[2016] UKFTT 641 (TC)

TC05374

Appeal number:TC/2014/02333

INCOME TAX – failure to notify chargeability – tax assessments – penalties – whether justified – whether excessive – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GARY JOHN ROBB **Appellant**

- and -

NATIONAL CRIME AGENCY **Respondents**

TRIBUNAL: JUDGE JONATHAN CANNAN
MRS ANN CHRISTIAN

Sitting in public in Manchester on 5 May 2016

No appearance by the Appellant

Mr Shamsher Singh of the National Crime Agency for the Respondents

DECISION

Background

1. This appeal is against assessments and penalty determinations made by the National Crime Agency ("NCA") in carrying out the general Revenue functions of HM Revenue & Customs pursuant to the Proceeds of Crime Act 2002. The tax assessments under appeal are for income tax and national insurance in tax years 1994-95 to 1998-99 and total £618,354 ("the Tax Assessments"). The penalty determinations are for the same tax years and total £432,847 ("the Penalties").

2. The Tax Assessments and the Penalties arise out of the Appellant's alleged failure to notify HMRC of his chargeability to income tax on income arising from a nightclub business in Sunderland. We set out the circumstances in which that income is said to arise in detail below.

3. The Appellant's grounds of appeal are essentially that the income from the nightclub was not his, and in any event the Tax Assessments and the Penalty are excessive.

4. The Appellant did not appear when the appeal came on for hearing. We were satisfied that the Appellant had been notified of the hearing and that it was in the interests of justice to proceed. The hearing commenced at 10.45am. At about 11.30am we were told that the Tribunal office had received an email from the Appellant's doctor seeking a postponement of the hearing and we took time to consider the email.

5. We set out in Annex 1 to this decision the terms of that email and the procedural history of the appeal. The Appellant failed to serve his witness statement on the Respondents. The Tribunal's original directions required that witness statement to be served by 9 January 2015. Subsequent directions made it clear that if he did not serve his witness statement then he would be entitled to rely only on a witness statement of his brother which had been served. Further, the Appellant had been given an opportunity to lodge written submissions which he had not done. Whilst making allowances for the Appellant's medical issues, described in Annex 1, we did not consider that he had made any real attempt to engage with the Tribunal and the Respondents. He failed to progress his appeal expeditiously, avoiding unnecessary delay and cost as required by the Tribunal Rules. In the light of the procedural history and in all the circumstances we considered that it remained in the interests of justice to proceed with the hearing.

Legal Framework

6. The Tax Assessments were made under Section 29 Taxes Management Act 1970 ("TMA 1970"). Insofar as relevant section 29 provides as follows:

> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment —

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax

7. Section 29(3) provides that where a taxpayer has made or delivered a self-assessment return, he cannot be assessed under section 29(1) unless one of two conditions is satisfied. The Respondents allege that the Appellant failed to notify his chargeability to tax and had not made or delivered any return of income for the relevant tax years. It was not therefore necessary for them to establish that the conditions referred to in section 29(3) were satisfied.

8. The meaning of the term "discover" in section 29(1) was considered by the Upper Tribunal in *Commissioners for HM Revenue & Customs v Charlton [2012] UKUT 770 (TCC)* where it stated as follows:

" 37. In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight."

9. It is clear therefore that whilst there is a threshold which requires a discovery to engage the power of assessment in section 29, the threshold is quite low.

10. Pursuant to section 34 TMA 1970, an assessment to income tax may not be made "more than 4 years after the end of the year of assessment to which it relates". However, s 36 provides for an extended time limit as follows:

" (1A) An assessment on a person in a case involving a loss of income tax or capital gains tax—

(a) brought about deliberately by the person,

(b) attributable to a failure by the person to comply with an obligation under section 7, or

…

may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period)."

11. Section 36(1A)(b) refers to a failure to comply with an obligation under section 7 TMA 1970. Section 7(1) provides that every person who is chargeable to income tax for any year of assessment and has not received a notice requiring him to make a return for that year shall notify HMRC that he is so chargeable within 6 months from the end of that year. That requirement is subject to certain exceptions which do not apply in the present case.

12. The burden of proof is on the Respondents to show a loss of tax attributable to a failure to notify chargeability (see generally *Hurley v Taylor (Inspector of Taxes)* [1998] STC 202 at 219).

