[2022] UKFTT 00040 (TC)

TC 08392/V

Discovery assessment – was the taxpayer or a person acting on his behalf careless - Section 36 TMA – application of Hicks *– accountant acting on taxpayer's behalf and careless – appeal dismissed*

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/05000

BETWEEN

JASON CALLEN **Appellant**

-and-

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

TRIBUNAL: JUDGE TRACEY BOWLER

The hearing took place on 18-21 October 2021. With the consent of the parties, the form of the hearing was V (video) using the Tribunal video platform. A face to face hearing was not held because of the circumstances of the pandemic.

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

Mr Jason Callen as a litigant in person.

Christopher Stone, Counsel, and Matthew Bignell, Counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents.

DECISION

INTRODUCTION

1. The Appellant (referred to as Mr Callen in this decision) appeals against a discovery assessment raised by the Respondents ("HMRC") in respect of the 2009-2010 tax year. The assessment relates to his participation in a tax avoidance scheme (known as the Montpelier Section 730 Dividend Strip Scheme ("the Scheme")) during the 2008/09 tax year. He sought to set off losses claimed to have been generated by the Scheme against income from his existing trade in the 2008-2009 tax year, and to carry forward the balance and use them in the 2009-2010 tax year against income arising in the same trade. He does not appeal against HMRC's conclusion that the Scheme did not work and that the losses are not allowable. He therefore accepts that there was an insufficiency in his tax return for 2009/10.

2. The issue in the appeal is whether the insufficiency in Mr Callen's tax return was brought about carelessly by Mr Callen and/or by another person acting on his behalf, so that HMRC's assessment was in-time.

3. The Scheme has been considered by the Upper Tribunal in the case of *Clavis Liberty 1 LP v HMRC* [2017] STC 2392. In addition, in the case of *Hicks* the same questions as those before me were addressed in the context of the participation by one of Mr Hicks' colleagues in the Scheme, who was advised by the same accountant, Mr Bevis. Although there are some factual differences between this case and *Hicks*, the result of applying the principles set out by the Upper Tribunal is that I conclude that Mr Bevis was acting on behalf of Mr Callen and the insufficiency in the assessment for 2009-2010 was brought about by the carelessness of Mr Bevis, for the reasons I now explain.

BACKGROUND

4. An enquiry was opened into the Appellant's 2008/09 self-assessment tax return on 17 September 2010 under Section 9A TMA 1970. Enquiries were not opened into the self-assessment return for 2009/10; however, a discovery assessment was issued for this year on 30 March 2015.

5. On 4 November 2010 HMRC issued an information notice under paragraph 1 of Schedule 36 of the Finance Act 2008. A penalty warning letter was issued on 18 January 2011 requiring compliance by 31 January 2011. A response was provided by Mr Callen's representatives, Precision Accountancy ("Precision"), on 2 February 2011.

6. Furner information was sought on 11 March 2011 by HMRC. On 25 May 2011 another information notice under Schedule 36 was issued by HMRC. Precision responded on 18 July 2011 providing further information which included a Counsel's opinion about the Scheme.

7. Correspondence continued between HMRC and Mr Callen and Precision, with Precision pressing for a decision by HMRC.

8. Mr Callen bought a Certificate of Tax Deposit on 6 February 2013.

9. On 14 November 2014 HMRC issued a letter setting out their technical analysis of the Scheme.

10. On 30 March 2015 HMRC issued an assessment for 2009-10 under s 36(1) TMA on the basis that the loss of tax was brought about carelessly. The assessed tax was £308,798.37.

11. Precision wrote to HMRC to appeal the assessment on 28 April 2015 and request postponement. On 30 April 2015 Mr Callen wrote to HMRC directly to appeal the assessment and set out the basis of his appeal.

12. On 30 June 2015 Precision wrote to set out further reasons why HMRC's assessment was disputed.

13. On 16 November 2015 accelerated payment notices ("APNs") for income tax and National Insurance Contributions in the tax years 2008/2009 and 2009/2010 arising from the Scheme were issued by HMRC to Mr Callen under Part 4, Chapter 3 of the Finance Act 2014. The amounts were:

2008-09 £432,122.00 – Income Tax

2008-09 £ 13,405.40 – NIC

2009-10 £298,470.80 – Income Tax

2009-10 £ 10,327.57 - NIC

14. Mr Callen paid the APN for 2009/2010 on 16 May 2016.

15. On 16 February 2016 HMRC wrote to Mr Callen to inform him of the First Tier Tribunal ("FTT") decision in *Clavis Liberty 1LP* [2016] UKFTT 253 (TC). In that decision the FTT decided that the Scheme did not work as a tax avoidance scheme: the purchase of the dividends and dividend rights were not transactions in the course of a trade. The FTT decision was confirmed by the Upper Tribunal the next year ([2017] UKUT 418 (TCC)).

16. On 10 February 2017 Precision requested a statutory review of the HMRC decision and assessment for the tax year 2009/2010. The statutory review letter of 19 May 2017 confirmed the assessment for 2009/2010.

17. On 14 June 2017 Crowe Clark Whitehill LLP submitted a Notice of Appeal on behalf of Mr Callen.

GROUNDS OF APPEAL

18. The grounds of appeal were:

(1) HMRC had not made a discovery in accordance with the requirements of s 29(1) TMA, in respect of the tax year 2009/2010; and

(2) HMRC had not demonstrated careless behaviour.

