[2018] UKFTT 359 (TC)

TC06573

Appeal number: TC/2016/02446

INCOME TAX – discovery assessment – whether negligent conduct on part of Appellant – yes – amount of profits – whether Appellant could evidence losses or expenses incurred – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PAUL HARRISON **Appellant**

- and -

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

TRIBUNAL: JUDGE JANE BAILEY
MR LESLIE HOWARD

Sitting in public at Taylor House, London on 25 April 2018

The Appellant did not appear and was not represented

Mr Keith Golder, presenting officer, for the Respondents

DECISION

Introduction

1. This appeal is against an assessment made by the Respondents under Section 29 of Taxes Management Act 1970 ("TMA 1970") upon the Appellant in respect of the tax year 2007/08. The Respondents maintain that the Appellant, in partnership with his wife, received £200,000 from the proceeds of sale of a property and that the partnership is liable to tax in respect of that receipt. The Appellant disputes both the amount received and that the partnership is liable to tax in respect of this receipt.

2. A number of issues which are relevant to this substantive appeal were determined following a case management hearing on 21 September 2017. This decision contains the determination of the remaining issues, and the determination of the substantive appeal.

Whether to proceed in the absence of one of the parties

3. Our first decision was whether the proceed with the hearing before in the absence of the Appellant.

4. On 20 January 2018, the parties had been informed that this hearing had been fixed for an oral hearing in London, to start not before 10:30 on 25 April 2018. This date was in accordance with the dates to avoid which had been provided by both parties. London is the main centre venue closest to the Appellant's home address. On 28 March 2018 both parties provided their skeleton arguments for the appeal hearing.

5. On 23 April 2018, following inter-partes correspondence, both parties wrote to the Tribunal. The Appellant wrote first, requesting that the hearing be changed to a paper hearing as the parties had set out their position in full in correspondence. The Respondents wrote in response to oppose this change of categorisation. Following the Respondents' email to the Tribunal, the Appellant wrote again, stating that he would not attend the hearing and no disrespect to the Tribunal was intended. This correspondence was referred to Judge Bailey late on 23 April 2018. Early on 24 April 2018, the Tribunal informed the parties that Judge Bailey had rejected the Appellant's application for re-categorisation on the basis that the matter was not appropriate for a paper hearing. The parties were directed that the oral hearing would remain listed in the absence of an application for postponement and that (given the proximity of the hearing) any application for postponement must now be made in person at the commencement of the oral hearing. The Appellant was informed that he could not be compelled to attend the hearing of his appeal but he was reminded that he bore the burden of proof and invited to re-consider his stance of not attending.

6. By the appointed time for the commencement of the hearing on 25 April 2018 the Appellant had not turned up. We delayed the start by a further 15 minutes in case of travel delay but the Appellant did not appear. In light of the correspondence from the Appellant on 23 April 2018 we formed the conclusion that the Appellant did not

intend to appear at the hearing or send a representative on his behalf. The Appellant had been notified of the hearing and had apparently chosen not to attend. The Respondents had appeared and were ready to proceed. In the circumstances we decided it was in the interests of justice that the hearing should proceed in the absence of the Appellant.

The substantive appeal

7. We had read the skeleton arguments of both parties in advance of the hearing. Having decided to proceed in the absence of the Appellant, we heard oral submissions from Mr Golder and we heard oral evidence of fact from the Respondents' Officer Mark Raven. We reserved our decision.

8. In this written decision we set out first our findings of fact, then set out the history of the Tribunal proceedings in order to explain what we consider was determined at the preliminary hearing on 21 September 2017 and what remains for us to determine. Finally, we set out our conclusions in respect of those remaining issues and state our conclusion in determination of this appeal.

Findings of fact

9. We considered Officer Raven to be a truthful witness and one who was careful to give a precise and complete answer to the questions he was asked. On the basis of the documents before us and the evidence of Officer Raven, we find as follows:

a. The Appellant was in partnership with his wife from the 1980s and was registered in the Self Assessment system in 1996. The partnership initially traded as forensic accountants and, from 1990, also traded in property development.

b. In around 1999 the partnership became involved in substantial and costly litigation in relation to its forensic accounting trade. The Appellant and his wife ceased trading in 2000/01, and the Appellant's Self Assessment account became dormant in 2002. However, the litigation continued until about 2008.

