[2018] UKFTT 282 (TC)

TC06512

Appeal number: TC/2014/05853

INCOME TAX –Discovery Assessments – deliberate behaviour by agent – extended time limits – whether validly made – yes – assessments confirmed - Capital Gains Tax – PPR – deliberate concealment – Closure Notice conclusions valid – penalties confirmed – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN McFARLANE **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT
MEMBER: IAN SHEARER

Sitting in public at George House, Edinburgh on Wednesday 25 April 2018

No appearance by or for the Appellant

Simon Bracegirdle, Officer of HMRC, for the Respondents

DECISION

Preliminary matters

Postponement application(s)

1. On 17 April 2018, the appellant's representative ("the agent") lodged with the Tribunal a doctor's letter which was treated as an application for postponement of the hearing set down for 25 and 26 April 2018. It said that the appellant had had health problems over the previous six months including a heart attack in October 2017 and it was "unlikely" that he would be fit for a Tribunal because it would be stressful. It was noted that following the heart attack a stent had been put in place. The agent was requested to provide further evidence. Nothing was forthcoming.

2. On 23 April 2018, Judge Kempster refused the application because:

(i) the appellant has a representative who can present his case;

(ii) the appellant has not filed a witness statement pursuant to earlier case management directions and therefore it appears he was not required as a witness;

(iii) the appellant relies on the documents bundle prepared by HMRC; and

(iv) no mention of a medical condition was made when the Tribunal enquired as to arrangements for a hearing and available dates.

3. A Direction to that effect was issued to the appellant's agent at 12:13 on 23 April 2018. The Direction stated specifically:

> "The hearing will therefore take place but the application may be renewed at the start of the hearing.".

4. On Tuesday 24 April 2018 the administration of George House emailed the appellant's agent to request the names of those who would be attending the hearing so that that information could be provided for security purposes. There was no response.

5. On 25 April 2018, there was no appearance by or for the appellant. Since the agent is based in Glasgow the administration contacted the agent's office and was told that he was not available as he was with a client. His secretary telephoned at approximately 10:10 explaining that the agent did not know that he was supposed to be attending because he had asked for a postponement. The secretary said that the appellant himself would not be attending the hearing. She reiterated the request for the hearing to be postponed. She was requested to send an email to George House with an explanation for the non-appearance, but told that the hearing was likely to proceed. By 10:30 that day nothing had been received. It is not clear if the agent is Mr or Ms Lynas, or both. The firm is M J Lynas Ltd.

6. HMRC requested that the hearing proceed in the absence of the appellant. They vigorously opposed any potential postponement as indeed they had opposed the original application.

7. The Tribunal's case management powers are to be found at Rule 5 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") and in particular Rule 5(3)(h) states that the Tribunal may, by direction, adjourn or postpone a hearing.

8. We annex at Appendix 1 copies of Rules 2 and 33 of the Rules but draw to the attention of the parties the need in both for the Tribunal to act in the interests of justice.

9. In *Teinaz v Wandsworth London Borough Council*[1]. Gibson LJ, commenting on Article 6 of the European Convention on Human Rights Article 6, states at paragraphs 21 and 22:

> "But the tribunal or court is entitled to be satisfied that the inability of the litigant…is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment…All must depend on the particular circumstances of the case."

10. What then are the particular circumstances of this case? Rule 2 of the Rules makes it explicit that the parties must co-operate with the Tribunal. The appellant has not. He has not lodged any witness statement in an appeal where part of the onus of proof lies with him. As can be seen from paragraphs 19 and 20 below, he has not addressed the subject matter of the appeal in any meaningful way. The Notice of Appeal is not compliant with Rule 20 of the Rules.

11. The medical evidence that was furnished was not accompanied by a formal application for postponement and was lacking in specification. Within the judicial knowledge of this Tribunal, in most cases where only one stent was inserted after a heart attack, it would be expected that there should be a quick recovery of function. No mention of any health conditions had been aired at any previous stage. The appellant did not provide further information as to current treatment and the prognosis as requested by the Tribunal.

12. As is made clear in *Transport for London v O'Cathall*[2] at paragraph 42 the overarching fairness factor must be taken into account in assessing the effect of the decision as to whether or not to adjourn on both sides. *Dhillon v Asiedu*[3] confirms that the decision as to whether or not to adjourn is a balancing exercise. Both parties are entitled to have the cases dealt with fairly and justly. The appellant does not have a monopoly of the fairness factors.

---

[1] [2002] I.C.R. 1471

[2] [2013] EWCA Civ 21

[3] [2012] EWCA Civ 1020

13. HMRC pointed to the fact that prior to the appeal there was a history of non-compliance and in particular fixed and daily penalties had been imposed in 2012 and twice again in 2013 for failures to comply with paragraph 1 Schedule 36 Finance Act 2008 Notices ("Schedule 36 Notices") requiring information. They further indicated that there had been a significant lack of cooperation with HMRC throughout the period of the enquiry and there had been minimal co-operation since the appeal had been lodged. In particular, since no witness statement had been lodged, they had not anticipated that the appellant would attend. The appellant had lodged no productions. They had been placed at a disadvantage preparing for this two-day hearing.

14. *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, little or no possibility of recovery of expenses for this hearing from the appellant and a further delay in access to justice for the parties. We take the view that an adjournment would result in significant prejudice to HMRC, the administration of justice and the public purse.

15. We had due regard to Rules 2 and 33 of the Rules and decided that it was appropriate to proceed with the hearing. We did.

16. Just before 14:00 on the first day set down for the hearing the agent emailed George House referring to the telephone conversation with the secretary some hours earlier and apologised for non-attendance stating:

> "I have incorrectly entered the Tribunal dates into the diary for the following week. Mr McFarlane would not have been able to attend due to his continuing ill-health … I will await the Court's direction."

17. That email changed nothing. It was inherently improbable that the wrong dates had been entered in the diary given the application for postponement and the contact from the George House administration specifying the time and date of the hearing quite apart from the usual intimation from the Tribunal. The hearing continued.

