TC03438

Appeal numbers: TC/2012/06189 & TC/2012/06190

Income tax/Corporation tax – Discovery assessments – £97,970 held in safety deposit box – Unexplained lodgements into bank accounts – Whether undeclared trading profits – Burden of proof – Whether sufficient evidence to displace assessments

FIRST-TIER TRIBUNAL
TAX CHAMBER

BRIMHEATH DEVELOPMENTS LIMITED

MICHAEL VICTOR BURGESS
t/a M J BRADLEYS **Appellants**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
MS ANNE REDSTON

Sitting in public at 45 Bedford Square, London WC1 on 8, 9 August 2013 and 12, 13 and 14 February 2014

Robert T B Green FCA of Tarrant Green & Co Chartered Accountants for the Appellants

Duncan Tebbet, Officer, of HM Revenue and Customs, for the Respondents

DECISION

1. Brimheath Developments Limited ("Brimheath") appeals against discovery assessments, issued by HM Revenue and Customs ("HMRC") on 22 November 2011, in respect of accounting periods ended 30 November 1999, 2001, 2002, 2003, 2004, 2005, 2006, 2007 and 2008 for the following amounts of corporation tax:

30 November 1999 – £ 3,460.63;

30 November 2001 – £8,817.08;

30 November 2002 – £9,790.50;

30 November 2003 – £12,674.74;

30 November 2004 – £4,550.83;

30 November 2005 – £16,546.03;

30 November 2006 – £18,734.73;

30 November 2007 – £13.312.61; and

30 November 2008 – £9,766.00.

2. Michael Victor Burgess, the sole director and shareholder of Brimheath, appeals against discovery assessments issued by HMRC on 7 November 2011 in relation to his self-employment as a sole trader, trading as M J Bradleys, for the years 1996-97, 1997-98, 1998-99 and 1999-00 for the following amounts of income tax:

1996-97 – £3,028.80;

1997-98 – £4,326.05;

1998-99 – £5,717.55; and

1999-00 – £2,706.14.

3. In accordance with the direction of the Tribunal released on 21 August 2012, the appeals of Brimheath and Mr Burgess were heard together. Mr Robert Green of Tarrant Green & Chartered Accountants represented both Brimheath and Mr Burgess. HMRC was represented by its presenting officer, Mr Duncan Tebbet.

Law

4. Insofar as it applies to this appeal, s 29 of the Taxes Management Act 1970 ("TMA") provides:

> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,

> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.
>
> (2) …
>
> (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—
>
> (a) in respect of the year of assessment mentioned in that subsection; and
>
> (b) ... in the same capacity as that in which he made and delivered the return,
>
> unless one of the two conditions mentioned below is fulfilled.
>
> (4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
>
> (5) The second condition [is not applicable to the present appeals]

Similar provisions, written in almost identical terms, in relation to corporation are contained within paragraphs 41-43 of schedule 19 to the Finance Act 1998.

5. Therefore, if HMRC "discover" income which ought to have but has not been assessed for income or corporation tax they make an assessment in that amount to make good the loss of tax. If a return has been submitted HMRC may only make an assessment for this purpose if the loss of tax has been brought about as a result of the careless or deliberate action of the taxpayer or a person acting on his or its behalf.

6. With regard to assessments, as Walton J said, in *Johnson v Scott (HM Inspector of Taxes)* (1978) 52 TC 383 at 394, in a passage approved by the Court of Appeal (at 403) in that case:

> "Of course all estimates are unsatisfactory; of course they will always be open to challenge in points of detail; and of course they may well be under-estimates rather than over-estimates as well. But what the Crown has to do in such a situation is, on the known facts, to make reasonable inferences. When, in paragraph 7(b) of the case stated, the Commissioners state that (with certain exceptions) the inspector's figures were 'fair' that is, in my judgment, precisely and exactly what they ought to be, fair. The fact that the onus is on the taxpayer to displace the assessment is not intended to give the Crown carte blanche to make wild or extravagant claims. Where an inference of whatever nature falls to be made, one invariably speaks of a 'fair' inference. Where, as is the case in this matter, figures have to be inferred, what has to be made is a 'fair' inference as to what such figures may have been. The figures themselves must be fair."

