TC01649

Appeal number TC/2010/01587

income tax – deductible expenses of partnership-legal costs of criminal prosecution against partner-wholly and exclusively-s34IT(TaOI)Act 2005-not deductible on these facts

FIRST-TIER TRIBUNAL

TAX

M A RAYNOR (DECEASED) and MRS B C RAYNOR **Appellants**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS (INCOME TAX) **Respondents**

TRIBUNAL: A P LONG (TRIBUNALJUDGE)
R CROSLAND

Sitting in public in Nottingham on 25 August 2010 and 11 March 2011

Stephen Kerby Accountant for the Appellants

Ms D Brooks (25 August 2010) and Mr R Linkin (11 March 2011) Senior Officers of HM Revenue and Customs for the Respondents

DECISION

1. The Appellants, Mr M A Raynor (now deceased) and Mrs B C Raynor, at the material time carried on business in partnership as haulage contractor Sid Raynor Haulage. By a Notice of Appeal dated 4 February 2010 the Appellants appeal against amendments to the partnership statements for the year 2006-2007. Those amendments were made in a letter dated 3 November 2009, confirmed by a review whose outcome was notified in a letter dated 12 January 2010.

2. The partnership statements were amended by the Respondents, Her Majesty's Revenue and Customs ("HMRC"), because they were of the view that £56,856 of expenditure had been deducted which was not wholly and exclusively laid out for the purpose of the trade of the Appellants.

3. Our decision is that the appeal should be dismissed and that the amendments are confirmed.

The legislation

4. The legislation about the allowability of deductions is contained in s34 of the Income Tax (Trading and Other Income) Act 2005 (the "Act").

5. Section 34(1) provides "in calculating the profits of a trade no deduction is allowed for (a) expenses not incurred wholly and exclusively for the purposes of the trade".

6. Section 34(2) provides "if an expense is incurred for more than one purpose, this section does not prohibit a deduction for any identifiable part or identifiable proportion of the expense which is incurred wholly and exclusively for the purposes of the trade".

The issue

The issue for decision was whether the £56,856 which had been deducted in computing the profits (loss) of the Appellants were monies wholly and exclusively expended for the purposes of the Appellants' trade within s34(1)(a) of the Act. The monies were legal costs arising from a criminal prosecution in which Mr Raynor was found guilty of polluting a tributary of the River Slea.

The evidence

7. The material before us consisted principally of three bundles labelled respectively the Basic Bundle, the Supplementary Bundle and the Additional Supplementary Bundle. These bundles included the material exchanged by the parties, including some documentary evidence and much case law.

8. Oral evidence was given on behalf of the Appellants by Mrs Raynor, the surviving Appellant. She had prepared a written statement, which was read out. HMRC did not ask her any questions by way of cross examination. She answered some questions

from the Tribunal. Additional evidence, mainly as to unchallenged background facts was given by her son, Mr J Raynor, who also was not cross examined. HMRC did not call any witnesses to give evidence.

9. Oral submissions were made on behalf of both parties and Mr Kerby provided us with a written statement of his submissions.

10. In our directions we specifically invited submissions about whether the expenditure should be considered as a whole or whether the invoices could be considered separately. Accordingly the parties were given the opportunity to contend that the expenditure was separable (in the way envisaged in s34(2)) but neither party so contended.

The background facts

11. From the evidence we find the following background facts. Mr M A "Sid" Raynor was born in 1955. In 1982 he set up his own haulage business. His wife Mrs B C Raynor became a partner in the business in around 1994. He started with one vehicle which increased eventually to twelve vehicles.

12. The business included haulage for agricultural purposes, such as potato delivery, which was mainly seasonal and the transportation of waste, some of it chemical or hazardous. The business had a permission to handle hazardous waste. The proportion of revenue from, respectively, agricultural haulage and waste disposal was broadly equal before the incident described below, but had subsequently become around 70% agricultural.

13. Mr Raynor died on 10 May 2008 at the age of 52 after the spillage incident and prosecution described below. The business ceased on 31 July 2008. Mrs Raynor had continued trading for a short while after Mr Raynor's death before concluding that it was not practical to continue trading on her own.

