



TC02944

Appeal number: TC/2011/01865

INCOME TAX AND NICs – tax assessments and penalty assessments – whether SOCA had reasonable grounds to suspect income accruing to appellant due to criminal conduct so that s. 317(1)(a) Proceeds of Crime Act 2002 applied giving it jurisdiction – yes – whether tax assessments for 2004/05 and 2005/06 raised timeously – yes – was cash received by appellant by way of income – yes – whether quantum of tax assessments correct – yes – whether level of penalties excessive – no - appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GEOFFREY MICHAEL FENECH

Appellant

- and -

SERIOUS ORGANISED CRIME AGENCY

Respondent

**TRIBUNAL: JUDGE DAVID DEMACK
RICHARD LAW**

Sitting in public at London on 29 and 30 April and 1 May 2013

Timothy Brown of counsel instructed by Azzopardi & Co, solicitors, London, for the Appellant

David Yates of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Mr Geoffrey Michael Fenech appeals against discovery assessments to income tax raised under s.29 of the Taxes Management Act 1970 (“TMA”) and assessments to class 4 national insurance contributions (“NICs”) for the five consecutive years commencing with that of 2004/05. At the time the assessments were originally raised they were in a total sum of £235,407.02.

2. Subsequently, that sum was reduced for two reasons. First, Mr Fenech provided the Serious Organised Crime Agency (“SOCA”) with information relating to a bank deposit of £22,224.54 in 2005/06, which it accepted as evidence of its being derived from a non-taxable source. Secondly, SOCA decided to reduce “unbanked cash” on which part of the tax assessments were raised from £113,574.31 to £39,000. We were not told what difference those deductions made to the tax and NICs assessed.

3. Mr Fenech also appeals against penalty determinations for each of the relevant tax years raised on 7 October 2010 and 1 November 2010 under s. 93(5) (incorrect returns) and s. 95 (late returns) of TMA amounting to £176,555.25, i.e. 75% of the tax assessed on him.

4. The assessments under appeal were raised by the SOCA, it having adopted the functions of HMRC in relation to Mr Fenech under the Proceeds of Crime Act 2002 (“POCA”).

5. SOCA is a non-departmental public body established by s.1 of the Serious Organised Crime and Police Act 2005. In broad terms, SOCA’s statutory remit is as follows:

- (a) to detect and prevent serious organised crime;
- (b) to mitigate the consequences of such crime;
- (c) to reduce the incidence of such crime in other ways;
- (d) to gather, store, analyse and disseminate information relevant to the above; and
- (e) to gather, store, analyse and disseminate information relevant to the investigation and prosecution of offences.

6. SOCA may adopt the functions of HMRC where the qualifying condition contained in s. 317 POCA is met. (The relevant parts of s.317 are set out at [87] and [90] below). The condition is met where SOCA has reasonable grounds to suspect that income, chargeable to tax, has arisen in a chargeable period as a result (in whole or part, directly or indirectly) of criminal conduct. Such conduct may be that of the person concerned, or another. The condition must continue to be met throughout the relevant periods.

7. By virtue of section 323(1) and (1)(d) of POCA, the general revenue functions include such of the functions vested in the Board of HMRC as relate to income tax, NICs and capital gains tax.

5 8. Until 1 April 2007 the civil recovery and revenue functions of the Assets Recovery Agency were vested in its director. On that date they were transferred to SOCA pursuant to s. 74 of the Serious Crime Act 2007.

9. Mr Fenech, having appealed separately against the tax and NICs assessments, and the penalty assessments, the tribunal considered it appropriate to require him to serve consolidated grounds of appeal, and directed accordingly.

10 10. Mr Fenech's consolidated grounds of appeal were served on 18 September 2012 in the following terms:

“The Assessments for Tax and NI

1. The Respondent did not satisfy the qualifying condition of s.317 POCA on the basis that:

15 (a) no income or gains have been derived by the Appellant as a result of criminal conduct by him or another; and

(b) there were no reasonable grounds to suspect that the income or gains derived from criminal conduct of the Appellant or another.

20 2. Even if the Respondent did satisfy s.317 POCA, the assessments for 2004/05 and 2005/06 are out of time, being made outside the four year time limit (s.34 TMA 1970).

25 3. The money on which the assessments raised by the Respondent for undeclared income tax on 18 June 2010 and amended on 11 February 2011 was not undeclared income; the Appellant having no taxable trading income for 2004/05 to 2007/08 inclusive and limited personal income as per the expert report of Mr David Winch B.Com FCA dated 17 May 2012.

4. The bank deposits on which the assessments were partly based were not derived from additional taxable income.

30 5. Alternatively, the quantum of the assessments is incorrect given the expert report of Mr David Winch B.Com FCA dated 11 May 2012.

Penalties

6. Any penalty for which there is no tax due should be reduced to zero.

7. A penalty of 75% on any tax due is excessive on the basis that the appellant has.

35 a) provided a statement relating to his business;

- b) provided documentation available to him; and
- c) not acted fraudulently, negligently or carelessly.”

11. The parties have agreed that the issues on which the tribunal is required to adjudicate are the following:

- 5 a. Was s.317(1)(a) POCA satisfied i.e. did SOCA have reasonable grounds to suspect that income accruing to Mr Fenech did so as a result of a person’s criminal conduct?
- b. Were the assessments for periods 04/05 and 05/06 raised timeously?
- 10 c. Was the cash seized by POCA received by Mr Fenech by way of income, or by other means?
- d. Is the quantum of the assessments correct?
- e. Is the level of penalty excessive in the circumstances?

12. Before us, Mr Fenech was represented by Mr Timothy Brown of counsel, and SOCA by Mr David Yates, also of counsel. They provided us with three bundles of
15 agreed copy documents, and two bundles of authorities. The former included statements of witnesses, some of whom were called to give oral evidence. Those so called were Mr Fenech himself, Mr David Winch FCA, a forensic accountant instructed by Mr Fenech, and Mr Roy Stoddart, a member of the staff of SOCA seconded from HMRC. It is from the evidence so presented that we make our
20 findings of fact.

The facts

13. The facts leading to the assessments under appeal involved three persons unconnected with the appeal itself. They were Michael Stratford, Robin O’Riordan and Gary Joliffe. We begin by describing their part in events.

25 14. On 28 March 2009, Mr Stratford, who was under surveillance by SOCA, drove to a caravan site at Weely, near Clacton in Essex. He was seen to make a phone call and a few minutes later Mr O’Riordan arrived to meet him. Mr Stratford took a bag from the boot of his car and gave it to Mr O’Riordan, who put it in the boot of his vehicle. Mr O’Riordan then drove off and was stopped by SOCA about a mile down the road.
30 On SOCA officers seizing and inspecting the bag it was found to contain £79,950 in cash.

15. A few hours later, in the same area, Mr Stratford travelled as a passenger in his brother’s car to a block of flats. He was seen leaving the block of flats with a holdall, which he placed in the rear of the car. As the car drove off, SOCA stopped it, and
35 took possession of the holdall. They found it to contain £123,000 in cash. Mr Stratford was arrested on suspicion of being involved in money laundering and drug trafficking. He was found to be in possession of a note containing calculations

referring to the two sums of £123,000 and £79,950. The note also suggested that Mr O’Riordan had received £80,000, and Mr Stratford £25,000.

5 16. A search of Mr Stratford’s home resulted in a further £24,820 in cash being found hidden beneath a pillow in a chest in the spare room. Not surprisingly, SOCA thought that that sum related to the £25,000 referred to in the note.

17. Mr Stratford and Mr O’Riordan were interviewed but, as was their right, they remained silent.

10 18. Mr Stratford was charged with three offences under POCA. The first count alleged that on 28th March 2009 he had transferred criminal property, namely cash of £79,950, knowing or suspecting it to represent, directly or indirectly, the proceeds of criminal conduct. He was further charged that on the same date he had acquired criminal property consisting of £123,000 cash, knowing or suspecting it wholly or partly to represent, directly or indirectly, the proceeds of criminal conduct. And thirdly he was charged with possessing criminal property, £24,820 in cash, again with
15 the requisite knowledge or suspicion. Mr O’Riordan was charged with using or having possession of the cash of £79,950, that being criminal property.

19. In their defence statements, the two men claimed the money found to have come from the legitimate dealings of Mr Fenech. In his statement, Mr Stratford claimed that “The money emanated from Geoffrey Fenech and belonged to him. It was
20 legitimate money and not the proceeds of crime. For various reasons he had temporarily entrusted it to Gary Joliffe ... for safe keeping. The money was business proceeds from his business of demolition and reclamation of building materials. He will give evidence to this effect for the defence and will further state that he had arranged for the return of the monies on 28.3.09 through the accused.”

25 20. When the cases of Mr Stratford and Mr O’Riordan came before the Crown Court there was no dispute that the person from whom Mr Stratford had collected the sum of £123,000 in cash was Mr Joliffe, and the jury were told that Mr Joliffe had informed the police that he had received the money from Mr Fenech. Mr Joliffe has never been charged with any offence.

