



TC06181

Appeal number: TC/2016/02365

*Income tax –closure notice &discovery assessments – unexplained income –
whether trading income – HELD – on balance of probabilities not taxable trading
income- appeal allowed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MR EDWIN BEKOE

Appellant

- and -

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

**TRIBUNAL: JUDGE RACHEL SHORT
MR WILLIAM SILSBY**

**Sitting in public at Eastgate House, Newport Road, Cardiff on 21 September
2017**

Mr Martyn Arthur of Martyn F Arthur Limited for the Appellant

**Ms Karen Powell, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. This is an appeal by the Appellant, Mr Bekoe against tax assessments amounting to £29,312.38 and penalties amounting to £15,901 for the four tax years 2008-9 to 2011-12.

2. Those assessments were raised by HMRC on the basis that amounts totalling £20,900 paid into a Barclays Bank account in the name of Mr Bekoe's brother during the 2009-10 period were undeclared taxable trading income of Mr Bekoe.

3. HMRC have applied penalties for each of the four years on the basis that Mr Bekoe deliberately failed to disclose this taxable income which he knew was in this bank account in his brother's name.

4. Mr Bekoe disputes that those payments were taxable trading income and says that they were in fact loans from friends and family members including his father.

15 ***Background***

5. HMRC opened an enquiry into Mr Bekoe's 2009-10 tax return on 11 January 2012. A closure notice for 2009-10 was issued on 12 January 2016 with discovery assessments for the 2008-9, 2010-11 and 2011-12 tax years. A penalty assessment for each of the four years was also issued to Mr Bekoe on 12 January 2016.

6. Mr Bekoe appealed against the assessments and the penalties to this Tribunal on 18 April 2016.

7. Mr Bekoe comes from Ghana but now lives and works in the UK as an IT specialist. During the 2009-10 tax year he had a full time job with a large IT company TPI Euro-sourcing and also worked as a consultant for his former employer Mphasis also a large IT company.

8. Mr Bekoe spent his weeks living at a property in London together with his two brothers (Darryl and Cyril) but the weekends at his property in Ashford Kent.

9. Mr Bekoe's wife is also from Ghana, both Mr and Mrs Bekoe have family members who still live in Ghana.

10. Mrs Bekoe's mother is a teacher and decided to set up a school in the capital of Ghana, Accra in 2009, known as the Fanida International School ("FIS")

11. Mr Bekoe paid a total of £21,000 towards the costs of setting up the school in Accra from a Halifax bank account in his name in May 2009. He entered into an agreement governing the funding of the school, a Partnership Agreement dated 1 May 2009 with three other partners.

The law

12. HMRC raised their assessment on Mr Bekoe under s28A Taxes Management Act 1970 for the enquiry year, 2009-10.

5 13. Their assessments for the 2010-11 and 2011-12 years were made under the discovery rules at s 29(3) and (4) Taxes Management Act 1970 on the basis that Mr Bekoe’s behaviour in failing to disclose additional taxable income for those years was careless or deliberate:

10 “29(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above-

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

15 29(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”

14. The discovery assessment for the 2008-9 year was made under s 36(1A) Taxes Management Act 1970 on the basis that Mr Bekoe’s actions in failing to disclose additional taxable income for that year were “deliberate”.

20 “S36(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax

(a) brought about deliberately by the person

(b)

(c).....

25 (d).....

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

30 15. The penalties charged on Mr Bekoe were charged under Schedule 24 of the Finance Act 2007 on the basis that Mr Bekoe’s actions were deliberate and on the same basis for all four of the years under appeal.

“Schedule 24

I(1) A penalty is payable by a person (P) where –

(a) *P* gives HMRC a document of the kind listed in the Table below, and

(b) Conditions 1 and 2 are satisfied.

