Neutral Citation: [2022] UKFTT 00342 (TC)

Case Number: TC08598

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2020/01315

PROCEDURE – strike out application – whether the appeal has a reasonable prospect of success – First De Sales – followed – no – application granted

Heard on: 2 February 2022
Judgment date: 14 September 2022

Before

TRIBUNAL JUDGE ANNE SCOTT

Between

DR KATARZYNA KONDRAT-WILK

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Setu Kamal of counsel, instructed by Moor Green & Co Limited

For the Respondents: Christopher Vallis, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This hearing was listed to hear the respondents' ("HMRC's") application for a Direction in terms of Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules") striking out the appeal on the basis that there is no reasonable prospect of the appellant's case succeeding.

2. In the alternative, HMRC sought Directions that the appellant provides Further and Better Particulars and information.

3. That application was opposed by Mr Kamal on the basis that "the strikeout (sic) application is premature".

4. The application was heard with applications, which were also opposed on the same grounds by Mr Kamal, in the appeals of two other appellants.

5. The appellants' accountants had asked for all three strike out applications to be considered together and HMRC had agreed to that on the basis that the arguments of the appellants overlapped to a significant extent.

6. The three appeals are TC/2020/02854 for Dr Jaraslaw Krason ("the first appellant"), TC/2021/00534 for Dr Marcin Daniel Cajdler ("the second appellant"), and TC 2020/01315 for Dr Katarzyna Kondrat-Wilk ("the third appellant"). The facts are slightly different so each appeal has its own decision and in the decisions, where referring to matters in common, I use these designations.

7. I heard no evidence.

8. With the consent of the parties, the hearing was conducted by video link using the Tribunal's video hearing system. A face-to face hearing was not held because of the difficulty of ensuring the safety of all participants.

9. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

10. I had a hearing bundle extending to 997 pages, an authorities bundle extending to 46 pages, HMRC's application dated 11 January 2022 and the (undated) Response to the application by Mr Kamal. I had Skeleton Arguments for both parties which both encompassed this appeal and the appeals for the other two appellants.

Overview of the arguments

11. An apparent issue was the grounds of appeal for each of the appellants. In the first appellant's case his grounds of appeal had been changed four times and Moor Green & Co Ltd ("Moor Green") had confirmed that the third version superseded all previous versions.

12. In the second appellant's case despite numerous attempts by HMRC, it appeared that it had not been possible to locate a full copy of the grounds of appeal as originally lodged. The amended grounds of appeal were identical to the second grounds of appeal for the first appellant. In correspondence it seemed that it had been Mr Kamal's intention to replace those with amended grounds, as in the case of the first appellant, but, for whatever reason, that did not happen. Mr Kamal lodged amended grounds of appeal for the third appellant.

13. However, in his Skeleton Argument, Mr Kamal stated that:

> "1. The arguments of the three appellants overlap to a significant extent.

2. In simple terms, the three appellants each maintain that:-

(1) Contributions were made by them to remuneration trusts in the years assessed.

(2) The "wholly and exclusively" rule governing deductibility as contained in section 34 Income Tax (Trading and Other Income) Act 2005 ("ITTOIA") ought to be construed in accordance with the laws of the European Union ("EU").

(3) The contributions were a deductible expense for the purposes of the trade carried out by them and ought therefore to be deductible in computing their profits, how so ever the rule is construed."

14. Although there is doubt about the status of the second appellant's amended grounds of appeal (ie the second version of the first appellant's grounds of appeal,) as far as the first sub-paragraph above is concerned it was stated that:-

> "The Appellant appeals each of the assessments raised by HMRC. The Appellant made contributions ('the Contributions') to a trust ('the Trust'). Under the terms of the arrangement with the Trust, the contributed funds were held in a Personal Management Company (or 'PMC'). The PMC held the funds in a fiduciary capacity on behalf of the Trust. A certain fraction of the contributions were applied in meeting the ongoing legal fees ('Legal Fees') of the providers of the trust services."

15. In the amended Grounds of Appeal for the third appellant it stated:-

> "The Appellant made contributions to a trust ("the Contributions"). This was done through funds becoming held on behalf of the trust by the Appellant/in a PMC".

16. As far as sub-paragraph (2) above is concerned, the Skeleton Argument articulates the very extensive arguments by Mr Kamal somewhat differently to how they are articulated, differently in each case, in the various Grounds of Appeal.

17. The key point is that Mr Kamal argues that the test regarding "wholly and exclusively" should be one which is consistent with EU law so there should be a new test "The Proposed Test" applied. Mr Kamal articulated that as being "An expense is deductible to the extent that it is made for the purposes of the trade (and irrespective of whether it is for any other purpose).

18. He has referenced in excess of 80 EU cases.

19. Mr Kamal argues that what he called the Scheme was widely used and that gives it credibility.

20. HMRC argue that there was a loss of tax and the appellants have not provided any evidence to demonstrate that payments to trusts were made. In fact, Moor Green have made it clear on several occasions that there is no evidence. The appellants have advanced evolving and contradictory explanations. In those circumstances, the Tribunal cannot reasonably expect any evidence to be available at trial to satisfy the appellants' burden of proof.

