[2013] UKUT 0305 (TCC)

Appeal number FTC/49/2012

Income Tax – whether legal costs incurred by Appellant in defending criminal charges were incurred wholly and exclusively for the purposes of his trade – 'purpose' and 'effect' of incurring expenditure distinguished – s 74 ICTA 1988 and s 34 ITTIOA 2005 – question answered in negative by First-tier Tribunal – no error of law in determination of the FTT – appeal dismissed

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

PAUL DUCKMANTON

Appellant

- and –

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: MR JUSTICE HENDERSON

Sitting in public at the Rolls Building, London EC4A 1NL on 25 April 2013

Mr Simon Baker, instructed by Mavin & Co Ltd, for the Appellant
Mr Christopher Stone, instructed by the General Counsel and Solicitor to HMRC, for the Respondents

Introduction

1. This appeal concerns the deductibility in computing the profits of the trade carried on by the taxpayer, Mr Paul Duckmanton, of sums spent by him in the preparation and conduct of his defence to a criminal charge of gross negligence manslaughter which led to two trials in 2003 and 2004. Mr Duckmanton was acquitted of the manslaughter charge at the second trial. He had, however, also been charged with two counts of attempting to pervert the course of justice, to which he pleaded guilty and in respect of which he was sentenced to concurrent terms of imprisonment for eight months.

2. Mr Duckmanton was at the material time the owner of an unincorporated car transport business called "Car Trans". The firm's business included the transport of vehicles from Solihull to the docks at Southampton. The criminal charges arose from a fatal accident in Southampton on 19 September 2002, in which a pedestrian had unfortunately been killed by a vehicle driven by one of Mr Duckmanton's drivers, Mr Roberts. Mr Roberts initially sought to blame the accident on faulty brakes, although he subsequently retracted this and admitted to driver error. Tests carried out by the police after the accident nevertheless showed that the vehicle's brakes were out of adjustment, and it was also discovered that the vehicle had missed a scheduled mandatory inspection in August 2002.

3. Mr Duckmanton and his foreman, Mr Gleadall, admitted that a number of vehicle maintenance records had been falsified to cover up the workshop's increasing difficulty in keeping up with the mandatory maintenance programme for his fleet of 18 car transporters. The documents which had been falsified included those relating to the missed inspection in August 2002 of the vehicle which a month later was involved in the accident.

4. In due course, Mr Roberts was charged with manslaughter to which he pleaded guilty and was sentenced to 12 months' imprisonment. Mr Duckmanton and Mr Gleadall were each charged with gross negligence manslaughter and two counts of attempting to pervert the course of justice. They both pleaded guilty to the latter charges, but not guilty to the manslaughter charge on the grounds that the accident was primarily caused by driver error.

5. The first trial took place in December 2003 and resulted in a successful submission of no case to answer on behalf of Mr Gleadall. The jury was discharged, and a second trial took place in September to October 2004. As I have already said, Mr Duckmanton was acquitted of the manslaughter charge,

but sentenced to eight months' imprisonment on the charges to which he had pleaded guilty. He was legally aided in the second trial, but was ordered to pay the costs of the first trial.

6. The costs of Mr Duckmanton's successful defence of the manslaughter charge were very substantial. They included the instruction of solicitors who specialised in transport regulatory issues, Messrs Ford & Warren in Leeds, and the instruction of leading and junior counsel to conduct his defence. They also included the costs of a detailed forensic analysis of the record keeping of the business, the purpose of which was to show that, despite the falsification of the vehicle maintenance records in August 2002, there had previously been no widespread culture of such falsification. The costs which are now in issue all relate to the criminal proceedings, and subject to the question whether they are properly deductible their amount has been agreed. They total £268,672, and were claimed as deductions in the accounts of the business for the accounting periods ending 31 August 2003 (£48,752), 2004 (£55,929) and 2005 (£163,991) respectively.

