



Neutral Citation: [2022] UKFTT 00456 (TC)

Case Number: TC08661

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Exeter Crown and County Court
Southernhay
Exeter

Appeal references: TC/2011/04539
TC/2016/04146

PAYE – whether tax deducted and paid by company – claim to offset PAYE against partnership scheme losses - no evidence that PAYE deducted and paid – no offset available

Heard on: 16 – 17 August 2022
Judgment date: 05 December 2022

Before

**TRIBUNAL JUDGE RACHEL SHORT
MOHAMMED FAROOQ MEMBER**

Between

JAMES STUART BAILLIE

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Baillie the Appellant in person

For the Respondents: Ms Browne litigator of HM Revenue and Customs’ Solicitor’s Office

DECISION

INTRODUCTION

1. These appeals by Mr Baillie the Appellant are against closure notices and discovery assessments issued by HMRC for seven tax years:
2. Closure Notices:
 - (1) 2003-4 issued on 12 February 2016 reducing Mr Baillie's overpayment from £1,453,625 to £2.50
 - (2) 2004-5 issued on 29 November 2010 nil assessment.
 - (3) 2005-6 issued on 29 November 2010 nil assessment.
 - (4) 2006-7 issued on 29 November 2010 £331,888 assessed.
3. Discovery Assessments:
 - (1) 2009-10 issued on 12 March 2014 £60,770.00 assessed.
 - (2) 2010-11 issued on 12 March 2014 £71,319 assessed.
 - (3) 2011-12 issued on 12 March 2014 £82,698.
4. The points at issue between the parties are, first whether the closure notices and discovery assessment have been validly issued and second, the quantum of the tax due, in particular by reference to a payment of PAYE which Mr Baillie says was made by the company of which he was a director, Baillies Limited, to HMRC in 2004 and which he seeks to have repaid to him as a result of claiming "sideways relief" for tax losses arising from two film partnership schemes (the "Partnership Losses").

Preliminary issues

Late evidence from HMRC.

5. HMRC submitted a witness statement of their officer, Fiona Deakin late, on 21 July 2022. Tribunal Judge Poole decided on 21 July 2022 that this evidence should be allowed despite having been served late unless Mr Baillie objected. At the hearing Mr Baillie confirmed that he had no objection to the late evidence being admitted.
6. HMRC produced additional documents at the start of the hearing on 16 August 2022, including a bundle of authorities and replacement pages for the hearing bundle. Mr Baillie objected to these documents being produced at such a late stage. Having considered the content of the documents the Tribunal concluded that they should be admitted. Despite having been served late the nature of the documents (case authorities and replacements for illegible or wrongly inserted documents) did not give rise to any serious risk of prejudice to Mr Baillie.

The invalid closure notice

7. HMRC issued a closure notice on 12 September 2006 in respect of Mr Baillie's self-assessment tax return for the 2003-4 tax year. Mr Baillie appealed against that closure notice and by a decision of 29 January 2016 the Tribunal concluded that the closure notice was not valid.
8. A new closure notice was issued for the 2003-4 tax year on 12 February 2016.

The application of the PAYE Regulations

9. At the hearing on the 16 August 2022 HMRC could not provide an explanation of the legal basis on which they had decided:

(1) not to include the PAYE debt as part of HMRC's debt claims against Baillies Limited when it went into liquidation because any such debt would have been covered by the partnership losses available to Mr Baillie.

(2) in 2006 when a closure notice was issued to Mr Baillie for the 2003-04 tax year, not to make a Regulation 72 direction against Mr Baillie (which would have transferred the PAYE obligation to him as an individual) because there would be no tax to pay (because of the partnership losses) and the conditions for making a Regulation 72 direction were not satisfied.

10. Given the significance of these issues to Mr Baillie's arguments, the Tribunal adjourned the hearing and asked HMRC to provide written explanations of their technical position on both of these points. That information was provided on 27 September 2022 and Mr Baillie provided his written response on 5 November 2022. This decision is written on the basis of those further submissions by the parties.

Agreed issues

11. It is not disputed that Mr Baillie claimed and has the right to utilise UK tax losses amounting to £3,642,125 arising from two film partnership transactions, the Third Close Film Fund No 3 Partnership and Grosvenor Park 2001 Partnership (the Film Partnerships).

12. The PAYE for which Mr Baillie seeks a repayment is PAYE due on a director's bonus, paid through his director's loan account by Baillies Limited of which Mr Baillie was a director. A bonus payment of £2,607,600 was recorded as made by Baillies Limited in Mr Baillie's directors loan account on 6 April 2003 and that is the date on which it is treated by HMRC as having been paid for tax purposes.

