NCN: [2020] UKFTT 0291 (TC)

TC07775

Appeal number: TC/2018/04052
TC/2018/04053

INCOME TAX – penalties issued under Schedule 24 – in their personal tax returns for successive years the Appellants had claimed the expense of making significant contributions into an offshore remuneration trust but neither Appellant made such a payment or incurred a liability to contribute – whether there was a inaccuracy in a document which led to a loss of tax – yes – whether inaccuracy deliberate – yes – penalties confirmed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARIE CHRISTINA HALLEN **Appellant**

- and -

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

ANETTE MAJVI PERSSON **Appellant**

- and -

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

TRIBUNAL: JUDGE JANE BAILEY

Sitting in public at Centre City Tower, Birmingham on 12 July 2019

The Appellant did not appear and was not represented

Mr Daniel Baird, presenting officer, for the Respondents

DECISION

Introduction

1. The joined appeals of Dr Hallen and Dr Persson are made against penalties issued to each of them under Schedule 24 to the Finance Act 2007 in respect of what HMRC considered to be deliberate inaccuracies in their tax returns. The penalties imposed are as follows:

	Dr Hallen	Dr Persson
2012/13	-	£24,979.96
2013/14	£12,044.39	£26,112.17
2014/15	£11,481.19	£10,819.71
2015/16	£11,504.98	£11,708.38
Totals:	**£35,030.56**	**£73,620.22**

2. These penalties were calculated by HMRC at 50.75% of the potential lost revenue for each of the years. The relevant tax was assessed under Section 29 of the Taxes Management Act 1970 and neither Appellant has appealed (either to HMRC or to the Tribunal) against the assessments to tax.

The decision to proceed with the hearing in the absence of one of the parties

3. Both Appellants filed an appeal with the Tribunal on 25 June 2018. These timeous appeals were made against review decisions dated 30 May 2018. The Appellants' appeals were allocated to the Standard category and were joined on 15 February 2019. On 18 December 2018, and again on 1 March 2019, Dr Persson had requested that the appeals be re-categorised as Paper so that she and Dr Hallen did not have to attend. It is unclear whether there was a response to these requests but on 8 April 2019, the parties were informed that the appeal had been listed for an oral hearing on 12 July 2019.

4. On 6 July 2019, the Tribunal and HMRC received an email from Dr Persson stating:

> Dear Sir/Madam,
>
> Good day to you
>
> We do not recall being informed that the Hearing Date is 7 July 2019

> Find attached evidence of my Health Condition and why I am presently in Sweden and unable to attend
>
> I have given my considered views and evidence as attached and not being a Solicitor neither have the Skills to cross examine
>
> nor do I have the nerves to represent myself within the hallowed Chambers of the Tribunal
>
> Hence as I have consistently requested My positions should be attended to as written down and submitted
>
> I wish the Tribunal happy Proceedings

5. This was accompanied by a Doctor's Note advising that Dr Persson had been advised to abstain from work for three months from 7 June 2019. Dr Persson also attached a skeleton argument on behalf of both Appellants, and four other documents described as Exhibits C, H, K and Z. (These exhibits consisted of a 2016 engagement letter, a 2018 email from Moor Green, a 2018 email with legal advice and HMRC's publication Spotlight 51 with HMRC's view of remuneration trusts.) If there are Exhibits A, B, D, etc, then I note that no documents so labelled have been provided to the Tribunal.

6. On 9 July 2019, a member of the Tribunal staff emailed the parties on my instruction. In that email it was explained that this matter would not be re-categorised as a paper hearing and, if the Appellants wished to postpone the hearing until a later date, a postponement application should be made at the hearing (which was still listed for 12 July 2019). That email concluded:

> The judge notes that the Appellants' current intention is not to attend the hearing. While appellants cannot be compelled to attend the hearing of their own appeals, the Appellants are reminded that if they do not attend they will lose the opportunity to cross examine HMRC's witness or challenge that oral evidence. That may put the Appellants at a disadvantage, and so the judge invites the Appellants to reconsider their attendance.

7. On the day of the hearing, neither Appellant had appeared at the Tribunal by the appointed time. The Tribunal clerk attempted to telephone both of the Appellants but there was no answer to either call.

8. I was satisfied from my inspection of the file and the email correspondence that the Appellants had been correctly notified of this hearing, and had subsequently chosen not to attend or be represented. The Respondents had attended and were ready to proceed with the hearing. In the circumstances I considered it was in the interests of justice that the hearing should proceed in the absence of the Appellants.

Witness evidence

9. I heard witness evidence from Mrs Wendy Bray, on behalf of HMRC. I found her to be an honest and reliable witness, and I accept her evidence in full.

Findings of fact

10. On the basis of the documents in the bundles before the Tribunal and the oral evidence of Mrs Bray, I find as follows:

a. At all relevant times, Dr Hallen and Dr Persson worked, apparently on a self-employed basis, as Associate Dentists for Nationwide Healthcare Providers Limited ("NHP"). Dr Hallen had worked as a dentist in the UK since 1997; Dr Persson had worked in the UK as a dentist since 2002. Dr Hallen and Dr Persson were both directors of NHP. NHP provided premises, dental equipment and other supplies necessary to run a dental practice; Dr Hallen and Dr Persson provided their expertise, and were paid gross monthly by NHP (with the amount paid depending on the activities each had undertaken in the month).

b. Both of the Appellant had been in HMRC's Self Assessment regime for a number of years before the years under consideration. Until about the end of July 2017, Mr Masoud Davood of Moor Green & Co. was instructed to act for Dr Hallen and Dr Persson and apparently a number of other people who worked for NHP. Each year prior to 2017, Mr Davood prepared the accounts and tax returns of Dr Hallen and Dr Persson. To enable Mr Davood to prepare these documents, in around June or July of each year, Dr Hallen and Dr Persson sent details of their income and receipts for their expenses for the previous tax year to Mr Davood.

c. On an unknown date, a company called Size 5 Limited and an organisation called Minerva International Wealth Planning ("Minerva") published information slides (the "Minerva slides") about a structure which was said to be tax efficient. Minerva was apparently run by a Mr Clive Richardson, a director of Size 5 Limited. The first of the Minerva slides, entitled "What's an Umbrella Remuneration Trust from Minerva Services Ltd", detailed the fees charged to those who wished to participate in the structure. The fees set out in the Minerva slides were a 10% product fee on each contribution to the umbrella trust, a 1% per annum fee (for the first five years) for legal and administrative costs, an annual fee of £200 and a one-off membership fee of £399.

d. The next of the Minerva slides detailed the wide range of clients for whom the arrangements were said to work. Subsequent slides, including a flow chart, explained that the arrangement worked by:

- an interested company first joining an offshore umbrella trust,
- that interested company then contributing funds to that umbrella trust, and
- finally, the directors of that interested company managing those contributed funds in a new onshore personal management company.

Further slides explained what it was said that the new onshore personal management company could do, and how it could be operated for the benefit of the contributing company. The relevant umbrella trust in this case was the Aionios Commercial Purpose Foundation ("Aionios"), a Mauritius based remuneration trust.

e. The Minerva slides described the contributions being made to Aionios via an organisation called Buckingham Administration, as agent for the trust. In the bundle before the Tribunal was details of a company called Buckingham W Services Limited (known as Baxendale Walker Wealth Limited until 12 May 2014) but it is unclear if Buckingham W Services Limited is the "Buckingham Administration" identified in the Minerva slides. In the event, it seems that all administration was undertaken by a company called Moorcroft Solutions Limited ("Moorcroft"). Mr Richardson – who ran Minerva – was also a director of Moorcroft.

f. On an unknown date and in unknown circumstances, Dr Hallen and Dr Persson became aware of Aionios and the structure described in the Minerva slides. Dr Hallen and Dr Persson initially told HMRC that they had conducted internet research into wealth management, identified Aionios as a result of that research, and then instructed their accountant, Mr Davood, to contact the relevant organisations so that they could be introduced to the scheme and make use of Aionios. In a subsequent meeting with HMRC, Dr Hallen and Dr Persson told HMRC that this initial explanation was untrue, and that it was Mr Davood who had brought up the use of Aionios and subsequently introduced them. In between those two meetings, Dr Hallen also told Mrs Bray, of HMRC, during a telephone call, that she had been made aware of Aionios by a colleague who used the scheme. In a witness statement made in other proceedings, Mr Davood stated that Dr Hallen and Dr Persson were aware of Aionios through friends and colleagues, and that Dr Hallen and Dr Persson had approached him and asked him to put them in touch with Moorcroft. Mr Davood's explanation is consistent with the version given by Dr Hallen in the telephone call with Mrs Bray.

g. Although it is clear that Mr Davood is treated as an "introducer" (by Aionios's agent), it is not clear whether this introduction came at the instigation of Mr Davood, or at the instigation of Dr Hallen and Dr Persson. By October 2016, Mr Richardson had informed Aionios members that Moorcroft had terminated its relationship with Mr Davood but there is no evidence of the nature of this relationship or when it arose. The documents which are available to the Tribunal do not preclude any of the three versions of events put forward at different times by the Appellants. Given the limited and conflicting evidence before me (and noting that there is ongoing investigation by the Institute of Financial Accountants), I make no finding as to how Dr Hallen and Dr Persson came to be aware of Aionios.

h. On 19 February 2014, Mr Davood wrote to Dr Hallen to inform her that Moor Green was introducing a "Tax Enquiry Fee Protection Service", from 1 March 2014, to protect its clients against the costs of responding to an enquiry. A handwritten note at the bottom of the page records that Dr Hallen paid a fee for this service by cheque on 24 February 2014. I have not seen a copy of any similar letter sent to Dr Persson but, on the balance of probabilities, I find that such a letter was sent to all clients of Moor Green.

