[2019] UKFTT 564 (TC)

TC07358

Appeal number: TC/2017/06951

INCOME TAX – whether the Appellant was trading commercially with a view to profit – no – whether the Appellant was entitled to trade loss relief – no – whether the Appellant acted deliberately – yes – assessments confirmed – penalties confirmed – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVID CLIFF **Appellant**

- and -

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

TRIBUNAL: JUDGE JANE BAILEY
MR MOHAMMED FAROOQ

Sitting in public at Taylor House, London on 5 December 2018

Mr Dave Morrison for the Appellant

Ms Gill Clissold for the Respondents

DECISION

Introduction

1. This appeal, filed with the Tribunal on 9 October 2017, was against a review decision dated 17 August 2017, upholding discovery assessments raised to recover income tax said to have been underpaid for the years 2007/08, 2009/10, 2010/11 and 2011/12, a closure notice for 2012/13, and related inaccuracy penalties for the years 2009/10, 2010/11, 2011/12 and 2012/13.

2. The Appellant's appeal is made on the basis that he was entitled to loss relief under Section 64 Income Tax Act 2007 for the years in dispute. The Appellant argues that he carried on a trade on a commercial basis with a view to profit. The Appellant denies that he is liable to penalties as his claims for trade loss relief were made in good faith and not to seek an illegitimate advantage.

3. The Respondents subsequently set aside the discovery assessment for 2007/08. Only the years 2009/10 to 2012/13 inclusive remain in dispute.

Preliminary issue - whether the Appellant's appeal should be admitted late

4. The decision appealed against is contained in a letter dated 17 August 2017. The Appellant attempted to appeal to the Tribunal on 5 September 2017 but he did not include a copy of the decision appealed against. This incomplete appeal did not meet the requirements of Rule 20 of the Tribunal Procedure Rules, and so the Tribunal returned the appeal form to the Appellant.

5. The Appellant filed a complete appeal with the Tribunal on 9 October 2017. As the statutory deadline for the Tribunal to receive an appeal is 30 days from the date of the decision appealed against, and the Appellant's appeal was received outside that time, the first decision we must make is whether to grant the Appellant an extension of time to appeal to this Tribunal.

6. In this case the deadline for an in-time appeal to be received was 16 September 2017. The complete appeal was received on 9 October 2017 and so is 23 days late. In the context of a 30 days' time limit, delay of 23 days is "serious" but not "significant". The Appellant has explained that he omitted the decision letter due to his misunderstanding of the requirements. The Respondents have not objected to the Appellant's lateness.

7. Although extensions of time should be granted only exceptionally, and we would expect the Appellant (who practices as a tax consultant) to be aware of the rules, the delay is relatively minor and the Appellant acted promptly once he was aware of his mistake. We bear in mind the guidance in *Martland v HMRC* [2018] UKUT 178 (TCC). As the Respondents do not object, we have decided that it would be appropriate in this case to grant the Appellant an extension of time. Therefore, we admit the appeal out of time.

Issues to be determined in this appeal

8. There are a number of issues raised by the parties for determination in this appeal. We have grouped these issues into the following overall issues, as set out below:

- Whether the Respondents have met the requirements of Section 29 Taxes Management Act 1970 ("TMA 1970") for each of the discovery assessments under appeal before us;

- Whether the Appellant's activities as a "dealer in thoroughbreds" constitutes trading commercially with a view to a profit;

- Whether the Respondents have met the requirements of Schedule 24 to the Finance Act 2007 to issue a penalty to the Appellant for the years 2009/10, 2010/11, 2011/12 and 2012/13; and

- Whether the Appellant has a reasonable excuse which would exculpate him from that penalty.

9. We set out the various sub-issues, and the parties' submissions, in our discussion below.

Findings of fact

10. The Appellant was present at the hearing before us but chose not to give evidence and be cross-examined. Therefore, the only evidence before us was that contained in the two bundles of documents before us.

11. Directions had been issued by the Tribunal to instruct the parties to prepare the appeal for hearing. These included the direction that both parties should provide a list of relevant documents. Despite chasing by the Tribunal, the Appellant had not complied with that direction, and so the Respondents had prepared the hearing bundle on the basis of their list. About six days before the hearing, the Appellant's agent had sent a further bundle to the Respondents. There was considerable overlap with the bundle prepared by the Respondents. A copy of this bundle was brought for the use of the Tribunal on the day of the hearing. The Respondents did not object to the admittance of this material.

12. On the basis of the two bundles of documents before us, we find as follows:

<u>The period 2007/08 to 2012/13</u>

a) In the tax years 2007/08 to 2012/13 inclusive, the Appellant was self-employed as a tax consultant, offering his services to racehorse trainers, jockeys, breeders and others in the equine industry.

b) In addition to his tax consultancy, during these tax years the Appellant considered himself to be self employed as a "dealer in thoroughbreds". This was the term used by the Appellant to describe his purchase of shares in racehorses and in horse racing partnerships.

c) The Appellant took the view that although he had purchased shares in racehorses and/or horse racing partnerships prior to 1 January 2008, it was from 1 January 2008 that he believed he had sufficient expertise and experience to turn his activity into a commercial venture. The Appellant did not draw up a business plan or profit forecasts to assist him but simply relied on his previous experience. The Appellant told the Respondents that he had decided to stop treating his activity as a commercial venture as at 31 December 2012, after he had incurred losses of approximately £160,000 over the preceding five years.

d) There is extremely limited evidence before us as to the Appellant's purchases or sales in any period before or after 1 January 2008 to 31 January 2012, and so we make no findings as to what occurred in any other period.

e) The Appellant told the Respondents that his place of business for his dealing in thoroughbreds in 2008 to 2012 was the office, in Chelsea, from where he operated as a tax consultant. From an unknown date until 31 July 2012, the Appellant was registered for VAT jointly with Venetia Williams, a well-known racehorse trainer.

f) From the Appellant's correspondence and the Respondents' notes of the meeting of 17 May 2017, we find that the horses concerned were invariably trained at their trainers' yards by people other than the Appellant, and that it was the trainers alone who decided how the horses were trained, when the horses would race and who would ride the horses.

g) The Appellant also told the Respondents in correspondence that "in most cases" he decided in which horses to invest and when to sell his share. This was not further explained so we do not know under what circumstances someone other than the Appellant was involved in the decision to purchase or sell a share.

h) During the Respondents' enquiry the Appellant prepared a Schedule entitled "Schedule of Shares in racehorses purchased and sold January 2008 – December 2012". This Schedule showed that over the period 1 January 2008 to 31 December 2012, he had bought and sold shares in ten racehorses. In these ten instances the Appellant's purchase was of either a share in a racing partnership or a part share of a racehorse, but it was not possible to tell which of the two from the Schedule.

