[2016] UKFTT 0397 (TC)

TC05151

Appeal number: TC/2014/00021

INCOME TAX – self assessment – closure notices – trade loss relief against general income – whether promotional activity a trade or venture – yes – whether trade commercial within meaning of s 66 ITA 2007 – held, not on commercial basis – also held, not with a view to realisation of profits of trade – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

STEPHEN GRAY **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN CLARK
JOHN ROBINSON

Sitting in public at The Royal Courts of Justice on 17 and 18 February 2016

Patrick Way QC for the Appellant

Alan Hall, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant, Mr Gray, appeals against the decision of the Respondents ("HMRC") to issue closure notices for the years 2011-12 and 2012-13, upheld on review, that his activities as a promoter did not amount to a venture in the nature of trade and that such activity was not undertaken on a normal commercial basis.

The background facts

2. The evidence consisted of three bundles of documents. In addition, witness statements were given by Mr Gray, and by his wife Ingrid Jacoby, who also provided a supplemental witness statement. Both Mr Gray and Ms Jacoby gave oral evidence.

3. From the evidence, we find the following background facts; we consider disputed questions of fact in a later section of this decision.

4. Mr Gray runs a sole practice as a tax attorney and counsellor at law. He specialises in international tax law and has clients all over the world, especially in North America. He resides in the UK.

5. On 24 May 2013 HMRC opened an enquiry under s 9A of the Taxes Management Act 1970 ("TMA 1970") into Mr Gray's tax return for the year ended 5 April 2012.

6. In a letter to HMRC dated 17 October 2013, Mr Gray indicated that he had not been aware of the need to state separately the earnings and expenses from his practice as a US tax lawyer and the corresponding details relating to his work as a promoter.

7. In a further letter to HMRC dated 30 June 2014, Mr Gray explained that in the calendar year 2011 he had spent £41,044.36 from his sterling accounts on the concert business, and an amount in US dollars equivalent to £2,248. He explained that this was why he had shown the total figure of £43,292.36 in his tax calculations.

8. He also gave details of his corresponding expenditure in the calendar year 2012, which was £89,859. He explained that some of this had come from his personal accounts and not through his office accounts.

9. In reply to HMRC's questions in their earlier letter dated 18 June 2014, he gave various details concerning Ms Jacoby's professional history. She had stated to play the piano at the age of 4, and after attending the St Louis Conservatory of Music, had won a number of music competitions. She had studied at the University of Texas and then at the University of Southern California, graduating with highest honours. After this she had won a number of international piano competitions.

10. She had come to the UK in 1982 to compete in the Leeds International Piano Competition. Although she had not won, she was invited by Yehudi Menuhin [later Lord Menuhin] to join his concert agency, Anglo-Swiss.

11. Mr Gray also set out in his letter various matters relating to Ms Jacoby's personal history, which we do not set out here, but which he considered to have affected her music career. Throughout her time in the UK, she had made small amounts of money from giving piano lessons and playing some concerts for a modest fee, while playing other concerts without fee in order to support charities. She had not earned above the UK reporting threshold for income.

12. When he had first met Ms Jacoby, Mr Gray had tried to help her in her career by sponsoring concerts for her in 1999, 2000 and 2002. He had also underwritten her big charity event at the Hackney Empire Theatre, and arranged a number of other performances for her. In addition, he had underwritten the cost of two CDs with the Royal Philharmonic Orchestra, and one solo CD.

13. These steps had led nowhere in relation to Ms Jacoby's career. Mr Gray had great confidence in her abilities, and could not understand why this had not translated into a bigger and financially rewarding career. Consequently, once Stephen Wright (who had previously been the head of IMG International's former classical music division) had acquired a new agency, ICA, Mr Grey had contacted him and asked him to take Ms Jacoby on to his book of artists and find her work. Mr Wright had been very guarded about this and initially refused. Mr Gray and Mr Wright had instead agreed on a paid consultancy. Having heard Ms Jacoby play, Mr Wright had become confident that he could act successfully as an agent if only he had the right marketing materials to promote her first. This had been the reason for Mr Gray agreeing to pay ICA a monthly fee of £5,700 including VAT. (The fee was reduced from February 2012 onwards to £4,275, and was further reduced at a later stage.)

14. Mr Gray explained that before the end of 2010, he had never been in the business of a concert/artist promoter. However, he felt that with the assurances given by Mr Wright and with Ms Jacoby's talent, she could not go wrong. She was happy that, if any money was to be made from this, it should be made by Mr Gray, especially as he was going to "bankroll" this effort.

15. After exchanges of correspondence between HMRC and Mr Gray, HMRC wrote to him on 2 September 2014 to set out their view on the loss claims for 2012 and 2013. This was that the claims were invalid because Mr Gray did not carry on the trade of a promoter, and even if he did, taking into account all the facts of his case HMRC did not consider this trade to be carried on on a commercial basis or with a view to realisation of profits.

16. Mr Gray responded on 10 September 2014 with detailed arguments against the view expressed by HMRC. (As these arguments relate to matters considered at the hearing, we do not set them out here.) He wrote again on 7 October 2014 stating that he had yet to receive a reply.

17. On 14 October 2014 HMRC wrote to Mr Gray repeating their views, and enclosing closure notices for the years 2011-12 and 2012-13; these corresponded to Mr Gray's accounting periods 31 December 2011 and 31 December 2012.