<u>2012/13</u>

i. On 13 January 2014, Dr Persson filed her tax return for 2012/13. During the course of 2012/13, Dr Persson made six payments (totalling £36,415.72) on account of the tax due under her self-assessment for 2012/13.

j. On an unknown date after Dr Persson's tax return for 2012/13 had been filed, there was a revision to Dr Persson's tax return and self-assessment, increasing her expenses to a level such that her net profits fell below the personal allowance for the year. This increase in expenses was said to be due to a very large amount having been contributed to Aionios. This resulted in no tax becoming payable for 2012/13 by Dr Persson. HMRC repaid to Dr Persson the tax which she had paid on account during 2012/13. There is no evidence about who made the revision to Dr Persson's return but it can only have been Dr Persson or Mr Davood. Given Dr Persson's reliance on Mr Davood, I find, on the balance of probabilities, that Mr Davood made these revisions. I also find, on the balance of probabilities, that Mr Davood was acting on the instructions of Dr Persson when he revised Dr Persson's 2012/13 return. (If Mr Davood had been acting completely without instructions, there is no reason why he would not also have amended the 2012/13 return of Dr Hallen.)

k. There is no evidence that Dr Persson made any contribution to Aionios in 2012/13, or that this claimed contribution was paid at any time. I find that Dr Persson did not make the claimed contribution to Aionios in 2012/13 or at any later time. The Appellants have argued that it does not matter that no actual payments were made or that no funds left their bank accounts, either to meet the expenses which they claimed or to repay loans which they say were taken out from third parties.

l. In making this argument, the Appellants rely on Section 27 Income Tax (Trading and Other Income) Act 2005, which provides that a reference to an expense is a reference to an item brought into account as a debit. The Appellants argue that as there is no implication that an expense must actually be paid, it is irrelevant that they made no payment. The difficulty for the Appellants in making that argument is that both Appellants have accepted (in the meeting with HMRC on 24 November 2017) that they did not consider they were ever under an obligation to pay to Aionios the amounts claimed in their tax returns.

m. Given Dr Persson's acceptance that she had not paid, and was not under any obligation to pay, the amount claimed as an expense in the revision to her 2012/13 tax return, then I am satisfied that the revision to Dr Persson's 2012/13 return contained an inaccuracy, and that the revised return was inaccurate. The expense of a contribution to Aionios had not been incurred because there was no obligation to make a contribution to Aionios. I am also satisfied that at the time her self-assessment was revised, Dr Persson was aware that she had not made a contribution to Aionios in 2012/13, or at all, because the funds were still in her bank account and Dr Persson was also aware that she had not incurred the expense of making a contribution to Aionios because she knew she was under no obligation to make the claimed contribution to Aionios at any time.

<u>2013/14</u>

n. On 5 July 2014, Mr Davood emailed Dr Hallen, attaching a copy of her accounts for 2013/14 and her draft tax return for the same year. Mr Davood advised Dr Hallen to print the attached documents and to sign them. In the body of the email, Mr Davood stated:

> Please see attached copy of your accounts and tax returns as at 05-04-2014
>
> Please print all the attached documents and sign the followings documents:
>
> 1- Accounts as at 05-04-2014- Please sign page 1
>
> 2- Tax return as at 05-04-2014- Please sign page 1
>
> 3- Tax to pay by 31-01-2015
>
> 3- Income tax calculation as at 05-04-2014
>
> 4- A copy of our invoice
>
> TAX TO PAY
>
> Total tax to pay by 31-01-2-15 **£nil No payments on account to pay by 31.07.2014**
>
> **Tax refunds due to you £11,021.12**
>
> **TRUST PAYMENTS**
>
> Total payments to the trust is £10212.42
>
> Please give me a call when you get this email.

o. On 9 July 2014, Mr Davood emailed Dr Hallen to inform her that her application to become a member of Aionios had been forwarded. The email continued:

> **Payments to the trust**
>
> The total profit for the trust purposes for the year ending 5th April 2104 (sic) £91022@11% = 10012.42 plus annual trustee fees of £200 = £10212.42 this is the total payments you are requested to pay on line plus sum of £399 membership fee (this is one off fee) before 15th July 2014 to the below bank account

p. The bank accounts details provided were for Moorcroft. Mr Davood's email of 9 July 2014 continued:

> **Tax refunds that you should receive within the next 2 weeks is £11,021.13.**
>
> Payments to Moor Green & Co.

> Please note that our fees for our services is £2500 (this is one off fees) please kindly arrange to send me a cheque for £2500. Please give me a call if you require further details.

q. No replies to those emails were provided to the Tribunal. On the basis of the emails of 5 and 9 July 2014, I find that Mr Davood calculated the fee to be paid to Moorcroft on the understanding that Dr Hallen would contribute £91,022 of her profits (the entirety of her net profits) for 2013/14 to Aionios, and those funds would then be managed by her within the personal management company she should have set up (as contemplated in the Minerva slides).

r. Dr Hallen paid the fees of £10,212.42 and £399 to Moorcroft. Dr Hallen also paid the fee of £2,500 to Moor Green as instructed. It is not in dispute that Dr Hallen did not pay any other amounts either to Moorcroft or Aionios for 2013/14.

s. On 27 August 2014, Dr Hallen's tax return for 2013/14 was received by HMRC. On the balance of probabilities, I find that Mr Davood filed this return after gaining the approval of Dr Hallen. Both Appellants have argued (argument xxxii below) that there is no evidence that they approved the returns which were filed, but I disagree: there is evidence that Mr Davood asked the Appellants to approve their returns and then, sometime later, those returns were filed. There is no reason for Mr Davood to file a return which had not been approved, and it is unlikely that he would do so as it would expose him to a potential claim of professional negligence. The Appellants have also argued (argument xix below) that the expenses claims had been inserted into the returns without the written approval of the Appellants. As Dr Hallen still has copies of the emails sent to her with the draft returns for the relevant years attached, it would have been a simple matter for her to provide HMRC with the draft returns which Mr Davood had sent her so that that draft could be compared with the returns which were filed. Dr Hallen did not take this step. On the balance of probabilities, I find that the Appellants did approve the filing of their returns, as requested by Mr Davood, before those returns were filed.

t. In that 2013/14 return it was claimed that Dr Hallen had incurred expenses of £94,777 in 2013/14, to be set against her gross profits of £97,998.43. I agree with HMRC that it is clear from Dr Hallen's bank statements and credit cards that Dr Hallen did not pay more than £3,755 as expenses in 2013/14, a difference of £91,022. For the same reasons as applied to Dr Persson's revised tax return for 2012/13, I am satisfied that Dr Hallen's 2013/14 return contained an inaccuracy, and that the return was inaccurate. I am also satisfied that Dr Hallen was aware (from the expenses receipts she had given to Mr Davood, from the fact that the funds were still in her bank account and from the fact that she was aware she had no obligation to make a contribution to Aionios) that she had not incurred the claimed expense of £91,022 in 2013/14. I am satisfied that Dr Hallen was aware of this when she confirmed to Mr Davood that her tax return for 2013/14 should be filed.

u. On 29 September 2014, Moor Green sought repayment from HMRC of the tax said to have been overpaid by Dr Hallen for 2013/14. That overpayment arose from

the first payment on account for 2013/14 paid to HMRC by Dr Hallen in July 2013. A repayment of £11,060.69 was issued to Dr Hallen on 13 October 2014.

v. For the reasons set out above, on the balance of probabilities, I find that Mr Davood prepared Dr Persson's tax return for 2013/14, and Dr Persson approved the filing of that tax return before it was filed by Mr Davood. On 18 January 2015, Dr Persson's tax return for 2013/14 was received by HMRC. In that tax return it was claimed that Dr Persson had incurred expenses at such a high level in 2013/14 that when they were set against her gross profits, it resulted in net profits for the year of £54. Those claimed expenses included a contribution to Aionios of £132,451.

w. For the reasons as set out above, I find that Dr Persson did not incur the expense of making a contribution to Aionios in 2013/14. I am satisfied that Dr Persson's 2013/14 return contained an inaccuracy, and that the return was inaccurate. I am also satisfied that Dr Persson was aware (from the fact that the funds were still in her bank account) that she had not paid £132,451 to Aionios in 2013/14 and was aware (from the fact that she had no obligation to make any contributions to Aionios) that she had not incurred the expense of a contribution to Aionios. I am satisfied that Dr Persson was aware she had not incurred the expense claimed when she confirmed to Mr Davood that her tax return for 2013/14 should be filed.

2014/15

x. On 23 July 2015, Mr Davood emailed Dr Hallen with her 2014/15 accounts and draft tax return. (These accounts had been prepared by Mr Davood after Dr Hallen had sent him her expenses receipts and income statements for 2014/15.) After instructions to print and sign the relevant pages of the account and return (as for 2013/14), Mr Davood continued:

> 4. Tax to pay = Nil
>
> **Payment to Trust**
>
> The total amount to pay is **£1825** you had already paid sum of £6900.
>
> Please arrange to pay the remaining balance.

y. No copy of the statements for Dr Hallen's bank account and credit card were provided for 2014/15 so I make no finding as to whether any amount was paid to Moorcroft at any time in respect of 2014/15.

z. On 6 October 2015, Dr Hallen emailed Moor Green, stating:

> Hello
>
> I would like to make part payment for year 2015-16 trust for £40000 til now. How much should I pay into the trust?

aa. Moor Green replied on the same day:

Dear Dr

You will need to pay to the trust

Total income £40000
Less expenses £6000

Total Net profit £32000

£32000@11% = £3250

Total payable to the trust is £3250

bb. On 3 November 2015, Mrs Bray of HMRC wrote separately to Dr Hallen and Dr Persson. Those letters were in very similar terms. In each of those letters, Mrs Bray informed the Appellants that she was investigating suspected tax fraud, and offered each of them the opportunity to make a disclosure under the Contractual Disclosure Facility. Neither Dr Hallen nor Dr Persson responded to this HMRC offer.

cc. On 9 November 2015, Moor Green wrote to Dr Hallen to again offer her their "Tax and VAT Enquiry Fee Protection Service", described as protecting "from the costs that arise in dealing with your HMRC enquiry". It is unclear if Dr Hallen decided to pay this fee.

dd. On 24 December 2015, Dr Hallen's tax return for 2014/15 was received by HMRC. In that return it was claimed that Dr Hallen had incurred expenses at such a high level in 2014/15 that when they were set against her gross profits, it resulted in total profits for the year of £162, and so no tax being payable. Those claimed expenses included a contribution to Aionios of almost all of her net profits.

ee. I am satisfied that Dr Hallen's 2014/15 return contained an inaccuracy, and that the return was inaccurate. I am also satisfied that Dr Hallen was aware that she had not paid almost all of her net profits to Aionios in 2014/15, and that she had not incurred an obligation to make a contribution to Aionios of almost all of her net profits for 2014/15. I am satisfied that Dr Hallen was aware she had not incurred the expense of a contribution to Aionios when she confirmed to Mr Davood that her tax return for 2014/15 should be filed.

ff. On 24 December 2015, Dr Persson's tax return for 2014/15 was received by HMRC. In that return it was claimed that Dr Persson had incurred expenses at such a high level in 2014/15 that when they were set against her gross profits, it resulted in no tax being payable. Those claimed expenses included a payment to Aionios of £70,186. I find that Dr Persson did not make a payment to Aionios of £70,186, and that she did not incur an obligation to make such a contribution to Aionios. I am satisfied that Dr Persson's 2014/15 return contained an inaccuracy, and that the return was inaccurate. I am also satisfied that Dr Persson was aware that she had neither paid £70,186 to Aionios in 2014/15, nor incurred an obligation to pay £70,186 to Aionios. I am satisfied that Dr Persson was aware that she had not incurred the expense of a contribution to Aionios when she confirmed to Mr Davood that her tax return for 2014/15 should be filed.

gg. On 5 January 2016, Moorcroft was dissolved.

hh. On 19 January 2016, Mrs Bray informed Dr Hallen and Dr Persson that HMRC's investigation into their tax affairs would continue, and that the investigation would be under Code of Practice 9.