The purchase and sale of Bearsted

c. By 2006 the Appellant and his wife expected to receive funds in settlement of their litigation. In 2006 the Appellant and his wife had agreed to purchase a property, called Bearsted, which they had identified as being suitable for development. The partnership intended to purchase this property out of the litigation settlement payment but this anticipated settlement did not materialise. The Appellant's son and daughter-in-law stepped in and, in January 2007, they acquired Bearsted instead of the partnership. Bearsted was subsequently sold in about November 2007 at a profit.

d. At some point between 2006 and 2008 the Appellant and his wife agreed with their son and daughter-in-law that the partnership would receive an amount from the proceeds of sale of Bearsted. This amount seems initially to have been

one third, and then later it seems that the amount was crystallised as £200,000. The agreement that the Appellant and his wife would receive £200,000 is evidenced in two emails, dated 8 and 11 March 2008, between the Appellant and his son. The second of those emails refers to "agreed schedules". In a letter to the Respondents dated 20 October 2015 the Appellant stated:

> I stand by my email, dated 11/03/08 (14:46) and confirm that out of Bearsted, my wife and I received £200,000 in cash and/or value which went back over a number of years and as would have been set out in the "agreed schedules" and the email, dated 08/03/08 (12:25).

e. At the time of the sale of Bearsted (and to date) the Appellant took the view that he and his wife had losses which could be set against this trading income, and that they incurred expenses related to their involvement in Bearsted, and that as a result no tax would be due from him or his wife for 2007/08. The Appellant concluded that in these circumstances it was not necessary for him to notify the Respondents of his chargeability to tax as a result of receiving an amount arising from the sale of Bearsted.

The Respondents' interest in the Appellant's son

f. The Appellant's son had also made the decision not to render a tax return for 2007/08, despite his profit on the sale of Bearsted and despite having been issued with a tax return for that year. The Respondents became interested in the Appellant's son's tax affairs. In July 2012 the Respondents obtained a search warrant and conducted a search of premises occupied by the Appellant's son. The Appellant was subsequently interviewed under caution, and in January 2013 the Appellant's son was charged with fraud. He subsequently pleaded guilty to that charge, was convicted and sentenced.

The Respondents interest in the Appellant

g. After the Appellant's son had been charged, Court appointed experts attempted to establish the accuracy of accounts the Appellant's son had kept, the extent of his profit and the appropriate tax treatment of sums received. On 28 November 2014, the Court experts produced a joint statement concluding that the Appellant's son and his wife had together in partnership conducted four separate trades, and that this restricted the losses available for the Appellant's son and his wife to set against the profit they had made on the sale of Bearsted.

h. Also, on 28 November 2014, the Appellant made a statement which was faxed to the Respondents. In that statement the Appellant stated that he and his wife had received sums from their son in respect of Bearsted. The Respondents entered into discussion, via the Court experts, about the Appellant's chargeability to tax.

The assessment and appeal

i. On 25 September 2015, the Respondents' Officer Raven raised an assessment under Section 29 TMA 1970 upon the Appellant. This assessment was in the sum of £75,435.20 on the basis that the Appellant had received £200,000 as a finder's fee in respect of the sale of Bearsted. This assessment was preceded by a letter dated 23 September 2015 from Officer Raven to the Appellant, stating:

> I understand that you are aware HMRC has been furnished with information implying you were in receipt of a £200,000 finder's fee from a property known as Bearsted … for the tax year 2007/08. Indeed, I further understand you are expecting the requisite discovery assessment, given that you have evidently failed to return this income.

j. By letters dated 30 September and 7 October 2015 the Appellant expressed surprise at the assessment and asked the Respondents to confirm when and how they came to have the information leading them to believe he had received a finder's fee. The Appellant referred to his statement of 28 November 2014.

k. By letter dated 8 October 2015 Office Raven expressed concern at the Appellant's surprise, sought a copy of the 28 November 2014 statement and then asked for more information about the Appellant's involvement with Bearsted. Officer Raven also warned of the possibility of penalties given the Appellant's failure to notify chargeability.

l. On 20 October 2015 the Appellant appealed against the assessment. The Appellant accepted that £200,000 had been received but stated that it was received by the partnership with his wife, and that there were partnership trading losses and expenses to be set against the £200,000 trading income. With this letter the Appellant provided copies of the emails of 8 and 11 March 2008 but stated that he was unable to locate the agreed schedules referred to in those emails. The Appellant asked the Respondents to confirm whether they had these documents.

m. On 3 November 2015 Officer Raven replied to the Appellant, asking that the Appellant provide evidence of the partnership, of the losses and of the expenses claimed. Officer Raven stated he "was unaware of being in possession of the schedules" and so could not forward these to the Appellant.

n. On 23 November 2015 the Appellant replied to the Respondents. The Appellant had concluded that the Respondents had come into possession of the 2008 emails as a result of the July 2012 search of his son's premises and that:

> HMRC were, therefore in possession of the emails on which your assessment on me was based at some time between 17th July and 9th November 2012.

o. (This latter date was the date of one of the Respondents' interviews of the Appellant's son. The transcript of that interview appears to confirm that the Appellant's son was asked to explain the contents of the emails.) In his letter

the Appellant continued by asking the Respondents to confirm his understanding that:

> HMRC may only raise an assessment on a person in respect of VAT, Income tax or CGT within 12 months of becoming aware of or notified of such a taxable liability.

p. Unfortunately, in his reply to the Appellant of 3 December 2015, Officer Raven incorrectly confirmed that an assessment under Section 29 TMA 1970 should be raised within 12 months of a discovery. Officer Raven went on to explain that the 2008 emails were insufficient by themselves to satisfy him that the Appellant was chargeable to tax.

q. There then followed a period of correspondence in which the Appellant reiterated that the Respondents were out of time to raise a discovery assessment upon him because they must have had the 2008 emails and so made their discovery by, at the latest, November 2012. The Appellant voiced a suspicion that a discovery assessment was not raised at that time because it could have undermined the Respondents' prosecution of his son. The Appellant did supply evidence of the partnership but, because he believed the underlying assessment to have been made out of time, he did not supply the requested evidence of the expenses or losses claimed. For their part the Respondents stated that the assessment was not out of time and continued to seek information to substantiate the Appellant's claim that the partnership had suffered losses and had incurred expenses. Information notices were issued to try to obtain documents which were relevant to this claim.

r. At some point in or around this period the Respondents had apparently accepted that the £200,000 was received by the partnership and not the Appellant alone, revised the assessment upon the Appellant and raised an assessment under Section 29 TMA 1970 upon the Appellant's wife. Although the parties made some efforts to agree what was in dispute between them, including the Respondents providing their View of the Matter, it became clear that they were not going to be able to agree the issue of whether an assessment under Section 29 TMA 1970 must be issued within 12 months of the Respondents' discovery.

The Tribunal proceedings

10. On 29 April 2016 the Appellant referred his appeal against the assessment to the Tribunal. The Appellant's sole ground of appeal was that Section 29 TMA 1970 prevented the Respondents from raising an assessment more than 12 months after making a discovery.

11. On 1 July 2016 the Respondents filed and served their Statement of Case. On 19 July 2016 the Tribunal issued standard directions. These required the parties to provide their list of documents. The Appellant wrote to the Respondents asking them to provide him with all communications between anyone in HMRC in connection with the emails of 2008 and his own tax affairs.

12. There then followed a great volume of correspondence between the Appellant, the Respondents and the Tribunal concerning what documents the Respondents might hold, the extent to which they had already conducted a proportionate search and given full disclosure to the Appellant, and the necessity of three named officers of the Respondents appearing as witnesses. Eventually the Appellant made an application to the Tribunal for disclosure and made another application for witness summons in respect of the three officers. The Respondents made an application that the issue of whether Section 29 TMA 1970 prevented an assessment being made more than 12 months after a discovery be heard as a preliminary issue.

13. On 28 April 2017 the Tribunal (Judge Cannon) directed a case management hearing take place for:

> The Tribunal to deal with outstanding issues relating to disclosure, the Appellant's application for witness summons … and the Respondents' application for the hearing of a preliminary issue.

14. This case management hearing was listed to take place on 15 June 2017. However, there was some initial confusion over what was to be determined at that case management hearing. This was partially clarified in a letter from the Tribunal dated 17 May 2017, and more fully clarified in the Tribunal (Judge Cannon)'s decision of 2 June 2017, refusing to grant the Appellant permission to appeal against the Directions of 28 April 2017. In that decision Judge Cannon made it clear that the case management hearing was to decide whether there should be a separate hearing of a preliminary issue, not to determine that preliminary issue.

15. However, in the meantime the Respondents had made an application to strike out the Appellant's case. In directions released on 8 June 2017, the Tribunal (Judge Cannon) directed that the Respondents' application to strike out the Appellant's case should also be listed to be heard at the case management hearing but that the hearing listed for 15 June 2017 would be postponed as there would be insufficient time in the short hearing slot booked for 15 June 2017 for all four applications to be heard.

16. The directions released on 8 June 2017 apparently caused further confusion. In a letter dated 24 July 2017, the Tribunal clarified that the hearing (by this stage listed for 21 September 2017) would be a hearing of:

1. Issues raised by the Appellant in relation to disclosure
2. The Appellant's application for witness summonses
3. The Respondent's application for the hearing of a preliminary issue, and
4. The Respondents application to strike out the appeal.

17. The Tribunal made it clear that at the hearing on 21 September 2017, the Appellant would be able to make his objection to applications 2-4 being heard before he had the disclosure he sought in the first application, and that the Judge would

decide whether disclosure was required before those other applications could be considered.

The case management hearing

18. The case management hearing took place on 21 September 2017. The Tribunal (Judge McNall) issued its decision on 3 October 2017. After considering the applications, the Tribunal took the view that the "issue of the timing of the assessment" should be determined first as it "is the issue upon which the other issues depend".

