Neutral Citation: [2023] UKFTT 00226 (TC)

Case Number: TC08746

FIRST-TIER TRIBUNAL
TAX CHAMBER

Manchester

Appeal reference: TC/2020/03059

DISCOVERY ASSESSMENTS - EIS – whether taxpayer responsible for actions of fraudulent agent – discovery – carelessness – authorisation – appeal allowed

Heard on: 15 November 2022
Judgment date: 02 March 2023

Before

TRIBUNAL JUDGE JENNIFER DEAN

Between

ROBERT ROBSON

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr R. Robson, assisted by Mr R. Tweddle

For the Respondents: Mr M. Mason, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This is an appeal against:

> (i) A discovery assessment made under s29 TMA 1970 for 2015/16 issued on 29 March 2019 in the sum of £12,850.60, amended on 3 February 2020 to £8,250.00 and
>
> (ii) A discovery assessment made under s29 TMA 1970 for 2016/17 issued on 29 March 2019 in the sum of £16,380.40.

FACTS

2. The following facts are not in dispute.

3. On 21 September 2016 a Self-Assessment record was created for the Appellant. On the same date, HMRC issued a notice to make a SATR to the Appellant for 2015/16.

4. On 29 September 2016 Capital Allowances Consultants Ltd ("CACL") emailed the Appellant to advise that they had requested an authorisation code from HMRC. The Appellant was requested to forward the code to CACL when received and he did so on 14 October 2016.

5. On 3 January 2017 the Appellant's purported SATR for 2015/16 was submitted online via the Agents Services Account. This generated an overpayment of tax of £8,250 which was repaid on 9 January 2017 to the nominee named on the return, Cryoblast.

6. On 6 April 2017 the purported SATR for 2016/17 was submitted online via the Agents Services Account. This generated a repayment of £16,513 which was repaid on 19 April 2017 to the named nominee on the return, ECO Cooling Solutions Ltd.

7. On 1 March 2019 HMRC officer Mr Barclay wrote to the Appellant regarding claims for Enterprise Investment relief ("EIS") contained in the purported returns for tax years ended 5 April 2016 and 2017. The Appellant was asked to provide form EIS3 (a document issued by EIS investee companies to the investor to confirm that the conditions for EIS relief were satisfied) to validate the claims which had been paid by HMRC without any checks.

8. On 20 March 2019 the Appellant contacted HMRC to advise he had not made any such investments.

9. Discovery assessments were raised on 29 March 2019 and on 3 April 2019 the Appellant lodged his appeal with HMRC. The assessments were upheld on review and the Appellant appealed to the Tribunal on 22 August 2020.

10. The Appellant's appeal was initially joined with 8 others; all appeals involved separate taxpayers who had appealed in similar circumstances which are outlined further below.

11. The main facts of this case are not disputed. The Appellant accepts that he was not eligible for EIS relief. The Appellant's case is that he had no knowledge of the claims being made on his behalf and that the person alleged to be acting on his behalf was acting fraudulently and was not his agent.

RELEVANT LEGAL PROVISIONS

12. Section 29 TMA provides as follows:

> 29 Assessment where loss of tax discovered
>
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive, the officer or, … the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

(2) Where—

(a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and

(b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed, the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) … in the same capacity as that in which he made and delivered the return, unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return, the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer …; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7)…

(7A)…

(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

(9) ….

(10) …

EVIDENCE AND SUBMISSIONS

13. In addition to the bundles of documents, which included correspondence between the parties and written submissions, I heard evidence on behalf of HMRC from Mr Barclay, the officer who issued the assessments, and on behalf of the Appellant from Mr Robson and Mr Tweddle. As I understand the position, Mr Tweddle has a similar appeal pending. However, I explained that this appeal is only concerned with the facts of Mr Robson's case. I must commend both Mr Robson and Mr Tweddle for the research and commitment they demonstrated in presenting this appeal. Neither has had legal training nor do they have any experience in handling tax matters and despite a clear sense of aggrievement they recognised the issues which form the crux of this appeal. Although on occasions their evidence and submissions overlapped, I have identified the distinction where appropriate to reach my findings of fact.