18. Following a further exchange of correspondence, Mr Gray wrote to HMRC on 5 November 2014 requesting a review.

19. On 11 December 2014 the HMRC Review Officer wrote to Mr Gray to set out the results of the review. He explained that Mr Gray's arguments and those of HMRC were well documented in the correspondence; he could not see that anything would be gained by repeating them. He continued:

> "There is nothing within the papers to suggest that the expenditure is anything else but genuine. The questions to be answered is [*sic*] whether you were trading as a promoter and if you were whether this was on a commercial basis, this being a requirement of the U.K. legislation.
>
> Having considered all the information provided to me I cannot see that the information within the case papers demonstrates that your activities as a promoter for your wife as a classical concert pianist amounted to a venture in the nature of trade i.e. a business venture. It is also considered that based on the information within the case papers such an activity was not undertaken on a normal commercial basis.
>
> **Conclusion**
>
> The closure notices were issued in accordance with the relevant legislation and HMRC's guidance. Given above I can but conclude that the decision, as reflected in HMRC's closure notices, (to charge the additional tax and National Insurance) should be upheld."

20. On 29 December 2014 Mr Gray gave Notice of Appeal to HM Courts & Tribunals Service.

The relevant legislation

21. Section 66 of the Income Tax Act 2007 ("ITA 2007") provides:

> "**Restriction on relief unless trade is commercial**
>
> (1) Trade loss relief against general income for a loss made in a trade in a tax year is not available unless the trade is commercial.
>
> (2) The trade is commercial if it is carried on throughout the basis period for the tax year—
>
> (a) on a commercial basis, and
>
> (b) with a view to the realisation of profits of the trade.
>
> (3) If at any time a trade is carried on so as to afford a reasonable expectation of profit, it is treated as carried on at that time with a view to the realisation of profits.
>
> . . .
>
> (7) This section applies to professions and vocations as it applies to trades."

Arguments for Mr Gray

22. Mr Way referred to s 66 ITA 2007; he submitted that Mr Gray met the conditions in s 66(2)(a) and (b), and that in relation to s 66(3) there was a reasonable expectation of profit. The reference to "trade" in s 989 ITA 2007, the definitions section, showed that "trade" included any venture in the nature of a trade.

23. HMRC's Business Income Manual at BIM20095 set out judicial guidance on the meaning of "trade"; Mr Way emphasised that he was not relying on this as authority, but merely as guidance and background. He also commented on another paragraph, BIM20065, which referred to the extended meaning of the expression in s 989 ITA 2007. He submitted that there was categorically a trade in Mr Gray's case.

24. In addition he referred to BIM 85705, accepting that this was not binding authority:

> "**BIM85705 - Trade losses - restriction of relief: uncommercial trades - not on a commercial basis**
>
> S66 Income Tax Act 2007 (ITA 2007)
>
> The object of S66 ITA 2007 is to deny relief for losses arising from activities which can be seen clearly to lack commercial inspiration. The Chancellor of the Exchequer, at the time the original legislation was enacted, stated in the course of a Parliamentary debate:
>
> > 'We are after the extreme cases in which expenditure very greatly exceeds income or any possible income which can ever be made in which, however long the period, no degree of profitability can ever be reached.' "

Mr Way emphasised the phrases "ever be made" and "however long the period".

25. He referred to the comments of Lord Morris in *Ransom v Higgs* [1974] STC 539 at 550 [we use only the STC reference, rather than the different references used by the respective parties to this appeal]:

> "To be engaged in trade or in an adventure in the nature of trade surely a person must do something and if trading he must trade with someone."

Mr Way argued that there was no doubt that Mr Gray's venture was a trade.

26. Lord Morris had then quoted with approval the comments of Lord Clyde in *CIR v Livingstone* (1926) 11 TC 542:

> "I think the test which must be used to determine whether a venture such as we are now considering is, or is not, "in the nature of trade" is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made."

27. Mr Way submitted that this test was plainly satisfied in Mr Gray's case.

28. He also cited the comments of Pennycuick J in *Noddy Subsidiary Rights Co. Ltd v IRC* [1967] WLR 1 at 16, and argued that on the facts of Mr Gray's case, this was another authority for saying that Mr Gray's activities were those of a person carrying on a trade.

29. We consider at a later point in this decision the respective submissions of both parties on the issues of fact.

30. Mr Way commented on the authorities to which HMRC had referred in their skeleton argument. The first was *Eclipse Film Partners No 35 LLP v Revenue and Customs Commissioners* [2012] UKFTT 270 (TC). He submitted on various grounds that this was not a case that had any relevance to any of the issues in Mr Gray's case.

31. HMRC had also referred to *Mr Philip Ian Murtagh v Revenue and Customs Commissioners* [2013] UKFTT 352 (TC), TC02754. Mr Way argued that the tests set out in that decision were interesting but factual and that the facts of Mr Gray's case were different, so that decision had no bearing on his case.

32. A further authority cited by HMRC was *Wannell v Rothwell* [1996] STC 450 (also reported at (1996) 68 TC 719). Mr Way described this as a very factual case, in which Robert Walker J, if deciding the matter at first instance, would have come to the conclusion that Mr Wannell was trading.

33. An additional authority referred to by HMRC was *Akhtar Ali v Revenue and Customs Commissioners* [2016] UKFTT 008 (TC), TC08416. Mr Way argued that this case had been based on its own facts; it was an extreme example, well away from Mr Gray's situation. The Tribunal had set out its key findings of fact at [29], and had held that Mr Ali was carrying on a trade with a view to making a profit. Mr Way made various distinctions between the facts of that case and the facts relating to Mr Gray.

34. Another of HMRC's additional authorities was *Kevin Johnson MBE v Revenue and Customs Commissioners* 2016] UKFTT 010 (TC). The Tribunal had set out the issues at [1]; these showed that it was a very factual first instance case.

35. The next additional HMRC authority was *Mr Anthony and Mrs Julia Rowbottom v Revenue and Customs Commissioners* [2016] UKFTT 009 (TC). In Mr Way's submission, it did not add anything to the discussions in Mr Gray's case; there was nothing relevant for this Tribunal to see.