19. The Tribunal then considered the timing of the issue of the assessment and concluded that it was issued in time, going on to conclude that it would be inappropriate to order disclosure (application 1) or to issue witness summons (application 2) as these two applications related to the timing of the assessment, and were no longer relevant given the way in which that timing issue had been determined. The Tribunal concluded that the substance of the request for a preliminary hearing (application 3) had been dealt with by the conclusion that the assessment was not out of time, and that the Respondents' application to strike out (application 4) would be dismissed.

What was determined as a result of the hearing on 21 September 2017?

20. The Respondents described the Tribunal's decision of 3 October 2017 as covering the "competency point" in respect of the Section 29 TMA 1970 assessment. However, we consider that the decision of 3 October 2017 is more accurately described as a determination of the timing issue, and in particular determining whether the Respondents had the statutory power to raise an assessment more than 12 months after making a discovery. This was the argument raised by the Appellant.

21. There are a number of aspects which the Respondents must establish when they raise an assessment under Section 29 TMA 1970. In this case it has been accepted by the Appellant that the partnership received £200,000 (not all of it in cash) and that the Respondents made a discovery (although, as outlined above, there was dispute about when that discovery was made.) As we set out above, in the decision of 3 October 2017 the Tribunal determined that in September 2015 the Respondents were within time to raise a Section 29 assessment for 2007/08 upon the Appellant, and that the Appellant had failed to fulfil his obligation to notify chargeability under Section 7 TMA 1970. The decision of 3 October 2017 sets out the legislation relevant to the time limits but there is no reference to the other aspects relevant to Section 29 which must be demonstrated if the Respondents are to be successful in having a discovery assessment confirmed on appeal by the Tribunal. There is also no reference in the decision to other legislation or case-law relevant to competency.

22. It seemed to us, on our first reading of the papers before the hearing, that there were two aspects of competency which might not have been determined in the decision of 3 October 2017: "staleness" and negligent conduct.

23. We deal first with "staleness", by which we mean the possibility that a discovery, although fresh when made, may have grown too stale for HMRC to raise a discovery assessment if a long period of time passes before HMRC act. This was explained in the Upper Tribunal decision of Pattullo v HMRC [2016] UKUT 270, in which Lord Glennie also made it clear that:

> … it would only be in the most exceptional of cases that inaction on the part of HMRC would result in the discovery losing its required newness by the time that an assessment was made.

24. Part of the reason that Lord Glennie stated that only in exceptional cases would a discovery become stale is because it is possible for a series of discoveries to be made, either as new information comes to light or as officers come to fresh conclusions – see also HMRC v Tooth [2018] UKUT 38, decided after the Tribunal's decision of 3 October 2017.

25. Upon reflection, we reached the conclusion that the aspect of staleness must have been determined by the Tribunal decision of 3 October 2017, and so we did not need to ask the Respondents to address this point at the hearing before us. Staleness is an inherent part of the question of whether an assessment is made in time. We do not know what evidence was before the Tribunal on 21 September 2017[1] but we have reached the conclusion that, whatever the answer to that question, the Tribunal's conclusion on 3 October 2017 that the assessment of September 2015 was made in time must mean that the issue of whether the discovery was sufficiently fresh or had become stale is no longer open for us to consider now.

26. The second aspect relating to competency which we were concerned might not have been determined was negligent conduct. In explaining why we consider this is relevant, we need to set out part of the statutory framework (unfortunately duplicating some of the legislation already set out in the case management decision). Subsection 29(1) TMA 1970, as it applied on 25 September 2015 when the assessment was raised, is as follows:

> **29** *Assessment where loss of tax discovered*
>
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, 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

[1] Officer Raven's evidence before us, which we accept, was that he made a discovery when he received the statement of 28 November 2014, and that he was in negotiation with the Court appointed experts in the period from receipt of this statement until September 2015.

(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.

27. Subsections 29(2) and (3) TMA 1970 apply only if a return has been made, which is not the case here. As the Tribunal held on 3 October 2017, there are statutory time limits for raising an assessment under Section 29, and Section 36 TMA 1970 allows the Respondents to look back further than usual in certain circumstances. The relevant parts of Subsection 36(1A) provide as follows:

36 *Loss of tax brought about carelessly or deliberately etc.*

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

(a) …,

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

(c) … , or

(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).

28. An obligation under Section 7 TMA 1970 is an obligation to notify chargeability. The Tribunal determined in the decision of 3 October 2017 that the Appellant had failed to comply with his obligations under Section 7. However, for 2007/08 there are additional aspects which the Respondents must satisfy before they can raise a Section 29 assessment.