I(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to –

5 (a) an understatement of a liability to tax

(b) a false or inflated statement of a loss, or

(c) a false or inflated claim to repayment of tax

I(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on *P*'s part”

10 16. We were also referred to the *Jonas v Bamford* decision ([51] TC 1) on which HMRC relied to apply the “assumption of continuity” for the assessed years other than 2009-10: The final paragraph of that decision concludes with this description of that assumption:

15 “So far as the discovery point is concerned, once the Inspector comes to the conclusion that, on the facts which he has discovered, Mr Jonas has additional income beyond that which he has so far declared to the Inspector, then the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly on the taxpayer”.

20 17. We were also referred to three Tribunal cases;

(i) *Ali v Commissioners for Her Majesty's Revenue & Customs* [2012] UKFTT 289(TC)

(ii) *Duffy v Revenue & Customs Commissioners* [2007] SpC 596

25 (iii) *Kohal v Commissioners for Her Majesty's Revenue and Customs* [2013] UKFTT 487 (TC)

Evidence seen

18. Copies of the Barclays Bank account statements in the name of Darryl Bekoe for 6 April 2009 to 5 April 2010.

30 19. Copies of Halifax Bank account statements dated 3 April 2009 to 1 April 2010 for an account in the name of Mr Edwin Bekoe.

20. Partnership Agreement relating to FIS in Accra of 1 May 2009.

21. Letter from Mr Bekoe's accountant, Mr Rabbani of Computaccount, to HMRC dated 10 August 2012 saying in respect of the Barclays Bank account:

5 *“This account is in the name of Mr Bekoe’s brother. At the start of his self-employment consultancy, Mr Bekoe wanted the income from his self-employment to be credited to a separate account, however, due to a poor credit rating at the time, he was unable to open a separate bank account for his self-employment income and he used his brother’s account instead”*

22. Letter from Mr Bekoe’s accountant, Mr Rabbani of Computaccount, to HMRC dated 10 February 2014 saying

10 *“Unidentified deposits: As mentioned previously these deposits are loans for the start up business (Fanida International School) operated in Ghana, Mr Bekoe is a Partner in this business and has incurred substantial losses (approximately £49,000 during the 2009/10 tax year) – documents for this to follow.*

Mr Bekoe has not been able to contact the individuals to get confirmation for these loans.

The £6,740 cash deposit is from Mr Bekoe’s brother”

15 23. Letter from Mr Sowa Bekoe, Mr Bekoe’s father, of 20 February 2014 saying

“This is to confirm I deposited an amount of about £6,700 into Edwin Bekoe’s account toward the building of Fanida International School”

24. Letter from Mr Sowa Bekoe of 25 February 2015 saying

“Settlement of loans for Edwin Bekoe

20 *This is to confirm that I settled loans towards the building of Fanida International School that had been incurred by my son Edwin Bekoe.*

The total amount settled was about £14169 and a loan to my son”

25. Undated letter from Mr Eze Oke at an address in Nigeria saying

25 *“I Eze Oke, have given Mr Edwin Bekoe the sum of 14160 pounds towards a school in Ghana as a loan which has been paid back”*

26. Letter dated 12 August 2014 from Freda Lamptey, Mr Bekoe’s mother in law founder and director of FIS headed “Confirmation of Investment” saying

30 *“I received 117,000 Ghana Cedis from my son-in-law Edwin Bekoe from April to September 2009 toward the building of Fanida International School, he was the sole investor in the partnership”.*

27. Letter dated 23 June 2010 from solicitors AB David Law headed “Partnership relationship in respect of Fanida International School”.

