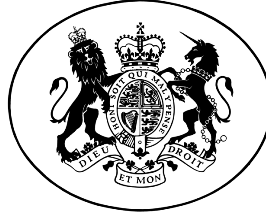

TC03550

Appeal number: TC/2013/0106, TC/2013/0107 & TC/2013/0108

CAPITAL GAINS TAX – penalties – section 95 TMA 1970 – negligently delivering a return – preliminary issue – whether the respondents have adduced evidence to establish a prima facie case of negligence – no – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) RYAN GARDINER **Appellants**
(2) ANNE GARDINER
(3) MICHAEL GARDINER

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
MR JOHN WILSON

Sitting in public in Manchester on 29 April 2014

Mr Keith Gordon of counsel instructed by EDF Tax Limited appeared for the Appellant

Mr Peter Massey and Mr Kevin McMahon of HM Revenue & Customs appeared for the Respondents

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DECISION

Background

1. These are appeals against penalty determinations pursuant to section 95 Taxes Management Act 1970. The penalties were issued against each appellant on 21 August 2012 as follows:

	£
First Appellant	4,764
Second Appellant	6,920
Third Appellant	12,941

2. Section 95 provides for liability to a penalty in certain circumstances, including where a person negligently delivers an incorrect return.

3. The second and third appellants are husband and wife. The first appellant is their son. In 2005 they entered into a marketed tax avoidance scheme with a view to sheltering chargeable gains they had realised on the disposal of shares in a company, Hall & Letts Limited. The scheme involved generating capital losses on the acquisition and disposal of capital redemption policies. They disclosed the scheme in their tax returns for the year ended 5 April 2006, which were delivered in January 2007. In or about June 2007 the respondents gave notice of enquiry into the returns.

4. The respondents challenged the scheme in the tax appeal of *Jason Drummond v Commissioners for HM Revenue & Customs [2009] EWCA Civ 608*. In June 2009 the Court of Appeal held that the scheme was ineffective.

5. Since the Court of Appeal decision the appellants have accepted that the tax is due. The enquiry was closed and we understand the appellants have paid the tax for 2005-06. The respondents however consider that the appellants had negligently delivered incorrect returns. The negligence relied on by the respondents in these appeals arises from what is alleged to be the incorrect implementation of the scheme. In particular they say that loans to the appellants totalling £1,788,000 as part of the scheme were never made, or only made after the event.

6. In the circumstances the respondents say that the appellants ought to have realised when they made their tax returns in January 2007 that tax relief was not due.

7. We were provided with two bundles of documentation by the respondents which included, in relation to each appellant the following documents:

(1) The tax return.

(2) Correspondence between the appellants, their advisers and the respondents in connection with the enquiries.

(3) Scheme documentation.

8. The appellants each lodged notices of appeal with the Tribunal on 27 December 2012. One ground of appeal pursued by each appellant was that the respondents had not demonstrated negligence.

5 9. On 26 April 2013 the Tribunal gave directions for the conduct of the appeals. These were standard directions, which did not include any direction for witness statements. However both parties were required to give listing information including whether or not witnesses were to be called. On 10 June 2013 the respondents provided listing information and stated "*the respondents do not intend to call any witnesses*".

10 10. The appeals were listed for hearing by way of a notice dated 4 February 2014 informing the parties that the appeals would be heard on 29 April 2014. In early March 2014 the respondents confirmed to the appellants' representative (EDF Tax) that they were not intending to call witnesses.

11. On 27 March 2014 EDF Tax wrote to the Tribunal, copied to the respondents, 15 in the following terms:

> "*We note in particular the fact that HM Revenue & Customs (HMRC) do not propose to adduce any witness evidence … Given the fact that the burden of proof falls squarely on them … we have been advised that the appeal should be summarily allowed as there is no evidence or statement of agreed facts on* 20 *which HMRC's case can rest.* "

12. The writer went on to say that the appellants would argue at the hearing that the appeals should be allowed on the basis of lack of evidence from the respondents. This approach was repeated in a letter dated 4 April 2014 from EDF Tax to the Tribunal.

13. Mr Gordon, who appears for the appellants served a skeleton argument on the 25 Tribunal and the respondents on 15 April 2014. This included an argument that "*the Respondents have not even raised a prima facie case to which the Appellants should be required to answer*". At the hearing he invited us to allow the appeal on the basis that the respondents had adduced no evidence to support a finding of negligence.

The Statement of Case

30 14. Both parties agreed that the burden was on the respondents to establish negligence on the part of the appellants. On that basis Mr Massey opened the appeal for the respondents.

15. The Statement of Case was undated but it was served on 26 March 2013. At [31] to [37] it sets out various assertions and arguments including:

35 > "*36. The Respondents contend that no reasonable person, having examined the documents, could have held that the transactions were carried out as described.*

37. For the avoidance of doubt, the appellants are put to proof of the following:

a) Whether the sum of £1,788,000 was made available to purchase these policies. This should include the source of funds and conditions of any loan

b) Whether the £1,788,000 was transferred to Mossbank Enterprises Ltd and if so on what date was it transferred.

…"

16. The Statement of Case was clearly deficient in a number of respects. It failed to properly particularise the negligence being alleged against the appellants and it wrongly sought to place the burden of proof on the appellants. Mr Massey quite rightly accepted these criticisms. Indeed he candidly accepted that the appellants were somewhat in the dark about the case against them.

17. In seeking to put the appellant to proof of various matters in connection with the implementation of the scheme the respondents appear to have overlooked the requirement that the burden is on them to establish negligence. The source of the material facts to justify a conclusion that a taxpayer has been negligent will generally be the taxpayer himself or those advising him. Part of the purpose of an enquiry into a tax return is for the respondents to investigate and gather evidence relevant to the issue of whether a penalty should be imposed. That evidence must then be adduced in the Tribunal to raise at least a prima facie case of negligence.

