



[2022] UKFTT 00128 (TC)

TC 08459

Appointment of agent: whether agent may delegate without the taxpayer's authority- No. Whether discovery assessment can be made to recover lost tax by fraudulent conduct of sub-agent No. Appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/06030

BETWEEN

SHAUN MCCUMISKEY

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE HEATHER GETHING
MEMBER DAVID BATTEN**

The hearing took place on 21 September 2021. With the consent of the parties, the form of the hearing was V (video). All parties attended remotely, and the remote platform was Tribunal video platform. A face-to-face hearing was not held because of covid 19 restrictions. The documents to which we were referred were a hearing Bundle (“the Bundle”) comprising 262 pages. On 16 December we issued directions and sought representations from HMRC on various issues of agency law. HMRC provided written representations extending to 8 Pages prepared by Ms Charlotte Brown of Northgate Tax Chambers on 9 February 2022

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 to observe the proceedings. As such, the hearing was held in public.

Mr Shaun McCumiskey in person, (“Mr McCumiskey”)

Ms Jennifer MacKay the presenting officer of HM Revenue and Customs’ Solicitor’s Office, for the Respondents (“HMRC” and “Ms MacKay”)

DECISION

INTRODUCTION

1. Mr McCumiskey appeals against a purported discovery assessment in respect of a self-assessment tax return for 2015-16.

2. Mr McCumiskey had lost his job in July 2015 and had undertaken some work as an electrician earning about £2,500 and needed to file a return for 2015-16.

3. Mr McCumiskey knew Mr Stefan Brown ("**Mr Brown**") a director of Alpha Tax Consultants Limited ("**Alpha**") and appointed Alpha to represent him to make a return of the income earned. He handed his information concerning his affairs to Mr Brown.

4. A purported self-assessment return was sent to HMRC by Capital Allowance Consultants Limited ("**Capital**") in Mr McCuskey's name ("**the purported return**"). The purported return contained a return of £30,000 income and no deductions and a fraudulent claim to Seed Enterprise Investment Scheme (SEIS) relief in respect of an alleged investment of £15,000.00. HMRC had paid £7,500 into a bank account of a nominee of Capital without, as HMRC concede, checking the validity of the claim. SEIS relief is available for high- risk investments and such investments are usually made by high earners.

5. It subsequently transpired that Mr McCumiskey had not made an investment, had never heard of SEIS and was unaware of any such claim. HMRC considered there had been a loss of tax because of a claim for SEIS relief becoming excessive and, as a return had been made and as they considered the conditions of section 29(4) and (5) Taxes Management Act 1970 ("**Section 29**" and "**TMA**") were satisfied, the purported discovery assessment was validly issued.

6. As Mr McCumiskey was not represented at the hearing in September 2021, and as the Presenting Officer's submissions did not deal with the issue of agency, we issued directions requesting HMRC to address issues of agency and we set out a few preliminary findings of fact. We had assumed for the purpose of the directions that Alpha and Capital were one and the same person known as Alpha Capital Allowances Consultants. We are grateful to Ms Charlotte Brown of counsel for her assistance on those issues. We are especially grateful as she clarified at [4] of HMRC's written submissions ("**Written Submissions**") some very important details relating to Capital and Alpha and the status of Mr Brown as a director of Alpha. In consequence, we are able to make corrected findings of fact below.

7. At para [4] of the Written Submissions HMRC state that they consider that Mr McCumiskey "*thought he was engaging Mr Brown to act as his agent in his capacity with Alpha. For present purposes it appears to be common ground that Mr Brown was engaged to file his tax return.*"

8. At para [5] of the Written Submissions HMRC state that the issue in dispute is "*the validity of a discovery assessment in the sum of £3,880 relating to the Appellant's Self-assessment Return for the year 2015-16.*"

8. The references to page numbers in brackets [] in this decision are to the pages in the Bundle unless indicated otherwise.

THE FACTS

9. We had the benefit of Mr McCumiskey's oral submissions at the hearing in September and the correspondence between Mr McCumiskey and HMRC during the investigation leading to the issue of the discovery assessment, a witness statement of Mr Kinnear the investigating

officer and some internal records of HMRC which were in the Bundle. We find the facts set out at [10] to [24] below.

10. In 2015-16 Mr McCumiskey's life was in turmoil. In April 2015 his wife had suffered a miscarriage [97]. In June 2015 he resigned from his job with British Airways and started work for Process Publishing. He was let go by Process Publishing in July 2015 and attempted to commit suicide. He separated from his wife in December 2015 and was "*sofa surfing*" and began drinking and gambling [97]. Mr McCumiskey was unemployed for much of 2015-16. He was using so called "*pay day*" loans to get by. These loans were cleared by his father using a credit card. His mother and father took out a loan to repay the credit card debt [97].

