TC03229

Appeal number: TC/2012/10502 & TC/2013/01242

Capital Gains Tax – negligence in making tax returns - CGT loss generating scheme- acquisition of Capital Redemption Policies – reliance on advice from professional firms – DOTAS number provided –held – failure to understand commercial elements of transaction and that financing to acquire Capital Redemption Policies was not a sham amounts to negligence – level of penalty reduced in respect of DOTAS disclosure and degree of co operation.

FIRST-TIER TRIBUNAL
TAX CHAMBER

BERNARD PETER LITMAN & ANN NEWALL **Appellants**

- and -

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

TRIBUNAL: JUDGE RACHEL SHORT
MR MOHAMMED FAROOQ

Sitting in public at 45 Bedford Square London on 10 December 2013

Mr Stephen Wood of Barnes Roffe LLP Accountants for the Appellants

Mr Peter Massey and Mr Kevin McMahon representing HM Revenue and Customs for the Respondents.

DECISION

1. This is an appeal against a penalty of £35,069.50 for Mr Litman and £23,629.20 for Mrs Newall determined under a 95(1)(a) Taxes Management Act 1970 ("TMA") being 25% of the tax payable in respect of Mr Litman and being 20% of the tax payable for Mrs Newall for the 2004/5 tax year in respect of capital gains tax arising on the disposal of shares in a UK company and UK land and buildings.

2. It was agreed before the Tribunal that the amount of tax owing had been incorrectly stated in the appeal documents and the correct amount was £118,146 in respect of both Appellants. The correct penalty figures are therefore £29,536.50 for Mr Litman and £23, 629.20 for Mrs Newall.

3. The Tribunal directed on 9 June 2013 that these cases should be heard together. The relevant facts and arguments in respect of Mr Litman and Mrs Newall are almost identical and reference is made to them both here as "the Taxpayers". At the material time Mrs Newall was known by her married name, Mrs Litman.

Agreed Facts

4. In the 2004/5 tax year the Taxpayers realised capital gains on the disposal of an entity known as Efforsenrab Ltd and land and buildings in Essex in the UK.

5. Mr Litman and Mrs Newall were business people who each held directorships in a number of companies in the UK.

6. The Taxpayers participated in a capital redemption policy scheme marketed by Montpelier Group in the Isle of Man ("Montpelier") and claimed a capital loss of £400,000 each arising from that scheme to set against the capital gains which they had realised.

7. The Taxpayers both signed a Professional Services Agreement with MTM (Tax Consultants) Limited under which MTM agreed to provide tax advice in respect of UK capital gains tax and the acquisition of a capital redemption policy (the "Capital Redemption Policy") to generate a capital loss.

8. The capital redemption scheme entailed the creation of a life settlement trust in the name of each of the Taxpayers with an entity known as MTM Trustees Limited as a second trustee, set up with an amount of £1,010. Shortly after the creation of the trusts, MTM (Tax Consultants) Limited notified the trustees that suitable capital redemption policies for investment had been found with a sale price of £400,000. On the same day, a company known as Mt Holdings Limited (Isle of Man) offered to advance to each of the Taxpayers £400,000 on an interest free and unsecured basis, with a repayment date of 31 December 2005. On the following day the trustees of the two settlements agreed to acquire the proposed Capital Redemption Policies from an entity called Mossbank Enterprises Limited and the Taxpayers instructed Mt Holdings Ltd to transfer the necessary funds to the seller.

9. Two days after the transfer of the policies to the trusts, MTM (Tax Consultants) Limited wrote to the trustees of both settlements advising them of the tax consequences of transferring the Capital Redemption Policies to each of the Taxpayers as life tenants. The following day the trustees of each of the settlements agreed to transfer the policies to the Taxpayers and the trustees signed a Deed of Assignment.

10. On the same day, the Taxpayers notified the policy issuer that they wished to surrender their policies with the balance of any proceeds being paid to the Taxpayers in excess of any loan balance outstanding.

11. On 9 December 2005 Montpelier Tax Consultants (Midlands) Limited (a UK entity) wrote to Mr Litman giving him instructions about the entries required for his 2004/5 personal tax return. Mrs Newell received a similar letter on the same date. The Taxpayers included the "DOTAS" number relevant to the tax planning scheme in their tax returns as required by the Finance Act 2004 rules concerning the notification of tax avoidance schemes, on the advice of their accountants, Barnes Roffe.

12. HMRC opened enquiries into Mr Litman's 2004/5 tax return in July 2006 and opened enquiries into Mrs Newall's 2004/5 tax return in December 2006.