7. Quite apart from the criminal proceedings, the accident also had important regulatory repercussions for Mr Duckmanton. In accordance with the provisions of the Goods Vehicles (Licensing of Operators) Act 1995 ("the 1995 Act"), he held a standard international operator's licence in the North Eastern Traffic Area for 32 vehicles and trailers. Without an operator's licence, he could not continue his business. Under section 27(1) of the 1995 Act, the traffic commissioner by whom a standard licence was issued must direct that it be revoked:

> "if at any time it appears to him that the licence-holder is no longer –
>
> (a) of good repute,
>
> (b) of the appropriate financial standing, or
>
> (c) professionally competent."

The traffic commissioner has to determine whether or not that is the case in accordance with Schedule 3 to the 1995 Act. As one would expect, the traffic commissioner is obliged to give the holder of the licence notice in writing that he is considering giving such a direction, stating the grounds relied upon, and he must then consider any representations made by the holder. By virtue of section 35, the traffic commissioner may also decide to hold a public inquiry.

8. Under paragraphs 2 and 3 of Schedule 3, the traffic commissioner is obliged to determine that a person is not of good repute if, among other things, he has

more than one conviction of a serious offence, defined as one for which a sentence of more than three months' imprisonment was imposed on him. In view of Mr Duckmanton's conviction on the two charges of attempting to pervert the course of justice, this condition was inevitably going to be satisfied, whether or not Mr Duckmanton was also convicted on the charge of manslaughter and (as would almost certainly have been the case) sentenced to more than three months' imprisonment in respect of it. If, however, he was not convicted on the latter charge, his position (although still serious) would arguably have been less grave from a regulatory perspective, and it seems he was advised by Ford & Warren that it would have been open to the traffic commissioner to determine a date for the revocation of his licence sufficiently far in the future to allow him to submit an application for a new licence in the meantime, and to be granted interim authority to operate in a form which would allow the business to continue.

9. Mr Duckmanton's legal team succeeded in obtaining a postponement of the public inquiry before the traffic commissioner until after the conclusion of the criminal proceedings, and it was then further adjourned to allow him to appear in person following his release from prison on licence. At a hearing on 7 February 2005 the traffic commissioner revoked Mr Duckmanton's standard international operator's licence, found that he was no longer of good repute either as an operator or as a transport manager, and disqualified him indefinitely under sections 26 to 28 of the 1995 Act. That decision was then appealed to the Transport Tribunal, but was dismissed by a written decision released on 3 June 2005. Mr Duckmanton's disqualification came into effect on 15 July 2005. He later reapplied for his operator's licence, which was renewed subject to strict conditions and undertakings.

10. For the proceedings before the traffic commissioner and the Transport Tribunal Mr Duckmanton was represented by different solicitors, first Waugh & Co and then Fear & Co. There is no dispute about the fees charged by those two firms, which HMRC have accepted as deductions in the computation of Mr Duckmanton's profits on the basis that they were wholly and exclusively incurred for the purposes of his business. The regulatory proceedings remain of relevance, however, because their future outcome was unknown at the time of the two trials, and they formed an important part of the factual background against which the deductibility of Mr Duckmanton's defence costs of the criminal proceedings had to be determined.

11. The procedural history of the present dispute is briefly as follows. HMRC opened enquiries into the self-assessment tax returns of Mr Duckmanton for the tax years 2003-04 to 2005-06 inclusive, in which deductions had been claimed for his defence costs. Following extensive correspondence between HMRC and Mr Duckmanton's tax advisers, closure notices were issued on 20 August 2009 for each of the three years disallowing the expenses and making

appropriate amendments to the returns. Mr Duckmanton appealed against the amendments, and his appeal was heard by the First-tier Tribunal ("the FTT") (Judge Connell and Mr R Barraclough) sitting at Leeds on 19 May 2011. By its decision released on 13 October 2011 ("the Decision"), the FTT dismissed the appeal. The FTT refused permission to appeal to the Upper Tribunal for reasons which it gave in a further decision dated 11 May 2012, but permission was subsequently granted by Judge Roger Berner of the Upper Tribunal on 3 July 2012.

12. At the hearing before the FTT, Mr Duckmanton was represented by Mr J Barnet of counsel, while HMRC were represented by an officer, Mr Alan Hall. On the appeal to this Tribunal, I have had the benefit of submissions from Mr Simon Baker of counsel for Mr Duckmanton and Mr Christopher Stone of counsel for HMRC.