11. In March 2016 a friend had informed Mr McCumiskey that if he wished to set up his own business as an electrician, he would need to file a self-assessment return of his income [97]. Mr McCumiskey had no experience in handling tax matters. His first job as a self-employed person was for a colleague of Mr Brown for which he received a fee of £2,500. That income needed to be reported to HMRC.

12. Mr McCumiskey knew Mr Brown because he drank in his local public house. Mr McCumiskey instructed Alpha to complete a tax return for him for the year 2015-16 [51]. Mr McCumiskey provided Mr Brown with the information requested to enable the return to be filed. Mr Kinnear's witness statement at paras [7].[10] and [23] confirms that Mr McCumiskey instructed Alpha as his agent, and not Mr Brown.

13. HMRC's records state that a form 68-4 had been received from an agent with a particular reference. HMRC no longer has the form. We understand from HMRC's Written Submissions at para [4] that the agent referred to in the form 68-4 was in fact Capital, and that Mr Brown was neither a director nor an employee of Capital and that the purported return was lodged using Capital's login details.

14. Mr McCumiskey did not see, review or sign any form 68-4 or the purported return.

15. Mr McCumiskey saw Mr Brown in the pub one evening. Mr Brown said the matter was "*sorted*" and "*he hadn't anything to pay*".

16. As Mr McCumiskey had no permanent home for a period in 2015-16, he was unable to notify anyone of a change of address. Any correspondence sent by HMRC to his former matrimonial home was not received by him. It seems his ex-wife may have sent the correspondence to his stepfather's former home. His stepfather is an expat living abroad and the premises were unoccupied at the material time.

17. HMRC's records show a letter was sent to Mr McCumiskey at a former address indicating that HMRC had approved a claim for SEIS relief and a payment of £7,500 was to be made to a bank account of Eco Cooling Limited. That letter was never received by Mr McCumiskey. Nor had Mr McCumiskey directed HMRC to make a payment to Eco Cooling. Mr McCumiskey was unaware of the payment, and did not receive any part of it.

18. Mr McCumiskey did not chase up Alpha. He did not think he needed to. Alpha were a professional outfit. He explained that when he installs a circuit board for a customer he does not expect them to contact him to ask is it OK, can I switch on the light?

19. It was not until 8 March 2019 that Mr McCumiskey received a letter from HMRC concerning a claim for SEIS relief [97]. That letter was sent by Officer Kinnear and indicated that the claim for relief in respect of £15,000 investment was invalid. Mr McCumiskey replied on 28 March 2019 informing HMRC he had never heard of SEIS relief, had never made an investment and did not have a form SEIS3 (which is a document that is issued by an SEIS

investee company to investors confirming that the conditions for SEIS relief are satisfied). We accept as a fact what Mr McCumiskey had to say.

20. The loss sustained by HMRC was brought about by Capital. Capital were facilitated by HMRC's policy of paying now and checking later.

21. On 10 April 2019 Officer Kinnear issued the purported discovery assessment under section 29 TMA for recovery of £3,880.00. The validity of the issue of the discovery assessment was the subject of a formal review, and the Reviewing Officer upheld the original decision. Mr McCumiskey appealed to the Tribunal.

22. In December 2019 HMRC recognised that PAYE income and other amounts paid under deduction had not been included in the return for 2015-16 and a further discovery assessment was issued by Officer Kinnear on 13 December 2019. The amount finally determined to be due in May 2020 is £3,682.20.

23. The usual period for enquiry into the return had expired. In consequence HMRC must establish that the conditions allowing for the issue of a discovery assessment are satisfied.

24. I note from HMRC's statement of case at Paras [53] and [54] that they consider that:

"[53] ...SEIS is designed to help small, early-stage companies to raise equity finance by offering a range of tax reliefs to individual investors who purchase new shares in those companies

It complements the existing Enterprise Investment Scheme which will continue to offer tax reliefs to investors in higher risk small companies. SEIS is intended to recognise the particular difficulties which very early stage companies face in attracting investment, by offering tax relief at a higher rate than that offered by the existing EIS.

[54] The available tax relief is generous because it takes into account the relatively higher risks incurred by the investor. Investors are usually higher rate customers who have the resources to risk losing their capital investment."

THE LEGISLATION

25. Section 29 TMA ("**Section 29**") 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) ...

HMRC'S POSITION

26. HMRC accept that it has the burden of proving the issue that the purported discovery assessment was authorised by section 29 TMA.