19. Prior to the hearing the first ground was abandoned by Mr Callen in the light of the decision in *HMRC v Tooth* [2021] UKSC 17.

THE BURDEN OF PROOF

20. The burden of proof lies with HMRC. It is the usual civil standard of the balance of probabilities.

THE EVIDENCE

21. I have been provided with a hearing bundle running to 689 pdf pages. In addition, I heard oral evidence from Mr Callen, Mr Bevis and Officer Boote of HMRC.

22. I found Mr Callen to be a generally reliable and consistent witness. HMRC have identified inconsistencies in his evidence and in particular, his evidence in his Witness Statement that he had not heard any negative comments from any colleague's accountants compared to the evidence of an email being copied to him in which a colleague's accountant is noted to have described the Scheme as high risk. However, I have concluded that' given the evidence overall, this is not inconsistent. I am satisfied that the participants in the Scheme were comforted by the reassurance provided by Montpelier and considered that, even if there was a high risk of challenge by HMRC, at worst, they were obtaining a cheap loan (albeit that I recognise that after HMRC's enquiries started Mr Callen purchased a certificate of tax deposit). Mr Callen's submissions regarding suggested findings of fact provided by

HMRC reflect an understanding that at most the reference to "high risk" was to financial risk. I am satisfied in the context of the evidence overall that this is consistent.

23. Similarly, at times Mr Callen was reluctant to agree to points put to him in cross-examination, particularly in relation to whether he had entered into the Scheme in order to generate the tax losses rather than for some other commercial benefit. However, it was clear that Mr Callen was concerned that he was in some way incriminating himself. Once I had made it clear that HMRC was not alleging dishonesty or evasion, he was entirely open and consistent in his evidence.

24. I also found Mr Boote to be a reliable witness. Mr Callen put questions to Mr Boote in cross-examination. His evidence was consistent.

25. However, I found Mr Bevis to be a less reliable witness for the following reasons:

(1) He recognised his duty under section 8 TMA and his responsibility to complete tax returns accurately and correctly on behalf of his clients. He recognised that this meant he needed to understand the entries he put into those returns, including the eligibility of a client for claims of losses and reliefs. He confirmed that he held himself out as competent to complete tax returns and deal with enquiries from HMRC. At the same time however, he sought to maintain that he was not a tax adviser but simply a facilitator putting numbers into tax returns;

(2) He sought to minimise the importance of a counsel's opinion produced for Montpelier and relied on by them in promoting the Scheme ("the Counsel's Opinion"), saying that it was simply one document, even though that was consistently referred to in the evidence otherwise as a foundation for promotion of the Scheme;

(3) He sought to claim that the contingent fees payable to Montpelier under the Scheme documentation were not contingent, except with the benefit of hindsight, even though the documents expressly stated that they were contingent;

(4) at one point he said that he knew that Mr Callen had not paid an amount of £250,000 claimed as expenses by Mr Callen in his tax returns and then later sought to change his answer. When the inconsistency was pointed out to him, and he was asked to explain the basis on which the amount was claimed in the tax return, he was unable to do so;

(5) he was asked why he had produced a second Witness Statement which was identical to the first, save for one sentence dealing with the Counsel's Opinion. Mr Bevis said that the change was grammatical. However, the change is not grammatical. It is a substantive change to the sentence, aligning it with the core position adopted by Mr Callen in his case that as a derivatives trader he fell within the constraints of the Counsel's Opinion. In fact, as Mr Bevis recognised in cross-examination, the Counsel's Opinion did not say that the Scheme was suitable for all derivative traders. It was much more specific.

26. I therefore found Mr Bevis' evidence to be inconsistent and evasive on numerous occasions and I have reduced the weight given to it. Where there is an inconsistency between the evidence of Mr Bevis and Mr Callen or Mr Boote, I have relied upon the evidence of Mr Callen or Mr Boote.

FINDINGS OF FACT

Mr Callen's background

27. Mr Callen joined the International Petroleum Exchange ("IPE") in 1989 as an employed trader. In l990 he traded Brent Crude and Gasoil. In 1992 he moved to the LIFFE

floor (London International Financial Futures Exchange) where he worked for 4 different trading firms in 7 years. He traded in Bund, BTP, Euromark, Euroswiss, Gilts and Short Stirling.

28. In 1999 he joined Amerex Futures Ltd on the IPE trading floor, trading Brent Crude and Gasoil. He was made redundant late in 2005 and used his redundancy payment to open a trading account to carry on oil and gas trading on a self-employed basis.

29. Mr Callen entered into the following types of trades in the ordinary course of his business: Foreign Exchange, Gasoil futures Singapore minute marker, Gasoil futures crack, Gasoil futures, Gasoil futures TAS, Gasoil futures Spread, Gasoil futures butterfly, Gasoil futures condor, Brent Crude futures, Brent Crude futures spread, Brent Crude futures butterfly, Brent Crude futures condor, Brent Crude futures Singapore minute marker, Brent Crude futures minute marker, Brent Crude futures TAS, Brent Crude-WTI futures spread.(ARB), WTI Crude futures, WTI Crude futures spread, WTI Crude futures butterfly, WTI Crude futures condor, WTI Crude futures TAS, and Russell 2000 Index Mini Futures.