Lodgement of three excerpts from an amended tax return

18. At the outset, Mr Bracegirdle sought leave to lodge in process three pages from the amended self-assessment tax return for 2010/11 prepared and submitted by the agent during the process of the enquiry but not accepted at that juncture. However, as the agent and appellant should have known, since they were so advised, they were relied upon for the Closure Notice. As those were documents prepared by the agent and the agent was aware that the information had been founded upon, we decided to admit them into evidence. They introduced nothing new but made the audit trail more straightforward.

[4] [2010] EWCA Civ 1345

Grounds of appeal

19. The Notice of Appeal lodged by The FTR Accountants Company Limited ("FTR") dated 28 October 2014 indicated that it was a late appeal and that it had been made out of time. It was not. We therefore did not have to consider an extension of time for lodgement of the appeal as it stood.

20. That Notice of Appeal with its numerous enclosures was deficient in a number of respects, but specifically:-

(a) It addressed only the discovery assessments.

(b) The "decisions" attached to the Notice of Appeal are not appealable decisions but rather consist of correspondence from HMRC and indeed include at least one letter which has nothing to do with the appellant. The totality is non-compliant with Rule 20 of the Rules but we waive those requirements.

21. We are aware that FTR had handled in excess of 300 appeals for clients and ex-clients of CLAC (see paragraph 27 below) and the information in this and other Notices of Appeal was, and is, largely generic. On receipt of all of those appeals, HMRC and HMCTS, decided that they, in order to achieve an equitable access to justice in an unusual situation, had to identify the decisions which were appealable for each individual taxpayer.

22. In this instance there are appealable decisions relating to not only the discovery assessments but also the Section 95 Taxes Management Act 1970 ("TMA") penalty determinations for 2005/06 to 2007/08, the Schedule 24 Finance Act 2007 ("Schedule 24") Income Tax penalty determinations for 2008/09 and 2010/11, the Schedule 24 Capital Gains Tax penalty for 2010/11 and the Closure Notice for 2010/11. The Notice of Appeal did not encompass those.

23. HMRC had prepared the Statement of Case on the basis that all appealable decisions would be appealed. In the circumstances we decided that there was a deemed application for late admission of appeals for all outstanding appealable decisions identified by HMRC in the Statement of Case and in the Bundle. We had due regard to Rules 2 and 5 of the Rules and decided to extend the time for lodging such appeals and deemed that the appellant had appealed all of those decisions, notwithstanding the absence of the appellant or representation therefor.

The hearing

24. We had the evidence of Officer Ellsbury who was very clear and wholly credible. His lengthy witness statement was in the extensive bundle and therefore both the appellant and the agent had had ample opportunity to peruse it. The Officer wished to add nothing to it. We asked him a number of questions for clarification and that raised nothing contentious.

25. The Bundle itself extended to some 517 pages. In addition we had a Bundle of Authorities.

26. As indicated above, in relation to the postponement applications, the appellant had produced no list of authorities, witness statements or indeed further information.

The Background

27. HMRC had identified this case for review under their Edgewood project. That was an HMRC project that looked at the tax affairs of all former clients of Christopher Lunn of Christopher Lunn & Co ("CLAC"). Christopher Lunn was an accountant who was prosecuted and ultimately convicted of fraud in December 2015.

28. In June 2010, the HMRC Criminal Investigation Team, armed with a search warrant, visited the premises of CLAC and removed paperwork from those premises which included client files containing copies of accounts, annual spreadsheets/ schedules submitted to CLAC detailing income and expenditure, details of the agents' contact with the client whether by email, correspondence, telephone etc and other ancillary matters.

29. The appellant, a film producer (although later also doing some other forms of work), had been a client of CLAC who had acted as his authorised tax agent from 2002. From the emails that were seized it is evident that although on occasion CLAC was asked for and gave advice (for an example see paragraph 114 below) their primary responsibility was to ingather information and prepare what they described as "Individual and Furnished Lettings Accounts" and the related tax returns. The appellant's files and papers were seized under the search at CLAC. Their invoices support that.

30. Since 2010 a series of generic letters were issued by HMRC to CLAC's clients and certainly on 29 July 2011, HMRC wrote to the appellant, requesting that he review his tax affairs, for the period during which he had been represented by CLAC and requesting a disclosure if errors were found. In the event that no disclosure was received HMRC intimated that they intended to review the information held.

31. On 10 October 2011, the appellant changed tax representation from CLAC to the agent, who continues to act, albeit the Notice of Appeal was lodged by FTR.

32. On 15 December 2011, no disclosure having been received by HMRC, HMRC wrote to the appellant stating that his tax returns had been checked against the information and documents held by the Criminal Investigation Team and that had identified potential irregularities in the tax returns which might give rise to additional tax liabilities and a penalty charge. He was invited to explain the position and provide full written disclosure of all omissions and understatements. A copy of that letter was sent to the agent.

33. HMRC also enclosed with that letter factsheets which covered general information about compliance checks, information about penalties, information about the Human Rights Act and information about self-assessment and old penalty rules. There was no response.

34. On 19 April 2012, HMRC wrote to the agent, who had filed the 2010/11 tax return which stated that the appellant's business was that of a sub-contractor and that

the estimated turnover was £1,000 with deductions of £400 and the estimated income from property was £1,000. HMRC requested actual accounts to replace the provisional figures and details of any other income together with computations and that by 24 May 2012.

35. Nothing was forthcoming so on 24 May 2012, HMRC issued the first of the Schedule 36 Notices. On 6 September 2012, a £300 penalty notice was issued as the appellant had not complied with the notice. Subsequently on 22 November 2012, further penalties of £600 were issued.

36. On 1 October 2012, the agent telephoned to state that there appeared to be an understatement of profit as a sub-contractor and the agent would send the information. HMRC raised a question about the deductibility of the interest on the mortgage and the question of capital gains tax for a property known as 12 Barlby Gardens, London ("the property").