7. Section 50(6) TMA provides that if, on an appeal, it appears to the Tribunal that an appellant is overcharged by an assessment the assessment shall be reduced accordingly but "*otherwise the assessment … shall stand good.*"

8. In the decision of the Court of Appeal in *T Haythornwaite & Sons v Kelly (HM Inspector of Taxes)* (1927) 11 TC 657 Lord Hanworth MR, referring to a previous incarnation of this enactment, said, at 667:

> "Now it is to be remembered that under the law as it stands the duty of the Commissioners [and from 1 April 2009 the Tribunal] who hear the appeal is this: Parties are entitled to produce any lawful evidence, and if on appeal it appears to a majority of the Commissioners by examination of the Appellant on oath or affirmation, or by other lawful evidence, that the Appellant is over-charged by any assessment, the Commissioners shall abate or reduce the assessment accordingly; but otherwise every assessment or surcharge shall stand good. Hence it is quite plain that the Commissioners are to hold the assessment as standing goods unless the subject – the Appellant – establishes before the Commissioners, by evidence satisfactory to them, that the assessment ought to be reduced or set aside."

9. Similarly in *Moschi v Kelly (HM Inspector of Taxes)*(1952) 33 TC 442 in which the Court of Appeal upheld the decision of the General Commissioners that the unexplained source of a taxpayer's wealth was business profits which he had not declared Somervell LJ said:

> "… of course, the onus was on the taxpayer to satisfy the Commissioners that the assessments were excessive."
>
> …
>
> "It seems to me, looking at the matter broadly, as it was before the Commissioners, they were fully entitles to say that the taxpayer had not discharged the onus which lay upon him of establishing his contention that his money came from assets brought in from 1933."

Evidence

10. We were provided with five lever arch files which contained documentary evidence including correspondence between the parties and bank statements; copies of relevant legislation and authorities relied on by the parties; and statements made by the following witnesses, all of whom gave oral evidence on which they were cross examined:

(1) Mr Burgess;

(2) Ms Maria Bather, the partner of Mr Burgess;

(3) Mr Stephen Lankston of Lankston & Company Accountants, the accountant for Brimheath from 2001;

(4) Mr Peter Barney, an employee of Brimheath who works as general manager of the *Friendly Society*, a Soho bar owned by the company;

(5) Mr Robert Green MA FCA of Tarrant Green & Co Chartered Accountants who, although he represented both appellants, also gave evidence on their behalf having acted as the accountant for Mr Burgess when he traded as M J Bradleys; and

(6) Mr Charles Murphy of HMRC's Specialist Investigations Fraud and Avoidance Office, the officer who had made the discovery assessments which gave rise to these appeals.

Facts (not in dispute)

11. Although there was no formal "Statement of Agreed Facts" the following facts were not disputed, unless otherwise noted below

12. In the late 1980s Mr Burgess acquired an existing café business, M J Bradleys, which traded from premises at 43 Bedford Street, London providing food and drink to customers for consumption on or off the premises. Customers included local businesses for which account facilities were operated enabling payment to be made after purchases had been consumed. In the early 1990s, as offices began to close due to re-development in the area around Bedford Street, the business began to decline and, in 1993, Mr Burgess opened a second outlet at 9 King Street Covent Garden. He closed the Bedford Street premises in September 1994.

13. However, because of competition the business was not ultimately successful and it was sold by Mr Burgess in 1999 for £105,000. After payments for dilapidations, agency and solicitors fees he was left with £71,900.01 which was paid into the bank account held by Brimheath (£70,379.86 on 20 April 1999 and £1,520.15 on 11 June 1999) which he had established in 1998.

