[2017] UKFTT 19 (TC)

TC05585

Appeal number: TC/2015/07296

CAPITAL GAINS TAX – principal private residence relief – discovery assessment denying relief – assessment made out of time – ss 36(1A) and 29 TMA 1970 – whether loss of tax brought about deliberately by taxpayer – held, no loss of tax as burden of proof not satisfied by HMRC – held in the alternative that if a loss of tax, burden of proving that it was brought about deliberately not satisfied – appeal allowed

Procedure – objection to evidence not supported by witness evidence – late challenge – decision to admit evidence under Rule 15(2)(a), subject to evaluation of weight of specific evidence where appropriate

FIRST-TIER TRIBUNAL
TAX CHAMBER

PAUL MUNFORD **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN CLARK

Sitting in public at the Royal Courts of Justice on 7 and 8 November 2016

Michael Firth of Counsel, instructed by The Independent Tax & Forensic Services LLP, for the Appellant

David Linneker, Solicitors Office & Legal Services, Appeals and Reviews, HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant, Mr Munford, appeals against a discovery assessment made by the Respondents ("HMRC") for the year to 5 April 2006 in respect of a capital gain of £730,302, and against a penalty determination for that year under s 95 of the Taxes Management Act 1970 ("TMA 1970") charging a penalty of £189,879.

The "absence of evidence" issue

2. As the assessment was a discovery assessment under s 29 TMA 1970, HMRC accepted that the burden of proof as to the relevant factors in respect of that assessment fell on them. For that reason, Mr Linneker presented HMRC's case and the evidence in support of that case before any submissions were made on Mr Munford's behalf.

Mr Firth's submissions

3. Following HMRC's opening of their case and the conclusion of their evidence, at which point Mr Linneker confirmed that HMRC did not have any witnesses, Mr Firth submitted that HMRC had no evidence with which to discharge the burden of proof, and that the appeal should be allowed accordingly without need to consider other issues.

4. He referred to the decision of the Upper Tribunal in *Michael Burgess and Brimheath Developments Limited v Revenue and Customs Commissioners* [2015] UKUT 578 (TCC), in which the Upper Tribunal had indicated at [48] that the issues of competence and time limits were issues with respect to which HMRC had the burden of proof, and as to which, for HMRC to succeed, had to form part of HMRC's own case; they were not issues that the appellants had to raise or argue. Mr Firth also referred to the decision at [49].

5. Mr Firth referred to Mr Munford's second ground of appeal, that HMRC had raised the assessment on an extended time limit basis for which they would need to show with evidence that any such errors in Mr Munford's return for 2005-06 were "deliberate" on his part, and that HMRC had failed to discharge that obligation with the result that they were time barred from making an assessment in respect of that year.

6. In the course of the hearing, HMRC had not called any witnesses yet purported to rely on the contents of voluminous documents from numerous different claimed sources. Mr Firth submitted that none of those documents was capable of acting as evidence of its content. He referred to s 8 Civil Evidence Act 1995, and to *Ventouris v Mountain (No. 2)* [1992] 3 All ER 414 at 427.

7. He acknowledged the Tribunal's power under Rule 15(2) of the Tribunal Rules to admit evidence that would otherwise be inadmissible. However, HMRC had made no application to rely on this Rule. He submitted that in any event it would be unfair

for HMRC to rely purely on the content of documents that had not been produced by any witness who could speak to them or be cross-examined on their content. He referred to *Gardiner v Revenue and Customs Commissioners* [2014] UKFTT 421 (TC), TC03550 at [29]-[33].

8. He explained that *Gardiner* was a case where HMRC had sought to rely on the extended time limit for penalty assessments based on negligence. He submitted that an allegation that the loss of tax was "deliberate" was plainly much more serious; it was even more unfair and inappropriate for HMRC to make such an allegation and then call no witness to back it up.

9. Following these submissions, Mr Firth indicated that I would probably want some time for reflection on his submission that I should take the same course as the Tribunal (Judge Cannan and John Wilson) in *Gardiner* and allow Mr Munford's appeal, rather than arriving at an immediate decision on that submission. I considered that it was appropriate to continue with the hearing.

10. At the end of the hearing on the second day Mr Linneker requested further time to review the case authorities and the arguments put forward on the "absence of evidence" argument. I agreed that HMRC should have 21 days to make written submissions on such matters and that Mr Firth should then have two days to respond.

11. On 29 November 2016, one of Mr Linneker's colleagues, Jennifer Small, sent an email message to the Tribunal requesting an extension of three hours to comply with the 21 day time limit. In her letter, she explained that Mr Linneker had been unexpectedly absent from the office since 25 November 2016. In his absence, the matter had been referred to her in order to meet the Tribunal's directions. She attached HMRC's written submission.

12. I confirm that in those circumstances, I am happy to grant the minor extension requested.

13. Both HMRC's submission and that prepared by Mr Firth have been referred to me. I therefore deal with both in this section of this decision.

HMRC's submissions on the absence of evidence issue

14. HMRC acknowledged that, as already agreed in their Statement of Case, the burden of proof as to the competency issue was on HMRC and the burden of proof that the discovery assessment was in time was on HMRC.

15. On Mr Firth's submission that HMRC had produced no evidence, HMRC subdivided this into two issues. The first concerned the lack of witness evidence. This could easily have been remedied by HMRC if they had been put on notice.

16. In any event, the contentions made for Mr Munford failed to assist the Tribunal; they did not explain what assistance a witness producing evidence would provide to the Tribunal. It had been suggested that a witness should have been made available to

test the documentation, to answer questions about the documents, and indicate the limitations of the documentary evidence.

17. HMRC submitted that on examination of the nature of documentary evidence within the bundle, there was little a witness could add to the correspondence section except to confirm that the letters were indeed letters, or, in the case of the tax returns, that the print-outs in the bundle did contain information obtained from Mr Munford's returns.

18. Within the sweeping suggestion that HMRC had no evidence before the Tribunal, Mr Munford's representative also included documentation that was provided and obtained from Mr Munford. It was also unclear why HMRC would be barred from relying on such evidence when they could do little more in proving a document than to confirm that it had been obtained from Mr Munford.

19. In HMRC's submission, unless those representing Mr Munford were proposing that the witness should speak to and explain every document within the bundle, there was little a witness could add to facilitate the Tribunal's view of the evidence beyond a bland statement that the documentation had been gathered during the course of enquiries into Mr Munford's tax affairs.

20. HMRC contended that, without specifying what documentation those representing Mr Munford sought to test or why HMRC should be made to produce documentation generated by Mr Munford, it was unclear how the approach being taken on Mr Munford's behalf would generate anything more than very little value for an over-burdensome cross-examination.

21. The second issue concerned the decision in *Gardiner*, on which Mr Firth had relied as authority for summarily dismissing HMRC's case. In HMRC's submission, *Gardiner* could be distinguished from Mr Munford's appeal on two points of fact.

22. The first was that, as Mr Linneker had stated on the second day of the hearing, HMRC had not been put on notice of the intention of those acting for Mr Munford to seek production of the evidence by way of witness evidence, nor had any indication been given to HMRC of the intention to argue on Mr Munford's behalf that failure to produce witness evidence would lead to an application for summary dismissal of HMRC's case.

23. Secondly, HMRC had filed a detailed Statement of Case on 4 March 2016. That Statement of Case had particularised the elements that constituted the competency and time limit arguments on which HMRC sought to rely and had included cross-references to documents generated by third parties.

24. The only similarity of Mr Munford's case to *Gardiner* was that Mr Munford's case concerned penalties; as such, those acting for Mr Munford were entitled to put HMRC to strict proof. In HMRC's submission, while in *Gardiner* the Tribunal relied upon the fact that the appellant put HMRC to strict proof, this, in isolation, should not be sufficient for HMRC's case in the present appeal to be struck out. It did not

automatically follow that such an entitlement would prompt a caseworker to seek a witness so as to produce evidence without explicit notice from an appellant.

25. Nonetheless, putting party to strict proof should not override the need to put a party on notice of the intention to challenge production of documentation. While HMRC noted that the Civil Procedure Rules ("CPR") did not bind the Tribunal, they had been drawn upon in *Gardiner* with reference to CPR 32.19. Thus, to make an analogous comparison with the position in civil proceedings, if a party was put to proof on an element of their case (for example under CPR 16.5(1)(b)), it did not negate the requirement under CPR 32.19 to file a notice of the intention to call a party to produce documentation. Further, the absence of such a notice allowed the parties to proceed on the basis that contents were agreed. That was indeed the prevailing practice in conduct of cases before the Tribunal, namely that reliance on the List of Documents pursuant to Rule 27 was sufficient in the absence of notification or directions to the contrary.

26. On Mr Firth's submissions that it would be unfair to admit the evidence and that, through lack of witness evidence, HMRC had not allowed those acting for Mr Munford to test the evidence, HMRC submitted that on 20 May 2016 and on 3 June 2016 they had put Mr Munford's representatives on notice that HMRC would not be calling witnesses. The issue of production of documentation had not been raised at those stages by those acting for Mr Munford, nor had they provided any explanation as to why this had not been done, given that those representatives had had approximately five months to raise this issue and approximately four months to consider additional documentation provided by HMRC. Had they done so, HMRC would have had the opportunity to remedy this issue. The lack of opportunity to cross-examine a witness on production of the evidence was one that fell on the failure of Mr Munford's representatives to communicate this to HMRC.