13. Section 50(6) TMA 1970 provides:

> " (6) If, on an appeal notified to the tribunal, the tribunal decides—
>
> (a) that the appellant is overcharged by a self-assessment;
>
> (b) that any amounts contained in a partnership statement are excessive; or
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good."

14. In *T Haythornwaite & Sons v Kelly (HM Inspector of Taxes)* (1927) 11 TC 657 Lord Hanworth MR, referring to what is now 50(6) TMA 1970 stated as follows at p667:

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

15. In *Johnson v Scott (HM Inspector of Taxes)* (1978) 52 TC 383 Walton J said at 394 in a passage approved by the Court of Appeal in that case:

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

16. Section 7(8) TMA 1970 provides for a penalty for failure to comply with section 7(1). The penalty is not to exceed the amount of tax for which the person is assessed under section 29. Section 100 TMA 1970 provides that an officer of HMRC may make a determination of a penalty setting it at such amount as in his opinion is correct. On an appeal against a penalty determination under section 100, section 100B provides that the Tribunal can set aside the determination if it appears that no penalty has been incurred. Otherwise the Tribunal can confirm the amount, or reduce or increase it to such amount as the Tribunal considers appropriate subject to the permitted maximum penalty which in the present case is the amount of the tax assessed.

17. Section 7(8) was repealed by Finance Act 2008 and replaced with a new penalty regime in Schedule 41 of that Act with effect from 1 April 2010. Schedule 41 applies in relation to obligations arising after that date. The penalties in the present case arose from obligations to notify chargeability in 1995 and were therefore determined pursuant to section 7(8).

18. We can briefly set out the provisions which give the Respondents and their predecessor the Serious Organised Crime Agency ("SOCA") the power to adopt the functions of HMRC and to make the Tax Assessments and the Penalties.

19. Section 317(2) of the Proceeds of Crime Act 2002 ("POCA") provides that the NCA can serve a notice on HMRC stating that it intends to carry out certain "general Revenue functions" specified in the notice in relation to a particular taxpayer for a particular period. Such a notice can be served only if the "qualifying condition" set out in section 317(1) POCA is satisfied. The qualifying condition is essentially that the NCA has reasonable grounds to suspect that a person is liable to pay tax on income which has arisen or accrued directly or indirectly from criminal conduct.

20. Where a notice under section 317(2) of POCA is served, section 317(3) provides that such of the "general Revenue functions" as are specified in the notice vest in the NCA in relation to the taxpayer named in the notice for the period specified in the notice. The "general Revenue functions" are defined by section 323(1) of POCA as including the functions of HMRC in relation to income tax and national insurance.

Findings of Fact

21. The evidence before us comprised a witness statement of Mr Tommaso Lisi of the Respondents, the witness statement of Mr James Robb and a bundle of documents. James Robb was not available to be cross-examined on his witness statement. We took it into account but in the absence of the witness the weight we attached to it was much reduced.

22. The Appellant had some involvement in relation to a nightclub in Sunderland called the Colosseum. The nature of his involvement and the extent of his income if

any from the Colosseum are the principal issues we have to determine. We consider the evidence in relation to those issues in more detail below.

23. In February 1996 Cleveland Police carried out a search at the Colosseum and on 4 February 1996 the Appellant was charged with permitting the premises to be used for supplying controlled drugs. He failed to attend his trial and absconded to Northern Cyprus in 1997 where we understand he remained for 12 years. Whilst in Northern Cyprus he had interests in various property developments involving construction of a hotel, apartments, a nightclub and shops.

24. In July 2005 the Appellant attempted to transfer approximately £1.5m from his bank account in Northern Cyprus to an account he held in Thailand. The payment was routed via London and was intercepted by UK law enforcement. A restraining order was subsequently obtained over the funds in support of a confiscation claim and a freezing order was granted.

25. In January 2009 the Appellant was arrested in Northern Cyprus and returned to the UK where we understand he was remanded in custody. On 22 July 2010 he pleaded guilty to various counts of permitting the Colosseum to be used for supplying controlled drugs and he was sentenced to 5 years imprisonment.