14. HMRC's position is that the assessments were made in accordance with s29 TMA. The officer reasonably believed that there was an insufficiency to tax; this was based on the information provided by the Appellant who did not dispute that he was not eligible for EIS relief, the claim in respect of which was paid by HMRC and caused the insufficiency to tax.

15. HMRC contend that the assessments were made within the time limits provided for by the legislation and that the conditions set out in s29 TMA 1970 are met.

16. The returns were submitted on 3 January 2017 and 6 April 2017 for tax years 2015/16 and 2016/17 respectively. No enquiries were opened and the period for doing so had expired. Section 29 TMA permits the making of an assessment within 4 years of the end of the tax year to which it relates.

17. HMRC contend that anyone who completes a return, files a return or communicates with HMRC is deemed to be acting on behalf of the taxpayer, relying on *HMRC v Hicks* [2020] UKUT 0012 and *Trustees of the Bessie Taube Discretionary Trust* [2010] UKFTT 473 (TC) at [93]:

> "In our view, the expression "person acting on … behalf" is not apt to describe a mere adviser who only provides advice to the taxpayer or to someone who is acting on the taxpayer's behalf. In our judgement the expression connotes a person who takes steps that the taxpayer himself could take, or would otherwise be responsible for taking. Such steps will commonly include steps involving third parties, but will not necessarily do so. Examples would in our view include completing a return, filing a return, entering into correspondence with HMRC, providing documents and information to HMRC and seeking external advice as to the legal and tax position of the taxpayer. The person must represent, and not merely provide advice to, the taxpayer."

18. It is HMRC's case that having followed the online agent authorisation process by providing a confirmation code to the agent, the Appellant engaged CACL to complete and submit returns. The test in *Taube* above is met and CACL was a person acting on the Appellant's behalf.

19. In evidence Mr Barclay explained that to appoint an agent, a taxpayer can ask them to use HMRC's online authorisation service or complete form 64-8 and send it to HMRC. There was no dispute that Mr Robson had not completed a form 64-8 and no such form was produced in evidence.

20. In order for an agent to be authorised via the online authorisation service the agent accesses their agent services account and completes the authorisation request. HMRC send an authorisation code by post to the taxpayer within 7 days. The taxpayer must provide the code to the agent within 30 days or it expires.

21. Using the code, the agent can sign into their account to enter the code and complete the authorisation process. HMRC argue that the Appellant provided his code to the agent and thereby authorised CACL to act on his behalf. Had the Appellant not wished CACL to act on his behalf, he need not have provided the code.

22. HMRC contend that in both instances the SATRs were filed online by the Appellant's former accountant/agent via the agent services portal following authorisation of that agent by providing the code issued to the Appellant to his agent. The return was therefore submitted in accordance with s8(2) TMA which provides as follows:

> "Every return under this section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete."

23. The declaration is made by marking a box and, Mr Barclay explained, the return cannot be submitted without it. As returns were submitted and received by HMRC, the box must have been ticked and the returns cannot be said to be invalid.

24. HMRC highlighted Regulation 8 of the Income and Corporation Taxes (Electronic Communications) Regulations 2003 which state:

> "Any information delivered by an approved method of electronic communications on behalf of any person shall be deemed to have been delivered by him unless he proves that it was delivered without his knowledge or connivance."

25. The burden to show that the return was not delivered by the Appellant therefore rests with Mr Robson. HMRC contend that the returns were submitted with the his knowledge or connivance and, in so submitting, they rely on emails between the Mr Robson and CACL which were provided to HMRC by Mr Robson and which, HMRC argue, show that Mr Robson authorised CACL to submit a return and he understood that claims would be made even if he was unaware of the specific entries on the return.

26. Mr Robson's grounds of appeal are lengthy and I will not set them out in full. He explained that in the relevant years he "used an accountant to obtain a rebate". Mr Robson provided CACL with the documents they requested to assist him in obtaining a rebate. He has reported the fraud to the police and in his view HMRC have acted negligently by pursuing him instead of prosecuting the person who committed the fraud. Mr Robson maintains, as he has from the outset, that he did not submit a SATR nor did he request, instruct or authorise CACL to do so.

