[2015] UKFTT 0625 (TC)

TC04754

Appeal number: TC/2013/01643

INCOME TAX – loss relief – whether appellant carried on trade as a money lender – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

R PARKER **Appellant**

- and -

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

TRIBUNAL: JUDGE JENNIFER DEAN
MR DEREK ROBERSTON

Sitting in public at Manchester on 18 November 2015

Mr A. Hall for HMRC

The Appellant did not attend the hearing

DECISION

Introduction and background

1. This appeal was listed before the same tribunal judge and member for case management on 15 January 2015. Included in the directions given following that hearing was an overview of the appeal and issues arising which to assist the reader's understanding we now set out below:

"This case was listed for a case management hearing to address the following issues:

- What loss claim is made by the Appellant; and
- Whether that claim was made within the statutory guidelines.

Due to ongoing health problems the Appellant did not attend the hearing. We were notified by the Appellant's representative, Dr Milton of Milton & Co by email dated 12 January 2015 that:

"With reduced earnings due to time off work due to illness, out of considerations of cost, the appellant has requested that we tender written submissions rather than attend the hearing in person."

We were grateful to Dr Milton for extending the courtesy of informing the Tribunal and we should note that we were in no way critical of the absence of the Appellant or Dr Milton.

We were referred to the skeleton arguments of both parties, a significant volume of correspondence and additional written submissions of Dr Milton. We took all into account.

It may be helpful at this stage to summarise the issues identified in this case so far, from which it will become clear that we did not have sufficient clarification before us to determine the matters set out above.

The Appellant has made returns as a quantity surveyor since October 1995. He was also a director of a company called Rapour Ltd which was incorporated on 9 June 2006. Rapour Ltd went into voluntary liquidation on 17 March 2008 and was dissolved on 14 September 2011. A Statement of Affairs at the time of its liquidation showed that the Appellant had an unsecured claim of £18,000 at that time.

On 16 May 2010 HMRC received a loss claim under Section 380 (1) (a) and (b) Income and Corporation Taxes Act ("ICTA") 1988 according to which loans made by the Appellant to Rapour Limited were irrecoverable due to its liquidation. The quantum of the loans was said to be £50,300. Of that amount £10,521.92 was to be set against 2009/10, £11,892.40 against 2008/09 and the remaining loss of £27,885.68 carried forward. In essence the Appellant contends that there is a loss from a trade of

money-lending which should be allowed against the declared profits of a quantity surveyor.

On 17 March 2011 HMRC opened an enquiry into the Appellant's 2009/10 SATR. A Closure Notice was issued on 11 December 2012. HMRC concluded that the Appellant's claim was not allowable and the return was amended to remove the losses claimed and increase the liability to tax to £5,260.96. The substantive appeal brought by the Appellant is against that Closure Notice and amendment to the 2009/10 SATR.

HMRC do not accept that a valid loss claim exists. A loss claim made under Section 253 Taxation of Chargeable Gains Act 1992 ("TCGA") may be triggered by Rapour's liquidation and properly claimable. However no claim under this section has been made.

The claim was made under Section 380 ICTA, which for the period relevant to this appeal was re-written into Section 64 Income Taxes Act ("ITA") 2007 which took effect from 2007/08. Section 64 ITA provides for the deduction of losses from general income. The legislation refers only to trade income and HMRC submit that the Appellant has not shown that a trade existed, there being nothing contained on the SATRs for 2007/08 or 2008/09 to demonstrate this.

HMRC also highlight that the loss claimed has changed from irrecoverable loans made to Rapour to being losses from a venture in the nature of trade as a money-lender. No evidence has been provided in support of this trade for example confirmation of regulation in the trade or that the Appellant was licensed by the Office of Fair Trading, nor have any accounts been submitted. Witness statements provided by the Appellant post-dated HMRC's decision and review and have therefore not been considered.

HMRC also query the quantum of the loss which was initially presented as £50,300 but later increased to £59,050. It was noted that part of the increase was attributed to a period after Rapour had gone into liquidation. Furthermore the Statement of Affairs sworn by the Appellant only showed a figure of £18,000.

Finally HMRC submit that if the claim is deemed to fall under section 64 ITA, it is out of time as the time limit set out in section 64 (5) expired on 31 January 2010. The Appellant made the claim by letter dated 16 May 2010 and amendment to the 2009/10 SATR on 6 July 2010.