30. Mr Callen submitted self-assessment returns under Section 8 Taxes Management Act 1970 ("TMA 1970") as a trader.

31. Mr Callen knows that he is required to take care to ensure his tax returns are accurate to the best of his knowledge and belief and that it is important to keep records and documents to support the figures in his tax returns.

The Scheme

32. The Scheme was marketed by Montpelier Tax Planning (Isle of Man) Ltd ("Montpelier"). It was disclosed to HMRC under the Disclosure of Tax Avoidance Scheme Rules ("DOTAS") and given a DOTAS reference number.

33. In essence, the Scheme was structured on the basis that a trader would acquire dividend rights and claim the cost of such rights as a deductible expense of the trade, while the income received by the trader was not taxable as a result of s730 Income and Corporation Taxes Act 1988 ("s730").

34. The DOTAS disclosure stated that the Scheme was available to self-employed derivative traders who worked at least 10 hours per week on average in the trade. The trader would acquire dividend rights with the intention that the cost of such rights was a deductible expense of the trade but the dividend income was not taxable as a result of s730.

The selling of the Scheme

35. Around September 2008 Montpelier and the Scheme were introduced to Mr Callen by Chappell Cole, and more particularly David Cole of that firm who was his accountant at the time. Mr Bevis was working for Chappell Cole at that time. He became the person to whom Mr Callen was directed with queries in the absence of Mr Cole and then by early 2009 had become Mr Callen's main contact at Chappell Cole.

36. In September 2008 Mr Callen attended a meeting with two Montpelier representatives and other traders. His principal contact was Montpelier's sales and marketing director, Mr DuPont. Mr DuPont presented the Scheme to the traders. Mr Callen accepts that Mr DuPont was a salesman who was there to sell the Scheme rather than advise him on it.

37. At the September 2008 meeting Mr Callen was given a copy of the Counsel's Opinion and a memorandum dated 1 August 2008 written by E W Gittens of Montpelier ("the Gittens Memorandum").

38. Mr Callen asked Mr DuPont about the statement in the Gittens Memorandum that the "trader should clearly establish himself as a dealer not merely of shares, securities and dividends. The trader must be able to demonstrate a pattern of dealing which leaves no doubt that he is trading in the right to receive dividends". This statement reflected the advice in the Counsel's Opinion which stated:

> "C is a sole trader dealing in a wide variety of shares, securities and derivatives and including amongst other things, dealing with the right to receive dividends…
>
> In my view the risk for "C" in this transaction is that the Revenue will contend the transactions into which "C" has entered are not trading transactions – or at least the one which concerns the proposed dividend is not a trade transaction – and accordingly that "C" will not be able to claim the benefit of the loss which might otherwise accrue to him in arriving at the income for the purposes of tax, Lord Morris in *Finsbury Securities Ltd v Bishop* at 627 observed that the transaction was a "wholly artificial device remote from trade to secure a tax advantage". It is for this reason that it is of great importance here that "C" should clearly establish himself as a dealer not merely of shares, securities and dividends of the kind which is under consideration here. He must be able to demonstrate a pattern of dealing which leaves no doubt that he is trading in the right to receive dividends."

39. Mr DuPont assured Mr Callen that his trading satisfied the criteria and Mr Callen relied on this reassurance.

40. Mr Callen also relied upon reassurance from David Cole who referred to the scheme as a "no-brainer". Mr Callen had no specialist tax knowledge and relied upon the advice.

41. In January 2009 Mr Callen helped to organise a further presentation by Mr DuPont to enable several of his colleagues to hear about the Scheme.

42. Mr Callen received a one-page handout from Montpelier entitled "Montpelier's Tax Structure Exclusively for Traders" summarising the use of the Scheme and emphasising the fact that the Scheme had a DOTAS number. It identifies the ability to carry forward the losses generated against profits of the same trade in later years of assessment.

43. Mr Callen was copied into an email dated 11 February 2009 from Mr DuPont to Mr Mckay (a trade colleague whom he sat next to who was also considering the Scheme). That email responds to a comment made by Mr Mckay that his accountant had told him the Scheme was "high risk". Mr DuPont responded by saying that the tax money was effectively a cheap loan from HMRC as any interest chargeable would be more than mitigated by the use of the money to make further profits. Furthermore, it stated "you are taking a position on our interpretation of the legislation, with us backing the interpretation to the High Court at our expense!".

44. At around the same time Mr Callen discussed the Scheme with Mr Bevis who told him that he would implement the scheme if he were in his shoes. Mr Callen understood that Mr Bevis was of the view that the Scheme worked, but Mr Callen also realised that Mr Bevis could not comment in detail about the technical aspects of s730.

45. Based on the evidence overall, I am satisfied that the traders at whom the scheme was marketed (including Mr Callen) were encouraged by Montpelier to view the Scheme as a "no-brainer", on the basis that: (i) at worst they would benefit from a cheap loan from HMRC and, at best, would obtain the tax losses with no commercial risk; and (ii) even the risk of inconvenience was dealt with by Montpelier's agreement to handle HMRC's enquiries up to the level of the High Court. Mr Callen took comfort (rightly or wrongly) by the fact that

there was a DOTAS reference number and from Montpelier's confidence in handling HMRC enquiries.