26. On 9 September 2010 the Appellant was interviewed under a civil caution by officers of SOCA at HM Prison Holme House with his solicitor and forensic accountant present. The main purpose of the interview was to establish the nature and source of the £1.5m. During the course of that interview the Appellant stated:

> (1) That a man called David Mallin ran the Colosseum for him whilst he was in Northern Cyprus. The takings in the form of door money were sent to the Appellant together with the door money from another club in South Shields. This happened over a period of one or two years.
>
> (2) He could not give exact figures for the money sent to him by Mr Mallin but it was maybe £5-10,000 per week. Mr Mallin and others would go to Northern Cyprus with the cash but it was also sent via certain accounts.

27. In 2011 SOCA commenced proceedings against the Appellant seeking a civil recovery order in relation to the £1.5m. The Appellant served a Summary Defence to those proceedings drafted by Garstangs Solicitors. The Summary Defence included a caveat that it was based on what were described as "incomplete instructions". It put forward the following matters as part of the Appellant's defence:

> (1) The Appellant maintained that the source of the £1.5m was legitimate. He denied that it was the proceeds of any drug-related activity but he admitted that he had not declared income transferred to him in Northern Cyprus to HMRC.
>
> (2) In 1996 and 1997 he had worked as a rent collector for Mr Robert Dalton and received a wage for doing this.

(3) He accepted that he "had some involvement in night clubs in the North East of England" and as such received the door monies from club nights whilst in Northern Cyprus. He admitted that whilst the Defendant was outside the UK Mr Mallin "ran his club 'night' for him at the Colosseum nightclub". He retained an interest in the club nights at various clubs in the North East whilst in Northern Cyprus and received the door monies from those events.

(4) The figures he had given in the Holme House interview of the income from the night clubs was an estimate and was exaggerated, but he accepted that he had an outstanding tax liability in relation to monies received by him whilst he was outside the UK which he had not declared to HMRC.

(5) The Colosseum had a capacity of over 1,000 and customers were charged about £10 entry.

28. The application for a civil recovery order was heard by Mackay J and is reported as *Serious Organised Crime Agency v Robb [2012] EWHC 803*. The Appellant who was the defendant in those proceedings did not appear and was not represented. SOCA sought to establish fraud on the part of the Appellant in his property dealings in Northern Cyprus. They relied on various matters as establishing a propensity towards fraud and dishonesty, including his failure to declare his liability to tax. It was found that the £1.5m was recoverable property as it was property obtained through unlawful conduct, namely his fraud in connection with the developments in Northern Cyprus.

29. Mackay J considered the Appellant's reliability as a witness and made the following findings which are relevant to the issues before us. At [24] he stated as follows:

> " 24. It is accepted by the defendant that he never made any declaration of his income for tax purposes between 1989 and 2005. His response is that he thought his employers were making appropriate deductions from his earnings at the time. This explanation is wholly incredible. There is no evidence that he was ever in a contract of employment at any stage of this period. On his own account he earned many hundred thousands of pounds during this time. Other evidence shows he was operating a substantial business empire on a cash basis. He told SOCA that on arrival in the TRNC he continued to receive £5-10,000 per week in cash from his interests in England for about a year, and over £500,000 by way of capital."

30. Having considered various accounts given by the Appellant as to his relationship to the Colosseum the judge stated:

> " 38. The claimant says that his equivocal evidence on ownership of these clubs indicates the propensity of the defendant to give whatever account of a particular transaction he considers suits him at any particular time. I agree with this submission. I would always look for corroborating evidence and would be slow to accept his unsupported evidence."

31. Finally the judge concluded at [50]:

" 50. On the balance of probability I reach the conclusion that the defendant is indeed a man with a propensity to use dishonest means for gain, and someone whose evidence must be treated with caution unless corroborated from other sources."

32. Following his release from prison in or about 2012 the Appellant was extradited to Cyprus where he pleaded guilty to an offence of selling land in Northern Cyprus originally owned by Greek residents. He was sentenced to 10 months imprisonment.

33. The Appellant relies in the present appeal on a witness statement of his brother James Robb. It is undated but it was lodged with the Tribunal on 8 January 2015. James Robb stated that the Colosseum was purchased by Stockbury Developments Limited ("Stockbury Developments") in January 1995. He then operated it as a "non profit making entity" as a members only "rave club". He paid the Appellant £8,000 for labour only to carry out repairs and renovations to the premises in February/March 1995. There were 6,000 members but the capacity was 700. He closed the club down in about October 1995 when it was effectively taken over by a local gang of criminals. He re-opened it again in November 1995 until it was closed following the police raid in February 1996. James Robb was convicted of permitting the premises to be used for the supply of controlled drugs and sentenced to 12 years in prison.

