TC04861

Appeal number: TC/2013/06983

INCOME TAX AND CLASS 4 NATIONAL INSURANCE CONTRIBUTIONS – whether certain amounts credited to the bank account of the Deceased were, as the Commissioners alleged, taxable income from a trade or another unidentified source – held on the evidence that the discovery assessments in issue were validly made and in time and that the Appellant had failed (except in relation to a certain amount in the final year of assessment in issue) to discharge the burden of proof of showing that they were excessive – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ONKAR SINGH CHEEMA as representative of HARDEEP SINGH CHEEMA deceased — **Appellant**

- and -

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

TRIBUNAL: JOHN WALTERS QC
SIMON BIRD

Sitting in public at Cardiff on 18 June 2015

Martyn Arthur for the Appellant

Jack Lloyd, HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal was brought (by a letter dated 21 February 2012) on behalf of Mr Hardeep Singh Cheema against assessments to income tax and Class 4 National Insurance Contributions ("NICs") for the tax years 2001/02 to 2010/11 inclusive. The assessments were discovery assessments purportedly made under section 29 Taxes Management Act 1970 ("TMA") and they are all dated 15 February 2012. They were raised by Officer Gillian Cleverly and were based on her best judgment of the unassessed income. The assessments charge 'profit from self-employment' (in the case of the assessments for 2001/02 and 2002/03 the words '(as a sole trader)' are added). Mr Hardeep Singh Cheema (hereinafter referred to as "the Deceased") died on 26 June 2012, aged 31. A copy of the death certificate was in the papers before us. We were told that the Deceased's father, Mr Onkar Singh Cheema ("OC") was the Deceased's personal representative, that the Deceased had left a will and that a grant of probate had been obtained. OC has been substituted for the Deceased as the appellant in the appeal.

2. On 28 May 2013, Officer Adrian Clancey withdrew the assessments for the tax years 2001/02 to 2004/05 inclusive following a telephone conversation which he had had with OC on 18 February 2013. Officer Clancey's contemporaneous note of that conversation (which was with our papers) stated that OC had insisted to him that the assessments for the years before 2005 must be wrong because his son was unemployed then and "only started the party dance floor business in 2005". (OC subsequently denied that he had said that.)

3. The assessments for the years 2005/06 to 2010/11 were adjusted to charge to income tax profits from self-employment as follows:

2005/06	£67,384
2006/07	£55,273
2007/08	£64,386
2008/09	£50,302
2009/10	£41,531
2010/11	£26,160

4. The charges to Class 4 NICs were in each year on slightly smaller amounts.

5. The assessments so revised (and which are now in issue) were dated 24 May 2013 and charged much lower amounts of profits than the assessments for those years which had been raised by Officer Cleverly. The profits originally charged for each of

the years 2005/06 to 2010/11 inclusive had been over £100,000. The tax charged by the assessments is as follows:

2005/2006	£23,446.24
2006/2007	£18,354.93
2007/2008	£23,196.46
2008/2009	£16,805.82
2009/2010	£12,575.68
2010/2011	£8,872.60

[This gives a total of £103,251.73.]

6. In broad terms HMRC's case is that they have made a discovery that the income of the Deceased originally taxed (under PAYE) was less than his true income, and that the underassessment of the Deceased's income was brought about carelessly or deliberately by the Deceased or a person acting on his behalf (see: section 29(4) TMA). HMRC contend further that the amounts of the revised assessments are based on material from which Officer Clancey could rationally form the opinion that insufficient tax had been charged.

7. OC's case is that the assessments overcharge tax and that the Deceased did not start a business in 2005. The funds credited to his bank account which are the basis for the assessments are not, according to OC, profits from any business but gifts from family members and others.

8. We heard evidence from Satnam Singh Cheema ("SC") and Balhar Singh Cheema ("BC"), both uncles of the Deceased, and from OC, the father of the Deceased. We also heard evidence from Officers Gillian Cleverly, and Adrian Clancey, for HMRC. SC and BC had both provided Witness Statements, as had each of the Officers. We also had before us a Witness Statement from Parveen Chadda, a partner in Kingston Smith, Chartered Accountants (who was not called to give oral evidence) and a bundle and a supplementary bundle of documents.

9. The burden lies on HMRC to show that they have made a discovery that (in the circumstances of this case) the income returned by the Deceased was less than his true income. In a case where the taxpayer has made a tax return for any year in issue, there are further issues of fact which must be proved by HMRC in order for a discovery assessment to be valid (see: section 29(2) to (6) TMA). In this case, however, the Deceased made no self-assessment income tax returns. HMRC also have to show that there was some material from which an assessing officer could rationally form the opinion that there was an insufficiency of tax paid. Then the burden passes to OC to show that the assessments actually made are excessive.