27. HMRC rely heavily on the emails provided by Mr Robson showing communications between himself and CACL. Those emails include the following:

Email CACL to Appellant 14 September 2016:

> "I have requested your UTR from HMRC. This should arrive in the post over the next few weeks so once you receive it could you please forward it to ourselves."

Email CACL to Appellant on 29 September 2016 following receipt of the UTR:

> "…we have now requested an agent authorisation code to let us act on your behalf. This will arrive in the post in the next week or so. Once you receive if you could forward it on and we will see what we can do for you."

Email Appellant to CACL on 14 October 2016 with authorisation code:

> "…I'm unsure if I can still do this rebate thing as HMRC have sent me a letter claiming I owe them over £4000 in unpaid tax…"

Email CACL to Appellant on 14 October 2016, CACL having updated HMRC's systems to record its authorisation:

> "…Thanks for sending this across. I have used the code to authorise us as your agent. This means from Monday we should be able to access your account. Once we have access we will have a look at what you have mentioned to see if there is anything that can be done."

Email CACL to Appellant on 19 October 2016:

> "…We have looked into your situation regarding your tax. You have underpaid tax by £4600.60. We are not entirely certain how this has come about but believe it may have been by AMEC submitting P46s each time you have worked for them.
>
> We can help you with this however as we deal with an investment company who are willing to create an investment on your behalf of £45000.00 which would generate a tax credit of £13500.00. They would normally charge 66% and pay you the balance of 33%. However this is less than the amount you would owe in tax so you would receive no rebate but it would clear any debt to HMRC.
>
> If you are happy to proceed please respond to this email and come April we can do this process again for you and if you do not owe any tax you will receive the rebate. Or alternatively if you would like to talk this through with us please let me know and I can arrange for my father to give you a call…"

28. On 12 December 2016 the Appellant emailed CACL to advise that HMRC no longer appeared to be seeking unpaid tax from him. CACL responded by asking if the Appellant still wished to carry on with "the claim" and requested bank details which were provided by the Appellant.

29. CACL contacted the Appellant on 6 April 2017 to advise that a tax credit would be generated and the Appellant would receive £5504.00. The Appellant was asked to confirm that he wished to proceed and provide his bank account details, which he did.

30. Mr Barclay concluded that the Appellant fully authorised and actively engaged with CACL to obtain a repayment of tax which included relief from an investment which was to

be created on his behalf. HMRC submit that the Appellant was fully aware of the circumstances of how the repayment was to be received and the amount. Although HMRC accept that the Appellant may not have been fully aware as to how the created investment was to result in a repayment from which he would benefit they noted that he did not query the investments or how they would generate tax credits from which he received 33% of repayments.

31. In considering whether to make an assessment, Mr Barclay formed the view that the loss of tax was brought about by carelessness on behalf of both the Appellant and agent. Relying on *HMRC v David Collis* [2011] UKFTT 588 (TC) at [29]:

> "That penalty applies if the inaccuracy in the relevant document is due to a failure on the part of the taxpayer (or other person giving the document) to take reasonable care. We consider that the standard by which this falls to be judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question."

32. Mr Barclay also took the view that the agent's actions were careless as he is deemed to know that an EIS certificate is required yet submitted the claim knowing there was no certificate.

33. Mr Barclay confirmed that following a conversation in which the Appellant advised that there were no investments, nor had he claimed relief, he made his discovery that the SATRs were inaccurate. He explained that in considering carelessness, he considered how the Appellant had acted up and until the submission of the claim for EIS relief and the fact that he had an agent acting on his behalf.

34. Mr Barclay had been told by the Appellant that he was introduced to the agent who recommended an investment opportunity, although he accepted that "investment" may be his term rather than the Appellant's. Mr Barclay considered that having an agent did not negate the requirement to do basic checks on the return or apparent investment opportunity; he took the view that a reasonable taxpayer unfamiliar with investments would have carried out research. As the Appellant had failed to take steps to do so, he considered the actions were careless. Mr Barclay added that although the Appellant told him he had not instructed an agent, he had given the agent the authorisation code, UTR and key information which led him to the view that the agent could be deemed to be acting on the Appellant's behalf. Mr Barclay did not accept that the Appellant only authorised CLAC to discuss his rebate with HMRC; he took the view that if the Appellant had wanted to restrict the agent's authority he would have written to HMRC to advise them. Mr Barclay did not accept that the return was not authorised or that it was an unsolicited return; he was satisfied that Mr Robson had provided the agent with all of the required information to authorise him.

