[2022] UKFTT 00140 (TC)

TC 08471/V

INCOME TAX – discovery assessments – whether taxpayer behaviour deliberate - no – when partnership commenced trading – whether consultancy fees wholly and exclusively for purposes of trade – whether penalty notices served - no

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/05339

BETWEEN

ROBERT DON HUNTER DOUGAN **Appellant**

-and-

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

TRIBUNAL: JUDGE VICTORIA NICHOLL
NOEL BARRETT

The hearing took place on 14, 15 and 16 February 2022. With the consent of the parties, the form of the hearing was video. A face to face hearing was not held because of the Covid 19 pandemic. The documents to which we were referred were the main bundle of 1,799 pages, a supplementary bundle of 198 pages, two authorities bundles, the Appellant's amended skeleton argument dated 27 January 2022, the Respondent's skeleton argument dated 31 January 2022, and the Appellant's skeleton argument in Reply to HMRC's skeleton argument. The Tribunal also received two further documents at the start of the hearing which are referred to in the decision.

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

Mr Ben Lewy, counsel instructed by Joseph Hage Aaronson LLP, for the Appellant

Mr Simon Bracegirdle, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This appeal concerns the date of commencement of a trade, the deductibility of expenses, loss relief claims, the validity of discovery assessments and service of penalty notices.

2. On 23 June 2017 the Appellant ("Mr Dougan") filed an appeal to the First-tier Tax Tribunal (FTT) against the decisions of the Respondent ("HMRC") in their 'view of the matter' letter dated 25 May 2017. The notice of appeal also referred to penalties that had been assessed by reference to the amounts charged, without referring to the relevant penalties or decisions. At the hearing it was confirmed that Mr Dougan seeks permission to make a late appeal against the penalties for the tax years 2004/05 to 2012/13 inclusive insofar as they were properly notified.

3. HMRC's letter of 25 May 2017 set out their view of the matter in relation to the tax years 2004/05 to 2007/08, as well as a number of other issues that are no longer the subject of this appeal, following some four years of correspondence and meetings. The letter refers to the issue of determinations under section 28C Taxes Management Act 1970 ("section 28C") that are all treated as final, and to the subsequent issue of the following discovery assessments under section 29 Taxes Management Act 1970 ("section 29"):

	2004/05	2005/06	2006/07
Section 29 discovery assessments	£75,000 Issued 28/02/2013	£80,000 Issued 28/02/2013	£85,000 Issued 28/02/2013

BACKGROUND AND PROCEDURAL HISTORY

4. Mr Dougan is an Australian national. Mr Dougan's wife is French. Mr Dougan lives and works in the UK under the terms of a visa. He does not have permission to work in France. Mr Dougan's home and family are based in London.

5. Mr Dougan is a successful music composer/producer. One of his songs, *Clubbed to Death* (*Kurayamino Variation*), was featured in the soundtrack of the science-fiction film, The Matrix. Mr Dougan operated his music business as a sole trader in the tax years the subject of this appeal.

6. Mr Dougan reports that it was through his wife that he began to discover the vineyards of the Languedoc region in France and to research their potential. Mr Dougan had some concerns about the future viability of his music business at that time. He was concerned about digital piracy and a decline in royalties. When Mr Dougan bought a vineyard in the Languedoc in 2004 it was partly with a view to supplementing or perhaps replacing his income from making music.

7. Mr Dougan invested significantly in setting up the new wine business. He sought advice on an appropriate structure that would allow the heavy costs of starting the wine business to be offset against his UK income.

8. As a result of the purchase of the new wine business, Mr Dougan had two businesses in the tax years the subject of this appeals, the music business and the wine business producing world class wines under the registered name La Pèira.

9. Mr Dougan has a history of late filing of tax returns. On 12 December 2011 his name was referred to HMRC officer Mark McGee as a valid action case because of his failure to file

returns despite escalating determination action by HMRC and questions over the source of money used to pay the determinations. Mr McGee first wrote requiring Mr Dougan to file a return for the year ended 5 April 2008 by 20 December 2011. As Mr Dougan failed to meet this deadline, a determination was issued for the tax year ended 5 April 2008 on 24 January 2012. When Mr Dougan simply paid the determination and payments on account arising in the amount of £98,434.12 on 18 June 2012 this further raised HMRC's concerns about the actual level of his tax liability and source of money to pay the tax. Mr McGee then wrote requesting all outstanding returns, and he warned Mr Dougan twice about the risk of enforcement action if he failed to comply.

10. As Mr Dougan failed to file his returns despite these warnings, section 29 discovery assessments were issued on 27 February 2013 for the tax years 2004/05, 2005/06 and 2006/07. However, his accountants filed claims for 'sideways loss relief' for relief of Mr Dougan's partnership losses against his general income for the tax years 2004/05 and 2005/06 on 31 January 2008, and against his 2006/07 income on 30 January 2012.

11. As a result of the amount of tax owed in relation to the discovery assessments and a further determination for the year ended 5 April 2011, HMRC's Enforcement Office began proceedings for recovery in April 2013.

12. On 25 June 2013 Mr Dougan filed self-assessment returns for the tax years ended 5 April 2005 to 5 April 2010 inclusive. The returns sought to claim loss relief for the trading loss incurred by Partnership Lindfield against Mr Dougan's general income, including his income from the music business.

13. Following discussions with HMRC officer Sally McGee in March 2014, Mr Dougan's accountants, Sedley Richard Laurence & Voulters ("SRLV"), filed an appeal and postponement application with HMRC. Payment was made of the amount required to end the debt proceedings.

14. Mr Dougan's accountants, SRLV, filed an appeal with HMRC on 8 June 2017. Mr Dougan's representatives, Joseph Hage Aaronson LLP filed an appeal with the Tribunal on 23 June 2017. As noted in paragraph 2 above, Mr Dougan's appeal to the Tribunal did not specify the assessments and penalties the subject of the appeal. HMRC made an application to the Tribunal on 10 August 2017 to require Mr Dougan to provide further and better particulars of the periods under appeal and the matters under appeal. Mr Dougan's response to the application clarified a number of issues, but HMRC's response was that they held no appeals against surcharges, late payment and late filing penalties.

15. The question of which penalties had been notified and whether they were the subject of this appeal was then the subject of two case management hearings. The directions issued on 13 February 2018 following the first hearing, and the information provided, are set out in paragraph 58 below in the context of our findings of fact.

16. The directions issued by Judge Mosedale on 16 August 2019 following the second hearing were stated to be for the purpose of setting out all the matters that should be the subject of a single hearing (this hearing):

> "1.An appeal against four discovery assessments all dated 28/2/13 (YE 5/4/5 for £75,000, YE 5/4/6 for £80,000, YE 5/4/7 for £85,000 and YE 5/4/8 for £6,000). This appeal is accepted by HMRC to be, or to be treated as, made in time.
>
> 2.Whether the Penalties or any of them were validly issued and served;
>
> 3.If so, whether the appellant is out of time to make an appeal against them;

> 4.And, if before the date of the hearing the appellant has applied to be allowed to make a late appeal against the Penalties, whether that appeal should be admitted;
>
> 5.If there is a valid appeal against the Penalties (whether because it was made in time, or has been admitted out of time) whether the appeal should be allowed."

17. Shortly prior to the hearing, Mr Dougan's representatives produced an amended version of his Skeleton Argument to include cross-references to the relevant pages in the hearing bundle, a supplementary bundle of authorities and a third witness statement by Mr Dougan. At the start of the hearing, Mr Lewy provided the Tribunal with a further document. HMRC did not object to the admission of these documents. The Tribunal considered the further evidence in accordance with rules 2, 5 and 15 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, and allowed the documents to be admitted.

SUBMISSIONS

18. Judge Mosedale listed the matters to be considered at the hearing as set out in paragraph 16 above. Mr Lewy then sub-divided the matters to be considered by the Tribunal under heading 1 into three issues in his submissions; whether the discovery assessments were validly issued within the time limit for cases that involve careless behaviour or whether Mr Dougan's behaviour was deliberate ("Limitation"); when Partnership Lindfield began trading ("Commencement") and whether the consultancy fees charged by SCEA Robert Dougan were deductible ("Wholly and exclusively"). These headings were adopted by the parties in making their submissions, and the parties' positions on each of the issues is set out below in context in the deliberations.