36. A further additional authority in HMRC's list was *Paul Duckmanton v Revenue and Customs Commissioners* [2013] UKUT 0305 (TCC). Mr Way argued that this case was of no relevance in Mr Gray's circumstances; it was so remote from the situation under review as not to be relevant.

37. The following case in HMRC's list of additional authorities was *Revenue and Customs Commissioners v Peter Vaines* [2016] UKUT 2 (TCC). In Mr Way's submission, this decision did not relate to the points under consideration in Mr Gray's case and so had no bearing on it.

38. The remaining authority referred to by HMRC in their Skeleton argument was *Interfish Limited v Revenue and Customs Commissioners* (in a series of decisions commencing with [2010] UKFTT 219 (TC) and culminating in [2014] EWCA Civ 876). Mr Way argued that the decision was not especially relevant in Mr Gray's circumstances. The Court of Appeal had referred to *Bentleys, Stokes & Lowless v Beeson* (1952) 33 TC 491 at 504. Mr Way made factual submissions on what he assumed might be HMRC's argument based on that case.

Arguments for HMRC

39. Mr Hall emphasised that the initial precondition was that there should be a trade. This could be an enterprise capable of carrying on a trade. Questions might be raised as to the principles of what expenditure could be deducted; ss 34 and 35 Income Tax (Trading and Other Income) Act 2005 ("ITTOIA 2005") would have to be considered. The motive behind expenditure could be indicative of that of the enterprise.

40. He referred to s 64(1) ITA 2007, which set out the requirement for a taxpayer seeking loss relief to be carrying on a trade. If it were accepted that a trade was being carried on, the question was whether it was being carried on in such a way as to enable loss relief to be available. In HMRC's submission, Mr Gray's enterprise did not look commercial. It was necessary to look at what was going on. The requirements in s 66(2)(a) and (b) ITA 2007 were that the trade, profession or vocation was carried on throughout the basis period on a commercial basis and with a view to realisation of profits of the trade.

41. In *Ransom v Higgs* at 545 Lord Reid had referred to the absence of any definition in the Income Tax Acts of "trade" or "trading". At 964 [*check correct reference*], Lord Wilberforce had indicated that "trade" could not be precisely defined; he had referred to the need for the fact finding body to consider whether there was a trade. There had to be something which the trade offered to provide by way of business. The latter comment had been cited by the Tribunal in *Eclipse Film Partners No 35 LLP* at [399].

42. In *Wannell v Rothwell* at 461 (68 TC 719 at 733) Robert Walker J had made clear that it was for the fact finding body to decide whether the trade was carried on on a commercial basis. He had referred to the way in which the trade was conducted, and whether the trader was "seriously interested in profit", the other end of the spectrum being the amateur or dilettante.

43. Mr Hall commented on the recent First-tier Tribunal decisions already mentioned by Mr Way. Mr Hall acknowledged that these might not yet be final and that they were not binding. However, they showed a way of arriving at an analysis of the facts.

44. He referred to *Murtagh* at [3]:

> ". . . in our view the outcome of this case will inevitably be governed by our understanding of the facts in relation to one fundamental point. This was the issue of whether the activity was so influenced by the feature that the Appellant wished to support his sons in the way that many fathers would naturally wish to support their children undermined the various claims, i.e. that there had been a trade at all, or certainly a trade conducted on the requisite commercial basis with a view to profit."

In HMRC's submission, this was a point which should be considered in the present case.

45. At [23] the Tribunal had said:

> "The critical point, it seems to us, in this case is to decide whether the Appellant's activity was fundamentally that of a service trade, carried on with a view to making profits and carried on in such a way that whilst for various reasons his first clients were his sons, the activity could have been extended to third parties."

46. Mr Hall made a number of general factual submissions by reference to various cases; we consider these in the context of both parties' submissions on the facts.

Discussion and conclusions

47. Mr Gray's appeal raises two questions. The first is whether his activities as a promoter of Ms Jacoby constitute either a trade or a venture in the nature of a trade. The second, which will only be relevant if the answer to the first question is in the affirmative, is whether throughout the basis periods for 2011-12 and 2012-13 he has carried on that trade on a commercial basis and with a view to the realisation of profits of the trade. A subsidiary issue raised by HMRC is whether the expenses claimed relate to his business as a promoter.

48. His appeal is against the closure notices. Under s 50(7A) TMA 1970, on an appeal against a closure notice, such notice is to stand good unless the Tribunal decides that the claim which is the subject of the decision in the notice should have been allowed or disallowed to an extent different from that specified in the notice. Here, Mr Gray is seeking to argue that the loss relief claims should be allowed. As demonstrated by numerous authorities to which we do not need to refer, the burden of proving this falls on him. In order to achieve this result, he has to satisfy us in respect of both the above questions.

49. In *Ransom v Higgs* at 553, Lord Wilberforce considered the meaning of "trade":

> " 'Trade' cannot be precisely defined, but certain characteristics can be identified which trade normally has. Equally some indicia can be found which prevent a profit from being regarded as the profit of a trade sometimes the question whether an activity is to be found to be a trade becomes a matter of degree, of frequency, of organisation, even of intention, and in such cases it is for the fact finding body to decide on the evidence whether a line is passed. . . .

> Trade involves, normally, the exchange of goods, or of services, for reward, not of all service, since some qualify as a profession, or employment, or vocation, but there must be something which the trade offers to provide by way of business. 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. The 'mutuality' cases are based in part at least on this principle, and it was the existence of it that made *Sharkey v Wernher* an interesting problem: could Lady Zia trade with herself?"

50. Thus the question whether Mr Gray's activities as a promoter of Ms Jacoby amounted to a trade or venture in the nature of a trade is one of fact. This means that other cases on the questions whether individuals were or were not trading can be of only limited assistance; what matters in relation to Mr Gray is the facts of his case.

