Neutral Citation: [2023] UKFTT 00124 (TC)

Case Number: TC08731

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/11462

Discovery assessment – sections 29 and 36 Taxes Management Act 1970 – whether underassessment of income tax brought about by taxpayer's carelessness – no - whether brought about by carelessness on the part of a person acting on behalf of the taxpayer – yes – appeal dismissed

Heard on: 12 and 13 January 2023
Judgment date: 13 February 2023

Before

TRIBUNAL JUDGE MARK BALDWIN
MR MOHAMMED FAROOQ

Between

DR SYED AKHLAQ RIZVI

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

The Appellant in person

For the Respondents: Miss Rebecca Arnold, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The Appellant, Dr Syed Akhlaq Rizvi ("Dr Rizvi"), made a number of claims for Enterprise Investment Scheme ("EIS") relief in respect of the tax years ended 5 April 2015, 2016 and 2017. When he made those claims he did not hold an "EIS3" (a compliance certificate required before a claim for EIS relief can be made). In consequence, Dr Rizvi made claims for EIS relief he was not entitled to make. On 12 March 2021 HMRC raised discovery assessments on Dr Rizvi in respect of those tax years. In order to be entitled to make those assessments, HMRC need to show that Dr Rizvi, or someone acting on his behalf, was careless, and that is what this case is about.

THE FACTS IN OUTLINE

2. The basic facts are not in dispute and are as follows:

(1) On 23 January 2016, Dr Rizvi filed his self-assessment tax return ("SATR") for the year ended 5 April 2015 ("SA 2015"). SA 2015 did not include a claim for EIS relief

(2) On 5 April 2016, Dr Rizvi subscribed for £300,000 shares in Kerris Films Limited ("Kerris Ltd").

(3) On 17 June 2016, Dr Rizvi amended SA 2015 to include EIS relief in respect of Kerris Ltd carried back from the year ended 5 April 2016 of £300,000

(4) On 7 October 2016, the investment promoter, Ben White, applied for clearance by signing Form EIS1 ("EIS1"), but Kerris Ltd was never authorised as an EIS qualifying company by HMRC, and no compliance certificate ("EIS3") was issued.

(5) On 24 January 2017, Dr Rizvi subscribed for £75,000 shares in Talland Films Limited ("Talland Ltd").

(6) On 24 January 2017, Dr Rizvi subscribed for £225,000 shares in Ellenglaze Films Ltd ("Ellenglaze Ltd").

(7) On 24 January 2018 Ben White of McKenzie Knight signed an EIS1 in respect of Talland Ltd, but no EIS3 was ever issued.

(8) On 25 January 2018 Ben White signed an EIS1 in respect of Ellenglaze Ltd but no EIS3 was ever issued.

(9) On 27 January 2017, Dr Rizvi filed his SATR for the year ended 5 April 2016 ("SA 2016"). SA 2016 included claims for EIS relief carried back from the year ended 5 April 2017 of £75,000 in respect of both Talland Ltd and Ellenglaze Ltd.

(10) On 4 May 2017 an amendment was made to SA 2016 to reduce the claim by £568 (reducing the Talland Ltd claim for SA 2016 to £74,432)

(11) On 8 August 2017, Dr Rizvi subscribed for £125,000 shares in Addington Films Limited ("Addington Ltd").

(12) On 29 January 2018 Ben White signed an EIS1 for Addington Ltd, but no EIS3 was ever issued.

(13) On 2 November 2017, Dr Rizvi subscribed for £125,000 shares in Quoit Films Ltd ("Quoit Ltd").

(14) On 11 September 2017 Ben White signed an EIS1 for Quoit Ltd, but no EIS3 was ever issued.

(15) On 31 January 2018, Dr Rizvi filed his SATR for the year ended 5 April 2017 ("SA 2017"). SA 2017 included claims for EIS relief for the year ended 5 April 2017 of £568 in respect of Talland Ltd and further amounts carried back from the year ended 5 April 2018 of £125,000 in respect of Addington Ltd and £125,000 in respect of Quoit Ltd.

3. The effect of all of this is that Dr Rizvi has made a number of claims for EIS relief without holding an EIS3, as required by section 203(1) Income Tax Act 2007 ("ITA 2007"). Dr Rizvi does not dispute this; he accepts that he was not entitled to make the claims for EIS relief set out above.