27. It had been contended for Mr Munford that without witness evidence HMRC could not rely on the contents of the evidence bundle. However, given the behaviour of the parties, it was fair and reasonable to rely on the contents of the bundle for the following reasons:

(1) In relation to the list of documents, the list for Mr Munford simply listed documents to be relied on in addition to those listed by HMRC. It had been and was reasonable to infer that the documentation (and the contents of that documentation) listed by HMRC and in the possession of those acting for Mr Munford were agreed.

(2) On the question of the behaviour of the parties, HMRC referred to a letter dated 22 July 2016. This was a culmination of correspondence with each party providing documentation that the other party did not have. This correspondence had had the objective of working towards the objective of agreeing a bundle that was to be prepared and served by those acting for Mr Munford. The practice direction of CPR32 paragraph 27.2 provided that, where a bundle was agreed, it was deemed that the contents of that bundle were also agreed unless a party gave a written objection. There had been no such written objection in this case.

(3) As to the timing of the notice to produce evidence, Mr Munford's representative appeared to have waited for confirmation that HMRC would not call any witnesses and for HMRC to have closed their case. However, written confirmation of this had already been provided and, in any event, such confirmation could have been sought outside the court or as a preliminary matter; instead, it had been raised after lunch, limiting the time HMRC would have to remedy any deficiency (perceived or otherwise) in HMRC's case. No explanation had been submitted as to why this was not dealt with earlier by Mr Munford's representatives or why those representatives had failed to provide a written notice.

(4) HMRC contended that, given the behaviour of those representing Mr Munford and the prevailing practice regarding bundles and their contents, it would be unfair for HMRC summarily to lose this case on the basis of a procedural error highlighted only after HMRC had closed their case. Moreover, the contentions made on Mr Munford's behalf concerning fairness were weakened, if not discredited in their entirety, following the manner in which HMRC had been informed of the submissions made on his behalf in relation to the evidence issue.

28. With reference to HMRC's failure to make an application under Rule 15, HMRC submitted that having regard to the behaviour already referred to, it had not been unreasonable for them to have relied on providing documentation listed in their List of Documents pursuant to Rule 27 without an additional application under Rule 15. In their submission, this element of the contentions for Mr Munford on the evidence issue failed.

29. HMRC also contended that if there was some doubt as to whether evidence could be adduced at a Tribunal hearing, discretion should fall in favour of admitting it. In this connection, they referred to *Masquerade Music Limited & Ors v Mr Bruce Springsteen* [2001] EWCA Civ 513 at [84]-[85]. In their submission, the fairer approach to the present appeal was to admit the evidence provided and for the weight and reliability of the evidence to be left to the discretion of the Tribunal.

30. HMRC made general submissions as to the potential precedent value that could be set in allowing the contentions made on Mr Munford's behalf to succeed. Parties would consider that they had an authority to bring technical points to the attention of their opponents and the Tribunal at the eleventh hour. This was contrary to the fairness element of the overriding objective, the general trend of identifying all issues in advance, as already referred to, and ultimately would impose more cost on taxpayers, HMRC and the Tribunal.

31. In addition to this, if parties were expected to provide a witness to prove documentation without notice, then it would follow that HMRC would need to begin adding witness evidence to a significant number of cases so as to guard against the chance that another party might raise the issue on the day of the hearing. This would impose a significant cost and time burden on the litigation of tax appeals for all concerned.

32. HMRC suggested alternatives to deeming their evidence inadmissible. They submitted that there were two alternative determinations that the Tribunal could reach, rather than barring reliance on HMRC's evidence completely:

(1) To determine that it was within the discretion of the Tribunal to allow evidence that would not ordinarily be admissible (rule 15(2)(a)) and that the weight and reliability of that evidence should be left to the determination of the Tribunal.

(2) To accept an application by HMRC that the matter should be re-listed for half a day, so that a witness could be provided to prove the documentation and be available for cross-examination to avoid any prejudice that Mr Munford may have suffered through the lack of opportunity to do so.

In HMRC's submission, such alternatives would be more in tune with the spirit of the overriding objective given the circumstances and behaviour of the parties in the present case.

33. In summary, the contentions on Mr Munford's behalf that HMRC had no evidence should be dismissed on the basis that:

(1) Those acting on Mr Munford's behalf had failed to comply with the usual requirement of providing written notice that the content of the documentation would be contested and had failed to provide an explanation;

(2) Following prevailing practice and guidance from the CPR, it was fair and reasonable to conduct the litigation on the basis that the content would not be contested;

(3) The case of *Gardiner* could be distinguished in this case on the facts and so any reliance on this case did not advance the contentions made on Mr Munford's behalf in this appeal;

(4) There were more appropriate solutions available to the discretion of the Tribunal in this appeal than to bar HMRC's evidence and thereby strike out HMRC's case.

The contentions on Mr Munford's behalf concerning the evidence issue should be dismissed and the appeal should be determined on the substantive arguments submitted to the Tribunal.

Mr Firth's response

34. On behalf of Mr Munford, Mr Firth made a series of brief points in response to HMRC's submissions:

(1) Mr Munford's second ground of appeal relied on HMRC's lack of evidence. HMRC had thus been on notice.

(2) It was not for Mr Munford to tell HMRC how to build their case against him. Any other conclusion would be astonishing and contrary to authority.

(3) *Burgess* showed that if HMRC failed to do what was required in respect of an essential element, the appeal had to be allowed. It was irrelevant whether HMRC claimed that they could have remedied the defect.

(4) This was not an application for "summary dismissal"; it was simply a submission that HMRC had produced no evidence and thus had not discharged the burden of proof.

(5) CPR 32.19 dealt with the authenticity of documents produced by a witness. The point being made for Mr Munford was that the documents had not been produced.

(6) For Mr Munford, the alleged "prevailing practice" referred to by HMRC was rejected. There was no practice that including a document in a list of documents absolved a party of the need properly to produce that document or that such documents thereby became "agreed".

(7) *Gardiner* plainly could not be distinguished. HMRC must therefore be asking this Tribunal to find it was wrongly decided. They had no reasons for doing so.

(8) Contrary to what HMRC had alleged, there had been no direction to "agree" a bundle. Instead, Mr Munford had been directed to produce a bundle containing both parties' list of documents (direction 4). That was what had been done.

(9) *Masquerade Music Ltd* had nothing to do with and did not override the need to produce evidence.

(10) The only "precedent value" of this point was that HMRC would be required to do what they had a duty to do (if the burden of proof was on them) and had claimed that they could "easily" do. If HMRC did not want to comply with their obligations, they needed an express concession from the taxpayer, as had been held in *Burgess*.

(11) It was too late now to seek to admit the evidence. If the evidence was reopened, then logically submissions had to be reopened as well in order to deal with that new evidence.

(12) In essence, HMRC appeared to be seeking to blame Mr Munford and his representatives for HMRC's own failure to comply with basic but essential litigation rules.

My conclusions on the absence of evidence issue

35. By way of initial comment, I would like to put on record that this is by far the worst example of an "ambush" that I have encountered in these Tribunals.

36. As HMRC have pointed out, on two occasions Mr Linneker wrote to Mr Munford's representative stating that HMRC did not intend to call witnesses. The first occasion was on 20 May 2016:

> "In accordance with Tribunal Direction 2 dated 17 March 2016, I am writing to confirm that the Respondents do not intend to call witnesses."

The second occasion was on 3 June 2016:

> "In accordance with Tribunal Direction 3 dated 17 March 2016 the Respondents provide the following listing information:
>
> . . .
>
> b. The Respondents do not intend to call witnesses as previously advised."

37. Thus, over a month before the parties were notified on 7 July 2016 of the hearing to take place in November 2016, it was entirely clear that HMRC were not intending to call witnesses.

38. The proper course for Mr Munford's representatives would have been to give notice, sufficiently in advance of the hearing, that they intended to put HMRC to proof of the documentation relied on by HMRC.

39. Mr Firth submits that the second ground of appeal in Mr Munford's Notice of Appeal relied on HMRC's lack of evidence, and that HMRC were thus on notice. The wording of that ground was the following:

> "2) In the alternative, HMRC have raised an assessment for the 2005-06 year on an extended time limit basis, for which HMRC would need to show, with evidence, that any such errors in Mr Munford's 2005-06 [*sic*] were "deliberate" by him. HMRC have failed to discharge that obligation and HMRC are time barred from assessing this old year."

40. I do not think that the wording of ground 2 can be construed as implying the need for the documentary evidence to be supported or verified by witness evidence. My reading of that ground is simply that HMRC bear the burden of proving that they were entitled to assess the disputed capital gain under the "discovery" provisions of s 29 of the Taxes Management Act 1970 ("TMA 1970") and the extended time limit provisions of s 36 TMA 1970. HMRC have acknowledged this to be the position.

41. Mr Firth relied on *Gardiner*. The significant difference between *Gardiner* and the present case is that in *Gardiner*, the representatives acting for the appellants wrote to the Tribunal a month before the hearing, to indicate that the appeal should be summarily allowed as there was no evidence or statement of agreed facts on which HMRC's case could rest. It was explained that the appellants would argue at the hearing that the appeals should be allowed on the basis of lack of evidence from HMRC. The appellants' skeleton argument, served 14 days before the hearing, also gave notice of their argument that there was not even a prima facie case.

42. Here, no notice was given in advance of the hearing. Nor did Mr Firth raise the issue at the start of the hearing. Instead, he confirmed that it was common ground that the burden of proof was on HMRC and therefore HMRC should open their case. Mr Linneker therefore proceeded to do so without knowledge of Mr Firth's intention to

raise the absence of evidence issue. That issue was only raised once Mr Linneker had finished the presentation of the evidence for HMRC.