The spillage incident and subsequent prosecution

14. In February 2003 a quantity of insecticide, Cypermethin, which is toxic to fish, escaped into a tributary of the River Slea. The escape caused the death of 100,000 fish along a 17km stretch of the river.

15. According to the prosecution summary this resulted in a Category 1 water pollution incident. Lethal toxic effects were recorded on fish populations along 17 km of river. More than 100,000 fish of various species were lost. All invertebrate life was removed as far as the confluence with the River Witham and some impact on invertebrate life was felt 30 km downstream of the spill. The release occurred as a result of the removal of 1000 drums from industrial premises at Sleaford. These drums had been stockpiled by Marque Technology Limited (the "Company"). The removal of the drums was a legal and contractual obligation on the Company's sole director Gareth Toogood.

16. The prosecution further alleged that the incident "occurred as a result of the action of Mr Toogood in choosing a significantly cheaper disposal option than the one he originally explored... (for reasons of cost)... he chose a haulage contractor with no knowledge of insecticide... He did not provide the contractor with any specific instruction about the contents of the drums or site drainage. He did not oversee the work or ensure that anyone at the company did so. The drum removal was carried out by two parties: Mr Michael Raynor of Sid Raynor Haulage and a Gordon Bristow of Kan a Kan Ltd. The yard area where the drums were stored drained into an open surface water gulley... (but) no proper precautions were taken." Mr Raynor was involved with Gordon Bristow in loading the drums on to lorries which (somehow) resulted in the release of insecticide into the surface water drainage system. It was the prosecution's case that the incident was foreseeable and avoidable.

17. Charges were brought against four defendants: Mr Toogood, the Company, Mr Bristow and Mr Raynor. They were each charged with causing poisonous, noxious or polluting matters to enter controlled waters contrary to s85(1) Water Resources Act 1991. Mr Toogood and the Company were also charged with a further two offences each of causing Mr Bristow and Mr Raynor respectively to commit the s85(1) offence.

18. After a contested Crown Court trial lasting ten days, all parties were convicted on 17 February 2006. In his post verdict comments (see C32-33) the judge concluded that the spillage was accidental not deliberate. Sentence was deferred to 10 March 2006. At the sentencing hearing, according to the BBC report, the Judge told all three defendants that they bore a heavy responsibility for the damage to the eco-structure of the river, which would take years to recover. The four defendants were ordered to pay a total of £33,000 towards the costs of restocking and £62,000 of prosecution costs. Mr Raynor's contribution was respectively £6,500 and £11,000, payable at £1,000 per month. Mr Raynor was also ordered to perform 150 hours of community service.

The engagement letter, accounts and appeal

19. In May 2005 Mr Raynor instructed solicitors, Anderson and Company, in relation to the prosecution. Those solicitors were already representing Mr Bristow. The engagement letter dated 25 May 2005 was sent to 'Mr Michael Raynor' at his home address and stated "I understand that you wish to instruct us as a joint client with our existing client, Mr Gordon Bristow, to advise you on the above matter and to represent you in proceedings commencing on 1 June 2005.... Bills will be sent to your business, 'MA and BC Raynor trading as Sid Raynor' at your above address and copied to you marked for your attention, unless you tell me differently. You will be joint and severally liable for our bills with Mr Bristow..'

20. The business paid costs of £56,856 in legal fees relating to the prosecution. These fees were in 17 invoices. Perhaps surprisingly the invoices were not included in the material made available to the Tribunal at the hearing. Moreover, neither party could obtain them on the day. We therefore ordered production of the invoices and thereafter invited submissions on some key questions arising which resulted in a second day of hearing.

21. The first invoice, for £6,168.75, was not available.(NB the costs were shared with Mr Bristow so it appears that Mr Raynor was responsible for only 50% of this invoice) The second invoice related to preparation for a Magistrates Court hearing on 1 June 2005.Subsequent invoices related to various hearings, including case management, full trial and the sentencing hearing. The invoices also related to preparing a defence and several conferences with Counsel.

22. The invoices appear to show that the two weeks of trial commenced on 6 and 13 February 2006 respectively. There is then an invoice dated 3 March 2006 requiring 'advance payment for services...i.e. preparation for and attending sentencing hearing at Leicester Crown Court on 10 March 2006..£4,000 plus VAT ..'.