The law

13. I can deal with the relevant law fairly briefly, because the parties are agreed about the principles which fall to be applied, and neither side contends that the FTT misdirected itself in law.

14. It is well known that the UK tax legislation has never made positive provision about what expenses or deductions are deductible in the computation of the profits of a trader's business. The relevant test has always been framed in purely negative terms. For the first two years under appeal, the test was contained in section 74 of the Income and Corporation Taxes Act 1988 (as amended) ("ICTA 1988"), which provided that:

> "(1) Subject to the provisions of the Tax Acts, in computing the amount of the profits to be charged under Case I or Case II of Schedule D, no sum shall be deducted in respect of –
>
> (a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession or vocation;
>
> (b) … "

15. For 2005-06, the charge to tax under Schedule D had been replaced by the provisions of the Income Tax (Trading and Other Income) Act 2005. The basic charge to income tax on the profits of a trade was contained in section 5. By virtue of section 7(1), tax was charged "on the full amount of the profits of

the tax year". Rules restricting deductions were set out in Chapter 4, and section 34 provided that:

> "(1) In calculating the profits of a trade, no deduction is allowed for –
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> (a) expenses not incurred wholly and exclusively for the purposes of the trade, or
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> (b) losses not connected with or arising out of the trade."

The prohibition in section 34(1)(a) corresponds with that previously contained in section 74(1)(a) of ICTA 1988, and restates the familiar principle that an expense is deductible only if it is incurred "wholly and exclusively for the purposes of the trade".

16. The modern law on the interpretation and application of this test was summarised by Millett LJ, as he then was, with the agreement of Hirst LJ and Sir John Balcombe, in Vodafone Cellular Limited v Shaw (1997) 69 TC 376 at 436-437, [1997] STC 734 at 742-743:

> "*Was the payment made wholly and exclusively for the purposes of the taxpayers trade?*
>
> Whether a payment is made exclusively for the purpose of the taxpayer's trade or partly for that purpose and partly for another is a question of fact for the Commissioners. The Court can interfere only if the Commissioners have made an error of law in reaching their conclusion. The principles on which the Court acts are to be found in the speech of Lord Radcliffe in *Edwards v Bairstow & Another* 36 TC 207; [1956] AC 14 and are too well known to repeat. It is sufficient to say that the Court will interfere where the true and only reasonable conclusion from the facts found by the Commissioners contradicts the determination.
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> In the case of an individual taxpayer, the other purpose is usually a private purpose of his own. In a case like the present, where the taxpayer is a company forming part of a group, the other purpose is likely to be the purpose of the trade of one or more of the other companies in the group. But the same principles apply …
>
> The leading modern cases on the application of the "exclusively" test are *Mallalieu v Drummond* 57 TC 330; [1983] 2 AC 861 and *MacKinlay v Arthur Young McClelland*

Moores & Co 62 TC 704; [1990] 2 AC 239. From these cases the following propositions may be derived:

> 1. The words "for the purposes of the trade" mean "to serve the purposes of the trade". They do not mean "for the purposes of the taxpayer" but for "the purposes of the trade", which is a different concept. *A fortiori* they do not mean "for the benefit of the taxpayer".
>
> 2. To ascertain whether the payment was made for the purposes of the taxpayer's trade it is necessary to discover his object in making the payment. Save in obvious cases which speak for themselves, this involves an inquiry into the taxpayer's subjective intentions at the time of the payment.
>
> 3. The object of the taxpayer in making the payment must be distinguished from the effect of the payment. A payment may be made exclusively for the purposes of the trade even though it also secures a private benefit. This will be the case if the securing of the private benefit was not the object of the payment but merely a consequential and incidental effect of the payment.
>
> 4. Although the taxpayer's subjective intentions are determinative, these are not limited to the conscious motives which were in his mind at the time of the payment. Some consequences are so inevitably and inextricably involved in the payment that unless merely incidental they must be taken to be a purpose for which the payment was made.

