



Neutral Citation: [2022] UKFTT 00343 (TC)

Case Number: TC08599

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2021/00534

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 February 2022

Before

TRIBUNAL JUDGE ANNE SCOTT

Between

DR MARCIN DANIEL CAJDLER

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. The application was contained in HMRC's Statement of Case at paragraphs 186 *et seq.*
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 1190 pages, an authorities bundle extending to 46 pages and the (undated) Response by Mr Kamal to the application. 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 (i.e. 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 paragraph 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. That response for the appellants, 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 letters for all three appellants, 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 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 second appellant

41. Since 2011/12 the appellant has claimed dramatically increased “Other Business Expenses) in his SATRs.

42. The appellant appeals against five discovery assessments issued under Section 29(1) TMA. The amounts involved are as follows:-

| Tax Year | Amount £ | Date |
|-----------------|---------------------|---------------|
| 2011/12 | 28,632.81 | 21 March 2018 |
| 2012/13 | 27,539.74 | 22 March 2019 |
| 2013/14 | 30,796.55 | 21 March 2018 |
| 2014/15 | 31,238.13 | 22 March 2019 |
| 2015/16 | 29,130.35 | 22 March 2019 |
| TOTAL | 147,337.58 | |

43. Where the discovery assessments were made and notified to the appellant more than four years after the end of the relevant tax year HMRC relied on section 36 of TMA on the basis that the behaviour had been, at best, careless and on section 34 TMA for the remainder.
44. The discovery assessments charge additional income tax on the profits of the appellant's trade pursuant to section 5 of ITTOIA.
45. In particular, the "Other Business Expenses" claimed by the appellant in his SATRs were reduced and thereby increased the trade profits chargeable to income tax.
46. In the interim, HMRC had telephoned Moor Green on 23 April 2018 and wrote to them on 25 April 2018 confirming postponement of tax.
47. On 14 May 2018, 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.
48. On 24 July 2018, HMRC wrote to Moor Green and to the appellant seeking, amongst other things, a copy of all receipts/documents to evidence the amount claimed as other business expenses and an analysis of that figure.
49. In response to HMRC's letter of 24 July 2018 seeking information, on 30 August 2018, Moor Green wrote to HMRC stating that the requests for information were impossibly wide and refusing to make any disclosure on the basis that "no material can reasonably be required to establish the taxpayer's position".
50. On 4 September 2018, HMRC issued a formal Information Notice pursuant to Schedule 36 Finance Act 2008.
51. On 8 October 2018, Moor Green wrote to HMRC in response to the Information Notice and stated that they enclosed "bank statements which are evidence of the amounts claimed as other expenses" and "an analysis of the other expenses" for the years 2011/12 and 2015/16.
52. For 2015/16 that analysis showed three payments to a trust of £687.50 (and therefore totalling £2,062.50) and "trade subscriptions" of £5,668.91. That trust is named as "B Wealth Services". There is no explanation of that. The other business expenses that had been claimed in the SATR were £81,148 for that year.
53. The figures for 2011/12 show trade subscriptions of £3,094.53 only. The expenses claimed had been £79,031.
54. On 23 November 2018, HMRC opened an enquiry under section 9 TMA in relation to the SATRs for the years ended 5 April 2017 and 5 April 2018. They wrote to Moor Green detailing the information requested which related to Box 30 "Other Business Expenses". The amounts claimed by the appellant were £90,538 and £85,356. HMRC sought an explanation as to what the "trust" expenses of £2,062.50 related. A copy of that letter was sent to the appellant.
55. On the same day, HMRC responded to Moor Green's letter of 8 October 2018 pointing out that only some of the information requested had been provided. HMRC could reconcile, as can I, the minor expenses for £3,094.53 and £7,731.41 for the two years in question to bank statements. However, the balance of the totals of £79,031 and £81,148 claimed in the SATRs were not vouched.
56. On 28 November 2018, Moor Green provided a new version of the breakdown of expenses for 2011/12 which included undated contributions to a trust of £74,871 for 2011/12 and £75,000 for 2015/16. Moor Green blamed the discrepancies on a "transcriptional error".

There are no corresponding entries in the bank statements. There was no explanation of the £2,062.50.

57. On 10 December 2018, Moor Green wrote to HMRC providing what they described as a “full breakdown” of other business expenses of £90,358 for 2016/17 and £85,356 for 2017/18 and “personal bank statements showing the expense being paid”.

58. Those “full breakdowns” again simply listed large undated, unsubstantiated contributions and the bank statements did not show the expenses being paid and were heavily redacted including some with no standard heading or dates. All that can be identified are professional subscriptions. However, those are not years under appeal here.

59. On 20 December 2018, HMRC issued a penalty for failure to comply with the Information Notice and, in particular, the failure to provide “a copy of all receipts/documents” and evidence of the amount claimed as “Other Business Expenses” for 2011/12 and 2015/16.

60. On 2 January 2019, Moor Green wrote two letters to HMRC appealing the penalty and stating that they had provided all relevant information. They enclosed an analysis for both 2011/12 and 2015/16 but again, in each case, it was a one page document with lists of small payments like subscriptions and then an undated entry labelled “contribution to trust” being £74,871 for the earlier year and £75,000 for the later year.

