TC05747

Appeal number: TC/2010/05696 and TC/2012/10690

Income Tax – disclosure and adjournment applications refused – discovery assessments – was income deposited in bank accounts income from employment? No- was the appellant a shadow director?-yes-does a NIL assessment satisfy Section 29(1) TMA – no - appeals allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

IAN ELDER **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT
MEMBER: ROLAND PRESHO

Sitting in public at North Shields on Tuesday 19, 20 and 21 April 2016

Submissions on competency of assessments - 28 April 2016 and 11 May 2016

Transcripts – 31 July 2016

Closing Submissions – 7 September 2016 and 27 September 2016

Mr Chris Leslie with Mr Jeff Lone for the Appellant

Mr Brendan Hone, Officer of HMRC, for the Respondents

DECISION

Background

1. The procedural, and indeed general, background to these appeals is, and has been, complicated as evidenced by the two long decisions already issued by Judges Tildesley and Cannan.

2. Mr Elder has made two separate appeals. The first appeal (TC/2010/05696) was made on 6 January 2010 against Revenue assessments in nil amounts for the years 1998-99 to 2006-07. That appeal was listed for hearing on 1 December 2010 when it was adjourned part heard after hearing the parties' evidence.

3. The second appeal (TC/2012/10690) was made on 26 November 2012 against a Direction under Regulation 72 Income Tax (PAYE) Regulations 2003 ("Regulation 72") for the years 1998-99 to 2006-07. The total amount of the tax assessed under the Regulation 72 Direction was approximately £170,000. On 15 February 2013 the Tribunal directed that the second appeal be heard at the same time as the resumption of the hearing of the first appeal.

4. For the avoidance of doubt, given the terms of Mr Elder's witness statement, neither appeal involves penalties in any form.

5. On 29 April 2013, the Tribunal issued extensive Directions of its own motion to progress the appeals. Further applications were lodged with the Tribunal and having heard parties on 25 and 26 March 2014, Judge Cannan issued a decision thereon on 30 July 2014 ("the 2014 decision") reported at [2014] UKFTT 728 (TC). It is not necessary to rehearse the detail but in particular it was decided that

   (a) The appeals should <u>not</u> be categorised as complex.

   (b) Some of the issues identified as preliminary issues required evidence and findings in fact to be made.

6. By Directions issued on 29 January 2015 at Direction 8, Judge Cannan directed that the part heard first appeal be heard of new. At Direction 2 it was directed that both parties agree a short statement of issues to include the substantive and preliminary issues. Those were amended in the course of the first day of this hearing and the ultimate agreed position is as set out below.

7. On 31 March and 1 April 2016, I issued Directions refusing Mr Elder's representative's opposed application to the effect that HMRC provide the appellant with "… submissions dated 29 January 2010 and any other relevant information …" and that on the basis that HMRC did not intend to rely on the said submission(s) and the witness in question would be available for cross-examination. The application for a stay in the proceedings was not granted given the proximity of the hearing and the long history of the proceedings but Mr Elder was given leave to lodge a fully reasoned application for adjournment together with details of all relevant authorities.

8. We pointed out to the parties that as long ago as April 2013, Judge Tildesley stated that "The Tribunal has also formed the view that the relationship between the parties was fractious …" and little seemed to have changed in the interim other than that Mr Leslie had recently replaced the representative who had previously acted. We are therefore indebted to Messrs Hone, Leslie and Lone who adopted a pragmatic and flexible approach to the Hearing.

9. That approach was essential not least because the hearing was punctuated with references to documentation produced by Mr Elder but which had not been served on HMRC. There were frequent "conversations" as to relevance but ultimately there was no dispute about which evidence or documentation was admitted, excluded or withdrawn.

Appellant's Applications for Disclosure and Adjournment

Disclosure

10. On 29 February 2016, (erroneously described as 2015 in the Application) Mr Elder's representative had sent HMRC an email request for signed copies of the witness statements and pointing out that "….We also note that in Mr K Wilde witness statement at point 8 he refers to a copy of a written summary at …" and requested a copy of the summary. That was immediately sent to the appellant.

11. Mr Elder argues that having read the summary it was noted that the officer had read the "file papers and submissions ….dated 29 January 2010" and on 6 April 2016, Mr Elder applied to the Tribunal for a Direction that HMRC "…disclose the 'file papers' which were relied on by Mr Wilde in his Direction dated 3 April 2012" and sought an adjournment of the hearing.

12. On 13 April 2016, HMRC opposed that application on the basis that the "file papers" were the original HMRC enquiry papers. All correspondence and documents upon which HMRC proposed to rely at the hearing had been copied from those enquiry papers and are in the document Bundles.

13. Mr Elder's representative made it clear that the application for disclosure was not restricted to that internal HMRC submission dated 29 January 2010 (erroneously described in the Application as 2012). However, there was no specification as to what documentation was in fact sought.

14. HMRC repeatedly stated that Officers Bell and Wilde were available to give evidence, that Officer Wilde had seen no correspondence or documentation other than that which had always been available to Mr Elder and his representatives (much of it generated by them) and that as far as the file papers were concerned the original document Bundles had been compiled as long ago as November 2011.

15. On 24 March 2016, HMRC stated that the document dated 29 January 2010 had been located and was "….an internal HMRC submission paper sent by Mr Charles Bell … and

contains a summary of the enquiry at that date including the tax risks involved …". HMRC argued that the document is privileged as internal correspondence.

16. The progress, or not, of the enquiry until January 2010 is well documented in the Bundles and we make findings thereanent below.

17. As far as the evaluation of the tax risks involved is concerned, on the balance of probability, that would be the officer's opinion of the tax risks. We drew the attention of both parties to Mrs Justice Proudman in *HMRC v Sunico AS*[1] at paragraph 29 which reads:

> "29. Accordingly … much in this case turns upon my assessment of the documentary evidence in the light of the parties' respective analysis of it. As I have already noted, to the extent that the witnesses expressed their opinions on the documents they discussed, I have discounted their evidence".

We are bound by that and that is our approach. The opinion evidence of the officer is to be discounted.

18. Lastly, HMRC drew our attention to a letter from Officer Bell to Mr Elder dated 21 June 2012 where he summarised Officer Wilde's reasons for authorising the issue of a Direction.

19. We see no reason to direct disclosure of the 29 January 2010 document, whether or not it is privileged, since all relevant information therein is in the extensive Bundles produced to us. What then of the "file papers" including specifically "any appropriate documents flagged up" to Officer Wilde, as sought by Mr Elder?

20. There is a presumption that there should be full disclosure as set out in *Dorset Health Care NHS Foundation Trust v MH*[2] but that must be read in the context of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"). Rule 27 of the Rules expressly relates to documents which a party intends to rely upon or produce in proceedings. There is nothing to say that a party has to produce <u>all</u> documents including those which may assist the other party's case.

21. HMRC stated that they do not rely on the 29 January 2010 document and that all of the relevant file papers on which they rely are in the Bundles and have been so for a long time.

Adjournment

22. The remaining factor which has to be considered is the fact that if a Direction were issued in regard to Disclosure then the application for adjournment would inevitably have to be considered. Any application for adjournment is a balancing exercise as is confirmed in *Dhillon v Asiedu*[3] and both parties are entitled to have the

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[1] 2013 EWHC 941 (CH)

[2] 2009 UKUT 4 (ACC)

[3] 2012 EWCA Civ 1020

cases dealt with fairly and justly. *Vladimir Terluk v Berezovsky*[4] correctly identified that a late adjournment involves a significant loss of time and money. If this hearing were to be adjourned there would undoubtedly be a waste of scarce Tribunal time and a further delay in access to justice for the parties in these very long running and hard fought two appeals.

23. As indicated above, the application for disclosure arises from the belated perusal of Officer Wilde's summary. Officer Wilde's witness statement, which extends to one side of A4 was served timeously on 21 April 2015 and refers to the summary but did not produce it. HMRC confirm that that summary had not been included in the final Bundle as a result of an oversight and the reason that the sentence had not been completed in the witness statement was because the witness statement was dated 21 April 2015 and the final document Bundles were to be prepared by the appellant by 7 July 2015. No question about the summary was raised when the witness statement was served nor when the Bundles were prepared later that year.

24. Both officers were available for cross examination.

25. We had in mind Rule 2 of the Rules and, in all the circumstances, we find that it is not appropriate to make a Direction in regard to disclosure and therefore the application for an adjournment fell to be refused. In the event, however, we having explained our decision on disclosure, Mr Elder withdrew his application for an adjournment because he opposed HMRC's subsequent application for adjournment.

HMRC's application for adjournment

26. All of the discovery assessments in the first appeal were made under the provisions of Section 29 of the Taxes Management Act 1970 ("TMA") and are a mixture of normal time limit assessments and extended time assessments. We annex at Appendix A the relevant provisions of Section 29 TMA together with copies of extracts from all other relevant legislation cited in these appeals.

27. At the outset of the hearing we drew the attention of the parties to *Burgess & Another v HMRC*[5], with which neither was conversant, and in particular to paragraph 59 which reads as follows:-

> "… It must be recognised, on the other hand, that the assessment system that Parliament has legislated for is designed to provide a balance between HMRC and the taxpayer. Part of that balance is the requirement, in relation to discovery assessments and assessments outside the normal time limits, that HMRC satisfy the FTT that the relevant conditions for those assessments to have been validly made have been met. If HMRC fail to do so, for whatever reason, the fact that a taxpayer might escape tax that would otherwise have been due is simply the consequence of the operation of a system that provides such a balance. It is not for this Tribunal to seek to achieve any result other than that prescribed by the law."

We granted a recess to allow them to consider the impact thereof.

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[4] 2810 EWCA Civ 1345

[5] 2015 UKUT 578

28. After the recess Mr Hone requested that the hearing be adjourned in order that he could take advice from the Solicitors' Office and that application was vigorously opposed by Mr Leslie on the basis that the validity of the assessments had always been challenged.