Background facts

13. Mr Baillie was the director of Baillies Limited from 2 September 1999. A winding up petition was made against that company on 31 December 2003.

14. Mr Baillie claimed losses of £1,900,027 in his self-assessment return for 2001-2 arising from the Grosvenor Park 2001 Partnership carried back against his personal tax liability for 2000-2001.

15. Mr Baillie became a member of the Third Close Film Fund No 3 Partnership on 1 May 2003. Mr Baillie's partnership page for 2003-4 showed losses of £3,624,125.

16. Mr Baillie was charged with conspiracy to cheat the Revenue and conspiracy to launder the proceeds of criminal conduct on 14 April 2004. A Restraint Order was made against Mr Baillie on 10 May 2004 and a Receiver was appointed on 24 May 2004

17. Mr Baillie was acquitted of all charges on 15 June 2006 and left the UK on 30 June 2006.

18. HMRC issued a final proof of debt against Baillies Limited on 23 September 2013. That did not include the disputed PAYE liabilities.

19. Mr Baillie's appeals are against closure notices issued for each of the April 2004 to April 2007 tax years and discovery assessments issued for each of the April 2010 to April 2012 tax years.

20. The issues in dispute as described in HMRC's skeleton argument are:

(1) Whether for the 2003-04 tax year, Mr Baillie's earnings (through his director's loan account) were £4,425,000 with tax deducted and paid (as Mr Baillie alleges) or £2,607,600 with no deduction of tax (as HMRC argue).

(2) Whether Mr Baillie is liable for tax on a share of profits from his Film Partnership investments for each of the relevant years under appeal.

(3) Whether the discovery assessments issued by HMRC on 12 March 2014 for the 2010 to 2012 tax years were valid.

EVIDENCE SEEN AND HEARD:

Witness statements

21. We saw witness statements from:

- (1) Mr Baillie dated 19 December 2020
- (2) Mr Baillie's ex-wife, Rebecca dated 2 April 2017
- (3) HMRC Officer Fiona Deakin dated 14 July 2022.

Written evidence

We also saw:

22. Letter from DPC accountants to HMRC dated 25 February 2005 referring to the reason why the PAYE debt was not paid and stating that no PAYE payment had been made saying:

“there was no payment by way of cheque or bank transfer. There was simply a credit to the director's loan account” and “The PAYE and NIC was not paid over to the collector due to insufficient sums being available in the company. As you are aware, the company went into liquidation in February 2004”.

23. Letter from Mr Baillie's solicitors dated 29 August 2006 setting out their claim for damages in respect of the failed prosecution of Mr Baillie for MTIC fraud.

24. Accounts of Baillies Limited for the years ended 31 July 2002 and 2003 showing the director's loan account with a credit of £1,361,732 for the July 2002 year and other taxes and social security costs as £2,393,072, for the 2003 year the figure of £2,607,660 in the director's undrawn loan account.

25. Liquidators report dated 8 October 2012 between the Liquidator, Mr Baillie and Baillies Limited among others.

26. HMRC final proof of debt dated 23 September 2013 in respect of Baillies Limited referring to corporation tax and interest only.

27. Final Report to Creditors in respect of Baillies Limited dated 26 April 2016 referring only to corporation tax.

28. Restraint Order Prohibiting Disposal of Assets of 12 May 2004 referring to extensive restrictions on Mr Baillie and his wife on dealing with their assets and bank accounts, and stating that Baillies Limited should not dispose of the properties listed, deal with the vehicles listed or deal with the bank accounts held in the name of other Baillie group companies. No restrictions are imposed on Baillies Limited access to its own bank accounts or funds for paying tax.

Oral evidence

Mr Baillie

29. We heard extensive oral evidence from Mr Baillie who expressed his frustration with the way he had been dealt with by HMRC and his belief that the disputed PAYE had been allocated and paid to HMRC in 2003.

30. In respect of the statements to the contrary by his advisers, Mr Baillie insisted that they had made those statements without his authority at a time when they were not being paid by him.

31. Mr Baillie was also clear, that despite HMRC's statements, at the time when Baillies Limited was in liquidation, the liquidators had control of all of the company's assets, including its ability to deal with its tax affairs.

Ms Deakin

32. Ms Deakin told us about the process of issuing the discovery assessments for the 2009-10 to 2011-12 years and confirmed that Mr Baillie had not submitted tax returns for any years after 2006.