Review of the Evidence

10. We therefore rehearse the evidence advanced by HMRC and then the evidence advanced by SC, BC and OC.

11. Officer Cleverly was working as an investigator in HMRC's Criminal Taxes Unit at the time of her involvement in the enquiry into the Deceased. She sent a letter opening that enquiry on 3 November 2011. It had come to HMRC's notice that two properties had been purchased by the Deceased in the tax year 2005/2006 for a total amount of £657,000. The view had been formed within HMRC that the Deceased had income which he had failed to return to HMRC.

12. Learning from OC that his son was seriously ill and that the prognosis was not good, Officer Cleverly raised estimated assessments on 15 February 2012. She had been informed that at January 2011 the capital outstanding on the combined mortgages which the Deceased had taken out was £466,699 and the calculations used in making the assessments were based on the amount of income which would have been needed to obtain this mortgage finance, on the assumption that the mortgages had been granted to an amount of 5 times the applicant's income. She concluded that an income of £100,000 would have been needed in 2005/2006 and she adjusted that amount for the years back to 2001/2002 and forward to 2010/2011 by reference to the retail prices index.

13. Kingston Smith, having been appointed to act at as agents, appealed against the assessments on 21 February 2012. Officer Cleverly agreed to a postponement of tax as Kingston Smith had stated that they would be analysing their client's records and would send a summary of his income when that analysis had been completed. Kingston Smith (through Mr Chadda) replied in some detail on 28 August 2012. That letter was in the following terms:

> 'Further to our recent telephone conversation, I would like to summarise the facts as known to us.
>
> Mr Cheema's [the Deceased's] date of birth was 23 December 1980. He left school when he was about 17 years old. He was unemployed until early 2001 and his only employment was with Marks & Spencer for 3 months in that period (exact dates not known). From early 2001 he was working temporarily on and off for 2 years via an agency working for NatWest and Yellow Pages. He was again unemployed until late 2004 when he commenced work with a courier company under PAYE. In early 2005 he also commenced a business of Party Dance Floors, which hired out a number of different types of dance floor.
>
> Just before Mr Cheema passed away, he was able to obtain copies of his current account bank statements with NatWest (copies enclosed). They were only able to go back to 7 March 2005. Our client's father is happy for you to contact NatWest and obtain any further information that you may require. [Mr Chadda also provided bank statements for Party Dance Floors Limited.]

I also enclose a summary of the property purchases together with the Completion Statements. As you can see, the deposits were entirely funded by Mr Cheema's uncles. I enclose a copy of the Cheltenham & Gloucester passbook of Mr & Mrs BS Cheema [BS and his wife] which shows the amounts which correlate to those recorded by Browns Solicitors in their Completion Statements. The balance of the 2 deposits on the purchase of Coppermill Road of £106,000 and £8,000 were received from Mr S S Cheema [SC] as confirmed by Mr Cheema's father [OC].

Mr Cheema's parents subsequently sold their Principal Private Residence in October 2005 and £56,000 was repaid back to Mr S S Cheema [SC].

I also enclose the following documentation as agreed during our telephone conversation:

1. Declaration of Trust relating to 52 Coppermill Road, Wraysbury, Staines TW19 5NS
2. Declaration of Trust relating to 3 Dickens Place, Colnbrook, Slough Berkshire
3. A valuation of £499,950 from Campsie Property Consultants relating to 52 Coppermill Road
4. A valuation of £500,000 from St John Homes relating to 52 Coppermill Road
5. A valuation of £190,000 from Campsie Property Consultants relating to 3 Dickens Place
6. A valuation of £180,000 from St John Homes relating to 3 Dickens Place
7. A valuation of £182,000 from B S Bennett relating to 3 Dickens Place

It appears from the evidence available that there are more liabilities than assets in Mr Cheema's estate.

Mr Cheema's parents are concerned about the fees being incurred in connection with this enquiry. In order to keep the costs down, I look forward to your assessment of the evidence available and how you would like to proceed.'

14. From the evidence of this letter and its enclosures it appears that 52 Coppermill Road was purchased for £490,278.13 on 3 August 2005, using mortgage finance of

£354,951. The balance of the purchase price was funded by SC and BC and his wife – the bulk of the finance coming from SC. It also appears that 3 Dickens Place was purchased for £184,974.71 on 18 January 2006, using mortgage finance of £154,651. The balance of the purchase price was funded by BC and his wife.

15. Mr Chadda's Witness Statement makes it clear that he never discussed the Deceased's business or tax affairs with the Deceased himself. He does however say that he analysed the bank statements of the Deceased and calculated "a potential tax exposure of £100,000". However, as far as we can see he never proposed an estimate of the true tax liability of the Deceased and neither has Mr Arthur done so after the case had been passed to him.