21. HMRC argue that EU law is of no application in those circumstances.

Preliminary Observations

22. The appellant's response ("the Response") to HMRC's applications filed by Mr Kamal is not helpful. Apart from the second paragraph, it is identical for all three appellants which is why I refer to it here. In the second paragraph, it accurately refers to the decisions under appeal for each appellant.

23. It refers to the appellant in each case as her and, of course, only the third appellant is female. At paragraph 19 it refers to Judge Aleksander's Directions and to three paragraphs in HMRC's application. Judge Aleksander issued Directions in only the third appellant's appeal.

The application in respect of the second appellant was contained in the Statement of Case and there was no separate application and therefore all of the references in paragraphs 19 to 29 of the appellant's response do not relate directly to HMRC's application in the second appellant's case. Although there was a freestanding application for the first appellant, the references do not directly relate to that either.

24. The Response, and indeed the Skeleton Argument for the appellants, focussed almost entirely on EU law and the concept of "wholly and exclusively". They do not address the question of evidencing payment of contributions to any material extent.

The common features

25. The appellants are all self-employed dentists. They provided dentistry services for Nationwide Healthcare Providers Limited ("NHP") and the nature of the business is described as "Dental Practice Activities". NHP describes itself as the "Practice Owner" and the third appellant's Agreement with them (which also included her husband) dated 12 June 2019, which is the only contract that has been provided and is after the period with which I am concerned, shows that at that stage they owned 17 dental practices.

26. NHP and the individual partnerships operating those dental practices contracted with self-employed dentists and NHP paid the dentists on a monthly basis.

27. NHP provide premises, staff, patients, equipment and supplies. The monthly payment statements furnished by NHP are net of costs but with no tax deducted. No contract has been provided for any of the appellants covering the periods of enquiry notwithstanding the issue by HMRC of Information Notices.

28. The appellants have been filing self-assessment tax returns ("SATRs") for many years. No other substantial income sources of income have been declared. From 2011/12 in the case of the first and second appellants and 2013/14 for the third appellant, all three appellants suddenly began to claim dramatically increased "Other Business Expenses" in Box 30 in their SATRs which reduced their tax liability either to nil or to a relatively modest three figure sum.

29. All of the appellants have been represented by Moor Green and now by counsel, Mr Kamal, although it appears that Moor Green may still be involved. That was the impression given at the hearing.

30. Moor Green lodged the Notices of Appeal for all of the appellants but Mr Kamal lodged the amended Grounds of Appeal (which he described as Statements of Case).

31. On 10 January 2018, different HMRC officers wrote to all three appellants and to Moor Green explaining that the appellants were suspected of having committed tax fraud. Investigations were commenced under the parameters of Code of Practice 9 ("COP9"), which afforded the appellants an opportunity to enter into the Contractual Disclosure Facility ("CDF"). No response was received within the permitted 60 day period. That offer was not accepted by any of them.

32. On 6, 13 and 26 March 2018, each of the three appellants, respectively, issued a letter that had clearly been provided by Moor Green, denying tax fraud, confirming that all SATRs were complete and correct and stating that all correspondence should be with Moor Green.

33. HMRC came to the conclusion that income, which ought to have been assessed to income tax, had not been assessed and raised assessments under section 29 Taxes Management Act 1970 ("TMA") to make good the loss of tax and those have been appealed. In the case of the third appellant, in addition to the discovery assessments, there were also Closure Notices under section 28A TMA.

34. In each case, the first of those assessments was issued on 21 March 2018.

35. In the case of the first and second appellants, on 16 April 2018, Moor Green wrote to HMRC appealing those assessments stating that "It is our view that discovery provisions cannot validly be used in this instance and as such the assessment issued by HMRC is invalid". They requested postponement of the tax. The assessment for the third appellant appears to have gone missing and Moor Green wrote to HMRC appealing it on 30 May 2018 stating that it was "ill-conceived".

36. On 14 May 2018, in letters for each of the appellants, Moor Green wrote to HMRC pointing out that the appellant "… is only one of a very large number of participants in materially identical structures" and that they therefore did not wish to "fully outline their position" at that juncture.

37. On 24 July 2018, HMRC wrote to Moor Green, and to the first and second appellants, seeking, amongst other things, a copy of all receipts/documents to evidence the amount claimed as other business expenses, an analysis of that figure and bank statements to support those documents.

38. On 20 July 2018, HMRC had written to Moor Green in regard to the third appellant seeking similar information.

39. On 13 February 2019, for the first and second appellants, and on 25 February 2019 for the third appellant, Moor Green wrote to HMRC in response to queries regarding the alleged contributions to a trust explaining that "from a commercial perspective, our client was able to arrive at the amount of contributions without recourse to any such formal 'calculations and detailed reasoning'".

40. The 13 February 2019 letter included a letter from NHP for each of the first and second appellants confirming that those appellants had started work as full-time Self-Employed Associate General Dental Practitioners in November 2004 and February 2005 respectively. No letter was included for the third appellant but Moor Green simply stated that she was self-employed. All three letters stated that there was no contract of engagement.

The Facts relating to the appellant in this decision, being the third appellant

41. The appellant had two appeals relating to different years of assessment and those appeals may have been consolidated since an application to that effect was lodged on 30 March 2021. If they were consolidated then it was under reference TC/2020/01315 which related to the years of assessment 2013/14 to 2015/16. The second appeal, which related to Closure Notices for the years 2016/17 and 2017/18, was under the reference TC/2021/00626.