Dr Milton's skeleton argument clarified that the loss claim was made as set out in the letter dated 16 May 2010. In additional written submissions prepared for the case management hearing, Dr Milton contends that in a letter dated 3 September 2010 HMRC advised that the losses are capital losses. This is not our reading of the letter which responds to the claim made on 16 May 2010 in respect of "*loans to the company for working capital"* and clarifies that "*relief for irrecoverable loans such as you are claiming are dealt with under the provisions of Section 253 (3) TCGA 1992. The relief is not available against income in the manner claimed but only*

against capital gains." HMRC subsequently requested that the Appellant set out in writing the statutory authority relied upon in making the claim.

The Appellant set out the basis of his claim by letter dated 19 July 2011 in which it was contended that *"…the loans being unconnected with the trade of surveying do not…preclude them being deducted against that trade."* Dr Milton submits that HMRC accepted that there was an adventure in the nature of trade and thus the loss is a trading loss. However the letter relied upon from HMRC dated 5 October 2011 stated *"…I did not dispute that an isolated transaction can be an adventure in the nature of trade…I also explained that I had not seen any evidence that your client was trading as a money-lender…the presumption is that the loan was an investment."*

Dr Milton highlights a number of witness statements adduced on behalf of the Appellant which purport to confirm that he was trading as a money-lender. In all of the circumstances it is submitted that the nature, quantum and statutory authority has been clearly set out.

The questions for us to consider is what loss claim is being made and the statutory guidelines for any such claim. Whilst we are grateful to Dr Milton for his succinct submissions and we are mindful of the financial difficulties faced by the Appellant, we have concluded that we need further clarification on the issues for the following reasons.

The claim was made under section 380 ICTA (now repealed). No claim has been made under section 253 TCGA. If the claim is considered under section 380 ICTA, which was applicable up to 5 April 2007, the claim would have had to be made by 31 January 2009. No SATRs were submitted showing the loss within that time limit. If section 64 ITA is applied, the time limit for making a claim was 31 January 2010 (section 64 (5)).

Given that the claim was not made until 16 May 2010 at the earliest, prima facie the claim is out of time.

We consider that we require further clarification on the statute relied upon and the issue as to whether a claim was made in time. Our directions are set out below.

The issue as to whether the Appellant carried on a trade as a money-lender is a matter for the substantive hearing and in those circumstances we make no comment on the evidence in that regard.

IT IS DIRECTED that the Appellant must provide within 28 days:

If the claim is to be treated as a trade loss:

(a) Particulars of the enterprise that generated the loss;

(b) The accounts for that enterprise or identify the accounts as submitted on a particular SATR(s);

(c) Particulars of the year/years of the loss/losses;

(d) Particulars of the legislation relied upon in making the loss claim;

(e) Particulars of the year/years in which relief is to be given; and

(f) Particulars of the quantum of the relief sought for each period.

If any part of the claim is made as a loss other than by way of a trade loss:

(g) Particulars of the origin of the loss;

(h) Particulars of the year of that loss;

(i) Particulars of the legislation relied upon in making the loss claim;

(j) Particulars of the year/years in which relief is to be given; and

(k) Particulars of the quantum of the relief sought

Submissions on the issue of the time limits applicable and jurisdiction of the Tribunal in respect of any claim together with the legislation relied upon.

Should the Appellant decide not to comply with the directions out of cost considerations, the Tribunal will determine the case management issues on the information currently held."

Legislation

2. Section 64 of the Income Tax Act 2007 ("ITA") provides:

"(1) A person may make a claim for trade loss relief against general income if the person—

(a) carries on a trade in a tax year, and

(b) makes a loss in the trade in the tax year ("the loss-making year").

(2) The claim is for the loss to be deducted in calculating the person's net income—

(a) for the loss-making year,

(b) for the previous tax year, or

(c) for both tax years."

3. Section 66 ITA provides:

"(1) Trade loss relief against general income for a loss made in a trade in a tax year is not available unless the trade is commercial.

(2) The trade is commercial if it is carried on throughout the basis period for the tax year—

(a) on a commercial basis, and
(b)with a view to the realisation of profits of the trade.

(3)If at any time a trade is carried on so as to afford a reasonable expectation of profit, it is treated as carried on at that time with a view to the realisation of profits."

4. Section 253 of the Taxation of Chargeable Gains Act 1992 ("TCGA") provides as follows:

"*(1) In this section "a qualifying loan" means a loan in the case of which—*

(a) the money lent is used by the borrower wholly for the purposes of a trade carried on by him, not being a trade which consists of or includes the lending of money, and

(b) the borrower is resident in the United Kingdom, and

(c) the borrower's debt is not a debt on a security as defined in section 132; and for the purposes of paragraph (a) above money used by the borrower for setting up a trade which is subsequently carried on by him shall be treated as used for the purposes of that trade.

