TC02902

Appeal number: TC/2013/01908

Non-payment of income tax by due date – validity of claim to carry back losses to year for which tax due – meaning of "quantified" - FA 2009 Sch 56 para 3(2) & para 16(1) – TMA 1970 s42(2) & Sch 1B para 2(2) - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MICHAEL E ROBINS **Appellant**

- and -

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

TRIBUNAL: JUDGE MALACHY CORNWELL-KELLY
MS ELIZABETH BRIDGE MA

Sitting in public at 185 Dyke Road, Brighton on 16 August 2013

Mr Peter Clarke of Clarke & Co for the Appellant

Ms Gloria Orimoloye of HM Revenue and Customs Solicitor's Office for the respondents

DECISION

1. This is an appeal against a penalty for a failure to make a payment of income tax due by 31 January 2012 in respect of the year 2010-11 of £6,331.58, the penalty amounting to £316. It raises a short question of law as to what constitutes a valid claim for the carry back of losses from the subsequent year of assessment to the year for which tax was due. The penalty was assessed pursuant to the Finance Act 2009, Schedule 56, paragraph 3(2); it is not in dispute that this provision was correctly implemented in the event that there was no valid claim to carry back, and if there was no reasonable excuse within the meaning of paragraph16(1) of Schedule 56.

The facts

2. The taxpayer had two relevant sources of income, one from a farming partnership and the other from a haulage business. The hard copy return for Mr Robins for 2010-11 was received by the Revenue on 17 May 2011, processed on 26 May and produced a tax liability of £6,331.68 payable on or before 31 January 2012. The tax was still unpaid by 2 March 2012 when the penalty under appeal was assessed.

3. The return for 2011-12 was received by the Revenue on 8 May 2012 and claimed to carry back losses for that year to the previous year, with – as the Revenue accept - the consequence that the tax payable for that previous year was absorbed by the losses carried back. On 24 January 2012, the taxpayer's agent had, however, written to the Revenue as follows:

Dear Sirs

M E Robins Esquire

My client has current year losses and will be setting them against his 2010-11 profits. He will not therefore be paying the £9,497.52 due on the 31st January 2012 or the £3,165.84 due on the 31st July 2012.

Yours faithfully

Peter Clarke

Clarke & Co

4. The legislation relevant is as follows -

– *Taxes Management Act 1970*

42 *Procedure for making claims etc*

(1) Where any provision of the Taxes Acts provides for relief to be given, or any other thing to be done, on the making of a claim, this section shall, unless otherwise provided, have effect in relation to the claim.

(1A) Subject to subsection (3) below, a claim for a relief, an allowance or a repayment of tax shall be for an amount which is quantified at the time when the claim is made.

(2) Subject to subsections (3) to (3ZC) below, where notice has been given under section 8, 8A . . . or 12AA of this Act, a claim shall not at any time be made otherwise than by being included in a return under that section if it could, at that or any subsequent time, be made by being so included.

(3) Subsections (1A) and (2) above shall not apply in relation to any claim which falls to be taken into account in the making of deductions or repayments of tax under PAYE regulations.

SCHEDULE 1B - CLAIMS FOR RELIEF INVOLVING TWO OR MORE YEARS

Loss relief

2(1) This paragraph applies where a person makes a claim requiring relief for a loss incurred or treated as incurred, or a payment made, in one year of assessment ("the later year") to be given in an earlier year of assessment ("the earlier year").

(2) Section 42(2) of this Act shall not apply in relation to the claim.

(3) The claim shall relate to the later year.

(4) Subject to sub-paragraph (5) below, the claim shall be for an amount equal to the difference between—

(a) the amount in which the person is chargeable to tax for the earlier year ("amount A"); and

(b) the amount in which he would be so chargeable on the assumption that effect could be, and were, given to the claim in relation to that year ("amount B").

(5) Where effect has been given to one or more associated claims, amounts A and B above shall each be determined on the assumption that effect could have been, and had been, given to the associated claim or claims in relation to the earlier year.

(6) Effect shall be given to the claim in relation to the later year, whether by repayment or set-off, or by an increase in the aggregate amount given by section 59B(1)(b) of this Act, or otherwise.

(7) For the purposes of this paragraph, any deduction made under section 62(2) of the 1992 Act (death: general provisions) in respect of an allowable loss shall be deemed to be made in pursuance of a claim requiring relief to be given in respect of that loss.

- Finance Act 2009, Schedule 56

Reasonable excuse

16(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

Submissions and Conclusions

5. It will be seen that section 42(1A) of TMA 1970 requires that a carry back claim must be "quantified at the time when the claim is made", though it may be made otherwise than in a return. The main question in this appeal is: was the letter of 24 January 2012 a claim within the meaning of section 42(1A)? The words used in this provision are not further defined and we are told that there is no authority on the matter.

6. Mr Clarke argued that the letter in question made the position perfectly plain, since the losses carried back to offset the tax due on 31 January 2012 could only be the sum of £22,396, which was later specified in the 2011-12 return, since only that sum could arithmetically achieve that result – no other calculation could do so; there was, he said, no more than a simple calculation needed to "quantify" the carry back claim and that was therefore no merit in arguing that because the amount of the carry back had not been stated in the letter it had not been "quantified" as required by the section. In fact, the actual figure had Mr Clarke told us had been ascertained in his office on 20 January 2012 when the accounts had been completed and could have been stated explicitly in his letter of 24 January 2012.

7. As against that, Ms Orimoloye submitted that "quantified" meant actually quantified and not "capable of being ascertained" or some such alternative meaning. If the taxpayer's agent had chosen to quantify the claim he, on his own admission, had been in a position to do so but instead all that was given was in effect notice of a claim that would be made. If the claim had been quantified in the letter, it would have sufficed to cancel the tax liability which fell due on 31 January 2012.

8. On a subsidiary point, which is not strictly a matter for the tribunal, Mr Clarke complained that his letter of 24 January received no response and had been ignored. In fact, in a letter of 5 March 2012 to Clarke & Co the Revenue attached a schedule of notes which did deal with the issue in general terms; it is true that no specific response was given at the time, but the objection is without substance since the issue was addressed. Replying promptly to letters is, in any event, a matter of administration and not a matter for us to deal with.

9. On the issue of law, whether the letter of 24 January 2012 was a valid carry back claim, we find against the appellant. The legislation is quite specific in requiring claims to be quantified and, as a matter of the normal use of language, we do not see that "quantified" can be read as meaning "capable of being quantified". In this case, it is true that the calculation needed was easy and obvious, but it may not always be so

in the case of taxpayers whose affairs are not as straightforward as Mr Robins's are, and the legislation is in terms which require certainty so that it can ascertained without difficulty and debate what the taxpayer's entitlement is.

10. The question of reasonable excuse was not argued on behalf of the appellant at the hearing and it is not pleaded in the grounds of appeal sent to the tribunal. Again, there appears to be no authority on this to which we can refer but, for what relevance it has, we are of the view that merely entrusting his tax affairs to a tax agent does not, without more, satisfy the requirement that the taxpayer "took reasonable care to avoid the failure" which occurred.

11. For these reasons, the appeal must therefore be dismissed.

12. 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.

MALACHY CORNWELL-KELLY
TRIBUNAL JUDGE

RELEASE DATE: 30 September 2013