The Appellants first meeting with HMRC

ii. On 17 February 2016, a meeting took place between Mrs Bray, Mr Johnson (both of HMRC), Dr Hallen, Dr Persson, Mr Davood, and a Mr Jamil Ahmad (a director and the controlling shareholder of NHP). At this meeting Mrs Bray explained that HMRC were investigating suspected tax fraud, and asked first about fees received by Dr Hallen and Dr Persson as directors of NHP. Dr Hallen and Dr Persson denied that such fees had been received. Mrs Bray then asked Dr Hallen and Dr Persson to explain the "other expense" set out in each of their tax returns for 2013/14 and 2014/15. Mr Davood replied that this was payment into a remuneration trust and that he would provide documents after the meeting. Mrs Bray expressed her concern to Dr Hallen and Dr Persson that, according to their tax returns, they had no income to meet their day to day needs as virtually all of their income had been expended into the remuneration trust. Mrs Bray also expressed her view that Dr Hallen and Dr Persson had knowingly submitted incorrect tax returns. Neither Dr Hallen nor Dr Persson responded, and the meeting concluded.

jj. On 28 February 2016, Mr Davood forwarded a letter from HMRC to Dr Hallen and Dr Persson, and asked them to provide him with as much information as they could to the questions which were not related to Aionios. By letter dated 24 April 2016, Moor Green provided HMRC with a copy of the Foundation Charter of Aionios, copies of eleven out of twelve of Dr Hallen's pay slips for 2013/14, copies of Dr Hallen's bank statements covering the period 14 March 2013 to 13 May 2014, and copies of Dr Hallen's credit card statements between April 2013 and April 2014.

kk. Moor Green also provided an analysis of Dr Hallen's "Other Expenses" claimed in her 2013/14 tax return as follows:

Details	Amount
Trade subscription	£3,605.00
Statutory Levy	£120.00
CPD Course fees	£30.00
Contribution to Commercial Purpose Foundation	£91,022.00
Total	£94,777.00

ll. The bank statements and credit card statements provided showed that Dr Hallen had not paid any amounts to Aionios in 2013/14.

mm. Moor Green provided HMRC with an analysis of Dr Hallen's income, showing that Dr Hallen had a gross income of £97,998.43 in 2013/14, and also received Child Benefit of £1,752.40. Dr Hallen's bank statements showed that she had not paid expenses totalling £94,777, and that the "other expense" claimed, of £91,022, remained in Dr Hallen's bank account.

nn. On 20 June 2016, Moorcroft emailed Moor Green to advise Mr Davood that he would shortly receive statements setting out the annual settlement and any amounts outstanding. Settled funds were to be sent to Moorcroft. (This was despite the dissolution of Moorcroft five months earlier.) On 1 August 2016, Moorcroft wrote to unidentified members of Aionios, copying in Moor Green, to state that the annual foundation fees were due.

The second meeting with HMRC

oo. On 19 August 2016, a meeting took place between Mrs Bray and Mr Johnson of HMRC, and Mr Davood, to discuss accountancy points in relation to the Appellants tax affairs. Mr Davood informed HMRC that his understanding was that Aionios was a commercial purpose foundation, and that payments were made into it by the Appellants for the purpose of the business. The Appellants business purpose was said to be tax planning which Mr Davood considered was a valid expense, akin to a membership fee. HMRC expressed their disappointment at the lack of documentation provided thus far by the Appellants.

pp. Later on 19 August 2016, a further meeting took place. This was the second meeting between Mrs Bray, Mr Johnson, Dr Hallen, Dr Persson and Mr Davood. During this meeting Dr Hallen and Dr Persson confirmed to HMRC that they had decided to research wealth management on the internet and, from this research and from discussions with colleagues, they had identified Aionios. Mr Davood suggested that Dr Hallen and Dr Persson had found Moorcroft, and that Moorcroft had then referred to Aionios. Dr Hallen and Dr Persson told Mrs Bray that they had discussed Moorcroft with Mr Davood, who had then telephoned Moorcroft. Mrs Bray asked Dr Hallen and Dr Persson to explain the purpose of a commercial purpose foundation, and also the business purpose for them of using Aionios, but they were unable to answer either question. When Mrs Bray pointed out that no payments been made to Aionios, Mr Davood suggested that the expense was incurred on the accruals basis. Mrs Bray informed Dr Hallen and Dr Persson that she currently believed deliberate penalties would be appropriate, and that she would send a schedule of further documents required.

qq. On 21 August 2016, Dr Hallen emailed Moorcroft and Moor Green asking that Moorcroft provide the information which HMRC had asked her to provide.

rr. One of the documents disclosed a few days before the hearing was the first page of a letter, dated 22 September 2016, from Buckingham Administrators Limited to Minerva Services Limited. That letter was said to have been provided to Dr Hallen so that she would be aware that Buckingham Administrators Limited would act as administrator, would liaise with Buckingham Wealth Limited and would "assist the

member and/or his tax advisor in dealing with HMRC enquiries concerning membership of the URT [Aionios] and taxation matters relating to such ownership".

ss. On 3 October 2016, Mr Richardson emailed Dr Hallen advising her that any questions regarding Aionios could be emailed to Moorcroft, or Dr Hallen could telephone Mr Richardson directly. On 5 October 2016, Moorcroft emailed members of Aionios to inform them that Mr Davood could not answer questions about Aionios, and that Moorcroft had terminated its relationship with Moor Green. The nature of that relationship was not explained.

tt. On 11 October 2016, Mr Richardson emailed Dr Hallen to advise her that he had yet to receive from Moor Green a copy of the information request made by HMRC, and that he required a copy without further delay if he was to assist. Dr Hallen replied to Mr Richardson to say that Mr Davood was on leave until 17 October 2016. There were further emails on 11 October 2016, in which Mr Richardson tried to ascertain the date by which HMRC was expecting a reply to their enquiries.

2015/16

uu. On 22 December 2016, HMRC received Dr Persson's tax return for 2015/16. In this return it was claimed that Dr Persson had incurred expenses at such a large level, including a very large payment to Aionios, that her net profits for the year were £10,832. This resulted in tax of £46.40 and NICs of £395.08 due. I am satisfied that no contribution to Aionios had been made and Dr Persson had not incurred the expense of a contribution to Aionios, and that the return which was filed contained an inaccuracy. I am also satisfied that Dr Persson knew she had not made a payment to Aionios or incurred an obligation to make a contribution, and that she knew this to be the case when she approved the filing of her tax return.

vv. On 3 January 2017, Moor Green emailed Dr Hallen with a copy of her tax return and accounts for 2015/16. In that email, Mr Davood stated:

> Please see attached a copy of your accounts and atx (sic) return as at 5th April 2016
>
> Please print all the attached documents and sign following pages:
>
> 1- Accounts as at 5th April 2016 – Please sign page one under your name
>
> 2- Tax return as at 5th April 2016 – Please sign page one (the fron (sic) cover page)
>
> 3- Invoice require payments for our services – please pay to our account: ….
>
> 4- Tax to pay = Nil
>
> 5- Nic to pay is £1033.81
>
> If you wish to pay your self assessment tax liability you can use the below link to pay on line before 31-01-2017. please use your Debit card to pay.
>
> [Mr Davood provided a link to enable Dr Hallen to pay HMRC the NICs which was due. Mr Davood continued]:

Payment to Trust

The total amount to pay is **Nil** you had already paid in ful (sic) to the trust

ww. On 21 January 2017, HMRC received Dr Hallen's tax return for 2015/16. In this return, Dr Hallen stated that her profits were almost completely reduced by expenses, including the expense of another very large contribution to Aionios. I am satisfied that no contribution was paid to Aionios, that Dr Hallen had not incurred an obligation to make a contribution to Aionios and that the return which was filed contained an inaccuracy. I am also satisfied that Dr Hallen knew she had not made a payment to Aionios or incurred an obligation to make a contribution, and that she knew this to be the case when she approved the filing of her tax return.

xx. On 1 March 2017, Dr Hallen emailed Moor Green to state:

> I would like to make a contribution to the trust tax year 16-17 (£4000).

yy. Moor Green relied asking Dr Hallen to send the name of her personal management company, and the bank account and sort code for that personal management company. On 20 March 2017, Dr Hallen replied to Moor Green with the requested details. On 21 March 2017, Moor Green emailed Buckingham Wealth with an attached "contribution notice", requesting that Buckingham Wealth issue Dr Hallen with a letter of authority to pay £4,000. Buckingham Wealth replied the next day, asking Moor Green:

> Please can you confirm fees and if this is a lev up?

zz. No copy of any reply to that email was provided to the Tribunal. However, on 23 March 2017, Buckingham Wealth emailed Dr Hallen with a letter of authority signed by the trustees. Dr Hallen was advised:

> Please follow the instructions on the letter. Once the transfer is made please also remember to send a bank confirmation to the trustees …

aaa. That letter of authority, dated 22 March 2017, stated:

> As Trustees of the [Buckingham Administrators Limited Remuneration Trust (2013)], and in light of your proposed contribution to the Trust in the amount of £36.363.63, we hereby authorize you to make the following allocation of funds and to arrange each respective payment as follows:
>
> A) Please transfer the sum of £4,000.00 as payment of the agreed Minerva fees to:
>
> …
>
> Once executed, please kindly save us scanned copies of the bank transaction confirmation advices for our records.

bbb. The clear expectation expressed in the letter of authority was that Dr Hallen would make a contribution to Aionios of £36,363.63, and that the payment of £4,000

was the fee in respect of that contribution. No such payment to Aionios was made by Dr Hallen, and no obligation to make a payment was incurred.

