ERROR OR MISTAKE – claim for relief – whether an agreement made during the course of enquiries leading to a notice of completion and the amendment of a self-assessment precludes the making of a claim – no – if so, whether there was an agreement – appeal allowed – TMA 1970 Ss 28A(3) and (5) and 33

THE SPECIAL COMMISSIONERS SpC 00303

PAUL WALL

Appellant

- and -

THE COMMISSIONERS OF INLAND REVENUE

Respondents

SPECIAL COMMISSIONER : DR NUALA BRICE

Sitting in London on 17 September 2001

Peter White, FCCA, of Messrs P White & Co, for the Appellant

Barry Williams, London Regional Advocacy Adviser, for the

Respondents

DECISION

The appeal

1. Mr Paul Wall (the Appellant) appeals against a refusal of a claim for error or mistake relief contained in a letter to him of 8 January 2001. That letter referred to revised tax computations and accounts for the years 1996/97 and 1997/98 which had been submitted by the Appellant's representative and which had been treated as a claim for error or mistake relief. The revisions concerned the deduction of expenses of a van and a motor car which the Appellant claimed had been used for business purposes. The reasons for refusing the claim were stated as:

"That there was no error or mistake on the returns for 1996/97 and 1997/98 as these were amended by yourself following discussions and correspondence with the Inspector.

"That, if the above reason is incorrect, there is no error or mistake as the additional expenses claimed are not allowable as business expenses and the capital allowances claimed on your car are not due."

2. The "discussions and correspondence" referred to in the decision letter took place after the Inspector of Taxes had given notice under section 9A of the Taxes Management Act 1970 (the 1970 Act) of her intention to enquire into the Appellant's tax returns and before the issue of a completion notice under section 28A(5) of the 1970 Act and the Appellant's amendment of his self-assessment under section 28A(3).

The legislation

3. At the relevant time the relevant parts of section 28A provided:

"(3) At any time in the period of 30 days beginning with the day on which the officer's enquiries are completed, the taxpayer may so amend his self-

assessment –

(a) as to make good any deficiency or eliminate any excess which, on the basis of the conclusions stated in the officer's notice under subsection (5) below, is a deficiency or excess which could be made good or eliminated under subsection (4) below …

(5) Subject to subsection (6) below, the officer's enquiries shall be treated as completed at such time as he by notice -

(a) informs the taxpayer that he has completed his enquiries, and

(b) states his conclusions as to the amount of tax which should be contained in the taxpayer's self-assessment and as to any claims or elections into which he has enquired."

4. The entitlement to error or mistake relief is contained in section 33 of the 1970 Act. At the relevant time the relevant parts of that section provided:

"33 Error or mistake

"(1) If any person who has paid tax charged under an assessment (whether under section 9 or 11AA of this Act or otherwise) alleges that the assessment was excessive by reason of some error or mistake in a return, he may by notice in writing at any time not later than

(a) in the case of an assessment to income tax or capital gains tax, five years after the 31st January next following the year of assessment to which the return relates; …

make a claim to the Board for relief.

(2) On receiving the claim the Board shall inquire into the matter and shall, subject to the provisions of this section, give by way of repayment such relief in respect of the error or mistake as is reasonable and just.

(2A) No relief shall be given under this section in respect of-

(a) an error or mistake as to the basis on which the liability of the claimant ought to have been computed where the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made; or

(b) an error or mistake in a claim which is included in the return.

(3) In determining the claim the Board shall have regard to all the relevant circumstances of the case, and in particular shall consider whether the granting of relief would result in the exclusion from charge to tax of any part of the profits of the claimant, and for this purpose the Board may take into consideration the liability of the claimant and assessments made on him in respect of chargeable periods other than that to which the claim relates.

(4) If any appeal is brought from the decision of the Board on the claim the Special Commissioners shall hear and determine the appeal in accordance with the principles to be followed by the Board in determining claims under this section; and neither the Appellant nor the Board shall be entitled to appeal under section 56A of this Act against the determination of the Special Commissioners except on a point of law arising in connection with the computation of profits."