19. The parties both made references to matters concerning Mr Dougan' tax liability for tax years that are not the subject of this appeal. The submissions asked the Tribunal to provide finality on the following issues:

> (1) On 7 June 2010 HMRC raised a determination for £1,633.50 under section 28C Taxes Management Act 1970 in respect of tax year 2004/05. Mr Dougan paid this determination on 24 June 2010. HMRC also charged penalties of £790 in respect of the amount charged by the determination. HMRC now accepts that this determination should be cancelled as it was issued out of time. Mr Dougan is therefore entitled to a refund of £1,633.50, and the £790 penalties should be cancelled.
>
> (2) HMRC agreed before the hearing that the discovery assessment for 2007/08 should be cancelled. The £5,000 late payment surcharges in relation to 2007/08 should also be cancelled.

STATEMENT OF AGREED FACTS

20. The following Statement of Agreed Facts was provided in the hearing bundle:

A. At all material times the Appellant (i) was resident in the UK for income tax purposes and (ii) carried on business as a musician, first as a sole trader and, from 18 April 2013, through an incorporated business.

B. The Appellant has also been a partner in a partnership known as "Partnership Lindfield".

C. The Appellant has appealed to the Tribunal against penalties for the years 2004-05 to 2012-13. HMRC object to the inclusion of these appeals on the grounds that the appeals against the penalties were made after the applicable time limits had passed.

D. The Appellant lived at the following properties at the period of the notification of the penalties.

E. The Appellant lived at 109 Rotherhithe Street, London SE16 4NF from some time in the year 2000 until 4 June 2015, when he moved to 15 Desenfans Road, London SE21 7DN.

F. The Appellant then moved to [SE22] on or around 6 June 2016. He still lives at [SE22] today.

G. 109 Rotherhithe Street was undergoing renovations between June and December 2015. The Appellant continued to own the property, although he was living and sleeping at 15 Desenfans Road during that period and until he moved to [SE22].

H. SRLV acted for the Appellant, corresponded with HMRC and provided all information requested by HMRC's inspector in the process of arriving at a decision regarding the loss relief claims over their period of deliberation from 2013-2017.

FINDINGS OF FACT

21. We considered the parties' submissions on the evidence and all of the evidence provided in making our findings of fact below. This includes the evidence in the main hearing bundle, the supplementary bundle and the further document provided to the Tribunal at the start of the hearing that is referred to in context below. Mr Dougan gave oral evidence, and he was then cross-examined by Mr Bracegirdle and answered questions from the Tribunal. We found him to be an open and honest witness. We gave less weight to the witness statements of HMRC officers Mr Mark McGee and Mrs Sally McGee as regards unsupported statements and conclusions as they could not be cross-examined. We did not accept certain statements made by Mr Bracegirdle in relation to the issue of the surcharges and penalties as evidence as it was provided in the context of making representations.

22. We made the following findings of fact from the evidence, and the conclusions set out in the discussion below are based on the application of the relevant law to our findings:

Mr Dougan

23. Mr Dougan began his wine business with no practical knowledge of the wine business. The only knowledge that he had was gained from books and articles about wine.

24. Mr Dougan is enthusiastic about his businesses, and his success in both music and wine businesses is evidence of his ability and drive. His oral evidence suggests that his focus is on the big picture, rather than in the detail.

25. Mr Dougan lived at 109, Rotherhithe Street, London SE16 4NF ("109 Rotherhithe Street") from 2000 until June 2015, being throughout the relevant periods the subject of this appeal. It is an individual house with its own mailbox. Mr Dougan opens all of his post. His wife ensures that any unopened post is opened.

26. Mr Dougan has a history of filing his personal tax returns late. He met with accountants, SRLV, once or twice a year, but he felt that he was always behind with his paperwork and that he was always being asked to send his accountants documents or receipts.

27. Mr Dougan engaged his accountants to deal with his tax filings, but he admits that he often failed to follow through to ensure that he had complied with his tax obligations. In June 2004 his accountants submitted his tax returns for 2000/01 to 2003/04, but between July 2004 until May 2013 no further self-assessment tax returns were filed for Mr Dougan. His accountants filed protective claims for 'sideways loss relief' and he believed that these claims covered his tax liability. From 2006/07 Mr Dougan was dealing with High Court litigation in relation to his music business and a critical time in the wine business.

28. Mr Dougan's self-assessment returns for six years 2004/05 to 2009/10 were filed by SRLV under cover of their letter dated 21 June 2013. The returns claim relief for his share of the losses of Partnership Lindfield against his other income.

29. SRLV were Mr Dougan's accountants throughout the relevant tax periods. SRLV warned Mr Dougan that HMRC may issue behaviour based penalties in the future, but they did not notify him that HMRC had issued late filing and late payment penalties.

30. When Mr Dougan receives a letter from HMRC his usual practice in the period between 2007 and 2011 was to pay any sums demanded and to pass the letter to his accountants. This is supported by the record of his payments on account and statements of account. Mr Dougan paid some £157,860 between April 2007 and February 2013, including three section 28 C determinations for 2004/05, 2005/06 and 2006/07. However, once HMRC had opened their investigation into Mr Dougan's tax affairs, the amount due was in dispute and not paid. As a result of the debt enforcement proceedings, Mr Dougan paid £261,885.21 in April 2014. Mrs McGee agreed in April 2014 that the amount paid would be credited to his self-assessment account. Mrs McGee also agreed that if it transpired that Mr Dougan's total liability was lower than the amount paid, an overpayment would be available for set off against other liabilities or repayment. Mr Dougan believes that the total of the amounts that he has paid exceeds his liabilities.

Structure: Partnership Lindfield and SCEA Robert Dougan

Partnership Lindfield

31. In or before April 2005 Mr Dougan instructed SRLV to advise on an appropriate structure for his new wine business. Karen Doe of SRLV prepared a report ("the Structure report") based on her understanding that Mr Dougan intended to buy a vineyard for approximately £200,000 and that he expected to incur further costs in preparing the vineyard, plus annual running costs. For French law, tax and social security reasons the land would be purchased through a French land holding company, a groupement foncier agricole ("GFA") owned by Mr Dougan. A separate French company (a societe civile d'exploitation agricole) SCEA Robert Dougan would be 95% owned by Mr Dougan and 5% owned by his wife. SCEA Robert Dougan was to carry on the actual farming of the vineyard.

32. The Structure report advised that in order to obtain tax relief for the losses that would be incurred in carrying on farming the vineyard in France against Mr Dougan's other personal income in the UK, he would need to farm the vineyard in partnership with the SCEA Robert Dougan. A new partnership, Partnership Lindfield, was therefore established between SCEA Robert Dougan and Mr Dougan for this purpose. In other words, the tax planning was based on the assumption that Partnership Lindfield would be carrying on the farming trade in partnership and consequently making the losses that could be set against Mr Dougan's other income.

33. In accordance with the advice provided, the partnership deed for Partnership Lindfield was drafted and signed on 14 June 2005. The deed states that the partnership is for the purpose of developing, exploiting and managing a wine business (including but not limited to producing, marketing, selling and distributing wine). The agreement states that the percentage shares of the partners and their contributions are as follows:

> Mr Dougan 95% - Mr Dougan is solely responsible for the management, running and development of the Partnership and wine business (including but not limited to the sale, distribution, marketing, promoting, advertising of the wine and/or wine business in the territory and any and all strategy and decision relating to the wine business for the

partnership). Mr Dougan shall bring all initial capital necessary for all costs related to and/or associated with the wine business as a whole.

SCEA Robert Dougan 5% - SCEA Robert Dougan shall be responsible for the administration and execution of all Partnership's agricultural and winegrowing endeavours and/or activities in the Vineyard and/or in France. The SCEA Robert Dougan shall bring its expertise, knowledge and know how in the production of wine in the Vineyard.

34. The partnership agreement does not provide for SCEA Robert Dougan to charge consultancy fees to Partnership Lindfield. The only specific reference to charges to be made is in clause 9 that provides that "where a Partner is entitled to be reimbursed by the Partnership for costs and expenses incurred by the Partner in the due performance of its obligations as a partner in the Partnership. Such reimbursement shall be in accordance with and subject to arrangements and procedures approved by all the partners." This drafting reflects the tax planning in the Structure report that assumed that Mr Dougan would be carrying on the trade in which the losses would arise in partnership with SCEA Robert Dougan. A summary of the structure provided by SRLV concluded with the statements that the SCEA Robert Dougan would deal with the administration on a day-to-day basis on behalf of the partnership and would employ the manager/farm workers, and "towards of the end of the accounting period the SCEA Robert Dougan will make a management charge to the partnership for, say, 95% of these costs."

35. Mr Dougan is the nominated partner of Partnership Lindfield for tax purposes, and he signed the partnership tax returns for the relevant periods. SRLV filed partnership returns for Partnership Lindfield for the seven years ended 5 April 2012 in December 2013. The partnership tax returns state that the date of commencement was 1 January 2005. Mr Dougan's share of partnership losses as shown in these returns did not match the loss claims in the personal tax returns that he filed in June 2013.

