[2016] UKFTT 0416 (TC)

TC05170

Appeal number: TC/2012/07003

Income tax - closure notice - discovery assessments and penalties - errors in Appellant's tax returns - whether Appellant had provided sufficient evidence to displace HMRC's figures in closure notice and assessments - no - whether deliberately delivering incorrect returns - yes - whether penalties correctly determined - yes - appeal dismissed and penalties confirmed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROBERT CHESLETT **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER LIZ POLLARD

Sitting in public at Alexandra House, The Parsonage, Manchester on 6 October 2015

Mr Charles Mace for the Appellant

Mrs Pat Roberts, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal by Robert Cheslett ("the Appellant") against:

(i) a closure notice and amendment to his self-assessment under s 28A(1) and (2) Taxes Management Act 1970 for the year 2001-02;

(ii) discovery assessments made under s 29(4) and s 36(1)(a) TMA for the years ended 2000-01, 2002-03, 2003-04, 2004-05, 2005-06, 2006-07, 2007- 08.

(iii) Penalty determinations under s 95 TMA for the years 2000-01 to 2007-08 inclusive.

2. The increased taxed due under the s 28A TMA Closure Notice is:

Year	Closure Notice Issued	Increased tax due
2001-02	20 January 2011	£56,882.92

3. The increased tax due under the s 29 TMA Assessments is:

Year	Tax due
2001	£19,311.83
2003	£62,349.52
2004	£92,194.16
2005	£153,977.94
2006	£88,919.29
2007	£17,445.60
2008	£116,713.20
TOTAL	£550,911.54

4. The initial revised assessment for 2001-02 and amended discovery assessments for the years 2000-01 and 2002-03 to 2006-07 inclusive were issued in 2006 and 2007. Final assessments were issued for all years including 2007-08 by HMRC on 20 January 2011and total £607,794.46.

5. The Penalty determinations were issued by HMRC under s 95(1)(a) TMA 1970 on 6 May 2011 and total £364,594.

6. The Appellant appealed the Closure notice and the discovery assessments on 17 February 2011. The Penalty determinations were appealed by the Appellant on 3 June 2011.

7. The matters at issue are:

i. Whether the Appellant has been overcharged in the closure notice.

ii. Whether the assessments are competent as to discovery.

iii. Whether the Appellant fraudulently delivered to HMRC incorrect Tax Returns for the years in question and whether the Penalty determinations are correct and appropriate.

Appeal Background

8. HMRC advised the Appellant on 11 October 2006 that they were undertaking an investigation of his personal tax affairs in order to establish whether there had been omissions of income from his Tax Returns in respect of the years 2000-01 to 2007-08 inclusive relating to:

i. Undisclosed rental income

ii. Undisclosed Property Sales / Capital Gains

iii. Undisclosed Bed & Breakfast income

9. On 27 February 2007 at a meeting between the Appellant, his advisors Cobham Murphy, Chartered Accountants, and Officers from HMRC, HMRC's statement "Civil investigation into cases of serious fraud" was read to the Appellant. Cobham Murphy made disclosures of irregularities on behalf of the Appellant and agreed that the Appellant's Tax Returns relating to Capital Gains Tax between 2001-02 and 2007-08, and rental income between 2000-2001 and 2006-07 were incorrect.

10. The Appellant said that he would arrange for Cobham Murphy to prepare a report for submission to HMRC on his behalf. Cobham Murphy said that a considerable amount of work would have to be undertaken to quantify the effect of the disclosures, as some of the paperwork "*could not be easily accessed and some documents may have been mislaid*". The indication was that it was likely to be some time before Cobham Murphy were able to finalise their report.

11. In the meantime based on the information held, HMRC raised assessments for 2001-02 to 2006-07 on 10 March 2006 and 14 June 2007. These were appealed on 6 April 2006 and 17 October 2007.

12. Following that, and pending completion of the Cobham Murphy report, correspondence and meetings between the parties continued. During this period the Appellant raised monies (£75,000) by way of mortgage on one of his properties in order to make a payment on account to HMRC.

13. On 23 June 2010, over three years after the meeting in February 2007, Cobham Murphy submitted "*A Document in support of the disclosures made by Mr Cheslett*" advising that "this document is not a Report, but a commentary". The report included a list of all the properties purchased and sold or rented out by the Appellant.

14. Cobham Murphy also submitted a Statement of Assets as at 31 May 2010, signed by the Appellant on 9 June 2010. The Appellant also signed a Certificate of Full

Disclosure covering the period 6 April 2001 to 5 April 2007 inclusive and a "Report Adoption Certificate" in which he declared that the statements, figures and schedules in the Report were true and correct to the best of his knowledge and belief.

15. HMRC accepted two of the three main areas of the Commentary, that is, rental income and bed and breakfast income which had resulted in additional income tax on revised figures, but they did not accept the Appellant's claims for expenditure and certain stated property purchase and disposal prices. HMRC say that they had not been provided with third party or independent verifiable evidence such as receipts, vouchers and invoices to demonstrate that the Appellant actually incurred expenditure as claimed and some purchase and disposal prices in his calculation of returned Capital Gains appeared to be incorrect.