29. Article 7 of the Finance Act 2008, Schedule 39 (Appointed Day, Transitional, Provisional and Savings) Order 2009 (SI 2009/403) provides:

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.

30. Therefore, for the Respondents to raise an Extra Time Limit (or ETL) discovery assessment under Section 36(1A)(b) upon the Appellant in respect of the year

2007/08, they must demonstrate that there is a loss of tax to the Crown which is attributable to the negligent conduct of the Appellant.

31. Mr Golder very fairly accepted that the issue of negligence was not explicitly raised as a specific aspect of competency at the hearing on 21 September 2017, and that he had not referred the Tribunal to SI 2009/403. In the circumstances that is not particularly surprising as the parties' submissions were drawn along a particular path relating to timing and not to other aspects of competency. Indeed, the case management hearing was originally intended only to decide *whether* there should be a preliminary hearing of the issue of timing. The issue of timing was determined after the hearing on 21 September 2017 only because the Tribunal decided it was a necessary precursor to deciding whether it should order disclosure and issue witness summons. Negligence had not explicitly been raised as an issue in dispute, and it was not necessary to consider it in order to make a decision about disclosure or witness summons. This reinforces our conclusion that negligent conduct was not an issue which the Tribunal determined in its decision of 3 October 2017.

What remains for us to decide

32. While the Appellant did not explicitly raise negligent conduct as a specific ground of appeal, it seems to us that this point was also not expressly conceded by the Appellant. In those circumstances, and following Burgess v HMRC, and Brimheath Developments Limited v HMRC [2015] UKUT 578, we consider that HMRC must satisfy us that there was negligent conduct on the part of the Appellant as a pre-requisite to the confirmation of the assessment.

33. Therefore, we consider the issues in dispute between the parties which are before us for determination are:

i. Was there negligent conduct on the part of the Appellant to which (but for the Section 29 assessment for 2007/08) a loss of tax would be attributable?

ii. On what amount of profits should the partnership be assessed?

iii. Has the partnership incurred losses or expenses in respect of its trade of property development and, if so, in what amount?

iv. Is the partnership able to set losses from its trade of forensic accountancy against income received in its trade of property development? If so, has the partnership incurred losses or expenses in respect of its trade of forensic accountancy and, if so, in what amount?

Onus and standard of proof

34. The onus is upon the Respondents to satisfy us on the first of the four issues we have identified above as being before us. If we are satisfied in respect of the first issue then the onus switches and it is for the Appellant to satisfy us that the figures in the assessment should be displaced in favour of other figures or reduced to zero.

Therefore, the onus is upon the Appellant in respect of the remaining three issues set out above.

35. The standard of proof in each case is the balance of probabilities.

First issue - Negligent conduct

36. As set out above, if the Respondents wish to raise an ETL assessment in respect of 2007/08 then they must establish that that assessment is to make good to the Crown a loss of tax attributable to the negligent conduct of the person to be assessed.

37. Therefore, we must now consider whether the Respondents have demonstrated there is a loss of tax attributable to the negligent conduct of the Appellant. In this part of our decision we focus upon the negligent conduct. (For the purposes only of considering negligent conduct we assume there was a loss of tax. Whether there was, in fact, a loss of tax as the Respondents allege, will be resolved following our consideration of the second to fourth issues, below.)

38. Mr Golder made a number of submissions in respect of negligence. We recognise that he had not anticipated having to present argument in respect of this issue and we hope we do not do him a disservice if we summarise those as essentially being two arguments:

a. a taxpayer's failure to notify chargeability under Section 7 TMA 1970 constitutes negligent conduct, irrespective of the taxpayer's individual characteristics and the surrounding circumstances; alternatively

b. a taxpayer's individual characteristics and the surrounding circumstances are relevant, but in this case the Appellant's failure to notify chargeability does constitute negligent conduct given the Appellant's background (being a forensic accountant) and knowledge, and given that the amount received was far too small to have simply been carelessly overlooked.

39. In considering the Appellant's conduct, we look first at the obligation under Section 7 TMA 1970 as it applied on 8 March 2008 (the latest date on which the Appellant could have received payment). Section 7 TMA 1970 provided:

> **7** *Notice of liability to income tax and capital gains tax*
>
> (1) Every person who—
>
> (a) is chargeable to income tax or capital gains tax for any year of assessment, and
>
> (b) has not received a notice under section 8 of this Act requiring a return for that year of his total income and chargeable gains,
>
> shall, subject to subsection (3) below, within six months from the end of that year, give notice to an officer of the Board that he is so chargeable.

....

(3) A person shall not be required to give notice under subsection (1) above in respect of a year of assessment if for that year his total income consists of income from sources falling within subsections (4) to (7) below and he has no chargeable gains.

