TC02218

Appeal number: TC/2011/07624

Income tax – overpayment of tax through PAYE system in 2002-03, 2003-04 and 2004-05 – claim for repayment made 17 March 2011 – time limits applicable – section 43 TMA or Schedule 1AB TMA - claim made out of time – no jurisdiction to require HMRC to apply ESC B41 – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANTONIO LAURICELLA **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
TERRY BAYLISS FFA FAIA

Sitting in public in Temple Court, Bull Street, Birmingham on 3 July 2012

The Appellant appeared in person

Simon Bates, Presenting Officer of HM Revenue and Customs, appeared for the Respondents

DECISION

Introduction

1. This appeal concerns a claim for repayment of allegedly overpaid income tax deducted through the PAYE system in the tax years 2002-03 to 2004-05, in particular the time limit applicable to any such claim. In addition, it concerns the applicability (or otherwise) of an Extra-statutory Concession in determining the appeal.

The facts

2. The Appellant had various employments during the tax years 2002-03, 2003-04 and 2004-05. It appears that the aggregate of deductions made from his wages during each of those years under the PAYE system may have exceeded his total income tax liability for those employments.

3. This fact only came to light when the Appellant, some years later, received some small unsolicited tax refunds from HMRC in respect of later years and started to look into the position in more detail. He ultimately made a claim for repayment in respect of the allegedly overpaid tax for the above years on 17 March 2011.

4. The Appellant was not required by HMRC to submit a self-assessment tax return in respect of any relevant tax year.

5. HMRC refunded to him overpayments that were found to have been made in later tax years, but refused to repay any sums for the above years on the basis that the repayment claim was made out of time.

6. The Appellant appealed. His requests for HMRC to provide him with copies of the relevant legislation were not complied with and he received mixed messages about the time limit that should apply to his claims. Even in HMRC's statement of case and at the hearing, the full basis of their argument was not made fully clear.

The law

7. It is fair to say that the law in this area is unclear and unnecessarily complicated. On the evidence of this case, it would seem that HMRC are themselves confused about it. The re-writing of the Taxes Management Act 1970 (which has been amended piecemeal innumerable times over the last forty years or more) is long overdue and, if properly done, would bring much needed clarity to this area of the law.

Section 43 Taxes Management Act 1970 ("TMA")

8. In their statement of case, HMRC relied on section 43 TMA as being the provision under which the Appellant's claim was time-barred.

9. Schedule 39 Finance Act 2008 ("FA08") made changes to TMA, in particular to section 43. Those changes generally took effect, by virtue of the Finance Act 2008,

Schedule 39 (Appointed Day, Transitional Provision and Savings) Order 2009, from 1 April 2010. However, under paragraph 10 of that Order, the effective date of the change was moved back to 1 April 2012 in certain situations, in particular where the individual in question had not been required, within one year of the end of the relevant tax year, to submit a self-assessment return. That was the case in relation to the Appellant, so in his case the changes to section 43 TMA only took effect from 1 April 2012.

10. Before the changes, the time limit set out in section 43(1) TMA provided as follows:

> "Subject to any provision of the Taxes Acts prescribing a longer or shorter period, no claim for relief in respect of income tax or capital gains tax may be made more than five years after the 31st January next following the year of assessment to which it relates."

11. After the changes, the section read as follows:

> "Subject to any provision of the Taxes Acts prescribing a longer or shorter period, no claim for relief in respect of income tax or capital gains tax may be made more than 4 years after the end of the year of assessment to which it relates".

12. In relation to the Appellant's claim, therefore, the "old" version of section 43 TMA applied as set out at 10 above, with the longer time limit. This meant that for the year of assessment (i.e. tax year) 2004-05 which ended on 5 April 2005, the time limit for making a claim set out in section 43 TMA expired on 31 January 2011. For the earlier tax years, it expired correspondingly earlier. The Appellant submitted his claim on 17 March 2011. Thus his claim, if it fell within section 43 TMA, was time-barred by that section in relation to 2004-05 and earlier years.

13. This was the argument that appeared to be put by Mr Bates at the hearing (though he also made some reference to schedule 1AB TMA – see below), and in the hearing bundle he included copies of section 43 TMA and some (but not all) of the legislation that effected the change to it.

Section 33 & Schedule 1AB TMA

14. We have grave reservations however about whether section 43 TMA is indeed the correct provision to apply in this case. We note that it is explicitly made subject to "any provision of the Taxes Acts prescribing a longer or shorter period" (and, for this purpose, "the Taxes Acts" included TMA itself – see section 118(1) TMA); also it is expressed to apply only to a "claim for relief in respect of income tax…" and Mr Bates drew our attention to no authority in support of the view that a claim for repayment, such as was being made by the Appellant in this case, fell within the meaning of the phrase "claim for relief".