4. On 12 March 2021 HMRC raised discovery assessments under section 29 Taxes Management Act 1970 ("TMA 1970") on Dr Rizvi in respect of the tax years ended 5 April 2015, 2016 and 2017 to make good the insufficiency of tax resulting from Dr Rizvi having made the claims for EIS relief he accepts he was not entitled to make.

5. The amounts of income tax assessed were originally £117,450 for the year ended 5 April 2015, £110,826.57 for the year ended 5 April 2016 and £75,000 for the year ended 5 April 2017. HMRC subsequently write to Dr Rizvi reducing the assessments for the years ended 5 April 2015 and 2016 to £90,000 and £89,826.58 respectively. Dr Rizvi does not raise any points on the quantum of these assessments.

DISCOVERY ASSESSMENTS

6. In order to make an assessment under section 29 TMA 1970 a number of conditions need to be met. The first (in section 29(1)) is that there is a discovery as regards a particular taxpayer and year of assessment that an amount of income or a gain which should have been assessed to income tax or capital gains tax has not been assessed or a relief that has been given is or has become excessive. Dr Rizvi does not dispute that HMRC have met this requirement.

7. The next requirement is that

> "(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—
>
> (a) in respect of the year of assessment mentioned in that subsection; and
>
> (b) in the same capacity as that in which he made and delivered the return, unless one of the two conditions mentioned below is fulfilled.
>
> (4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf."

8. As we have seen, Dr Rizvi submitted a SATR for each relevant year of assessment. He considers that the condition in subsection (4) is not satisfied.

9. TMA 1970 prescribes time limits within which assessments are required to be made. The ordinary time limit (in section 34 TMA 1970) is that an assessment to income tax cannot be made more than 4 years after the end of the year of assessment in which it was made.

10. Section 36 TMA 1970 extends that period to 6 years where the loss of tax is brought about carelessly and 20 years where it is brought about deliberately. More precisely, it provides:

> "(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it

relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).

(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax —

(a) brought about deliberately by the person,

(b) attributable to a failure by the person to comply with an obligation under section 7,

(c) attributable to arrangements in respect of which the person has failed to comply with an obligation under section 309, 310 or 313 of the Finance Act 2004 (obligation of parties to tax avoidance schemes to provide information to Her Majesty's Revenue and Customs), or

(d) attributable to arrangements which were expected to give rise to a tax advantage in respect of which the person was under an obligation to notify the Commissioners for Her Majesty's Revenue and Customs under section 253 of the Finance Act 2014 (duty to notify Commissioners of promoter reference number) but failed to do so,

may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period).

(1B) In subsections (1) and (1A) references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person."

11. All of these assessments were issued outside the ordinary time limit in section 34 TMA 1970. Consequently, HMRC must establish that they have met the conditions in section 36 TMA 1970 to allow the assessments which were made within 6 years of the end of the year of assessment to which they relate. Again, Dr Rizvi argues that the required level of carelessness is not present.

When is a taxpayer careless?

12. Turning to the question of carelessness, this was addressed by this tribunal in *David Collis v HMRC,* [2011] UKFTT 588 (TC) (a penalty case where carelessness is defined as a failure to take reasonable care – paragraph 3(1)(a) Schedule 24 Finance Act 2007). Here the tribunal observed:

> "That penalty applies if the inaccuracy in the relevant document is due to a failure on the part of the taxpayer (or other person giving the document) to take reasonable care. We consider that the standard by which this falls to be judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question."

13. In *HMRC v John Hicks*, [2020] UKUT 0012 (TCC), the Upper Tribunal (dealing with the legislative provisions we are) observed (at [120]):

> "Whether acts or omissions are careless involves a factual assessment having regard to all the relevant circumstances of the case. There are many decided cases as to what amounts to carelessness in relation to the completion of a self-assessment tax return. The cases indicate that the conduct of the individual taxpayer is to be assessed by reference to a prudent and reasonable taxpayer in his position: see, for example, *Atherton v HMRC* [2019] STC 575 (Fancourt J and Judge Scott) at [37]."

When is a person "acting on behalf of" a taxpayer?

