Case No: A3/2016/1810

Neutral Citation Number: [2018] EWCA Civ 45

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)**
**[2016] UKUT 0002 (TCC)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/01/2018

**Before :**

**LADY JUSTICE SHARP**
**LORD JUSTICE HENDERSON**
and
**LORD JUSTICE NEWEY**

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**Between:**

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| **PETER VAINES** | **Appellant** |
| **- and -** | |
| **THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS** | **Respondents** |

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**The Appellant appeared in person**
**Mr Michael Jones** (instructed by the **General Counsel and Solicitor to HM Revenue and Customs**) for the **Respondents**

Hearing date: 7th November 2017

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# Judgment

**Lord Justice Henderson:**

## Introduction

1. This is an appeal by the taxpayer, Mr Peter Vaines, from a decision of the Tax and Chancery Chamber of the Upper Tribunal (Judge Malcolm Gammie CBE QC and Judge Judith Powell) ("the Upper Tribunal") released on 28th January 2016. The Upper Tribunal allowed the appeal of the Commissioners for Her Majesty's Revenue and Customs ("HMRC") from the decision of the First-tier Tribunal (Judge John Brooks and Rebecca Newns) ("the FTT") released on 15th October 2013, which upheld a claim by Mr Vaines to be entitled to deduct a sum of £215,455 from his share of the profits of his profession as a solicitor in the tax year 2007/08.

2. At the material time, Mr Vaines was a partner in the law firm of Squire Sanders & Dempsey LLP ("SSD"). His share of profits from the firm was his only source of professional income for the year 2007/08. But the deduction which he sought to make had no direct connection with the business of SSD. It related, instead, to the previous period of Mr Vaines' professional career when he had worked (until 31st December 2005) in the London offices of a German law firm, Haarmann Hemmelrath & Partner GbR ("HH GbR"). HH GbR was a partnership under German law, and Mr Vaines had been a member of that partnership until it was dissolved, and ceased trading, on 31st December 2005.

3. At the time when it ceased trading, HH GbR owed a total of approximately €17 million (including accrued interest) to Bayerische Landesbank and two other German banks. In 2007, Bayerische Landesbank sought repayment of this sum from Mr Vaines, claiming that he was personally liable for the debts of HH GbR, either in his capacity as a former partner in that firm or in his capacity as a partner in SSD (which had apparently succeeded to part of the business of HH GbR). Similar claims were made against a number of Mr Vaines' former colleagues in HH GbR.

4. As Mr Vaines explained, in his witness statement for the hearing before the FTT:

> "I did not consider that I was liable for any part of the amount claimed by the Bank but the risk of challenging the Bank through the German Courts was unacceptable to me. The Bank made it clear that they would sue me for the full amount which I understood was €17,000,000 on the basis of joint and several liability. I would have been involved in expensive and lengthy litigation in a foreign country and even a comparatively modest success on their part would have bankrupted me. Even a very low risk of bankruptcy was too great a risk to contemplate as it would have effectively deprived me of my livelihood."

A brief statement of agreed facts prepared for the same hearing confirmed that, if he were made bankrupt, Mr Vaines would lose his position as a partner in SSD.

5. Following negotiations with Bayerische Landesbank, an agreement was reached in October 2007 whereby Mr Vaines would be released from all personal claims against him by the German banks upon payment of the sum of €300,000. Payment of this sum was funded by SSD, which agreed to make a loan for that purpose to Mr Vaines (and

certain other colleagues who settled the claims against them on a similar basis). The payment was made in January 2008. Mr Vaines subsequently repaid the full amount of the loan to SSD over an agreed period.

6. On 27th October 2009, Mr Vaines wrote to HMRC claiming to make an amendment to his self-assessment tax return for the year ended 5th April 2008, in respect of the payment made to Bayerische Landesbank in January 2008. He enclosed a detailed note explaining the circumstances of the payment, and an additional information sheet for that year in which he included the sterling equivalent of £215,455 in box 6 ("Post-cessation expenses and certain other losses") under the heading "Other tax reliefs". He said he believed that to be the correct place for the claim, but added that, if it should be made in some other fashion, he would be grateful if HMRC would let him know.