28. Invoices for work done at FIS dated April 2009 to September 2009.

29. Schedule of payments prepared by HMRC setting out the dates when cash payments were received into the Barclays Bank account and when the “loan” payments were made into that account, with the names of those making the payments and their description:

5 Deposits made in the account:

DATE	DETAILS	AMOUNT
9 April 2009	Ezeoke OM Purchase	£3,500
17 April 2009	Ezeoke OM Purchase	£470
20 April 2009	Ezeoke OM Purchase	£500
5 May 2009	Ezeoke OM Purchase	£2,400
19 August 2009	Ezeoke OM Purchase	£1,800
11 December 2009	S Rojer Mark	£550
19 January 2010	CN Martins Barclays	£2,120
9 February 2010	S Rojer Mark	£700
9 February 2010	OM Ezeoke Bill	£1,400
25 February 2010	OM Ezeoke Bill	£720

Cash payments into the account:

DATE	DETAILS	AMOUNT
28 September 2009	Cash Victoria Street	£220
4 November 2009	Cash Dagenham Highway	£400
18 November 2009	Cash Victoria Street	£500
1 December 2009	Cash Romford Branch	£650
24 December 2009	Cash Maidenhead High	£970
30 December 2009	Cash Dagenham Highway	£1,000
25 March 2010	Cash Chadwell Heath	£3,000

30. Written statement of Mr Bekoe dated 30 August 2016.

31. Note of meeting of 14 August 2014 between Mr Bekoe, Mr Arthur and Mr Rabbani of Computaccounts and Mrs Lazarus and Mr Ahmed of HMRC.

5 32. Mr Bekoe's tax returns and tax calculations for each of the tax years ending 2009, 2010, 2011 and 2012.

33. Tax assessments and penalty assessments issued to Mr Bekoe for 2008-9 to 2011-12 tax years on 12 January 2016.

34. Various correspondence between the parties.

10 *Witness evidence*

35. We were provided with a written witness statement from Mrs Angela Lazarus dated 4 April 2017, the HMRC officer in charge of Mr Bekoe's case. Mrs Lazarus gave oral evidence to the Tribunal and was cross-examined by Mr Arthur.

Mrs Lazarus' evidence

15 36. Mrs Lazarus' witness statement was taken as read. In that statement she explained that Mr Bekoe had been chosen for an enquiry into his 2009-10 tax return because of the low level of self-employed earnings reported.

20 37. Mrs Lazarus could not confirm when HMRC were first provided with extracts from the Barclays Bank account and in particular whether it was before or after the Schedule 36 Information Notice had been served on 7 March 2012.

25 38. Mrs Lazarus' statement referred to the series of correspondence between HMRC and Mr Bekoe's advisers, Mr Rabbani and Mr Arthur, asking for information from Mr Bekoe to explain the payments made into the Barclays Bank account and to a meeting between the parties on 14 August 2014 at which Mr Bekoe was instructed by his adviser not to respond to specific questions from HMRC unless they were put in writing.

39. Mrs Lazarus explained that the basis on which HMRC had concluded that the Barclays Bank account was a business account was the statement made by Mr Rabbani in his letter of 10 August 2012.

30 *Mr Bekoe's evidence*

40. We heard oral evidence from Mr Bekoe who was cross-examined by Ms Powell.

41. Mr Bekoe struck as a straightforward and reliable witness.

The school in Accra

42. Mr Bekoe told us that his mother in law had originally run a nursery school in Accra. After a divorce she had decided that she would try and expand. He heard about this plan when his wife was in Accra in February 2009. It was eventually decided that this expansion would be more ambitious and that a new school would be set up as a commercial venture. Mr Bekoe thought that this was an opportunity to give something back to his home country and make some money so decided to provide some cash. His intention was to invest as a joint investment with other family members (his mother in law, Freda Lamptey, his sister in law and his brother in law)

43. He provided some small amounts of funding for the school in May 2009 before the formal Partnership Agreement was entered into in May 2009.

44. He transferred two sums of money from his Halifax Bank account, the first of £15,000 and a second of £6,000 in May 2009 to pay his share of the school partnership investment. He travelled to Ghana in May 2009 and took the first payment of £15,000 in cash himself.

45. By the end of September 2009 it was clear that significant additional funds were needed and when the school opened it was not a success, with only nine pupils and problems hiring teachers. By early 2010 the project had fallen apart, with his mother in law and other family members not wanting his “hands-on” approach to the project.