i) In the Respondents' bundle were copies of three syndicate agreements, all relating to relationships with Highclere Thoroughbred Racing Limited ("Highclere").

j) The first agreement was headed "The Zaminder Syndicate" and related to the acquisition of a share in the "Zaminder Racing Partnership". We note that Zaminder is not listed as one of the horses bought by the Appellant in his Schedule. The Respondents' notes of the meeting which took place on 16 May 2017 record the Appellant as stating that a share in Zaminder was purchased prior to the Appellant's decision to treat his acquisitions and sales as a commercial venture. Zaminder is recorded as being a two-year-old in May 2010, and so we do not accept that a share in a racing partnership relating to Zaminder could have been purchased prior to 1 January 2008.

k) We find that under the Zaminder Syndicate agreement, dated 27 May 2010, the Appellant bought one of 20 shares in the Zaminder Racing Partnership for £4,950 plus VAT. The agreement noted that the Zaminder Racing Partnership had agreed to lease a horse from Highclere, which would then race under Highclere's colours. Under this agreement, the partnership's two nominated partners (Highclere and Highclere Nominated Partner Limited) had the sole discretion to make all decisions relating to the management and training of Zaminder, and the time and method of sale. It was anticipated that the horse would be sold by 31 December 2012. The agreement noted the expectation that the partnership would be registered for VAT and that each shareowner would receive a full refund of the VAT paid if the horse was trained in England.

l) The Appellant's only rights as a shareholder under this agreement were to receive updates, view Zaminder, attend race meetings at which Zaminder was racing and to participate rateably in the net proceeds of sale of the horse, after the deduction of specified costs and expenses. Clause 10 of the agreement stated:

> Each Share Owner acknowledges that participation in the partnership is for the purpose of sharing in the enjoyment of the Horses and not for investment.

m) The second agreement in the Respondents' bundle was headed "The Inetrobil Syndicate" and was dated 6 June 2011. The terms of this agreement were very similar to the Zaminder agreement. Highclere owned 51% of Inetrobil and the price of each share was £5,950 plus VAT. It was anticipated that the horse would be sold by 31 December 2013. The agreement records that the Appellant bought one share out of 20 shares in the partnership. Inetrobil was one of the horses which the Appellant had listed on his schedule of shares bought in racehorses, and that schedule shows that the Appellant sold his share by the end of 2011. Clause 10 was the same as for the Zaminder Syndicate save that it referred to "the Horse" (rather than Horses).

n) The third agreement before us was headed "The Tuscan Gold Syndicate" and was dated 3 November 2011. The terms were again very similar. Highclere owned Tuscan Gold outright and the price of one share was £5,950 plus VAT. It was anticipated that the horse would be sold by 31 December 2014. The agreement records that the Appellant bought one share out of 20 shares in the partnership. Tuscan Gold is one of the horses listed on the Appellant's schedule of shares bought in racehorses, and that schedule shows that the Appellant sold his share by the end of 2012. Clause 10 was the same as for the Inetrobil Syndicate.

o) Although we were not provided with copies of ownership agreements where the Appellant directly owned a share in a horse, from the Respondents' notes of the meeting which took place on 16 May 2017, we find that the Appellant showed the Respondents a document showing that he had owned 95% of a horse named Erzen. The Appellant's schedule shows that the Appellant's share in Erzen was purchased in 2010 and sold in 2011.

p) The Appellant also showed the Respondents a document showing that he had owned 75% of a horse named Amigayle. The Appellant's schedule shows that the Appellant's share in Amigayle was both purchased and sold in 2012.

The Appellant's tax returns

q) On unknown dates the Appellant filed his tax returns for 2007/08 and 2008/09. In February 2010, an HMRC officer in Salford accepted that the Appellant's claim for losses arising from the Appellant's racehorse purchases and sales were mathematically correct, and had allowed the Appellant's claim for losses. There is no evidence before us that the Appellant filed accounts with either of these tax returns. On the basis of the entries in his later returns, on the balance of probabilities we find that in both of these returns the Appellant described his activity as being "dealer in thoroughbreds" and provided no other information except for the figures entered into the relevant boxes in his returns.

r) On 16 September 2010, the Appellant filed his tax return for 2009/10. In this return, in addition to his tax consultancy, the Appellant filed business pages describing himself as a "dealer in thoroughbreds". No further information was provided save for the figures in the boxes of the pages of the return. In 2009/10, the Appellant claimed a loss from this activity of £26,867.

s) On 28 January 2011, the Appellant filed his tax return for 2010/11; on 28 January 2013, the Appellant filed his tax return for 2011/12; and on 18 October 2013, the Appellant filed his tax return for 2012/13. As with 2009/10, in each of these returns the Appellant described himself as a "dealer in thoroughbreds". In each of these years the Appellant incurred a loss from this activity which he claimed to set against his other income. Those losses claimed are £31,617 in 2010/11, £41,326 in 2011/12 and £30,995 in 2012/13.

The chronology of the enquiry

t) By letter dated 1 August 2014, the Respondents opened an enquiry into the Appellant's tax return for the year 2012/13. Mr Robertson, the officer conducting the enquiry, explained that he would be checking into the losses made by the Appellant in his dealing in "thoroughbred horses". As part of his enquiry, Mr Robertson asked to see:

- the Appellant's accounts for the period 1 April 2011 to 31 December 2012 (the date of cessation of this activity), accompanied by income tax computations and a detailed analysis of the cost of goods amounting to £82,943;

- a brief history or description of the dealing from commencement on 1 January 2008 to cessation, with details of where the business operated, how it was advertised, the Appellant's previous experience of involvement in the industry, and confirmation that there had been a necessary adjustment for stable rent, feed costs, vet fees and other expenses if horses were owned outside the business; and

- the Appellant's comments on the commerciality of his business, including provision of his business plan or details of his future profit projections.

u) By a letter in response to Mr Robertson dated 28 August 2014, the Appellant stated that his activity consisted of:

> …the purchase of shares in racehorses, the racing thereof under the rules of racing for prize money, and the sale thereon at a profit.

v) The Appellant explained in his letter that his activity had been undertaken from his address in Chelsea and enclosed one page as his accounts for the period 1 April 2011 to 31 December 2012, which showed prize monies of £10,621 over the period, losses on the sale of horses as £58,973 and costs of £23,970. The losses had been apportioned over 2011/12 and 2012/13.

w) No primary records or further information has been provided which would enable us to see the basis of the figure of £58,973 as a loss on the sale of horses. The costs of £23,970 is broken down into training, vets and farrier costs (£18,749), subscriptions and journals (£509), travel and subsistence (£1,030), auction costs (£3,276) and sundry (406). No primary records were provided, nor an explanation of how these costs relate to the Appellant's activity.