The Appellants' Applications

18. Mr Gordon maintained that the respondents had failed to adduce any evidence to support their allegation of negligence. In particular he said that even if there were flaws in implementing the scheme, there was no evidence that the appellants could have known of those flaws.

19. Both parties were content to deal with this as a preliminary issue at the hearing. The preliminary issue may be put in the following terms:

"*Have the respondents adduced evidence from which the Tribunal could prima facie be satisfied that the appellants negligently delivered incorrect tax returns for year 2005-06?*"

20. Mr Gordon submitted that there was a fundamental obstacle in the way of the respondents' case. There was no evidence, in a formal sense, of what was before the appellants at the time the return was lodged in January 2007. The issue for the Tribunal would be what the appellants ought to have done differently, based on what they knew in January 2007. In the absence of any witness involved in the enquiry the Tribunal could not be satisfied what was available to the appellants and so would be unable to say that the appellants ought to have acted differently.

21. Mr Massey submitted that there was documentary evidence, even without witnesses, which showed that all three appellants signed documents which were either not authentic, misrepresented the reality or related to transactions which simply didn't happen. In making that submission he was careful not to suggest anything beyond negligence on the part of the appellants. He submitted that the documents available to the appellants should have caused them to query whether the scheme was effective.

22. We were taken to the principal documents implementing the scheme in relation to the Third Appellant which were relied on by the respondents. These included the offer of a loan dated 2 September 2005 and certain bank statements which suggested that the funds did not move between companies controlled by the scheme promoter until November 2005, after the acquisition and disposal of the capital redemption policies had purportedly been completed. Some of the documentation was signed by the Third Appellant. However the documents which might give rise to a suspicion that the implementation of the scheme was flawed were all what Mr Gordon described as "unilateral documents". That is documents signed by or on behalf of the scheme promoter. He submitted that there was no evidence that the unilateral documents were available to the Third Appellant when he made his tax return.

23. We accept Mr Massey's submission to the effect that if the appellants had not asked for documents to satisfy themselves that the scheme had been properly implemented then that might be prima facie evidence of negligence. However that is not how the respondents put their case on negligence. The allegation at [36] of the Statement of Case is to the effect that a reasonable person, having examined "the documentation" would have realised that the scheme had not been properly implemented.

24. In a penalty appeal we would expect the allegations of negligence to be clearly particularised. It seems to us that the failure to particularise what it is that the appellants ought to have done or ought to have realised in January 2007 has led the respondents to overlook the need for evidence to establish a prima facie case of negligence.

25. We were referred to a letter dated 21 August 2012 from Mr Guy Woods, the officer who issued the penalty determinations. The letter accompanied the penalty determinations and said:

> "*HMRC contend that these transactions fall down on implementation and that the errors, failings and weakness are such that they should have been visible to the taxpayer who would have realised that events were not taking place as they should have. My letter issued on 30 April 2012 explained in detail why a penalty was appropriate in this case.*"

26. Mr Woods' letter dated 30 April 2012 sets out in detail the circumstances in which the enquiry progressed, including the gathering of information and documentation from the appellants. He then sets out in detail his understanding of the scheme documentation and the inferences he drew from that documentation taking

into account explanations offered by the appellants through their accountants. By way of example, he says:

> "*MT Holdings wrote to Mr Gardiner on 2 September 2005 offering him a loan of £892,000, interest free and unsecured. Mr Gardiner completed no application forms and provided no evidence of earnings or his ability to repay the loan. There was no loan agreement. I would contend that any person with a basic financial awareness would have realised that this was an unrealistic and uncommercial arrangement.*"

27. It is not clear whether this, or other matters referred to in the letter, are particulars of negligence relied on by the respondents for the purposes of this appeal. It has not formed any part of the respondents' Statement of Case.

28. The document bundles include the underlying scheme documentation and the correspondence during the enquiry. We were not taken to any specific documents relied on to show exactly what was available to the appellants in January 2007.

29. It appears that the respondents simply rely on documents in the bundle as evidence as to the truth of their contents. The respondents produced a List of Documents in accordance with the Tribunal Rules. In the ordinary course of civil litigation where a document is disclosed, unless specific objection is taken the document is treated as authentic (see *CPR Part 32.19*). However where a party relies on a document as evidence of a statement in the document, it must still be proved by production of the document (see *Section 8(1)(a) Civil Evidence Act 1995*). Production is not simply by counsel or a representative handing up the document, but by a witness qualified to say what it is (see *Ventouris v Mountain (No 2), The Italia Express [1992] 3 All ER 414 at 427*).

30. In the present appeals no witness has produced the documents relied upon.

31. The respondents did not seek to rely on Rule 15(2) of the Tribunal Rules or invite us to exercise our discretion under that rule which provides as follows:

> "*The Tribunal may –*
>
> *(a) admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom.*"

32. Without the benefit of argument, our initial view would have been that in these particular appeals it would not be appropriate to admit documents in evidence without a witness adducing those documents and explaining the reliance placed on them. These are penalty appeals and in our view the appellants are entitled to put the respondents to strict proof. They are also entitled to know and question what significance is placed on particular documents in support of the allegation of negligence. The respondents were on notice as to the appellants' position and chose not to adduce witness evidence.

33. In the absence of evidence to support the respondents' case on negligence we have concluded that they have failed to satisfy the burden of establishing a prima facie case of negligence. In the light of our answer to the preliminary issue we must allow the appeals.

34. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 6 May 2014