TC02306

Appeal number: TC/2011/08600

INCOME TAX – self assessment - enquiry into letting income and business profits - whether profits understated - unidentified deposits in private bank account - investment in properties - whether partly funded by family members - held, on facts, no - closure notice confirmed subject to minor amendments as made on review - discovery assessments for previous two years confirmed - penalties under s 95 TMA 1970 confirmed but in reduced amounts - penalty under Sch 36 FA 2008 confirmed - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

AZADUL HUSSAIN CHOWDHURY **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN CLARK
DAVID E WILLIAMS CTA

Sitting in public at 45 Bedford Square, London WC1B 3DN on 25 June 2012

Jarnal Grewal of Redford & Co, Chartered Accountants, for the Appellant

David J Glassonbury, Tribunal Caseworker, HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant, Mr Chowdhury, appeals against the decisions by the Respondents ("HMRC") to make discovery assessments for the years 2004-05 and 2005-06, and a closure notice in respect of 2006-07, to impose penalties under s 95 of the Taxes Management Act 1970 ("TMA 1970") for all three of those years, and to impose a penalty under Schedule 36 to the Finance Act 2008. All the decisions relating to the assessments and the penalties were upheld on review as set out in a letter from HMRC dated 27 September 2011.

The background facts

2. The evidence consisted of a bundle of documents. Mr Chowdhury gave oral evidence. In addition, witness statements were provided by members of his family. As these witnesses did not attend the hearing, we considered the extent to which these statements could be taken into account; we deal with this at a later point below.

3. From the evidence we find the following background facts. We deal with disputed matters in the final section of this decision.

4. Mr Chowdhury's business "Becontree News & Groceries", which started in February 2002, is located in a small parade of shops in the Dagenham area (at 759 Becontree Avenue). The items sold are "CTN", ie confectionery, tobacco goods and newspapers and magazines, and essential groceries. It is not a supermarket, and there is a branch of Morrisons supermarket about 200 yards away. The customer base is local residents. Payments can be made by the Paypoint service, and Oyster cards are sold. Money transfers can be made via Western Union. For the latter activities, the business receives commission payments.

5. His second business, Admost Limited (trading as Fairways Newsagent), which started in September 2004 and was not under HMRC enquiry, is located in Ilford. This is also a "CTN" business. In comparison to the situation of Becontree News, it is nearer to the main shopping centre in Ilford.

6. In addition, Mr Chowdhury owns, or has interests in, various properties. As the exact terms of ownership of certain properties are matters of dispute, we do not set out any details here, but cover them below.

7. On 3 September 2008, Mrs Clague, an HMRC enquiry officer, gave notice that she intended to enquire into Mr Chowdhury's tax return for the year ended 5 April 2007. The schedule to her letter listed the various items of information which she required for the purposes of her enquiry.

8. That return ("the 2007 return") showed entries for self-employment profits from Becontree News, "employment income" from Becontree News & Groceries (stating that this employment had ceased on 31 March 2007), employment income from Admost Ltd, and a "Land and Property" loss of £ 17,456. We deal with the

"employment income", which was not in fact a separate employment, in paragraph 50 below.

9. On 20 February 2009 Mrs Clague wrote to Mr Chowdhury asking for further information. After further correspondence (not included in the evidence) Mr Grewal wrote to Mrs Clague on 30 April 2009 to confirm that his firm, Redford & Co, would be acting for Mr Chowdhury as new agents in relation to the enquiry, and to provide a form 64-8.

10. Following further correspondence, in the course of which various details were provided to Mrs Clague, she wrote to Redford & Co on 25 August 2009. She stated that during the period from 22 May 2006 to 30 April 2007 Mr Chowdhury's private bank account had been credited with a total of £256, 910.84. She listed a number of credits which had been identified, but indicated that credits totalling £140,965.82 remained unidentified. She requested a comprehensive breakdown of the unidentified deposits. She raised a number of other questions in respect of which she requested comment.

11. On 27 October 2009, Mr Grewal replied. Under the heading "Property Portfolio Funding", he referred to an enclosed summary of amounts credited to Mr Chowdhury's account. This summary deducted from the unidentified credits of £140,965.82 a series of items totalling £102,621.06, leaving a balance of unidentified credits totalling £38,344.76. Mr Grewal explained that he was writing to Mr Chowdhury's accountants to establish how the balance was dealt with. He gave information relating to a series of items on which Mrs Clague had requested comment.

12. Correspondence continued over an extended period; it is not necessary for us to set out full details of the exchanges. In her letter to Redford & Co dated 5 May 2010, Mrs Clague revised the total of unidentified credits to £114,339.76; she stated that in the absence of evidence to substantiate these deposits, she proposed to treat them as trading income.

13. In late June 2011, Mrs Clague wrote to Mr Chowdhury, stating that as no agreement could be reached, she was now closing her enquiry. She set out the details of discovery assessments for a number of years, and a summary of her enquiry into 2006-07. She also gave details of the penalties. The closure notice, discovery assessments and the penalty determinations would be sent under separate cover.

14. On 27 July 2011 Redford & Co wrote to Mrs Clague to give notice of appeal against the 2006-07 assessment, the discovery assessments for the relevant years, and the penalty determinations. They set out responses on a number of matters, and requested an independent review.

15. On 15 August 2011 Meira Taylor, an HMRC officer in the same office as Mrs Clague (who had retired from HMRC), responded with her opinion of the position in Mr Chowdhury's case.

16. The Review Officer, Mrs J Laube, wrote to Mr Chowdhury on 27 September 2011 with the results of her review. She considered that a number of the discovery assessments should be cancelled, as should a number of the penalty determinations. She upheld the discovery assessments for 2004-05 and 2005-06, the penalty in respect of 2006-07 under Schedule 36 FA 2008, and the penalties under s 95 TMA 1970 in respect of 2004-05, 2005-06 and 2006-07. Subject to minor adjustments, she confirmed the liability for 2006-07 as set out in the closure notice.