35. Mr Barclay could not recall a meeting with the Appellant on 9 November 2019 at which his colleague had shown the declaration for submitting the SATR which showed that there had been no contact with the Appellant.

36. HMRC submitted that the Appellant engaged CACL to act and claim a refund on his behalf yet failed to take reasonable care to ensure the SATRs submitted on his behalf were accurate and correct. HMRC contend that the Appellant was fully aware that an investment would be created on his behalf but failed to undertake any checks into the scheme proposed by his agent. Had the Appellant carried out checks he would have easily identified that he was not eligible for the relief.

37. Relying on *Lagham v Veltema* (76TC259) HMRC submitted that an officer of the Board could not have been reasonably expected to be aware of the excessive relief claim on either return before the expiry of the relevant enquiry windows. An officer would not have been aware that the claims for EIS relief were invalid based on the information available at

the time. Mr Barclay stated that until he looked at Mr Robson's returns and investigated the EIS claims in the returns, he could not have been aware that the claims were invalid.

38. As Mr Barclay was satisfied that both conditions under sections 29(4) and 29(5) TMA were satisfied, he issued the assessments. Section 34 TMA 1970 allows HMRC to make a discovery assessment under s29 not more than 4 years after the end of the year of the assessment to which it relates. The assessments were issued on 22 March 2019 and re-issued on 29 March 2019 and they therefore fell within the ordinary time limits.

39. Mr Barclay was not aware whether his colleague had told the Appellant that following a complaint made about CACL HMRC had investigated all its customers on its client list and that HMRC were out of time to assess, although he accepted that this may have been the case. Mr Barclay was unaware whether a complaint was made about CACL; he was simply given the Appellant's case and checked the EIS relief claim. He did not need to know any information beyond whether there were EIS certificates or not in order to reach his decisions about whether the SATRs were accurate.

40. Mr Barclay could not comment on the agent specifically but confirmed that the allegation of fraud was passed to the relevant department. He confirmed that HMRC had made a decision not to pursue penalties against the Appellant or others in this position.

41. The Appellant had requested copies of the letters purportedly sent to him which he did not receive. Mr Barclay explained that copies of correspondence to taxpayers are not routinely kept. HMRC's systems are relied on to show what had been sent out.

42. There was an issue as to whether enquiries had been opened in relation to this matter or others. Mr Barclay clarified that no enquiries were opened into the Appellant's SATRs as discovery assessments can be made without an enquiry.

43. Mr Robson explained in oral evidence that at the relevant time he worked offshore. He explained he was referred to CACL by a work colleague who advised that he might be entitled to a rebate. He contacted the accountant and obtained the code which allowed the agent to speak to HMRC regarding his rebate. He was told that he needed to provide various pieces of information to comply with HMRC's anti-money laundering policy which he accepted as credible and an indication that the company was legitimate.

44. Mr Robson said that he received the rebate and the same occurred the following year. He heard nothing more and was told the agent was ill. A letter from Mr Barclay then arrived. He was unable to telephone HMRC immediately as he was offshore but subsequently told he was liable for a claim which he had not made and in a sum he had not received.

45. Mr Robson agreed that correspondence with CACL referred to allowing the "agent to act" but explained that this was to discuss his rebate. His employer Amec had told him that he had been paid and he was entitled to a rebate; he explained that on starting the job he attended a seminar which said that Amec would "invest" in its employees, and he had understood the investment to refer to his employer. The figures were consistent with his P60 and the wage he received. Mr Robson highlighted that the email correspondence with CACL referred to his "claim" and the subject line was headed "Tax rebate". He had not noticed that this had later been changed to "tax return".

46. Mr Robson explained that he had contacted CACL who had explained his situation to him and given him confidence in them as experts. He did not understand and was told not to worry about the legal jargon as they were the experts. Mr Robson highlighted that the emails do not refer to EIS, nor do they explain what it is or ask for his agreement to such an EIS claim.