The conclusion of HMRC's investigation

ccc. On 2 May 2017, Mrs Bray wrote to Dr Hallen to tell her that the investigation was being brought to a close. On the same day, Mrs Bray sent a separate letter in similar terms to Dr Persson. Mrs Bray stated that her conclusion in the cases of both Dr Hallen and Dr Persson was that the expenses claimed were not allowable, and therefore that tax was payable for the years 2012/13 (in the case of Dr Persson), 2013/14, 2014/15 and 2015/16 (in the case of both Appellants). Mrs Bray offered Dr Hallen and Dr Persson the opportunity to settle the matter by contractual settlement. Mrs Bray stated that in the absence of agreement, assessments would be raised. Mrs Bray also stated her intention to consider the imposition of penalties, and she invited representations from Dr Hallen and Dr Persson.

ddd. Neither Dr Hallen nor Dr Persson accepted the offer of a contractual settlement. Consequently, on 13 June 2017, HMRC issued assessments to tax to Dr Hallen and Dr Persson, disallowing the expenses relating to the Aionios Settlement which had been claimed for three years by Dr Hallen and for four years by Dr Persson. No appeal was made against those assessments.

eee. On 27 June 2017, Moor Green emailed Dr Hallen and Dr Persson as follows:

> As you are aware i have spent to the trust and tey (sic) shall start taking your case as a matter of urgency but they stated as it is code 9 is beyond the normal course of the trust issue and you may have to pay £250 (sic) each.
>
> …
>
> Please when you both had made payments of £2500 each let me have a proof of payments so that I can transmit your proof of your payments so that their legal team can commerce litigation and file defence etc.

fff. Following this email, Dr Hallen and Dr Persson each paid £2,500 to Buckingham Wealth. On 29 June 2017, a Mr Andrew Liyanage of Buckingham Wealth advised Mr Davood that the issue which had arisen was not a Trust issue but a Code 9 issue, and therefore Buckingham Wealth could not defend the Appellants. Mr Liyanage advised that fees received would be refunded, and that Dr Hallen and Dr Persson should seek advice from a tax counsel. On the same day Mr Davood forwarded this email to Dr Hallen and Dr Persson, and asked them to call him as soon as they received his email.

ggg. On 5 July 2017, Mr Davood emailed Dr Hallen and Dr Person, forwarding an email from Griffin Law (described by Moor Green as "the legal team"). Mr Davood noted that the cost of considering and drafting "an appeal" would be £15,000 plus VAT. On the balance of probabilities, I find that this was a prospective appeal against the assessments to tax. Moor Green asked both Appellants to let them know if they considered that proposal reasonable so he could instruct the legal team. On 7 July

2017, Moor Green emailed Mrs Bray of HMRC, asking her to call him as soon as possible.

hhh. On 10 July 2017, Moor Green sent two letters to HMRC, one each in respect of Dr Hallen and Dr Persson. In each of these letters, Moor Green stated that neither Appellant intended to appeal the assessments but that each would need some time to pay the balance of the tax due. Moor Green suggested that Dr Hallen and Dr Persson had both "made enormous amount of corporation (sic) throughout the tax enquiry". On 12 July 2017, Moor Green again emailed Mrs Bray asking her to call him and suggesting that she was avoiding him.

iii. On or about 21 July 2017, Dr Hallen sent some documents to Crystal Finance Services Limited ("Crystal"). On 24 July 2017, Crystal wrote to HMRC to inform Mrs Bray that the firm was instructed to act on behalf of Dr Persson. In this letter Mr Ikezogwo of Crystal stated that Mr Davood "coerced", "cajoled and hassled" Dr Persson and other dentists working for NHP into participating in the Aionios remuneration trust. Mr Ikezogwo incorrectly identified Mr Davood as managing Moorcroft, and asserted that Dr Persson could not reasonably be expected to have understood the arrangements, and had relied upon Mr Davood.

jjj. On 25 July 2017, Dr Hallen telephoned Mrs Bray to inform HMRC that Mr Davood was no longer instructed to act for her. During that call, Mrs Bray asked Dr Hallen if she wished to revisit any of what had been said in the first two meetings and to say if Mr Davood had introduced her to Aionios. Dr Hallen told Mrs Bray that she did not wish to revise what had been said previously, and that Aionios had come to her attention through the recommendation of colleagues. Dr Hallen added that Mr Davood had advised her to submit her 2016 tax return with the claimed expenses.

kkk. On 27 July 2017, Dr Hallen emailed Mrs Bray to tell her that she had instructed Crystal in place of Moor Green. In a letter dated 31 July 2017, Mr Ikezogwo of Crystal wrote to HMRC, arguing that HMRC had not shown that the conditions set out in Schedule 24 for the imposition of a penalty had been met. Mr Ikezogwo referred to *Rowland v HMRC* (2006) SpC 00548, and suggested that Dr Hallen could not have been expected to challenge the advice of Moor Green, that Moor Green's advice was that participation with Aionios constituted legal tax planning, and that any inaccuracies in Dr Hallen's tax returns was attributable to Moor Green. Mr Ikezogwo (incorrectly) asserted that Mr Davood was a manager of Moorcroft and, through her ignorance, Dr Hallen had been coerced into participating in Aionios.

lll. Mr Ikezogwo wrote again to HMRC on 1 August 2017, enclosing certain documents. These consisted of publicity material for Size 5, the Minerva slides (detailed above), an email from Moorcroft to Dr Hallen dated 3 October 2016 which referred to Mr Davood as an "introducer", an invoice apparently from Moorcroft to Dr Hallen seeking payment of £10,212.42 plus a fee of £399, to be paid in July 2014, and an email dated 5 July 2014 from Moor Green to Dr Hallen (also detailed above). In his covering letter Mr Ikezogwo again argued that it had been Mr Davood who had suggested using Aionios, and that Dr Hallen had understood that the "scheme"

constituted lawful tax planning, so Dr Hallen should not be liable for any penalty as she had taken reasonable care.

mmm. On 18 October 2017, Crystal wrote again to HMRC, complaining that HMRC had already made its decision regarding penalties in its letter of 2 May 2017, and so there was a failure to follow due process when HMRC had sought representations on the proposed penalties. Crystal also argued that as Dr Hallen had not participated in Aionios, her involvement with Aionios should not have been a relevant factor when determining penalties. Crystal also argued that Dr Hallen had taken reasonable care and that any inaccuracies in her return were solely due to the actions of her former agent. Crystal further described the "closure letter" as being "mumbo jumbo", and maintained that no further questions could be asked of Dr Hallen once that closure letter had been issued so, although Dr Hallen would be prepared to attend a further meeting, that attendance must be viewed as under duress.

The third meeting with HMRC

nnn. On 24 November 2017, there was a further meeting between Mrs Bray, Dr Hallen and Dr Persson. This meeting was offered by HMRC given Mr Ikezogwo's points were at odds with the explanation previously given by the Appellants. Ms Carroll of HMRC, Mr Ikezogwo and Mr Ahmed were also in attendance. HMRC subsequently produced notes of this meeting, which were agreed by Mr Ikezogwo on behalf of Dr Hallen and Dr Persson.

ooo. During this meeting Dr Hallen and Dr Persson informed HMRC that Mr Davood had told them they would be participating in beneficial tax planning and, because they trusted him, there had been no further discussion about Aionios. Dr Hallen and Dr Persson also claimed that, immediately before the August 2016 meeting had begun, Mr Davood had asked them to tell HMRC that they had themselves researched Aionios when the true position was that Mr Davood had introduced them to Aionios. Dr Hallen and Dr Persson both told Mrs Bray that they were unhappy about doing this but, as it was sprung upon them, they agreed to go along with what Mr Davood had said. Dr Hallen and Dr Persson said that, despite this incident, they continued to trust Mr Davood and that they claimed expenses in their tax returns for the next year because, despite HMRC's investigations, they believed Mr Davood's reassurances. In considering this point, I note that neither Dr Hallen nor Dr Persson attended the Tribunal hearing. I have not had the benefit of direct evidence from either of them about this assertion, and neither has been cross-examined. It is clear from Mr Davood's statement (in a complaint made against him) that he does not agree that he asked Dr Hallen and Dr Persson to lie.

ppp. I have considered this point very carefully. I consider it inherently unlikely that intelligent women, such as Dr Hallen and Dr Persson, should continue – for over a year – to trust a tax advisor who had asked them to lie to HMRC, especially when they knew HMRC suspected them of tax fraud and were actively investigating their tax affairs. If Dr Hallen and Dr Persson believed that they had participated in legitimate tax planning and that their affairs were above board, there was no reason for them to lie to HMRC. I can see that they might tell an untruth at a meeting if a

request not to tell the truth was suddenly sprung upon them and they had no time to properly think about matters, but it is not credible that they would then continue to trust the person who asked them to lie, and it is not credible that immediately after that meeting they would not start to question what they were told by that person. On the balance of probabilities, I find that Mr Davood did not, just before the August 2016 meeting, tell Dr Hallen and Dr Persson to lie to HMRC.

qqq. During the 24 November 2017 meeting, Dr Hallen and Dr Persson both confirmed to HMRC that they knew that they had not paid the amounts claimed in their tax returns for 2013/14, 2014/15, and 2015/16 (and 2012/13 in the case of Dr Persson), and that they knew they had no obligation to pay the amounts claimed as contribution expenses. Dr Hallen and Dr Persson suggested that the 11% fee paid to Moorcroft was a type of tax which Moorcroft would pass on to HMRC. Neither Dr Hallen nor Dr Persson were able to point to anything to support this understanding. During the meeting on 24 November 2017, Dr Hallen and Dr Persson both accepted that when they had submitted their 2014/15 and 2015/16 tax returns, they had each known that HMRC were investigating their tax affairs because HMRC suspected tax fraud.

rrr. Crystal wrote to HMRC on 24 November 2017, following the meeting. In this letter, Crystal asserted that Dr Hallen and Dr Persson had taken reasonable care by instructing an agent and relying on that agent's advice, and that it was up to HMRC to establish that Dr Hallen and Dr Persson had "knowingly submitted incorrect returns" to HMRC. Crystal asserted that Dr Hallen and Dr Persson did not know that that their returns were inaccurate. Crystal also asserted that Dr Hallen and Dr Persson believed that amounts they paid each year to Moorcroft were "for the settlement of Taxes". Finally, having asserted that Mr Davood should be liable for penalties, and that any behaviour of Dr Hallen and Dr Persson should be considered to be "careless", Crystal suggested that any penalty imposed upon Dr Hallen or Dr Persson should be suspended.

