[2016] UKFTT 0402 (TC)

TC05157

Appeal number: TC/2015/00086

VAT – Returns not filed in time - Statutory assessments made by HMRC - Amounts so assessed paid by taxpayer - Returns filed by taxpayer more than 4 years after due dates - Returns show that significant overpayment had been made - Claim for repayment - Claim refused as outside 4 year statutory time limit - VAT Act section 80(4) - Application to strike-out the Appeal - Rule 8(3)(c) - Consideration of Article 1 Protocol 1 - Application allowed - Appeal struck-out

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR XYZ **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MISS SUSAN STOTT FCA CTA

Sitting in public on 8 September 2015

The Appellant was represented

Mrs Spence, an Officer of HMRC, for the Respondents

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DECISION

1. This is our decision in relation to HMRC's application dated 9 March 2015 to strike out this appeal under Rule 8(3)(c) of *The Tribunal Procedure (First–tier Tribunal) (Tax Chamber) Rules 2009* (SI 2009/273). Of our own initiative, we also, pursuant to Rule 14(b) make an order anonymising this Decision prior to publication so as to preserve the anonymity of the Appellant.

The appeal

2. The underlying appeal is made by way of a Notice of Appeal dated 2 January 2015.

3. The appellant was and is a self-employed barrister in independent practice. He failed to submit his VAT returns on time for the periods 05/09, 08/09, 11/09 and 02/10. Those were the only four periods in dispute before us. HMRC's decision in relation to a late return for the period 02/09 had not been notified to the Appellant at the time of the hearing.

4. The VAT for those periods in dispute was assessed by HMRC, pursuant to section 73(1) of the Value Added Tax Act 1994 (*'the 1994 Act'*), which reads as follows:

> **Failure to make returns etc.**
>
> (1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

5. The amounts assessed came to £47,548.

6. Payments were subsequently made by the appellant.

7. On 29 July 2014 the appellant filed VAT returns for those periods, showing much reduced amounts of VAT due.

8. In summary, the position was this:

Period	*Date of HMRC assessment*	*VAT assessed by HMRC £*	*Appellant's return £*
05/09	17/07/09	11,141.06	669.94 claim
08/09	16/10/09	10,677.26	1,168.74
11/09	15/01/10	11,994.00	316.29 claim
02/10	16/04/10	9,608.62	2,288.38

9. An overpayment of approximately £43,000 had been made by the appellant in relation to those four periods.

10. The appellant requested that the overpayment be used to pay the actual VAT liability for later periods, and that any surplus should be repaid to him.

11. On 8 August 2014, HMRC refused to do so, on the basis that section 80(4) of the 1994 Act prevented it from doing so.

12. Insofar as material, section 80 of the 1994 Act reads as follows:

> **Recovery of overpaid VAT.**
>
> (1) Where a person has (whether before or after the commencement of this Act) paid an amount to the Commissioners by way of VAT which was not VAT due to them, they shall be liable to repay the amount to him.
>
> (2) The Commissioners shall only be liable to repay an amount under this section on a claim being made for the purpose.
>
> (3) It shall be a defence, in relation to a claim under this section, that repayment of an amount would unjustly enrich the claimant.
>
> [...]
>
> (4) The Commissioners shall not be liable, on a claim made under this section, to repay any amount paid to them more than four years before the making of the claim.

13. HMRC's decision was that the appellant's claim should not be allowed, as out of time.

14. Following a statutory review, HMRC concluded on 5 December 2014 that the original decision should be upheld. The reason given was that the amounts relating to the four VAT periods had been '*capped correctly in accordance with section 80(4) of the VAT Act 1994'*.

The Application to strike-out

15. *Rule 8(3)(c)* reads:

> " The Tribunal may strike out the whole or a part of the proceedings if - (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding".

16. Striking-out under Rule 8(3)(c) is discretionary.

17. The application was made only on that footing. Although HMRC invited the Tribunal, at the hearing, to consider striking out the whole or part of proceedings under Rule 8(2) (which is a mandatory provision) we decline to deal with the

application on that footing. We were not given any reason as to why the application had been framed in the limited way that it was. We considered that it was not fair to require the appellant's representatives to have to deal with a re-framing or a re-formulation of the application made in the face of the Tribunal, and at the hearing.

HMRC's arguments

18. HMRC argued that the appellant was subject to a legal obligation to submit his returns, together with any payments due, by the due dates. His failure to do so entitled HMRC to make assessments, under section 73 of the 1994 Act, as the means of establishing a VAT debt in relation to the prescribed accounting periods where the appellant's returns were missing. It was said that the assessments had been made to best judgment based on centrally stored data and information held concerning the appellant's business.