To these propositions I would add one more. The question does not involve an inquiry of the taxpayer whether he consciously intended to obtain a trade or personal advantage by the payment. The primary inquiry is to ascertain what was the particular object of the taxpayer in making the payment. Once that is ascertained, its characterisation as a trade or private purpose is in my opinion a matter for the Commissioners, not for the taxpayer. Thus in *Mallalieu v Drummond* the primary question was not whether Miss Mallalieu intended her expenditure on clothes to serve exclusively a professional purpose or partly a professional and partly a private purpose; but whether it was intended not only to enable her to comply with the requirements of the Bar Council when appearing as a barrister in Court but also to preserve warmth and decency."

The only point I need to add to the above summary, by way of explanation, is that the fact-finding role of the General or Special Commissioners is now

performed by the FTT. It remains the case that an appeal from the FTT to the Upper Tribunal lies only on questions of law, and that the principles on which the Upper Tribunal will interfere with the facts found by the FTT are still those stated in Edwards v Bairstow.

17. The distinction between the object of the taxpayer in spending money and the effect of the expenditure was explained by Lord Brightman in Mallalieu v Drummond [1983] 2 AC 861 at 870F-871A:

> "The object of the taxpayer in making the expenditure must be distinguished from the effect of the expenditure. An expenditure may be made exclusively to serve the purposes of the business, but it may have a private advantage. The existence of that private advantage does not necessarily preclude the exclusivity of the business purposes. For example, a medical consultant has a friend in the South of France who is also his patient. He flies to the South of France for a week, staying in the home of his friend and attending professionally upon him. He seeks to recover the cost of his air fare. The question of fact will be whether the journey was undertaken solely to serve the purposes of the medical practice. This will be judged in the light of the taxpayer's object in making the journey. The question will be answered by considering whether the stay in the South of France was a reason, however subordinate, for undertaking the journey, or was not a reason but only the effect. If a week's stay on the Riviera was not an object of the consultant, if the consultant's only object was to attend upon his patient, his stay on the Riviera was an unavoidable effect of the expenditure on the journey and the expenditure lies outside the prohibition …"

18. The importance of the distinction between object and effect, and of the findings of fact made by the fact-finding tribunal, is well illustrated by the subsequent decision of the House of Lords in McKnight v Sheppard (1999) 71 TC 419, [1999] 1 WLR 1333. The taxpayer in that case was a stockbroker, who had incurred legal expenses of around £200,000 in defending himself on a number of charges before the disciplinary committee of the Stock Exchange and appearing before the appeals committee. The appeals committee set aside an order for suspension imposed by the disciplinary committee, and substituted fines totalling £50,000. The taxpayer sought to deduct both the fines and the legal expenses in computing his profits under Case I of Schedule D. On appeal from the disallowance of the deductions by the Inspector of Taxes, the Special Commissioner (Mr Theodore Wallace) found that the taxpayer's exclusive purpose in incurring the legal expenses had been to preserve his business, although he had also been concerned with his personal reputation. Accordingly, the expenses had been incurred wholly and

exclusively for the purposes of his trade, and their deduction was not prohibited.

19. The Special Commissioner's decision on the legal expenses was overturned by Lightman J in the High Court, on the basis that there was an insufficiently close connection between the expenditure and the taxpayer's trade. The taxpayer succeeded, however, on this part of the case both in the Court of Appeal and in the House of Lords. The critical importance of the Special Commissioner's findings of fact was emphasised by Nourse LJ (with whom Potter and Mummery LJJ agreed) in the Court of Appeal at 71 TC 419, 446I:

> "I would commend the Commissioner's decision both for its full and careful statement of the background facts and the evidence as to purpose and for its application of the correct legal principles to the facts found. As to those facts, it may be exceptional, perhaps extremely rare, for someone placed in the taxpayer's position to be so indifferent to his personal reputation that its preservation was not one of the purposes of the expenditure. Nevertheless, that was the finding of the tribunal of fact, the Commissioner, who had the advantage of seeing and hearing the taxpayer give his evidence. Even before an appellate tribunal which was conducting a re-hearing, that finding would have been unimpeachable. Moreover, the Commissioner was correct in saying that it was not inescapable that one purpose of the expenditure was the preservation of the taxpayer's personal reputation. The human species has not yet been reduced to a uniformity incapable of such insouciance. He was entitled to distinguish *Mallalieu v Drummond* on that ground."