Mr Callen's participation in the Scheme

46. Mr Callen entered into the first tranche of the Scheme by signing tripartite loan agreements between 14 and 18 November 2008 and a professional services agreement ("PSA") with Montpelier Tax Consultants (Barbados) Ltd on 14 November 2008. He entered into a second tranche of the Scheme on 13 – 17 March 2009.

47. Under the loan agreements the lender (a Montpelier control financial intermediary) provided Mr Callen with the necessary funds to acquire the right to a dividend that had been declared, but not yet paid, by a UK resident unlimited company controlled by Montpelier through non-resident holding companies. The agreement provided for the funds for the acquisition of the rights to be advanced directly by the lender to the holding company. On payment of the dividend the loan was to be terminated and the sum would then be treated as payment for the acquisition of the right to receive the dividend.

48. The Scheme agreements show Mr Callen entering into tripartite agreements concerning the rights to 10 dividends payable on 21 November 2008 or 20 March 2009 in amounts ranging from £100,000 to £400,000 and totalling £2,500,000. After a charge to loan interest of £1568 a profit of £928 was produced for Mr Callen. However, this was before fees of £250,000 payable in accordance with two PSAs.

49. No documentary evidence to show the payment of the dividends has been provided by Montpelier (or anyone else). In a letter from Precision dated 2 February 2011 it was stated that it was understood that the transactions in relation to the purchase of the dividend rights were conducted through inter company accounts between the two companies involved and therefore no dividend vouchers, invoices or receipts were issued.

50. Mr Callen did not enter into any other documents beyond the tripartite loan agreements and the PSAs. The tripartite loan agreements do not, in themselves, transfer the right to the dividends paid by the UK companies from their holding companies to Mr Callen. No other document has been provided which does this. Instead, he simply received letters from the lender under the tripartite loan agreements stating that the transactions in the rights to dividends had been completed and the loans had been repaid in full. Mr Callen was sent cheques in the amount of £654.92 and £273.09 for what were described as the resulting profits. Mr Callen relied upon the letters confirming that the transactions had taken place as anticipated and did not see the need for any further documentation.

51. In relation to the fees, there were two PSAs entered into by Mr Callen; one for each tranche of his Scheme participation. On 27 February 2009, Mr Callen paid Montpelier an up-front fee of £75,000 pursuant to the first PSA which stated that a further £75,000 was contingent upon agreement of the losses by HMRC. Further fees were payable under the second PSA: £20,000 initially and £80,000 contingent upon the success of the Scheme. Mr Callen claimed the deduction in full (i.e. £250,000 in respect of the fees) in his accounts even though he had only paid £95,000.

52. The PSAs stated that:

(1) the agreement was in respect of Montpelier accepting instructions from Mr Callen to provide tax advice on the basis set out therein;

(2) Mr Callen was to receive tax advice primarily from Mr Gittins;

(3) the advice was to be given in respect of the UK tax implications and consequences of Mr Callen trading in financial derivative products, including, but not limited to dividend rights;

(4) £1500 of the fees was allocated to the handling of HMRC enquiries.

53. Together with two colleagues who had also participated in the Scheme, Mr Callen spoke to Mr Gittins in conference calls on two occasions up to the middle of 2014. Those conversations were about the HMRC enquiries which had commenced. There is no evidence of any advice given by Mr Gittens to Mr Callen beyond reassurance in those calls that the enquiries were as expected.

54. Given the evidence overall of the circumstances, as well as the terms of the PSAs, I find that the PSAs were in fact agreements providing for the payment of a fee to enter into the Scheme, which were partly contingent on the ability of Mr Callen to obtain the intended tax losses. The fees were not in fact paid for tax advice, although £1500 of the amount paid was allocated to assistance with HMRC enquiries. The real effect of the PSAs was recognised by Mr Callen in cross-examination in the context of the second PSA in particular and in evidence from him that he saw the PSAs as "formalities".

Mr Callen's relevant tax return entries

55. In his tax returns, Mr Callen relied on s730 to exclude the receipt of £2.5m dividend income from his trading income during the income tax year ended on 5 April 2009. By excluding the dividend income under s730 (and deducting the total fees payable under the PSAs) Mr Callen's taxable profit of £854,668 was reduced to nil and a loss of £1,643,832 was created. This loss was carried forward under s83 Income Tax Act 2007 to reduce the taxable profits of his pre-existing trade in the in the tax year ending 5 April 2010 from £771,352 to nil.

56. In his tax returns for the tax years 2008-2009 and 2009-2010 Mr Callen declared use of the Scheme under DOTAS.

Mr Callen's knowledge

57. Mr Callen is not a naïve person. He says that he is not a man of letters, although his preparation for the hearing and presentation of his case was impressive for a person with no legal training or background. However, most relevantly at the hearing he showed himself to have been a man who is commercially aware and astute. He knew that no money would flow in or out of his personal bank account and he had no money at risk under the Scheme. He made a small profit on the Scheme transactions, which was eliminated by the Montpelier fees, and Mr Callen was fully aware of how the figures worked. Although he has, at times, described interpreting the Montpelier fees as being equivalent to an option premium, the economics remain the same and I have no doubt in concluding that the only reason for Mr Callen entering into the transactions was the tax advantage he understood could be generated by the tax losses, even though he was somewhat reluctant to accept this position in cross-examination in the hearing. Ultimately, Mr Callen accepted that the Scheme would not have been entered into without the expectation of the tax losses.