37. Despite reminders no information was sent and the further daily penalties were issued. Ultimately on 27 November 2012, the agent wrote stating that the capital gains tax position was that the property was the appellant's principal private residence and that the tax return would be amended that day. In fact amendment was attempted on 29 November 2012.

38. On 30 November 2012, HMRC wrote to the agent pointing out that amendments to a return under enquiry would only be given effect at the end of the enquiry. Accounts should be produced. Detailed information was requested in relation to the potential capital gains tax exposure.

39. On 1 February 2013, the agent wrote to HMRC, without giving the information requested, but enclosing a purported Section 222(5) Taxation of Chargeable Gains Act ("TCGA") 1992 nomination dated 3 January 2003. If that were valid it would have been a nomination of the property as the appellant's principal private residence from January 2002.

40. HMRC have established beyond any doubt, let alone on the balance of probabilities, that this alleged nomination was addressed to HMRC at an address which was not occupied by HMRC or any predecessor organisation until 2010. There can have been no reason to send a nomination to that address in 2003. It is not valid.

41. On 6 March 2013, HMRC replied to the agent making that point and again requesting detailed information about capital gains tax and responding to the assertion in the letter of 1 February 2013, that: "I would also confirm that there are no irregularities in Mr McFarlane's returns. All expenses claimed have been properly vouched". HMRC pointed out the serious nature of the matters under consideration and, in particular, identified as primary issues the problems with accountancy fees and loan interest. Nothing was forthcoming.

42. The second of the Schedule 36 Notices was issued on 24 April 2013.

43. Although on 24 May 2013, a profit and loss account for the year to 5 April 2011 for the appellant trading as Baby Rocks Jewellery ("Baby Rocks") was produced, there was nothing else provided to HMRC.

44. On 5 June 2013, HMRC issued the £300 penalty notice and also wrote to the agent requesting detailed information, not least because that was the first intimation of the existence of Baby Rocks. As indicated at paragraph 34 above, the tax return had said that he was a sub-contractor.

45. On 20 September 2013, yet another Schedule 36 Notice was issued as were daily penalties under the previous Notice.

46. Limited information was furnished comprising the financial accounts for the 2011 tax year for the appellant t/a Baby Rocks, the Schedule of income and expenditure for the period 6 April 2010 to 4 April 2011 for the appellant t/a Baby Rocks, HSBC bank statements for the account of John McFarlane and a Paul McFarlane, t/a Baby Rocks for the period 17 March 2010 to 16 April 2011, a statement of income and expenditure for the period April to October 2010 in respect of the property and a loan interest certificate for 2011 in respect of the property.

47. Significantly no documentation or evidence to support the omission of a capital gains charge from the 2011 return had been provided and nor had any disclosure been made regarding the irregularities identified in the tax returns submitted by CLAC.

48. On 28 February 2014, HMRC wrote to the agent analysing that information, pointing out the deficiencies, requesting further information and pertinently asking what the position was in regard to the returns prepared by CLAC.

49. There was no response other than that the agent intimated that there would be no reply.

50. On 3 July 2014, HMRC wrote to the appellant providing a comprehensive view of the matter for the years ended 5 April 2006 to 5 April 2011 setting out the irregularities for each year and the tax consequences of those irregularities. The intention was to conclude the enquiry and issue a Closure Notice for the tax year 2010/11 and tax assessments for the years 2005/06 to 2009/10. The possibility of penalties was also raised.

51. On 28 July 2014, HMRC issued a penalty explanation letter for the years ended 5 April 2009, 2010 and 2011. There was also a letter explaining the penalty position for the years 6 April 2005 to 5 April 2008.

52. On 20 October 2014, the assessments were issued.

53. On 21 October 2014, the Closure Notice under Section 28A(1) and (2) TMA for the year ended 5 April 2011 was issued.

54. On 20 October 2014, a penalty determination was issued in respect of the Section 95 TMA penalties for the years ended 5 April 2006 to 5 April 2008 inclusive.

55. On 21 October 2014, notices of penalty assessments dated 20 October 2014 were issued raising the Schedule 24 penalties for the years ended 5 April 2009 to 5 April 2011 inclusive.

56. On 28 October 2014, the appellant appealed directly to the Tribunal.

Matters under appeal

57. The quantum of the assessments and amendments are as follows:

Year Ended	Total Tax & NIC Charged
5 April 2006	£15.30
5 April 2007	£888.56
5 April 2008	£2,017.98
5 April 2009	£2,699.16
5 April 2010	£1,955.40
5 April 2011 – Amendment	£52,937.00
Total Tax charged	£60,513.40

58. The Closure Notice for the year ended 5 April 2011 was issued on 21 October 2014 under Section 28A(1) & (2) TMA 1970. As can be seen the amendment was for £52,937.00 and it was appealed on 28 October 2015.

59. The Penalty Determinations are as follows:-

Year Ended	Penalty charged
5 April 2006	£6
5 April 2007	£400
5 April 2008	£908
5 April 2009	£688.28
5 April 2010	£508.62
5 April 2011 (CGT)	£50,985.08

5 April 2011 (IT)	£433.27
Total penalties charged	£53,929.25

60. The penalty determinations for the years ended 5 April 2006, 5 April 2007 and 5 April 2008 were made under section 95 TMA.

61. For the years ended 5 April 2009, 5 April 2010 and 5 April 2011 the relevant penalty legislation is Schedule 24.

The issues for the Tribunal

62. HMRC identified five issues where the onus of proof lay with them, namely:-

(a) Were the discovery assessments for 2005/06 to 2009/10 validly raised?

(b) On the balance of probability, was the quantum of the penalty assessments for 2005/06 to 2009/10 correct?

(c) Were the adjustments to the appellant's 2010/11 self-assessment tax return as a consequence of the HMRC enquiry properly founded?

(d) Were the penalties raised under Section 95 TMA valid?

(e) Were the penalties raised under Schedule 24 valid?