19. HMRC's assessments were withdrawn upon receipt of the appellant's VAT returns for the disputed periods on 29 July 2014.

20. However, given that the appellant had chosen to pay HMRC's assessments instead of submitting his returns on time, he consequently could only recover any amounts overpaid by making a claim under section 80 of the 1994 Act.

21. The legislation prescribes that such a claim must be made within four years of the end of the accounting period in which the assessment was made. Therefore, the appellant had submitted his claim outside the statutory time limit.

22. HMRC acknowledged that the appellant's VAT returns were submitted late due to illness, and that the amount in dispute was substantial, and expressed considerable sympathy for the appellant's circumstances. We were told that HMRC had afforded the appellant special relief under Schedule 1AB of the *Taxes Management Act 1970* in relation to his income tax returns (similarly late), and in the exercise of its care and management powers.

23. Nonetheless, HMRC considered that the 1994 Act afforded it no discretion, and, as such, it was obliged to strictly apply the time limit in section 80(4). It was submitted that there was no legal basis in domestic legislation upon which either HMRC or this Tribunal could extend that time limit.

24. In short, HMRC's position was that any claim made more than four years after the end of the accounting period in which the assessment was made was capped, irrespective of the circumstances.

25. It drew support for its arguments from the decision of the First-tier Tribunal (Judge Rachel Short and Mrs Sheila Cheesman) in *Brent Newsagents v HMRC [2015] UKFTT 32 (TC)*. In that case, the Tribunal, striking out an appeal under Rule 8(3)(c), held that the four year time limit in section 80(4) was lawful and proportionate.

The Appellant's arguments

26. The appellant had been suffering from poor health, with a fragile mental state, and had been barely functioning professionally.

27. The appellant had made the payments in good faith. He had sent in an amount which he knew would be greater than the true liability "*hoping to give an indication that he did not intend to deprive HMRC of their proper portion"*.

28. The assessments were unreasonably excessive and punitive, and had no basis in or connection with the real financial position.

29. The correct reading of the legislation was a purposive one. Read as such, Parliament had intended to ensure that the Commissioners could not be held liable in law for any unjust or unmerited enrichment which would accrue to them by virtue of overpayments. Parliament did not prevent the Commissioners from looking at a case and "*despite the letter of the law being firmly on the side of the Commissioners"* nonetheless *"determining that it would be just to credit or repay the amount*".

30. The Commissioners had applied the legislation in an "algorithmic" manner, and had therefore failed to take account of the equity of the case.

31. It was neither proportionate nor consonant with the basic principle of fairness that HMRC should be entitled to retain the overpayment.

Discussion

Domestic legislation

32. The language of section 80(4) of the 1994 Act is clear and unambiguous. The expression 'shall not be liable' is ordinary language, and does not admit of any doubt.

33. Section 80(4) is self-contained. It is not made subject to any qualification or rider.

34. Moreover, our attention was not drawn to anything within the 1994 Act more generally which would itself enable this particular time limit to be extended. In this regard, the 1994 Act imposes a 'bright line' rule, in the sense that a claim for repayment is either made within time, or it is not.

35. We do not consider there to be any statutory basis in the 1994 Act which would authorise HMRC to extend the time limit in question, were it minded to do so.

36. Accordingly, we do not consider that there is anything in the 1994 Act which would permit the statute to be read in the manner contended for by the Appellant.

Article 1 Protocol 1

37. It was not disputed by HMRC that the right to make a claim for over-declared VAT or a late claim for input tax is a "possession" within the meaning of Article 1 Protocol 1 of the European Convention on Human Rights ("A1P1").

38. Given that there is no route for extending time under the 1994 Act, then the only remaining basis upon which the appellant could succeed before the tribunal is by virtue of the argument that application of the four-year time-limit in this VAT means that the appellant's right (afforded by A1P1) to the peaceful enjoyment of his property has not been respected.

39. We consider that the four-year time limit set out in section 80(4) of the VAT Act is both legitimate and proportionate, even though the expiry of that period necessarily entails the dismissal of any appeal against its operation. We consider that the United Kingdom, as a member state, has the right to procure the payment of taxes. Domestic legislation requires legal certainty to determine how long tax claims can remain outstanding. We consider that there is a strong public interest in the imposition of finality in such circumstances, so that both HMRC and individual taxpayers know where they stand. In our view, the four-year time limit is well within the wide margin of appreciation afforded to the United Kingdom.