x) By letter dated 23 September 2014, Mr Robertson explained to the Appellant the Respondents' view that racing was not a taxable activity and, as the majority of horses involved in racing were not profitable, his own view that the Appellant's activity could not have been managed on a commercial basis with a view to profit. Mr Robertson concluded that the Appellant's losses for the years 2008/09 – 2012/13 did not appear to be available to set against his other income for these years, and invited the Appellant's comments.

y) On 26 September 2014, Mr Robertson forwarded to the Appellant a copy of *Murray v HMRC* [2014] UKFTT 338, mentioned in his letter of 23 September 2014, and again invited the Appellant's comments.

z) On 15 October 2014, the Appellant telephoned Mr Robertson and asked for a copy of all of the cases cited in his letter of 23 September 2014. At the request of the Appellant, Mr Robertson extended his deadline for a response to 5 January 2015. The cases were forwarded to the Appellant under cover of a letter dated 17 October 2014.

aa) On 11 December 2014, the Appellant telephoned Mr Robertson to ask for more time to respond due to the 31 January self assessment deadline which would affect the Appellant in his professional capacity as a tax consultant. Mr Robertson extended his deadline for a response to mid-February 2015.

bb) By letter dated 9 February 2015, the Appellant wrote to the Respondents. He stated that his ownership of shares in racehorses was not a hobby, and that if he had not ceased his activity at the end of 2012, he would have shown a profit in 2013/14. The Appellant stated that the Respondents were out of time to enquire into his returns for 2008/09 to 2011/12.

cc) By letter dated 25 February 2015, Mr Robertson reiterated the Respondents' view that racing is not a taxable activity. Mr Robertson enclosed a copy of *McMorris v HMRC* [2014] UKFTT 1116, and stated that the losses made by the Appellant should not have been claimed. Mr Robertson stated that, as he considered the returns to be incorrect, he would have to consider penalties. Mr Robertson enclosed HMRC's penalties factsheets and invited comments from the Appellant, by 30 March 2015, on

his "behaviours" for penalty purposes. In response to the Appellant's comment that the Respondents were out of time to open enquiries, Mr Robertson drew the Appellant's attention to Section 29 TMA 1970. Mr Robertson also noted that the deadline for him to "check" 2008/09 was approaching.

dd) With his letter, Mr Robertson enclosed a letter, also dated 25 February 2015, which was stated to be a check under Section 9A TMA 1970 of the Appellant's 2008/09 return. (It is unclear to us what effect this letter – which purported to open an enquiry five years after the enquiry window for the Appellant's 2008/09 tax return had closed – could possibly have. It seems – from later correspondence – that the Respondents also issued a discovery assessment for 2008/09 to the Appellant on this date.)

ee) On 4 and 6 March 2015, Mr Robertson sent further letters to the Appellant, apparently as a result of telephone calls, with a copy of the relevant part of the Respondents' manual and an indication that he was willing to consider arguments made by the Appellant. Mr Robertson asked the Appellant to provide his final accounts for 1 April 2011 to 31 December 2012.

ff) By letter dated 8 March 2015, the Appellant informed the Respondents that he considered he was able to distinguish his circumstances from *McMorris* and *Murray*. The Appellant noted that it was through lack of evidence that Mr Murray had been unsuccessful, and asserted that he had full records and VAT returns. The Appellant stated that he considered his position to be similar to a client of his, who he understood had been entitled to loss relief, and the Appellant took issue with the suggestion that "dealer in thoroughbreds" might not fully describe his activities. The Appellant reiterated his understanding that he was carrying on a trade.

gg) By letter dated 12 March 2015 (apparently sent before receipt of the Appellant's letter of 8 March 2015), Mr Robertson explained to the Appellant that he had discovered the nature of the Appellant's activities only after opening his enquiry, and he did not consider he could reasonably be aware of the situation on the basis of the information made available to him at the date he ceased to be able to open an enquiry.

hh) By letter dated 18 March 2015, Mr Robertson replied to the Appellant's letter of 8 March 2015. Mr Robertson suggested that the parties set aside their disagreement as to whether the Respondents could issue discovery assessments, and that the Appellant provide additional facts as to his activities.

ii) By letter dated 23 March 2015, the Appellant appealed against what he described as the Respondents' 2008/09 assessment.

jj) By letter dated 25 May 2015, Mr Robertson gave the Appellant more time to respond to his earlier information request, apparently at the Appellant's request, and asked for a copy of receipts to support claimed expenses.

kk) By letter dated 27 April 2015, the Appellant suggested a distinction should be made between owing racehorses as a hobby and owning them as a commercial operation. The Appellant refuted the suggestion that there had been a discovery, and provided a copy of his VAT registration.

ll) By letter dated 5 May 2015, Mr Robertson informed the Appellant that he would seek advice from his specialist colleagues but repeated his earlier request for information to enable him to make such a referral. By letter dated 6 July 2015, the Appellant replied, providing some of the information requested by Mr Robertson, including a schedule of ten horses in which shares has been purchased and sold in the period January 2008 to December 2012. The Appellant also enclosed a 2009 race programme, and suggested that his records could be inspected at his offices.

mm) On 21 July 2015, Mr Robertson wrote again to the Appellant, informing him that his view remained unchanged but that it would be helpful to have a meeting to discuss matters and inspect records. Mr Robertson asked for proposed dates. On 28 July 2015 the Appellant telephoned Mr Robertson to decline the offer of a meeting. The Appellant indicated he would await the Respondents' specialist's comments but that he would appeal any assessments raised.

nn) On 29 July 2015, Mr Goodrich, from the Respondents' Shares and Assets Valuation team wrote to the Appellant, reiterating the Respondents' view and noting that the Appellant had not provided any evidence of the steps taken which would result in a reasonable expectation of a profit. Mr Goodrich asked a number of other questions of the Appellant, and asked for a response by 15 September 2015.

oo) The Appellant apparently wrote to the Respondents on 30 September 2015 but a copy of that letter was not in our bundles. On 5 October 2015, the Appellant wrote again, to Mr Robertson, asking him to explain why he considered a discovery had been made. Mr Robertson replied on 14 October 2015, enclosing an excerpt from his earlier correspondence. Mr Robertson asked the Appellant to provide copies of the ownership agreements for all the horses featuring in the Appellant's accounts.

pp) Following a telephone call on 6 November 2015, Mr Robertson wrote again to the Appellant on 10 November 2015. In this letter, Mr Robertson asked the Appellant to provide any evidence the Appellant had that the Respondents were aware of the nature of his activity before the enquiry was opened. Mr Robertson repeated his earlier request for information.