16. The Declaration of Trust relating to 52 Coppermill Road was made by the Deceased as trustee and OC and Jaswinder Kaur Cheema (whom we take to be his wife, the Deceased's mother) as beneficiaries. It is dated 19 July 2006 and recited *inter alia* that the property was purchased in order to provide a home for the Deceased and his parents. The trust provided that the Deceased (the trustee) had no beneficial interest in the property and no beneficial interest in any proceeds of sale of or rental income from the property. It includes a covenant on the part of the beneficiaries that they will pay the costs of the mortgage repayments, buildings insurance, council tax and other outgoings.

17. The Declaration of Trust relating to 3 Dickens Place was also dated 19 July 2006 and was made between the same parties. It recites *inter alia* that the property was purchased as an investment property. It also provided that the Deceased (the trustee) had no beneficial interest in the property and no beneficial interest in any proceeds of sale of or rental income from the property. There was a similar covenant on the part of the beneficiaries to pay the costs of the mortgage repayments and other outgoings.

18. Officer Cleverly considered Kingston Smith's letter and the enclosures. Kingston Smith also wrote on 21 November 2012 contesting the accuracy of Officer Cleverly's assessments and reiterating that the Deceased had a history of employment and unemployment between January 1998 and December 2004 and that it was their understanding that the business of Party Dancefloors commenced in early 2005. Officer Cleverly wrote to Kingston Smith on 5 December 2012. In that letter she noted that although Kingston Smith had informed her that the business of Party Dance Floors was started in early 2005, the limited company (Party Dance Floors Limited) was not set up until 11 June 2010. She assumed, therefore, that the Deceased had failed to notify to HMRC his self-employment in the years 2005/2006 to 2009/2010. She had some concerns about the information that relatives of the Deceased had provided the deposits for the house purchases, but stated that she had raised the assessments based on the amount of profit that would have been needed to be declared to a lender in order to obtain mortgage loans of £354,951 and £154,651 in one year.

19. She also analysed the total deposits in the private bank account of the Deceased for the years under appeal. It showed 'potentially taxable bank deposits' into the private bank account as follows:

2005/2006	£67,384.21
2006/2007	£55,273.23
2007/2008	£60,446.62
2008/2009	£50,302.37
2009/2010	£41,531.33
2010/2011	£42,580
2011/2012	£9,040

20. Her analysis also showed that 'potentially taxable bank deposits' of £26,210 had also been made into the bank account of the limited company.

21. She recorded that no returns of self-employment income had been made by the Deceased in any of the years in issue, and that his PAYE income declared had been as follows: in 2007/2008: £9,843; in 2008/2009: £9,128; and in 2009/2010: £9,108.

22. Officer Cleverly left the Criminal Taxes Unit, and ceased to be directly involved with the handling of this case, at the beginning of 2013.

23. Officer Clancey works in HMRC's Criminal Investigation Division. He has been involved in the investigation of the Deceased's tax affairs throughout, first as Officer Cleverly's manager and later as the case owner himself.

24. Officer Clancey's evidence is that the gross value of the Deceased's estate has been returned at £325,000 for inheritance tax purposes.

25. After he had taken over the case himself, Officer Clancey spoke by telephone to OC (on 18 February 2013). He made a note of the conversation which he told us was contemporaneous. We record the full text of the note as follows:

> 'Mr Cheema rang re £100 penalty demands for failing to submit a return which he states he cannot.
>
> We spoke about the enquiry into his son's affairs. He was not always easy to understand. He was at times quite upset and emotional but he appeared to wish to continue the conversation.
>
> He insists that there is no money. I explained that at present, we are trying to establish what is due.
>
> He confirmed that he is executor.
>
> He stated that he has no business records that belonged to his late son.

He insisted that the assessments for the years before 2005 must be wrong because his son was unemployed then and only started the party dancefloor business in 2005. I agreed that this was something to be considered.

He insisted that the assertion that his two brothers did not have enough money to purchase the properties was wrong. One had a well paid job with First Busses. He explained that as the oldest of three brothers they would do as he said and that the capital for the property purchases came from a pot of family money.

He stated that he just wanted matters resolved quickly.

He stated that Mr Arthur [his representative at the hearing of the appeal] had advised him that he shouldn't provide any information to HMRC and that everything would be contested at tribunal. I explained that these two things could not both happen. If he wanted matters resolved quickly, the easiest way to achieve this was to tell HMRC everything that he could. He repeated that this was the advice that Mr Arthur had given. I suggested that it was his choice, that if he wants matters resolved then any route involving tribunal was not going to be quick, and as he was paying it was his decision to make.

He suggested that I phone Mr Arthur. I explained that I was writing to him, so didn't need to.'

26. Officer Clancey confirmed to us that he had written the note immediately after the telephone conversation with OC. Following that telephone conversation, Officer Clancey withdrew the assessments originally made for years before 2005/2006 and decided that the deposits made to the bank accounts provided a better measure of income than a calculation based on assumptions connected with the applications for mortgages.