sss. On 31 January 2018, Mrs Bray wrote separately to Dr Hallen and Dr Persson. Those letters are in very similar terms. In the letter to Dr Hallen, Mrs Bray explained that she considered Dr Hallen's behaviour was deliberate. Looking at 2013/14, Mrs Bray noted that Dr Hallen had been self-employed for a number of years, that Dr Hallen knew that a tax year ran April to April, that Dr Hallen had paid £10,012.24 to Moorcroft in July 2014 and that (in Mrs Bray's opinion) Dr Hallen knew that was not a payment which had been incurred in 2013/14. Looking at all three years, Mrs Bray noted that Dr Hallen was aware (from emails dated 9 July 2014 and 6 October 2015) that she was only obliged to pay 11% of her profits in any year for the scheme, and that was the amount which Dr Hallen had actually paid in each of the three years. Mrs Bray also noted that Dr Hallen had accepted in the meeting with HMRC on 24 November 2017 that she knew she had no obligation to pay the amounts for which she had claimed a deduction. Mrs Bray further noted that Dr Hallen's 2014/15 self assessment had been returned six weeks after HMRC had offered the opportunity to enter into the Contractual Disclosure Facility, and it was not credible that Dr Hallen did not consider there was a connection between her inflated expenses claim for 2013/14, and HMRC's investigations. In respect of the later years, Mrs Bray referred

to the meeting of 24 November 2017 and Dr Hallen's assertion that Mr Davood had asked her to conceal the truth in the February 2016 meeting. Mrs Bray noted that Dr Hallen had not mentioned this until July 2017 despite opportunities to mention this earlier, and that Dr Hallen had submitted a further incorrect tax return during this period. Mrs Bray concluded that in the relevant years Dr Hallen deliberately claimed a deduction which she knew was excessive. Very similar points were made in Mrs Bray's letter to Dr Persson. In each of the letters, Mrs Bray noted her intention to raise penalty assessments.

ttt. On 1 February 2018, HMRC raised the penalty assessments under appeal. These penalties were set at 50.75% of the potential lost tax, on the basis that the Appellants behaviour was deliberate.

uuu. On 12 February 2018, Crystal wrote to HMRC to note that both Dr Hallen and Dr Persson wished to appeal the penalties. Mr Ikezogwo asserted that the inaccuracy in the return was not attributable to participation in Aionios as Dr Hallen and Dr Persson had not made contributions to Aionios. Mr Ikezogwo argued that there was no connection between Aionios and the inaccuracies in the tax returns.

vvv. On 19 March 2018, HMRC issued their view of the matter.

www. Although Moor Green had apparently not been instructed by Dr Hallen or Dr Persson since July 2017, it seems that at least one of the Appellants either remained on a Moor Green mailing list or was accidentally copied into email correspondence. One of the four documents disclosed by the Appellants just before the hearing was a pdf of two emails, dated 26 April and 10 May 2018, from "Joseph", at a barristers' chambers in London, and an undated draft letter to be sent as a response to HMRC opening an investigation. (A letter from Moor Green to HMRC, dated 11 June 2018, in respect of another taxpayer was also attached but its relevance was not explained.) In the first of these two emails, copied to Moor Green, Joseph advised the unknown recipients that it appeared HMRC would investigate them for fraud but that there was no chance of HMRC making out any case of fraud. In the second email, to Moor Green, Joseph referred to a draft letter to be sent to HMRC on behalf of Moor Green clients who refuse the Contractual Disclosure Facility.

xxx. Another of the four documents disclosed by the Appellants just before the hearing was an email dated 23 May 2018 to "MSL Customer Service Team". On the balance of probabilities, I find that MSL is Minerva Services Limited. In that email Moor Green asked two questions:

> 1- Does my client have to settle with HMRC-is it mandatory or no the BW defence team case is very Strong … client does no need to worry at all – or can they continue to make contribution as normal ? and there is threat from HMRC ? and they do not need to Register themselves by 31-05-2018 with HMRC.
>
> …
>
> 2-My client can not afford to pay such a amount for settlement they had already argued with me over the last weekend in my office-a) why should they settle

with HMRC if BW had told them the strategy is safe and good … B) Why should they pay for the settlement fees

yyy. No reply to that email was provided. The Appellants have referred to other parts of this email as evidence that the efforts made at this time by Mr Davood show he was responsible for the errors in their tax returns. I do not consider that conclusion or responsibility can be drawn from the emails but, even if it was, it is clear from the dates of the emails that any references to clients in that email must be references to persons other than the Appellants.

zzz. On 30 May 2018, HMRC issued review conclusion letters to each of Dr Hallen and Dr Persson, upholding the earlier decisions to issue penalties to them based upon deliberate conduct. On 25 June 2018, Dr Hallen and Dr Persson each appealed to the Tribunal against the penalties which had been imposed upon them by HMRC.

aaaa. Dr Hallen and Dr Persson each filed a "appeal statement" with their appeals to the Tribunal. These were in very similar terms. Although in the format of a witness statement, each statement principally consisted of contentions made by the Appellants. These statements ran to almost 30 pages of contentions, from which I have endeavoured to extract the arguments put forward by the Appellants. Paraphrasing those arguments, the Appellants contend that:

i. They had been reassured by Mr Davood that the HMRC investigation was not something they should be worried about;

ii. The issue identified by HMRC was a point of law which they could not be expected to identify or understand, and that they had relied completely upon Mr Davood who acted not as a functionary but as a professional advisor;

iii. The returns were supplied to HMRC by Mr Davood, and so the penalties could only be raised under Paragraph 1A of Schedule 24, and on the basis that the Appellants had provided false information to Mr Davood;

iv. They had each taken reasonable care in seeking professional advice, neither of them had provided false information to Mr Davood, any errors in the returns were attributable to him, the fact that they had signed the returns to agree they should be filed did not mean that HMRC should not investigate the role of Mr Davood as around 200 clients of Mr Davood had been investigated by HMRC;

v. The arrangements with Aionios had not led to a loss of tax, and so HMRC should not have sought information relating to Aionios;

vi. A deliberate penalty required HMRC to demonstrate that the taxpayer intended to misrepresent their tax affairs but this could not be demonstrated as HMRC were aware of the Appellants' tax affairs;

vii. There was no connection between the alleged deliberate behaviour and the loss of tax;

viii. HMRC's letters of 2 May 2017 were closure letters under Section 28A TMA 1970, so HMRC's investigation was brought to a close at that time, and therefore the meeting on 24 November 2017 should not have taken place and all comments should be regarded as obtained under duress;

ix. The penalties issued under Paragraphs 1 and 1A of Schedule 24 could not together exceed 100% of the potential lost revenue, so as a deliberate penalty imposed upon Mr Davood could be up to 70% then the penalty percentage of 50.75% imposed upon the Appellants was too high; and

x. The requirements of Schedule 24 were not met.

The Tribunal proceedings

11. Following notification of the Appellants' Notices of Appeal, HMRC filed their Statement of Case as directed. In a Response to HMRC's Statement of Case, Dr Hallen raised the following additional arguments:

xi. HMRC did not file their Statement of Case or List of Documents on time;

xii. HMRC had failed to show that their discovery assessments were "new" and there had been a failure to establish causation of a loss of tax;

xiii. HMRC had failed to prove deliberate behaviour;

xiv. HMRC had failed to provide evidence either of the steps which the Appellants should have taken, or of their conscious choice not to take such steps;

xv. HMRC had failed to show any connection between the error in the returns and membership of the scheme;

xvi. The COP9 investigation was a deception to cover the lack of a Section 9A enquiry;

xvii. The Appellants' expenses claims were clearly set out in their returns and so HMRC did not make a discovery which entitled them to raise discovery assessments;

xviii. The error in the tax returns was the "professional error" of "treating capital provisions and contingent liabilities within the Profit and Loss account rather than in the Balance Sheet, where they could have been stated either as Investment or Drawings", and that was Mr Davood's mistake which could not have been known about by the Appellants;

xix. The expenses claims had been inserted into the returns without the written approval of the Appellants;

xx. The dishonesty of Mr Davood had been proved by HMRC opening investigations into other clients of Mr Davood, and some of those clients had been offered settlement offers with careless penalties;

xxi. HMRC had not demonstrated that the Appellants had failed to check their returns to the best of their ability;

xxii. That it was not necessary for amounts to have been paid from their bank accounts for the Appellants to have made a contribution to Aionios;

xxiii. The 11% paid to the trust administrator was treated as tax and so did not feature in the Appellants' tax returns;

xxiv. No penalty could be raised because HMRC had held a meeting with the Appellants after issuing a closure notice;

xxv. HMRC were not permitted to gather information in relation to the penalties after the discovery assessments had been issued;

xxvi. Any reasons for the deliberate behaviour which were put forward by HMRC after the discovery assessments were issue was ultra vires; and

xxvii. A percentage of 51.75 for the penalty could not be a fair reflection of the Appellants' assistance and it was a breach of the obligation in the European Convention on Human Rights to treat all taxpayers fairly.

The Appellants' skeleton argument and further grounds of appeal

12. HMRC filed their skeleton argument as directed. In a skeleton argument filed on 6 July 2019, the Appellants raised the following additional arguments:

xxviii. Following *Cotter v HMRC* [2013] UKSC 69, HMRC could only amend the tax return under Section 9ZB TMA 1970 or open an enquiry under Section 9A TMA 1970, and as HMRC accepted that no enquiry has been opened under Section 9A, the entire COP9 investigation was illegal and so the discovery assessments could not be used to calculate the potential lost revenue for the penalties;

xxix. There is no provision for a Section 29 investigation into a tax return;

xxx. HMRC have not explained how the same discovery can apply to four consecutive years;

xxxi. The assessments are invalid and the Appellants seek a refund of the tax paid under those assessments;

xxxii. The burden of proof in respect of the penalties is upon HMRC and they cannot prove that the Appellants signed off the tax returns which were filed;

xxxiii. The burden of proof in respect of the assessments is upon HMRC and they cannot prove that the "provisions (not payments)" claimed were not necessary to offset the loans from third parties as contributions to the remuneration scheme; those loans did not appear in the bank statements of the Appellants;

xxxiv. HMRC's argument (that if the Appellants knew, there were steps they could have taken to establish the true position) is proof that the Appellants lacked knowledge of any inaccuracy;

xxxv. In Spotlight 51, HMRC had stated that it was considering whether the GAAR applied to the scheme, and stated its intention to charge a 60%

GAAR penalty to those who used the scheme after 14 November 2016, with the possibility of a carelessness penalty in addition for users after 16 November 2017 – it was therefore a breach of the Equality Act 2010 for scheme users who ceased before November 2017 to be charged a deliberate penalty;

xxxvi. The complaint the Appellants had made against Mr Davood was evidence that he was responsible for any inaccuracies in the returns;

xxxvii. The subsequent efforts made by Mr Davood showed that he was responsible for the inaccuracies in the returns;

xxxviii. HMRC should follow their Compliance Handbook in alleging dishonesty;

xxxix. That it was outrageous that no action had been taken by HMRC against Mr Davood;

xl. It would be revealing to ask how HMRC had failed to conclude that Mr Davood acted dishonestly;

xli. Mr Davood was a "dishonest agent" of HMRC and the Appellants, and did not act on her behalf; and

xlii. In respect of the quantum of the penalties, the Appellants had not provided assistance to HMRC and accordingly the penalties should not take account of any assistance.