43. The question at issue in *Gardiner* was that of penalties imposed on the grounds of negligence. At [24] the Tribunal commented:

> "In a penalty appeal we would expect the allegations of negligence to be clearly particularised. It seems to us that the failure to particularise what it is that the appellants ought to have done or ought to have realised in January 2007 has led the respondents to overlook the need for evidence to establish a prima facie case of negligence."

44. This is very different from the present case, at least in relation to the discovery assessment. Here, detailed particulars of HMRC's contentions were contained in their Statement of Case. (I think it more appropriate to deal separately at a later point in this decision with the issues involved in the appeal against the penalty assessment.)

45. In *Gardiner* at [27] the Tribunal commented on the documentation referred to in the preceding paragraph of the decision:

> "It is not clear whether this, or other matters referred to in the letter, are particulars of negligence relied on by the respondents for the purposes of this appeal. It has not formed any part of the respondents' Statement of Case."

46. At [29], the Tribunal continued:

> "It appears that the respondents simply rely on documents in the bundle as evidence as to the truth of their contents. The respondents produced a List of Documents in accordance with the Tribunal Rules. In the ordinary course of civil litigation where a document is disclosed, unless specific objection is taken the document is treated as authentic (see CPR Part 32.19). However where a party relies on a document as evidence of a statement in the document, it must still be proved by production of the document (see Section 8(1)(a) Civil Evidence Act 1995). Production is not simply by counsel or a representative handing up the document, but by a witness qualified to say what it is (see *Ventouris v Mountain (No 2), The Italia Express* [1992] 3 All ER 414 at 427)."

47. The Tribunal commented that no witness had produced the documents relied upon. The respondents had not sought to rely on Rule 15(2) of the Tribunal Rules (considered below). At [32] the Tribunal continued:

> "Without the benefit of argument, our initial view would have been that in these particular appeals it would not be appropriate to admit documents in evidence without a witness adducing those documents and explaining the reliance placed on them. These are penalty appeals and in our view the appellants are entitled to put the respondents to strict proof. They are also entitled to know and question what significance is placed on particular documents in support of the

> allegation of negligence. The respondents were on notice as to the appellants' position and chose not to adduce witness evidence."

48. In Mr Munford's case, any possible requirement for strict proof would only be applicable to the question of the penalty assessment, and not to the discovery assessment. I re-emphasise that HMRC were not given advance notice of this challenge to their evidence. Thus on two grounds, the position differs from that in *Gardiner*.

49. I agree with HMRC's submission that the CPR do not bind the Tribunal. This was confirmed by the Upper Tribunal (Judge Sinfield) in *Revenue and Customs Commissioners v McCarthy & Stone (Developments) Limited* [2014] UKUT 0196 (TCC) at [43].

50. Nonetheless, I consider it helpful to take into account the argument put here by HMRC in their written submissions that if a party is put to proof in respect of an element of their case, this does not negate the requirement under CPR 32.19 to file a notice of the intention to call a party to produce documentation.

51. The absence of notice to HMRC that they would be required to provide witness evidence in support of their documentary evidence causes acute difficulty in the present case. The opportunity for HMRC and the Tribunal to consider the implications in advance of HMRC presenting their evidence was not made available. If the point had been raised at the beginning of the hearing, it might have been considered appropriate for the hearing to be adjourned pending a decision on how to proceed. That possibility was pre-empted by the course of action which Mr Munford's representatives chose to take.

52. The Tribunal has to deal with this difficulty in the light of the overriding objective under Rule 2 of the Tribunal Rules. In *Gardiner*, the Tribunal did not consider that it would have been appropriate to apply Rule 15(2)(a). Here, HMRC have not expressly applied for the evidence to be admitted under that provision. However, they have argued that it was not necessary for them to have done so, having provided documentation listed under their List of Documents pursuant to Rule 27.

53. Rule 15(2)(a) provides:

> "(2) The Tribunal may—
>
> (a) admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom: . . ."

54. I consider that the appropriate course, given the conduct of Mr Munford's representatives, is for the Tribunal of its own motion under Rule 15(2)(a) to admit HMRC's documentary evidence without requiring HMRC to provide witness evidence in support of that documentary evidence. This is subject to the following limitation: as proposed by HMRC, the weight and reliability of the evidence provided is to be left to the Tribunal to evaluate. The Tribunal can therefore decide, in respect of each item of evidence considered, to what extent its value may be diminished by the absence of any witness evidence to support it.

55. I consider this approach to be the appropriate one in the context of what has happened in these proceedings. I agree with HMRC's submission that in respect of much of the evidence, there would be little that a witness could add to the documentation. Further, if it had been necessary to call witnesses in support of the documentation, this would have added considerably to the length of the hearing, which as it was lasted two full days.

56. Further, if a party to Tribunal proceedings proposes to challenge evidence in this way, I consider that such party is under an obligation to specify in detail the particular evidence which it requires the other party to support by witness evidence. It is entirely inappropriate to make a sweeping challenge to the totality of the evidence without showing what elements of that evidence are questioned.

57. I also accept HMRC's argument that much of the documentation in Mr Munford's case was documentation which Mr Munford already had in his possession. It follows that the question as to the value of "unsupported" documentary evidence will be very much limited to the proportion of evidence not previously in his hands.

58. HMRC referred to the question of precedent. I consider that there are only limited circumstances where a challenge to the evidence on a comparable basis would be appropriate. There would need to be clear justification, as the Tribunal considered there to be in *Gardiner*, for an appeal to be allowed on the basis that the documentary evidence needed to be backed up by witness evidence. It would be essential in the context of any such challenge that sufficient notice of it should be given, both so that the parties could be fully aware of it in advance, and so that the Tribunal could consider whether the need for additional witness evidence correspondingly required an increase in the time allowed for the hearing.

59. I therefore proceed to deal with the substantive issues on the basis of my decision to admit HMRC's evidence under Rule 15(2)(a) without requiring HMRC to provide witness evidence in support. Where appropriate, I consider the weight to be given to evidence where it might, in other circumstances, have been regarded as requiring such support.

The background facts

60. The evidence consisted of two bundles of documents. These included witness statements given by Mr Munford and by Mrs Charlotte Munford. Both Mr and Mrs Munford also gave oral evidence. From the evidence I find the following background facts; I deal later in this decision with disputed matters of fact.

61. In 2004 Mr and Mrs Munford decided that they and their family would like to move from their home in West Heath Road, Hampstead, to central London. On 25 June 2004, Mr and Mrs Munford purchased a property in Ingram Avenue, London NW11; the purchase consideration was £4 million. On the same day, Mr Munford purchased, in his sole name, a property in Halsey Street, London SW3; the purchase price was £1,050,000. The Halsey Street property required full renovation; the works began in December 2004.

62. On 21 February 2006, Mr Munford entered into a contract to sell the Halsey Street property. The sale was completed on 21 March 2006. The sale price paid by the unconnected third party purchaser was £2,550,000.

63. On 3 March 2006 Mr and Mrs Munford made an election for Capital Gains Tax purposes that the Ingram Avenue property should be treated as their principal private residence with effect from 24 June 2004. Mr Munford's accountants sent this election to HMRC on 13 March 2006, giving the respective Unique Tax References for Mr and Mrs Munford as also shown on the election.

64. On 10 March 2006, Mr and Mrs Munford made an election that the Halsey Street property should be treated as their principal private residence with effect from 19 December 2005. Mr Munford's accountants sent this election to HMRC on 28 March 2006, giving the Unique Tax Reference for Mr Munford. (The election showed both such references.)

65. On 17 March 2006, Mr and Mrs Munford made an election that the Ingram Avenue property should be treated as their principal private residence with effect from 26 December 2005. Mr Munford's accountants sent this election to HMRC on 5 April 2006, again giving the respective Unique Tax References for Mr and Mrs Munford as also shown on the election.

66. Mr and Mrs Munford continue to reside in the Ingram Avenue property as their private residence.

67. Mr Munford's self-assessment return for the year 2005-06 gave details of his taxable income for that year, but contained no entries relating to capital gains.

68. On 20 September 2013 Anne Baxter of HMRC wrote to Mr Munford; the first section of her letter stated:

> "Self Assessment tax return – year ended 5 April 2006
>
> I believe that your Self Assessment Tax return for the above year is inaccurate.
>
> I have received information that indicates that you may have incorrectly claimed Private Residence Relief on the capital gain realised from the disposal of 9 Halsey Street, London."

69. She enclosed a copy of her letter to Mr Munford's accountants requesting various items of information. She indicated that once she had worked out whether there was any additional tax to pay, she would let Mr Munford know.

70. On 23 October 2013 Officer Baxter issued an information notice to Mr Munford, together with a schedule of the information which she still required. She explained that she had not received any of the information requested on 20 September 2013.

71. On 21 November 2013, Mr Munford's accountants responded to HMRC's information notice. They set out a series of answers to the points raised in the schedule.

72. In a letter dated 11 December 2013, Officer Baxter gave her responses to the various answers given on Mr Munford's behalf. She asked a series of further questions, and indicated that on receipt of Mr Munford's response she would like to meet with him to discuss the Halsey Street property. She mentioned that she had been in touch with Kensington & Chelsea Borough Council, and that their response very much suggested that Mr Munford and family had never moved into the property.

73. HMRC's enquiries continued for some time. With Mr Munford's permission, HMRC approached a number of third parties for information relating to the Halsey Street property and the Ingram Avenue property. A number of responses were received.