30 21. Taking account of Mr Fenech’s lack of declared means and the failure of various companies through which he claimed to trade (with which we shall shortly deal), the prosecuting authorities formed the view that he was not in a position to produce £227,760 in cash, and the prosecution of Stratford and O’Riordan proceeded on the basis that the monies were not those of Mr Fenech: the suggestion that the monies
35 were his and derived from his business activities were said to be pure fabrication. On 2 October 2009, the judge in the Crown Court decided that there was no case to put before the jury: he found that, whilst there was a “very heavy suspicion” that the seized funds were criminal property, the inference was not irresistible in the light of Mr Fenech’s evidence.

40 22. The prosecution appealed, challenging the judge’s ruling. In the alternative, they argued that, if the funds belonged to Mr Fenech, they were nonetheless criminal

property taking account of certain mortgage frauds, and frauds on Mr Fenech's creditors.

23. In its judgment of 11 May 2010, the Criminal Division of the Court of Appeal, [2010] EWCA Crim 1127, noted that whilst there was a "good deal of suspicious activity", the inference that the seized funds were criminal property was not irresistible taking account of Mr Fenech's evidence, including the fact that cash withdrawals "in the region of £600,000" had been made from his bank accounts. The Court declined to consider evidence of criminal conduct by Mr Fenech which had not been put to the Crown Court, and dismissed the appeal.

24. Mr Fenech had, in the meantime, made a formal claim for the return of the money. His claim was presented in the Westminster Magistrates Court. He had been interviewed, but had not been charged with any offence either involving the money or involving the account that he gave to the police of how he had come legitimately by it.

25. In his claim for return of the monies seized, Mr Fenech said that:

- a) he traded in building materials through Slates Direct (London) Ltd ("SDLL") between 2005 and 2008;
- b) he traded in building materials on his own account from 2008 onwards;
- c) the business predominantly dealt in cash;
- d) his mother lent him approximately £203,000, which he invested in the business;
- e) those funds comprised of £59,203.37 paid on 09/02/05, and £143,929.35 paid on 03/03/06, and derived from mortgages;
- f) this money was held as a cash float and supplemented by profits from his business;
- g) his bank records showed that between 2005 and 2008 he made cash withdrawals of at least £600,000 from his business account;
- h) he did not trust banks; and
- i) the funds held by Mr Stratford and Mr O'Riordan were derived from a cash float.

26. On 31 March 2009 Westminster Magistrates' Court made a cash detention order against the funds seized from Mr Stratford and Mr O'Riordan.

27. Meanwhile, HMRC were making their own enquiries into Mr Fenech's tax affairs. For each of the tax years 2004/05 and 2005/06 he completed a tax return, albeit in

each case later than the date prescribed by law, but despite being issued with returns for 2006/07, 2007/08 and 2008/09, he failed to make any of them.

28. As a result HMRC's records showed that he had declared income for tax purposes as follows:

5	Tax Year	Income
	2004/05	£24,000
	2005/06	£23,782
	2006/07	Nil
	2007/08	Nil
10	2008/09	Nil

29. SOCA claimed to be unable to reconcile those declarations and failures to make returns with deposits Mr Fenech made into certain bank accounts (to which we shall later refer), the version of events put forward by him in the cash forfeiture proceedings, and in the proceedings involving Mr Stratford and Mr O'Riordan. In consequence, SOCA concluded that Mr Fenech had failed to notify HMRC of a liability to tax as required by s. 7 TMA, and that a tax loss had been incurred.

30. We should record at this point that SOCA accepts that tax evasion is not criminal conduct for the purposes of s. 317 POCA, pursuant to s. 326 of that Act. They do, however, suspect, and continue to suspect, that income received by Mr Fenech was tainted by the following criminal conduct:

- (1) mortgage fraud by Mr Fenech and/or his mother;
- (2) money laundering by Mr Fenech; and
- (3) the theft of building materials and handling stolen goods by Mr Fenech.

31. We shall deal with SOCA's claims seriatim, but first we should provide some background information about Mr Fenech, his family and his business activities over the years.

Mr Fenech's income, businesses, assets and family

32. In his evidence, after claiming that the funds seized by SOCA were his, Mr Fenech maintained that his companies had "rendered professionally prepared accounts", and that he had been assessed to tax on sums banked, with no account being taken of reliefs and allowances to which he was entitled. The "professionally prepared accounts", which were in fact unaudited, were produced by Russell James Ltd, accountants of Chelmsford, and were subsequently relied on by Bushwoods Accountants who were appointed to deal with Mr Fenech's affairs in 2010. Bushwoods produced a report which they submitted to SOCA.

33. At 51.4 of his judgment in *SOCA v Fenech* [2011] EWHC 10(QB), in dealing with the question of whether SOCA had an arguable case against Mr Fenech for a

freezing order in respect of the monies seized from Mr Stratford and Mr O’Riordan, Mr R Lissack QC sitting as a Deputy Judge of the High Court, said this:

5 “ ..., with all due respect, the evidence from Bushwoods...is not remotely compelling comprising as it does unsubstantiated assertions that are variously inconsistent with other information emanating from [Mr Fenech’s] own side, not evidenced and not remotely good enough to displace the otherwise compelling arguable case as made out in my judgment by [SOCA].”

10 34. That statement is equally applicable in the present context, and we adopt it. We might add that we consider the Russell James accounts worthless for present purposes since all the evidence points to their having been prepared without that company having had sight of any records, except perhaps bank statements.

15 35. Mr Fenech now trades on his own account as a wholesaler of reclaimed building materials. He previously conducted the same type of business through a series of limited companies, including Slates Are Us Ltd (June 1995 to July 2003), Slates Direct Ltd (“SDL”) (September 2000 to December 2006) and SDLL (October 2004 to March 2009). We have included a complete list of the companies through which he traded in the First Schedule to our decision. He claimed not to have been trading on his own account when trading through one or other of those companies. We shall deal with his claim in that behalf later in our decision.

20 36. All Mr Fenech’s companies operated from 460 Railway Arches, Sebert Road, London E7 0NW, those premises being the subject of a licence to Mr Fenech by Network Rail plc and, previously, by its predecessor company, Railtrack plc.

25 37. Although the principal or sole shareholder in each company, Mr Fenech was not usually a director. For instance, the sole director of Slates Are Us Ltd was Mr Fenech’s then wife, Natasha Dee Fenech (“the former Mrs Fenech”). He was the company secretary. The sole director and company secretary of SDL was Mr Fenech’s sister, Alison Concheta Fenech.

30 38. On 10 December 2004, Mr Fenech and the former Mrs Fenech made an application for a mortgage on what was then their matrimonial home. In it they stated his annual gross basic income/net profit or remuneration to be £68,000, and hers to be £35,000 per annum. They said his income came from SDL, and that the company had been established for 14 years. The mortgage application was signed by both applicants, and was supported by a statement of truth. The initial advance applied for was £250,000, but the borrowing in that sum was added to in March 2006 by £39,500.
35 The property was sold in June 2008, the mortgage being discharged on payment of £291,462.83. We were not told what happened to the remaining proceeds of sale, if any. In evidence, Mr Fenech denied receiving any income during the tax year 2004/05, other than the sum of £24,000 he declared to HMRC.

40 39. SDL commenced trading in September 2000 as a supplier of reclaimed building materials. Its issued share capital was 100 £1 ordinary shares, half of which were held by Mr Fenech and the remaining half by the former Mrs Fenech. The company

initially traded successfully, reporting a first year profit of £11,900. It was said to be funded by Mr Fenech. Natwest Bank plc held a floating charge over its assets. In September 2003 SDL purchased a large number of slates from an unknown supplier for £48,000 cash. It was later found that the supplier had paid for the slates using a
5 stolen credit card. The slates were confiscated by the police and returned to their rightful owner, SDL receiving no compensation for its loss. SDL continued trading, but Mr Fenech claimed that the loss caused it serious cash flow problems. In order to settle SDL's creditors' claims, Mr Fenech decided to sell the company's plant and machinery, and its remaining stock. The amount realised from the sales was
10 insufficient to meet all creditors' claims, and the company was subsequently found to be insolvent.

40. SDL went into liquidation on 27 June 2005 with debts exceeding £150,000. The company owed a sum in excess of £120,000 to HMRC. It was dissolved on 27 December 2006. In the director's report prepared for the first statutory meeting of the
15 creditors, the former Mrs Fenech, as the company's director, stated that the controlling mind and de facto director of the company was Mr Fenech; that the company was funded by means of unsecured loans from Mr Fenech; and that the property 460 Railway Arches was leased to the company by a family member who allowed its use free of charge.

20 41. SDLL was incorporated on 15 October 2004. Its Memorandum of Association showed it as a roofing, tiling and slate wholesaler. Its sole director was Mr Fenech's sister, Alison Concheta Vincent. Mr Fenech held the entirety of the company's issued share capital. SDLL made two corporation tax returns, the first covering the period from 15 October 2004 to 14 October 2005, and the second from 15 October 2005 to
25 31 October 2005. In the earlier return, signed by Mr Fenech as "director", SDLL's turnover was revealed as £150,616, and its profits chargeable to corporation tax as £7,394. Its turnover in the latter period was shown as £7,015, and its profits liable to corporation tax as £344. SDLL made no corporation tax returns for the years to 31 October 2006, and 31 October 2007.