42. Since 2013/14 the appellant has claimed dramatically increased "Other Business Expenses" in her SATRs.

43. The appellant appeals against three discovery assessments for the earlier years issued under Section 29(1) TMA and two closure notices issued under Section 28A TMA for the later years. The amounts involved are as follows:-

Tax Year	**Amount** **£**	**Date**
2013/14	14,406.25	21 March 2018
2014/15	16,885.75	15 March 2019

2015/16	15,207.43	15 March 2019
2016/17	10,621.90	6 April 2020
2017/18	11,986.87	6 April 2020
TOTAL	69,108.20	

44. The appellant has been filing SATRs since 2007/08 and between that date and the 2012/13 tax years her Other Business Expenses were minimal and did not exceed £2,500. However, from 2013/14 the increase was very significant. In 2013/14 the turnover was £55,754 and the Other Business Expenses claimed were £53,135.

45. On 18 September 2018, HMRC issued a formal Information Notice under Schedule 36 Finance Act 2008.

46. On 10 October 2018, Moor Green responded to HMRC stating that they enclosed the documentation in terms of the Information Notice.

47. HMRC responded on 20 November 2018 pointing out that only some of the information requested had been provided. The analysis of Other Business Expenses showed expenses of £3,811.65 and £10,572.05 for the tax years 2013/14 and 2016/17 respectively. The amounts actually claimed had been £53,135 and £44,450.

48. On 21 November 2018, HMRC opened an enquiry under Section 9A TMA in relation to the SATRs for the tax years 2016/17 and 2017/18. The specific information requested related to Box 30 Other Business Expenses and the amounts claimed in those SATRs were £44,450 and £44,717 respectively.

49. On 28 November 2018, Moor Green replied stating, as they had in similar circumstances for both of the other appellants, that there had been a "transcriptional error in administration" by their office and a revised version was enclosed. That included the previous subscriptions amounting to £3,811.65 but then had an additional entry which was undated and which read "YE 5 April 2014" and £49,251 was entered in a column headed "Moorcroft". No explanation was offered.

50. On 19 December 2018, HMRC issued a £300 penalty for non-compliance with the Information Notice.

51. On 8 January 2019, Moor Green replied stating that they were enclosing the contract of engagement with NHP and "a copy of all receipts to evidence the amount claimed as other expenses" for 2013/14 and 2016/17.

52. They confirmed that there were no business bank statements for those years but heavily redacted personal bank statements were included. Those disclosed payments of £3,811 of business expenses. There were no entries for payments to any trust.

53. They enclosed monthly payment statements from NHP.

54. In addition there was an unsigned three page document dated 7 July 2014 headed "Declaration of sub-fund" between the appellant and Minerva Fiduciary Services (Mauritius) Limited which was described as being the original Council of the Aionios Foundation. It was stated to be supplemental to the Aionios Foundation Charter. That was not produced.

55. It said that the appellant was a member of the "Transferor Group" which was not defined. The "Designated Purpose" referred to the Transferor Group and amongst other things to the possibility of making loans to stakeholders of the Transferor Group. The Residual Beneficiary,

if the Designated Purpose failed, was the issue of the appellant. It was not complete and it was not signed. It said that the "Initial Sub Fund Funds" were £49,251.

56. Lastly, Moor Green also enclosed a document headed "7. Contributions Notice to Buckingham" which referenced Kate Dent Ltd as the PMC, an alleged contribution of £26,818.18 with Minerva fees of £2,950 for the accounting period "05-04-17" and which purported to be signed on 10 November 2017. It asked for details by returning the form so that they could provide bank details.

57. Kate Dent Limited was only incorporated on 8 November 2017 so was not in existence for any of the earlier years.

58. On 5 February 2019, HMRC wrote to Moor Green, pointing out that not all of the documents requested in the Information Notice had been provided and in particular there were no documents providing evidence that the contributions to the trust had been made or from what source. They again asked for evidence and a copy of the contract of engagement with NHP.

59. The response was the letter of 25 February 2019 to which I refer at paragraph 39 above.

60. On 18 March 2019, HMRC having chased Moor Green to provide a copy of a letter which they had stated that they had sent to HMRC in December 2018, that letter with attachments was provided.

61. That letter stated it was a reply to HMRC's letter of 21 November and it included details and documents for the tax years 2016/17 and 2017/18. Those were stated to be "a full break down of the other business expenses figure of £44,450 for 2016/17" and the same for 2017/18, albeit the figure was £44,717. Heavily redacted bank statements and Schedules of Pay from NHP plus the analysis of other expenses for each year were included.

62. On 27 March 2019, HMRC sent their view of the matter on the penalty notice appeal and on 17 April 2019, Moor Green responded:-

> "We will revert to yourselves once we have obtained the information from our client.
>
> The contribution was made for the purpose of benefitting the trade of the business and is therefore by definition wholly and exclusively for the purpose of the trade. HMRC might argue that it was not wholly and exclusively but it is understood that it is the decision of those operating the business which is of primary importance and this point has been confirmed in case law. The business clearly had the objective of facilitating the conduct of the trade."