7. Correspondence with HMRC then ensued, which resulted in the disallowance of the claimed deduction by a closure notice issued by HMRC under section 28A of the Taxes Management Act 1970 on 28th February 2012. Mr Vaines then appealed against the closure notice to the FTT.

8. The FTT heard Mr Vaines' appeal on 27th September 2013. He appeared in person, as he has at all subsequent stages of the litigation. HMRC were represented by an officer, Mr Hillier. The FTT had before it the brief statement of agreed facts which I have already mentioned, and which is reflected in the narrative I have already set out. Mr Vaines also gave oral evidence, and was cross-examined by Mr Hillier. In paragraph 3 of its decision ("the FTT Decision"), the FTT found that:

> "Although [*Mr Vaines*] accepted that the payment to Bayerische Landesbank had enabled him to avoid bankruptcy and protect his reputation we find, as a matter of fact, that his purpose for making that payment was to preserve and…protect his professional career or trade."

(In paragraph 3, the word "his" appears before "protect" in the passage which I have quoted, but this appears to be a typographical error. Nobody has suggested that any significance attaches to it.)

9. In paragraph 6 of the FTT Decision, the FTT identified the following three issues as arising:

(1) whether Mr Vaines carried on, as an individual, a profession or trade;

(2) if so, whether the payment of €300,000 he made to Bayerische Landesbank was incurred wholly and exclusively for the purposes of that profession or trade; and

(3) whether the payment was revenue or capital expenditure.

The FTT added that, for consistency with the relevant legislation, they would refer to Mr Vaines as carrying on a "trade", on the basis that (as is common ground) that term included his profession as a solicitor.

10. The FTT answered all three questions in Mr Vaines' favour, and therefore allowed his appeal. The Upper Tribunal then allowed HMRC's appeal on issues 1 and 2, for the

reasons explained in their very full and careful decision ("the UT Decision"). In view of their conclusion on those issues, it was unnecessary for the Upper Tribunal to deal with the third issue.

11. Mr Vaines now appeals to this court, with permission granted by Kitchin LJ on 16th September 2016. The Upper Tribunal had itself refused permission, in a further decision dated 15th April 2016.

12. At the hearing before us on 7th November 2017, Mr Vaines developed his submissions in support of his appeal clearly and courteously. We then heard submissions from counsel for HMRC, Mr Michael Jones, who had also appeared before the Upper Tribunal. At the conclusion of the hearing, we were able to state our conclusion, which was that Mr Vaines' appeal should be dismissed for reasons which we would later give in writing. This judgment contains the reasons which led me to that conclusion.

**What was the trade carried on by Mr Vaines in 2007/08?**

13. Mr Vaines claims to be entitled to deduct the £215,455 from his trading profits in 2007/08. More precisely, he claims to be entitled to make the deduction in computing the taxable profits of his profession as a solicitor for that year. He does not allege that there is any freestanding relief which would allow him to deduct that sum from his trading income for the year once it has been properly ascertained. The first necessity, therefore, is to identify the relevant trade for income tax purposes which Mr Vaines carried on in 2007/08. Once that trade has been correctly identified, the next question is whether the payment is properly deductible in computing his share of the profits of the trade for that year.

14. The only source of Mr Vaines' professional income in 2007/08 was the trade of SSD, of which he was a member. SSD is a limited liability partnership, which has a separate corporate existence from its members: see section 1(2) of the Limited Liability Partnerships Act 2000. In this important respect, therefore, a limited liability partnership differs from an ordinary partnership under English law, which is defined in section 1 of the Partnership Act 1890 as "the relation which subsists between persons carrying on a business in common with a view of profit." Under English law, unlike the law of Scotland, an ordinary partnership as such has no separate corporate existence, and the business which it carries on is therefore the collective business of the individual partners.