qq) On 17 December 2015, Mr Robertson wrote again, to repeat his requests and warning that an information notice would be issued if there was no reply by 18 January 2016. This letter apparently crossed with a letter of the same date from the Appellant, suggesting that the Respondents should reconsider their case as they had recorded insufficient notes. The Appellant asserted that full accounts for a Dealer in Thoroughbreds had been supplied to an inspector in Salford on 10 January 2010, and subsequently agreed. (No copy of these records was produced to us or has apparently been produced to the Respondents.) The Appellant argued that the Respondents should have been aware that the title "Dealer in Thoroughbreds" meant the buying and selling of racehorses, and asserted that the Respondents were unable to rely on the discovery provisions.

rr) By letter dated 11 January 2016, Mr Robertson refuted the Appellant's suggestion that the HMRC officer in Salford could have known that what the Appellant described as dealing in thoroughbreds meant the purchase of shares in racehorses. Mr Robertson asked for further information from the Appellant in order

that he could issue a closure notice for 2012/13 and raise discovery assessments for earlier years. Following a telephone call on 29 January 2016, Mr Robertson wrote to confirm that a colleague would attend the Appellant's offices on 17 February 2016 to take copies of documents relating to the ownership of the horses featured in the Appellant's accounts.

ss) This arranged visit did not take place. On 4 March 2016, Mr Robertson wrote to the Appellant to express his sorrow that the planned meeting could not take place due to the Appellant's poor health. Mr Robertson asked again for the ownership information, and details of the figure representing the losses on the sale of horses.

tt) On the same date, the Respondents issued the Appellant with a discovery assessment in the sum of £6,770.40 for the year 2009/10. There was apparently no appeal against this assessment, and so this assessment is not in dispute before us.

uu) On 6 June 2016, the Respondents issued the Appellant with an Information Notice, requiring the information earlier sought by Mr Robertson. On 25 July 2016, the Appellant telephoned Mr Robertson to say that he was out of hospital but not yet walking. The Appellant stated he had requested ownership documents and would contact Mr Robertson when these were available.

vv) There was then a pause until 18 October 2016, apparently due to the Appellant's ill health. Mr Robertson to the Appellant on that date, reiterating his request for documents and information.

ww) By letter dated 27 February 2017, the Appellant wrote to Mr Robertson, providing a copy of the agreements showing the Appellant's purchase of a share in racing partnerships for three horses (Zaminder, Inetrobil and Tuscan Gold).

xx) On 3 March 2016, the Respondents issued a first discovery assessment for 2010/11 in the additional sum of £7,476.20. This was sent to the Appellant on 6 March 2017. Mr Robertson stated his opinion that the agreement provided showed that the Appellant had no control over the training or racing of the horses covered by the Highclere agreement. Mr Robertson reiterated his request for business plans, ownership agreements for all non-syndicate horses, and copies of the agreements for the sale/disposal of interests. Mr Robertson again offered a meeting with the Appellant.

yy) By letter dated 17 March 2017, the Appellant appealed to the Respondents against this first assessment for 2010/11.

zz) On 16 May 2017, Mr Robertson and a colleague met the Appellant at his office. At that meeting the Appellant provided the Respondents with some additional documents, and explained that he had begun his activity on 1 January 2008 as he considered he had the expertise to make his activity a success. The Appellant had ceased to consider his activity as a trade on 31 January 2012 after making losses of approximately £160,000.

aaa) Mr Robertson wrote to the Appellant on 19 June 2017 to explain that a closure notice and discovery assessments would be issued shortly. On 21 June 2017, Mr

Robertson wrote to the Appellant, apparently enclosing discovery assessments issued on 20 June 2017 by the Respondents, for the years 2006/07, 2007/08, 2009/10, 2010/11 and 2011/12, and a closure notice for 2012/13. The Respondents considered assessments were required for the earlier years the Appellant had carried back losses said to have been incurred in 2007/08 and 2008/09, to set against his profits in the preceding year.

bbb) It appears that the discovery assessments for 2009/10 and 2010/11, in the sums of £6,770.40 and £7,476.20 respectively, were additional discovery assessments as the Respondents had already raised assessments for 2009/10 and 2010/11 (in March 2016 and March 2017, see above). It is unclear to us whether the original 2009/10 and 2010/11 assessments had been cancelled or withdrawn when these second assessments for 2009/10 and 2010/11 were issued.

ccc) On 21 June 2017, the Respondents issued the Appellant with a letter stating their intention to issue penalties under Schedule 24 to the FA 2007.

ddd) By letter dated 3 July 2017, the Appellant appealed against all of the discovery assessments and closure notice issued in June 2017, and sought a review.

eee) On 5 July 2017, the Respondents issued the Appellant with a Schedule 24 penalty determination in the total amount of £17,654.83 in respect of inaccuracies in the Appellant's tax returns for the years 2006/07, 2007/08, 2009/10, 2010/11, 2011/12 and 2012/13.

fff) By letter dated 15 July 2017, the Appellant appealed to the Respondents against the penalty determination.

ggg) On 17 August 2017, the Respondents issued a review decision to the Appellant. In that review, the reviewing officer cancelled the assessment for 2006/07 and reduced the assessment for 2007/08. The reviewing officer also reduced the penalty to £13,130.79 to reflect the cancellation of the penalties as they related to 2006/07 and 2007/08. The Respondents' decision to issue the remaining discovery assessments, the closure notice and the penalty was upheld.

hhh) On 5 September 2017, the Appellant attempted to appeal to the Tribunal but omitted the decision under appeal. A fully constituted appeal was filed with the Tribunal on 5 October 2017.

iii) On 14 December 2017, Mr Robertson wrote to the Appellant to tell him that he had decided to set aside the discovery assessments and penalties for 2006/07 and 2007/08.

Burden of proof

13. In respect of a discovery assessment, the onus is upon the Respondents to establish, in accordance with the legislation, that they have made a discovery and that the assessment was raised within time. The onus is upon the Respondents to satisfy us that they have met the statutory requirements in respect of the penalties. In both cases the standard is the civil standard, on the balance of probabilities.

14. If the Tribunal is satisfied that the Respondents have met the burden in respect of an assessment, then the onus is upon an appellant to displace the figures in the assessment, which can include reducing it to zero. We appreciate that the Appellant's skeleton argument does not accept this to be the case. Nevertheless, as Section 50(6) TMA 1970 provides that an assessment (which will be in the Respondents' figures) stands unless the Tribunal decides to reduce the figures in it, we consider that the onus is upon the Appellant to satisfy the Tribunal that the figures charged should be reduced or varied.

15. If the Tribunal is satisfied that the Respondents have met the burden in respect of a penalty then the onus is upon the Appellant to establish that he has a reasonable excuse for his default.

Discussion and decision

16. It will be convenient to discuss separately each of the four issues set out above. We start with the issues relating to the discovery assessments.

