# TC05060

**Appeal number: TC/2014/03166**

***INCOME TAX – sideways loss relief – closure notice – discovery assessment - penalties***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**Mr Sarfraz Qayyum** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE Rachel Mainwaring-Taylor**
**Mrs Ruth Watts Davies MHCIMA FCIPD**

**Sitting in public at Fox Court, London on 18th January 2016**

**The Appellant represented himself**

**Mr Anthony O'Grady, presenting officer of HM Revenue and Customs, for the Respondents**

## DECISION

1. The Appellant claimed sideways loss relief under section 64 Income Taxes Act 2007 in relation to the tax years ended 5th April 2010 and 5th April 2011. The losses were generated by a consultancy business the Appellant ran in those years. HMRC queried firstly, the expenditure deducted to give rise to the losses and, secondly, the availability of sideways relief in relation to those losses. HMRC opened an enquiry into the year ended 5th April 2011, which culminated in a closure notice, issued under section 28A(1) and (2) Taxes Management Act 1970, dated 17th April 2013, disallowing the loss claimed sideways. HMRC issued a discovery assessment under section 29(4) and (5) Taxes Management Act 1970 in relation to the year ended 5th April 2010 disallowing the loss claimed sideways in that year. HMRC issued a penalty assessment under Schedule 24 of the Finance Act 2007 on 21st January 2014, applying a penalty of 28.5% of the underpaid tax in both years. The Appellant appealed against (1) the closure notice, (2) the discovery assessment and (3) the penalty notice.

### Appellant's application to postpone

2. The Appellant argued the hearing should not go ahead without his adviser, Ms Carla Parrish. He was not prepared for the hearing and had not had a chance to read HMRC's bundle. He told us Ms Parrish could not come for "personal reasons" and due to illness; she had been ill a lot since he received the hearing notice (which was sent in November 2015). The Appellant's request, which we treated as an application to postpone, was opposed by HMRC. We noted the previous hearing listed for 1st July 2015 had been postponed because the appellant and his representative had said they had not received notice of the hearing. The Appellant's later application of 7 January 2016 to postpone the current hearing had been refused by Judge Kempster on 13 January 2016. In that application Ms Parrish had said she was required in another court hearing on the same day.

3. We considered the possible prejudice to the Appellant in going ahead with the hearing, noting this was mitigated by the following: 1) the legal issues raised by the appeal, as pointed out by HMRC, namely whether it could be demonstrated that the business expenditure claimed had been incurred, and whether he had run his business on a commercial basis and with a view to realising a profit, involved considerations which a lay person in the appellant's position could understand; 2) the Appellant could be given sufficient opportunity to review the bundle HMRC had prepared and offered a break after he had heard HMRC's arguments to review any further documents and prepare his arguments as he thought necessary; and 3) the Tribunal could assist the Appellant in structuring the issues he needed to address and giving him the opportunity to put forward evidence on the respective points that needed to be covered.

4. The Tribunal considered it was fair and just for the hearing to go ahead and we refused the Appellant's application. We did not have a satisfactory explanation for Ms Parrish's unavailability given the different reasons provided, the matter had already been postponed before, and any prejudice to the appellant, taking account of the points above was outweighed by the prejudice to HMRC and the need to avoid resolve matters as quickly and efficiently as possible.

**Background and matters not in dispute**

5. During the tax years 2009-10 and 2010-11 the Appellant was employed in full time work by Deutsche Bank as a project manager, earning a salary of over £100,000. He continues to be employed by Deutsche Bank, now in a more senior role.

6. The Appellant reported the commencement of a self-employment described as a business consultancy in an amended tax return submitted for the tax year 2009-10. (The Appellant's original return for this year, submitted on 5th June 2010, made no mention of the business, but an amended return was submitted on 23rd June 2011.)

7. The first accounts for the business consultancy showed a turnover of £4,500 and expenses of £34,123, resulting in trading losses of £29,623 for the tax year 2009-10. These losses were claimed sideways against the Appellant's salary of £101,172 from Deutsche Bank.

8. The Appellant reported a further full year's trading as a business consultant in his 2010-11 tax return (submitted on 23rd June 2011). The accounts for the year ended 5th April 2011 showed a turnover of £5,175 and expenses of £33,019, resulting in trading losses of £27,844. These losses were claimed sideways against the Appellant's salary of £108,015 from Deutsche Bank.