23. There is a final invoice for the period of March – June 2006. The narrative states 'including preparing for and attending sentencing hearing at Derby Crown Court of 10 March 2006 and pre-hearing conference with Charles Pugh and corresponding with you ....' (Although there are two invoices and two venues listed making it appear that there were two sentencing hearings, both are for the same date, so the likelihood is that the venue was switched and there was only one sentencing hearing).

24. The costs in all the invoices were claimed as a deduction in the accounts of the partnership for 2006-2007, resulting in a loss of £44,001. HMRC amended the accounts by adding back in the £56,856 producing a profit of £12,855 and increased tax due of £2,101.40. The fine and contribution to prosecution costs totalling £17,500 were included as expenditure by the partnership but no deduction was claimed for tax purposes.

25. HMRC stated in the review letter of 12 January 2010 "there would have been an inevitable private purpose in trying to avoid a criminal conviction..." and costs are not deductible "if there is a conscious purpose, such as the preservation of private reputation or the avoidance of an unpleasant personal consequence such as prison or community service". By contrast in the grounds of appeal in the Notice of Appeal dated 4 February 2010 it is said "Mr Raynor's reason for defending the charges was totally to defend his business'.

Evidence

26. Mrs Raynor's written statement sought to explain "why my late husband Sid decided to fight the case brought against him and defend the haulage company's name… I need to tell you that he was not responsible for the spillage and that's why he never pleaded guilty… At the first hearing we were told that if we plead guilty, we would probably get a fine of £2000 and possibly community service, there was also a very slight chance of imprisonment. As the business was not to blame for the spillage, we had to try and do everything we could to save the business name and reputation. So my husband and myself went against the solicitors advice and decided to defend the case all the way, because he didn't want to lose the business he had worked so hard to build up for 20+ years. Because we were not guilty, we thought that was the only possible thing to do and thought if we carried on the truth would come out and clear the business name... Because there was no strong evidence against the business

the solicitors gave us a 50-50 chance of getting off. Although there was only a 50% chance of getting off we had to carry on to the end"

27. Mrs Raynor's statement went on to explain how for health reasons it would have been easier for Mr Raynor to give up at an early stage and plead guilty. She also explained how important the business was to the family and staff members and how ultimately the business suffered as a result of the conviction.

28. The advice about plea is also contained in an undated written advice from counsel, which appears to have been given in late January 2006 shortly before the start of trial. The advice was to both Mr Raynor and Mr Bristow. The conclusion was "there is the real risk that B and R will be convicted of these charges,.. (they) both have been fully advised as to the difference between the penalties that are likely if they fight the case and the lesser penalties that are likely if they plead guilty at the outset of the trial. It is entirely a matter for B and R as to the decision they make in relation to plea. It really is very difficult to predict the outcome here… I consider that B and R have a sporting chance of an acquittal. Whether they wish to take the risk inherent in the litigation in order to achieve the same must be a matter for them to decide".

29. There is independent confirmation that the election for Crown Court trial was at the instance of Mr Bristow and Mr Raynor. A letter dated 9 June 2005 from the prosecutor, the Environment Agency, states ' it was Mr Jermy, for your clients, who was the only advocate to submit that the matters should be heard in the Crown Court'

30. There was no material from Mr Raynor himself save for an undated statement at D29 and D30 headed "regarding the judgement against us". This document was prepared after the conviction and therefore after the decision had been taken to incur the expenditure. Moreover, it was not prepared for the purposes of this dispute and seems to be directed at other issues. It explains the damage done to the business by the conviction. In relation to the expenditure the statement records "this was to prove our innocence…" The document continues "if I had done this I would put my hands up and own up to my responsibility. I have never been a gambling man and would not put my family and business at risk. If I have done this I would not jeopardise half my life and all that I have worked for. This money still has to be paid back, losing was not an option to me as I never did it".

31. The contemporaneous evidence was limited. There was an attendance note by the solicitors Anderson and Company of a telephone conversation on 8 December 2005 with Charles Pugh of counsel. That note includes "I said my view was that our clients have genuine convictions that they were innocent but did not, in reality, know exactly what happened on site that weekend… I also asked (counsel) to note that because Mr Bristow's business was with local authorities and Mr Raynor had a hazardous waste licence our clients felt that they had no real alternative to defending as long as there remained a reasonable prospect of success. The issue of costs if they lost was therefore less of a priority for them."