63. We were not referred to the case but we had *Burgess and Brimheath Developments Ltd v HMRC*[5] very much in mind. However, Mr Bracegirdle comprehensively, and indeed almost forensically, covered all relevant points and in particular the competence and time limit issues pertaining to the discovery assessments.

Discovery and Quantum

64. As can be seen, despite numerous attempts by HMRC to obtain information from the appellant in relation to the years 2005/06 to 2009/10, where the returns had been submitted by CLAC, nothing had been produced, so the only evidence came from the seized papers. The questions of discovery and quantum are therefore inextricably intertwined and we deal with them in that fashion.

65. The assessments under appeal were issued on 20 October 2014 and were all raised under Section 29 TMA and that is set out, in full, at Appendix 2 together with the text of the legislation pertaining to time limits (Sections 34 and 36 TMA) and the Tribunal's powers on appeal (Section 50(6) TMA).

[5] 2015 UKUT 578 (TCC)

66. The appeal is predicated on the basis that Section 29 TMA cannot be applied because HMRC have not made a "discovery" of a loss of tax. Secondly, it is argued that the methodology behind the calculation of the expenses had been examined in the Crown Court and CLAC had not been convicted of any of the charges. It is alleged that all expenses were incurred wholly and exclusively for the purpose of the trade.

67. In this hearing, HMRC did not rely on anything that may or may not have been said in the course of Christopher Lunn's trials. In any event he was convicted a year after the Notice of Appeal was lodged so the Notice of Appeal cannot reflect that. The trials are not relevant to this appeal.

68. What is relevant is whether or not HMRC made a discovery of loss of tax in terms of Section 29 TMA in respect of each year. Both Officer Ellsbury and his predecessor compared the tax returns with the information seized in the raid. The appellant has been given every opportunity to produce contradictory or further information and has quite simply failed to do so. For years the appellant has been aware that the primary focus for HMRC was two issues, namely, accountancy fees and rental income. The peripheral issue in terms of the CLAC returns were "other expenses" in 2008/09.

Accountancy expenses

69. The accountancy expenses in each of the years 2005/06 to 2008/09 were fees invoiced by CLAC. Since nothing has been provided by the appellant, the audit trail in relation to those accountancy fees is to be found in the papers seized from CLAC. In 2005/06 the invoice was in the sum of £547 yet CLAC claimed a deduction in the self-employment income of £980 for accountancy fees and in the property income a deduction of £470, a total of £1,450. Since the total claim was £1,450 there was therefore an overclaim of £903.

70. In 2006/07, 2007/08 and 2008/09 exactly the same quantum of accountancy fees was claimed for the two sources of income but the actual fees (rounded up) per the invoices in each of those years were £670, £541 and £541 respectively.

71. In each of those years there was a total claim of £1,450 which resulted in an over claim in 2006/07 of £780 and in each of the subsequent years an overclaim of £909.

72. Since CLAC did not prepare the accounts for 2010/11 and the records had been seized in June 2010, the officer very fairly did not challenge the deduction for accountancy in 2010/11. The officer has allowed a deduction for the actual amount shown on the invoices in each year.

73. Firstly, CLAC had issued the invoices so they must have known the amount of the invoices. Secondly, the appellant had received the invoices (it is noted that he did not always pay them on time) and knew the amount of the invoices.

74. The first hurdle for HMRC is whether or not the officer discovered, in terms of section 29(1) TMA, that there was a loss of tax. HMRC referred us to Lewison LJ at paragraph 18 in *Hankinson v HMRC*[6] where he states:

> "…that Section 29(1) is dealing with the subjective views of the officer concerned …".

75. In addition the opinion of that officer must be reasonable and Mr Justice Norris and Judge Berner at paragraph 24 in *Charlton & Another v HMRC*[7] refer to *Hankinson* and state:

> "… it is nevertheless the case that an officer's discovery must be a reasonable conclusion from the evidence available to him. To that extent although the test in s 29(1) is a subjective test, an element of objectivity is introduced in examining the reasonableness of the officer's conclusion …".

76. Looking at the evidence in this case we have no hesitation in accepting that the officer's view was not only reasonable but in fact very objective.

77. We have no difficulty in finding that as a result of the over-claiming of accountancy expenses, there was a loss of tax in each of those years. That was a discovery made by the officers, it is very well documented and the quantum of the resultant part of the assessments is unimpeachable.

Rental income and interest

78. Profits of a property business are determined according to the application of trading income rules and that is clearly set out at Section 272 Income Tax (Trading and Other Income) Act ("ITTOIA") 2005. The relevant legislation for trading income rules is Section 34 of ITTOIA which reads:

> "(1) In calculating the profits of a trade, no deduction is allowed for—
>
> (a) Expenses not incurred wholly and exclusively for the purposes of the trade, or
>
> (b) Losses not connected with or arising out of the trade.
>
> (2) If an expense is incurred for more than one purpose, this section does not prohibit a deduction for any identifiable part or identifiable proportion of the expense which is incurred wholly and exclusively for the purposes of the trade."

79. Accordingly the only interest that would be deductible in respect of the rental income would be interest incurred for the purposes of that trade. In this case that is the mortgage interest on the property. At all known times, the appellant had an interest and capital repayment mortgage. He started to rent out the property in 2000/2001 and at that point the amount of the loan outstanding was £56,002.72. In the following year the amount of loan outstanding had reduced to £54,609.26 and in 2002/03 the amount of the loan was £52,922.57. At that juncture the actual interest paid was £3,005.50. There are no mortgage interest certificates available for the

---

[6] 2012 1 WLR 2322

[7] 2012 UKUT 770 TCC

following two years although the loan interest claimed through the accounts remained consistent with the previous years at £3,060 and £2,945 respectively.

80. However, the loan interest claimed for 2005/06 leapt up to £11,131. HMRC made every effort to ascertain the reasons for the increase in the mortgage but, due to the lack of co-operation from the appellant, there are only three adminicles of evidence. The first is a handwritten note found in the seized papers which indicated that the mortgage had been £50,000 but the property had been remortgaged in June 2005 with a new mortgage of £220,000 which had been used to repay the original loan and also repay the mortgage on the appellant's home one month later.

