Neutral Citation: [2022] UKFTT 00458 (TC)

Case Number: TC08663

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/01407

Application to strike out - Tribunal Procedure - First-tier Tribunal) (Tax Chamber) Rules 2009 rule 8(3)(c) – application granted

Heard on: 17 October 2022
Judgment date: 06 December 2022

Before

TRIBUNAL JUDGE VIMAL TILAKAPALA

Between

MATTHEW EVANS

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: In person

For the Respondents: Christopher Vallis litigator of HM Revenue and Customs' Solicitor's Office

DECISION

1. With the consent of the parties, this was a remote hearing by video with both parties participating via the Tribunal video hearing system.

2. 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.

INTRODUCTION

3. This decision concerns an application by the Respondents (**HMRC**) for a direction under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) rules 2009 (the **FTT Rules**) striking out the proceedings brought by the Appellant (**Matthew Evans**) on the ground that his case has no reasonable prospect of success.

APPLICABLE LEGISLATION

4. Rule 8(3) of the FTT Rules provides, so far as material;

> "*(3) The Tribunal may strike out the whole or a part of the proceedings if-*
>
> *(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.*"

5. When considering an application to strike out proceedings under Rule 8, it is necessary to bear in mind the overriding objective of the FTT Rules. Rule 2 provides:

> "*(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly*
>
> *(2) Dealing with a case fairly and justly includes –*
>
> *……*
>
> *(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;*
>
> *(d) using any special expertise of the Tribunal effectively; and*
>
> *(e) avoiding delay, so far as compatible with proper consideration of the issues.*
>
> *(3) The Tribunal must seek to give effect to the overriding objective when it –*
>
> *(a) exercises any power under these Rules; or*
>
> *(b) interprets any rule or practice direction.*"

RELEVANT CASE LAW

6. The Upper Tribunal (Carr J and Judge Sinfield) in *The First De Sales Limited Partnership and others v HMRC [2018] UKUT 396 (TCC)* ("First De Sales") (at [33]) provides helpful guidance in relation to strike out applications:

> "*Although the summary in Fairford Group Plc2 is very helpful, we prefer to apply the more detailed statement of principles in respect of application for summary judgment set out by Lewison J, as he then was, in Easyair Ltd (t/a Openair) v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15]. This was subsequently approved by the Court of Appeal in AC Ward & Sons v Caitlin Five Limited [2009] EWCA Civ 1098. The parties to this appeal did not suggest that any of these principles were inapplicable to strike out applications.*

"i) The court must consider whether the claimant has a 'realistic' as opposed to a "fanciful' prospect of success: Swain v Hillman [2001] 1 All ER 91

ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a 'mini-trial': Swain v Hillman

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."

7. The Upper Tribunal continued at [74]:

"*The issue concerning section 225 ITEPA 2003 gave rise to a short point of construction. The FTT, correctly in our judgment, was satisfied that it had before it all the evidence necessary for the proper determination of the question and that the parties had an adequate opportunity to address it in argument. The Appellants' evidential case was, in our view, hopeless, based on the evidence before the FTT. The FTT was right to conclude it is not enough simply to*

argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."

Factual background to the appeal

8. On the basis of the documents provided I find the material facts to be as follows.

9. At some point during the 2006/07 tax year Mr Evans entered into a tax avoidance scheme known as "Excalibur" (the **Excalibur Scheme**). The scheme fell within the Disclosure of Tax Avoidance Schemes (**DOTAS**) provisions in Schedule 7 Finance Act 2014 (and related secondary legislation), and a scheme reference number (**SRN**) was allocated to it. The scheme was, in broad terms, designed to create a relievable loss for tax purposes with no corresponding economic loss.

10. In his self assessment tax return for 2006/07 filed on 31 January 2008 (the **2006/07 Tax Return**), Mr Evans claimed a capital loss of £604,446 arising from the disposal of shares pursuant to the Excalibur Scheme and sought relief for that capital loss under section 574 of the Income and Corporation Taxes Act 1988 (now repealed) by way of set-off against his income for the 2006/07 tax year. This was on the basis that the company was a "qualifying trading company". His claim for relief was intended to result in a refund of overpaid tax. As required under the DOTAS provisions, Mr Evans included the Excalibur Scheme SRN in the 2006/07 Return.