30 42. Mr Fenech claimed to provide finance to SDLL in part by the use of a credit card issued by NatWest Private Banking in the name of the former Mrs Fenech, but on which he was an authorised signatory. Using that card, he said he withdrew approximately £180,000, plus associated handling fees, and paid the monies withdrawn into SDLL's bank account. He maintained that he then repaid the credit
35 card. Mr Fenech claimed the monies so withdrawn to have been expended for business purposes, but he was unable or unwilling to provide any documentation or other information to substantiate the claim. In the absence of any corroborative evidence, we are not prepared to accept the claim.

40 43. In the *Fenech* case, Deputy Judge Lissack dealt with a claim by Mr Fenech that he used a personal credit card for the purpose of financing SDLL, saying:

“The assertion that [Mr Fenech] drew money on credit cards, deposited that money in the bank and then repaid the credit card is not evidenced and is a

commercial nonsense, the more so when [Mr Fenech] himself reported to the Official Solicitor that the company did not use a credit card.”

44. That statement is equally applicable in the instant case, and we adopt it.

5 45. SDLL was wound up on 10 October 2008. Mr Fenech subsequently completed a questionnaire for the Insolvency Service in which he stated that the company was funded by his brothers, and the company had no records because he had fallen out with his accountant. However, in a witness statement made on 31 July 2009, he asserted that SDLL had been funded by loans from his mother. We thus have three completely different explanations from Mr Fenech as to the funding of SDLL.

10 46. 460 Sebert Road is currently occupied by The Old Slate Yard Ltd, another Fenech family run business now in the hands of Mr Fenech’s son and daughter. In 2009 it had as directors Mr Fenech’s daughter, Charley Marielee Fenech, and Natasha-Dee Dorrington, the latter we suspect to be the former Mrs Fenech.

Monies borrowed by Mrs Fenech senior

15 47. Mr Fenech separated and was divorced from the former Mrs Fenech on an undisclosed date, but which we believe to have been about 2007 or 2008. He moved out of the matrimonial home and went to live with his mother, Mrs Alice Maud Fenech (“Mrs Fenech senior”). She lived at Gladding Road, Manor Park, London E12 5DD.

20 48. Mr Fenech claimed that some of the cash seized represented sums borrowed by his mother on the security of her home, and lent to him. The evidence adduced in relation to the monies so lent took the following form.

25 49. Mrs Fenech senior had owned and lived at Gladding Road for many years. On 21 January 2005, she made application for a mortgage on the security of the property to Southern Pacific Mortgage Ltd (“SPML”). On the application form she stated that she required a loan of £60,000 to be repaid over a term of 5 years, and its disclosed purpose was “for holiday home”.

30 50. She was required to provide “Occupation details self-employed or controlling director [owning or controlling 25% or more of the voting rights of the company]”. In response she claimed an interest in two businesses – “London Slate Co” and “Slates Direct London”, and her “percentage shareholding” as 30. Mrs Fenech senior self-certified her income as follows:

35 2004 £28,000 p.a.
 2003 £28,000 p.a.
 2002 £27,000 p.a.

She added that “income is from a family firm and will continue”.

51. At paragraph 24 of the form, a Declaration and Consent, Mrs Fenech senior certified “that the statements and particulars given above and all the information in

this form are true and complete and understand that these will form the basis of any mortgage offer.”

52. On 9 February 2005, Mrs Fenech senior’s solicitors, Charles Whiting, having completed the mortgage on her instructions, telegraphically transferred the net amount of the mortgage advance, £59,203.37, to the bank account of SDLL at the Tower Bridge branch of Natwest Bank plc. Within 6 days of the monies being deposited, £55,000 was withdrawn. No evidence was adduced as to the identity of the person by whom the monies were withdrawn, or to what purpose they were applied.

53. In the unaudited balance sheet of SDLL for the year to 31 October 2005 there was no mention of the company having borrowed from, or otherwise being provided with, money by Mrs Fenech senior.

54. Mr Fenech maintained that monies seized by SOCA formed a “cash float”, and included both monies produced by his legitimate business and those lent to him by Mrs Fenech senior. He explained that the monies were normally kept in a safe at her home. But as she had refused to have such a large quantity of cash in the house, he had been obliged to entrust the “cash float” to Mr Joliffe. However, Mr Joliffe “borrowed some of the cash” without clearing it with Mr Fenech. Mr Fenech therefore said that he asked Mr Stratford and Mr O’Riordan “to collect my money”, and deduct sums he had agreed to lend them. It was whilst collection was in progress that the monies were seized.

55. On 7 December 2006, Mrs Fenech senior completed a form of application for a remortgage of the Gladding Road property. She said she required the sum of £200,000, including £60,000 to repay the earlier mortgage of the property. She self-certified her income for the tax years ending in 2003, 2004 and 2005 as £75,000, £78,000 and £82,000 respectively, and claimed it to be derived from a 50% shareholding in the company “Slates Direct (Wholesaler)”, that business being “family run and owned with her sons”, and operating from 460 Sebert Road. The application form contained a declaration similar in form to that recorded at [51] above.

56. The remortgage having been completed, on 3 March 2006 Charles Whiting again paid the monies raised, £143,929.35, to the account of SDLL and, following the pattern established when the earlier borrowing was paid into the company’s account, it was withdrawn within 3 weeks.

57. Although it is unclear from SDLL’s bank statements, SOCA suspects that the withdrawals from SDLL’s accounts referred to above were made in cash. Whilst we cannot be sure that that was the case, we too suspect that it was. Our suspicion is in large part based on the fact that SDLL kept no paper or other records of any sort, and Mr Fenech was unable or unwilling to deal with the form of withdrawal in his evidence to us.

58. When SDLL subsequently went into liquidation the report prepared by the director, the former Mrs Fenech, contained no mention of the two loans from Mrs

Fenech senior. Not only were the loans by Mrs Fenech senior absent from the liquidator's report of the affairs of SDLL but, as we earlier said, nor did they appear in the company's unaudited accounts for the period to 31 October 2005. It would appear, and we find, that neither the accountant acting for the company nor the
5 Official Receiver, as liquidator of SDLL, was informed of the existence of the two loans by Mrs Fenech senior.

59. We were provided with the HMRC record for Mrs Fenech senior. It showed them to hold no self-assessment income tax record for her, and to contain a note that for the tax years 6 April 2001 to 5 April 2009 they had no record of her being employed or
10 having paid NICs, or her being allowed any tax credits. For the period covered by the record, Mrs Fenech senior declared no income liable to income tax. All the indicators were that her only source of income was her state pension.

60. We infer and find that Mr Fenech held the monies borrowed from Mrs Fenech senior personally. We do so against a background of his having made a statement at Brentwood Police Station on 31 July 2009 in which he said, "I had my own business,
15 an incorporated company arranged through my accountants. I have run the business independent of the cash flow arranged through my mother, drawing from those funds from time to time to assist with the purchases and repaying back to her fund... [On the business being wound down] the residual stock was sold over a period and monies
20 realised was (sic) added to the cash and stored at my mother's home where I resided after I moved out of the matrimonial home...". In our judgment, Mr Fenech's admission to have withdrawn and repaid sums to Mrs Fenech senior's "fund" indicates plainly that it was neither her intention nor that of Mr Fenech to provide SDLL with capital permanently, but rather intermittently and temporarily by way of
25 loans; and we find that such loans were made to the company by Mr Fenech personally.

61. Mr Fenech claimed that his mother, as a lady of advancing years, would in all probability not have understood the effect of the documents she had signed, and would not have intended to make false declarations; her actions could not be
30 classified as criminal offences for the purposes of s. 317 POCA. We are unable to accept his claim in that behalf, for no evidence was adduced to show that Mrs Fenech senior would not have understood the nature of the statements and declarations she made. In the absence of any evidence whatsoever to the contrary, we infer, and thus find, that Mrs Fenech senior knowingly made false statements to obtain the mortgage
35 advances in question.

(1) Suspected mortgage frauds

62. SOCA claims that Mr Fenech was a party to the mortgage frauds committed by Mrs Fenech senior because:

- (1) he was the beneficiary of her criminal conduct;
- 40 (2) the fraudulent statements related to a business or businesses carried on by him; and

(3) he had a history of dishonesty in that

(a) in the mortgage application of 10 December 2004 (referred to at [38] above) he himself stated his “income, profit and remuneration” to be £68,000 per annum, whereas in his tax returns for 2003/04 and 2004/05 he declared his annual income to HMRC in each of those years as £24,000; and

(b) on 11 September 2007 Mr Fenech pleaded guilty to using a goods vehicle without an operator’s licence; he was found to have displayed another operator’s licence in a vehicle with intent to deceive.

63. For the reasons relied on by SOCA, we accept without reservation SOCA’s claim that Mr Fenech was a party to the mortgage frauds committed by his mother.