14. As to the breadth of "person acting on behalf of" this was also addressed by the Upper Tribunal in *John Hicks* where the Tribunal commented (at [122]):

> "There is an issue in the present case as to the application of the phrase "a person acting on his behalf" in section 29. The FTT considered the decisions in *Trustees of the Bessie Taube Trust v Revenue & Customs* [2010] UKFTT 473 (TC) (Judge Berner and Mrs Stalker) and *Atherton v HMRC* [2017] UKFTT 831 (TC) (Judge Mosedale and Mr Barrett). Earlier in our decision, we have described the approach of the FTT in relation to these two cases. We agree with the FTT that the legal test to be applied is the test stated in *Bessie Taube* at [93]:
>
>> "… In our view, the expression "person acting on…behalf" is not apt to describe a mere adviser who only provides advice to the taxpayer or to someone who is acting on the taxpayer's behalf. In our judgment the expression connotes a person who takes steps that the taxpayer himself could take, or would otherwise be responsible for taking. Such steps will commonly include steps involving third parties, but will not necessarily do so. Examples would in our view include completing a return, filing a return, entering into correspondence with HMRC, providing documents and information to HMRC and seeking external advice as to the legal and tax position of the taxpayer. The person must represent, and not merely provide advice to, the taxpayer." "

15. In *John Hicks* the tribunal considered possible carelessness on the part of three people, the taxpayer, Mr Bevis (an accountant, but not a tax specialist, who advised Mr Hicks to utilise a pre-packaged tax scheme and who helped him complete his tax returns) and Montpelier (the promoters of the scheme). It is instructive to note how the tribunal dealt with each of these three people. As far as Mr Bevis was concerned, the tribunal found a number of failings in what he did, starting with advising Mr Hicks to participate in the scheme when Mr Bevis was not competent to give that advice and, had he been, he would have given different advice and carrying this through into the completion of Mr Hicks' tax returns. The tribunal observed (at (140-[141]):

> "By taking on the role of a tax adviser to Mr Hicks in this respect, Mr Bevis has to be judged by the standard of a reasonably competent tax adviser giving advice to a taxpayer on this matter. The advice which Mr Bevis gave was not advice that could have been given by a tax adviser of reasonable competence. That is particularly so in 20 the light of paragraph 11 of Counsel's Opinion. Mr Bevis' actions in completing the relevant assessments were not actions which ought to have been carried out by a tax adviser of reasonable competence.
>
> It follows from the above reasoning that the insufficiency in the relevant assessments was brought about because Mr Bevis gave advice which a reasonably competent tax adviser could not have given as to the deductibility of the expenditure and, similarly, Mr Bevis failed to give the advice which a reasonably competent tax adviser ought to have given to the effect that the expenditure was not deductible. Therefore, the insufficiency in the assessments was brought about by a person acting on behalf of Mr Hicks within section 29(4)."

16. As far as Mr Hicks was concerned, the tribunal's finding that Mr Bevis had been careless and was acting on his behalf made it unnecessary for the tribunal to come to a view on this point. Clearly, if Mr Bevis had not been involved, it would have been careless for Mr

Hicks to have relied on his own assessment of the scheme, but Mr Bevis was involved and this led the tribunal to observe (at [149]):

> "Mr Bevis was involved and took on the role of giving advice and making recommendations to Mr Hicks in the way we have described above. That fact obviously reduced the need for Mr Hicks himself to form his own independent view as to the relevant matters and we consider that it would be wrong to hold that Mr Hicks was careless for failing to do due diligence and pay attention to the detail in the ways alleged by HMRC.
>
> It is more arguable that Mr Hicks should have absorbed the key point that the expenditure could only be deducted if he carried on a relevant trade but in view of all of the comments made to Mr Hicks by Montpelier, Mr Cole and Mr Bevis and taking account of the fact that Mr Bevis did not draw attention to this matter and treated it as being of no importance, we consider that we would have been unlikely to have reversed the finding of the FTT as to carelessness on the part of Mr Hicks in these respects."

17. The tribunal was less sure about whether Montpelier (the promoter) was acting on Mr Hicks' behalf. In its role as seller of the scheme or an adviser to Mr Hicks, the tribunal considered it would not be acting on Mr Hicks' behalf, but its role went beyond this to providing Mr Bevis with entries to be cut and pasted into Mr Hicks' tax returns. The tribunal did not need to, and so did not, express a concluded view on this point.

THE ISSUES BETWEEN THE PARTIES

18. As we have already seen, Dr Rizvi agrees that he was not entitled to make the EIS relief claims he made, nor does he dispute that the condition for making a discovery assessment in section 29(1) TMA 1970 has been satisfied. The only issue between Dr Rizvi and HMRC is whether he, or someone acting on his behalf, was careless so as to enable a discovery assessment to be made, even though Dr Rizvi had submitted a SATR return, and to extend the period for making an assessment to 6 years after the end of the year of assessment.