61. They stated that they enclosed “A copy of all receipts to evidence amount claimed as other expenses...”

62. They also included a document entitled “4. Contribution Notice to Buckingham” which is not dated and referred to a contribution of £74,871 for the accounting period 05/04/2012 and the contribution was said to be by the appellant. There were no details in the box for a “relevant PMC”. There is no receipt. The bank details to which the contribution was to be paid was Baxendale Walker.

63. They also produced ten documents entitled “2. Contributions Receipt” which said that it was a “Receipt For Contribution Made to Buckingham Administrators For URT”. The name of the sole trader was the appellant and the relevant PMC name was Marcin & Jolanta Limited.

64. Marcin & Jolanta Limited was 100% owned by the appellant and his wife, was dormant from incorporation in December 2012 and throughout the periods of appeal. It was dissolved on 6 July 2021 having been compulsorily struck off.

65. I observe that at paragraph 7 of the Amended Grounds of Appeal it is claimed that the PMC is owned by a parent company in another Member State but does not identify the parent or the State. The Companies House records contradict that and the PMC never held any funds beyond the £2 share capital. Paragraph 25 states that on that alleged change of ownership the appellant entered into a “stringent deed of undertaking”. No such document has been produced.

66. The receipts were described as being contributions for accounting periods 04/15, 06/15, 08/15-10/15, 12/15-04/16. The sums varied in amount but the total was £75,000. There was no explanation either of the documents themselves or of the PMC or the missing accounting periods. The figures cannot be traced in the bank statements. There is no evidence of payment.

67. On 23 January 2019, HMRC wrote to Moor Green pointing out that there still was no evidence of payments having been made to the trust or why, if that could be established, they were wholly and exclusively for the purposes of the appellant’s profession.

68. Moor Green’s generic response on 13 February 2019 is noted at paragraph 39 above.

69. As indicated above, further assessments were issued and on 17 April 2019, Moor Green appealed the assessments issued on 22 March 2019 and sought postponement of the tax.

70. On 13 May 2019, HMRC wrote again to Moor Green pointing out that there was still no evidence to substantiate expenditure in the amounts claimed in the tax returns for 2011/12 of £74,871 and for 2015/16 of £75,000.

71. HMRC again requested unredacted bank statements if the Trust contributions had been made from the same bank account for which redacted statements had been provided, or bank statements from an accounts from which the contributions had been made, or confirmation that there is no such evidence of expenditure. Specifically, HMRC requested unredacted bank statements if payments had been made from the declared bank account and if not unredacted statements from any other account, which failing an explanation of the source of funding to the trust.

72. Moor Green responded on 10 June 2019 stating:-

“It is noted you wish ‘tangible’ evidence and (sic) appreciate the usual meaning of this term in the circumstances. It should be stated that we have previously stated there is no evidence and an explanation was provided. While you may wish ‘tangible’ evidence we suggest that the ‘explanation is tangible’...”.

73. Having written to Moor Green on 11 July 2019 requesting information and received no reply, on 13 August 2019, HMRC wrote again, pointing out that no evidence had been provided of expenditure on the amounts described as “contributions to trust” yet “Other Business Expenses” in the SATRs were now known to have included those sums. HMRC requested a range of information rehearsing all of the previous requests.

74. On 12 September 2019, Moor Green wrote to HMRC stating:-

“... the initial contribution was made by and on behalf of the taxpayer ... the taxpayer borrowed sufficient cash to enable her (sic) 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 tax payer. We would confirm that the taxpayer would not have access to any such third-party confidential documentation in this regard ...

Our client relied on professional advice which was given verbally. We would confirm that our client possesses significant business and commercial acumen and did not require the retention of written correspondence in order to comprehend the contributions made and the expenses claimed vis-à-vis signing off on the accounts ...

Due to the passage of time our client is unable to recall who provided the initial advice.”

75. That letter was only received by HMRC after they stated in an email dated 22 October 2019 that they had received no such letter. It was the first time that there was any suggestion that the appellant had borrowed funds to finance any contributions.

76. On 18 December 2019, HMRC wrote to Moor Green giving their view of the matter and referencing a recent Tribunal decision in a related case, namely *Hallen and Persson v HMRC* [2020] UKFTT 291 (TC) which described the outline of the scheme used and Moor Green’s involvement.

77. On 10 February 2020, Moor Green responded stating that they did not require to provide evidence about the contributions.

78. On 11 February 2021, HMRC issued a Schedule 36 Information Notice for the year 2018/19 having had no response for a request for information dated 2 October 2020.

79. On 29 March 2021, Moor Green, without comment beyond stating that they were replying to that, enclosed a number of documents. They are not relevant to these appeals other than that they shed light on earlier documents that had been received in isolation.