34. James Robb claimed that he was responsible for all the management of the club and that the Appellant was not involved with the club. Initially it opened on Fridays and Saturdays but later it only opened on Saturdays. The average door takings were £5,000 but after costs any profit was put into entertainment for the next night of opening.

35. On 23 February 2012 SOCA gave notice to HMRC pursuant to section 317(2) Proceeds of Crime Act 2002 that it would be taking over the general Revenue functions in relation to the Appellant's income tax, national insurance and capital gains tax for tax years 1993-94 to 2005-06 inclusive. The notice was acknowledged by HMRC on 27 February 2012.

36. On 27 February 2012 SOCA gave notice to the Appellant that they had adopted the functions of HMRC. In the same letter they gave notice of the Tax Assessments for tax years 1994-95 to 1998-98. On 10 October 2013 penalties for failure to notify chargeability to tax were determined.

37. The Tax Assessments and the Penalties were as follows:

Tax Year	**Income Assessed** **£**	**Tax and NIC** **£**	**Penalty** **£**
1994-95	225,000	85,843	60,090
1995-96	300,000	115,733	81,013
1996-97	300,000	115,266	80,686
1997-98	390,000	150,852	105,596
1998-99	390,000	150,660	105,462
Total:	£ 1,605,000	£ 618,354	£ 432,847

38. The Tax Assessments and the Penalties are not based on any accounting records. In his notice of appeal to the Tribunal the Appellant intimated that he was putting his paperwork together to establish that the Tax Assessments and the Penalties were excessive. However no such records have been produced.

39. The basis on which the Tax Assessments were made is the Appellant's admission, in the Holme House interview, that between £5-10,000 per week of door takings were made available to him when he was in Northern Cyprus for a period of one or maybe two years. The assessing officer therefore estimated that the Appellant's income from the club in 1997-98 and 1998-99 was some £7,500 per week or £390,000 per year. A figure of £300,000 per year was taken for the prior years to give some allowance for the fact that they were earlier years in the business. An apportionment was made for 1994-95 to reflect the fact that the Colosseum commenced trading in July 1994.

40. The penalties were calculated at 70% of the additional tax. It appears that this was based on the penalty regime in Schedule 41 Finance Act 2008 where the standard penalty for a deliberate but not concealed failure to notify chargeability is 70% of the additional tax.

41. The Appellant lodged appeals with SOCA against the Tax Assessments and the Penalties on 14 March 2012 and 28 October 2013 respectively. In relation to the Tax Assessments his ground of appeal was that he was currently serving a prison sentence in Cyprus and required time to access his financial records and seek professional advice. In relation to the Penalties his grounds of appeal were that his representation had been unprofessional and incompetent.

42. The Appellant instructed a professional adviser, Mr Martyn Arthur to represent him. Mr Arthur submitted revised grounds of appeal against the Tax Assessments on 12 June 2012. Essentially Mr Arthur stated that the Tax Assessments were estimated and excessive and that funds received by the Appellant were not his income.

43. On 10 October 2013 SOCA wrote to Mr Arthur pursuant to section 49C TMA 1970 giving their view of the matter and offering a review of the decision to make the Tax Assessments. The letter also enclosed the penalty determinations. The Appellant appealed the Penalties to SOCA and he was offered a review of the decision to impose the Penalties. On 7 November 2013 the Appellant himself requested a review of the Tax Assessments and the Penalties.

44. The review was conducted by officers of HMRC. At a meeting on 24 January 2014 between the Appellant and the officers, the Appellant stated that his answers to questions in the Holme House interview could not be relied upon. He had just wanted to get out of prison and he was suffering from mental health issues. He maintained that he was employed as a rent collector by Stockbury Developments which had purchased the Colosseum in March 1994. It was his brother James who leased the Colosseum and Stockbury Developments received 10% of the door takings. The

Colosseum had opened in July 1994, originally for two nights a week but eventually on just one night a week. Nobody had brought him money whilst he was in Northern Cyprus.