11. A tax repayment of £241,501.88 (the **Tax Repayment**) was paid to Mr Evans by HMRC on 31 January 2008, in respect of his claim for relief made in the 2006/07 Tax Return.

12. On 20 June 2008, HMRC notified Mr Evans that they were opening an enquiry under section 9A of the Taxes Management Act 1970 (**TMA 1970**) into the 2006/07 Return. In this letter, the HMRC officer stated that "*Under the authority of S59B (4A) TMA 1970 I shall not currently be making any repayments in relation to this claim*". This was a reference to the tax relief arising from the Excalibur Scheme. This was notwithstanding the fact that Mr Evans had by that date already received the Tax Repayment. The letter also mentioned that there was no need for Mr Evans to answer any questions in relation to the enquiry as the issues arising in connection with his claim were being dealt with separately. Subsequent correspondence between Mr Evans and HMRC makes it clear that this was a reference to HMRC dealing directly with the promoter of the Excalibur Scheme.

13. There is then a gap in the correspondence included in the Bundle, the next document being a letter dated 26 November 2014 from Mr Evans to HMRC responding to an HMRC letter of 17 November 2014. In his letter Mr Evans told HMRC that he had assumed that HMRC had agreed his tax affairs for the 2006/07 tax year and he queried the basis on which they continued to enquire into it.

14. On 6 March 2015 HMRC wrote to Mr Evans responding to his letter of 9 February 2015. In their letter HMRC explained that the fact that the Tax Repayment had been made did not mean that the 2006/07 Tax Return was agreed by HMRC nor did it prevent HMRC from opening an enquiry into that return. The letter also explained that HMRC's letter of 20 June 2008 opening the enquiry into his return was a standard form letter sent to all users of the Excalibur Scheme hence the reference to not making any tax repayments. This is why the letter did not take into account the fact that Mr Evans had already received the Tax Repayment.

15. On 9 July 2015 HMRC wrote to Mr Evans informing him that he would soon need to make a payment in respect of the Excalibur Scheme under the "accelerated payment procedure" and on 26 August 2015 an Accelerated Payment Notice (the **APN**) for £241,778.80 was issued under section 219(4)(b) of the Finance Act 2014. Mr Evans paid the amount demanded shortly after receiving the APN.

16. On 7 September 2015 Mr Evans wrote to HMRC to complain about the way in which his tax affairs were being handled. He pointed out that HMRC had indicated that the tax repaid to him was "not in dispute". He claimed also that the APN was incorrect and that even if it was correct, Extra Statutory Concession A19 ought to apply to prevent HMRC from claiming that tax.

17. In April 2017 the First Tier Tribunal considered the Excalibur Scheme in *A Kerrison v HMRC [2017[UKFTT 322*. It held, so far as relevant, that (a) the capital loss was not available as it was reduced to zero by the value shifting rules in section 30 of The Taxation of Chargeable Gains Act 1992 (**TCGA 1992**), (b) the loss relief claim was not allowable, and (c) waiver of a loan to Mr Evans made by a BVI company as part of the scheme did not give rise to a charge to income tax under section 687 of the Income Tax (Trading and Other Income) Act 2005. HMRC appealed conclusion (c).

18. Following the FTT decision in *Kerrison,* HMRC wrote to Mr Evans on 19 June 2017 offering him the opportunity to settle the open enquiry.

19. On 7 July 2017 Mr Evans replied to HMRC stating that he had discussed the case with "RPC" and believed that it was premature to settle.

20. On 18 September 2017 HMRC wrote to Mr Evans advising him that the FTT decision in *Kerrison* had been appealed to the Upper Tribunal but that, notwithstanding this, if he did not settle, a closure notice would be issued.

21. On 18 April 2018 HMRC issued a closure notice to Mr Evans (the **Closure Notice**) under sections 28A(1) and (2) TMA 1970. It set out HMRC's decision that (a) the capital loss of £604,446 was not allowable, (b) the claim to set the capital loss against income was not allowable and (c) the amount of a BVI loan made to Mr Evans and then written off was chargeable to income tax. In the Closure Notice, the HMRC officer stated that:

> "*I have amended your return in line with my decision:*
>
> - *It previously showed that you were overpaid £241,501.88 tax*
> - *It now shows that you were due to pay £217,877.32 tax*
> - *the difference is £459,379.20*"

22. The Closure Notice acknowledged that an APN had been issued and that once the period for appealing against the Closure Notice had passed, arrangements for the credits set against the APN and any additional general payments on account made in respect of the Excalibur avoidance scheme would be "*transferred to the Self Assessment statement*" and an updated statement sent showing the additional interest due.

