[2019] UKFTT 38 (TC)

TC06934

Appeal numbers: TC/2014/05302 & 06566

INCOME TAX, NATIONAL INSURANCE CONTRIBUTIONS & VALUE ADDED TAX – Enquiry into partnership return for 2005-06 on basis that deposits into bank accounts exceeded returned sales in partnership's accounts – subsequent discovery assessments for years back to 2001-02 and forward to 2011-12 based on presumption of continuity – VAT assessments of 02/02 to 08/13 based on 2005-06 income tax figures extrapolated by RPI – validity of discovery amendments & VAT assessments – examination of principle of presumption of continuity – validity of penalties – whether behaviour deliberate – appeals allowed for the most part.

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) MR MOHAMMED CHOUDHRY **Appellants**
as representative partner of
CONTINENTAL FOOD STORE
(2) MR MOHAMMED CHOUDHRY & MRS SHAHEEN CHOUDHRY as partners in CONTINENTAL FOOD STORE
(3) MR MOHAMMED CHOUDHRY
(4) MRS SHAHEEN CHOUDHRY

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
ANTHONY HENNESSEY FCA

Sitting in public at Alexandra House, Manchester on 8 and 9 October 2018

Nigel Gibbon of Nigel Gibbon & Co for the Appellants
John Nicholson, litigator, HMRC Solicitor's Office and Legal Services, for the Respondents

DECISION

1. The hearing was of appeals by:

(1) Mr Mohammed Choudhry as representative partner of Continental Food Stores, a business run in partnership with his wife Mrs Shaheen Choudhry, against (a) the amendment made to the partnership return for the tax year 2005-06, (b) discovery amendments made to those returns for the tax years 2001-02 to 2011-12 except for 2005-06 and (c) assessments of penalties for incorrect partnership returns or inaccuracies in the returns for all years 2001-02 to 2011-12 imposed on each of the partners. These assessments etc relate to income tax and Class 4 National Insurance Contributions ("NICs").

(2) Mr and Mrs Choudhry (together "the appellants") against (a) assessments to VAT for the prescribed accounting periods 02/02 to 08/13 and (b) penalties for dishonesty evading or attempting to evade VAT, inaccuracies in the VAT returns and other matters for the prescribed accounting periods covering those accounting periods.

(3) Mr Choudhry against assessments on him personally for 2005-06 (income tax and Class 4 NICs) and 2006-07 (capital gains tax ("CGT")).

(4) Mrs Choudhry against an assessment on her personally for 2006-07 (income tax).

2. The position regarding what appeals had been made, whether they were in time, whether they had been settled and whether they could be even be made was very unclear, and we have needed to investigate these questions in some detail, our findings being not always what the parties suggested they should be (see §99 to §153).

3. For the benefit of Mr and Mrs Choudhry we explain that we have cancelled all tax and penalties assessed on them or the partnership except for 2005-06 on the partnership where we have reduced the amount of profits and as a result reduced substantially the income tax they will have to pay and we have also upheld the assessment to CGT on Mr Choudhry for 2006-07 and the assessment on interest on Mrs Choudhry for the same year. But we consider that CGT has been overcharged by the assessment on Mr Choudhry.

Facts

The undisputed evidence: income tax & CGT enquiry

4. We set out first a chronology of the investigation carried out by Mr Alan Lenegan, an officer of HMRC, into the income tax (which for this purpose includes Class 4 NICs[1]) affairs of the appellants' business which they carried on in partnership and of

[1] By paragraph 4 Schedule 2 Social Security Contributions and Benefits Act 1992 partnerships are treated for the purposes of Class 4 NICs in the same way as they are treated for income tax. By paragraph 7 of that Schedule a final and conclusive determination of an assessment for the purposes of income tax is

their own affairs (including CGT). The matters we mention are primarily taken from the exhibits to Mr Lenegan's witness statement and are not in dispute and we find them as fact. We consider the evidence of and for the appellants and make findings on that later.

5. On 9 January 2008 Mr Lenegan informed Mr Choudhry that he was opening an enquiry into the partnership return for 2005-06. On the same day he also informed Mr and Mrs Choudhry separately that he was opening an enquiry into their personal tax returns for the same year. The letters, which were copied to their agent, Mr Silver of Lord & Co, set out a schedule of information required by him.

6. Over the next year or so information was provided piecemeal and in response at times to threats of and determinations of penalties under s 19A Taxes Management Act 1970 ("TMA"). The information and documents requested such as bank statements related primary to Mr Choudhry's property income and gains.

7. On 20 March 2009 a notice of "further" assessment was issued to Mr Choudhry for 2005-06. This was appealed on 30 April 2009.

8. In June 2009 Mr Lenegan summarised the information that was outstanding and made certain other requests for information and documents about bank accounts of each of the appellants (whether already revealed or not) and of the partnership and records of sales of the partnership. The main thrust of his requests was the source of deposits to all the banks accounts for the 2005-06 tax year. Notices under Schedule 36 were issued to the appellants and penalties assessed for failure to comply.

9. On 2 February 2010 (by which date some information had been provided) Mr Silver told Mr Lenegan that some of the amounts deposited had come from Pakistan and he was obtaining documentary evidence about them.

10. On 7 April 2010 for "procedural reasons" a notice under Schedule 36 was re-issued for sales details of the partnership.

11. Between April and September 2010 there was further correspondence, and at a meeting on 5 October Mr Silver informed Mr Lenegan that chargeable gains had been omitted from Mr Choudhry's 2006-07 personal return.

12. On 7 October 2010 Mr Lenegan informed Mr Silver that he had reviewed the VAT returns for the period under review and they showed a large discrepancy between recorded sales figures and the recorded sales in the partnership return. Mr Silver subsequently explained this discrepancy to Mr Lenegan's satisfaction as being caused by the inclusion of National Lottery figures in the sales figures in the return.

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also final and conclusive for Class 4 NICs and by paragraph 8 of that Schedule Part 5 TMA (appeals) applies to Class NICs as it applies to income tax, with irrelevant modifications. By s 16 of the 1992 Act provisions as to assessments and penalties in TMA apply to Cass 4 NICs with any necessary modifications. From this point in the decision it can be assumed that any reference to income tax (where it is charged on trading income) includes Class 4 NICs unless otherwise stated.

13. On 8 December 2010 Mr Lenegan warned Mr Choudhry and Mr Silver that in the absence of an explanation for the source of deposits into all the accounts he would have no option but to regard them as business related. Further Schedule 36 notices were issued.

14. On 31 March 2011 Mr Lenegan issued a notice of "further" assessment on Mr Choudhry for 2006-07 to "protect the position" of HMRC. This increased the income tax, CGT and Class 4 NICs due from £795.36 to £122,965.35. The assessment was said to be to "reflect" the omitted taxable gains and to protect HMRC's position on the expected deposits made to the various bank accounts during this period that Mr Choudhry would no doubt be unwilling or unable to explain, the relevant amount being based on the deposits made during the tax year 2005-06 that that had so far not been explained. The assessment was appealed against on 15 April 2011.

15. Also on 31 March 2011 Mr Lenegan issued a notice of "further" assessment on Mrs Choudhry for 2006-07 to "protect the position" of HMRC. This increased the tax due from £3,141.30 to £71,429.46. The assessment was said to be an estimate of undisclosed chargeable gains of £150,000. The assessment was appealed against on 15 April 2011.

16. On 8 June 2011 Rehman Michael & Co told Mr Lenegan that they were now acting for the appellants. On 14 June 2011 Ms Sadiya Hussain[2] from Rehman Michael told Mr Lenegan that she had reviewed the papers and met the appellants, who had informed her that they had borrowed from friends in the region of £150,000 to keep the business going. Mr Lenegan also spoke to a Mr Malik of Rehman Michael, who told him that Sadiya Hussain worked on a sub-contract basis for them, and that he was satisfied with the explanation from the appellants, it being not unusual among first generation immigrants from their culture. He had visited the shop and the living quarters and they seemed to be something from the 1950s with a very frugal lifestyle.

17. At a meeting on 12 July 2011 Sadiya Hussain told Mr Lenegan that the main lender to the appellant was a Mr Hussain, a long term friend and successful businessman in Rochdale from whom he had borrowed around £40,000 to £50,000 in the period under review and maybe £150,000 over the years. Mr Hussain had expressed surprise to her that Mr Silver, who had been his accountant, had not mentioned the loans to her. She was, she said, attempting to obtain documentary evidence of the loans.

18. Sadiya Hussain mentioned that the appellants had an account with Bookers for their purchases and that she would obtain duplicate statements as they had not been included in the business records seen by HMRC.

19. On 4 January 2012 Mr Lenegan informed Sadiya Hussain that Bookers had been approached by his colleague in Bristol and they had supplied details of all purchases by Continental Food Stores in the period 1 December 2004 to 30 March 2006. We mention

[2] After this we call Ms Husain "Sadiya Hussain" or "Sadiya" without meaning any disrespect so as to distinguish her more easily from Mohammed Hussain, who we also refer to by their first names for the same reason.

here that the basis period for the accounts of the partnership was 1 December to 30 November.

20. Mr Lenegan's analysis of the Bookers information he had obtained showed that "additional" purchases totalling £118,845 had been made in the period 1 December 2004 to 30 November 2005. The Bookers purchases for 1 December 2005 to 28 March 2006 when annualised also exceeded the accounts figure for the year to 30 November 2006.

21. On 1 June 2012 Mr Lenegan informed the appellants that a decision had been taken to extend the enquiries to include VAT and that HMRC had reason to believe that conduct involving dishonesty had occurred in relation to their VAT obligations.

22. On 2 October 2012 a meeting was held at which Sadiya Hussain and Mr (but not Mrs) Choudhry were present. An unsigned letter from Mohammed Hussain was handed over. The meeting was adjourned, and on 10 July 2013 Mr Lenegan spoke to Sadiya Hussain by phone. He was told that Mr Choudhry did not wish to attend a further meeting and that HMRC should calculate what he owed and they would take it from there. Mr Lenegan informed Sadiya that he had information that purchases had been seriously understated by an amount in the region of £120,000.

23. On the next day Sadiya told Mr Lenegan that the clients were "somewhat surprised" by the Bookers information, as with the exception of items for family use all the Booker invoices had been given to Mr Silver on a quarterly basis to enable him to complete the VAT returns. Sadiya asked how she could report Mr Silver to the relevant authorities.

24. On 8 November 2013 Mr Lenegan wrote to Sadiya Husain with proposals for settlement. This letter enclosed a number of schedules and a summary of deposits made to the business account and Mr Choudhry's personal accounts and details of the amounts which Mr Lenegan regarded as explained as being not business related. This did not include loans from Mr Husain.

25. The outcome of Mr Lenegan's analysis was that the unexplained balance was £391,176, and he could only assume that these amounts were business related. There was an excess of £118,845.94 in the Bookers purchases over the amounts in the accounts.

26. Mr Lenegan included a further schedule to show the impact of the figures on the accounts for the year to 30 November 2005. In his letter he said:

> "I acknowledge that the end results appear to be unrealistic but these figures are based on actual bank deposits and the verified additional purchases."

27. Mr Lenegan asked for agreement to the figures or for comments, which would need to be backed up by appropriate credible documentary evidence in support of any further explanations of deposits and of Bookers purchases not related to the business.

The letter also covered omitted chargeable gains for 2006-07, and also asked for agreement or comments.

28. The letter finished by proposing a period of 30 days for comments, failing which he would issue closure notices for 2005-06 and further assessments "pre and post this period", the relevant taxable profits for those periods being based upon the "revised" [his quotation marks] profits for 2005-06. Additional VAT assessments would be issued based on the revised profits. Interest and penalties would also be chargeable.

29. The 2005-06 revised profits were £98,490 compared with £16,946 in the return, and the additional VAT was net £27,175 (based on a figure of 67% for standard rated items). The gross profit ratio (profit:sales) for the original return revealed a percentage profit on sales of 21.83. For the revised profits the percentage was 33.30.

30. In a phone discussion on 10 January 2014 with Sadiya Hussain Mr Lenegan was told that the CGT position was agreed and that the £120,000 extra purchases were of alcohol for Mr Choudhry's own consumption as he was an alcoholic. Mr Lenegan did not accept that this was possible, while Sadiya Hussain stressed that this was what she was instructed to say.

31. On 4 February 2014 Mr Lenegan wrote to Mr Choudhry and Sadiya Hussain with:

(1) a summary of his calculation of revised profits for the partnership for 2002-03 to 2011-12 inclusive.

(2) a closure notice under s 28B TMA for his check into the partnership return for 2005-06.

(3) copies of the partnership statements showing the allocation of the revised profits to each of the partners,

(4) a notice of amended assessment for 2006-07 on Mr Choudhry personally removing an amount of £250,000 "self-employment income" but including a chargeable gain of £106,911.

(5) Mr Choudhry's self assessment statement of account.

32. He said that the items in (1) had been calculated by applying the increase in the RPI backwards and forwards to the 2005-06 figure and then adjusted to "incorporate the necessary VAT adjustments".

33. On 4 February 2014 Mr Lenegan also wrote to Mr Choudhry explaining that he was by that letter amending the partnership statements for 2002-03 to 2004-05 and 2006-07 to 2011-12 inclusive and attached statement showing the amendments. We can find no reference to the statutory authority for these amendments.

34. On 16 September 2014 Mr Lenegan spoke to Ms Azra Choudhry, the appellants' daughter. She had asked if all relevant assessments had been issued (the appellants having received VAT assessments and penalties and CGT assessments of around £48,000 and £90,000). Mr Lenegan told her that "further SA (*sic* - we assume "income tax" is what is meant) assessments would be issued in the next couple of days".

35. He also told her that the appeal period for the CGT assessments had expired some time ago and that the appellants could make late appeals. Azra told him that her parents had passed everything about tax to Sadiya Hussain and were now seeking new accountants.

36. On 23 September 2014 Mr Lenegan wrote to Mrs Choudhry and Sadiya Hussain with:

(1) a closure notice for his check into her personal return for 2005-06 increasing her share of the partnership profits,

(2) letters giving details of amendments to her returns for 2002-03 to 2004-05 and 2006-07 to 2011-12 inclusive increasing her share of the partnership profits. Appeal rights are not mentioned.

(3) a notice of amended assessment for 2006-07 on Mrs Choudhry personally removing an amount of "self-employment income" and chargeable gains but including bank interest not disclosed on the return.

(4) Mrs Choudhry's self assessment statement of account.

(5) a warning that penalties would be assessed shortly and enclosing factsheets.

37. On 24 September Mr Lenegan wrote to Mrs Choudhry copied to Sadiya Hussain with:

(1) an explanation schedule of the penalties he was proposing to charge for 2008-09 onwards because of the submission of incorrect returns, giving her until 14 October 2014 to given any relevant explanation that might change HMRC's view of the penalties.

(2) notices of determination of penalties under s 95 TMA for the years 2002-03 to 2007-08 dated 26 September.

38. On 25 September 2014 Nigel Gibbon & Co (the proprietor of which firm acted in the hearing on behalf of the appellants) wrote to Mr Lenegan to inform him that they had been asked to assist Mr and Mrs Choudhry in relation to the check of the returns and VAT assessments. Mr Gibbon asked if any assessments to income tax were extant.

39. On 7 October Mr Lenegan informed Mr Gibbon that assessments on Mr Choudhry, similar to the ones Mr Gibbon knew of in relation to Mrs Choudhry would be issued next day.

40. On 8 October 2014 a further amended further assessment on Mr Choudhry was issued referring to the amended further assessment sent on 3 (not 4) February 2014 (see §31(4)). We have the tax calculation which purports to charge a further £40,882 CGT on the taxable gain of £106,911 because the 3 (or 4) February calculation wrongly failed to tax the gain at the correct 40% rate of CGT. The notice purported to give appeal rights to the appellant.

41. Also on 8 October 2014 Mr Lenegan sent Mr Choudhry:

(1) letters giving details of amendments to his personal returns for 2002-03 to 2004-05 and 2006-07 to 2011-12 inclusive increasing his share of the profits from partnerships. No appeal rights are mentioned.

(2) an SA statement of account as at 7 October 2014.

42. It appears there was a covering letter because the bundle contains what is obviously only the last page of a letter from Mr Lenegan.

43. On 9 October 2014 Mr Lenegan wrote to Mr Choudhry, copied to Mr Gibbon, enclosing:

(1) an explanation schedule of the penalties he was proposing to charge because of the submission of incorrect partnership returns and giving him until 29 October 2014 to provide any further relevant information that might affect HMRC's view of the penalty.

(2) notices of determination of those penalties under s 95 TMA for the years 2002-03 to 2007-08.

44. At a meeting on 14 October 2014 Mr Gibbon is reported in a note made by Mr Lenegan to have said that "the late appeal" had been submitted (but Mr Lenegan's notes do not indicate which assessment the appeal was against). He also said that HMRC should proceed with the penalty assessments and that he was likely to recommend to his clients that they withdraw their appeals.

45. But on 28 October 2014 Nigel Gibbon & Co appealed against:

(1) the closure notices on each appellant personally for 2005-06.

(2) the "amended" assessments for 2002-03 to 2011-12 on each appellant.

(3) penalties charged on each appellant for 2002-03 to 2007-08.

46. On 30 October 2014 Nigel Gibbon & Co appealed against penalties assessed on Mrs Choudhry for 2008-09 to 2011-12.

47. On 24 November 2014 Mr Lenegan told Mr Gibbon that no appeals could be made against the amendments to the appellants' self assessments as these were consequential on the amendments made to the partnership returns which had been issued on 4 February 2014 "copied to Mr Choudhry (*sic*) and Mrs Hussain" and so any appeals were late. It is clear from the letter that at that stage Schedule 24 penalties for the periods for 2008-09 to 2011-12 had not been issued.