14. Due to the lapse of time and the policy of HMRC, explained in the letter of 1 May 2013 to Tarrant Green & Co, "not to retain customer records for more than six years", no HMRC records remain for 1996-97 to 1999-00, the years covering the assessments on Mr Burgess when he traded as M J Bradleys. However, it would appear from letters dated 22 January 1996, 11 February 1996 and 19 November 1997 from Tarrant Green & Co to the Inland Revenue, which were retrieved by Mr Green from his records, that Mr Burgess had been subject to an Inland Revenue enquiry as enclosed with the letter dated 19 November 1997 from Tarrant Green & Co were accounts for M J Bradleys for the years ended 31 December 1993 and 1994; income tax computations for 1994-95 and 1995-96; and income tax returns for 1987-88 to 1995-96, inclusive.

15. By the time he sold M J Bradleys and established Brimheath, Mr Burgess had met and formed a relationship with Maria Bather. They lived together originally at 504 Cascades Tower until its sale in 2001 before moving to 907 Cascades Tower and subsequently, from 2004, to the residential accommodation at the *Commercial Tavern*.

16. When Ms Bather and Mr Burgess met she was employed by the Oasis Group earning approximately £1,100 a month. In addition to her salary from Oasis, in 1998 Ms Bather sold her property in Oswestry. She told us she used the £16,743.34, being the net proceeds from the sale, to make loans to family and friends including, she said, £15,000 to Mr Green which had subsequently been repaid. HMRC did not accept this, and we make no finding of fact at this stage as to what happened to the money from the house sale.

17. Ms Bather continued to work for Oasis until 2001, with a break for maternity leave following the birth of their son in January 1999. Following her return to work with Oasis Mr Burgess cared for their son and also used this time to locate suitable premises for the licensed bar in Soho that he and Ms Bather had planned to open, operating the business through Brimheath. The parties did not agree whether he was also working at this time, and we make no finding of fact on that issue.

18. Having located suitable basement premises in Wardour Street for the licensed bar in Soho that they had planned to open, Mr Burgess and Ms Bather re-mortgaged 504 Cascades Tower through Barclays Bank. £25,356.14, which was half of the sum raised as a result was paid into Ms Bather's bank account and immediately transferred from it.

19. The remainder of money raised by the re-mortgage was paid by Mr Burgess, into Brimheath's bank account and treated as a loan to the Company as had been the case with the net proceeds from the sale of M J Bradleys. Mr Lankston explained that when he reconciled the information provided to him about the cash transactions and reconciled the bank statements when preparing Brimheath's accounts any unaccounted balance would be posted to Mr Burgess's director's loan account.

20. The Wardour Street premises had been used as a betting shop and on 16 June 2000 a licence to occupy the property and change its use to a bar was obtained. An alcohol licence was granted on 16 December 2000 and the *Friendly Society* opened in 2000. Before the *Friendly Society* opened for business and in order to gain relevant experience, in addition to her job at Oasis, in June 2000, Ms Bather started working at the *GE Club* located in basement of The *Great Eastern Hotel* at Liverpool Street Station in the evenings.

21. Further payments, which were not identified, were also made into Ms Bather's bank account which amounted to £16,108.56 between 12 April to 22 November 1999; £20,787.48 between 2 December 1999 and 23 November 2000; and £11,782.69 in the period between 27 December 2000 and 13 November 2001.

22. The till system used in the *Friendly Society* was recommended to Mr Burgess and Ms Bather by Mr Lankston. It recorded drinks purchased, the amount taken and the change given. We were told that the information from the till was recorded on sales sheets which were reconciled with the cash and credit card sales, cash purchases and petty cash expenditure. The parties did not agree about the completeness of this reconciliation (ie whether all monies were included) and we make no finding of fact on that at this stage. The reconciliation was originally carried out by Ms Bather but was later undertaken by staff, usually Mr Barney in the *Friendly Society* and the sales sheets and cash brought to Mr Burgess and Ms Bather for banking.