SCEA Robert Dougan

36. SCEA Robert Dougan is French company. It obtained the necessary permission to farm the vineyard and it has a SIRET number. It has prepared and filed tax returns in France. These show the following income and expenditure (in euros) in the calendar three years ended 2008:

Years ended 31 December	2008	2007	2006
Fees charged to Partnership Lindfield	31,505	180,053	165,348
Other income [inc. wine sales]	206,401	23,736	27,757
Total Income	237,906	203,789	193,104
Total Expenditure	292,559	207,730	201,700

37. It will be seen from these figures that SCEA Robert Dougan made a small loss in each of these years. The amount of the fees charged to Partnership Lindfield is hugely reduced in 2008, but this is the year in which the wine sales income begins. Employment costs remain at about 50,000 euros plus social charges of about 12,500-20,000 euros in these years.

38. The invoices for the fees charged by SCEA Robert Dougan to Partnership Lindfield for the calendar years 2005-2007 do not include any narrative about the services provided. We were shown invoices for 2013 and another year that include a detailed narrative of the services provided.

39. SCEA Robert Dougan has had a bank account in France since early 2006.

Plan v Practice

40. The structure put in place by Mr Dougan created three separate legal entities, the GFA, SCEA Robert Dougan and Partnership Lindfield. Mr Lewy noted that not all of the advice in the Structure report has been followed. In particular he noted that whereas SRLV had originally advised that the GFA should lease its land to the partnership so that the partnership would carry out the wine-growing trade itself, this could not be followed because it was considered problematic for a UK resident person to conduct farming activities in France. SCEA Robert Dougan therefore carries on the wine making business in France, and sells its wines to Partnership Lindfield in the UK where Mr Dougan could market and sell the wines. The structure of the business, as planned or as implemented, was not designed or implemented as part of a tax avoidance scheme, but a commercial structure for a new business that has flourished to become a profitable and world recognised wine business.

41. The price of the wines invoiced by SCEA Robert Dougan to Partnership Lindfield is described by Mr Dougan as the 'wholesale price', but it was largely determined by reference to market prices of comparable wines and production costs were only a factor. It is not a reflection of the costs of production of the wines. SCEA Robert Dougan's tax returns reflect its trade as a wine maker, including its sales of wine to Partnership Lindfield.

42. Partnership Lindfield's trade is the promotion, marketing and sale of La Pèira wines. Mr Dougan estimated that Partnership Lindfield's sale prices were about 30% more than the wholesale price in the relevant tax years. Partnership Lindfield required the services of SCEA Robert Dougan to promote, market and sell the wines. The services were largely provided by Jeremie Depierre in the tax years the subject of this appeal. He ensured that Partnership Lindfield was informed about all the relevant advice, information and decisions made in the business that would be relevant to promotion, marketing and sale of the wine, including passing on the advice provided by experts such as Claude Gros, Chuck House and Mr Trovell of Vignerons Independent. The fees charged by the experts were paid by SCEA Robert Dougan and not recharged as such to Partnership Lindfield.

43. Mr Dougan relied heavily on the advice from, or passed on by, Mr Depierre to understand matters such as vineyard practice, conditions and decisions so that he could write and speak about the wines to wine experts about vintage conditions, soil types, grape varieties and blends, vinification methods used, harvest dates and wine-aging choices. The advice also covered methods of optimising wine sales and holding successful tastings. Mr Dougan regarded himself as Partnership Lindfield in the UK.

44. Mr Dougan cited the rates charged by wine consultants, including a press article about rates in excess of $100,000 US per year for three or four visits and high rates for Bordeaux based experts that he had contacted. Mr Lewy cited fees of between $3,000 and $10,000 per month for regular (i.e. non-leading) consulting winemakers.

Timeline

45. The vineyard was acquired in late 2004. While Mr Dougan had the choice of selling the product as grapes, or as newly vinified wine to a 'negotiant', the higher prices and profits would come from making high quality wines that were farmed, vinified, aged and bottled by the business. This process takes around two and a half to three years (12 months farming and vinification and around 18 months for aging and bottling). This meant that the earliest the wines could be assessed by merchants, critics and the market would be mid-2007.

46. In early 2005 Mr Dougan and his wife engaged Mr Jeremie Depierre as the vineyard manager of SCEA Robert Dougan. After a meeting in June 2005, Mr Dougan wrote to Mr

Depierre setting out their objectives for the year. These were to have a chai with equipment delivered, to undertake the same level of vineyard work as leading producers and to prepare for a successful harvest.

47. In April and May 2005 Mr Dougan sought advice from SRLV about the structure for his new wine business as noted above. In June 2005 both SCEA Robert Dougan and Partnership Lindfield were established.

48. SCEA Robert Dougan engaged the services of Mr Claude Gros in 2005. Mr Gros is an experienced oenologist.

49. In June 2006 Mr Dougan emailed Mr Depierre with the final choice of three possible names for the domaine. The name chosen was La Pèira.

50. The Tribunal was provided with a copy of a document from Chuck House to Mr Dougan dated 20 August 2006 at the beginning of the hearing. This shows that SCEA Robert Dougan instructed Chuck House design agency to design the bottle, labels and capsule. The document does not specify the timing of the work or payment.

51. In February and March 2007 Mr Dougan sent emails (on Robert Dougan Productions letterhead) to wine critics inviting them to attend the first tasting of La Pèira en Damaisela's 2005 and 2006 vintages in April 2007. Mr Dougan described the business as run by a small team consisting of "Jeremie Depierre (a young vigneron with training stints at Chateau Margaux, Moet & Chandon, Chateau Guiald), Karine Ahton (a French-Chinese lawyer from Montpellier) and myself". Karine Ahton is Mr Dougan's wife. Mr Dougan also wrote that the business works with "Claude Gros (Clos Truffieres, Chateau de la Negly) as consultant oenologist".

52. The wine tasting in early April 2007 was of sample bottles from preliminary bottling of 100-200 bottles for importers and critics. The hearing bundle includes a letter from Mr Gros dated August 2016 in which he confirms that he approached various importers in concert with Mr Dougan, and that Jeffrey Davis/Signature Selection offered to buy 50% of the first three years' wine production. This offer was made and accepted before the wine was bottled in 2008, but reflected the tasting of the preliminary bottles in April 2007.

53. Mr Dougan prepared a business plan for SCEA Robert Dougan. It was described in correspondence with HMRC as a pitch for securing a bank loan. The marketing strategy section of the business plan clearly refers to the plan to send wines to critics such as Neal Martin (Robert Parker), le Guide Hachette, Jancis Robinson, Decanter and Wine Spectator. This is consistent with Mr Dougan's evidence.

54. The business plan includes a calendar of what has been achieved to date and what is planned. The entry for 2007 that confirms Mr Dougan's evidence that La Pèira's wines were first presented at a tasting in April 2007 and that there were negotiations of contracts for the distribution and sale of the wines in 2007. It refers to the excellent reception of the wines at the tasting and contracts with importers and distributers for the sale of the entire 2005 and 2006 vintages in the next 4-6 months.

55. The bundle includes invoices on La Pèira en Damaisela letterhead that state that they are from Lindfield Partnership to the wine buyer concerned. The earliest such invoice included is dated April 2008. The bundle also includes an invoice from SCEA Robert Dougan to Partnership Lindfield for wine.

56. The wines were trade-marked in January 2008, and the brochures were printed in February 2008. The final pricing was agreed pre bottling in 2008. The print runs of the labels

and foils were approved in early 2008. The first bulk bottling of wines was in early 2008. Partnership Lindfield opened a bank account in June 2008.

Penalties

57. Mr Dougan states that he did not receive notices of any of the penalties and surcharges listed in the Appendix at l09 Rotherhithe Street. Mr Dougan paid amounts demanded by HMRC, whether on statements of account or otherwise, that included debts in respect of penalties and surcharges that had been raised by HMRC, but he did not notice that he was paying amounts in respect of penalties and surcharges. He did however understand from his accountants, SRLV, that there was a risk that HMRC would raise behaviour based penalty assessments. These have not been issued to date.

58. As referred to above, Mr Dougan and his representatives included a generalised appeal against penalties when filing the appeal to the Tribunal. No appeal was made to HMRC in respect of the penalties. HMRC required the appeal to be specified, but Mr Dougan claimed that he could not do this as he had not received the notices. Following a case management hearing before Judge Beare on 8 February 2018, directions were issued requiring HMRC to file a list of all the determinations and notices relating to penalties and surcharges which HMRC allege to have issued to Mr Dougan in relation to the tax years 2004/05 to 2012/13 (inclusive), together with details of the dates on which, and the addresses to which, such determinations and notices were alleged to have been sent.