20. In the House of Lords Lord Hoffmann, who delivered the only reasoned speech, quoted the same critical findings of fact and, after referring to the passage which I have cited from Lord Brightman's speech in Mallalieu v Drummond, continued as follows at 451C:

> "If Lord Brightman's consultant had said that he had given no thought at all to the pleasures of sitting on the terrace with his friend and a bottle of Côtes de Provence, his evidence might well not have been credited. But that would not be inconsistent with a finding that the only object of the journey was to attend upon his patient and that personal pleasures, however welcome, were only the effects of a journey made for an exclusively professional purpose. This is the distinction which the Special Commissioner was making and in my opinion there is no inconsistency between his conclusion of law and his findings of fact."

The decision of the FTT

21. The FTT heard oral evidence from Mr Duckmanton and Christabel Hallas, a solicitor who was at the material time employed by Ford & Warren as an assistant solicitor in their regulatory transport department. Both witnesses were cross-examined by Mr Hall for HMRC.

22. After setting out the background facts, substantially as I have recounted them, and the relevant legislation, the FTT reviewed the evidence which they had heard. They recorded that Mr Duckmanton "provided some historical background relating to his business and explained his purposes in incurring the legal and other professional fees".

23. The FTT's record of the evidence given by Mr Duckmanton in section 9 of the Decision includes the following:

> "Mr Duckmanton said that the legal costs he incurred in fighting the Gross Negligence Manslaughter charge were huge but that he was determined to fight them because he regarded the charge as fundamentally "wrong" and also because it portrayed him as a reckless individual without any regard for safety standards. He said that he was never in any doubt that forensic evidence relating to his safety procedures would eventually vindicate his claim that there had been no widespread culture of falsification of records or other wanton disregard for safe working practices.
>
> Mr Duckmanton said that, at considerable cost, he employed leading and junior counsel to conduct his defence. He said that prior to the hearing he had to make an application to the court for the purpose of setting up a test rig to conduct tests on the vehicle involved in the accident (which had been impounded) to prove the "point of failure" of its brakes in order to establish that, whether or not the brakes were out of adjustment, the primary cause of the accident was driver error. He says the police resisted the application but eventually the tests were undertaken and the vehicle's brake efficiencies were found to be a "pass".
>
> Mr Duckmanton said that at the time of the trial, irrespective of the eventual outcome, preserving his business reputation and status as a person of good repute, in his capacity as a transport manager, and thereby hopefully preserving his operator's licence, was [of] paramount importance. It was, he said, more important to him to establish that the accident had been caused

by driver error and not because of a breach of safety standards, and thereby preserve his reputation, than it was to avoid the prospect of being sent to prison for a term of five years.

Mr Duckmanton conceded that there was a possibility of a civil action against him because of the fatality and that had he been found guilty on the Manslaughter charge a substantial damages action against him could have ruined his business. Again, however, he said that this was of secondary importance to the preservation of his business reputation and transport manager's operator licence which was his sole means of livelihood."

24. The FTT then summarised the evidence given by Ms Hallas:

> "In her evidence Ms Hallas said that under the provision of paragraph 1(1) of schedule 3 of [*the 1995 Act*] in determining whether or not Mr Duckmanton was of good repute, the Traffic Commissioner would have had to have regard to any relevant convictions and any other information in his possession which appeared to him to relate to the individual's fitness to hold a licence. She confirmed that had Mr Duckmanton been found guilty of Gross Negligence Manslaughter then the Traffic Commissioner and the Court of the Transport Tribunal would have placed significant weight on his conviction, not only in determining whether or not Mr Duckmanton continued to be of good repute at the Public Enquiry, but also any future application for an operator's licence. Ms Hallas said that had Mr Duckmanton not successfully defended the Gross Negligence Manslaughter proceedings and the allegation that there had been a widespread culture of falsification of maintenance records, he would not only have lost his operator's licence but would have found it extremely difficult to regain his repute and with that an operator's licence for any future business."