27. On 21 August 2013, an officer of HMRC's Specialist Investigations, who had reviewed the case, wrote to OC informing him that the assessments made by Officer Clancey would be upheld.

28. Officer Clancey's analysis of the bank statements for the Deceased's bank account showed 161 deposits into that account between 29 April 2005 and 14 February 2012 totalling £302,371.96. Those figures took no account of deposits in respect of interest, inter-account transfers, refunds or payments from known employers. Officer Clancey's analysis of the bank statements for the bank account of Party Dancefloors Limited showed 42 deposits into that account between 28 July 2010 and 28 February 2012 totalling £58,760. Those figures took no account of re-presented cheques or other correcting entries.

29. Officer Clancey identified 4 payments out of the bank account of Party Dancefloors Limited which were in his view possibly the source of deposits into the personal bank account of the Deceased. These payments were made between 26 October 2010 and 1 August 2011 and amounted to £9,200 in total. Officer Clancy accepted that the income assessed in 2010/2011 should be reduced by that amount

(even though the last of these 4 payments, that of £2,700, made on 1 August 2011) was made after the end of 2010/2011.

30. Officer Clancey's evidence was that the balance of £351,931.96 (302,371.96 + 58,760 – 9,200) - which we note is a higher figure than the sums assessed – was in his view as reasonable a measure of the profits accruing to the Deceased from the party dancefloors business over the period from April 2005 to February 2012 as it was now possible to obtain. But, in his view, that figure was more likely than not to be too low because he considered that the evidence of irregular patterns of cash withdrawals from the Deceased's bank account over that period suggested that private cash purchases must have been made by the Deceased from other sources of cash at different times during the period. He commented, however, that it did not appear to be possible at this stage to quantify these with any degree of accuracy.

31. We were shown three invoices addressed to 'Party Dancefloors' at Unit 9, Mill West, Mill Street, Slough, which appears to us to be a business address. Two of these, issued by Grumpy Joe's and both dated 19 May 2010 and numbered 2329 and 2330, were each for lights and a floor trolley (for £11,489.36 + VAT), and the other, dated 27 October 2010, was for an amount of £2,050 + VAT for website design and development of www.partydancefloors.co.uk. The invoice for website design and development stated that the website was created and launched in October 2010 (which we note was 4 months after the limited company was set up).

32. Officer Clancey examined the invoices from Grumpy Joe's and noticed that invoice 2329 was marked 'Your Order Number: Cash' and did not match any transaction in either bank account. Likewise invoice 2330 did not match any known bank transaction. His evidence was that the Unit 9, Mill West address was the address of Kudos Roadshow, a company specialising in organising entertainment at Asian weddings, with whom the Deceased was believed to have been associated throughout.

33. Officer Clancey had considered SC's evidence (see: below) that cheques which he had written could be identified as gifts to the Deceased, from examining the Deceased's bank account statements and his own old cheque books, and discounted that explanation on the basis that a link was improbable, given the different amounts of the cheques and the deposits and difference in timing between the drawing of the cheques and the deposits. With regard to the suggested gifts of £30,000 and £22,000 on 18 August 2010 and 1 April 2011 respectively, Officer Clancey's evidence was that neither amount matched any transaction in either the Deceased's bank account or the bank account of the limited company and that the amounts were far greater than the sums deposited in those accounts, making the point that only £9,000 was deposited in the private account in the whole year to April 2012.

34. Officer Clancey had also considered BC's evidence (see: below) that he had given the Deceased £9,000, which had been channelled through the account of the brother of the Deceased. Officer Clancey discounted this evidence on the basis that neither of the withdrawals from the brother's account could be seen to match any deposit to the Deceased's bank account.

35. Officer Clancey's evidence was that his review suggested that the 161 deposits to the bank accounts of the Deceased and the limited company were not funded from family members' accounts to any extent, principally because the amounts and the chronology of the suggested gifts do not match the deposits in the accounts.

36. The statements of the bank accounts of the deceased and of Party Dancefloors Limited were in our bundle. They show payments being received by the Deceased on a consistent basis, many in cash, such that the personal account was a few thousand pounds in credit between March 2005 and November 2006, and generally less than £5,000 in debit between November 2006 and February 2012 – and this despite very considerable expenditure of an apparently private nature (but minimal withdrawals of cash). Officer Clancey's view was that the payments received by the Deceased represented net profits – that is, taxable income, whether or not derived from the dancefloor business. The balance on the company's account between July 2010 and February 2012 was consistently a few thousand pounds in credit, again with payments of several thousand pounds being paid in consistently each month, and money being regularly transferred out to the deceased's private account.