17. On behalf of Mr Chowdhury, Redford & Co gave Notice of Appeal to HM Courts & Tribunals Service on 25 October 2011.

Arguments for Mr Chowdhury

18. Mr Grewal questioned whether HMRC's letter dated 3 September 2008 was a valid notice under s 9A TMA 1970. It had not been signed and did not refer to that section. In the schedule of information, Mrs Clague had asked, under the heading "Income from Property from 06/04/2006 to 05/04/2007", for credit card statements, bank statements, building society passbooks, cheque book stubs and paying-in book counterfoils covering the period from 1 January 2006 to 30 June 2007. She had explained:

> "Three months either side of the accounting year have been asked for to help reconcile payments in advance and in arrears."

He contended that the period from 1 January 2006 was outside the scope of the enquiry.

19. He made various submissions on the facts. He handed in a document entitled "Accounts Summary" analysing the results for the three years to 2006-07, and showing the "Actual Gross Profit percentage"; the document compared this with the revised gross profit figures and revised gross margin figures resulting from HMRC's revisions to the profits. He described these margins as unachievable and therefore "fantasy". There had not been a single letter where HMRC had concentrated on the veracity of these figures.

20. He submitted that there had been no disputes and that there had been total co-operation. He referred to HMRC's former publication "Business Economic Notes" number 26. He accepted that the figures used in the example on page 2 of that publication were old, and submitted that since then, the position for traders had been worse rather than better, due to factors such as competition and so on. The returns as filed were very much in line with that information. It was therefore "unfounded" to accept the discovery assessments. If the officer had confined her attention to the discovery year, Mr Chowdhury and his advisers would not have had to deal with this.

21. Mr Grewal referred to Mrs Clague's request for information concerning Becontree for the period between February 2002 and April 2007. He submitted that a large part of this period was not covered by the enquiry. Mrs Clague had also asked for evidence such as bank statements from members of Mr Chowdhury's family to show when and how they had transferred monies to him, and had stated that in the

absence of such evidence she would have to assume that this funding came from trading. Mr Grewal submitted that Mr Chowdhury could not exercise this power over others, and that everything listed on the next page of the letter as required for the purposes of the enquiry was unwarranted and not relevant to the period under enquiry. Mr Grewal made similar submissions in relation to various parts of the subsequent correspondence.

22. He made a number of points concerning the "unidentified deposits"; these are considered in the final part of this decision. He argued that the discovery assessments were completely erroneous and had no basis in fact; they had been the results of the stance taken by the particular officer. No proper business economic exercise had been carried out, and the officer had decided that these assessments would give a good result for HMRC.

23. He made various submissions concerning the penalties and the percentage rate after abatements for disclosure, co-operation and seriousness. He had never come across penalties being levied at the substantial rate of 65 per cent of the tax due.

Arguments for HMRC

24. Mr Glassonbury referred to the unidentified deposits as being the main crux of the case, although a number of other issues arose. He made various submissions on the facts, considered below. He submitted that it was not correct to paint the officer (Mrs Clague) as a "lone maverick"; she had acted in accordance with normal HMRC instructions for dealing with such cases.

25. He submitted that the s 9A TMA 1970 enquiry notice had been legal; there was no need to mention the legislation under which it had been issued. There was no specific requirement that it must be signed, although he hoped that it had been. The version included in the bundle was a file copy.

26. It was open to HMRC to request the information. Nothing had specified "private accounts". It was not correct to suggest that Mr Chowdhury had been "singled out" for enquiry.

27. In relation to the penalties under s 95 TMA 1970, he accepted that these were dependent on the assessments. Mr Grewal's submissions that the penalties should be at a significantly lower rate, rather than nil, seemed to imply acceptance that there had been negligence. There had been an admission that £38,344.76 remained unexplained, and this might be attributable to the other business. Mr Glassonbury submitted that there were fundamental weaknesses in Mr Chowdhury's case. A large part of the process of arriving at penalties under s 95 TMA 1970 was size and gravity (or "seriousness" as it was now described in HMRC documents). Mr Glassonbury accepted that if the Tribunal concluded that there was no additional income to assess, there would be no s 95 penalty. He submitted that the level of penalty being sought by Mr Grewal on Mr Chowdhury's behalf was low, and indicated that a penalty of 50 per cent would be low in such a case. We consider below the issue whether Mr Chowdhury is liable to such penalties, and if so the quantum of those penalties.

28. Mr Glassonbury submitted, in response to Mr Grewal's comments on the length of the enquiry, that the reason why it had continued for so long had been that a great deal of information had been required in order to complete it. It had not been a case of HMRC "going on a fishing expedition". The unexplained deposits of £140,000 had emphasised the need for the enquiry.

29. In summary, the explanations did not "stack up". If money was coming back to Mr Chowdhury, there were no figures showing signs of appearing in the schedule prepared by HMRC of unidentified credits to his bank account.

30. HMRC accepted that the total of unidentified deposits should be altered by deduction of a "contra" payment of £15,000 relating to Admost Limited, and a deposit of £11,626 made after the end of 2006-07. The amended total was £114,339.76.

31. Mr Glassonbury referred to the judgment of the Privy Council in *Bi-Flex Caribbean Ltd v The Board of Inland Revenue* (1990) 63 TC 515. This cited various authorities stating that in making an assessment to the best of his judgment, the officer should make a fair and proper estimate of the proper figure to be assessed. In Mr Chowdhury's case, it was not unreasonable to conclude that other "diversions" were not banked. This had been the basis for the additions to the amounts assessed.

32. In summary, the main issue was the level of unidentified deposits. The £114,000 still remained unexplained. Mr Glassonbury submitted that the explanations put forward on Mr Chowdhury's behalf were not credible, and asked for the appeal to be dismissed.