25. I have been supplied with a copy of Ms Hallas' witness statement dated 22 December 2010. In relation to the alleged falsification of inspection records, she said this:

> "18. Part of the prosecution case was that there was a widespread culture of falsification of inspection records. The prosecution produced a significant number of inspection sheets which they alleged were false. Had this not been challenged, then notwithstanding any conviction for gross negligence manslaughter, there would have been grounds to revoke the licence. The allegation went to the heart of operator licensing

> regarding regular inspection of vehicles. It was therefore necessary *not only as part of the defence against the manslaughter case but in order to protect Mr Duckmanton's current repute and future repute* [my emphasis] that this allegation was challenged. This necessitated going through each service record and finding relevant invoice parts and time sheets to show that the vehicle was serviced in accordance with the preventative maintenance inspection schedule. This was a very time consuming exercise, but as a result, the prosecution conceded that there was no widespread culture of falsification."

The words which I have emphasised make it clear that the allegation of widespread falsification of records was of central importance to the criminal proceedings as well as to the regulatory proceedings before the traffic commissioner. Furthermore, once the traffic commissioner had agreed to postpone the regulatory proceedings until after the conclusion of the trial, it must have been obvious that this issue would first have to be resolved in the context of the criminal proceedings.

26. In section 10 of the Decision the FTT set out the parties' submissions at considerable length, under the headings:

a) Was the expenditure incurred for the purposes of the trade?

b) Was there duality of purpose? and

c) Legal fees arising after the criminal proceedings.

The FTT then reviewed the case law in section 11, beginning with the summary given by Millett LJ in Vodafone. Apart from Vodafone and McKnight, they also referred to three earlier decisions at first instance: Spofforth and Prince v Golder (1945) 26 TC 310; Bowden v Russell & Russell (1965) 42 TC 301; and Knight v Parry (1972) 48 TC 419.

27. The final section of the Decision, headed "Conclusion", reads as follows:

> "The question whether expenses were incurred wholly and exclusively for the purposes of a trade is a question of fact. Section 74 ICTA and 34 ITTOIA say in clear terms that the

purpose must be the sole purpose. Case law authority shows that if the sole purpose of the taxpayer in incurring expenditure is business preservation, the expenditure should not be disallowed simply because the purpose of the expenditure necessarily involved some other result. If however, as in this case, legal fees are incurred with the object of firstly defending criminal charges, secondly preserving a business reputation and thirdly avoiding the possibility of a substantial damages claim, then the requirements of the legislation are clearly not satisfied.

Mr Duckmanton said in evidence that the real possibility of his losing his liberty was not a factor or primary factor in his decision to incur substantial legal expenses in defending the Gross Negligence Manslaughter charge. He said that the protection of his business and operator's licence was his only real concern. The Tribunal do not accept this. Whilst we accept, and it is established from case law authority, (see *Mallalieu v Drummond*) that not every benefit resulting from expenditure constitutes an inescapable object of that expenditure, it would defy common sense not to conclude that Mr Duckmanton's main purpose in incurring significant expenditure on legal and other professional fees was to defend the Manslaughter charge for the purpose of protecting his liberty and personal reputation. We do not accept that the sole or even a primary object of Mr Duckmanton in incurring that expenditure was to establish that the cause of the road traffic accident was driver error, or primarily driver error, and therefore retain the prospect of regaining his operator's licence. We accept that had the jury not come to the conclusion that it did, Mr Duckmanton faced the possible destruction of his business. However, the result of the jury's findings is that Mr Duckmanton was acquitted of a serious criminal charge for which he could have been in prison for many years. Although Mr Duckmanton, in giving evidence, may now some nine years after the event honestly believe that he was indifferent to the prospect of imprisonment, we cannot accept that this was a secondary motivation when the expenditure was actually incurred at the time of the trial.

In our view the only reasonable conclusion we can come to on the facts is that the expenditure incurred by Mr Duckmanton, as detailed [in] paragraph 2 of this decision, should be disallowed … as not having been incurred wholly and exclusively for the purposes of his trade.

For the above reasons the appeal is disallowed."