5. Subsection (1) of section 33 referred to sections 9 and 11AA both of which provided that a return included a self-assessment.

The issues

6. The Inland Revenue argued that there could be no claim for error or mistake relief as the Appellant had reached an agreement about the matters which were the subject of the claim after the Inspector of Taxes had given notice under section 9A of the 1970 Act of her intention to enquire into the Appellant's tax returns and before the issue of a completion notice under section 28A(5) Act and the Appellant's amendment of his self-assessment under section 28A(3). The Appellant argued that there had been no such agreement.

7. Thus the issues for determination in the appeal were:

(1) whether an agreement reached, after an Inspector of Taxes had given notice under section 9A of an intention to enquire into a taxpayer's return and before the issue of a completion notice under section 28A(5) and the amendment of a self-assessment under section 28A(3), precluded a claim for error or mistake relief; and if so

(2) whether there was such an agreement.

8. I was asked to give a decision in principle on these issues and, under Regulation 18(5)(a) of the Special Commissioners (Jurisdiction and Procedure) Regulations 1994 SI 1994 No 1811, reserve the making of the final

determination.

The evidence

9. An agreed bundle of documents was produced. Oral evidence was given on behalf of the Appellant by his father, Mr James Wall. Oral evidence was given on behalf of the Respondents by the acting Inspector of Taxes (the acting Inspector) and the Inspector of Taxes (the Inspector) at the district which dealt with the Appellant's tax affairs. Both the acting Inspector and the Inspector had signed written statements of their evidence.

10. The Appellant has dyslexia which means that he requires assistance with reading. This assistance was given at the hearing by Mr James Wall. When the time came for the Appellant to give evidence he had become distressed and for that reason did not give oral evidence on his own behalf.

The facts

11. From the evidence before me I find the following facts.

The Appellant and his business

12. The Appellant and his father, Mr James Wall, are self-employed sub-contractors and undertake work for a firm of builders.

13. The Appellant and his father are two of ten men who undertake drainage and water systems work for the firm. Most of the work is undertaken in an emergency. The men are on call twenty-four hours each day for seven days each week. The Appellant and his father work together as one team and the other eight workers also work in pairs. Most of the work is in central London but sometimes it is necessary to travel as far away as Brighton or Margate. Every morning the Appellant and his father go to the offices of the builders and collect their work. Mr James Wall sorts out the work among the ten men.

14. The builders provide a van which only Mr James Wall is insured to drive. The van holds all the equipment for the drainage work including a high pressure water jet. The cost of running the van is borne by the builders but Mr James Wall and the Appellant purchase the diesel for it.

The 1995 meeting

15. On 15 June 1995 there was a meeting attended by the Appellant, Mr James Wall and the then Inspector of Taxes at the district which looks after the tax affairs of the Appellant. The keeping of records was discussed and Mr James Wall produced a diary in which his wife recorded

what both Mr James Wall and the Appellant told her that they had spent during each day. No receipts were kept. The previous Inspector stated that receipts should be kept and also suggested that a cash book be maintained in addition. He said that proper records should be kept of all expenses in order to prove that expenses claims were valid.

1997-8 – The Appellant's motor car and van

16. On 27 February 1997 the Appellant purchased a Ford Fiesta SI motor car for the sum of £14,595. The car was purchased on hire purchase. At the beginning of 1998 the Appellant purchased a Peugeot van which was about three and a half years' old at that time and which cost £2,500. The Appellant borrowed the money from Mr James Wall who borrowed it from his bank. The Appellant repays his father at the rate of £220 per month including interest. The Appellant claimed that the Peugeot van was used for straightforward plumbing jobs when the large company van was not necessary. He claimed that he used the van wholly for business purposes and the motor car 75% for business purposes.