37. SC's evidence was that he had a close relationship with the Deceased and enjoyed close contact with him with phone calls and personal visits. He had given gifts and money to the Deceased since his teenage years and this 'continued throughout [their] relationship'. He recalled two amounts of money which he had given to the Deceased - gifts of £30,000 and £22,000 on 18 August 2010 and 1 April 2011 respectively, and we were shown bank statements recording withdrawals of those amounts on those dates. SC's evidence was that these payments had been made to the Deceased after he had informed SC that he had been borrowing from friends over a number of years

38. SC said that he had made "lots of other payments" to the Deceased. He had bought a 2 year old Vauxhall Astra car for the Deceased on his 18th birthday.

39. SC's evidence was that the Deceased was not self-employed. SC said that he never discussed the Deceased's life style with him but he knew he had had well-off friends and he would have known if the Deceased had started a business.

40. In cross-examination, SC mentioned gifts of £2,000, £3,000, £1,000 and £1,000 which he identified in an email dated 24 March 2014 (to Cooksie Cheema and OC), which he had identified as gifts to the Deceased from examining the Deceased's bank account statements and his own old cheque books. His evidence was that his guess was that he had given the Deceased between £70,000 and £80,000 since 2005.

41. SC's evidence was that he never sought repayment of these gifts.

42. SC described the Deceased's life style as someone who liked going out, wearing nice clothes and "keeping up with other kids". SC had given the Deceased money in the knowledge that he would spend it at casinos. However, beyond knowing that the Deceased enjoyed himself going out, SC said that he did not know where he actually went.

43. The records of the transactions on the bank account with National Westminster Bank plc which had been operated by the Deceased included withdrawals of £1,000 on 25 September 2006 at Ladbrokes Casino and Bar, London W2 and £1,000 on 10 November 2006 and £500 on 1 December 2006 at Grosvenor Casino, Harrington Gardens, London SW7.

44. SC said that he earned "good money" (a salary of £100,000 and a 50% bonus was mentioned) but that he did not spend a lot of money and was happy to lend or give money to other members of his family. He suggested that the value of his own estate at the time of the hearing of the appeal was "maybe £1million".

45. BC's evidence was that he was not as well off as SC, and that he earned about £40,000 a year. He said that he had a close relationship with the Deceased and had very frequent contact with him by telephone or personal visits. BC also said that the family was very close and was used to giving emotional and financial help and support to each other. He said that he had on numerous occasions given money to the Deceased, whenever he had asked for it. He never kept records of these gifts as he regarded them as a private family matter. He did, however, recall that in April 2010, the Deceased had asked him for £9,000 and that he complied with this request by making out a cheque to the brother of the Deceased, Harvin Singh Cheema ("HC"). So that he could credit it to his bank account and make the money available for the Deceased. We saw extracts from bank statements of BC and HC which showed £9,000 being debited to BC's bank account on 2 May 2010 and credited to HC's bank account on 27 May 2010. The extract from the statement of HC's bank account also shows a withdrawal of £8,800 in two instalments, £8,000 and £800 on 4 and 9 June 2010 respectively, and we were told that those withdrawals represented payments to the Deceased. BC accepted that HC seems to have kept £200. He had not asked why. He had thought the £9,000 was 'for the family' – the Deceased had not said he needed the money to pay off debts.

46. BC's evidence was that he did not 'give the kind of money that [SC] gave' – the largest amount of money given as cash had been £3,000. He had not been aware of the amounts of the gifts that SC was making to the Deceased (although he knew that he had been giving him money). He accepted that he had not been as close to the Deceased as SC. Nevertheless he said that he would have known if the Deceased had ben running any sort of business and that he had not been aware that he had been running a business. Apart from the gifts of £9,000 and £3,000 already mentioned, his gifts of cash had been of amounts of about £200.

47. OC's evidence was that he had telephoned Officer Clancey in February 2013 (after the death of the Deceased, and in his capacity as the Executor of the Deceased) to complain that he had received a demand from HMRC for payment of a penalty. He complained that Officer Clancey had been abrupt with him and his evidence was that he had never told Officer Clancey that the Deceased had started a business in 2005.

48. We have in our papers a copy of a fax sent by Mr Arthur to Mrs Baynes and Mr Mear (officers of HMRC) on 11 May 2013 complaining, amongst other things, about Officer Clancey's conduct in this case.

49. We also have a copy of a letter sent by Officer Clancey to OC dated 28 May 2013 in which Officer Clancey stated as follows, under the heading "Facts as seen":

> '1 As the proprietor of the business called Party Dance Floors, Mr Cheema [the Deceased] was in receipt of income, firstly as a self employed person and later as an employee, over a number of years. This business first operated in 2005. A limited company was formed and Mr Cheema appointed director 11/06/10. During the period from then onwards he failed to notify chargeability to HMRC at the correct time and failed to operate PAYE on his salary when remunerated as a director of the company.'
>
> 2. In a conversation of 18/02/13, Mr O Cheema [OC] stated that assessments made for the years before 2005 were wrong because the business started in 2005.
>
> 3. In a letter of 21/11/12, Parveen Chadda of Kingston Smith accountants stated that his firm's understanding was that the business started in early 2005.
>
> …'

50. OC apparently contacted Mr Chadda after receipt of the letter dated 28 May 2013 from Officer Clancey, and asked him what had made him say that the business started in 2005. Mr Chadda apparently told OC that he had come to that conclusion on the basis of the payments into the Deceased's bank account – although he did not mention this in his Witness statement in this appeal.