16. Further, HMRC say that some disposals of properties had been omitted from the Appellant's returns and although some of these had been included in the Commentary by Cobham Murphy, others had not. The figures contained in the Commentary therefore could not be accepted as accurate.

2000-01

17. HMRC noted that for 2000-01 the Commentary report provided the following figures

9 Hurst Green - Profit £6,340
10 Ecclesall Road - Loss £8,201
116 Roundthorn Road - Loss £12,789
10 Cobden Street - Loss £11,121
17 Richmond Street - Profit £25,701

18. HMRC noted that the figures used to arrive at the Capital Gains as returned in the Commentary were incorrect. With regard to 9 Hurst Green, the information held by HMRC revealed that the purchase price should have been shown as £31,816 and the sale price £55,000 as opposed to a purchase price of £45,410 and sale price of £51,750 as used to arrive at the gain returned. That meant that the overall gain on that property should have been £23,184 as opposed to £6,340 as returned.

19. In addition, losses returned on the properties 10 Ecclesall Road and 116 Roundthorn Road included expenditure of £5,000 on each property which was not supported by documentation. It is usual practice for expenditure claimed as a deduction to be supported by evidence. In the absence of such evidence HMRC disallowed the £10,000 expenditure.

20. HMRC calculated that the overall revised net gain on these properties was £26,774. After applying the Appellant's personal exemption of £7,200 for 2000-01 there was a chargeable gain of £19,311.83, as opposed to nil returned.

2001-02

21. A property purchased and sold by the Appellant was missing from the Commentary. In 2001-02, Dukes Platting, Ashton, Lancashire was purchased for £60,000 on 31 May 2001 and sold for £125,000 on 5 November 2001, which indicated a gross capital gain of £65,000. In respect of another property the stated purchase price was incorrect; the purchase price of 16 Ball Avenue was shown as £32,450 whereas evidence held by HMRC showed that the price was only £28,000.

22. Further the Appellant's calculation of the CGT losses of £3,576 on the above properties included un-vouched expenditure of £35,800. HMRC said that they were not prepared to accept the claim to expenditure without evidence.

23. In respect of 15 George St and 200 Stockport Road, the calculations again included un-vouched claims to expenditure of £19,758. HMRC were not prepared to accept the claim to expenditure without evidence.

24. The additional tax due for the year 2001-02 after HMRC's amendments was £56,882.92.

2002-03

25. The Appellant's calculation of CGT on 79 Old Road included un-vouched expenditure of £18,630. There were also claims for un-vouched claim to expenditure on 123 Gladstone, 2 The Crescent, 110 Ashton Road, 28 Oldham Road, 95 York Road of £91,739 which HMRC was not prepared to accept without evidence.

26. The additional tax due after HMRC's amendments was £ 62,349.52.

27. Another property, 23 Beech Avenue Droylsden, Manchester, which HMRC subsequently found had been purchased for £27,000 on 30 June 2000 and sold for £46,000 on 25 September 2002, (indicating a gross capital gain of £19,000) does not appear to have been included in HMRC's assessment.

2003-04

28. The Appellant's calculations of CGT on 315 Hyde Road, 3 Canning Challets, 5 Tewksbury, 10 Edale Road, 212 Ashton, 30 Heathersage, 64 Coalshaw Green and 8 Alexandra Road included an un-vouched claim to expenditure of £142,754 which HMRC was not prepared to accept without evidence.

29. The additional tax due after HMRC's amendments was £ 92,194.16.

2004-05

30. The Appellant's calculations of CGT on 102 Victoria St, 109/111 Little Heys Street, 128 King Street, 12 Stanhope, 12 Tinningham Close, 13 Howden Close, 55 Boyds Walk, 5 Wemyss Ave, 8 Flemish Road, 8 Jasmine Ave and 9 Central Drive included un-vouched claims to expenditure of £339,809. HMRC were not prepared to accept the claims to expenditure without evidence.

31. The additional tax due after HMRC's amendments was £ 153,977.94.

2005-06

32. Chinley Liberal Club, Lower Lane, Chinley purchased for £220,000 on 13 October 2003 and sold for £350,000 on 22 April 2005, which indicated a gross capital gain of £130,000 had not been included in either the Appellant's returns or the Cobham Murphy report.

33. The Appellant's calculations in respect of 147/155 Burnley Lane, 1 Lyme Grove, 34 Victoria, and 8 River Street included un-vouched claims to expenditure of £169,439 which HMRC was not prepared to accept without evidence.

34. The additional tax due after HMRC's amendments was £88,919.29.

2006-07

35. The sale of 45 Ney Street reported in 2005-06, but which fell into 2006-07 and was therefore brought forward, showed a net gain £11,250. Other properties had been missed from the Appellant's return and the report. 16 A J Cook Terrace, Durham, was purchased for £53,500 on 13 December 2004 and sold for £65,000 on 23 June 2006, which indicated a gross capital gain of £11,500. 18 Park Square, Ashton, Lancashire purchased for £67,500 on 1 April 2006 and sold for £84,000 on 30 June 2006, indicated a gross capital gain of £16,500.

36. The Appellant's CGT calculations included un-vouched claim to expenditure of £33,750 which HMRC was not prepared to accept without evidence.