Whether the Respondents have met the requirements of Section 29 TMA 1970

17. We set out the relevant provisions of Section 29 TMA 170 as an appendix to this decision. This is as the law applied on 3 March 2017 when the first discovery assessment for 2010/11 was raised, and which still applied on 20 June 2017 when the discovery assessments for 2009/10, 2010/11 (second) and 2011/12 were raised.

18. The parties were agreed that where, as here, a taxpayer has filed a tax return for the relevant year and the enquiry window has closed, then a discovery assessment may be raised only if the Respondents can demonstrate that one of two conditions have been met. Those conditions are set out in Subsections 29(4) and (5).

19. During the enquiry, the Respondents relied upon Section 29(5) TMA 1970 arguing that a reasonable officer could not have been aware of the true nature of the Appellant's activities when the enquiry window closed for each of the relevant years of assessment. The Respondents argued that the Appellant's description of his activities as a "dealer in thoroughbreds" was insufficient to alert the Respondents to the fact that the Appellant was buying and selling shares in racehorses.

20. In their Statement of Case, and before us, the Respondents relied upon Section 29(4), arguing that the loss of tax was brought about deliberately by the Appellant or, in the alternative, that it was careless.

21. In his skeleton argument the Appellant argued that he is entitled to the protection of Subsection 29(2) as his returns were made in accordance with the practice generally prevailing at the time. The Appellant also takes issue with the Respondents decision to rely upon Subsection (4) rather than Subsection (5), and denies that there were losses of tax or that any losses were brought about by his deliberate or careless behaviour. The Appellant contends that he made the claims in good faith and without any illicit intention.

22. We note that the legislation provides that the Respondents must establish that either subsection (4) or (5) applies. There is no requirement that the Respondents must choose either (4) or (5) and stick rigidly to their arguments in relation to that subsection even if they later consider that the other subsection also applies or better represents the facts as they have come to light.

23. Before us, the Respondents rely upon Subsection 29(4), and so we consider whether there was a loss of tax which was brought about carelessly or deliberately. The Respondents' submission in this regard was that the Appellant acted deliberately because he made a conscious choice to use the phrase "dealer in thoroughbreds" rather than giving a more accurate description of his activities. The Appellant agrees that he made a conscious choice to use that phrase but argues that the description was accurate, and also that for an act to be "deliberate" for the purposes of Subsection 29(4), there must be an illicit or deceitful intention.

24. We consider first whether the description "dealer in thoroughbreds" is an accurate description of the Appellant's activities.

25. We consider a dealer to be someone who buys and sells goods with the aim of making a profit. Usually a dealer will improve the goods bought so that they can be sold for a higher price. When animals are bought and sold, they are usually trained or brought on in some way in order to increase their value. We consider thoroughbreds to be horses of a pure breed, often used for racing.

26. We have reached the conclusion that the Appellant was not a "dealer in thoroughbreds" because he did not buy and sell horses, or make decisions as to which horses should be bought or sold, or when. The Appellant bought shares in horses or in racing partnerships. We consider trading in greater depth below but we note that when the Appellant bought shares in racing partnerships, this cannot have been with a view to making a profit because the acquisition documents for those partnerships made it explicit that the share purchase was for the pleasure of owning the horse and not as an investment. The Appellant also did not train or improve any horses he part-owned, and he took no part in a decision as to when a horse would reach its peak value and should be sold. At best the Appellant was only able to decide to sell his share (and we have no evidence that he did this at any time), not the horse.

27. We consider that the Appellant bought shares in racehorses or in racing partnerships. We agree with the Respondents that the description "dealer in thoroughbreds" is not an accurate description of the Appellant's activities.

28. Next, we consider whether the Appellant acted deliberately in using the phrase "dealer in thoroughbreds" in his tax returns. The parties are in agreement that the use of that phrase was as a result of a considered and conscious choice by the Appellant. However, the parties disagree as to whether that makes it deliberate. The Respondents argue that a considered choice is "deliberate", whereas the Appellant argues that a decision to use a specific phrase or description can only be "deliberate" if it was a conscious decision to act deceitfully or with illicit intentions.

29. As we noted during the hearing, if the Appellant was correct about the meaning of deliberate, it would be difficult to see what meaning should attach to "fraudulent".

Mr Morrison was unable to suggest a convincing distinction between "fraudulent" and his interpretation of "deliberate". We conclude, in agreement with the Respondents, that the word "deliberate" means a conscious choice to act in a certain way. In reaching this conclusion we agree with the Tribunal in *Clynes v HMRC* [2016] UKFTT 369 that "deliberate" involves an element of conscious or purposeful choice. We also agree that this choice does not have to be accompanied by an intention not to pay tax or be made without good faith, as a loss of tax can be brought about by a taxpayer making a purposeful but poor decision. Our conclusion on the meaning of deliberate is supported by the comments of the majority of the Court of Appeal in *HMRC v Tooth* [2019] EWCA Civ 826.

30. In his skeleton argument the Appellant asserts that he weighed up his circumstances and made his loss claims in good faith. We have concluded that the Appellant made a conscious choice to use the description "dealer in thoroughbreds", and that it was an inaccurate description of the Appellant's activities. We agree with the Respondents that the Appellant acted deliberately in using this phrase.

31. The Appellant argued in his skeleton argument that he was protected by Subsection 29(2) TMA 1970 as his claims were made in accordance with the practice generally prevailing at the time. Subsection (2) provides protection where there has been a loss of tax which is due to an error in the return which has arisen due to a practice which was generally prevailing at the time that the return was filed. However, the Appellant did not identify an error in his return, did not identify the generally prevailing practice related to this error, and did not provide any evidence that a relevant practice was generally prevailing at the time he submitted his tax returns. It is clear that for a practice to have been generally prevailing it should be such that both the Respondents and taxpayers accepted it at the time (see *Boyer Allen Investment Services Ltd v HMRC* [2012] UKFTT 558). In this case there is no acceptance of an error or evidence of any practice. Given the lack of detail provided by the Appellant, we do not consider that the Appellant can be protected by Subsection 29(2) TMA 1970.

32. Neither party specifically addressed us on the issue of whether the assessments were raised within time and made promptly. Section 34 TMA 1970 provides that the usual statutory time limit for raising discovery assessments is four years. In their Statement of Case the Respondents referred to the extended statutory time limits in Section 36 TMA 1970. We have set out Section 36 TMA 1970, as it applied at 4 March 2016, as Appendix B to this decision. Section 36 provides that the Respondents have an extended time limit to raise discovery assessments in certain circumstances; such assessments are usually referred to as being "ETL assessments".

33. The Respondents argued that the loss of tax was brought about by the Appellant's deliberate actions, and that Section 36 enabled the Respondents to raise ETL discovery assessments within 20 years after the end of the year of assessment. We have already concluded that the Appellant acted deliberately in using the phrase "dealer in thoroughbreds". In the alternative, the Respondents argued that they could raise assessments within six years if a loss of tax was brought about carelessly. The assessments in dispute were all raised within six years.