13. Some time later, on 7 August 2006 the policy issuer wrote to Mr Litman confirming the encashment of the Capital Redemption Policies on 15 March 2005 and the forwarding of the proceeds to Mt Holdings Limited. On the same date Mt Holdings Limited confirmed to Mr Litman that the £400,000 loan had been re paid on 15 March 2005. Similar letters were sent to Mrs Newall on 26 January 2007.

14. As a result of the decision in *Jason Drummond v HMRC* ([2009] EWCA Civ 608) it was accepted that the capital redemption scheme was not effective and the Taxpayers attempted to conclude a negotiated settlement with HMRC. The full amount of the tax and interest due in respect of the capital gains tax charge was paid by the Taxpayers in July 2009.

15. A penalty determination was issued by HMRC on 31 August 2012 to Mr Litman amounting to 25% of the tax payable (25% of £ 140,276) being £35,069.50 and on 17 October 2012 to Mrs Newell, amounting to 20% of the tax payable, (20% of £118, 146) being £23,269.20 (it was accepted at the Tribunal hearing that the penalty figures should be £23,629 for Mrs Newall and £29,536.50 for Mr Litman).

16. Mr Litman appealed against this penalty on 5 September 2012. Mrs Newall appealed against her penalty on 23 October 2012.

The Law

17. The relevant legislation relating to the penalties for negligently delivering an incorrect return are at s 95 TMA. The Tribunal's ability to set aside, increase or decrease these penalties is set out at s 100B TMA.

18. It is accepted that the burden of proof lies with HMRC to establish that the penalties have been properly applied.

The Evidence

19. We were provided with copies of the following documents relating to both Taxpayers, which were identical in most respects. At the time of the relevant transactions Mrs Newall was known by her married name, as Mrs Litman:

(1) MTM Insurance Company Inc – Standard Policy terms and conditions

(2) MTM (Tax Consultants) Limited – Professional Services Agreement dated 8 March 2005 with each of Mr Litman and Mrs Litman.

(3) Bernard Litman Life Settlement & Ann Litman Life Settlement both of 8 March 2005.

(4) Letters from Mossbank Enterprises Limited to each of Mr and Mrs Litman offering capital redemption policies for sale, of 11 March 2005.

(5) Letter from Mt Holdings Limited to each of Mr and Mrs Litman on 11 March 2005 stating that

> "*We are prepared to advance you a loan of £400,000 upon the following terms:*
>
> *(a) Repayable on 31 December 2005 or such earlier date as agreed*
>
> *(b) Interest free and unsecured"*

(6) Letter from MTM International (Tax Consultants) Limited to each of the Bernard Litman and the Ann Litman Life Settlements concerning the location of capital redemption policies for £400,000 on 11 and 9 March 2005.

(7) Letter from each of Mr Litman and Mrs Litman to Mt Holdings Limited instructing the transfer of £400,000 to Mossbank Enterprises Limited on 12 March 2005.

(8) Minutes of a meeting of the both the Bernard Litman and the Ann Litman Life Settlement trustees, held by telephone in both cases, concerning the acquisition of the Capital Redemption Policies of 12 March 2005.

(9) Letter from MTM International (Tax Consultants) Limited to the Bernard Litman and Ann Litman Life Settlements setting out the tax consequences of appointing the Capital Redemption Policies to each of the life tenants, dated 14 & 15 March 2005.

(10) Minutes of a meeting of both the Bernard Litman and the Ann Litman Life Settlement trustees, held by telephone in both cases, confirming the appointment of the Capital Redemption Policies to the life tenants in each case, dated 15 March 2005.

(11) Deed of Assignment from the trustees of each Life Settlement assigning the Capital Redemption Policies to Mr Litman and Mrs Litman on 15 March 2005.

(12) Letters from Mr Litman and Mrs Litman of 15 March 2005 to MTM Insurance Company Inc requesting surrender of each of their Capital Redemption Policies

(13) Letter to each of Mr Litman and Mrs Litman on 9 December from Montpelier Tax Consultants (Midlands) Limited giving details of how each of them should complete their personal tax returns to reflect the above transactions.

(14) Letters of 7 August 2006 to Mr Litman from MTM Insurance Company Inc confirming the encashment of the Capital Redemption Policies on 15 March 2005 and to Mr Litman from Mt Holdings Limited confirming the release of his loan liabilities on the same date.