51. We agree with Mr Way's submission that the question whether a person is trading is separate from the question whether the trade is carried on on a commercial basis and with a view to profit. This was made clear by Robert Walker J (as he then was) in *Wannell v Rothwell*, in which Mr Way appeared for the taxpayer. At 460 Robert Walker J considered the argument put for the Revenue that an activity carried out on an uncommercial basis could not be a trade. He did not accept this argument, and explained the reasons for his view. He continued:

> "Furthermore out of numerous reported decisions on profitable transactions which have been held to be taxable as trading activities I was not shown any (with the possible exception of *Graham v Green* (*Inspector of Taxes*)) in which a lack of commercial approach or organisation has enabled the taxpayer to escape liability as a trader. In *Graham v Green* (*Inspector of Taxes*) (the betting case) Rowlatt J did refer (see [1925] 2 KB 37 at 41–42, 9 TC 309 at 313–314) to the appellant's not being organised in the way in which a bookmaker was organised, but those remarks must be read in their context. In general a substantial degree of organisation (a very imprecise term, especially across the whole range of trading activities) is neither a necessary not a sufficient condition for carrying on a trade (for the first limb see the observations of Lord Radcliffe in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at 37, 36 TC 207 at 230 and for the second those of Lord Wilberforce in *Ransom (Inspector of Taxes) v Higgs* [1974] STC 539 at 556."

52. Mr Hall indicated in the course of cross-examining Mr Gray that HMRC would take the position that Mr Gray was sponsoring his wife Ms Jacoby; this was the leitmotif of the case. Subsequently, in putting HMRC's case, he referred to the passage from *Murtagh* at [3] cited above.

53. We have considered whether the view taken by the Tribunal in *Murtagh*, namely that Mr Murtagh's motivation was relevant both to the question whether a trade was being carried on and as to the issue of "commerciality", is of relevance to Mr Gray's case. On balance, we accept that it is a factor to be taken into account in relation to both questions.

54. In *Murtagh* at [23] the Tribunal said:

> "Both parties referred during the hearing to various authorities on the various subjects of trading, "trading on a commercial basis", and the issue of when profits should be anticipated. None of the authorities were, however, particularly relevant to the circumstances of this case. The critical point, it seems to us, in this case is to decide whether the Appellant's activity was fundamentally that of a service trade, carried on with a view to making profits and carried on in such a way that whilst for various reasons his first clients were his sons, the activity could have been extended to third parties. In addressing this, we must consider the terms on which the activity was conducted with the Appellant's sons. It is immaterial that there might be differences between the way in which the existing major management companies operated when providing services to young professional golfers, and the way in which the Appellant operated. If however we conclude that there are features of the activity undertaken by the Appellant that are more obviously accounted for by the desire of a father simply to support his sons, almost regardless of the cost and whether there was a reasonable prospect of recovering any significant amount of his outlay, then that reality will undermine the notion that there was a trade as such, and certainly the notion that there was a trade carried on commercially with a view to profit. This will be particularly so should the terms of the activity with the Appellant's sons be terms that would be fundamentally unappealing either to the Appellant or to "outsiders" if we consider their application to contracts with such "outsiders"."

55. We emphasise that the underlying facts in *Murtagh*, as Mr Way submitted, were very different from those in Mr Gray's case. However, it appears to us that the question of motivation must have some relevance to the "trade" issue, as well as that of commerciality. The thought process of Robert Walker J in *Wannell v Rothwell* was confined to deciding whether commerciality was relevant in deciding whether a trade was being carried on at all. (In that case, Mr Wannell was arguing that his activities amounted to a trade; he wished to claim loss relief. Robert Walker J decided that the Deputy Special Commissioner must be taken to have reached the conclusion that Mr Wannell was trading.) We do not think that Robert Walker J was placing any other limitations on the factors to be taken into account in deciding whether an individual was carrying on a trade.

56. On the commerciality issue, Robert Walker J made the following comments in *Wannell v Rothwell* at 461 referring to the lack of previous authority:

> "The deputy Special Commissioner seems to have concluded that because of his lack of commercial organisation the taxpayer, even if carrying on trading activities, could not have been doing so on a commercial basis. I was not shown any authority in which the court has considered the expression 'on a commercial basis', but it was suggested that the best guide is to view 'commercial' as the antithesis of 'uncommercial', and I do find that a useful approach. 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 is between the serious trader who, whatever his shortcomings in skill, experience or capital, is seriously interested in profit, and the amateur or dilettante. There will no doubt be many difficult borderline cases well for the commissioners to decide; and such borderline cases could as well occur in Bond Street as at a car boot sale."

57. In *Rowbottom* at [46]-[47] the Tribunal considered that two questions arose under s 66 ITA 2007. The first was whether the trade was carried on on a commercial basis; this raised an objective test. They continued:

> "We consider that the second issue – whether the trade was carried on in the relevant period with a view to the realisation of profits in the trade – is primarily a subjective issue, namely was that the view of those carrying on the trade, but that the test can be satisfied in relation to any particular time if objectively it is shown that at that time the trade was being carried on so as to afford a reasonable expectation of profit."

58. We agree that the two questions are separate. We view with some caution the Tribunal's view that the second is a subjective issue, as traders in this position will inevitably express the view that they are trading with a view to the realisation of profits. We accept that there is a subjective element. However, what is required is objective evidence which demonstrates an appropriate basis for the trader taking that view in the particular circumstances of that trader's case.

59. We turn to the two questions for consideration in this appeal. Although the two questions are clearly separate, it appears to us that the factors relevant to the respective questions tend to overlap, as the Tribunal found in *Murtagh*, and as seems to have led to the difficulties encountered following the decision of the Special Commissioner in *Wannell v Rothwell*.