23. On 23 April 2018 Mr Evans wrote to HMRC formally appealing against the Closure Notice stating that;

> *"the grounds for my appeal are as follows:*
>
> - *My tax affairs were agreed by HMRC in 1 March 2013 and the enquiry was closed at that point*
> - *HMRC is wrong in its interpretation of the legislation*
> - *The capital loss claimed in the sum of £606,446 is allowable*
> - *The claim to set all or part of that capital loss against income is allowable*
> - *The amount of the BVI loan made to me and subsequently written off is not chargeable to income tax"*

24. On 8 August 2018 HMRC responded, as required under section 49C(2) TMA 1970, to Mr Evans' appeal, upholding the conclusions originally reached. As per standard practice, the letter stated that if Mr Evans disagreed with HMRC's decision he could ask for a review of the decision by an HMRC officer not previously involved in the matter or he could appeal to an independent tribunal.

25. On 20 August 2018 Mr Evans confirmed that he did not agree with HMRC's decision in relation to his appeal and he requested the independent HMRC officer review that had been offered. His letter included several additional representations in respect of HMRC's decision, including that: (a) HMRC's decision should await the decision of the Upper Tribunal in *Kerrison,* (b) HMRC had failed to provide him with copies of correspondence between HMRC and the scheme promoter, (c) HMRC's summary of the facts of his case was incorrect, (d) his series of transactions was not pre-ordained, (e) HMRC had not entered into any technical correspondence with him or attempted to establish the actual facts of his

case, (f) the Enquiry Notice was flawed and invalid as it said that no repayment of tax would be made to him even though a repayment was actually made, (g) the fact that he received tax repayments for subsequent years of assessment indicated that his tax affairs were in order for the 2006/07 tax year; and (h) the HMRC on-line system indicated that all of his tax years were settled.

26. There then seems to have been a large gap in the correspondence between HMRC and Mr Evans, with HMRC's next substantive response to Mr Evans being a letter dated 29 September 2021. Although a copy of this letter has not been included in the materials provided to the Tribunal it appears from subsequent correspondence between Mr Evans and HMRC that this letter acknowledged HMRC's failure to carry out the review requested in August 2018 but confirmed that it was still willing to do so. In this period the Upper Tribunal published its decision in *Kerrison*, upholding the FTT decision in relation to the capital loss not being allowable and the claim for loss relief not being allowable. It also upheld the FTT decision in relation to the BVI loan waiver not resulting in a charge to income tax, dismissing HMRC's appeal on the point.

27. Mr Evans replied to HMRC on 23 October 2021. In that letter he said that his understanding of the applicable legislation in TMA 1970 was that HMRC's failure to notify him of the outcome of the independent review within 45 days of having been asked to carry it out meant that HMRC had "*effectively issued a closure notice and started tribunal proceedings against me*". He went on to say that HMRC had not sent him notice of this "deemed" closure notice nor complied with "*s20"* of the FTT Rules. He concluded that because of what he saw as HMRC's failure to follow correct procedure, the First Tier Tribunal "*would not accept the case*" and he therefore sought confirmation from HMRC that the year was settled and that his payment made under the APN would be refunded.

28. In a telephone conversation with HMRC on 14 December 2021 (referred to in HMRC's letter of 17 December 2021) Mr Evans made a number of additional representations in respect of the Closure Notice, including that; (a) he was not informed that he was entering into a DOTAS scheme when he made his investment, and (b) as HMRC had issued a tax repayment, the provisions of section 30 rather than section 28A TMA 1970 were in point.

29. On 17 December 2021 in a letter headed "Review Conclusion Letter" HMRC finally provided Mr Evans with a conclusion of the independent HMRC officer review. The review concluded, *inter alia*, that the provisions of section 30 TMA 1970 were not in point and that the Closure Notice was a valid one under section 28A TMA 1970. It also concluded that the decisions in relation to the availability of the capital loss and the ability to set it off against income were correct but that the Closure Notice decision should be varied to reflect the Upper Tribunal's decision in *Kerrison* with the effect the BVI loan waiver should not be chargeable to income tax. The result of this was that the amount of tax due for the 2006/2007 tax year as a result of the amendments was reduced from £459,379.20 to £241,778.80.