THE LAW

Closure Notices

33. The closure notices were issued under s 28A Taxes Management Act 1970.

Discovery assessments

34. The discovery assessments were issued under s 29(1)(a) Taxes Management Act 1970

Sideways loss relief

35. Sideways loss relief is available under s 380 Income Taxes Act 1988 (for years up to April 2007) and s 64 Income Tax Act 2007 for later years.

PAYE Regulations

36. The PAYE Regulations under which PAYE can be charged to Baillies Limited or Mr Baillie are SI/2003/2682 Income Tax (Pay As You Earn) Regulations 2003 and in particular Regulations 72, 80 and 185.

37. We were referred to these case authorities

(1) *R v Commissioners of Inland Revenue ex parte McVeigh* [68]TC 121

(2) *HMRC v Stephen West* [2018] UKUT 0100 (TCC)

(3) *Stephen Hoey & Others v HMRC* [2022] EWCA Civ 656

38. The onus of proof is on HMRC to demonstrate that the Closure Notices and Discovery Assessments have been validly issued.

39. The onus of proof is on Mr Baillie to demonstrate to the civil standard of proof that the PAYE payment has been made to HMRC and that therefore he can utilise the Partnership Losses to make a tax reclaim of £1.4 million.

MR BAILLIE'S ARGUMENTS

Background facts

40. Mr Baillie told us that he had worked his way up in the mobile phone industry as a successful salesman culminating in setting up his own companies. As a major player in that

market, he was aware of the “MTIC fraud” schemes and had been through multiple visits from HMRC to his business, who had told him he was doing nothing wrong.

41. His business and personal life started to go wrong when he was falsely accused of involvement in an MTIC scheme and prosecuted on the basis of evidence which he says was fabricated. He spent some time in prison and endured an 8-month trial before he was acquitted.

42. In 2003, he decided to close Baillies Limited down to minimise any risk of being implicated in MTIC fraud. He was not involved with and did not understand the details of the accounts and finances of Baillie Limited. However, he understood and his accountants understood that in order for his investment in the Film Partnerships to work, the PAYE for 2003 had to be paid, which he believed had been done.

43. If it was not possible for Baillies Limited to make the PAYE payment, his intention was that the tax due should be paid by another group company. In the event, this was not possible because of the freezing order which was made in May 2004.

PAYE repayment

44. Mr Baillie said that he understood, on the basis of advice from the accountants who had advised him on the Film Partnerships that he would obtain a cash flow advantage because any tax due (PAYE) on his bonus would be offset by the Partnership Losses and he would only pay tax on the partnership profits going forward.

45. Mr Baillie accepted that Baillie Limited had not paid the PAYE on time, but said that it was reasonable for Baillie Limited to retain the PAYE tax due to pay at a later date, which is common practice.

46. Mr Baillie accepted that the PAYE had not actually been paid by Baillie Limited or any other company in the group, but insisted that it was included in Baillie Limited’s accounts for the period to 31 July 2003 as “undrawn emoluments” of £2,607,660 (at Note 11).

47. If his assets had not been frozen, the PAYE would have been paid and the losses could have been claimed against the amount of tax due. He was falsely accused of being involved in a tax fraud for which he was completely acquitted. Mr Baillie said

“The intent was always there, the planning was always there, but the events surrounding the misconceived attempted prosecution prevented events taking their proper course”.

48. The money was left in the company to pay the tax. Mr Baillie believes that the tax was paid. Mr Baillie says that the reference in the 2003 accounts to the £2,607,660 as “directors unpaid emoluments” shows that it was an indication that tax had been deducted at source prior to the net amount being credited to his director’s loan account.

49. The PAYE debt should have been included in the liquidation settlement of Baillies Limited in 2004, but HMRC decided not to include it. If it had been included, it would have been treated as paid as part of the full and final settlement of Baillies Limited’s debts under the liquidation in 2012. In Mr Baillie’s words

“When Baillies Limited went into liquidation, the accountants dealing with the closure either did not deal with this in the way that was intended. HMRC undoubtedly had a hand in the finalization of the accounts.... and I would hazard a guess they chose not to put the PAYE debt into the final accounts”

50. It is not correct, despite the statement from Baillies Limited’s accountants (DPC) in 2005 that the company did not pay the PAYE owing because it did not have the funds to pay. At the time when DPC gave this response to HMRC he was not paying their fees and they did not give a proper response to HMRC.

51. In any event by this time, it was the receiver, not Mr Baillie or his agents who were in control of Baillies Limited and HMRC should have asked the receiver about the PAYE debt but did not do so.