74. On 12 May 2015 Mr Allsopp of HMRC wrote to Mr Munford's accountants setting out HMRC's decision concerning the claim to private residence relief on the Halsey Street property. Based on the comprehensive chronology which HMRC had compiled from information provided by Mr Munford and a number of third parties, it did not appear on the balance of probabilities that Mr Munford occupied that property during the period between the claimed occupancy date of 26 November 2005 and the date on which Mr Munford had submitted the election under what Mr Allsopp referred to as s 225 TCGA 1992, but should have been s 222(5) TCGA 1992, in favour of this property. HMRC considered that a chargeable gain had arisen on Mr Munford for the year ended 5 April 2006. The amount of that gain was £730,302.80. The tax (incorrectly described as Income Tax) arising on that additional gain was £292,120.80. The penalty (incorrectly referred to as being chargeable under para 20 Sch 18 Finance Act 1998) was assessed at 65 per cent of the tax. In addition, an amount of interest was specified, calculated to 30 June 2015.

75. The formal notice of further assessment was issued to Mr Munford on 23 July 2015, together with a penalty notice under s 95(1)(a) TMA 1970 in the sum of £189,879.

76. On 29 July 2015 Mr Munford's accountants gave notice of appeal to HMRC on his behalf against the tax assessment. For the avoidance of doubt, they wrote on 5 September 2015 to ask that their letter be taken as a formal appeal against the assessment. They requested a review. On 5 October 2015, HMRC wrote to them to point out that no formal appeal against the penalty had been received. On the same date, the accountants wrote to HMRC asking for their letter to be accepted as a late appeal against the penalty assessment, and requesting a review of the decision to raise the penalty.

77. On 11 December 2015, following agreed extension of the statutory review period, HMRC wrote to Mr Munford with the result of the review. The decision of the Review Officer was that the assessment and penalty should be upheld with one small variation, namely that Mr Munford should be allowed the annual exempt amount,

which had stood at £8,500 in 2005-06. The revised chargeable gain was £721,802, the revised tax due was £288,720.80, and the revised penalty was £187,668.52.

78. As the matters raised in the review letter either corresponded with or were related to the matters considered at the hearing, I do not set them out here.

79. On 22 December 2015, Mr Munford's representative on his behalf gave Notice of Appeal to the Tribunal. After exchanges of correspondence, the representative submitted the relevant form of authority signed by Mr Munford and dated 27 June 2016.

Arguments for HMRC

80. For HMRC, Mr Linneker referred to the questions raised by the appeal. These were the amount of the capital gain on the disposal of the Halsey Street property, whether the gain was eligible for private residence relief under s 222 of the Taxation of Capital Gains Act 1992 ("TCGA 1992"), whether HMRC were entitled to assess the gain under s 29 TMA 1970 and the extended time limit provisions of s 36 TMA 1970, and whether Mr Munford was liable to a penalty under s 95 TMA 1970 for delivering an incorrect return. Mr Linneker acknowledged that the initial burden of proof rested with HMRC, to show that the conditions of s 29 TMA 1970 had been met.

81. If they had, the ultimate onus of proof rested with Mr Munford to show in accordance with s 56 TMA 1970 that he was overcharged by the assessment.

82. Mr Linneker also acknowledged that the burden of proving that a penalty assessment under s 95 TMA 1970 was appropriate rested on HMRC. The standard of proof was the ordinary civil standard, which was the balance of probabilities.

83. Mr Linneker made various submissions on factual matters; I consider these at a later point.

84. He referred to s 29 TMA 1970. In relation to s 29(2), Mr Munford had delivered a return under s 8 TMA 1970, so that s 29(3) applied. The relevant conditions in terms of HMRC's discovery position were at s 29(5). Mr Linneker referred to *Langham v Veltema* [2004] EWCA Civ 193, [2004] STC 544, at [32] to [36] and [47].

85. HMRC submitted that the evidence showed that an officer had discovered that a chargeable gain that ought to have been assessed had not been, so that the self assessment was insufficient and therefore that the condition in s 29(1) TMA 1970 was satisfied. HMRC also submitted that the evidence showed that the conditions of s 29(5) TMA 1970 were satisfied.

86. HMRC accepted that they were out of time to issue an assessment under the normal time limits in ss 34 and 36(1) TMA 1970. However, the time limit for making an assessment within the relevant period was contained in s 36(1A). Where a loss of capital gains tax was brought about deliberately by the relevant person, an assessment could be made at any time not more than 20 years after the end of the relevant year of

assessment. Mr Linneker made factual submissions in connection with s 36(1A); I consider these later.

87. Mr Linneker also made submissions concerning the expenditure deductible in computing the chargeable gain, and whether certain expenditure incurred by Mr Munford was deductible. Again, it is more appropriate to deal with these issues at a later point.

88. He submitted that HMRC had taken a reasonable approach to mitigating the penalty; after abatements, the penalty loading was neither disproportionate nor unreasonable in the circumstances, and had been correctly determined in accordance with s 100 TMA 1970.

89. HMRC asked the Tribunal to dismiss Mr Munford's appeal and determine the tax and penalty due in in varied amounts, by adjusting the gain to £721,802, the tax to £288,720.80, and the penalty to £187,668.52.

Arguments for Mr Munford

90. Mr Firth made various preliminary points. He emphasised the need for HMRC, if they could prove a loss of tax, to prove for the purposes of s 36(1A) TMA 1970 that it was "brought about deliberately". The case hinged on "deliberately", because without that HMRC had nothing; they relied on the "deliberate" time extension. Unless they could prove that the loss of tax was brought about deliberately, the case went nowhere. He submitted that there had been no loss of tax. Finally, even if the assessment were to be held valid, it was for the wrong amount.

91. The word "deliberately" meant intentionally or knowingly. Mr Firth referred to the recent decision of the Tribunal (Judge John Brooks) in *Raymond Tooth v Revenue and Customs Commissioners* [2016] UKFTT 723 (TC), TC05452 at [49] and [57]. Mr Firth submitted that in the context of s 36 TMA 1970, the question was what HMRC could point to as something that Mr Munford had done, knowing or intending it to bring about a loss of tax.

92. Mr Firth further argued that reliance on s 36(1A) TMA 1970 was essentially an allegation of dishonesty, and therefore a very serious one. The case law demonstrated that where an allegation was of such a serious nature then particularly cogent evidence would be required to discharge the burden of proving that allegation on the balance of probabilities. This was for the simple reason that the more serious the allegation the less likely it was to have happened, and therefore the more cogent the evidence needed to be to make that accusation or allegation more likely than not to be true. Mr Firth argued that if dishonesty was not an element of s 36(1A) TMA 1970, the result would be that anyone who submitted a tax return based on an extra-statutory concession would necessarily be completing his return deliberately bringing about a loss of tax. Plainly, that could not have been intended.

93. Mr Firth referred to *In Re H and Others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 at 586; this specified the need for cogent evidence where an allegation was of such a serious nature.

94. What this meant was that HMRC had to prove, first, that Mr Munford was not entitled to principal private residence relief, and secondly, that Mr Munford had submitted his tax return actually knowing that he was not entitled to principal private residence relief.

95. In assessing whether HMRC had proved these elements, the standard of proof was the balance of probabilities. However, regard must be had to the inherent probabilities of what was alleged. Fraud was usually less likely than negligence.

96. With reference to these principles, Mr Firth made submissions in relation to factual matters; I consider these in the final section of this decision.

Consideration and conclusions

97. I look first at the principles to be applied in relation to the assessment made on Mr Munford, then consider the application of those principles in the context of the facts.

98. The events in issue concerned the tax year ending on 5 April 2006. HMRC's enquiries into Mr Munford's tax affairs for that year began in September 2013. The assessment was made in July 2015. As a result of the timing of HMRC's enquiries, it was not open to them to make a discovery assessment under s 29 TMA 1970 within the normal time limit. The only basis available for such an assessment was pursuant to the extended time limit provisions in s 36(1A) TMA 1970.

> "(1A) An assessment on a person involving a loss of income tax or capital gains tax—
>
> (a) brought about deliberately by the person,
>
> . . .
>
> 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)."

99. As a consequence, it needs to be shown both that the condition in s 36(1A)(a) is fulfilled, and that there has been a loss of capital gains tax. The words "loss of tax" correspond to the words at the end of s 29(1) TMA 1970:

> "**29 Assessment where loss of tax discovered**
>
> (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."

100. Section 29 contains limitations on HMRC's powers to make a discovery assessment where the taxpayer has made a return. The relevant restriction in the present case is s 29(4):

> "(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf."

101. In a case where HMRC have to rely on s 36(1A) TMA 1970, the words "carelessly or" in s 29(4) are not relevant. It is necessary both under s 36(1A) and s 29(4) for HMRC to show that the taxpayer's conduct leading to the loss of tax was deliberate.

102. Although s 36(1A)(a) imposes the "gateway condition" to the making of a discovery assessment outside the normal time limit, there is arguably an earlier step in the logic. In putting HMRC's case, Mr Linneker acknowledged that the initial burden of proof rested on HMRC to show that the conditions of ss 29 and 36 TMA 1970 had been met. I have already referred to the need for HMRC to show for the purposes of both these sections that there has been a loss of capital gains tax. If they do not succeed in demonstrating that there has been any such loss, the assessment cannot stand.

103. In order to show that there has been a loss of capital gains tax, the burden of proof falls on HMRC. This requires them to show that Mr Munford was not entitled to private residence relief on the Halsey Street property. I emphasise that this involves a significant difference between Mr Munford's case and many of the authorities normally relied on in determining whether such relief is available. Those other authorities do not generally involve the burden of proof falling on HMRC; in such cases, that burden falls on the taxpayer. Where the burden rests on HMRC, any doubts which there might be as to the taxpayer's basis for arguing that relief is available must be put to one side; HMRC must show on the balance of probabilities that the taxpayer does not qualify for the relief.