37. The additional tax due after HMRC's amendments was £19,602.60.

2007-08

38. The Appellant's returns and the report omitted 117 Hope Street, Dukinfield, Cheshire purchased for £15,000 on 17 December 2004 and sold for £90,000 on 2 February 2007, indicating a gross capital gain of £75,000.

39. The Appellant's CGT calculations in respect of 250 Houghton Green (brought forward from 2007) included un-vouched claim to expenditure of £196,123. HMRC was not prepared to accept the claim to expenditure without evidence.

40. The additional tax due after HMRC's amendments was £ 116,713.20.

41. On 20 January 2011, HMRC issued assessments to reflect the additional taxes for years 2000-01 to 2007-08 as set out above.

42. HMRC informed the Appellant that payments on account of £79,456.83, and a rebate due of £138.14 for 1999-2000, would be set against tax due for the later years to cover some of the liabilities.

43. On 14 February 2011 the Appellant appealed HMRC's assessments saying that HMRC had "failed a balancing test" in arriving at the assessments which he said were "*Wednesbury unreasonable*". He requested a further meeting with HMRC.

44. HMRC explained why the penalties (imposed on 6 May 2011) had been imposed and how they had been calculated. HMRC said that:

i. It was accepted by all parties that Capital Gains arising on the disposal of properties between 2001 and 2008 had not been correctly recorded on the Appellant's Self-Assessment Tax Returns.

ii. Rental income declared on the Appellant's Tax Returns for 2001 to 2007 were not correct.

iii. Income from Bed & Breakfast trading had not been correctly declared on the Appellant's Tax Returns.

iv. It had been established that the Appellant had fraudulently delivered to an officer of HMRC incorrect Tax Returns for the years 2001 to 2008 and therefore penalties arose under s 95(1)(a) TMA 1970.The penalty which is chargeable is on the "difference" as specified in s 95(2) TMA 70. Section 95(2) TMA 70 provides that:

> "The difference is that between -
>
> The amount of income tax and capital gains tax payable for the relevant years of assessment by the said person (including any amount of income tax deducted at source and not repayable), and
>
> The amount which would have been the amount so payable if the return, statement, declaration or accounts as made or submitted by him had been correct."

The maximum penalty is subject to abatement in accordance with HMRC leaflet IR160 [now CC/FS15]. The maximum amount of the penalty is 100% of the difference. However the penalty can be subject to abatement. Authority for penalty abatement comes from s 100(1) TMA 1970 which says that an authorised officer of the Board making a penalty determination may set it at such amount as, in his opinion, is correct or appropriate.

The maximum penalty can be abated by up to:

20% (exceptionally 30 %) for the amount of disclosure by the taxpayer;

40% for the amount of co-operation received from the taxpayer during the enquiry;

40% for the seriousness of the offences.

A penalty of 60% had been charged in this case after abatements totalling 40%. The relevant factors considered by the Decision Maker were:

- With regard to disclosure, this has been provided on a piecemeal basis only and although the Appellant engaged an Accountants firm to provide a disclosure report it is clear that this was not complete and did not fully cover all issues regarding the disposal of properties for Capital Gains Tax purposes.

- With regard to co-operation, whilst the Appellant attended meetings with HMRC voluntarily, a considerable length of time elapsed before the Commentary report was submitted to HMRC, to enable the omissions and understatements to be identified.

- With regard to the seriousness of the offences, the irregularities in the case were sizeable and occurred over a prolonged period of time.

45. On 15 August 2011 a meeting was held between the Appellant, Mr Christopher Mace his adviser and Officer Melia, the investigating HMRC Officer. HMRC's summary (abbreviated so far as relevant) is below:

- Mr Mace outlined that the Appellant had lost a great deal of money over the years and wished to claim the losses which have never been factored into HMRC's assessment of tax due. The Appellant referred to expenses not having been allowed against gains on a number of properties. He referred to the Chinley Liberal Club transaction which he said was a total disaster - the whole project going over budget by some £220K. The Appellant said he had an agreement to purchase the Club and land attached to it for £350K to commence a new build 4 bed detached property on the understanding the Club would be refurbished - the builder had quoted £130K for the price of the new build and then kept on increasing it - the mortgage to the bank had swallowed up all the profit as had the mortgage payments. Officer Melia said he had not factored in any losses with regard to the transaction as he has no evidence on which to base those losses — in addition the property transaction re Chinley had not been put into the report and it was he who had traced that missing purchase and sale transaction.

- Officer Melia stated this was one of the worst cases of fraudulent activity he had seen and the Appellant would be aware that this was the third investigation that had taken place into his affairs. The case from inception has been ongoing for approximately 9 years. HMRC had accepted current returns, which Officer Melia believed were also incorrect, but only as a compromise, the alternative being a further enquiry into those returns.

- Mr Mace said that £420,000 had been lost in a limited company the Appellant had been involved with. Officer Melia pointed out it that would be unlikely that the Appellant would be able to claim company losses against personal income.