59. In response to this direction Mr Bracegirdle prepared a schedule setting out all of the surcharges and penalties charged for the years concerned ("the Penalties Schedule"). An abbreviated version of the Penalties Schedule is set out in the Appendix. Mr Bracegirdle's response to the directions stated that all of the original notices had been issued to Mr Dougan at 107 Rotherhithe Street, and added that this address "was shown as White Walks, 107 Rotherhithe Street until 20 May 2007, when the 'White Walks' part of the address was removed." Mr Dougan's representative's response to Mr Bracegirdle's submission was that his address was 109 Rotherhithe Street and not 107 Rotherhithe Street. Mr Bracegirdle then responded that his earlier submission was an error as HMRC's records referred to 109 and not 107.

60. Mr Lewy took us through the information in HMRC's systems records produced by Mr Bracegirdle. Mr Lewy submits that the fixed penalties were not referred to by Mr and Mrs McGee until March 2014. Neither officers' witness statement refers to service of the notices or even lists them. In terms of HMRC's computer records, Mr Lewy noted an entry on 25 May 2004 recording a call with Mr Dougan in which he said that his address is 109 Rotherhithe Street, and that although White Walks is the name of the house, it is not displayed. Mr Dougan confirmed at the hearing that the name of the house is The Whiteworks, not White Walks. On 20 May 2007 HMRC noted a change of address from 'White Walks', suggesting that they had been using this address until then, but no new address is shown on the TBS record in May 2007 and so it appears that the 'White Walks' address continued to be used by HMRC for some purposes. The next entries concerning Mr Dougan's address in TBS are in May 2016. Mr Lewy took us to two letters from HMRC dated 2013 that were addressed to Mr Dougan at different addresses. One was addressed to 'The White Works' and the other was correctly addressed to 109 Rotherhithe Street. We find that HMRC held two addresses on their system for Mr Dougan at that time.

61. Mr Dougan accepts that the penalties for the tax years 2010/11 and 2011/12 (which were issued under Schedule 55) were sent to his accountants, SRLV, but HMRC failed to give notice to him as the taxpayer. Mr Dougan also claims that if his payment on account of £261,885.51

in April 2014 were to be allocated to tax years that were not in dispute, this would impact the question of whether the penalties are due or their quantum.

62. Mr Bracegirdle made submissions at the hearing in relation to the content of the Penalties Schedule. He explained that HMRC do not retain copies of notices issued to taxpayers. He had prepared the Penalties Schedule using information in HMRC's systems. One system is TBS and the other is the case notes. Some of the documents referred to by Mr Bracegirdle are not posted to taxpayers, but only available to view online. He explained that the dates in the columns headed "date charge raised" were calculated by reference to the "due date" shown in HMRC's records on the basis that the due date would be 28 days (plus 7 days) after the issue date. The column headed "issue date of statement when first shown" refers to the issue date of the first statement on which the relevant penalty was shown. It became apparent that this column in the Penalties Schedule was intended to comply with Judge Beare's direction to list the dates on which the penalty notices had been sent by listing (in respect of the earlier tax years) the dates of notification of the amount of the penalties outstanding within a statement of account sent to Mr Dougan. This concerned the Tribunal, and we considered the evidence that HMRC had put forward in support of service of the penalty notices in detail.

RELEVANT LAW

63. The law applicable to the issues the subject of this appeal is set out in the context of the consideration of each of the issues.

64. The burden of proof is that HMRC must first establish that the conditions for the issue of the discovery assessments have been satisfied. If HMRC establish that a discovery assessment is validly issued, it is then for Mr Dougan to establish if, or the extent to which, HMRC's figures in the discovery assessments overcharge him, in which case the Tribunal may reduce the assessments or figures accordingly, increase them if they undercharge him, but otherwise they stand good.

65. The burden of proof in relation to the penalties is that HMRC must establish that they have been validly issued. It is then for Mr Dougan to establish his grounds of appeal.

66. The standard of proof is the ordinary civil standard of the balance of probabilities.

67. The following cases are referred to in context below:

The Birmingham & District Cattle By-products Co, Ltd v The Commissioners of Inland Revenue [1919] 12 TC 92 ("Birmingham Cattle")

Kirk and Randall, Limited v Dunn [1924] 8 TC 663 *("Kirk and Randall")*

Mallalieu v Drummond [1983] 2 All ER 1095 ("Mallalieu")

Mansell v HMRC; SpC 551 [2006] STC (SCD) 605 ("Mansell")

Romasave (Property Services) Ltd v Revenue and Customs Commissioners [2015] UKUT 254 (TCC) ("Romasave")

Anthony Clynes [2016] UKFTT 369 (TC) ("Clynes")

Tooth v HMRC [2019]EWCA Civ 826 *("Tooth")*

Ransom v Higgs [1974] 3 All ER 949 *("Ransom v Higgs")*

Earlspring Properties Ltd v Guest [1993] STC 473 *("Earlspring")*

Wannell v Rothwell [1996] S.T.C. 450 ("*Wannell*")

Barry Edwards v HMRC [2019]UKUT 131 *("Barry Edwards")*

William Martland [2018] UKUT 178 (TCC) ("Martland")

DISCUSSION

68. We have applied the relevant law and authorities to our findings of fact in order to decide each of the issues to be determined in this appeal.

1. Discovery assessments: Limitation - deliberate or careless behaviour

69. The discovery assessments the subject of this appeal were made under section 29(1) TMA. As Mr Dougan had not filed returns in respect of the relevant tax years at that time, the provisions of subsections (2) and (3) were not in point. Section 29(1) TMA provides 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 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."

70. Section 36 TMA sets out the time limit applicable to the issue of section 29 discovery assessments as follows:

> "(1)An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).
>
> (1A)An assessment on a person in a case involving a loss of income tax or capital gains tax —
>
> (a)brought about deliberately by the person,
>
> ….
>
> may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period)."

71. Section 31 TMA allows an appeal to be brought against an assessment under section 29 TMA. Section 50 TMA sets out the procedure for an appeal against an assessment as follows:

> "… (6) If, on an appeal notified to the tribunal, the tribunal decides-
>
> (a) that, . . ., the appellant is overcharged by a self-assessment;
>
> (b) that, . . ., any amounts contained in a partnership statement are excessive; or
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.
>
> (7) If, on an appeal notified to the tribunal, the tribunal decides-
>
> (a) that the appellant is undercharged to tax by a self-assessment…;

> (b) that any amounts contained in a partnership statement . . . are insufficient; or
>
> (c) that the appellant is undercharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be increased accordingly."

72. As summarised in paragraph 64 above, HMRC need to demonstrate that the discovery assessments were properly made by reference to the applicable requirements of section 29 and the time limits in section 36 TMA.

73. We accept that HMRC have established that HMRC officer Mark McGee issued the discovery assessments to Mr Dougan in accordance with section 29 following the discovery that the determinations that had been issued by HMRC were likely to be insufficient as returns had not been filed. Mr Dougan does not dispute that a discovery was made. The discovery assessments were issued to the correct address and received by Mr Dougan.

74. HMRC submit that the discovery assessment were issued in accordance with the extended 20 year time limit in section 36(1A)TMA as the loss of income tax was brought about by the taxpayer deliberately. The discovery assessments were issued by HMRC officer Mark McGee and then checked by HMRC officer Mrs Sally McGee. Both officers considered that Mr Dougan's behaviour could be treated as deliberate. They concluded that Mr Dougan had made a conscious decision not to complete his returns or respond to Mr McGee's letters knowing that his debt to HMRC would be greater if he responded. Mr Bracegirdle summarised HMRC's position as being that an intention to bring about a loss of tax can be an intention not to file returns that would show the taxpayer's correct higher liability, and that prioritising his business affairs over preparation of his tax returns was a choice and deliberate act.

75. Mr Bracegirdle's submissions focussed on the definition of deliberate in the case of *Clynes*, citing the following extract from the decision [at para 82] concerning its normal meaning following a consideration of the definition in the Oxford English dictionary:

> "On its normal meaning, therefore, the use of the term indicates that for there to be a deliberate inaccuracy on a person's part, the person must to some extent have acted consciously, with full intention or set purpose or in a considered way."