9. On 12th April 2012, HMRC sent a notice under section 9A TMA 1970 to the Appellant informing him that they were enquiring into his tax return for the year 2010-11. HMRC requested a detailed analysis of the turnover and expenses figures claimed in relation to the business consultancy, together with copies of all sales invoices issued by the Appellant and of all invoices and receipts for the expenditure claimed. HMRC issued an information notice under Schedule 36 Finance Act 2008 ("Schedule 36") on 28th May 2012, under which information was to be provided by 2nd July 2012.

10. On 28th May 2012 Ms Parrish wrote to HMRC enclosing two sales invoices and some documentation relating to expenditure. Further information followed under cover of letters dated 2nd July and 10th July 2012.

11. HMRC found this information to be insufficient and raised further questions in a letter dated 13th July 2012. Some further information was provided but HMRC found it necessary to issue a further information notice under Schedule 36 on 11th October 2012, which was not complied with, resulting in a £300 penalty being issued on 28th November 2012. The penalty went unpaid and the Schedule 36 notice was not complied with, so further penalties of £840 were imposed under Schedule 36 (HMRC's letter of 9th January 2013). HMRC chased Ms Parrish by telephone and

agreed with her on 14th March 2013 that a second tranche of daily penalties (running form 9th January 2013) would not be charged provided the information due under the notice was received by 19th March 2013. On 19th March 2013, Ms Parrish provided further information by email.

12. On 17th April 2013 HMRC issued a closure notice under section 28A TMA 1970, concluding the enquiry into the return for the tax year ended 5th April 2011 and requiring the Appellant to pay tax of £16,082.20.

13. On 17th April 2013 HMRC issued a notice of assessment under section 29 TMA 1970 in respect of the tax year ended 5th April 2010, determining that tax of £11,849.20 was due.

14. On 14th May 2013, the Appellant appealed against both the closure notice and the assessment. HMRC replied on 17th May 2013, seeking to clarify which aspects of the closure notice were being appealed and stating that it was the Appellant's responsibility to demonstrate that the expenditure giving rise to the loss being claimed sideways was incurred for business purposes and that the requirements for sideways relief were satisfied, and requesting again the information HMRC had asked for in July 2012 with a view to establishing these points.

15. Some further information was provided in relation to mortgage interest payments (20th May 2013), but not in relation to the other matters. HMRC wrote to the Appellant on 4th July 2013 again seeking to clarify which aspects of the closure notice he wished to appeal. The letter stated that if no reply was made within 30 days HMRC would assume the decisions were agreed.

16. On 30th August 2013 HMRC wrote to the Appellant noting that no reply had been received to its letter of 4th July 2013 and informing the Appellant that it was now imposing penalties under Schedule 24 Finance Act 2007 ("Schedule 24").

17. On 27th September 2013 the Appellant informed HMRC (through his agent, Ms Parrish) that he wished to have the decisions reviewed by another officer of HMRC before appealing to the Tribunal. A review was conducted, during which further time extensions were requested by Ms Parrish to provide information. The review decision was eventually issued on 16th January 2014, upholding the original closure notice and assessment (both dated 17th April 2013).

18. On 6th June 2014 the Appellant appealed to the Tribunal. This appeal was made outside the time limit of 30 days from the date of the review letter. The reason for the delay was "birth of child, illness and dealing with a police arrest/issue". The Appeal notice stated that the losses should have been accepted by HMRC for 2009/10 and 2010/11 and that special relief should have been granted for 2006/7. HMRC did not object to the late appeal.

**Evidence**

19. The Appellant gave evidence orally. We found him to be a credible witness but his recollection was rather vague on many points.

20. HMRC provided no witness evidence. We heard submissions from Mr Anthony O'Grady who appeared for HMRC.

**Issues before the Tribunal**

21. The issue of special relief for the year 2006/7, mentioned in the appeal notice, had been resolved and was not a matter before the Tribunal.

22. The issues before the Tribunal were:

(1) Whether the expenditure which gave rise to the losses claimed sideways had been incurred for the purposes of the business; and, if so

(2) Whether the loss so made could be claimed sideways, under sections 64 and 66 Income Tax Act 2007 ("ITA 2007"), being generated by a business carried on as a commercial trade and with a view to a profit during the whole of the relevant period.