30. On 11 January 2022 Mr Evans completed his Notice of Appeal form (form T240). In this form he stated in Box 18 (*Grounds for appeal*) that;

> "*Since 2015, I have been asking HMRC to issue an assessment under s30 TMA 1970 to collect the tax over-repayment. HMRC has stated that it doesn't need to do so. HMRC believes the closure notice it has issued in the last 30 days covers the tax "underpayment". If I accept HMRC's viewpoint I will be liable to interest on the tax at stake from 2006/07 to the date that an APN was settled in 2016. If I am correct, I believe that no interest would be due, because the delays gave occurred as a 100% as a result of HMRC not dealing directly with me.*
>
> *There are also a lot of other issues that will need to covered in the tribunal, such as whether the tax is actually payable, what is the position as a result of HMRC taking over 3 years to carry out a review of my tax affairs, as opposed to the 45 days that it is required to take under the statute."*
>
> In Box 6 (*What is your appeal about?*) he wrote;

"Whether s30 TMA 1970 applies relating to a tax over-repayment"

In Box 19 (statement of desired outcome) he wrote;

"Either: No tax is payable, due to the failure by HMRC to follow the correct procedures, or If tax is payable, there is no interest payable due to the failure by HMRC to follow the correct procedures"

31. In a letter dated 31 March 2022 to the Tribunal and copied to HMRC, Mr Evans set out under the heading "statement of case" (the **First Statement of Case**) a summary of his facts and his "list of issues to be decided". This is considered further below.

32. In a letter dated 12 May 2022 to the Tribunal and copied to HMRC Mr Evans set out under the heading "statement of case" (the **Second Statement of Case**) a response to HMRC's strike out application. This is also considered further below. In this letter he further developed his argument in relation to sections 28A and 30 TMA 1970. In particular he said that he did not dispute HMRC's power to amend his tax return under section 28A TMA 1970. He focused instead on whether HMRC could in fact make the amendments it sought to make to his actual return, concluding that they could not. He went on to state that in his particular situation section 30 TMA 1970 was in fact the only provision under which HMRC could have issued an assessment for the tax in question.

33. Prior to the hearing Mr Evans summarised what he wanted to say to the Tribunal in a "script" (the **Script**) from which he read at the hearing. The Script outlined what he saw as the key aspects of his appeal.

34. I asked Mr Evans to send a copy of the Script to the Tribunal (copied to HMRC) after the hearing so that we could review what it said, acknowledging here that Mr Evans had not been able to read it out in full at the hearing. He also sent in a copy of the 2006/07 Return which has not been included in the Bundle.

The Grounds of appeal

What are Mr Evans grounds of appeal?

35. In order to consider HMRC's strike out application it is necessary first to determine what Mr Evans grounds of appeal are. There is some confusion here given the way that Mr Evans has completed his Notice of Appeal, the content of his two statements of case and his Script.

36. In his Notice of Appeal form Mr Evans set out the following in Box 18 (Grounds for appeal);

"*Since 2015, I have been asking HMRC to issue an assessment under s30 TMA 1970 to collect the tax over-repayment. HMRC has stated that it doesn't need to do so. HMRC believes the closure notice it has issued in the last 30 days covers the tax "underpayment". If I accept HMRC's viewpoint I will be liable to interest on the tax at stake from 2006/07 to the date that an APN was settled in 2016. If I am correct, I believe that no interest would be due, because the delays have occurred 100% as a result of HMRC not dealing directly with me.*

There are also a lot of other issues that will need to covered in the tribunal, such as whether the tax is actually payable, what is the position as a result of HMRC taking over 3 years to carry out a review of my tax affairs, as opposed to the 45 days that it is required to take under the statute."

37. In his First Statement of Case, Mr Evans stated that;

"*The case centres on whether s30 TMA 1970 applies to collect the tax over-repayment.*"

38. This letter went on to provide a list of the "*facts*" which he identifies as enabling him to conclude that the tax due is a "tax over-repayment" for which HMRC need to issue an assessment under section 30A TMA 1970. His letter includes the following list of items under the heading "*Issues to be decided*":

"1. s598 (4A) TMA 1970 allows HMRC to issue tax refunds that are not in dispute. The June 2008 enquiry notice cited that no tax refunds would be made, even though a refund had already been made. Does the reference to s598(4A) in the enquiry notice mean that the tax refund is not 'in dispute'?