76. Mr Lewy's submission highlighted the fact that in *Clynes* the FTT was considering an inaccuracy in a document that had been filed by the taxpayer. In contrast, Mr Dougan has not filed an inaccurate document and the Tribunal should consider the more recent and binding authority of the Court of Appeal in *Tooth*, that was upheld in the Supreme Court. In particular he referred us to the following passage [at para 86]:

> "The deliberateness requirements of s 29(4) and 36(1A)(a) require HMRC to prove that the taxpayer intended to bring about a particular fiscal result. In the case of s 29(4) it is an intention to bring about a situation in which an assessment to tax is insufficient, and in the case of s 36(1A)(a) it is an intention to bring about a loss of tax."

77. As the Court of Appeal in *Tooth* went on to make clear in the subsequent sentences of that paragraph, in cases concerning an inaccuracy in a document or filing, the deeming provision in section 118(7) TMA "means that HMRC can establish the relevant intention by showing that there was a deliberate inaccuracy in a document given to HMRC by or on behalf of the taxpayer, and that the loss of tax followed 'as a result of' the deliberate inaccuracy. That is no more than what the language of the statute conveys. It follows that the enquiry about the taxpayer's intention stops once it is established there is a deliberate inaccuracy in a document.

Thereafter one enquires into whether the loss of tax or other situation occurred as a result of the inaccuracy. That is simply a question of factual causation."

78. We agree with Mr Lewy that *Tooth* is authority that HMRC must prove that the taxpayer deliberately intended to bring about a loss of tax and that there is no deeming provision applicable. It is not enough to establish that a taxpayer is late in filing his tax returns, with the result that HMRC do not receive the information required to assess him. It is not enough to establish that the failure to file returns was a conscious act, or even that the conscious act brought about a loss of tax. The test requires HMRC to prove that the taxpayer deliberately intended to bring about a loss of tax.

79. The facts in this case are that Mr Dougan did not address his tax responsibilities and that his focus was on his new wine business, young family and litigation in relation his music business. Mr Dougan has a history of late filing of tax returns, and so it is surprising that this did not prompt earlier investigation by HMRC, but Mr Dougan had periodically caught up with his UK tax filing in the past, and we found that this was Mr Dougan's intention in relation to the years under appeal. He met with his UK accountants regularly and sought to provide them with the necessary paperwork. He believed that HMRC were aware of his music income, and he believed that his UK tax liability would be offset by his losses from the new wine business.

80. We did not find HMRC's suggestion that Mr Dougan either planned to file no returns or to otherwise ensure that HMRC were time-barred from assessing his income is supported by the facts. On the contrary, Mr Dougan's tax planning was based on claiming loss relief in his tax returns and he simply failed to ensure that it happened when it should.

81. Applying the test in *Tooth* to the facts, we concluded that Mr Dougan did not intend to bring about a loss of tax. We found Mr Dougan's evidence clear and consistent on this issue. Mr Dougan behaviour was careless, but not deliberate for the purposes of section 36 TMA.

82. As a result the discovery assessments for 2004/05 and 2005/06 were not issued within the time limit in section 36 TMA and are not valid.

83. The discovery assessment for 2006/07 was validly issued within 6 years in accordance with section 29 and section 36(1)TMA as Mr Dougan's behaviour was careless.

2. Loss claims

84. Having established that the discovery assessment for 2006/07 was validly issued, the next step is to determine the quantum of Mr Dougan's liability for that year. As set out in paragraph 64 above, Mr Dougan has the burden of establishing his claim that he is overcharged by the assessment and that the Tribunal should reduce the assessment in accordance with its powers under section 50(6) TMA because his loss claims and claims in respect of pre-trading expenses are valid. Mr Dougan did not otherwise challenge the amount of the discovery assessments or HMRC's calculation of the sums due.

85. The losses claims by Mr Dougan were made under Section 384 Income and Corporation Taxes Act 1988 ("ICTA") that provides 'sideways loss relief' as follows:

> "(1) Where in any year of assessment any person sustains a loss in any trade, profession, vocation or employment carried on by him either solely or in partnership, he may, by notice given within twelve months from the 31st January next following that year, make a claim for relief from income tax on— (a) so much of his income for that year as is equal to the amount of the loss or, where it is less than that amount, the whole of that income; or (b) so much of his income for the last preceding year as is equal to that amount or, where it is less than that amount, the whole of that income; but relief shall not be

given for the loss or the same part of the loss both under paragraph (a) and under paragraph (b) above.

…"

86. Mr Dougan claims relief for pre-trading expenses under the following provisions of section 57 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"):

"(1) This section applies if a person incurs expenses for the purposes of a trade before (but not more than 7 years before) the date on which the person starts to carry on the trade ("the start date").

(2) If, in calculating the profits of the trade-

(a) no deduction would otherwise be allowed for the expenses, but

(b) a deduction would be allowed for them if they were incurred on the start date,

the expenses are treated as if they were incurred on the start date (and therefore a deduction is allowed for them)."

87. Mr Dougan's claim for loss relief in respect of the losses and expenditure of Partnership Lindfield is made pursuant to the provisions of section 852 ITTOIA that provide as follows:

"(1) For each tax year in which a firm carries on a trade (the "actual trade"), each partner's share of the firm's trading profits or losses is treated, for the purposes of Chapter 15 of Part 2 (basis periods), as profits or losses of a trade carried on by the partner alone (the "notional trade").

(2) A partner starts to carry on a notional trade at the later of –

(a) when becoming a partner in the firm, and

(b) when the firm starts to carry on the actual trade.

…"

88. As Mr Dougan has claimed his share of Partnership Lindfield's losses against his personal income in the tax years that are the subject of the discovery assessments, the parties have addressed the tax position of Partnership Lindfield to determine when it commenced trading, and whether the fees that it paid to the SCEA Robert Dougan are tax deductible such that Partnership Lindfield has tax losses available for Mr Dougan to set against his personal income using sideways loss relief. Mr Dougan did not challenge HMRC's calculations of his liability other than in relation to the availability of the sideways loss relief and pre-expenditure claims.

2.1 When did Partnership Lindfield commence trading?

89. In order to consider the tax position of Partnership Lindfield, it is necessary to determine when it began trading, and using this date, its first and subsequent basis periods. The general rule and the rules for the first and second tax year are set out in sections 198,199 and 200 ITTOIA as follows:

" Section 198(1) The general rule is that the basis period for a tax year is the period of 12 months ending with the accounting date in that tax year.

(2) This applies unless a different basis period is given by one of the following sections:

section 199 (first tax year),

section 200 (second tax year), …"

> "Section 199 (1) The basis period for the tax year in which a person starts to carry on a trade
>
> (a) begins with the date on which the person starts to carry on the trade, and (b) ends with 5th April in the tax year.
>
> …"
>
> "Section 200 (1) The basis period for the second tax year in which a person carries on a trade is determined as follows.
>
> (2) If in that tax year
>
> (a) the accounting date falls less than 12 months after the date on which the person starts to carry on the trade, and
>
> (b) the person does not permanently cease to carry on the trade,
>
> the basis period is the period of 12 months beginning with the date on which the person starts to carry on the trade.
>
> (3) If in that tax year
>
> (a) the accounting date falls 12 months or more after the date on which the person starts to carry on the trade, and
>
> (b) the person does not permanently cease to carry on the trade,
>
> the basis period is that given by the general rule in section 198.
>
> …"

90. HMRC submit that Partnership Lindfield did not commence trading until the tax year 2007/08.

91. Mr Dougan claims that Partnership Lindfield began trading as soon as it was established. He claims that it began trading when SCEA Robert Dougan began to take in raw materials and to turn out its product, and it began to promote, devise, market and distribute that product. Mr Lewy conceded that Partnership Lindfield did not commence trading in 2004/05, and he asked the Tribunal to determine whether it commenced in 2005/06 or 2006/07. Mr Lewy provided the Tribunal with draft calculations showing the effect on the availability of loss relief and relief for pre-trading expenditure if trading commencing in 2005/06 or if it commenced in 2006/07.

92. The parties referred us to the decisions of Rowlatt J in the High Court in *Birmingham Cattle* and *Kirk and Randall*, and to the decision of Special Commissioner Charles Hellier in *Mansell* that includes a detailed analysis of the case law and conclusions on the applicable principles. These conclusions include [at paragraphs 89-94] the following points that were accepted by both parties:

> "First before the trade can be said to commence, there must be a fairly specific concept of the type of activity to be carried on."
>
> "Second: an activity which consists merely of a review of the possibilities in the expectation or hope that information will be obtained to justify going into a business of some kind is not the carrying on of a trade."
>
> "Third: it is not always necessary that a sale is made or a service supplied before a trade can be said to be commenced."
>
> "It seems to me that a trade commences when the taxpayer, having a specific idea in mind of his intended profit making activities, and having set up his business, begins operational activities - and by operational activities I mean dealings with third parties immediately and directly related to the supplies to

> be made which it is hoped will give rise to the expected profits, and which involve the trader putting money at risk: the acquisition of the goods to sell or to turn into items to be sold, the provision of services, or the entering into a contract to provide goods or services: the kind of activities which contribute to the gross (rather than the net) profit of the enterprise. The restaurant which has bought food which is in its kitchen and opens its doors, the speculator who contracts to sell what he has not bought, the service provider who has started to provide services under an agreement so to do, have all engaged in operational activities in which they have incurred a financial risk, and I would say that all have started to trade."