64. Against the background of Mr Fenech having claimed the cash of £227,760 seized in 2009 from Mr Stratford and Mr O’Riordan as his property, and representing a cash float originally obtained through the remortgage of Mrs Fenech senior’s home, Mr Stoddart considered her mortgage applications fraudulent as she had included in them fictitious shareholdings, and income unsupported by any declarations to HMRC. We accept his claim in that behalf.

65. SOCA further claims that Mr Fenech’s own income was tainted by Mrs Fenech’s frauds since the proceeds of the fraudulent mortgages appeared to have been invested, in whole or in part, in Mr Fenech’s demolition and reclaimed building materials business. Again, we accept the claim.

66. However SOCA does not directly rely on the fraudulent mortgage application referred to in the penultimate paragraph, as it has not linked the advance to Mr Fenech’s income.

(2) Suspected money laundering

67. The grounds on which SOCA claims to have suspected Mr Fenech of money laundering are that:

a) he had been arrested on suspicion of money laundering;

b) he had conducted his business outside the mainstream financial system and in cash;

c) he failed to keep business records;

d) he placed large sums of money in the hands of Mr Stratford, Mr O’Riordan and Mr Joliffe; and

e) the Crown Court, in dealing with the cases of Mr Stratford and Mr O’Riordan, held that there was “a very heavy suspicion” that the seized funds were criminal property and, in the Court of Appeal, Hooper LJ noted that, whilst there was “ a good deal of suspicious activity”, the inference that the seized

funds were criminal property was not irresistible taking account of Mr Fenech's evidence, including the fact that "in the region of £600,000" had been withdrawn in cash from his bank accounts.

5 68. In relation to 67(a) above, we should observe that Mr Fenech was never prosecuted for any money laundering offence.

69. Mr Stoddart noted that the use of cash was common within the criminal community; it ensured that there were no business records, and that detection within the mainstream financial system was impossible. An example he cited was SDL's purchase for cash of £48,000 of the quantity of slates which subsequently proved to
10 have been bought by the company's supplier using a stolen credit card. The suspicious nature of cash trading was reflected in the existence of the cash forfeiture requirement of Part 5 Chapter 3 of POCA.

70. The grounds on which SOCA relies to suspect Mr Fenech's income to have been tainted by money laundering are that:

- 15 (a) in the absence of an alternative explanation, it was reasonable for it to suspect that money laundering activity would be conducted for profit; and
(b) that it reasonably suspected Mr Fenech of money laundering activities interconnected with his demolition and reclaimed building materials business.

71. The fact that the monies seized were not held by Mr Fenech, but were in the hands
20 of two others who claimed them to have been derived from his legitimate business activities (see the statement of Mr Stratford at [19] above), in our judgment, provides confirmatory evidence of Mr Stoddart's suspicion that Mr Fenech was involved in money laundering activities interconnected with his business.

72. In dealing with the money laundering question, Mr Stoddart took account of
25 evidence of considerable cash trading and loans made by Mr Fenech to individuals said to be involved in organised crime. He did so against a background of the following paragraph of the judgment of Hooper LJ in the *MS and RO* case (i.e. the Stratford and O'Riordan case):

30 "3. It is well known that the offences designed to catch what is normally known as money laundering are wide offences. It is also well known that the prosecution must approach these charges with care. In particular, of course, it has to be shown that the defendants were transferring, acquiring or in possession of criminal property, and that they have the necessary *mens rea*, which is either
35 knowledge or suspicion. It is also well established that it is not necessary for the prosecution to point to any particular criminal offence. Provided that the jury can be sure that the property is the proceeds of some criminal conduct that is sufficient."

73. Although he was charged with no money laundering offence, we hold that
40 SOCA's suspicion that Mr Fenech's demolition and reclaimed building materials business was interconnected with, and tainted by, money laundering was justified. In the absence of any alternative explanation, in our judgment it was reasonable of

SOCA to suspect that Mr Fenech undertook money laundering activity for profit: on the balance of probabilities we are satisfied that the monies seized by SOCA were the proceeds of some criminal conduct.

(3) Suspected thefts and dishonesty

5 74. The grounds on which SOCA rely to justify their claim to suspect Mr Fenech of the theft of building materials and handling stolen property are:

a) that he has 5 convictions for handling stolen property, one conviction for theft, one conviction for burglary in a dwelling, and one conviction for taking a motor vehicle without authority, albeit that all the offences took place between
10 1981 and 1994;

b) he informed the liquidator of SDL that the company had purchased slates from an unknown individual for £48,000 cash, those slates subsequently proving to have been stolen and being seized by the police;

c) he was arrested on 21 February 2010 for theft of roof tiles, and subsequently
15 charged with that offence.

75. Although subsequently charged with the theft at 74(c) above, Mr Fenech was acquitted of the offence.

76. Further relevant matters which we might conveniently mention at this point are that on 21 July 2010 Mr Fenech was arrested in connection with the theft of bricks
20 from an old ambulance station. He was released on police bail, and his bail was cancelled on 22 September 2010, no further action being taken against him. He was further arrested on 18 October 2010, again for the theft of bricks. But once more, having been released on police bail, his bail was cancelled on 22 December 2010, and no further action taken against him.

25 77. At the time Mr Fenech's monies were seized, he was being prosecuted for the theft of building materials. Since he claimed selling building materials to be his principal trade, Mr Stoddart also formed the view that the businesses might be vehicles for handling stolen goods. In so doing, Mr Stoddart took Mr Fenech's spent convictions into consideration. (We observe that s.4(1) of the Rehabilitation of
30 Offenders Act 1974 which deals with spent convictions does not apply to proceedings pursuant to a notice under s.317(2) of POCA).

78. SOCA claims to suspect Mr Fenech's income to have been tainted by theft and handling stolen goods because:

a) the offences referred to at [74] above were acquisitive offences and their
35 commission was motivated by gain; and

b) the incidents identified at [74](a) and (b) related to reclaimed building materials, causing SOCA to suspect that the income generated by Mr Fenech's

demolition and reclaimed building materials business had been directly tainted by his criminal conduct.

79. For the same reasons, we too are satisfied that it was reasonable of SOCA to suspect that Mr Fenech's income was tainted by theft and handling stolen goods.

5 **The case for Mr Fenech**

80. As we said at [54] above, Mr Fenech claimed his cash float to consist both of monies produced by his legitimate business and lent to him by his mother, the latter remaining owing to her. He produced no evidence in support of either claim and, in its absence and in the light of the large sums of money paid into various bank
10 accounts he used, we reject them.

81. He also invited us carefully to note that, even on SOCA's case, there was no evidence of proceeds of crime.

82. Further evidence given by Mr Fenech took the following form:

15 a) "My companies made appropriate tax returns, professionally prepared, for the appropriate years and matters, in some cases, were subject to discussions between my accountants and HM revenue officers."

20 b) "I have been asked to provide expenditure for my business (by which I intend to mean companies where such exist, as I always trade through companies). I am not good with that sort of thing and leave admin and office type work to others, particularly my accountants..."

83. As to [82]a we need merely say that we place as little reliance on Mr Fenech's tax returns as we do on the accounts of his companies (see [34] and [35] above). As to [82]b, in our judgment, Mr Fenech's statement speaks for itself.

The s.317 issue

25 84. In considering whether the qualifying condition in s.317 of POCA was satisfied, Mr Stoddart said that he took into account factors relating to Mr Fenech's income, the alleged mortgage fraud by Mrs Fenech senior, and Mr Fenech's prosecutions for theft and handling stolen goods, and money laundering.

30 85. SOCA accepts that on the appeal of any assessment to the tribunal, it is open to an appellant to challenge the s.317 condition. It does so having accepted the decision of the Special Commissioners in *Khan v Director of the Assets Recovery Agency* [2006] STC (SCD) 154 where they dealt with the matter in the following way:

35 "15. The jurisdiction of the Special Commissioners is not limited to situations where the taxpayer claims to have been overcharged by a valid assessment. The jurisdiction covers situations where the taxpayer contends that there is no charge on grounds that the document purporting to be the assessment is invalid or ineffective. The most usual case is where the assessment is challenged as being

out of time. Another example is where the taxpayer contends that the assessment is on the wrong person (eg where the assessment is on him as an individual whereas he claims he should have been assessed as a trustee). A further example of a challenge to the validity of the assessment that falls within the Special Commissioners' jurisdiction is where the taxpayer contends that the assessing officer did not have had the Board's authority to make the assessment. The words of s 50(6) do not, expressly or by necessary implication, restrict the scope of the appeal commissioners and prevent them from examining the validity of the assessment on those grounds. Indeed s 29(8) expressly provides for an appeal on the grounds that neither of the conditions in subsections (4) and (5) are fulfilled.

16. So here we hold that a person who has been assessed by the Director in pursuance of s 317 may put forward as one of his grounds of appeal that the person making the assessment, the Director, had no authority to do so on the basis that the Director has not satisfied the qualifying condition in s 317(1)(a). It would then be for the Director to show that she had properly served a notice on the Revenue under s 317(2) and thereby obtained the right to exercise the general Revenue functions specified in the notice. The jurisdiction of the Special Commissioners exists to entertain the appeal on those grounds without reference to any Human Rights or natural justice issues and without considering the implications of any general prohibition against retrospective legislation."