Mr Bevis

58. In March 2009 Mr Bevis left Chappell Cole and set up his own firm of accountants Precision. Mr Callen became one of Mr Bevis' clients in June 2009. In a letter dated 19 April 2017 from Precision it was stated that Mr Callen had discussed the Scheme with the firm as his tax advisor. Mr Bevis' own Witness Statement states that he has been responsible for the completion and submission of all tax related matters for Mr Callen from April 2008 when he was employed by Chappell Cole. In addition, Mr Callen's evidence, which I have

accepted, is that he was told by Mr Bevis that he would enter into the Scheme if he was in Mr Callen shoes. Mr Callen has written in the context of this litigation to say that his tax return had been completed with the figures as advised by his professional advisers and he had no reason to doubt their advice. At the hearing he said that he relied upon Mr Bevis' advice "100%" for the preparation and submission of his tax returns.

59. I am therefore entirely satisfied that Mr Callen's description of the role played by Mr Bevis is accurate. He relied upon him to advise him about the preparation of his tax return as well as to prepare that return.

60. Mr Bevis had barely any experience of marketed tax avoidance schemes before the Scheme. He said that he was very loosely involved with a previous employer in a film partnership scheme.

61. Mr Bevis attended a meeting with Montpelier in order to have the Scheme explained to him, but he did not take any notes of the meeting. He did not carry out any research himself regarding the application of s730, or the matters addressed in Counsel's Opinion, even though he had never advised about that section, or indeed about any marketed tax avoidance schemes. He relied on the assurances provided by David Cole and Montpelier.

62. Although the Counsel's Opinion clearly identified the requirements in terms of an existing trade and pattern of dealing, Mr Bevis did not query this in the context of Mr Callen's trade or discuss this issue with Mr Callen. Instead, his evidence is that he read the documents and "found no reason to change his opinion" that the Scheme was directed at a person such as Mr Callen. He has failed to explain on what reasoned basis that "opinion" had been formed.

63. Although he said that he relied upon reassurance from people such as David Cole, he did not take any steps to assess the position for himself once he had set up his own accountancy firm. Even then he did not look up the relevant legislation and consider how it had changed over time, or any commentaries thereon. Mr Bevis did not consider the statutory provisions applying to the carry forward of losses and, in particular, s83 Income Tax Act 2007 which requires there to be the same trade. He described himself at the hearing as "not being that au fait with the rules". Even though he described a situation where he sought a specialist opinion because he lacked the relevant knowledge about potential R&D tax allowances, he took no action to obtain specialist advice on the Scheme, despite saying that he lacked knowledge about the application of section 730.

64. Mr Callen relied upon Mr Bevis' advice for the preparation and submission of his tax returns. Mr Bevis had records of Mr Callen's trading activity. Mr Bevis knew that the Scheme transactions were not oil and gas related and he did not ask Mr Callen whether he had started trading in the purchase of dividend rights.

65. Mr Bevis did not review any of the Scheme documentation or PSAs and simply relied upon a spreadsheet provided by Montpelier for the figures to insert into Mr Callen's tax returns. He did not check that underlying documentation such as minutes declaring dividends and assignments of the dividends existed. He simply relied upon Montpelier, the salesman of the Scheme to provide reassurance that the Scheme worked and provide the requisite figures, despite their clear vested interest in getting taxpayers to participate. At the hearing he confirmed that the tax return production process simply involved him asking Montpelier what figures to put in the boxes, which they then checked and returned before the return was sent to Mr Callen to sign. This approach was continued when he responded to enquiries raised by HMRC in which he again simply copied answers provided by Montpelier. At no point did he carry out any independent consideration of what entries should be completed in Mr Callen's tax return or assess whether Montpelier's drafted responses to enquiries were correct.

66. Mr Bevis accepted at the hearing that he had included the financial information provided by Montpelier, which included a deduction of £250,000 for professional fees, despite knowing that Mr Callen had not paid that full amount of fees (as some were contingent on the Scheme's success).

67. Mr Bevis did not make any white box disclosure to the effect that some of the fees were contingent and had not been paid and did not tick the box to state that the tax return contained provisional estimated figures. Mr Callen did not query the inclusion of the unpaid fees.

68. In responding to HMRC's enquiries in the letter of 2 February 2011, Mr Bevis cut and pasted a response provided to him by Montpelier including statements that there was no documentation, marketing material or counsel's opinion, even though those answers were factually untrue and misleading. The response given to the full description of business was that Mr Callen undertook trading and financial derivatives including purchase of dividend rights even though this was clearly incorrect. In fact, Mr Callen had never traded in the purchase of dividend rights.

HMRC'S CASE

69. HMRC relies on *HMRC v Hicks* [2020] UKUT 12 (TCC) and submits that the test for carelessness is therefore an objective one. The Tribunal is required to assess the acts and/or omissions of the individual taxpayer by reference to what a reasonable and prudent taxpayer in his position, exercising reasonable care in the completion of an accurate self-assessment tax return, would have done.

