[2016] UKFTT 0612 (TC)

TC05348

Appeal number: TC/2016/00012

INCOME TAX – share loss relief – Ch 6 Pt 4 ITA 2007 – whether shares subscribed for – yes, claim allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

STAN MURRAY-HESSION **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

Sitting in public at Alexandra House, Manchester on 24 August 2016

Ben Miller of JMW Solicitors LLP for the Appellant

Anthony O'Grady, Presenting Officer, for the Respondents

DECISION

1. This is an appeal by Stan Murray-Hession ("the appellant") against the conclusions set out in a closure notice and the consequential amendments to his return for the tax year 2011-12. The Commissioners for Her Majesty's Revenue and Customs ("HMRC") had concluded that they should refuse the appellant's claim made in his tax return for that year which was that he had incurred a loss on the disposal of shares which he was entitled to set against other income for that year.

2. The sole question for my determination was whether the appellant had subscribed for shares within the meaning of s 135(2) Income Tax Act ("ITA") 2007 or not. I have concluded that the appellant had indeed subscribed for shares within the meaning of that subsection and that his claim is upheld.

Evidence and facts

3. There was a strong dichotomy in the type of evidence in this case. HMRC's case relies almost entirely on documents of, or relating to, a company, Geezer Telecom Ltd ("Geezer"), the company for shares of which the appellant says he subscribed. The documents concerned are those which HMRC has obtained from Companies House.

4. The appellant's evidence consists in the main of his own two witness statements and the documents exhibited to it. Those documents are his and relate to his "investment", to use a neutral word, in Geezer. He also relies on accounts of meetings with, and some references in documents to, an agreement he reached with a Mr Alan Gray. He takes issue with some of the "official" documents of Geezer and in particular with HMRC's interpretation of them.

5. The appellant put his witness statements in as his evidence in chief. He was cross-examined by Mr O'Grady and briefly re-examined by Mr Miller. I state my impression of Mr Murray-Hession as a witness later.

6. I am unable to state my impression of Mr Gray as a witness even though he filed a witness statement. He did not appear and was said to be abroad. Mr O'Grady expressed frustration at his inability to cross-examine Mr Gray. He did not suggest what weight if any I should give to Mr Gray's statements, but I deal with that question below.

7. Because of the stark difference in the type of evidence I have decided to first set out what relevant documents were available to me and their provenance and to make findings of fact on them. I will then consider the appellant's evidence, written and oral, and make such further findings of fact as are appropriate, drawing inferences from his evidence and the documents.

The documentary evidence from Geezer

8. On 13 May 2011 Geezer was incorporated as a private company limited by shares with a registered office in England and Wales and incorporating the model articles for such a company. This is evidenced by a certificate of incorporation under the Companies Act ("CA") 2006 and a copy of the Application to Register (IN01f). The fact of its incorporation as such a company is not in dispute.

9. The sole director of the company from 13 May 2011 (and, it was accepted, throughout the period with which I am concerned) was Mr Alan Gray. This is evidenced by Companies House documents (IN01f) and is also not in dispute.

10. In a Statement of Capital filed at Companies House (also in the IN01f) the share capital allotted consisted of 100 ordinary shares of £1 per share paid up. This is not in dispute.

11. In a list of the initial shareholdings (also in the IN01f) the 100 shares of £1 each are shown as those of Mr Gray. This is not in dispute.

12. Mr Gray also made a Statement of Compliance as "subscriber". He is shown as the only subscriber to the company's memorandum of association. This is not in dispute.

13. On 13 July 2011 Mr Gray in his capacity of the sole director of the company resolved to subdivide the share capital of the company from 100 nominal shares at £1 to 1000 shares at 10p.

14. He also resolved that "the company secretary will undertake to issue a [sic] new share certificates [*my emphasis of the use of the plural*] and the appropriate entries be made in the company register to reflect the subdivision".

15. The resolution and its date was referred to in a Notice (SH02) of, among other things, "subdivision". The notice is signed by Mr Gray and presented by Neil Hooton of Neil Hooton Accountancy Services of Bolton. In two places the documents shows the subdivision of 100 £1 shares into 1000 10p shares.

16. It is not in dispute that this form and the resolution was filed with Companies House by or on behalf of Mr Gray.

17. On 25 May 2012 an annual return (AR01(ef)) was filed at Companies House. The "date of this return" was 13 May 2012 (the anniversary of the date of incorporation). Mr Gray was shown as the sole director. The return contained a "Statement of Capital" showing the number of shares allotted as 1000 with nominal value of £100 with 10p per share paid up.

18. In a "Full list of Shareholders" in that annual return as at 13 May 2012, Mr Gray was shown s holding 645 Ordinary shares and the appellant as holding 225 ordinary shares. The remaining 130 shares were divided between six other individuals, including a Mr Ross Guilder ("Mr Gilder" – as his name is apparently correctly spelled).

