



TC03149

Appeal number: TC/2013/01525

Income Tax – claim for overpayment relief refused by HMRC – was there sufficient evidence to support the claim – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BRIAN J MELLING

Appellant

- and -

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

**TRIBUNAL: JUDGE LADY JUDITH MITTING
MARY AINSWORTH**

Sitting in Manchester 27 November 2013

The Appellant appeared in person

**Mr A J O'Grady, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

The appeal

5 1. Mr Brian Melling appeals against the following decisions of the Commissioners:

- (1) **2007-2008.** Enquiry closure notice issued under para 7(1) (2) & (3) of Schedule 1A to the Taxes Management Act 1970. Self assessment of £33,966.25 originally made to remain undisturbed.
- 10 (2) **2008-2009.** Enquiry closure notice issued under para 7(1) (2) & (3) of Schedule 1A to the Taxes Management Act 1970. Self assessment of £26,255.46 originally made to remain undisturbed.

2. Mr Melling is a Financial Services Consultant trading as “Brian J Melling Financial Services”. The appeal arises out of a claim made on 15 July 2011 by Mr Melling’s accountant for overpayment relief for the years 2007-2008 in the sum of 15 £53,901 and 2008-2009 in the sum of £55,137. A claim had also been made at the same time in respect of 2005-2006 and 2006-2007 but had been abandoned as out of time. The basis of the claim was that in the relevant years, Mr Melling had paid commission to his son Aiden Melling but had omitted to claim relief for the commission payment in his returns. The Commissioners had refused the claims 20 because insufficient evidence had been provided, in their mind, to support them.

3. The issue before the Tribunal is therefore whether Mr Melling is entitled to the relief now claimed. The onus of proof is on Mr Melling and to allow his appeal we have to be satisfied, on the balance of probabilities, not only that the payments had been made to his son but also that relief had not already been claimed in the relevant 25 accounts and returns.

The hearing

4. On his way to the hearing, Mr Melling had been involved in what we understand was a minor low speed accident. He was shaken but after a delayed start he declined our suggestion that we should delay further whilst he sought medical 30 advice and expressed his wish to proceed.

5. Mr Melling’s accountant, Mr Andy Liddle, did not represent Mr Melling at the hearing. Mr Melling informed us that this was because he could not afford the fee which Mr Liddle was charging for his attendance. It had been Mr Liddle who had submitted the claims and during the hearing it became apparent that Mr Melling did 35 not understand how Mr Liddle had arrived at or calculated the amounts claimed. With the consent of Mr Melling, Mr O’Grady telephoned Mr Liddle and a loudspeaker discussion with Mr Liddle took place between Mr O’Grady, Mr Melling and the Tribunal. Mr Melling also spoke privately to Mr Liddle, in the sense that the discussion was not on loudspeaker. We refer below to what he gleaned during the 40 course of the discussions with Mr Liddle.

6. The Commissioners called no oral evidence and Mr Melling presented his own case but calling no witnesses. He had already put before the Tribunal in the form of documentary evidence a set of bank statements and copy cheques. He had also submitted a folder containing ten letters from people supporting the basis of Mr Melling's business relationship with his son.

Mr Melling's evidence and our findings of fact

7. Mr Melling told us and we accept that during the years 2004 to 2009, his son Aiden worked with him in a capacity of "mortgage adviser". His main task was to process the mortgage applications that came into the firm. For the first four weeks, he was classed as an employee and accounted for under PAYE. Thereafter, and thus during the entirety of the period with which we are concerned, Aiden was treated as self-employed.

8. There were two elements to Aiden's remuneration. First, he was paid £300 per week in cash every Friday. Although there is no supporting evidence to these payments, we accept Mr Melling's oral evidence both as to the fact and the amount of the payments. This was a regular practice which Mr Melling would clearly remember.

9. Secondly, Mr Melling told us that he also paid his son 20% of the commission payments which came into the firm. These would be paid by cheque but randomly, either immediately after he, Mr Melling, received a commission payment or, on occasion, if Aiden was short of money, in advance of a commission payment being received. Of this element of the remuneration, we have rather more difficulty in accepting Mr Melling's evidence. We accept and find as a fact that some such payments were made to Aiden. However, we can find no corroboration of the amount either from Mr Melling's oral evidence or from the documents in front of us. Mr Melling, perhaps not unreasonably, has no recollection of the actual amounts paid. The bank statements show us nothing and the cheques give little corroboration. Of the cheques we saw, none fall into the earlier of the two years (2007-2008). Of the 42 cheques we saw which fell into 2008-2009 (accounting year ending 31 May 2008), none are payable to Aiden Melling. Some are payable to "Mrs Melling" or "Mrs S Melling". We were told by Mr Melling that this was Aiden's wife. Some cheques which were payable to third parties had had manuscript comments added on them such as "Aiden car" or "Aiden Laburnum Street" or "Aiden Comm". This evidence is so incomplete, raising more questions than it answers, that we cannot make any finding as to the amount actually paid to Aiden as this element of his remuneration.