23. In 2003 Brimheath acquired the lease for the *Commercial Tavern* in Spitafields, London. It was originally a tied house but in 2009 Brimheath purchased the freehold with the assistance of an £80,000 loan from the Allied Irish Bank and a re-mortgage of Mr Burgess's property at 907 Cascades Tower which raised £89,000. The same system of recording and reconciling sales to that used in the *Friendly Society* was

adopted in the *Commercial Tavern* which had three tills, two of which that were in the same bar were linked.

24. Also, as in the *Friendly Society*, Mr Burgess was not involved with the reconciliation of the takings etc. Mr Burgess told us, and both Mr Barney and Ms Bather confirmed, that he does not get involved in "cashing up" and that he is rarely, if ever, behind the bar of either the *Friendly Society* or the *Commercial Tavern* and does not operate the tills and, in the words of Mr Burgess, he was "never around a paying customer" and we accepted this evidence as a fact

25. From 2001 weekly payments of £350 were made from Brimheath's bank account into the private account of Mr Burgess.

26. On 2 June 2008, as part of Operation Rize, the Metropolitan Police raided several security depositary centres in London. A deposit box held by Michael Burgess at a centre in Mayfair was opened and found to contain £97,970 which was seized by the police. During an interview at New Scotland Yard on 29 July 2008, which he attended with his accountant Stephen Lankston, Mr Burgess said that the source of the money was cash drawn by him as the director of Brimheath and, after the intervention of his solicitor and the provision of further information to the police, the money was returned to him on 16 January 2009. We make no finding of fact at this stage about the source of this money.

27. However, in November 2008 the police had discussed the circumstances in which the money had been seized with HM Revenue and Customs ("HMRC") and in 2009 provided them with the information that had been obtained. As a result, on 4 February 2010, Mr Murphy wrote to Mr Burgess to tell him that HMRC was undertaking an enquiry into his personal tax affairs and the tax affairs of Brimheath:

> … because I have information in my possession which suggested that there may be a serious loss of tax and additionally because of your failure as a director of [Brimheath] to submit any personal tax returns to HMRC over the lifetime of this company Brimheath Developments Limited.

28. As part of this enquiry a meeting was held, on 17 March 2010, at the *Commercial Tavern*. It was attended by between Mr Murphy and Martin Hunter of HMRC and Mr Burgess, Ms Bather and Mr Lankston. During this meeting, in addition to discussing the operation of Brimheath's business, M J Bradleys was also discussed.

29. Contrary to the usual practice of HMRC, a note of the meeting was not sent to Mr Lankston, as Brimheath's accountant. Therefore, the contents of the note, prepared by Mr Murphy and disclosed as part of these proceedings had not been agreed by those present as a correct record of what had been discussed. Mr Murphy explained that he had not sent a copy of this note because of the number of people contributing and the amount of cross-conversation, although he did write to Mr Lankston on 23 March 2010 requesting further information.

30. On 7 November 2011, following further correspondence between Mr Murphy and Mr Lankston in which Mr Lankston provided Mr Murphy with further information including schedules which he said showed the cash transactions of Mr Burgess through his director's loan account and the private bank statements of Mr Burgess and Ms Bather, HMRC issued Brimheath with discovery assessments to corporation tax. Discovery assessments for income tax were also issued, on 7 November 2011, to Mr Burgess.

31. In both cases Mr Murphy concluded that the omission of profits was deliberate.

32. On 29 November 2011 Brimheath and Mr Burgess appealed to HMRC against these assessments and requested a review under s 49B(2) of the Taxes Management Act 1970 ("TMA"). This was undertaken by HMRC and the assessments upheld. Brimheath and Mr Burgess were notified of the outcome of the review by letters dated 8 May 2012.

33. Appeals to the Tribunal were made on 7 June 2012

Submissions of the Parties

34. Mr Tebbet, who accepts that tax returns for the years from 1987-88 to 1995-96 were filed, contends that Mr Burgess, while trading as M J Bradleys, failed to return the full profits of arising and deliberately did not file any self-assessment tax returns for 1996-97 onwards. In the absence of self-assessment tax returns for 1996-97 to 1998-99, assessments were made for these years which were estimated on the basis that Mr Burgess would require an annual income of at least £15,000 to meet personal expenses. Although these assessments were made on the understanding that M J Bradleys was not VAT registered it is now accepted that this is not the case and, as Mr Tebbet submitted had Mr Murphy been aware of this the estimated assessments may have been higher.