The Barclays Bank account

46. Mr Bekoe gave us a slightly different explanation for the use of the Barclays Bank account from the one provided by his adviser in their letter of 10 August 2012. Mr Bekoe said that he had used the Barclays Bank account when he was an employee of Mphasis. It was much easier to use that account with them for his subsequent self-employed income, since they already had details for that account.

47. Mr Bekoe said that although this account was in his brother’s name, he had access to it on-line and access to a credit card in his brother’s name. His brother had given him access to the account when he knew that Mr Bekoe was short of funds. The account was also used to pay shared utility bills for the house which they shared in London and for other personal transactions, which he pointed out to us in the copy bank statements provided.

48. Mr Bekoe explained that he did not regularly check this account, he only checked if he was expecting payments to be made into the account and used it for paying bills.

The cash payments - £6,740

49. Mr Bekoe told us that the £6,740 of cash payments had been paid into the Barclays Bank account by friends and family members who had travelled to the UK from Ghana and were making payments on behalf of Mr Bekoe’s father to support his son in the UK. Currency would have been exchanged in Ghana and sterling cash paid

into the account in the UK. In some cases his bother would have met the people paying in the cash at the local branch.

The loan payments – Mr Eze Oke £14,160

50. Mr Bekoe explained that Mr Eze Oke was known to him but was actually a contact of his wife. He had been willing to offer funds to Mr Bekoe when he was short of cash at an “aggressive rate” – the interest rate payable was 25%. He could not identify the two other named people who had paid bank deposits into the account but could say that they were related to Mr Eze Oke.

51. Mr Bekoe accepted that there was no written loan agreement with Mr Eze Oke but described the arrangement as more a response to ad hoc requests to provide cash rather than a formal loan. The intention was that any loan would have been re paid out of income generated by the school, but in the end no such income was generated.

52. Mr Bekoe was adamant that despite the descriptions of the payments as “bills” and “purchases” on the Barclays Bank account statements he had not provided services to any of these people.

53. He told us that when the school project went wrong it was obvious that he was not going to be able to pay back the loan from Eze Oke so his father had agreed to pay it off.

54. Mr Bekoe told us that he worked full time for a large IT company throughout 2009-10 but had decided to carry on doing some consultancy work for his former employer, Mphasis because he wanted to keep in touch with them with a view to being involved in part of their business in the future. He agreed that he was not making large profits from the consultancy work which he was doing.

55. Mr Bekoe told us that he had neither the time nor the inclination to undertake any other work and that his expertise was not suited to working for individuals on a one off basis.

HMRC’s arguments

56. It was accepted by the parties that while the onus was on Mr Bekoe to demonstrate, on the balance of probabilities, that the payments into the Barclays Bank account were not taxable trading income, the onus was on HMRC to demonstrate that discovery assessments could properly be made for the three years; 2008-9, 2010-11 and 2011-12 and that penalties had been properly applied.

57. HMRC accepted that the £21,000 paid by Mr Bekoe from his Halifax Bank account in May 2009 had been paid towards the funding of the school run by his mother in law in Accra.

The assessment year – 2009-10

58. Ms Powell said that HMRC had started their enquiry into Mr Bekoe's tax return because of the low level of his self-employed profits.

59. HMRC explained that they had come to the view that cash payments of £6,740 and bank deposits of £14,160 which had been paid into the Barclays Bank account during 2009-10 were undisclosed taxable earnings of Mr Bekoe. They had come to this conclusion because:

10 (i) The Barclays Bank account had been set up in order to receive Mr Bekoe's self-employment income, as stated by Mr Rabbani in his letter of 10 August 2012.

(ii) If these additional amounts were added to Mr Bekoe's self-employed income, the amount of his self-employed earnings looked more credible.

15 (iii) HMRC had asked on numerous occasions for an explanation of where the cash and money deposits had come from but had not received a response from Mr Bekoe which made sense.

60. The evidence provided by Mr Bekoe to support the payments being loan payments were not consistent with the facts:

(i) The letter from Mr Sowa Bekoe of 20 February 2014 referred to a single deposit, when in fact numerous deposits had been made.