32. There was a letter dated 13th June 2006 from Anderson and Company to Garwyns, insurance brokers. That letter was in support of the insurance claim

whereby Mr Raynor sought after the event to have his legal costs paid by his insurers. That letter shows clearly that, immediately after the guilty verdicts were delivered on 17 February 2006 the Judge stated that, (so far as Mr Raynor was concerned) the spillage was accidental not deliberate.

33. The letter dated 13 June 2006 records "from the outset our instructions from both Mr Bristow and Mr Raynor have been that they were not guilty and that a conviction would seriously damage their businesses. This being the case, even though we advised them the offence was "strict liability" which would make it more difficult and expensive to defend, they felt that they had no option but to defend the proceedings to the end of trial".

34. In the bundle before us was the covering letter dated 12 April 2010 from Anderson and Company in which they sent the attendance note of 8 December 2005 to the Appellants' son. That covering letter included ' we advised your father...the charges were difficult to defend and that he should consider pleading guilty to reduce legal costs and the personal stress of a trial....your father, however, felt that the adverse publicity and loss of business from the public which would inevitably result from a conviction outweighed personal considerations and that he had no real option but to fight the charges to save his business'.

35. The Appellant also produced for the second day of our hearing a letter dated 12 January 2011 from Anderson and Company in which they stated "throughout the case we were instructed by Mr Raynor that the main reason for defending the charges was the adverse publicity to his firm which would result from a conviction and/or a finding of deliberate causation". This 2011 letter also said that "it was only at the sentencing hearing that the trial judge put it on record that although Mr Raynor had been found guilty he had not acted deliberately and added that but for this finding he would have considered an immediate custodial sentence" This statement contradicts the letter of 13 June 2006,also from Anderson and Company which states that the Judge's finding of 'accident' was made not at the sentencing hearing on 10 March 2006, but after delivery of the verdicts on 17 February 2006.

The case law

36. The bundles contained, and we were referred to, extensive case authorities consisting of the nine cases set out in tab b of the Supplementary Bundle and the two cases in the Additional Supplementary Bundle. On the basis of that material our conclusion is that the principal tests to apply are those as summarised in the case of *AB (a firm) v Revenue and Customs Commissioners* SpC572. Fortunately both parties agreed that these were the right principles.

37. Those principles are (1) the question whether an expense of the firm was incurred wholly and exclusively for the purpose of the profession was a question of fact (2) the expenditure had to be made for the purpose of earning the profits of the trade (3) the business or professional purpose had to be the sole purpose (4) the distinction between furthering the business interests of the firm on the one hand and the essentially private purposes of the partners on the other could be a fine one (5) in

determining the purpose, it was necessary to look at the taxpayer's subjective intentions and although those were determinative they were not limited to conscious motives in his mind at the time of the payment; consequences which were inevitably and inextricably linked in the payment had to be taken to be a purpose for which the payment was made and (6) if the taxpayer's only conscious motive at the time of the expenditure was a business motive, then the expenditure would be deductible.

38. The other case law that we found of assistance was that contained in *McKnight –v- Sheppard* (HL) [1999] 1 WLR 1333; [1999] STC 669.Importantly, purpose and effect are not the same. In that case legal fees incurred in a stockbroker's defence of disciplinary proceedings were found to have been incurred wholly and exclusively for business purposes. Those disciplinary proceedings put the taxpayer's right to earn his living as a stockbroker in jeopardy. The Special Commissioner had not accepted the stockbroker's evidence that he was wholly unconcerned about his personal reputation. At paragraph 97 the Special Commissioner said "it does not seem to me that common sense requires me to conclude that one of the reasons of the Appellant for incurring the expenditure was to protect his personal reputation… the sole object "to be served by" the legal costs was to avoid the destruction of the Appellant's business. The fact that his personal reputation was inevitably involved also does not make the preservation of his reputation the purpose"

39. That case referred back to the statement of Lord Brightman in *Mallalieu –v- Drummond* that ' the object of the taxpayer in making the expenditure must be distinguished from the effect of the expenditure'.