19. On 21 June 2012 another annual return (AR01(ef)) was filed at Companies House. The "date of this return" was 14 May 2012 (*one day after* the one referred to in §§17 and 18). Mr Gray was shown as the sole director. This return contained a "Statement of Capital" showing the number of shares allotted as 1000 with nominal value of £100 with 10p per share paid up.

20. In the "Full list of shareholders" in that return as at 14 May 2012, Mr Gray was shown as holding 1000 Ordinary shares and the appellant as holding no Ordinary shares. The form stated that the appellant had transferred his shares to Mr Gray on 13 July 2011 (the day of the subdivision).

21. I find as a fact that these two returns were filed at Companies House on the date they state. But the inferences I should draw from the two returns were a matter of dispute and I deal with my findings on this situation below.

22. In re-examination Mr Miller put a document which had just been discovered to the appellant. I asked Mr O'Grady if he had any objection to the production of this documents, which he had been given just before the hearing started. He had none so I permitted it to be introduced.

23. The document is dated 12 July 2012 (after the second annual return had been filed and all the money paid) and is from Mr Gray to Mr Murray-Hession (and it appears all other shareholders, as it starts "Dear Shareholder").

24. The document describes the progress of the business and refers to a proposed investment by a Mr Fazelynia, who Mr Gray said had "purchased" 40% of Geezer and that:

> "the total cash impact into Geezer is £800,000. I remain & continue to be majority shareholder & CEO of the company. …. There will be a dilution of shares as in all expansions like this. You will receive your new share allocation shortly. This won't impact the value of your return & may look like you have more shares because the amount may go up."

25. I find as a fact that this letter was sent by Mr Gray and received by Mr Murray-Hession on the date given.

26. On 13 January 2013 Robert Cooksey MIPA and Jonathan Lord MIPA as Joint Administrators of Go2 Telecommunications Ltd (previously Geezer Telecom Ltd) published a report and proposal and filed it at the Manchester District Registry of the Chancery Division.

27. That documents contains what I assume are standard disclaimers to the effect that the report is not to be relied on by any other person or for any other purpose.

28. The Report, in a section "Statutory Information", states that Mr Gray was the sole director from Geezer's incorporation to its entering administration (and beyond). It reports that the initial 100 shares were "issued" to Alan Gray.

29. Section 5 of the Report is headed "Circumstances leading to the Appointment of […] the Joint Administrators". Section 5.1 says that Mr Gray has provided the joint administrators with "the following information".

30. At Section 5.5 it is stated:

> "When additional working capital was needed to ensure the effective running of the business, loans to the Company were provided by the Director's acquaintances. Combined with the initial investment provided by the Director, these investments total £969,000. A Schedule of these investments is detailed below for ease of reference.
>
> | **Name of Investor** | **Investment (£)** |
> |---|---|
> | … | … |
> | Murray-Hession, Stan | 258,758" |

31. Section 5.6 adds that:

> "the above investments were made on an informal basis only. Therefore there is no prescribed rate of interest which has accrued to date, or will accrue in the future. In addition there are no specific repayment terms or other onerous obligations imposed on the Company."

32. At Section 5.11 it reports that:

> "the Company resolved to obtain the necessary finance [to repay a "deposit" of £70,000, made by another person] from Adlington Finance Limited specifically to satisfy the debenture held in relation to the investment. The funds advanced by Adlington were also secured by a fixed and floating charge registered at Companies House on the 31st August 2012."

33. At Section 7.2 it is stated:

> "In conjunction with the financial information provided by the Director, the Joint liquidators have prepared an Estimated Outcome Statement (Appendix I) together with a list of names and addresses of all known creditors and the amounts of their debts."

34. This follows 7.1 which informed the court that Mr Gray had provided them with a Statement of Affairs as at 14 December 2012.

35. Section 7.6 contains a list of unsecured non-preferential creditors. It shows "3rd Party investment £969,000".

36. Appendix I, the Comparative Outcome statement, shows the amounts estimated to be raised for creditors in three scenarios. In two of them, "Administration followed by Liquidation" and "Liquidation" the 3rd Party Investors are shown as "Unsecured Creditors" for £969,000. In the third scenario, "Administration followed by CVA" the 3rd Party investors are shown as creditors for nil.

37. Note 6 to Appendix I shows the same list as was in Section 5.5 (see §30).

38. At this stage I simply find as a fact that this report was filed with the Court. I note that the all of the financial information and information about the company's operations and business including its creditors and debtors came from Mr Gray and him alone. I discuss the inferences to be drawn from this document later.

39. The final document I deal with here is undated. The appellant's accountants supplied HMRC on 8 November 2013 with "extracts from Geezer Telecom Limited draft accounts for the year ended 31 May 2012". These showed a Balance Sheet for 31 May 2012 with relevantly:

"**CAPITAL AND RESERVES**

Called up share capital	100
Share premium	680,176
Profit and loss account	(1,129,282)"

40. The same page shows that the statement that the financial statements (of which the balance sheet was part) were "approved by the director on …… and were signed by: ….. .Director". In other words they were unsigned and undated.