(3) Whether the penalties imposed under Schedule 24 should stand.

**Law**

***Tax returns, enquiries and assessments***

23. Section 8 TMA 1970 ("section 8") obliges an individual to file a self assessment tax return when required to do so by HMRC.

24. Under section 9ZA(1) and (2) TMA 1970 a taxpayer may amend his return under section 8 by notice to an officer of the Board no later than twelve months after the filing date.

25. Under section 9A(1) and (2) TMA 1970 an officer of the Board may enquire into a return under section 8 if he gives notice to the taxpayer within the time allowed. Where a return is delivered on or before the filing date the time allowed is twelve months from the date on which the return was delivered (section 9A(2)(a) TMA 1970). Where a return is amended by the taxpayer under section 9ZA, the time allowed is up to and including the quarter day (that is, 31st January, 30th April, 31st July or 31st October) next following the first anniversary of the day on which the amendment was made (section 9A(2(c) TMA 1970).

26. Under section 28A(1) TMA 1970, an enquiry under section 9A(1) is completed when an officer of the Board informs the taxpayer, in the form of a closure notice, that he has completed his enquiries and states his conclusions. The closure notice must make the amendments of the return required (if any) to give effect to these conclusions (section 28A(2) TMA 1970).

27. Section 29 TMA 1970 reads as follows:

"(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been so assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax…

…(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above-

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board-

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information available to him before that time, to be aware of the situation mentioned in subsection (1) above."

28. (Section 29 (2) TMA 1970 is not relevant here.)

29. Under section 34 TMA 1970, subject to contrary provision in particular cases, an assessment to income tax or capital gains tax may not be made more than four years after the end of the year of assessment to which it relates.

***Deduction of expenditure***

30. Section 34 Income Tax (Trading and other Income) Act 2005 ("ITTOIA 2005") provides as follows:

"(1) In calculating the profits of a trade, no deduction is allowed for-

(a) expenses not incurred wholly and exclusively for the purposes of the trade, or

(b) losses not connected with or arising out of the trade.

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

***Loss relief***

31. Under section 64 ITA 2007:

"(1)a person may make a claim for trade loss relief against general income if the person-

(a) carries on a trade in a tax year, and

(b) makes a loss in the trade in the tax year ("the loss-making year").

(2) The claim is for the loss to be deducted in calculating the person's net income-

(a) for the loss-making year,

(b) for the previous tax year, or

(c) for both tax years."

32. Under section 66 Income Tax Act 2007:

"(1) Trade loss relief against general income for a loss made in a trade in a tax year is not available unless the trade is commercial.

(2) The trade is commercial if it is carried on throughout the basis period for the tax year-

(a) on a commercial basis, and

(b) with a view to the realisation of profits of the trade.

(3) If at any time a trade is carried on so as to afford a reasonable expectation of profit, it is treated as carried on at that time with a view to the realisation of profits…

(5) If there is a change in the basis period in the way in which the trade is carried on, the trade is treated as carried on throughout the basis period in the way in which it is carried on by the end of the basis period…

(7) This section applies to professions and vocations as it applies to trades."

33. Section 83 Income Taxes Act 2007 permits a trading loss to be carried forward and set against profits of the trade of a subsequent year.

***Case law***

34. We were referred to the following cases on the meaning of the term "commercial basis": *Wannell v Rothwell (1996) 68 TC 719, Charles Atkinson [2013] UKFTT 191 (TC), Stephen Kitching [2013] UKFTT 384 (TC)* and *Walls v Livesly [1995] STC (SCD) 12*. Due to our conclusions it is not necessary to set these out in detail here.

***Penalties***

35. Schedule 24 Finance Act 2007 provides as follows:

"1(1) A penalty is payable by a person (P) where-

(a) P gives HMRC a document of a kind listed in the Table below, and

(b) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which amounts to or leads to-

(a) an understatement of a liability to tax,

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

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

(3) Condition 3 is that the inaccuracy was careless within the meaning of paragraph 3 or deliberate on P's part."

36. The table referred to includes a return under section 8 TMA 1970.

37. Under paragraph 3 an inaccuracy is careless "if the inaccuracy is due to a failure by P to take reasonable care". Paragraph 18 clarifies that P is liable for a careless inaccuracy given to HMRC on P's behalf, for example by P's agent.