63. On 20 May 2019, Moor Green appealed the penalty notice and included again the documentation sent with their letters of 10 October 2018 and 8 January 2019.

64. On 28 June 2019, HMRC wrote to Moor Green detailing the correspondence and documents received and explaining why in their opinion not all of the documents and information requested had been provided. The letter explained what was still outstanding and confirmed that the penalties had been issued correctly.

65. On 22 July 2019, Moor Green provided a copy of the contract between the appellant, her husband and NHP. Its commencement date was 1 April 2019.

66. On 8 August 2019, HMRC responded and reiterated that there was still outstanding information that was required. There was no response in that regard and, on 2 October 2019, HMRC sent a reminder. That letter stated that the outstanding information would have to be provided and that the Schedule 36 initial and daily penalties issued would now come back into charge.

67. On 14 October 2019, HMRC's computer systems issued a demand for payment which was entitled "Statement of Liabilities" showing the penalties.

68. On 20 October 2019, Moor Green submitted an appeal having mistaken it for a Notice of Penalty Assessments.

69. On 5 November 2019, Moor Green wrote stating:-

> "2014, 2015, 2016
>
> We would like to clarify that documentation for payment for the years 2014, 2015 and 2016 are no longer in our clients' possession. The payment only depicts part of the payment our client made as per bank statements."

70. There is no further explanation for those years. As far as 2016/17 was concerned, they drew HMRC's attention to what they described as

(a) "letter of authorisation £35,000"

That was a letter from Belize Offshore Services Ltd ("Belize") dated 30 October 2019 (which is long after the periods with which I am concerned, headed "Contributions to the Buckingham Administrators Ltd Remuneration Trust (2013") and described as a letter of authorisation. It said that in light of "your proposed contribution to the Trust in the amount of £35,000" the appellant was authorised "to make the following allocation of funds and to arrange each respective payment…".

It requested a transfer of the sum of £3,850 as payment "of the agreed MSL Services fees and asked for scanned copies of the bank transaction confirmation advices. It does not state to what period it relates.

(b) "proof of payment"

There was a scanned document from the bank.

(c) "For this financial year our client had already sent funds for her contribution but somehow the Bank did not honour the payment. Please see letter".

That letter was a letter from the appellant stating that it had been brought to her attention that the "MSL fee payment" was not honoured by the bank and she asked for confirmation of the bank details in order to remit it. That letter was headed "Contribution for the period ending 05.04.2017". Clearly when referencing contributions both Moor Green and the appellant were referring to the MSL fees.

71. On 18 November 2019, HMRC wrote to Moor Green pointing out that this was the first time that it had been stated that there was no documentation available for 2014-2016.

72. On 4 December 2019, HMRC wrote to the appellant with a copy to Moor Green confirming that the COP9 investigation would be brought to an end. At the beginning of the letter, the officer drew the appellant's attention to a recent Tribunal decision in a related case, namely *Hallen and Persson v HMRC*, then unreported but now reported at [2020] UKFTT 291 (TC), which described the outline of the Scheme used by the appellant and Moor Green's involvement. I observe that those appellants were partners in the partnership with whom the appellant signed the NHP agreement. They were directors of NHP.

73. The officer explained that the COP9 investigation was to be concluded because no evidence had been provided to explain the amount of the expenses claimed, how the expenses were paid or how they were an allowable business expense. Closure Notices would be issued for the two later years. HMRC pointed out that the letter from Belize (see paragraph 70 above),

referred to a future payment and was dated after the years under enquiry, as was the letter from the appellant to Belize.

74. On 11 December 2019, Moor Green wrote to HMRC referring to the letter of 18 November 2019, which had been received by the appellant but apparently not by themselves, stating:-

> "Our client cannot provide what she does not have. Not everyone is aware that documents etc ought to be saved for several years."

75. On 3 January 2020, Moor Green wrote to HMRC in the following terms:-

> "We would confirm that the initial contribution was made by and on behalf of the taxpayer. We would further explain that the taxpayer borrowed sufficient cash to enable her to make contributions to the Trust in the total amount as stated. As the borrowings were effected via internal client accounts of the Trustee and third parties, these would not necessarily appear on the bank statements nor would related evidential documentation be provided to the taxpayer. We would confirm that the taxpayer would not have access to any such third-party confidential documentation in this regard."

76. Moor Green then offered a lengthy argument that the contributions to a Remuneration Trust was in keeping with generally accepted accounting practice ("GAAP") and were deductible as they were wholly and exclusively for the purposes of the trade. Further correspondence ensued and the appellant's Notice of Appeal for the discovery assessments was lodged with the Tribunal on 8 March 2020.