The enquiry

17. On 8 July 1998 the Inspector opened an enquiry under section 9A Taxes Management Act 1970 into the Appellant's 1998 tax return. Her review of the papers indicated that expenditure was high for such a trade; that some expenditure claimed might be of a capital nature; that some personal expenditure was being claimed; and that some expenditure had been estimated. The Appellant telephoned the Inspector in response to her opening letter and advised her that the loan interest he claimed related to the van he used for business. He also explained that he had bought a car under a finance arrangement. The Inspector explained that capital repayments were not an allowable deduction but that a claim could be made for capital allowances and adjusted for private use.

18. On 4 August 1998 the Inspector opened an enquiry into the Appellant's 1997 return and asked for further information. On 11 September 1998 Mr James Wall telephoned the Inspector and told her that the Appellant wished to claim the expenses of both the van and the car. It was agreed to discuss these matters further at a meeting.

The meeting on 7 October 1998

19. On 7 October 1998 a meeting was held at the offices of the Inland Revenue attended by the Appellant, Mr James Wall, The acting Inspector and the Inspector. The acting Inspector made notes of the meeting.

20. At the beginning of the meeting Mr James Wall said

that he wanted to tape-record the meeting and he had his own tape recorder. His request was refused. (However, the Inland Revenue's Investigation Handbook (IH2352) states that an Inspector should normally allow a tape recording of the meeting to be made and that the taxpayer should be asked to provide either a full typed transcript at his own expense or an unedited copy of the tape.)

21. The Inspector explained that the purpose of the meeting was to discuss the Appellant's business affairs in order to check the accuracy of the self-assessment returns for the years ending on 5 April 1997 and 5 April 1998. She thought that some expenses had been claimed incorrectly and wanted to clarify some points. Mr James Wall explained that there was a company van and that he and the Appellant also used the Appellant's Peugeot van which had been purchased at the beginning of 1998. 100% business use was claimed for the Peugeot van. The Appellant also used his own Ford Fiesta SI motor car and 75% business use was claimed for the Appellant's car. The Inspector was unable to accept these figures as there were no records to justify them. She found it hard to accept that the Appellant used both the company van and his own van and that 75% of his car was used for business purposes. The notes of the meeting then recorded:

"J Wall then suggested that all car expenses are excluded from claims for 1997 and 1998 leaving 100% of the van expenses allowable. The Inspector agreed this and said she would detail revised figures in her letter to be sent out with the notes of the meeting."

22. The meeting also discussed repairs of the vehicles, motor expenses and finance charges. The relevant extracts from the notes of the meeting stated:

"REPAIRS - £1170

Receipts for only £956 relating to the car and £252 relating to the van have been submitted. The Inspector proposed only £252 would be allowed.

MOTOR EXPENSES - £4689

This figure includes £1385 for fuel but receipts for only £262 four star and £574 unleaded have been submitted. Also included in this figure is £705 car insurance and £2589 parking. The Inspector said she would put forward proposals to take into account discussions regarding the disallowance of car expenses and she would consider the parking claims after examining the diary handed over today.

FINANCE CHARGES - £4116

This relates to the monthly repayments on the car none of

which is allowable."

23. The notes of the meeting went on to record other matters and the final paragraphs read:

"J Wall expressed his discontent at his son having to pay additional tax with interest and penalties when he had agreed to waive any claim to car expenses. The Inspector stated she would not have accepted a 75% business car claim and if P Wall felt a deduction was due for car expenses then he had the right to pursue his claim and ultimately to go before the Commissioners if a decision could not be reached between ourselves.

J Wall said he would like to see my proposals for consideration.

The Inspector said she hoped to get letters and proposals out by the end of this week."

24. On 15 October 1998 the Inspector sent to the Appellant a letter with her proposals in respect of the expenses and also sent copies of the notes of the meeting. She explained in her letter that the finance charges claimed related exclusively to the car and the full amount had been disallowed as it had been agreed on behalf of the Appellant at the meeting to withdraw all claims made in respect of car expenses. On 20 October 1998 Mr James Wall wrote to the Inspector and returned copies of the notes of the meeting signed by him and by the Appellant and a certificate of disclosure. He stated in his letter that he was not happy that the Inspector had disallowed a parking claim and said "We were fair with you by taking out the car but you took everything". On 3 November 1988 the Inspector telephoned Mr James Wall to discuss his letter of 20 October. She was concerned that the Appellant should not feel coerced into accepting any figures. Mr James Wall said that he just wanted the enquiry finalised. On 6 November 1998 completion notices under section 28A(5) of the 1970 Act were issued. On 15 November 1998 the Appellant signed and dated the amendment to self assessment under section 28A(3) of the 1970 Act.