The undisputed evidence: VAT enquiry

48. We now set out a chronology of the enquiry into the VAT affairs of the partnership Continental Food Stores carried out by Ms Jayne Charnock and then Mrs Jacqui McMillan, officers of HMRC. The matters we mention are primarily taken from the exhibits to Ms Charnock's and Mrs McMillan's witness statements and are not in dispute and we find them as fact.

49. In May 2012 Ms Charnock was asked to work a case in conjunction with Mr Lenegan.

50. On 1 June 2012 the appellants were invited to a "formal PN160 interview". This took place on 2 October 2012, but was adjourned part way through because of the illness of Mr Choudhry (Mrs Choudhry being unable to attend).

51. In the absence of progress in obtaining the business records from Mr Silver, on 20 November 2012 Ms Charnock issued a notice under paragraph 2 Schedule 36 to Mr Silver for the records.

52. On 7 February 2013 Ms Charnock and Mr Lenegan visited Mr Silver's offices, and were presented with records covering VAT period 02/11 to 11/12. He said he did not have the records before December 2010, and answered further questions about his preparation of the VAT returns and the records from which he did so, including the purchase records.

53. On returning from the offices Ms Charnock and Mr Lenegan observed the shop. Ms Charnock noted that the stock seemed limited.

54. Later on 7 February Ms Charnock wrote to Mr Silver requesting the VAT summaries (later in the letter called "VAT accounts") for VAT periods from 11/10 to 02/04 (*sic*), pointing out that the enquiry covers the period 01 December 1992 to date, but that he may not have all the VAT summaries for the "said dates".

55. The notes of the meeting record that the appellant gave Mr Silver hand written sheets as his evidence of daily gross takings but no till rolls, and that purchases included everything that Mr Choudhry had given him.

56. Mr Silver was asked for an explanation of the fact that sales increased significantly between 11/06 and 02/10 and then decreased again., but he said he did not compare years with other years. It was also recorded that the VAT return for 08/10 was outstanding.

57. Mr Silver was told that HMRC would be approaching Bookers to assist them with the enquiry.

58. At the end of March 2013 Ms Charnock was reassigned within HMRC. Mrs McMillan who had been present at the meeting on 2 October 2012 took over her duties.

59. On 17 January 2014 (or 8 February – both dates are given in the same paragraph of her witness statement) she issued a VAT assessment (or VAT assessments – both terms are used in the same paragraph of her witness statement) to the appellants, for the periods 02/02 to 08/13 inclusive. They were calculated using the sales and purchase figures supplied by Mr Lenegan for the "Accounts Year End 11/02/2006 (*sic*)" and extrapolated using the RPI. She then used a standard rated percentage of 67% in all periods.

60. The assessments showed a single period before 02/08 with a nominal period of 00/00, but Mrs McMillan said that a schedule showing the breakdown for each VAT period was included with the assessment.

61. A Notice of assessment of a default surcharge was also issued on 7 February 2014 for the period 11/10 increasing the surcharge by £144.40.

62. Ms McMillan calculated what she thought to be an appropriate penalty under s 60 Value Added Tax Act 1994 ("VATA") for the appellants' dishonest evasion of VAT for periods to 02/09. This was at a rate of 65% of the culpable tax.

63. On 11 August 2014 she sent a penalty calculation letter and schedules showing how she calculated proposed penalties under Schedule 24 FA 2007 for the periods 05/09 to 08/13.

64. On 16 September 2014 Mr Lenegan notes that in a conversation with Ms Azra Choudhry she had told him that appeals had been made "some time ago" against the VAT assessments and penalties, but he told her they had not been received by HMRC.

65. Following comments by Mr Gibbon, Mrs McMillan reviewed her calculations and discovered that the original assessments and penalties had been based on potential lost revenue ("PLR") figures that included VAT already paid by the appellants. Accordingly she said that on 1 July 2016 she amended the assessments and penalties and sent the appellants updated schedules, though her letter is dated 4 July 2016.

Evidence from the appellants

(a) Mr Mohammed Choudhry

66. Mr Mohammed Choudhry made two witness statements in 2016, in March and April. He also made a third in 2017 which is not relevant to the appeals as it relates to a CGT issue where no appeal was made.

67. He explained in his first statement that the shop takings were all paid into a Lloyds TSB account, but the amounts were often transferred by cheque to an RBS account for cash flow reasons.

68. He acknowledged that Mr Lenegan's researches into the accounts had thrown up unexplained deposits of about £205,000. His explanation was that they were money given to him by his wife whenever he asked for money and that she had received a large inheritance from her father in Pakistan and other members of her family had brought over cash to the UK in 2004/5 and he referred to his wife's witness statement.

69. He also referred to the Bookers purchases of £118,845 not recorded in the business records. He said that he had no knowledge of accountancy and had trusted Mr Silver to keep everything in order and he never kept anything from him. In this context he described his sponsorship of the Hamer Boxing Club in Rochdale.

70. He said he had been a great supporter of the club on Rugby Road, Rochdale and had sponsored it from 2000 to 2008 during the time when his son was a boxer. He

made weekly contributions of drinks and snacks and 3 times a year sponsored shows and also monthly in-house events with alcohol and other drinks and savoury food. The money for the purchases came from his wife and from Mr Hussain, and he gave the receipts for these purchases to Mr Silver.

71. In his second statement he referred again to Mr Hussain, giving more detail. He said that during 2005 he borrowed large amounts of money from Mohammed Hussain, a friend as he told Mr Lenegan at the start of the investigation. He had borrowed money in various amounts usually between £2,000 and £3,000. Most of money was banked by him in various accounts.

72. In examination in chief Mr Choudhry agreed that he had not told HMRC about the boxing club. He had told Mr Silver who said he would deal with it.

73. Asked what explanation he had for the Bookers purchases, Mr Choudhry referred to a Mr Nazir from whom he had bought the business in 1999. Mr Nazir had bought stock for Mr Choudhry as he had a van and was buying for his own new business. Mr Choudhry let Mr Nazir use his Bookers account to make these purchases. This agreement ended in 2007 when Mr Choudhry got a car.

74. As to the loans from Mr Hussain he explained that business had dropped because Asda and Lidl had opened nearby. Mr Hussain was a family friend and the arrangement was that he would pay him back when able to.

75. In response to Mr Nicholson in cross-examination Mr Choudhry agreed he had not mentioned the loans from Hussain for over two years of the investigation but said that no one had asked him, and the same applied to the money from his wife. He had relied on his accountants.

76. Asked about the statement by Sadiya Hussain that the unrecorded Booker purchases were of alcohol for his own consumption and that he was an alcoholic he said that she had made it up. He accepted that the boxing sponsorship payments of £118,000 had been over a long period.

77. He denied that the Nazir story was new, and asked why HMRC had not been supplied with proof of loans for over 10 years of investigation he again blamed Mr Silver.

(b) Mrs Shaheen Choudhry

78. Mrs Choudhry's witness statement explained that her father Muhammad Iqbal Hussain had died in Pakistan in November 2002. She had inherited a half share in two properties in Faisalabad, a bus transport business and 2 crore (20 million) rupees. She also inherited jewellery worth 1 crore rupees (about £90,000). The value of her share of the properties and business was about £300,000, but she added that this was her father's valuation, and in fact they were worth substantially more.

79. She had kept the jewellery but gave her brother, the other beneficiary, a power of attorney to manage the properties and business. He and other family members brought

cash to her from 2004 onwards, a minimum of £20,000 each time, and she regularly gave sums to her husband to help with the business which was a way of life for them.

80. She estimated that between the start of 2005 and late spring of 2006 she gave her husband £250,000. She had also sold some of the jewellery in Manchester for £10,000 in 2005 and had given HMRC the receipt for this.

81. She exhibited her father's will and a translation of it and her father's death certificate.

82. In chief she agreed that she had first told anyone about this money when she told Mr Gibbon in 2014 and that before that no one had asked her. She had never seen Mr Silver.

83. In cross-examination she explained that the money from Pakistan was brought to her by business friends in cash.

(c) Sadiya Hussain and Mohammed Hussain

84. Sadiya Hussain produced a witness statement (made in 2016) in which she said she was a personal friend of the appellants and helped them in their dealings with HMRC in 2013. Her statement concerned the money which her uncle, Mohammed Hussain, had lent to the appellants and which HMRC had treated as takings.

85. Mohammed Hussain had died in 2015 but before he died he had produced a witness statement prepared with the help of Sadiya. She added that she had discussed the matter with him from 2012 until his death and he had confirmed the amounts he referred to was correct.

86. The draft witness statement of Mohammed Hussain states that during 2005 he lent Mr Choudhry money in order to help him in his business which was going through a difficult period. He himself was doing well in his business, running market stalls in Preston and Manchester and selling clothing to wholesalers in Manchester. He had also sold a property for £140,000.

87. What he had given Mr Choudhry were loans which he expected him to repay when he sold property. He had not repaid him at the time of the statement because of the property crash.

88. He used a year planner, a copy of which he exhibited, to note down the amounts he paid to Mr Choudhry, the total during the year being £75,200.

(d) Our findings on the evidence for the appellants

89. So far as necessary we make findings of fact about the evidence from the appellants and Sadiya Hussain in the discussion section.

Law

90. In this section we set out the fundamental provisions relating to the charging of tax and penalties that have been, or should have been, used in this case. Material about

the making of assessments and determinations, appeals and time limits is in other parts of the text at the appropriate place.

91. It can be taken as a given, as there was no contrary suggestion, that for each of the tax years in issue Mr Choudhry made partnership returns under s 12AA TMA as the representative partner and that he and Mrs Choudhry made personal income tax returns for those years. It can also be taken as a given that the partnership made VAT returns for the quarterly periods 02/02 (the three months ending 28 February 2002) to 08/13 (the three months ending 31 August 2013), except for 11/10.

92. Enquiries into a partnership return (which is relevant in this case for 2005-06 only) are governed by s 12AC TMA:

> "*12AC Notice of enquiry*
>
> (1) An officer of the Board may enquire into a partnership return if he gives notice of his intention to do so ("notice of enquiry")—
>
> (a) to the partner who made and delivered the return, or his successor,
>
> (b) within the time allowed.
>
> (2) The time allowed is—
>
> (a) if the return was delivered on or before the filing date, up to the end of the period of twelve months after the day on which the return was delivered;
>
> (b) if the return was delivered after the filing date, up to and including the quarter day next following the first anniversary of the day on which the return was delivered;
>
> (c) if the return is amended under section 12ABA of this Act, up to and including the quarter day next following the first anniversary of the day on which the amendment was made.
>
> For this purpose the quarter days are 31st January, 30th April, 31st July and 31st October.
>
> (3) A return which has been the subject of one notice of enquiry may not be the subject of another, except one given in consequence of an amendment (or another amendment) of the return under section 12ABA of this Act.
>
> (4) An enquiry extends to anything contained in the return, or required to be contained in the return, including any claim or election included in the return, subject to the following limitation.
>
> …
>
> (6) The giving of notice of enquiry under subsection (1) above at any time shall be deemed to include the giving of notice of enquiry—
>
> (a) under section 9A(1) of this Act to each partner who at that time has made a return under section 8 or 8A of this Act or at any subsequent time makes such a return, …

…

(7) In this section "the filing date" means the day specified in the notice under section 12AA(2) of this Act or, as the case may be, subsection (3) of that section."

93. The conclusion of such an enquiry is governed by s 28B TMA:

"*Completion of enquiry into partnership return*

(1) An enquiry under section 12AC(1) of this Act is completed when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions.

In this section "the taxpayer" means the person to whom notice of enquiry was given or his successor.

(2) A closure notice must either—

(a) state that in the officer's opinion no amendment of the return is required, or

(b) make the amendments of the return required to give effect to his conclusions.

(3) A closure notice takes effect when it is issued.

(4) Where a partnership return is amended under subsection (2) above, the officer shall by notice to each of the partners amend--

(a) the partner's return under section 8 or 8A of this Act, or

(b) the partner's company tax return,

so as to give effect to the amendments of the partnership return.

…"

94. Discovery amendments of partnership returns (relevant for 2002-03 to 2011-12, except 2005-06) are governed by s 30B TMA:

"*Amendment of partnership statement where loss of tax discovered*

(1) Where an officer of the Board or the Board discover, as regards a partnership statement made by any person (the representative partner) in respect of any period—

(a) that any profits which ought to have been included in the statement have not been so included, or

(b) that an amount of profits so included is or has become insufficient, or

(c) that any relief or allowance claimed by the representative partner is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (3) and (4) below, by notice to that partner so amend the partnership return as to make good the omission or deficiency or eliminate the excess.

(2) Where a partnership return is amended under subsection (1) above, the officer shall by notice to each of the relevant partners amend—

(a) the partner's return under section 8 … of this Act,

…

so as to give effect to the amendments of the partnership return.

(3) Where the situation mentioned in subsection (1) above is attributable to an error or mistake as to the basis on which the partnership statement ought to have been made, no amendment shall be made under that subsection if that statement was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

(4) No amendment shall be made under subsection (1) above unless one of the two conditions mentioned below is fulfilled.

(5) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by—

(a) the representative partner or a person acting on his behalf, or

(b) a relevant partner or a person acting on behalf of such a partner.

(6) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the representative partner's partnership return; or

(b) informed that partner 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.

(7) Subsections (6) and (7) of section 29 of this Act apply for the purposes of subsection (6) above as they apply for the purposes of subsection (5) of that section; and those subsections as so applied shall have effect as if—

(a) any reference to the taxpayer were a reference to the representative partner;

(b) any reference to the taxpayer's return under section 8 or 8A were a reference to the representative partner's partnership return; and

(c) sub-paragraph (ii) of paragraph (a) of subsection (7) were omitted.

(8) An objection to the making of an amendment under subsection (1) above on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the amendment.

(9) In this section--

"profits"—

(a) in relation to income tax, means income,

(b) in relation to capital gains tax, means chargeable gains, and

(c) in relation to corporation tax, means profits as computed for the purposes of that tax;

"relevant partner" means a person who was a partner at any time during the period in respect of which the partnership statement was made.

(10) Any reference in this section to the representative partner includes, unless the context otherwise requires, a reference to any successor of his."

95. Assessments to VAT in this case are provided for by s 73 VATA 94:

"*Failure to make returns etc*

(1) Where … it appears to the Commissioners that [any VAT] returns are incomplete or incorrect, they may assess the amount of VAT due from [the person required to make them] to the best of their judgment and notify it to him.

…"

96. Penalties for incorrect partnership returns for periods up to and including 2007-08 are in s 95A TMA:

"*95A Incorrect partnership return or accounts*

(1) This section applies where, in the case of a trade, profession or business carried on by two or more persons in partnership—

(a) a partner (the representative partner)—

(i) delivers an incorrect partnership return, or

(ii) makes any incorrect statement or declaration in connection with a partnership return, or

(iii) submits to an officer of the Board any incorrect accounts in connection with such a return, and

(b) either he does so fraudulently or negligently, or his doing so is attributable to fraudulent or negligent conduct on the part of a relevant partner.

(2) Each relevant partner shall be liable to a penalty not exceeding the difference between—

(a) the amount of income tax or corporation tax payable by him for the relevant period (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 made or submitted by the representative partner had been correct;

and in determining each such penalty, regard shall be had only to the fraud or negligence, or the fraudulent or negligent conduct, mentioned in subsection (1)(b) above.

(3) Where, in respect of the same return, statement, declaration or accounts, penalties under subsection (2) above are determined under section 100 of this Act as regards two or more relevant partners—

(a) no appeal against the determination of any of those penalties shall be brought otherwise than by the representative partner or a successor of his;

(b) any appeal by that partner or successor shall be a composite appeal against the determination of each of those penalties; and

(c) section 100B(3) of this Act shall apply as if that partner or successor were the person liable to each of those penalties.

(4) In this section—

"relevant partner" means a person who was a partner at any time during the relevant period;

"relevant period" means the period in respect of which the return was made."

97. Penalties for evasion of VAT for periods up to 02/08 are in s 60 VATA 1994:

"*VAT evasion: conduct involving dishonesty*

(1) In any case where—

(a) for the purpose of evading VAT, a person does any act or omits to take any action, and

(b) his conduct involves dishonesty (whether or not it is such as to give rise to criminal liability),

he shall be liable … to a penalty equal to the amount of VAT evaded or, as the case may be, sought to be evaded, by his conduct.

…

(7) On an appeal against an assessment to a penalty under this section, the burden of proof as to the matters specified in subsection (1)(a) and (b) above shall lie upon the Commissioners."

98. Penalties for inaccuracies in documents for tax years 2008-09 onwards and VAT periods 05/08 onwards are in Schedule 24 FA 2007 and the relevant parts imposing the penalty here are:

"**1**(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

(b) 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,

…

(3) Condition 2 is that the inaccuracy was … deliberate on P's part.

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

Table

Income tax or capital gains tax	Accounts in connection with ascertaining liability to tax.
Income tax or capital gains tax	Partnership return.
Income tax or capital gains tax	Statement or declaration in connection with a partnership return.
…	…
VAT	VAT return under regulations made under paragraph 2 of Schedule 11 to VATA 1994.

3(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is—

…

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

…

4(1) This paragraph sets out the penalty payable under paragraph 1.

(2) … the penalty is—

…

(b) for deliberate but not concealed action, 70% of the potential lost revenue,

…

5(1) "The potential lost revenue" in respect of an inaccuracy in a document … is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

(3) In sub-paragraph (1) "tax" includes national insurance contributions.

6

…

(2) In calculating potential lost revenue where P is liable to a penalty under paragraph 1 in respect of one or more understatements in one or more documents relating to a tax period, account shall be taken of any overstatement in any document given by P which relates to the same tax period.

> **20**(1) This paragraph applies where P is liable to a penalty under paragraph 1 for an inaccuracy in or in connection with a partnership return.
>
> (2) Where the inaccuracy affects the amount of tax due or payable by a partner of P, the partner is also liable to a penalty ("a partner's penalty").
>
> (3) Paragraphs 4 to 13 and 19 shall apply in relation to a partner's penalty (for which purpose a reference to P shall be taken as a reference to the partner).
>
> (4) Potential lost revenue shall be calculated separately for the purpose of P's penalty and any partner's penalty, by reference to the proportions of any tax liability that would be borne by each partner."