20 (ii) The amount of the loan stated to have been settled by Mr Sowa Bekoe did not correlate with the amounts which had actually been paid into the Barclays Bank account.

25 (iii) The pattern and timing of the payments coming into the Barclays Bank account did not reflect the need for funding for the school in Accra or the terms of the Partnership Agreement; loan payments had been paid into the Barclays Bank account before the time when Mr Bekoe said that the school ran into problems and before the Partnership Agreement was signed on 1 May 2009.

(iv) No evidence had been provided of any loan documentation or of the loans having been re-paid.

30 (v) There was no explanation for why payments were made into the Barclays Bank account when Mr Bekoe had made his payments for the school from his Halifax Bank account.

35 (vi) There was no explanation for making payments to fund the school in Ghana to someone in the UK when the payments could have been made directly to the school or someone representing the school in Ghana.

(vii) The letter from Freda Lamptey of 12 August 2014 referred to Mr Bekoe as the only investor in the school, while the Partnership Agreement referred to several other investors.

5 61. HMRC argue that the evidence provided by Mr Bekoe to support his explanation of the payments into the Barclays Bank account is not reliable, is inconsistent with the facts and is not provided by independent third parties.

62. HMRC refer to the Tribunal decisions in *Ali v HMRC*, *Duffy v HMRC* and *Kohal v HMRC* to support their position that if Mr Bekoe's evidence is not credible then he has not demonstrated on the balance of probabilities that this income is anything other than trading income. In the *Ali* case the tribunal judge said "*The question in this appeal is whether we accept or not the explanations given by Miss Ali as to the nature of the various deposits in her bank accounts. If there remains any uncertainty in our minds, then it follows that she has not discharged the burden of proof upon her*".

15 *Years 2008-9, 2010-11 and 2011-12*

63. HMRC's assessments for these years are made under the discovery rules at s 29 Taxes Management Act 1970. HMRC say that they discovered that income which should have been charged to tax had not been charged to tax in January 2016 when discovery assessments were issued.

20 64. Ms Powell explained that HMRC had applied the "assumption of continuity" to raise discovery assessments for each of the 2008-9, 2010-11 and 2011-12 tax years on the basis of the information which they had for the 2009-10 tax year. She referred to the decision in *Jonas v Bamford* to support HMRC's ability to assume that there was under-declared income in these years as well as the year of enquiry and that this principle operated both retrospectively (for the 2008-9 year) and prospectively (for 25 the 2010-11 and 2011-12 years). The Judge in *Jonas v Bamford* said that "*the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly on the taxpayer*" [Walton J at final paragraph].

30 65. HMRC say that they repeatedly asked Mr Bekoe and his advisers whether there had been any change in Mr Bekoe's practice and were eventually told (by letter of 3 May 2015) that there had been no change other than that Mr Bekoe had been more diligent over his affairs since the enquiry commenced.

Discovery – 2008-9

35 66. HMRC accepted that a discovery assessment could only be issued to Mr Bekoe for the 2008-9 tax year if it could be demonstrated that Mr Bekoe had been deliberate in understating his tax liabilities for that year. (s36(1A) Taxes Management Act 1970).

Discovery – 2010-11 and 2011-12

67. HMRC stated that discovery assessments could be issued to Mr Bekoe for 2010-11 and 2011-12 on the basis that he had been at least careless if not deliberate in failing to disclose additional taxable income for those years.

- 5 68. HMRC say that Mr Bekoe's actions were deliberate or at least careless in failing to disclose taxable income which he knew was in the Barclays Bank account in 2009-10 and therefore the same can be said of his behaviour in the 2008-9 and 2010-11 to 2011-12 tax years.

Penalties

- 10 69. Ms Powell said that HMRC had applied the assumption of continuity to the way in which penalties had been calculated from the 2008-9, 2010-11 and 2011-12 years also; the mitigation which had been applied for 2009-10 had been replicated for each of the other three years assuming consistent behaviour by Mr Bekoe.