Discussion and conclusions

33. We deal first with the amendment by the closure notice to the self-assessment for 2006-07, and the assessments for 2004-05 and 2005-06. On an appeal to the Tribunal, s 50(6) of the Taxes Management Act 1970 ("TMA 1970") provides that an assessment is to stand good unless the Tribunal decides that the appellant is overcharged by a self-assessment or an assessment. Various decided cases (details of which we do not find it necessary to set out here) have established that it is for the appellant in such circumstances to satisfy the Tribunal that an assessment should be reduced, in other words that the burden of proof is on the appellant. The standard of proof is the ordinary civil standard, ie on the balance of probabilities. In applying that standard, the House of Lords in the case of *In Re B* [2009] AC 11 made it clear that inherent probabilities or improbabilities should be taken into account.

34. In order to reach the conclusion that the assessments for the three years made on Mr Chowdhury should be reduced, we therefore need to be satisfied on the balance of probabilities that the evidence leads to that conclusion.

Preliminary point on witness statements

35. One element of the evidence is the witness statements provided by other members of Mr Chowdhury's family. As considered in further detail below, part of

Mr Chowdhury's case is that money held for these family members was used to assist in purchasing various properties, so that they would each have interests in those properties; investments were being made on their behalf, as they would not have been able to obtain the finance to make outright purchases of the properties in their own right. Mr Glassonbury submitted that as those witnesses were not present at the hearing and therefore could not be cross-examined, their evidence should not be admitted. In response, Mr Grewal referred to the absence of the enquiry officer, Mrs Clague. On that point, Mr Glassonbury indicated that HMRC could have called her, although she was now retired, but she was not putting forward any evidence. Mr Grewal's response to the submission that the witness statements should not be admitted was to refer to the practical problems of getting the individuals concerned to attend. People were needed to keep the business running while the hearing was going on. It had been suggested by Mr Glassonbury that statements should be obtained; there had been no reference to the effects of the witnesses not attending the hearing.

36. Mr Glassonbury responded that if witness statements were to be put forward as evidence, the witnesses should attend. Notice of objection had been given; this was a fundamental principle.

37. Having heard the arguments on this preliminary point, we retired to consider the issue. Our conclusion, which we announced on resumption of the hearing, was that we would admit the witness statements, but would take into account the absence of any cross-examination in assessing the weight to be given to that evidence. We noted HMRC's objection, and agreed that we would record it in our decision. On that basis, Mr Glassonbury accepted that the witness statements should be admitted in evidence.

Validity of the enquiry notice under s 9A TMA 1970

38. We are satisfied that this notice was properly issued. We accept Mr Glassonbury's argument that the version of the notice contained in the bundle is a copy of the notice, rather than the original, and therefore does not carry Mrs Clague's signature. Section 9A does not specify the form in which such a notice is to be issued. Although we consider it advisable for a notice to carry the officer's signature, as a means of establishing that the officer issued the notice, there does not appear to be a formal requirement that an enquiry notice should be signed by the issuing officer. Nor is there any formal requirement for the notice to specify the legislation under which it is issued. We therefore reject Mr Grewal's challenge to the validity of the enquiry notice dated 3 September 2008.

Closure notice for 2006-07

39. Mr Chowdhury's self assessment return for 2006-07 showed pay from all employments totalling £11,960 and profit from self-employment of £13,328. His rents and other income from land and property were shown as £29,990, against which expenses totalling £42,647 (including finance charges) were set, giving a loss of £14,657. The total amount of tax and National Insurance Contributions ("NICs") shown as due was £3,518.10.

40. HMRC's closure notice dated 28 June 2011 showed pay from all employments of £6,760 (ie removing from this heading £5,200 which had been shown as Mr Chowdhury's employment income from Becontree News) and profit from self-employment of £39,445. The latter figure was arrived at by making two additions. The first was £14,207, made up of a disallowance of £8,049 in respect of premises costs, the disallowance of the £5,200 referred to above in respect of employment costs, and an increase in commission income of £958. The second was an addition based on a calculation related to the unidentified deposits; this figure was £12,000. (We return separately below to the question of the unidentified deposits.) The total additions were therefore £26,207.

41. The notice made no reference to property income, to which Mrs Clague had referred in Section A annexed to her undated letter setting out the reasons for her decisions in relation to all the years then under review. In that Section she set out a "Revised rental account". The rental income was increased to £31,990, less expenses of £9,014, finance of £19,111 and 10 per cent "wear and tear" allowance of £3,199, giving a total taxable rental income for 2006-07 of £666. Mrs Clague referred to a telephone conversation between Mr Grewal and her colleague Mrs Meira Taylor on 9 March 2011 in which Mr Grewal had accepted the wear and tear allowance and had agreed that the expense figures as originally shown had been incorrectly claimed.

42. The closure notice showed additional tax and NICs as being due in the sum of £7,721.35. In her review letter dated 27 September 2011, Mrs Laube indicated that according to HMRC's current view of the matter, the total should be £7,218.28. The tax calculation attached to her letter showed a small reduction in Mr Chowdhury's profit from self-employment (£38,218 rather than £39,445).

43. In their letter dated 27 July 2011 appealing to HMRC in relation to various matters including the closure notice for 2006-07, Redford & Co challenged disallowance of a number of the property expenses, and claimed that the net expenses to be disallowed should be £4,727.64. In those circumstances, they considered that Mr Chowdhury should still have a loss carried forward in respect of his property income. In relation to his self-employment income, they contended that the assessment should be amended by £12,022, and not the figure shown by Mrs Clague. They commented that "the Enquiry Office has added a fictitious £12,000 assessable".

44. Before considering the amount of the self-employment income, we deal first with the property income for 2006-07. The total disallowances conceded on Mr Chowdhury's behalf in respect of expenditure initially claimed against rental income amounted to £5,958.02. The difference between this figure and the net expenditure to be disallowed was £1,230.38. The latter was made up of claims for expenditure on various items as costs of the business of letting the properties (described in a series of handwritten schedules as "Other general repair"), plus a rent collection allowance of 1/26 of the rental income to cover expenses which would otherwise have been charged by a managing agent.