81. That is consistent with a note of a telephone call with the agent on 1 October 2012 where it was confirmed that "…there had been a remortgage to buy his first wife out".

82. The handwritten note on the face of the accounts for the year to 5 April 2006 seized from CLAC stated "check mortgage Int" and indicate that at that juncture the mortgage was a capital and interest mortgage at a fixed rate on a "£218,458 mortgage". There is a handwritten amendment to the accounts for 2005/06 increasing the mortgage interest to £11,331 from £2,982.

83. On the balance of probability the officer is entirely correct in adjusting the loan interest claims to an equivalent figure of the business expense, ie £50,000/£220,000 amounting to 23%.

84. Again we find that HMRC have made a discovery of a loss of tax and HMRC has objectively quantified it.

Other expenses

85. Other expenses arise only in 2008/09. Amongst the seized papers there was an expenditure schedule from the appellant's Cash Book at a period when he was working as a sub-contractor. It showed the costs incurred on a monthly basis in that year and was produced to CLAC by the appellant.

86. The officer compared that with the claims made in the accounts for that year. Significantly there were no entries in the schedule for direct costs, mobile telephone, home telephone, printing, postage and stationery or travel. There were only claims of £902.78 for motor expenses, clothing of £266.80 and £862 for "food at work". That was a total of £2,031.58 but food at work would not be a deductible expense and the clothing is possibly doubtful.

87. Amongst the other seized documents was a handwritten annotation on the face of the accounts for that year showing how the expenses totalling £6,618 that were claimed in the accounts had been quantified. There were entries for direct costs, mobile telephone, home telephone and printing, postage and stationery. In addition, there was accountancy of £980 (which is of course over-inflated as indicated at paragraph 72 above), travel of £1,329 and motor expenses of £1,708. Many of the figures were estimates.

88. On a without prejudice basis, the officer allowed a number of those un-vouched claims, with adjustments for private usage, but he discounted the food at work which would never be a deductible amount. In the circumstances, we take the view that the officer was certainly very fair and possibly generous.

89. Obviously, the appellant should have known that he had only claimed £2,031.58 plus a lesser amount for accountancy. CLAC knew that all of the other claims were not vouched.

Conclusion

90. It is established that there were discoveries of loss of tax. A discovery does not suffice alone. In terms of Section 29(4) TMA, on which HMRC rely, HMRC must establish that the loss of tax "was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf".

91. An issue in the context of the discovery assessments is whether or not the taxpayer can be assessed as a result of the behaviour of the agent. HMRC referred us to *Clixby v Pountney*[8] where Cross J stated:

> "… it would be unfortunate if a taxpayer could escape liability by saying: 'It is true that you proved that my agent committed fraud on my behalf; but you have failed to prove that I was privy to it, and as you did not discover it … I can take – and propose to take – advantage of it'".

92. Far more recently Judge Berner in *Trustees of the Bessie Taube Discretionary Settlement Trust and Others v HMRC*[9] said:

> "In our view, the expression 'person acting on … behalf' is not apt to describe a mere adviser who only provides advice to the taxpayer or to someone who is acting on the taxpayer's behalf. In our judgment the expression connotes a person who takes steps that the taxpayer himself would take, or would otherwise be responsible for taking … Examples would in our view include completing a return, filing a return, entering into correspondence with HMRC, providing documents and information to HMRC and seeking external advice as to the legal and tax position of the taxpayer. The person must represent, and not merely provide advice to, the taxpayer".

93. That is precisely what CLAC did as we set out at paragraph 29 above. Therefore we find that we can look not just at the appellant's action but those of CLAC.

94. HMRC argue that the loss of tax was certainly deliberate on the part of CLAC and, at best for the appellant, there was carelessness on the part of the appellant.

95. In relation to the accountancy fees, there is no doubt that there was a loss of tax caused by deliberate actions on the part of CLAC. The appellant knew or ought to have known what the amount of the invoice was and, given that there are so few entries in both the accounts and the tax returns, it should have been obvious to him

---

[8] 1968 CH 719

[9] 2010 UKFTT 473 (TC)

that the figures had been overstated and that by a significant amount in each and every year. He was undoubtedly careless. CLAC indulged in deliberate behaviour.

96. As far as interest is concerned, at best for the appellant it is careless since it should be within the knowledge of any trader that one cannot put the expenses of personal borrowings through a business. In the case of CLAC, it is very obviously deliberate behaviour given the note showing the derivation and application of the funds. They knew that the primary purpose of the new mortgage had nothing to do with the property. Further, the "wholly and exclusively principle" is a basic tenet of tax law and any and every accountant should be aware of that. We agree with HMRC that that was a deliberate action.

97. Lastly, as far as other expenses in 2008/09 are concerned, given that the expenses claimed bore no relation to the schedule given to CLAC we find that there was deliberate behaviour aimed at creating a loss of tax.

98. Accordingly we find that the loss of tax in relation to accountancy fees and interest and other expenses were all caused by the deliberate actions of CLAC acting on behalf of the taxpayer, with or without his knowledge, but the taxpayer was also certainly careless in signing his returns.

Time limits

99. All of the above discoveries resulted in a loss to HMRC and were attributable to deliberate activity. The final issue in relation to discovery assessments is the time limits for assessments. The relevant legislation is annexed at Appendix 2.

100. HMRC argue, and we agree, that the loss of tax was brought about carelessly or deliberately in terms of Section 29(4) TMA.

101. HMRC have established quite clearly that they had discovered a loss of tax in that income figures on those returns had been understated as a result of extensive claims to expenses in the trading and property accounts. The appellant had been given every opportunity to explain matters and to produce further information but even in the face of three Schedule 36 Notices, failed to make adequate disclosures.

102. The ordinary time limits in Section 34 TMA enable HMRC to raise an assessment no more than four years after the end of the year of assessment to which it relates. The latest year assessed was 2009/10 and that year ended on 5 April 2010. All assessments were therefore raised after the expiry of the ordinary time limit.