29. After hearing argument, we refused the application for adjournment, since we had four days set down for this hearing, and having due regard to Rule 2 of the Rules we wished to minimise expense and delay and act proportionately and flexibly. Notwithstanding the vast amount of time and resource expended on these appeals by both parties, they are standard cases. We directed that Mr Hone contact the Solicitors' Office and that HMRC should produce a submission in the course of the substantive hearing.

30. No advice or submission was forthcoming in the course of the three days notwithstanding the pressure Mr Hone applied to the Solicitors' Office. At the end of the hearing HMRC requested leave to lodge a written submission on the competence of the assessments with particular reference to the fact that all of the assessments were "nil" assessments. A period of 14 days was sought and that was again opposed by Mr Elder. I issued Directions and submissions from both parties were duly lodged.

Other Procedural matters

31. At the outset of the hearing it was established that Mr Elder was very deaf and that he had employed a stenographer. That came as a surprise to HMRC and the Tribunal.

32. The Tribunal articulated concern as to whether or not Mr Elder would be able to participate fully in the proceedings. He was insistent that he wished to proceed although it was evident at the outset that he had great difficulty hearing anything that was said. The matter was ultimately resolved by agreement whereby there would be hourly breaks and his two representatives would discuss matters with him and ensure that he knew precisely what had transpired.

33. For that reason, the hearing was very unconventional, the witness evidence was "broken up" by topic and, as appropriate, cross-examination followed each topic, rather than being confined to the conclusion of the examination-in-chief.

34. In fact, although initially it seemed that Mr Elder was seriously challenged by his hearing deficit, when we arranged matters such that he could clearly see the person speaking, he participated fully. Indeed, on the third day he was seen to have no difficulty in responding in detail to the Tribunal's close questioning in relation to the mechanics of payment for contract and cash hires and the movement of money thereafter.

35. It transpired that the stenographer had also been employed on the basis that she would produce the transcript some months later (for the purposes of an appeal!). She was unable to produce the transcripts any earlier due to other work commitments. After discussion, and with the consent of Mr Hone, we granted leave to have Ms Brownlie transcribe the proceedings but only on the basis that the transcript be

released to everyone simultaneously and written Closing Submissions would be lodged thereafter.

36. Lastly, neither Mr Leslie nor Mr Lone were conversant with the Rules or with Tribunal procedure generally and both had differing areas of expertise. With Mr Hone's consent, in order to facilitate Mr Elder's full participation, unconventionally each handled different areas of evidence and occasionally both addressed some of Mr Elder's evidence.

The evidence

37. Extensive Bundles had been produced for previous hearings and were in large part replicated for this hearing and had also been supplemented. With no notice, and no application for admission thereof, Mr Elder produced supplementary Bundles on the first day of the hearing some of which replicated other Bundles but much did not. He was advised that he required to seek leave to have these admitted. Some of the documentation in those Bundles was immediately excluded since it related to penalties.

38. As Mr Elder sought to refer to his Bundles in the course of the hearing that was dealt with on an *ad hoc* basis. In Directions issued on 26 April 2016, I formally confirmed that save only to the limited extent that documents from Mr Elder's Bundles had been admitted in the course of the hearing nothing else was admitted. I gave leave to Mr Elder to identify any other items on which he wished to rely in his Closing Submissions and, if opposed by HMRC, I would hear argument at that stage.

39. In fact, only two other items were introduced in the Closing Submissions. The first was in relation to the mortgage on the Newcastle property and there was no opposition so it was admitted. However, it was of doubtful value for the reasons set out below.

40. The second item was evidence from the public domain in respect of bank sort codes. It was not contested and so was admitted. It proves only that many deposits into the Isle of Man bank account came from Mr Elder's bank in Livingston. It does not prove what went into that account or from whence the deposits derived.

41. We heard oral evidence from Officers Bell and Wilde and Mr Elder.

42. Despite the longevity of these appeals, the extensive correspondence, the substantial Bundles, and the lengthy previous submissions for Mr Elder, there was considerable lack of clarity as to the underlying facts, there were some obvious discrepancies in the witness statements of Officer Bell and Mr Elder and we had no Statement of Agreed Facts.

43. The discrepancies in Officer Bell's statement were not material and were largely inaccurate references to underlying documentation. We have relied on the source material in our findings in fact.

44. Mr Elder's Witness Statement is brief and largely deals with the procedural history of these appeals. We did however also have the benefit of the "Appellant's Submission on HMRC Statutory Review" dated 15 October 2012 ("the 2012 Submission") that had been produced by Mr Elder's then solicitor. That submission, which extends to 53 pages and 254 paragraphs, is a mixture of submissions and assertions of fact and contains at the final paragraph:

> "**Voluntary Statement of Truth** The facts referred to above reflect the appellant's evidence. Should it be of assistance, the appellant has confirmed that he believes that the facts stated above are true."

We have disregarded the submisions which have largely been overtaken by events but where relevant have weighed in the balance the said alleged facts. We use the word alleged deliberately since in some instances other alleged facts averred by Mr Elder are in conflict as we describe below.

43. Unsurprisingly, and in the circumstances, inevitably, for the reasons we outline below, there were some errors in the skeleton arguments.

The Issues

44. As directed by Judge Cannan, the parties had produced a short statement of the substantive issues and they had agreed that, in regard to the preliminary issues, they adopted the Judge's description thereof in the 2014 decision. Judge Cannan had made it explicit at paragraph 20 of the 2014 decision that some of the eight preliminary issues required evidence and findings of fact to be made.

45. Having decided **not** to adjourn the Hearing we decided that we would proceed to hear the evidence, find the facts and then look at the issues.

46. We annex at Appendix 1 the detail of the eight preliminary issues as narrated by Judge Cannan since, towards the end of the first day of this Hearing, after various Directions on Applications had been issued verbally and numerous recesses, Mr Hone and Mr Leslie agreed that there were now only four issues beyond their three agreed substantive issues.

47. Those substantive issues were stated to be as follows:

> **"Substantive issues**
>
> (1) Whether or not the Appellant was in receipt of remuneration (i.e. relevant payments) from Topcars Taxis Limited, for all years under appeal, that was in excess of the figures to which PAYE was applied.
>
> (2) Whether or not the Appellant, an employee of Topcars Taxis Limited, received such relevant payments knowing that the employer wilfully failed to deduct the amount of tax which should have been deducted from those payments for each year concerned.
>
> (3) The amount of assessable benefit arising on the provision of living accommodation at 35 Braid Green, Livingston, to the Appellant for the years 2001-02 to 2006-07. The Shadow director status is denied by the Appellant and the burden of proof is on HMRC."

48. The four "other" issues identified by the parties were:

(a) Competency of the assessments;

(b) Nil assessments;

(c) The Offshore Disclosure Facility ("ODF"), and

(d) Regulation 72.

and that in the circumstances none should be case managed as preliminary issues. In the event only ODF was canvassed in the course of the hearing and the other issues were the subject matter of written submissions.

49. Whilst we understand why the parties identified the first two substantive issues, and we have no issue with the third, we take the view that given the almost total lack of clarity about the factual matrix the primary key issues and therefore the substantive issues for the Tribunal to identify, insofar as possible, were:

(a) Who was Mr Elder and what did he do, when and how?

(i) Mr Elder

(ii) The companies

(iii) ODF disclosures

(iv) HMRC enquiries

(b) What was the position with rental payable for the premises from which the businesses operated?

(c) What happened to taxi fares charged?

(d) What was/were the source(s) of monies at Mr Elder's disposal, namely the bank accounts and the funding of the purchase of, and mortgage payments for, his property in Newcastle?

(e) What did HMRC know, or could have known, and when?

50. These factual matters are inextricably bound up with the ODF disclosures which we decided was a substantive issue.

51. Whilst it is always essential that the FTT finds the facts, in this case we have narrated both the background and the facts found at length since, with no disrespect to Messrs Hone, Leslie and Lone, much only became clear, in relation to these matters, when we asked questions of Mr Elder in some detail and at some length and some of the evidence adduced was not consistent with previous assertions.

Overview of Mr Elder, the companies associated with him and his role in the companies

Mr Elder

52. Mr Elder has lived in Scotland since 1979 and, prior to 1998 had traded through a number of companies with which we are not concerned. He estimated that he had some £35,000 in savings in 1979. It proved impossible to even guess his financial position in 1995 or 1998.

53. More recently he has also had a home in Newcastle which he had personally bought in 2005 for £331,000 and for which he had a mortgage. Prior to, and during the hearing, precise figures were not available as to the level of mortgage but it was believed to be of the order of £196,000. Mr Elder could not remember how he had been able to negotiate such a high mortgage when aged approximately 62. It was suggested that it was possible that the mortgage had been self-certified but there is no evidence.

54. In Closing Submissions, he relied on what purported to be a Completion Statement, possibly from lawyers. It was not on headed paper, it was dated 11 March 2014 yet it related to a purchase completed in 2005. That is extraordinary. It showed receipt of a mortgage advance of £281,000 and a deposit of £60,652.74. It was accompanied by two pages only of a mortgage offer dated 2 November 2005 which was expressly stated not to be a binding document.

55. By contrast an Experian report obtained by HMRC in 2007 had been lodged in process many years ago had been discussed in detail at a meeting on 1 February 2011 and had been the subject of cross examination. Furthermore, on 10 December 2008 Officer Bell had written to Mr Elder, telling him that he had information (which was in fact the Experian report) which showed that the mortgage was £196,000 and the deposit was approximately £135,000. There was no rebuttal of that until this hearing. Indeed the reply to that letter simply stated that a source of funds which became the deposit had been the account referred to in the ODF disclosure. Of course that too proved to be inaccurate as we set out below. On the balance of probability the earlier information is more likely to be accurate.

56. Although both HMRC and Mr Elder's agents have analysed his living expenses, not even his agents were able to identify any expenditure, or funding thereof, in respect of removal costs etc. There is only one payment of £1000 to a bedding company.

57. Mr Elder had MBNA credit cards. Platinum Plus and RBS MINT. The former had a credit limit of £15,200 and the latter £3,400.