51. OC responded to Officer Clancey in a letter dated 17 June 2013 as follows:

> 'For the purpose of record, I would like to clarify points 2 and 3 in your letter of 23 May 2013.
>
> Point 2 – You state that I said the business started in 2005. I never said to you that my late son's business started in 2005. What I said repeatedly was that I have no knowledge of any records of my son's business affairs, and that he had worked via temp agencies up to around 2005. You say this as a telephone conversation I beg to differ, I would call it a telephone interrogation. Your continuous bombardment of your one liner question to me "where is the money" was very upsetting and distressing. You telling me or rather threatening me that this case will only finish quickly if I was to reinstruct my advisor [Mr Arthur] and when I mentioned that surely you should be having this conversation with my advisor you replied that you would not speak to that man, your exact words sir, the only thing that I was glad to hear from our conversation was when you said you do now accept that the deposits for the properties could well have come from family members as this was the first time that you or your department had said this. When our conversation had ended, I immediately telephoned my advisor Martyn Arthur and informed him of what had just taken place.

Point 3 – I have spoken with Mr Chadda from Kingston Smith who has confirmed that his firm's understanding that the business commenced early in 2005 came solely from the fact that bankings in my son's personal account started around then. This is merely just an assumption from him.'

52. OC said in evidence that he was aware of the Deceased's visits to casinos. He went with friends from India and Dubai. He had tried to obtain information from Ladbrokes as to how much money the Deceased had won or lost there, but without success. He knew that his younger brother, SC, had given the Deceased 'quite a bit' of money.

53. OC said in evidence that it is very likely that the friends from India and Dubai would have given the Deceased money. When the Deceased had become ill the friends had told OC that they knew of a doctor in Germany and that he (OC) should not worry about the cost. OC did not, however, know these friends well – the only time he talked to them was when the Deceased was very ill – and he had no idea what business they were in.

54. OC's evidence was that he wanted the Deceased to settle into a job, but instead he 'went for temporary contracts', with Marks & Spenser, O2 and NatWest. He said that the Deceased would have got 'more solace' from SC. The Deceased had worked up to 2005 in temporary roles. In 2005 he moved from Slough to Wraysbury. OC had wanted the Deceased to take responsibility. He had wanted to push him towards a long term permanent job.

55. OC's oral evidence was that he did not know whether the Deceased was involved in his own business activities from 2005. He said that at that time (2005/06) he was working and he believed that his son (the Deceased) must have been doing some sort of work.

56. He said that the properties, which were the starting point for HMRC's enquiries, had been bought in 2005 and 2006. The ownership of them had been put into a trust as recommended by the solicitors instructed, since the Deceased's parents were providing the deposit for the purchases. It had been difficult for OC and his wife to get mortgages at their age. The Deceased had arranged to obtain 'self-certified' mortgages himself. The Deceased had lived at 52 Coppermill Road, and his girlfriend had lived for a short while in the other property. The aim had been to buy the properties for renting out. Terminal 5 at Heathrow Airport was opening up at this time. There were £3,000 per month mortgage payments. OC said that he was not making these payments and he could not say where the deceased was getting the money from in order to make them (apart from gifts from his brothers, SC and BC).

57. OC said at one point in his evidence that he did not speak to Mr Chadda of Kingston Smith, Chartered Accountants, about the source of the money in the Deceased's bank accounts or on any other matter. He said later that in 2012 Mr Chadda had asked him where the money had come from and he had told him that he did not know. He explained that Officer Cleverly had asked the Deceased to authorise

the release of his bank statements and he (the Deceased) had done so and Mr Chadda had analysed the statements.

58. OC said that he did not know where the Deceased had got the idea of a dancefloor business – The business had provided dancefloors for weddings and events. OC had no idea is it was profitable.

59. OC said that the Deceased had left a will and that a grant of probate had been obtained. There was, however, no money in the Deceased's estate – only clothes and bills outstanding (£7,000 to £8,000 in credit card debts and an overdraft at the bank of £3,000 to £4,000).

Sections 29 and 36 TMA

60. Discovery assessments under section 29 TMA may be made in the circumstances of this case if HMRC have discovered that the Deceased had income in each of the years 2005/2006 to 2010/2011 inclusive which ought to have been assessed to income tax but which has not been assessed (see: section 29(1) TMA). In the present case the assessments for the earlier years (2005/2006 to 2008/2009 inclusive) were made after the ordinary time limit of 4 years from the end of the year of assessment (section 34 TMA). The time limit in the case of a loss of income tax brought about carelessly is 6 years from the end of the year of assessment (this would apply to the assessments for 2007/2008 and 2008/2009) (see: section 36(1) TMA). If the assessments for the years 2005/2006 and 2006/2007 are to be upheld HMRC must show that the loss of tax was brought about deliberately or is attributable to a failure to notify liability to HMRC pursuant to section 7 TMA (see: section 36(1A) TMA).