47. Mr Robson explained he had always been PAYE and had no understanding of SATRs. As he had no experience in such matters he had gone to the accountant. At the time it appears there was some confusion regarding Mr Robson's tax as he had also received a letter regarding a potential debt to HMRC which I note was referred to in the documentary evidence.

48. Mr Tweddle supported Mr Robson's account of the meeting with HMRC on 9 November 2019 and agreed with the submission that he, Mr Robson and a number of others were victims of fraud. He recalled Mr Robson being told at the meeting that HMRC were out of time to pursue him and that following an allegation being made against the agent HMRC had approached everyone on the company's client list. This was borne out by the notes of the meeting on 9 November 2019 which record HMRC had stated they had been made aware of information from a referral from the Agent Compliance Team regarding allegations made about the tax agent which led them to look at the client list of Cryoblast and Eco Cooling and open enquiries into individuals.

49. Mr Tweddle also recalled Mr Robson being shown a declaration which, he argued, showed that Mr Robson had had no involvement in the submission of the returns, about which I set out my findings below. Mr Tweddle had reported the matter to the police. He also works offshore and heard nothing for a number of months until he was contacted by the police. He added that neither he nor Mr Robson were in the country when the returns were submitted as they were offshore.

FINDINGS OF FACT AND DECISION

50. The burden of proof rests with HMRC to establish that the discovery assessments were validly made.

51. I am grateful to Mr Robson for providing his submissions in writing. Those submissions are detailed and lengthy as are the grounds of appeal. For that reason, I have not referred to each and every point raised by Mr Robson, however I considered all of the material before me.

52. It is fair to say that HMRC's case relied on evidence provided by Mr Robson. Mr Robson has always accepted that he did not make an investment. Mr Robson has consistently maintained that the EIS claim was made without his knowledge and without his authorisation.

53. I found Mr Robson credible and I accepted his evidence in its entirety. Mr Tweddle supported Mr Robson's evidence and, to the extent that it was relevant to Mr Robson's appeal, I accepted his evidence.

54. I did not find, as invited to do by Mr Robson, that HMRC officer Mr Barclay had fabricated evidence. Mr Barclay accepted that his notes of the meeting with Mr Robson and Mr Tweddle on 9 November 2019 may have mistakenly attributed comments to the wrong person. I did not consider that this undermined Mr Barclay's evidence to any material degree. For reasons I will set out below, the role of Mr Barclay was limited; he considered the EIS claim and the absence of an EIS3 certificate in support. He formed his view that there was an insufficiency to tax and issued assessments for the years in question. None of that is in dispute.

55. The issue for the Tribunal to determine is whether the discovery assessments were validly made and whether they are in the correct amounts. There are a number of issues arising and I will address each in turn.

56. Dealing with the issue of quantum first; it is not disputed that Mr Robson was not entitled to EIS relief for 2015/16 or 2016/17. Consequently, if the discovery assessments

were validly made, then the quantum is correct, it being the amount claimed to which there was no entitlement.

57. Turning to the validity of the assessments, HMRC contend that they were issued in accordance with the relevant legislation and are therefore valid. Mr Robson disputes this.

58. Section 29(1) requires an officer of the Board to make a discovery of an insufficiency to tax. By virtue of s29(3), one of two conditions must be fulfilled; either the insufficiency was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf or at time that the enquiry window expired the officer could not have been reasonably expected on the information before him to be aware of the insufficiency.

59. I could appreciate Mr Robson's position that HMRC were aware that a fraud had been committed at an earlier point than when Mr Barclay spoke to him and confirmed that he had made no investments, and consequently there was sufficient information provided to HMRC at a time when an enquiry could have been opened. Certainly, the notes of the meeting support Mr Robson's evidence that HMRC had received an allegation of fraudulent conduct by CACL and were investigating the company's client list.

60. However, this is not sufficient for the purposes of the legislation. I am bound by the Supreme Court judgment in *Commissioners for HM Revenue and Customs v Tooth* [2021] UKSC 17 which considered this issue at [64]:

> "…the question whether there is a discovery for the purposes of section 29(1) depends upon the state of mind of the individual officer of the Revenue who decides to make the assessment. For these purposes there is no concept of the Revenue having collective knowledge such that if one officer makes a discovery that is to be regarded as a discovery made once and for all by the Revenue as a whole."