77. On 2 June 2020, HMRC issued the Closure Notice for 2016/17 pursuant to section 28A(1B) and (2) TMA. The Closure Notice increased the tax due from £592.90 to £11,214.80 giving the following reasons:-

> (a) No credible explanation or evidence as to the business reason for the significant new expenses as claimed by the appellant from 2013/14 onwards had been provided.
>
> (b) The appellant had provided partial documents of alleged contributions made to the Aionios Sub Fund but did not provide a full set of documents nor any real detail of how, when and for what business purposes alleged contributions were made.
>
> (c) No evidence that the full expense was actually paid out or an obligation to pay it out had been provided.
>
> (d) No evidence that any of the sums contained in the appellant's analysis of other business expenses had been provided to show that there was any allowable business purpose in terms of section 34 ITTOIA. The explanation that the alleged "contribution" was in the appellant's opinion facilitating the conduct of trade did not suffice to make it deductible.
>
> (e) There has been no credible evidence or tangible evidence or explanation as to the business purpose of the expense provided.
>
> (f) The expenses claimed were not commercially viable and would result in no profits in the business and therefore limited means to meet day to day personal financial needs.
>
> (g) The letter of authorisation referring to a proposed contribution to the Trust is dated 30 October 2019 which is after the years under enquiry and the payment details and letter to Belize produced on 8 December 2019 (not in the Bundle) also refer to actions after the period of enquiry. They could have no impact on the 2017 and 2018 enquiries.

78. On the same day a Closure Notice was issued for 2017/18 and the same reasons were advanced for increasing the tax due from £428.27 to £12,425.14.

79. On 24 June 2020, Moor Green wrote appealing the Closure Notices on the basis that "the contributions are in keeping with both generally accepted accounting practice and were incurred wholly and exclusively for the purposes of the trade". It was argued that:-

(a) There would only ever be a class of potential beneficiaries under the Trust. The Trust is long term in nature, would benefit the trade over the period and the lack of any distribution from the Trust is not a determining factor.

(b) FRS 12 applies in relation to provisions, contingent liabilities and contingent assets and so sums gifted to a "commercial incentives trust is that of provisions". In the context of FRS 12 it follows the obligations in respect of expenses actually paid during an accounting period are "irrelevant".

(c) Where the contribution was made after the period end, the factual commercial liability arises from services which have been provided to the business and that was therefore constructive liability for the purposes of FRS 12.

(d) By irrevocably gifting monies into a trust, it discharged the commercial obligation and did not have to take any further action.

(e) It was argued that there is no FRS directly relevant to remuneration trust contributions but it might come within The International Accounting Standards Board Conceptual Framework.

(f) By contributing to a Trust the funds were placed irrevocably outwith the control of the business. They were therefore wholly and exclusively incurred.

80. On 24 June 2020, Moor Green sent HMRC the Foundation Charter of the Aionios Foundation. That makes no reference to the appellant nor details any connection between the appellant and the Aionios Foundation.

81. HMRC's review letter dated 29 December 2020 upheld the Closure Notices for 2016/17 and 2017/18 and the appellant's Notice of Appeal was dated 1 March 2021.

82. Correspondence ensued and on 16 September 2021 Judge Aleksander issued Directions which, in so far as relevant to this strike out application provided that there should be lodged with HMRC and the Tribunal within 30 days:-

(a) "further and better particulars of the Appellant's assertion that '… the treatment of contributions to a Remuneration Trust are in keeping with generally accepted accounting practice (GAAP) in accordance with section 25(1) ITTOIA and were incurred wholly and exclusively for the purposes of the Appellant's trade, including the basis on which there exists a constructive obligation that justifies the recognition of the liability and associated expense;

(b) the Appellant's profit and loss account for the years in question, or a statement that no such accounts exist;

(c) further and better particulars of the Appellant's assertion in her letter of 3 January 2020 that the borrowings were effected through client accounts of the Trustee and third parties;

(d) copies of the entries in the relevant client account ledgers; and

(e) copies of any agreements relating to the loan transactions (or other documents evidencing the terms of the loans)."

83. In their application HMRC pointed out that the appellant had only provided a profit and loss account for the tax years ended 5 April 2017 and 5 April 2018 in an email dated

6 December 2021 and, on an unspecified date, two "Contributions Notices" for 2016/17 and 2017/18 which are both dated 20 October 2019. No attempt has been made to explain how those relate to the years under appeal or to the Notice referred to in paragraph 56 above. All Mr Kamal argues is that the later date was simply "tidying up".

84. HMRC argued that on being reminded of non-compliance with the Directions, the appellant responded by changing the Grounds of Appeal. There was no explanation for the non-provision of the information requested.

85. On 20 October 2021, the appellant had lodged amended Grounds of Appeal (described by Mr Kamal as a Statement of Case).

86. For the first time that advanced the argument that the contributions were made for the purpose of setting up a structure whereby benefits might be provided to the spouse of the appellant. It was argued that the appellant would produce a witness statement to say that her spouse had taken on roles which freed her up to better focus on the trade carried on by the appellant. The Trust was said to provide a structure whereby benefits could be obtained by her spouse in the future. "It was understood that the terms of the Trust were wide enough to allow the spouse of the Appellant to become a beneficiary and the Trustees would be a third party who would owe a direct fiduciary obligation to the spouse".

HMRC's contentions

87. There is no evidence that any payment was actually made to a trust or that it was a remuneration trust of which the appellant was an employee or from which she received remuneration either directly or through the PMC. In any event the PMC only existed latterly and was dormant.

88. At various times it has been argued that she paid contributions through her bank account, then she received a loan from a trust, then borrowings were effected via internal accounts of the trustee and third parties, then the contribution was made by the PMC but there is no evidence.