19. HMRC say that one or both of Dr Rizvi and his tax agents were careless and Dr Rizvi says that they were not. Although it would appear HMRC harbour wider concerns about the EIS relief claims Dr Rizvi made (in particular, they seem to have suspected that the schemes did not meet the "no linked loan requirement" in section 164 ITA 2007), it is important to note that HMRC's allegation of carelessness on Dr Rizvi's part is confined to his failure to make sure that he had an EIS3 before making a claim; HMRC did not suggest before us that the careless was in failing to satisfy himself that the schemes met all the statutory requirements.

20. We heard evidence from Mr Joe Rawbone ("Officer Rawbone") (an HMRC officer) and Dr Rizvi. We found both witnesses to be straightforward and wholly credible. We have no hesitation in accepting their evidence.

OFFICER RAWBONE'S EVIDENCE

21. Officer Rawbone has worked as an officer for HMRC since 1988 and as the lead on EIS-related work since November 2020.

22. HMRC had been considering the risk around EIS schemes and carried out profiling of SATRs looking for cases where individuals had claimed EIS relief in excess of or at a high percentage of their total taxable income in 2016. The initial concern was that, in order to qualify for EIS relief, both the investor and the company must meet certain requirements. One of the investor requirements is the 'no linked loan requirement' set out in Section 164 ITA 2007. that the investor must not have received a loan which would not have been made, or would not, have been made on the same terms, were it not for the EIS investment. This

initial profiling work was conducted between March 2017 and October 2017 and highlighted potential risks around EIS schemes devised and marketed by White & Co and their associated firm, McKenzie Knight and Partners Ltd ("McKenzie Knight").

23. Officer Rawbone noted that Dr Rizvi's returns stated that his agent was McKenzie Knight. Clients of McKenzie Knight clients had been encouraged to invest in White & Co, EIS products. In 2015, Ben White (of White & Co.) became a director of McKenzie Knight and acquired McKenzie Knight. Officer Rawbone mentioned that HMRC are conducting a criminal enquiry into Ben White, but there is no suggestion that Dr Rizvi is complicit in this at all.

24. HMRC's profiling identified that Dr Rizvi had invested significant amounts in EIS schemes when compared to his gross income.

25. Officer Rawbone ultimately concluded that Dr Rizvi's investments in Kerris, Ellenglaze, Talland, Addington, and Quoit were not eligible for EIS relief as the companies had not been authorised under section 204(3) ITA 2007 to issue compliance certificates and Dr Rizvi could not therefore hold a valid EIS3 in respect of any of them.

26. Officer Rawbone explained that he considered Dr Rizvi's careless behaviour to be his failure to observe the EIS rules by claiming relief where appropriate approval to the scheme had not been given, in other words, Dr Rizvi made claims without being in possession of the form EIS3. Whilst Dr Rizvi states that he relied on his agent, who he considered to be a professional, Officer Rawbone considers that this is not enough for him to meet his responsibilities to ensure his SATRs were correct. In his view, Dr Rizvi should have checked that he met the eligibility criteria, and had he followed the steps a reasonable and prudent taxpayer would have, he would have known he was ineligible to claim EIS relief.

27. Officer Rawbone took us to the HMRC Form SA101 (Additional information notes), which contains this passage:

> "Box 2 Subscriptions for shares under the Enterprise Investment Scheme
> You can claim tax relief if you received:
>
> • form EIS3, 'Enterprise Investment Scheme Certificate and claim to relief' from the company you invested in
>
> • form EIS5, 'Enterprise Investment Scheme' from the fund manager of an approved investment fund
>
> Put the amount on which relief is being claimed, up to £1 million, in box 2.
> You must also give us details about each investment in box 21 on page Ai 4"

In all of Dr Rizvi's returns, boxes 2 and 21 have been completed and the relevant companies are referred to.

28. He also took us to the information memoranda for Kerris in the hearing bundle. It contained a section dealing with the EIS regime, which contained the following passage:

> "The Company is raising finance to fund the development and production of the Films in such a way so as to enable Investors to qualify for tax benefits under the Enterprise Investment Scheme ("EIS"). The Company will operate a qualifying trade under the rules of the EIS, for which advance assurance is being sought from HMRC.
>
> Investors in the Company will be able to claim EIS Reliefs on receipt of EIS Compliance Certificates, which will be issued to Investors by the Directors following each Investment and after approval by HMRC."