The notices and the appeals

99. The section above covering the undisputed facts relates, among other things, what Mr Lenegan and Mrs McMillan said to the appellants and their agents about the actions they were taking under various provisions of the Tax Acts and VATA. In this section we check whether what has been said is correct by reference to the documents in the bundle. We do this because of Mr Nicholson's informing us at the start of the hearing that HMRC had got their penalty determinations wrong and because Mr Gibbon has queried what he was told by HMRC about this aspect of the enquiry.

2005-06 income tax on partnership income

100. An enquiry was opened under s 12AC into the partnership statement. That enquiry automatically triggered an enquiry into the partners' personal tax returns but only so far as the entries in them relate to income from the partnership (see eg *Mark Reid & Simon Emblin v HMRC* [2018] UKFTT 326 (TC) (Judge Nicholas Aleksander).

101. Mr Lenegan's letter of 4 February 2014 enclosed a closure notice in relation to the enquiry under s 28B TMA, with detailed workings including the partnership allocations. The closure notice showed a revised profit of £106,554, but according to the calculation sheet that was the profit for 2011-12, that for 2005-06 being £98,490.

102. In a letter dated 22 September 2014 (Mr Lenegan's witness statement says 23 September) Mr Lenegan wrote to Mrs Choudhry purporting to close his enquiry into Mrs Choudhry's "self assessment" tax return for 2005-06 under s 28A TMA and to amend her return self assessment. No such enquiry had been opened. The amended self assessment shows that the additional amount of tax arises from income from the partnership. Where a partnership enquiry is closed the returns of the partners are to be amended by the officer under s 28B(4) TMA, so it appears that the amendment may be correctly made but not under the provision said to justify it.

103. The letter also explained to Mrs Choudhry that if she disagreed with the decision she could appeal against it.

104. On 8 October 2014 Mr Lenegan wrote to Mr Choudhry purporting to close his enquiry into Mr Choudhry's "self assessment" tax return for 2005-06 under s 28A TMA. No such enquiry had been opened. The amended self assessment shows that the

additional amount of tax arises from income from the partnership. Where a partnership enquiry is closed the returns of the partners are to be amended by the officer under s 28B(4) TMA, so it appears that the amendment may be correctly made but not under the provision said to justify it.

105. Although there is a clear error here in that Mr Lenegan purported to do that which happens automatically, there is no prejudice to the appellants and Mr Gibbon did not take any point on it, so we ignore the error and assume that the amendments to the personal returns were properly made.

106. When Mr Gibbon appealed against the amendments to the income tax returns for 2005-06 Mr Lenegan told him that there was no such right, this despite the fact that he had told Mr and Mrs Choudhry that there was. He said that instead the only right of appeal was against the s 28B notice issued in February 2014 and so any appeal against that would be late, and Mr Gibbon would need to make a late appeal explaining the appellants' reasonable excuse, but that, as he had appealed against the VAT assessments, it might be more sensible for him to appeal to the Tribunal on this point.

107. The appeal was made to the Tribunal on 4 December 2014 and sought the permission of the Tribunal to make a late appeal to HMRC. At the hearing no point was taken about lateness of the appeal and so we say only this. It ill became Mr Lenegan to object to the lateness of the appeal when he had taken such an inordinate length of time to do what should happen automatically and when he did so he quite incorrectly told the Choudhrys that they could appeal against the amendment to their returns.

All other years: income tax on partnership income

108. On 4 February 2014 Mr Lenegan issued to Mr Choudhry amendments to the partnership returns for each of the years 2002-03 to 2011-12 inclusive, except for 2005-06 ("the other years").

109. On 8 October 2014 Mr Lenegan issued to Mr Choudhry "amendments to your personal Self Assessment tax return" for each of the other years. These, although they did not say so, were made under s 30B(2) TMA.

110. On 8 October 2014 Mr Lenegan also issued to Mrs Choudhry "amendments to your personal Self Assessment tax return" for each of the other years. These, although they did not say so, were made under s 30B(2) TMA.

111. The position with appeals was as it was in relation to 2005-06 save that the consequential amendments to the partners' returns did not show any appeal rights. The appeals are before the Tribunal.

Personal tax returns

112. On 20 March 2009 Mr Lenegan issued a notice of assessment for 2005-06 on Mr Choudhry in an amount of £40,000 "profit from self-employment". On 30 March 2009 Lord & Company appealed against the assessment. We cannot trace what has happened to this appeal or the assessment. We think the safest course for us and Mr Choudhry is

to say that we are prepared to take the notification of appeals to the Tribunal as including this appeal. We deal with this further in the discussion section.

113. On 30 March 2011 a further assessment was issued to Mr Choudhry for 2006-07. On 15 April 2011 Lord & Co appealed against this assessment. We deal with this further in the discussion section.

114. On 31 March 2011 a further assessment was issued to Mrs Choudhry for 2006-07. On 15 April 2011 Lord & Co appealed against this assessment. We deal with this further in the discussion section.

Income tax penalties: years to 2007-08

115. On 23 September 2014 Mr Lenegan wrote to Mrs Choudhry referring to her liability to penalties for the submission of incorrect returns, which would be issued very shortly. The letter referred to a factsheet about the "old penalty rules" but we have neither a copy of the factsheet in the bundles nor an indication of what is meant by the "old" rules. The penalty assessment would, Mr Lenegan said, follow "very shortly".

116. On 24 September, true to his word, Mr Lenegan issued a notice of determination of penalties charged under s 95(1)(a) TMA on Mrs Choudhry for fraudulently or negligently delivering to an officer an incorrect return under s 8 TMA for each of the years 2002-03 to 2007-08, totalling £58,282. No indication was given about how they were charged or of what the appeal rights were.

117. As for Mr Choudhry he did not get the benefit of a letter warning him of the penalties. On 9 October 2014 Mr Lenegan issued a notice of penalty determination to him of penalties charged under s 95(1)(a) TMA for fraudulently or negligently delivering to an officer an incorrect return under s 8 TMA for each of the years 2002-03 to 2007-08, totalling £42,106. No indication was given about how they were charged or of what the appeal rights were.

118. These notices on both appellants were appealed against.

119. At the outset of the hearing Mr Nicholson explained to the Tribunal that when he was preparing his skeleton argument for the Tribunal he came to realise that s 95 TMA did not apply to partnership statements, but that s 95A TMA did. The Tribunal expressed its agreement, having also spotted this point in its pre-reading.

120. Mr Nicholson said that as a result HMRC could not support the penalties charged under s 95 TMA. We note that in fact the determinations for 2006-07 are not entirely bad as they seem to refer in part to the omitted chargeable gains by Mr Choudhry and omitted interest by Mrs Choudhry. We deal further with this issue in the discussion section of this decision.

121. We note that the time limit for raising a s 95A penalty is three years from the date of our determination of the tax by reference to which the penalty is payable (s 103 TMA).

Income tax penalties: years from 2008-09

122. On 23 September 2014 Mr Lenegan wrote to Mrs Choudhry referring to her liability to penalties for the submission of incorrect returns. The letter referred to enclosed factsheets about the Human Rights Act and penalties for inaccuracies. The penalty assessments would, Mr Lenegan said, follow "very shortly".

123. On 24 September 2014 Mr Lenegan issued a "Penalty Explanation" letter. It said that there was no right of appeal against it, but if a penalty assessment was sent the recipient would be able to appeal. The letter asked for any relevant information the appellant might have by 14 October 2014.

124. The penalty explanation schedule showed as the inaccuracy for each tax year that the taxable profits "relevant to" the partnership had been understated. It showed the amount of PLR for each tax year as one amount despite the schedule referring to a "grouped" inaccuracy penalty charged under Schedule 24.

125. The behaviour of Mrs Choudhry was said to be deliberate as she had not explained the source of the deposits into the bank accounts or the additional Booker purchases and had failed to provide credible explanations for them. This failure to given credible explanations showed that she had deliberately tried to reduce the tax payable. A reduction of 35% was offered for disclosure which when applied to the relevant band made the penalty 57.75% of the PLR.

126. Although there is no trace in the bundles of a notice of assessment of these penalties it appears that notice of the penalties may in fact have been issued as Mrs Choudhry got a demand to pay them and Mr Gibbon appealed against them on her behalf (or to be precise[3] on Mr Choudhry's, the representative partner's, behalf). But there is no trace in the bundles of any copies of the notices.

127. As to Mr Choudhry, on 9 October 2014 Mr Lenegan issued a "Penalty Explanation" letter to him. It said that there was no right of appeal against it, but if a penalty assessment was sent the recipient would be able to appeal. The letter asked for any relevant information the appellant might have to be given to him by 29 October 2014.

128. The penalty explanation schedule showed as the inaccuracy for each tax year that the taxable profits "relevant to" the partnership had been understated. It also showed the amount of PLR for each tax year as one amount despite the schedule referring to a "grouped" inaccuracy penalty charged under Schedule 24.

129. The behaviour of Mr Choudhry was said to be deliberate as he had not explained the source of the deposits into the bank accounts or the additional Booker purchases and had failed to provide credible explanations for them. This failure to give credible explanations showed, the notice said, that he had deliberately tried to reduce the tax

[3] See paragraph 20(6) Schedule 24 FA 2007

payable. A reduction of 35% was offered for disclosure which when applied to the relevant band made the penalty 57.75% of the PLR.

130. On 24 November 2014 Mr Lenegan wrote to Mr Gibbon referring to the penalties for 2008-09 to 2011-12 "that are to be charged". There is no later mention of these penalties in the bundle, nor does Mr Lenegan's witness statement refer to them.

131. This puts us in some difficulty. If they haven't been made that is the end of the matter. But if they have, have they been appealed? Mr Gibbon's appeals do not include these years and while he made a subsequent appeal against the penalties on Mrs Choudhry, we can see no similar appeal against those on Mr Choudhry. Yet the statement of case and Mr Nicholson's skeleton assumes they were issued and are under appeal. We will therefore take HMRC's word for it that they are under appeal and will make a decision about them, but this will, of course, have no effect if they were not issued.

132. As to time limits, by paragraph 13(3) Schedule 24 FA 2007 an assessment of a penalty under paragraph 1 of that Schedule (which this is) must be made before the end of the 12 months beginning with the date on which the appeal against the decision correcting the inaccuracy is determined. That will be the date of this decision, so HMRC would be in time to assess Mr Choudhry if they have not in fact already done so, at any time within 12 months of the release of this decision should they wish to do so.

VAT assessments

133. Notices of the VAT assessments were issued on 7 February 2014, although they carry a date of calculation of 17 January 2014. They cover the quarters 02/02 to 08/13 and charge VAT in total of £354,237. The schedules forming part of the assessment show detailed quarterly figures for 02/08 to 08/13, but for periods to 11/07 there is a single amount and the period is shown as 00/00.

134. On 14 October 2015 Mr Gibbon pointed out to Mr Nicholson the very large error in the VAT (and consequential penalty) amounts in the assessments, the failure to take into account the VAT on the returns which had been paid.

135. On 23 December 2015 Mr Lenegan said he agreed with Mr Gibbon's point, and that his VAT colleague would write shortly.

136. On 4 July 2016 Mrs McMillan sent the appellants a schedule of her revised workings and said that an amended notice of assessment would be issued.

137. On 5 July 2016 Mrs McMillan issued what she called amended VAT assessments in the amount of £70,896 (though we do not have copies of those assessments in the bundle).

138. In his skeleton Mr Nicholson submits that those revised figures substantially understate the VAT due and that the true figure is £152,387.38 rather than the £70,896 in Mrs McMillan's schedules.

139. We consider the significance of these errors in the discussion section.

140. As to appeals we note that there is nothing in the bundle to indicate that when HMRC sent their notice of assessments they offered the appellant a review as is required under s 83A(1) VATA. Given that, the date for making an appeal to the Tribunal was 30 days from 7 February ie 9 March (though the appeal says it is 4 March 2014). The appeal was made on 25 September 2014 and contained an explanation for the lateness. As the appeals are before the Tribunal permission must have been given under s 83G(6) to make them late.

VAT penalties

141. On 3 July 2014 (at 13.02) Mrs McMillan issued a notice of penalty assessment under s 60 VATA. The notice said that her action in dishonestly evading VAT for the periods 02/02 to 08/13 had led to an under-assessment of VAT of £354,237 which was stated to be the amount of the penalty as under s 60 VATA the penalty was the amount of the tax evaded. But HMRC had reduced the penalty to £129,062.70 because of her co-operation and disclosure (which represented mitigation of some 63%).

142. On 3 July 2014 at 14.27 Mrs McMillan issued a notice of penalty assessment under s 60 VATA. The notice said that her action in dishonestly evading VAT for the periods 02/02 to 08/13 had led to an under-assessment of VAT of £198,558, which was stated to be the amount of the penalty as under s 60 VATA the penalty was the amount of the tax evaded. But HMRC had reduced the penalty to £129,062.70 because of her co-operation and disclosure (which represented mitigation of 35%).

143. On 10 July 2014 a Mrs R Allen issued a Penalty Explanation letter about penalties HMRC intended to charge under Schedule 24 FA 2007 for 05/10 to 08/13 and requesting that any relevant information from the appellants should be supplied by 9 August 2014. The inaccuracy was stated to be that they had underdeclared both sales and purchases for VAT resulting in loss of tax. The behaviour was considered deliberate because the appellants deliberately chose not to include them on their VAT return, and they had not supplied any evidence that "these sales and purchases" (which rather begs the question at least in relation to some of the balance of unexplained deposits) should not have been declared for VAT and have knowingly submitted incorrect VAT returns.

144. On 6 August 2014 a notice of penalty assessment under Schedule 24 was issued totalling £89,904.56.

145. On 29 July 2015 Mrs McMillan wrote to the appellants saying she had been directed to reissue some of the paperwork regarding penalties, and that it was not an alteration of the overall position.

146. The primary change was that the s 60 VATA assessment was to be amended to show only an amount for the periods up to 02/09, but the penalty was unchanged at £129,062 being 65% of £198,558. The bundles contain a notice of assessment dated 24 July 2015 with these details and figures.

147. The letter of 29 July 2015 also says that there is enclosed a notice of assessment of a civil evasion penalty for period 11/10. We consider this penalty in the discussion section.

148. We have referred above to the letter from Nigel Gibbon of 14 October 2015 pointing out the error in the assessments and the consequential effect on penalties. On 4 July 2016 Mrs McMillan told the appellants that amended notices of penalties would be received from "our central team", and on 5 July she apparently sent details of the revised calculations.

149. On 29 June 2016 Mrs McMillan sent a letter to the appellants to the effect that HMRC were "now" going to charge a civil evasion penalty under s 60 VATA 1994 for the periods 02/02 to 02/09. The tax evaded was £53,245 and after a reduction of 35% the penalty was £34,609, payable by 31 August 2016. The appellants' appeal rights were set out and an offer of a review made. This then appears to be a notice of a new assessment. Nothing was said about the already existing assessment under s 60 VATA covering these periods, but given the appeal rights shown in this assessment the previous one must have been withdrawn.

150. As to appeals we note that when HMRC sent their notice of assessment under s 60 VATA on 3 July 2014 they offered the appellant a review as is required under s 83A(1) VATA. There is no trace of this offer being accepted so the date for making an appeal to the Tribunal was 30 days from 3 July 2014 that is 2 August (though the appeal says it is 6 August 2014). The appeal was made on 25 September 2014 and contained an explanation for the lateness. As the appeals are before the Tribunal permission must have been given under s 83G(6) to make them late.

151. There is however no trace of any offer of a review sent with the notice of assessment under Schedule 24 FA 2007 dated 6 August 2014. The date for appealing to the Tribunal is thus 30 days from that day, 6 September 2014. The appeal was made on 25 September 2014 and contained an explanation for the lateness. As the appeals are before the Tribunal permission must have been given under s 83G(6) to make them late.

152. As to the s 60 VATA penalty for 11/10 we note that when HMRC sent their notice of assessment under s 60 VATA for this period on 29 July 2015 they offered the appellant a review as is required under s 83A(1) VATA. The date for appealing to the Tribunal is thus 30 days from that day, 28 August 2015. No appeal appears to have been made, possibly because HMRC did not send a copy to Nigel Gibbon & Co, even though they must have known that that firm was acting. Given that the appellants through Nigel Gibbon & Co had appealed against the Schedule 24 FA 2007 penalty for 11/10 we treat the appeal against that as an anticipatory appeal against the s 60 VATA 11/10 assessment and deal with it as part of our decision on the appeals.

153. As to the amended s 60 penalty assessment issued on 29 June 2016 there appears to be no appeal against it. The parties have proceeded on the basis that the existing appeal against the previous s 60 penalty assessments must carry over to the new assessment, and so we consider it in that light.

Discussion: Income Tax: 2005-06 Partnership profits

154. For this year and this year only, HMRC have sought to bring additional tax (over and above that shown on the appellant's partnership return) into account by issuing a closure notice under s 28B TMA stating their conclusion that the return understated the profits of the partnership for the tax year.

155. For HMRC Mr Nicholson in his skeleton simply argued that the burden falls on the appellant to show that the amendments to the partnership profits are incorrect. But he recognised that to support a penalty for the year and to justify applying the result of 2005-06 to other years it was necessary, or at least advisable, for him to explain why HMRC's figures for 2005-06 were sustainable.

156. His closing submissions therefore dealt with the strength of Mr Lenegan's reasons for the conclusion of his enquiry. The basis for that conclusion was twofold. First, the analysis of the bank accounts in the names of Mr and Mrs Choudhry shows deposits into them in the period 1 December 2004 to 30 November 2005 (the basis period for the partnership accounts) substantially in excess of the disclosed turnover in the accounts; and the appellants had not explained to Mr Lenegan's satisfaction a non-trading source for these deposits. Second, the records of the appellants' account for the period with Bookers, their wholesaler for all goods apart from tobacco, show purchases substantially in excess of those in the accounts ("the undisclosed purchases"). From this fact Mr Lenegan inferred that sales of the goods the purchase of which was undisclosed were also excluded from the accounts.