38. Under paragraph 4, if the inaccuracy is in category 1 the penalty for careless action is 30% of the potential lost revenue. Penalties for inaccuracies in other categories are higher.

39. Paragraph 9 allows for reductions in penalties where a person discloses an inaccuracy by telling HMRC about it, helping HMRC quantify it and allowing HMRC access to records in order to correct it. Disclosure is unprompted if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy; otherwise it is prompted. Quality of disclosure relates to its timing, nature and extent.

40. Paragraph 10 provides that if a person who would otherwise be liable to a penalty of 30% has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure but may not reduce it below 15% in the case of a prompted disclosure.

41. Under paragraph 13, where a person becomes liable for a penalty, HMRC shall assess the penalty, notify the person and state in the notice a tax period in respect of which the penalty is assessed. A penalty assessment must be made within 12 months of the end of the appeal period for the decision covering the inaccuracy or of the end of the appeal period for the assessment of tax which corrected the understatement (as appropriate).

42. Under paragraph 15 a person may appeal against a decision by HMRC that a penalty is payable or against the amount of a penalty.

43. Under paragraph 17, on an appeal, the tribunal may affirm or cancel HMRC's decision that a penalty is payable. Where the appeal is against the amount of the penalty, the tribunal my affirm HMRC's decision or substitute it for another decision that HMRC had the power to make.

**Burden and standard of proof**

44. The burden of proof is on the Appellant to show, on the balance of probabilities, that the claim for sideways loss relief under section 64 ITA 2007 should succeed (section 50(6) TMA 1970).

**Facts, evidence and discussion**

***The tax returns, enquiry and assessments***
*Tax year 2009/10*

45. The Appellant filed his tax return for the year 2009/10 on 5th June 2010, within the time limit provided for by statute (statutory deadline 31st January 2011).

46. The Appellant amended this return on 23rd June 2011, within the deadline of twelve months from the filing date of 31st January 2011 section 9ZA TMA 1970).

47. HMRC issued a discovery assessment on 17th April 2013. This was within the usual deadline of four years after the end of the tax year concerned stipulated by section 34 TMA 1970. Section 29 TMA 1970 permits a discovery assessment if one of two conditions is met. The first condition is that an insufficiency of tax has been paid or an excess of relief has been given and this situation was brought about carelessly or deliberately by the taxpayer (subsection (4)). The second condition is that when the time limit for HMRC to open an enquiry expired the officer of the Board could not have been reasonably expected, on the basis of the information available to him at that time, to be aware of the insufficiency of tax or excess of relief given (subsection (5)). The deadline for an enquiry to be opened into the 2009/10 return would have been 31st July 2012 (section 9A TMA 1970).

48. HMRC argue that it wasn't until it received Ms Parrish's letter of 20th August 2012 (in response to the enquiry it opened into the Appellant's 2010/11 tax return, as to which see below) that the HMRC caseworker was able to conclude that the losses claimed in 2010/11 and by extension in 2009/10 could not be set off sideways and that therefore, the caseworker could not have been reasonably expected as at 31st July 2012, on the basis of the information available to her before that time, to be aware that there had been an underpayment of tax due to an excess of relief given. HMRC also argue that the 2009/10 return was negligently submitted by the Appellant, either because he knew that the losses had never been sustained or because he knew that the business consultancy was not a truly commercial enterprise.

49. The Appellant did not challenge the validity of the discovery assessment under section 29 TMA 1970. Nor had his agent Ms Parrish sought to do so, either in the correspondence before the Tribunal since the assessment was issued on 17th April 2013, or in the appeal notice.

50. Having heard HMRC's arguments and the Appellant's evidence regarding the expenses claimed, we find that the Appellant, although guided by his agent, had not taken sufficient care in reporting the expenses claimed and that the return was submitted negligently.

*Tax year 2010/11*

51. The Appellant submitted his tax return for the year 2010/11 on 23rd June 2011, within the time limit provided for by statute (statutory deadline 31st January 2012).

52. HMRC notified the Appellant that it was opening an enquiry into the return on 12th April 2012 under section 9A TMA 1970. The time limit for opening an enquiry was twelve months from the filing date (section 9A(2)(a) TMA 1970), so in this case the deadline was 23rd June 2013 and the notice was issued before the deadline.