- Mr Mace said that £350,000 had been lost on property deals completed in Portugal, involving the purchase of two plots of land in Portamio, Portugal in September 2005. Officer Melia stated that he had been provided with no evidence of this and in any event would like to know the source of the funds to fund the projects in the first place. The Appellant said it had been from the sale of properties already disclosed. Officer

Melia responded that he could not see this from the information he held. Also there had been no mention in the report of these transactions and there should have been. The Commentary should have identified any such transactions to demonstrate what losses arose from the ventures. It was clear however from correspondence with Cobham Murphy that they were unable [despite a period of more than 3 years having elapsed] to produce a full detailed report.

- The Appellant said that there had been a raid on his premises and all of his records and documents had been taken.

46. On 16 August 2011 the Appellant requested an independent review of the decision of 20 January 2011.

47. HMRC responded on 28 October 2011 saying the assessments were based upon evidence HMRC had obtained from the Land Registry Office and the Valuation Office with regard to the Appellant's various property transactions and Officer Melia had set out fully how the Capital Gains had been arrived at for each year. The Appellant had not contested the Capital Gains as assessed or provided any alternative to the figures for consideration by HMRC. Officer Melia advised that the time limit within which the Appellant had to lodge an appeal with the Tribunal would expire on 28 November 2011.

48. The Appellant lodged a late appeal with the Tribunal on 5 July 2012, reiterating that HMRC had arrived at conclusions and decisions that were "*clearly Wednesbury unreasonable and disproportionate in all areas. If all the facts had been considered a different conclusion would have been arrived at. ... The assessments and penalties were wrong*".

49. On 5 October 2012, the Tribunal issued standard directions to the parties and in particular that a list of documents on which a party intended to rely should be provided to the other party, together with other relevant evidence and a statement including any authorities to be relied upon, to be included in a bound and paginated bundle prepared by HMRC no later than 14 December 2012.

50. HMRC had previously filed their Statement of Case on 25 September 2012, and lodged their list of documents on which they intended to rely on 14 November 2012.

51. The Appellant failed to comply with directions and on 6 March 2013 HMRC requested a direction from the Tribunal that unless the Appellant complied with the directions order by 5 April 2013 his appeal should be struck out automatically without recourse to further proceedings.

52. On 22 March 2013 a prehearing review was listed for hearing on 10 May 2013.

53. The Appellant requested a postponement of the hearing due to illness and provided supporting evidence of his condition.

54. The Tribunal directed that the pre hearing should not be adjourned. The Appellant, in his absence, was represented by Mr Graeme Bennett. The Tribunal directed that by

31 July 2013 the Appellant should produce to HMRC all vouchers and invoices on which he proposed to rely (by way of evidence of expenditure on properties which he had purchased and sold) in pursuance of his appeal.

55. On 31 July 2013 the Appellant wrote to the Tribunal saying that he did not want to prejudice his case by producing his evidence in detail until the hearing.

56. The Appellant was advised that the Tribunal would extend the time within which the Appellant had to comply with directions to 6 September 2013 and that if he failed to do so, HMRC may apply to have his appeal struck out and that in that event it may be difficult for the Tribunal to resist making an order to that effect.

57. On 22 August 2013 the Appellant reiterated his request that his evidence should not have to be produced until the appeal hearing, as otherwise "*this would undermine my defence and place me at a serious disadvantage*".

58. On 23 September 2013, the Appellant having still not complied with the directions issued on 5 October 2012, HMRC applied to the Tribunal for the Appellant's appeal to be struck out in accordance with Rule 8(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, [as in force from 1 April 2013].

59. A further prehearing review of HMRC's application was listed for 29 November 2013.

60. On 30 November 2013 the Appellant applied for a postponement of the prehearing review, saying that he was suffering from a kidney problem, stress and fatigue and was due to be hospitalised for surgery. He asked for the review to be postponed until February 2014, by which time he would have had his surgery.

61. The Tribunal granted the Appellant's application to postpone and relisted the prehearing review for 26 February 2014.

62. At the review, the Appellant was represented by Mr Bennett. The Tribunal adjourned the hearing of the strikeout application and directed that the Appellant produce to the Tribunal and HMRC by 7 March 2014:

(a) calculations of the capital gains made by the Appellant on the sales of various properties, the subject of the assessments under appeal and

(b) calculations of the capital gains tax on those gains

(c) the case management review be relisted for 10 April 2014.

63. On 7 March 2014, the Appellant filed with the Tribunal a schedule referring to eight properties which he had bought and sold, stating the purchase and sale price of each and expenditure incurred. He stated that the properties referred to had all been jointly owned and that consequently he was only liable for one half of the profit. Without providing any explanatory narrative, the Appellant included within the

schedule, profit figures which indicated errors in the computation of gains by HMRC totalling £382,000.

64. On 28 March 2014, the Appellant wrote to the Tribunal to explain that he was still suffering from ongoing health problems, requesting an adjournment of the case management review.

65. At the review on 10 April 2014, the Appellant was again represented by Mr Bennett. The Tribunal directed that the review be postponed to 2 June 2014, subject to the Appellant providing evidence of title in respect of the properties he claimed to be a joint ownership.