157. He argued that the evidence showed that the records of the appellant were inadequate, there were significant deposits into various banks accounts in excess of the disclosed takings, that the evidence given by the appellants was not credible and had not been given to HMRC during the investigation and did not in any event cover the deposits in their entirety.

158. In particular, there were discrepancies in the account of the supposed loans from Mohammed Hussain with different amounts being given every time an explanation was proffered. Mr Choudhry was unclear about what he owed Mr Hussain and different addresses had been given for him, so that evidence was not credible.

159. As for Mrs Choudhry's inheritance there was no evidence of realisation of properties or businesses in Pakistan and the account of how the money was brought to the UK, £20,000 at a time, was far too risky to be true, as declarations should have been given to customs authorities. The information about this came 6 to 7 years after the start of the enquiry. And if Mrs Choudhry was so rich, why were the loans from Mr Hussain needed?

160. As to the Bookers purchases, the original explanation, own consumption of alcohol, was simply incredible. The second explanation, the boxing club sponsorship, could not explain all the excess. And as to the Nazir story, why was it being mentioned only now?

161. Mr Gibbon, for the appellants said in his skeleton that in their statement of case for direct tax HMRC had said "the additional banking in the enquiry year was around £391,000. No adequate explanation has been provided". Mr Gibbon says that the appellants have given explanations including the cash received by Mrs Choudhry and the loan of £75,200 from Mr Mohammed Hussain.

162. The appellants also say that HMRC's recalculated profit figure is not possible, either in absolute terms, given the size and location of the business and the lack of wealth of the appellants, or because it implies a gross profit ratio way above the norm for this type of business. They gain some, indeed strong, support for this second point, because, as we have found, Mr Lenegan also agreed that the recalculated profit figure was unrealistic. But he said he could do nothing about that in the absence of a good explanation for the excess deposits.

163. The gross profit ratio ("GPR") in the accounts was 21.83%. It is clear to the Tribunal from experience in similar cases and from published decisions of this Tribunal that 21.83% is in the normal range for a convenience store selling a range of alcohol, tobacco, food and other household goods items, and we so find.

164. The appellants did seek to explain the unexplained purchases. The initial explanation as recorded by Mr Lenegan is that Mr Choudhry was buying alcohol for his "own consumption". Ms Sadiya Hussain's evidence was that she did not say that to Mr Lenegan. Obviously as an explanation of nearly £120,000 of purchases of alcohol in a year it was ridiculous, even for an alcoholic, and we find that it is not true, something with which we think Mr Choudhry and Mr Gibbon would agree. This episode does however cast doubt on the reliability of Sadiya Hussain's testimony.

165. Mr Choudhry's further explanation was that he sponsored a local boxing club and bought food and drink for events to support the club. We are satisfied that this explanation is true – so far as it goes. Accepting Mr Choudhry's account of what he did for the club, weekly purchases of drinks and snacks, similar purchases for one-off in house events and three shows, we are prepared to accept that no more than £5,000 was spent on weekly purchases and another £5,000 on the less frequent events.

166. At the hearing Mr Choudhry put forward a further explanation, that involving Mr Nazir. The precise financial arrangements between Mr Choudhry and Mr Nazir were very difficult to untangle from what seemed like conflicting evidence given by Mr Choudhry. On the other hand we do not think that Mr Lenegan has demonstrated that all the undisclosed purchases were actually paid for by Mr Choudhry or that he was not reimbursed if he did pay for Mr Nazir's purchases. But we have decided that we should give no weight to this explanation, not only because of the muddle in Mr Choudhry's testimony but also, and mainly, because the explanation emerged only at the hearing. HMRC have therefore had no opportunity to test it eg by seeking to interview Mr Nazir or obtaining further information from Bookers, and Mr Nicholson was put at a clear disadvantage by being ambushed in this way.

167. We therefore find that all but £10,000 of the undisclosed purchases were purchases of the business. We also find that these purchases must have been sold in

the ordinary course of the business and that the commensurate sales were omitted from the accounts. We can see no reason for not applying the GPR as disclosed to these additional purchases so that the net of VAT additional purchases are:

£118,845 - £10,000 - £108,845 of which 67% are standard rated = £72,926

VAT @ 17.5% included in £72,926 = £10,861, so

Net of VAT purchases are £108,845 - £10,861 = £97,984.

168. A GPR of 21.83% means that purchases are 78.17% of sales, which are therefore £125,347 net of VAT, and we find that net sales of that amount at least were omitted from the accounts and the partnership statement.

169. These omitted undisclosed sales do not however fully account for the excess deposits. There is a balance of about £60,000. The appellants' explanation for the remaining excess is that deposits came from Mrs Choudhry's inheritance from her father and from loans to Mr Choudhry from Mr Hussain.

170. We accept that Mrs Choudhry's father was a man of some wealth as shown by his will (a translation of which had been obtained by HMRC who did not challenge its authenticity) and that he left assets to Mrs Choudhry. What HMRC were unwilling to accept was that arrangements were made by Mr Choudhry's brother, who managed the assets in Pakistan for her, for cash amounts of up to £20,000 a time to be given to Mrs Choudhry by businessmen in the UK. Mr Nicholson said that such an arrangement was too risky to be credible, given the need to declare cash to Customs etc.

171. We think that that is to take a civil servant's view of the arrangements. Mrs Choudhry's evidence is in line with the Tribunal's experience of such arrangements, known in some circles as "Hawala banking", and we accept it as true.

172. As to the loans by Mr Hussain it was unclear to us precisely over what period the amounts was said to have been lent. Despite our reservations about Sadiya Hussain we find from the evidence of her and of Mr Choudhry that Mr Hussain did lend money to the Mr Choudhry which he banked. We find therefore that there is an adequate explanation for the total excess of deposits into bank accounts over disclosed turnover plus turnover from the omitted purchases.

173. Thus our initial finding that sales commensurate with undisclosed purchases were not included in the accounts is our final finding on the question of understatement of the partnership profits for the year ended 30 November 2005, the basis period for the tax year 2005-06. This finding is supported in our view by Mr Lenegan's admission that his calculations were not realistic.

174. The additional profits for income tax purposes are therefore £27,363 (sales £125,347 less purchases £97,984)

Discussion: Income Tax: 2001-02 to 2004-05 and 2006-07 to 2011-12 Partnership profits

175. For none of these years did an officer of HMRC (or of the Board of Inland Revenue) open an enquiry under s 12AC TMA. Instead Mr Lenegan has proceeded by way of "discovery" amendments of the partnership return under s 30B TMA, the effect of which is to automatically amend the individual tax returns of the appellants so far as profits of the partnership are concerned.

176. Section 30B operates in the same way as s 29 TMA. The two "gateways" in s 29(4) and (5) are reproduced as s 30B(5) and (6) but there is nothing in s 30B that allows a discovery amendment where a partnership return had not been made, in the way that s 29 does, obviously because in that case there would be nothing to amend[4].

177. Mr Nicholson did not seek to rely on s 30B(6) TMA. Frequently HMRC do not rely on s 29(5) TMA (no adequate information about tax loss on face of return) in cases where the normal time limit for assessing in s 34 TMA has expired (as it had here). This is because they would inevitably have to demonstrate that the loss of tax was brought about carelessly (up to 6 years) or deliberately (up to 20 years) because of s 36(1) and (1A) TMA which restricts the ability to make valid assessments without HMRC showing that conduct. In cases of tax evasion s 29(5) will inevitably apply, but it is pointless HMRC relying on that subsection alone.

178. But s 34 TMA does not apply to amendments of partnership returns (or indeed of any returns). There is no time limit, and no need to rely on s 30B(5) and to show deliberate conduct. But as s 30B(5) was what was relied on, that is what we consider (and of course if HMRC are to succeed in imposing penalties for deliberate conduct they would still have the burden of showing that conduct even if they proceeded on the basis of s 30B(6) to justify the amendment of the return).

179. Thus in order for HMRC to succeed in each of these "discovery" years HMRC have to demonstrate that Mr Lenegan did discover an omission of profits from the partnership return for each year and that the omission for that year was brought about deliberately by Mr Choudhry as the representative partner or someone acting on his behalf, or by Mrs Choudhry or someone acting on her behalf.

180. As to discovery we were referred by HMRC to *Hankinson v HMRC* [2011] EWCA Civ 1566. We do not think that case, at least in the Court of Appeal, really addresses the point of what a discovery is. We prefer to consider *HMRC v Charlton, Corfield & Corfield* [2012] UKUT 770 (TCC) (Norris J and Judge Roger Berner) ("*Charlton*") where there is useful (and binding) guidance on the question. They said:

> "37. In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an

[4] It does not seem possible for HMRC to recover a loss of tax in relation to a partnership where no partnership return has been made (whether or not one was required under s 12AC TMA). But that is not our concern here.

> insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight."

181. We were also referred to *Anderson v HMRC* [2018] UKUT 159 (TCC) (Morgan J and Judge Roger Berner) ("*Anderson*") where at [24] the Tribunal said in relation to s 29(1):

> "Since the introduction of self assessment, there have been comparatively few decisions on the meaning of s 29(1) TMA but there have been rather more as to the meaning and effect of s 29(5) and 29(6) TMA. The principal authorities on s 29(5) and (6) are, now, *Hankinson v Revenue and Customs Commissioners* [2012] 1 WLR 2322, *Revenue and Customs Commissioners v Lansdowne Partners Ltd Partnership* [2012] STC 544 and *Sanderson v Revenue and Customs Commissioners* [2016] STC 638. Although a detailed discussion of the decisions on s 29(5) and 29(6) is not necessary for present purposes, it is helpful to refer to some of the propositions established by those authorities, taken together with the decision in *Charlton* on s 29(1). As will be seen, the decisions identify differences between what is involved under s 29(1) and what is relevant for s 29(5) and 29(6). We consider that the following propositions are now established by the various authorities:
>
> (1) s 29(1) refers to an officer (or the Board) discovering an insufficiency of tax;
>
> (2) the concept of an officer discovering something involves, in the first place, an actual officer having a particular state of mind in relation to the relevant matter; this involves the application of a subjective test;
>
> (3) the concept of an officer discovering something involves, in the second place, the officer's state of mind satisfying some objective criterion; this involves the application of an objective test;
>
> (4) if the officer's state of mind does not satisfy the relevant subjective test and the relevant objective test, then the officer's state of mind is insufficient for there to be a discovery for the purposes of subsection (1);
>
> (5) s 29(1) also refers to the opinion of the officer as to what ought to be charged to make good the loss of tax; accordingly, the officer has to form a relevant opinion and such an opinion has to satisfy some objective criterion;"

182. These decisions are as applicable to s 30B(1) TMA as they are to s 29(1). As to the "subjective" and "objective" tests referred to in *Anderson* at [24] that is a reference back to what the Tribunal said at [11]:

> "The concept of a 'discovery' by an officer was considered in detail by the Upper Tribunal (of which Judge Berner was a member) in *Charlton v Revenue and Customs Commissioners* [2013] STC 1033 where many of the earlier cases were reviewed. In the present appeal, it is not in dispute that the concept of a 'discovery' by an officer involves the application of a subjective test, as to the officer's state of mind, and an objective test as to whether it is open to an officer to have that state of mind."

183. In *Daisley v National Crime Agency* this Tribunal (Judge Nigel Popplewell and Mr Simon Bird) [2018] UKFTT 708 (TC) has helpfully summarised the recent binding decisions about these tests:

> "*The subjective test*
>
> 25. It is clear that before an officer makes a discovery assessment, he must have formed a certain state of mind. The question raised on this appeal is: what must the officer think or believe? The three judges in the Divisional Court in *R v Kensington Income Tax Commissioners* all agreed that it was not necessary for the officer to reach a conclusion which was justified by sufficient legal evidence. However, when describing what was required for this purpose, the three judges expressed themselves in different terms which do not appear to us to describe the same test.
>
> 26. Any test which is devised as to the necessary subjective belief on the part of the officer must be a practical and workable test. The expression of the test has to recognise that at the time when an officer thinks that it is desirable to make a discovery assessment, the officer may appreciate that in certain respects he may not be in possession of all of the relevant facts. Further, the officer may foresee that a discovery assessment might give rise to questions of law some of which might not be straightforward.
>
> 27. In *Revenue and Customs Commissioners v Lansdowne Partners Ltd Partnership*, when considering the meaning of 'be aware of' for the purposes of s 29(5), it was said that 'awareness' was a matter of perception not conclusion and that it was possible to say that an officer was 'aware of' something even when he could not at that stage resolve points of law and even though he was not then aware of all of the facts which might turn out to be relevant. Although the word 'discover' and the phrase 'be aware of' cannot be treated as synonyms, we consider that if it is possible to be aware of something when one does not know all of the relevant facts and one cannot foretell how relevant points of law will be resolved, it cannot be said to be premature for an officer to 'discover' that same something even when he knows he is not in possession of all of the relevant facts and does not know how relevant points of law will be resolved.
>
> 28. In *Sanderson*, Patten LJ described the power under section 29(1) in this way:
>
> > 'The exercise of the section 29(1) power is made by a real officer who is required to come to a conclusion about a possible insufficiency based on all the available information at the time when the discovery assessment is made.'
>
> We consider, with respect, that this test is in accordance with the earlier authorities. This passage describes the test somewhat briefly because, of course, that case concerned s 29(5) rather than s 29(1). Having reviewed the authorities, we consider that it is helpful to elaborate the test as to the required subjective element for a discovery assessment as follows:

> 'The officer must believe that the information available to him points in the direction of there being an insufficiency of tax.'
>
> That formulation, in our judgment, acknowledges both that the discovery must be something more than suspicion of an insufficiency of tax and that it need not go so far as a conclusion that an insufficiency of tax is more probable than not.
>
> *The objective test*
>
> 29. The authorities establish that there is also an objective test which must be satisfied before a discovery assessment can be made. In *R v Bloomsbury Income Tax Commissioners*, the judges described the objective controls on the power to make a discovery assessment. Those controls were expressed by reference to the principles of public law. In *Charlton* at [35], the Upper Tribunal referred to the need for the officer to act 'honestly and reasonably'.
>
> 30. The officer's decision to make a discovery assessment is an administrative decision. We consider that the objective controls on the decision making of the officer should be expressed by reference to public law concepts. Accordingly, as regards the requirement for the action to be 'reasonable', this should be expressed as a requirement that the officer's belief is one which a reasonable officer could form. It is not for a tribunal hearing an appeal in relation to a discovery assessment to form its own belief on the information available to the officer and then to conclude, if it forms a different belief, that the officer's belief was not reasonable."

184. We respectfully agree with these paragraphs.

185. As to s 30B(5) TMA (the partnership equivalent of s 29(4) TMA) there is no guidance to be found in any of the cases referred to above, as they all concerned s 29(5). There was no dissent from the proposition that deliberate conduct is conduct which is performed knowingly, ie that the person said to have brought about the discovered tax loss knew that the omission of income from the partnership return was wrong, that is dishonest. To that extent there is of course a strong subjective element. Nor was there any disagreement that there is an objective test and it is for HMRC to show that what the person accused of deliberate conduct did was wrong or dishonest by the standards of ordinary right thinking people.

186. HMRC's skeleton argument says on the question of discovery (ie for years other than 2005-06):

> "**Onus of proof**
>
> …
>
> 33. In the present appeal the burden falls on the appellant to displace the assessment in respect of the year of enquiry. The presumption of continuity is made by the officer who has a reasonable belief that the level of defaults is likely to be similar for the surrounding years.
>
> **Direct tax**

> 34. The respondents submit the evidence clearly shows that they have made a discovery in that income of the appellant that ought to have been assessed to tax has not been assessed, in that the appellants deliberately supressed income and purchases from their business trading as Continental Food Store leading to an under declaration of taxable profits. [Typos corrected]
>
> …
>
> 36. The authority to make a discovery assessment is given by section 29 Taxes Management Act 1970. In all cases, the relevant requirement for the purposes of this statement is a discovery 'that an assessment to tax is or has become insufficient'.
>
> 37. In terms of discovery, the respondents submit that the conditions have clearly been met as set out in the case of *Hankinson v HMRC* [2011] EWCA Civ 1566.
>
> 38. The 'presumption of continuity' is covered in the case of *Larry John Barreto* TC05618 which sets out the onus of proof in such cases and cites *Jonas v Bamford* (1973 STC 519).
>
> 39. The respondents submit that the loss of income tax has been brought about deliberately by the appellant. The appellants actively supressed their purchases in order to declare lower sales in an attempt to avoid detection, resulting in under declared profits and sales of their business both for income tax and VAT." [Typos corrected]

187. The appellant's skeleton puts it thus:

> "3.9 The validity of the assessment for 2004/05 depends on evidence relating to only 4 months of the year (December 2004 to 5 April 2005). As there is no evidence of that the conduct alleged during the enquiry year occurred for the previous 8 months of the year, the assessment for that year is also out of time and should be discharged."

[We interpolate here to say that the appellant's skeleton proceeded on the erroneous assumption that time limits applied to s 30B. Mr Gibbon accepted that on this point his argument was that because HMRC had shown no evidence of deliberate conduct the amendments should be cancelled. Passages below must be read with these modifications]

> "3.10 The validity of the assessment for 2006/07 depends on evidence relating to only 9 months of the year (April to December 2006). Firstly, the evidence is insufficient to prove that the conduct alleged during the enquiry year occurred at all during this year. Secondly, as there is no evidence that the alleged conduct occurred during the last 3 months of the year (January to March 2007), the assessment for that year is also out of time and should be discharged.
>
> 3.11 The Respondents will point to the "presumption of continuity" to support their argument that the Appellants deliberately under-declared tax in years prior to and subsequent to 2005/06.
>
> 3.12 However, the presumption of continuity (as to which see section 4) is insufficient to discharge a burden of proof that the appellants

deliberately under-declared tax on their tax returns for years for which the respondents have offered no proof of their conduct (ie. all years save the enquiry year and parts of 2004/05 and 2006/07). The presumption is an assumption. It is not evidence of anything. In fact (as will be seen in section 4), even where it is permissible to use the presumption it is not possible to do so without some evidence being produced to support the assumption that conduct which occurred in one period must have occurred in another period.