61. It may well be that HMRC knew prior to meeting with Mr Robson that the EIS relief claims on his SATRs were likely to be false. However, that is not what the law requires. I must consider Mr Barclay's evidence as the officer who made the assessments. I accepted Mr Barclay's evidence that he made a discovery once he had looked at the returns and established that Mr Robson was not eligible for EIS relief. By that point Mr Barclay had ceased to be entitled to open an enquiry and could not have been reasonably expected to be aware of the insufficiency to tax as he had not had sight of Mr Robson's returns or the claims contained therein, nor was he aware of the fact that Mr Robson was not eligible for relief. In those circumstances I am satisfied that the condition is met.

62. Although only one of conditions must be met, I will address the alternative condition set out in s29(4). HMRC's pleaded case relied on carelessness; both of Mr Robson and of his agent. Mr Barclay confirmed he did not give any consideration to the issue of deliberate as he considered the condition of carelessness was met.

63. I do not agree with HMRC's submissions. Having accepted Mr Robson's evidence, I found that he had acted reasonably and diligently. It was clear from the oral evidence that Mr Robson had in the past had issues with his tax codes and there was an issue relating to a potential underpayment, the facts of which are not relevant to this appeal, but which demonstrated that Mr Robson had contacted HMRC on a number of occasions to ensure his tax affairs were in order and he had raised the possible underpayment with CACL to seek clarification and resolution. At the time, Mr Robson worked offshore yet despite the practical difficulties this brought with it, I was satisfied that Mr Robson generally acted responsibly and proactively in managing his affairs to the best of his ability and understanding.

64. I accepted Mr Robson's explanation that due to the erratic pay structure of his work and bonus payments he believed he was due a tax rebate and had received similar payments in the

past. I also accepted Mr Robson's evidence that he contacted CACL to seek assistance as he had always been PAYE and did not understand how to claim money owed. I found my finding was supported by the documentary evidence provided to HMRC by Mr Robson. The email chain between Mr Robson and CACL began with the clear heading "tax rebate". This continued throughout correspondence in September and October 2016 until it is changed to "tax return" on 19 October 2016. The heading reverted back to "tax rebate" by April 2017. However, the emails themselves continued to refer to a rebate and I accepted Mr Robson's evidence that as far as he was concerned, he was seeking a rebate he was entitled to. Moreover, Mr Robson's screenshots of payments received from Cryoblast and Eco Cooling were also entitled "rebate".

65. I also accepted Mr Robson's evidence that CACL had been recommended to him by a colleague and that correspondence from CACL indicated it was regulated by the ATT which led him to trust that the company was legitimate. Mr Robson has since reported the company to the Serious Fraud Office and has a police crime reference number. All of these factors led to my overall impression and finding that Mr Robson acted diligently and reasonably.

66. I accepted Mr Robson's evidence that he had queried the names Cryoblast and Eco Cooling to whom payments were made and was told by CACL that it was "an agent reference carried forward from another case as CACL deals with 100s of cases each day". In the circumstances I did not find it unreasonable that Mr Robson had accepted the explanation, nor did I find it unreasonable that Mr Robson had relied on what he believed to be regulated accountancy advice in pursing a rebate and, in doing so, he accepted CACL's explanation that the reference to investment was "legal jargon" which should not concern him. Mr Robson explained, and I accepted, that his employer at the time had when he commenced his employment advised him that it was a company which invested in its employees; as the amounts referred to by CACL matched his wages, he had no reason to doubt that the investments referred to related to his employment and the tax rebate arising from that employment. Mr Robson is not a tax expert; I consider that his actions were those of a reasonable taxpayer seeking professional advice in circumstances where Mr Robson had no previous experience of the tax system. I therefore rejected HMRC's submission that his actions were careless.