61. As stated above, the burden is on HMRC to show that they have made such a discovery. They also must show that the assessments are made in time in accordance with section 36 TMA.

62. Mr Arthur submitted that the assessments were in some way defective because they had originally been issued (by Officer Cleverly) on the invalid assumption that the Deceased beneficially owned the two properties at Coppermill Road and Dickens Place. We reject this submission. Although Officer Cleverly did make that assumption on the basis of the information then available to her, HMRC have subsequently accepted (following the submission of Kingston Smith's letter dated 28 August 2012 with its enclosures, which included the bank statements referred to above) that the deposits for the purchase of these properties was provided by family members rather than the Deceased himself. Further, Officer Clancey (who took over the case from Officer Cleverly in early 2013), following his telephone conversation with OC on 18 February 2013, both withdrew the assessments originally made for the years before 2005/2006 and revised the assessments for the later years on the basis of his analysis of the bank statements, rather than any assumptions as to the income needed to obtain the mortgage finance which had been obtained by the Deceased. There is no merit at all in this point made by Mr Arthur.

63. We add that Mr Arthur's admission in argument that the Deceased had probably made dishonest self-certified mortgage applications, together with the fact that no

returns were made by the Deceased in relation to his admitted employment with Party Dancefloors Limited, persuade us that there was a pattern of deliberately incorrect disclosure in financial matters by the Deceased, which is a factor to be taken into account suggesting that the credits to his bank accounts did indeed represent taxable income.

64. It is clear to us that in this case HMRC have made a relevant discovery – namely that the Deceased had resources in addition to his declared income. This is proved beyond any doubt by the bank statements in evidence. The bank statements in our judgment are also material from which Officer Clancey could rationally form the opinion that there was an insufficiency of tax paid. Since no self-assessment returns had been made by the Deceased for any of the years in issue, in our judgment there was clear evidence of carelessness and indeed of a deliberate attempt to evade tax. This is reinforced by the Deceased's apparent failure to keep records of his income. The decision of Special Commissioners Avery Jones and Huddleston in *Thomas Duffy v Revenue and Customs Commissioners* [2007] UKSPC 00596 was cited by Mr Lloyd and we apply the same approach as was applied in that case in dealing with these points.

Are the assessments excessive?

65. This question is at the heart of this appeal. On this issue, the burden of proof lies with the appellant (OC).

66. The issues of the Deceased's ability to fund the mortgages on the Coppermill Road and Dickens Place properties is now of no material significance. The explanations advanced by Kingston Smith in their letters of 28 August 2012 and 21 November 2012 have been accepted by HMRC, but we bear in mind that besides informing HMRC that the properties were not beneficially owned by the Deceased and that the deposits for their purchase had been provided by family members, Kingston Smith had stated, and reiterated, their understanding that the Party Dancefloor business had been started by the Deceased in early 2005.

67. There was a conflict of evidence on this latter point at the hearing of the appeal. SC's evidence was that the Deceased was not self-employed and that he would have known if the Deceased had started a business. BC also said that he would have known if the Deceased had been running any sort of business and that he had not been aware that he had been running a business. OC denied that he had told Officer Clancey in the telephone conversation on 18 February 2013 that the Deceased had started the Party Dancefloor business in 2005. When he received Officer Clancey's letter dated 28 May 2013 setting out as a "fact as seen" that the Deceased had been the proprietor of the business from 2005 until the formation of the limited company in 2010, his reaction was not immediately to contact Officer Clancey to put him right (which we might have expected him to do), but instead to contact Mr Chadda of Kingston Smith to ask him what had made him say that the Deceased's business had started in 2005. He eventually wrote to Officer Clancey on 17 June 2013 denying that he had ever said that the business had started in 2005.

68. We found Officer Clancey's evidence on this point convincing and prefer it to the conflicting evidence. Officer Clancey said that immediately after his telephone conversation with OC he had written the note which we have set out above which included OC's unambiguous statement that the Deceased had started the business in 2005. This fact had, of course, been included in Kingston Smith's letters of 28 August 2012 and 21 November 2012, and we consider it highly probable that Mr Chadda had taken a history from members of the Deceased's family before writing to HMRC in these terms. Further, it seems to us more likely that the company was formed in 2010 to take over an established business than that it started in business then from a standing start. We also take into account that the credits were made to the bank account of the Deceased between 2005/2006 and 2010/2011 on a consistent basis of monthly payments. Following the formation of the company in 2010 there were similarly consistent monthly payments made into the company's bank account. Further, the level of some of the outgoings featured in the bank statements, such as hotel and telephone expenses, is, in our judgment, indicative of the Deceased having carried on some form of business. These facts, together with OC's failure to put Officer Clancey right immediately on receipt of his letter of 28 May 2013 persuade us that as a matter of fact the Deceased did indeed start the party dancefloor business in early 2005. We so find. We therefore reject Mr Arthur's submission that the evidence showed that the business was started in 2010 when the limited company was formed.