15. For income tax purposes, however, limited liability partnerships are treated in the same way as an ordinary English partnership. This is achieved by section 863 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"), the first two subsections of which provide as follows:

> "(1) For income tax purposes, if a limited liability partnership carries on a trade, profession or business with a view to profit –
>
> > (a) all the activities of the limited liability partnership are treated as carried on in partnership by its members (and not by the limited liability partnership as such),

(b) anything done by, to or in relation to the limited liability partnership for the purposes of, or in connection with, any of its activities is treated as done by, to or in relation to the members as partners, and

(c) the property of the limited liability partnership is treated as held by the members as partnership property.

References in this subsection to the activities of the limited liability partnership are to anything that it does, whether or not in the course of carrying on a trade, profession or business with a view to profit.

(2) For all purposes, except as otherwise provided, in the Income Tax Acts –

(a) references to a firm or partnership include a limited liability partnership in relation to which subsection (1) applies,

(b) references to members or partners of a firm or partnership include members of such a limited liability partnership,

(c) references to a company do not include such a limited liability partnership, and

(d) references to members of a company do not include members of such a limited liability partnership."

16. By virtue of this statutory deeming, the actual trade of SSD in 2007/08 has to be treated as though it were carried on by the members of SSD, including Mr Vaines, in partnership. The next step, therefore, is to turn to the special rules about partnerships contained in Part 9 of ITTOIA. Part 9 is introduced by section 846, which says that it "contains some special rules about partnerships". So far as material, the next three sections provide as follows:

"847 **General provisions**

(1) In this Act persons carrying on a trade in partnership are referred to collectively as a "firm".

(2) The provisions of this Part which are expressed to apply to trades also apply, unless otherwise indicated (whether expressly or by implication)-

(a) to professions, …

…

848 **Assessment of partnerships**

Unless otherwise indicated (whether expressly or by implication), a firm is not to be regarded for income tax purposes as an entity separate and distinct from the partners.

*Calculation of partners' shares*

849 **Calculation of firm's profits or losses**

(1) If –

(a) a firm carries on a trade, and

(b) any partner in the firm is chargeable to income tax,

the profits or losses of the trade are calculated on the basis set out in subsection (2) or (3), as the case may require.

(2) For any period of account in which the partner is a UK resident individual, the profits or losses of the trade are calculated as if the firm were a UK resident individual.

(3) For any period of account in which the partner is non-UK resident, the profits or losses of the trade are calculated as if the firm were a non-UK resident individual.

…

850 **Allocation of firm's profits or losses between partners**

(1) For any period of account a partner's share of a profit or loss of a trade carried on by a firm is determined for income tax purposes in accordance with the firm's profit-sharing arrangements during that period.

…"

17. In 2007/08, Mr Vaines was resident in the UK. It therefore follows from section 849 (1) and (2) that the profits of the (deemed) partnership trade are to be calculated "as if the firm were a UK resident individual", the "firm" for this purpose being a collective description of Mr Vaines and his fellow partners in the (deemed) partnership of SSD. The trade in question is the actual trade of SSD, which section 863 (1) treats as carried on in partnership by its members. It is not a separate trade carried on by Mr Vaines alone, but the trade of SSD carried on collectively by himself and his fellow partners.

18. Once the profits of that collective trade have been ascertained, section 850 then provides (as one would expect) that Mr Vaines' share of the profit for the relevant period of account is to be determined "in accordance with the firm's profit-sharing arrangements during that period." Under section 5 of ITTOIA, Mr Vaines is charged to income tax on his share of the profits. By virtue of section 7, the tax is charged on the full amount of the profits of the tax year, which means the profits of the "basis" period for the tax year. As the Upper Tribunal explained in paragraph 9 of the UT Decision, the basis period rules are found in Chapter 15 of Part 2 of ITTOIA. The normal rules operate by reference to the date in the tax year by reference to which 12 month accounts are drawn up, with specific rules to cover the situation in which a person has started or ceased (or is treated as starting or ceasing) to carry on a trade.