25. Although copies of the signed notes of the meeting on 7 October 1998 were produced at the hearing no copies of any documents subsequent to the meeting were produced.

The 1999 enquiry

26. On 6 December 1999 the Inspector opened an enquiry into the Appellant's 1999 return. The Appellant then appointed Mr White to represent him. Mr White obtained some mileage records relating to the Ford Fiesta motor car from the Appellant's garage. He also discovered a number of vouchers, including bills for diesel for the van and petrol for motor car. From the information in his possession Mr

White estimated that the business use of the motor car was about 72.6%. On 28 February 2000 he submitted revised accounts for the years 1996/97 and 1997/98. The Inland Revenue replied that the enquiries for both years had been formally closed on 6 November 1998 and the Appellant's signed amendments to his self-assessments under section 28A(3) of the 1970 Act had been received on 18 November 1998. Mr White then submitted a claim for error or mistake relief for 1996/97 and 1997/98. That claim was formally refused on 8 January 2001 and it is against that refusal that the Appellant appeals.

The arguments for the Appellant

27. For the Appellant Mr White argued that there had been no agreement such as to preclude a claim for error or mistake relief. The Appellant had been refused the use of a tape recorder at the interview on 7 October 1998 and had not received professional help. Mr James Wall had no expertise in tax matters and the Inland Revenue should have known that he was not competent to deal with his son's affairs. The Appellant should have been advised to seek professional advice. The Inland Revenue had taken advantage of the Appellant's lack of understanding. The Appellant had been under duress and had signed the notes of the meeting just to get the enquiry closed. He distinguished the decision in Eagerpath Ltd v Edwards [2001] STC 26 where the taxpayer had agreed the original assessment, where there had been no investigation, and where the taxpayer had been advised throughout. He argued that there had been duress as defined in Pao On and Others v Lau Yiu Long and Others [1980] AC 614 as the Appellant and his father had protested at the agreement; they had no independent remedy as they did not know to whom they should complain; Mr James Wall was not competent to advise the Appellant; and the request for a tape recording had been refused.

The arguments for the Respondents

28. For the Respondents Mr Williams first argued that the Appellant had agreed the treatment of the vehicle expenses and so could not claim error or mistake relief. He argued that the subject of vehicle expenses had been discussed at the meeting on 7 October 1998 and thereafter agreed by the Appellant who had signed the notes of the meeting. The Inspector had served a notice of completion of enquiries which, he argued was an offer, and the Appellant had amended his self-assessment which, he argued was the acceptance of the offer. There was no right of appeal in section 31 of the 1970 Act against a taxpayer's amendment of his self-assessment because there was no need to appeal against something that the Appellant had accepted. That meant that the Appellant was barred from a subsequent claim for error or mistake relief. He relied upon paragraphs 9 and 26 of the judgment of Robert Walker LJ in Eagerpath

as authority for the view that the situation had to be viewed objectively from the point of view of whether the taxpayer's agreement to the relevant computation, having regard to the surrounding circumstances including all the material known to be in his possession, was such as to lead a reasonable man to the conclusion that he had agreed to the computation; if there were an agreement then no claim for error or mistake relief could be made He also cited R v Inspector of Taxes, ex parte Bass Holdings Ltd and related application [1993] STC 122. Secondly, Mr Williams argued that there had been no duress. He argued that the principles applicable to duress were established by the Privy Council in Pau On. He argued that there was no protest at the interview of 7 October 1998, the notes of which had been subsequently signed; that an independent remedy was available by means of the present appeal; that the Appellant had been advised by his father, Mr James Wall; and that after the interview the Appellant had made an amendment to his self-assessment. There was therefore no duress. Mr Williams accepted that the interview should have been tape-recorded when requested by the Appellant.