70. Sections 29(4) and 36 TMA provide that the carelessness may be that of the taxpayer or a person acting on his behalf. The use of professional advisors does not absolve the taxpayer of his responsibility to take reasonable care in completing an accurate self-assessment. Whether it was reasonable for a taxpayer to rely upon professional advice received depends upon the circumstances of the case. In *Litman & Newall v HMRC* [2014] UKFTT 89 (TC), the FTT found the taxpayers to be negligent not because they did not understand the technical intricacies of a Montpelier tax avoidance scheme, but because they failed to carry out any due diligence into the basic commerciality of the scheme.

71. The meaning of 'a person acting on his behalf' within s 29(4) TMA was considered in *Hicks*. The Upper Tribunal endorsed the test set by the FTT in *Trustees of the Bessie Taube Discretionary Settlement Trust v HMRC* [2010] UKFTT 473 (TC).

72. HMRC assert that the following features of why the Scheme did not work are relevant to the issue of carelessness:

> (1) the claimed transactions for the Scheme did not take place at all. This is because despite requests having been made, no evidence has been provided by Mr Callen demonstrating that the Scheme transactions actually occurred, or that there was an actual flow of funds in accordance with the agreements entered into;
>
> (2) if the transactions took place the dividends paid were illegal. The UK resident unlimited companies have provided no accounts in order to demonstrate compliance with their obligations laid down by the Companies Act for declaring and paying dividends Montpelier, which controlled those companies, knew or ought to have known this;
>
> (3) the transactions entered into by Mr Callen (if they existed at all) were not trading transactions. They were entirely circular, artificial and entered into for the sole purpose of carrying out a raid on the Exchequer. Each dividend transaction was structured so as to show a small profit if considered in isolation. However, when the Scheme entry fees are factored in, there is not a profit but an economic loss of £249,072. The transactions

only made economic sense if the tax losses could be claimed. It follows that the dividend transactions were not trading transactions (*Lupton (Inspector of Taxes) v FA & AB Ltd* [1972] AC 634);

(4) the transactions were not part of Mr Callen's pre-existing trade: Mr Callen had been involved in trading oil and gas futures in several capacities since the 1990s. The Montpelier dividend transactions did not form any part of that trade. The acquisition of rights to dividends was far removed from his normal trading activity. Mr Callen had no history of trading in dividends, let alone a "pattern" of such;

(5) *Ramsay* applied: the FTT in *Clavis Liberty* found that the transactions that looked to take advantage of s 730 were to be disregarded and did not give rise to the alleged tax losses.

73. Mr Callen was careless because he failed to take reasonable care to determine that his trade was suitable to participate in the Scheme. In response to submissions made by Mr Callen, Mr Stone submitted that even someone who was not a tax expert would see that the Counsel's Opinion required the participant to be trading in dividends. The opinion referred to derivatives and "dividends of the kind which is under consideration here".

74. In response to Mr Callen's claim that he was told that the Scheme was a "no-brainer" for him, it was not clear what was meant by that phrase. Mr Callen had not sought clarity of what was meant and it did not inevitably mean that he was told that the Scheme would work so that it was correct to claim the losses in his tax return. In relation to the extent to which Mr Callen should have been able to take comfort from the fact that it was a DOTAS registered scheme, Mr Stone submitted that it was incumbent upon a participant such as Mr Callen to ensure they met the qualifications for the Scheme.

75. It was also incumbent on him to ask about the dividends which he was supposedly buying. The circumstances in this case are different to those in the case of *Herefordshire Property Company Ltd v* HMRC [2015] UKFTT 79 (TC) relied upon by Mr Callen. In that case there was nothing more expected beyond the transactions identified and evidenced by the appellant and the decision in the case was premised on the fact that the scheme had in fact been implemented; both of these elements are missing in this case.

MR CALLEN'S CASE

76. Mr Callen submits that the only person who should be treated as "acting on his behalf" is his accountant, Mr Bevis, and neither he nor Mr Bevis were careless in relation to the decision to claim relief for the losses in the 2009/10 tax return. On 30 March 2015 Mr Callen wrote: "I have not been careless. My tax return has been completed with the figures as advised by my professional advisers and I have no reason to doubt their advice. The return included the information that a tax scheme had been used and the DOTAS number was provided. I do not see; that there is any other way in which the return could have been completed and most certainly there was no carelessness."

77. Mr Callen says that during the relevant time he was a derivatives trader. In order to act as such there was no prerequisite to trade in the underlying security itself. The trading element within the arrangements was a derivative – it was a trade in the right to receive dividends, not a trade in the underlying dividend shares.

78. The Scheme was recommended to him by his former accountant and tax expert, David Cole, who considered it to be a "no-brainer" for derivatives traders. The Scheme was marketed specifically at derivatives traders and the Counsel's Opinion was read by him as simply requiring that the taxpayer was a derivatives trader. There was therefore no need for Mr Callen to establish a new trade. This conclusion was emphasised by the wording in

paragraph 3 of the Counsel's Opinion referring to "Mr C" as a "sole trader dealing in a wide writing shares, securities and derivatives". Mr Callen assumed that the reference in paragraph 11 of the counsel's opinion to a dealer in "shares securities and dividends" had mistakenly referred to dividends rather than derivatives. In any event, it was impossible to have a trading pattern in a new product and therefore the reference to the trading must be to derivatives generally and not to a specific type of derivative.

79. Mr Callen relied upon the case of *Hicks* to submit that carelessness must be assessed according to the standard that a taxpayer is required to declare that to the best of his knowledge, the return is correct and complete.