19. At this point, it is necessary to introduce a further complication – but, I stress, a complication which relates only to the basis period rules in Chapter 15 of Part 2 of ITTOIA. For those purposes, but no other, section 852 (1) states that:

> "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")."

The remainder of section 852 lays down rules as to when a partner starts, or permanently ceases, to carry on this notional trade, and related matters. Section 853 then further provides that the basis period of a partner's notional trade is determined by applying the rules in Chapter 15 of Part 2 as if:

> "(a) the trade were carried on by an individual, and
>
> (b) its accounts were drawn up to the same dates as the accounts of the actual trade."

20. For present purposes, nothing turns on these detailed provisions relating to basis periods. The important point is that it is only for these limited purposes that a partner is deemed to carry on a notional trade of his own, separate from the actual trade of the partnership which he carries on together with his fellow partners. Furthermore, these provisions only come into play at the final stage of assessing partnership profits to tax on the individual partners, after the profits of the trade have been ascertained and after each partner's share of those profits has been allocated to him.

21. Before the introduction of self-assessment, this third and final stage in the assessment of partnership profits operated in a different way, as Vinelott J explained in a frequently cited exposition of the three stages which he gave in MacKinlay v Arthur Young McClelland Moores & Co 62 TC 704 at 724, [1986] 1 WLR 1468 at 1474 :

> "There are, in effect, three stages. First, the profits of the firm for an appropriate basis period must be ascertained. What has to be ascertained is the profits of the firm and not of the individual partners. That is not, I think, stated anywhere in the

> Income Tax Acts, but it follows necessarily from the fact that there is only one business and not a number of different businesses carried on by each of the partners. The income of the firm for the year is then treated as divided between the partners who were partners during the year to which the claim relates – the year of assessment – in one of the many senses of that word: see the proviso to s 26 of the Taxes Act 1970. That is the second stage. The tax payable is then calculated according to the circumstances of each partner – that is, after taking into account on the one hand any personal allowances, reliefs or deductions to which he is entitled and any higher rate of tax for which he is liable. The Acts do not provide for the way in which personal allowances, reliefs and deductions are to be apportioned between the partnership income and other income. I understand that in practice they are deducted from the share of the partnership income if that was the partner's main source of income. When the tax exigible in respect of each share of the partnership income has been ascertained the total tax payable is calculated. Section 152 (formerly Rule 10 of the Rules applicable to Cases I and II of Schedule D) provides that the total sum so calculated is to be treated as "one sum … separate and distinct from any other tax chargeable on those persons … and a joint assessment shall be made in the partnership name." That is the third stage."

22. Plainly, after the introduction of self-assessment it was no longer possible to require a joint assessment to be made in the partnership name after calculating the amounts of tax payable by each of the individual partners separately. Further, as the Upper Tribunal correctly observed in paragraph 25 of the UT Decision:

> "Prior to self-assessment, the basis periods for the assessment of partnership profits depended upon whether the entry or departure of any partner was treated as a cessation of the partnership trade or its discontinuance. The determination of the basis period for the assessment of the partnership's profits on partners generally depended upon that determination. Following the introduction of self-assessment, however, each partner is assessed to tax on their share of the profits by reference to the basis period determined according to their notional trade. It is, however, as the language of [*ITTOIA*] recognises, a notional trade only for the purposes of assessment. The actual trade remains that of the partners collectively and it is the profits of that collective trade that must be computed before being allocated or shared among partners to provide each partner's share of the profit that is the profit of their notional trades for the purposes of their self-assessment."