53. No argument was raised by the Appellant at the hearing or by his agent on his behalf either in correspondence the Tribunal saw or in the appeal notice, as to the validity of the enquiry or the closure notice dated 17th April 2013 by which it was concluded.

**Expenditure incurred in the course of the business: tax year 2010/11**

54. HMRC had requested details from the Appellant of how the figures given for the turnover (£5,175) and expenses (£33,019) of the business were constituted.

***Sales invoices 2010-11***

55. The Appellant provided two sales invoices: one dated 8th July 2010 in the sum of £1,500 addressed to a Mr A Pritchard in Staffordshire and the other dated 22nd March 2011 in the sum of £3,675 addressed to a Mr Ali in Essex.

***Expenditure 2010-11***

56. The Appellant provided a breakdown of the global expenditure figure, listing various headings of expenditure as follows: rent and office admin £22,000, motor expenses £3,204, mobile telephone £1,046, telephone and internet £240, accountancy £2,000, postage £80, stationery £30, computer software £19, depreciation (capital allowance claimed) £4,400.

*Rent 2010-11*

57. In support of the rent and office admin figure, the Appellant provided 11 invoices covering the period from 1st May 2010 to 1st March 2011, each in the sum of £2,000 being monthly rent for a fully serviced office, addressed to the Appellant at his private address at the time in Wembley Park. The name and address of the landlord is shown as London Accountancy & Management Limited, 1 Moatlands House, Cromer Street, London WC1 8DF. HMRC's enquiries showed that this company was registered with Companies House on 1st December 2009 and was in liquidation by August 2012, never having filed accounts.

58. HMRC sought clarification of the address of the rented office from the Appellant, but did not receive this. During the hearing, the Appellant confirmed that the office was located at Cromer Street (the address given on the invoices).

59. No evidence was provided as to how the rent payments were made. They did not show on the Appellant's bank statements. HMRC asked for a further explanation and were told the Appellant paid the rent in cash. HMRC could not see cash withdrawals on the Appellant's bank statements to corroborate this. Following the issuing of the closure notice and a subsequent request for statutory review, the Appellant's advisor wrote to HMRC on 31st December 2013, stating that the payments were made in cash and funded by cash payments the Appellant received in reimbursement of legal fees from a former tenant. A document which appears to be a solicitor's invoice or financial statement addressed to the Appellant was provided in support of this. The document does not bear any heading or give details beyond heads of charge including barrister's fees, office copy entries and other searches etc.

60. HMRC did not find this explanation adequate. As regards the financial statement, HMRC noted that it appeared to be a bill for work carried out for the Appellant during the period January 2005 to July 2006 and written up in September 2008 and provided no evidence of cash payments having been made either to or by the Appellant.

61. The Appellant explained at the hearing that he used to own a property on Shrublands Road in East London. He had rented this property to his uncle. Problems had ensued: the uncle did not pay rent and sought ownership of the property itself, claiming that that Appellant had given it to him. The legal proceedings related to the ownership of the property and the Appellant was successful in defending his title to it, but incurred fees of around £40,000, which the court ordered should be borne by the Appellant's uncle. The uncle also owed rent for approximately three years but the Appellant did not pursue this in court. The Appellant stated that he did not recover the costs of the legal proceedings from his uncle in full. He was not on speaking

terms with his uncle. An agreement was reached whereby the uncle made payments of approximately £2,200 or £2,300 each month in cash to the Appellant via the Appellant's wife's family. The Appellant estimated that he received a total of perhaps £25,000 from his uncle in this way, well short of the amount he owed him. He could not remember precisely when the payments began and ended. We asked if he could work this out based on when the legal proceedings concluded and he said he thought it was around 2011 but was not sure. The Appellant told us that it was from these funds that he paid the rent for his serviced office and that he did not bank the cash because it did not make sense to do so when he had immediate expenses.

62. Mr O'Grady asked the Appellant if he was sure the total sum he received from his uncle was around £25,000. The Appellant confirmed this. Mr O'Grady pointed out that the sum of £25,000 would roughly cover the rent of £22,000 for the year 2010-11. Total expenditure of £34,123 was claimed for 2009-10. No breakdown had been provided for this figure, but Mr O'Grady assumed the rent was likely to have accounted for around two thirds of it (the same proportion of overall expenditure as the rent represented for the year 2010-11), that is approximately £22,000. Mr O'Grady asked how, based on this assumption, the Appellant had paid the rent for the year 2009-10. The Appellant said he was not comfortable with the dates or figures; he was very much 'guesstimating' to try to be helpful. He was, however, certain that he paid all the rent from the cash he received from his uncle as described above and remembered the payments from his uncle having coincided with the period during which he was renting the office.