104. The next step in the logic will only be relevant where HMRC succeed in showing a loss of tax. It then becomes necessary for them to satisfy the Tribunal that the loss of tax was brought about deliberately by Mr Munford. (In *Tooth* it was common ground that the burden of proving that the insufficiency of tax had been brought about deliberately fell on HMRC; see the Tribunal's decision at [1] and [48].) The Tribunal was considering the words ". . . brought about . . . deliberately" in s 29(4) TMA 1970, but its decision is equally applicable to the words "brought about deliberately" in s 36(1A) TMA 1970. I accept Mr Firth's submission that what HMRC must do in order to satisfy the Tribunal to this effect is to show that Mr Munford had

submitted his tax return actually knowing that he was not entitled to principal private residence relief.

105. Mr Firth referred to the need to have regard to the inherent probabilities of what was alleged, and cited *In Re H*. The House of Lords has since commented on the application of the standard of proof in such cases: see *In Re B (Children)* [2008] UKHL 35, 2009 AC 11. At [14]-[15] Lord Hoffman commented:

> "[14] Finally, I should say something about the notion of inherent probabilities. Lord Nicholls said, in the passage I have already quoted, that —
>
> > "the court will have in mind as a factor, *to whatever extent is appropriate in the particular case*, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."
>
> [15] I wish to lay some stress upon the words I have italicised. Lord Nicholls was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not."

106. At [70] Baroness Hale referred to the legislation under consideration and continued:

> "Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies."

107. At [72] she commented further on the question of the seriousness of the allegation:

> "[72] As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog."

108. Thus Mr Firth's submission that the more serious the allegation, the less likely it is to have happened, and therefore the more cogent the evidence needs to be to make that allegation more likely than not to be true, needs to be treated with some degree of

caution. The appropriate test is the inherent probability or improbability of the event or action in question.

109. Although Mr Firth dealt first with the question whether there had been a loss of tax brought about deliberately, I consider that the appropriate question to start with is whether HMRC have established that there was a loss of tax. As I have already stated, this requires HMRC to show, on the balance of probabilities, that Mr Munford was not entitled to private residence relief on the Halsey Street property.

Loss of tax?

(a) The evidence

110. The question requires a much more detailed examination of the facts. Mr and Mrs Munford had decided in 2004 that they would like to move to Central London. Mrs Munford confirmed this in cross-examination and I accept her evidence on this point. Both she and Mr Munford mentioned various benefits which they considered that they and their children would derive from living there.

111. They did not wish to continue to live in the West Heath Road property, as a violent robbery had taken place there at a time when Mrs Munford had been there alone with her two children.

112. Mr Munford's evidence was that he had engaged finders to identify a suitable property in the relevant part of Central London, as such properties sold so quickly. He and Mrs Munford were looking for a property within walking distance of his office in Mayfair that he could renovate to a high standard. They regarded the Halsey Street property as ideal. It was a five storey town house with four bedrooms and was the right size for their family. Mr Munford stated that in 2004 he and Mrs Munford had had no intention of having any more children.

113. At the same time they had found the Ingram Avenue property. This had required cosmetic work, and although it was larger than they needed, they bought it for a very good price. They had decided to live there while carrying out the work on the Halsey Street property. They had planned to sell the Ingram Avenue house once they moved to Halsey Street.

114. The Halsey Street property had been acquired at a very good price. Substantial renovation works were carried out on it. Mr Munford found the project very time consuming but worthwhile because he was creating what he believed to be their ideal family home. For this reason, work had been carried out to a very high standard to take account of their particular requirements.

115. Mr Munford's further evidence was that the family had moved into Halsey Street on 26 November 2005. There was some snagging work to be completed, but it seemed to be dragging on unnecessarily. He had hoped that moving in would allow Mrs Munford to identify exactly what needed doing, and that having the family living in the property would demonstrate to the workmen a sense of urgency to get the work

finished. The family had mattresses on the floor to sleep on, and their bedding. They did not consider this a hardship, as they had only a few weeks before they were to go on holiday for Christmas.

116. From the time of purchasing Halsey Street, through the year of the renovation project and at the time when the family had moved into that property, it had been with the intention that it would be their new permanent family home.

117. While they were on holiday they had discussed their new home. Mrs Munford was four months pregnant at the time they moved in. The renovation work had been well under way when they had found out that Mrs Munford was expecting again; this had been a surprise.

118. It had not been until they had actually begun living in Halsey Street that they had realised how impractical it would be to live there with a baby. There were five flights of stairs, so they would have required around ten stair gates once the baby became mobile. They were planning on getting a full-time nanny for the baby, and the nanny would require accommodation. The property had not been designed with this in mind. The basement, which might otherwise have been staff quarters, had been converted into a living space with bespoke audio-visual equipment fitted at some expense.

119. Mr and Mrs Munford had decided while on holiday that they would reluctantly have to return to Ingram Avenue, which was more suitable for the family with a baby or toddler and with a live-in nanny.

120. They had moved back to Ingram Avenue after returning from their holiday on 7 January 2006.

121. Mr Munford had taken advice from his then accountant on the taxation position in relation to Halsey Street. The accountant had advised that Mr and Mrs Munford could make an election to treat Halsey Street as their main residence, so that any gain on disposal would be exempt from capital gains tax.

(b) HMRC's submissions on loss of tax

122. For HMRC, Mr Linneker made a number of challenges to Mr Munford's case that he and his family had occupied the Halsey Street property as their only or main residence. Mr Linneker referred to the decision of the Tribunal in *Jason Terrence Moore v Revenue and Customs Commissioners* [2010] UKFTT 445 (TC) at [38]:

> "38. A residence for these purposes must be a person's 'home' (*Sansom v Peay*, [52 TC 1] at 6G), 'a place where somebody lives' (*Frost v Feltham*, [55 TC 10] at 13I). However, 'even occasional and short residence in a place can make that [place] a residence' (*Moore v Thompson*, [61 TC 15] at 24E). *Goodwin v Curtis* is more helpful in assisting a resolution of the problem on the facts of this appeal. The Court of Appeal in that case was unanimous in the view that 'there must be some assumption of permanence, some degree of continuity,

> some expectation of continuity to turn mere occupation into residence'."

123. A residence had to be a person's home. Even though short residence could make it a residence, there had to be a degree of permanence, continuity or expectation of continuity for occupation to be residence.

124. HMRC submitted that the evidence showed that it was more likely than not that Mr Munford and his family did not occupy the Halsey Street property as their residence as they asserted.

125. In the alternative, HMRC submitted that even if there was any period of occupation, the evidence showed that such occupation lacked any degree of permanence, continuity or expectation of continuity.

126. HMRC contended that Mr Munford was not entitled to private residence relief in respect of the disposal of the Halsey Street property.

127. Mr Linneker made submissions on the evidence. HMRC's first argument was that Halsey Street had been an investment property. HMRC contended that it was more likely than not that Mr Munford had purchased the property with the intention to refurbish it, as it was in need of refurbishment, and to sell it once refurbishment had been completed knowing that he would make a substantial gain, and not a residence for his family as he had asserted. The circumstances suggested to HMRC that this might even have been an adventure in the nature of trade.

128. All the previous family homes had been owned jointly by Mr and Mrs Munford. Consistently with that history, Ingram Avenue had been acquired in joint names. In contrast, Halsey Street had been acquired in Mr Munford's sole name. This was consistent with the acquisition of another property by Mr Munford in his sole name.

129. The Halsey Street property had been marketed as "an unmodernised Freehold house", as shown in the estate agent's preliminary particulars. The mortgage valuation report for the property had referred to the planned major works on the property, including extension.

130. The works on the property had commenced in December 2004, and the point of "Practical Completion" had been reached on 13 February 2006. The date of the contract for the sale of the property had been about a week later, on 21 February 2006.

131. Most of the fee invoices relating to the refurbishment had been addressed to Mr Munford at a business called Corporate City Developments based at Mr Munford's office address and owned by Mr and Mrs Munford.

(c) Mr Firth's response on the "investment property" submission

132. Mr Firth responded to Mr Linneker's submissions that Halsey Street had been an investment property. On the question of the property not having been purchased and mortgaged in joint names, if it had been acquired as an investment to be

redeveloped and never lived in, one might have expected it to be acquired through a company, particularly in the light of the then rate of capital gains tax at 40 per cent. Even if that had not been done, a purchase in joint names would have had the advantage of allowing Mrs Munford to use up her allowances or basic rate band. The mortgage had been "ported over" (ie transferred) from the previous family home to the Halsey Street property; as would be expected, the person on the mortgage matched the person on the title.

133. The plan to renovate Halsey Street was entirely consistent with everything which Mr Munford had said about the preparation of the property for the family to live in as their new permanent family home. On the question of the dates of the beginning and completion of the works, it was not clear how this supported HMRC's case. The property was in Mr Munford's name, and the work was done on his personal behalf, irrespective of how the fee invoices were addressed. The address was simply one where Mr Munford's personal assistant could receive the documents and deal with them as appropriate. Mr Firth pointed out that the mortgage offer on Ingram Avenue had been sent to Mr and Mrs Munford at the same address.

(d) My conclusions on HMRC's investment property submission

134. I consider Mr Linneker's submissions in support of his "investment property" argument in the light of Mr Firth's responses for Mr Munford. As I have already emphasised, the burden of proof is on HMRC. On the question of any prospective increase in value as a result of the refurbishment works, this is not necessarily an indication of an investment motive. Any purchaser of a property who decides to undertake a renovation project is likely to consider whether the carrying out of the work will enhance the value of the property, whether or not his ultimate intention is to dispose of it rather than living in it as his residence. The hope for an increase in value cannot be taken as an indication of that purchaser's intention to sell.