93. The legislative context in this case is set out in section 199 ITTOIA as it that determines the first basis period of a trade as beginning "with the date on which the person starts to carry on the trade".

94. It was acknowledged by both parties that due to the passage of over 15 years, there is limited documentary evidence available to assist the Tribunal in determining the date of commencement of the wine business. We had the benefit of Mr Dougan's witness evidence, but we found that he had some difficulty in differentiating between the activities of SCEA Robert Dougan and those of Partnership Lindfield, and that many of the documents produced relate to SCEA Robert Dougan's trade. As noted in paragraph 40 above, Mr Lewy accepts that not all of the advice on the structure provided by SRLV was followed. We found that this explained a level of blurring between the activities which Mr Dougan carried out as director of SCEA Robert Dougan and those he carried out as a partner in Partnership Lindfield. We therefore sought to identify Partnership Lindfield's trade first, and from there we determined when it commenced.

95. Applying the statute and case law to our findings of fact in this case, we considered that the following points as key indicators:

(1) Partnership Lindfield's trade is the promotion, marketing and sale of La Pèira wines. Mr Lewy described Partnership Lindfield's trade as focused on bringing the wines to market.

(2) SCEA Robert Dougan is responsible for the administration and execution of all agricultural and winegrowing endeavours and/or activities in the vineyard and/or in France. SCEA Robert Dougan is to bring its expertise, knowledge and know how in the production of wine in the vineyard to Partnership Lindfield.

(3) The decision to produce wine rather than to sell the grapes, the establishment of the wine making equipment, the advice about the preparation of the vineyards and blending were made by SCEA Robert Dougan for its business. The decisions made were then communicated to Partnership Lindfield for its business.

(4) The timeline set out in paragraphs 45-56 inclusive above.

96. Mr Dougan had a clear idea of the wine business to be carried on by SCEA Robert Dougan and Partnership Lindfield together, but he did not differentiate between his roles, perhaps for the reasons cited in paragraph 94 above. For example, his invitations to the first wine tasting were written in his own name of Robert Dougan Productions letterhead (his music sole trader business). The business plan to raise funds for SCEA Robert Dougan does not clearly refer to Partnership Lindfield, but to Mr Dougan and his wife in the UK. Similarly, Mr Dougan refers to his input in matters such as the design of labels, but this was in relation to advice sought and obtained by SCEA Robert Dougan for its wine production business.

97. We considered all of the documentary evidence produced and concluded that the steps taken by Partnership Dougan in 2004, 2005 and 2006 were preparatory steps, mostly limited

to receiving information from SCEA Robert Dougan. In February and March 2007 Mr Dougan sent invitations to third parties to attend the tasting in April 2007. While this was arguably a "dealing with third parties" as described in *Mansell*, this step was not a supply and did not involve the trader putting money at risk. As Lords Wilberforce and Cross commented [at p.6 and p.25 respectively] in *Ransom v Higgs*:

> "Trade, moreover, presupposes a customer (to this too there may be exceptions, but such is the norm), or, as it may be expressed, trade must be bilateral - you must trade with someone."
>
> "A man cannot be trading or engaged in an adventure in the nature of trade unless there is someone with whom he is trading - someone to whom he supplies something such as goods or services for some return."

98. The tasting invitations introduced the wines to be brought to the market, but they did not commit Partnership Lindfield to provide goods or services for payment at that time. Partnership Lindfield was not providing a service to SCEA Robert Dougan in April 2007 or others at that time. The position was that SCEA Robert Dougan was trading and obtaining expert advice for its business, for example in relation to the vineyard work, blending, equipment and bottle design, and it passed on the information and advice received to Partnership Lindfield. Partnership Lindfield used the information provided for the first tastings, but this was preparatory to the commencement of its operations.

99. The business plan lists the negotiation of distribution and sale contracts with importers and distributors as taking place in 2007. No details are provided, but it is possible that this refers to the offer by Jeffrey Davis to buy 50% of the first three years' wine production following the first tasting. This is consistent with the evidence listed in the timeline that the contracts and sales followed in the months following the April 2007 tasting.

100. As we have highlighted throughout this decision, both parties are hampered by the paucity of contemporaneous evidence, partly because of the passage of time and partly because much of activity was carried out in person or by telephone. However, taking account of the evidence available, we consider that on the balance of probabilities Partnership Lindfield commencing trading after 5 April 2007. The basis period for its first year of trading is 2007/08.

2.2 Consultancy fees – wholly and exclusively?

101. On the basis of our conclusions that Partnership Lindfield did not commence trading until after 5 April 2007, the first year in which losses may arise is 2007/08. The section 28C determination for this year is final and HMRC have confirmed that the discovery assessment should be cancelled. The question of the tax deductibility of the SCEA Robert Dougan's consultancy fees for Partnership Lindfield is therefore not relevant to this decision, but as we were asked to address this issue, we have gone on to set out our findings on this issue for completeness.

102. The relevant law in relation to the deductibility of expenses changed on 6 April 2005. Until 5 April 2005, for the tax years 2004/05 and 2005/06 section 74 ICTA 1988 provided as follows:

> "(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;
>
> …"

103. Since 6 April 2006, and for the tax year 2006/07 onwards, section 34 ITTOIA is the relevant provision and it 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.

104. Any expenditure incurred that is disallowed because it was not incurred wholly and exclusively for the purposes of the trade does not qualify as pre-trading expenditure for the purposes of section 57 ITTOIA.

105. HMRC claim that the consultancy fees charged by SCEA Robert Dougan to Partnership Lindfield in the relevant tax years are not deductible. HMRC submit that the fees were not incurred wholly and exclusively for the purposes of the partnership's trade. HMRC submit that the purpose of acquiring knowledge and advice from SCEA Robert Dougan was either a purpose of Mr Dougan personally, or a purpose of SCEA Robert Dougan which, presumably, required a director who had some knowledge of the trade it carried on. HMRC also submit that although they accept that Partnership Lindfield was trading with a view to a profit, the trade was not being conducted on a commercial basis, that the services and fee were not on an arm's length basis and that the fees were charged by reference to the production expenses of SCEA Robert Dougan in order to obtain a UK tax deduction for Mr Dougan. HMRC also refer to SRLV describing the invoices as being for the production of the wines.

106. Mr Dougan claims that the consultancy fees were wholly and exclusively incurred for the purposes of Partnership Lindfield's trade that is and has always been conducted on a commercial basis.

107. We established that Mr Depierre was required to consult with Mr Dougan in relation to decisions concerning SCEA Robert Dougan. Mr Dougan received updates and advice in this capacity. Mr Depierre also provided information and advice to Partnership Lindfield by speaking with Mr Dougan, passing on advice from the experts SCEA Robert Dougan had engaged and his personal knowledge. The fact that Mr Dougan was a director of one entity and a partner of the other does not mean that all of the information or advice was for one or other purpose or for Mr Dougan personally as HMRC allege, but focused our fact finding on the purpose and content of the advice.

108. In considering HMRC's submission that the consultancy advice provided a personal benefit to Robert Dougan, we were guided by the House of Lords' decision in *Mallalieu*. This concerned the question of whether the expenditure by a practising barrister on the purchase and cleaning of black tights, black shoes, black suits, black dresses and white shirts was deductible. We were referred to the following passages in Lord Brightman's decision [p. 1100 and p.1103]:

> "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."
>
> "But she needed clothes to travel to work and clothes to wear at work, and I think it is inescapable that one object, though not a conscious motive, was the

> provision of the clothing that she needed as a human being. I reject the notion that the object of a taxpayer is inevitably limited to the particular conscious motive in mind at the moment of expenditure. Of course the motive of which the taxpayer is conscious is of a vital significance, but it is not inevitably the only object which the Commissioners are entitled to find to exist. In my opinion the Commissioners were not only entitled to reach the conclusion that the taxpayer's object was both to serve the purposes of her profession and also to serve her personal purposes, but I myself would have found it impossible to reach any other conclusion.