23. Standing back from the detail, it is now possible to answer the first question which I have posed in paragraph [13] above. The only trade which Mr Vaines carried on for income tax purposes in 2007/08, leaving aside the special provisions relating to basis periods upon which nothing turns, was the actual trade of SSD, deemed by section 863(1) to be carried on in partnership by its members. It is accordingly in the context of that deemed partnership trade of SSD, carried on collectively by Mr Vaines and his partners, that the deduction of his payment of £215,455 has to be justified.

24. The FTT took a different view. They rejected HMRC's submission that there was only one relevant trade, namely that of the partnership carried on collectively by the members, and agreed with Mr Vaines that each partner is to be regarded as carrying on a separate trade. With respect to the FTT, their reasoning on this point is not entirely easy to follow, but they seem to have been influenced by section 848 of ITTOIA which provides, as we have seen, that:

> "a firm is not to be regarded for income tax purposes as an entity separate and distinct from the partners".

25. By contrast, section 111 of the Income and Corporation Taxes Act 1988 ("ICTA 1988"), in its original form before the introduction of self-assessment, provided as follows:

> "111. Where a trade or profession is carried on by two or more persons jointly, income tax in respect thereof shall be computed and stated jointly, and in one sum, and shall be separate and distinct from any other tax chargeable on those persons or any of them, and a joint assessment shall be made in the partnership name."

That provision, however, related only to the third stage of Vinelott J's analysis, and had nothing to do with the first stage with which I am now concerned. The first stage is now governed by sections 848 and 849 of ITTOIA, which re-enact much of the substance (although not the precise wording) of the revised subsections 111(1) and (2) of ICTA 1988 which came into force with the introduction of self-assessment.

26. As substituted by the Finance Act 1994 section 215, those two subsections provided as follows:

> "(1) Where a trade or profession is carried on by persons in partnership, the partnership shall not, unless the contrary intention appears, be treated for the purposes of the Tax Acts as an entity which is separate and distinct from those persons.
>
> (2) So long as a trade or profession is carried on by persons in partnership, and any of those persons is chargeable to income tax, the profits or losses arising from the trade or profession ("the actual trade or profession") shall be computed for the purposes of income tax in like manner as if –

(a) the partnership were an individual; and

(b) that individual were an individual resident in the United Kingdom."

Subsection (3) then provided for a person's share in the profits or losses arising from the actual trade for any period to be determined according to the interests of the partners during that period (the forerunner of ITTOIA section 850), while subsection (4) made changes to the basis period rules.

27. All of this was lucidly explained by the Upper Tribunal in the UT Decision at paragraphs [22] to [24]. Contrary to what the FTT seems to have thought, however, there was nothing in these changes which detracted from the basic point that the profits of the actual trade carried on by the partners were to be computed as if that trade were carried on by an individual resident in the UK. Thus, far from deeming there to be a series of separate trades carried on by the individual partners, the legislation treats the collective trade of the partnership as if it were the trade of a single UK-resident individual.

28. At times in his written and oral submissions to us, Mr Vaines appeared to accept that there was indeed a single trade, namely the one carried on collectively by himself and his partners in SSD. He also expressly accepted, in answer to a question from Newey LJ, that under the old law (before the introduction of self-assessment) he could not have obtained a deduction for his payment, because it was not made to protect the business of the partnership. But, as I have sought to explain, the change to self-assessment made no material alteration to the way in which the profits of a partnership's trade are computed. That being so, I consider that Mr Vaines is no more able now, than he would have been 25 years ago, to obtain a deduction for expenditure which was not incurred wholly and exclusively for the purposes of the partnership business. This is, effectively, the second issue in the appeal, to which I now turn.