103. However, Section 36 TMA provides extended time limits where the loss of tax is brought about carelessly or deliberately by a person or another person acting on behalf of that person.

104. HMRC established at considerable length and detail that CLAC acted on behalf of the appellant and deliberately inflated the expenses thereby causing a loss of tax in each year.

105. The requirements of Section 29(4) and Section 36 TMA 1970 are therefore satisfied and HMRC may make assessments to recover the tax lost. The quantum of the assessments has been carefully based on the available evidence.

106. Lastly, and for completeness, we find that there was no staleness for the discovery. To the extent there was any delay that was attributable to the appellant.

Closure Notice under Section 28A(1) and (2) for the year ended 5 April 2011

Capital gains tax 2010/11

107. The appellant sold the property on 25 October 2010 for £625,000, the purchase price having been £129,000 on 15 January 1996. The gross gain is therefore £486,000. Although the appellant has claimed principal private residence ("PPR") relief on the basis of the Section 222(5) Notification, for the reasons set out in paragraph 40 we do not accept that a valid election was ever made.

108. Furthermore, the appellant's other property transactions indicate that it was not his main residence after July 2000. In August 2000 he rented out the property. In July 2000 he purchased 87 Kilravock Street, London, for £250,000 and sold it in March 2005 for £375,000.

109. During that period that address was the correspondence address for CLAC, the Child Support Agency, the Inland Revenue and Acton Magistrates Court. The appellant made no capital gains tax declaration when the house at Kilravock Street was sold in 2005 and it must therefore be assumed that he considered that it was his principal private residence during that period. Indeed on 21 March 2005 he emailed CLAC stating "…I just sold my house my main residence of Kilravock St …". He went on to say his brother-in-law had told him to get tax advice on CGT on the sale of a house.

110. The appellant also appeared to spend some time abroad in 2004 and 2006. In July 2005, CLAC corresponded with the appellant at an address in Glasgow. In 2006 the appellant purchased a further property in Lauderdale Road, Glasgow and that was again used as a correspondence address for CLAC and HMRC. He worked as an employee and a self-employed person in the Glasgow area and his work records also used that address. In September 2008 he emailed CLAC stating that "our place in Scotland is owned outright".

111. Between May 2008 and October 2010 utility bills for the property in the joint names of the appellant and an unknown other but on the balance of probabilities, the tenant of the property, were sent to another Glasgow address. The fact that they were sent to Glasgow leads us to find that on the balance of probability he was not residing in the property, notwithstanding the terms of an email from the appellant dated 26 October 2009 stating "I have been living at 12 Barlby Gardens for the past tax year as that is my full time house". That is supported by the fact that, notwithstanding that comment, CLAC had issued their invoice in November 2008 to Glasgow and the invoice in November 2009 was also issued to Glasgow.

112. In regard to capital gains tax we have no hesitation in finding that the conclusions in the Closure Notice, which incidentally gave to the appellant some allowable elements of PPR and letting reliefs, were correct. Further the appellant's actings in regard to capital gains tax are both deliberate and concealed. He was well aware that there was exposure to capital gains tax even if the property was his principal private residence and yet there was no entry in the return for that.

113. Tellingly, prior to selling the property in 2010 the appellant emailed CLAC in March and May 2010 asking about the capital gains tax position if the property were to be sold. The copy email on 12 May 2010 includes handwritten annotations suggesting that on the basis of the information provided by the appellant, CLAC had calculated a gain of £62,490 on the property which was in line with the prevailing 18% tax rate at that time. The lost tax was £11,248. That calculation was on the basis that it was his principal private residence.

Income Tax 2010/11

114. As can be seen, the appellant's 2011 tax return was incorrect and there was a loss of both income tax and national insurance contributions. The return as submitted to HMRC on 30 January 2012 included provisional figures for both self-employment trade profits and UK property profits. The appellant's self-employment description of business was claimed as that of a sub-contractor, for which there was £1,000 turnover and £400 of expenses. It was not, it was Baby Rocks, and the figures were far higher.

115. The financial accounts in respect of the self-employed business were finally submitted on 24 May 2013 and a Schedule of UK property income and expenditure with an accompanying loan interest certificate was received on 14 February 2014. HMRC received supporting records to verify the trading account income and expenditure sheets together with the HSBC bank statements. HMRC accepted at face value the accounts figure of £8,269 profits for the self-employed trade.

116. As far as property income is concerned, in common with the other years, the officer reduced the loan interest claims to 23%. The profit was therefore increased by almost £7,000.

117. At best, the appellant's behaviour was careless because he knew that the provisional figures bore little resemblance to the factual position and he was not self-employed as a sub-contractor as he stated in his return.

Conclusion

118. We find firstly a valid enquiry had been opened and secondly that the conclusions set out in the Closure Notice dated 21 October 2014 were correct and the appeal in that regard should be dismissed.

Penalties

2005/06 to 2007/08

119. I annex at Appendix 3 the provisions of Section 95 TMA. In summary that states that where a person fraudulently or negligently delivers an incorrect return they shall be liable to a penalty not exceeding the additional tax payable.

120. For penalty purposes it is the behaviour of the appellant which matters not the behaviour of his agent.

121. Section 100 TMA reads:-

> "(1) … an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting out such amount as, in his opinion, is correct or appropriate…".

122. Officer Ellsbury's opinion was that the appellant had been negligently submitting incorrect returns. The term "negligent" is not defined in Statute but HMRC cited and we agree and indeed are bound by Judge Bishopp in *Moore v HMRC*[10] where he stated that he agreed with the argument that:

> "First, one must consider whether a person whose conduct is under scrutiny had a duty of care and, if so, the nature of the duty … Once a duty of care has been identified, it is necessary to go on to decide whether the person has satisfied the duties".

He went on to say at paragraph 15:

> "There can, I think, be no doubt that any taxpayer completing a self-assessment return has a duty to take care when doing so: the obligation upon him is plainly to submit an accurate return".