The issues before this Tribunal

13. In light of the many arguments raised by the Appellants, it is helpful to restate the issues which are before the Tribunal, and to note what is not before the Tribunal.

14. The assessments to tax, raised under Section 29 TMA 1970, were issued on 13 June 2017. The Appellants have not appealed to HMRC (or the Tribunal) against those assessments, and therefore the assessments are final and conclusive. If the Appellants wished to argue that HMRC was unable to raise assessments under Section 29 TMA 1970, then they should have appealed to HMRC within 30 days of the assessments being raised. In the absence of an open appeal, the Tribunal will not look behind the assessments which are final and conclusive. Therefore, HMRC do not need to explain the basis on which those assessments were raised. The only appeals before the Tribunal are the Appellants' appeals against the penalties imposed upon them by HMRC under Schedule 24.

15. That means that I will not consider the Appellants' arguments xii, xvii, xxviii, xxix, xxx, xxxi and xxxiii as they relate to the validity of the discovery assessments.

16. It is also important to note that it is not for the Tribunal to direct HMRC either to investigate Mr Davood, or to issue penalties to him. It is for HMRC to make their own decisions about who they investigate and to whom they penalise. The Appellants have already complained to the Institute of Financial Accountants about Mr Davood's behaviour, and that professional body is considering that complaint. I will not

consider the Appellants' arguments xx, xxxix, and xl as they relate to allegations about Mr Davood's behaviour which are not relevant to their own behaviour.

17. Finally, before moving on to consider this appeal, I will address the procedural points made. The Appellants have argued (argument viii) that the 2 May 2017 letters which concluded the COP9 investigation were Section 28A TMA 1970 closure letters and so the 24 November 2017 meeting should not have taken place. I do not consider that is correct. Section 28A TMA 1970 provides for the issue of a closure letter to bring to an end an enquiry into a specific tax return opened under Section 9A TMA 1970. There was no Section 9A enquiry into any of the relevant tax returns in this case, and so the letters which concluded the COP9 investigation were not closure letters.

18. Dr Hallen has complained (argument xi) that HMRC did not file their Statement of Case or List of Documents on time. I do not agree that either procedural document was late. HMRC was directed to file their Statement of Case by 20 October 2018, and the Tribunal received HMRC's Statement of Case for Dr Hallen under cover of an email sent at 14:42 on 19 October 2018. Dr Hallen was copied into that email. Both parties were directed to file their list of documents by 4 January 2019, and HMRC filed their list on 19 December 2018. Again, Dr Hallen was copied into HMRC's email. Therefore, I do not accept that there was delay by HMRC.

19. The Appellants have argued (argument xvi) that the COP9 investigation was a deception to cover the lack of a Section 9A enquiry. I do not agree that this is correct. There is no obligation to open a Section 9A enquiry. Given the seriousness of their concerns, HMRC were entitled to begin a COP9 investigation into the Appellants' tax affairs.

20. The Appellants have argued (argument xxiv) that no penalty could be raised because HMRC had held a meeting with the Appellants after issuing a closure notice and, in a similar vein, they argued (argument xxv) that HMRC were not permitted to gather information in relation to the penalties after a closure notice had been issued. I have already explained that there was no Section 28A TMA 1970 closure notice. I do not agree with the Appellants that, once HMRC had issued their 2 May 2017 letters, HMRC were not permitted either to hold a meeting with the Appellants or to gather information which might have enabled them to view the Appellants' behaviour (for the purpose of considering penalties) in a different light.

21. The Appellants have also argued (argument xxvi) that the reasons which HMRC put forward after their 2 May 2017 letters had been issued, for considering the Appellants behaviour to be deliberate, were ultra vires. I consider the Appellants have misunderstood the nature of the deliberations undertaken by HMRC before issuing the penalties. HMRC had explained they considered deliberate penalties were appropriate but invited the Appellants to put forward any points which the Appellants wished HMRC to consider before those penalties were issued. That invitation was the Appellants opportunity to provide information which would exculpate themselves; it was not an ultra vires step by HMRC.

22. Having made those points, it is now possible for me to consider the Appellants' appeals against the penalty determinations.

Burden of proof

23. In an appeal against the imposition of a penalty imposed under Schedule 24 to the Finance Act 2007, the onus is upon HMRC to demonstrate that the requirements of Schedule 24 are met. I agree with the Appellants in this regard. The standard of the proof is the civil standard of the balance of probabilities.

Relevant legislation

24. HMRC rely upon Paragraph 1 of Schedule 24. Paragraph 1 of Schedule 24, as it applied on 1 February 2018, provided as follows:

> **1. Error in taxpayer's document**
>
> (1) A penalty is payable by a person (P) where—
>
> (a) P gives HMRC a document of a kind listed in the Table below, and
>
> (b) Conditions 1 and 2 are satisfied.
>
> (2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—
>
> (a) an understatement of a liability to tax,
>
> (b) a false or inflated statement of a loss . . ., or
>
> (c) a false or inflated claim to repayment of tax.
>
> (3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.
>
> (4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

25. The Appellants have argued that the relevant returns were filed (and thus given to HMRC) by Mr Davood and so Paragraph 1 does not apply to them. They argue (argument iii) that they can only be liable to a penalty if HMRC establish the conditions set out in Paragraph 1A. Paragraph 1A provides as follows:

> **1A. Error in taxpayer's document attributable to another person**
>
> (1) A penalty is payable by a person (T) where—
>
> (a) another person (P) gives HMRC a document of a kind listed in the Table in paragraph 1,
>
> (b) the document contains a relevant inaccuracy, and
>
> (c) the inaccuracy was attributable to T deliberately supplying false information to P (whether directly or indirectly), or to T deliberately withholding information from P, with the intention of the document containing the inaccuracy.

(2) A "relevant inaccuracy" is an inaccuracy which amounts to, or leads to—

(a) an understatement of a liability to tax,

(b) a false or inflated statement of a loss, or

(c) a false or inflated claim to repayment of tax.

(3) A penalty is payable under this paragraph in respect of an inaccuracy whether or not P is liable to a penalty under paragraph 1 in respect of the same inaccuracy.

26. I have considered this carefully. Given the general thrust of their arguments and the contention that responsibility lies with Mr Davood, I understand why the Appellants should form the view that they have not "given" their tax returns to HMRC and that Paragraph 1 cannot apply to them. However, I have concluded that HMRC are correct to consider that it is Paragraph 1 which is relevant. No distinction is usually made between a return submitted by a taxpayer, and a return submitted on behalf of a taxpayer. That is consistent with the position that a person bears the consequences of the actions and omissions of his or her agent – see *Hytec Information Systems v Coventry City Council* [1996] EWCA Civ 1099 – just as a person bears the consequences of their own action and omissions. There is no obvious reason why a distinction should be made for the purposes of Schedule 24 between documents filed by a taxpayer, and documents filed on behalf of a taxpayer. Where Schedule 24 penalties have been imposed and the behaviour is alleged to be careless, then Paragraph 18 of Schedule 24 provides a defence for taxpayers who have careless agents but who themselves have taken reasonable care. The obvious contradiction between deliberate behaviour, and taking reasonable care, means that this defence is not available to those who are alleged to act deliberately. The defence for taxpayers alleged to have acted deliberately is that HMRC must establish that their behaviour, not their agent's behaviour, was deliberate.

27. Although the point does not seem to have been explicitly considered in previous cases, my conclusion is consistent with the approach taken in previous decisions of this Tribunal. Those previous decisions include *Hutchings v HMRC* [2015] UKFTT 9, the first reported decision in respect of penalties imposed under Paragraph 1A where it was held that a beneficiary under a will had deliberately failed to disclose information to the executors of that will with the result that the executors' return was inaccurate. *Hutchings* also appears to be the only reported decision in respect of penalties imposed under Paragraph 1A. Given the number of documents filed by agents, to have just one reported decision (and for that to be a case where agency was irrelevant) would be quite remarkable if the Appellants are correct that taxpayers can only liable under Paragraph 1A if an agent filed the relevant document. The other previous decision which it is relevant to note is *Stanley v HMRC* [2017] UKFTT 293 where the Tribunal commented upon the distinction to be made between the behaviour or knowledge of a taxpayer, and the behaviour or knowledge of an agent, when a deliberate penalty was being considered. At paragraphs 222 to 224, it was stated:

222. A penalty can be imposed on the taxpayer under para 1, or the agent under para 1A, or both (see sub-para 1A(3)), but the behaviour criteria have to be relevant to each of the persons. It is untenable to impose a penalty on the taxpayer based on the behaviour or knowledge of his agent, or *vice versa*.

223. The spectrum of agency engagement is broad, and can involve the mere engagement of a filer for the submission of a return, with all figures being supplied by the taxpayer, to the other end of the spectrum where the agent has to find the relevant facts and figures from the taxpayer for the purpose of making an accurate and complete return.

224. At either end of the spectrum, an inaccuracy can arise attributable to the agent. An agent as a mere filer of a return can omit an entry that has been supplied by the taxpayer either by deliberateness or carelessness, and the possibility is open for the agent to be assessed to a Sch 24 penalty under para 1A if the action is found to be deliberate. The taxpayer in such a case is supposed to have checked the return entries before its submission, and a Sch 24 penalty can also be imposed on the taxpayer for failure to take reasonable care, since he is not relieved of the responsibility for the accuracy of the return by the mere engagement of an agent.

28. I conclude that HMRC are correct and that it is Paragraph 1 which is the paragraph applicable to a taxpayer, even when an agent has filed the document in question. The protection for a taxpayer comes from the fact that HMRC must establish that the taxpayer's behaviour was deliberate, and cannot rely on the knowledge or behaviour of the agent.

29. Therefore, in respect of Dr Hallen and Dr Persson, HMRC must establish that:

- a document in Table 1 has been given to HMRC,

- that document contains an inaccuracy which amounts to, or leads to—

    (a) an understatement of a liability to tax,

    (b) a false or inflated statement of a loss . . ., or

    (c) a false or inflated claim to repayment of tax; and

- the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on the part of Dr Hallen and Dr Persson.