41. The appellant's accountants did not reveal who had prepared the accounts, where they had obtained them or whether they had in fact been signed. At this stage I say no more than that they were produced to HMRC and what I have stated above is what they show. They also show that the "Ultimate Controlling Party" is Mr Gray. As Mr Gray was the sole director throughout the life of the company I accept as fact that it must have been him who caused these Financial Statements to be created but no more.

Mr Murray-Hession's evidence

42. In the witness box Mr Murray-Hession took the opportunity to respond to Mr O'Grady's somewhat discursive questions by reiterating what he had said in his witness statement.

43. He said that he was a director of a large recruitment company living and working in the Manchester area. He was Irish and was closely associated with the sport of hurling as a manager. His circle of friends and acquaintances inevitably included people from Ireland or with Irish heritage and these included Alan Gray, who was one of that circle in 2010.

44. He explained that in the course of his social meetings with Mr Gray in 2010 he became aware of Mr Gray's entrepreneurial spirit and his frustration with the arrangement he had with a company selling phone and broadband services to SMEs. He wished to strike out on his own as he thought it better to make his own money than to earn large amounts for someone else.

45. The conversations about Mr Gray's new business became serious in early 2011. Mr Gray needed capital investment to support his business model. The appellant said

he was not an experienced investor, particularly in startups: he was a family man with a full time job on PAYE. He was also aware that others in his friendship group were investing in Mr Gray's venture.

46. He said that after some negotiation he agreed with Mr Gray in early 2011 that he would receive a 22.5% stake in the ordinary share capital of the company to be formed for an investment of £272,000. It was agreed that this amount, which represented most if not all of the family's savings, would be paid up in tranches as that gave the appellant the opportunity to see how the business was progressing without his having committed the whole sum at once, something he said he thought Mr Gray did not want either.

47. The mechanics of the investment were to be sorted by Mr Gray's finance manager, Alan Brookes. The appellant says he is neither legally nor accounting oriented and did not understand the technicalities of companies and shares. For example, he did not know at the time the difference between a share issue and a share transfer.

48. The appellant exhibited an email which he said contained the terms of the agreement, the subject line of the email showing "investment". The email was dated 10 June 2011 (about four weeks *after* incorporation and four weeks *before* the subdivision). It said:

> "Dear Stan,
>
> As discussed and further to today's meeting I am writing to confirm the salient points of our meeting in relation to our agreement regarding your investment in Geezer Telecom Ltd.
>
> 1. You have agreed to invest £272372.00 in Geezer Telecom Ltd.
>
> 2. In return for this investment you will receive a subscription of 225 new shares in Geezer Telecom Ltd which will come from a new issue of ordinary shares.
>
> 3. These 25 shares will equate to 22.5% of the total ordinary share capital of Geezer Telecom Ltd.
>
> Finally may I take this opportunity to welcome you as an investor in the company and look forward to us sharing many successful days in the future.
>
> Kind regards
>
> Alan Gray
> Founder & CEO"

49. The appellant stated that he had received a share certificate, but it was not in evidence, and we do not know the date on which he received it.

50. In relation to the money the appellant put into the company he had provided a schedule for HMRC together with the relevant bank statements from his personal accounts showing the transfer. The Schedule showed that:

(1) £25,000 was paid on 13 June 2011 (ie *after* incorporation but *before* the email above and the subdivision)

(2) £25,000 was paid on 27 June 2011 (ie *after* incorporation and the email above but *before* the subdivision)

(3) £219,822 was paid in 13 tranches between 18 July 2011 and 30 April 2012 (ie *after* the subdivision but *before* the date of the first annual return)

(4) £2,550 was paid on 21 May 2012 (ie *after* the date of both annual returns but *before* they were filed at Companies House).

51. In his second witness statement Mr Murray-Hession denied that he had ever transferred his shares back to Mr Gray and he said that he had never signed a share transfer form nor had he received one.

52. In response to questions from Mr O'Grady the appellant also said that he had not been told of the subdivision. He had not been informed of the incorporation: he had committed the funds as part of his business arrangement – a gentleman's agreement he called it – with Mr Gray. He had not seen the Company House documents.

53. In the second statement he also sought to rebut HMRC's claim, based on the administrators' report, that the money he put in was a loan. To show that he was always and throughout a shareholder he pointed out that, as stated in §50(4), the final payment was made after he was supposed to have sold his shares, and that in August 2012 he had agreed to give, along with Mr Gray, a personal guarantee for a loan made to Geezer by Adlington Finance Ltd, which also took a debenture over the company's assets. The appellant produced a faded version of an "Applicant Information Form" from Adlington from which I could see that the appellant was disclosing his income and assets to that company.

54. He also referred to his having in May 2012 agreed to personally guarantee borrowing by the company from Ultimate Asset Finance Ltd. He exhibited an email from Ultimate to Mr Gray and the guarantee relating to him. The email includes:

> "I am conscious that the PG for Stan needs to be witnessed by a solicitor, is this possibility for this afternoon".