66. On 27 May 2014 the Tribunal of its own motion directed that the case management review be postponed to 1 August 2014 and that, by 11 July 2014, in substitution for the earlier direction:

(a) Evidence of ownership of those properties claimed to be held jointly and

(b) The Appellant provide HMRC with all the evidence on which he intended to rely in support of his various claims for expenditure on the properties where he was in dispute with HMRC.

67. On 16 July 2014, the Appellant not having complied with the Tribunal's directions, HMRC lodged a further strike out application which was listed for hearing on 20 October 2014.

68. On 20 October 2014 the Appellant attended with his representative Mr Mace. He said that he had not been able to comply with the Tribunal's directions, citing the reason given to HMRC previously that his office had been broken into and documentation taken. He was still unwell. He disagreed with HMRC's assertion that his appeal had no reasonable prospects of success. He also said that HMRC had copy documentation which would assist his case which he had previously supplied to HMRC, but which they would not release to him.

69. The Tribunal issued directions that by 17 November 2014:

(a) the Appellant should produce a list of any documents which he says HMRC have in their possession

(b) the Appellant should comply with the directions previously issued by the Tribunal

(c) the Appellant should provide any witness statements on which he would sought to rely

Thereafter HMRC should respond by 1 December 2014 informing the Appellant what if any other documents referred to at (a) above were in their possession, following which, the case would be listed for a full hearing, subject to any renewed application HMRC may make for the appeal to be struck out.

70. On 6 November 2014, on HMRC's application, the Tribunal postponed the date by which HMRC were to comply with the Tribunal's directions to 17 December 2014.

71. On 14 November 2014 the Appellant responded to the directions of 20 October 2014:

(a) He said that he was unable to identify and produce a list of the documents which HMRC had their possession (and on which he would wish to rely). He said that the documents had been deliberately withheld from him by HMRC.

(b) The Appellant submitted a completion statement in respect of properties at 147 and 155 Burnley Lane, Oldham which he said indicated that he had received only half the proceeds of sale, the other half being paid to a Mrs Dutson. He did not produce any evidence to show that Mrs Dutson was a joint owner of the property. He said there were other similar cases but he had been unable to find the necessary documentary evidence in support; he explained that unfortunately he had allowed ownership of properties to be in his name because the other "joint purchasers" were unable to raise the necessary finance. Nonetheless on the resale of the properties concerned he had shared profits with them.

72. The Appellant said that he had suffered other losses which should be taken into account as follows:

i. Independent Freight Services limited

The Appellant said that the company commenced trading on 20 July 2003. He had made loans of £309,000 to the company to finance vehicles and trailers. The company ceased trading in January 2005 and was subsequently dissolved. None of the monies loaned to the company were repaid to him. The Appellant did not produce any copy accounts for the company to indicate whether it traded at a profit or a loss and in fact it appears that none were ever filed with Companies House.

ii. Bex Club

This was an enterprise jointly owned with a Mr Bowers which failed, leaving the Appellant to pay off the debt of £54,000. No further details were provided.

iii. Woodfield Property Company

This company was set up to purchase a block of flats which were to be refurbished, let out and then sold at a profit as an investment. The Appellant said that he loaned the company £200,000 and took a first legal charge over the property as security. The Appellant says that a director of the company re-mortgaged the property without his knowledge and used the monies for another investment. He had also loaned the director £15,000 to purchase a vehicle. None of these monies were repaid. The

Appellant did not explain why his legal charge was not registered with the Land Registry and Companies House which would normally have afforded priority over any subsequent charge, or why he did not seek to have the later unlawful mortgage set aside.

iv. £25,000 loan

The Appellant made a personal unsecured loan of £25,000 to a Mr Gargan, which monies were never repaid. No further information or documentary evidence was supplied.

As a result of the above the Appellant says that he sustained losses of £603,000 which had not been taken into account by HMRC.

73. On 10 December 2014, HMRC lodged a further application with the Tribunal that the appeal be struck out on the basis that the Appellant had not complied with the Tribunal's directions of 20 October 2014 and the appeal had no prospect of success. The application was listed to be heard on 29 January 2015.

74. At the hearing on 29 January 2015 the strikeout application was postponed to be heard on 20 April 2015. The Appellant's letter of 14 November 2014 was directed to be admitted as his witness statement and it was further directed that both parties should serve on the other party any further evidence on which they intended to rely, including witness statements and that these be filed with the Tribunal.

75. The substantive hearing of the appeal and strikeout application was listed for 20 April 2015 but subsequently postponed by agreement of the parties to 6 October 2015.

Evidence before the Tribunal

76. The evidence before the Tribunal consisted of copies of the Appellant's self-assessment tax returns for 2000 to 2008 inclusive; copy correspondence with the Appellant and his agents; notes of meetings between the parties; copy schedule of properties purchased and disposed of or rented out by the Appellant; the closure notice and of discovery assessments for the years in question; the penalty determination notice; the decision and the Independent review decision; the Commentary prepared by Cobham Murphy; a statement of assets owned by the Appellant; the investigating HMRC Officer Melia provided a witness statement and gave evidence to the Tribunal. The Appellant also gave evidence to the Tribunal; copy relevant case law authority and legislation.

Legislation

77. The relevant legislation in respect of inaccurate returns due to be filed before 1 April 2009 is contained in s 29 TMA 1970, which makes provision for assessment by HMRC where loss of tax is discovered.

