls within the period beginning with 6 April 2017 and ending with 4 April 2021.
>
> (2) The period in which it is lawful for HMRC to assess the person to the offshore tax is extended by virtue of this paragraph to end with 5 April 2021.
>
> (3) In this paragraph "offshore tax", in relation to any relevant offshore tax non-compliance, means tax corresponding to the offshore PLR [potential lost revenue] in respect of the non-compliance.

23. Secondly, in 2019, a separate specific time limit was introduced in relation to the loss of tax involving offshore income or gains. Section 36A of TMA 1970 provides:

> 36A Loss of tax involving offshore matter or offshore transfer
>
> (1) This section applies in a case involving a loss of income tax or capital gains tax, where:
>
> (a) the lost tax involves an offshore matter, or
>
> (b) the lost tax involves an offshore transfer which makes the lost tax significantly harder to identify.
>
> (2) An assessment on a person ("the taxpayer") may be made at any time not more than 12 years after the end of the year of assessment to which the lost tax relates.

24. Section 36A was introduced by section 80 of Finance Act 2019 which included the following subsection:

> (5) The amendments made by this section have effect
>
> (a) in relation to assessments on a person relating to the 2013-14 year of assessment and subsequent years of assessment, where the loss of tax is brought about carelessly by that person or by a person acting on that person's behalf, and
>
> (b) in any other case, in relation to assessments relating to the 2015-16 year of assessment and subsequent years of assessment.

PARTIES' ARGUMENTS

Appellant's arguments

25. Put briefly, the argument put forward on the appellant's behalf is that:

(1) only section 36A applies;

(2) the effect of section 80(5) of FA 2019 is that the extended 12 year limit can only apply in relation to 2013-14 and 2014-15 where there has been careless behaviour;

(3) therefore the assessments were raised out of time.

26. Mr Birkbeck argues that if both para 26 and section 36A can apply to an assessment for the periods 2013-14 and 2014-15, the wording in section 80(5) has no effect and this cannot be correct.

27. He cites the rule against redundancy in *R(Spath Holme) v Secretary of State for Environment Transport and the Regions [2001] 2 AC 349, at 376.*

28. He argues that the only way to avoid the futility of section 80(5) is to conclude that para 26 is impliedly repealed by Finance Act 2019 by virtue of the principles in *Re Williams [1887] 36 Ch 573 at 578.*

29. He submits that not only is this conclusion necessary in order to avoid a futile or redundant provision in a later Act, it also falls within the legislative intent of section 80 because the consultation paper concerning the introduction of the extended offshore limits explicitly states that the changes apply to taxes that were at that time within the scope of the requirement to correct rules.

30. In response to HMRC's argument that the requirement to correct provisions still apply even though section 36A has been introduced, Mr Birkbeck submits that this still does not explain the purpose of section 80(5). If HMRC's position were correct, then it would not matter whether the behaviour was careless because HMRC would always be in a position to assess under the requirement to correct provisions.

HMRC arguments

31. HMRC argue that they can rely on para 26 to raise the assessments and that neither section 36A nor section 80(5) override the application of para 26.

32. HMRC accept that there is a doctrine of implied repeal but argue that it only applies where the earlier and later Acts are inconsistent. HMRC submit that para 26 and section 36A are not inconsistent.

33. HMRC accept that section 80(5) prevents them from using the time limits in section 36A to raise an assessment on Mr Scott in relation to 2013-14 and 2014-15 because he was not careless.

34. However, HMRC argue that section 36A is permissive and allows HMRC to look elsewhere for a provision that allows them to raise the assessment. HMRC submit that this permission is found in para 26.

35. They argue that there is no contradiction between the rules because they look at different behavioural characteristics.

36. They also argue that it would be an absurd legislative development for HMRC to have had extended powers under the requirement to correct provisions and then for them to be taken away again impliedly by the extended time limits provided in 2019.

37. HMRC also raised an alternative argument showing how section 36A could have been used to raise these assessments based on a purposive interpretation of section 80(5) as meaning that section 36A applies to any years that were "in time" under any provisions (including paragraph 26) at the commencement date.

DISCUSSION

38. As noted above, the question for us to decide is a very narrow one.

39. All parties accept that HMRC made a discovery and that Mr Scott had been neither careless nor deliberate in relation to the inaccuracy in his tax returns.

40. All parties also accept that if the law had not been changed in 2019 to introduce the extended offshore time limits, then HMRC's assessments under the extended time limits in the requirement to correct provisions under para 26 of Finance (No 2) Act 2017 would certainly have applied and the assessments would have been made in time.

41. All parties also accept that, in terms of the taxes and transactions covered, the scope of the requirement to correct provisions and the extended time limits are the same, despite some small variations in wording.

42. The question for us to decide is whether the changes to the law made in 2019 alter that position and render the assessments out of time. It is therefore a process of statutory interpretation that we must undertake.

43. We have clear guidance on the way in which we must approach questions of statutory construction from the *Ramsay* line of cases *WT Ramsay* [1981] STC 174, from which the principle has often been summarised as "whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically". Lord Walker in *Tower MCashback [2011] UKSC 19* noted the need "to recognise Ramsay as a principle of statutory construction, the application of which must always depend on the text of the taxing statute in question".