55. The guarantee document shows at the end a Schedule in which the "Company" is shown as Geezer and the "Guarantor and Indemnified" as the appellant.

56. The appellant also states that in relation to the administrators' report he notes that Laura Walshe, an insolvency manager with the administrator, explained that the administrators' view that his investment was a loan was based on an assumption. He said that he had no knowledge that the investment was portrayed in that way. He added that he would not have lent the company such a sum without any security: he invested the money as equity capital on the basis that Geezer had a future, asset cover and sound management. Unfortunately things did not turn out that way and the whole sum was lost.

57. I consider Mr Murray-Hession to be a transparently honest and reliable witness and I accept his evidence in full, with these minor caveats. His relating of what Laura Walshe said is hearsay and is not so far as I can see backed up by any direct evidence. Secondly, while I accept that so far as he is concerned he intended to subscribe for shares and thought he had subscribed for shares and did not make a loan, that is to an extent merely his non-expert opinion, and it is my task to see if the totality of the evidence bears that out and, if it does, whether it is sufficient for his claim to succeed in law.

Mr Gray's evidence

58. Mr Gray's witness statement consists of his agreement "to the best of his knowledge, recollection and belief" of the truth of the factual matters stated in the appellant's first witness statement.

59. As I have already, said Mr Gray did not appear and was not available for cross-examination. His endorsement of every factual matter stated by the appellant in his first witness statement is to my mind of little worth if he could not be questioned about how he knew that, unless there is other evidence corroborating it. The difficulty is that there is some that does corroborate it such as the Annual Return to 13 May 2102 and some that does not, such as the Annual Return to 14 May 2012.

60. Mr Gray's absence also means that a number of puzzling things and inconsistencies about, in particular, the Companies House documents, the draft accounts and sections of the administrators' report, remain unexplained. What is apparent to me from eg the email of 10 June 2011 (§48) and the letter of 12 July 2012 (§§23 and 24) is that Mr Gray has only a very hazy notion of the legal side of running a company and dealing with its capital.

61. But where his endorsement of Mr Murray-Hession's evidence contradicts what he has said or caused to be said or done in other circumstances, I need to decide which is right. An example here is the administrators' report. The administrators say that their information about the status of the investors' rights (creditors, not equity holders) came from Mr Gray. If that is so then what the report says is directly in conflict with what Mr Murray-Hession says. Since I have accepted Mr Murray-Hession's evidence in full it seems to me that where Mr Gray's evidence in his witness statement supports the appellant but contradicts other statements by him, then I prefer the version which Mr Murray-Hession advances. But otherwise I give Mr Gray's evidence no weight, including the information given to the administrators.

The law

62. The law on share sale relief is found in Chapter ("Ch") 6 Part ("Pt") 4 ITA. The parts relevant to this case are:

> "**131 Share loss relief**
>
> (1) An individual is eligible for relief under this Chapter ("share loss relief") if—

(a) the individual incurs an allowable loss for capital gains tax purposes on the disposal of any shares in any tax year ("the year of the loss"), and

(b) the shares are qualifying shares.

This is subject to subsections (3) and (4) and section 136(2).

(2) Shares are qualifying shares for the purposes of this Chapter if—

…

(b) … they are shares in a qualifying trading company which have been subscribed for by the individual.

(3) Subsection (1) applies only if the disposal of the shares is—

…

(d) a deemed disposal under section 24(2) of that Act (claim that value of the asset has become negligible).

…

132 Entitlement to claim

(1) An individual who is eligible for share loss relief may make a claim for the loss to be deducted in calculating the individual's net income—

(a) for the year of the loss,

(b) for the previous tax year, or

(c) for both tax years.

(See Step 2 of the calculation in section 23.)

(2) If the claim is made in relation to both tax years, the claim must specify the year for which a deduction is to be made first.

…

(4) The claim must be made on or before the first anniversary of the normal self-assessment filing date for the year of the loss.

135 Subscriptions for shares

…

(2) An individual subscribes for shares in a company if they are issued to the individual by the company in consideration of money or money's worth.

151 Interpretation

…

(8) For the purposes of this Chapter a disposal of shares which results in an allowable loss for capital gains tax purposes is treated as made at the time when the disposal is made or treated as made for the purposes of TCGA 1992."

63. In this case the allowable loss is claimed to have arisen by virtue of s 24(1A) to (2) Taxation of Chargeable Gains Act 1992 ("TCGA"):

"(1A) A negligible value claim may be made by the owner of an asset ("P") if condition A or B is met.

(1B) Condition A is that the asset has become of negligible value while owned by P.

…

(2) Where a negligible value claim is made—

(a) this Act shall apply as if the claimant had sold, and immediately reacquired, the asset at the time of the claim or (subject to paragraphs (b) and (c) below) at any earlier time specified in the claim, for a consideration of an amount equal to the value specified in the claim.