40. There is no 'special relief' or dispensing regime in relation to VAT, and we do not consider that there is any arguable scope for the Tribunal to fashion or introduce one, even if the circumstances of a case were to be compelling. It is not part of our function to usurp the legislative competence of Parliament by introducing such a regime in relation to VAT.

41. We respectfully consider there to be considerable force in the tribunal's remarks in *Brent Newsagents* at Paragraph [23]:

> "In circumstances in which a taxpayer has had ample opportunity to make accurate returns but has failed to do so for reasons within their control we cannot see how it is possible to argue that the imposition of a statutory time limit gives rise to a result which is either unfair or disproportionate. To allow a taxpayer in the Appellant's position to make claims outside the statutory time limit would be to remove any force from the statutory time limits themselves, to the disadvantage of both HMRC and tax payers"

42. Our attention was also drawn to the decision of Barling J., sitting as a Judge of the Upper Tribunal, in *R (on the application of Andrew Michael Higgs) v HMRC [2015] UKUT 92 (TCC)*. That was an application for judicial review of a decision by HMRC not to process the Applicant's self-assessment tax return (on the basis that it was submitted after the expiry of the four-year limit referred to in section 34(1) of the *Taxes Management Act 1970*) and that HMRC was therefore entitled to retain an overpayment on account. The primary conclusion was that the time-limit in section 34(1) TMA 1970 had no application to self-assessment (as opposed to assessment by HMRC) and, accordingly, the Applicant was not out of time.

43. As the learned Judge observed, given his conclusion on the primary issue, the alternative argument that HMRC had a discretion which it should have exercised in the applicant's favour did not strictly speaking arise. The Applicant argued that, if HMRC could treat his self-assessment return as time-barred, then that would amount to a disproportionate interference which his rights under A1P1.

44. Critically, in that case, it was common ground that HMRC had a discretion to waive the time limit in question: see Paragraph [53]. That discretion was a statutory one. The existence of such a discretion, in itself, makes *Higgs* a significantly different case from this one, and we cannot derive assistance from it in the manner contended for by the Appellant.

45. As such, the appellant has no reasonable prospect of success in this regard, and his appeal must be struck-out pursuant to Rule 8(3)(c).

The role of exceptional circumstances

46. However, given that the matter was argued before us, and on the hypothesis that we are wrong on the above point, we shall express our views as to whether the ECHR could override the statutory time limit, for example where there are exceptional circumstances.

47. The appellant's representatives drew our attention to the decision of the First-tier Tribunal (Judge Rachel Short and Mr Michael Bell) in *Ignatius Fessal v HMRC* [2015] UKFTT 0080 (TC) where a similar view is expressed at Paragraph [44]. Although that decision is materially distinguishable (since it holds that the appellant's right to reclaim tax for an overpayment year under Schedule 1AB of the Taxes Management Act 1970 was <u>not</u> a possession for the purposes of A1P1) the Tribunal did go on to observe (albeit, strictly speaking, obiter) that, had it been required to decide the matter, it would have concluded that the time limit did pursue a legitimate aim, namely being to ensure certainty and closure of tax issues for both taxpayers and HMRC, in a manner which is reasonably proportionate. That view chimes with the one which we have already expressed above.

48. It was argued before us that the appellant was worse off by virtue of making payment than if he had not paid anything at all, and that this constituted an exceptional circumstance and/or was sufficient to render HMRC's decision a disproportionate and unlawful interference with the appellant's rights.

49. We do not agree. We do not consider the fact of an overpayment to be an exceptional circumstance. If it were, then the time limit in section 80(4) would be devoid of meaning.

50. In this case, the real cause of the appellant's situation was not his overpayment, but rather was his failure to file his returns timeously. We cannot speculate as to what would or might have happened had the appellant not paid anything, but it reasonable to suppose that HMRC would have taken steps to recover the sums which it had

assessed. We must decide this application on the basis of the facts before us. We cannot decide it on the basis of hypothesis or speculation.

51. Ultimately, we do not need to express any concluded view in principle as to whether exceptional circumstances could operate to extend the time-limit. This is because even if (for the sake of argument) the appellant's argument was well-founded, and exceptionality was a relevant factor, we nonetheless do not consider that the circumstances of this case can properly be described as exceptional.

52. Thus, and irrespective of the argument about whether the time-limit in section 80(4) is absolute or not, our view on this point, in and of itself, means that the appellant has no reasonable prospect of success.