Did Mr Gray's activities amount to a trade?

60. We refer to Mr Gray's evidence, but leave it until a later point before making any findings based on that evidence. He stated that at the end of 2010 he had decided to go into the separate business of promoting Ms Jacoby; he believed then (and continues to believe) that the business of promoting her could be commercially successful and make money for him. He had agreed with Mr Wright of ICA on a paid consultancy to Mr Gray's new business as promoter of Ms Jacoby. The terms were that that he (Mr Gray) would become a client of ICA, and that invoices would be sent to him.

61. It would not have been possible for Ms Jacoby to enter into a normal commission-based direct relationship with ICA because she did not have an established "book of business", ie a history of earnings and a series of advance concert bookings. Further, Ms Jacoby did not have sufficient resources to fund a consultancy relationship between her and ICA. It had been for these reasons that Mr Gray had become her promoter and had entered into the consultancy agreement with ICA.

62. He had agreed with Ms Jacoby that if he funded the promotion business, the fees generated would belong to him until he had recouped what he described as his "capital outlay", and then subsequently the fees derived from her music career would be divided equally between them. The agreement had been oral; he had seen no need for any writing between them, as they had a "50/50 marriage".

63. Mr Gray paid a monthly fee to ICA, and had done so for the calendar years 2011, 2012, 2013 and 2014. This monthly fee was to be reviewed if the concert fees from Ms Jacoby's performances increased to the point where ICA's usual 20 per cent commission would be material.

64. Mr Wright had made forecasts of the minimum number of paying concerts which Ms Jacoby would obtain as a result of the arrangement. These projections were based on Mr Wright's estimate, made in good faith, of what he could achieve at that time. It had not been foreseen that they would turn out to be over-optimistic, even wildly so.

65. Mr Gray had expected that his promotion business would at the least break even after the first year and be in profit by year two. It had been (and still was) his intention to make a profit. First-rate pianists, of whom he considered Ms Jacoby to be one, commanded large fees. The hard part was getting on to the merry-go-round in the first place.

66. He had been told that the business was slow and that Ms Jacoby was an unknown commercial quantity, so that ICA needed more and more commercial marketing materials. The demand for such materials had become greater and greater, and they had greatly exceeded the costs which he had anticipated. He had made frequent and bitter complaints to ICA. However, he had been committed to making this business work, and to protect what he had already spent; he did not want to write it off as wasted.

67. He acknowledged that it would be untrue to suggest that he had had only a profit motive; of course, he loved his wife, and of course he wished her to be happy and fulfilled as an artist.

68. Despite the involvement of ICA, he had continued to expend large amounts of time on this concert business. He had spent on average about 10 hours per week on this business in the start-up years; this was not time taken away from his law practice but from his own time.

69. In his letter to HMRC dated 17 October 2013, Mr Gray stated:

> "I only do this work for my wife. I do not envision continuing with this business, and throwing good money after bad, unless ICA can demonstrate that we have turned the corner. It has made two mass mailings for Ingrid and is due to make one more, in February 2014. I am not sanguine."

70. In cross-examination, he was asked why he had not "cut out" Stephen Wright of ICA as a "middleman". He explained that he had had to involve Mr Wright because the business was a "closed shop". Mr Wright was aware of all the issues involved in the music business and of what was good or bad; he had a very well educated and refined sense of this.

71. Mr Gray explained that for a reasonably successful concert artist, earnings could be expected to be £100,000 or more a year. He believed that Ms Jacoby could and should be one of those artists. This view was shared by the conductors Sir Charles Mackerras and Sir Neville Marriner. (A letter from Sir Neville Marriner dated 3 June 2015 set out his views as to her professionalism, musical preparation, and the quality of her playing and performance.)

72. Mr Way submitted that on the evidence it was plainly the case that Mr Gray's activity was a trade.

73. In contrast, Mr Hall submitted that it was doubtful whether that activity amounted to a trade. He acknowledged that it might be an enterprise capable of a trade.

74. We examine a summary of the factors relevant to determining whether Mr Gray was carrying on a trade, or a venture in the nature of a trade. We deal first with the factors in favour of his contention that he was doing so:

(1) It was clear from his evidence and from the email correspondence that Mr Gray had a considerable knowledge of classical music and the classical music business.

(2) On the basis of his knowledge, he concluded that he could not act alone in the activity of promoting Ingrid Jacoby as a concert artist, and that it was necessary to use the services of ICA as an intermediary, and in particular of Stephen Wright of ICA, in order to further that activity.

(3) He had full knowledge of Ms Jacoby's experience and capabilities as a concert pianist.

(4) He was actively involved in seeking to promote her career, spending significant amounts of his own time despite also using the services of ICA.

75. The following is a summary of facts pointing in the other direction:

(1) There was no established book of business in Ms Jacoby's case; despite Mr Gray's previous efforts to support and develop her career, her performances had been for modest fees or had been without charge in order to support charities.

(2) Mr Gray had no cash flow forecasts; subject to a conflict of evidence which we consider later, the only predictions were forecasts by Mr Wright of ICA of minimum numbers of concerts over a period.

(3) He had placed a financial limit on what he was prepared to spend on the promotional activities, but there was no budget as such.

(4) Having committed himself to the monthly fee payable to ICA and the additional expenditure required for promoting Ms Jacoby, Mr Gray had no alternative "Plan B" to adopt in the event of his promotion activities proving unsuccessful.

(5) Mr Gray made it clear to HMRC in his letter dated 17 October 2013 that he only did this work for his wife. Thus there was no prospect of the promotion activity being extended; he had only one client.