35. The unidentified payments into Ms Bather's bank account (to which we referred in paragraph 21, above), which Mr Tebbet submitted was unrecorded trading income, had been included in both the 1999-00 assessment on Mr Burgess and the assessment on Brimheath for the accounting period ended 30 November 1999 (there is no assessment for the 30 November 2000 accounting period). Mr Tebbet accepted that as these assessments were made in the alternative only one should stand.

36. With regard to the remaining assessments on Brimheath for the accounting periods ended 30 November 2001 to 30 November 2008, Mr Tebbet explained that these were based on the cash found in the safety deposit box and an analysis of the company's bank statement and the director's loan account and submitted that these related to undisclosed and unreported takings as Mr Burgess had made unrecorded cash withdrawals from the company in excess of his original loan to Brimheath and even if no cash had been drawn from Brimheath the total amount loaned to the company was inadequate to cover all the money in safe deposit box.

37. For Mr Burgess, Mr Green submitted that self-assessment returns had been filed showing losses for the years in question but that, as a result of HMRC's policy (to which we referred above) not to retain records beyond six years there is no evidence that this was the case. Any records of this period kept by Mr Burgess were, Mr Green submitted, lost when the basement of the *Commercial Tavern* flooded. Also, in contrast to the period between 1987-88 to 1995-96, he was unable to locate any correspondence or documentary evidence to establish these returns had been submitted.

38. Turning to the payments into Ms Bather's bank account Mr Green submitted that these were not unidentified credits of trading income but related to repayments of loans that made Ms Bather had made from the proceeds of sale from her property in Oswestry (see paragraph 16, above) including £15,000 to himself. He contended that subsequent lodgements into the account were Ms Bather's earnings from the *GE Club* for which she had been paid by cheque and which she had banked.

39. The source of the money found in the safety deposit box was, Mr Green submitted, cash drawn by Mr Burgess as the director of Brimheath which Mr Burgess took, if he needed it, from any cash remaining on the premises before banking it but that this was by way of repayment of his directors loan. Therefore, he contended, that Brimheath had fully accounted for and included all its income in its returns.

Discussion and Further Findings of Fact

40. Mr Green, in his written and oral submissions, criticized the approach of HMRC to this appeal, in particular he emphasised that a copy of the notes of the 17 March 2010 meeting had not been sent to the appellants or their representatives and that Mr Murphy's investigation had been "coloured" by the Operation Rize the police report. However, this appeal is against the assessments made on Brimheath and Mr Burgess and not the conduct of HMRC, a matter over which we do not have jurisdiction as was made clear by the decision of the Tax and Chancery Chamber of the Upper Tribunal in *HMRC v Hok Ltd* [2012] UKUT 363 (TC).

41. It is also clear, from *Johnson v Scott*, *Haythornwaite & Sons v Kelly*, *Moschi v Kelly* and the legislation to which we have referred above, that if the assessments on Mr Burgess and Brimheath are "fair", ie not "wild or extravagant" but based on inferences drawn from the evidence, the onus is on Mr Burgess and Brimheath to displace them and in the absence of satisfactory evidence the assessments "shall stand good".

42. With regard to the evidence, we found Mr Lankston, Mr Barney and Mr Murphy to be credible witnesses who gave clear and consistent evidence. Unfortunately the same cannot be said of Mr Burgess, Ms Bather and Mr Green whose evidence was often contradictory, inconsistent and at times simply not credible.

43. For example, Mr Burgess told us that he took cash for his own use after it had been taken from the tills of Brimheath's establishments before banking the remainder

whereas Ms Bather was adamant that Mr Burgess did not ever take cash in this way and that all of the takings were banked. We preferred the evidence of Mr Burgess and find as a fact that he did take cash from the takings.