67. I also did not accept that the actions of CACL were careless. For reasons of confidentiality HMRC made no comment about the allegations of fraud although the documents before me confirmed that the information had been passed to the relevant authorities. Mr Robson is, as I understand the position, one of many taxpayers in this situation. In circumstances where, on the material before me, it appears that a fraud has been perpetrated I do not accept that the actions of CACL can be described as merely "careless". I also did not accept Mr Barclay's evidence that CACL had acted "poorly" and "appears to have given misleading advice". On the material before me the actions of CACL went far further than that. In my view "carelessness" connotes a different manner of behaviour to and is distinct from fraudulent conduct. As HMRC did not plead its case on the basis of deliberate I make no findings in that regard. In those circumstances, had the condition in s29(4) been a prerequisite for HMRC's case, I would have found that it was not satisfied either in respect of Mr Robson or in respect of CACL.

68. However, I do not consider that that is an end to the matter. It seems to me that HMRC failed to consider the requirements of s29(1) more widely in reaching its decision. I raised my concerns at the hearing as to whether it could be said that Mr Robson did in fact authorise CACL as his agent and I am grateful to the parties for their submission on the issue.

69. HMRC relied on the email correspondence between Mr Robson and CACL which, HMRC argued, demonstrated that Mr Robson had authorised CACL by providing the code required. Mr Robson argued that he had done so in order to claim a rebate and that the correspondence from HMRC itself, when the code was provided, stated that the tax code allowed HMRC to "exchange information" with CACL; it did not suggest anything more than that.

70. I noted HMRC's reliance on *Clixby v Poutney* [1968] EWHC 76 in which the Court held that a principal will be bound by the fraudulent conduct of an agent even if the principal was unaware of the fraud. On a closer reading, I consider that *Clixby* is distinguishable from the facts in this case. In *Clixby*, the taxpayer engaged the agent and signed the returns without checking or examining them. The Court recognised that although there was no positive decision by the taxpayer not to do his duty, there was conscious carelessness as to whether or not he was doing his duty. On my reading, the Court in *Clixby* recognised the distinction between a case of fraud where the taxpayer is wholly innocent and a case where it can be said that there was carelessness on the taxpayer's part. The Court also appears to recognise that it would be an unusual case for a professional accountant to commit fraud when acting in his or her professional capacity. I agree; in such circumstances one would have to query the benefit to the accountant of doing so. In the case before me, it must be noted that Mr Robson received only a minimal amount of the repayment made by HMRC (the amount he understood to be owed by way of rebate) and on the material before me I consider it a reasonable inference to draw that the remainder paid to Cryoblast and Eco Cooling benefitted CACL:

> "Of course it is easy enough to figure a case in which the taxpayer is completely innocent but his or her agent is guilty of fraud or wilful default in preparing the returns. An elderly mother, for example, might entrust the preparation of her returns to her son who will himself benefit indirectly by the reduction of her income tax liability and who places before his mother for her signature returns which he knows to be false but she does not. But it is less easy to see why a professional accountant should prepare returns for a client which he knows to be false or in respect of the preparation of which he is recklessly careless whether they are true or false while the client has no suspicion of the inaccuracy. One would have thought that in such a relationship the position would be that either the accountant was only guilty of negligence or that if he was guilty of fraud or wilful default his client was privy to it. However, I must take the facts as they are found.
>
> …
>
> Further, I do not find it in the least surprising that Parliament when it decided in 1942 to allow assessments to be reopened and penalties claimed at any distance of time if fraud or wilful default was proved should have wished the provisions which it was enacting to extend to cases where the fraud or wilful default was committed by an agent and it could not be proved that the taxpayer was privy to it. After all, by 1942 the preparation of tax returns had become a complicated matter in which many taxpayers employed agents of one sort or another and it would be unfortunate if a taxpayer could escape liability by saying: "It is true that you have proved that my agent committed fraud on my behalf; but you have failed to prove that I was privy to it and as you did not discover it until after six years had expired I can take - and propose to take - advantage of it." On their natural construction the words "on his behalf" are perfectly clear and I see no justification for reading them in the restricted sense suggested by counsel for the appellant. I think that Parliament in 1942 assumed that section 132 of the Act of 1918 applied, in some cases at least, to frauds committed by agents."