80. The front page of each document has a heading Umbrella Remuneration Trust (“URT”) and it is described as being the Membership Completion Pack. The contents are then listed and those are:-

1. Completion Memorandum
2. Contributions Receipt
3. PMC Transfer Memorandum
4. Completion Statementn
5. Fiduciary Receipts Agreement
6. Fiduciary Receipt

At the bottom of the page under the heading “For office use only” it gives the name of the sole trader, in this case the appellant, and there is an entry for the relevant PMC name, in this case Marcin & Jolanta Limited. With each pack only a few items were included but I can see there variations on what was included for earlier years such as 2. Contributions Receipt. There is one “pack” which includes 3. PMC Transfer Memorandum. Whilst that is headed correctly for the appellant and his PCM and it purports to report a Memorandum of Transfer of URT monies to a PMC, under the heading PMC bank account details it simply says n/a.”

81. No other portions of any of the packs were included. Clearly the documents to which I refer at paragraph 63 above were from similar packs. Therefore the information provided is far from complete.

82. Moor Green wrote to HMRC on 26 May 2021 arguing that the contributions to the remuneration trust were “evidently” wholly and exclusively for the purposes of the “trade”. They stated :-

“It is anticipated but not necessarily guaranteed that the business will benefit from adherence to the Remuneration Trust...It is understood in this case that the contribution may not necessarily result in improved economic performance but may result in or include improved relations and dealings with suppliers...Dr Cajdler’s adherence to the Trust is valid as a matter of trust law and the expense was wholly and exclusively for the purposes of the trade as confirmed above.”

HMRC’s Grounds for the application

83. HMRC argue that the Discovery Assessments were entirely properly, timeously and competently raised by HMRC, given that there were very good grounds to assume there had been a loss of tax. That was the reason for raising the COP9 investigation.

84. The expenses claimed by each of the appellants were very, very large in relation to their turnover. That alone caused HMRC to believe that there was a potential loss of tax. That view is objectively justifiable. There had been no discernible change in the appellants’ trade yet, after claiming these expenses, the tax due to HMRC was £NIL.

85. The information provided was incomplete, heavily redacted and did not support either the amount of the expense claimed or the fact that such an amount had actually been paid.

86. The appellant originally stated that the payments to the trust were made by him but provided no information and no bank statements supporting that.

87. The appellant eventually confirmed that there was no evidence of payment of the expenses.

88. The PMC has been dormant throughout although it is alleged that payments were made through it.

89. Mr Davood of Moor Green assisted in the preparation of the appellant's tax returns and even the original letters from the appellants appeared to have been produced by Moor Green. They have been involved at every stage.

90. There was no information in the white space notes in the SATRs or attachments. There was no DOTAS disclosure.

The appellant's grounds of appeal and the Response

91. Under the headings Overview of the Arguments and Preliminary Observations I set out the issues for this appellant with identifying his grounds of appeal and the opposition to the application for strike out. In fairness to him, I have assumed that Mr Kamal's amended grounds of appeal for the first appellant should be read into this appeal since these two appeals are very similar indeed with the exception of the identity of the PMC.

92. Apart from focussing on EU law, the argument is that the appellant should be permitted to lodge a witness statement(s) to support the claims. As a matter of procedure it is for the Tribunal in the substantive hearing to decide on the sufficiency and quality of the evidence.

Discussion

93. 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.

94. 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”.

95. 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 the case of the third appellant where Moor Green argued that case law states that it is the subjective view of those running the business which is determinative.

96. 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.

97. 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.

98. 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.”

99. 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.

100. 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.

101. 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 “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.

102. 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 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.

103. 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.

104. 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.

105. 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.

106. 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.

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

108. 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.

109. As far as deficient paperwork is concerned, in the Response, and there talking about documents provided by the third appellant 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.

110. 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."

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

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

113. 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 ... But 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.”

114. 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.

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

116. 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.

117. 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.

118. 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?

119. As indicated above, I do not know precisely what the appellant’s grounds of appeal are but in the hearing Mr Kamal advanced the various arguments on bare trusts. The argument that the funds were held in a bare trust does not sit well with the previous argument (which is in his current amended grounds of appeal) that they were held in the PMC. The fact that the PMC was dormant at all times does not assist.

120. Moor Green made it explicit that the appellant could not even recall who had advised him in relation to the trust and he had no records.

121. I dismiss the argument that GAAP might assist the appellant. When I asked why Judge Aleksander’s Direction 1(a) in the third appellant’s appeal in that regard 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.

122. Bare trusts are not a simple matter. There is simply a very late assertion that such a thing exists. Thus far there has been no evidence offered as to the precise purposes of this appellant’s alleged trust and whether those have been fulfilled

123. If the argument was that it would improve relationships with suppliers that is in the realms of fanciful since it is NHP who has contracts with suppliers.

124. 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.

125. 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.

126. Given that it is argued that the burden of proof lies with HMRC to establish that no expenses were incurred, 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.

127. 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.

128. 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.

129. 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.

130. 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.

131. 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.

132. 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.

133. 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.

134. In the context of this appeal, given the stated lack of recall by the appellant of even the source of the initial advice and the contradictions in the evidence and the various submissions, whether by Moor Green or Mr Kamal, I find that witness statement(s) 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 evidence is to be tested; that is very clear from *De Sales*.

135. 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.

136. 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

137. For all these reasons I grant the application to strike out the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

138. 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

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] 1 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."