53. The question of whether a taxpayer had failed to make accurate returns for reasons within their control is one of fact, depending on the circumstances of each individual case. By way of illustration, the tribunal in *Brent Newsagents* observed that the Appellant had "not come anywhere near" establishing that this was the case, notwithstanding its argument that its VAT returns had not been made in time for a number of reasons, including pressure of work running a small business, ill health, family bereavements, and lack of clear information from HMRC about the application of time limits which would mean that this VAT could not be reclaimed.

54. In the present case, whilst the appellant had been suffering from ill-health, it was nonetheless clear, on the basis of the documents which we have seen, that he was aware of his tax obligations, and had ample opportunity to make his returns, but had failed to do so for reasons within his control:

(1) On 1 October 2009, HMRC spoke with the appellant in relation to his returns. He explained that 'things had got waylaid' and that the late returns would be ready in two weeks;

(2) On 10 November 2009, HMRC spoke with the appellant. The returns were still not complete. He said that he would bring them to his accountant 'tomorrow'. He made a payment;

(3) On 4 February 2010, HMRC spoke with the appellant;

(4) On 28 April 2010, the appellant rang HMRC and advised that he had been working at a reduced work load due to illness, but that everything was now back on track and would get all outstanding returns completed and paid;

(5) On 25 May 2010, the appellant rang HMRC. He advised that he was in the process of completing all outstanding returns, would be out of the country for a week, and would forward the returns on his return;

(6) The appellant had a phone conversation on 5 September 2011 with Mr Colwyn Griffiths, an Officer of HMRC, in relation to the giving of security under Schedule 11 of the 1994 Act, pursuant to a Notice served on 22 April 2010. He agreed to attend an interview on 14 October 2011, although he did not subsequently attend;

(7) In April and May 2012, the appellant wrote three cheques in respect of income tax and VAT liabilities, and lodged a sum at a bank;

(8) On 2 July 2013 the appellant wrote to HMRC, in a letter (from his professional address) responding to a letter from HMRC of 13 March 2013, recognising that he had not attended to his tax affairs as he ought to have done, informing HMRC that he disputed the sums claimed, and that he would have the accounts for the appropriate years completed by the end of August;

(9) A statutory demand was issued in March 2013. According to HMRC's log, that demand was served on 14 June 2013. It had certainly come to the appellant's attention by 2 July 2013. There is no record of any application to set the statutory demand aside. A bankruptcy petition was apparently presented, since petition hearings are recorded on 27 February 2014 and 17 April 2014. HMRC's log indicates that it was told, at one of the hearings, that "a house in the USA had been sold but the proceeds had not yet been released". The accuracy of HMRC's log was not disputed before us. The statement referred to can only have come from the appellant, or from someone acting on his behalf.

55. The conclusion must be that the appellant was engaging, albeit intermittently, both with HMRC (and also with the court) when it came to the matters of his outstanding returns, the sums due, and the bankruptcy petition.

56. We therefore cannot accept, on the basis of the material and information before us, that the appellant had been left in 2008, and at all material times thereafter, unable to attend to any normal social or professional functions.

57. At the hearing, we were provided with a report from a consultant psychiatrist dated 19 March 2015. The report is marked 'Strictly Confidential', but the appellant's representatives confirmed, when handing this document up for our consideration and in support of the appellant's case, that they were waiving their client's confidentiality.

58. We have treated that report as the best evidence which the appellant is able to produce as to his health difficulties, and we have carefully considered it. The diagnostic formulation is that in recent times the appellant had been presenting with significant but not very severe manifestations of a pathological anxiety/depressive psychological stress reaction. However, the report makes no mention of any hospital attendance or admission at any time. The report was based entirely on an interview with the appellant in March 2015. The author had not been involved with the appellant's care or treatment before making the report. The author does not mention any communication or correspondence with others who had been involved in the appellant's care and treatment before March 2015.

59. In our view, and although we wish to express our considerable sympathy for the personal and health difficulties which the appellant has undoubtedly suffered, we do not consider that report supportive of the contention that the appellant was left completely unable to deal with his tax affairs in time from 2008 onwards; and, as we have already found, he was, in fact, dealing, to some degree, with them.

Conclusion

60. For the above reasons, we consider that there is no reasonable prospect of the appellant's case succeeding, and the appeal is therefore struck out under Rule 8(3).

61. 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 McNall
TRIBUNAL JUDGE

RELEASE DATE: 25 November 2015