Assessments

The relevant provisions relating to:-

a revenue amendment to a self-assessment are contained in s 28A (1) and (2) TMA 70.

a discovery assessment is contained in s 29(4) TMA 70 and s 36(1)(a) TMA 1970 where a loss of income tax or capital gains tax has been brought about deliberately by the person. The time limits relating to Discovery assessments where loss of tax has occurred due to the deliberate behaviour of a person is contained in s 36(1)(b) TMA 1970 as amended by FA 2008 Schedule 39 paragraph 9. Where HMRC has established that there has been a loss of tax due to the deliberate behaviour of the person. The time limit for making such assessments is 20 years from the end of the year of assessment

Penalty determinations are issued under s 95(1)(a) TMA 1970 for fraudulently delivering an incorrect Return to an Officer of HMRC. The Penalty is issued under s 100(1) TMA 1970 and amount determined by s 95(2).

Section 95 TMA 1970 - Incorrect return or accounts for income tax or capital gains tax

(1) Where a person fraudulently or negligently -

(a) delivers any incorrect return of a kind mentioned in [section 8 or 8A of this Act (or either of those sections] as extended by section 12 of this Act ...), or

(b) makes any incorrect return, statement or declaration in connection with any claim for any allowance, deduction or relief in respect of income tax or capital gains tax, or

(c) submits to an inspector or the Board or any Commissioners any incorrect accounts in connection with the ascertainment of his liability to income tax or capital gains tax,

he shall be liable to a penalty not exceeding [the amount of the difference specified in subsection (2) below]

(2) The difference is that between-

(a) the amount of income tax and capital gains tax payable for the relevant years of assessment by the said person (including any amount of income tax deducted at source and not repayable), and

(b) the amount which would have been the amount so payable if the return, statement, declaration or accounts as made or submitted by him had been correct.

(3) The relevant years of assessment for the purposes of this section are, in relation to anything delivered, made or submitted in any year of assessment, that, the next following, and any preceding year of assessment; ...

Section 38 TCGA 1992 sets out the relevant provisions relating to acquisition and disposal costs:

(1) Except as otherwise expressly provided, the sums allowable as a deduction from the consideration in the computation of the gain accruing to a person on the disposal of an asset shall be restricted to -

(a) the amount or value of the consideration, in money or money's worth, given by him or on his behalf wholly and exclusively for the acquisition of the asset, together with the incidental costs to him of the acquisition or, if the asset was not acquired by him, any expenditure wholly and exclusively incurred by him in providing the asset,

(b) the amount of any expenditure wholly and exclusively incurred on the asset by him or on his behalf for the purpose of enhancing the value of the asset, being expenditure reflected in the state or nature of the asset at the time of the disposal, and any expenditure wholly and exclusively incurred by him in establishing, preserving or defending his title to, or to a right over, the asset,

(c) the incidental costs to him of making the disposal.

(2) For the purposes of this section and for the purposes of all other provisions of this Act, the incidental costs to the person making the disposal of the acquisition of the asset or of its disposal shall consist of expenditure wholly and exclusively incurred by him for the purposes of the acquisition or, as the case may be, the disposal, being fees, commission or remuneration paid for the professional services of any surveyor or valuer, or auctioneer, or accountant, or agent or legal adviser and costs of transfer or conveyance (including stamp duty [or stamp duty land tax]) together -

(a) in the case of the acquisition of an asset, with costs of advertising to find a seller, and

(b) in the case of a disposal, with costs of advertising to find a buyer and costs reasonably incurred in making any valuation or apportionment required for the purposes of the computation of the gain, including in particular expenses reasonably incurred in ascertaining market value where required by this Act.

(3) Except as provided by section 40, no payment of interest shall be allowable under this section.

(4) Any provision in this Act introducing the assumption that assets are sold and immediately reacquired shall not imply that any expenditure is incurred as incidental to the sale or reacquisition.

Section 12B TMA 1970 provides details of records that must be maintained and the period for which there must be retained.

12B Records to be kept for purposes of returns

(1) Any person who may be required by a notice under section 8, 8A ...11 or 12AA of this Act ...17 to make and deliver a return for a year of assessment or other period shall-

(a) keep all such records as may be requisite for the purpose of enabling him to make and deliver a correct and complete return for the year or period; and

[(b) preserve those records until the end of the relevant day, that is to say, the day mentioned in subsection (2) below or, where a return is required by a notice

given on or before that day, whichever of that day and the following is the latest, namely—

(i) where enquiries into the return ...12 are made by an officer of the Board, the day on which, by virtue of section [28A (1) or 28B (1)112 of this Act, those enquiries are ...12 completed; and

(ii) where no enquiries into the return ...12 are so made, the day on which such an officer no longer has power to make such enquiries.]

(2) The day referred to in subsection (1) above is—

(a) in the case of a person carrying on a trade, profession or business alone or in partnership or a company, the fifth anniversary of the 31st January next following the year of assessment or (as the case may be) the sixth anniversary of the end of the period;

(b) [otherwise], the first anniversary of the 31st January next following the year of assessment ...