63. The Appellant said he paid the rent in cash to someone at the rented office. He did not obtain any receipts. He thought he may have had a rental agreement at the outset but was not sure if he still had a copy of it.

64. HMRC argued that there was insufficient evidence to support the expenditure on rent was actually incurred.

65. We find that the eleven invoices provided are evidence of rent being charged to the Appellant during the period, but not of it being paid. The only further evidence was the Appellant's explanations at the hearing, which were not sufficiently clear and consistent to satisfy us of these payments. The Appellant had had professional advice throughout the period from when the tax returns were submitted, the enquiry opened and assessments issued and up to the hearing. He had therefore had opportunity to provide documentary evidence (which has been requested by HMRC since 2012). No documentary evidence was put before us and we found the Appellant's oral evidence too vague and imprecise to be reliable. We conclude that the Appellant has not met his burden of proof to show, on the balance of probabilities, that the rental expenses were actually incurred.

*Motor expenses and associated capital allowances*

66. The expenditure includes motor expenses of £3,204 and capital allowances of £4,400 in respect of the Appellant's BMW car. The figure of £3,204 breaks down as follows:

- Motor insurance with Admiral - £893.80. Renewal notice provided.
- Kwikfit - £390.52. No invoice, but bank statement showing payment provided.
- Service at H R Owen, Holland Park on 12th October 2010 - £295.21. Invoice provided.
- Car wash and vacuum £8 per week (total £416). No invoices or receipts provided.
- Congestion fees - £330 (Handwritten breakdown as follows: 20 x £8,6 x £18, 2 x £10 plus £26 and £16). One invoice for £8 on 30th July 2010 was provided (two copies of this are included in the Respondent's bundle).
- Fuel - £754.10. No invoices or receipts provided.
- An item of £125 is listed on the handwritten schedule without description.

67. Bank statements were provided which may evidence some (but not all) of the above expenditure. It was not immediately obvious from the documents provided and the Tribunal has not analysed these bank statements in detail.

68. During the enquiry the Appellant conceded that only 50% of each of these figures was to be claimed as a business expenses. The Appellant had kept no mileage log but believed that half of the total mileage had been incurred for business purposes.

69. HMRC argued that, whilst expenditure has undoubtedly been incurred in relation to the Appellant's car, there is no evidence that any part of it was incurred for the purposes of the consultancy business.

70. The Appellant did not provide any further evidence, oral or documentary, at the hearing to demonstrate that these costs were incurred in the course of his business.

71. We find that the Appellant has not shown that any part of the motor expenses was incurred in the course of his business. There was no explanation of the basis for the revised claim that half of the costs were business expenditure.

*Mobile telephone*

72. The sum of £1,046.70 constitutes the Appellant's mobile phone bills from Vodafone during the tax year 2010/11. The Appellant confirmed at the hearing that he had had only one mobile phone during the period, which he used for personal calls as well as for his consultancy business. He said he had not kept a record of which calls or which proportion of usage related to the business as opposed to his personal use. The figures given (claimed as expenditure) were his total payments to Vodafone during the period, taken from his bank statements.

73. HMRC argue that in the absence of evidence that these costs were incurred in the consultancy business, they could not be deducted.

74. We find that the Appellant has not demonstrated that any part of the mobile phone costs were incurred in the course of the business.

*Telephone and internet*

75. Some Virgin Media bills were provided which were addressed to the Appellant at his home address. The services provided are itemised as: telephone line rental, talk unlimited, broadband size L, paper bill charge (asterisks have been marked against these items), TV size L, callbar/callwait services and a 'loyalty back' deduction. Additional call charges are listed separately from these 'main services'. It is not entirely clear which of the charges appearing on these bills make up the figure of £240 claimed as expenditure.

76. HMRC argue that in the absence of evidence that these costs were not incurred in the consultancy business, they could not be deducted.