45. In section A of the appendix to her undated letter notifying closure of the enquiry, Mrs Clague referred to Mr Chowdhury employing the services of a letting

agent, and disallowed various deductions in relation to properties on the basis that administration costs were largely included in their fees. In the Notice of Appeal and at the hearing, it was made clear that although Mr Chowdhury used a letting agent, that agent was responsible only for sourcing tenants and was not engaged in providing letting management services. As a consequence, Mr Chowdhury had to incur various minor expenses in collecting rents and administering the letting business. We are persuaded, on balance, that the deductions for "Other general repair" represent a reasonable estimate of the cost of other items of expenditure associated with the upkeep of the properties, although we consider it advisable for more specific records to be kept in future to substantiate such costs. Taking all these matters into account, we accept that the £1,230.38 should not be disallowed in computing the rental income for 2006-07.

46. In the Grounds of Appeal, Redford & Co also submitted that there should be no disallowance in respect of finance charges. In section A of the appendix to her "closure" letter, Mrs Clague indicated that as the purchase price of the property at 19 Belmont Road had been £110,000 in 1999, only that proportion of the interest on the £202,000 mortgage taken out at a subsequent stage should be allowed against the rental income. We accept that the "wholly and exclusively" rule applies for the purposes of the letting business.

47. There is some indication in the correspondence, as well as matters referred to at the hearing, that the additional amount raised by re-mortgaging the property was used for the purposes of acquiring the business premises. It is not clear whether this refers to the Becontree News business or the Fairways News business, and we are therefore unable to make any specific findings concerning the precise purpose. Although Redford & Co referred in their letter dated 7 September 2010 to the re-mortgage funds having been used to acquire the freehold of 759 Becontree Avenue, in their letter to Mrs Clague dated 3 June 2009 they had stated that the re-mortgage had had been obtained for the purpose of providing funding for the purchase of Fairways Newsagents. In her reply dated 3 November 2010, Mrs Clague asked for information as to the use of the re-mortgage funds. In her later letter dated 4 March 2011 she repeated this request, and referred to the Schedule 36 Information Notice issued at that point requesting documents to help clarify the situation. She indicated that if the loan had been used to purchase the Fairways business, the loan interest could be shown in those accounts. In the same way, if the loan was a business loan to purchase the Becontree News premises, then it would show in the latter accounts.

48. As far as the rental business is concerned, we find that there is no evidence sufficient to displace the conclusion arrived at by Mrs Clague in the closure notice that a proportion of the total interest of £10,512 should be disallowed. The disallowance figure used by Mrs Clague was £4,624. It appears to us that this figure is not correct; on our calculations, the figure disallowed ought to be £4,787.64, the difference between the two figures being £163.64.

49. Our overall conclusion as to the rental income for 2006-07 is that the total taxable rental figure of £666 shown at page 3 of Mrs Clague's section A of the

appendix to her letter should be reduced by £1,066.64 (£1,230.28 less £163.64), giving a loss carried forward of £400.64.

50. Turning to the income from Becontree News for 2006-07, Mr Chowdhury accepted that there should be "add-backs" for rent claimed of £6,822 and for "employee costs" of £5,200 – the latter, though entered as income on his return, being simply his own drawings as proprietor. He did not accept Mrs Clague's add-back of £810 in respect of rates for the flat above the shop, or her disallowance of £417 in respect of utilities for the flat. The evidence from the correspondence was that the flat had been let for eight months in that year. (In relation to rental income, we have insufficient evidence to show whether any allowance against that income was made by Mrs Clague for the £810 rates or the £417 in respect of utilities, but in turn we have no evidence to demonstrate that she did not do so; those items of expenditure related to the rental income rather than the income from the business, and therefore fall to be disallowed in computing the taxable profits of the Becontree News business.) As indicated above, the burden of proving that the assessment is excessive falls on Mr Chowdhury, and therefore in this respect the assessment as represented by the closure notice must stand.

51. The other adjustment made by Mrs Clague was to increase the commissions received from Transys in respect of travel and bus passes by £958. The evidence included a copy of a letter from Transys dated 5 May 2010 enclosing a printout showing Mr Chowdhury's sales for the period 1 April 2006 to 31 March 2007. In her letter dated 23 July 2010, Mrs Clague referred to the amount declared by Mr Chowdhury as commission from this source as having been £5,028, whereas the Transys statement showed a total of £6,013.33. We calculate the difference as £985.33, so Mrs Clague's figure appears to have two digits transposed. Redford & Co argued in their letter to HMRC dated 27 July 2011 and in their Grounds of Appeal that the assessment should be amended by £12,022 (ie by the add-backs for rent and salary referred to above); we consider in the light of the evidence as to the commission income that there is no basis for resisting Mrs Clague's further addition of £958 (which should have been £985, but the difference is minimal in the context of the other matters in dispute).

52. The additions referred to above amounted to £14,207. Mrs Clague made a further addition to the business profits in respect of the matters referred to below; this was £12,000. At page 3 of section A of the appendix to her closure letter, she restated her comments in her letter dated 5 May 2010:

> "I consider that it is your normal practice to retain cash for personal use which has not been included within the accounts. Similar to the Discovery Assessments raised for the years ended 5 April 2005 and 5 April 2006 I consider that a sum to reflect this practice should be added to the overall profit.
>
> In the absence of bank statements for the beginning of the financial period (requested in the Information Notice dated 3 November 2010) I consider that this figure should be £12,000. This amount is similar to

> the unidentified deposits into your personal account in the early part of the year ended 5 April 2007."