27. HMRC assert that section 29(1) allows HMRC to issue a discovery assessment where, among other things, a relief from tax which has been given and the relief has become excessive.

28. HMRC assert that a self-assessment return had been made and accept that the purported discovery assessment is only valid if the conditions in section 29(4) or (5) are satisfied. HMRC accept they have the burden of proving the conditions have been met.

29. A discovery assessment must be made within four years of the end of the tax year to which it relates. In this case that is before 5 April 2020. The discovery assessment issued by Officer Kinnear was issued on 5 April 2019. If the conditions were met the purported discovery assessment was made in time.

30. HMRC's notes at [189] state that HMRC had received a form 64-8 appointing Capital as Mr McCumiskey's agent and Mr McCuiskey's return was filed by Capital using Capital's agent account login details.

31. HMRC say all this was done by Mr Brown. HMRC accept that Mr Brown was a director of Alpha and not an employee or director of Capital but that Mr Brown "*was involved with Capital at the relevant time*". HMRC say at [4] in their Written Submissions, "*From the facts presented by Mr McCumiskey he thought he was engaging Mr Brown to act as his agent in his capacity with Alpha. [Emphasis supplied] For present purposes it appears to be common ground that Mr Brown was engaged on the appellant's behalf to file his tax return...*".

32. HMRC say that the return filed contained a claim for SEIS relief which is invalid. Tax was repaid to a nominee account the details of which were provided by Capital.

33. In consequence, HMRC consider that they had power to issue a discovery assessment in respect of the year 2015-16 to recover lost tax because a self-assessment return had been filed, a claim to SEIS had been made, the SEIS relief that had been given had become excessive and because the conditions in section 29(4) or 29(5) were satisfied. (Only one of those sections need be satisfied). HMRC state that the discovery assessment is not vitiated by the fraudulent conduct of an agent.

34. **Compliance with section 29(4).** HMRC's case is that section 29(4) is satisfied because the loss of tax "*was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.*" [Emphasis added by HMRC.] HMRC rely on the UT decision in *HMRC v John Hicks* [2020] UKUT 0012 ("**John Hicks**") (which endorses statements made in the FTT in the case of the *Trustees of Bessie Taube Discretionary Trust & Others v HMRC* [2010] UKFTT 473 at [93]) ("**Bessie Taube**") that a person "*acts on behalf*" of another if he /she does acts that could have been done by the taxpayer. Giving advice is not sufficient. HMRC also rely on *Clixby v Pountney* [1968] EWHC 76, 44 TC 515 ("**Clixby**") that a principal will be bound by the fraudulent conduct of an agent even if the principal was unaware of, or not privy to, the fraud of the agent. HMRC assert that the wording of section 29(4) expressly includes the situation where the loss is brought about by the deliberate actions of an agent. Further HMRC state that if there has been a breach of the arrangement between Mr McCumiskey and his agent, that is an issue to be resolved between Mr McCumiskey and his agent but is not a relevant consideration here.

35. Alternatively, HMRC say they rely on Section 29(5) because at the time when HMRC ceased to be entitled to enquire into the return the officer could not have been reasonably expected, on the basis of information made available to him before that time, to be aware of the situation. HMRC recognise that SEIS relief is generous reflecting the high-risk nature of the investments at which it is targeted. HMRC state that section 29(5) is satisfied because Officer Kinnear could not reasonably have been expected to have been aware of the excessive claim for relief on the basis of the information available to him in 2017 when he approved the claim for relief and arranged a payment of £7,500 to Capital's nominee.

36. In relation to the issue of agency HMRC consider that Mr Brown was Mr McCumiskey's agent, and he had implied, apparent and usual authority to file the return and make a claim for SEIS relief on his behalf.

DISCUSSION

37. As mentioned above, the Tribunal is grateful to counsel for HMRC for preparing their Written Submissions on the facts and the law of agency. HMRC informed the Tribunal that Alpha is a limited company and Mr Brown is a director of Alpha, and that Capital is a limited company, but Mr Brown is neither an employee nor a director of Capital.

38. HMRC's appointment of agent form 68-4 allows a taxpayer to appoint an agent. I notice that that form does not expressly allow an agent to delegate or appoint a sub-agent.

39. The law of agency on the ability of an agent to delegate or appoint a sub-agent is set out in *Bowstead & Reynolds on Agency* 22nd Edition (published by Sweet & Maxwell) at 5-001. Where the act done involves confidence, such as the appointment to file a tax return, an agent may not delegate or appoint a sub-agent without the express or implied authority of the principal. The cases where authority is implied are confined to five identifiable cases none of which is relevant here. A delegation by an agent or appointment of a sub-agent may be ratified by the principal.