77. We find that there is no evidence that these costs were incurred in the course of the business.

*Accountancy*

78. An invoice issued by Mr Parrish dated 15th July 2011 for a fixed fee of £2000 was provided to HMRC. The narrative reads: "To review your figures provided in respect of Losses from Business Consultancy for the Year Ended 5th April 2011 including analysing bank account and cash payments/invoices. To prepare Trading and Profit and Loss Account and Balance Sheet".

79. HMRC appear to be of the view that this charge is excessive in light of the documents they have seen, namely a very simple statement of income and expenditure and no balance sheet or nominal ledger accounts which may have been drawn up in preparation for the balance sheet.

80. We find that whether these fees were excessive or not, they appear to have been incurred in the course of the business. We were not directed to any evidence of payment of these fees, or lack thereof, so we assume this is not a matter of dispute between the parties and that both agree these fees were paid. We therefore find that the accountancy fees are expenditure incurred wholly for the purposes of the business.

*Postage, stationery and computer software*

81. Expenditure of £80, £30 and £19 respectively was claimed by the Appellant for postage, stationery and computer software and has not been evidenced by receipts or invoices.

82. In the absence of any evidence, documentary or oral, we find that the Appellant has not shown that these expenses were incurred in the course of the business.

**Expenditure incurred in the course of the business: tax year 2009/10**

83. In a letter dated 22nd August 2012 HMRC informed the Appellant that it was now also looking at the year 2009/10 and requested detailed breakdowns of the

turnover and expenses claimed in that year, as well as invoices and receipts to evidence the same. HMRC has not received this information.

84. Mr Qayyum did not provide any evidence of the expenditure claimed in respect of the year 2009/10 at the hearing.

85. We find that the Appellant has failed to provide satisfactory evidence that this expenditure was incurred, whether in the course of the business or otherwise.

**Sideways loss relief**

86. In order for a taxpayer to set off his losses sideways against general income under section 64 ITA 2007, the losses must have been made in the course of a trade which is commercial, meaning that it is carried on throughout the relevant period on a commercial basis and with a view to the realisation of profits of the trade (section 66 ITA 2007).

87. In a letter dated 13th July 2011, HMRC expressed concerns that the business may not have been run on a commercial basis with a view to the realisation of a profit. HMRC's concerns were based on the facts that the Appellant was in full time employment at the time, his expenses appeared disproportionate to his turnover, he only appeared to have obtained two clients in the second year of trading (and a similar number in the first, judging by the turnover, though no details had been provided). HMRC asked the Appellant for various information pertaining to the business consultancy in order to ascertain whether it was run on a commercial basis with a view to profit, including: details of the Appellant's intentions when he set up the business, whether he had made his employer aware of his consultancy business, how he had obtained clients, copies of his business plan and related documents including marketing materials, estimates and contracts for services for his clients, unsuccessful tenders for new clients.

88. On 20th August 2012 the Appellant's advisor stated in an email to HMRC that the Appellant "thinks he discarded his business plan and advertising materials, however he will continue to search for these". The email also explained that the Appellant set up the consultancy in light of job insecurity in the banking industry where he was employed, that he did so with a view to realising a profit and that he "vehemently denies undertaking work solely for fiscal purposes (to get a tax advantage)".

89. In a letter dated 22nd August 2012 HMRC states that it is the Appellant's responsibility to demonstrate that his business was being run on a commercial basis with view to a profit, refers to the information requested in its letter of 13th July 2012 and states that if the Appellant cannot satisfy HMRC of this then the losses claimed sideways will not be allowed.

90. At the hearing, Mr Qayyum gave oral evidence of how he ran his consultancy business during the tax years 2009/10 and 2010/11. He told us that he had always intended to set up his own consultancy business, and still has this ambition. In the