(4) A source of income falls within this subsection in relation to a year of assessment if—

(a) all payments of, or on account of, income from it during that year, and

(b) all income from it for that year which does not consist of payments,

have or has been taken into account in the making of deductions or repayments of tax under PAYE regulations.

(5) A source of income falls within this subsection in relation to any person and any year of assessment if all income from it for that year has been or will be taken into account—

(a) in determining that person's liability to tax, or

(b) in the making of deductions or repayments of tax under PAYE regulations.

(6) A source of income falls within this subsection in relation to any person and any year of assessment if all income from it for that year is—

(a) income from which income tax has been deducted;

(b) income from or on which income tax is treated as having been deducted or paid; or

(c) income chargeable under Chapter 3 of Part 4 of ITTOIA 2005 (dividends etc from UK resident companies etc),

and that person is not for that year liable to tax at a rate other than the basic rate, the dividend ordinary rate, the lower rate savings rate or the starting rate.

(7) A source of income falls within this subsection in relation to any person and any year of assessment if all income from it for that year is income on which he could not become liable to tax under a self-assessment made under section 9 of this Act in respect of that year.

40. As at 8 March 2008, the relevant part of Section 9 TMA 1970 provided

9 *Returns to include self-assessment*

(1) Subject to subsections (1A) and (2) below, every return under section 8 or 8A of this Act shall include a self-assessment, that is to say—

(a) an assessment of the amounts in which, on the basis of the information contained in the return and taking into account any relief or allowance a claim for which is included in the return, the person making the return is chargeable to income tax and capital gains tax for the year of assessment; and

(b) an assessment of the amount payable by him by way of income tax, that is to say, the difference between the amount in which he is assessed to income tax under paragraph (a) above and the aggregate amount of any income tax deducted at source and any tax credits to which section 397(1) of ITTOIA 2005 applies

but nothing in this subsection shall enable a self-assessment to show as repayable any income tax treated as deducted or paid by virtue of section … 246D(1) … of the principal Act, section 626 of ITEPA 2003 or section 399(2), 400(2), 414(1), 421(1) or 530(1) of ITTOIA 2005.

41. While there is an attractive simplicity to the Respondents' first argument that failing to notify chargeability is, in all cases, negligent conduct, it seems to us that this interpretation fails to give a purpose to SI 2009/403. As the explanatory notes to that SI explain:

> Article 7 makes transitional provision for the new subsections 36(1A)(b) and (c) of the Taxes Management 1970, which apply an extended time limit for assessing income tax or capital gains tax where there is a failure to notify liability or a failure to notify an avoidance scheme as required by section 309, 310 or 313 of the Finance Act 2004. It ensures this provision is not retrospective. For the tax years 2008-09 and earlier, the extended time limit will only apply if it also applied under the previous rules, namely if there has been negligent conduct.

42. If Parliament considered that failure to notify was in itself negligent, no matter what the surrounding circumstances or the characteristics of that taxpayer, then it would not have been necessary for Article 7 to apply to Section 36(1A)(b). We have concluded that failure to notify cannot, simply by itself, amount to negligent conduct.

43. We have reached the conclusion that Mr Golder's second submission is correct. So, although the obligation to notify must be the same in each case, whether a failure to notify amounts to negligent conduct in any particular case will depend on the circumstances of that case.

44. In looking at whether the Appellant's conduct was negligent conduct, it seems to us that we should take into account the Appellant's explanation for not notifying chargeability (namely that, had he made a self-assessment under Section 9 TMA 1970

then, because of the losses and expenses which he claimed were available for set-off he would not have been liable to any tax). It seems to us that it is possible that the Appellant is making the argument that Subsection 7(7) TMA 1970 applied and that, in the absence of the Appellant to make this point himself, we should consider this potential argument. Such an argument cannot, at this stage, result in a finding that the Appellant was not obliged to notify chargeability – that has already been determined by the Tribunal decision of 3 October 2017. But it seems to us that it is relevant to the question of whether the Appellant was negligent in failing to notify chargeability.

45. To properly consider this aspect, we need to consider the Appellant's arguments as to why the partnership is not liable to income tax on the £200,000 received. Therefore, it will be convenient for us to jump forward and consider issues 2, 3 and 4, before returning to the question of whether the Appellant's failure to notify chargeability amounts to negligent conduct.

Second issue – the amount of the profits

46. As we noted above, the onus is upon the Appellant to demonstrate that the figures in the assessment raised by the Respondents should be displaced.

47. The original assessment was raised upon the Appellant alone on the basis that he had received £200,000. The Respondents have accepted that this is incorrect, and this assessment has been replaced by assessments upon each of the Appellant and his wife, on the basis that they each received income of £100,000. Therefore, this figure of income of £100,000 received by the Appellant will stand unless the Appellant can persuade us that there is a more accurate figure which should be used.