**Was the payment made by Mr Vaines deductible in computing the profits of the partnership's trade?**

29. Section 34 of ITTOIA 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) …

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

30. As the Upper Tribunal pointed out at paragraph [37] of the UT Decision, "the trade" in this context is the trade of SSD conducted collectively by its members as partners. The payment in question was not borne by SSD, nor was there any suggestion that Mr Vaines' decision to pay €300,000 to Bayerische Landesbank was a matter for discussion and agreement between him and the firm's management committee, or the members of SSD as a body (other than those who happened to find themselves in a similar position to Mr Vaines). Nor could the FTT's finding that Mr Vaines' purpose in making the payment was "to preserve and protect his professional career or trade" be of any assistance to him. It merely indicates "that this was a personal expense, directed at resolving Mr Vaines' situation, and not one that was related to the professional activities of [*SSD*] that he was carrying on in common with the other members of the firm" (ibid).

31. The Upper Tribunal continued:

> "38. It was a liability that had arisen from his previous engagement with the law firm Haarmann Hemmelrath and in that respect had nothing whatsoever to do with the business of [*SSD*]. We are not considering a case in which, when he joined [*SSD*] as a member, Mr Vaines negotiated an arrangement under which [*SSD*] would contribute to or discharge any liability that he might have incurred in respect of his previous association with Haarmann Hemmelrath. In fact (as appears from Mr Vaines' witness statement to the First-tier Tribunal), the payment of €300,000 was initially funded by [*SSD*] which agreed to lend Mr Vaines the money and which he then repaid over an agreed period. This indicates that [*SSD*] specifically declined to take any responsibility for the payment."

32. In my respectful opinion, this reasoning is unanswerable. Mr Vaines made the payment, for entirely understandable reasons, in order to settle a claim which had the potential to render him bankrupt, if he lost, and thereby to lose his position as a partner in SSD. From his personal point of view, therefore, it was expenditure which bought him peace of mind and enabled him to continue in his chosen career. But that does not turn it into expenditure which was wholly and exclusively incurred for the purposes of SSD's trade. Had that been the case, it would have been necessary to adduce evidence of a decision to that effect taken by the firm in accordance with its constitution, and one would then expect the firm to have made the payment itself, or at least to have reimbursed the payment if Mr Vaines made it personally. By contrast, the firm's involvement was limited to lending the necessary money to Mr Vaines who then repaid it over an agreed period. The firm's balance sheet was thus unaffected. How, then, could a deduction properly be allowed, for expenditure which the firm had deliberately decided not to incur, in computing the firm's trading profits? By virtue of section 25(1) of ITTOIA, the profits of a trade must be calculated in accordance with generally accepted accounting practice. The rules regarding deductions are strict, and are subject to the "wholly and exclusively" test. On the basis of the evidence before the FTT, and its single finding about Mr Vaines' purpose, there is simply no way in which this test could have been satisfied.

33. Mr Vaines realistically accepted that he could not hope to show that the deduction should have been allowed in the computation of SSD's trading profits, but he nevertheless sought to argue that it could properly be allowed as a deduction from his share of those profits. Indeed, this was the basis upon which he claimed to be entitled to make the deduction in the first place: see paragraph [6] above. In support of this argument, Mr Vaines referred us to a partnership tax return help sheet number 231 issued by HMRC for the year ended 5th April 2010, which gave advice relating to doctors' expenses. This help sheet began by explaining in general terms how partnership profits are to be calculated:

> "The rules for calculating the taxable profit made by any business reflect the sources of income making up that business. And where, for example, a medical practice is carried on in partnership, that practice is a single source for tax purposes, regardless of the number of partners entitled to share the profits of the practice.
>
> It follows that the Partnership Tax Return for any business must contain all the information required to calculate the taxable profits arising from that business in any accounting period. This includes any claims (such as capital allowances) that must be taken into account when calculating the taxable profits.
>
> It also follows that individual partners are not entitled to make any adjustments to the amount of partnership profit allocated to them for a particular accounting period. For example, the entry that a partner makes in box 7 of the *Partnership* pages of the personal tax return is the share of profit allocated to that partner in the Partnership Statement for the relevant accounting period."