58. Mr Elder argued that he lived frugally but even his own agent's suggested figures for earnings and living expenses make unusual reading. For example his income after deduction of PAYE ranged from slightly in excess of £15,000 in 1999 when his mortgage accounted for almost half of that, with insurances as £1,400 but food at a mere £690 to income of £9,000 in 2007, car expenses of £2,000 and food of

£1,700. The mortgage payments of £56,234.50 in that year were apparently funded by loans (see below). He was unable to credibly explain the very low food costs in most years or why there was no exceptional or one off expenditure.

59. He was always paid in cash.

60. Mr Elder has retained extremely few financial records. He argues that since he did not submit tax returns there was no need to retain records. He is wrong.

The companies

61. In the context of these appeals, we find that he has established links with a number of companies. The first three of interest are Topcars (Taxis) Limited **("Topcar")**, Hire Services Limited **("Hire")** and Diamond Office Services Limited **("Diamond")**. All three were British Virgin Islands ("BVI") companies, the directors were "Advisors & Services (BVI) Corp" and Mr Elder was the Authorised Official. In oral evidence he conceded that he was the controlling mind of all three.

62. The remaining companies of interest are Northern Property Investments Limited **("Northern")**, Internet Communications Group Limited **("ICGL")** and ALLTHEFOURS Inc **("ATF Inc")**. Northern and ICGL are also BVI companies.

Topcar

63. Topcar commenced trading on 1 October 1998 as a taxi hire booking agency. In his capacity as "authorised official", Mr Elder signed the form CT41G being "New Company Details" on 17 May 2000 and lodged it with HMRC. It gave the address for the registered office as being in the BVI. It gave an address in Newcastle-upon-Tyne as being the address where the business was carried out and to which correspondence should be sent.

64. In fact, that was simply serviced office premises. The taxi business was actually in Livingston in Scotland where Mr Elder then lived.

65. He also stated that "No individual will be a director and no person in UK will receive payment of directors fees". He has been an employee of Topcar throughout and has been paid a salary under deduction of PAYE. He confirmed that all of Topcar's staff, including him, were paid in cash. Mr Elder has no other disclosed source of earned income, albeit we note with interest that in a letter dated 4 March 2010 to HMRC Mr Lone states that " For the years 2003 04 and 2006 07 our client resided in a property owned by one of his employers…". HMRC do not appear to have investigated that.

66. The accounts for Topcar described the principal activity as that of "radio hire and taxi booking service" and consistently contained a Note which stated:-

> "**Controlling parties**
>
> The company is controlled by Mr Ian Elder."

The accounts also disclose Related Party Transactions with both Diamond and Hire. There were inter company loans.

67. Amongst other accounts, Mr Elder produced the accounts for Topcar for the year to 30 September 2006 and the Note on Related party transactions shows loans of £23,318 to Hire and £9,093 to Diamond. The turnover in both 2005 and 2006 was in excess of £200,000.

68. The only source of income for Topcar was what was described as "rental payments for the radios" received from the self employed drivers and owner operators (other than Hire which made no payments to Topcar). Although described as "rental payments for the radios" it was in fact a payment for the radio and the booking and other services, such as collection of contract rental. In reality it included a service charge.

69. Topcar never had an overdraft facility. From time to time Mr Elder would meet expenditure personally and be reimbursed. He kept no records of those transactions.

70. Topcar was put into Voluntary Liquidation and commenced dissolution on 14 October 2008. Mr Elder alleged that it was in Administrative Strike Off in September or October 2007. He produced no detail of why or how that happened furnishing only the criteria for Strike Off but pointing to the fact that if the BVI tax was not paid then the company would go into Administrative Strike Off. Since he controlled the company that was a matter for him.

Hire

71. Hire commenced business on 22 April 2002 and the form CT41G was signed by Mr Elder as "Operations Manager" and described its business as "hire car operation".

72. It owned a number of vehicles (a maximum of six at one point) for which the hire purchase agreements were in fact in Mr Elder's name and he made the payments in the first instance but the taxi licenses and insurance were in the name of Hire. However, as late as at a meeting on 6 July 2011, it was still being argued that Mr Elder continued to meet those finance costs because Topcar had had difficulty getting finance. That was reinforced in the document described as "Quantum of Assessments" ("Quantum") produced to HMRC by Mr Lone on 10 October 2012 where at 5.1, it is explicitly stated that:

> "During the running of the business Mr Elder was required to take out personal HP agreements in respect of vehicles as the finance companies would not engage with Topcars (Taxis) Ltd. He would then pay the HP agreements personally and claim the monies back from the company."

73. Those vehicles were let to taxi drivers and the takings were split between Hire and those drivers on a 55:45 basis. The first time that HMRC were told that Hire received such payments, and it was not quantified, was at the meeting on 6 July 2011 yet on 1 February 2011, HMRC had been told that "…the nature of the business set up had been to lease vehicles to drivers".

74. The day to day *modus operandi* is set out in detail below but an overview is that Topcar operated as a booking agent and allocated work either to Hire or to self-employed taxi drivers (the number varied but in general there were at least 60). Approximately 10% or 12% of total hires were allocated to Hire (and thereby to its drivers).

75. It was argued for Mr Elder in Quantum at 7.2 that for at least three years Mr Elder had met expenditure for Hire and then been reimbursed. There are no records.

76. Mr Elder produced the accounts for the year to 30 September 2006 and the Note on Related party transactions shows loans of £44,500 to Diamond and the £23,318 from Topcar. The turnover in both 2005 and 2006 was approximately £91,000. Those were the last accounts for Hire yet it traded after that date.

77. It was also put into Administrative Strike Off and subsequent Voluntary Liquidation and commenced dissolution on 14 October 2008. Mr Elder states that there are no available records.

Diamond

78. Diamond was based in Newcastle and provided office services to Topcar, Hire and other companies. Diamond only registered for VAT in 2005 stating that its first taxable supply was on 6 June 2005. Mr Elder signed the VAT registration form describing himself as a director. He signed the tax return for a two month period in 2008 as company secretary. The accounts to 30 Sepember 2008 showed sums of £48,500 and £27,498 due to Hire and Topcar respectively. It is not known what happened to those debts when those companies were liquidated.

79. In oral evidence we discovered that there had been an unnamed predecessor company which evolved into Diamond and prior to 2005 provided office services to Topcar and then Hire and from the serviced office address then used in Newcastle (HMRC were wrong in believing that that was Mr Elder's home address, but understandably so since nothing in that regard had been clarified before the last day of this hearing).

80. In evidence Mr Elder stated that Diamond ceased trading at an unspecified date because it was never profitable.

Northern

81. Mr Elder has a home in Livingston where he has lived, in his words, "off and on for about 30 years". He and his then wife certainly owned it from December 1987 until 1994 and he owned it personally in August 2001 when he transferred it to Northern "for certain good causes".

82. In his oral evidence, Mr Elder said that Northern was "…formed years ago. I became a shareholder for 23% which I no longer have…and it was done to protect an asset."

83. Interestingly, in his telephone conversation with Officer Bell on 2 November 2007 he is reported as saying that he owned 21% of Northern and his then current wife the rest. That contrasts with his witness statement where he states that he had a "…business arrangement with Northern…" because he had wanted to protect property during a marital breakdown. In that witness statement he denied that he ever had any control of Northern and said that he had been a minor shareholder for a short period. At the meeting on 5 November 2007, he confirmed that the accommodation address in Newcastle for Topcar (and indeed Hire and Diamond) was leased from Northern and he was an authorised official for Northern.

84. Mr Lone wrote to HMRC on 6 February 2009 stating that Mr Elder's minority shareholding had "now ceased". No detail has ever been provided.

ICGL

85. Topcar operated from premises in Livingston which had been owned by ICGL since September 1995. HMRC ascertained from a planning application that in 2000 ICGL applied for planning permission and gave as its address the serviced office premises then used by Topcar in Newcastle.

86. Topcar, and later Hire, nominally paid rent of £3,000 each per annum to ICGL and that has allegedly been claimed as a deduction in their accounts but the reality was that those sums were paid to Mr Elder personally.

87. In his witness statement, at paragraph 19, Mr Elder states: "The rents paid were disclosed in the accounts of ICGL and Corporation Tax returns and tax paid." HMRC have traced no returns whatsoever for ICGL. They, and we, have seen no accounts. The only financial information in the hands of HMRC about ICGL was in regard to the ODF disclosure. We set out more detail under the heading "ICGL Disclosure". In that disclosure Mr Elder describes himself as the "authorised person". Certainly Corporation tax was paid in the context of the disclosure, but only in that context.

88. As far as the premises are concerned, Officer Bell has ascertained from the Scottish Land Registry that ICGL had taken entry to the premises in Livingston on 1 September 1995 and registered the title on 18 September 1995. It then transferred the premises to ATF Inc with entry being given on 28 March 2001 "for certain good causes". The title was only registered by ATF Inc on 29 October 2007 after the HMRC enquiry was opened. Nevertheless, the legal impact of that is that ATF Inc owned the premises from 2001.

89. On 27 December 2007, Mr Elder told HMRC that ICGL, Diamond and Hire were associated companies as far as Topcar was concerned.

90. ICGL too was apparently also put into Voluntary Liquidation at some date prior to 6 February 2009 when Mr Lone wrote to HMRC confirming that fact.

ATF Inc

91. ATF Inc is a Panamanian company. In late 2007 Mr Elder decanted the businesses of Topcar and Hire into ATF Inc for no consideration. It was not a transfer as a going concern for VAT purposes, albeit Mr Elder described it as such. For him, little appeared to change. Allegedly, the major account customers simply transferred to ATF Inc. Mr Elder described it as being a case of his "goodwill" being transferred.

92. ATF Inc traded using the Topcar name and advertised using that brand in 2008. Only the telephone number changed and that had in fact changed whilst Topcar was still trading.

93. Mr Elder signed a Company Short Tax Return form for ATF Inc for the year to 30 September 2008 on 17 September 2009 declaring that his status was "Company Secretary". In oral evidence Mr Elder confirmed that he "ran" ATF Inc just as he "ran" Topcar and Hire.