44. So, we must start by looking at the text of the statute.

45. It is plain and unambiguous that, absent anything further, section 36A(2) of TMA 1970 provides HMRC with the power to make an assessment relating to the loss of income tax or capital gains tax involving offshore matters or offshore transfers at any time up to 12 years from the end of the year of assessment.

46. It is equally clear and unambiguous that, absent anything further, paragraph 26 of Schedule 18 to Finance (No 2) Act 2017 extends the period in which HMRC may raise an assessment in relation to offshore tax non-compliance. The extension is to 5 April 2021 and applies to any period where HMRC's other assessment powers would have ended within the period 6 April 2017 to 4 April 2021.

47. The years of assessment with which we are concerned are 2013-14 and 2014-15. Therefore the normal period for assessment would have ended on 5 April 2018 and 5 April 2019 respectively (since there was no carelessness involved) under section 34 of TMA 1970.

48. However, section 36A was not introduced without any restrictions. It was introduced by section 80 of FA 2019, which provided for its insertion into TMA 1970, alongside two smaller consequential amendments which are not relevant to this question. Section 80(5) also provided what is usually referred to as a commencement provision.

49. We repeat the full text of that subsection here since we are interpreting it in detail:

> (5) The amendments made by this section have effect
>
> (a) in relation to assessments on a person relating to the 2013-14 year of assessment and subsequent years of assessment, where the loss of tax is brought about carelessly by that person or by a person acting on that person's behalf, and
>
> (b) in any other case, in relation to assessments relating to the 2015-16 year of assessment and subsequent years of assessment.

50. The opening words "have effect" makes it very clear that the purpose of this subsection is to provide for the coming into action of section 36A (and those small consequential amendments). HMRC had included in their skeleton argument a submission that subsection 5 was purely "explanatory". While they did not pursue this argument in oral submissions, we find that it is not explanatory. We find that it is clearly setting out the circumstances in which section 36A is intended to have effect.

51. In our view the words of section 80(5) are clear. They allow HMRC to raise an assessment using the 12-year time limits in section 36A:

(1) For tax years 2013-14 and 2014-15 only where there has been carelessness in the bringing about of the loss of tax; and

(2) For tax years 2015-16 onwards, whatever the behaviour of the taxpayer.

52. Since the assessments under appeal relate to the tax years 2013-14 and 2014-15, HMRC could therefore only rely on section 36A to raise the assessments if there had been carelessness of the taxpayer. Since HMRC accept that there had been no carelessness, HMRC may not assess Mr Scott under section 36A.

53. HMRC argue that they can, nevertheless, assess Mr Scott under the provision in paragraph 26 of Schedule 18 to Finance (No 2) Act 2017 and that this provision is not inconsistent with the commencement provision in section 80(5).

54. Mr Birkbeck for the taxpayer argues that section 80(5) would have no effect whatsoever if HMRC can always turn back to paragraph 26.

55. We find that we cannot agree with Mr Birkbeck. The requirement to correct provisions were a specific time-limited set of provisions predicated (as can be seen in paragraphs 1 and 26 of that Schedule) on the fact that at the end of the tax year 2016-17 the person has a relevant offshore non-compliance to correct. The requirement to correct provisions have a diminishing effect over time.

56. By contrast the 12 year extended time limits are an ongoing set of provisions. It is correct to say that their target is the same – dealing with offshore non-compliance and both provide HMRC with extensions of time limits to assess, but the requirement to correct is more narrowly focused in terms of the periods covered.

57. There are taxpayers who are protected from the extended time limits in section 36A by virtue of section 80(5). In the absence of section 80(5)(a), HMRC would be able to continue to raise assessments for a taxpayer who took reasonable care but nevertheless made an offshore error in their tax return in 2013-14 all the way up until 5 April 2026.

58. Therefore for any taxpayer in that position where HMRC did not raise an assessment by 5 April 2021 by applying the extended time limit in paragraph 26, section 80(5) provides them with protection from an additional 5 years of potential assessment.

59. Therefore we do not accept that section 80(5) is automatically rendered futile by the interaction with the requirement to correct rules. Since we find that there is a functional effect of section 80(5), we also find that there is not an inconsistency between the two rules that could give rise to the need to consider implied repeal.

60. Finally, we also consider whether the interpretation we have reached on the effect of section 80(5) aligns with the purpose of the regime. We find that the purpose of the regime introduced through Finance Act 2019 was to give HMRC more time to make assessments related to offshore income and gains, but that the extensions should not be retrospective in effect. We were taken to an extract of Hansard where the Financial Secretary to the Treasury stated "The new extended time limits will not enable HMRC to assess any tax that can no longer be assessed under current rules at the time the legislation comes into force".

61. Allowing HMRC to raise an assessment under the paragraph 26 rules does not go against this purpose of section 36A and section 80(5), since they are assessments for which parliament had already given an extended time limit.

62. Since HMRC expressly stated that they were not pursuing the alternative interpretation of section 80(5), we do not express a view on it.

DISPOSITION

63. For the reasons given above, we dismiss the appeal and find that the assessments were raised in time.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

64. 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.

ABIGAIL MCGREGOR
TRIBUNAL JUDGE

Release date: 04th APRIL 2023