- 15 70. HMRC considered that Mr Bekoe's actions had been deliberate but not concealed and that the disclosure to HMRC was prompted. The penalty range under Schedule 24 Finance Act 2007 was therefore from 35% to 70%.

- 20 71. HMRC said that although Mr Bekoe had provided invoices to demonstrate what his taxable self-employed income was for 2009-10, he must have been aware that the funds in the Barclays Bank account were much higher than the turnover figure stated on his tax return of £37,741. There had therefore been a deliberate under declaration of earnings. If Mr Bekoe's actions could not be described as deliberate, they should at least be considered to be careless.

- 25 72. In applying the potential mitigation to the penalty, HMRC had concluded that: (i) no mitigation should be given for telling HMRC about the omission of taxable income (ii) mitigation of 35% should be given for helping HMRC; it had taken Mr Bekoe some time to provide the information requested by HMRC and (iii) mitigation of 10% for providing records should be given since the disclosure was prompted. Resulting in an overall mitigation rate of 45%.

- 30 73. Applying that mitigation % to the potential penalty range (from 35% to 70 % = 35% x 45% = 15.75) gave an overall penalty % of 54.25 (70% - 15.75) which had been applied for each of the 2008-9 to 2011-12 years.

74. HMRC say that they considered whether any special circumstances existed which would allow them to reduce the penalties charged but concluded that no special circumstances existed.

35 ***Mr Bekoe's arguments***

75. On behalf of Mr Bekoe Mr Arthur started by pointing out that HMRC should not be using information from what was essentially a private bank account, the

Barclays Bank account, as the basis for tax assessments. HMRC have no right to see such information in circumstances in which “records are not broken”.

76. Any issues with a failure to provide information were as much due to HMRC as Mr Bekoe.

5 77. Mr Arthur accepted that Mr Bekoe’s book-keeping had been wanting but that this was mainly because of the way in which the school business in Accra had been run, which was a shambles.

78. Mr Arthur stressed that HMRC had no evidence that the sums received in the Barclays Bank account were trading income of Mr Bekoe. The Barclays Bank account was not a business account and had clearly also been used for personal transactions. Monies paid into that account should not be assumed to be business income.

79. The cases referred to by HMRC considered taxpayers who were actually traders; that was not Mr Bekoe’s situation, he was essentially an employee who did a small amount of consulting work and was involved in trying to support a school in his home country.

80. Mr Arthur described Mr Bekoe as a straightforward and honest man who had tried to provide the information which HMRC required. Mr Arthur said that he accepted that there were discrepancies between the timing and amount of payments in the Barclays Bank account and the letters provided from Mr Sowa Bekoe and Mr Eze Oke.

81. If Mr Bekoe had wanted to hide additional payments from HMRC, he would not have included cash payments in a bank account which HMRC could easily access information about.

82. As far as the penalties were concerned, Mr Arthur said that Mr Bekoe had correctly provided the invoices relating to his self-employed income to his accountant and these had been used as the basis for his tax return. It was not correct that Mr Bekoe must have known that he should have included the other amounts from the Barclays Bank account; as far as he was concerned this was not trading income. Mr Bekoe had no intention of deliberately hiding income from HMRC.

30 *Findings of Fact*

83. On the basis of the evidence provided to the Tribunal we find as a fact that:

(i) The Barclays Bank account in the name of Darryl Bekoe was used by Mr Bekoe to receive his income when he was an employee with Mphasis and in 2009-10 for his self-employed income but was not used exclusively for this purpose during 2009-10.

(ii) Mr Bekoe worked full time and, separately, did consultancy work for Mphasis during 2009-10. The type of work which he did was not compatible with offering services to individuals on an ad hoc basis.

Decision

The 2009-10 enquiry year

5 84. We have concluded that Mr Bekoe has demonstrated, on the balance of probabilities, that the monies in the Barclays Bank account for the 2009-10 tax year were not undeclared taxable earnings.