(b) An earlier time may be specified in the claim if—

(i) the claimant owned the asset at the earlier time; and

(ii) the asset had become of negligible value at the earlier time; and either

(iii) for capital gains tax purposes the earlier time is not more than two years before the beginning of the year of assessment in which the claim is made; …

…"

64. As to case law, the appellant cited *McLocklin v HMRC* [2014] UKFTT 42 (TC) ("*McLocklin*") and *HMRC v Alan Blackburn Sports Limited and another* [2008] EWCA Civ 1454 ("*Blackburn*"). Mr Miller also referred to Revenue & Customs Brief 41/10 which sets out a change of practice, showing that "We will now accept claims to relief on the disposal of qualifying shares where the subscription is made in joint names or through a nominee …"

65. For HMRC Mr O'Grady cited *National Westminster Bank plc v Commissioners of Inland Revenue; Barclays Bank plc v Commissioners of Inland Revenue* (67 TC 1) ("*NatWest*").

The appellant's submissions

66. It is settled law that, for share loss relief, a person may subscribe through a nominee or trustee (see *McLocklin* in particular, and HMRC Brief 41/10). The appellant's case here is stronger than Mr McLocklin's case where there was an agreement to *transfer* the shares.

67. As to whether the appellant made a loan to the company, *Blackburn* shows that money advanced on account of capital remains capital.

68. The appellant could not have transferred his shares to Mr Gray because under s 770 CA 2006 a transfer of shares cannot be registered without a share transfer document and the appellant did not sign or deliver one to Mr Gray.

69. HMRC's reliance on *NatWest* is misplaced for three reasons. Firstly, the case concerns the offering of shares to the public, and the more rigorous requirements applicable to a p.l.c.; second, it was not disputed that shares were issued to Alan Gray, nor was there any doubt that at the time of that issue he was under an agreement with the appellant for him to have 22.5% of those shares and third, *NatWest* concerns the position under CA 1985. The company in this case is a 2006 Model Articles company, and the law has significantly changed in this area (see eg s 546 CA 2006).

70. In the case of Mr Gilder HMRC had accepted what is Mr Murray-Hession's case here.

71. The appellant had a binding agreement with Mr Gray to subscribe for 22.5% of the newly issued shares in the company. Alan Gray was the appellant's nominee for that purpose. The entries in the Companies House documents and other records are irrelevant if Mr Gray had agreed with the appellant that he would have a percentage of the shares that been issued. HMRC accepted in correspondence that there was such an agreement and that the transfer to the appellant was part and parcel of that agreement.

72. The Companies House return showing a share transfer from Mr Murray-Hession cannot be relied on, nor can any other documents of which the appellant was unaware. He should not be denied relief by a quirk of accounting procedure. To deny relief on an arid technical point would be a case of the tail wagging the dog, to quote Lord Neuberger in *Blackburn*.

73. It is within the purpose of the legislation, as Mr Gilder's Inspector specifically noted, to allow individuals genuinely investing in companies that qualify to get the benefit of the relief.

74. In summary:

(1) the appellant bargained for brand new shares;

(2) the appellant paid the consideration within the agreed time;

(3) the appellant's consideration went into the capital account of the Company and not to Mr Gray;

(4) the appellant's investment was shown in the share premium account of the Company.

On that basis, the documents purporting to subdivide the shares are as anomalous and potentially as incorrect as the contradictory annual returns.

75. On the basis of the above, taken in totality, the appellant must have purchased new shares from the Company (using Alan Gray as agreed) and must have been registered as a holder of those freshly issued shares.

76. The HMRC position can only be that the appellant purchased Alan Gray's shares "second hand" to enable them to be shown in the Annual return to 13 May

2012 and the appellant's share certificate, but this cannot be the case, because if it was:

(1) Alan Gray would have received £272,372 from the appellant but he received nothing;

(2) The Company would have received nothing from the appellant but it received £272,372;

(3) The appellant's investment would not have been shown in the share premium account.

HMRC's submissions

77. HMRC accepts that it may well be the case that the appellant intended his payments to Geezer to be for a subscription of new shares, but HMRC is concerned with what actually happened.

78. It says that what actually happened was:

(1) The appellant made payments to Geezer of £272,372 between 21 June 2011 and 21 May 2012.

(2) But Geezer did not issue any new share capital beyond the £100 subscribed by Mr Gray on incorporation.

(3) Instead it subdivided its 100 £1 shares into 1000 10p shares, and on the day it did so, 13 July 2011, Mr Gray transferred 225 shares to the appellant for a nil consideration.

(4) On 14 May 2012 the appellant transferred his 225 shares to Mr Gray for a nil consideration.

79. As a result:

(1) the appellant must have lent £272,372 to Geezer.

(2) as he paid nothing for the shares acquired from Mr Gray and got nothing when he transferred them to Mr Gray he made no loss on their disposal.

(3) In any event that disposal was of shares acquired, not subscribed for.

(4) Therefore there is no loss qualifying for relief under Ch 6 Pt 4 ITA.