(15) Letters of 26 January 2007 to Mrs Litman from MTM Insurance Company Inc confirming the encashment of the Capital Redemption Policies on 15 March 2005 and from Mt Holdings Limited confirming the release of her loan liabilities on the same date.

20. We were provided with a copy of the letter from Montpelier Tax Consultants to the Taxpayers of 9 December 2005 explaining the entries required in their tax returns, but we were not provided with any evidence of any other advice which was given by Montpelier to the Taxpayers at the time when the transactions were entered into or prior to the completion of their tax returns. The Professional Services Agreement entered into with both Mr Litman and Mrs Newall referred in Schedule 1, to the tax services to be provided, which were described as:

> "*Taxation advice given in respect of UK capital gains and the acquisition of a capital redemption policy so as to cause a capital loss to arise*".

Schedule 2 refers to the fees payable by the Taxpayers, being 2% plus VAT of the cost of any Capital Redemption Policy and 2% plus VAT of any capital losses arising from the encashment of the Capital Redemption Policy.

21. The only other tax advice which we were shown was a brief statement made to the trustees of both Life Settlements on 14 & 15 March 2005 concerning appointing the Capital Redemption Policies to the life tenants:

> "*We confirm that this will not be a chargeable event for income tax purposes as the transfer is for no consideration. Consequently any tax liability on subsequent encashment falls on the life tenant in terms of income tax and capital gains tax. As previously advised to Mr Litman the consequences of encashing the policies for a figure in excess of cost are:*
>
> > *(a) a chargeable event for income tax purposes*
> >
> > *(b) capital loss of capital gains tax purposes*
>
> *The trustees may therefore wish to consider the benefit to the life tenant of this appointment"*

We did not see any written evidence of the "previous advice" referred to here which had been given to Mr Litman or Mrs Newall.

22. We were not provided with any evidence relating to the transfer of the £400,000 loan from Mt Holdings Limited to the Taxpayers or from the Taxpayers to Mossbank Enterprises Limited for the acquisition of the Capital Redemption Policies. The only evidence provided in respect of those funds transfers and the loan is the letter of 11 March, described at (5) above, setting out the loan terms in two short paragraphs and the retrospective confirmation of repayment, some months after the loans were due to be re-paid in August 2006 (for Mr Litman) and January 2007 (for Mrs Newall). These retrospective confirmations took place after HMRC had opened enquiries into the Taxpayers' tax returns for the relevant period. We were provided with evidence of the original payments made into Mr Litman's Life Settlement of £1,010 from the bank statements of the Settlement Trustees, but no other bank account evidence of funds moving between the relevant parties was provided.

23. In correspondence with Barnes Roffe of March 2007 in response to HMRC queries, Montpelier Tax Planning (Isle of Man) refer to the fact that the £400,000 loaned monies were transferred direct from Mt Holdings Limited to Mossbank Enterprises Limited to enable that entity to purchase the Capital Redemption Policies for both Taxpayers as part of this transaction and that all other negotiations concerning the loan agreements was conducted verbally.

24. No witness evidence was given to the Tribunal by either Appellant.

The Appellant's Arguments

25. For the Taxpayers, Mr Wood said that the Taxpayers had included all information which was considered relevant to the capital losses claimed on their tax returns on the basis of advice provided by Montpelier and Barnes Roffe, two professional advisers and none of their actions could be considered negligent. The return included a DOTAS number providing HMRC with all relevant information about the loss generating scheme which could reasonably have been required. The Taxpayers were anxious to ensure that these arrangements were correctly reported and that was the reason why they appointed Barnes Roffe to complete their tax returns and make appropriate disclosures. HMRC had been given all relevant information and had every opportunity to raise enquiries into these returns.

26. The test to be applied in determining whether a taxpayer has been negligent is that set out in the Anderson decision (*Anderson(deceased) v HMRC* [2009] UKFTT 206)

> "*The test to be applied, in my view, is to consider what a reasonable taxpayer exercising reasonable diligence in the completion and submission of the return would have done".*

This was a tax avoidance scheme and therefore it was reasonable for the Taxpayers to assume that normal commercial rules would not apply. In deciding how a reasonable taxpayer should have acted in these circumstances, the comparison should be with a reasonable taxpayer entering into a packaged tax avoidance transaction. Taking those circumstances into account, the level of due diligence expected of a reasonable taxpayer was not the same as a taxpayer who was entering into more straightforward commercial transactions. In the context of a packaged scheme like this one, the Taxpayers had no alternative but to rely on Montpelier to implement these transactions on their behalf and could not be expected to carry out any due diligence on the implementation of the scheme themselves.