135. As to the purchase of Halsey Street in Mr Munford's sole name, this may appear inconsistent with other property purchases made by Mr and Mrs Munford, but I do not consider that it amounts to an indication of an investment motive. Whatever the formal position in relation to the legal interest in the property, there may have been other arrangements as between Mr and Mrs Munford concerning underlying interests in it. (This leaves aside the question of what a court might or might not have ordered had there been a dispute between them as to entitlement to the eventual proceeds of sale.)

136. I accept Mr Firth's submission that the plan to renovate the property was entirely consistent with Mr Munford's evidence concerning its preparation for use as the family home. (This should not be taken as a finding that it was so used; it is neither necessary nor appropriate for me to make such a finding.)

137. In relation to the timing of the start of the refurbishment, the practical completion, and the sale of the property, these are not inconsistent with the version of events put forward by Mr and Mrs Munford, namely the acquisition, the refurbishment, the period of occupation, the change of mind in the light of their

changed family situation and the decision that they should go back to Ingram Avenue. I do not consider that the timing can be taken as an indication of motivation to realise an early profit on realisation of the property as an investment asset. On a connected point made by Mr Linneker, the facts that the larger and more expensive Ingram Avenue property remained available to Mr and Mrs Munford and that ultimately they continued to live there do not necessarily lead to a conclusion that Halsey Street was acquired for investment purposes; if events had taken a different turn and they had decided that Halsey Street should be their home in the long term, it would have been Ingram Avenue that could have been the property suggested by HMRC to have been acquired for investment purposes.

138. Mr Linneker followed up a question raised by Officer Baxter concerning the Ingram Avenue property and Mr and Mrs Munford's intentions in relation to it if the intention was that Halsey Street should be the family's main residence. Reference had been made in the accountants' response to Ingram Avenue having been quietly marketed by Glentree Estate Agents.

139. It appears to me that there must have been some confusion on HMRC's part in relation to this reply, or possibly some confusion on the part of the accountants as to the point at which this marketing had taken place. In cross-examination, Mr Munford made clear that when he and Mrs Munford had bought Ingram Avenue, no sales literature had been produced. The property had been quietly marketed by Glentree Estate Agents. I am satisfied that Mr Munford's answers on this issue clearly and correctly state the position. Although Officer Baxter's question was presumably intended to relate to any potential onward sale of Ingram Avenue, the accountants took it as relating to Mr and Mrs Munford's purchase of that property. The answer does not throw any light on the question of Mr and Mrs Munford's intentions in respect of the Halsey Street property, in particular whether or not it was purchased as an investment property.

140. I accept Mr Firth's submissions on the question of the addressing of the invoices.

141. Looking at all the factors together in the light of the evidence and Mr Firth's responses, I am not satisfied on the balance of probabilities that Mr Munford acquired the Halsey Street property as an investment property.

(e) HMRC's submissions on absence of occupation as a residence

142. Mr Linneker's next series of submissions was made with a view to showing that Mr Munford did not occupy the Halsey Street property as a residence. Mr Munford had said that he and his family had moved into the property on 26 November 2005 and had vacated the property six weeks later on 7 January 2006, a period during which Mr Munford and his family had taken a three week holiday in December 2005. In HMRC's submission, the evidence showed that it was more likely than not that Mr Munford and his family had not occupied the Halsey Street property as their residence.

143. Mr Linneker referred to a letter dated 20 July 2005 from Mr Munford to the Royal Borough of Kensington and Chelsea indicating that the Halsey Street property was vacant and had been vacant since 1 April, due to structural alterations and repairs being carried out, and asking for a corrected council tax bill to be issued.

144. Mr Linneker also referred to an email message from a Mr Bradley of the Royal Borough of Kensington and Chelsea to HMRC's Officer Baxter dated 18 September 2013, indicating that from 19 April 2005 the non-resident owners had been Mr and Mrs Munford. In a further email dated 20 September 2013, Mr Bradley stated:

> "A letter was received from them dated 20/07/05 claiming exemption due to building works. Our property officers visited several times subsequently & confirmed works in progress. Their final visit was on 07/02/06 when they reported that works were nearly complete & the property was for sale. We were subsequently told that the property was sold on 17/03/06."

145. Although the Royal Borough of Kensington and Chelsea council records showed occupation and liability in the name of the new owner from 17 March 2006, there was no evidence that Mr Munford had told the council that he and his family had taken up residence at the property before that date. Nor was there any evidence that Mr Munford had notified any others, such as his children's schools, that he had moved to Halsey Street. There was no evidence that Mr Munford had informed Barnet Council that Ingram Avenue was no longer occupied, as Mr Linneker submitted would have been expected in the circumstances.

146. Mr Linneker referred to differing accounts relating to furniture and personal possessions and how these were moved to Halsey Street. (As there was some dispute as to the relevance of the evidence, I consider this below.) Mr Linneker acknowledged that the furnishing or otherwise of the property was not in itself sufficient to conclude that Mr Munford and his family did not take up occupation of the property as their residence, but contended that what he said were inconsistencies in the developing account of the furniture and other items brought into question the accuracy and reliability of the information which Mr Munford had provided to HMRC.

147. Mr Linneker commented that Mr Munford's assertion that the move to the Halsey Street property had taken place on 25 November 2005 had also been at a time when Mr Munford's children, aged 10 years and 7 years, would normally still have been in school; at a time when Mr Munford's wife was 4 to 5 months pregnant; at a time when they were preparing for a three week family holiday; a move without the benefit of a professional removal service; at a time they were content to sleep on what Mr Linneker referred to as "camp beds"; at a time when the property was still undergoing refurbishment works, and at a time when their larger residence at Ingram Avenue was available to them. Mr Linneker submitted that this all painted a rather extraordinary situation, one which HMRC contended cast doubt on the assertion relating to the occupation of the property during the period from 26 November 2005 to 7 January 2006.

148. Even if Mr Munford and his family had moved into the Halsey Street property on 26 November 2005, the circumstances which Mr Linneker had outlined were strongly indicative of temporary occupation and did not suggest occupation of the property with any degree of permanence, continuity or expectation of continuity.

149. Based on the evidence HMRC submitted that the Halsey Street property had not been occupied by Mr Munford and his family as their residence and as such Mr Munford was not entitled to private residence relief in respect of the disposal of that property.

(f) Mr Firth's response to HMRC's "absence of occupation" submissions

150. Mr Firth responded to Mr Linneker's submissions on the "absence of occupation as a residence" issue. Mr Firth submitted that the council tax exemption had been correctly claimed on 20 July 2005. Mr Munford had explained the meaning of this letter in the course of cross-examination; on the date when it had been written, the property had been vacant. It did not indicate that the property was going to be vacant for the whole period. Mr Munford did not know whether he had informed the council of the change of occupancy. In his witness statement he had said that they had not got round to notifying the relevant authorities in respect of the changes for council tax purposes; he would have sorted out the council tax on his return and they would have sent him a recalculated bill for each property, so he was not overly concerned about it. In cross-examination he stated that it had been decided to sell the Halsey Street property, so that the notification to the council would not have taken priority.

151. Mr Linneker's point amounted to nothing more than putting to Mr Munford that he had not notified the council straightaway. This was true but not surprising, and hardly a priority at the time. The need to notify had been overtaken by events.

152. On the question of the visits by officers of the council, which Mr Firth argued had not been proven to have occurred, it was entirely possible, if such visits had occurred, that the visitor or visitors had simply made an assumption without investigation or enquiry.

153. In relation to notifying the schools, there had been no need to do so immediately, as, for the time being, the Munfords still owned the Ingram Avenue property.

154. As to the point on moving furniture, the Halsey Street property had fully fitted out bedrooms, kitchen and so on. Mr Linneker had referred to "camp beds"; these words had never been used by Mr Munford or his advisers. The reference in correspondence had been to fold-up beds; these were futons, with mattresses and a base. There had not been a mass moving of furniture.

155. It had been true that the property was still undergoing refurbishment on 26 November 2005, but the works had been substantially completed and the property had been suitable for living in, as acknowledged in the documents on which HMRC

purported to rely. Snagging issues remained, and part of the reason for moving in had been to ensure that these were dealt with swiftly and not overlooked.

(g) My conclusions on HMRC's "absence of occupation as a residence" submission

156. I consider Mr Linneker's submissions on the question of residence. On the first, relating to the timing, I have already commented on its application in the context of the "investment" argument. On its relevance to the residence issue, there have been examples in other cases of relatively short periods qualifying, as in *Richard James Dutton-Forshaw v Revenue and Customs Commissioners* [2015] UKFTT 478 (TC), TC04644. In that case the period of residence was about seven weeks, as stated by the Tribunal at [62].

157. I acknowledge that other cases on private residence relief need to be looked at with caution, as indicated in another case with which I was concerned, *Wade Llewellyn v Revenue and Customs Commissioners* [2013] UKFTT 323 (TC), TC02726, at [46]-[47], in which the Tribunal commented on the judgment of Millet LJ in *Goodwin v Curtis* ([1998] STC 475 at 480):

> "[46] In his leading judgment, Millett LJ commented:
>
> > "Temporary occupation at an address does not make a man resident there. The question whether the occupation is sufficient to make him resident is one of fact and degree for the commissioners [ie, since April 2009, the Tribunal] to decide."
>
> [47] This makes it clear that the question of the nature of the occupation is a question of fact for the Tribunal. As a result, examining the facts of other cases is unlikely to provide significant assistance, unless a case amounts to an illustration of the relevant principles to be taken into account."