INCOME TAX ASSESSMENTS - THE PRESUMPTION OF CONTINUITY

… [Extracts from *Barreto v HMRC* and *Dr I Syed v HMRC*]

4.3 Whilst purporting to argue that, once raised, the presumption of continuity applies, in the absence of rebuttal evidence, regardless to previous and subsequent years, the Respondents have stated at SoC paragraph 5.3 that:

> *'The presumption of continuity is made by the officer who has a reasonable belief that the level of defaults is likely to be similar for the surrounding years.'*

4.4 The Respondents thus tacitly acknowledge what the Tribunal was saying in the *Syed* case, namely that it would be wrong just to assume that, because a certain behaviour occurred in a given period that it must have occurred in other periods as well.

4.5 This is why the Respondents go on to say (still in paragraph 5.3):

> '*Officer Lenegan has established that the activities leading to the defaults occurred outside the enquiry year. He has not seen any material changes in the way the business was run since 1989*.'

4.6 What the Respondents have been less willing to accept is that the activities established by officer Lenegan which occurred outside of the enquiry year are very limited in scope.

4.7 Three categories of such activity are identified at Income Tax SoC paragraph 5.3(a)-(c). The restricted nature of those activities is as follows:

> (a) There is no evidence that "similar bank transactions" occurred before 1 December 2004 or after 1 April 2006;
>
> (b) There is no evidence of the level the Appellants' purchases from Booker prior to 1 December 2004 or after 1 April 2006.
>
> (c) There is no evidence relating to cheque book counterfoils prior to 1 December 2004 or after 31 December 2006.

4.8 The Respondents are therefore asking the Tribunal to invoke the presumption of continuity for periods prior to December 2004 and after April/December 2006 when they can point to no evidence which suggests that the behaviour complained about in the enquiry year was present.

4.9 The Tribunal in *Syed* explained the oft quoted principle from *Jonas v Bamford* thus:

'This Tribunal is not bound to conclude that what happened this year will happen next year. It seems to us that Walton J is instead expressing a common sense view of what the evidence will show.'

4.10 [Extract from *Andrew Barkham* [2012] UKFTT 519 (TC)]

4.11 The Respondents accept that that is the case in their internal Enquiry Manual at EM3309 (see Appendix 3 hereto) where the following instructions are given to enquiry officers:

'... you should first satisfy yourself that any inferences you are drawing about those [other] years are reasonable in all the circumstances of your particular enquiry. It is not enough to quote the judge's remarks out of context';

'*The "presumption of continuity" alone does not justify increases in assessments, the onus is on HMRC to bring evidence in support of the argument.*'

"Estimated" or "protective" assessments should not be raised before you have a case both for the existence of current year assessed liabilities and for the presumption of continuity.'

4.12 In this case there is no evidence to suggest that what the respondents allege was happening in the enquiry year was happening in periods prior to December 2004 and after April/December 2006 and the presumption should not be invoked by the Tribunal – even if it were legally permissible to do so (but see paragraph 3.12, above)."

188. HMRC put forward three grounds in their statement of case and in their closing submissions to show that Mr Lenegan reasonably thought there was a tax loss in all the other years. These reasons were:

(1) "similar bank transactions" occurred between 1 December 2004 and 1 April 2006;

(2) the level of purchases from Booker was similar between 1 December 2004 and 1 April 2006;

(3) cheque book counterfoils confirm round sum payments to Booker until December 2006.

189. The dates here need to be considered carefully. The enquiry was into the tax year 2005-06, the period 6 April 2005 to 5 April 2006. But the basis period for the partnership accounts was 1 December 2004 to 30 November 2005. Thus the "similar bank transactions" outside 2005-06 cover the period 1 December 2005 to 1 April 2006 (four months); the Bookers purchases 1 December 2005 to 1 April 2006 (also four months) and the cheque book counterfoils the basis period for 2006-07.

190. HMRC have then put forward evidence to show why they suspected a tax loss for 2006-07, but for no other year. For the other discovery years they rely entirely on the "presumption of continuity" with no other corroborating evidence and we consider that issue later in relation to those other years.

Income Tax: 2006-07 partnership profits

191. We now turn to the 2006-07 amendment to the partnership return. We look at this year in isolation because of the submissions by HMRC on the evidence on which they rely for discovery and which relate to this tax year alone. That evidence consists of the three items listed in §188.

192. The period which falls within the basis period for 2006-07 is in items (1) and (2) and is the four months to 1 April 2006.

193. We accept that Mr Lenegan formed an opinion on the basis of this evidence that he had discovered a loss of tax and that he did so honestly. We also find that it was objectively reasonable for him to form this opinion from the evidence which he had in respect of items (1) and (2) only. We do not think that it is reasonable to form an opinion that there has been a tax loss simply from the making of round sum payments to Bookers demonstrates an omission of profits. As a result we find that Mr Lenegan did discover, in terms of s 30B(1) TMA, that profits which ought to have been included in the partnership return and statement had not been so included.

194. But to succeed in showing that the assessment for this tax year is competent, HMRC must demonstrate that there was in fact an omission of profits and that the omission was brought about by the deliberate conduct of Mr or Mrs Choudhry or by some person acting on their behalf (not necessarily we think a third party: each of Mr and Mrs Choudhry might be acting on behalf of the other).

195. HMRC accept, rightly, that they have the burden of proof on this question. An allegation of deliberate conduct in this context is tantamount to an allegation of fraud[5] and must be properly pleaded so that the facts on which HMRC depend to show the conduct are spelled out in detail, and as the appellants submit, quoting Lord Hoffmann in *Secretary of State for the Home Department v Rehman* [2001] UKHL 47 at [55] where he said "cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner".

196. HMRC's evidence for the alleged loss of tax is that the deposits into bank accounts for the first four months of the basis period exceeded the turnover prorated for the period shown in the partnership statement ie the accounts ("the excess"). They argue that the excess is undisclosed takings of the business. We are satisfied that there are undisclosed takings for the first four months of the basis period because, and only because, we are satisfied that there were purchases from Bookers which are not included in the accounts for that basis period and that the commensurate sales of those undisclosed purchases were also necessarily undisclosed. But that is all: to the extent that there remains an excess unaccounted for we consider that it does not represent undisclosed sales of the business and is explained by the matters we have considered in relation to 2005-06 eg Mrs Choudhry's inheritance.

[5] See *HMRC v Raymond Tooth* [2018] UKUT 38 (TCC) at [55].

197. Have HMRC shown that the omission of profits was brought about by the deliberate conduct of the appellants or on their behalf? So far as HMRC have spelled out what they allege they say:

> "The respondents submit that the loss of income tax has been brought about deliberately by the appellant. The appellants actively supressed their purchases in order to declare lower sales in an attempt to avoid detection, resulting in under declared profits … of their business … for income tax …." [*the omitted words relate only to VAT*]

198. The allegation is therefore that the appellants knew that the partnership statement and the accounts supporting the statement understated the purchases and they knew that commensurate sales had been understated. The submissions do not specifically allege that the appellants must have known that by understating these amounts they were doing so knowing that to do so was wrong and so in effect fraudulent.

199. On this issue we find that Mr Choudhry was aware of the full extent of the Bookers purchases. We are not satisfied that he was aware that not all of those purchases were reflected in the accounts. We accept his evidence that he gave all his records to Mr Silver primarily for the preparation of his VAT returns but also for the preparation of his partnership returns for income tax purposes. We also accept as true the hearsay evidence given by Mr Silver to the HMRC officers at the meeting in his offices shown in the recorded answers to questions asked by those officers and shown to us in the HMRC exhibits to witness statements. In those statements he is recorded as saying that Mr Choudhry had no understanding of tax issues or what went into the accounts and VAT returns.

200. It is true that Mr Choudhry has sought to provide explanations for the undisclosed purchases, but this came after HMRC had demonstrated to him that there were purchases from Bookers in excess of the amounts disclosed in the accounts. The fact that he sought to produce explanations does not show he knew that the accounts were falsely stated. We have also found that the boxing club explanation while true could only have accounted for a small part of the undisclosed purchases. And although we have not accepted his further explanation about his dealings allegedly of behalf of a Mr Nazir, that is because we attached no weight to his testimony given it was a novel explanation which HMRC did not have the opportunity to test.

201. But we do not make any finding that the Nazir explanation was necessarily untrue. That is not inconsistent with our decision on the amounts of profits on which the appellants are taxable for 2005-06 and 2006-07, something which depends on the appellants' ability to produce evidence that the discovery amendment is excessive and by how much. Nor do we think that the lateness of the Nazir explanation means inevitably that it was an attempt to put forward a new explanation knowing it could not be tested. We consider, from the evidence we have heard, that in a community such as that in which the appellants operate, there may well be loyalties at play which make it uncomfortable for someone in the appellants' position to reveal matters which it would be to their personal advantage to reveal in a hearing of their tax appeals. We have noted for example that the appellants' accountant, Mr Silver, was also Mr Mohammed Hussain's accountant, and that Mr Silver was both blamed by Sadiya Hussain for his

errors and lies and was trusted implicitly by Mr Choudhry who had no understanding of tax.

202. We have come to the conclusion, taking everything said and done by Mr Choudhry and others into account that HMRC have not shown cogent evidence that Mr Choudhry delivered the partnership statement to HMRC knowing that the profit of the partnership was understated. We add that had we held that he had known, we would have held that while Mrs Choudhry did not act dishonestly[6], Mr Choudhry would have dishonestly delivered the statement on her behalf as representative partner.

203. That is not quite the end of the matter because there is the question whether a third party dishonestly delivered the statements on the appellants' (or Mr Choudhry's) behalf[7]. The only person who might be in the frame for this would be Mr Silver, the accountant. HMRC did not however submit that Mr Silver was acting fraudulently on the appellants' behalf or produce any evidence, cogent or not, to show that he was. And the appellants were not asked about Mr Silver's conduct, nor were they (or he) forewarned that evidence from him would be desirable.

204. As a result we hold that the discovery amendment for 2006-07 does not meet the condition in s 30B(5) TMA and the appeal against it must be allowed.

Income Tax: 2001-02 to 2004-05 and 2007-08 to 2011-12 partnership profits

205. In view of our decision for 2006-07 we hold that the appeals against all other partnership amendments must be allowed. But against the possibility that it was to be found on appeal that our decision in relation to 2006-07 was one that we were not entitled to come to, we have considered what we would have decided for the remaining years.

206. These are all years for which HMRC rely on the presumption of continuity. What they say about this in their skeleton is limited and is the single paragraph [38] in that skeleton shown in §186:

> "The 'presumption of continuity' is covered in the case of *Larry John Barreto* TC05618 which sets out the onus of proof in such cases and cites *Jonas v Bamford* (1973 STC 519)."

207. What is said in *Barreto v HMRC* [2017] UKFTT 101 (TC) (Judge Ashley Greenbank and Rayna Dean) ("*Barreto*") about the presumption is this:

> "62. In making its assessments, HMRC has relied on the "presumption of continuity". This is a reference to the dicta of Walton J in *Jonas v. Bamford* [1973] STC 519 at 540 where he said:

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[6] HMRC have not suggested that in this matter Mrs Choudhry's own conduct was deliberate or fraudulent or dishonest.

[7] We are not entirely convinced that where sections 29(4), 30B(5) and 36 TMA refer to a loss of tax being brought about deliberately by a person or on their behalf, it must be shown that the deliberate behaviour was the third party's rather than or as well as the "person's", but we assume it is for the purposes of this decision.

> ‘ …so far as the discovery point is concerned, once the inspector comes to the conclusion that, on the facts which he has discovered, the taxpayer has additional income beyond that which he has so far declared to the inspector, then the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly on the taxpayer.’
>
> 63. The presumption of continuity is merely a presumption. It can be rebutted. …”

208. In fact that is all that they rely on, as there is no evidence put forward at all of what, if any, was the excess of bankings over turnover in these years, nor of what the Bookers purchases were, and in the case of later years even whether Bookers were the wholesalers they used.

209. We have set out the appellants’ submission on the presumption at §187.

210. We think it is necessary to examine the concept of the presumption of continuity in tax investigation cases in some detail and depth, starting with *Jonas v Bamford (HM Inspector of Taxes)* (1973) 51 TC 1 (“*Jonas*”), as this was the first tax case in which the presumption of continuity was explicitly referred to by a judge (although it was applied in earlier cases) and also looking at *Nicholson v Morris (HM Inspector of Taxes)* (1976) 51 TC 95 (“*Nicholson*”). To prevent the narrative being too clogged up with quotations from this and other cases we have relegated much to an Appendix.

211. In relation to *Jonas* and *Nicholson* we make the following important preliminary points.

212. First, the assessments in these cases predate self assessment, and in most cases predate the 1964 major changes to assessing procedure. Younger readers may not be familiar with the concept of additional first assessments. In those pre-self-assessment times a discovery assessment could be made under s 29 TMA or its predecessor without there being any condition as is now found in s 29(4) or (5), but there were constraints where an assessment was sought be made outside the then normal 6 year time limit. The leave of a General (or Special) Commissioner was required for the making of a discovery assessment for an out of date year. It is also fair to say that the question of where the burden of proof lay in relation to appeals against discovery assessments, particularly where it was not necessary to show fraud, was much less clear cut than it is today.

213. Secondly, the cases were appellate decisions, as all cases reported on this subject in the HMSO Tax Cases are. This is important in that the function of the judge in the Chancery Division hearing these highly fact-intensive cases was to consider whether or not the body of General or Special Commissioners hearing the case at first instance had evidence on which they could properly come to the decision they did, not whether the judge would have come to the same decision (and in some instances they hinted heavily they would not have). On the other hand these cases may have precedential value unlike the reported cases of the Special Commissioners or this Tribunal.

214. Thirdly, and in our view, very importantly, until 1976 there was no statutory power given to, and used by, inspectors of taxes in "back duty" enquiries, as civil fraud investigations were called then, to obtain information from the subjects of an enquiry or from third parties. We say "used by", as s 20 TMA as originally enacted[8] was a very limited power enabling the Board of Inland Revenue, not an Inspector, to issue a notice requiring a trader to provide to an inspector copies of their accounts including balance sheets and books, accounts and documents which contain information as to transactions of the trade, profession or vocation. In practice it was not used. Section 20 TMA was substituted in FA 1976 by a new provision allowing both first party and third party information to be obtained with the leave of a General or Special Commissioner, and was not limited to information about trades or professions.

215. We have quoted from so much from *Jonas* (see the Appendix) because we think it is important to put the paragraph quoted in *Barreto* ("the Walton dictum") at §207 in its full context. We make the following points about the decision:

(1) All of the assessments in relation to which HMRC succeeded were in time and did not require a showing of fraud, wilful default or neglect.

(2) Only three of the eight assessments relied on the principle of continuity

(3) They were for years *after* those for which the principle did not need to be invoked

(4) The appellant was asked to provide information for those three last years but refused.

(5) The Special Commissioners held that the appellant had not discharged the onus on him for those three years

(6) Walton J held that the appeals failed because the appellant had not shown that the Special Commissioners were wrong to say that the appellant had not discharged the onus.

(7) In the paragraph his judgment in which the Walton dictum appears he reiterates for emphasis that the appellant had refused to give any information to the inspector.

216. Within three years of his judgment in *Jonas*, Walton J was called on again to deal with an appeal, by a barrister's clerk in *Nicholson*. Again we have quoted relevant passages from *Nicholson* in the Appendix, and we make the following points about the decision.

(1) The assessments in the case covered the years 1946-47 to 1960-61 and were all made in 1970 so were outside the then time limit of 6 years and required the leave of a General Commissioner.

[8] Section 20 TMA was a consolidation of s 31 Income Tax Act 1952, itself a consolidation of s 35 FA 1942 where the provision had its origin.

(2) They were all made under s 36 TMA on the basis that there was fraud or wilful default, and in the alternative for 1955-56 onwards on the basis of negligence.

(3) For the years 1955-56 to 1960-61 there was no need for a finding of fraud or wilful default to justify discovery.

(4) The Inland Revenue had obtained clear evidence of omissions from independent sources for 1955-56 to 1960-61, so the presumption of continuity was being used for the years from 1946-47 to 1954-55.

(5) Mr Nicholson had only one source of income, clerk's fees of a percentage of each fee earned by the barristers in his chambers.

(6) Walton J was obviously very unhappy about the decision for the early years, but pointed out that Mr Nicholson had been his own worst enemy in refusing to provide information he was asked for.

217. As to *Rosette Franks (King Street) Ltd. v Dick* (1955) 36 TC 100 ("*Franks*") (referred to in *Nicholson*) we note that evidence was given in person before the General Commissioners for the Division of Manchester by a purchaser from the appellant's shop of an "off the books" purchase from a lady who it was agreed was Mrs Franks, one of the owners of the business. Mrs Franks did not give evidence, and when the appellant was given the opportunity to put forward further evidence it declined to do so. The Commissioners confirmed assessments from 1941-42 to 1952-53 in the inspector's figures on the basis that:

> "We, the Commissioners, were of opinion that the accounts submitted to the Revenue in support of the appeals could not be relied upon to show the whole of the trading profits of the Company."

and they had no evidence to rebut those assessments. The issue of burden or proof or negligent or fraudulent behaviour is not mentioned.