34. However, this is not the end of the matter, as neither party addressed us on the question of whether the assessments were raised promptly at a time when the discovery was still fresh. Mr Morrison referred to *Burgess and Brimheath Developments v HMRC* [2015] UKUT 0578 at the conclusion of skeleton argument, so we are satisfied that he was aware that the Respondents bear the burden of satisfying us on all aspects of the competence of discovery assessments which are in issue. However, despite that awareness, the Appellant did not put in issue the question of whether the Respondents sat too long on their discovery before raising assessments, so that the discovery was no longer new (see for example, *Beagles v HMRC* [2018] UKUT 380).

35. As this was not put in issue by the Appellant, we consider this point only very briefly. We conclude that, despite the apparently very long interval between Mr Robertson's initial discovery (in September 2014) and the raising of the assessments under appeal before us (in March 2017 and June 2017), the assessments were not raised too late. We reach this conclusion because it is clear from the correspondence set out above that Mr Robertson was actively seeking to gather fresh information from the Appellant in order to more fully consider the Appellant's claim. No doubt, if the Appellant had put this in issue, Mr Robertson would have attended the hearing to give evidence. It may be that the Appellant did not raise this as an issue because he recognised that the enquired was so protracted due to his failure to provide information, and then his poor health. We can see that another inspector might have raised assessments immediately after the Appellant's initial response in September 2014 but we do not consider that Mr Robertson should be criticised for attempting to gather further information which might have changed his view of the matter in favour of the Appellant.

36. We have already concluded that the description given by the Appellant in his tax returns was inaccurate, and that his decision to use the phrase "dealer in thoroughbreds" was deliberate. Therefore, if we go on to find that any tax was lost through relief which was given having become excessive, and that this is attributable to the Appellant, then we will be in agreement with the Respondents that they are entitled to raise ETL assessments for the years 2009/10, 2010/11 and 2011/12. We consider whether any relief given has become excessive when we consider whether the assessments should stand good, below.

Whether the Appellant's activities as a dealer in thoroughbreds constitutes trading commercially with a view to a profit

37. The Appellant bears the burden of displacing the figures in the discovery assessments for 2009/10, 2010/11 and 2011/12, and also the closure notice for 2012/13. Those assessments and closure notice were raised to recover what the Respondents consider to be a loss of tax due to the Appellant having been given relief for what he claimed as losses in his returns for the relevant years. The Appellant considers he was entitled to make those claims as he considers he made losses from what he considers to be a trade.

38. We start by noting again the extremely limited evidence before us. Of the ten horses on the Appellant's schedule, we were provided with evidence of the Appellant's acquisition of shares in two: Tuscan Gold and Inetrobil. Of the remaining

eight horses, the documents in our bundle demonstrate that the Respondents were provided with evidence of the Appellant's acquisition of shares in only Erzen and Amigayle. There is no evidence before us, and apparently no evidence provided to the Respondents, that the Appellant purchased or had any involvement with Born West, Fantastic Arts, Running Upthathill, Centigrade, Omme Anntique or Dictionary.

39. There is no evidence at all before us (nor apparently was any evidence made available to the Respondents) to indicate that the Appellant sold his interest in any of the four horses for which there is evidence of acquisition (or, indeed, of any of the ten horses on the Appellant's schedule).

40. There is a one-page profit and loss account for the period 1 April 2011 to 31 December 2012 but it is unsupported by any primary records. Even if we assumed that the Appellant had made the ten sales he claimed, it is impossible to see from the documents before us how the Appellant reached his figure of £58,973 for his losses from the sale of shares in six horses in 2011 and 2012. Similarly, the acquisition documents we have seen suggest that the costs which the Appellant has claimed separately in his profit and loss account would be deducted from the sale cost, and not charged separately to shareowners. It may be that the Appellant had a different arrangement when he directly owned a share in a racehorse but, if so, he has not provided us with any evidence that was the case.

41. For an appeal which involves a claim for losses incurred, there is a startling lack of evidence to show that the Appellant has incurred any losses whatsoever. This gaping omission is inexplicable given that the Appellant practices as a tax consultant, and must know that records must be kept to demonstrate claims made, and also given that, during his correspondence with Mr Robertson, the Appellant claimed to distinguish his case from that of *Murray* on the basis that he had full records to support his claims whereas Mr Murray did not.

42. Unfortunately for the Appellant, this absence of evidence alone is sufficient to dispose of his appeal against the assessments and closure notices. This is because (even if we accepted that the Appellant was trading) for the Appellant to satisfy us that the figures in the assessments and closure notice should be displaced, he must demonstrate that he incurred trade losses. The Appellant has failed to provide any evidence that he suffered any losses in any amount during the period 2008 to 2012, and so there is nothing to persuade us that the figures in the assessments and closure notice should not stand good.

43. Therefore, we dismiss the Appellant's claim to be entitled to the relief which is the subject of the appeal against the assessments and closure notice.

44. Out of courtesy to Mr Morrison, who did his best with the very limited material available to him, we have considered his submissions that buying and selling shares in racehorses can be a trade, that the Appellant was trading in the period 1 January 2008 to 31 December 2012 and that this trade was on a commercial basis and with a view to profit.

45. On the issue of whether buying and selling shares in racehorses can be a trade, the Respondents relied upon Section 30 of Income Tax (Trading and Other Income) Act 2005 ("ITTOIA 2005"). The relevant parts of Section 30 provide:

> **30 Animals kept for trade purposes**
>
> (1) Animals or other living creatures kept for the purposes of a trade are treated as being trading stock if they are not kept wholly or mainly-
>
> (c) for racing or other competitive purposes.
>
> …
>
> (3) This section applies to shares in animals or other living creatures as it applies to the creatures themselves.

46. As the effect of Section 30 ITTOIA 2005 is to prevent shares in racehorses from being trading stock, and the Appellant does not assert that he bought or sold any other asset as a trade, we conclude that the Appellant's purchase and sale of shares in racehorses could not be a trade.

47. In case we are wrong in that conclusion, we also consider whether the Appellant was trading, trading commercially and trading with the intention of making a profit.

48. Mr Morrison argued that the Appellant's purchase and sale of shares in racehorses or in a racing partnership could constitute trading. In support of this point, Mr Morrison argued that the badges of trade were met. Mr Morrison pointed to what he submitted were nine relevant factors which we should take into account:

- Intention to make a profit;
- Systematic and repeated transactions;
- Whether the asset can be turned to advantage or has personal value;
- Similar to existing trade;
- Was the asset improved to make it more profitable;
- Was the asset sold in a typical manner;
- Was the asset debt financed;
- Was the asset sold quickly; and
- Was the asset acquired by gift.