158. It is also necessary to keep in mind the question of the burden of proof. As I have indicated, it is for HMRC to satisfy the Tribunal on the balance of probabilities that Mr Munford did not qualify for private residence relief in respect of the Halsey Street property.

159. On the question of the claim for the council tax exemption, I accept Mr Firth's submissions. The absence of an amendment to take account of the period during which the Munford family were in the property is not of itself evidence that they did not occupy the property during that period. The absence of notifications to the two councils can be explained by the swift movement of events following the decision taken by Mr and Mrs Munford when on holiday.

160. Mr Linneker also referred to the email messages concerning the visits by the council's property officers. Mr Firth challenged this evidence on the basis of his opening submission concerning the absence of evidence. I have expressed my views on that challenge. The evidence was obtained from the Royal Borough of Kensington and Chelsea as a result of a letter headed "Request under S29 DPA 1998" sent by

Officer Baxter of HMRC. This does not appear to have required Mr Munford's consent.

161. As a result, I treat this evidence with some caution in the absence of supporting evidence from the property officers involved. Nevertheless, it is possible to comment on it, in the terms used by Mr Firth. If it is assumed that the visits described in those messages took place, there is no evidence as to the actions taken by the property officers. They may have looked at the property from a distance and observed that works were continuing. There is no evidence that they inspected the inside of the property at a time when members of the Munford family were present. There is nothing in the evidence either of Mr Munford or Mrs Munford to suggest that they had knowledge of any such visit. Without further evidence from the property officers, the visits mentioned in the emails are not sufficient to show that the Munford family were not in occupation of the property during the period from 26 November 2005 to 7 January 2006.

162. I accept Mr Firth's submission concerning notification of the schools. The absence of notification is not inconsistent with a period of residence in the Halsey Street property.

163. On the question of the moving of furniture, there are certain confusions, possibly inconsistencies, between elements of the evidence. Rather than reviewing these in detail, it is simpler for me to consider the position on the basis adopted by Mr Firth. The position taken for Mr Munford is that it was not necessary to move significant amounts of furniture when they went into the Halsey Street property on 26 November 2005, because it was only necessary to take in the fold-up beds and some other items; the property contained various items of fitted furniture. Mr Linneker accepted that the furnishing or otherwise of the property was not in itself sufficient to conclude that Mr Munford and his family did not take up occupation of the property as their residence. I do not consider that limited availability of furniture is a significant factor in support of HMRC's submissions on the absence of residence.

164. In relation to the certificate of practical completion being dated February 2006, a letter to HMRC dated 19 December 2014 from Mr Munford's architects states:

> "There is no evidence in our files that shows the client moved in, however, the snagging items remaining in November 2006 to January 2006 were local, and although practical completion did not occur until February 2006, in our opinion it would have been possible to occupy the premises during this time."

I consider that this response is entirely consistent with the evidence of both Mr and Mrs Munford that they occupied the property. Thus the dating of the certificate does not support the implication in HMRC's argument that the property was incapable of occupation during the relevant period.

165. On Mr Linneker's more general list of factors, I consider that these can all be answered by reference to the accounts given by Mr and Mrs Munford explaining the way in which they had originally approached the Halsey Street project and how, as a

result of supervening events, their minds had been changed when considering the practicalities of living in that property.

166. Looking more generally at the residence question, I do not consider that HMRC have succeeded in demonstrating on the balance of probabilities that Mr and Mrs Munford did not occupy the Halsey Street property as their private residence.

167. Although the period for which they maintain that they occupied the property was from 26 November 2005 to 7 January 2006, the effect of the elections which they made was to specify Halsey Street as their main residence for the one week from 19 to 26 December 2005.

168. I should stress that my conclusion that HMRC have not succeeded in showing that Mr and Mrs Munford did not occupy the Halsey Street property as their private residence should not be taken as a positive finding that it was their private residence. Had the burden of proof been on them, it would have been necessary for the Tribunal to take a very different approach to the evaluation of the evidence. It does not assist to speculate what the outcome of that process would have been.

169. As HMRC have not satisfied the burden of proving that Mr and Mrs Munford and their family did not occupy the Halsey Street property as their private residence, it follows that HMRC have not shown that there was a loss of capital gains tax on the disposal of that property by Mr Munford.

170. That is sufficient to determine the outcome of Mr Munford's appeal, which must be allowed on that basis alone. However, to allow for any possibility that my conclusion might not be upheld, it is necessary to consider the other question; assuming, contrary to that conclusion, that there was a loss of capital gains tax, was that loss brought about deliberately by Mr Munford?

Was the alleged loss brought about deliberately?

171. Mr Linneker's submissions put the emphasis on s 29 TMA 1970. In contrast, Mr Firth argued that the relevant provision on which HMRC needed to rely was s 36(1A) TMA 1970. I accept Mr Firth's argument. Unless HMRC can show that the conditions set out in s 36(1A) are satisfied, there is no basis for considering the position in the context of s 29 TMA 1970, because the discovery assessment will have been made out of time. For the assessment to be held to be "in time", HMRC have the burden of proving that the loss of tax was brought about deliberately by Mr Munford.

(a) Mr Linneker's submissions on deliberate conduct

172. In his submissions, Mr Linneker accepted that the burden was on HMRC to show that Mr Munford's actions in submitting an incorrect return were deliberate. HMRC submitted that, based on the evidence, it was more likely than not that when he had submitted his tax return, Mr Munford had known both that he had made a substantial gain on the sale of the Halsey Street property and that he was not entitled to the private residence relief afforded by s 222 TCGA 1992. As a result, HMRC were

entitled to issue an assessment in accordance with the time limits of s 36(1A)(a) TMA 1970.

173. Mr Linneker referred to the evidence on the "brought about deliberately" issue. Mr Munford had stated that he was the Chief Executive Officer of a company which he had set up, specialising in brokering high value residential and commercial mortgages. Mr Linneker commented that it was surprising that, given his own professional role, Mr Munford's mortgage application for the funds to purchase the Halsey Street property gave his income before tax as a very much higher amount than that reported to HMRC in his tax returns for 2003-004 and 2004-05.

174. HMRC accepted that this was not evidence that Mr Munford had deliberately submitted an incorrect tax return for the year ended 5 April 2006. However, HMRC contended that it was relevant when considering the accuracy and reliability of information provided by Mr Munford. Mr Linneker drew inferences as to Mr Munford's behaviour and approach.

175. In relation to Mr Munford's principal private residence elections, there was only one week when Mr Munford's election defined the period that Halsey Street was his main residence, in contrast to the period of six weeks' occupation by the family to which reference had been made by Mr Munford and his advisers during the course of HMRC's enquiry. That six week period had included a three week holiday in December 2005.

176. Mr Munford had known what he was doing, because he had taken advice from his then accountant, whose letter had included the following:

> "Further to our meeting, I attach a schedule showing the PPR election that I suggest you make to the Inland Revenue with regard to your two main residences.
>
> As you lived in both properties, you are able to claim PPR relief against the capital gain and, as discussed, the schedule attached shows the best possible way of utilising this relief to minimise the capital gain.
>
> We also discussed the risks involved in making the attached PPR elections. The Inland Revenue may look at your past and the present facts and may deem that you are carrying on a trade in buying and selling properties based on, for example, the period you held each property etc., or for any other reason.
>
> . . ."

177. When it had come to submitting his tax return for 2005-06, no reference had been made to the disposal of the Halsey Street property.

178. HMRC contended that Mr Munford's actions relating to these elections, their timing, and the fact that he had not drawn HMRC's attention to the disposal of the Halsey Street property when completing his tax return despite the warnings given to him by his accountant, showed that he had set about this course of action to switch the main residence for the purpose of private residence relief only, actions that were

therefore deliberate and intended only for the purpose of avoiding capital gains tax on a substantial gain.

179. Mr Linneker made submissions based on the contention that Halsey Street was an investment property. In the light of my above finding to the contrary, I do not record or take into account those submissions.

180. He argued that even if Mr Munford and his family had occupied the Halsey Street property at some time during the period 26 November 2005 to 7 January 2006 as asserted, it could only have been for between one week and three given their three week holiday in December 2005. This temporary period of 'camping' in the property in the circumstances described showed that this was intended to pretend that there was some residence, such that this was also a planned and considered approach to knowingly and wrongly claiming private residence relief.

181. On the basis of his submissions on the evidence, Mr Linneker submitted that the condition in s 36(1A) TMA 1970 was satisfied because the loss of tax had been brought about by Mr Munford's deliberate actions. HMRC were therefore entitled to make an assessment to bring into charge tax on the capital gain that ought to have been assessed.

(b) Mr Firth's response on deliberate conduct

182. Mr Firth commented that, as far as could be ascertained, HMRC's case was that there was a deliberate loss of tax because Mr Munford had never occupied the Halsey Street property, and at the time of submitting his return he had known that it was a condition of private residence relief that the property had been occupied.

183. The first point was that HMRC were accusing Mr Munford of lying about occupying Halsey Street in order to obtain private residence relief. The Tribunal should begin by considering the inherent probabilities of such dishonesty. Mr Firth referred to Mr Munford's professional position and the regulation regime which applied to his and his company's professional operations.

184. In that context it was inherently unlikely that Mr Munford would have suddenly and uncharacteristically decided to bring about a loss of tax in a dishonest manner in order to save himself just under £200,000 of tax (this being the tax at 40 per cent on what Mr Firth submitted was the actual gain of approximately £500,000, less the then annual exempt amount of £8,500).