76. In the course of cross-examining Mr Gray, Mr Hall asked him why he did not count as sponsorship the payments which he had made in the course of his promotional activity for his wife. We note that before 2011 Mr Gray had expended various sums in seeking to advance Ms Jacoby's career, such as his sponsorship of three concerts at the Wigmore Hall in 1999, 2000 and 2002 as mentioned by Ms Jacoby in her witness statement. We have considered whether there were differences between the basis on which Mr Gray had supported Ms Jacoby during the period to the end of 2010 and the nature of his activities from the beginning of 2011 onwards. We are satisfied that there was a change in the character of his activities, in particular that he decided to pursue them on a more organised business basis.

77. We consider that his case is close to the margin, but on balance our conclusion is that although the relationship between him and Ms Jacoby was a material factor, the activity which he began in 2011 (having had discussions with Mr Wright in late 2010) was sufficiently organised to amount at least to a venture in the nature of a trade. As indicated by Scott LJ in *Smith Barry v Cody* (1946) 28 TC 250 at 258, considering what is now s 989 ITA 2007:

> "As the definition includes the very word "trade" without qualification, that word must be used in its ordinary dictionary sense and the other words must necessarily be intended to enlarge the statutory scope to be given to the word "trade" . . ."

78. In HMRC's Business Income Manual at BIM20095, they give their view on the effect of Scott LJ's statement:

> "This is authority for the view that 'trade', for tax purposes, includes situations which fall short of being full blown, unquestionable trades (see BIM 20065)."

Although this is merely an indication of HMRC's view, and not in any way binding on us, we accept that conclusion.

79. On that basis, Mr Gray's activities during the relevant periods amounted to a trade.

Was the trade "commercial"?

80. We have concluded following *Rowbottom* that this question involves two issues, and in relation to both that the tests to be applied are objective. We have already referred to certain parts of Mr Gray's evidence; it is necessary to consider those together with the following matters.

81. In his grounds for appeal, Mr Gray described the arrangement with ICA; this involved paying the monthly fee for ICA to book paying concerts for Ms Jacoby, the total fees from which, with no agency offset, would go to Mr Gray. At some future date, ICA would stop the fee and take a commission out of what was earned. This was expected to occur after 36 months. Once Mr Gray had recouped all of his outlay and a reasonable profit, Ms Jacoby would be entitled to her own concert fees.

82. In his witness statement, Mr Gray stated that Mr Wright of ICA had forecast that at a minimum, Ms Jacoby would get five to ten paying concerts in 2011, 10 to 20 paying concerts in 2012 and 20 to 30 concerts in 2013. Ms Jacoby's witness statement (which had been prepared first but in many respects bore a very close resemblance to Mr Gray's statement) was almost identical in referring to Mr Wright's forecast.

83. We are not persuaded that the latter evidence is consistent with other documentary evidence. On 21 April 2012, Ms Jacoby sent an email to Cathy Carson at ICA raising a number of questions, which Cathy Carson answered in her reply dated 24 April 2012. We refer to one paragraph in Ms Jacoby's message:

> "I know that you cannot guarantee concerts, but Stephen Wright did forecast that I would have 5 to 10 concerts this year, and 10 to 20 the following year. Does this seem likely?"

In referring to "this year", she can only have been commenting on the position in 2012, and not 2011.

84. In an email to Mr Gray dated 2 May 2012, Mr Wright sought to answer a number of points which Mr Gray had raised in recent emails:

> "I have discussed with Cathy and with others in ICA the concerns you have voiced and my responses are set out below. Before getting on to those, I ought to remind you that we are just about at the halfway stage of the two year period of management that we agreed at the outset. Had you asked me in May 2011 whether or not ICA could relaunch Ingrid's career and obtain for her significant engagements within twelve months, I would have answered an unequivocal "No". . ."

85. On the basis of the documentary evidence, we find that the evidence in the two witness statements concerning the forecasts of the minimum number of concerts cannot be accepted as a record of the position as it would have been understood in early 2011 at the commencement of Mr Gray's promotion activity.

86. Mr Gray's business plan was as described in his grounds of appeal, as quoted above. He found it necessary to use Mr Wright of ICA because the classical music business was a "closed shop". In order to promote Ms Jacoby as a concert artist, Mr

Wright had specified a number of marketing materials which he would need. He had not given Mr Gray a specific description of the costs involved, just a general description.

87. In cross-examination, Mr Gray stated that he spent as much as he had, and was advised to by Mr Wright.

88. Mr Gray also stated that he had placed a financial limit on what he would spend; he had since reached that limit and did not spend anything more.

89. He confirmed that he had not had a "plan B"; he had been working on this project and committed resources to it, and had expected it to be successful. It had not.

90. He did not have any cash flow forecasts; other than the payments to Mr Wright [ie to ICA], there had been no information relating to the amounts. Mr Gray referred to the minimum forecasts.

91. The amount of the monthly payments to ICA had been £5,700 per month, including VAT. The explanation for the cost was that Mr Wright had to allocate a full time person to the project.

92. It had not been possible to enter into a commission arrangement with ICA, as this would have required the cash flow from Ms Jacoby's concert performances; the project would not have come to fruition until some time in the future.

93. His expectation had been that his business would at the least break even after the first year and be in profit by year two.

(a) HMRC's submissions on "commerciality"

94. In putting the case for HMRC, Mr Hall submitted that Mr Gray's enterprise did not look commercial. It had been Mr Gray's function to pay bills. There had been no business plan setting out what was to happen over a six month period, and no cash flow forecasts. In HMRC's submission, the person carrying out the promotional activity was ICA, and ultimately Mr Wright.

95. Mr Hall also argued that in seeking to further Ms Jacoby's career, Mr Gray had a high degree of personal interest, as she was also his wife. Mr Gray had only one client.