48. The Appellant initially accepted, in his letter of 20 October 2015, that he and his wife had together received £200,000 in respect of the sale of Bearsted. This figure is also that used by the Appellant's son in his email of 8 March 2008 in which he requests "an invoice from you and mother for the £200k".

49. However, in his skeleton argument the Appellant disputes that the entirety of the £200,000 was actually received. The Appellant suggests that the correct figure for the income of the partnership was £52,550. The Appellant argues this was the cash which the partnership actually received, and that £83,400 credit was given by the partnership to their son and his wife for rent and car payments. The Appellant argues that there was a shortfall of £64,050. The Appellant does not refer to any legislation or case-law to support his argument that it is the cash actually received by the partnership which is the relevant amount upon which the partnership should be assessed.

50. In their skeleton argument the Respondents refer us to Sections 7 and 25 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA 2005"). In 2007/08 Section 7 ITTOIA provided:

> **7** *Income charged*
>
> (1) Tax is charged under this Chapter on the full amount of the profits of the tax year.

(2) For this purpose the profits of a tax year are the profits of the basis period for the tax year.

(3) For the rules identifying the basis period for a tax year, see Chapter 15.

(4) This section is subject to Part 8 (foreign income: special rules).

(5) And, for the purposes of section 830 (meaning of "relevant foreign income"), the profits of a trade, profession or vocation arise from a source outside the United Kingdom only if the trade, profession or vocation is carried on wholly outside the United Kingdom.

51. Section 25 ITTOIA 2005 provides that the profits of a trade must be calculated in accordance with generally accepted accounting practice ("GAAP"). Under GAAP the profits of a business are the amount it is entitled to receive, and not only the proportion of that entitlement which is the cash actually received. Although some small businesses may account on the cash basis, there is no evidence (or suggestion) that the Appellant's partnership drew up its accounts for each of its trades on the cash basis. Therefore, we agree with the Respondents that the "full amount of the profits of the tax year" is the amount which the partnership was entitled to receive and not, as the Appellant argues, the (lesser) amount of the cash which was received.

52. The Appellant has accepted, and the evidence confirms, that the amount the partnership was entitled to receive was £200,000. Therefore, we reject the Appellant's submission that the figure of £200,000 should be replaced by the figure of £52,550. We confirm the figure of £200,000 as the profits the partnership of the Appellant and his wife received out of the proceeds of sale of Bearsted.

Third issue – losses or expenses of the property development trade

53. The third issue is whether the partnership has incurred losses or expenses in respect of its trade of property development and, if so, in what amount.

54. In his skeleton argument the Appellant argues that there are partnership losses of (at least) £121,920 (considered below), and expenses relating to Bearsted of £71,000, and so there was no taxable income and, it followed, no tax payable. The Appellant also suggested that there might have been other unrelieved losses which could not be established due to the collapse of Arthur Andersen in 2002.

55. Mr Golder drew our attention to the evidence which had been provided by the Appellant in respect of the partnership's losses and expenses. That evidence, in its totality, consists of three single sides of A4. The first of these pages is a handwritten list headed "Expenses/Costs, Haslam Tunstall litigation" and is dated 6 February 2015. The second page is headed "Partnership Costs/Losses, Haslam Tunstall Litigation" and is dated 28 October 2015. The final page is headed "Bearsted Direct Costs and Expenses" and is also dated 28 October 2015. We will return to the first and second page when we come to consider the fourth issue but only the third page – the list of Bearsted costs – is relevant to this third issue.

56. We remind ourselves that the onus is upon the Appellant to establish that the partnership incurred losses or had expenses in respect of their property development trade, and to demonstrate the amounts incurred. The only evidence we have in respect of the partnership's property development trade is this single handwritten list described above. There are no underlying records (such as receipts, invoices, contracts or bank statements) to support the Appellant's list and there are apparently no accounts. The Bearsted expenses are said to have been incurred between January 2006 and August 2009 so the most recent of these costs was incurred more than six years before the list was written in October 2015. As the Appellant chose not to appear, we do not have his explanation of how he managed to compile this list so long after the event and apparently without the benefit of any underlying records, or how the amounts listed were wholly incurred for the purposes of the partnership's property trade. As he also traded as a forensic accountant we would expect the Appellant to appreciate the value of keeping records of the expenses the partnership had incurred, and to be able to reconstruct the audit trail.

57. We do not consider a handwritten list of sums expended, drawn up more than six years after the event and unsupported even by oral evidence, is sufficient for us to be satisfied that the partnership incurred expenses in its trade of property development and that those expenses were wholly and exclusively incurred in that trade. So, as the Appellant has failed to establish that the partnership incurred any expenses or had any losses in respect of its trade of property development, we conclude that there are no losses or expenses in respect of this trade for the partnership to set against its income for 2007/08.