52. It was not the case that he did not fulfil the requirements for a Regulation 72 Notice (Regulation 72(4)(b)); at the relevant time, as a result of the “freezing order” he had no control over any of his assets, including any tax reclaims. It was the receiver, Kroll who raised questions with HMRC about the £1.4 million of PAYE.

Partnership profits

53. No profits have been received by him from the Film Partnerships and he should not have to pay tax on profits which he has never received.

Discovery assessments

54. Mr Baillie did not dispute that the discovery assessments or the closure notices were properly and validly issued. Rather, his complaint concerned the manner in which he had been treated by HMRC since 2004 which he described as a one-man battle against HMRC’s persecution. HMRC seemed to want to “have their cake and eat it” and who had intentionally acted to ensure that he could not utilise the Partnership Losses against the PAYE liabilities.

55. Despite the agreement with the liquidator, HMRC tracked down Mr Baillie in France. Mr Baillie believed that the liquidation order meant that no more monies were due and that the PAYE had been paid, but HMRC continued to pursue him.

HMRC ARGUMENTS

PAYE payments

56. HMRC say that there is no evidence that the PAYE due from Baillies Limited was ever paid. Mr Baillie has been asked to provide evidence that it has been paid, but no evidence has been provided by him. It is not possible to make a repayment of tax which has not been paid.

57. Payment for these purposes must entail more than a mere accounting entry and must be an actual cash payment: see *McVeigh*

“In these circumstances I consider that it would be a misuse of language to say that the book-keeping and accounting alone, without actual payment, and without any of the procedures which the Regulations require, constituted a deduction of tax from the gross payment” [pg 10].

58. The only evidence provided by Mr Baillie is the accounts of Baillies Limited for the 31 July 2003 period showing a bonus of £2,607,660 in Mr Baillie’s director’s loan account. No evidence has been provided that Mr Baillie was actually entitled to a bonus of £4.25 million or that PAYE of £1.7 million on that amount had been paid. HMRC referred to the decision in *Stephen West* (which considered *McVeigh*) and elaborated:

“In such circumstances, it seems to us, as a matter of law, no amount of bookkeeping or other “making of a record” can amount to a true deduction of tax”. [58]

59. Mr Baillie’s advisers confirmed (in their letter of 25 February 2005) that the PAYE was not paid on behalf of the company.

60. The losses from the Partnership are still available to Mr Baillie to be offset against other profits, (including the profits generated by the Film Partnerships for later tax years) but not against the PAYE, because this has never been paid.

61. In response to the Tribunal's request for more technical analysis of the reasons why, despite accepting that the PAYE liability could in theory have been transferred to Mr Baillie in his capacity as a director of Baillie Limited under s72 of the 2003 PAYE Regulations, HMRC decided not to take this course of action when the original closure notice was issued in 2006 HMRC said that:

(1) HMRC have a discretion to decide whether to collect tax through Regulation 80 or Regulation 72, depending on the circumstances of each case. In this case, their decision was driven by the fact that Baillies Limited was already in liquidation at the time when they opened an enquiry into Mr Baillie's tax return. The insolvency of Baillie Limited was the main reason why HMRC decided to take the Regulation 72 route.

(2) The application of Regulation 72 interacts with Regulation 185 and s 59B Taxes Management Act 1970. HMRC amended Mr Baillie's tax return to reduce his employment income to the credit on his director's loan account and removed the credit for PAYE deducted. Mr Baillie's available partnership losses covered the entirety of his income for the year and only a very small credit was available to Mr Baillie (£2.50 for tax deducted from his savings income).

(3) On the basis that no PAYE was deducted from Mr Baillie's earnings, there is no amount available for credit under s 59B and therefore neither is any credit available under Regulation 185(5).

(4) Only if a credit was due under Regulation 185(5) would a Regulation 72 direction be made.

(5) It is not correct to describe the Regulation 72 direction as a "paper exercise"; since there was no credit under Regulation 185, a Regulation 72 direction was simply not necessary.

(6) HMRC also point out that on the authority of *Hoey* the First-tier Tribunal does not have jurisdiction to consider the availability of a credit under Regulation 185, since that depends on the exercise of wide discretionary powers granted to HMRC by s 684 ITEPA 2003.

Partnership profits

62. As for tax on the partnership profits, the accounts and tax returns provided by the two partnerships show that profit was allocated to Mr Baillie in his capacity as a partner for the years in question. It is not an issue for HMRC if Mr Baillie is claiming that those monies were never paid to him.