40. We find as a fact that Mr McCumiskey appointed Alpha (and not Mr Brown) as his agent. This fact was accepted by Officer Kinnear as referred to in his Witness Statement at paras [7],[10] and [23]. We also find as a fact that Mr McCumiskey gave his information to Mr Brown as director of *Alpha*.

41. In consequence, unless there was an express authority given by Mr McCumiskey to *Alpha* to appoint Capital as a sub-agent or there has been a ratification by Mr McCumiskey of the appointment of Capital, Capital may not be regarded as the agent of Mr McCumiskey.

42. We find as a fact that Mr McCumiskey never saw the form 64-8 and so did not expressly approve the appointment of Capital, and that HMRC has not retained the form 64-8 and so cannot discharge the burden of proving that Mr McCumiskey appointed Capital as his agent. Indeed, all the evidence assembled by Mr Kinnear in his Witness Statement points to *Alpha* having been appointed by Mr McCumiskey and Mr McCumiskey having had no knowledge of Capital.

43. We further find that HMRC has produced no evidence that Alpha's /Mr Brown's actions in appointing Capital were ratified by Mr McCumiskey. HMRC say that Mr Brown was "*involved with*" Capital. That is not evidence of Mr McCumiskey having ratified the appointment of a sub-agent.

44. HMRC point to two cases concerning when a person is acting on behalf of another for the purposes of section 29(4). Those cases involve a person appointed by the taxpayer to represent them rather than advise them, and none of the cases deals with a case such as this where the taxpayer has appointed an agent, following which the agent delegates or purports to delegate to another person or appoints a sub-agent without approval or ratification.

(1) In the case of *John Hicks* the issue was whether a promoter of a tax scheme was acting on behalf of Mr Hicks in providing advice as to what to include in a return which was prepared and filed by Mr Hick's accountant on Mr Hick's behalf. The UT referred to the statements of the FTT in the case of *Bessie Taube* and included para [93] of the FTT decision the ultimate line of which states: "*The person must represent, and not merely provide advice, to the taxpayer.*"

(2) In the case of *Clixby* the dispute concerned whether a principal can be responsible for the fraudulent acts of a duly appointed agent.

45. Accordingly, we find that there was no valid appointment of Capital as agent or sub-agent of Mr McCumiskey and that Capital was not "*acting on behalf of*" Mr McCumiskey.

46. The purported return was not therefore a self-assessment return filed by or on behalf of Mr McCumiskey. The claim for SEIS relief was not made by or on behalf of Mr McCumiskey. No SEIS relief was therefore given to him.

47. As the filing of a self-assessment return is a prerequisite for sections 29(4) and (5) TMA to be engaged, neither of those sections is satisfied.

48. In relation to section 29(4), we consider that as there was no valid appointment of Capital, the loss occasioned was not the result of any careless or deliberate act of a person acting on behalf of Mr McCumiskey. Nor was the loss occasioned by the carelessness of Mr McCumiskey. He engaged a professional tax agent Alpha to prepare his returns. He is an unsophisticated taxpayer and had next no experience of dealing with tax returns. We find that Mr McCumiskey was suffering mental health issues at the time and in the circumstances, we consider it necessary to consider his personal attributes in determining whether he has been careless. It is understandable that in the circumstances he did not chase up his adviser. He necessarily relied on Alpha, a professional tax advisory firm. There was nothing he could have done in view of his mental ill health and lack of familiarity of the tax system to prevent the loss to HMRC by Capital.

49. In relation to section 29(5), we do not accept that there was insufficient information available to the officer to doubt the validity of the claim for SEIS relief of £7,500 in respect of an at-risk investment of £15,000 by a person on a modest salary such as Mr McCumiskey. We have seen a number of these cases where claims for EIS/ SEIS have been investigated and the investigation has begun because the investigating officer has doubted the ability of the taxpayer to afford to make such an at-risk investment. Indeed, we note the usual attributes of investors in SEIS companies are set out in HMRC's statement of Case at paras [53] and [54]. Mr McCumiskey does not fit that description. We also consider that it is most unlikely that an electrician would have precisely £30,000 of income and no deductions at all in the first year in which a trade is carried on. We doubt that the conditions for section 29(5) were satisfied.

50. The conditions for the issue of the discovery assessment against Mr McCumiskey were not satisfied in this case.

DECISION

51. We allow the appeal in full.

APPEAL RIGHTS

52. 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.

**HEATHER GETHING
TRIBUNAL JUDGE**

RELEASE DATE:12 April 2022