86. The Special Commissioners then set out the relevant test at [39]:

"39. The expression 'reasonable grounds to suspect' requires us to be satisfied on two counts. First we need to be satisfied that the Director or an authorised member of her staff, here Mr Archer, had formed the genuine suspicion in his own mind that the income arose as a result of the criminal conduct of the person. Second, we need to be satisfied that what was in his mind was, viewed objectively, reasonable in the sense that it amounted to a reasonable suspicion. If confirmation for this is needed, it is found in the decision of the House of Lords in *O'Hara v Chief Constable of Royal Ulster Constabulary* [1997] AC 286 a case concerned with the statutory powers of arrest conferred on a constable. *O'Hara* further establishes that the person whose decision it is is entitled to rely on secondary evidence. To contend, as Mr Power does, that we need to be satisfied of Mr Khan's guilt and of his having benefited from the crime, is not supported by the words of s 317(1) on any reading."

87. The same approach was adopted by Deputy Judge Lissack in the *Fenech* case.

88. Section 317 of POCA reads in its relevant parts as follows:

"SOCA's general revenue functions

(i) For the purposes of this Section the qualifying condition is that SOCA has reasonable grounds to suspect that –

(a) income arising or a gain accruing to a person in respect of a chargeable period is chargeable to income tax or is a chargeable gain (as the case may be) and arises or accrues as a result of the person's or another's criminal conduct (whether wholly or partly and whether directly or indirectly. . .)"

5

89. This is known as the "qualifying condition".

90. Section 326 in Part 6 of POCA defines "criminal conduct"

"(1) Criminal conduct is conduct which -

(a) constitutes an offence in any part of the United Kingdom, or

10

(b) would constitute an offence in any part of the United Kingdom if it occurred there.

(2) But criminal conduct does not include conduct constituting an offence relating to a matter under the care and management of the Board."

91. A possible consequence of the qualifying condition being satisfied is dealt with in sub-sections (2) to (4) of s. 317 which read:

15

"(2) If the qualifying condition is satisfied [SOCA] may serve on the Commissioners of Inland Revenue (the Board) a notice which -

(a) specifies the person or the company (as the case may be) and the period, and

20

(b) states that [SOCA] intends to carry out, in relation to the person or the company (as the case may be) and in respect of the period, such of the general Revenue functions as are specified in the notice.

(3) Service of a notice under sub-section (2) vests in SOCA, in relation to the person ... and in respect of the period such of the general revenue functions as are specified in the notice; but this is subject to Section 318.

25

(4) SOCA -

(a) may at any time serve on the Board a withdrawal of the notice under subsection (2);

30

(b) must serve such a notice of withdrawal on the Board if the qualifying condition ceases to be satisfied."

92. Thus, SOCA may exercise the functions of the Board when it has, and continues to have, reasonable grounds for suspecting that the subject derived income or made gains from his own or another's "criminal conduct".

93. If SOCA does not have reasonable grounds for so suspecting, or if, as time goes on, it becomes apparent that no relevant income or gain arose from criminal conduct, the agency has no jurisdiction, and cannot continue to act. In such a situation it cannot serve a notice under s.317(2). If one has already been served, whether rightly or wrongly, a notice of withdrawal must be served under sub-section (4)(b).

35

94. Unless SOCA establishes that it has reasonable grounds to suspect (s.317(i)) that the taxpayer is caught by the criminal conduct provision (s. 326), it has no jurisdiction to act, in that the qualifying condition is not met.

5 95. At [37] of his judgment, Deputy Judge Lissack dealt with SOCA's case on the point both before him and before us in the following terms:

10 "The agency submits that contrary to [Mr Fenech's] argument that it does not need to have a suspicion of a criminal offence in relation to the money detained. Rather, all the Agency has to show is that it has reasonable grounds to suspect criminal conduct (of whatever kind) and that there is income or gain (however indirect) which flows from it. They go on that there is no need to trace the income or gain into the cash. The cash simply is the subject matter of this freezing injunction application and will go towards satisfying the Respondent's tax debts."

15 96. Mr Brown advances Mr Fenech's case on the point by first observing that s.317 requires SOCA to have a reasonable suspicion that income arising in a chargeable period is chargeable to income tax and arises as a result of criminal conduct. Developing that case, Mr Brown submits that s.317 is not satisfied on two grounds.

20 97. First, Mr Stoddart claimed in evidence that he suspected Mr Fenech of criminal conduct including income tax fraud, mortgage fraud, theft or handling of stolen goods, and money laundering. Having correctly observed that by s.326(2) of POCA income tax fraud cannot be regarded as criminal conduct, Mr Brown submits that with regard to the remaining alleged conduct, even if Mr Stoddart had a reasonable suspicion of such conduct, none of it gave rise to income subject to tax, *Lindsay v IRC* [1932] TC 43, *Leeming v Jones* [193] 15 TC 333.

25 98. He further submits that the two-stage test applied by Deputy Judge Lissack at [47.1] of his judgment in the *Fenech* case failed to take into account the requirement that income "is chargeable to income tax" or is a chargeable gain (as the case may be) and arises or accrues as a result of the person's or another's criminal conduct, as provided for by s.317(1) of POCA. In other words, Mr Brown contends, first the seized funds must, to satisfy the condition precedent, be either "income" or "gain", and, in Mr Fenech's case, they were neither. Secondly, he submits, a "conjunctive condition" that the "income" or "gain" arises or accrues applies as a result of the person's criminal conduct. Thus, he continues, there must not only be a nexus between the two conditions, but the income or gain must directly or indirectly be
35 consequent upon the criminal conduct – the specific criminal conduct must be consequential upon the income or gain: the suspicion of some other criminality unconnected or not consequential to the income or gain is insufficient to satisfy the provision. [I'm not sure that I follow this; it seems to be a bit circular. Is there a simpler way of putting it?]

40 99. Secondly, Mr Brown submits that s. 317 is not satisfied because, in any event, the test of whether an officer has a reasonable suspicion of criminality is in part subjective and in remainder objective, *O'Hara*: it is whether a reasonable man would

form such an opinion having regard to the information in his mind, and depends on the source of the information and its context, seen in the light of the whole of the surrounding circumstances (Lord Hope in *O'Hara* at 298). In the instant case, Mr Brown submits that the objective test is not met; a reasonable man would not have formed such a view; and SOCA has adduced no evidence that the monies were obtained as a result of crime. Mr Fenech was acquitted of all the offences with which he was recently charged. Mr Brown submits that the law must have intended SOCA to put forward some evidence of criminality, and without such evidence SOCA cannot continue to act under its revenue powers.

10 100. However, as Mr Yates submits, correctly in our judgment, all that s.317(1) requires is that SOCA has reasonable grounds to suspect criminal conduct, and that there is income, however indirect and however little, flowing from it. SOCA does not have to prove that any of the income assessed on Mr Fenech arose from criminal conduct; it merely has to have a reasonable suspicion that he received some income
15 (even if only £1) directly or indirectly from criminal conduct for that year; there is no need to trace the gain into cash.

101. In the High Court, in the *Fenech* case Deputy Judge Lissack observed that it was of some potential importance whether the language of s.317 permits of corporate or cumulative reasonable grounds for suspicion, or whether it has to be the reasonable
20 suspicion of A or B, i.e. in the instant case Mr Stoddart. Having considered the submissions of the parties the judge preferred SOCA's reasoning – that the statutory language permits the former. Thus he concluded that the statutory condition was satisfied, giving a number of reasons for so doing. Those reasons relevant for present purposes are the following:

25 “47.1 Firstly, a two stage test is to be applied:

47.1.1 Stage 1: had [SOCA] corporately and Mr Stoddart personally formed the genuine suspicion that the income arose as a result of the criminal conduct of [Mr Fenech]? If yes,

30 47.1.2 Stage 2: was that genuine suspicion, viewed objectively, reasonable in the sense that it amounted to a reasonable suspicion?

47.2 Secondly, the answer as to both stages is “yes”.

35 47.3 Thirdly, I agree that all [SOCA] has to show is that it has reasonable grounds to suspect criminal conduct (of whatever kind) and that there is income (however indirect) which flows from it. There is no need to trace the income into cash. The cash simply ... will go towards satisfying [Mr Fenech's] tax debts.

47.4 Fourthly, ...

40 47.5 Fifthly, were there any lingering doubts about whether [SOCA] had a reasonable suspicion based on the evidence of Mr Stoddart in his first and second affidavits [in support of SOCA's application for a freezing order],

5 it is in my judgment banished by the express, referenced and particular views set out in [SOCA's log] as explained and bolstered by Mr Stoddart's Third Affidavit between paragraphs 3 and 12 which together make out a compelling case of [SOCA] having reasonable grounds to suspect criminal conduct involving mortgage fraud, theft handling stolen goods and money laundering"

10 102. In SOCA's log there is a summary of Mr Fenech's suspected criminality. It reads, "There is an inference of tax evasion when Fenech's statement is compared to his HMRC record. However, this is clearly Part VI [of POCA] appropriate by virtue of the illegitimate profits earned from laundering the proceeds of his mother's mortgage frauds and his associates' drug dealing. Further he has a criminal record for acquisitive crime dating back to 1981 the profits from which have not to date been taxed."