80. Since the true position is that the appellant lent £272,372 to the company he may, to the extent the loan is irrecoverable, have a claim under s 253 TCGA, though no claim has been made.

81. *NatWest* is cited to demonstrate that had Geezer issued new shares to the appellant and had all the "requirements of registration been satisfied" (as set out by Lord Templeman) there may well have been a [sc valid] claim for a share loss, but this didn't happen even if it was intended that it should.

82. Mr O'Grady also argued that the treatment of another investor, Mr Gilder, was irrelevant. Mr Gilder was a client of Mr Murray-Hession's accountants and made a share loss relief claim for the £50,000 he invested, which was accepted by a different Inspector of Taxes. HMRC argued that each turns on its own facts.

83. Finally he responded to the accounts showing a share premium account which he agreed must have included the appellant's payments. He said that it proves nothing at all, and that it seems to HMRC to be odd that a balance sheet has been produced by the accountants as they had said to HMRC that no accounts had ever been produced.

Discussion

84. I first make further findings of fact based on the evidence I heard and read.

85. I find as a fact that the appellant had an agreement with Mr Gray that he would invest £272,000 of his own money in Geezer Ltd, and that this investment would be by way of subscription for shares.

86. I find that it is more likely than not the reason there was a share subdivision was to enable the agreed number of shares to be transferred to the appellant. It would not have been possible to give the appellant 22.5% (an amount insisted upon by Mr Gray according to the appellant's evidence) had the share capital remained 100 £1 shares.

87. There is also some evidence to be found in the resolution (see §14) that Mr Gray intended to transfer shares to Mr Murray-Hession after the subdivision and to cause the register to reflect that, and I find it is more likely than not that that was done. But of itself that does not determine whether or not the appellant acquired beneficial ownership of the shares from Mr Gray (something that would be fatal to his claim).

88. I find that it is more likely than not that as a result of an agreement between Mr Gray and the appellant, Mr Gray was from the outset holding a percentage of the shares as nominee, agent or otherwise on behalf of the appellant until the shares could be registered in the appellant's name and that the payment by the appellant of funds to the company, and not to Mr Gray, is inexplicable on any other basis. I also find that it is more likely than not that Mr Gray transferred the legal title to Mr Gray after the subdivision. This is consistent with the 13 May 2012 Annual Return which I find correctly reflects what actually happened. As a result of this finding it follows that the appellant did not acquire beneficial ownership of the shares from Mr Gray: he always had it.

89. I find as a fact that the appellant did not transfer 225 shares to Mr Gray on 13 July 2011 or any other date and that the purported annual return to 14 May 2012 is incorrect. I prefer the appellant's evidence on this point (supported for what it's worth by Mr Gray's witness statements, notwithstanding that Mr Gray must have authorised the 14 May Annual Return). I do not need to decide whether that was an

annual return within the meaning of CA 2006 and do not do so, but I have found that it, unlike the 13 May one, does not show the true position.

90. I find as a fact that the draft accounts of the company as at 31 May 2012 correctly showed the existence of a share premium. These accounts were clearly not prepared by Mr Gray but by a qualified accountant. I had no evidence to show they were not genuine.

91. Having found these facts and those in an earlier section of this decision, I turn to the legal analysis of the facts.

92. I agree with the appellant that *McLocklin* is highly relevant. It is a decision of the First-tier Tribunal and so not binding on me. But I should follow it unless I consider it to be plainly wrong. I do not. I respectfully agree, and agree fully, with the decision of the Tribunal (Judge Malcolm Gammie QC and Mrs Debell).

93. In *McLocklin* the appellant and other investors agreed with a Mr Winter (the "Mr Gray" in that case) to subscribe for shares. Mr McLocklin, because of divorce proceedings, was unable to pay his subscription money at that point. He agreed with Mr Winter that Mr Winter would subscribe for the 18 shares it was agreed the appellant was to get, and that within two years the appellant should pay the amount due whereupon Mr Winter would transfer the shares to him, and that is what happened.

94. The Tribunal held that Mr McLocklin had subscribed for the shares because Mr Winter had subscribed for them on his behalf. The transfer was to be ignored for the purpose of the share loss relief provisions.

95. The message I take from *McLocklin* is not that I need to decide what the precise legal nature of the relationship between Mr Gray and the appellant is, nominee, trustee or something else. It is that where a person is acting on behalf of another person it is to the agreement between them and not to the technicalities of company law that I need to turn. I have found as a fact that Mr Gray had at all times intended to issue shares for the benefit of the appellant in return for his investment, and I consider that this is what he was doing when the 100 £1 shares were issued to him on incorporation. Mr Gray's ignorance of company law is irrelevant, as is the fact that it would not have been possible before the subdivision for Mr Gray to transfer the legal title to 22½ shares. But it was after the subdivision and that is what Mr Gray did.