218. It should be noted that in that case an Inland Revenue accountant had had access to the books and records of the company for the year and had found other weaknesses:

> "Mr. Wykes formed the opinion that occasionally the directors, Mr. and Mrs. Franks, received moneys from the Company's debtors which were not recorded in the Company's cash book with the result that in dealing with the sales figures in the accounts submitted to the Revenue the Company's accountant made certain adjustments to cover the moneys which the directors had received. The adjustments represented a debit to the current account of either or both of the directors and a credit to the sales ledger. No suggestion was being made that the Company was concealing anything in these particular cases, but since the cash received was not recorded there was no certainty that all sums which had been received by Mr. and Mrs. Franks were included in the accounts." [36 TC 101 at 104]

219. On appeal Danckwerts J concluded that:

> "It is perfectly true that this is only one incident, and the one incident only, which the Inspector of Taxes was able to establish before the Commissioners; but it was open to the Commissioners, as it seems to me, to conclude that this was not merely an isolated transaction but showed the kind of thing which was going on, and they were, in my view, entitled to come to the conclusion to which they did come from this incident, though one only, that there must have been other similar incidents and, therefore, that the accounts of the Company could not be relied upon to show the whole of the trading profit of the Company.
>
> It seems to me, therefore, I must come to the conclusion that I cannot upset the findings of the Commissioners and the Appellant must fail."

220. Danckwerts J did not directly address the presumption of continuity. The incident of the dress took place in the first half of 1945 and the assessments covered 1941 to 1953. There is no mention in the stated case of when the assessments were made[9].

221. We have also looked at *Khawaja v Etty (HM Inspector of Taxes)* (2003) 75 TC 774 and the decision of Lawrence Collins J (as he then was). It seems on the face of it to be a "presumption of continuity" case, but there is clearly evidence of discrepancies and omissions in many of the years involved.

222. A number of cases from this tribunal have commented on HMRC's use of the presumption. Both parties in this case refer to *Dr I Syed v HMRC* [2011] UKFTT 315 (Judge Charles Hellier and David E Williams CTA) ("*Syed*") a case which has been subsequently commented on favourably in other cases (including in *Barreto* immediately after the passage we have quoted). In *Syed* the Tribunal said:

> "37 In relation to the earlier years the correspondence shows that Mr Preston assumed that the same errors had occurred relying on the 'presumption of continuity'. This phrase is taken from the judgment of Walton J in *Jonas v Bamford* :
>
> '…once the inspector comes to the conclusion that, on the facts which he has discovered, Mr Jonas has additional income beyond that which he has so far declared to the Inspector, then the usual presumption of

---

[9] We cannot help but think that the fact that the incident happened during the war and involved possible misuse of clothing coupons may have subconsciously influenced the General Commissioners for Manchester. For an illustration of the feeling of those in authority towards tax dodgers and spivs generally, see the speech of Lord Simon LC in *Latilla v Commissioners of Inland Revenue* 25 TC 107 where he said:

> "My Lords, of recent years much ingenuity has been expended in certain quarters in attempting to devise methods of disposition of income by which those who were prepared to adopt them might enjoy the benefits of residence in this country while receiving the equivalent of such income, without sharing in the appropriate burden of British taxation. Judicial dicta may be cited which point out that, however elaborate and artificial such methods may be, those who adopt them are 'entitled' to do so. There is, of course, no doubt that they are within their legal rights, but that is no reason why their efforts, or those of the professional gentlemen who assist them in the matter, should be regarded as a commendable exercise of ingenuity or as a discharge of the duties of good citizenship."

continuity will apply. The situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly on the taxpayer.'

38 In our view this quotation expresses no legal principle. It seems to us that it would be quite wrong as a matter of law to say that because X happened in Year A it must be assumed that it happened in the prior year. An officer is not bound by law and in the absence of some change to make or to be treated as making a discovery in relation to last year merely because he makes one for this year. This tribunal is not bound to conclude that what happened this year will happen next year. It seems to us that Walton J is instead expressing a commonsense view of what the evidence will show. In practice it will generally be reasonable and sensible to conclude that if there was a pattern of behaviour this year then the same behaviour will have been followed last year. Sometimes however that will not be a proper inference: there will be occasions when the behaviour related to a one off situation, perhaps a particular disposal, or particular expenses; in those circumstances continuity is unlikely to be present. In the circumstances of *Jonas v Bamford* there had been undeclared income in a particular year: it was not unreasonable to conclude that the same habit of concealing income had been followed in previous years."

223. We now turn to other material about the presumption of continuity.

224. *Jonas* was, as we have said, the first tax case to refer to the presumption. It is notable that Walton J in his dictum refers to the "usual" presumption of continuity. So where did that phrase come from? It seems from eg *Phipson on Evidence* ("*Phipson*") that it is more commonly referred to as the "presumption of continuance" and is a presumption of fact, which like all presumptions of fact may be rebutted.

225. In Chapter 7 of *Phipson* we find:

"6.—Previous and Subsequent Existence of Facts; Course of Business

7.19 It has been established above that evidence is relevant if it could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceedings. …

7.20 (a) Continuance

States of mind, persons, or things at a given time may in some cases be proved by showing their previous or subsequent existence in the same state, there being a probability that certain conditions and relationships continue. This sort of inference is sometimes called *the presumption of continuance*. While it is preferable to characterise this as a presumption of fact and not a presumption of law (that is a *true* presumption), it is more sensible and more accurate to regard it as a type of ordinary reasoning which applies in circumstances of the utmost frequency and diversity. The strength of the inference naturally diminishes with the remoteness of time, and is merely part of the totality of the evidence in the case. … The use of the expression 'presumption of continuance' obfuscates the fact that whether or not a state of affairs continues is a question of fact, and depends only on the totality of the evidence and the

natural probabilities. The court will no doubt be less ready to infer the continuance of an unlawful state of affairs, but there can be no *rule* as to the inference the court will draw from previous conduct in the absence of direct evidence as to conduct at the material time."

226. The appellant also refers to HMRC Guidance on the presumption which is in the HMRC Enquiry Manual paragraph 3309:

"**Reopening Earlier Years: Discovery - Extending an Enquiry**

The Courts have given their support for the view that in certain circumstances evidence of omissions from one or more years' returns permits the Inspector to infer that omissions will have continued in other years.

You may find it useful to illustrate this point by reference to the decided cases EM3310+[10] explained below if the taxpayer or agent challenges your right to open other years. But you should first satisfy yourself that any inferences you are drawing about those years are reasonable in all the circumstances of your particular enquiry. It is not enough to quote judges' remarks out of content.

In enquiry work two sets of circumstances frequently arise

- proven omissions for the enquiry year but no investigation or evidence of omissions from previous accounts, for example, where a business economics exercise has been used for one year only or
- proven omissions for some years but not for others for example, where capital statements have been used.

If the taxpayer does not accept that additions are required for all years or disputes the amount of the additions and this dispute is not resolved by the review process, the taxpayer will be able to notify their appeals to the tribunal for a decision. ARTG2100+ provides more detailed information on this process.

During your enquiry you will have obtained evidence of the conduct of the business, the record keeping, the lifestyle etc of the taxpayer and where some or all of these have pointed to understatements of income you must establish the reason(s) for these before proceeding further. If you have found only one omission in one year and when asked the taxpayer immediately offers a reasonable explanation for its existence, you would not be in a position to argue for additions to other years on that fact alone.

However if you have proven omissions for which there is no ready explanation and the business and way of life of the taxpayer have not changed you will be in a much stronger position to argue for addition to other years.

Taken together, then, the tax cases EM3310+ demonstrate that, in the absence of evidence to the contrary, a 'presumption of continuity' can

[10] *Jonas*, *Franks*, *Nicholson* and a Privy Council case, *Bi-flex Caribbean Ltd*

be made and the Inspector can be entitled to conclude that under-declarations in some years can be taken as a pointer to under-declaration in others and make discovery assessments accordingly. If there is only one under-declaration shown in only one year, it will need something extra to show that other years' accounts may be false.

Once the assessments are made and appealed against the onus is on the appellant to displace these. Where the appellant brings evidence, or the Inspector wishes to argue for an increase in the assessment, the 'presumption of continuity' does not and cannot replace the need for the Inspector to bring evidence to support his or her arguments. The most it can do is cast doubt on the appellant's evidence where this suggests that the accounts do not understate profits but does not demonstrate a change in practices since the year(s) where the understatement of profits has been shown.

The 'presumption of continuity' alone does not justify increases in assessments, the onus is on HMRC to bring evidence in support of the argument. This emphasises the need for adequate estimated assessments to be made at the appropriate time. [The appellant places particular emphasis on this paragraph]

These limitations on the use of the presumption of continuity are particularly important where you are considering reopening accounts prior to the incorporation of a business. Remember that the company and the sole trader (or partnership) are separate legal persons and evidence against one is not necessarily evidence against the other. This was brought out clearly in the court of appeal judgements in the case of *Rose v Humbles*, 48TC123. You will need to establish carefully the similarities in the business methods of the two periods and obtain if you can an admission that the faults apparent from the company investigation also existed in the earlier period.

Estimated or 'protective' assessments should not be raised before you have a case both for the existence of current year assessed liabilities and for the presumption of continuity." [The appellant also places particular emphasis on this paragraph]

227. From all this material we make the following points:

(1) The decisions of appellate courts (*Jonas*, *Nicholson*, *Franks* and *Khawaja*) in this area do not seek to lay down whether the Inspector of Taxes was justified in relying on the presumption of continuity and had produced sufficient evidence to justify applying it: their task was to determine whether there was evidence on which the Commissioners could properly have reached the decision they did to infer from the evidence (or lack of it) that the conduct continued after or had occurred before the years for which there was an accepted discovery of a tax loss. It follows that these cases do not fetter us in coming to our decision on the facts.

(2) In *Jonas* and *Nicholson* what went a long way to satisfying the High Court that it could not intervene in the decisions of the Commissioners was the total lack of evidence from the appellants in relation to the "presumption" years. This

was remarked on by Walton J in both cases many times, including in the paragraph in *Jonas* containing his dictum where he refers to the presumption.

(3) In both cases the inspectors had sought information from the appellants about "presumption" years, but they had refused to provide it. That was, as we have said, in years before the existence of the modified s 20 TMA or of Schedule 36 FA 2008: in the years concerned in this case HMRC were not similarly hamstrung.

(4) In those two cases the Commissioners had evidence from the Inland Revenue of five years capital statements demonstrating that known income was insufficient to support lifestyle (*Jonas*) and eight years of clear evidence of omissions or understatements from returns (*Nicholson*).

(5) The presumption is the stronger the nearer the year in question is to the years under detailed investigation with clear evidence of suspected tax loss. Correspondingly it weakens as the years are farther away.

(6) There can be no presumption that something that is not capable of recurring happened more than once, and "lumpy" items of receipt of expenditure cannot be presumed to recur or to recur in the same amounts.

(7) It is ultimately a question of fact for the Tribunal, and in relation to all years we must consider the evidence. But what may support a discovery by HMRC may not be significant enough to support a finding of fraud or deliberate conduct where the onus is on HMRC.

228. The presumption of continuity is not an appropriate way to deal with receipts that are lumpy or irregular (see eg *Dr Syed*). And in essence HMRC did not really seek to suggest that it was appropriate in this case. Their submissions in relation to deliberate conduct relate solely to the suppressed purchases. What would have gone a long way to convincing us that there were omitted profits in these other years would have been HMRC's producing to us information from Bookers about purchases on the appellants' account for the remaining years (as they did for some sixteen months of the basis periods for 2005-06 and 2006-07). They could, if the information from Bookers did show it, thereby have demonstrated that there were undisclosed purchases and by how much and argued that there must have been commensurate undisclosed sales taking into account the likely margin on sales.

229. There are indications that HMRC knew that having the Bookers evidence for a period of sixteen months was inadequate. HMRC's evidence includes a pre-prepared questionnaire and aide memoire for the meeting with Mr Silver on 7 February 2013 in which is printed:

> "Comment that we will be approaching the main supplier (Bookers) in order to gain further information relating to the purchases made by Mr & Mrs Choudhry T/A Continental Food Store to assist us with our enquiry."

The response recorded is:

> "Mr Silver is aware of this from Mr Choudhry"

230. This comment was made before any assessments or amendments were made for either income tax or VAT purposes. But HMRC did not pursue the matter. Unlike in *Jonas* and *Nicholson*, HMRC were in this case in a position to obtain information from third parties such as Bookers using the provisions of Schedule 36 FA 2008 or other more informal arrangements.

231. We are not prepared to hold, in the circumstances of this case where no attempt at all was made to obtain relevant evidence that was very likely to have been available for at least the later of the remaining years (given that it was supplied in 2012 for 2005-06 and 2006-07), that the presumption of continuity by itself can operate to justify a discovery amendment which is only competent if there was deliberate ie dishonest conduct which brought about an omission of profits.

232. It is a minor point but we also doubt whether the RPI is the right way to scale back or forward amounts of undisclosed purchases of stock. Mr Lenegan's workings show that his method produces GPRs which fluctuate much more than those shown in the appellants' accounts for those years.

Income Tax personal returns

233. On 20 March 2009 Mr Lenegan issued a notice of assessment for 2005-06 on Mr Choudhry in which he purported to increase the "profit from self employment" from £4,895 to £40,000 and on 30 March 2009 Lord & Company appealed against the assessment. In case this assessment has not been settled under a s 54 TMA agreement, we cancel it. It is clearly wrong for many reasons, not least of which is that there is no evidence, and Mr Lenegan had none, that Mr Choudhry carried on any trade or profession for the period.

234. As to the assessment for 2006-07 this charged £250,000 profit from self employment and taxable chargeable gains of £57,017 in addition to the amounts on Mr Choudhry's tax return. The income tax and Class 4 NIC further assessed was £99,363.19 and the CGT £22,806.80 (40%).

235. On 4 February 2014 Mr Lenegan informed Mr Choudhry that he enclosed a notice of "amended further assessment" removing the income from self assessment and increasing the "taxable capital (*sic*) gain" to £106,911. We can find no trace of this purported amended assessment in the bundle. Then on 8 October 2014 what is said to be a further "amended further assessment" was issued referring to the amended further assessment sent on 3 (not 4) February 2014 which charged tax of £37,062 which we assume is all CGT[11]. The notice explains that it was being issued because HMRC had found out that the full gain of £106,911 is all chargeable at 40%.

236. We have the tax calculation for this October assessment. It charges a gain of £106,911 to CGT, £9,412 of which is charged at 20% and £97,499 at 40% giving tax of £40,882. The notice gave appeal rights to the appellant.

[11] It may have included income tax of £795.36, the tax on partnership profits on the self assessment return

237. We find it difficult to see what is being done here and under what authority. The assessment of 30 March 2011 must have been made under s 29 TMA and would have had to have met one of the two conditions in s 29 TMA. Nothing has been said by Mr Lenegan about the conditions in s 29(4) and (5) or even about his discovery, contrary to the guidance in HMRC Manuals. An appeal having been made, a s 29 assessment can only be amended in accordance with a provision of the Taxes Acts, which in such a case means either by an agreement under s 54 TMA or a determination of the tribunal, neither of which had happened. The amendment was made unilaterally, something which is not permitted – see *Baylis (HM Inspector of Taxes) v Gregory and anor* (1985-88) 62 TC 1 at [90]. In our view the original 2011 s 29 assessment remained under appeal.

238. The assessment of 8 October 2014 is also a discovery assessment and unlike that of 30 March 2011 is out of time under the normal rules for assessing in s 34 TMA. It is only valid therefore if it was made to recover a loss of tax brought about by the appellant's deliberate conduct (as it is also out of time on the basis of negligence). It also clearly duplicates the original assessment as reduced in February 2014 because that assessment had already charged £37,062 (this also seems wrong to us, as on the basis of what Mr Lenegan said he had done, the rate of CGT on a gain based on the appellant's income as shown on his return would have been 20%).

239. The October assessment was clearly made because on 8 October 2014 Mr Lenegan purported to amend the appellant's return for 2006-07 to include the revised figure of profit from the partnership. But that figure was £24,135 and the tax calculation for that year shows that the tax is £4,997.36 with the marginal rate being the basic rate. It follows that the gain of £106,911 is still chargeable wholly at 20% and not 40%, ie £21,382.20.

240. The question is can the Tribunal rescue the position and assume jurisdiction in order to rectify what seems to be an unjust position with the original assessment still standing and a second assessment imposing an incorrect and excessive amount of tax even if the original assessment does not stand? The position is made more complicated by that fact that Mr Gibbon made an application to the Tribunal to amend the grounds of appeal to include an appeal against what he clearly thought was the original 2011 assessment as amended. This however was on the basis that the calculation of the gain was incorrect not that the amount of tax charged was incorrect. Following HMRC's objection to this application, Mr Gibbon informed the Tribunal that he did not intend to pursue the application.

241. It seems to us that we cannot entertain an appeal against either or both of the CGT assessments. All we can do is to point out to HMRC and the appellant that the original assessment is still open and that they should agree under s 54 TMA that it should be reduced to nil, and that the October 2014 assessment is excessive and should be reduced to a 20% charge.

242. Finally there is the assessment on Mrs Choudhry for 2006-07. This added "profit from self employment" (*sic*) of £34,800, interest of £1,461 and "taxable capital (sic) gains" of £141,200 to the amount shown on the self assessment which were £16,366

"profit from partnerships" (*sic*). On 18 September 2014 Mr Lenegan sent an "amended further assessment" which removed the "income from self assessment" and the chargeable gains. The notice of assessment said that the amount previously charged was £68,266.16 (the amount on the original 2011 assessment), the amount charged by "this" assessment was £292.40 so that the "total amount now assessed was £202.40". The notice purported to give appeal rights to the appellant.