[or (in either case) such earlier day as may be specified in writing by the Commissioners for Her Majesty's Revenue and Customs (and different days may be specified for different cases)]

[(2A) Any person who -

(a) is required, by such a notice as is mentioned in subsection (1) above given at any time after the end of the day mentioned in subsection (2) above, to make and deliver a return for a year of assessment or other period; and

(b) has in his possession at that time any records which may be requisite for the purpose of enabling him to make and deliver a correct and complete return for the year or period, shall preserve those records until the end of the relevant day, that is to say, the day which, if the notice had been given on or before the day mentioned in subsection (2) above, would have been the relevant day for the purposes of subsection (1) above.]

(3) In the case of a person carrying on a trade, profession or business alone or in partnership -

(a) the records required to be kept and preserved under subsection (1) [or (2A)] 5 above shall include records of the following, namely -

(i) all amounts received and expended in the course of the trade, profession or business and the matters in respect of which the receipts and expenditure take place, and

(ii) in the case of a trade involving dealing in goods, all sales and purchases of goods made in the course of the trade.

The Appellant's contentions

78. The Appellant's grounds of appeal (so far as relevant) as stated in his notice of appeal are that HMRC's investigating officer had arrived at:

"conclusions that are in law Wednesbury unreasonable and disproportionate in all areas. The demands are for ridiculous amounts to which penalties have been added…

the figures having been terribly inflated. If all the facts are considered a different conclusion would have been arrived at. The amount of tax and thus the penalties levied from wrong and misleading assessments must be tested in law."

79. At the hearing the Appellant said that he had been suffering ill-health for over six years and, having suffered a break-in at his offices, no longer has the documentation that could have verified the expenditure claimed on various properties in his tax returns. He agreed however that some of the documentation possibly did not exist in that he had paid a lot of tradesmen in cash, some of it out of income received from properties which he rented out. He said that he was a property developer and that he knew nothing about bookkeeping. He conceded that his record keeping had not been satisfactory.

80. The Appellant reiterated in evidence much of what he had said in correspondence and meetings with HMRC. He was not able to explain why if he had not retained receipts for costs incurred in improving properties prior to sale, he had not been able to reconstitute evidence of the expenditure by some other means. He said that he had taken on too much and "*got all mixed up*" with his paperwork.

81. The Appellant agreed that could not explain why seven properties which he had bought and sold, did not appear in the Cobham Murphy commentary. He said that he had given the information to Cobham Murphy.

82. When asked why he did not produce copy bank statements he said that they wouldn't show anything because he had used cash from rents to pay for property improvements.

83. There was very little else he could add.

84. The Appellant produced a schedule of property transactions which he said supported his assertion that he had either not made the gains as alleged by HMRC or had sustained losses that could be set against those gains. However, the properties and transactions contained in the schedule did not support the Appellant's assertions and as HMRC said had no relevance whatsoever to the Capital Gains Tax calculations under appeal.

HMRC's contentions

85. HMRC's case is that:

- The Appellant has not provided any evidence such as receipts, vouchers and invoices to demonstrate that he actually incurred the expenditure as claimed in the Capital Gains computations submitted in support of his returns for all years or in the "Commentary" prepared by Cobham Murphy.

- HMRC do not accept the Appellant's capital gains computations in respect of the purchase and sale of properties. Some property disposals had been omitted from the Appellant's returns and also omitted from the Commentary.

86. The Appellant has a duty to maintain records in order that he can provide full and accurate returns. He has consistently failed to provide primary evidence of expenditure as requested by HMRC to verify claimed acquisition costs and disposal proceeds.

87. In respect of the 2001-02 enquiry, where a Closure Notice and amendment has been issued, the onus is on the Appellant to satisfy the Tribunal that HMRC's figures are incorrect.

88. For the tax years in respect of which discovery assessments have been made, the onus is on HMRC to show the Tribunal that the actions taken by the Appellant during those years were deliberate in returning incorrect returns to HMRC. Once HMRC has shown the Appellant's actions to have been deliberate, the onus reverts back to the Appellant to satisfy the Tribunal that the revised figures used by HMRC are incorrect.

89. The standard of proof is the ordinary Civil Standard of the balance of probabilities. It is only necessary for HMRC to show that on the balance of probabilities their assessments are more likely to be accurate than the Appellant's submitted returns and computations. It is for the Appellant to produce evidence to support his figures. Section 50(6) TMA places the ultimate onus on the Appellant to displace the revisions to additional tax due under the closure notice and assessments.

90. Mrs Roberts for HMRC said that the Appellant had previously been the subject of HMRC investigations/enquiries as follows:

- Years 1983-84 to 1985-86 inclusive, settled 13 February 1999, Gross offer £12,500
- Years 1987-88 to 1996-97 inclusive, settled 6 September 2001, Gross offer £182,000
- Years 1997-98 to 1998-99 inclusive, settled 12 October 2001, nil settlement.

91. In respect of the years 2000-01 to 2007-08, the Appellant had agreed that his returns were incorrect. In total £1.2 million in expenditure had been claimed for which no evidence had been provided. By any standards the Appellant's conduct had been fraudulent.