96. In *Blackburn*, also relied upon by the appellant, the situation was somewhat different. Mr Blackburn was at all times the registered holder of the shares and the shares were subscribed for by him and issued to him. The issue there related to payments he had made in advance of being allotted shares, and the effect of these on anti-avoidance rules in the Enterprise Investment Scheme ("EIS") requiring that no value must pass *from* the company *to* the subscriber. The Special Commissioner (Dr John Avery Jones) had held that where money was paid in advance, the allotment and issue of the shares "technically" resulted in the discharge of a debt from the company to Mr Blackburn and so there was value passing within the meaning of the EIS rules.

97. The High Court (Peter Smith J) overturned this on the basis that there was no debt and that a payment in advance was still a contribution to capital and not a loan. This was based on a Privy Council decision from the Turks and Caicos Islands *Kellar v Williams* [2000] UKPC 4, not cited to Dr Avery Jones. The Court of Appeal affirmed his decision.

98. *Blackburn* is it seems to me mostly irrelevant to this case because of the difference in the facts. The first payment by the appellant here was made after incorporation but before subdivision. Even if the shares had been subscribed by him in his own name then the payment was not before allotment so the issue in *Blackburn* did not arise. It could be relevant if it was on the subdivision that the appellant's name first became registered as an allottee, but the decision in *Blackburn* would simply have the consequence that the appellant would be treated as subscribing for shares and not making a loan, given the obvious intention of the parties. But this is all hypothetical because here the appellant did not subscribe for shares in his own name.

99. But it seems to me that Lord Neuberger's approach in [23] and [24] to the facts in *Blackburn* is instructive:

> "23. In those circumstances, it seems to me that, when Mr Blackburn made the payments amounting to £96,000, he, both in his individual capacity and as a director and effective controller of the Company, appreciated and intended that the payments would be reflected by the allotment of 96,000 shares in the Company. In other words, the money was, as Peter Smith J held, a payment into the capital account of the Company, but, crucially, it was also made in the word used by the Special Commissioner, conditionally on, 96,000 shares being allotted to Mr Blackburn. Accordingly, as I see it, the payments totalling £96,000 were made and accepted in circumstances in which it is right to infer that Mr Blackburn was "agreeing to take [96,000] shares" … and the Company was agreeing to allot him 96,000 shares.
>
> 24. That view is reinforced by the improbability of the payments giving rise to debts. If they had given rise to debts, they must have been repayable on demand (as there appears to be no other basis for repayment), an unlikely notion given the financial position of the Company, and the fact that the money was largely going into building works. I am unimpressed in this connection by the fact, relied on by the Revenue, that, in his 26th April 2000 letter, Mr Blackburn referred to his having made "cash advances" of £96,000; the word "advances" could refer to loans or it could refer to money advanced in anticipation of receiving shares."

100. I am equally unimpressed by the reliance by HMRC in this case on the Administrators' Report that shows the appellant as a creditor for some very informal and undocumented loan to Geezer, and I also think it highly improbable that the agreement and the manner in which the amounts were paid did give rise to a debt.

101. HMRC's reliance on *NatWest* is also misplaced. There is no doubt that the shares were issued in the company law and *NatWest* sense to Mr Gray. But even if

the shares had been allotted to the appellant without being registered I am not sure that *NatWest* would have affected the issue for the following reasons.

102. There was no doubt in *NatWest* that shares had been issued – the issue was the date they were issued, because the success or failure of an avoidance scheme depended on the answer to that question.

103. National Westminster Bank was a p.l.c. and each of the actual issuing companies was also incorporated as a p.l.c. Those companies were initially subsidiaries of the bank. Groups such as banking groups can be expected to follow the formalities, and they did so. The position in small companies is usually much more informal as it clearly was in this case, though as Peter Smith J pointed out in *Blackburn* that does not require that an advantage be given to such companies because of their laxness in following the formalities of company law.

104. But more importantly to my mind, *NatWest* was about a scheme, the Business Enterprise Scheme ("BES"), that applied only where the subject company was incorporated in the United Kingdom (s 293(1) Income and Corporation Taxes Act 1988). The only system of company law that could apply is UK company law. This is not so with share loss relief – the relevant question is where the business of the company is carried on. Thus the provisions in Ch 6 Pt ITA defining "subscribed" and referring to "issued" have to be construed in the context of every company law system in the world where the distinctions drawn in *NatWest* may not apply. I note that both the BES and share loss relief were introduced in the same Finance Act, that of 1983, so it is unlikely that the difference was unintentional. I do also note though that the BES was an expansion of an earlier relief, the Business Startup Scheme, which was introduced by Finance Act 1981 and which was in identical terms as to the type of company as the BES.

105. I have also noted that s 288(5) TCGA gives a relevant definition:

> "(5) For the purposes of this Act, shares or debentures comprised in any letter of allotment or similar instrument shall be treated as issued unless the right to the shares or debentures thereby conferred remains provisional until accepted and there has been no acceptance."