89. The Contributions Notices do not prove payments or a liability and one of them predated the existence of the PMC.

90. There is no evidence in relation to her spouse.

91. The argument that the trust would benefit relationships with her suppliers cannot be accurate because it is NHP which has all dealings with suppliers.

Discussion

92. These appeals were unusual for a number of reasons but prime amongst those were the very unusual arguments advanced by both Moor Green and Mr Kamal.

93. Some are more easily dismissed than others. As an example, Moor Green asserted in the case of the first and second appellants that payments into the Trust were wholly and exclusively for the purpose of the business because the appellants believed them to be for the benefit of the business. They went further in the original grounds of appeal for the first appellant where they stated:

> "The clear intentions and beliefs of the Appellant's advisers acting on the Appellant's behalf and to which the Appellant evidently acquiesced, are attributable to the Appellant as his employed purpose. This is key evidence for the purposes of determining the Appellant's purpose in making the contribution".

94. Whilst Mr Kamal no longer adheres to those Grounds of Appeal it is indicative of the approach by Moor Green throughout and is supported by the more extensive argument in this case (see paragraph 62 above) where Moor Green argued that case law states that it is the subjective view of those running the business which is determinative.

95. That is plainly wrong in law. For more than a century, not only in the United Kingdom but also in many countries around the world, the concept of "wholly and exclusively" is well understood, at the highest level, to be a matter that is objectively determined.

96. I raise that, in part, because there was a suggestion that those advising the appellants could provide witness statements. I pointed out to Mr Kamal that witnesses are witnesses of fact. Arguments on the law are a matter for submissions.

97. On the issue of evidence, the Response stated under that heading that the Scheme was "widely applied, well recognised and, indeed, there have been a number of recent decisions on it: *Dukeries Healthcare Limited v HMRC* [2021] EWHC 2086 (Ch) and *Marlborough DP Limited v HMRC* [2021] TC 08246. It is unlikely that the parties would have wished to deviate from it."

98. Firstly, the fact that something is widely used does not make it right. Secondly, and infinitely more importantly, as can be seen from those case reports, in both cases there was voluminous contemporary documentary evidence. That is most certainly not the case in this instance.

99. Another example of an unsustainable argument is Mr Kamal's statement in correspondence to HMRC that "Questions of compatibility of domestic laws with EU laws are questions of principle and do not need facts". He reiterated that at the hearing, insisting that it was simply a matter of principle. The problem with that is that the primary function of the First-tier Tribunal is to find the facts and then to apply the law. The Tribunal does not consider the law in the abstract.

100. It has been exceptionally difficult to identify many facts. The position has persistently changed. Since the investigations began in January 2018, when asked to justify the claims for Other Business Expenses, in broad terms the stance of Moor Green and latterly Mr Kamal have covered the following changes:-

(a) In August 2018 it was argued that the expenses could not be explained because the request to do so was "impossibly wide".
(b) In the autumn of 2018 it was argued that the appellants' bank statements would evidence the amount claimed.
(c) That changed radically in the summer of 2019 when, 18 months after the investigation was started, it was argued that the sums did not come directly through the appellants' bank accounts and/or there was no tangible evidence.
(d) In the period August 2019 to January 2020 it was variously argued that the appellants had borrowed cash in order to enable them to make contributions to the trust.
(e) In the amended Statement of Case for the first appellant in July 2021 and as also argued in the course of the hearing for all three appellants, Mr Kamal argued that the contribution to a trust does not require the making of a payment where the funds are held on bare trust for the trust. There are no details of any such bare trust.

101. At the outset of the hearing in this matter, Mr Kamal confirmed that, apart from the documents already submitted by Moor Green including what he described as a "contribution document", the appellants would rely on parole evidence, inferences to be drawn from that and from the documents in the Bundles and the fact that that Scheme had been "widely applied" so

that would give it credibility. I recapped that to him and he agreed that it was a fair summation of his submissions.

102. Mr Vallis argued that that highlights the reason for HMRC's applications. It also confirms the quotations from Moor Green to the effect that there is no tangible evidence.

103. In debate thereafter, in summary, initially, Mr Kamal conceded that it was possible that no money had passed hands. Latterly, he conceded that no money had passed hands.

104. His argument came down to saying that contributions were "done through an oral declaration of trust", to which witnesses would speak. Then he said that the appellants "would argue that you can declare a trust without actually moving money". In essence he argued that by creating a trust a contribution was made.

105. He then moved on advancing a new argument stating that the appellants had not simply declared a trust but that certain funds were held by them on behalf of the trust. I put it to him that what he was saying was that witnesses would give evidence to the effect that they had declared a trust and the money was still in their hands but could be claimed as a deduction because of the bare trust. He agreed.

106. Understandably, Mr Vallis observed that this was an unheralded and completely new argument.

107. When asked why every taxpayer did not attempt to do the same, Mr Kamal's response was that his only submission was that it seemed that it was a case of "shoddy paperwork" but that would be a matter to decide in the substantive hearing. He wished the opportunity to adduce witness statements from unspecified parties in order to manage the deficiencies in the paperwork and expand the evidence.

108. As far as deficient paperwork is concerned, in the Response, and there talking about the documents provided by this appellant (see paragraph 83 above) Mr Kamal argued that "it is perfectly reasonable for documents to have been entered into after the event in the course of "tidying up". Those documents were dated at least 18 months after the later of the tax periods in question and long after the investigation commenced. In my view, that is not a strong argument absent compelling reasoning.