34. The help sheet went on to explain that the partnership tax return for a business "must contain all the information relevant to the calculation of the taxable profits arising from that business, including any expenses incurred by a partner on behalf of the partnership." The guidance then said:

> "It is not possible for individual partners to make supplementary claims, whether for expenses or capital allowances, in their own tax return. This is because expenditure incurred by a partner only qualifies for relief if it is made "wholly and exclusively" for the purposes of the partnership business. And the only legal basis for giving relief for any such expenditure is as a deduction in the calculation of the profits of the partnership business.
>
> …
>
> However, this does not mean that any legitimate expenditure incurred by a partner – *that is, any expense that would be allowable if met from partnership funds* – can only be relieved if it is formally included in the partnership accounts.

> …
>
> Providing that:
>
> - any expenditure… is correctly calculated for tax purposes, and
>
> - records relevant to those calculations are made and kept as if the expenditure…were part of the partnership accounts
>
> we will accept entries in the relevant sections of the Partnership Tax Return which, though based on the partnership accounts, include adjustments for such expenditure…But once the adjustments have been made the expenditure will be treated, for all practical purposes, as if it had been included in the partnership's accounts."

35. In my view, Mr Vaines can derive no assistance from this help sheet. In the first place, it correctly emphasises the general rule that the only legal basis for giving relief for expenditure by an individual partner is as a deduction in the calculation of the profits of the partnership business. Thus, for example, if a doctor incurs expenditure relating to his individual specialisation, but the expenditure nevertheless satisfies the "wholly and exclusively" test, it may properly be deducted in calculating the partnership profits. Secondly, however - and here there may be a small element of concessionary treatment - HMRC do not insist on the inclusion of all such expenditure in the partnership accounts. Provided that the expense in question "would be allowable if met from partnership funds", HMRC will accept entries made in the relevant sections of the partnership tax return, by way of adjustment to the partnership accounts. Once the adjustments have been made, the expenditure will then be treated as if it had been included in the partnership accounts. There is no suggestion, however, that any expenditure by an individual doctor could be allowed as a deduction even if it failed to satisfy the "wholly and exclusively" test. Nor is there any indication that a doctor could make such adjustments in his personal tax return, which is what Mr Vaines purported to do. At most, therefore, the help sheet provides a limited measure of practical assistance for medical partnerships. Even if similar assistance were to be provided, by analogy, for solicitors' partnerships, it could not help Mr Vaines, for two reasons. First, the payment which he made could not satisfy the "wholly and exclusively" test, and could never have been an allowable deduction in computing the profits of SSD's trade. Secondly, Mr Vaines sought to make the deduction, without reference to SSD, in his personal tax return.

36. For these main reasons, I was satisfied by the end of the hearing that Mr Vaines' appeal must be dismissed. It is unnecessary to go on to consider what the position would have been if SSD had itself made the payment from its own resources, or if Mr Vaines could somehow be treated as having carried on an independent trade of his own, separate from that of the partnership. Nor is it necessary to consider whether the expenditure, if it satisfied the "wholly and exclusively" test, would nevertheless not have been deductible because it was of a capital rather than an income nature.

37. Finally, I should mention that Mr Vaines referred us to, and placed considerable store by, the decision of Park J in Major v Brodie 70 TC 576, [1998] STC 491. Again, however, I do not consider that it helps Mr Vaines. It was a case on unusual facts, involving a Scottish partnership, and concerned different statutory provisions. In so far as Park J referred to the general law of partnership in his characteristically lucid judgment, I find nothing there which casts any doubt on the basic principles which I have sought to explain. In particular, when he said at 597 that "a trade carried on by a partnership is a trade carried on by its members and by each of them", he clearly did not mean to suggest that each individual partner carries on a trade separate from that of the firm.

**Conclusion**

38. For these reasons, I was satisfied that Mr Vaines' appeal had to be dismissed.

**Newey LJ:**

39. I agree.

**Sharp LJ:**

40. I also agree.