53. The additions referred to by Mrs Clague were based on the unidentified deposits into Mr Chowdhury's account. Although we have given some details above concerning these, for ease of reference we also set out this information here. As revised, Mrs Clague's total of such deposits was £114,339.76. The period over which the deposits were made was from 22 May 2006 to 30 April 2007; the balance at the former date was £40,376, and the total of credits for the period was £256,910.84. Approximately £116,000 of this total was identified, together with the further reductions of £11,626 and £15,000 referred to above.

54. In an attachment to Redford & Co's letter dated 27 October 2009, they set out details of further credits, and showed them as deductions from the then unidentified credits total of £140,965.82. These further credits included the £11,626 relating to 2007-08; the contra entry was shown as £17,000 rather than £15,000. The other items were "Siblings Cash" £50,000, "Rebts" [*sic*] £12,075, "Becontree salary" £5,200, and "Admost salary" £6,720. The balance after deducting the total of £102,621.06 was £38,344.76.

55. In argument, Mr Grewal accepted that Mr Chowdhury was unable to account for this total of £38,344.76. He explained that the bankings for the business were dealt with in Ilford, as Admost's premises were opposite the bank. He assumed that there had been an error on the part of one of Mr Chowdhury's brothers, who occasionally dealt with the banking of cash if Mr Chowdhury was unavailable, and accepted that there had been an error; he agreed that this amount was assessable.

56. No explanation for the contra entry of £17,000 was provided in the correspondence, or at the hearing. The bank information showed two transfers out, annotated "Admost", of £10,000 and £5,000 respectively on the day following the deposit of those sums. We are not satisfied that there was a further entry amounting to £2,000.

57. The reference to the credit for "Rebts" was explained by Redford & Co in their letter dated 12 February 2010 as either a typographical error, or a misreading of the schedule attached to their letter dated 27 October 2009. The copy in evidence shows this error, and we accept that the intention was to refer to rents. In the analysis shown in the bundle, the rents are stated to be in respect of "Mormora [*sic*] /Ashburton". The properties concerned are 15 Marmora House and 144 Ashburton Avenue Ilford. In a summary of receipts and expenses for 2006-07, the rent from 15 Marmora House totals £8,975; there is an annotation against the figure for December 2006 showing "£75 refund". The total rent received in that period for 144 Ashburton Avenue (for December 2006 to March 2007 only) is shown as £4,800. The total rents from these two properties are therefore £13,775; even if the £75 is deducted, the total exceeds the £12,075 referred to by Redford & Co. We are unable to reconcile the total rents against the entries in the list of unidentified credits. Mr Grewal referred to various sums as including rents in respect of particular properties, but the amounts to which he referred do not enable us to establish to our satisfaction that there is any link

between the rents referred to in the handwritten schedules contained in the bundle and the entries in the list of unidentified deposits.

58. In relation to the "Becontree salary" and the "Admost salary", we are not satisfied that there is any relationship between those amounts and the list of unidentified credits. The "Admost salary" amounts to £560 per month; no such amounts appear in the list, and there is no amount corresponding to the total salary. Redford & Co's calculations do not appear to take into account the fact that this "salary", having been treated as employment income for PAYE purposes, was subject to deduction of tax. Whether or not the tax of £172 withheld under PAYE is deducted from the gross "salary", it is not possible to find a corresponding entry in the list of credits. The "Becontree salary" amounts to £100 per week, and again there is no reference to this amount being deposited. If the tax of £1144 withheld under PAYE is deducted from this amount, there is again no entry in the list which corresponds to the net amount or any proportion of it. We are not satisfied that any amounts in respect of these "salaries" can be set against the total of the unidentified credits.

59. The remaining item is for "Siblings Cash". The explanation given for this amount was as follows. Mr Chowdhury's wife Shamima, his sister Nasema, and his brothers Anwar and Dilwar had all worked in the business on a part time basis during the five years to 5 April 2007. (Mrs Chowdhury had not worked during the year to 5 April 2007.) Over the period, they had been paid in cash, but subject to PAYE. The net sums had, at least in part, been handed to Mr Chowdhury for investment on their behalf. A document prepared by Redford & Co showed that the total amount of all the payments to the family members (using estimates in several cases, rather than P35 and P60 records) was £86,557. Of the total £50,000 referred to as "Siblings Cash", £10,000 was shown as provided from Mrs Chowdhury, £15,000 from Nasema Chowdhury, £15,000 from Anwar Chowdhury and £10,000 from Dilwar Chowdhury.

60. Mr Chowdhury explained that at the relevant time, Nasema and Anwar had been students, living with their parents, and had worked part time in the business. His wife Shamima had been able to work part time in the business because the children's grandmother was able to look after the children. Dilwar (who is Anwar's twin) had worked part time in the Fairways business. Payment for their services had been made in cash, but a proportion of the payments had been given to Mr Chowdhury or to his father (who had since died) to retain for investment. The money had been stored by his father in a large safe in the basement of his father's house. Mr Chowdhury stated that the reason for retaining the money was the view, as taught by his father, that members of the family should spend the minimum and save the maximum.

61. In the respective witness statements, which were all in virtually identical form, and should more correctly be described as letters setting out the respective family members' description of the factual circumstances, the four members of Mr Chowdhury's family each stated that they had given a proportion of their income to him to retain for investment in the future. Their understanding was that the income, having been retained in cash, had been reinvested in cash by him when he bought his property portfolio.

62. Although we note the contents of these witness statements, we give them very little weight in terms of evidence, as the members of the family who provided them were not present at the hearing to be cross-examined. We therefore consider whether the evidence as to the surrounding circumstances corroborates the statements made.

63. The payment said to have been made by Nasema was £15,000 out of a total income for the five years of £21,312. The figures for Anwar were comparable, being £15,000 out of a total income of £20,131. Both were students for part of the period; Mr Grewal intervened to point out that they had been based at home. We are not convinced that the balance after the alleged retention would have been sufficient for them to fund their costs, even allowing for them living at home.