85. We say this because:

10 86. (i) Although there were some discrepancies in the documentary evidence provided, we have accepted Mr Bekoe's explanation for the payments into the Barclays Bank account as reasonable and credible. We do not think that a lack of formal documentation or some discrepancies in the amounts stated to be payable are sufficient, in an informal family arrangement, to suggest that these arrangements were not essentially as Mr Bekoe described them.

15 87. (ii) Mr Bekoe has convinced us that he was not available for, nor interested in, the type of one-off supply of IT services from which HMRC suggested these payments arose. Mr Bekoe was fully occupied with his full time work and the consultancy work which he was doing for Mphasis during 2009-10.

20 88. (iii) We have accepted Mr Bekoe's explanation for why he was prepared to do consultancy work for Mphasis at such a low profit margin, on the basis that there were potential future advantages for him in staying in contact with Mphasis.

25 89. (iv) We do not accept HMRC's logic that because Mr Bekoe's agent said that the Barclays Bank account was set up to receive self-employed income that necessarily means that all sources of payment into that account should be assumed to be taxable self-employed income, particularly in this case where the account was in another person's name and could be and was used for a variety of other purposes.

30 90. (v) HMRC have not provided any compelling evidence to suggest that the payments in the Barclays Bank account should be treated as self-employed income. We do not accept that the brief descriptions given in the bank transfer details shown on the bank statements for this account are sufficient to determine their character in the face of an alternative reasonable explanation provided by Mr Bekoe.

35 91. (vi) HMRC referred to the Tribunal decisions including *Ali*, suggesting that any uncertainty over Mr Bekoe's explanation for the payments in the Barclays Bank account must mean that he had failed to discharge the burden of proof on him. In our view there is no requirement that we are certain that Mr Bekoe's alternative explanation is correct; we merely need to be satisfied on the balance of probabilities that the deposits in question are something other than undeclared taxable income.

The 2008-9 discovery assessment

92. HMRC accepted that any assessments for the 2008-9 tax year could only be made under s 36(1A) Taxes Management Act 1970 if Mr Bekoe's behaviour could be shown to be deliberate.

5 93. HMRC's assessment on Mr Bekoe for 2008-9 rested on the "assumption of continuity", that Mr Bekoe's behaviour in this year was the same as his behaviour in 2009-10. Following that logic, since we have concluded that Mr Bekoe did not receive additional taxable income in 2009-10 we can only conclude that HMRC have not demonstrated any basis on which Mr Bekoe can be treated as deliberately failing to disclose taxable income in 2008-9.

94. HMRC's assessment on Mr Bekoe for the 2008-9 tax year is not a valid assessment and Mr Bekoe's appeal against the discovery assessment and related penalties for 2008-9 is therefore allowed.

The 2010-11 and 2011-12 discovery assessments

15 95. HMRC also relied on the "assumption of continuity" to extrapolate the payments received by Mr Bekoe for 2009-10 forwards to the next two tax years. Since we have concluded that no such taxable payments were received by Mr Bekoe in 2009-10, we must also conclude that HMRC have not demonstrated any basis on which Mr Bekoe was careless or deliberate in failing to disclose additional income in either of these later years.

96. Mr Bekoe's appeal against the discovery assessments and related penalties for the 2010-11 and 2011-12 tax years is therefore allowed.

Assumption of continuity

25 97. Although not required for the purposes of this decision, we would add that even if we had come to a different conclusion about the treatment of the sums received in 2009-10, we would have had doubts whether, in the particular circumstances, the assumption of continuity could have taken HMRC as far as they would have liked. In our view, any such assumption must depend on an established pattern of behaviour or circumstances which may be assumed to continue because they form a predictable pattern. It is hard to see the basis for any such predictable pattern in this case.

98. For these reasons this appeal is allowed.

99. 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

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100. 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.

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**RACHEL SHORT
TRIBUNAL JUDGE**

RELEASE DATE: 24 OCTOBER 2017

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