Reasons for decision

29. I consider separately each of the issues for determination in the appeal.

(1) Can there be a claim for error or mistake relief?

30. The first issue is whether an agreement reached, after an Inspector of Taxes has given notice under section 9A of an intention to enquire into a taxpayer's tax returns and before the issue of a completion notice under section 28A(5) of the 1970 Act and the amendment of a self-assessment under section 28A(3), precludes a claim for error or mistake relief.

31. I start with the provisions of section 33. At the relevant time section 33(1) provided that any person who had paid tax charged under an assessment (which included a self-assessment) could make a claim for error or mistake relief if he alleged that the self-assessment was excessive by reason of some error or mistake in a return. In this appeal the Appellant is arguing that his amended self-assessment was excessive by reason of error or mistake in a return. It seems, therefore, that, having regard only to the provisions of section 33(1), he is entitled to make a claim.

32. Subsection (2A) of section 33 provides that relief is not to be given in two circumstances (neither of which it was argued applied in this appeal). If the section had intended to deny the relief in cases where an agreement had been reached before a self-assessment was amended by a taxpayer, then it could have said so.

33. The Inland Revenue relied upon Eagerpath as authority

for the view that, where there was an agreement, there could not be a subsequent claim for error or mistake relief. Eagerpath started as Grafton Ltd v Inland Revenue Commissioners [1998] STC (SCD) 278. In that appeal the taxpayer appealed against an estimated assessment. Subsequently accounts were submitted and, after discussion, agreed after which the appeal was settled. The taxpayer subsequently claimed error or mistake relief which was refused by the Inland Revenue on the ground that the fact upon which the claim was made had been raised in the discussions before the appeal was settled and that the effect of sections 54 and 46(2) of the 1970 Act was that the assessment was final and conclusive. The taxpayer's representative accepted that a claim for error or mistake relief could not be made if the subject matter of the claim had formed part of the earlier agreement (although this concession was withdrawn on appeal). The decision of the Special Commissioner was based solely on the provisions of section 54 and 46(2) and, having found that the subject matter of the claim did form part of the earlier section 54 agreement, the appeal was dismissed.

34. The relevant parts of section 54 of the 1970 Act provide:

"54 Settling of appeals by agreement

(1) Subject to the provisions of this section, where a person gives notice of appeal and, before the appeal is determined by the Commissioners, the inspector …and the appellant come to an agreement, …that the assessment or decision under appeal should be treated as upheld without variation, or a varied in a particular manner or as discharged or cancelled, the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, the Commissioners had determined the appeal and had upheld the assessment or decision without variation, had varied it in that manner or had discharged or cancelled it, as the case may be."

35. "The like consequences" are described in section 46(2) which provides:

"(2) Save as otherwise provided in the Taxes Acts … the determination of the General Commissioners or the Special Commissioners in any proceedings under the Taxes Acts shall be final and conclusive"

36. In the High Court and the Court of Appeal the argument centred on the extent of the right of appeal from the decision of the Special Commissioners and in particular, to the meaning of the reference in section 33(4) to "a point of law arising in connection with the computation of profits". The decision of the Special Commissioner was

confirmed. The issue in this appeal was not considered in Eagerpath but the judgment of Brooke LJ, particularly at paragraph 36, indicates the need to provide a mechanism for the recovery of wrongly paid taxes which in turn would lead to the conclusion that section 33 should not be restrictively construed.

37. Mr Williams argued that, even though there had been no previous appeal in this case, the same principle applied; there had been an agreement and that precluded a claim for error or mistake relief. However, in my view that would be an undue extension of the principle in Eagerpath for which there is no authority. In Eagerpath the bar to the claim for error or mistake relief was the existence of the agreement under section 54, with the statutory consequences of section 46(2) that it was final and conclusive. Those factors do not apply in the present appeal. Neither the issue of a completion notice by the Inspector under section 28A(5), nor the amendment of a self-assessment under section 28A(3), are stated to be final and conclusive.