(2)In subsection (1) above references to a trade include references to a profession or vocation; and where money lent to a company is lent by it to another company in the same group, being a trading company, that subsection shall apply to the money lent to the first-mentioned company as if it had used it for any purpose for which it is used by the other company while a member of the group.

(3) If, on a claim by a person who has made a qualifying loan, the inspector is satisfied that—

(a) any outstanding amount of the principal of the loan has become irrecoverable, and
(b)the claimant has not assigned his right to recover that amount, and
(c)the claimant and the borrower were not each other's spouses, or companies in the same group, when the loan was made or at any subsequent time, this Act shall have effect as if an allowable loss equal to that amount had accrued to the claimant when the claim was made…"

The Appellant's case

5. Following the direction above being issued the Appellant provided its response dated 16 February 2015 as follows: Robert Parker sole trader unincorporated trading as a commercial money lender. The loss claim computation has been provided showing loans between 29 September 2006 and 20 November 2008. The losses relate to the years 2008/2009 and 2009/2010; the losses became irrecoverable in period 09/10. The claim is made under section 64 ITA 2007 and the Appellant seeks relief

for 2008/2009 (to carry back the loss) and 2009/2010 (the year of the loss) in the amounts of £11,892.40 and £10,521.92 respectively.

6. In respect of time limits, the Appellant submitted that the 2009/2010 return had to be filed by 31 January 2011; the Appellant therefore had until that date to either file the return or amend it. The Appellant's representative Milton & Co notified HMRC about the claim by letter dated 16 May 2010 thus making the claim before the statutory deadline. The Appellant's records show that the 2009/2010 return was received on 15 May 2010 and the amended return which claimed the losses was received on 6 July 2010.

7. The Appellant provided an updated skeleton argument dated 4 November 2015 in which it was requested that the Tribunal take account of the contents of its written representations dated 12 January 2015, 16 February 2015 and 28 May 2014. In the updated skeleton argument the Appellant reiterated that HMRC were notified in advance of the loss claim which the Appellant intended to make. No objections were raised by HMRC at that point. The Appellant submitted that the onus of showing that a legitimate trade was carried on has been met, not least by the abundance of witness statements served on behalf of the Appellant. The Appellant contends that the claim has been clearly quantified and the Appellant has shown that losses were suffered and properly claimed. Those losses are revenue and not capital in nature. The absence of a money lending licence is irrelevant to the appeal as loans were not made to the general public.

HMRC's case

8. On behalf of HMRC Mr Hall highlighted that the claim made by the Appellant has varied considerably. The most recent position taken by the Appellant appears to be a loss claim of £59,050 arising in 2009/2010 to be set off, first against 2008/2009 then against 2009/2010 under section 64 ITA.

9. HMRC do not accept that there is a valid claim. Mr Hall noted that there has been no claim made under section 253(3) TCGA, more about which we will say in due course.

10. The onus of proof rests with the Appellant to show that his assertions in respect of the closure notices are correct. The Appellant must show that there was a trade, that it was carried out in a commercial manner and that there was a trade loss based upon the accounts (as opposed to a capital loss). The Appellant must demonstrate that any debt is a debt incurred by way of trade in order for the write-off of a bad debt to be allowable.

11. A claim made under section 64 ITA (a claim for trade loss relief against general income) must be made on or before the first anniversary of the normal filing date for the self-assessment return relating to the loss-making year. In applying the time limits to the present case Mr Hall explained that the amount now claimed of £59,050 was initially claimed under section 380 ICTA. The Appellant has since clarified that the claim is made under section 64 ITA. The Appellant has stated that the loans from

which the loss arose were written off in 2009/2010 which, the Appellant contends, was made in time on 6 July 2010 before the time limit of 31 January 2011. However HMRC submit that no evidence or information has been provided to show the grounds upon which the losses were written off in 2009/2010; no accounts have been provided nor were any details given on the relevant self-assessment returns.

12. In the absence of such evidence and information HMRC cannot consider whether there was a trade or whether this trade was carried out on a commercial basis (relying on *Agnew v HMRC* [2010] UKFTT 272 (TC)). No accounts or records have been produced to HMRC save for personal bank statements which do not assist.

13. HMRC cannot ascertain what the trading period is alleged to be in order to correctly assign profits and losses to the correct period. HMRC are also unable to determine whether any "loan" was made in the course of trading in order that a deduction is allowable.

14. The Appellant initially claimed that the losses arose from loans made by the Appellant to Rapour Ltd which went into voluntary liquidation on 17 March 2008. Based on that fact, the loss year would be 2007/2008 and not, as the Appellant contends 2009/2010, and the time limit for that claim would have been 31 January 2010.