Discovery Assessments

63. The discovery assessments have been properly made in accordance with s 29 TMA 1970 and were made in time. Mr Baillie did not submit any tax returns for the 2006-7 and subsequent tax years and therefore the only conditions which need to be fulfilled are those at s 29 (1)(a).

64. HMRC accepted that the discovery assessments (for each of the 2009-10 to 2011-12 tax years) needed to be adjusted down to remove rental income which had incorrectly been included for years after the property had been sold.

DISCUSSION AND DECISION

Findings of fact

65. On the basis of the evidence seen and heard we find as a fact that:
- (1) The only evidence provided by Mr Baillie of the PAYE payment having been made to HMRC is the entry in his director's loan account for 6 April 2003 of an amount of £2,607,600.
 - (2) No PAYE debt was included in the liquidation accounts of Baillies Limited.
 - (3) No other company in the Baillie group paid an amount representative of the PAYE to HMRC.
 - (4) Had the PAYE been paid as planned by Baillies Limited or another group company it would have been paid late.
 - (5) The freezing order which was imposed by HMRC in May 2004 did impose extensive restrictions on Mr Baillie's access to assets and bank accounts, but did not specifically restrict Baillies Limited from accessing its own bank account.

The Discovery Assessments

66. HMRC have accepted that the quantum of the discovery assessments for each of the years is incorrect. However, no challenge has been made by Mr Baillie to the validity of those assessments. We therefore accept, on the basis of s 29(1)(a) Taxes Management Act 1970 that those discovery assessments were validly made.

The Closure Notices

67. Similarly, while Mr Baillie objected to the manner in which he was dealt with by HMRC, we did not see or hear any evidence from him which persuaded us that the Closure Notices issued by HMRC should not be treated as valid.

The PAYE repayment

68. The core of Mr Baillie's appeal is that:
- (1) The PAYE was actually paid through his director's loan account at Baillies Limited to HMRC.
 - (2) If it was not actually paid, it was his intention that it should have been paid and the statements made in correspondence by his advisers are incorrect.
 - (3) If it was not actually paid, the main reason for this was because of the freezing order imposed by HMRC in 2004 which meant that he was no longer in a position to make any payments out of the company.

69. On the basis of the evidence which we saw and heard we have concluded that, while the PAYE might have appeared as an entry in Mr Baillie's director's loan account, there is no evidence that it was actually paid to HMRC. Unfortunately for Mr Baillie, for these purposes, as stated in the *McVeigh* decision, the mere entry in the accounts of a company is not sufficient to amount to payment. In order to succeed, Mr Baillie needs to show that payment of this amount was actually paid to HMRC and he has not been able to show that.

70. Equally, any intention by Mr Baillie that the payment should have been made can also not change the fact of whether the payment was actually made.

71. Finally, we understand Mr Baillie's protestation that from May 2004 after the freezing order was imposed, he was not able to make any payments, but note, as HMRC pointed out, that by the time that freezing order was imposed, the PAYE payment was already late (the due date for payment was May 2003).

72. We have gone on to consider whether HMRC followed the correct procedure in deciding not to issue a Regulation 72 on Mr Baillie. Again, we understand why Mr Baillie feels that this was a strategic decision by HMRC in order to ensure that he could not claim the Partnership Losses as credit against the PAYE. That is the reason why we insisted that HMRC provided additional analysis of why they had chosen not to take this course, since it appeared to us that this could have been done.

73. However, having considered the additional analysis provided by HMRC and in particular the interaction of s 59B Taxes Management Act 1970 and Regulation 185 we have concluded that, on the basis that no PAYE had been paid by Baillies Limited, and that the Partnership Losses had been used to reduce Mr Baillie's tax liabilities to £2.50 for the relevant year, HMRC were acting within the terms of the regulations in concluding that since no credit was payable under Regulation 185, there was no basis to make a Regulation 72 direction on Mr Baillie.

74. For the same reasons, we have concluded that HMRC were correct not to include the PAYE in the debts settled by the liquidator, since from their perspective, no income tax was due from Mr Baillie or Baillies Limited at that time.

75. For these reasons HMRC's assessments on Mr Baillie are confirmed and these appeals are dismissed.

76. This decision is given in principle, but Tribunal notes that:

(1) HMRC agreed at the tribunal that the Discovery assessments would be reduced to remove rental income incorrectly included.

(2) HMRC agreed at the tribunal that the remaining Partnership Losses (for 2008, 2009 and 2010) could be used to offset additional taxable earnings from the partnerships for later years.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

77. 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.

**RACHEL SHORT
TRIBUNAL JUDGE**

Release date: 05th DECEMBER 2022