80. Mr Callen relied on the case of *Herefordshire Property Company Ltd* v *HMRC* [2015] UKFTT 79 (TC). In that case the tribunal took into account what the taxpayer expected to happen in the transactions. Similarly, Mr Callen had found the transactions had operated as he had expected and, in particular, he had not expected monies to be moving in and out of his bank account. Account was taken of the fact that the taxpayer and the accountant were non-tax specialists in concluding that there was no negligence. Mr Callen was at least as engaged with the scheme transactions as the taxpayer in *Herefordshire Property Company*, similarly considering a tax opinion from counsel; yet that taxpayer was not expected to verify any of the behind-the-scenes steps in the transactions and was entitled to assume that the transactions took place as described. He was in the same position as that in which that taxpayer was described by the tribunal and was similarly entitled to think that the Scheme had operated as expected. He had relied on the fact that he had used a DOTAS scheme.

81. Mr Callen also relied upon the case of *Rowan Carstairs* T2016/0493 saying that, in just the same way, this tribunal should proceed on the basis that when Mr Callen entered into the Scheme and submitted his tax return he accepted the advice he was given in good faith. The change in legislation in April 2009 reinforced the view that a loophole had been shut down and it was that loophole on which Mr Callen had relied. He had no reason to believe that the Scheme would not work.

82. Relying upon the *Bessie Taube* analysis of the expression "person acting on… behalf" Mr Callen submitted that Montpelier was not "acting on his behalf" in relation to the submission of his tax return, although their input was much greater later on and they, in effect, took control of the correspondence with HMRC.

83. Mr Callen found the suggestion that the approach to participating in the Scheme and his submission of his tax return subsequently was equivalent to taking a cheap loan from HMRC until the litigation was finished, provocative. He had invested a huge amount of time and emotion in seeking to show that he had not been careless.

THE LAW

84. The usual time limit for issuing an assessment is four years after the end of the year of assessment to which it relates (s34 TMA). This time limit is extended in certain circumstances by s 36 TMA, which, so far as relevant, provides:

> '36 Loss of tax brought about carelessly or deliberately etc
>
> (1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates …
>
> (1B) In subsections (1) and (1A), references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person.'

85. Section 118(5) TMA provides as follows:

> '(5) For the purposes of this Act a loss of tax or a situation is brought about carelessly by a person if the person fails to take reasonable care to avoid bringing about that loss or situation.'

86. The Upper Tribunal in *Hicks* confirmed the approach to be applied in determining who is treated as "acting on behalf of another" as the test in Bessie Taube at [93}, i.e.:

> '… 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.'

87. Furthermore, *Hicks* emphasises that the insufficiency in the assessment must be "brought about", that is, caused by the relevant carelessness. If the assessment to tax (as contained in the self-assessment tax return) states the wrong figure as to the tax payable and the wrong figure is stated as a result of carelessness, then the insufficiency in the assessment tax is brought about by that carelessness. Carelessness can take the form of omissions as well as positive acts [para 119].

88. Cases such as *Atherton v Revenue and Customs Comrs* [2019] UKUT 41 (TCC) show that the conduct of the individual taxpayer is to be assessed by reference to a prudent and reasonable taxpayer in his position.

89. As *Hicks* makes clear a taxpayer making a self-assessment must take care to get the assessment right. He must take care to get it right both as to matters of fact and matters of law. The standard against which a person acting on behalf of a taxpayer as their tax advisor should be assessed is that of a reasonably competent tax advisor.

DISCUSSION

90. This case clearly bears significant similarities to the *Hicks* case. However, that does not mean that I am bound to reach the same conclusions. I must apply the law as set out in *Hicks*, as well as the other authorities I have referred to in the section of this decision setting out the law, and the result of that application depends upon the facts. The fact that both Mr Callen and Mr Hicks entered into the Scheme and were both advised by Mr Bevis is in itself insufficient to reach the same conclusions. As I explained to Mr Hicks at the hearing, the fact sensitivity explains cases such as *Herefordshire Property Company Ltd* and *Litman*.

Was Mr Bevis acting on behalf of Mr Callen?

91. The first issue is whether Mr Bevis was a person acting on Mr Callen's behalf in bringing about the insufficiency in the tax returns.

92. It was accepted at the hearing by Mr Callen that Mr Bevis was a person acting on his behalf at the relevant time. I am conscious of my duty towards a litigant in person and have considered whether this was an appropriate concession from Mr Callen to make. I am entirely satisfied that it was. Mr Bevis very clearly satisfied the *Bessie Taube* test: he took the steps that Mr Callen himself could take, or would otherwise be responsible for taking in completing tax returns for Mr Callen, filing those returns, entering into correspondence with

HMRC, providing documents and information to HMRC and seeking advice from Montpelier as to the tax position of Mr Callen. He represented Mr Callen.

Was Mr Bevis careless?

93. Having reached the conclusion that Mr Bevis was acting on behalf of Mr Callen I move onto consider whether Mr Bevis was careless in submitting Mr Callen's tax returns for 2009-2010.

94. Given my findings regarding Mr Callen's perception of what Mr Bevis was doing as well as what Mr Bevis was holding himself out as doing and in fact did, I am clear that Mr Bevis took on the role of a tax adviser to Mr Callen and, applying *Hicks*, I must therefore judge Mr Bevis by the standard of a reasonably competent tax adviser giving advice to a taxpayer.