30. I now consider whether these conditions are met.

Has a document in Table 1 been given to HMRC?

31. The Table set out in Paragraph 1 includes personal tax returns. I am satisfied that the tax returns filed for Dr Persson for 2012/13, and for both Dr Hallen and Dr Persson for 2013/14, 2014/15 and 2015/16 are all documents within Table 1. I am also satisfied that when they were filed they became documents given to HMRC.

Do the returns contain an inaccuracy which led to a loss of tax?

32. The Appellants have made a number of arguments about whether there are inaccuracies in their returns, and (if there are inaccuracies) whether those inaccuracies amount to or lead to an understatement of liability, an inflated statement of a loss or an inflated claim to repayment of tax. There are two parts to this – there must be an inaccuracy, and that inaccuracy must be what led to a loss of tax.

33. Looking first at whether the returns contain an inaccuracy, the Appellants have argued (argument xxii) that it was not necessary for amounts to have been paid from their bank accounts for the Appellants to have made a contribution to Aionios. I agree that it is possible for an expense to have been incurred in any given tax year, and the liability not met until a later date. However, in this case, the Appellants knew that they had not incurred any liability to make any contribution to Aionios (and only a 1% fee to Moorcroft). I agree with HMRC that there was an inaccuracy contained in the returns, and that that inaccuracy was that there was a claim for an expense which had not been incurred.

34. Turning to the question of whether that inaccuracy led to a loss of tax, the Appellants have argued that (argument v) the arrangements with Aionios had not led to a loss of tax, that (argument vii) there was no connection between the alleged deliberate behaviour and the loss of tax, and (argument xv) that HMRC had failed to show any connection between the error in the returns and membership of the scheme.

35. Looking at arguments v and xv, I have found that the Appellants failed to carry out the necessary steps to participate in the scheme as envisaged by Minerva. That absence of participation means that the Appellants are correct to say that there was not a loss of tax as a consequence simply of their membership of Aionios (argument xv). Therefore, the question of whether the Aionios arrangements are effective (argument xv) is not relevant to this appeal because the Appellants did not fully participate in the Aionios arrangements. However, in respect of argument vii, the inaccuracy in the returns was that the Appellants' claim for expenses was far larger than it should have been. That inflated claim for expenses meant that the tax which was due was calculated at too low a figure. That inaccuracy directly led to the loss of tax.

36. I am satisfied that the tax returns filed by the Appellants in 2013/14, 2014/15 and 2015/16, and Dr Persson's revised self assessment for 2012/13, all contained a relevant inaccuracy in that, in each of the affected documents, Dr Hallen and Dr Persson made a claim for an expense which they did not incur. These inaccurately claimed expenses led to an understatement of a liability to tax.

Was the inaccuracy deliberate on P's part?

37. The meanings of "careless" and "deliberate" for the purposes of Schedule 24 are set out in Paragraph 3:

3. Degrees of culpability

(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is—

(a) "careless" if the inaccuracy is due to failure by P to take reasonable care,

(b) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and

(c) "deliberate and concealed" if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

(2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate on P's part when the document was given, is to be treated as careless if P—

(a) discovered the inaccuracy at some later time, and

(b) did not take reasonable steps to inform HMRC.

38. HMRC have alleged that the Appellants' behaviour was deliberate. Although Mr Ikezogwo argued that the Appellants behaviour was careless and that the penalties should be suspended, the Appellants current case is that their behaviour was neither careless nor deliberate. I consider first whether HMRC have made out their allegation that the Appellants behaviour was deliberate.

39. "Deliberate" and "deliberately" are not defined in Schedule 24, but have been commented upon in a number of earlier decisions. In *Auxilium Project Management Limited v HMRC* [2016] UKFTT 249, when considering a deliberate penalty imposed under Schedule 24, the Tribunal held at paragraph 63:

> In our view, a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time.

40. Later that year, a differently constituted Tribunal considered whether another taxpayer had acted deliberately so as to be liable to penalties under Schedule 24. In *Clynes v HMRC* [2016] UKFTT 369, at paragraphs 81 to 86, the Tribunal held as follows:

> 81. On that basis we must seek to interpret the relevant provisions in schedule 24 according to their natural meaning looking at the context of their use in the overall scheme of schedule 24. We take the dictionary definition of the term "deliberate" as a starting point which states (in the Oxford English dictionary) that deliberate (as regards action) means:

> "Well weighed or considered; carefully thought out; formed, carried out, etc. with careful consideration and full intention; done of set purpose; studied; not hasty or rash."

82. On its normal meaning, therefore, the use of the term indicates that for there to be a deliberate inaccuracy on a person's part, the person must to some extent have acted consciously, with full intention or set purpose or in a considered way.

83. In a sense, in the context we are concerned with, simply filling in a VAT return with particular information can be held to be a deliberate act (in the sense of being undertaken with intent or a set purpose of filling in the form) whether or not the person knew or had any consciousness as regards the accuracy of the information. Our view is that such an interpretation cannot be correct on a purposive interpretation looking at the natural wording and the scheme and context of the overall provisions. The term is used in the context of an "inaccuracy" which was "deliberate" on the relevant person's part. The fact that the deliberate conduct is tied to the inaccuracy, indicates that for this penalty to apply the person must have, in a subjective sense, acted with some level of knowledge or consciousness as regards the inaccuracy. In the case of a Company we take the relevant awareness or knowledge to be that of the relevant officers, such as the appellant acting as director, acting on its behalf.

84. The alternative interpretation would set the bar for a deliberate penalty at a lower level than that for a careless penalty. There is a careless penalty only where the inaccuracy arises as a result of the failure by the person to take reasonable care. That penalty is set at a maximum of 30% of the potential lost revenue. A deliberate penalty is set at a maximum of 70% or 100% of the potential lost revenue depending on whether the person has made arrangements to conceal the inaccuracy or not. The potential doubling or tripling of the penalty for such deliberate inaccuracies indicates that a deliberate penalty is intended to apply only where there is more a serious failing by the taxpayer than a failure to take reasonable care.

85. In our view, therefore, there would clearly be a deliberate inaccuracy on the part of the Company as regards the relevant VAT returns, to the extent that the appellant, as the officer acting on its behalf in this respect, actually knew that the FRS did not apply, that the return for 12/11 failed to account for the 3 month period ending on 09/11 and that amounts retained by the factoring agent should be included in the returns.

86. However, we consider that the term "deliberate inaccuracy on a person's part" can extend beyond this. Our view is that, depending on the precise circumstances, an inaccuracy may also be held to be deliberate where it is found that the person consciously or intentionally chose not to find out the correct position, in particular, where the circumstances are such that the person knew

> that he should do so. A person cannot simply escape liability by claiming complete ignorance where the person clearly knew that he should have taken steps to ascertain the position. We view the case where a person makes such a conscious choice not to take such steps with the result that an inaccuracy occurs, as no less of a "deliberate inaccuracy" on that person's part than making the inaccuracy with full knowledge of the inaccuracy.

41. Armed with that guidance, I now consider whether Dr Hallen and Dr Persson acted consciously, knowingly providing HMRC with a document that contained an error with the intention that HMRC should rely upon it as an accurate document. I do not consider it necessary (or even possible), as the Appellants have argued (argument xiv) for HMRC to set out and evidence steps which the Appellants did not take but should have taken.

42. The Appellants have argued (argument xviii) that the error in the tax returns was the "professional error" of "treating capital provisions and contingent liabilities within the Profit and Loss account rather than in the Balance Sheet, where they could have been stated either as Investment or Drawings". The Appellants argue that this error was Mr Davood's mistake and it could not have been known about by the Appellants. I accept that the Appellants relied upon Mr Davood to draw up their accounts and to complete their tax returns. However, the draft tax return for each of the relevant years showed a very large payment being made to Aionios as a contribution. The difference in size between the expenses they had actually incurred, and the expenses claimed in the draft returns provided for their approval, were so large that they cannot have been overlooked when the Appellants reviewed their draft tax returns. Irrespective of how those accounts were drawn up, both of the Appellants knew that they had not made contributions to Aionios and that they had no obligation to pay Aionios the amounts claimed as an expense. Those are not "professional" errors or accounting errors. I am satisfied that in each relevant year the Appellants knew that they had not made a contribution to Aionios, and they knew they had not incurred an obligation to pay any amount to Aionios (and only a 1% annual fee to Moorcroft). Despite that knowledge, the Appellants gave approval for their draft returns to be filed.

43. The Appellants have also argued (argument xxiii) that the 11% paid to the trust administrator was treated as tax, and that is why it did not feature in the Appellants' tax returns. I am afraid I do not consider it is credible that the Appellants thought that the fees they paid to Moorcroft constituted tax which would be passed on to HMRC. Mr Davood's emails to Dr Hallen made a clear distinction between the tax to be paid and the payments to the trust. When there was an amount of tax or NICs to be paid, Mr Davood provided a link in his email so that payment could be made to HMRC. There is no suggestion in any of the Minerva slides that the trust administrator acted as a conduit to HMRC. I do not accept that the Appellants tax returns contained a claim for an extremely large expense which had not been incurred because the Appellants had understood that the fees they paid to Moorcroft constituted tax.

44. The Appellants have also argued (argument xxxiv) that the fact that there were steps that they could have taken to establish the true position is proof, because they did not take those steps, that the Appellants lacked knowledge of any inaccuracy. I do

not accept that the logic of this argument. HMRC have alleged (and in my opinion demonstrated) that the Appellants knew there was an inaccuracy in their tax returns. That is unaffected by the existence of checks which the Appellants could have undertaken.

45. I conclude that the Appellants knowingly provided HMRC with a tax return which contained an inaccuracy in each affected year, with the intention that HMRC should rely upon that inaccurate tax return as an accurate document. I am satisfied the Appellants behaviour was deliberate. Consequently, I dismiss the Appellants contention (argument xiii) that HMRC have failed to prove deliberate behaviour on their part.

46. In reaching this conclusion I have taken into account the Appellants arguments (argument i) that they had been reassured by Mr Davood that the HMRC investigation was not something they should be worried about, and (argument ii) that the point of law in dispute with HMRC was something they could not be expected to identify or understand, and that they had relied completely upon Mr Davood who acted not as a functionary but as a professional advisor.