40. The burden of proof is on the Appellant and on the balance of probabilities.

Analysis and Findings

41. *The test.* The test that this Tribunal must adopt is to apply the words of the statute, namely whether the expenses were incurred wholly and exclusively for the purposes of the trade. In doing so we must take into account and apply the case law, particularly as set out above. As that reminds us, the test is essentially one of fact. The business or professional purpose has to be the sole purpose. The taxpayer's subjective intentions are determinative and if the taxpayer's only conscious motive at the time of incurring the expenditure was a business motive, then the expenditure would be deductible. Whilst doing so we must carefully evaluate the evidence. The fact that the expenditure might result in non-business benefits is something which we should take into account and consider carefully in making findings as to purpose, whilst being careful not to conflate effect or benefit with purpose. If there are dual purposes i.e. a personal purpose as well as a business purpose, then the expenditure is not deductible. The evaluation of the evidence has, of course and sadly, been made more difficult because of the death of Mr Raynor, the person who would have been best placed to give evidence about intentions and motives.

42. *Personal elements.* There were significant potential personal benefits in incurring the expenditure. The potential personal consequences of the prosecution included imprisonment (which was unlikely) and community service (which was the eventual

outcome). Both are punishments that have significant personal effect. Efforts to avoid, by a not guilty verdict, or reduce, by establishing certain facts or by way of mitigation, those punishments, are of significant personal benefit.

43. We find as a fact that the prosecution was against Mr Raynor personally. It was contended that he was prosecuted in a business capacity as the partner most closely connected and that the firm had no separate legal personality. However, in the closely connected case of Mr Bristow the business was a limited company with separate legal personality and he (Mr Bristow) rather than the company was prosecuted. Whilst recognising that the distinction can be fine, we conclude that the prosecution of Mr Raynor was of him as an individual rather than of the business.

44. The contract with the solicitors appears to have been in Mr Raynor's name personally rather than that of the partnership. The engagement letter was sent to Mr Raynor at his home address. Having said that, the personal nature of the prosecution and of the contract with the solicitors is not determinative, but instead amount to pointers toward the personal elements.

45. It is clear, and we find as a fact, that Mr Raynor had a genuine and strongly held belief that he was not guilty of the charge against him. This is clear from many documents. First, Mr Raynor himself ' this was to prove our innocence...losing was not an option to me as I never did it..'. Secondly, Mrs Raynor's statement ' he was not responsible for the spillage and that's why he never pleaded guilty...'. Thirdly, the note of 8 December 2005 ' our clients have genuine convictions that they are innocent..' Fourthly, the letter of 13th June 2006 ' from the outset our instructions ...have been that they were not guilty..'.

46. The guilty verdict and sentence would have diminished Mr Raynor's standing in the community. He would have wished to avoid this, particularly as he strongly believed in his innocence. It was said that for him that the business was his life and that business name and reputation were the same as personal name and reputation. Although there are fine distinctions, we think that there were also clear *personal* benefits. An acquittal would have benefited Mr Raynor's personal reputation.

47. The personal benefits give rise to a strong but rebuttable inference of personal motive. We also bear in mind that the personal benefits are not the same as, and would not necessarily prove, a personal purpose.

48. *The expenditure*. For the expenditure to be 'wholly and exclusively' for business purposes all of it must be so. There were at least three elements in the legal services for which the business paid. These were (a) a separate sentencing hearing (b) the advice/information to Mr Raynor as to the likely personal impacts on him over and above that which would fall on the partnership and (c) a contested trial.

49. We were asked to consider the expenditure as a whole. The expenditure was not broken down into separate elements, different parts of which might have had different purposes. We were not requested, despite our raising the issue, to carry out the type of

exercise envisaged by s34(2). The consequence is that if there is a personal purpose in any of the elements listed above, then all of the expenditure must be disallowed.

50. *(A) Expenditure on sentencing*. The final invoice related to sentencing. The invoice was raised (and payment sought) for the work relating to the sentencing hearing before it took place. It is clear, and we find, that Mr Raynor was convicted more than three weeks before sentencing. The Appellants' evidence does not deal specifically with the reason or motivation for incurring legal fees for the sentencing hearing. By that stage the advantages and purpose of a not guilty outcome were no longer available. The point at issue in the sentencing hearing had very significant personal elements, particularly as to penalty and in the event as to the imposition and extent of the community service order. The Appellants' evidence does not deal substantively with why this cost was incurred. Our conclusion is that the natural inference is that there was a personal motivation, as well as a personal benefit, in the decision to incur that expenditure. In principle, this inference could have been displaced by evidence; but the evidence of the Appellants falls far short of establishing that the motivation did not include a personal element. We find as a fact that there was a conscious personal purpose.