106. The same wording appeared in the previous consolidation of the tax law on chargeable gains in 1979. While this definition does not expressly apply to ITA, nor is TCGA to be "treated as read as one with" Ch 6 Pt 4 ITA (or vice versa), it is clear from eg s 150(8) ITA that concepts from the TCGA are relevant to Ch 6 Pt 4 ITA and it is obviously desirable that terms applying in each should not be interpreted so as to have a different meaning.

107. Further, subsections (8A) and (8B) of s 150 *TCGA* use the term "issued" in relation to shares that qualified for the EIS, the scheme in *Blackburn*. If "issued" in the EIS legislation is to be treated as having the *NatWest* meaning, while s 150 TCGA has the s 288(5) TCGA meaning, then there is something approaching circularity, because s 288(5) says that shares which are subscribed are issued, but *NatWest* is said

by HMRC to hold that if shares are not registered they are not issued, even though they have clearly been subscribed for.

108. If all this points to my not following the minutiae of UK company law in determining when shares are subscribed for or issued for the purposes of share loss relief I would do so if it was necessary, but it is not.

109. Finally although I did not have the share register of Geezer in evidence, I would have been prepared to assume that it would show that shares had been issued to Mr Gray and that is all that is necessary in a "nominee" case.

110. As I have found as a fact that Mr Gray had subscribed for 22.5% of the ordinary shares of Geezer on behalf of the appellant, and transferred the legal title to him and that the appellant did not transfer any shares to Mr Gray, I hold that it was the appellant who subscribed for 225 shares in Geezer for the purposes of s 131 ITA 2007.

111. HMRC did not argue at the hearing about the validity of the claim to a deemed allowable loss for the purposes of TCGA. Their case was simply that the provisions of Ch 6 Pt 4 ITA did not apply to the appellant because he did not subscribe for shares. They argued in their skeleton that the appellant would possibly have suffered a loss under s 253 TCGA (loss on irrecoverable loan) but had not made a claim for such a loss.

112. I do not need to decide whether the entry of an allowable loss of £272,372 in the appellant's tax return would have sufficed to cover a s 253 loss, because I have held that the appellant owned share capital not a loan.

113. I do note however that HMRC did not enquire into the claim that there was an allowable loss. It seems to me that in those circumstances, even if I had found against the appellant on the basis that he made a loan to Geezer, it is strongly arguable that the allowable loss claim would have stood and been available to carry forward against chargeable gains of the following year. But I do not need to decide this.

114. But I have to say I find it a little surprising that HMRC did not at least contest the year in which the loss was claimed, as that would also have affected the years for which a share loss relief claim could be effective (s 151(8) ITA). The 2011-12 Income Tax return which was in evidence shows a claim for an allowable loss of £272,372 (so it is claimed and quantified under s 16(2A) TCGA and s 42 Taxes Management Act 1970 ("TMA")).

115. The details of the computation of the loss are shown in the white space entry on box 36 of the CGT pages. They say that the shares became worthless as the company entered administration. The company entered administration on 14 December 2012 in the tax year 2012-13.

116. The deemed disposal so arising is treated as taking place on the date of the claim, which is included in the return received by HMRC on 20 March 2013, so in 2012-13, the year after the year of the share loss relief claim. By s 24(2)(a) TCGA

the disposal can be backdated to any earlier time specified in the claim, but none was. That however is not my problem.

117. The appellant's return also shows a claim that £203,155 is to be set off against other income for 2011-12 by virtue of Ch 6 Pt 4 ITA. That amount is the total income of the appellant for that year. The return also shows a claim that £69,192.77 is to be set off against income of 2010-11 (by virtue of s 132(1)(c) ITA). The return showed that the loss was to be set off first against 2011-12 (s 132(2) ITA) and the claim was in time (s 132(3)).

118. The enquiry started by HMRC on 24 June 2013 (also in time) was only expressed to be into the 2011-12 return. At the end of the enquiry HMRC stated their conclusion in a letter of 31 July 2015 that "you are not entitled to claim share loss relief against income in either the financial year [sic] ended 5th April 2011 or 2012.

119. The appellant's return for 2011-12 was amended to remove the relief claimed so that the additional tax arising was £79,577.50. The closure notice did not amend the 2010-11 return.

120. An appeal against the "decision" ie the conclusion and the amendment of the return for 2011-12 was made on 25 August 2013. A review was requested and carried out, upholding the conclusion and amendment, and the appeal was notified to the Tribunal on 23 December 2015.

121. Section 50(7A) TMA deals with the Tribunals' power where a claim is the subject of a decision contained in a closure notice which disallows the claim. It permits the Tribunal to allow or to disallow the claim to the extent the Tribunal thinks it appropriate.

Decision

122. I allow the claim that was disallowed in the closure notice and reflected in the amendment to the return for 2011-12.

123. How this decision is to be reflected in the liability for 2010-11 I do not know, as there was no suggestion made to me or in the papers that HMRC had assessed the appellant under s 30 TMA for that year. I presume that any attempt to reclaim the repayment made for that year will simply be abandoned.

124. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 2 SEPTEMBER 2016