95. Mr Bevis has described at length how he relied upon the expertise of Mr Cole with, and for whom, he worked when he was at Chappell Cole. However, by the time of the submission of Mr Callen's relevant tax returns he was running his own firm, Precision. Responsibility fell squarely on his shoulders from the formation of Precision. Even before this point Mr Bevis has described reading the Counsel's Opinion and Gitten's Memorandum and reaching the conclusion himself that there was no reason to change his opinion that the Scheme was directed at a person such as Mr Callen. Yet the Counsel's Opinion stated clearly that the key issue concerned the ability of the Scheme participants to rely on the Scheme transactions being trading transactions for them. Counsel stated clearly that the participant "must be able to demonstrate a pattern of dealing which leaves no doubt that he is trading in the right to receive dividends".

96. Mr Bevis was fully aware of Mr Callen's trade, but, just as in the *Hicks* case, he took no action to investigate whether Mr Callen had established the necessary pattern of trading when completing Mr Callen's 2008/2009 and 2009/2010 tax returns. He therefore included the expenditure without having addressed whether it was properly deductible on the basis of the Counsel's Opinion; let alone on the basis of core principles of UK tax rules requiring expenditure to be wholly and exclusively for the purposes of a person's pre-existing trade if it is to be deducted. This is not a case where a tax advisor considered the issues and reached a view which proved to be wrong. Mr Bevis did not attempt any independent assessment at all.

97. Mr Callen has focused much of his energies in this case in asserting that he was a derivatives trader and therefore the transactions involved in the Scheme were transactions carried out in the course of that trade as they were transactions in derivatives, i.e. rights to dividends rather than the underlying shares. While this may be an understandable position for a layperson, despite the clear wording of the Counsel's Opinion, who read and interpreted that opinion in line with reassurances given by those with expertise, Mr Bevis was in a different position. As Mr Callen has said, Mr Bevis knew what Mr Callen's existing pattern of trade was and it should therefore have been obvious to him that dealing in rights to dividends was not part of that existing trade.

98. Mr Callen has described Mr Bevis as his tax adviser, not a tax expert. However, if Mr Bevis did not have expertise in the areas at which the Scheme was directed and therefore felt unable to properly assess the Scheme, it was incumbent upon him as an adviser to seek expert advice, or inform Mr Callen that he could not advise him on it, or the completion of his tax return as a result thereof.

99. At one point in the evidence Mr Bevis said that he was not a "high level tax adviser" which I asked him to clarify. He sought to distinguish situations involving tax avoidance schemes. Yet he never told Mr Callen that he lacked the expertise to complete his tax returns

as a result of the participation in the Scheme. He did not seek the advice of someone with more expertise. He simply copied entries provided to him by Montpelier with no engagement of any independent consideration of assessment thereof.

100. In addition, Mr Bevis was careless in preparing and submitting Mr Callen's tax returns with deductions claimed for the total fees payable under the PSAs rather than the amounts in fact paid by Mr Callen with no indication of the basis for doing so. This was not a matter which required more than the most basic tax knowledge. It did not require him to be what he called a "high level tax adviser". Mr Callen's evidence was clear that he relied upon Mr Bevis in the preparation of his tax return, including in relation to the claim for expenses. (There is a separate matter as to whether Mr Callen was careless in submitting his tax returns which stated the full fee figure rather than the amount he had paid. His evidence at the hearing showed that he was aware that there were rules about what could and what could not be claimed, even if he did not have detailed knowledge of each and every rule.)

101. Again, Mr Bevis simply copied the entries provided to him by Montpelier in a spreadsheet with little or no thought as to whether they were correct. Although his carelessness in sending responses to HMRC's enquiries which were clearly and obviously incorrect (in stating, for example, that there was no counsel's opinion, marketing material or documentation for the Scheme and in its description of Mr Callen's business) is arguably not carelessness which brought about the inadequate tax assessments, as it post-dated the submission of the tax returns, it is consistent with the Mr Bevis' approach throughout his handling of the tax returns of paying little, or no, regard to the information he was providing to HMRC.

102. I therefore conclude that Mr Bevis, acting on behalf of Mr Callen, carelessly brought about the insufficiency in Mr Callen's tax assessments as a result of:

(1) compiling the tax returns on the basis of deductions claimed for the purchase costs of the rights to dividends without adequate consideration of Mr Callen's entitlement thereto or to his entitlement to carry forward the losses;

(2) including deductions for £250,000 of professional fees as deductible expenses of Mr Callen's trade even though Mr Callen had only spent £95,000 and the remaining fees were contingent on the success of the Scheme transactions, without any indication on the returns that the figures were to any extent contingent, provisional or estimated.

103. These conclusions are sufficient to mean that I must dismiss Mr Callen's appeals. It is unnecessary for me to address whether, in addition, Mr Callen was careless and/or Montpelier was acting on behalf of Mr Callen and careless.

CONCLUSION

104. The discovery assessment for the tax year 2009-2010 was made within the statutory time limits by HMRC and therefore the appeal is dismissed.

SUPER HEADING

RIGHT TO APPLY FOR PERMISSION TO APPEAL

105. 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.

TRACEY BOWLER
TRIBUNAL JUDGE

Release date: 04 FEBRUARY 2022