15. Moreover, the initial loss claim has been incorrectly set against tax; the correct manner of giving relief is for the loss to be set against income and this takes priority over the personal allowance. Therefore the loss carried forward to later years is not £27,885.68 as the Appellant claims.

16. Mr Hall highlighted a Statement of Affairs sworn by the Appellant in 2008 in which the amount owing to the Appellant was declared as £18,000 in contrast to the claim before this Tribunal which vastly exceeds that amount. He also noted that the sum of £5,3000 claimed to be a loss incurred on 25 November 2008 appeared to relate to the settlement of a claim made against the Appellant personally by Commercial Vehicle Finance Ltd.

17. As regards the Appellant's purported trade as a money lender HMRC found no evidence that the Appellant was regulated or licensed by the appropriate authorities as would be expected of someone carrying out this type of genuine trade.

18. In summary, HMRC contend that there the quantum claimed is inconsistent and unreliable, there is no evidence of trade, nothing to support the contention that the losses were income in nature and the claims were made out of time in any event.

19. In response to the Appellant's claim that "advance notice of the claim" was given on 16 May 2010, it was noted that the 2009/2010 self-assessment return was received prior to that date on 15 May 2010. HMRC remain unclear as to why the Appellant claims that the principle of estoppel arises in this case and submit that any argument in respect of legitimate expectation should be dealt with by way of judicial review.

20. The Appellant relies on witness statements submitted after HMRC had carried out its review. Mr Hall noted that the statements were provided 4 months after HMRC's statement of case and almost a year after the closure notices were issued. Mr Hall submitted that the statements are of little value; they were untested in oral evidence, no statement was provided by the Appellant, the date on one statement post dated the date upon which it was served by 2 weeks, the contents of the statements are vague and none relate to 2009/2010, instead all appear to relate to 2006/2007.

21. HMRC take the view that the most likely explanation based on the information provided by the Appellant is that he made loans to Rapour Ltd (of which he was director and 100% shareholder) via a director's loan account. These loans became irrecoverable when Rapour went into voluntary liquidation. Mr Hall noted that despite HMRC having advised the Appellant on 3 September 2010 that relief for irrecoverable loans is available under section 253 TCGA against capital gains, no such claim has been made.

Discussion and decision

22. We carefully considered all of the documentary evidence and written submissions before us. The absence of the Appellant left a number of issues unclear and unsupported by evidence which, despite our attempt to remedy via the direction issued following the case management hearing on 15 January 2015, remained vague and inconsistent. We attached no weight to the witness statements relied on by the Appellant; the witnesses were not called to give oral evidence and therefore the contents of their statements were untested. Moreover the statements were vague as to the money lending trade purportedly carried on by the Appellant and did not appear relevant to the year of the purported losses.

23. The Appellant's 2008/2009 return received by HMRC on 25 January 2010 indicated in the additional information that the Appellant had incurred credit card borrowings in the sum of £50,300 to provide working capital to Rapour Ltd which subsequently went into liquidation.

24. The Appellant's tax return for 2009/2010 received by HMRC on 15 May 2010 made no mention of any trade other than the Appellant's self-employment as a surveyor. The amount of taxable profit recorded for 2009/2010 was £25,047.

25. On 16 May 2010 HMRC received notice of an intention to amend the 2009/2010 return to include a claim for income tax relief for a trading loss arising in 2009/2010 on the basis that the Appellant had made loans to Rapour Ltd which became irrecoverable when the company went into liquidation on 17 March 2008. The claim at that point was said to be made under section 380 of the Income and Corporation Taxes Act 1988 ("ICTA") (the provisions of which were subsequently re-written into sections 64 and 65 ITA with effect from 2007/2008). The computations provided showed five advances to Raopur Ltd totalling £50,300 between 29 September 2006 and 20 November 2008. The loss was utilised by reference to the amounts of tax and NIC due rather than the amount of income.

26. The 2009/2010 return was amended on 6 July 2010. The income tax losses on the additional information pages showed £50,300; £25,047 had been claimed for 2009/2010 and the balance of £27,100 was to be carried back to 2008/2009. No additional self-employment pages were included in the amendment. £25,047 was claimed as if it was a loss from the Appellant's business as a surveyor in an earlier year and the whole of the loss was claimed as a "miscellaneous loss". In response HMRC advised that the loss on the irrecoverable loans may be properly claimable under section 253 TCGA 1992 but that no relief was available against income.