64. In response to Mr Glassonbury's question why all the investments had been made in Mr Chowdhury's name, Mr Chowdhury indicated that he regretted having put everything in his name. He explained that they had been students, whereas he was working and could get a mortgage. As the eldest brother, the burden fell on him. This was a matter of the way in which the society to which he belonged actually worked. On his father's death (in 2009) he became the head of the family and had certain traditional responsibilities towards his younger siblings, especially as regards their financial status and marriage prospects.

65. We asked Mr Chowdhury whether there was any legal record of the arrangements with his family. He indicated that there was not; everything had been done as a short-term arrangement, until the respective family members could get a mortgage. We then asked him what was happening to the rents on the properties held for the others. He explained that separate accounts were not kept; instead, he kept a folder to tell what was held for each family member. We also asked him why there was a "double transaction", involving payment of cash which was then returned to him. He replied that they could at least see what they were earning; there had been no hard and fast rules to say how much they should be able to keep before the balance was handed over. Payments to him were mostly in round sums, but sometimes not; there were no hard and fast rules. Payments by them were made "as and when", whatever they could afford. There was no obligation for them to pay the same amount.

66. Earlier, in cross-examination, he stated that the amounts which he had invested on their behalf were round sums, because these were the amounts which his father had given to him. His father had kept a note of who had given what; he did not give Mr Chowdhury the "odd amounts". Mr Chowdhury did not know what his father had done with the other balances for each family member.

67. Following on from our question relating to the "double transaction", we asked whether at some stage a record of the amounts retained for investment had been kept. Mr Chowdhury indicated that no record had ever been provided to him. His father had preferred to keep the cash in the basement safe, and was the only one who had the key. Mr Grewal also confirmed that he had never seen any such record.

68. We are not satisfied that the evidence concerning the investment of funds on the other family members' behalf is a true account of the position. The statements by Mr Chowdhury and the other members of his family are no more than mere assertions. There is no evidence to corroborate these assertions. In particular, there are no documentary records to suggest that any of the properties is held by Mr Chowdhury on behalf of another family member. In Mr Chowdhury's Statement of Assets as at 5 April 2007, he indicated that in terms of beneficial ownership, he held a 33 per cent share in 15 Marmora House, ie £49,500 out of the full asset value of £150,000. 144 Ashburton Avenue was shown as beneficially owned by one of his brothers, with a value (subject to a mortgage of £208,000) of £250,000. The property at 17 Cavenham Gardens was shown as beneficially owned by a brother, the value (subject to a mortgage of £205,000) being £235,000. The property at 38 Bonham Road was shown as beneficially owned by his sister, the value (subject to a mortgage of £155,000) being £173,000. Handwritten annotations on a summary of properties attached to the Statement of Assets referred to Nasema Chowdhury in connection with 38 Bonham Road, Anwar Chowdhury in relation to 17 Cavenham Gardens, and Dilwar Chowdhury in connection with 66 Broadhurst Avenue; there is no evidence as to when such annotations were made, or, in particular, whether they were on the summary at the time when this was supplied to HMRC. Further, the annotation concerning 66 Broadhurst Avenue is not consistent with the information set out earlier as to beneficial ownership of 144 Ashburton Avenue by one of Mr Chowdhury's brothers.

69. The amounts shown as "Deposits" in relation to the properties listed on that summary (ie the differences between the total cost of each property and the amount of the mortgage relating to each such property) are significantly greater, in the cases where the family members were said to be involved, than the amounts said to have been contributed by such members. The "deposit" for 17 Cavenham Gardens was £32,018, whereas Anwar Chowdhury's contribution was shown in the other document referred to above as £15,000. It is unclear on what basis the excess over the latter amount was provided. The "deposit" for 38 Bonham Road was £22,213, whereas Nasema's alleged contribution was £15,000. The "deposit" for 66 Broadhurst Avenue was £41,471, whereas Dilwar's alleged contribution was £10,000. The "deposit" on 144 Ashburton Avenue was £47,974, significantly greater than the alleged contributions from either of Mr Chowdhury's brothers. There was nothing to indicate how the alleged contribution of £10,000 from Mrs Chowdhury was said to have been applied in purchase of any property.

70. In Mr Chowdhury's return for the year 2006-07, the amount shown in respect of rents from land and property was £27,990. (This was subsequently increased by Mrs Clague, in Section A of the attachment to her closure letter, to £31,990, to take account of eight months' rent on the flat above the shop.) The entries in Section A make clear that the return included the full amounts of rent on 17 Cavenham Gardens, 144 Ashburton Avenue, and 15 Marmora House. There is no mention of 38 Bonham Road; we do not have sufficient evidence to establish whether any rent was received in respect of this property, or whether it was occupied by Nasema Chowdhury.

71. The reporting of the full rental income from the first three of these properties appears to us inconsistent with the assertion that they were held on behalf of the other family members respectively as beneficial owners.

72. Mortgages were obtained on all four of these properties. If they were held for the other family members as beneficial owners, this information would have been a material consideration for the respective mortgagees concerned. There is nothing to suggest that any notification of the alleged arrangement was given to the mortgagees; despite the Information Notice (considered below), the mortgage applications were not produced.

73. The absence of any formal record of the arrangements between the family members and Mr Chowdhury or his late father is a further factor casting doubt on the assertions as to the alleged "investment arrangements". Further, there is nothing to show, in the event of the death of any of the family members or Mr Chowdhury himself, that the properties are held otherwise than for him as owner of the legal estate in, and beneficial owner of, those properties.