243. As with the further assessment on Mr Choudhry we find it difficult to see what is being done here and under what authority. The assessment of 30 March 2011 must have been made under s 29 TMA and would have had to have met one of the two conditions in s 29 TMA. Again nothing has been said by Mr Lenegan about the conditions. An appeal having been made, a s 29 assessment can, as we have said, only be amended in accordance with a provision of the Taxes Acts, which in such a case means either by an agreement under s 54 TMA or a determination of the tribunal, neither of which had happened. The amendment was made unilaterally, something which is not permitted. In our view the original 2011 s 29 assessment remains under appeal. In this case we think that it can be encompassed in the appeal made by Mr Gibbon. We therefore determine the assessment as shown in the purported amended further assessment.

Income Tax penalties - partnership: 2001-02 to 2007-08

244. For the years 2001-02 to 2007-08 inaccuracies in returns and accounts could be punished by penalties charged under Part 10 TMA. HMRC had in this case made determinations under s 100 TMA imposing penalties under s 95 TMA.

245. As we have noted Mr Nicholson said HMRC could not support the penalties charged under s 95 TMA, as they ought to have been determined under s 95A. We therefore quash them.

246. Mr Nicholson further said that HMRC would consider whether to raise penalty determinations under s 95A TMA, but this might depend on the outcome of the hearing. The Tribunal said that to assist it would indicate what its decision on penalties would have been had they been raised under s 95A TMA.

247. Given that we have decided that all the discovery amendments must be cancelled, the only relevant year is 2005-06, where there was an appeal against HMRC's amendment to the partnership return on the conclusion of the enquiry and the automatic consequent amendment to each of the appellant's tax return.

248. Section 95A(1) TMA, which gives the case where the section applies, read, before its repeal by Schedule 24 FA 2007:

> "*Incorrect partnership return or accounts*
>
> (1) This section applies where, in the case of a trade, profession or business carried on by two or more persons in partnership—
>
> (a) a partner (the representative partner)—
>
> (i) delivers an incorrect partnership return, or

(ii) makes any incorrect statement or declaration in connection with a partnership return, or

(iii) submits to an officer of the Board any incorrect accounts in connection with such a return, and

(b) either he does so fraudulently or negligently, or his doing so is attributable to fraudulent or negligent conduct on the part of a relevant partner."

249. The penalisable conduct alleged is the fraudulent delivery by Mr Choudhry, the representative partner, of an incorrect partnership return and the submission of incorrect accounts. HMRC have not suggested that the only other relevant partner's, Mrs Choudhry's, conduct was fraudulent. We add that although the word to describe the conduct in s 95A is "fraudulent" whereas in s 30B(6) TMA it is "deliberate", we do not consider that this makes any difference to our approach to what HMRC must show and certainly none to the burden of proof[12].

250. That being so it follows that, although we have found that the return and accounts were incorrect, we quash the s 95A penalty for the reasons we have given in relation to the partnership amendment for 2006-07, namely that Mr Choudhry did not deliberately bring about a loss of tax through incorrect accounts and so did not bring about a loss of tax fraudulently.

251. Had we been considering s 95A penalties for the other years we would have quashed them for the same reasons as we quashed the 2005-06 penalty, that there was no fraudulent conduct proved.

252. Section 95A does not provide for any conduct of a third party acting on behalf of the partner being penalisable.

Income Tax penalties - partnership: 2008-09 to 2011-12

253. For these years penalties have been assessed under Schedule 24 Finance Act 2007, at least on Mrs Choudhry. The only conduct penalisable is Mr Choudhry's[13] giving to HMRC an inaccurate partnership return or accounts and the inaccuracy is (here) deliberate on Mr Choudhry's part.

254. That being so it follows that the penalties must be cancelled because there are no deliberate inaccuracies on Mr Choudhry's part.

Income tax penalties: personal tax returns

255. Section 95 TMA penalties were determined on Mr Choudhry for 2006-07 in the sum of £25,636. This amount of tax on which this as based was £46,612 which is made

[12] And see fn 5.

[13] This is because the conduct concerned must be that of "P", and in this case P is the partner who delivered a return with inaccuracies and did so deliberately (paragraph 1(2)) Schedule 24. This contrasts with s 95A where the conduct may be that of any relevant partner. Nor is any conduct of a third party penalisable where deliberate conduct is involved – see paragraph 18 Schedule 24 (agency) which applies only to careless errors.

up of £5,730 from Mr Choudhry's share of the partnership trading profits and £40,882 CGT.

256. The penalty so far as relating to the partnership profits must be reduced to nil. But so far as it relates to CGT it is valid. In opening Mr Nicholson said that because he realised that the partnership penalties should have been determined under s 95A TMA HMRC could not support the penalties charged under s 95 TMA. We interpret him to confine his concession to the s 95 penalties that were imposed by reference to omitted partnership profits so that the appeal against the s 95 penalty for this year falls to be determined by us.

257. Mr Choudhry was asked why he did not return the gains at the meeting on 2 October 2012. His response was the he thought they had been included. Asked why he thought that, he said that Mr Silver dealt with everything. Mr Lenegan pointed out to him that he had signed the return and it was his responsibility to check it, to which Mr Choudhry again replied that he left it to Mr Silver.

258. In discussions with Mr Lenegan who had shown Mr Gibbon the invoices for work done on the properties concerned which Mr Choudhry had offered in explanation of a reduced or nil gain, Mr Gibbon agreed they were not credible as supposedly contemporary documents from many years ago.

259. The question under s 95 is whether the tax return was delivered "fraudulently or negligently". In our view it was negligent of him to sign a return with no chargeable gains on it, however much he relied on Mr Silver, and we consider the penalty was justified in principle. As to the amount HMRC have given a discount of 45%. A penalty of 55% may well have been appropriate for the fraudulent omission of partnership profits but for negligent conduct it is excessive. But the conduct is in our view aggravated by what seems to have been an attempt to produce a false document in support of an appeal. We consider that an appropriate level of penalty is 35%. It needs to be applied to the true level of CGT.

260. As to Mrs Choudhry's 2006-07 returns it appeared she omitted £1,461 of interest and that the s 95 penalty on her had included the tax on this in its calculation. We consider that a penalty is due on the appropriate amount of tax for negligent conduct in omitting it from the return, and that a suitable rate of penalty would be 15% of the tax found to be due as a result of this decision, which will be less than the 40% charged.

Discussion: VAT Assessments 02/02 to 08/13

HMRC's submissions

261. HMRC argue that all the assessments were made within the time limits in s 77 VATA and that in particular s 77(4) allowing for a 20 year limit applied for those outside the standard 4 year limit. These are valid because of the appellants (in this case the Choudhrys acting in partnership) deliberate conduct in not explaining to the satisfaction of HMRC the significant bank deposits, and because of further evidence which shows that the appellants deliberately under-declared the profits of the business to hide the level of sales. The appellants have, say HMRC, retained the VAT on the

suppressed sales and used it for his (*sic)* personal gain. Attempts to blame Mr Silver have not been backed up by evidence.

262. HMRC argue that the presumption of continuity applies to VAT: otherwise HMRC would be required to enquire into every single year.

263. As to penalties HMRC say that, as a result of the appellants' failure to declare the correct amount of VAT, penalties are due under Schedule 24 FA 2007 and under s 60 VATA. As to the latter where dishonesty must be shown by HMRC, they say that the appellants concealed their true liability to VAT by not declaring the true level of profit in their VAT returns and that was dishonest.

264. HMRC also ask the Tribunal to increase the VAT assessments under s 84(5) VATA. This is because, when the original assessments were revised in 2016 in response to Mr Gibbon's querying the basis of computation used, they were revised to figures that are too low. The amount should be increased from £70,896 to £152,387.38.

265. HMRC's skeleton and statement of case seeks to counter an argument from the appellants that the VAT assessment shown as for the period 00/00 was invalid. They say that there is sufficient detail in the documents associated with the assessment to show how the VAT had been allocated to periods.

266. The appellants did not in fact pursue the point is their skeleton, quite rightly in our view as we agree with HMRC on this.

The appellants' submissions

267. The appellants' argument in their skeleton is that assessments before 02/10 are invalid as being out of time, and are not rescued by s 77(4) and (4A) VATA as there was no deliberate conduct. They cite *Derbyshire Motors Ltd v HMRC* [2018] UKFTT 543 (TC) in support of the burden of proof being on HMRC to show that s 77(4) allows them to assess.

268. HMRC have produced evidence of deliberate conduct only for periods between 02/05 and 11/06 and part of 02/07. Because it is only part of 02/07 that period's assessment is invalid. Accordingly assessments for 02/02 to 11/04 and 05/07 to 11/09 are invalid.

269. Assessments for later periods up to 08/13 were not however made to best judgment and must be discharged (citing *van Boeckel v Commissioners of Customs and Excise* [1981] STC 290 per Woolf J). There was no material on which HMRC could base their assessment for these periods. As a second line of defence for 02/02 to 11/04 and 05/07 to 11/09 the appellants also say they were not made to best judgment as there was no material before HMRC on which they could be based.

270. They also say that the presumption of continuity plays no part in analysing the validity of VAT assessments.

271. As to the HMRC request to use the power in s 84(5) the appellants say that the Tribunal should not do so given that the original computation was extremely wrong (it

charged £363,832 originally) and that they exercised insufficient care when trying to correct the figure. There is no new evidence here.

Our decision

272. As well as the time limits in s 77(1) and (4) all assessments to VAT must be within the time limits in s 73(6) VATA, notwithstanding that they meet the time limit condition in s 77. Mr Gibbon did not raise this issue so far as we can see, but given that HMRC have the burden of proof for all assessments up to 11/09 and for all penalties, we consider the issue needs to be examined.

273. Section 77(6) allows HMRC to assess no later than the later of the period of two years from the end of the period concerned or one year after evidence of the facts, sufficient in the opinion of HMRC to justify the making of the assessment came to their knowledge.

274. Assessments were made on 17 January 2014 (say HMRC, though we have no direct evidence of this) for all quarters from 02/02 to 08/13. Accordingly periods 02/12 to 08/13 are within the two year limit as well as the four year limit in s 77(1) VATA. For all earlier periods it is necessary to check when the evidence of facts which did in fact justify the assessments came to HMRC's knowledge.

275. On 1 June 2012 Mr Lenegan, who up to then had been conducting a check into the income tax (and CGT) affairs of the appellants informed the appellants and Sadiya Hussain that enquiries were now going to be made into the VAT position under PN160 – civil investigation of fraud. We find that the impetus for this referral to VAT colleagues was the receipt by Mr Lenegan in January 2012 of the Bookers information.

276. On 2 October 2012 Ms Charnock and Mrs McMillan (with Mr Lenegan) met Mr Choudhry, his daughter and Sadiya Hussain at HMRC offices in Bolton. Mr Choudhry gave some facts to HMRC about the history of his business, the type of items sold, the opening hours and about the way takings are recorded. They were also told who worked in the shop and for what pay, about the age of the till and about fluctuations in trade. They were informed about the main suppliers including Bookers and that they were paid by cheque with some occasional purchases for own use.

277. On 7 February 2013 Mesdames Charnock and McMillan and Mr Lenegan met Mr Silver at his offices. The additional facts they obtained from him included that he had queried on one or two occasions whether he had received all purchase invoices from Mr Choudhry as the VAT seemed high, that he had completed the VAT returns and that Mr Choudhry had signed them without checking as he would not have understood them. HMRC took away VAT summaries and bank statements for some periods. HMRC informed Mr Silver that they would be approaching Bookers.

278. No further information was received from Mr Silver, the appellants or Sadiya Hussain before the assessments were made.

279. The calculations enclosed with the assessments and Mrs McMillan's witness statement show that they were based solely on the workings of Mr Lenegan which in

turn were based on the omitted purchases from Bookers provided in January 2012 and his schedules of other unexplained deposits.

280. It seems to us therefore that the evidence of facts justifying the assessment came into the hands of HMRC at the latest when Mr Lenegan obtained the Bookers details in January 2012. Even though he was not investigating VAT at the time, he was an officer of "the Commissioners" ie HMRC. And if Mr Lenegan is not in fact the appropriate person, then the Bookers and deposits information came to Ms Charnock's attention in June 2012 which is still more than one year before the date of the making of the assessments. We can see no facts obtained by HMRC from the appellants or Mr Silver that entered into Mrs McMillan's thought processes when she made the assessments, and her witness statement does not refer to anything she did between the Silver meeting and making the assessments or that she considered anything other than the Lenegan figures and workings when making them.

281. Even more telling in our view is what was said at the meeting with Mr Silver about the intention to obtain figures from Bookers for other periods, an intention which was never carried out before the assessments were made.

282. Accordingly we find that the assessments for 02/02 to 11/11 are out of time under s 73(6) VATA and are invalid.

283. We then still need to consider the assessments for 02/12 to 08/13, and whether they were made to the best of Mrs McMillan's judgment. The Bookers details are, for the reasons we have set out in relation to the partnership returns and statements, material on which Mrs McMillan could reasonably come to the conclusion that a net understatement of VAT had been discovered for the VAT periods 02/05 to 05/06 inclusive. We have also considered whether she could reasonably have come to the view that the unexplained deposits in excess of the aggregate of the returned and omitted turnover figures could represent further omitted turnover. In our view the admission by Mr Lenegan that his workings showed an unrealistic profit level should have been taken into account by Mrs McMillan, and that she would not have been justified in making the assessments if there had been no Bookers information.

284. But the reason we do not think that these or any other VAT assessments were made to Mrs McMillan's best judgement is the obvious and enormous error in making them, in not giving any credit for VAT already paid in the normal course of making quarterly VAT returns. It should not have needed the appellants' specialist representatives to point out the error.

285. We add that, even if we ignore the error of failing to credit VAT already paid, we would have been inclined to accept Mr Gibbon's arguments that there was no factual material on which Mrs McMillan could have made a best judgment assessment for VAT periods 02/02 to 11/04 and 08/06 to 08/13.

286. As a consequence we do not need to address HMRC's request under s 84(5) VATA. We are inclined to the view that it would not have been appropriate for us to

have given a direction in view of the large and egregious errors in making the original assessments and then amending them.

Discussion: VAT Penalties 02/02 to 08/13

287. In our view the penalties under Schedule 24 FA 2007 cannot stand, as there is no PLR. By virtue of paragraph 5(1) Schedule 24, PLR is the "additional amount due or payable in respect of tax as a result of correcting the inaccuracy", and under s 73(1) VAT is "assessed as due from" the person, so if there is no valid assessment nothing is due by way of VAT. But in case we are wrong, we say that for the reasons we gave in relation to Schedule 24 penalties for income tax, we would have quashed the penalties.

288. But the fact that we have not upheld the validity of any of the VAT assessments does not in our view necessarily affect the penalties charged under s 60 VATA for periods up to 02/09 or for 11/10. This is because the penalty is a maximum of the amount of VAT evaded *or sought to be evaded*, and that is not a question which we needed to consider in relation to the assessments.

289. There is a preliminary point in relation to s 60 VATA. The section refers to a person's conduct and that person's liability to a penalty: who in this case is that person? The answer is given by *Gul-Nawaz Khan Akbar and others t/a Mumtaz Paan House v Commissioners of Customs and Excise* (VAT Decision 15386) where it was held (by Mr A W Simpson, Chairman) that a penalty assessment can be validly made against several persons together who constitute a partnership, whether or not dishonest conduct is alleged to have been that of all of the persons acting together. This is relevant as it seems from HMRC's skeleton and statement of case that it is Mr Choudhry alone who is alleged to be dishonest. We accept that any lack of dishonesty by Mrs Choudhry cannot affect the penalty if Mr Choudhry was dishonest.

290. But for the same reasons as we gave in relation to Mr Choudhry's conduct for the purposes of s 95 and s 95A TMA we do not consider that HMRC, on whom the burden of proof is explicitly placed by s 60(6) VATA, have shown that Mr Choudhry was dishonest or knowingly sought to evade VAT.

Discussion: VAT Penalty 11/10

291. This penalty was one which HMRC said had "been removed from Schedule 24(2) to Section 60 as a deliberate penalty under Section 13(4)", and that amended paperwork may be received showing the change in penalty for period 11/10. Paragraph 2 Schedule 24 FA 2007 (if that is what is meant) penalises unnotified under-assessments by HMRC. We have no idea what Act "Section 13(4)" is a section of, or why it might be needed to justify a penalty under s 60. The only relevant documents we can find are the second and third pages of a letter from Mrs McMillan saying it is a penalty assessment made under s 76(1) VATA. The tax liable to a penalty is £1,444 and the penalty is £938 (65%). There is also a separate notice of assessment of this penalty dated 24 July 2015 which shows the date of issue as 14 July 2014. The penalty code is "09" (the code for "Tax evasion conduct involving dishonesty"), the "default dates" are shown as from 01/09/10 to 30/11/10 which is said to be 1,292 days (it is in fact 91 days).

292. It cannot be a coincidence that a notice of assessment of a default surcharge was issued on 7 February 2014 for the same period 11/10 increasing the surcharge by £144.40 and that in the meeting with Mr Silver in February 2013 HMRC pointed out that no return had been made for that quarter. In the schedule of VAT assessments, the assessment for 11/10, unlike all the other quarters and periods, is shown as "Additional Assessment" of £1,444. This implies that there was a "central assessment" made in the absence of a return and a default surcharge based on that failure.

293. To seek to impose a s 60 VATA penalty for this quarter it must be shown by HMRC that the saving for s 60, which was otherwise repealed by Schedule 24 FA 2007 long before the 11/10 quarter, still applied. There is no hint in the statement of case that HMRC have sought to do so. Section 60 was saved by article 4 of the Finance Act 2007, Schedule 24 (Commencement and Transitional Provisions) Order 2008 (SI 2008/568) (C. 20) which says:

> "Notwithstanding paragraph 29(d) (consequential amendments), sections 60 and 61 of the Value Added Tax Act 1994 (VAT evasion) shall continue to have effect with respect to conduct involving dishonesty which does not relate to an inaccuracy in a document or a failure to notify HMRC of an under-assessment by HMRC."