49. Mr Morrison argued that the Appellant had demonstrated his intention to make a profit and that his decision to cease treating his activity as a trade after five years of losses demonstrated his diligence and evidenced his intention to make a profit. We do not agree.

50. Through his contact with the equine industry, the Appellant was familiar with the fact that the majority of racehorses do not win sufficient prize money to cover the cost of their training. The only explanation the Appellant has given for why he thought he could make a profit when others had failed was that he considered he had sufficient expertise by 2008 to run a profitable endeavour. No evidence has been

provided of the Appellant having any expertise at all in horse-racing, let alone having greater expertise than others in the equine industry at identifying profitable racehorses. Those horses would have to be animals who raced well irrespective of their training regime as the Appellant had no involvement or say in training of the horses in which he owned a share. The Appellant did not draw up a business plan or make any profit projections, or apparently take notes of particular training regimes or decisions about when and where to race, so he could assess his expertise.

51. Mr Morrison argued that there was no reason for the Appellant, as a small trader, to draw up a business plan. We do not agree that small traders are any less likely than larger traders to evidence their business decisions. All traders who require an injection of finance will be aware of the need to demonstrate how they intend to produce a return for their investors. Additionally, in this case, we would have expected the Appellant to have been aware (from his work as a tax consultant) of the Respondents' views on trading in animals used for racing, and so taken particular care to ensure that his intention was well evidenced (with documents such a business plan, evidence of his expertise and contemporaneous notes to explain his purchase and sale decisions). In correspondence the Appellant had referred to a client of his tax consultancy who had been treated as trading but, as Mr Robertson subsequently pointed out, that client traded principally as a breeder of racehorses.

52. If the Appellant's intention was to make a profit, then it is odd that he purchased shares in racing partnerships run by Highclere. The acquisition documents we have seen make it clear that when the Appellant was buying a share in a racing partnership, he was purchasing that share for the enjoyment of the horse, and not as an investment. We have not seen the terms of the other acquisitions but the fact that the Appellant attempted to claim losses in respect of his shares in the racing partnerships demonstrates the very opposite of diligence. The terms on which the Appellant purchased shares in the racing partnerships meant that they could not have been acquired for dealing, however much care and expertise had gone into the Appellant's selection of the horses. The Appellant should have been aware that was the case.

53. We conclude that the Appellant hoped to turn his pastime into a profit-making venture but his lack of business plan, apparent lack of research and failure to keep formal records meant that his hope did not solidify into an intention.

54. Under Mr Morrison's heading of systematic and repeated transactions, Mr Morrison sought to persuade us that the Appellant's pattern of buying shares in horses differed in the period 1 January 2008 to 31 December 2012 when compared to the periods before and after. We cannot accept that submission because the Appellant has not provided any evidence of what happened in the periods before and after 1 January 2008 to 31 December 2012. There is similarly no evidence to support most of the remainder of Mr Morrison's submissions relating to the badges of trade. So, for example, we do not accept that the rate at which the Appellant acquired and sold his shares was high during 2008 to 2012 because we have no evidence of the usual rate of acquisition and sale (of the Appellant, or of anyone else). We do not know the basis on which the Appellant selected the horses in which he wished to acquire shares because he has not explained that basis; and we do not know whether the shares were sold in a typical manner because there is no evidence of the typical manner (or of a sale). We agree with Mr Morrison that the shares were purchased, and not gifted to

the Appellant. We do not consider that to be sufficient to indicate trade given our conclusions on the other badges of trade.

55. Mr Morrison argued that the asset was improved to make it more profitable, and that this is a good indicator of a trade taking place. We agree that improvement of goods, or the bringing on of an animal, is a good indication of trading. However, the Appellant did not train any of the horses in which he had shares, and he had no say in the training or racing of any of the horses owned by racing partnerships. The Appellant took no control whatsoever over any of the steps by which the racehorses could be brought on or made more profitable.

56. We have concluded:

- any activity which wholly or mainly involves the purchases and sale of racehorses cannot be trading (by virtue of Section 30 ITTOIA 2005), and/or

- the Appellant has not demonstrated that he was trading, that he was trading commercially or that he was trading with a view to a profit.

57. The consequence of our conclusions at paragraph 43 (or alternatively paragraph 56) is that we agree with the Respondents that the Appellant was granted relief to which he has not demonstrated he was entitled. We agree with the Respondents that this situation is attributable to the Appellant making claims for relief, and we agree with the Respondents that the Appellant's decision to claim relief as a "dealer in thoroughbreds" was deliberate.

58. Therefore, we are satisfied that the Respondents were entitled to raise discovery assessments for 2009/10, 2010/11 and 2011/12, and that those assessments were raised in time. The Appellant has failed to demonstrate his entitlement to the losses claimed and so the three discovery assessments and the closure notice for 2012/13 all stand good. This aspect of the Appellant's appeal is dismissed.

59. Before we on to consideration of the penalties, there is one final point we wish to address in respect of the discovery assessments. Neither party addressed us on the duplicate assessments for 2009/10 and 2010/11. We take the view that both of the assessments for each of 2009/10 and 2010/11 stand separately as valid assessments.

60. For 2009/10, the first assessment was not appealed, and so is not before us. We do not know if this assessment has been withdrawn or cancelled. We have found that the second assessment stands good. However, we wish to make it clear that it would not be right for the Respondents to recover £13,540.80 in additional tax for 2009/10 from the Appellant. We consider that only £6,770.40 in additional tax for 2009/10 is due.

61. For 2010/11, both assessments were appealed and are apparently before us. (We say apparently because, again, it is unclear whether the earlier assessment was cancelled or withdrawn.) Again, we make clear that it would not be right for the Respondents to recover £14,952.40 in additional tax for 2010/11 from the Appellant. We consider that only £7,476.20 in additional tax for 2010/11 is due.

Whether the Respondents have met the requirements of Schedule 24 FA 2007 to issue a penalty to the Appellant for the years 2009/10, 2010/11, 2011/12 and 2012/13

62. The burden of proof is upon the Respondents on this issue. Schedule 24 to the Finance Act 2007 provides that a penalty is payable if there is an inaccuracy in a return which has led to an understatement of a liability to tax, and that inaccuracy was careless or deliberate.

63. Where the inaccuracy is deliberate but not concealed, the penalty is a maximum of 70% of the potential lost tax. In this case the Respondents have given the Appellant some credit for his disclosures, and calculated the penalty to be 45.5% of the potential lost tax.

64. Sub-paragraphs 13(3) and (5) of Schedule 24 provides as follows:

> (3) An assessment of a penalty under paragraph 1 or 1A must be made before the end of the period of 12 months beginning with-
>
> (a) the end of the appeal period for the decision correcting the inaccuracy
>
> …
>
> (5) For the purpose of sub-paragraphs (3) and (4) a reference to an appeal period is a reference to the period during which-
>
> (a) an appeal could be brought, or
>
> (b) an appeal that has been brought has not been determined or withdrawn.