96. On the second issue, whether the trade was carried on throughout the basis period with a view to realisation of profits of the trade, Mr Hall commented that the fees paid by Mr Gray to ICA had vastly exceeded the modest receipts from Ms Jacoby's concert performances, which had all been either charity performances or at "low end" fees.

97. In HMRC's submission, Mr Gray's activities had not been carried out with a view to profit. The evidence had shown that Ms Jacoby did not have an established book of business, and that prestigious concerts would be booked two to three years in

advance. If Mr Gray was approaching the matter commercially, he would need to know when to stop throwing good money after bad. Mr Gray had stated in evidence his expectation as to the eventual profits of the promotion business; it had not been demonstrated how these figures had been arrived at, as opposed to the economic reality. Apart from the lack of cash flow predictions and any recorded business plan, there were no separate accounts setting out the results of the promotion business. Nor was there any stated specific figure to trigger any decision by Mr Gray to come out of the business.

98. Mr Hall also emphasised the passive nature of Mr Gray's approach to the expenditure; he had spent what he had been asked to spend and could afford. His business model appeared to depend on two people; Mr Wright told him what to do, and the business relied on the professional ability of Ms Jacoby. The risks did not appear to be offset elsewhere by taking on other clients.

(b) Mr Way's submissions on "commerciality"

99. Mr Way argued that Ms Jacoby was extremely well known and that she had every prospect of success. She was capable of earning £100,000 per annum. She had no book of business but performed all around the world. What was needed was the "push" of promotion. She had the potential for a very successful financial career, and for Mr Gray to be successful in his business project.

100. Mr Way submitted that, given Mr Gray's efforts, his project would have been successful with any pianist; it was simply a matter of the way things had worked out. Mr Way emphasised the difference between the position of the golfer in *Murtagh* and that of Ms Jacoby, and the different scale of the task of promoting the career of a concert pianist.

101. In relation to HMRC's question whether Mr Gray had had a business plan, Mr Way submitted that this patently had been the case. He had done what was required to provide a website and CD recordings, and had appointed Mr Wright, a major figure in the classical music business. This was precisely the form of business plan for a promoter to follow. Mr Gray had used an expert, and followed his views, and had also used his own knowledge and experience to go over and above what ICA advised.

102. In Mr Way's submission, it was not necessary to have a written business plan. Mr Gray had had a genuine business plan, and had been seeking genuinely to make money.

103. Mr Way submitted that there was more than enough evidence to show that the trade had been carried on commercially and with a view to profit.

(c) Our conclusions on "commerciality"

104. We start by considering the first issue, whether Mr Gray's promotion trade was carried on on a commercial basis. We examine the various factors:

(1) Although financial projections are relevant to the second issue, they are also relevant to the first. We have concluded that the evidence of both Mr Gray and Ms Jacoby as to Mr Wright's forecasts for 2011 and 2012 is not consistent with the documentary evidence, which we find more persuasive. We find that there is no clear evidence to show that at the beginning of 2011 Mr Gray had sufficient information to predict the financial results of his activity.

(2) Under the terms of the agreement with ICA, Mr Gray was committed to pay ICA's monthly fees, and in addition he agreed to pay, and did pay, for the promotional materials which Mr Wright had advised him to be necessary for the advancement of Ms Jacoby's career as a concert pianist. Mr Wright did not itemise those costs, but gave a general description. As shown by Mr Gray's email to Mr Wright dated 25 April 2012, Mr Gray had to pay for the costs of the CD recording in Warsaw, those for a video of the Mansion House recital, those for a solo CD, and those for updating Ms Jacoby's webpage. Taking the Warsaw recording as an example, the costs of that project had for various reasons increased beyond the original budget. As Mr Gray stated in evidence, he spent what he was asked to and what he could afford.

(3) The strategy in Mr Gray's plan for the future of his promotional activity was largely based on what Mr Wright had recommended. One significant exception concerned the Warsaw recordings. Following discussions and email exchanges Mr Gray told Mr Wright that instead of the Chopin piano concerti which had originally been proposed as part of the agreed strategy, Ms Jacoby had decided to record the second and fourth piano concerti of Beethoven.

(4) Mr Gray did not have any cash flow forecasts.

(5) He stated that he had placed a financial limit on his expenditure, but did not specify what it was or on what basis he had calculated that limit.

(6) In oral evidence, he stated his belief that there was a computerised record of the running total of his expenditure on the promotional activity. However, no evidence was produced as to this total. There was no evidence of any accounts or calculations to show the setting of the expenditure against performance and other receipts in order to arrive at the figures giving rise to the losses for the years in question.

(7) Mr Gray had no alternative strategy or "plan B" to take into account the possibility that the promotional activity might not prove successful.

(8) He had only one client, and had no intention to extend his promotional activities beyond that client.

(9) As a result, the success or otherwise of his venture depended on ICA and its main protagonist Mr Wright and on Ms Jacoby's professional ability. That ability could only be harnessed if ICA's work on what Mr Wright described as the 'Ingrid Project' proved successful. There was no provision for the risk of Mr Gray's promotional activities based on his agreed strategy turning out to have been fruitless.

105. We have already referred to the extent of Mr Gray's knowledge of classical music and the classical music business. It is clear that he approached the task of

promoting Ms Jacoby's career in a determined way. The question is whether he has established on the evidence that his promotional trade was carried on on a commercial basis. Our view is that on balance, he has not done so. We fully understand his reasons for his views as to Ms Jacoby's capabilities as a concert pianist, endorsed by Sir Neville Marriner and other prominent individuals in the classical music world. Mr Gray's views are based on his classical music knowledge, rather than on the fact that Ms Jacoby is his wife. However, we do not think it possible to discount entirely the influence of their relationship on his thinking; we think that it had some effect as a factor in deciding his approach to promoting Ms Jacoby's career, although we see this factor as having had much less of an influence than her artistic and professional capabilities.