51. In passing, we do not think that this outcome would have been affected if Anderson and Company's letter of 12 January 2011 had been more accurate than their letter dated 13 June 2006.We prefer the version in the 2006 letter , principally due to it being closer in time to the events about which it speaks. The 2011 letter suggests that the Judge's finding of accidental, rather than deliberate, spillage was made at the sentencing hearing itself. If that had been the case it would have meant, as the letter dated 12 January 2011 itself suggested, that at the sentencing hearing there had remained a realistic prospect of an immediate custodial sentence. That would have been a yet greater incentive to incur the costs for personal reasons.

52. *(B) Expenditure on advice/information as to personal consequences.* The first invoice for £6,168.75 is missing. This cost was incurred by Mr Raynor in a personal contract whereby he was likely to obtain personal benefit. The absence of an invoice, and the narrative thereon, inevitably makes it more difficult for this Tribunal to conclude that the expenditure was wholly and exclusively for business purposes. Moreover, before deciding whether to go through with a not guilty plea, Mr Raynor needed both information as to the criminal court's powers and also advice as to the likely outcome. He got both information and advice about the consequences which might be visited on him; from the first magistrates court hearing (as recounted in Mrs Raynor's evidence) and from the written advice from counsel. We find as a fact, on the balance of probabilities, that there was a conscious personal purpose in incurring this element of the expenditure.

53. *(C) Expenditure on a not guilty plea*. These were the main costs incurred and the main element to which submissions were directed. In view of our findings above that there was a personal purpose in the other elements (A) and (B), the expenditure cannot have been incurred wholly and exclusively for business purposes. The appeal must therefore fail whatever our finding on this element.

54. . Determining whether there had been a personal purpose in the expenditure of a not guilty plea has been more difficult. It is easy for us to conclude on the evidence that there was some business purpose in incurring the costs, for the reasons set out in Mrs Raynor's statement. It is also easy to conclude that there were potential personal benefits to Mr Raynor in contesting the charge. A not guilty verdict would, for numerous reasons which are obvious, have been much better for him as a person as well as for the business. The difficult issue is whether there was a dual purpose, and whether Mr Raynor's motivation was personal as well as business.

55. The Appellants relied on the election for Crown Court trial. We are satisfied that there was some business motivation behind this. In large measure, however, it appeared that the Appellants were responding to HMRC's contention in correspondence that Mr Raynor incurred these costs because of a risk of imprisonment. The election for Crown Court trial demonstrated that he was prepared to take a greater risk of imprisonment in exchange for the possibility of a not guilty outcome. However, that does not in itself demonstrate that it was the only purpose. There could still have been, and we find that there was, a personal motivation in electing to plead not guilty.

56. The Appellants also relied on the note of 8 December 2005 made by the solicitor which said ' our clients have genuine convictions that they were innocent....(and because)...Mr Raynor had a hazardous waste licence our clients felt that they had no real alternative to defending as long as there remained a reasonable prospect of success. The issue of costs if they lost was therefore less of a priority for them'. We have considered this very carefully as it is important evidence. That note clearly establishes some business motive; it is also consistent with a sole business motive. It is however also consistent with a dual purpose, wherein the private purpose was the desire to achieve the personal benefits of establishing innocence. We reach a similar conclusion in relation to the letter dated 13 June 2006.

57. Our overall evaluation is that the evidence does not go as far as outweighing the inference of personal purpose. In particular, whilst establishing some business motive, the evidence (to a large degree) does not deal directly with the exclusion of the possible personal motives. For example, whilst the Notice of Appeal referred to 'reason was..*totally* to defend his business', there was no such expression in Mrs Raynor's statement

58. The evidence does refer to 'no real alternative' (attendance note 8 December 2005) and 'only possible thing to do' (Mrs Raynor's statement) and 'losing was not an option' (Mr Raynor) and 'no option but to defend' (letter dated 13 June 2006). Our reading of these statements is that they could establish a *sufficient* business reason for incurring the costs; but they do not establish that there was not a concurrent personal reason/purpose/motivation. Even if a 'main' business reason is established (as per the Anderson and Company letter of 12 January 2011) that is not in itself sufficient to meet the statutory test of 'wholly and exclusively'.