109. The Tribunal's powers in relation to strike out are contained in Rule 8(3)(c) of the Rules which reads:-

> "(3) The Tribunal may strike out the whole or a part of the proceedings if –
>
> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."

110. HMRC sought strike out. Mr Kamal opposed that seeking the opportunity to provide witness statements.

111. As far as witness statements are concerned, there is extensive law on the approach to be taken to the approach to evidence.

112. As Stewart J observed in *Kimathi & Ors v The Foreign and Commonwealth Office* [2018] EWHC 2066 (QB):

> "95. In recent years there have been a number of first instance judgments which have helpfully crystallised and advanced learning in respect of the approach to evidence. Three decisions in particular require citation. These are:
>
> - *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm) – Leggatt J (as he then was)

- *Lachaux v Lachaux* [2017] EWHC (Fam) – Mostyn J
- *Carmarthenshire County Council v Y* [2017] EWFC 36 – Mostyn J

96. Rather than cite the relevant paragraphs from these judgments in full, I shall attempt to summarise the most important points:

i) *Gestmin*:

- We believe memories to be more faithful than they are. Two common errors are to suppose (1) that the stronger and more vivid the recollection, the more likely it is to be accurate; (2) the more confident another person is in their recollection, the more likely it is to be accurate.
- Memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is even true of "flash bulb" memories (a misleading term), ie memories of experiencing or learning of a particularly shocking or traumatic event.
- Events can come to be recalled as memories which did not happen at all or which happened to somebody else.
- The process of civil litigation itself subjects the memories of witnesses to powerful biases.
- Considerable interference with memory is introduced in civil litigation by the procedure of preparing for trial. Statements are often taken a long time after relevant events and drafted by a lawyer who is conscious of the significance for the issues in the case of what the witness does or does not say.
- The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. "This does not mean that oral testimony serves no useful purpose … Buts its value lies largely … in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth".

ii) *Lachaux*:

- Mostyn J cited extensively from ***Gestmin*** and referred to two passages in earlier authorities (The dissenting speech of Lord Pearce in *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403, 431; Robert Goff LJ in *Armagas Ltd v Mundogas SA* [1985] 1 Lloyd's Rep 1, 57). I extract from those citations, and from Mostyn J's judgment, the following:
- "Witnesses, especially those who are emotional, who think they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the incident occurred. Therefore, contemporary documents are always of the utmost importance…"

- "… I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective fact proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities…"
- Mostyn J said of the latter quotation, "these wise words are surely of general application and are not confined to fraud cases … it is certainly often difficult to tell whether a witness is telling the truth and I agree with the view of Bingham J that the demeanour of a witness is not a reliable pointer to his or her honesty."

iii) *Carmarthenshire County Council:*

- The general rule is that oral evidence given under cross-examination is the gold standard because it reflects the long-established common law consensus that the best way of assessing the reliability of evidence is by confronting the witness.
- However, oral evidence under cross-examination is far from the be all and end all of forensic proof. Referring to paragraph 22 of *Gestmin*, Mostyn J said:

  "…this approach applies equally to all fact-finding exercises, especially where the facts in issue are in the distant past. This approach does not dilute the importance that the law places on cross-examination as a vital component of due process, but it does place it in its correct context."

97. Of course, each case must depend on its facts and (a) this is not a commercial case (b) a central question is whether the core allegations happened at all, as well as the manner of the happening of an event and all the other material matters. Nevertheless, they are important as a helpful general guide to evaluating oral evidence and the accuracy/reliability of memory."

113. In these appeals, by the time they get to trial, it will be more than ten years since the earliest of the disputed years in question. That poses obvious problems with oral evidence.

114. Furthermore, the accounts of what happened, or is alleged to have, happened have changed right up to and including this hearing.

115. The Upper Tribunal has provided guidance, upon which HMRC rely, at paragraph 33 of *The First De Sales Limited Partnership and others v HMRC* [2018] UKUT 396 (TCC) ("De Sales") and I annex a copy thereof as an Appendix.

116. The first question that I must ask myself is, would the appellant have a realistic as opposed to a fanciful prospect of success of establishing that at least part of the sums claimed were deductible for income tax purposes.

117. As I have already pointed out, the question is not about the EU arguments on "wholly and exclusively". The key question is, can the appellant establish that expenditure was incurred?

118. The current argument that there is a bare trust does not sit well with the previous arguments advanced for the appellant as can be seen from the findings in fact.

119. It is clear that Moor Green and the appellant had in mind the MSL fees when talking about contributions which raises the inference that those were the only payments made (see paragraph 70 above).

120. The fact that the PMC was dormant at all times does not assist and nor does the fact that it only came into existence in November 2017. There is no explanation in relation to the earlier years.

121. Moor Green made it explicit that the appellant had no records for 2014 to 2016.

122. I dismiss the argument that GAAP might assist the appellant. When I asked why Judge Aleksander's Direction 1(a) in this appeal had not been obtempered, Mr Kamal said that parole evidence would establish that the contribution had been made. I can only take it from that, that that is consistent with saying that no money passed hands, there was a bare trust and therefore GAAP is not relevant.