109. We applied this guidance to our findings of fact and concluded that Partnership Lindfield's purpose or motive in paying for consultancy fees was not to educate Mr Dougan in the wine business. Mr Dougan did not require or benefit from this consultancy advice as an individual. He operated two businesses on a commercial basis in the relevant tax years, and whereas his music business was as a sole trader, the wine business was run through two separate legal entities.

110. We the considered HMRC's submission that Partnership Lindfield's trade was not conducted on a commercial basis once it began. This submission focuses on the amount of the consultancy fees paid to SCEA Robert Dougan as being indicative of non-commercial activity.

111. Mr Lewy's referred the Tribunal to the following passage in Robert Walker J's decision in *Wannell* [at p.13]:

> "A trade may be conducted in an uncommercial way either because the terms of trade are uncommercial (for instance, the hobby market-gardening enterprise where the prices of fruit and vegetables do not realistically reflect the overheads and variable costs of the enterprise) or because the way in which the trade is conducted is uncommercial in other respects (for instance, the hobby art gallery or antique shop where the opening hours are unpredictable and depend simply on the owner's convenience). The distinction [between commerciality and un-commerciality] is between the serious trader who, whatever his shortcomings in skill, experience or capital, is seriously interested in profit, and the amateur or dilettante."

112. Our finding on this issue is that although Mr Dougan was a newcomer to the wine business in the relevant tax years, he always intended to establish a leading and profitable wine business. His claim is evidenced by both the success of La Pèira wines and the positive wine press articles throughout the relevant periods. Once the business commenced trading, it was with a view to making a profit.

113. We do however agree with HMRC that the amount of the consultancy fees is high and that each invoice for the relevant tax years represents a significant proportion, albeit not exactly 95% of SCEA Robert Dougan's costs. This concerned us given the comment in SRLV's advice on structure that "towards of the end of the accounting period the SCEA Robert Dougan will make a management charge to the partnership for, say, 95% of these costs" (see para 33 above). We therefore considered whether the amount of the invoices suggests that they were not wholly and exclusively incurred for the purposes of the trade despite our findings that there was no personal motive for Mr Dougan's wine education.

114. Mr Dougan produced a narrative for the services provided by SCEA Robert Dougan in later tax years, but he does not have this information for the much larger invoices in the tax years the subject of the discovery assessments. He described the amount of the fee as being discussed each year, but he could not explain the methodology used to arrive at the amount charged. He referred to it being a market rate or much less than named wine experts might charge, or being exceptional value in his opinion.

115. Mr Lewy provided us with evidence of fees charged by consulting winemakers ranging from $3,000 to $10,000 per month. Mr Claude Gros charged SCEA Robert Dougan about 12,000 euros per annum, providing his services several days per annum. Mr Jeremie Depierre has relevant experience, but he was in his twenties when he was employed by SCEA Robert Dougan and this was his first opportunity to manage a vineyard. Mr Dougan provided us with articles about the amounts charged by top winemakers in the US.

116. We accept from Mr Dougan's evidence that Partnership Lindfield required information and advice from SCEA Robert Dougan in order to be able to promote and market the wines to experts. The wines could not be sold by Partnership Lindfield as a recognised wine; the importers and buyers of fine wines that are not yet known in the market require information about matters such as the vineyard and production and this information and advice was required to be provided to Partnership Lindfield. However, we do not accept that the full amounts charged represent reasonable payment for these services.

117. Mr Lewy referred the Tribunal to *Earlspring* and *Ransom v Higgs* as authority that if the Tribunal considered that the fees were not deductible because of the amounts charged, it might consider an apportionment. He suggested that at least £55,500 pa of the fee should be deductible because it was included in tax computations and not challenged by HMRC in later tax years. Mr Lewy also suggested that if SCEA Robert Dougan had not charged fees, it could have had transfer pricing issues in France. Mr Bracegirdle submits that such an apportionment is only applicable in cases of excessive remuneration and that the only question is whether the payment is wholly and exclusively for the purposes of the trade. Mr Bracegirdle also noted that the amounts concerned had not been accepted by HMRC as such, but rather there had been no enquiries into the tax years concerned.

118. As we have found that Partnership Lindfield had not commenced trading in the relevant tax years, we agree with Mr Bracegirdle that the fees paid could not have been for the purposes of the trade. If we are wrong in our finding about the date of commencement of trading, we consider that the evidence supports identifying a proportion of the consultancy fees for each year that were incurred wholly and exclusively for the purposes of the trade. We concluded on the balance of probabilities that £55,500 pa of the total amount of fees charged in the relevant tax years represents a fair estimate of the reasonable fees for the services provided. We arrived at this figure by reference to the fair comparison with the rate of $3,000 pm for a non-leading (and in Mr Depierre's case relatively inexperienced) winemaker, plus the cost of passing on the advice of Mr Claude Gros and others in France, and it is consistent with the amounts charged in later years.

3. Penalties

119. Before considering the validity of the surcharges and penalties listed in the Appendix and any appeal, a number of specific penalties and surcharges can be dealt with as a preliminary point:

(1) As we have decided that the discovery assessments for 2004/05 and 2005/06 are not valid, the late payment surcharges for those years listed in the Appendix are cancelled. The late return penalties are not affected by the cancellation of the discovery assessments.

(2) As explained in paragraph 19 above, HMRC have agreed that the determination for 2004/05 should be cancelled. The associated penalties of £790 (in total) listed in the Appendix are cancelled.

(3) HMRC agreed before the hearing that the discovery assessment for 2007/08 should be cancelled. As in the case of the penalties for 2004/05, the cancellation of the assessment for 2007/08 does not affect the late return penalties.

120. Mr Dougan claims that the penalties and surcharges listed in the Penalties Schedule were not properly notified to him. He submits that they are not valid and should be cancelled.

121. HMRC submit that they notified Mr Dougan about all of the penalties and surcharges listed in the Appendix by posting the notices to 109 Rotherhithe Street. Mr Bracegirdle produced system evidence to support his submissions. This shows self-assessment statements of account issued to Mr Dougan and screenshots of breakdowns of penalties and surcharges, 'View/ Cancel Penalties' or 'Amend Fixed Penalties' by tax year. Mr Bracegirdle submits that the penalties set out in the Penalties Schedule (and set out in the Appendix) were notified to Mr Dougan on the dates stated in the schedule, and that Mr Dougan requires permission to make a late appeal against the penalties as no appeal has been received by HMRC. An HMRC witness statement that had been produced for a case management hearing was withdrawn and not included in the hearing bundle.

122. The penalties and surcharges set out in the Penalties Schedule are in respect of the late filing of returns and the late payment of tax. They were charged under section 59C and 93 TMA in respect of the tax years 2004/05 to 2009/10 and Schedules 55 and 56 Finance Act 2009 in relation to 2010/11 and later years. Section 31A TMA sets out the time limit for an appeal of 30 days from when the notice was issued. Section 115 TMA provides that any notice to be given may be served by post, addressed to that person at his usual or last known place of residence. The relevant provisions for the penalties charged under the Finance Act 2009 are that HMRC must notify the taxpayer of any penalty assessed.

123. In terms of the question of whether the notices had been served, section 7 of the Interpretation Act 1978 provides that "where an Act authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

124. Mr Lewy argued that an application for permission to make a late appeal was not appropriate in these circumstances, but he conceded that as the appeal did not specifically address the penalties, Mr Dougan wished to apply for permission to make a late appeal against the penalties if and to the extent that the Tribunal determined that the penalties were properly notified.

125. We considered that as the Tribunal could only address the issue of the penalties if it was the subject of an appeal to the Tribunal, the first step was to consider the application for permission to make a late appeal, and as a first step in that context, when and if the penalty notices were properly notified. In order to decide whether to give Mr Dougan permission to make the late appeal against the penalties, we followed the guidance provided by the Upper Tribunal in *Martland*. The Upper Tribunal provided the following guidance to the Tribunal [at paragraphs 44-45]:

> "44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in Denton:

> (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that 220 17 applications can be granted for very short delays without even moving on to a consideration of those stages.
>
> (2) The reason (or reasons) why the default occurred should be established.
>
> (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.
>
> 45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. …"

126. Applying the guidance provided in Martland to our findings of fact, we reached the following conclusions:

(1) Length of the delay

127. If HMRC can establish that the notices were served on the dates shown under the heading "issue date of statement when first shown", the length of the delay ranged from 11 years to 3 years by reference to the date of filing of the appeal with the Tribunal 2014. This is clearly a "serious and significant" delay as described in *Romasave* and referred to in *Martland*.

128. However, we did not accept that the notices were necessarily served on the dates alleged by Mr Bracegirdle. We were referred to the decision of the Upper Tribunal in *Barry Edwards* that addressed the question of whether HMRC had demonstrated that notices had been properly addressed and sent to the taxpayer. HMRC accepted that if we found that the notices had not been properly notified, they are invalid and the question of an appeal or the lateness of an appeal falls away.