94. Note 10 to the accounts for that year reads:

> "…The ultimate controlling party is Northern Property Inc ("NIC") who own 100% of the issued share capital."

We have no information about the ultimate controlling party and that was not canvassed in the Hearing.

95. Note 12 to the accounts reads:

> "The company operates a separate agency account. Money is collected on behalf of the drivers and reimbursed to them in full. The company makes no profit from these transactions and the figures are not included in the accounts."

96. There had never been any such disclosure in the accounts for Topcar.

97. Mr Elder is recorded at Companies House as having been appointed as Company Secretary of a UK Company AllTheFoursLtd on 3 September 2007. That company is not registered with HMRC.

The Offshore Disclosure Facility ("ODF")

Background

98. The ODF was a concession by HMRC whereby it was open to those who held, whether directly or indirectly, an offshore account that is any way connected to a loss of UK tax and/or duties to reach a settlement with HMRC. The ODF worked where a full disclosure of all undeclared liabilities, not just those connected with an offshore account was made, and the taxpayer was required to make a disclosure by 22 June 2007, and pay all taxes, duties, interest and penalties by 26 November 2007. If that was done then HMRC undertook to give a final decision on the disclosure and settlement offer as soon as possible and by 30 April 2008 at the latest.

99. The Royal Bank of Scotland wrote to Mr Elder in May 2007 advising him that HMRC were investigating use of offshore accounts by UK residents and that the bank had complied with Statutory Notices and provided HMRC with information relating to customers who had, or had had, an offshore account with a link to a UK address in the last six years. The bank gave him details of the ODF. They subsequently confirmed to him that although they could not give details of what they had disclosed to HMRC they could confirm that it related to two specific bank accounts.

100. Mr Elder then made two ODF disclosures. One was a personal disclosure under reference XM000400142074 and offered £475 in settlement.

101. The other was a disclosure on behalf of ICGL under reference XK0000400067587 and offered £11,633 in settlement. Mr Elder signed as "Authorised Person" and asked for correspondence to be sent to what was Diamond's address. Only the ICGL disclosure was accepted on 25 April 2008.

Personal Disclosure

102. On 25 April 2008, Officer Bell wrote to Mr Elder formally confirming that his personal disclosure and settlement offer under the terms of the ODF was not accepted. A copy of that letter was sent to CTC, Topcar's then accountants (HMRC held an unrevoked mandate inferring that they still acted for Mr Elder), and it has been confirmed that they had received it on or about 28 April 2008.

103. Mr Elder argues that he only received the said letter of 25 April 2008 on 2 May 2008 and, although he concedes that CTC received their copy on 28 April 2008, he argued that Royal Mail may not have delivered it promptly to him since they do have an error rate.

104. Whilst we note with interest the various authorities quoted on statutory notices this is not a statutory notice. In HMRC's booklet about making an ODF disclosure, HMRC quite simply state that the amnesty which is offered is in the context of disclosure and that "If we cannot accept the disclosure we will open an enquiry before 30 April 2008".

105. They certainly did open an enquiry before that date because, the letters both to Mr Elder and to CTC, were initially dated 23 April 2008 and a handwritten amendment to 25 April 2008 was marked thereon by Officer Bell. His entirely credible evidence was that he personally typed the letters and ensured that they were sent first class at the same time on that date.

106. As we note above, it is not disputed that CTC received that letter on or about 28 April 2008. The 25th of April 2008 was a Friday. Section 7 of the Interpretation Act 1978 makes it explicit that mail will be deemed to be received on the next working day (including a Saturday) if sent by first class mail. We find that, firstly, both letters were sent at the same time and from the same place, and secondly, on the balance of probability, given that the advisers received their letter on the following Monday, it seems inherently improbable that Mr Elder would only have received his letter on the following Friday.

107. In any event, the letter was sent to the address held by HMRC for Mr Elder, which was the serviced office premises of Diamond. At that time, Mr Elder was primarily living and working in Scotland. Indeed, he advanced an argument that the delay in receiving the letter might have been because of the different bank holiday arrangements in England and Scotland. He then argued that the office staff had instructions to open brown envelopes and telephone him.

108. His core argument was that as the letter had apparently not arrived by 30 April 2008 then a contract came in to being as a result of which claims within the scope of the ODF were finalised and HMRC is precluded or debarred from making any further claims.

109. Since we find that the letter was posted and did arrive before 30 April 2008 we have no necessity to debate the nature of any contract with HMRC and/or the impact of the statutory provisions. There was no contract. An enquiry was opened timeously.

ICGL Disclosure

110. Since that disclosure had been accepted by HMRC it does not fall within our jurisdiction but Mr Elder relied heavily on the information relating to the disclosure and that is very relevant to the movement of monies with which we are concerned.

111. ICGL had owned the premises in Livingston since 18 September 1995. For the purposes of the ODF disclosure it had been treated as continuing to own the premises until 30 September 2006 whereas, of course, it had not owned it since 28 March 2001.

112. The calculation of Corporation Tax and Section 419 tax liabilities for the year ended 30 September 1999 shows that there was a loan account in the sum of a total of £15,838 for the purchase price, restoration and legal fees and BVI tax relating to that property. Mr Elder confirmed that those were the original costs when the property was purchased in 1995 and that he had met those costs personally.

113. That contrasts with the assertion as long ago as 10 October 2012 in Quantum where at 2.1 it states:

> "Mr Elder introduced cash to ICGL in the accounting period ended 30 September 1999…".

Clearly he did not and the Closing Submissions state that that those funds were introduced "On commencement of ICGL…".

114. On the balance of probability, the reality is that Mr Elder controlled ICGL, he financed the purchase and refurbishment of the property and when he commenced Topcar it used the premises and it was agreed that rent would be paid from its first year of trading which coincides with the first year of the ODF disclosure. No repayments were made until there was a source of income from the property. That does not have the hallmarks of an arm's length transaction. We do not accept his conflicting evidence that he had a business relationship with ICGL and latterly that ICGL was owned by a friend who has died.

115. It proved absolutely impossible to even guess how Mr Elder had funded the loan to ICGL. At the time of the ODF disclosure the only information provided to HMRC was that the funds in ICGL were derived from "savings and loans".

116. In that and each year thereafter Mr Elder personally paid the BVI tax. He also withdrew either £3,000 or £6,000 which matches the figure recorded as "sales" but which was apparently the rent payable to ICGL by Topcar initially and from 2002 by both Topcar and Hire. That was the evidence at the hearing, however, in Quantum at 2.5 it states in relation to the figures of £3,000 and £6,000 that:

> "The explanation to this is that Topcars (Taxis) Ltd were due to pay rent to ICGL…".

There was no mention then of any rent paid by Hire.

117. In fact the money was paid direct to Mr Elder by Topcar and Hire. There are no invoices and we note that there are inherent inconsistencies such as the fact that the rental in 2004 was half the amount in other years and in 2002 Hire paid exactly the same rental as Topcar even although Hire had not even existed for less than half of the 12 month period.

118. That loan account gradually reduced over the years until in the year to 30 September 2004 Mr Elder had been repaid the capital lent by him. Over the period 1999 to 2006 he admits to having extracted £36,000 from ICGL by way of capital repayment and loans. That is the amount shown in the ODF computation.

119. That is wholly inconsistent with Mr Elder's witness statement where he states that the rental was £30,000, and with the letter to HMRC dated 17 May 2010 that read:

> "The calculations show that £16,664 was loaned to Mr Elder. However, in addition to this amount, as detailed in the loan account supplied to HMRC, there was a credit to these accounts and a total of £30,000 was repaid or loaned to Mr Elder in this period."

120. On 4 March 2010, Mr Elder's advisers had intimated to HMRC that ICGL had made loans to Mr Elder and that had been covered by the ODF disclosure. In fact there was no notification of any loans *per se* to Mr Elder in the disclosure. The disclosure computation simply shows movements in a loan account which is not even described as being Mr Elder's Loan account. The undisputed amount of the loans covered by the disclosure was £16,664 over the period to 30 September 2006.

121. Obviously, quite apart from making no mention of any payments due from Hire, the ODF disclosure does not deal with the fact that from 2001, it was ATF Inc who had a beneficial interest in any rental payments.

122. Lastly, as we indicate below at the time of the ODF Disclosure and later that year Mr Elder was arguing that the figures involved were approximately £27,000 and there was no suggestion that he himself had lent any monies.

Overview of the HMRC Enquiries

Topcar

123. On 29 August 2007, HMRC opened an enquiry into the tax return for the period 1 October 2004 to 30 September 2005 in respect of Topcar.

124. HMRC experienced enormous difficulty in obtaining any information from Mr Elder. On 7 September 2007, the company's accountants responded to the intimation of enquiry stating that Mr Elder was experiencing ill-health and requesting an extension of time for provision of books and records and other information until 15 October 2007. On 19 October 2007 the accountants telephoned HMRC and intimated that the information had not been produced and therefore HMRC issued a formal Notice in terms of paragraph 27 Schedule 18, Finance Act 1998 on that day. It requested the same information. Some of that information, such as details of the drivers to whom payments were made and the amounts has never been furnished to HMRC.

Telephone Call on 2 November 2007

125. On 2 November 2007, Mr Elder telephoned HMRC. Officer Bell recorded that Mr Elder stated that Topcar had been struck off and had no records as nine years of records had been disposed of in September 2007 because of lack of room. When it was pointed out that that had therefore happened after the enquiry had opened he is reported as then stating that he had disposed of the records long before that.

126. In the course of that telephone conversation Mr Elder also told Officer Bell about the existence of ATF Inc (erroneously recorded as ATF Ltd since that was how it was then described), ICGL, Diamond and Northern and that all the companies were BVI companies to hide assets from a greedy ex wife.

127. He said that he had nothing to do with ATF Inc or indeed Topcar; he was only an authorised official which, of course, is not consistent with his admissions in the hearing.