15 103. For completeness paragraphs 3 to 12 inclusive of Mr Stoddart's third affidavit are set out in the Second Schedule to our decision.

20 104. For the same reasons as Deputy Judge Lissack came to his decision, we are satisfied that, in the instant case, the jurisdictional threshold of s. 317(1) is met, so that SOCA is permitted to adopt the powers of HMRC for the relevant years of assessment. In so deciding, we have carefully considered all Mr Brown's submissions, but are unable to accept them.

Are periods 04/05 and 05/06 out of time?

105. It is common ground that for the 6 year, as opposed to the ordinary 4 year, time limit provided by s.36 TMA 1970 to apply, SOCA must show that there was at least negligent conduct on the part of Mr Fenech.

25 106. The interaction of this burden of proof with that generally imposed on appellants in tax appeals was addressed by Park J in *Hurley v Taylor (Inspector of Taxes)* [1998] STC 2002 at 219:

"I will first set out certain propositions of law, and then I will relate them to the facts of the case. My propositions of law are as follows.

30 1. By s 36(1) of the TMA 1970 an assessment to income tax can be made on a person outside the normal six years period (but subject to a maximum 20 years cut-off) 'for the purpose of making good to the Crown a loss of tax attributable to his fraudulent or negligent conduct'.

35 2. This requires the Revenue to show: (1) fraudulent or negligent conduct by the taxpayer; and (2) a loss of tax attributable to it.

3. On appeal to the commissioners the burden rests on the Revenue of establishing paragraph 2(1) and (2). If they do not discharge the burden the appeal should be allowed (see e.g. *Hillenbrande v IRC* (1966) 42 TC617 at 623 per the Lord President (Clyde)). I will call this 'the s.36 burden'.

4. The burden does not rest on the Revenue to any greater extent than the s.36 burden. If they establish some fraudulent and negligent conduct and some loss of tax attributable to it they have satisfied s. 36. From then on s50(6) takes over and applies as it does for in-date assessments: that is to say thereafter the burden rests on the taxpayer to establish that the assessment is wrong (see e.g. *Johnson v Scott (Inspector of taxes)* [1978] STC 48 at 53) ...”

107. We agree with a submission by Mr Yates that there was at least some income for which Mr Fenech failed to account in his tax returns, and there was a loss of tax brought about by his negligence, if not more, so that the 6 year time limit for the raising of assessments is applicable. We therefore hold that the assessments for 2004/05 and 2005/06 were made timeously.

Was the cash in question received by Mr Fenech by way of income, or by other means?

108. Mr Brown observes that the tax assessments under appeal were made under s.29 TMA 1970 pursuant either to s. 5 of that Act or, alternatively, to s.687 of the Income Tax (Trading or Other Income) Act 2005, so that they were appropriate only to income which ought to have been assessed to income tax. He submits that, as SOCA allege the source of the cash was fraudulent, it resulted from something other than employment or trade, so that the assessments are invalid. Alternatively, he claims that it was not Mr Fenech who came into possession of the cash, but rather SDLL.

109. Mr Yates, in turn, notes that all the tax assessments were raised in the alternatives of Schedule D Case I (trading), Schedule D Case II (profession or vocation, and Schedule D Case VI (miscellaneous income). Consequently, he submits, it is not enough for Mr Fenech to show that SDLL alone was trading, he must also satisfy the tribunal that the amounts identified from deposits in his and his ex-wife’s personal bank accounts were not otherwise income.

110. In relation to trading, Mr Yates notes that it is common ground that Mr Fenech and SDLL were trading in building materials. The question for 2004/05 to 2007/08 is whether SDLL alone was trading. SOCA’s primary case is that Mr Fenech was simply the agent or nominee of SDL and SDLL, and he made no serious attempt to separate those companies’ interests from his own. Alternatively, it seemed that SDL and SDLL might have been trading in parallel with Mr Fenech in similar activities.

111. As part of its investigation into the affairs of Mr Fenech, SOCA sought information to show that, during the periods he was claiming to trade solely through SDL and SDLL, he was in fact also operating as a sole trader. It obtained a copy of a lease entered into by Mr Fenech personally of premises at 808 Dagenham Road, Dagenham, Essex. It was granted by Daejan Investments Ltd on 17 April 1996 for a term of 16 years. The agents for that property, Freshwater Property Management, by Mr H S Laurie provided SOCA with a statement on 26 August 2009 confirming that the annual rent of the property was £8,250, and that Mr Fenech had traded in antique furniture from that address. It also said Mr Fenech vacated the property at some

point, owing £15,805.90 rent. HMRC's records for the enquiry years, 2002/03 to 2008/09, contained no mention of Mr Fenech having declared income from a business carried on from the premises in question.

5 112. That was not all. In response to a SOCA application made under Schedule 36 of the Finance Act 2008, Network Rail plc confirmed that Mr Fenech, trading as Slates R Us, was granted a licence of a yard at 460, Sebert Road, Forest Gate, London on 16 December 1999 by its predecessor, Railtrack plc, and on 28 November 2008 Mr Fenech, continuing to trade as Slates R Us, signed a rent review memorandum. Network Rail also supplied a schedule of rental payments showing that Mr Fenech
10 paid the rent due until at least 7 February 2012 (the date of the response to the Sch. 36 application).

113. Mr Fenech's evidence in chief, based on a witness statement made on 31 July 2009 contained the following statements.

15 "I have no trading address except my mother's address. I no longer have a yard to keep stock. In substance there is no stock. What I buy in is sold shortly after purchase . . ."

20 114. Although we need be satisfied only on the balance of probabilities that Mr Fenech operated as a sole trader doing periods in which he was trading through SDL and SDLL to find that he was trading in parallel with one or other of those companies, the evidence before us illustrates clearly, and we find, that he was so trading. The extract we have cited from Mr Fenech's evidence was partly untrue.

25 115. The Supreme Court gave judgment in *Prest v Petrodel Resources Ltd and others* [2013] EWCA Civ 1395 after we heard the instant case, but each party drew our attention to it in a letter to the tribunal. That case concerned the question of whether, in certain circumstances, the corporate veil may be pierced. We consider it unnecessary to have resort to the decision in *Prest*, or the other cases raised before us on this issue, being quite satisfied of the correctness of Mr Yates's submission that Mr Fenech acted as agent for SDL and SDLL and made no attempt to separate those companies' interests from his own.

30 **The assessments to tax**

35 116. Mr Yates submits that Mr Fenech effectively controlled all four accounts on which Mr Stoddart relied (see [127] below) as the basis of his calculation of the tax assessed, and the deposits in those accounts represented Mr Fenech's income. From the sums deposited in the accounts Mr Stoddart deducted the amounts disclosed as income by Mr Fenech to arrive at the net sum assessed to tax. He then adjusted the net result by deducting, first, the £22,224.54 accepted as being derived from a non-taxable source and, secondly, by substituting the aggregate of "unbanked cash" from a 20% methodology to a fixed amount of £39,700.

40 117. For each of the tax years 2004/05 and 2005/06, Mr Fenech completed a tax return, albeit in each case later than the date prescribed by law for the purpose. But,

despite being issued with returns for 2006/07, 2007/08 and 2008/09, he failed to make any of them.

118. HMRC's record for Mr Fenech showed him as having declared income for income tax purposes as follows:

5	2004/05	£24,000
	2005/06	£22,222.72 *
	2006/07	Nil
	2007/08	Nil
	2008/09	Nil

10 * Mr Fenech received a dividend of £20,000 from SDLL plus the associated tax credit.

119. SOCA observe, and we accept, that those declarations cannot be reconciled with deposits paid into Mr Fenech's bank accounts, or with his version of events in the cash forfeiture proceedings and money laundering prosecutions. (Details of the deposits paid into Mr Fenech's bank accounts are contained in the table at [127] below).

120. In a letter of 21 May 2010, Mr Stoddart informed Mr Fenech that SOCA had reason to believe that he had not disclosed the full extent of his income for tax purposes from 2002/03 to 2008/09. Mr Stoddart said that it was evident from the scale of Mr Fenech's personal bank deposits that the income required to meet his financial commitments as revealed by his bank statements considerably exceeded his declared income. Mr Stoddart asked for explanations of the sources of the monies, and circumstances of the deposits, together with supporting documentation. He also said that he would include an estimate of unbanked cash expenditure in any tax assessments to be raised. Mr Fenech failed to respond to his requests. Consequently, on 18 June 2010 Mr Stoddart proceeded to issue the assessments under appeal, excluding the years 2002/03 and 2003/04 as he believed SOCA to have insufficient information to assess for those years.