2. If a tax liability does arise, is this the collection of a tax underpayment or a tax over-repayment?

3. Assuming it is a tax over-repayment, does HMRC now have to issue an assessment under s30 TMA 1970?

4. Is HMRC within the statutory time limits to issue that assessment, given the long delays that have occurred to date (explained in detail below)? Given that HMRC spent three years after the closure notice was appealed against to carry out the review, is HMRC out of time for the current proceedings?

5. Assuming the s30 assessment is made, what date would any interest accrue from?:

39. In his Second Statement of Case the focus of his argument shifts slightly. Rather than disputing HMRC's power to amend his tax return under section 28A TMA 1970, he concentrates instead on whether HMRC can actually make the amendments to his return that are specified in the Closure Notice. He concludes that HMRC cannot. This is because, in his view, his claim for loss relief in 2006/2007 did not result in an underpayment of tax for that year. His position is that (a) the claim for loss relief resulted in an underpayment of tax only when he received the Tax Repayment and (b) the Tax Repayment was received after the 2006/2007 tax year. He goes on to argue that in this particular situation section 30 TMA is in fact the only provision under which HMRC could have issued an assessment for the tax in question – as it was an over-repayment and not an underpayment.

40. This argument is developed further in the Script where he states, in relation to the documents that HMRC has provided to the Tribunal, that:

> "*My grounds of appeal are not as stated but that HMRC has not amended the return in accordance with what the legislation allows them to do. Therefore the [completion] notice is incorrect*".

41. The Script then expands his argument as to why this is the case and why section 30 TMA 1970 rather than section 28A TMA 1970 is the appropriate provision for his assessment.

HMRC's view

42. Mr Vallis summarises Mr Evan's ground of appeal as being that the appropriate way to assess him was under section 30 TMA 1970 rather than Section 28A TMA 1970 because he received a tax repayment after filing the return in question.

43. He refers to Mr Evans "*issues to be decided list*" and submits that the points listed have no relevance to the validity of the Closure Notice as they relate to the potential assessment under section 30 TMA 1970.

44. He refers to Mr Evans' reference in his Notice of Claim to "*a lot of other issues that will need to be covered in the tribunal such as whether the tax is actually payable*" but does not regard these as grounds of appeal. He notes in this regard that Mr Evans has not listed any other issues as grounds of appeal nor has he made any substantive challenge to the conclusions of the Closure Notice in either his Notice of Appeal or his Statement of Case letters.

Identification of the grounds of appeal

45. It is apparent from his correspondence with HMRC that Mr Evan's has challenged the Closure Notice on several grounds and on several occasions. However, none of those grounds are listed specifically in his Notice of Claim.

46. Of course issues mentioned in the course of correspondence between HMRC and a taxpayer in relation to an assessment do not, on appealing that assessment to the Tribunal, automatically become "grounds of appeal". Section 31A(5) TMA 1970 requires the grounds of appeal to be specified in the notice of appeal and it is those grounds of appeal which then set the boundaries of the case to be determined by the Tribunal.

47. Having said that, the Tribunal must also take into account its obligation under Rule 2 of the FTT Rules and the overriding objective.

48. Here the consequence of HMRC's strike out action, if successful, is that Mr Evans' appeal must fail entirely if his only ground of appeal is that his assessment should have been made under under section 30 TMA 1970 and not section 28A TMA 1970.

49. With this in mind and taking into account the fact that Mr Evans is a litigant in person without the benefit of representation, I asked Mr Evans whether HMRC were correct to regard his arguments as to the inability of HMRC to collect the tax under section 28A TMA 1970 and the need for him to have been assessed under section 30 TMA 1970 as his only ground of appeal. I also directed Mr Evans to some of the other points that he had made in his earlier correspondence (including that the facts in *Kerrison* differed from the facts of his case), by way of reference, to the other challenges that he had made to his assessment.

50. Mr Evans confirmed, however, that his ground of appeal for the purpose of this hearing was his contention that HMRC should have assessed him under section 30 TMA 1970 rather than section 28A TMA 1970. He was clear that he did not want to raise any of the issues that he had mentioned previously in his correspondence with HMRC. He confirmed also his understanding of the consequences of relying on a single ground of appeal in the context of this strike out hearing, namely that if HMRC was successful, his appeal would fail.