29. Copies of offering documents for Talland, Ellenglaze and Addington were also in the hearing bundle. Officer Rawbone took us to the corresponding (identical) passages in the information memoranda for those share issues.

30. Officer Rawbone also considers that a person acting on Dr Rizvi's behalf, McKenzie Knight, was at least careless in advising or making the returns on Dr Rizvi's behalf, without taking reasonable case to ensure Dr Rizvi was entitled to claim the relief.

DR RIZVI'S EVIDENCE

31. Dr Rizvi explained that he has been a medical doctor for over 40 years and was a consultant working in the NHS looking after elderly patients. He said that he was always meticulous in managing his patients and their care. As a result of Covid, he has been seriously ill in hospital. He said that he was nearly on his death bed and lost over 12kg in weight. He developed prostate cancer and needed extensive surgery. He has been unable to work for quite some time and since the pandemic his private practice has collapsed. His situation now is very different from that which obtained in 2015/16 and he is just not able to do what he did before. As a result of all of this, he says, he is not in a position to pay the amount of tax HMRC has assessed.

32. Dr Rizvi said that he always submits his SATR by 31 January after the end of the relevant tax year. Historically, this has always been accepted by HMRC and in his view they have a duty to tell him if there are any mistakes in his return. HMRC are querying a number of investments over three tax years. In Dr Rizvi's view HMRC were aware of these investments and at no stage did HMRC alert taxpayers and tell them that something wasn't right with them. He is not arguing that everything is right with his investments, but his point is that he made a genuine investment and HMRC have a duty to identify errors. They have missed a deadline and now they are trying to claim, on the basis of carelessness, that they can raise tax assessments late. He regards it as an insult for HMRC to accuse of him of being careless; he has always been meticulous in all aspects of his life.

33. Dr Rizvi explained that he had been with McKenzie Knight since 1993 and they had never let him down. They always filled in his tax returns for him. He sent them information in good time (bank statements and other papers they asked for) and they calculated the tax for him. They would always ask Dr Rizvi to have a look at the return and he might raise some questions, but fundamentally he expects his accountant to complete the forms and get it right. When people come to him as a doctor, they ask for his expert opinion and he gives it to them and he doesn't expect (and generally isn't asked) to explain why. He takes the same approach with his accountants.

34. Dr Rizvi had dealt with Philip Cowman (the owner of McKenzie Knight) since 1993 and in 2015 he suggested making EIS investments and introduced him to Ben White and said that he would take the lead in dealing with the investments. He was told that they were all approved and were fully qualifying. Mr Cowman had. Each time Dr Rizvi made an EIS investment it was on the basis that Ben White told him that it was approved and the company was waiting for the EIS3 certificate. Dr Rizvi stressed the need to make investments within a particular period of time, and it was common for compliance certificates to follow. He had received a number of EIS3's, and indeed produced some to the Tribunal in the court of his evidence. Miss Arnold put it to him that that meant that he was aware of the requirement of submitting the EIS3. Dr Rizvi said that he knew one would be needed, but he would often make investments on the basis that the EIS3 would be forthcoming. He was assured that this would be the case and so went ahead with investments. He criticised HMRC for not realising that he had made a claim without an EIS3 at the time. In Dr Rizvi's view, HMRC had his tax returns and had had plenty of time to review them and they had missed the boat.

35. Ms Arnold asked Dr Rizvi whether, when his tax return was completed, he was still waiting for EIS3's. He said that he had no idea a certificate was needed by them, McKenzie Knight would have known and he would have expected them to tell him he couldn't claim if that was the case. EIS3's regularly came along after he had made an investment and so not having one by a particular time never concerned him.

36. Dr Rizvi agreed with Miss Arnold that he did look through his tax return and checked what was in them. Following on from that, she asked him whether he understood the need to be sure that his EIS relief claims were correct. Dr Rizvi said that he saw no reason to suspect anything untoward. He had made the investments on the basis of an assurance that they were valid.

37. Miss Arnold took Dr Rivzi to the tax return guidance, which stresses the need for an EIS3. Dr Rizvi said that he was not disagreeing that he needed one. He said he just did not realise this at the time.