years leading up to 2009/10 he worked in strategy with a specialism in information and technology ("IT"). By 2009/10 he was not especially busy at Deutsche Bank and believed he had time to start his own consultancy. His aim was to provide management consultancy services, including offering a broad range of IT products to improve client service and efficiency. The main difficulties he faced in setting up on his own were: having to prove himself, selling his services and obtaining clients. He could have started the business from home but decided that in order to be taken seriously in the market he needed to have offices in central London from the outset. He targeted small companies in accountancy and related fields in north west London (the area where he lived). He used his networks to try to get referrals from contacts and he 'cold called' businesses. Whilst trading he targeted 10 or 12 clients seriously and of those only two got to the stage where work was done which he was able to bill. He tried to pitch his fees at £400-£500 for "mini projects". He worked more on the basis of the value of the work rather than basing his charges on an hourly rate. He recalled that Mr Pritchard in Staffordshire (to whom one of the invoices provided to HMRC was addressed) had a business involving accountancy services as well as money transfers and travel services. He had recommended ways in which the business could be developed, in particular how to target and make more out of the existing client base. Mr Qayyum could not recall anything about Mr Ali of Essex to whom the other invoice was addressed, although he later remembered having had at least eight meetings with him. Mr Qayyum had not retained any copies of business plans or of advice or other correspondence sent to clients or any records of target companies. He said he upgraded his computers every two or three years and such information would have been lost as a result of that. Mr Qayyum did not continue with the business after 2010/11 because he became busier at work, had more responsibility and was required to work longer hours. He also found the consultancy business was taking up too much of his social time and he was "putting in more than he was getting out". During the period 2009 to 2011 when he was trading, Mr Qayyum was a project manager for transition services with Deutsche Bank. He worked full time and it was a '9 to 5' type of role. He had no company car. He travelled by tube to Liverpool Street to work. He never claimed any work expenses from his employer. He worked out of the office, at home, a couple of days a week. He was not sure whether his contract with Deutsche Bank permitted him to carry on his own business whilst in its employment. He worked on his own business at the office he rented in the evenings, typically for three or four hours a day from 6pm to 9pm, sometimes less, and at the weekends when he worked the whole day. He said he intended to run the business seriously and to make a profit in due course as it built up, but when his duties at work changed after 2011 he revised his plans. He would still like to set up his own business, but now is not the right time for him.

91. HMRC suggested that the level of work the Appellant took on, compared with the disproportionately high costs he incurred, meant that there was never any realistic prospect of making a profit and that therefore the business was comparable to the hobby market gardening enterprise described by Robert Walker J in *Wannell v Rothwell* and as such not carried on on a commercial basis.

92. Given our conclusions in respect of the expenditure incurred, we make no findings of fact on this point.

## Further discussion and conclusions

### *Expenditure*

93. Having found that only the accountancy charges of £2,000 in 2010/11 had been shown to be expenditure incurred in the course of a business and could in principle be deducted under section 34 ITTOIA 2005, we must conclude that no losses have been shown to have been realised for that tax year, the turnover having been £5,175. We therefore agree with HMRC's submission that the Appellant's return for the year 2010/11 should be amended to reflect a no profit no loss position for the business.

94. In the absence of any evidence of the expenditure incurred in the year 2009/10, we conclude that none may be deducted from the profits of the business and again, agree with HMRC that the Appellant's return for the year 2009/10 should be amended to reflect a no profit no loss position for the business.

### *Loss relief*

95. Having concluded that the Appellant's returns for both tax years in question should be amended to show no profit or loss generated by the business consultancy he ran, since there is no longer a loss we do not need to examine whether the further requirements for the relief under sections 64 and 66 ITA 2007 are met.

### *Penalties*

96. Penalties are payable where the conditions of Schedule 24, set out above, are met.

97. Applying that Schedule, if the Appellant's tax return contained an inaccuracy which led to an understatement of liability to tax or an inflated statement of a loss (meeting condition 1 set out in paragraph 1(2) of Schedule 24) then we must consider whether the inaccuracy was careless or deliberate on the Appellant's part, within the meaning of paragraph 3 of Schedule 24 (meeting condition 2 set out in paragraph 1(3)).

98. Having found that the expenditure deducted in the Appellant's tax returns for the years 2009/10 and 2010/11 was either not incurred or not incurred for business purposes, we must conclude that their deduction by the Appellant represented an inaccuracy in his returns and that condition 1 is satisfied.

99. HMRC do not suggest that the inaccuracy was deliberate on the Appellant's part, but that it was careless.

100. Under paragraph 3 of Schedule 24, an inaccuracy is careless if it is due to "a failure by P to take reasonable care". In this case, we consider that the Appellant's failure to keep detailed and adequate records of his expenditure constitutes a failure to take reasonable care. Accordingly, condition 2 is met.

101. Given that the penalty imposed by HMRC is within the range of 15% to 30% permitted by statute, it shall stand.

102. 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.

**RACHEL MAINWARING-TAYLOR**
**TRIBUNAL JUDGE**

**RELEASE DATE: 26 April 2016**