In this case the appellant did not do so.

123. Was that negligent? HMRC relied on, and we agree with, the very old case, which is still an authority, *Blyth v Birmingham Water Works* which stated that

> "Negligence consists in the omitting to do something that a reasonable man would do, or the doing of something that a reasonable man would not do…".

A reasonable man would not have done what the appellant did.

124. HMRC argued that a reasonable person would be expected to check the figures in the return prior to signing it. We accept that. We agree with the Tribunal in *Zepinc v HMRC*[11] at paragraph 35 where it states:

> "A reasonable taxpayer would know that, even if the tax return was to be filed by an accountant, the taxpayer still had to approve the tax return before it could be submitted".

---

[10] 2011 UK UT 239 TCC

[11] 2017 UKFTT 663

125. As we indicate above the appellant knew the level of invoices for accountancy and yet signed returns which grossly overstated those. He should have known that the remortgage was not for the purpose of the business. In the case of 2010/11 he knew or should have known that his income was vastly in excess of the very small amount intimated.

126. Penalties are calculated by reference to 100% of the tax arising from the inaccurate tax returns and then abatements are available under the categories of disclosure, cooperation and the seriousness of the offence. HMRC's policy is maximum abatements of 20%, 40% and 40% respectively.

127. As can be seen, at no point since the issue of the first generic letter of July 2010 has the appellant submitted any disclosure or admitted any irregularities. Nevertheless the officer allowed a reduction of 10%. As far as cooperation is concerned the officer has allowed a reduction of 15% notwithstanding the fact that the appellant has repeatedly been advised of the areas that were of particular concern to HMRC, being the accountancy fees and interest payments, yet he did not engage with the disclosure process. The amounts over-claimed for both of these elements were significant.

128. Lastly, the officer allowed a reduction of 30% in respect of the seriousness of the offence. Irregularities were established in every year and there was an under-assessment of tax of £2,900. (Incidentally the under-assessment of tax would have been far higher had there not been losses carried forward).

129. On that basis a 45% penalty was calculated and that was intimated appropriately to the appellant on 28 July 2014 before the penalty determinations were notified.

130. We confirm those penalties.

Income tax penalties for the tax years 2008/09 and 2009/10

131. The irregularities in the return for 2008/09 for accountancy and interest were exactly the same as in the previous years but it was simply a question that the penalty regime had changed. We annex the relevant provisions from Schedule 24 at Appendix 4.

132. The question is whether or not the appellant's actions were careless. We agree with Judge Berner in *Collis v HMRC*[12] at paragraph 29 where he stated in relation to carelessness that

> "We consider that the standard by which this falls to be judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question."

133. As far as 2008/09 is concerned the appellant's own schedule for expenses claimed only £2,031.58 and yet the claim in the accounts was £6,618. It was again a

[12] 2011 UKFTT 588 (TC)

large overstatement. The appellant knew or should have known that the figures were wrong. He was certainly careless in that, as also for the accountancy fees and interest.

134. The appellant had not taken reasonable care to ensure that the figures were correct prior to signing the returns. These were careless inaccuracies.

135. The maximum penalty for careless behaviour is 30%. There is no doubt that the disclosure was prompted as the appellant has made no attempt to advise a declaration of underpaid tax and indeed on the contrary the appellant's position has always been as stated in the letter of 1 February 2013 that there were no irregularities in the returns and that all expenses claimed had been properly vouched.

2008/09 and 2009/10

136. For 2008/09 and 2009/10 the officer concluded that the reduction for telling was 0%, for helping 0% and for giving access 0% because the appellant failed to disclose anything to HMRC. We agree. The chargeable penalty is therefore 30% in terms of paragraph 4 of Schedule 24.

2010/11

137. As can be seen at paragraph 116 above a limited amount of information was provided so the officer concluded that the reduction for telling was 0% but there should be 10% for each of helping and giving access. The chargeable penalty is therefore 27%.

Capital gains tax penalty assessment 2010/11

138. The appellant states simply that the property was his principal private residence at all times. As we have clearly indicated above that simply was not the case and HMRC have established that there is a liability to capital gains tax. This is the late nomination.

139. Schedule 24 does not define the word "deliberate". We agree with the Tribunal in *Auxilium Project Management Ltd v HMRC*[13] where it said:

> "In our view, deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time."

140. In this instance the fact that HMRC have comprehensively established that the address to which the appellant purportedly sent the PPR election in 2003 simply did not exist as an HMRC office until many years later is extremely clear evidence of a deliberate attempt to mislead HMRC.

[13] 2016 UKFTT 0249 (TC)

141. Furthermore the fact that the appellant had sought advice from the agent about the potential capital gains tax exposure prior to the sale of the property and that he knew that there would be an exposure and yet there was no declaration of the sale in the tax return, is further evidence of deliberate actings.

142. We agree with Judge Morgan at paragraph 82 in *Clynes v HMRC*[14] when she said that:

> "… for there to be a deliberate inaccuracy on a person's part, the person must to some extent have acted consciously, with full intention or set purpose or in a considered way."

That is exactly what the appellant did in this case.

Summary

143. The Schedule 24 penalties have all been validly raised. The officer did consider whether the reductions were appropriate and he also considered whether any special circumstances applied and concluded that they did not. Since the inaccuracies were deliberate there was no consideration of suspension. In those circumstances the officer concluded that the penalty should be 100% of the potential lost revenue which is to say £50,985.

Conclusion

144. In summary the assessments for 2005/06 to 2009/10 were validly raised.

145. The conclusions in the 2010/11 Closure Notice are correct.

146. The appellant has challenged the assessments but the onus of proof rests with him. He has produced no evidence so the tax charged is correct.

147. The Section 95 TMA penalties are valid and set at an appropriate level.

148. The Schedule 24 penalties are valid and set at an appropriate level.

149. The appeal is dismissed.

150. 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

[14] 2016 UKFTT 369 (TC)

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.