44. In addition Mr Burgess was vague when asked about the safety deposit box and could not remember exactly when he had first used the facility but said he did recall making three visits to the depositary centre initially paying in £30,000 and removing £10,000 some 12 months later. He also recalled that he had £50,000 - £60,000 which he put into the box "in one go." He said that this money was from takings, evidence totally contradicted by Ms Bather, and was repayment of loans from Brimheath. However, Mr Burgess would have had no idea how much was due to him from Brimheath at the time he took the cash as this was reconciled by Mr Lankston after the year end when the company's accounts were prepared. When asked by the Tribunal how he knew whether the cash he was taking was repayment of the director's loan account he was unable to explain.

45. We do not accept the veracity of Mr Green's assertion, made for the first time during the hearing, that he had received a loan of £15,000 from Ms Bather out of the £16,473.34 net proceeds of the sale of her Oswestry property. This was not mentioned in his witness statement or his skeleton argument which in contrast refers to this money being "lent to family and friends". It therefore follows that we do not accept the suggestion, raised by Mr Green in his skeleton argument, that repayment of these "loans" could account for some of the unexplained lodgements into Ms Bather's account with Lloyds Bank.

46. We also reject Ms Bather's explanation that the credits in her bank account were earnings received from the *GE Club* for which she had been paid by cheque. She unable to identify any of these payments during her evidence and only did so after being recalled at the request of Mr Green, and after a period when she had discussed the case with others. Furthermore, many of these payments were made into the account before she was employed by the *GE Club*; and following the commencement of this employment, the narrative in the bank statement, "GE Club BGC", indicated that she was not paid by cheque but by credits made directly into her account. We find as a fact, based on the clear evidence in her Lloyds bank account, that *GE Club* and *Oasis* both paid Miss Bather directly into that account.

47. Ms Bather also told us that £25,356.14, half of the sum raised by the re-mortgage of 504 Cascades Tower (see paragraph 18, above) was paid into a Tesco High Interest Deposit account to enable monthly mortgage payments of £1,056.83 to be met. However, no payments to or credits from Tesco Bank are shown in Ms Bather's Lloyds bank account.

48. Mr Green said that Mr Burgess had filed tax returns for 1996-97 to 1999-00 but that these were lost when the basement of the *Commercial Tavern* flooded. We found neither Mr Green nor Mr Burgess to be credible witnesses and we note that Mr Green had managed to retrieve information about earlier years. As a result we do not accept their evidence that these returns had been filed.

49. In the circumstances, given the unreliable and inconsistent evidence adduced by and on behalf of Mr Burgess and Brimheath, we find that Mr Burgess has not discharged the burden of proof that he did submit returns for the years 1996-97 to 1999-00; that that the unidentified lodgements into Ms Bather's bank account were unrecorded trading income as was the source of funds in the safety deposit box and that Brimheath has not discharged the burden of proof in relation to the assessments made on it.

Conclusions

50. We therefore conclude that there were grounds on which HMRC could base the assessments on Mr Burgess and that the evidence adduced by and on his behalf is insufficient to displace the assessments raised against him which must therefore stand good.

51. As we have upheld the assessments for 1999-00 on Mr Burgess which include the unidentified lodgements in Ms Bather's bank account, as Mr Tebbet accepts, they cannot also be attributable to the trading profits of Brimheath, which did not commence trading until after the alcohol licence was obtained for the *Friendly Society* on 16 December 2000. We therefore allow Brimheath's appeal in respect of this accounting period.

52. However, we do not find the evidence to be sufficient to displace the assessments in relation to the accounting periods ended 30 November 2001 through to 30 November 2008, inclusive, and therefore dismiss these appeals and confirm the assessments for these accounting periods.

53. This means that the assessments listed at paragraph 1 of this decision are confirmed with the exception of the first (for £ 3,460.63) and all the assessments listed at paragraph 2 are confirmed.

Right to apply for Permission to Appeal

54. 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 BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 25 March 2014