74. P35s and P60s were supplied to verify part of the income received by the family members. These establish the receipt of that part of the income by those individuals. Redford & Co referred in their letter dated 29 July 2009 to a cultural trait of the Asian community, with Mr Chowdhury being the eldest, that his siblings would have entrusted him to look after their interests. Mr Grewal repeated this submission at the hearing. We are prepared to accept the existence of such a cultural trait, although we emphasise that the reference to this was more an assertion than a matter of formal evidence. The important question, however, is whether this occurred in the present case. In her letter dated 23 July 2010, Mrs Clague made the following comment on the question of the unidentified deposits:

> "I do not refute the existence of P35s, nor do I contest the ability of Mr Chowdhury's family to assist him in his business. However, as I have said in previous correspondence I do not consider ability to pay as evidence of payment."

75. We agree with the latter comment. We find that there is insufficient corroborative evidence to satisfy us that the arrangements described by Mr Chowdhury and his advisers were made in the manner claimed, or that the family members had interests in the properties referred to above.

76. In the absence of any supporting evidence to establish the existence of the alleged arrangements, and taking account of the contrary indications, we find, on the balance of probabilities, that the £50,000 was not provided by the family members as stated by Mr Chowdhury.

77. In her letter dated 9 December 2009, Mrs Clague proposed to add the sum of £50,000 to the net profits of the year under enquiry (2006-07). The approach which she took in her closure letter was different; see paragraph 52 above. Thus instead of treating the whole £50,000 as arising in 2006-07, she regarded the sum as having accrued over a longer period. We are satisfied that this approach is reasonable, and

accept that £12,000 should be added to the profits of Becontree News for the year 2006-07, together with the other addition referred to above. In Mrs Clague's closure letter, this was stated to be £14,207; however in Mrs Taylor's letter dated 15 August 2011, this was revised to £12,980. The latter figure was confirmed on review. The Tax Calculation attached to the review letter showed an increase in profits of £24,980; we consider this to be the correct figure.

78. Mr Grewal argued that the revised gross margin resulting from HMRC's adjustments to the business profits was "unbelievable" and therefore "fantasy". There had not been a single letter where HMRC had concentrated on the veracity of these figures. He submitted that the revised gross margin percentage was unachievable.

79. In making those comments concerning 2006-07, he was referring only to the £12,000 addition, and not to the other £12,980. The percentages for the previous two years as amended by the discovery assessments were greater, given the more substantial additions for those years (considered below). Although the percentages appear high, they do not amount to evidence that the assessments for 2006-07 and the previous two years were not correctly made; we have to consider on the balance of probabilities whether the amended assessments and closure notice issued by HMRC should stand, or whether there is evidence justifying any reduction in the amounts assessed. In relation to 2006-07, we are satisfied that the assessment was appropriately amended by the addition of £24,980 to the business profits.

Discovery assessments for 2004-05 and 2005-06

80. These assessments each increased the business profits by £60,000 to reflect the steady acquisition of the unidentified funds in Mr Chowdhury's personal bank account in the year of enquiry. We have already considered in detail the issue of the unidentified credits to that account, and concluded in relation to 2006-07 that the addition of £12,000 to the profits for that year was properly made and that there was no evidence to support the reduction of that amount. On the basis that £12,000 out of the £114,339.76 total of unidentified deposits for the period from 26 May 2006 to 5 April 2007 was attributed to 2006-07, we accept that the balance should be attributed to earlier years, on the basis of the presumption of continuity as referred to by Walton J in *Jonas v Bamford* (1973) 51 TC 1 at 25. We also note that Mrs Clague took into account the probability that there would have been unidentified deposits for the period from 6 April 2006 to 25 May 2006, and made assumptions in relation to that period based on the deposits made in the corresponding period in 2007.

81. Mr Grewal argued that the discovery assessments were completely erroneous and had no basis in fact; they were the result of the stance taken by the officer concerned. No proper business economic exercise had been carried out, and the officer had decided that the assessments would give a "good result" for HMRC.

82. We note Mr Grewal's submissions. However, there was no challenge to the validity of the discovery assessments as such, and we do not consider that there would have been any basis for such a challenge. The question whether the discovery assessments should stand therefore depends on the extent to which it can be shown on

Mr Chowdhury's behalf that, on the evidence, the assessments should be reduced. We re-emphasise that the burden of proving this falls on Mr Chowdhury as the Appellant seeking to challenge these assessments.

83. Other than the evidence already considered, no evidence was provided on Mr Chowdhury's behalf to satisfy us that the discovery assessments for these years should be reduced. We therefore find that they should be confirmed in the amounts assessed.

Penalties under s 95 TMA 1970

84. The maximum penalty under s 95 TMA 1970 (as it applied for the relevant years) is 100 per cent of the difference between the tax as shown in the return and the tax payable if the return had been correct. However, it is HMRC's practice to make abatements of such penalties under the headings "Disclosure", "Co-operation", and "Seriousness". The maximum possible reduction for disclosure (other than full voluntary disclosure where there was no fear of early discovery by HMRC) is 20 per cent. The maximum reduction for co-operation is 40 per cent, and the maximum reduction under the heading of seriousness is 40 per cent.

85. Mrs Clague's decisions on abatements, both in relation to 2006-07 and the discovery assessments for the two previous years, were the following; disclosure: 10 per cent; co-operation: 10 per cent; seriousness: 15 per cent. As a result, the penalties were 65 per cent of the "tax difference".

86. Mr Grewal indicated that penalties of 65 per cent were bordering on the criminal. He had not come across penalties at this level. He submitted that there should be the full 20 per cent abatement for disclosure, that there should also be the full 40 per cent abatement for co-operation, and a substantial reduction for seriousness. His experience was that he had encountered penalties of 15 per cent in such cases.

87. Mr Glassonbury submitted that in appearing to accept a penalty in the region of 10 to 15 per cent, Mr Grewal seemed to be acknowledging that there had been negligence. There had been an admission that £38,500 was unexplained; this might be attributable to the business. Penalties under s 95 TMA 1970 were dependent on increases in assessment; if the Tribunal concluded that there was nothing additional to assess, there would be no s 95 penalties. Mr Glassonbury did not accept that the penalty could be 10 to 15 per cent; in his experience, a penalty of 50 per cent would be low for a case of this type. He indicated that he had not come across a penalty of 65 per cent for a considerable time.