27. The Taxpayers had properly relied on professional advice and so could not be treated as negligent. The Taxpayers had no knowledge of the technicalities of capital redemption policies and were in a similar position to the taxpayer in *Bingham. (Bingham v HMRC [2013] UKFTT 110 (TC))*, where it was held that ignorance of technical aspects of the settlements legislation did not amount to negligence. In addition, the Taxpayers had sought professional advice and could therefore not be held to be negligent only because that advice had proved to be incorrect, as was made clear in the *Hanson* decision. (*Hanson v HMRC [2012] UKFTT 314 (TC)).* In this respect the Taxpayers' situation was different than the position in *Moore*, where a taxpayer who had relied on the informal advice of an adviser given in a social situation was held to be negligent in making a tax return relying on that advice (*Moore v HMRC* [2011] UKUT 239). The Taxpayers had relied on advice from both Montpelier and Barnes Roffe (a firm of professional chartered accountants) and it was perfectly reasonable for them to rely on their professional advisers to implement the arrangements correctly.

28. The Taxpayers were diligent in responding to queries from HMRC and co operated fully when asked to give further information about the scheme. The tax due was paid in full prior to the final decision in the *Drummond* case (in July 2009) and before HMRC's statements about the impact of that decision. (May 2010). These actions suggested that the Taxpayers were reasonable and would not have acted in a negligent way in completing their tax returns.

HMRC Arguments

29. On behalf of HMRC Mr Massey explained that HMRC was not arguing that the Taxpayers failed to understand the complex legislation in this area relating to the loss generating scheme or that entering into a tax planning transaction is negligent per se.

30. HMRC's case was that the penalties were due because the Taxpayers were negligent in failing to enquire into the commercial reality of the acquisition of the assets (the Capital Redemption Policies) and their subsequent sale. The Taxpayers' failure was in respect of not understanding straightforward commercial documents (such as the loan agreements), which were "ordinary documents". The scheme documentation was flawed, contained glaring omissions and did not demonstrate that the transactions portrayed were actually carried out, or not in the way described in the documents and the Taxpayers should have been aware of this.

31. The documents produced were part of a "package" of documents which could not be authenticated. There was no evidence available to the Taxpayers that the events

described by the documents actually took place, or that some of the documents could have been signed at the time when they were purported to have been signed. The transaction was a “sham” and the Taxpayers should have been aware of this and not put in a tax return on this basis without doing further investigation. Failure to establish the commercial reality of the transaction was failing to take reasonable care. A reasonable taxpayer, aware of the documents as drafted, should have been aware that the transactions were not carried out as described in the documents.

32. Any tax advice which was given to the taxpayers was “thin”. There was no evidence of any detailed advice about the scheme or its implementation. The Taxpayers had a duty of care to ensure that entries in their tax returns were correct. Both Taxpayers were business people who understood complex contractual issues and should have been in a position to establish that the entries on their tax returns reflected what actually occurred.

33. The Taxpayers had been negligent, having “*failed to do what, in the circumstances, a reasonable and prudent person would have done*” (*Roberts & Anor* [2011] UKFTT 268(TC)). Whether the Taxpayers have failed to fulfil their duty of care is a question of fact (*Colin Moore v HMRC* UKUT 239 (TCC) [2011]).

Discussion

34. There are a number of decided authorities in this area, but they are based on facts which are different than those under consideration here, dealing with circumstances in which a taxpayer has put incorrect numbers on a return or failed to understand a complex area of law. We were not referred to any authorities dealing with a taxpayer’s obligations in respect of complex packaged anti avoidance schemes such as the one sold to Mr Litman and Mrs Newall by Montpelier.

35. The authorities make it clear that an innocent error can amount to negligence as in *Anderson,* but ignorance of technical areas of law such as the settlements legislation, does not amount to negligence. As was said in *Bingham*

> “*His appreciation of the true legal position concerning the jointly held accounts may have been at fault, but that does not mean he was negligent* “.

A taxpayer is entitled to rely on technical advice, but the circumstances in which advice is given is important as illustrated by the *Hanson* decision.

> “*If a taxpayer reasonably relies on a reputable accountant for advice in relation to the content of his tax return then he will not be liable to a penalty*”.