185. Not only would such dishonest behaviour have been completely without precedent and contrary to the many indications of good character referred to in oral evidence; it would also have been irrational to risk everything, in particular the loss of what was referred to as his "CF1" status (see below), and therefore his business, for what was a relatively small amount for him.

186. The inherent probability that Mr Munford had done what he had been accused of doing was therefore extremely low. Very cogent evidence would be required to make it "more likely than not".

187. The second point was that when HMRC's investigation had begun in September 2013, the relevant period from 2004 to 2005 had already been more than eight years beforehand. This had two important consequences. One was that no weight could be attached to the absence of documents that might have existed at the time; there was no requirement or expectation that persons should keep documents for that long. The other was that Mr Munford was at a disadvantage in dealing with the investigation because of the passage of such a lengthy period, both in terms of his own recollection and the potential availability of documents to refresh his memory.

(c) My conclusions on the deliberate conduct issue

188. On Mr Linneker's submission concerning the completion by Mr Munford of his mortgage application form, I consider it correct for Mr Linneker to have acknowledged that this did not constitute evidence that Mr Munford had deliberately submitted an incorrect tax return. However, I think it appropriate to respond to that submission.

189. In his oral evidence, Mr Munford explained that he runs an "independent financial adviser" type of business. His own status was a "CF1", which was the principal of a firm, someone who was responsible for any breaches of protocol or compliance. He had never had a complaint. He considered his reputation to be hugely important. His business was his reputation and he would not make a dishonest representation. The effect of any such representation on his business would be negative. The whole regulatory basis of the financial services industry in the UK was based on probity and being fit and proper to advise clients, and to run a business. If that was in doubt, it would have negative implications on his reputation, both in relation to clients and, very importantly, to regulators to whom his business had responsibilities, and consequent negative implications for the continuation of the business.

190. On the question of the amount of the income before tax referred to in his mortgage application form, he explained that in addition to his own income, this included the profits of his own company, of which he was the 99.9 per cent owner. The net profit from his company was solely distributable to him if he so wished. The common understanding and accepted protocol in assessing mortgage applications was income that was available to the borrower. That income was available to him should he wish to take it.

191. I accept Mr Munford's evidence on these two elements of Mr Linneker's argument. Before considering all the factors together, it is necessary to deal with certain other issues raised by Mr Linneker.

192. On the question of the private residence relief elections, I accept Mr Firth's submission that the whole point of making such an election is to determine the

question definitively. He explained that there was no reason why the period on the election should correspond to any actual period of residence, so the taxpayer was entitled to pick any period. The fact that the period shown in the election was a single week was therefore neither here nor there.

193. Later in the hearing, Mr Firth referred to a passage from the HMRC Capital Gains Manual, CG64510. This showed how private residence relief could be maximised by varying notices given under s 222(5) TCGA 1992. Far from the elections being regarded as contrived, it appeared from that passage that HMRC supported, or at least did not object to, tax planning in this context. The idea had been to get the gain on the one property down to the smallest possible time so as not to affect the relief on the other property. This was exactly what HMRC's Manual talked about doing.

194. It must be emphasised that in order to make an election, the property in question must actually be the taxpayer's main residence, or one of his main residences. However, in the context of an argument under s 36(1A) TMA 1970 that the taxpayer has deliberately brought about a loss of tax, the question is not whether the taxpayer has made a valid election, but instead whether the taxpayer has made an election in circumstances where he knows that he does not qualify for private residence exemption.

195. It is clear that Mr Munford took advice from his accountant, as shown by the extract set out above. In cross-examining Mr Munford, Mr Linneker sought to show that the accountant's advice had been based on the factual information which Mr Munford had provided to his accountant. Mr Munford responded that the accountant's advice had been based on the facts, partly from a conversation which Mr Munford had had with him, and partly from the accountant's knowledge of Mr Munford's occupancy and residency in the Halsey Street property. Mr Munford considered the reference to risks in the letter to be a caveat of a standard nature, and not specific to his situation.

196. The question as to the making of the elections based on the accountant's advice needs to be considered in the wider context of the deliberate conduct issue, which I review after looking at the other relevant factors.

197. Mr Linneker referred to the absence of anything on Mr Munford's return to indicate that he had disposed of the Halsey Street property. I do not consider this to be any indication of an attempt to conceal or mislead. Mr Munford, based on his understanding of the facts, had taken advice from his accountant concerning the availability of private residence relief. His accountant gave that advice on the basis of what Mr Munford had told him, and wrote to him at the Halsey Street address to set out the advice. This is entirely consistent with Mr Munford's evidence that the accountant did not base his advice purely on what Mr Munford had told him. (The accountant did provide a witness statement, but as he was not called to give evidence, I have ignored that statement.) If the gain was not considered to be taxable, there is no apparent reason why Mr Munford should have made any reference to it in his tax return.

198. In that connection, I accept that the letter from Mr Munford's accountant was simply warning him that he could not ignore the possibility of a challenge by HMRC.

199. Mr Linneker argued that Mr and Mrs Munford and their family had been on holiday for three weeks of the period for which they stated that they had lived in the Halsey Street property. I consider this to be a completely erroneous and irrelevant argument. Going on holiday cannot affect the question of residence. If the position were to be as suggested by Mr Linneker, this would mean that anyone who went away for, say, six months at a time would have to adjust the extent of their private residence exemption by reference to every such occasion so that the correct taxable portion of their gain on ultimate sale of their residence was accounted for in their tax return. Arguably, on that basis, everyone who went away on holiday for only a week or two at a time would also find themselves in that same position when they came to sell.

200. I appreciate that Mr Linneker's argument concerned the quality of the family's residence in Halsey Street. However, this is not a question relevant to the issue of deliberate behaviour on Mr Munford's part. It would be necessary for HMRC to go further and show that, given the nature of the family's residence (or possibly non-residence) in the property Mr Munford was fully aware, at the time of completing his tax return, that private residence relief was not available.

201. Mr Linneker suggested that the period which the Munford family spent "camping" in the property demonstrated that there was an intention to pretend that there was some residence and that this was a planned and considered approach to claiming private residence relief in circumstances where it was not available and where Mr Munford was aware of this. This suggestion amounts to no more than an assertion.

202. As I have sought to make clear, the burden of proving, for the purposes of s 36(1A) TMA 1970, that Mr Munford deliberately brought about a loss of capital gains tax on the disposal of the Halsey Street property falls on HMRC. Mr Firth emphasised that it had never been put to Mr Munford that he had known at the time of submitting his return that it was a condition of private residence relief that the property had to be occupied.

203. I have accepted Mr Munford's evidence on his professional status and the completion of his mortgage application form. I have considered Mr Linneker's submissions, the general thrust of which is to seek to show deliberate conduct on Mr Munford's part in relation to his claim for private residence relief. Looking at all the factors together, I take into account the inherent probability or otherwise that Mr Munford deliberately and wrongly claimed private residence relief in respect of the Halsey Street property, thus bringing about a loss of tax. Having regard to all the evidence considered together, I find that proposition to be inherently improbable. In particular, Mr Munford took advice from his accountant on his capital gains position, and Mr and Mrs Munford made private residence elections based on that advice. The basis on which HMRC have sought to challenge the evidence of Mr and Mrs Munford amounts to a series of assertions and assumptions. My conclusion is that HMRC have not achieved their objective in their attempt to make that challenge. In addition, I do

not consider that HMRC have succeeded in discharging the burden of proving on the balance of probabilities that Mr Munford deliberately brought about a loss of tax in relation to the Halsey Street property. As a result, the conditions for making an assessment out of time under s 36(1A) TMA 1970 are not fulfilled.

204. In the same way as I have done in the context of the "loss of tax" question, I emphasise that I am not making a finding that Mr Munford has validly claimed private residence relief; in the context of the present circumstances, it is not necessary or appropriate for me to do so. However, I acknowledge Mr Firth's submission that the question of the quality of the residence required in order to qualify for private residence relief is a value judgment based on nuanced principles that have emerged from decades of case law. As a result, the only course open to a taxpayer who considers that relief is available is to proceed on that basis and wait to see whether HMRC choose to question the stance which that taxpayer has taken. Mr Firth pointed out that the taxpayer would have to decide whether to make any disclosure in the "white space" on the tax return and potentially block any discovery assessment, or to say nothing and remain at risk of a discovery assessment. I agree with him that this is a matter for the taxpayer and his advisers.

205. In Mr Munford's case, HMRC did not take any action after receiving the elections made by Mr and Mrs Munford in March 2006 and sent to HMRC in March and early April 2006, and only began to enquire into the position in 2013. As a result, they were subject to s 36(1A) TMA 1970, and so had to prove deliberate conduct on Mr Munford's part. I have found that they have not succeeded in doing so.

206. For the above reasons also, Mr Munford's appeal must be allowed.

Other matters

207. I have concluded on two alternative grounds that the assessment cannot stand. As a result, I do not consider it necessary to deal with the question of the quantum of the assessment, and in particular with the question whether certain expenditure shown as deductions in computing the capital gain is or is not deductible.

208. As the assessment cannot stand, it also follows that the penalty assessment falls away. I do not consider it necessary to review the percentage rates of abatements made in arriving at the final amount of the penalty assessment.

Outcome of the appeal

209. Mr Munford's appeal against the assessment and the penalty assessment is allowed.

Right to apply for permission to appeal

210. 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 CLARK
TRIBUNAL JUDGE

RELEASE DATE: 3 January 2017