88. Mr Grewal's submission was that the additions to income made by the closure notice and the discovery assessments should be rescinded and that in consequence the penalties under s 95 TMA 1970 should also be rescinded.

89. In the light of our findings as to the additional income for the three years under appeal, we do not accept the latter submission.

90. Mr Grewal commented that he had never heard of penalties under s 95 TMA 1970 at the rate of 65 per cent. However, such a level is not unprecedented; see the recent decision by the First-tier Tribunal in *William Stockler v Revenue and Customs Commissioners* [2012] UKFTT 404 (TC), TC02099, in which the penalty of 70 per cent was upheld.

91. We accept that a penalty of 65 per cent is high. In the light of our findings above as to the amounts of tax assessed, we consider the penalty determinations under the above three headings, to determine whether they should stand or should be varied.

92. Mrs Clague's comments on disclosure were as follows:

> "You have agreed that the accounts for both Becontree News and the rental business have been wrong. These anomalies were identified in the early part of 2009 but agreement was not reached until March 2011 after protracted discussion. I consider a 10% abatement to be appropriate."

93. We have reviewed the correspondence as shown in the bundle. We do not consider that there were long gaps in the correspondence. Against this, Redford & Co did "dig their heels in" so far as Mrs Clague's request for details of the private bank account was concerned. It took some time for sufficient information to be made available to HMRC. On balance, we consider that an abatement of 15 per cent under this heading is appropriate.

94. On the question of co-operation, again we find the abatement given by Mrs Clague to be low. The level of co-operation as shown by the correspondence and notes of meetings and telephone conversations appears to us to have been greater than her abatement of 10 per cent implies. Our view is that the appropriate abatement under this heading is 20 per cent.

95. In relation to seriousness, we agree that the amounts involved are substantial both in absolute terms and relative to the declared profits of the Becontree business; we also consider that Mr Chowdhury's persistence in maintaining his unverifiable account of the retention of funds on behalf of his wife and siblings, and their alleged lodgement in his father's safe prior to their supposed investment in the purchase of the property portfolio, is a serious matter. HMRC officers are inevitably sceptical of such accounts because they are too convenient a method of "explaining" any otherwise unidentified deposits. Having heard Mr Chowdhury's evidence, and noted the absence of any supporting documentary evidence apart from the limited weight to be given to the statements from his wife and siblings – statements which do not go to the issue of where the alleged monies were held after being contributed – we share that scepticism in this case.

96. Mrs Clague's comment was that this was "at best very serious negligence" and her proposal was for the abatement under this heading to be only 15% instead of the maximum of 40%. While this aspect of the matter is undoubtedly serious, an abatement of only 15% puts Mr Chowdhury's conduct more than halfway towards the serious end of a scale bounded, in the words of her own closure letter, by "a

premeditated and well-organised fraud" at the serious end, and "something much less serious" at the other end. Taking into account his evidence concerning his family position and customs, and giving limited weight to the statements from the other family members, we do not view the matter as being quite so far towards the serious end and therefore our view is that the abatement under this heading should be 20 per cent.

97. We therefore hold that the appropriate percentage rate for the penalties under s 95 TMA 1970 is 45 per cent.

Penalty under Schedule 36 to the Finance Act 2008

98. HMRC's Information Notice dated 3 November 2010 requested personal bank information for the period 6 April 2004 to 21 May 2006, mortgage applications for six properties, and various other documents. Mrs Clague sent a final warning letter on 12 January 2011, stating that she had not received everything she had asked for, and indicating that if she did not receive the relevant items by 27 January 2011, a penalty of £300 would be charged. On 14 February 2011 Mrs Clague issued the penalty notice.

99. In their appeal to HMRC against this penalty notice, Redford & Co submitted that the information requested was unnecessary, and that the provision of the mortgage applications would have no bearing on the enquiry and would involve additional costs.

100. We would comment that although Redford & Co appealed against the penalty notice, they had not sought to challenge the Information Notice by appealing against that pursuant to Part 5 of Schedule 36 to the Finance Act 2008.

101. HMRC submitted that the legislation had been correctly followed, that the decision to charge the penalty was correctly made, and that the grounds of appeal set out by Redford & Co did not constitute a reasonable excuse.

102. We have reviewed the Notice of Appeal sent to HM Courts & Tribunals Service on 25 October 2011. This does not specify an appeal against this penalty. We are satisfied that this was an oversight, and therefore admit this appeal against the £300 penalty as part of the composite series of appeals.

103. We are satisfied that the information requested by HMRC in the Information Notice dated 3 November 2010 was not provided to HMRC, and that there was no reasonable excuse for the failure to provide it. We consider that the information as to the mortgage applications was properly required for the purposes of HMRC's enquiry, as the circumstances of the property acquisitions were a significant factor in determining the question of the source of the unidentified deposits.

104. We therefore confirm the £300 penalty.

Summary of findings

105. Our findings are as follows:

(1) In respect of the closure notice for 2006-07, we confirm the amounts determined as subsequently adjusted in the amount set out in the amended Tax Calculation attached to Mrs Laube's review letter dated 27 September 2011. In relation to rental income, we leave it to the parties to reach final agreement as to the loss carried forward, in the light of our decision as to the deduction of repair costs and rent collection costs; in our view, that loss should be £400.64.

(2) We confirm the discovery assessments for 2004-05 and 2005-06.

(3) We hold that the percentage rate for the penalties under s 95 TMA 1970 is 45 per cent, based on the undeclared income for the years 2004-05, 2005-06 and 2006-07 respectively.

(4) We confirm the penalty of £300 under Schedule 36 to the Finance Act 2008.

Subject to these adjustments, we dismiss Mr Chowdhury's appeal.

Right to apply for permission to appeal

106. 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: 8 October 2012