71. Although HMRC did not draw my attention to it, *Clixby* refers to *Wellington v Reynolds* (1962) 40 TC 209. Given that Mr Robson was not represented, I consider that the interest of justice and overriding objective require me to consider this case. In *Wellington,* a wife who carried on business as an innkeeper concealed facts from her husband who carried on other businesses independently but who made returns for both himself and his wife. An investigation revealed that the wife had substantial savings which in the Inspector of Taxes' view represented concealed profits from her trade. The Court held that the wife's fraud could not be imputed to her husband in circumstances where there was no evidence, or insufficient evidence, that the husband was aware or ought to have been aware of facts which made his declarations false.

72. Although the two cases dealt with slightly different legal provisions and tests, it seems to me that *Wellington v Reynolds* is more analogous to the facts of this case. However, both authorities recognise a distinction between the actions of a wholly innocent party and those of a person who has authorised a representative to act on his or her behalf but by omission or conscious carelessness can be deemed to have the relevant knowledge.

73. I did not accept that Mr Robson authorised CACL to prepare or file a return on his behalf. As noted by Mr Robson, a letter from HMRC to Mr Robson dated 29 September 2016 stated:

> "Capital Allowances Consultants Ltd…has told us that you want to authorise them to act as your agent on your behalf in connection with your tax affairs….Once this authority is activated it will allow us to exchange information about your tax affairs with Capital Allowances Consultants Ltd…You may receive additional authorisation codes if you have asked your new agent to represent you for other areas of HMRC business…"
>
> (emphasis added)

74. As set out above I accepted Mr Robson's evidence and in doing so I accepted that he was content for CACL to assist him in a tax rebate claim. CACL was not authorised to submit a SATR or make a fraudulent claim for EIS relief about which the Appellant was wholly unaware. He could not check, nor did he carelessly omit to check the returns because he knew nothing about them. I did not accept that the emails provided sufficient evidence when balanced against the oral evidence of Mr Robson to support a finding that there was either actual or implied authorisation for HMRC to submit a return or make a claim for EIS relief on Mr Robson's behalf.

75. For those reasons, I find that Mr Robson has discharged the burden of proof in relation to Regulation 8 of the Income and Corporation Taxes (Electronic Communications) Regulations 2003 that there was no knowledge or connivance on his part.

76. I also consider that the requirements of s8 TMA are not met. S8(2) requires that:

> "Every return under this section shall include a declaration by the person making the return to the effect that the return is to the best of his knowledge correct and complete".

77. The person making the return is the person who is chargeable to tax. I was provided at the hearing by HMRC with a document showing the declaration required for submitting an electronic return in a case such as this. I accept HMRC's submission that in order for a return to be received and processed by HMRC the declaration must be completed. However, the declaration states:

> "You can use the client declaration to obtain your client's written confirmation that the return information is correct.

> [ ] I confirm that my client has received and approved a copy of this return containing the correct return reference number and given me authority to submit their return.

78. As noted by Mr Robson, HMRC's internal manuals (SAM121000 and SAM121030) also make it clear that a return must be signed by either the customer or "a person acting in a capacity for the customer (for example, an executor / administrator of a deceased customer).

79. The box on the declaration was clearly completed by CACL or the return would not have been received by HMRC. However, I am satisfied that Mr Robson had not seen the return, he had not confirmed the accuracy of its contents and he had not given authority for its submission. For the reasons set out above, I rejected HMRC's submissions that the email correspondence showed that Mr Robson knew a SATR was to be submitted on his behalf and that he authorised CLAC to do so; I am not convinced the evidence supports such a finding. I do not consider the fact that the email chain heading changes to "tax return" or the reference to an investment are sufficient when viewed against Mr Robson's honest and credible evidence to demonstrate that Mr Robson knew a SATR would be submitted or that he authorised it.

80. The facts of Mr Robson's appeal are unusual and specific and as I have concluded that CACL were not authorised to act on behalf of Mr Robson, I do not accept that *Clixby* supports HMRC's case to the extent submitted. While cases such as this must be rare, it appears to be an unfortunate loophole in HMRC's system that this process was open to abuse.

81. I concluded that CLAC was the not authorised agent of Mr Robson. That being so, the return cannot be deemed to have been submitted on behalf of Mr Robson. As s29 TMA requires the filing of a return the statutory requirements are not satisfied.

CONCLUSION

82. For the reasons set out above, the appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

83. 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.

JENNIFER DEAN
TRIBUNAL JUDGE

Release date: 02nd MARCH 2023