Take more care!

Carelessness over a tax matter can arise both from the taxpayer or the tax advisor, writes Elliot Green

Many taxpayers make use of the services of a tax advisor to complete their tax returns.

The case of Callen v Commissioners for HMRC [2022] ULFTT 00040 (TC) involved an assessment of HMRC tax carelessness in relation to the completion of a personal tax return. The taxpayer, Jason Callen, had employed an accountant, Mr Bevis, to assist him with his tax return. Mr Callen was a derivatives trader.

He had become involved in a tax avoidance scheme. The scheme was known as the Montpelier Section 730 Dividend Strip Scheme ("the Scheme") in which it sought to set off losses against Mr Callen's income in the tax year 2008-2009.

It appears that Mr Callen was encouraged by a former associate of Mr Bevis who appeared to view the Scheme as a "no-brainer" because at worst it could amount to a cheap loan from HMRC and in any event, the tax promoter (Montpelier) agreed to handle the HMRC enquiries up to the level of the High Court.

Raising of discovery assessments

The Tax Tribunal determined that following a decision in the Upper Tribunal in Clavis Libert 1 LP v HMRC [2017) STC 2392 that the tax avoidance scheme did not work. As a result, there was an insufficiency in Mr Callen's tax return that led to a discovery assessment in the sum of £308,798.37 that culminated in Accelerated Payment Notices being issued on 16 November 2015, totalling a frightening £754,325.77. However, they were paid on 16 May 2016.

HMRC said the scheme did not work as the purchase of dividends and dividend rights were not transactions in the course of a trade, being circular and artificial, with no flow of funds to suggest transactions actually occurred. The upshot being that HMRC said it was a pure tax avoidance routine.

Mr Callen appealed the discovery assessments but lost due to the carelessness of his tax advisor, Mr Bevis.

Appeal on grounds of no HMRC tax carelessness

Whilst the Tribunal found Mr Callen to be reliable as a witness, it was less eager to provide the same endorsement for Mr Bevis.

HMRC relied upon the threshold in HMRC v Hicks [2020] UKUT 12 (TCC) ("Hicks") suggesting that the assessment of carelessness is an objective test.

Mr Callen suggested that Hicks had to be viewed on the basis of a taxpayer making a declaration to the best of his knowledge.

However, in Litman & Newall v HMRC [2014] UKFTT 89 (TC), the Tribunal 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.

Hicks said self-assessment means care has to be taken to get the tax return correct.

The view of the Tribunal

The Tribunal found for HMRC. It said that Section 118(5) of the Taxes Management Act 1970 said:

(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.

The problem highlighted by the Tribunal was the lack of care by Mr Bevis, who as a tax advisor had to be judged by the standard of a reasonably competent tax advisor. A lack of care by a tax advisor is a lack of care by the taxpayer if the advisor is also completing the returns on the taxpayer's behalf.

The examples selected by the Tribunal showing the lack of care, appear to have amounted to evidence of a delegation of verifying the disclosures in the tax turn to the tax promoter of the Scheme by Mr Bevis:

"… 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".

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.

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.

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.

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.

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.)

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.

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