28. In reaching this conclusion, the FTT clearly rejected Mr Duckmanton's evidence that the protection of his business and operator's licence had been his only real concern. They found that his expenditure on legal fees had three separate objects: first, the defence of the criminal charges; secondly, the preservation of his business reputation; and thirdly, avoiding the possibility of a substantial damages claim if he were convicted. They expressly rejected his evidence that the real possibility of losing his liberty was not a factor, or the primary factor, in his decision to incur the expenditure. On the contrary, they said it would "defy common sense not to conclude" that his main purpose in incurring the expenditure was to protect his liberty and personal reputation. Although Mr Duckmanton may honestly have believed, when giving evidence nine years after the event, that he had been indifferent to the prospect of imprisonment, the FTT expressly refused to accept that this had been merely a secondary motivation at the time when the expenditure was actually incurred.

29. On the basis of those findings of fact, the conclusion that the expenditure was not deductible inevitably followed. Given that the question was, on the authorities, one of fact, and given that an appeal to the Upper Tribunal could lie only on a question of law, one might be forgiven for supposing that the case could have gone no further. Nevertheless, permission to appeal was sought from the FTT on grounds which included procedural impropriety and failure to find that there was no duality of purpose. The burden of the first ground was that the FTT had failed to give proper consideration to the evidence of Ms Hallas and the significance of the traffic commissioner's pending inquiry.

30. In refusing permission to appeal, the FTT took the opportunity, in their further decision of 11 May 2012, to amplify their views about the relevance of Ms Hallas' evidence and Mr Duckmanton's credibility:

> "(a) The Tribunal took into account the evidence of Miss C Hallas in reaching its decision. [HMRC] did not challenge her evidence that one of the Appellant's reasons for defending the gross negligence manslaughter charge against him was in order to preserve his professional reputation and retain the prospect of renewing his operator's licence. Miss Hallas did not say, and was not in a position to say, that the prospect of a criminal conviction and custodial sentence was not the primary and significant purpose for the Appellant defending the charge.
>
> (b) The appeal was based on the assertion that the main purpose of challenging the gross negligence manslaughter charge was to preserve his reputation and retain some prospect of retaining his international operator's licence. Questions raised by [HMRC] in cross-examination, and directly by the Tribunal, tested the credibility of that assertion. The Tribunal does not

> suggest in its Decision that the Appellant was dishonest in giving evidence. The Tribunal's conclusions make it clear that, although in giving evidence at the hearing some 9 years after the event, the Appellant may honestly believe that he was indifferent to the prospect of imprisonment, the Tribunal did not accept that this was a secondary consideration at the time of his trial when the expenditure on defending the charge was actually incurred."

31. Undeterred, Mr Duckmanton renewed his application for permission to appeal to the Upper Tribunal. His grounds of appeal, settled on his behalf by Mr Baker, maintained the submission that the FTT had erred in law by failing properly to consider the evidence of Ms Hallas. The second ground was likewise maintained, in reliance on the same factors that were said to substantiate the first ground. There was also a third ground, which I need not consider as it has been abandoned.

32. On 3 July 2012 Judge Berner granted permission to appeal on all three grounds. In relation to the first two grounds he pointed out, correctly, that the appeal could not succeed unless an error of law within Edwards v Bairstow were established. He said he was satisfied that Mr Duckmanton had an arguable case of that nature.

The grounds of appeal: discussion

33. The nub of the first ground of appeal, as set out in the written grounds settled by Mr Baker, is that the FTT erred in law in failing properly to consider the evidence of Miss Hallas. It is argued that any reasonable tribunal would have been bound to conclude that the focus of the evidence gathering exercise was on the traffic commissioner's pending inquiry, and that this conclusion would be highly significant in evaluating whether Mr Duckmanton's primary purpose in incurring the legal expenses was to protect his business. It is said that the only reference in the Decision to Miss Hallas' evidence is the incomplete summary of it which I have quoted in paragraph 24 above, and that no reference was made to other parts of her evidence such as paragraph 10 of her statement. Paragraph 10 reads as follows:

> "10. Following the commencement of the criminal proceedings it would have been open for the Traffic Commissioner to call an inquiry prior to the outcome of the criminal trial. Had this been the case, then it could have been prejudicial to the criminal trial. It was therefore imperative that representations were made to the Traffic Commissioner that no regulatory proceedings take place prior to the conclusion of the criminal

> proceedings. In order for the Traffic Commissioner to stay the calling of the public inquiry, Mr Duckmanton had to gather together evidence to show that road safety would not be jeopardised in the meantime. Advice was given to Mr Duckmanton as to what evidence would be likely to satisfy the Traffic Commissioner."