106. Taking into account all the relevant factors, our view on balance is that Mr Gray's promotional trade was not carried on on a commercial basis. The approach which he took involved less of a degree of organisation and planning of his business (as opposed to the planning of the various steps in seeking to promote Ms Jacoby's career) than would be appropriate or expected for a business of that nature.

107. Our finding on the first issue is sufficient to determine the result of Mr Gray's appeal, as in order for the trade to be "commercial", both of the conditions under s 66(2) ITA 2007 must be fulfilled. However, in case any question arises as to our finding on the first issue, we think it appropriate to consider in addition whether the trade was carried on with a view to realisation of profits of the trade.

108. Some of the factors to which we have referred in the context of the first issue are also relevant to this second issue; we return to these after considering others. We look first at Mr Gray's stated expectations. His evidence was that he expected that the business would at the least break even after the first year and be in profit by year two. He had intended to make a profit, and this was still his intention.

109. As referred to in *Rowbottom*, this was his subjective view. This requires to be tested by reference to the objective evidence.

110. We have found that the documentary evidence contradicts the evidence of Mr Gray and Ms Jacoby concerning Mr Wright's forecasts of the minimum number of paying concerts which Ms Jacoby could obtain for 2011, 2012 and 2013. As a result, we have found that the documentary evidence is to be preferred. It follows that Mr Gray's expectations as to profit calculated by reference to those stated forecasts cannot have been as he stated in his evidence.

111. Under the agreement with ICA, Mr Gray was committed to make the monthly payments, initially at the rate of £5,700 per month inclusive of VAT but reduced at a later date. He had also agreed, on the basis of Mr Wright's advice and recommendations, to undertake significant expenditure on the promotional materials which Mr Wright considered necessary for the purposes of advancing Ms Jacoby's career.

112. We accept that it was necessary for Mr Gray to enter into the agreement with ICA. The monthly fee was based on the cost of allocating one individual within ICA on a full-time basis to the task of promoting Ms Jacoby's career. We see no reason to question Mr Wright's view that the use of such an individual was necessary, even though at a much later stage Mr Wright himself took over that role.

113. As a result of the arrangements with ICA and Mr Wright, Mr Gray's outgoings in respect of his promotional activity were substantial.

114. We have referred to the absence of cash flow forecasts and the absence of evidence of accounting records showing the total of expenditure incurred and corresponding receipts from Ms Jacoby's professional activities. As Mr Gray's outgoings were so substantial, we would have expected to see much closer monitoring of the financial results of his promotional activities in order to establish the extent to which they were producing a loss or a profit at various stages.

115. As also already mentioned Mr Gray had set an overall limit on what he was prepared to pay in carrying out his promotional activity, but he did not specify what that limit was or how he had calculated it.

116. Taking into account the evidence to which we have referred, we are not satisfied that Mr Gray's promotional trade was carried on throughout the basis periods for 2011-12 and 2012-13 with a view to realisation of profits of that trade.

117. As a result, the condition in s 66(2)(b) ITA 2007 is not satisfied. Even if, contrary to our finding above, the condition in s 66(2)(a) ITA 2007 is to be regarded as having been fulfilled, the trade is not "commercial" as defined in s 66(2).

118. Thus Mr Gray's appeal against the closure notices for 2011-12 and 2012-13 fails and must be dismissed.

(d) Other matters

119. Although our above findings determine the result of Mr Gray's appeal, we think it appropriate to address certain points raised by Mr Hall in the context of the expenditure incurred by Mr Gray. Mr Hall suggested that the expenses were those of Ms Jacoby rather than those of Mr Gray. We do not accept that suggestion. We are satisfied that the expenses were incurred by Mr Gray. In those circumstances, it would be inappropriate for them to be taken into account in computing Ms Jacoby's profits or losses for tax purposes.

120. Further, the suggestion ignores the particular limited context of this appeal. Our decision concerning the closure notices is limited to the question whether Mr Gray was entitled to set the losses from his promotional trade against his general income. We have decided that his activities do amount to a trade for tax purposes. He may have incurred losses for the periods under appeal, and for subsequent years, but if there is a change in the fortunes of Ms Jacoby's career as a concert pianist, further amounts may become payable to Mr Gray as a result of the terms which have been

agreed between them. The possibility that at some future time Mr Gray may move into the position of making a profit from his promotional trade cannot be ruled out. In those circumstances he may wish to use the carried forward losses derived from his cumulative expenditure against the profits of that trade. It is his expenditure which has given rise to those carried forward losses. We see no basis for restricting his ability to use them as we have described.

121. Mr Hall also raised generalised questions as to the deductibility of the expenditure. We consider that to be an inappropriate issue to raise in the context of this appeal. HMRC had not sought to challenge the computation of the losses for the respective periods (based on the calendar years 2011 and 2012). They have made no decision on the amount of the losses, and thus there is no basis for that question to be raised on appeal. The only decision which HMRC took in relation to the losses was to refuse relief for them against Mr Gray's general income. Unless and until the question of the amount of the losses becomes relevant as a result of a further decision relating to their use, the Tribunal has no jurisdiction to consider it.

122. On a separate subject, we think it appropriate to explain that although the evidence before us referred to various personal matters and relationships, we do not consider it appropriate to refer to that evidence, given the sensitivity of some of the matters mentioned, and the fact that Tribunal decisions are published. In any event, we do not consider that evidence to be relevant to the determination of the matters raised in the context of Mr Gray's appeal.

Right to apply for permission to appeal

123. 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.

JOHN CLARK
TRIBUNAL JUDGE

RELEASE DATE: 06 JUNE 2016