45. It appears that by the time of the meeting the Appellant had ceased to instruct Mr Arthur. The Appellant confirmed at the meeting that he was content to proceed with the review without representation from Mr Arthur. During the meeting HMRC asked the Appellant to supply certain documents and information to support what he had said in interview. In particular documents to support his income from Stockbury Devlopments and details of the agreement between Stockbury Developments and his brother. The Appellant subsequently confirmed that no further documentation was available.

46. The Appellant was notified that the Tax Assessments and the Penalties had been upheld on review by letter dated 8 April 2014. He then appealed to the Tribunal. In his notice of appeal dated 26 April 2014 the grounds of appeal were broadly that other people were involved, he wasn't the "main man" and the Tax Assessments and the Penalties were based on limited paperwork. As mentioned above he intimated that he was putting his paperwork together to establish that they were excessive, but he has provided no documentation to the Tribunal.

47. We have various conflicting accounts as to the nature of the Appellant's involvement with the Colosseum as follows:

(1) The Appellant's answers during the Holme House interview in which he admitted in great detail that he received significant sums by way of income from the Colosseum over a number of years.

(2) The Appellant's Summary Defence in the civil recovery proceedings in which he again admitted that he was entitled to the income of the Colosseum, although he maintained that the amounts of income he had indicated in the Holme House interview were exaggerated.

(3) In his meeting with HMRC on 24 January 2014 the Appellant maintained that he was employed as a rent collector by Stockbury Developments between July 1994 and September 1994 and that it was James Robb who operated the Colosseum.

48. It is clear that we cannot take anything the Appellant has said in relation to the Colosseum at face value. We must consider whether there is any evidence to corroborate the Appellant's case that the income from the Colosseum was not his, and that in any event the sums assessed are excessive.

49. The only corroborating evidence is that of the Appellant's brother James Robb. In a case such as this it is essential that oral evidence can be tested in cross examination. James Robb's evidence has not been tested, nor have we heard from the Appellant. We do not consider that James Robb's evidence is cogent or reliable. It is not independent, coming as it does from the Appellant's brother. It also comes from an individual who was convicted of being concerned in the management of premises being used for the supply of controlled drugs and sentenced to 12 years in prison.

50. We note that the Appellant's prison sentence for permitting the premises to be used for the supply of controlled drugs was substantially less than that of his brother. However, we do not know enough about the circumstances of those convictions to draw any inference from the disparity in sentence.

51. There is no documentary evidence at all to support the Appellant's case on this appeal or to support the evidence of his brother. Having said that the burden is on the Respondent to establish that the Appellant failed to notify that he was chargeable to income tax and national insurance contributions.

52. We do not accept the Appellant's claim in his meeting with HMRC that he was simply a rent collector for Stockbury Developments. It is not mentioned by James Robb in his witness statement, even though James Robb claimed to be the tenant and running the Colosseum. Further, the evidence before us included financial statements for Stockbury Developments for the period 4 February 1994 to 28 February 1995. The principal activity of the company is described as property developer and it had only one employee, a Mr Dalton who was also the sole director. Those financial statements cover the period when the Appellant contends that he was an employee of Stockbury Developments but they contradict his case that he was an employee.

53. The Appellant first appealed to SOCA following the Tax Assessments on 14 March 2012. It is notable that his ground of appeal was that he required time to access his financial records and seek professional advice. We take into account that he was in prison in Cyprus at that time, but if he had not been entitled to the income which was assessed we have no doubt that he would have said so in his grounds of appeal. That would have been an obvious response to the Tax Assessments, if it was true.

54. In the light of the Appellant's answers to questions in the interview at Holme House prison, we consider that there is a prima facie case that he was entitled to the door money from the Colosseum. There was no evidence before us that the Appellant was suffering from any mental health issues at that time. The Appellant was professionally represented at the interview by a solicitor. He stated that he was not suffering from any condition which might impair his ability to understand. At the end of the interview he stated that he had no complaints about the conduct of the interview. He repeated much of the Holme House interview in his Summary Defence, taking issue only with the amount of the income.

55. We are not satisfied that the Appellant has discharged the evidential burden of establishing that what he said in the Holme House interview and in the Summary Defence was not true. In those circumstances we find that he was entitled to the door money from the Colosseum.