92. Mrs Roberts said that the Appellant's assertion that the decisions and assessments were *Wednesbury* unreasonable, was plainly incorrect. HMRC's decisions and the assessments were based on facts and supported by independent evidence. The decisions and assessments were not irrational or so unreasonable that no reasonable person acting reasonably could have made them (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1947) 2 All ER 680). The decisions made were based upon information provided in the Commentary and accepted by HMRC and separately from independent evidence held by HMRC. It was therefore difficult to see how the figures used in the assessments could be considered as being unreasonable.

93. The Appellant had put forward contentions which he considered should be accepted by HMRC to mitigate the overall liability for the years 2000-01 to 2007-08, but had not supported those contentions with any documentary evidence.

94. For example, at a meeting held on 15 August 2011 and subsequently the Appellant maintained that he had "*lost £420k in a limited company that he had been involved with*". He also claimed other losses, but no further detail or documentary evidence had been offered.

95. The Appellant claimed that "*a further £350k was lost on property deals completed in Portugal*" and separately that he had been "*ripped off by a builder, Dale Endthorpe from Oldham*". Again there have been no further facts nor evidence presented to support those contentions. The Commentary that Cobham Murphy was appointed to prepare should have been comprehensive enough to have identified such transactions and demonstrate what losses arose from those ventures.

96. The Appellant now claims that that the Commentary completed by Cobham Murphy is factually incorrect and does not reflect all of the expenses that he claims to have incurred, but he has not offered any detailed explanation or provided any supporting evidence.

97. The amounts of the Capital Gains assessed are based upon evidence HMRC has obtained from the Land Registry Office and Land Valuation Office with regard to the various properties. A full explanation as to how the Capital Gains had been arrived at for each year was contained in HMRC's review letter issued on 20 January 2011.

98. The Appellant has not substantively contested the amounts of Capital Gains or provided any alternative to the figures for consideration by HMRC.

99. It has been established that the Appellant deliberately submitted an incorrect Tax Return for the years 2001 to 2008. Therefore a penalty arises under s 95(1)(a) TMA 1970.

Conclusions

100. The enquiry into the Appellant's tax affairs commenced in 2006 and relate to amendments to his tax returns going back over fifteen years. The appeal itself has been ongoing for ten years.

101. The Appellant has not produced any documentary evidence to displace the figures in HMRC's Closure notice and assessments. No meaningful evidence has been adduced by the Appellant to show that HMRC's assessments are incorrect. He has not produced copy bank accounts because he says that these would not show everything, the explanation being that cash from rental income was used for capital expenditure or property improvements.

102. The protracted chronology of this appeal and the numerous failures on the part of the Appellant to comply with directions that he produce evidence of expenditure, together with his failure to advance substantive argument in support of his case,

illustrate the weakness of the Appellant's case. Unfortunately if a tax payer loses essential evidence and generally fails to co-operate by losing opportunities given to advance his case, at least in a substantive manner, then we are left with little opportunity but to accept the case put forward by HMRC. A tax payer is required to keep all such records as may be requisite for the purpose of enabling him to make and deliver complete and correct returns. On the evidence, the Appellant has manifestly failed to do that. Clearly the Appellant will have incurred some expenditure on property improvements, but there is no evidence whatsoever to show how much has been incurred. There does not appear to have been any attempt on the part of the Appellant to reconstitute his records, for example by producing copy invoices or witness statements from sub-contractors in respect of work carried out.

103. There were also a number of discrepancies in information provided to HMRC by the Appellant. HMRC sometimes have to make assessments to best judgment but in this instance have been able to arrive at assessments based on evidence obtained from the Land Registry and Land Valuation office. HMRC have provided a copy of all their workings, detailing the figures they proposed using to formally issue the closure notice and discovery assessments.

104. The Appellant filed incorrect tax returns for the years 2000-01 to 2007-08. There is an obligation on a taxpayer to check the accuracy of a return before submitting it to HMRC. The errors contained in the self-assessment return have resulted in a loss of tax which was attributable to deliberate behaviour on the part of the Appellant. Consequently assessments are permitted for those years by virtue of s 29(4) TMA 1970.

105. The primary onus of proof is on the Appellant. He must prove that the amendment or assessments are excessive (s 50(6) TMA 1970). If the Appellant cannot prove, on the balance of probabilities, that an amendment or assessment is excessive, they must stand good. Taking into account the totality of evidence the Appellant has not discharged that burden.

106. With regard to the penalties, the maximum penalty is subject to abatement in accordance with HMRC leaflet IR160 [now CC/FS15]. The maximum amount of the penalty is 100% of the difference; however the penalty can be subject to abatement. An authorised officer of HMRC making a penalty determination may set it at such amount as, in his opinion, is correct or appropriate. The penalties have been abated by 40% for the reasons given in the review letter. We concur with the reasons given in the review and confirm the penalties at 60% of the potential lost revenue.

107. We find that:

i. The Appellant has not provided any evidence to displace HMRC's figures in the closure notice.

ii. The discovery assessments were competent and the Appellant has not provided any evidence to displaced HMRC's figures.

iii. The Appellant failed to notify his chargeability to income tax and capital gains tax and submitted incorrect returns.

108. For the above reasons the appeals are dismissed and the penalty determination confirmed.

109. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 14 June 2016