10. Mr Melling's task in proving the amounts which he had paid to Aiden was made all the harder by the fact that when Aiden left, he left abruptly and took with him a file in which Mr Melling told us he had stored all the receipts which Aiden would have signed for each payment received. There is now a most tragic family rift and the file is irrecoverable and we will never know how much of the payments would have been documented.

11. In summary therefore, whilst accepting that Aiden was paid by Mr Melling, we accept that he received weekly cash payments of £300 and we accept that he received some further remuneration in the form of a percentage share of commission but as to the actual amount we can make no finding and we cannot accept the amount put forward by Mr Melling as representing this element.

Had relief for the commission payments previously been claimed

12. Mr Melling was really unable to help us on this. He, and we so find, honestly and genuinely believed that relief had not already been claimed but he readily accepted that he did not understand his accounts. He had parted company from the previous accountants who had drawn them up and he had no idea how certain key entries in those accounts had been calculated or made up. As it was Mr Liddle who had made the claim, he was asked on what basis he had concluded that no earlier claim had been made. He told us, and this was not disputed by Mr Melling, that he had not at this stage seen any accounts but that Mr Melling had come to him and expressly told him that no relief had previously been claimed and had asked him to pursue a claim now. The calculation of the claim which he made had been based on Mr Melling's assertion that he had paid Aiden £300 per week plus 20% of turnover. The figures claimed by Mr Liddle were therefore made up in each of the two years of 20% of the stated turnover plus £15,600 (i.e. £300 per week).

2007-2009

13. Mr Melling's last set of accounts, and the only set before us, were to 31 May 2007. These accounts form the basis of the figures returned by Mr Melling in his 2007-2008 return. The accounts show commission received in the year as £183,951 of which 20% amounts to £36,790. Administrative expenses claimed include an item "Commission payable £37,816". Mr Melling told us that, other than to Aiden, he paid very little out by way of commission. A Mr Ashworth gave him the odd introduction on which Mr Melling would make a payment to him and a firm Kays Estates provided him with a small amount of business and they also would have been paid something. Mr Melling accepted that only a very small amount of commission payments could be attributed to these two sources and certainly nothing like the £37,816 claimed in the accounts. Mr O'Grady put it to Mr Liddle that given this the most likely explanation of the commission entry in the accounts was that it included the commission payable to Aiden. Mr Liddle agreed. Mr Melling told us that he had never seen his 2007 accounts and he could add nothing to this suggested explanation.

14. Given the similarity in the figures – i.e. £37,816 claimed and £36,790 representing 20% of total commission, we find that the strong likelihood is that the relief paid by Mr Melling to his son in 2007-2008 had already been claimed in the accounts and thus the return. The balance was almost certainly accounted for by any commission paid by Mr Melling to Mr Ashworth and Kays.

2008-2009

15. The calculation for 2008-2009 is not so straightforward as there were no accounts but Mr O’Grady had prepared an extrapolated analysis which we have developed. This was not challenged by Mr Melling and we think is probably the best that can be done in the circumstances.

5 16. The accounts for 31 May 2007 show the direct cost of sales as £5,097 in 2007 and £4,781 in 2006. It can therefore be safely assumed that they would probably be around £5,000 in 2008. The 2008 return had shown the cost of goods bought for resale and goods used at £42,913 which less the direct costs of £5,097 leaves £37,816 – i.e. the amount of the commission entry. If the same analysis is applied to the 2009
10 return, the cost of goods bought for resale is stated to be £67,768. If an estimated £5,000 is deducted for direct costs and the balance, as in 2007, attributed to commission, the figure would be £62,768. Without the benefit of accounts, again the amount of total commission for the year ended 31 May 2008 can only be extrapolated from the return. This shows turnover of £197,685. If this is taken as commission,
15 20% would be £39,537. Adding in the weekly allowance payment of £15,600, the result is £55,137 – the precise sum claimed by Mr Liddle.

17. Given Mr Melling’s evidence of very little commission having been paid out other than to Aiden, we believe again that the strong likelihood is that the £67,768 cost of sales figure has to include any commission paid to Aiden.

20 **Summary**

18. To summarise therefore, we believe that on the evidence available to us, the overwhelming likelihood is that whatever commission may have been paid to Aiden it has already been reclaimed as a cost of sale in both of the two years in question. Without further evidence we cannot say this definitively but given that the onus of
25 proof is on Mr Melling, he has come nowhere near satisfying us that the claim has still to be made.

19. For all these reasons the appeal is dismissed.

20. 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
30 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.

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JUDGE LADY JUDITH MITTING
TRIBUNAL JUDGE

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RELEASE DATE: 20 December 2013