51. On this basis, the hearing was limited to the parties' arguments as to the validity of the assessment under section 28A TMA 1970 and whether the assessment should have been made under section 30 TMA 1970.

DISCUSSION

52. Other than in relation to interest, there is no dispute between the parties as to the amount of tax due. The issue is simply whether that tax can be assessed under section 28A TMA 1970 or whether it can only be assessed under section 30 TMA 1970. If it should have been assessed under section 30 TMA 1970, HMRC are likely to be out of time to issue the assessment.

HMRC's argument

53. HMRC's argument is simply that section 30 TMA is a permissive and not a mandatory provision. Specifically, section 30(1) TMA provides (with emphasis added) that:

> "(1) *where an amount of income tax or capital gains tax has been repaid to any person which ought not to have been repaid to him, that amount of tax* ***may*** *be assessed and recovered as if it were unpaid tax"*

54. Mr Vallis notes also that there is nothing in section 30 TMA 1970 which precludes HMRC from issuing a closure notice under section 28A TMA which he says HMRC were fully entitled to do.

55. Mr Vallis did not make any specific comments on the arguments raised in Mr Evans' Second Statement of Claim. He also confirmed some time after the Tribunal hearing that he had no comments to make on the Script.

Mr Evans' argument

56. Mr Evans considers that HMRC are unable, in his particular circumstances, to make the amendments to his return that they seek to make under section 28A TMA 1970.

57. He states the following in his Script:

> "*The inspector is allowed to amend the return, but he must still produce a tax return that would be valid. However it would be impossible for him to have produced the tax return that HMRC states that it has amended – one of the boxes simply does not exist on the tax return"*
>
> *My entries on the 2006/07 tax return were:*
>
> - *Salary This cannot be amended*
> - *PAYE tax paid This cannot be amended*
> - *Loss relief claimed This would be amended by s28A*
> - *Investment income This cannot be amended*
> - *Tax over-repayment There is no box to amend*
>
> *As the tax over-repayment does not have a box on the return, the result of the above amendment would be the £276 tax liability shown on the APN*"

58. He believes that as his claim for relief in the 2006/2007 tax year resulted in a repayment only after the end of that tax year, his return for the 2006/2007 tax year can show no tax underpayment. This is because, in his view, he will "owe" that tax only if the repayment is taken into account.

59. The consequence of Mr Evans' view is that on an examination of his 2006/2007 Return, the tax "owed" by him for that tax year would be a minimal amount (£276) as most of his tax for that year would have been paid under the PAYE tax system.

60. He does not dispute the amount claimed by HMRC in respect of the Excalibur Scheme but argues that as it was not "owed" in the 2006/07 tax year, it is recoverable only as an over repayment of tax under section 30 TMA 1970 rather than through an amendment to his return under section 28A TMA 1970.

DISCUSSION

61. This is, in my view, the type of situation listed in paragraph (vii) of the extract from *The First De Sales* case – a short point of law or construction where the Tribunal has before it the evidence necessary to determine the question properly and where the parties have had an adequate opportunity to address it in argument.

62. With respect to Mr Evans I disagree with his view.

63. The 2006/07 Return included the following entries;

> In Box 18.3 (Total tax)
>
> "*(241, 501.88)*", the brackets indicating that this was an overpayment of tax.
>
> In Box 23.9 (Additional information)
>
> "*Box 18.3 – This refers to a loss arising during 2006/07 on the disposal of shares in Broadgate trading PLC and claims against income under s574 ICTA 1988.*

I claim under TA 1988 s574(1)(a) that an amount equal to the lower of the amount of the loss and the whole of my income for the year 2006/07 be set against my income for 2006/07 and that any amount remaining unrelieved be set, under TA 574(1)(b) against my income for 2005/06.

The loss is calculated as follows

Sales Proceeds	*were £14.64*
Less Cost	*of £604,460.76*
Loss	*of £604,446.12*

During the tax year, a loan that I received from Broadgate Group Holdings Ltd was released at the discretion of the Board of that company. The loan was from a non-close and non-resident company of which I was not a shareholder. The release does not give rise to a taxable receipt."

64. It is clear, therefore, that the 2006/07 Return showed a capital loss, a claim for loss relief and a corresponding overpayment of tax.