27. On 17 March 2011 HMRC opened an enquiry. We were satisfied that the enquiry was properly opened in accordance with law and that it was valid. We rejected the Appellant's suggestion, as we understand it, that by its lack of response to the letter dated 16 May 2010 indicating that a claim would be made HMRC had somehow accepted the claim.

28. In a letter dated 18 May 2011 the Appellant's representative wrote to HMRC to advise that the loans made to Rapour were for working capital and not capital investment. The letter went on to state:

"If we are wrong…as the repayments would have included a taxable profit element, the loans were thus in the character of 'an adventure in the nature of trade'".

29. At this point there was still no clear expression by the Appellant of a trade in money lending. However in a letter dated 27 June 2011 HMRC stated:

"…Your client did not borrow the money wholly and exclusively for the purpose of his trade as a surveyor, the "loss" of £50,300 is not connected with or arising out of his trade as a surveyor and…no deduction can be allowed for items of a capital nature…

Your second suggestion is that the loan to the company constituted a trading venture…Whether the making of loans amounts to a trade is essentially a question of fact and there has to be sufficient evidence of trading in order to displace the presumption that the loan is an investment…(CIR v Livingstone & Others [1926] 11 TC 538)…If your client made loans only to Rapour Ltd then his activity was not on a par with the normal activities of a commercial moneylender…"

30. By letter dated 19 July 2011 the Appellant's representative asserted that the trade of moneylending had been established. In a further letter dated 8 September 2011 the Appellant's representative stated that the liquidation of Rapour Ltd put *"the trade into dormancy."*

31. The Appellant notified HMRC of an increase in the loss (to £59,050) by letter dated 26 December 2011. This appears to have included the sum of £5,300 incurred on 25 November 2008 which post dates the liquidation of Rapour Ltd. Furthermore it appears from the documents before us that this amount arises from the settlement of a claim in County Court proceedings between Commercial Vehicle Finance Ltd and the Appellant and therefore has no relevance to Rapour Ltd and the loans purportedly made.

32. We noted that there was no evidence before us to show that the sums paid by the Appellant were paid to Rapour Ltd. Leaving aside the changes in quantum notified by the Appellant, we were concerned by the fact that the Statement of Affairs sworn by the Appellant declared only £18,000. We had no explanation from the Appellant regarding this discrepancy. We noted HMRC's review which indicated that the accounts for Rapour Ltd for the period to 30 June 2007 appeared to show that in that period the company was loaned £55,000 of which it repaid £35,375. On the basis of the evidence before us we reached the inescapable conclusion that the amount said to comprise the losses upon which the Appellant's claim is based is, at the very least, unreliable and inaccurate.

33. On the issue of the Appellant's trade as a moneylender, as we have already stated, we attached no weight to the witness statements submitted by the Appellant. There were eight statements in total all dated in either August or September 2013. The statements gave no detail as to the period during which it was asserted that the Appellant was *"starting a finance business"* and gave no more than vague references to this business. The parties did not describe their relationship to the Appellant, although we noted that one had the same address as the Appellant. We concluded that the statements, untested in oral evidence, provided no assistance to us in determining whether the Appellant carried out the trade of money lending or, if there were such a trade, over what time period.

34. We queried why the first suggestion that the Appellant traded as a moneylender was not made until 18 May 2011. Moreover there was no cogent evidence before us to support this assertion; the Appellant provided no information as to the commencement of any such business, no commercial documentation such as written agreements with Rapour Ltd or other clients (for instance relating to repayment terms and interest rates) and no accounts. Quite simply, there was no evidence upon which we could conclude that the Appellant had ever been engaged in the trade of money lending or a venture in the nature of that trade. Even if we had found that such a trade was carried out, we should note that the only client referred to was Rapour Ltd. We inferred that once Rapour Ltd had entered into liquidation the purported trade did not continue. That being the case (and there being no suggestion to the contrary) any losses incurred by the Appellant could not be brought forward as those losses can only be deducted from subsequent profits of the same trade (section 83(3) ITA).

35. As to the issue of time limits, we agreed with HMRC's submission that any losses that may exist arose from loans made by the Appellant to Rapour Ltd in 2007/2008 and not 2009/2010 (by which point Rapour Ltd had already entered into liquidation) and the time limit for that claim would have been 31 January 2010. The claim made was therefore out of time.

Conclusion

36. We concluded that there was no evidence before us to demonstrate that the Appellant traded as a moneylender in 2009/2010 (or indeed any period) or that, if there were such a trade, it was carried on on a commercial basis and with a view to

the realisation of profits. We were also satisfied that there was no evidence of losses made in trading as a moneylender in 2009/2010.

37. The appeal is dismissed.

38. 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: 27 NOVEMBER 2015