65. In this case the penalty was assessed on 5 July 2017. The discovery assessments under appeal before us, which corrected the inaccuracies were raised on 3 March and 21 June 2017. During the hearing we asked the Respondents to explain how the penalty for 2009/10 could have been raised in time, as it was raised more than one year after the initial discovery assessment for 2009/10 (which was raised in March 2016). At that time the Respondents conceded that the penalty did appear to be out of time. After the hearing the Respondents wrote to the Tribunal submitting that as the Appellant's appeal was still live, they were in time to raise a penalty assessment.

66. We accept that there is an appeal before us against an assessment for 2009/10, and that assessment was raised in June 2017. The penalty for 2009/10 was raised the day after the second 2009/10 discovery assessment was raised. Given our conclusion that both 2009/10 assessments stand independently of each other, we accept that the penalty for 2009/10 was raised within 12 months of the second assessment for 2009/10, and so was raised in time. However, see our further comments below on whether this penalty should be enforced.

67. We have already concluded that there was an inaccuracy in each of the returns, and that this has led to an understatement of tax. Mr Morrison submitted that, if there was an inaccuracy in the returns, the Appellant could not have known that was the

case at the time and that the Appellant believed he was entitled to the losses claimed in the returns.

68. We concluded (above) that the Appellant's behaviour was deliberate. As we concluded (in the context of ETL assessments), deliberate behaviour is purposeful or consciously undertaken and it does not have to be accompanied by an intention to deceive. Therefore, we do not consider it is necessary for the Respondents to demonstrate that the Appellant deliberately made a claim to which he knew he was not entitled. We have already found that the Appellant did consciously choose to make claims, and that those claims are inaccurate. Nevertheless, in this case, we note that some of the losses which the Appellant claimed to incur arose out of his participation in racing partnerships. Given the explicit wording of Clause 10 of the syndicate acquisition documents, we do not accept that the Appellant could genuinely have believed that he was entitled to make a claim for losses in respect of his shares in Highclere racing partnerships.

69. We are satisfied that the Respondents have met the requirements of Schedule 24 FA 2007 in respect of all of the penalties under appeal. However, we are concerned that the Respondents should concede the penalty for 2009/10 at the hearing before us, and then revert with written submissions after the hearing (when they could have asked to revert with written submissions, without having made the concession). The Tribunal has no jurisdiction to prevent the Respondents from enforcing a penalty which was lawfully raised, and we do not find that the penalty for 2009/10 was not lawfully raised or is not lawfully due. However, we request the Respondents consider, bearing in mind their power of care and management, whether it would be appropriate for them to enforce the penalty for 2009/10 which was conceded before us.

Whether the Appellant has a reasonable excuse which would exculpate him from that penalty

70. The Appellant bears the burden of satisfying us on this issue but no reasonable excuse has been suggested. We dismiss the Appellant's appeals against the penalties.

Conclusion on this appeal

71. For the reasons given above, this appeal is dismissed.

The Appellant's out of time request for a full decision

72. On 22 May 2019, a summary decision was issued to the parties. The final paragraph of that decision notified the parties that if they wished to appeal then they must "apply within 28 days of the date of release of this decision to the Tribunal for full written findings and reasons". On 21 June 2019, the Tribunal received a letter dated 18 June 2019, from the Appellant, requesting a full decision. The Tribunal asked the Appellant for his reasons for this late application. In an email dated 7 July 2019, the Appellant stated that his letter was posted in good time and that he could only surmise that his letter was delayed in the postal service or in the Tribunal's post room. HMRC were invited to comment but declined to respond.

73. The Appellant's application for a full decision was received two days late. Although the Appellant's experience (both from his practice, and from his earlier delay both in appealing and in providing documents) might have led him to post his request earlier than the penultimate day of the 28 day period, given that his delay is minor and HMRC have not objected, the Tribunal granted the Appellant an extension of time to make this request.

74. 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.

JANE BAILEY
TRIBUNAL JUDGE

RELEASE DATE: 04 SEPTEMBER 2019

APPENDIX A – SECTION 29 TMA 1970 AS IT APPLIED ON 3 MARCH 2017

29 Assessment where loss of tax discovered

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

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

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

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

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

(2) Where—

(a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and

(b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,

the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

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

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

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

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

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

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

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

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

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

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

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

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

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

(7) In subsection (6) above—

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

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

(ia) a reference to any NRCGT return made and delivered by the taxpayer which contains an advance self-assessment relating to the relevant year of assessment or either of the two immediately preceding chargeable periods; and

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

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

(7A) The requirement to fulfil one of the two conditions mentioned above does not apply so far as regards any income or chargeable gains of the taxpayer in relation to which the taxpayer has been given, after any enquiries have been completed into the taxpayer's return, a notice under section 81(2) of TIOPA 2010 (notice to counteract scheme or arrangement designed to increase double taxation relief).

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

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

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

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

APPENDIX B – SECTION 36 TMA 1970 AS IT APPLIED ON 3 MARCH 2017

36 Loss of tax brought about carelessly or deliberately etc

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

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

(a) brought about deliberately by the person,

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

(c) attributable to arrangements in respect of which the person has failed to comply with an obligation under section 309, 310 or 313 of the Finance Act 2004 (obligation of parties to tax avoidance schemes to provide information to Her Majesty's Revenue and Customs), or

(d) attributable to arrangements which were expected to give rise to a tax advantage in respect of which the person was under an obligation to notify the Commissioners for Her Majesty's Revenue and Customs under section 253 of the Finance Act 2014 (duty to notify Commissioners of promoter reference number) but failed to do so,

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

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

(2) Where the person mentioned in subsection (1) or (1A) ("the person in default") carried on a trade, profession or business with one or more other persons at any time in the period for which the assessment is made, an assessment in respect of the profits or gains of the trade, profession or business in a case mentioned in subsection (1A) or (1B) may be made not only on the person in default but also on his partner or any of his partners.

(3) If the person on whom the assessment is made so requires, in determining the amount of the tax to be charged for any chargeable period in any assessment made in a case mentioned in subsection (1) or (1A) above, effect shall be given to any relief or allowance to which he would have been entitled for that chargeable period on a claim or application made within the time allowed by the Taxes Acts.

(3A) In subsection (3) above, "claim or application" does not include an election under . . . any of sections 47 to 49 of ITA 2007 (tax reductions for married couples and civil partners: elections to transfer relief) . . .

(4) Any act or omission such as is mentioned in section 98B below on the part of a grouping (as defined in that section) or member of a grouping shall be deemed for the

purposes of subsections (1) and (1A) above to be the act or omission of each member of the grouping.