36. It was accepted by HMRC that entering in to a packaged avoidance scheme is not in itself a negligent act and the Tribunal accepts that the Taxpayers could not be expected to understand the legal and tax implications of the trust arrangements and the Capital Redemption Policy acquisition and redemption, the order in which documents needed to be signed, or the basis on which HMRC might argue that the

transactions should not be respected for tax purposes. In each of these instances we accept, as reflected by the previous decisions in this area, that these are matters for which a reasonable taxpayer might properly be expected to rely on its professional advisers. The Taxpayers can rely, in this regard, on the decisions in *Bingham* and *Hanson.*

37. We agree with the Taxpayers that in defining what we mean by a "reasonable taxpayer" the comparator here should be with a taxpayer who is knowingly buying into a packaged avoidance scheme when applying the *Anderson* test of a reasonable taxpayer;

> *"The test to be applied is what a reasonable taxpayer exercising reasonable due diligence would have done"*

38. The critical question for this Tribunal is how much enquiry should a sophisticated taxpayer be expected to make in respect of a packaged scheme in which advice has been provided by professional advisers and all documents have been drafted by them. We have concluded that the level of due diligence required of a taxpayer in respect of the technical and legal aspects of such a scheme is low, when professional advisers are involved and the relevant areas of law are technical, as is the case here. In that respect, we do not think that the Taxpayers were negligent in not understanding the details of the acquisition and disposal of the Capital Redemption Policies, the timing of the signing of the relevant documents or how the tax losses were actually being generated.

39. However, HMRC's arguments go not only to the Taxpayers' failure to understand the legal technicalities of the transactions, but also their failure to consider its commercial impact and particularly the lack of evidence of the £400,000 loan (which was required to purchase the Capital Redemption Policies) ever having been advanced or re paid. In other words, HMRC's position is that a taxpayer who enters a packaged tax planning scheme nevertheless needs to establish that the scheme is not a sham from a commercial perspective in order to fulfil the reasonable taxpayer test. The Taxpayers' argument is that all taxpayers who buy into "packaged schemes" buy them "blind" both from a legal and a commercial perspective, and that is what a reasonable taxpayer would have done. It is in the nature of a packaged scheme, and was true of this Montpelier scheme, that a taxpayer has to rely on their professional advisers for all aspects of the transaction, including the commercial as well as the technical aspects.

40. It is worth setting out at this stage exactly what advice the Taxpayers actually received on this transaction, which, from the evidence which we were given, was relatively little; the advice given directly to the Taxpayers related only to the mechanics of the figures which were to be included in their tax return set out in the 9 December 2005 letters. The Taxpayers said that Montpelier had provided advice about how the scheme was to be implemented, however, other than the very brief statement in the Professional Services Agreement and the equally brief statement in their letter to the Settlement Trustees concerning the appointment of the Capital Redemption Policies to the life tenants, we were not given any evidence of detailed

advice having been provided to either of the Taxpayers. To the extent that the Taxpayers were relying on technical advice from their advisers, it was not very extensive advice.

41. As for any commercial advice, Mr Litman also said that his advice from Montpelier had included a suggestion that no money would actually need to be paid out in respect of the acquisition of the Capital Redemption Policies. We were not provided with any written evidence of this advice. In his letter of 12 March 2005 to Mt Holdings Limited Mr Litman states "*I refer to my loan agreement in the sum of £400,000. Please accept this as my instruction to transfer that sum to the account of Mossbank Enterprises Limited"* We were provided with no evidence that this money was ever transferred from either Mr Litman or Mt Holdings Limited to Mossbank Enterprises Limited to acquire the Capital Redemption Policies. Nor did we see any evidence of the re payment of the monies at the time when the Capital Redemption Policies were surrendered or evidence of any detailed loan agreement. There is a similar lack of evidence concerning the loan funding for Mrs Newall.

42. The question for the Tribunal is whether it is reasonable for a relatively sophisticated investor to rely on this level of advice from his advisers and to complete his tax return relying on their assurances, knowing that a loan was required for the purchase of the scheme investments, to be satisfied that this did not require even any entries on the Taxpayers' bank accounts, let alone any actual movement of cash, on the premise that this was a packaged scheme to which the normal commercial rules did not apply.

43. The Taxpayers argue that it was reasonable for them to rely on statements from Montpelier about how the transactions would be implemented and that no cash transfers were actually required. In this regard we would refer to the *Hanson* decision which makes it clear that a taxpayer cannot simply leave everything to his agent, it is the taxpayer's obligation to ensure that the agent has not made any errors and "*that might involve the taxpayer seeking to understand the basis upon which an entry on his return has been made by the agent"*. In our view, the question of whether the financing to make the acquisitions on which the transactions relied had actually been put in place is one of those elements which a taxpayer should understand. We cannot accept that, even in the circumstances of a packaged transaction, it was reasonable for the Taxpayers to have done no basic due diligence in respect of the payment flows or to ascertain whether a loan had in fact been made and to have acted on so little in the way of advice from Montpelier.