Reasons

56. The issues which arise on the appeal may be summarised as follows:

(1) Were SOCA and the Respondents as the successor of SOCA entitled to assume the general Revenue functions of HMRC in relation to the Appellant for the periods assessed?

(2) Were the Respondents entitled to rely on section 29 TMA 1970 to make the Tax Assessments?

(3) Were the Tax Assessments made in time?

(4) What was the Appellant's source of income?

(5) Did the Appellant fail to notify chargeability of that source of income?

(6) Were the Tax Assessments excessive?

(7) Were the Penalties justified?

(8) Were the Penalties excessive?

57. These are essentially factual issues and follow from our findings of fact.

58. We are satisfied that the qualifying condition for SOCA to give notice under section 317(2) POCA was satisfied. SOCA plainly had reasonable grounds based on the Holme House interview to suspect that income chargeable to income tax had accrued directly or indirectly as a result of criminal conduct. Mr Singh suggested the criminal conduct was the evasion of tax, but it seems to us that the door money was income which indirectly accrued from permitting use of the Colosseum for supplying controlled drugs.

59. It is for the Respondents to establish that the relevant conditions for the issue of a discovery assessment under s 29 TMA have been met and that the assessments were in time by reference to s 36 TMA – see *Burgess & Brimheath Developments Ltd v HMRC* [2015] UKUT 0578 (TCC). In the case of a failure to notify chargeability to tax the only relevant condition is that an officer has discovered that income has not been assessed to tax.

60. The Respondents have satisfied us that there was a discovery engaging section 29 TMA 1970. SOCA discovered that the Appellant had a source of income which he had not declared to tax. They were therefore entitled to make an assessment under section 29.

61. The Respondents rely on the extended time limit in section 36(1A)(b) as giving power to make an assessment more than 4 years after the end of the year of assessment. HMRC have confirmed and we find that the Appellant made no self-assessment returns for tax years 1994-95 to 1998-99 and that the Appellant is not recorded as having any employments during those years. The one thing the Appellant has consistently acknowledged and has not denied is that he has failed to pay tax on his income. We are satisfied on the basis of the evidence before us that he failed to notify chargeability to tax on his income.

62. We have found that the Appellant was entitled to the door money from the Colosseum. It was his chargeability to that income which he failed to notify to HMRC.

63. The burden is then on the Appellant to satisfy us that the Tax Assessments are excessive. In the light of all the evidence we are not satisfied that they are excessive. We consider that in the absence of any more reliable figures or records the Respondents were entitled to calculate the lost tax by reference to the figures given by the Appellant in the Holme House interview. They made reasonable inferences based on what the Appellant himself had said. It does not appear that there was any deduction for expenses but the Appellant had said that he received the door monies. We do not know what other income there may have been apart from door money to defray such expenses.

64. Turning to the Penalties, the burden is on the Respondent to satisfy us that penalties were chargeable, in other words that there was a failure to notify chargeability to income tax. We are satisfied that is the case. We are not satisfied that the Penalties were excessive. They were calculated as 70% of the lost tax which is the penalty that would have been applicable under Schedule 41 if it had applied. Whilst the present penalties arose under section 100 TMA 1970 we consider that a penalty at the rate of 70% was in all the circumstances justified.

Conclusion

65. For the reasons given above we dismiss the appeal.

66. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 16 SEPTEMBER 2016

ANNEX 1

Procedural History

1. The Notice of Appeal was lodged on 29 April 2014 and the Respondents served their Statement of Case on 16 July 2014. On 17 July 2014 the Appellant applied for the appeal to be stayed for 6 months on medical grounds. The application was refused but directions were given for the provision of lists of documents and witness statements taking into account the Appellant medical condition. Witness statements were due to be served by 9 January 2015.

2. On 8 January 2015 a witness statement made by the Appellant's brother, James Robb was served. However by letter dated 16 January 2015 solicitors instructed by the Appellant asked for an extension of time until 9 March 2015 to serve the Appellant's witness statements. The solicitors noted that they had recently been instructed and that the Appellant had been admitted to hospital for 2 days in early January 2015 with a heart condition.

3. The Tribunal released revised directions on 29 January 2015. However on 28 April 2015 the solicitors wrote to say that the Appellant remained very unwell with a heart condition and they were unable to take instructions from him in relation to his witness statement. The Tribunal stayed the proceedings until 30 June 2015.