5

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 29 May 2018

2.—Overriding objective and parties' obligations to co-operate with the Tribunal

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

33.— Hearings in a party's absence

If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—

(1) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

(2) considers that it is in the interests of justice to proceed with the hearing.

APPENDIX 2

Section 29 TMA

29 Assessment where loss of tax discovered

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

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

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

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

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

…

(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.

(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 5 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.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) In subsection (6) above—

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes—

(i) a reference to any return of his under that section for either of the two immediately preceding chargeable periods; and

(ii) where the return is under section 8 and the taxpayer carries on a trade, profession or business in partnership, a reference to any partnership return with respect to the partnership for the relevant year of assessment or either of those periods; and

(b) any reference in paragraphs (b) to (d) to the taxpayer includes a reference to a person acting on his behalf.

…

(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

(9) Any reference in this section to the relevant year of assessment is a reference to—

(a) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) above, the year of assessment mentioned in that subsection; and

(b) in the case of the situation mentioned in paragraph (c) of that subsection, the year of assessment in respect of which the claim was made.

Section 34 TMA

34 Ordinary time limit of 4 years

(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains tax may be made at any time not more than 4 years after the end of the year of assessment to which it relates.

(2) An objection to the making of any assessment on the ground that the time limit for making it has expired shall only be made on an appeal against the assessment.

Section 36 TMA

36 Loss of tax brought about carelessly or deliberately etc

(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).

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

(a) brought about deliberately by the person,

(b) attributable to a failure by the person to comply with an obligation under section7, or

…

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

(1B) In subsections (1) and (1A), references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person.

Section 50(6) TMA

50 Procedure

…

(6) If, on an appeal notified to the tribunal, the tribunal decides—

(a) that the appellant is overcharged by a self-assessment;

(b) that any amounts contained in a partnership statement are excessive; or

(c) that the appellant is overcharged by an assessment other than a self-assessment, the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

Finance Act 2008, Schedule 39 (Appointed Day, Transitional Provision and Savings) Order 2009 (SI 2009/403), para 7

Section 36(1A)(b) and (c) of TMA 1970 (fraudulent and negligent conduct) shall not apply where the year of assessment is 2008-09 or earlier, except where the assessment on the person ("P") is for the purposes of making good to the Crown a loss of tax attributable to P's negligent conduct or the negligent conduct of a person acting on P's behalf.

95 Incorrect return or accounts for Income tax or capital gains tax

(1) Where a person fraudulently or negligently—

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

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

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

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

(2) The difference is that between—

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

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

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

APPENDIX 4

Schedule 24 Finance Act 2007

The relevant provisions read:

Paragraph 1 of Schedule 24 Finance Act 2007 states in the relevant part as follows:

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

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

(c) Conditions 1 and 2 are satisfied.

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

(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.

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

(4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

Tax	*Document*
Income Tax or capital gains tax ……	Return under section 8 of TMA 1970 (personal return). ……

Paragraph 3 of Schedule 24 provides for degrees of culpability as follows:

(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is-

(a) "careless" if the inaccuracy is due to failure by P to take reasonable care,

(b) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and

(c) "deliberate and concealed" if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

(2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate on P's part when the document was given, is to be treated as careless if P-

(a) discovered the inaccuracy at some later time, and

(b) did not take reasonable steps to inform HMRC.

Paragraph 4 sets out the penalty payable under paragraph 1. Paragraph 4(1)(a) provides that the penalty, for careless action, is 30% of the potential lost revenue. For deliberate but not concealed action, the penalty is 70% of the potential lost revenue, and for deliberate and concealed action, the penalty is 100% of the potential lost revenue.

Paragraph 5 defines "potential lost revenue" as "the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment".

Paragraph 9 provides for reductions in the penalty for disclosure depending on whether it is prompted or unprompted.

Paragraph 10(1) provides that "Where a person who would otherwise be liable to a 30% penalty has made an unprompted disclosure, HMRC shall reduce the 30% penalty to a percentage (which may be 0%) which reflects the quality of the disclosure".
Paragraph 10(2) provides that "Where a person who would otherwise be liable to a 30% penalty has made a prompted disclosure, HMRC shall reduce the 30% penalty to a percentage, not below 15%, which reflects the quality of the disclosure".

Paragraph 11 further provides that HMRC may reduce the penalty under paragraph 1 "If they think it right because of special circumstances".

Paragraph 14 also enables HMRC to suspend all or part of a penalty for a careless inaccuracy under paragraph 1, but (under paragraph 14(3)) "only if compliance with a condition of suspension would help P to avoid becoming liable to further penalties under paragraph 1 for careless inaccuracy".

Under paragraph 15, a person may appeal against a decision of HMRC that a penalty is payable (sub paragraph (1)), or as to the amount of a penalty payable, (subparagraph (2)) or a decision not to suspend a penalty payable, (subparagraph (3)) or a decision as to the conditions of suspension (subparagraph (4)).

Paragraph 17 deals with the powers of the Tribunal in any such appeal.

(1) On an appeal under paragraph 15(1) the appellate tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 15(2) the appellate tribunal may

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the appellate tribunal substitutes its decision for HMRC's, the appellate tribunal may rely on paragraph 11

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the appellate tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed.

(4) On an appeal under paragraph 15(3)

(a) the appellate tribunal may order HMRC to suspend the penalty only if it thinks that HMRC's decision not to suspend was flawed, and

(b) if the appellate tribunal orders HMRC to suspend the penalty

(i) P may appeal to the appellate tribunal against a provision of the notice of suspension, and

(ii) the appellate tribunal may order HMRC to amend the notice.

(5) On an appeal under paragraph 15(4) the appellate tribunal

(a) may affirm the conditions of suspension, or

(b) may vary the conditions of suspension, but only if the appellate tribunal thinks that HMRC's decision in respect of the conditions was flawed.

(6) In sub-paragraphs (3)(b), (4)(a) and (5)(b) flawed means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(7) Paragraph 14 (see in particular paragraph 14(3)) is subject to the possibility of an order under this paragraph.