128. Mr Elder went on to explain that the only thing that he had not done correctly was to disclose that Topcar (again he did not mention Hire) had paid rent to ICGL of around £6,000 per annum, maybe £27,000 in total. He conceded that the rental monies were paid into his own bank account and not to ICGL. He stated that he had registered to take advantage of the ODF and that that disclosure should cover the rental paid to ICGL. He was told that since the rental was paid to his account in the UK the ODF disclosure would not cover it. He made no mention of any loan by him to ICGL.

Meeting on 5 November 2007

129. On 5 November 2007, Mr Elder attended a meeting with Officer Bell and another officer and expanded upon the information given verbally. The key additional points are that ATF Inc had taken over the businesses of Topcars and Hire

as part of a long term strategy, the rental that was due to ICGL had been paid into his personal bank account and "he considered that it was rent received by him" and lastly that he was the authorised official for Northern.

130. In the context of the rent he described it as rent due by Topcar and he did not mention Hire. He was again advised that the ODF disclosure would not cover monies paid in the UK.

131. He described the *modus operandi* of Topcar and Hire in very broad terms, albeit he relied on the fact that he was neither a shareholder nor director of either. The focus was almost entirely on Topcar. It is specifically recorded that:

> (a) "Hire Services Ltd was set up to provide taxis for rent to subcontracted drivers – the fact they depended on the car provision was intended to give Topcars more leverage over drivers to ensure Topcars could always get a driver when they wanted one", and
>
> (b) "It was stated that 100% of all money paid under contracts were paid out to drivers who undertook the contracts. This was on the basis that the company as an agent was collecting monies due to the subcontracting drivers."

In the course of the hearing it transpired that both of those statements were misleading since in fact Hire never received rent but rather received 55% of all taxi hire payments including monies paid under contracts, albeit that 55% equates to rental for the vehicle and radio.

132. He did concede that he directed the operations of Topcar.

133. He was advised to complete the tax returns that had been sent to him. He did eventually submit the 2004/05 return on 4 December 2008 but it disclosed only income of £17,160 from Topcar and that he had made an ODF disclosure. Subsequent returns disclosed the same information.

Mr Elder

134. By letter dated 25 April 2008, HMRC opened an enquiry into Mr Elder's own tax affairs in addition to the enquiry into Topcar and requested further detailed information.

Progress of the two enquiries

135. Since Mr Elder had signally failed to produce the information required by HMRC, on 3 June 2008 Officer Bell wrote to Mr Elder warning that he would be approaching the Commissioners for formal measures. He was also advised that since his home in Livingston was owned by Northern, therefore he should be taxed on the benefit as he was a shadow director.

136. Ultimately, on 9 December 2008, in the absence of co-operation from Mr Elder, a General Commissioner issued a Notice under Section 20 Taxes Management Act 1970 requesting production of Documents and Particulars by 31 January 2009.

137. There was very limited compliance. On 6 February 2009, Mr Elder's new adviser, Mr Lone wrote to HMRC giving no material detail, stating that Mr Elder had no connection with Topcar, Hire and ICGL because they had been liquidated and simply offered mandates allowing HMRC to approach the "Bank of Scotland" and the offshore bank for ICGL. He confirmed that Mr Elder had only retained records of a personal nature for two years and therefore could not provide the requisite detail. Lastly, it was confirmed that the source of the deposit for the Newcastle house was the offshore account referred to in the ODF disclosure. Of course that proved not to be the case. On 17 May 2010, he wrote to HMRC and stated that only £30,000 had been sourced from the ICGL account.

138. HMRC used their powers to access information from offshore banks and found that in one case some £135,928 had been deposited over a 24 month period. (Most of the bank statements that were ultimately provided by Mr Elder were only produced in response to a Direction for Disclosure from the Tribunal dated 18 July 2011, albeit an agreed Direction.)

139. On 27 March 2009, Officer Bell wrote to Mr Lone confirming that HMRC's view was that Mr Elder had largely failed to comply with Notices and that complete information might never be made available so therefore to protect the Crown

> (a) he would be raising discovery assessments in respect of income presumed to have been extracted from the companies and deposited offshore,
>
> (b) those assessments would include amounts based on the taxable benefit of beneficial occupation of company owned property,
>
> (c) there might be further assessments in relation to £27,000 of rental income received by Mr Elder.

140. Assessments covering the years 1998/99 to 2006/07 totalling in excess of £238,000 were duly issued. On review, only the quantum of the assessments relating to the benefit for the accomodation was upheld because the Review Officer formed the view that Officer Bell had not established that Mr Elder had been operating a trade of consultancy and that the funds identified had flowed from that.

141. HMRC then went on to intimate that further assessments and a Direction under Regulation 72 would be issued. That led to these appeals.

142. However, it is of note that in the correspondence in relation to these issues, in regard to (c) above, on 27 May 2009, Mr Lone wrote to HMRC stating that

> "As advised by our client the rental income of £27,000 taken from Top Cars (Taxis) Limited was a loan made by him to the company. The company paid Section 419 tax on this amount and when the company was liquidated the loan was written off….".

Of course the ICGL disclosure suggests that the rental income was more than that and that Mr Elder's loan to ICGL was repaid in full. We know only that, like the other companies ICGL was liquidated. We assume that the loans due by Mr Elder to ICGL

on which tax was indeed paid may have been written off which would have been to his benefit.

143. In regard to (a) above, on 4 March 2010, Mr Lone wrote to HMRC and confirmed that it was not disputed that

> "…although income was extracted from the companies it was in the form of regular loan payments which our client then deposited into his overseas accounts. These funds were accumulated and used to pay the deposit on …and also to enable him to meet the monthly repayments."

The companies referred to in the letter were Topcar and ICGL. There was no mention of Hire, Diamond or any of the other companies. Mr Elder has consistently denied extracting income from Topcar whether by way of loan or otherwise.

Modus Operandi of Topcar and Hire

144. Topcar, in the person of Mr Elder, priced, quoted for and negotiated all tenders for, and contract hire of, taxis. It took all telephone bookings and on receipt of a booking the computer would allocate the booking to the first available driver. It operated as a booking agency. It owned no vehicles.

145. The hire purchase agreements for the vehicles driven by the drivers employed by Hire were held in the name of Mr Elder and he made all the payments for them. He was then reimbursed by Hire. There are no records.

146. The physical provision of the taxi hire was either through Hire (approximately 10 to 12%) or through self-employed drivers. There was apparently a register of drivers albeit, it has never been produced. Those drivers paid Topcar £65 (in 2005) per week for the hire of a radio. There was no formal agreement and either party could give one week's notice.

147. In 2005, Mr Elder told a VAT Inspector that there were 71 drivers, with the total having increased in the previous three years, but that the number of such drivers fluctuated. He told Officer Bell at the meeting on 5 November 2007 that there were 60 drivers.

148. Mr Elder confirmed to HMRC (on 27 November 2007) that he was the bookkeeper for Topcar, albeit we note that a lady was employed to "do the accounts for the Drivers Agency Account". She generated the invoices referred to below.

149. Topcar had approximately 150 contract customers who had accounts including a number of major account holders such as West Lothian Council, Sky, Motorola and the NHS. The contractual provision of the account taxi hire was undoubtedly by Topcar. The tenders were signed by Mr Elder in the name of Topcar and the contracts, such as for West Lothian Council were granted to Topcar and promoted publically as such. The value of the contract with West Lothian Council was £242,725 when awarded on 30 August 2007.

150. The individual drivers did not know the contract terms. Account customers were invoiced with 30 days payment terms.

151. In the case of the self-employed drivers, if the payment was on account, the driver asked the customer to sign an advice note and then Topcar would later issue an invoice "on behalf of the Drivers Agency Account" demanding payment. When payment was received then that would eventually be remitted in full to the self-employed driver who was paid in arrears. Effectively they could be up to 60 days in arrears. The only income derived by Topcar from the self-employed drivers was the radio rental fees. Hire paid Topcar nothing, albeit it received the same services from Topcar.

152. By contrast, where a driver employed by Hire provided the taxi service on account the driver would receive 45% of the income that would become due and Hire would be entitled to 55% which effectively represented rental of the car and radio. Where it was an account customer the driver also asked the customer to sign an "advice note" and that was passed to Topcar who would then invoice "on behalf of the Drivers Agency Account".

153. Where payment was made in cash, the driver, whether self employed or employed by Hire, would record the amount on his weekly takings sheet. The self employed drivers would retain their cash takings. Since roughly 50% of the transactions undertaken were paid for in cash, Hire would net off the sums due to the driver and in general the driver would be paid in full in cash although there were some instances where there was insufficient cash so the driver would be paid by cheque.

154. The payments from account customers passed through the Drivers Agency Account but then would be paid in full to the self-employed drivers. The funds due to Hire were retained in the Drivers Agency Account after sufficient monies had been paid to Hire to enable it to make any residual payments due to its drivers.

Bank accounts

155. Ultimately, HMRC established that Mr Elder operated a multiplicity of bank accounts in a number of names. HMRC have traced £387,065.52 of lodgements to three bank accounts in the period 1998/99 to 2006/07. In his Skeleton argument, Mr Elder states that the "actual deposits into the accounts total £393,196".

156. Apart from the offshore accounts and Mr Elder's personal account, the account of primary interest was the Drivers Agency Account. At the heart of Mr Elder's argument was that payments from all account customers went to the Drivers Agency Account and not to him or Topcar.

Drivers Agency Account

157. That Drivers Agency Account was an account with the Bank of Scotland at 153 Portobello High Street, Edinburgh in the name of "Top Cars (Taxis) Limited DR AG AC". That bank was the same bank with which Mr Elder held other accounts as, for example, I.G. Elder Offshore Agency and one of his own personal accounts.

158. At page 38 of the 2012 Submission, Mr Elder's then solicitor stated that at all material times Mr Elder was the Topcar employee responsible for this account. It was the operating account through which Topcar passed all contract payments.

159. The first Drivers Agency Account bank statement produced to HMRC is dated 5 April 2005 and is number 249. There appear to be two statements every month. That would therefore suggest that the account had been running for at least the 11 years which Officer Bell had assumed. HMRC ultimately were only able to access the majority of those bank statements once the appeals had been lodged with the Tribunal.