4. On 17 July 2015, in the absence of any contact on behalf of the Appellant the Tribunal wrote to the parties indicating that it would list the appeal for hearing. On 10 September 2015 the Tribunal notified the parties that the hearing would take place on 22 October 2015.

5. The Respondents served their skeleton argument on 6 October 2015.

6. On 8 October 2015 the Appellant's doctor wrote to the Tribunal indicating that the Appellant had a number of health problems including an irregular heart rhythm which was being investigated. He asked if the hearing could be deferred because it coincided with an appointment at a cardiology department and so that the Appellant's heart condition could be addressed.

7. The Respondents objected to that application, noting that the date of the cardiology appointment had not been stated. The Tribunal appears to have contacted the Appellant's doctor and was told that there was no appointment on 22 October 2015. The Tribunal therefore refused the application although the Appellant was told that he could renew the application on the day of the hearing.

8. In the meantime, on 15 October 2015 the Appellant's solicitors notified the Tribunal that they were no longer instructed.

9. The Appellant's doctor emailed the Tribunal on 19 October 2015 stating that the Appellant had a hospital appointment on 23 October 2016 but that the stress of a

hearing the previous day would not be advisable for him. In the circumstances the Tribunal postponed the hearing and gave directions dated 20 October 2015. Those directions provided that unless the Appellant served a witness statement setting out the evidence he intended to give by 27 November 2015 then he would not be entitled to rely on any evidence other than that contained in his brother's witness statement.

10. There is some suggestion that the Appellant did send a witness statement to the Respondents. On 6 December 2015 he emailed the Respondents to say that it had been posted. The Respondents replied to say that it had not been received by them and asked for a copy to be forwarded to them. No copy was ever received by the Respondents or by the Tribunal.

11. On 7 December 2015 the Tribunal notified the parties that the appeal would be heard on 2 February 2016.

12. The Appellant's doctor wrote to the Tribunal again on 29 January 2016 asking for a further postponement of the hearing for three months. It was said that the Appellant had had a planned cardiac procedure and was in a medically fragile state. He was due to be reviewed by the cardiology specialists in three months time. Reference was also made to a recent diagnosis of sleep apnoea syndrome.

13. The Respondents objected to that application on the basis that it was made very late in the day and the Appellant had failed to produce any witness statement in accordance with the previous directions. They also suggested that it was unlikely the Appellant's medical condition would have improved for a hearing to take place in three months time.

14. The Tribunal gave further directions released on 1 February 2016. The directions recited that it was considered necessary in the interests of justice for the appeal to proceed without further delay and whether or not the Appellant was fully able to participate in the proceedings. The directions included a request for dates to avoid in the period 3 May 2016 to 31 August 2016 and a direction that if the Appellant was unable to attend the final hearing in that period then he would be entitled to lodge written submissions with the Tribunal at least 7 days before the hearing.

15. The Appellant did not provide any details of his availability and on 10 February 2016 the parties were notified that the hearing would take place on 5 May 2016. The Appellant emailed the Tribunal on 24 February 2016 to ask: "please tell me my next court date". The Tribunal responded the following day re-sending the notice of hearing and confirming that the hearing was listed on 5 May 2016

16. As stated above the Appellant did not appear at the hearing. There was no indication that the Appellant would not attend the hearing or that there was any reason to suggest that he might not be able to attend for medical reasons. He had not served any witness statement of his own evidence or any written submissions. The email received during the hearing was timed at 10.43 and contained an attached letter dated 5 May 2016 which stated as follows:

" As you know, [the Appellant] has previously been granted an adjournment because of a serious cardiac condition for which he has now had treatment (a cardiac ablation), and he was reviewed by the cardiology team on the 3rd May 2016, when they reported that the procedure seemed to have been successful and he has a final review planned for 10th May 2016.

Given his understandable anxiety about the situation, he does not feel able to make any reasonable preparation for his forthcoming tribunal and so I would be very grateful if some consideration could be given to him again, for a further adjournment so he can now begin to prepare for the hearing which he tells me he now feels able to do.

Whilst he fully accepts that the matter may have to be heard in his absence, I would nevertheless be grateful if the Court might give consideration to a further adjournment and I would be happy to provide any further detail or clarification if you felt that would help."

17. We have set out in the body of this decision our reasons for refusing the application to postpone.