121. In calculating Mr Fenech's additional income for the purpose of assessment, Mr Stoddart took into account sums deposited in three personal bank accounts he considered to be under the control of Mr Fenech, including two accounts jointly operated with his ex-wife Natasha, less the income declared by the two of them to HMRC. The three accounts in point were:

35 Natwest a/c no xxxx9155 in the joint names of Geoffrey Fenech and Natasha-Dee Fenech

Lloyds TSB a/c no xxxx4629 in the joint names of Mr G M and Mrs N Fenech

HSBC a/c no xxxx6484 in the sole name of Geoffrey Michael Fenech

122. On 2 August 2010, Mr Stoddart wrote to Mr Fenech's accountants, Bushwood, enclosing schedules of the monies deposited annually into each of those three accounts. The correctness of those schedules has not been challenged, so that we accept them as correct.

5 123. Mr Stoddart also took account of significant sums deposited in an account at Barclays (a/c no xxxx2530) in the name of Mrs Fenech senior in the tax years
10 2007/08 and 2008/09 as those and other sums appeared to him to relate to Mr Fenech's business activities, e.g. they included receipts from a roofing company. He also took account of the fact that in the tax years in question Mrs Fenech senior
15 declared no income to HMRC. On 3 November 2010 Mr Stoddart wrote to Bushwoods with details of the sums deposited in the account, which he had included
20 in his assessments, and asked for an explanation for them. Bushwoods failed to respond to his request.

124. In the 4 years 2004/05 to 2008/09 a total of £567,870.87 was deposited in the 4
15 bank accounts identified by SOCA as used by Mr Fenech (see the last preceding and the antepenultimate paragraphs). In our judgment, that gives the lie to a claim by Mr Fenech to have no trust in banks, and to justify his use of cash for trading purposes.

125. In addition, Mr Stoddart provided Bushwoods with an estimate of Mr Fenech's
20 unbanked cash earnings calculated at the rate of 20% of the sums deposited in the personal accounts referred to in the penultimate and last preceding paragraphs. For each of the tax years 2006/07, 2007/08 and 2008/09 Mr Stoddart also included a sum of £10,000 for estimated cash income of Mr Fenech, that amount representing the approximate difference between the proceeds of Mrs Fenech senior's remortgage of her home and the total cash seized in March 2009 and claimed by Mr Fenech.

25 126. Although accepting that cheque receipts were paid "in the bank", Mr Fenech explained that 20% of cash receipts were "used in the course of business to pay overheads and expenses". He added, "Sometimes I would use all or most of the cash to purchase stock, other times there would be little or no cash used." Consequently,
30 Mr Fenech accepted that confirmed that to be a reasonable estimate of his cash earnings that he did not bank. He repeated that confirmation to us

127. On the basis so explained Mr Stoddart produced the following table of Mr Fenech's personal bank deposits and other income said to be taxable in the years from 2004/05 to 2008/09:

	Deposits xxxx9155	Deposits xxxx4629	Deposits xxxx6484	Deposits Alice Fenech	Add 20% Unbanked cash	Balance of accumulated amount	Gross taxable	Less net income	Net taxable
2004/05	42,351.84	35,577.05			15,585.78		93,514.67	34,621.30	53,893.37
2005/06	53,070.67	13,170.00			13,248.13		79,488.80	38,026.99	41,461.81
2006/07	64,029.71	18,531.51			16,512.24	10,000.00	109,073.46	6,714.00	102,359.46
2007/08	109,107.00	12,454.57		29,590.00	30,230.31	10,000.00	191,381.88	6,733.00	184,648.88
2008/09	80,110.50	17,934.81	27,450.00	65,393.92	37,997.85	10,000.00	237,987.08	0.00	237,987.08

5 (We should note that the total of the deposits in a/c no xxxx9155 in 2004/05 is not an actual figure, but rather a pro-rata figure based on the statements available for that period.)

128. As a result, Mr Fenech was assessed to tax as follows:

2004/05	£23,800.53
2005/06	£16,250.75
2006/07	£35,646.19
2007/8	£69,140.88
2008/09	£90,568.67
Total	£235,407.02

129. Subsequently, on 11 February 2011 SOCA substituted a fixed sum of £39,700 for the amount of “unbanked cash” included in the table above

10 130. The only co-operation Mr Fenech provided to SOCA subsequent to the raising of the tax assessments, related to a deposit of £22,224.54 in 2005/06, which Mr Stoddart accepted as received from a non-taxable source.

131. We should observe that our own examination of those bank statements reveals nothing we are able to identify as deposits corresponding to the withdrawal of monies provided by Mrs Fenech senior from the SDLL account.

15 132. Further, since in evidence Mr Fenech claimed that the whole of the monies SDLL “borrowed” from his mother remained owing to her, we are unwilling to accept that any of the monies deposited in her bank account in 2007/08 and 2008/09 consisted of the repayment of any such monies.

20 133. The tax assessments were subsequently reduced to take account of the adjustments made to them by SOCA (as per [128] and [129] above). We were not provided with details of the reductions in tax resulting.

134. Thus far, in dealing with quantum, we have concentrated on the evidence of Mr Stoddart. We have done so as we found him to be a reliable and honest witness, his evidence having been subjected to and withstood cross-examination. In contrast, we reject the evidence of Mr Winch, essentially on the same basis that Mr Stoddart rejected it. However, it is appropriate for us now to deal with Mr Winch's evidence, setting out both our own and Mr Stoddart's reasons for rejecting it.

135. In a detailed report prepared for the purpose of these proceedings, Mr Winch maintained that SOCA, in the form of Mr Stoddart, could not have concluded that there was a reasonable suspicion that Mr Fenech's income derived from criminal activity. Mr Winch so concluded despite having been provided with no business records whatsoever for Mr Fenech. As Mr Stoddart said, Mr Winch was able only "to put forward unsubstantiated opinions rather than present actual facts". Mr Stoddart's statement followed a written response to a question put to Mr Winch by SOCA prior to the hearing. In it he confirmed that "there is complete absence of business records, or any supporting accounting evidence such as trading invoices or receipts, cash book, detailed directors' loan accounts etc to enable [me] to conduct a proper analysis of Mr Fenech's finances and reach verifiable conclusions, including [my] calculations of profits". Further, Mr Winch provided no assurance to SOCA that he carried out his own detailed examination of the bank statements for the accounts used by Mr Stoddart as the basis of the tax assessments raised.

136. Mr Winch maintained that there was no evidence of any income tax liability on Mr Fenech from 2004/05 to 2007/08 as, according to its bank statements, SDLL continued in existence until June 2008, and all bank transactions in those years could be attributed to the company's trading activity. He did so despite the company having prepared no annual accounts after 31 October 2005. In so claiming, Mr Winch endorsed a claim by Mr Fenech to us to have "one business and traded as that ... I did not run any parallel business". (By that, we understood him to mean that the "one business" was one or other of the limited companies, and the reference to a "parallel business" was to the allegation by SOCA that he contemporaneously operated as a sole trader). Consequently, Mr Stoddart observed, correctly in our judgment, that no business accounting records were available to Mr Winch on which he could have based his claim.

137. Alternatively, Mr Winch claimed that if Mr Fenech operated as a self-employed trader between 2004/05 and 2007/08 his total net profit in that period based on personal bankings of £368,962 (including the set-off of losses) would have been a mere £7864. To arrive at that figure, Mr Winch used the gross profit figure of 12% declared in SDLL's accounts for the period to 31 October 2005, and deducted the revenue expenses claimed by the company as an annual allowance. In rejecting that claim as being totally devoid of substance, we should say that we agree with an observation of Mr Stoddart that Mr Winch "demonstrated a complete lack of awareness of Mr Fenech's business or other financial activities from 2005 onwards".

138. Mr Winch accepted that Mr Fenech operated as a sole trader in 2008/09. Having made various assumptions and estimates, he calculated Mr Fenech's net profit in that year in the alternatives of £19,354 (based on the trading profit method) and £40,657

(based on the accounts method). Again we agree with Mr Stoddart who observed that Mr Winch had no more idea than anyone else of the activities in which Mr Fenech was involved in that year or his true business performance. It follows that we are not prepared to give Mr Winch's figures any credence.

5 139. Amongst other matters, Mr Winch suggested that Mr Fenech's bankings reflected turnover rather than the net profit of his business. In the absence of any records to support that theory, we reject it.

10 140. Mr Winch also claimed that deposits exceeding £400,000 into Mr Fenech's own and his mother's bank accounts would have been incidental to SDLL's trading. Once more we look to an observation of Mr Stoddart and agree with him that it discounts the possibility of parallel trading, much of which Mr Fenech would have carried out in cash. On the basis of all the evidence presented to us, we are satisfied that Mr Fenech was trading in parallel with SDL and SDLL in the years with which we are concerned.

15 141. Another concern arising from Mr Winch's report identified by Mr Stoddart was the former's acceptance of Mr Fenech's business requiring and carrying a cash float of £200,000. Mr Fenech provided no evidence whatsoever to support that acceptance, and we observe that it was made against a background of SDLL reporting turnover of only £157,000 in the period to 31 October 2005. Mr Stoddart's observation on the
20 acceptance, with which we entirely agree, is that it lacked credibility.