160. At paragraph 20 of Mr Elder's Skeleton Argument it states that payment for contract work "…is paid into a trust account and the appellant then distributes the income to the drivers and to Hire Services Limited." By contrast the 2012 Submission made no reference whatsoever to Hire in relation to this account and argued strenuously that all monies were paid out and there was never a shortfall. It states explicitly at paragraph 195 that:

> "The intention and purpose of the driver's agency account was to ring fence and keep for the benefit of the drivers only…payments that were received from account customers. Only the drivers were beneficially entitled to those payments…[it] was clearly a trust account."

161. The funds due to Hire from the contract payments remained in that account. In Mr Elder's own words "…Hire Services did not draw what it was entitled". It drew down only enough to pay its drivers after the cash and credit balances had been netted off.

162. Specifically, although Mr Elder argued that it was effectively a bank account held in trust for the drivers, the funds that were retained in the account, which was the lion's share of Hire's entitlement, formed no part of the turnover either in Topcar or in Hire's accounts.

163. The funds passing through that bank account have never been declared as turnover in any company return. Accordingly, we noted that Hire's turnover was very low compared to that of Topcar whereas Topcar's income was limited to the radio rental, yet Hire was entitled to 55% of 10 to 12% of the sales revenue, which was very substantial.

164. In the course of the hearing, Mr Elder conceded that roughly each month he would look at how much money was sitting in the Drivers Agency Account and if Hire did not need it he would draw it down as a loan and transfer it into his RBS account in Livingston and thereafter he moved funds from there offshore or used it for such purpose as he deemed necessary.

165. Mr Elder argued that the funds were accumulated and used to pay for the deposit on the home that he himself owned in Newcastle and meet the mortgage repayments.

166. There is no evidence in any of the accounts produced, whether of Topcar or Hire in regard to any "loans". Obviously, there is no evidence of any repayments by or to the Drivers Agency Account.

167. The 2012 Submission stated that he "… now accepts that it was improper of him to transfer any funds …to his offshore accounts for his own personal use at any time" since it was clearly a trust account for the drivers.

168. There is an analysis of the withdrawals from the Drivers Agency Account in the period covered by the bank statements dated 19 October 2005 to 26 February 2007 ranging from £1,460.80 to £11,550. That clearly identified £88,805 of deposits into Mr Elder's Isle of Man bank account. In that period there is one identified withdrawal of £7,800 on 9 November 2006 which went into the bank account for Hire. The destination of the other £19,944 of withdrawals is unknown and Mr Elder offered no explanation. There are therefore withdrawals by Mr Elder from that account totalling £108,749 in 16 months. No tax has been paid on any of those sums.

Other bank accounts

169. As we indicate above, HMRC had traced three bank accounts being the Bank of Scotland bank account in Mr Elder's own name, a Royal Bank of Scotland account in Guernsey and a Royal Bank of Scotland account in the Isle of Man and there were £387,065.52 of lodgements to those accounts.

170. We were provided with a very full analysis of the deposits and indeed the withdrawals. In the entire period there was only one withdrawal of £100 in cash from Mr Elder's Bank of Scotland account. There was no evidence of expenditure on ordinary activities of daily living other than mortgage payments and insurance. By contrast the deposits particularly in the later years were largely lump sum round figures such as £8,000 or £200 etc. Mr Elder was unable to account for any of these entries.

VAT

171. Mr Elder placed heavy reliance on what he described as a VAT inspection but which was in fact the first assurance visit, on 4 October 2005. Officer Campion had written to what he took to be the principal place of business for both Hire and Topcar but which was, of course, only the serviced office in Newcastle. He met with Mr Elder and produced a detailed Note of Meeting which identified four risk areas and he noted that there was only limited information available. He had found no reason to doubt the credibility of the trader although that could not be assured unless a visit was made to inspect the exact nature of the business in Livingston. In particular, he had identified the fact that there were inadequate records insofar as he deduced that Mr Elder did not separately analyse cash movements so there was no way of conducting a cash reconciliation. There was no audit trail of takings available.

172. Mr Elder relied on the paragraph which read:-

> "Determined that on invoices issued to account customers it stated that the invoice was collected on behalf of the Drivers Agency Account, the drivers were not VAT registered and that no VAT is due or charged on the supply. Checked Drivers Agency bank account and records to establish that **all** the monies paid in by account customers were then distributed amongst the drivers and to Hire Services Limited …".

173. In Mr Elder's words that confirmed to him that the sums in the Drivers Agency Account "wasn't company money".

174. The crucial point about the VAT visit is the word "all" that we have highlighted, since that simply could not have been the case for the period with which we are concerned. It is not known precisely what records were inspected by Officer Campion and since no records were ever made available to HMRC from the moment that the enquiries were opened the position cannot be checked.

175. However, since by Mr Elder's own admission

(a) monies extracted from the Drivers Agency Account over a period of time were the source of the deposit for the property purchased in Newcastle on 30 November 2005,

(b) the VAT visit was on 4 October 2005,

(c) Mr Elder had only drawn £11,500 on 19 October 2005 and £11,000 on 9 November 2005 (and only £10,000 of the latter was transferred into the Isle of Man account from which a deposit of in excess of £60,000 was admittedly sourced,

the funds must have been extracted in the period covered by the VAT visit.

Invoices

176. We have not had sight of any of the invoices issued at the relevant time but we have the description of the invoices from the VAT officer and we have seen the more recent invoices for ATF Inc which match that description. The company name is in bold at the top of the invoice in a very large font and in tiny print at the bottom of the invoice in what appears to be notes to the invoice it simply states:

"1. Invoice collected on behalf of Drivers Agency Account.

2. The drivers are not VAT registered.

3. No VAT is due or charged on this invoice".

Discussion

177. We have set out the factual position in considerable detail primarily because up to, and during, the hearing it was very far from clear, other than perhaps to Mr Elder, precisely how he and the various companies had operated. Had it been clear we, and HMRC, would have had the advantage of an outline of the factual position. Instead, as can be seen, we had numerous contradictions almost all of which emanated from Mr Elder and those acting on his instructions. It is for that reason we have identified, where possible, how the accounts given by, or for, Mr Elder changed.

178. At the heart of HMRC's case is that Topcar was in receipt of the substantial contract income and that Mr Elder diverted substantial parts of that to his own use. He

had deposits into bank accounts and a lifestyle which was not supported by the evidence of his earnings from Topcar, which was alleged to be his only source of income.

179. Further as Officer Bell made explicit in cross examination, although he had very limited information, as he did not have accounts for all of the companies, he had a concern about large sums of money, thousands of pounds, which could be seen to move between the various companies.

180. By contrast Mr Elder has always been adamant that Topcar was never in receipt of the contract income. What did not become clear until the last day of this hearing is how Mr Elder and his companies operated. We are in no doubt that they are all his companies despite his numerous prior denials.

Mr Elder, his companies and the taxi fares

181. The starting point is that Mr Elder ultimately admitted that he ran Topcar, Hire and ATF Inc. Notwithstanding his protestations, he clearly controlled all three at all material times. We understand why HMRC had thought that ATF Inc had only been incorporated in 2007 since that was the inference from the limited information provided by Mr Elder in November 2007. It certainly seems to be the first time that it traded in the UK. However, given the date of entry (28/03/01) disclosed in the Land Registry documentation, ATF Inc has been in existence for a very long time.

182. What of ICGL? We find that that too was at all material times under the control of Mr Elder. There can be no other reasonable explanation (and none was offered) for the variation in the rent, the fact that by his own admission he personally paid the BVI taxes each year, that it lent him substantial sums of money, that he did the ODF disclosure and that it allegedly permitted him to receive the rents in each year.

183. As far as the rents are concerned, the only reasonable explanation for ICGL allegedly having any interest in the rents after 2001 (when legally any rent would have been due to ATF Inc) is that both companies were controlled by Mr Elder. The same holds true for the fact that there was no financial consideration for the transfer of the businesses of Topcar and Hire to ATF Inc or the properties between ICGL and ATF Inc. The actual registration of the title in the name of ATF Inc occurred immediately after Officer Bell had been made aware of ICGL's existence.

184. That leaves Diamond and Northern who in turn are linked in that Northern holds the lease for Diamond's premises. Diamond is also very clearly linked to Topcar and Hire and large sums of money can be seen to move between the companies. On the balance of probability Diamond was undoubtedly controlled by Mr Elder. What about Northern?

185. It is undoubtedly the case that Mr Elder previously owned the property in Livingston and sheltered it in Northern. His own evidence is inherently inconsistent about Northern, as much else. It is most unlikely that he would have met all expenditure for the property including repairs and improvements if it was owned by an entity that was at arm's length. Even more pertinently he certainly paid no rent for

the property. On the balance of probability, we find that the most likely explanation is that he most certainly did control Northern at all material times whether directly or through his then wife.

186. We find it wholly unlikely that it is a coincidence that within weeks of intimation of the HMRC enquiry, that ATF Inc would suddenly register the title to the premises in Livingston which it had owned since 2001, that Topcar and Hire would transfer all of their business to ATF Inc and disappear from the UK with intercompany debt outstanding, that ICGL would follow suit and that Mr Elder would suddenly cease to be a shareholder in Northern.

187. We take the view that it is established not only on the balance of probabilities but beyond any reasonable doubt, that Mr Elder controlled all six of the offshore companies. They all have links to the serviced office address(es) in Newcastle, Mr Elder has manipulated heritable properties, monies and indeed the trade contracts between various of the companies.

188. At all material times he was the *deus ex machina* or controlling mind of these companies. We do not rehearse the law on shadow directors, since there was no challenge to that, but given our findings in fact, we are satisfied that he was a shadow director of all of the companies in the periods with which we are concerned.

189. In that capacity he was in a position to, and did, arrange the movement of funds and assets between companies.

What happened to taxi fares charged?