34. It is complained that the FTT made no reference to Ms Hallas' evidence when explaining their findings of fact in the concluding section of the Decision. With reference to the further explanation given by the FTT when refusing permission to appeal, the FTT is said to have concluded that since she could not know the mind of her client, she was not in a position to say what his primary purpose was. Such a conclusion, it is submitted, was wrong in both fact and law. Although Ms Hallas could not speak to the internal workings of Mr Duckmanton's mind, her evidence was nevertheless relevant to the assessment by the FTT of Mr Duckmanton's primary purpose. The evidence in paragraph 10 of her statement, and elsewhere, constituted important circumstantial evidence from which inferences could properly be drawn about Mr Duckmanton's state of mind at the relevant time. I am invited to infer that the FTT took the view that her evidence was incapable of informing their decision, beyond confirming that the interests of the business were one of Mr Duckmanton's reasons for incurring the disputed expenditure.

35. Mr Baker amplified these submissions in oral argument, but I have to say I find them wholly unconvincing. The question which the FTT had to determine was one of fact. They reached their conclusion after hearing oral evidence from both Mr Duckmanton and Ms Hallas. The evaluation of that evidence, and the weight to be attached to it, were matters for the FTT. Having heard and seen Mr Duckmanton give evidence, they were in my judgment plainly entitled to take the view that the preservation of his business was not the only object which he had in mind when he incurred the legal costs relating to his defence of the criminal proceedings, and that his protestations to the contrary, nine years after the event, could not be accepted. The obvious risks of imprisonment for a substantial term, and of a potentially ruinous civil claim for damages, if he were convicted of manslaughter, were matters which he could hardly have ignored, and the FTT clearly considered that they ranked as independent objects of the expenditure which he incurred. Indeed, they thought it would "defy common sense" not to conclude that his main purpose in defending the manslaughter charge was to protect his liberty and personal reputation. Again, this was in my view a conclusion which was plainly open to the FTT on the facts, and the context of their remark shows that they had the distinction between the object and the result of expenditure well in mind.

36. The argument that the FTT failed to give proper weight to the evidence of Ms Hallas is in my view fanciful. They were under no obligation to set out her

evidence at length, and the summary of it in the Decision was perfectly adequate. I can see no reason to doubt the assurance given by the FTT, when refusing permission to appeal, that they took her evidence into account when reaching their decision; and they were in my view obviously right to say that she was in no position to give evidence about Mr Duckmanton's purpose in defending the manslaughter charge. The value of her evidence lay in the explanation of the regulatory background, and the nature of the work that was done on Mr Duckmanton's behalf. She was a witness of fact, not an expert witness, and any opinions which she may have expressed about Mr Duckmanton's personal motivation would have been irrelevant. Furthermore, even read at face value her witness statement does not substantiate the argument that the sole or main focus of the evidence-gathering exercise conducted by Ford & Warren had been the pending inquiry before the traffic commissioner. On the contrary, she pointed out in paragraph 18 of her statement that the issue of falsification of records had to be challenged "not only as part of the defence against the manslaughter case but in order to protect Mr Duckmanton's current repute and future repute". She must therefore have regarded at least this substantial part of the expenditure as having a dual purpose.

37. In short, I consider that the first ground of appeal represents a groundless attempt to discover an error of law in what was, in truth, a decision on the facts which the FTT were fully entitled to reach.

38. Mr Baker sensibly accepted in oral argument that the second ground of appeal added nothing to the first, and merely stated the conclusion which the court was invited to draw if the first ground were made out. It is therefore unnecessary for me to discuss it further. The third ground, as I have already said, was abandoned before the hearing.

39. Accordingly, the appeal will be dismissed.

TRIBUNAL JUDGE

MR JUSTICE HENDERSON

RELEASE DATE: 4 July 2013