69. We also have to decide whether gifts from family members was a more plausible explanation for the sums credited to the Deceased's bank account than HMRC's suggestion that those sums were the profits from some unspecified business or income producing activities and were therefore taxable profits which had not been declared as such to HMRC. The bank statements are convincing evidence of the fact that sums credited to the Deceased's bank account between 29 April 2005 and 14 February 2012 totalled £302,371.96, without taking into account interest credited, inter-account transfers, refunds or payments from known employers.

70. Here, again, there was a conflict of evidence. Clearly, in view of our finding that the party dancefloor business started in early 2005, one would expect any profits from that business to find their way into a bank account owned by the Deceased and profits from that business are a plausible explanation of the origin of the sums credited to the Deceased's bank account. However, the question for us is not whether the sums credited to the bank account were profits from the party dancefloors business, but whether the Deceased was overcharged by the assessments – which is effectively a question of whether the sums credited to the bank account represented undeclared taxable income of some sort. (Answering such a question was the approach of the Special Commissioners in the *Duffy* appeal – see: *ibid.* [19].)

71. The first point to make is that SC, BC and OC in their evidence account for gifts of between £70,000 and £80,000 (SC), something over £12,000 (BC) and an indeterminate amount that might have been given to the Deceased by friends from India and Dubai (OC). This falls far short of an explanation for credits totalling £302,371.96 as identified by Officer Clancey. The possibility that friends from India and Dubai might have given the Deceased money was raised for the first time at the hearing – by OC in the course of his cross-examination. We discount this explanation

– there is no corroboration for it in any of the other evidence and it appears to us to have been no more than an afterthought.

72. OC's evidence that he knew little about the Deceased's business affairs (which we accept), while given in order to counter the evidence that he had told Officer Clancey that the Deceased only started the party dancefloor business in 2005, does demonstrate that he (OC) is unable to discharge the burden of proof which is on the appellant in this case to show that the assessments are excessive.

73. We accept SC's evidence that he had been generous towards the Deceased and that he gave him substantial sums of money over the years in question. However it has proved difficult (as HMRC submit) to reconcile the receipt by the Deceased of the sums SC identified as gifts given by him (principally the payments of £30,000 (on 18 August 2010) and £22,000 (on 1 April 2011)) with the credits to the bank accounts of the Deceased and the limited company which were of much smaller amounts. We consider on the balance of probabilities that the gifts given by SC to the Deceased did not feature in the bank accounts we have seen.

74. We consider it unlikely that BC, who earned about £40,000 a year, was gave significant sums to the Deceased in the years in question. The payment of £9,000 made by BC in April 2010 was traced to the account of the Deceased' brother (HC) and £8,800 was shown to have been debited from that account in June 2010, but there is no evidence (other than assertion) that that money formed any part of the credits to the bank account of the Deceased. Similarly the payment of £3,000 in cash by BC which was mentioned could not be traced to the bank account of the Deceased. In all the circumstances we are unable to find that any part of the credits of £302,371.96 in issue originated in payments by BC.

Our Decision

75. Having regard to the evidence as a whole we find that no part of the credits of £302,371.96 has been shown to be derived from gifts, from SC, BC or anyone else. It is, we accept, possible that these credits represent turnover from a business run by the Deceased as opposed to profit or taxable income. However, the burden of proof on this point is on the appellant in this appeal and that burden of proof has not been discharged.

76. We note that the tax charged by the assessments appealed against in £103,251.73 in total and that that sum closely approximates to the 'potential tax exposure of £100,000' mentioned by Mr Chadda of Kingston Smith in his Witness Statement. This fact confirms our view that we should dispose of this appeal by confirming the assessments subject to the reduction of £9,200 from the amount (£26,160) assessed for the year 2010/2011.

77. Our attention was drawn to this tribunal's decision in the appeal of *Miss Mead Ali v Commissioners for HMRC* TC01977 [2012] UKFTT 289 (TC). The appeal in that case was allowed because the Tribunal accepted that evidence given by the appellant and on her behalf discharged the burden of proof. In this case, however, we cannot be

satisfied that the various deposits in the bank accounts in issue do not represent the taxable income of the Deceased.

78. The appeal is therefore dismissed (subject to the reduction in the assessment for 2010/2011 mentioned above) for the reasons given above.

79. 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 WALTERS QC
TRIBUNAL JUDGE

RELEASE DATE: 4 FEBRUARY 2016