47. Taking the argument ii first, if the Appellants had paid the large contributions to Aionios which they claimed, and the dispute with HMRC was about whether those payments were an expense incurred for a business purpose or whether the scheme was effective, then I would have some (albeit limited) sympathy with the Appellants' argument that the issue was a point of law which was too complex for them to understand. However, the Appellants did not make the contribution or incur a liability to do so. As a consequence, the dispute with HMRC was whether the Appellants had each claimed an expense which had not, in fact, been incurred. The Appellants had both been self-employed and claiming expenses for a number of years. I do not accept that the issue of whether an expense had been incurred was beyond the understanding or knowledge of either Appellant. The amounts said to have been expended remained in the Appellants' bank accounts. The Appellants knew they did not, at any time, have to pay the amount they had claimed as an expense. There is no evidence that Mr Davood advised the Appellants on the suitability of Aionios or on whether it might be beneficial for them but, even if Mr Davood did give this advice, I am satisfied that at all relevant times the Appellants knew they had not incurred the very large contributions to Aionios which they had claimed to have incurred.

48. In looking at argument i, I bear in mind that the Appellants have not provided any evidence that Mr Davood reassured either of them that the HMRC investigation was something they should not be worried about. I have concluded that the Appellants deliberately claimed expenses they knew they had not incurred. If, after filing the first inaccurate tax return, the Appellants were concerned about the very serious nature of HMRC's investigation then it is surprising that they continued to file further tax returns containing the same inaccuracy. There may or may not have been reassurances by Mr Davood but I am afraid that does not change the deliberate nature of the Appellants' behaviour. They knew their tax returns were inaccurate and yet they continued to give approval for their tax returns to be filed.

49. Before leaving my consideration of "deliberate", I will also comment briefly upon the Appellants' remaining submissions relating to deliberate behaviour.

50. The Appellants argued (argument vi) that for a deliberate penalty to be imposed, HMRC must demonstrate that the taxpayer intended to misrepresent their tax affairs, and this could not be demonstrated in this case as HMRC were aware of the Appellants' tax affairs. In considering this point it is important to bear in mind the various stages of this investigation. On the date when the Appellants filed their tax returns each year, HMRC did not know whether the expenses claimed by each of the Appellants had been incurred as claimed. By the conclusion of their investigation, HMRC were satisfied that the claimed contribution to Aionios had not been paid and that the returns filed were inaccurate. The fact that HMRC became aware of the errors as a result of investigating the Appellants does not lead to the conclusion that the Appellants did not intend HMRC to rely upon those returns as accurate documents. It follows that I do not accept this argument of the Appellants.

51. The Appellants also argued (argument xxxviii) that HMRC should follow their Compliance Handbook in alleging dishonesty. The role of the Tribunal is to interpret and apply the law. If the Appellants consider that HMRC have failed to follow their own guidance then that is a matter to take up as a complaint with HMRC.

52. Finally, the Appellants argued (argument xli) that Mr Davood was a "dishonest agent" of HMRC and the Appellants, and did not act on their behalf. This argument is based upon the false premise that an authorised agent who registers to use HMRC online services becomes an agent of HMRC. I do not agree that Mr Davood acted as the agent of HMRC. If the Appellants consider that Mr Davood did not act in accordance with his instructions then that is a matter for them to raise in their complaint to the Institute of Financial Accountants.

Was the inaccuracy careless on P's part?

53. As I have concluded that the Appellants behaviour was deliberate, I do not need to consider, as an alternative, whether the behaviour was careless.

Did the Appellants take reasonable care?

54. Sub-Paragraph 18 of Schedule 24 provides a defence to penalties under Paragraph 1 in certain circumstances, as follows:

> (3) Despite sub-paragraphs (1) and (2), P is not liable to a penalty [under paragraph 1 or 2] in respect of anything done or omitted by P's agent where P satisfies HMRC that P took reasonable care to avoid inaccuracy (in relation to paragraph 1) or unreasonable failure (in relation to paragraph 2).

55. The penalties imposed upon the Appellants were imposed as a result of their own behaviour, and not the acts or omissions of Mr Davood. Therefore, I do not accept that Sub-paragraph 18(3) can apply. If I am wrong in this, given my conclusions that the Appellants deliberately gave inaccurate tax returns to HMRC, I do not accept that instructing an agent is sufficient to exculpate the Appellants from

the consequences of their subsequent deliberate behaviour. It follows that I do not accept the Appellants argument (argument iv) that they took reasonable care. Similarly, I do not accept the Appellants argument (argument xxi) that HMRC had not demonstrated that the Appellants had failed to check their returns to the best of their ability. The inaccuracies were of such magnitude that they could not have been missed by the Appellants when reviewing their tax returns.

56. The Appellants have also argued (argument xxxvi) that their complaint against Mr Davood was evidence that he was responsible for any inaccuracies in the returns, and (argument xxxvii) the efforts made by Mr Davood in respect of other taxpayers showed that he was responsible for the inaccuracies in the Appellants returns. I do not agree that either the Appellants complaint, or evidence that Mr Davood was concerned about HMRC's investigation into other taxpayers, results in the conclusion that the Appellants did not act deliberately when they filed their inaccurate tax returns.

Calculation of the penalty

57. Finally, I consider the calculation of the penalties and the four arguments raised by the Appellants with regard to the amount of the penalties imposed. Paragraph 4 of Schedule 24 sets out the amount of the penalties which can be imposed:

> **4. Standard amount**
>
> (1) This paragraph sets out the penalty payable under paragraph 1.
>
> (2) If the inaccuracy is in category 1, the penalty is—
>
> (a) for careless action, 30% of the potential lost revenue,
>
> (b) for deliberate but not concealed action, 70% of the potential lost revenue, and
>
> (c) for deliberate and concealed action, 100% of the potential lost revenue.

58. Paragraph 4A(1) provides that an inaccuracy is in category 1 if it involves a domestic matter.

59. Paragraphs 9 and 10 of Schedule 24 provide that HMRC must reduce the standard amount of the penalty to reflect the quality of the disclosure given by the taxpayer. Paragraph 10 provides that where the standard amount of a deliberate penalty is 70% of the potential lost revenue ("PLR"), then the minimum size of that penalty is 35% of the PLR if the inaccuracy came to HMRC's attention as a result of a prompted disclosure. Therefore, the range of the penalties imposed upon the Appellants should fall between 35% and 70% of the PLR. After taking account of the quality of the Appellants disclosure, HMRC imposed penalties of 50.75% upon the Appellants.

60. The Appellants have argued (argument ix) that the penalties issued under Paragraphs 1 and 1A of Schedule 24 could not together exceed 100% of the PLR and so, as a deliberate penalty imposed upon Mr Davood could be up to 70% then the penalty percentage of 50.75% imposed upon the Appellants was too high.

61. I appreciate why the Appellants believe that a penalty should be imposed upon Mr Davood. But there is no evidence that any such penalty has been imposed. Even if such a penalty were to be imposed then – following *Stanley* cited above – such a penalty would be imposed on Mr Davood under Paragraph 1A. Paragraph 4B provides that any penalty under Paragraph 1A is 100% of the potential lost revenue. I have been unable to identify any provision which would suggest that the Appellants are correct to believe that penalties under Paragraphs 1 and 1A cannot together exceed 100% of the potential lost revenue, and logic would suggest there is no such provision. I reject argument ix.

62. The Appellants have noted that in Spotlight 51, HMRC had stated that it was considering whether the GAAR applied to the scheme, and stated its intention to charge a 60% GAAR penalty to those who used the scheme after 14 November 2016, with the possibility of an additional carelessness penalty for users after 16 November 2017. The Appellants have argued (argument xxxv) that it is a breach of the Equality Act 2010 for scheme users who ceased before November 2017 to be charged a deliberate penalty.

63. As the Appellants did not make contributions to Aionios, they are not scheme users. HMRC are entitled to treat different situations differently. I reject argument xxxv. The Appellants may wish to bear in mind that if HMRC had taken the view that the Appellants were scheme users, and had applied a GAAR penalty of 60% and a carelessness penalty in the range of 0-35%, then that combined penalty (of 60-95%) would inevitably be greater than the penalties (of 50.75%) which have, in fact, been imposed.

64. In calculating the deduction, HMRC gave the Appellants credit of 15% (out of 30%) for telling, 25% (out of 40%) for helping and 15% (out of 30%) for giving HMRC access to records, to give a total disclosure reduction percentage of 55%. Applying that reduction percentage to 35% (the difference between the minimum penalty of 35% and the maximum penalty of 70%) gives a deduction of 19.25%. Removing that deduction of 19.25% from 70% gives a penalty of 50.75%.

65. The Appellants have argued (argument xxvii) that a percentage of 51.75% (sic) was not a fair reflection of the Appellants' assistance and was a breach of the obligation in the European Convention on Human Rights to treat all taxpayers fairly. Oddly, the Appellants also argued (argument xlii) they had not provided assistance to HMRC and accordingly the penalties should not take account of any assistance.

66. The obligation to treat taxpayers fairly is set out in the Taxpayers Charter. There is no evidence that the Appellants have been penalised more heavily than other taxpayers in a similar position (and even if there was, treating one taxpayer less favourably than another would not be a matter over which the Tribunal has

jurisdiction). Bearing in mind the Appellants initial refusal to engage with HMRC's investigations, the differing accounts of events, and the relatively limited documents and information provided, I do not consider that a total disclosure reduction of 55% is inappropriate. The Appellants have not suggested, and I am unable to discern, any reason why the disclosure reduction percentage should be increased. I confirm the penalties at 50.75%.

67. I dismiss the Appellants overall contention (argument x) that the requirements of Schedule 24 are not met.

Conclusion

68. For the reasons given above, the appeal of Dr Hallen and the appeal of Dr Persson are both dismissed. The penalties are confirmed in the amounts issued.

Issue of summary decision and request for full decision

69. A summary decision was issued to the parties on 5 November 2019. Rule 35(4) provides that a party to the proceedings may request a full decision but that such a request should be received within 28 days of the issue of the summary decision. On 14 January 2020, the Respondents made a late request for a full decision, accompanied by their reasons for the delay and an application for an extension of time. Rule 5(3) provides that the Tribunal may extend the time for complying with any rule.

70. Following the Tribunal's receipt of the Respondents' application, the Appellants were asked to comment upon the Respondents' late application. On 22 June 2020, in the absence of a response from either Appellant, the Respondents' request for a full decision was referred to me. Applying the principles set out in *Martland v HMRC* [2018] UKUT 178 (TCC), I took into account the length of the delay (six weeks), the Respondents' reasons for that delay, the absence of any objection from either Appellant to the application, and the potential prejudice to each party if the application was, or was not, granted. I concluded that it would be appropriate to extend time and to grant the Respondent's application for a full decision.

71. 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.

JANE BAILEY

TRIBUNAL JUDGE

RELEASE DATE: 9 JULY 2020