38. Miss Arnold took Dr Rizvi to the guidance notes for completing self-assessment tax returns and also the EIS help sheet, both of which make it abundantly clear that a claim for EIS relief must be accompanied by an EIS3. Dr Rizvi said that he did not have these at the time he made his claims. Miss Arnold put it to Dr Rizvi that he was making an EIS relief claim without checking the guidance and requirements. Dr Rizvi said that he hired his accountant to do the right thing for him. He is an experienced, senior doctor and he can't be a lawyer and an accountant as well.

39. Miss Arnold took Dr Rizvi to the offering documents for shares in Kerris, Talland, Ellenglaze and Addington. All of these documents say that the company will operate a qualifying trade and is seeking advance assurance of this, but makes it very clear that an investment can only be made with an EIS3. Dr Rizvi said that he would not necessarily have or read any information memoranda. He made his investments on the basis of recommendations from his accountants. He knew that investments needed to be made within a particular period, but EIS3 certificates would regularly follow. He would be sent these by McKenzie Knight from time to time and he would keep them. He made a number of investments without holding an EIS3 at the time. He knew that his accountants had selected a small number of investment opportunities out of what he described as a couple of hundred investment opportunities and he had been told that the opportunities offered to him were the best investments, they were in reputable companies and there was nothing untoward and it was expected that the tax requirements would be met.

40. Miss Arnold put it to Dr Rizvi that he was making EIS claims without checking the relevant guidance. Dr Rizvi's reply was that he hired accountants to do the right thing for him. He is an experienced, senior and very effective doctor but he can't be a lawyer and an accountant as well. He agreed that he didn't discuss EIS claims in any detail. He was assured by Mr Cowman that everything was in order and he trusted his accountants, who had looked after him successfully for a long period. He accepted Miss Arnold's assertion that he "blindly followed" his agent's advice. Dr Rizvi said that he was confident that his accountants had the information they needed. He was careful in his dealings with the patients and with these investments he trusted his accountants who told him that all the investments qualified and met the requirements.

DISCUSSION

41. In order to resolve this matter, we need to decide three things. Firstly, whether Dr Rizvi himself was careless in making claims for EIS relief without at that time holding an EIS3. Secondly, if we conclude that Dr Rizvi was not careless, whether McKenzie Knight (or someone else) was acting on his behalf in completing his tax returns and making EIS

relief claims. Thirdly, if there was such a person, whether that person was careless in the way they completed Dr Rizvi's relevant tax returns.

42. Dealing first with the position of Dr Rizvi, it is abundantly clear from the evidence that Dr Rizvi relied on McKenzie Knight. They had looked after him, without any problems, since 1993 and he clearly placed a lot of trust and confidence in them. There was no reason for him to think that there would be any particular problems with tax returns or claims they prepared for him. By the time he made the claims we are considering, McKenzie Knight had a "track record" of looking after Dr Rizvi well for a period in excess of 20 years. They were a well-established, competent firm of accountants.

43. The relationship between Dr Rizvi and McKenzie Knight is very similar to the relationship between Mr Hicks and Mr Bevis in *John Hicks*. In the Upper Tribunal's words (cited above) Mr Bevis' involvement "obviously reduced the need for Mr Hicks himself to form his own independent view as to the relevant matters and we consider that it would be wrong to hold that Mr Hicks was careless for failing to do due diligence and pay attention to the detail in the ways alleged by HMRC". The alleged carelessness on Mr Hicks' part was not of an administrative nature; the criticism levelled against Mr Hicks was that he had not properly reviewed and considered whether a particular pre-packaged avoidance scheme worked at all and its suitability for him.

44. Mr Bevis was wholly unqualified to help Mr Hicks form a view on those points, but that was not something that Mr Hicks was aware of. There is no suggestion here that McKenzie Knight (whether before or after its acquisition by White & Co) was not competent to undertake the tasks it did.

45. HMRC's criticism of Dr Rizvi is different from its criticism of Mr Hicks. The criticism of Dr Rizvi is that he did not make sure that, before any relevant EIS claims were made, he was in possession of a form EIS3. There were hints, in the course of Miss Arnold's questioning of Dr Rizvi, that HMRC take the view that he was insufficiently inquisitive about the EIS claims he was making, but this is no part of their criticism of him, which is confined to his making claims without an EIS3. They criticise for him for being unaware of the requirement, not reading the guidance HMRC produce or paying attention to, and realising the importance of, the relevant comments in the offering documents. Dr Rizvi's answer to this, which repeated on a number of occasions before us, is his complete reliance on McKenzie Knight, who introduced him to the idea of making EIS investments in general and particular investments from time to time. They dealt with all aspects of these investments, just as they dealt with processing his tax return on the basis of the raw information he sent them every year.