44. To ask the same question in terms of the authorities such as *Bingham*, was the existence of this loan something which "*would be outside the normal considerations which a taxpayer would have in mind when making a return to the Revenue*"? We think that so fundamental a question as whether £400,000 of financing had actually been provided to the Taxpayers to enable to the acquisition of the Capital Redemption Policies is something which it is reasonable to expect a taxpayer to ascertain for themselves and not something for which reliance can be placed solely on their advisers.

45. Even to relatively sophisticated taxpayers such as Mr Litman and Mrs Newall, a £400,000 loan is a significant sum of money. We have concluded that the Taxpayers were negligent in signing their tax returns reflecting transactions which relied on significant levels of financing which they had no evidence had ever been advanced or re paid. We do not think that any statements or advice from their professional advisers can or should remove the obligation on a taxpayer to consider whether the proposed transactions stand up to some basic level of commercial scrutiny. To decide otherwise would be to suggest that it is reasonable for a taxpayer to enter into a transaction believing that it can obtain £400,000 of tax losses for doing nothing other than signing a number of documents provided by their advisers and paying a fee.

46. We have considered whether the fact that the Taxpayers were advised that this was a “notifiable transaction” under the Finance Act 2004 rules which therefore required specific disclosure on their own tax returns make any difference to this analysis. Mr Wood suggested that by providing the DOTAS number, the Taxpayers had done all that was required by HMRC. Our conclusion on this point is that this has no impact on the Taxpayers’ obligations; if anything it should have alerted the Taxpayers to the fact that the transaction was likely to attract HMRC’s scrutiny. In any event, none of the technical analysis on which the DOTAS reporting relies is relevant to the basic commercial understanding which we say the Taxpayers should have applied to establishing whether the lending transactions had actually happened and whether the losses could be claimed.

47. In conclusion, it is this Tribunal’s view that the failure to enquire into the basic commercial reality of the transactions entered into by these Taxpayers is negligence for these purposes and that a reasonable taxpayer, including one prepared to enter into a packaged scheme like this, would have ensured that the commercial elements of the transaction, including the loan in particular, stood up to some commercial scrutiny and had been properly implemented. The Taxpayers should not have claimed the capital losses on their tax returns without at least understanding that an actual transaction had been entered into, that some money had moved and that the transaction was not a sham.

48. The Taxpayers stressed the level of co operation demonstrated by the them at a later stage of the enquiry, but in the Tribunal’s view this is not relevant to the question of whether the tax return was completed negligently, that test has to be applied at the time when the returns were made and any later actions, however “reasonable” cannot retrospectively colour the Taxpayers’ activities at the time. If the level of co operation is relevant, it is relevant only to the potential mitigation of penalties.

49. The Taxpayers asked us to considered mitigating the level of penalties charged under our s 100B TMA powers, even if we did conclude that the Taxpayers had been negligent. The Taxpayers’ suggestion was that the level of penalties should be reduced to 5%. We have considered HMRC’s logic for arriving at levels of penalty (as set out in their letter of 24 July 2012 for Mrs Newall & 3 November 2010 for Mr Litman) being;

		Mr Litman	Mrs Newall
(1)	Reduction for disclosure -	10%	15%
(2)	Reduction for co operation -	35%	40%
(3)	Reduction for seriousness -	30%	25%

In respect of HMRC's 10% penalty reduction applied for "incomplete and brief disclosure in return" for both Taxpayers, we have concluded that the Taxpayers, acting on the advice of their professional advisers, did make full disclosure in their tax returns and therefore we have concluded that this element of the penalty reduction should be increased to 20% in both cases. We can also see no logic in the level of penalties for co operation and seriousness not being the same for both Taxpayers, given that their cases have effectively been handled together by Barnes Roffe and are factually almost identical. We have concluded that the reduction for co operation should be 40% for both Mr Litman and Mrs Newall and that the reduction for seriousness should be 30% for both Mr Litman and Mrs Newall. This results in an overall penalty of 10% of the tax due for both Mr Litman and Mrs Newall, amounting to £11,814.60 in both cases.

50. For these reasons this appeal is dismissed but the penalties are mitigated under s 100B TMA.

51. 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.

RACHEL SHORT
TRIBUNAL JUDGE

RELEASE DATE: 16 January 2014