142. Mr Winch also suggested that Mr Fenech could properly have held a cash float of over £200,000 outside SDLL prior to its liquidation. We can find no justification whatsoever for such an assertion, since on the company being wound up in September 2008 it had no declared assets and was unable to meet its creditors' claims. Further no
25 directors' loan account was maintained, and SDLL submitted no annual returns or prepared accounts for its last three years of trading.

143. It will be recalled that Mrs Fenech senior lent SDLL £59,203 in February 2005. Mr Winch used that figure in part as the basis of the company's cash float of £200,000 in 2008. The loan was not included in SDLL's balance sheet for the year to
30 31 October 2005, the only creditors being a bank and a hire-purchase company. Yet again, we agree with an observation of Mr Stoddart that "either there is no credibility to the company's accounts which Mr Winch has used as a basis for his calculations for Mr Fenech's potential income tax liabilities, or the explanation of the circumstances behind the funding of the cash hoard is false".

35 144. We are unable to attach any weight whatsoever to Mr Winch's report, and reject it as representing pure conjecture.

145. Amongst Mr Fenech's complaints about the way in which Mr Stoddart went about calculating the tax assessed was that the latter failed to take account of the expenses he, Mr Fenech, would necessarily have incurred in the running of his
40 business. Had Mr Fenech produced any evidence at all to support a claim for those expenses, we should, of course, have considered it most carefully, and would have

made such allowances as we considered appropriate. However, in the event, Mr Fenech produced no evidence at all, and we are therefore unwilling to reduce the tax assessed to take account of any business expenses

5 146. In our judgment, Mr Fenech made no attempt whatsoever to run his companies' businesses or his own business with regard to accepted, indeed essential, accounting and administrative principles. No evidence whatsoever was presented to us to show that he maintained any trading records, or sought to distinguish between his own business affairs and those of his companies. Indeed, everything points to his having treated his affairs and those of the companies as interchangeable, and as having been
10 arranged with the intention of evading tax, and to ensure that the tax authorities would have the greatest difficulty in finding, let alone tracing, any audit trail.

147. Since Mr Fenech produced no evidence at all to justify any reduction in the tax assessments under appeal, we are unwilling to reduce the tax assessed. We confirm the assessments, as adjusted, and rely on the parties to agree the amounts thereof. If
15 they are unable to do so, either may apply to the tribunal for the case to be restored to the hearing list for the matter to be determined.

Penalties

148. Mr Stoddart determined penalties for the tax years 2004/05 and 2005/06 under s.95 TMA for Mr Fenech's incorrect tax returns, and under s.93(5) TMA for late
20 returns in 2006/07, 2007/08 and 2008/09. Although such penalties were potentially chargeable at a rate of 100% of the tax lost, Mr Stoddart determined a rate of 75% to be appropriate, resulting initially in total penalties of £170,296.

149. As Mr Fenech made no attempt to provide relevant financial documents and information on their being requested, no mitigation of the penalty appeared
25 appropriate to Mr Stoddart for disclosure. And, since Mr Fenech failed to make returns for 2006/07, 2007/08 and 2008/09, we agree that the penalties should not be reduced for disclosure.

150. Nor did Mr Fenech supply any information in support of his appeals and, initially failed to accept an offer from SOCA to discuss the basis of the tax assessments; and when he eventually did agree to a meeting he himself failed to
30 attend it, but rather left the matter in the hands of Mr Edmonston of Bushwoods. At the meeting, the latter made reference to an accountant's forensic report on SOCA's decision and calculations of the tax assessed, but did not produce the report, so that SOCA was not aware of its contents. Later two such reports were received by SOCA
35 but, having examined them, Mr Stoddart concluded that they added nothing meaningful to his work. As very little verifiable information was provided by Mr Fenech, Mr Stoddart considered no mitigation to be appropriate for co-operation. We agree.

151. Mr Stoddart then took the view that the identified personal bankings of Mr
40 Fenech and the funds paid into his mother's bank account were intended to be concealed, and that he intended to evade tax. Further, as Mr Fenech had failed to

maintain business records, made incorrect tax returns for the tax years 2004/05 and 2005/06, and failed to make returns for the tax years 2006/07 to 2008/09, Mr Stoddart concluded that only 25% mitigation of the penalty for seriousness was, and continued to be, appropriate in all the circumstances. Again we agree.

- 5 152. It follows that we confirm the penalty assessments in the sums assessed, less the adjustments required to take account of the reductions in the tax assessments.

Conclusion

153. We dismiss the appeal in its entirety on the bases that:

- 10 a) s.317(1)(a) was satisfied; SOCA did have reasonable grounds to suspect the income accruing to Mr Fenech did so as a result of a person's criminal conduct;
- b) SOCA raised the assessments to tax for the years 2004/05 and 2005/06 timeously;
- c) the cash seized by POCA was received by Mr Fenech by way of income;
- 15 d) as adjusted, the quantum of the tax assessments is correct; and
- e) the level of the penalty imposed is not excessive in the circumstances.

154. 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.

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**DAVID DEMACK
TRIBUNAL JUDGE**

RELEASE DATE: 10 October 2013

FIRST SCHEDULE

SUMMARY OF COMPANIES MENTIONED IN EVIDENCE

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	Company No	Incorporated	Liquidator appointed	Winding up Order	Wound up Complete	Struck off	Dissolved
The Old Slate Yard Ltd	7309867	09/07/2010					N/A
Fenics Fireworks Ltd	3505252	05/02/1998				21/07/2009	21/07/2009
Slates Direct (London) Ltd	5260915	15/10/2004		10/10/2008	29/12/2008		29/03/2009
Slates Direct Ltd	4077451	25/09/2000	27/06/2005				27/12/2006
Slates Are Us Ltd	3064292	05/06/1995	07/04/2000				18/07/2003
Essex Roofing and Building Supplies Ltd	2949335	17/07/1994	03/06/1997				27/10/1998
Hornchurch Builders Merchants Ltd	2775756	30/07/1975	?? 1995				19/12/1996
Larkbright Ltd	2659514	??					21/10/1994
Bondhaven Ltd	2571497	??					02/09/1993

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SECOND SCHEDULE

3. In the course of this review I considered, in conjunction with the case lawyer whether the qualifying conditions to adopt HMRC revenue functions, as set out in section 317 of the Proceeds of Crime Act 2002, were met.

Income

4. I examined financial and other records relating to Mr Fenech and determined that there was a probable tax liability, in the region of £200,000 before interest and penalties, in relation to the tax years 2004/05 to 2008/09.

10 Mortgage Fraud

5. Mr Fenech's income appeared to arise from a series of businesses, financed through mortgage advances. I reviewed the relevant mortgage applications and formed the view they were probably fraudulent. For the avoidance of doubt I continue to hold this suspicion.

15 Theft/Handling Stolen Goods

6. Mr Fenech was being prosecuted in relation to the theft of building materials at that time. Mr Fenech indicated that selling building materials was his principal trade and I therefore formed the view that his businesses might be vehicles for handling stolen goods. In considering this possibility I took Mr Fenech's spent convictions into consideration. For the avoidance of doubt I continue to hold this suspicion.

Money Laundering

7. The referral to the Civil Recovery & Tax Department arose from cash seizure proceedings. Taking account of evidence of considerable cash trading and loans made to individuals potentially involved in organised crime and the facts cited by the Court of Appeal in *R v MS & RO* [2010] EWCA Crim 1127 I formed the suspicion that Mr Fenech might also be involved in money laundering. For the avoidance of doubt I continue to hold this suspicion.

8. On the 20th May 2010 the case team produced a Log recommending that Mr Fenech be adopted for a tax enquiry, but not a civil recovery investigation. This Log identified mortgage fraud, theft and money laundering as matters taken into consideration. Logs of this type are not generally disclosed as:

the content provided by the case team's lawyer is subject to legal professional privilege;

the content provided by intelligence staff is potentially subject to public interest immunity, as it may reveal SOCA's methods or sensitive intelligence; and,

the log contains confidential personal data, such as the names and telephone numbers of SOCA staff.

9. On the 2nd June 2010 I served a notice on HMRC adopting general revenue functions. My decision to serve this notice was based upon the factors set out in the Log referred to above.

10. On the 18th June 2010 I raised discovery tax assessments upon Mr Fenech in respect of tax years 2004/05 to 2008/09

5 11. On the 7 July 2010 Mr Fenech appealed against these assessments. The stated grounds of appeal were that the assessments were estimated and that there was no supporting evidence to substantiate them. The Appellant did not challenge the adoption of revenue functions by SOCA.

10 12. On the 20th September 2010 I produced an affidavit in support of SOCA's application for a freezing order. Within this affidavit I referred to the matters giving rise to my suspicions and exhibited the relevant documentation in the context of the background to the application generally, the basis of the tax assessments and the risk of dissipation. I did not however explicitly state that the basis upon which the section 317 notice had been served was that I suspected mortgage fraud, theft/handling stolen goods and money laundering.

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