(2) The reasons why the default occurred

129. Mr Dougan claims that the reason for the delay in making the appeal is that the notices were not served. HMRC submit that Mr Dougan was in any event aware of the penalties as he paid them as part of the amounts shown as due on statements of account.

(3) Evaluation of all the circumstances of the case

130. We have considered any obvious strengths or weaknesses of a substantive appeal against the assessments in the context of our overall evaluation of the circumstances of the case. We have taken account of "the prejudice which would be caused to both parties by granting or refusing the permission" in the balancing exercise required by *Martland*. We recognise that HMRC would be prejudiced if we were to allow the late appeal because of the time that has passed, and because of the need for litigation to be conducted efficiently and at a proportionate cost. However, we also consider that Mr Dougan would be significantly prejudiced if HMRC are not required to prove that the penalties are valid. We also accept that there would be no grounds of appeal against the penalties if and to the extent that we find that the notices were properly served.

131. Weighing the relevant factors in the balancing exercise as set out in *Martland*, we considered that it would be in the interests of justice to give permission for the appeal against the penalties and surcharges to be admitted out of time, and in particular for the Tribunal to consider the issue of whether the penalties had been properly served.

132. Mr Lewy confirmed at the hearing that the only grounds of appeal against the penalties and surcharges is that they are invalid as they were not properly served.

133. We applied the guidance provided by the Upper Tribunal in *Barry Edwards* to our findings of fact to determine if the notices had been properly served. We consider that the evidence provided by Mr Bracegirdle as regards the notification of the penalties carries very little weight. The computer records provided simply cite the "charged date", as opposed to when the penalties were notified to Mr Dougan. Mr Bracegirdle sought to rely on the fact that Mr Dougan must have been aware of the penalties as he had paid them as part of the amounts due following the issue of statements of account and he had paid £105.10 as part of a £284,769.49 debt enforcement proceedings. We do not agree. The fact that a taxpayer is aware of a penalty or has paid them does not satisfy the obligation on HMRC to prove that it was properly notified.

134. We found that Mr Dougan's claim that he did not receive the penalties is supported by his credible and consistent evidence that he had not received notice of the penalties, plus two other factors. First, Mr Lewy has identified a number of discrepancies in HMRC's records of Mr Dougan's address and the absence of evidence that they were sent to the correct address. Second, while we accept that other documents, such as statements of account, have been received and actioned by Mr Dougan, we consider that given his method of dealing with demands from HMRC, he would have paid the penalties concerned as and when they were received if they had been notified. It would not be logical to pay statements of account but not small, fixed penalties.

135. We concluded on balance of probabilities that the penalties had not been properly served and should be cancelled.

DECISION

136. The discovery assessments listed in paragraph 2 for the tax years 2004/05 and 2005/06 are cancelled. The £6,000 assessment for 2007/08 is also cancelled as agreed by HMRC.

137. The discovery assessment for the tax year 2006/07 is upheld, but varied to £88,852.40 in accordance with section 50 TMA to reflect Mr Bracegirdle's revised calculations as set out in paragraphs 157 to 161 of HMRC's skeleton argument and in its Statement of Case, taking account of the section 28C determination of £14,701.

138. The penalties and surcharges listed in the Appendix are cancelled.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

139. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

140. This decision has been amended in accordance with Rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The amended decision has been released on the date shown below.

VICTORIA NICHOLL
TRIBUNAL JUDGE

Release date of amended decision: 04 MAY 2022

APPENDIX

PENALTIES SCHEDULE

Year	Description	Original Charge	Due date	Date charge raised	Issue date of statement when first shown
2004/05	1st late return penalty	£100	24/03/2006	17/02/2006	08/03/2006
	2nd late return penalty	£100	12/09/2006	08/08/2006	25/08/2006
	1st late payment surcharge	£395	23/07/2010	18/06/2010	30/06/2010
	2nd late payment surcharge	£395	23/07/2010	18/06/2010	30/06/2010
	1st late payment surcharge	£3,668.32	14/06/2013	10/05/2013	23/05/2010
	2nd late payment surcharge	£3,668.32	15/11/2013	11/10/2013	25/10/2013
2005/06	1st late return penalty	£100	23/03/2007	16/02/2007	28/02/2007
	2nd late return penalty	£100	05/10/2007	31/08/2007	11/09/2007
	1st late payment surcharge	£4,000	14/06/2013	10/05/2013	23/05/2013
	2nd late payment surcharge	£4,000	15/11/2013	11/10/2013	25/10/2013
2006/07	1st late return penalty	£100	25/03/2008	19/02/2008	04/03/2008
	2nd late return penalty	£100	09/09/2008	05/08/2008	18/08/2008
	1st late payment surcharge	£735.05	24/03/2011	17/02/2011	01/03/2011
	2nd late payment surcharge	£735.05	24/03/2011	17/02/2011	01/03/2011
	1st late payment surcharge	£3,514.95	14/06/2013	10/05/2013	23/05/2013
	2nd late payment surcharge	£3,514.95	15/11/2013	11/10/2013	25/10/2013
2007/08	1st late return penalty	£100	24/03/2009	17/02/2009	09/03/2009
	2nd late return penalty	£100	08/09/2009	04/08/2009	20/08/2009
	1st late return surcharge	£2,500	23/03/2012	17/02/2012	02/03/2012
	2nd late payment surcharge	£2,500	23/03/2012	17/02/2012	02/03/2012
2008/09	1st late return penalty	£100	23/03/2010	16/02/2010	02/03/2010
	2nd late return penalty	£100	07/09/2010	03/08/2010	23/08/2010
2009/10	1st late return penalty	£100	22/03/2011	15/02/2011	01/03/2011
	2nd late return penalty	£100	06/09/2011	02/08/2011	30/08/2011
	1st late payment surcharge	£2,087.46	15/11/2013	11/10/2013	25/10/2013
	2nd late payment surcharge	£2,087.46	15/11/2013	11/10/2013	25/10/2013

2010/11	**Late filing penalty**	**£100**	**20/03/2012**	**14/02/2012**	**02/03/2012**
	6 mth late filing penalty	**£300**	**13/09/2012**	**11/09/2012**	**12/09/2012**
	12 mth late filing penalty	**£300**	**28/03/2013**	**19/02/2013**	**07/03/2010**
	Late filing daily penalty	**£900**	**13/09/2013**	**07/08/2012**	**12/09/2012**
	6mth late filing penalty	**£3,720**	**06/03/2014**	**28/01/2014**	**13/03/2014**
	12mth late filing penalty	**£3,720**	**06/03/2014**	**28/01/2014**	**13/03/2014**
	30day late payment	**£157**	**11/07/2013**	**04/06/2013**	**25/06/2013**
	6mth late payment	**£157**	**11/07/2013**	**04/06/2013**	**25/06/2013**
	12 mth late payment	**£157**	**11/07/2013**	**04/06/2013**	**25/06/2013**
	30 day late payment	**£3,863**	**06/03/2014**	**13/03/2014**	**28/01/2014**
	6mthlate payment	**£3,863**	**06/03/2014**	**13/03/2014**	**28/01/2014**
	12 mth late payment	**£3,863**	**06/03/2014**	**13/03/2014**	**28/01/2014**
2011/12	**Late filing penalty**	**£100**	**21/03/2013**	**12/02/2013**	**07/03/2012**
	6mth late filing	**£300**	**20/09/2013**	**14/08/2013**	**12/09/2013**
	6mth late filing	**£3,732**	**06/03/2014**	**28/01/2014**	**13/03/2014**
	Daily penalty	**£900**	**20/09/2013**	**14/08/2013**	**12/09/2013**
	12 mth late filing	**£4,032**	**06/03/2014**	**28/01/2012**	**13/03/2014**
	30 day late payment	**£4,032**	**06/03/2014**	**28/01/2014**	**13/03/2014**
	6mth late payment	**£4,032**	**06/03/2014**	**28/01/2014**	**13/03/2014**
	12 mth late payment	**£4,032**	**03/04/2014**	**28/01/2014**	**13/03/2014**
2012/13	**Late filing penalty**	**£100**	**06/03/2014**	**28/01/2014**	**13/03/2014**
	30day late payment	**£2,879**	**24/04/2014**	**18/03/2014**	**22/05/2014**
	6mth late payment	**£2,879**	**24/09/2014**	**18/08/2014**	**11/09/2014**
	12mth late payment	**£2,879**	**02/04/2015**	**24/06/2015**	**24/02/2015**