Fourth issue – set off of expenses from the partnership's other trade

58. Next, we consider whether the expenses and losses of the partnership's trade as forensic accountants can be set against the income received in the partnership's property development trade.

59. The Appellant argued that he had incurred expenses and losses of at least £121,920 in respect of the forensic accountancy business, and that these losses reduced the partnership's tax liability to zero. The Respondents' position was that it was not possible for the partnership to carry forward a loss from one trade to set against the profits of another trade.

60. We agree with the Respondents that the partnership was carrying on two trades: forensic accountancy and property development. We consider these clearly to be separate trades. We also agree with the Respondents that while there are provisions which enable the losses of a trade to be set against profits made in the same year, carried forward or carried back, all the conditions for claiming such a loss deduction must be met if the loss deduction is to be allowed.

61. Section 64 ITTOIA 2005 provides that a person may make a claim for trade loss relief against general income if that person carries on a trade in that year and makes a loss in the trade in that year. Such losses can be set against the income for the year in which the loss was made and/or the previous year. Losses can be carried back further

where they are made in the 12 months of trading (known as terminal losses). Section 89 ITTOIA 2005 enables terminal losses to be used against profits in the final tax year and the preceding three tax years. However, terminal losses can only be set against the profits of that trade. Section 83 ITTOIA 2005 enables a loss to be carried forward to subsequent years, but such a loss can only be set against profits of that trade. Such losses cannot be set against the profits of any other trade carried on by that trader.

62. The Appellant's case is that the partnership ceased to trade as forensic accountants in about 2000/01 as a result of the events which caused the litigation. Therefore, any forensic accountancy losses which the partnership suffered in 2000/01, its last year of trading, could be set against property development profits received in 2000/01 or in 1999/2000. Any terminal losses of the forensic accounting trade could have been set against earlier forensic accounting profits. However, the legislation does not allow profits of the partnership's property development trade received in any tax year after 2000/01 to be reduced by losses incurred in the partnership's forensic accounting trade.

63. Therefore, whatever losses or expenses the partnership incurred in its forensic accountancy trade before the partnership ceased trading in 2000/01, we conclude that such losses were not available to reduce the partnership's property development profits in 2007/08.

64. For completeness, we add that we were not satisfied that there were any such expenses or losses of the forensic accountancy trade. The only evidence we had were the two handwritten lists from February and October 2015 described above. Again, there were no underlying records. The sums involved are said to have been incurred from March 1999 to 17 July 2006, and so the lists had been drawn up between five and 16 years after the event. (It was unclear for what purpose the February 2015 list was drawn up when it was the Appellant's case that he was unaware of the possibility of being assessed until the assessment was received in September 2015.) As before, these handwritten lists are insufficient to satisfy us that the expenses or costs were incurred, and were incurred wholly and exclusively for the purposes of that trade.

Return to First issue - Negligent conduct

65. So, finally, we return to the issue of whether there was a loss of tax which was attributable to negligent conduct on the part of the Appellant.

66. The Appellant has failed to satisfy us that the partnership's profits are the amount of cash received rather than its profits calculated according to generally accepted accounting principles. The Appellant has also failed to satisfy us that the partnership had any losses or expenses which could be set against income from the partnership's property development trade in 2007/08. We are satisfied that there was a loss of tax.

67. We consider that this loss of tax was attributable to the Appellant's failure to notify chargeability and we also consider that, in the circumstances of this case, failure to notify chargeability does amount to negligent conduct. In reaching this

conclusion we have taken into account that the Appellant traded as a forensic accountant for many years and so must be presumed to have a good knowledge of the tax system, including knowing of the obligation to notify chargeability, a good understanding of basic accounting principles, and a good understanding of the need to substantiate claims which are made. We have also taken into account the absence of any records in respect of either trade to support the partnership's claim to have losses and expenses. We have taken into account the large size of the income, and the inherent unlikelihood of there being no chargeability to tax on an amount of that size.

68. We have considered what a person, in the Appellant's position and aware of the obligation to notify chargeability, might do when the partnership received profits of £200,000. We have concluded that a person in the Appellant's position should have appreciated that he was required to notify chargeability. In these circumstances we conclude that the Appellant's failure to notify was not merely an oversight or carelessness but was negligent conduct on the part of the Appellant.

Conclusion

69. For the reasons set out above, this appeal is dismissed.

70. A summary of the findings of fact and reasons for this decision was released to the parties on 9 May 2018. On 4 June 2018, so within 28 days of that summary decision being released, the Tribunal received a request from the Appellant for full findings of fact and reasons for the decision.

71. This document contains the full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JANE BAILEY
TRIBUNAL JUDGE

RELEASE DATE: 28 JUNE 2018