65. The Closure Notice of 18 April 2018 stated the following under the heading "My decision":

"- the capital loss claimed un the sum of £604,446 is not allowable

- *the claim to set all or part of that capital loss against income is not allowable*
- *The amount of the British Virgin Island (BVI) loan made to you and subsequently written off is chargeable to income tax*"

It went on to state that:

"*I have amended your tax return in line with my decision*

- *it previously showed that you were overpaid £241,501.88 tax*
- *it now shows that you were due to pay £217,877.32 tax*
- *The difference is £453,379.20*"

66. A Closure Notice is required to;

"*state the HMRC officer's conclusions and* -

.....

(b) make the amendments of the return required to give effect to his conclusions" (S 28A(2) TMA 1970).

67. The Closure Notice satisfies both of the requirements of section 28A(2) TMA 1970. It states the HMRC officer's decision and it expresses, in monetary terms, the required amendments to Mr Evans' return – those amendments resulting in (a) the overpayment of tax of £241,501.88 shown in the unamended return no longer being shown (reflecting the unavailability of the relief claimed) (b) an amount of tax of £217,877.32 being shown as due (reflecting income tax chargeable on the BVI Loan waiver), and (c) a total amount of £459,379.20 of tax being due (being the sum of the (a) and (b)).

68. None of the amendments made by the Closure Notice require the Tax Repayment to be taken into account. They are based simply on the actual entries in the 2006/07 Return.

69. The only ground for Mr Evans' contention that the Closure Notice takes into account the Tax Repayment can be the reference in the Closure Notice to the 2006/07 Return having "*previously showed that you **were** overpaid £241,501.88*". Specifically, it is the use of the word "*were*" which lends itself to such a conclusion.

70. However, in the context of the Closure Notice I do not consider that this conclusion is supported.

71. The Closure Notice refers to what the 2006/07 Return "*previously showed*" (i.e. what it showed before the amendments made by the Closure Notice). Here, the return previously showed, in Box 18.3, an overpayment of tax of £241,501.88. It did not, nor could it, show a "repayment" of that sum in the 2006/07 tax year. The changes that the Closure Notice sought to make to the 2006/07 Return and the amount of tax described as due as a consequence of those changes are entirely consistent with the reference being to the overpayment in Box 18.3 rather than to any subsequent repayment of tax.

72. I consider therefore that the reference in the Closure Notice to the tax overpaid is to the tax overpayment in Box 18.3 of the 2006/07 Return rather than to the repayment of that overpayment, and that the inclusion of the word "*were*" is a mistake.

73. This mistake is not one which I consider sufficient to affect the validity of the Closure Notice. I have taken into account in this regard the potential effect of section 114(2) TMA 1970 which provides, so far as relevant, that;

"*An assessment or determination shall not be impeached or affected –*

(a) by reason of a mistake therein as to –

.....

(ii) the description of any profits or property"

74. In this case, the error is a minor one and it is clear from the content of the 2006/07 Return what is being referred to. Further, there is no confusion about the amount of tax which is being assessed.

75. The revision made by HMRC to the Closure Notice on 17 December 2021 following the independent HMRC officer review does not change this position. It concluded that:

"the decision is varied as follows;

- *the capital loss for the year ended 5 April 2007 is not allowable*
- *the claim to set all or part of the capital loss of £604,446.12 against income is not allowable*
- *the BVI loan of £544,001.00 made to you and subsequently written off is not chargeable to income tax.*

The income tax now due for the year ended 5 April 2007 is £241,778.80."

76. As with the original decisions stated in the Closure Notice, there is no confusion as to the amounts due nor is there a need for the Tax Repayment to be taken into account in determining the amendments required.

77. It follows that the amendments made in the Closure Notice are amendments which HMRC is able to make under section 28A TMA 1970. In essence, the amendments made by the Closure Notice (as revised) and the computation of tax due, relate to the disallowed loss and disallowed claim for

relief of that loss made by Mr Evans in the 2006/07 tax year and the resulting overpayment shown in the 2006/07 Return. The subsequent repayment of that overpayment is not relevant for this purpose, although it would have been relevant in determining the amount of tax actually payable by Mr Evans to settle his self assessment account (had Mr Evans not effectively repaid it via the APN).

79. For these reasons I consider that Mr Evans' appeal has no reasonable prospect of success and I therefore strike it out.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

80. 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.

VIMAL TILAKAPALA
TRIBUNAL JUDGE

Release date: 06th DECEMBER 2022