190. The Drivers Agency Account lies at the heart of this case and always has done. The problem was that the relationship between Topcar, Hire and the drivers and the extent of it did not become clear until the last day of the hearing.

191. It was argued for Mr Elder that, for example, West Lothian Council always understood and accepted that Topcar acted as an agent for the drivers, whether they were self-employed drivers or owner operators, that the bank account and indeed the invoices also make that explicit and that it is wholly understandable that the VAT officer did not consider that the sums in the Drivers Agency Account were attributable to Topcar.

192. We did look at the letter from West Lothian Council dated 15 February 2013, (which is of limited value since it refers to questions asked by Mr Elder which we have not seen) wherein West Lothian Council confirmed that they understood that Topcar acted as agent for the drivers and owner operators. We do however note that the publication of the award of the contract makes it explicit that it was anticipated that the work would be sub-contracted.

193. Certainly, the bank statements do make it clear that although the bank account was operated by Topcar it was named the Drivers Agency Account and the small print on the invoices makes the same point. It is not uncommon for taxi companies to

operate in this manner. Indeed HMRC have a VAT Notice 700/25 which covers it. We find that that is how Topcar and Hire operated.

194. The fact that the bulk of the funds in the Drivers Agency Account at any given time, and therefore the source of even the admitted loans in relation to the Newcastle property, were at best (for Mr Elder) monies due to Hire came as a discovery in the course of the hearing. Since Mr Elder controlled both companies it was he who manipulated those funds. It required detailed questioning to elicit that information.

195. As we indicate above, even as late in the day as in his Skeleton Argument at paragraph 20 Mr Elder had argued:

> "None of the monies deposited were taken from Topcars…the payments for this contract work is paid into a trust account and the appellant then distributes the income to the drivers and Hire Services Ltd."

Only a small proportion was ever distributed to Hire so that was not accurate.

196. Mr Elder is not assisted by the VAT assurance visit. It is explicit in the notes of that meeting that that officer thought that all sums due to Hire were paid to Hire. Since it transpires that that was certainly not the case, and since 50 % of the takings were cash which was apparently "netted off" against contract receipts, and there was no way of checking cash movements, and the officer was not at the principal place of business we find that that visit should not reasonably provide comfort.

197. We are wholly unsurprised that HMRC did not appreciate the significance of Hire until this hearing. In response to a question from his own representative, Mr Leslie, Mr Elder confirmed that what HMRC had been told on 21 November 2007, by CTC, was a correct representation of how the fares were treated, namely: "The company collects money on behalf of the drivers and the full amount is then passed on to the drivers." That is quite simply a misrepresentation or at best a half truth. Certainly the self employed drivers or other owner operators did receive the full amount of the taxi fares.

198. Hire, who were effectively owner operators, did not. Had that been the case there would never have been enough money in the Drivers Agency Account for Mr Elder to borrow for more than an extremely short period and there is no trace of any repayments.

199. To whom then did those funds belong when paid to Topcar? They certainly were lodged in the Drivers Agency Account which was operated by Topcar and in fact by Mr Elder. It is clear, and we accept, that Topcar paid the self-employed drivers their share relatively promptly, or at least within 60 days.

200. The problem is the balance. Mr Elder made it absolutely clear to us that he saw no reason why those funds should be reflected in any accounts (including those of Hire) because "they belonged to the drivers" and indeed he asked us "Well why should it be declared anywhere?" That was the basis on which he operated Topcar and Hire and he was very clear indeed about that.

201. That misses the obvious issue that 55% of the contract income, where the work was done by drivers who obtained their cars from Hire, had apparently been collected by Topcar as (undisclosed) agent for Hire. That was 10 or 12% of the total contract taxi hires – a substantial sum. Did those monies belong to Topcar?

202. It is only in the Closing Submissions that, for the first time, and unsurprisingly in light of the oral evidence adduced, it was argued at paragraph 17 that "The Appellant contends that the origins of funds transferred were in relation to loans from Hire Services Ltd and not Topcars (Taxis) Ltd.". That is in stark contrast with the tenor of all of the previous correspondence and meetings and indeed the original Notice of Appeal which stated that "...Our client has explained that the monies deposited in this period were from personal funds and from loans from his employer." Ostensibly, he has never been employed by Hire, albeit he ran that company.

203. Further, for most of his oral evidence Mr Elder was clear that the loans were from the Drivers Agency Account. Since that is in the name of Topcar it is obvious why HMRC took the stance that they did.

204. At paragraph 38 of their Closing Submissions HMRC argue that:

> "HMRC submit that, on the facts and evidence heard, Mr Elder used the Drivers Agency Account as the vehicle through which he could extract substantial monies from Topcars (Taxis) Ltd over all years under appeal without deduction of tax. The 'arrangements' in place – use of the Drivers Agency Account to shelter surplus funds and Hire Services Ltd only being paid what was necessary to pay the drivers and cover essential overheads – were all set up by Mr Elder who controlled both companies. These were not normal third party commercial arrangements. Any argument that Hire Services Ltd was entitled to further monies on the basis of some percentage of profit sharing is sham. These 'arrangements' were designed by Mr Elder – the mind that drove both companies – to ensure that the Drivers Agency Account would always have money that Mr Elder himself could access whenever he so wished."

205. We agree that the Drivers Agency Account was a vehicle that enabled Mr Elder to manipulate monies. The point is whether those funds were extracted from Topcar as HMRC argue?

206. The fact is that those funds were not paid into Hire and accounted for in that company because Mr Elder, who controlled Hire did not demand payment to the full extent of entitlement. Those monies never belonged to Topcar but did belong to Hire. Topcar was the taxi booking service for Hire, its drivers and the self-employed drivers. It is only because Mr Elder was the controlling mind of both companies that he could hide the funds in this way.

207. Those funds should not have been treated as a personal bank for Mr Elder which is actually what happened.

208. The conclusion in the last part of the final sentence in that paragraph from the Closing Submissions reads:

> "These 'arrangements' amount to tax evasion on a large scale and their true purpose was to enable Mr Elder to understate the true level of his remuneration from Topcars (Taxis) Ltd".

209. Undoubtedly, it was tax evasion on a large scale but, very reluctantly, we have to find that the sums not paid out of the Drivers Agency Account were in fact due to Hire and should have been reflected in the accounts for Hire. Topcar were at all times acting as agent for an undisclosed principal.

210. Those funds were technically at the disposal of Hire, and therefore Mr Elder, but those funds did not derive from Topcar.

211. The monies known to be derived from the Drivers Agency Account do not amount to anything like the full amount of the deposits in the known bank accounts and, as can be seen above, it has been conceded on occasion that unspecified "companies" made loans to Mr Elder. It is clear that there were substantial movements of funds between Topcar, Hire and Diamond and nothing is known about the other companies. There is no information as to why and how there was such intercompany debt and what happened on the liquidation of the companies.

What was the position with rental payable for the premises from which the taxi business operated?

212. It is quite clear, that as a matter of law, and in the absence of any assignation and not even the suggestion of one has been provided, the rental income for these premises should have been paid to ATF Inc. For a long time Mr Elder suggested that the rental was payable by Topcar and did not even mention Hire. However, the increase in the alleged payment coincided with the incorporation of Hire yet there are still anomalies in the amounts allegedly paid.

213. As with everything else in these appeals there is a lack of clarity. Originally Mr Elder suggested that the total rentals were £27,000 and thereafter that it was £30,000 and then it transpired that there was allegedly a loan by him to ICGL and by ICGL to him. Even the Skeleton Argument is incorrect in suggesting that the loan for the purchase price was introduced in 1999 since, of course, the property was purchased in 1995 and Mr Elder was clear that he had met the costs of purchase personally.

214. The only evidence in regard to alleged loans and the rental payments comes from the IGCL ODF Disclosure which was taken at face value by HMRC and was then spoken to by Mr Elder. There is no independent evidence vouching any of these alleged payments.

215. In all these circumstances we find that the maximum loan obtained from ICGL by Mr Elder is the £16,664 conceded by HMRC.

What did HMRC know, or could have known, and when?

216. HMRC have had very considerable difficulty due to the fact that almost all relevant records for the companies were destroyed or removed from the UK. We do not accept that it was a commercial decision by Mr Elder to decant his businesses into ATF Inc in autumn 2007 and that it was wholly unconnected with the enquiry by HMRC.

217. The extensive variation in the accounts given to HMRC, whether in correspondence or in submissions at different times has muddied already decidedly opaque waters.

218. We find that Mr Elder's argument that there should be no accounting for the funds in the Drivers Agency Account is disingenuous at best. If all of the funds had been paid out to the drivers and Hire the situation would have been quite different. The absence of records aggravated the position.

219. We are wholly underwhelmed by the argument advanced to the effect that Officer Bell failed to ask the right questions and that Mr Elder had tried to tell HMRC about Hire on 5 November 2007. The terms of the letter of 27 November 2007 simply do not reflect that; on the contrary there is no mention of Hire and it suggests that all funds were paid out of the bank account. Only 13 copy bank statements for this account were produced years after the event. The remaining statements were only produced in response to the Tribunal's Direction.

220. HMRC knew from the outset that Mr Elder appeared to have been able to purchase a substantial property with a large mortgage yet having only a relatively small income. He was connected with numerous offshore companies and as soon as HMRC took an interest in him, the companies and all of their records vanished. He had access to credit facilities and numerous bank accounts with significant deposits which bore no resemblance to his apparent earnings.

221. Even following this hearing, with the available bank accounts having been carefully scrutinised, it has not proved possible to find the source of, for example, the funding for the alleged loan to ICGL or the establishment of the home in Newcastle (and he repeatedly agreed that he lived part time in both homes) or for the running costs of both or indeed for the high level of credit offered to him.

222. He did not voluntarily co-operate with HMRC and HMRC had to invoke their statutory powers. Even then there was limited compliance. We agree with Officer Bell when he stated that the offer of an open mandate (which was not produced) would not identify specific banks and accounts in relation to all personal bank accounts and other companies' and entities' accounts under Mr Elder's effective control. Mr Elder went out of his way, until this hearing, to argue that he did not have control of those entities.