38. Mr Williams drew attention to section 31 of the 1970 Act and pointed out that there was no right of appeal against an amendment of self-assessment made by a taxpayer (although there is such a right where an amendment is made by the Inland Revenue) and he argued that, to that extent, the amendment of the self-assessment was conclusive. However, in my view the amendment of a self-assessment has the same effect as an original self-assessment, namely that if it is accepted by the Inland Revenue there is no appeal against it but that a claim for error or mistake relief can still be made within the statutory time limits. The effect of Mr Williams' arguments would be that it would be necessary to read into the provisions of section 28A(3) words to the effect that an agreement reached before an amendment of a self-assessment made by the taxpayer after the officer's enquiries are completed makes the self-assessment final and conclusive. If the legislation had intended to say that then it could have done so but I can see no justification for reading in words that are not there.

39. In the absence of words equivalent to those in section 54 and 46(2), it seems to me that an amendment of a self-assessment following enquiries has the same status as a normal self-assessment. In other words, error or mistake relief is available under section 33(1) so long as the claim is made within the stated time limits.

40. I therefore conclude that the Appellant is entitled to make a claim for error or mistake relief even if there were an agreement preceding his amendment of self-assessment. That means that the appeal is allowed. However, in case I am wrong in that conclusion, I now consider the second issue which is whether there was an

agreement.

(2) Was there an agreement?

41 The second issue in the appeal is whether there was an agreement and here I consider the oral evidence. The Inspector was a good and credible witness and in her view there was an agreement. The evidence of the acting Inspector was that at the end of the meeting a summary was made of what had been agreed and in his view all present understood it. The evidence of Mr James Wall was that the Appellant was very upset at the meeting and just wanted "to get it over" and that the Appellant would agree to anything to end the meeting. He (Mr James Wall) thought that the Inland Revenue were refusing deductions for the repayments of the purchase price of the motor car but not the petrol and the running expenses.

44. Having heard the evidence and seen the witnesses I do not accept that there was any duress on the part of the Inland Revenue. The notes of the meeting were signed some days after the meeting and also some days after the meeting the self-assessment was amended and signed by the Appellant. There was clearly an error about the tape recorder but I do not accept that that amounted to duress. I do not accept that the Inland Revenue should have advised the Appellant to get independent advice when he had his father to advise him.

45. Having said that, however, I have formed the view that there was a misunderstanding, at least as far as the Appellant was concerned. All the witnesses agreed that the Appellant was stressed at the meeting and in my view it is probable that he did not fully understand what was being proposed. The Appellant did not give evidence before me because he was too distressed but, from what I observed of his behaviour in the court room, I formed the view that it was unlikely that he understood what went on at the meeting, particularly towards the end of it, and that it is very probable that by the end of the meeting he would have agreed to anything "just to get it over". There was no meeting of minds; there was no consensus. Justice would appear to indicate that this is a case where a claim for error or mistake relief should be capable of being made.

46. Of course, the Appellant must still satisfy the Inland Revenue that he is entitled to the deductions he claims for the vehicle expenses but in my view he should have the opportunity of presenting any new evidence he has.

Decision

45. My decisions on the issues for determination in the appeal are:

(1) that an agreement reached, after an Inspector of Taxes

had given notice under section 9A of the intention to enquire into the Appellant's tax returns and before the issue of a completion notice under section 28A(5) of the 1970 Act and the amendment of a self-assessment under section 28A(3), does not preclude a claim for error or mistake relief; that means that the appeal is allowed but as arguments were put on the second issue I express my views which are:

(2) that there was no agreement.

46. The appeal is, therefore, allowed in principle.

47. As requested by the parties this is a decision in principle. Under Regulation 18(5)(a) of the Special Commissioners (Jurisdiction and Procedure) Regulations 1994 SI 1994 No. 1811 I adjourn the making of the final determination. Either party has

liberty to apply.

DR NUALA BRICE

SPECIAL COMMISSIONER

RELEASE DATE:

SC 3056/01

(ORIGINAL DECISION RELEASED ON 25.10.01)