294. Where a central assessment is issued which is too low, as happened in this case, there was a failure to notify HMRC of an under-assessment, at least if the subsequent additional VAT assessment had been valid. But by virtue of the saving provision in art 4 of SI 2008/568 it follows that even if the further VAT assessment had been valid, the penalty could not have stood, as s 60 VATA had been repealed in relation to the conduct in question.

Decisions

295. We bring together all our decisions here.

296. Under s 50(6)(b) TMA (including as applied and modified by paragraph 9 of Schedule 2 to the Social Security Contributions and Benefits Act 1992 ("SSCBA")) we decide that the amounts contained in the partnership statement for 2005-06 (as amended under s 28B TMA) are excessive and are reduced to £44,629 (£16,906 as returned plus £27,363 the additional profits). Under s 28B(4) TMA the partners returns are to be automatically amended to reflect this reduction.

297. Under s 50(6)(b) TMA (including as applied and modified by paragraph 9 of Schedule 2 to the Social Security Contributions and Benefits Act 1992 ("SSCBA")) we decide that the amounts contained in the partnership statements for 2001-02 to 2004-05 and 2006-07 to 2011-12 (as amended under s 30B TMA) are excessive and are reduced to nil. Under s 28B(4) TMA the partners returns are to be automatically amended to reflect this reduction.

298. Under s 50(6)(c) TMA (including as applied and modified by paragraph 9 of Schedule 2 to the Social Security Contributions and Benefits Act 1992 ("SSCBA")) we decide that Mr Choudhry was overcharged by an assessment which is not a self-assessments for 2005-06 and the assessment is reduced to nil.

299. Under s 50(6)(c) and (8) TMA (including as applied and modified by paragraph 9 of Schedule 2 to the Social Security Contributions and Benefits Act 1992 ("SSCBA")) we decide that Mr Choudhry was overcharged by an assessment which is not a self-assessment for 2006-07 and the assessment is reduced to be on an amount of chargeable gains of £106,911.

300. Under s 50(6)(c) and (8) TMA (including as applied and modified by paragraph 9 of Schedule 2 to the Social Security Contributions and Benefits Act 1992 ("SSCBA")) we decide that Mrs Choudhry was overcharged by an assessment which is not a self-assessment for 2006-07 and the assessment is reduced to be on an amount of interest of £1,461.

301. Under s 100B(2)(b)(i) TMA we decide that no penalties under s 95 TMA have been incurred by Mr Choudhry for 2001-02 to 2005-06 or for 2007-08 and we set them aside.

302. Under s 100B(2)(b)(ii) TMA we decide that a penalty under s 95 TMA has been incurred by Mrs Choudhry for 2006-07 but is varied to be at a rate of 15% on the income tax on interest of £1,461 found to be due as a result of our decision in §300.

303. Under s 100B(2)(b)(ii) TMA we decide that a penalty under s 95 TMA has been incurred by Mr Choudhry for 2006-07 but is varied to be at a rate of 35% on the amount of CGT found to be due as a result of our decision in §299.

304. Under paragraph 17(1) of Schedule 24 to the Finance Act 2007 we cancel HMRC's decision to assess penalties on Mr Choudhry for 2008-09 to 2011-12 for inaccuracies in the partnership statements.

305. Under paragraph 17(1) of Schedule 24 to the Finance Act 2007 we cancel HMRC's decision to assess penalties on Mrs Choudhry for 2008-09 to 2011-12 for inaccuracies in the partnership statements.

306. We cancel all VAT assessments for the periods 02/02 to 08/13 inclusive.

307. We cancel all penalties under s 60 VATA for periods 02/02 to 02/09 inclusive and for 11/10.

308. Under paragraph 17(1) of Schedule 24 to the Finance Act 2007 we cancel HMRC's decision to assess penalties for inaccuracies in VAT returns for 05/09 to 08/13.

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

accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 16 JANUARY 2019

APPENDIX

Jonas v Bamford

310. In *Jonas* the stated case shows that:

(1) The enquiry into the affairs of Mr Jonas was started in 1962 by his local Inspector of Taxes and was directed at finding an explanation for apparent increases in Mr Jonas's wealth which could not be explained by his declared income from his company Baker Sportwear Ltd.

(2) The investigation was into the years 1956 to 1961 and was transferred to the Enquiry Branch of the Inland Revenue, an elite investigation unit. Estimated further assessments were made for the years 1958-59 to 1961-62 (all in time) and in 1969 leave was obtained from a General Commissioner for the Division of the City of London to make an out of time assessment for 1957-58.

(3) On 10 August 1967 the Inspector asked for information for subsequent years up to 1967. On legal advice Mr. Jonas declined to give any information for those years, and further assessments for 1962-63, 1963-64 and 1964-65 were made in the sum of £5,000 each year.

(4) At the hearing of appeals against all these assessments before the Special Commissioners in 1972 the Inland Revenue put in evidence a schedule prepared by Mr. Geoffrey Spencer of Enquiry Branch relating to Mr. Jonas's financial position for the six years ended 31 August 1955 to 1961, with five pages of supporting statements.

(5) The explanations offered of the increase in Mr. Jonas's wealth in the six years to 31 August 1961 (apart from a variety of matters which, after evidence had been adduced at the hearing, were accepted by the Crown) were: (a) cash wedding presents; (b) gifts from Mrs. Sarah Jonas, Mr. Jonas's mother; (c) gains from betting on racehorses; (d) amounts of disbursements on general living expenses and personal expenditure, which was a material matter in dispute because they entered into the calculation of the amounts to be explained; (e) certain small sums paid to jockeys.

311. The submission made by Marcus Jones[14] for Mr Jonas included:

(1) that the Special Commissioners should accept the explanations or possible explanations of the amounts in dispute as shown, and, in particular, that they should accept that Mr. Jonas could reasonably have made betting gains;

(2) that there was no loss of income tax during the year 1957-58 which was attributable to wilful default and which justified the making of assessments under the proviso to s. 47(1) of the Income Tax Act 1952.

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[14] It may not be entirely fanciful to suggest that the presence of Marcus Jones, a barrister who specialized in taking cases such as these before the bodies of Commissioners and thence the courts, in this and other cases may have caused the judges to be less sympathetic to his clients and more sympathetic to the Inland Revenue that would otherwise be the case.

312. The decision of the Special Commissioners included

> "Before going on to say what we have to say about betting and living expenses, we wish to deal with the year 1957-58, this being one of the years in which the Crown have to show 'wilful default'. The amount to be explained is £6,563, but this is arrived at after bringing in a betting loss of £1,747 - a sum calculated on the scanty information Mr. Spencer had produced to him and a little more produced at the hearing. Assuming Mr. Jonas broke even on his betting in that year, we would find the following results: by excluding the betting loss of £1,747, the amount to be explained is reduced to £4,816.
>
> This is explained by gifts of £3,900 from Mr. Jonas's mother and £1,000 wedding gifts, making £4,900 in all - there is thus a margin of £84 which could have been betting losses or extra living expenses. In view of what we have to say later about betting, this seems to us reasonable, and accordingly we find (and so far as it is a matter of law, we hold) that wilful default has not been established as regards 1957-58, and the assessments for the year cannot stand. We would add, as regards this, that Mr. Jonas did, he says, borrow from his brothers in July 1956; this has been repaid and he must have found the money to repay it from somewhere, but we do not know when; it could have been in 1956 or 1958 - all we can say is that it has not been established that he repaid it in the year to August 1957."
>
> With 1957-58 out of the way, we can consider the following years up to and including 1961-62. As regards these years, it is for Mr. Jonas to discharge the onus on him to show that the assessments are incorrect. He has not done so. We have accepted, so far, £600 received from his mother in 1958, which makes only a small inroad in the amount to be explained for this year. The rest (apart from some small items) he attempts to explain by over-statement of living expenses and by betting gains.

313. After considering in depth the explanations for 1958-59 to 1961-62, they said:

> "For the years 1962-63, 1963-64 and 1964-65 he has chosen not to offer any evidence whatsoever of his personal affairs, beyond stating that he had no sources of income other than betting and his remuneration shown in the accounts of Baker Sportswear which was covered by the first assessments to which those under appeal are additional.
>
> The evidence was that the auditor gave a clear certificate to such accounts, but the accounts themselves were not produced to us and we have not seen them. In all the circumstances we cannot say he has discharged the onus on him to displace the assessments for these later years, and we find he has not."

314. And their final conclusion was:

> "The conclusion we have reached is that we should confirm the income tax assessments for all years, other than that for 1957-58 which we discharge. We were asked by the Crown to increase those up to and including 1961-62 to the amounts requiring explanation. We have given

> careful consideration to this. To do so we would have to be positively satisfied that (for example) £2,917 was in fact the correct figure for 1959-60; in view of all the uncertainties surrounding the matter we are not so satisfied as regards any year, and further-more in view of all the circumstances (so far as we know them) we feel that substantial justice would be done to both sides if we confirm them."

315. Appeals by the appellant were heard by Walton J in 1973. In his judgment he said:

> "This is an appeal by the taxpayer against seven additional assessments under Schedule E in respect of remuneration alleged to have been obtained by him from a company known as Baker Sportswear Ltd. ('Baker'). There were originally eight such assessments, running from the fiscal year 1957-58 to 1964-65 inclusive; but the first was out of time and was discharged by the Special Commissioners on the ground of there being no fraud or wilful default on Mr. Jonas's part in respect of that fiscal year, as demonstrated by the fact that it could not be shown that his capital worth had increased during that year to an extent not explicable by his declared remuneration and other sources or wealth.
>
> …
>
> The Revenue authorities discovered that Mr. Jonas was living above his ostensible income and commenced an inquiry into his affairs accordingly. He produced a great deal of evidence in relation to the years 1957-58 to 1961-62 inclusive, but he has consistently refused to produce any evidence in relation to the last three years of assessment, 1962-63 to 1964-65 inclusive. The result of this investigation was that the Revenue became convinced that Mr. Jonas had a source of revenue which had not been disclosed to them. Mr. Jonas said that indeed he had: he made considerable gains on betting, and this was the explanation of his otherwise inexplicable increase in wealth. The Revenue were not convinced, and made the additional assessments accordingly."

316. And finally the paragraph including the passage which is always quoted from, and indeed was included in HMRC's skeleton (and Mr Gibbon's for that matter), which we have italicised:

> "It is convenient at this stage to notice that Mr. Jones said that a fortiori in connection with the three financial years 1962-63, 1963-64 and 1964-65 (being the years in relation to which Mr. Jonas has, on advice, refused to give the Inspector of Taxes any information) there was (a) no discovery by the Inspector and (b) no evidence of any unexplained intake of moneys by Mr. Jonas. *But, so far as the discovery point is concerned, once the Inspector comes to the conclusion that, on the facts which he has discovered, Mr. Jonas has additional income beyond that which he has so far declared to the Inspector, then the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly on the taxpayer.*"

Nicholson v Morris

317. The inspector put in evidence to the General Commissioners for the Division of Cavendish records obtained from the executors of a barrister, Mr P J Brennan, including a private ledger showing fees paid to the appellant between 1954 and 1961.

318. The appellant did not give evidence but in the course of cross-examining Mr Morris, the inspector:

> "he made statements of fact and produced and relied upon an account book (exhibit 26) which was neither admitted nor proved before us; and in so far as these oral statements and the statements contained in the account book were relevant we treated them as evidence consisting of admissions by words or conduct made by a party against his own interest in our presence."

319. The inspector found discrepancies between the figures in Mr Brennan's records and those in the appellant's returns. These discrepancies related to years between 1995 and 1961, but the Commissioners record:

> "This led the Inspector to infer that the understatements might have followed a previously existing course of conduct. Accordingly further assessments had been raised in respect of years back to 1946-47."

320. The inspector argued:

> "that in the absence of satisfactory explanation it was open to the Commissioners to draw the inference that in the case of all years the Appellant had been guilty of fraud or wilful default, or alternatively in the case of the years 1955-56 to 1960-61 he had been guilty of neglect;
>
> that the Commissioners were entitled to conclude that the discrepancies were not just isolated instances but were part of a course of conduct which started when the Appellant commenced as a barrister's clerk in 1946: *Rosette Franks (King Street) Ltd. v Dick* (1955) 36 TC 100."

321. The appellant argued

> "that there were no grounds for believing that tax might have been lost for the years 1946-47 to 1960-61 and no evidence was put before the tribunal by either the Crown or the Appellant for the years prior to 1955-56;
>
> that the Crown had failed to discharge the onus of showing that there bad been fraud or wilful default in respect of the years 1946-47 to 1954-55"

322. The Commissioners found as established the discrepancies between Mr Brennan's ledger and the appellant's returns and that:

> "The Appellant did not return any details of fees for the year 1960-61 in respect of Mr. Bruce Laughland, Mr. Aubrey Fletcher, Mr. David Jackson and Mr. P. J. Brennan.

> The Appellant did not comply with the request of Mr. Morris to supply details of his private assets, income and expenditure."

323. Their decision was that the Appellant committed fraud or wilful default in respect of all the years.

324. On appeal to the Chancery Division Walton J said:

> "The second point is really, I think, the nub of the matter. They found that Mr. Nicholson was guilty of fraud or wilful default, not merely for the years during which Mr. Brennan was in his chambers but for all the years under appeal, going right back to the year 1946-47. At this point I have to remind myself that my jurisdiction is confined solely to questions of law. The Taxes Management Act 1970, s. 56(6), says:
>
> > 'The High Court shall hear and determine any question or questions of law arising on the case, and shall reverse, affirm or amend the determination in respect of which the case has been stated, or shall remit the matter to the Commissioners',
>
> and so on; so my functions are limited to determining 'any question or questions of law arising on the case'. Of course, again, that does not exclude, if one applies the *Edwards v Bairstow* test, my coming to the conclusion that, on the facts which they have found, the conclusion reached by the General Commissioners is one which contradicts their very findings of fact. I confess that it might very well be that if I had been in the shoes of the General Commissioners I should not have felt it right to draw the inference which they have drawn - that the Appellant was guilty of fraud or wilful default for all the years under appeal - but I very much regret that I am not at liberty to substitute the conclusion which I think I would have drawn for the conclusion which the General Commissioners have in fact drawn unless I can say that that conclusion contradicts the evidence in front of them; and the unfortunate thing which again I come back to is that, since Mr. Nicholson gave no shred of evidence in front of the Commissioners, by his own neglect he placed the Commissioners in a situation which was really an impossible one so far as they were concerned. What conclusion is one to draw from the fact that there is in front of one absolutely unchallenged evidence (because it comes from the Appellant's own books) that some of his returns, at any rate, were incorrect, and that those returns were incorrect when he had the right book, in his own possession, in front of him?
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> In *Rosette Franks (King Street) Ltd. v Dick* (1955) 36 TC 100 Danckwerts J. came to the conclusion that he could not upset the Commissioners in relation to assessments for the years 1941-42 to 1952-53 inclusive when they had found that the only thing that was wrong with the accounts of the company so far as they knew was just one sale which quite clearly had not gone through the books. It seems to me that that is a very strong case to show that it is open to the General Commissioners, if they take that view, to find that merely one instance of wilful default or fraud can colour the whole period of the tax operations of the taxpayer. Here, of course, it is not merely just one year but a number of years which are clearly wrong; and, further, a number of additional years which look as if they are wrong as well in the light

of Mr. Brennan's ledger. So although, as I say, I might very well not myself have come to the same conclusion as the General Commissioners, since they have come to the conclusion that Mr. Nicholson was guilty of fraud or wilful default for all the years under appeal I regret that I cannot possibly differ from them. If only Mr. Nicholson had gone into the box and explained, as may very well be the case, that all this happened whilst and because Mr. Brennan was in chambers - not because, of course, of anything personal to Mr. Brennan but because of the methods by which he conducted his practice and the disruption to chambers which some of those methods involved - that might have been one thing, and I dare say the General Commissioners would have been very glad to have come to a more limited decision; but in the total absence of any such evidence which could so easily have been given I regret that I cannot possibly differ, as a matter of law, from the findings of the Commissioners."

325. The Court of Appeal had fewer misgivings than Walton J exhibited. Orr LJ said:

"As to the main issue, in my judgment, Walton J. was entirely right in holding that it was not open to him, consistently with the test laid down in *Edwards v Bairstow* to reject the Commissioners' contentions as to fraud or wilful default, or the figures of assessment at which they arrived. I would only add that, in all the circumstances of the case, I, for my part, am in no way surprised that the Commissioners, having found striking discrepancies in the figures for certain years, were prepared to infer that there had been fraud or wilful default in all the years going back to 1946. If they were satisfied, as they were, that there had been fraud or wilful default from 1955, when Mr. Brennan joined the chambers, it must either have begun then or begun at an earlier date, and they were fully entitled, in my judgment, to infer that it had been going on since 1946. I would only add that, on the issue of fraud or wilful default, the facts of the present case seem to me to be considerably stronger against the taxpayer than those in the case of *Rosette Franks (King Street) Ltd. v Dick* (1955) 36 TC 100, to which Walton J. referred, and in which Danckwerts J. refused to interfere with the determination of the Commissioners. "

326. Goff LJ said

"As to the second limb, in my judgment, and with respect, I do not wholly share Walton J.'s doubts. Although there was no direct evidence to show non-disclosure in earlier years, the Commissioners were fully entitled to draw the inference that this was not something which went on only during Mr. Brennan's time, but was a continuing course of conduct on Mr. Nicholson's part which had begun earlier and persisted throughout the years in question. I think I would have arrived at the same conclusion as they did. But, as the learned Judge pointed out, the question is whether there was evidence on which they could reach that conclusion, and as to that he had no doubt. Neither have I.

Rosette Franks (King Street) Ltd. v Dick (1955) 36 TC 100 to which Walton J. refers, fully supports this view. Mr. Nicholson has argued that that was a very different case, and much stronger against the taxpayer

because it had actually been caught out in a false transaction. I do not agree with that submission. In my view the present case is much stronger because of the many years of unexplained under disclosures."

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