15. We consider it much more likely therefore that the provisions governing this appeal are those contained in section 33 and Schedule 1AB TMA. We only express

our view in such provisional terms because the matter was not properly argued before us and is in any event not crucial to our decision.

16. Section 33 TMA (as inserted by schedule 52 Finance Act 2009 ("FA09")) is headed "Recovery of overpaid tax" and introduces a new schedule 1AB TMA (also inserted by FA09 schedule 52). By virtue of section 100(2) FA09, schedule 1AB has effect "in relation to claims made on or after 1 April 2010".

17. In the hearing bundle, Mr Bates included some extracts from schedule 1AB. The following provisions of schedule 1AB are relevant:

> "**1** – (1) This paragraph applies where –
>
> (a) a person has paid an amount by way of income tax or capital gains tax but the person believes that the tax was not due…
>
> (2) The person may make a claim to the Commissioners for repayment or discharge of the amount.
>
> …
>
> **3** – (1) A claim under this Schedule may not be made more than 4 years after the end of the relevant tax year.
>
> (2) In relation to a claim made in reliance on paragraph 1(1)(a), the relevant tax year is –
>
> (a) where the amount paid, or liable to be paid, is excessive by reason of a mistake in a return or returns under section 8, 8A or 12AA of this Act, the tax year to which the return (or, if more than one, the first return) relates, and
>
> (b) otherwise, the tax year in respect of which the payment was made."

18. In addition, paragraph 10 of Schedule 52 FA09 contained the following transitional provision:

> "**10 –** (1) In relation to a relevant claim, paragraph 3(1) of Schedule 1AB to TMA 1970 (inserted by this Part of this Schedule) has effect as if for "more than 4 years after" there were substituted "more than 5 years after the 31st January next following".
>
> (2) "Relevant claim" means a claim within paragraph 3(2)(a) of Schedule 1AB to TMA 1970 that –
>
> (a) is made before 1 April 2012 by a person other than a company, and
>
> (b) satisfies sub-paragraph (3).

> (3) A claim satisfies this sub-paragraph if notice requiring the return (or, if more than one, the first return) mentioned in paragraph 3(2)(a) of Schedule 1AB to TMA 1970 was not given within one year of the end of the tax year to which the return relates."

19. The claim in this case is clearly a claim for repayment of income tax which has been paid but was not due, and the overpayment was not made by reason of a mistake in a return under section 8, 8A or 12AA TMA (which all concern normal annual self-assessment returns). This means that the claim is not a "relevant claim" within the meaning of paragraph 10 of Schedule 52 FA09, because it is a claim that falls under paragraph 3(2)(b) and not 3(2)(a) of Schedule 1AB TMA. Therefore the original "more than 4 years after" wording in paragraph 3(1) of Schedule 1AB applies.

20. It follows that in our view, the relevant time limit for claims for repayment of overpaid PAYE income tax for the tax year 2004-05 would be 5 April 2009 (being four years after the end of the 2004-05 tax year); therefore the Appellant's claim (which was made on 17 March 2011) was more than two years out of time.

Extra Statutory Concession B41

21. The Appellant argued that whichever statutory time limit applied, his claim should be admitted late under HMRC's Extra-statutory Concession B41, which provides that "repayments of tax will be made outside the statutory six-year time limit where an overpayment of tax has arisen because of an error by HMRC or another government department, and where there is no dispute or doubt as to the facts."

22. Mr Bates had two replies to this argument. First, he said that because of the lapse of time, HMRC had destroyed all relevant records in line with their usual data retention policies and therefore it was not possible to establish whether the overpayment had arisen because of an error by them. Second, even if it had, the Tribunal had no jurisdiction to require HMRC to apply an Extra-statutory Concession.

23. We make no criticism of HMRC for their destruction of the records after such a lapse of time, and we agree with Mr Bates' observation that the error probably occurred because of a mistake or oversight by the Appellant or his employer rather than by HMRC. However, the key point is that we agree this Tribunal has no power in any event to require HMRC to apply an Extra-statutory Concession.

Conclusion

24. We therefore find that the Appellant's claim is time-barred by virtue of paragraph 3(1) of Schedule 1AB TMA. Even if we were wrong in our view that this provision applies rather than section 43 TMA, his claim would still be time-barred by virtue of that section. And we have no jurisdiction to intervene in relation to HMRC's decision not to apply the benefit of Extra-statutory Concession B41.

25. The appeal must therefore fail.

26. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 13 July 2012