123. Bare trusts are not a simple matter. There is simply a very late assertion that such a thing exists.

124. As can be seen from paragraph 86 above, there is the argument that the alleged payments (ie the monies allegedly held on bare trust) were for the purpose of making loans to the appellant's spouse at some unspecified point. It is not for me to determine whether that would be an allowable expense in this or any business but, this is a specialist Tribunal, and the extensive case law, not on "wholly and exclusively" but on "for the purposes of the trade" suggests the prospects of success beyond a *de minimis* basis are likely to be very slim. There is also the issue in terms of the law of bare trusts as to whether that purpose has been fulfilled. It seems not.

125. Looking at the history of this investigation, the paucity of the documentation and the conflicting accounts offered, I find that there is no realistic possibility of the appellant producing evidence that, in terms of section 34(1) ITTOIA, expenditure was incurred. That is the first step long before one gets to whether it was wholly and exclusively incurred for the purposes of the trade.

126. The second question I must ask is whether there is any real substance in the factual assertions made. Given the multiplicity of contradictions in the documentation over the years, I find that there is not.

127. Given that the appellant bears the burden of proof in relation to the Closure Notices, I cannot find that any new evidence is likely to come to light. The appellant has been given multiple opportunities to produce any evidence at all, and in the context of Information Notices, and only conflicting accounts have been produced.

128. I do not accept the argument that the appellant could not have produced a witness statement before now. Mr Kamal has been involved since January 2021 and the appellant has been professionally advised throughout. The fact that HMRC appear to have considered that witness statements would not assist is not relevant. If the appellant had had any information that would have assisted the appeal then that should have been lodged long ago whether in the form of a witness statement or, like much of the other information, by correspondence.

129. I do agree with Mr Kamal, as do HMRC, that it is incumbent on HMRC to discharge their burden of proof in regard to the discovery assessments. However, that is in relation to timing and competency.

130. Did the officer discover a loss of tax and were the assessments raised in time? The absence of any credible information or records to vouch the alleged substantial expenditure means that the short answer to that is that it certainly appears that that is a burden that would be discharged.

131. Where I fundamentally disagree with Mr Kamal is that it is certainly not for HMRC to prove that no expenses were incurred. Income tax is a self-assessed tax and it is not for HMRC to prove a negative.

132. HMRC have described as "ludicrous" the arguments about the compatibility of domestic legislation with EU law and the argument that there should be a new "Proposed Test". I understand why they are baffled but I do not propose to consider the EU law question because I do not need to do so.

133. The simple point is that the domestic legislation, which is the starting point, requires evidence that expenditure has been incurred by the appellant and that it is for the purpose of the trade. For the reasons set out above I find that there is no realistic possibility of the appellant doing so. Therefore section 34 ITTOIA, which is a relieving section, is not engaged. There can be no deduction from the profits of the trade. The concept of "wholly and exclusively" does not fall to be explored.

134. For the avoidance of doubt I am aware that there is a lot of money at stake in this matter. I have weighed in the balance the totality of the evidence and whether anything could be achieved by directing the production of witness statements since it would appear that that is all that is possible.

135. In the context of this appeal, given the lack of documentary evidence and the contradictions in the evidence and the various submissions, whether by Moor Green or Mr Kamal, I find that a witness statement and oral testimony would be very unlikely to assist in a substantive hearing. I do not accept that it is only at the substantive hearing that adequacy or not of the evidence is to be tested; that is very clear from *De Sales.*

136. This appeal has already absorbed a huge amount of time and money. There have been procedural issues. HMRC have made strenuous attempts to elicit information over a long period of time in the face of a flow of ever changing argument which did not address in a meaningful way the core issue. That issue was, and is, proof that expenditure was incurred, to whom, when, how and why. HMRC have also addressed many of the lengthy "EU" arguments. It has been to no avail.

137. Whether I strike the appeal out is a discretionary matter and I have had in mind Rule 2 of the Rules. Parole evidence, which is all that is offered, in the context of the multiple previous contradictory accounts and very many years after the events in question is very unlikely to assist the Tribunal. I find that there is no reasonable prospect of this appeal succeeding.

Decision

138. For all these reasons I grant the application to strike out the appeal. In the event that the appeals were not formally consolidated then appeal TC/2020/80626 is also struck out.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

139. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date:
14th SEPTEMBER 2022

Appendix

The First De Sales Limited Partnership and others v HMRC **[2018] UKUT 396 (TCC)**

33. Although the summary in Fairford Group Plc is very helpful, we prefer to apply the more detailed statement of principles in respect of application for summary judgment set out by Lewison J, as he then was, in Easyair Ltd (t/a Openair) v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15]. This was subsequently approved by the Court of Appeal in ward & sons v Caitlin Five Limited [2009] EWCA Civ 1098. The parties to this appeal did not suggest that any of these principles were inapplicable to strike out applications.

> "i) The court must consider whether the claimant has a 'realistic' as opposed to a "fanciful' prospect of success: Swain v Hillman [2001] I All ER 91
>
> ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]
>
> iii) In reaching its conclusion the court must not conduct a 'mini-trial': Swain v Hillman
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]
>
> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;
>
> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."