46. We are with Dr Rizvi on this point. McKenzie Knight had looked after him for well over 20 years and had done so well. They were appropriately qualified to look after his tax returns. Judging Dr Rizvi's behaviour by the standards of a prudent and reasonable taxpayer, it does not seem to us to be imprudent or unreasonable for a taxpayer to assume that a well-qualified firm of accountants would make sure that any formal requirements needed before a particular tax position could be adopted (here, a relief claimed) had in fact been obtained. This is not an area where the person preparing the tax return needs to discuss a position or obtain information from the taxpayer. The return preparer simply needs to make sure that they have had sight of the required form. In the case of Dr Rizvi's EIS investments, these forms had always come through McKenzie Knight. It was not careless of Dr Rizvi to assume that the accountants preparing his tax return would deal with mechanical, administrative tasks such as making sure that any required paperwork had been obtained.

47. Whether it was careless of Dr Rizvi to have taken such an uncritical approach to his involvement in making EIS investments (particularly on the very large scale he did) is a different question altogether, but this is not a criticism that HMRC have made of him in these proceedings. Their criticism is that he was careless in not checking for himself that the required HMRC forms had been obtained, and we consider that this is a mechanical exercise which it would be perfectly reasonable and prudent to leave to accountants.

48. Given our finding that Dr Rizvi himself had not been careless, we need to turn to see whether there is a person who was "acting on behalf of" Dr Rizvi as regards the submission of his tax returns and the making of these EIS claims and whether that person was careless.

49. We are entirely satisfied that McKenzie Knight was "acting on behalf of" Dr Rizvi so far as these matters are concerned. Although they gave Dr Rizvi some advice (introducing him to the idea of making EIS investments and then suggesting particular investment opportunities), their role went far beyond that. They are identified on his tax returns as his agent and, as Dr Rizvi has explained, they completed his tax returns for him on the basis of information he supplied. They represented, and did not merely provide advice to, Dr Rizvi.

50. The next question, which we can deal with equally briefly, is whether when they performed those functions McKenzie Knight were careless in not making sure that Dr Rizvi had an EIS3 for each EIS claim he was making. The short answer to that question is yes. As we have discussed in the context of answering the question whether Dr Rizvi was himself careless, checking whether there was an EIS3 is a relatively mechanical, undemanding exercise. The need for it is obvious. It should be at the forefront of the mind of any firm whose clients make EIS investments, even more so in the case of a firm like McKenzie Knight (both before and after its acquisition by Mr White's firm) where that firm promoted EIS opportunities actively to its clients. Even a firm which did not "sell" EIS opportunities and simply prepared tax returns for individuals should have been aware from the material produced by HMRC (if not from their study of the primary legislation) how important holding an EIS3 was. To allow a client to make a claim for EIS relief without making sure that the client held a valid EIS3 is carelessness of a high order.

DISPOSITION

51. We have determined the issues before us as follows:

(1) As far as section 29(1) TMA 1970 is concerned, the insufficiency of tax arising from Dr Rizvi's invalid EIS relief claims is not a situation brought about by carelessness on the part of Dr Rizvi, but it was brought about by carelessness on the part of McKenzie Knight and they were a person acting on behalf of Dr Rizvi.

(2) So far as section 36 TMA is concerned, the loss of income tax which HMRC's assessments seek to remedy was not brought about carelessly by Dr Rizvi, but it was brought about by carelessness on the part of McKenzie Knight and they were a person acting on behalf of Dr Rizvi.

52. In consequence, HMRC were entitled to raise the three discovery assessments in question, despite Dr Rizvi having submitted a SATR for the relevant years of assessment, and they could do so at any time up to the end of a period of six years after the end of the relevant year of assessment.

53. It follows that this appeal must be, and is, dismissed and the three discovery assessments are confirmed in the amounts mentioned in paragraph [5] above, namely £90,000 for the year ended 5 April 2015, £89,826.58 for the year ended 5 April 2016 and £75,000 for the year ended 5 April 2017.

Right to apply for permission to appeal

54. 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.

MARK BALDWIN
TRIBUNAL JUDGE

Release date: 13th FEBRUARY 2023