223. We find that the discovery assessments were raised timeously following discovery.

What was the source of the monies in the bank accounts and the funding of the purchase of, and mortgage payments for the Newcastle property?

224. Although at times Mr Elder had attempted to argue that funds from the Drivers Agency Account were only utilised to finance the purchase of the property in Newcastle in 2005, he did also agree at other times that he regularly withdrew "loans" from the Drivers Agency Account and we find that on the balance of probability that

would account for some of the substantial lodgements both offshore and into the Bank of Scotland account.

225. Shortly put, it was the introduction of Hire and the failure to remit funds to Hire, and or the failure by Hire to draw down those funds, which allowed the manipulation of the funds in the Drivers Agency Account. Regretably that only became apparent on a close examination of the evidence, and in particular Mr Elder's oral evidence, instead of many years ago.

226. Lastly, we consider it decidedly probable that funds were extracted from and manipulated through the other companies and that that accounts for some of the unaccounted for deposits in some of the bank accounts.

Key facts

227. We highlight the following crucial facts:

(a) Topcar acted as a booking agency, negotiated the contracts, received telephone hires, allocated all hires, whether contract or telephone, to the self-employed drivers and Hire and collected payment of the contract fares.

(b) The self-employed drivers paid Topcar a "rental" fee and offset cash fares against the contract fares collected by Topcar for them.

(c) Hire and its drivers offset cash fares against the contract fares collected by Topcar. Hire retained 55% and the drivers 45%. Hire did not draw down all of the contract income due to it from the Drivers Agency Account.

(d) At all material times, Mr Elder controlled all of the companies and moved funds and assets between them.

Decisions on the facts only in relation to Mr Elder's remuneration from Topcar (Issues one and two)

228. Mr Elder was clear in his oral evidence that the "main" source of the deposits into the bank accounts was from the Drivers Agency Account. On that basis alone, the primary source of the deposits was indeed Hire. Topcar itself did not receive any taxi fares whether cash or contract. It was the drivers and owner operators including Hire which had the right to the receipts. Therefore, any funds that were diverted into the bank accounts were not derived from Topcar or by reason of Mr Elder's employment with Topcar. On that basis there was no reason for PAYE tax to be deducted. Accordingly the appeal must succeed to that extent.

Decision on the facts only on Issue three

229. As far as the third issue and Northern is concerned, we are in no doubt that at all material times, Mr Elder controlled Northern and therefore HMRC had discharged the burden of proof and established that he had shadow director status. A shadow director is defined in section 741(2) of the Companies Act 1985 as a person in accordance with whose directions or instructions the directors of the company are accustomed to act. That is reiterated in section 168(8) ICTA 1988 and where such a person is

provided with living accommodation by the company then that individual will be liable to charges under sections 145 and 146 in the same way as if that individual had held a formal appointment as a director.

230. Mr Elder deliberately failed to disclose the assessable benefit to HMRC thereby triggering the loss of tax.

231. Mr Elder has advanced no credible evidence to challenge the assessable benefit. We therefore confirm the amount of the assessable benefit arising on the provision of living accommodation to Mr Elder for the years 2001/02 to 2006/07. However, those figures are very small. The detail is set out in the HMRC review letter to Mr Elder dated 11 June 2010.

Is that recoverable? – Discovery Assessments

232. It is disappointing that the whole issue as to the competency, and/or timing, of the purported discovery assessments in these appeals was only addressed in detail following the hearing.

233. It is not disputed that the onus of proof lies firmly with HMRC.

234. The discovery assessments were made under the provisions of Section 29 Taxes Management Act 1970 ("TMA") and are a mixture of normal time limit assessments and extended time assessments. When the discovery assessments were issued in December 2009, Section 34 TMA provided for an ordinary time limit of six years. Accordingly the discovery assessments for 2003/04 to 2006/07 inclusive are normal time limit assessments in accordance with Section 34(1). The discovery assessments for the years 1998/99 to 2002/03 inclusive are extended time limit assessments made under Section 36(1) TMA which relates to fraudulent or negligent conduct.

235. The relevant provisions of Section 29 TMA provide as follows:-

> **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, 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.
>
> (4) The first condition is that the situation mentioned in subsection (1) above [was brought about carelessly or deliberately by] the taxpayer or a person acting on his behalf.
>
> (5) The second condition is that at the time when an officer of the Board—

> (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under [section 8 or 8A] of this Act in respect of the relevant [year of assessment]; or
>
> (b) informed the taxpayer that he had completed his enquiries into that return, the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

236. HMRC argue that the discovery assessments were issued by the officer in order to "make good to the Crown the loss of tax" and therefore satisfy Section 29(1). HMRC have established that Mr Elder was the controlling mind of Northern and that there was an assessable benefit arising on the provision of living accommodation at 35 Braid Green, Livingston. The failure to account for tax undoubtedly was caused by Mr Elder's deliberate decisions and in the absence of any records or accounting no officer of HMRC could have reasonably been expected to be aware of the situation. Accordingly Sections 29(4) and (5) of Section 29 TMA are comprehensively met.

237. It is perhaps helpful to give the timescale. On 18 November 2009 Officer Bell wrote to Mr Lone intimating that it was intended to issue discovery assessments but that directions would be issued under Regulation 72 of the Income Tax (PAYE) Regulations 2003 ("the PAYE Regulations"). The discovery assessments in the sum of NIL tax due were issued in December 2009 and on 12 January 2010 Officer Bell confirmed that the discovery assessments issued in January 2009 "also include the benefits previously assessed" and on review in June 2010 those were revised. The direction under Regulation 72 was issued on 5 April 2012. It is through that direction that HMRC sought to recover the tax which they say ought to have been deducted.

238. The issue is, and always has been, whether a nil assessment can ever make good a loss of tax.

239. Were the discovery assessments in the sum of nil competent? HMRC argue that the issue of the discovery assessments was simply the first leg of the process to make good the loss of tax and that detailed calculations of liability for each of the relevant years underpinned the discovery assessments and that the discovery assessments include a notional tax credit as required by Regulation 188 of the PAYE Regulations.

240. HMRC then argue that the direction under Regulation 72(5) of the PAYE Regulations was the second leg of the process required to make good the loss of tax.

241. For Mr Elder it is argued that there was no discovery because at the time the discovery assessments were raised, there had been no direction in terms of Regulation 72(5) and HMRC could not have discovered that tax had not been paid by Mr Elder. A mere suspicion did not suffice. Further a discovery assessment is not the first leg of a process to make good the loss of tax but rather the final leg of the process and an assessment which shows an amount of tax due as nil cannot be subsequently amended by a Regulation 72(5) direction.

242. There is an undoubted loss of tax fraudulently and deliberately caused by Mr Elder. The language of the Statute is very clear and a discovery assessment must be in the amount which makes good the loss of tax.

243. There is no statutory definition of an assessment but it is the basis by which tax is claimed. It seems to us to be self-evident that an amount of zero cannot ever make good a loss of tax. The assessment stands in isolation at the point at which it is issued. The assessment(s) might not have been appealed. The loss of tax is quantified at nil. HMRC might never have made any other Direction.

244. There is no general power to raise assessments under Section 29 TMA and the power that does exist is limited to making good a loss of tax that is brought about by the taxpayer. The loss of tax and the behaviour have been established but the assessment does not, and cannot make that good since it charges no tax.

245. Accordingly, for all these reasons the appeals must succeed.

246. 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.

JUDGE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 5 APRIL 2017

APPENDIX A

Preliminary issues (identified by Mr Elder) as described by Judge Cannan at paragraph 19 in the 2014 decision

> **"**(1) The appellant sought to take advantage in 2007 of what was described as an "Offshore Disclosure Facility" ("the OSD Facility"). As I understand it, having made a disclosure the OSD Facility provided that by 30 April 2008 HMRC would either accept the disclosure or open an enquiry. The respondents sought to open an enquiry by letter dated 25 April 2008 but it is alleged that this was not received by the appellant until 2 May 2008. The appellant contends that the OSD Facility gave rise to a contract and that the respondents are prevented from relying on an enquiry notice which fell outside the terms of the OSD Facility. Questions as to the jurisdiction of the tribunal may also arise in relation to this issue.
>
> (2) Whether the nil assessments issued in December 2009 are assessments at all. The appellant contends that an assessment must specify an amount of tax falling due and that in the circumstances of the present appeals a nil assessment is meaningless. The proper charging provision is said to be a direction under Regulation 72. In addition it is said that the assessments were issued for a collateral or tendentious purpose, in order to obtain findings in the first appeal which would then bind the appellant in any appeal against a Regulation 72 direction.
>
> (3) The respondents' "claim" under Regulation 72 ought to have been brought at the same time as the assessment. As such, and if the first appeal is struck out, the respondents' defence of the second appeal ought to be struck out as an abuse of process. Reliance is placed on *Henderson v Henderson* (1843) 3 Hare 100.
>
> (4) Whether the respondents require permission to amend their Statement of Case in the first appeal in order to bring or maintain the Regulation 72 claim. In reality it is submitted that this is one set of proceedings.
>
> (5) Whether in the second appeal the burden of proof is on the respondents to establish knowledge on the part of the employees that the employer had wilfully failed to deduct tax.
>
> (6) Whether the Regulation 72 direction is supported by a valid assessment so as to engage the deeming provision in Regulation 188(5). If the nil assessments are invalid, then it is suggested that there are no valid assessments to support the Regulation 72 direction.
>
> (7) Whether it was an abuse of process by the respondents to seek to establish liability as against the appellant as a company officer in the first appeal and then to proceed to establish liability as an employee in the second appeal.
>
> (8) Even if the nil assessments were valid, they did not show any credit for tax under Regulation 72. As such, an issue is said to arise as to whether the deeming provision in Regulation 188(5) is engaged."

Subsequently, and prior to this hearing, in regard to preliminary issue 4, HMRC sought and obtained permission to lodge an amended Statement of Case, which they did. In regard to preliminary issue 5, it was conceded that the burden of proof lay with HMRC.