59. The non-contemporaneous letter dated 12 April 2010 from Anderson and Company used the phrase 'outweighed personal considerations'. The author of that

letter was not called to give evidence, he did not provide a statement nor confirm the letter with a statement of truth. He was not available to be cross examined. The comments were prepared more than four years after the event and the phrase 'outweighed personal considerations' was not in the 8 December 2005 attendance note that it enclosed. The subsequent recollection of Anderson and Company in the January 2011 letter conflicts with their own 2006 material and casts doubt on the reliability of their 2010 and 2011 material. Accordingly we can give no real weight to that phrase.

60. In any event, the phrase 'outweighed personal considerations' can be interpreted as referring to the *negative* personal considerations such as the stress of a trial (as cited earlier in the attendance note).The personal considerations would have positive elements (a possibility of acquittal) as well as negative (such as stress of a trial and possibly a higher sentence).The phrase is, in our view, consistent with the stated business benefits and purposes, together with the unstated personal motives and benefits, outweighing the negative personal considerations. That is also consistent with Anderson and Company's 2011 reference to a 'main' (rather than 'sole') purpose.

61. We find as a fact that there was a personal motivation in incurring the expenditure as well as a business one. We are not satisfied on the balance of probabilities that the conscious motives for incurring the expenditure of a not guilty plea were solely for business purposes, nor therefore that the expenditure was incurred wholly and exclusively for business purposes. Whilst it is clear that there were some business purposes, these were not the only motives.

62. Our principal reason for coming to this conclusion is that there is a strong natural inference of personal purpose arising from the significant personal benefit of a not guilty outcome. This inference was not displaced by the Appellants' evidence. The personal benefits are clear and obvious, particularly in the context of an individual who had a strong belief that he was not guilty. We think it inherently unlikely that such considerations were not part of Mr Raynor's purpose and the evidence does not sufficiently displace that inherent unlikelihood The Appellants' evidence was successful in persuading us that there was some business motive but it did not demonstrate to us that the business purpose was the only one. In coming to this conclusion we take into account all of the evidence, including the points set out above.

63. On the evidence as a whole we find as a fact, on the balance of probabilities, that there was also a conscious personal purpose in incurring the costs of a contested not guilty plea.

64. *Some miscellaneous points.* First, we note that, in many circumstances, a decision to incur over £50,000 in legal costs would have been an unusual and unlikely decision solely on business grounds. The context was the advice from counsel that there was a real risk that Mr Raynor would be convicted (with a 'sporting chance' of acquittal) and that a guilty plea would result in a lower penalty and much lower legal costs. We acknowledge that incurring such substantial costs might be consistent with a belief

that contesting the case was necessary to defend the business (which is itself consistent with the note of 8 December 2005). But also it suggests to us, and is consistent with, there being other (personal) motives.

65. Secondly, there are some factors which were not relevant in applying the statutory test, though they were referred to in submissions. In our judgement, it does not matter that the conviction did not in itself result in mandatory closure of the business - there could be a business reason for seeking to avoid damage which fell short of closure of the business. Moreover, it does not matter ultimately to our decision what the outcome of the criminal trial turned out to be; the issue is what the purpose was in incurring the costs.

66. Thirdly, we also note that we are coming to a different conclusion from that produced in the *McKnight* case which is a House of Lords authority. It is unsurprising that a different outcome can result as the issue is one of fact. The principal reason for a different outcome is our (different) finding of fact. The principal reasons for that different finding are the much more extensive benefits of avoiding a criminal conviction (and thus stronger inference of personal purpose) combined with the insufficient evidence (in our view) about motive to displace that inference.

Conclusion

67. We find as a fact that there was a dual purpose, business and personal, in incurring each of the three elements of expenditure listed above. As a result, we conclude that the expenditure was 'not incurred wholly and exclusively for the purposes of the trade' within s34(1) and therefore that the appeal must be dismissed.

68. 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.

Andrew Long

TRIBUNAL JUDGE
RELEASE DATE: 12 DECEMBER 2011