NCN: [2021] UKFTT 130 (TC)

TC08111

INCOME TAX – discovery assessments – ss 29, 34, 36 and 118 of Taxes Management Act 1970 – no returns filed for relevant years – information from police raid – interaction with reg 72 Income Tax (PAYE) Regulations 2003 – whether discovery of insufficiency 'stale' – obiter dictum of Charlton *re-considered – 'danger' of judicial paraphrase per* Lansdowne *– the concept of 'staleness' unsupported by statutory context, and unsupportable in the absence of judicial review jurisdiction – extended time limits – whether loss of tax brought about carelessly or deliberately – issue of quantification – whether assessments raised on proceeds of crime – frauds being 'incidents' of a trade – elements of illegality cannot be founded upon to avoid tax – whether assessments stand good; yes –* ***appeal allowed in part*** *– but only in relation to assessments not defended by the respondents; appeal otherwise dismissed*

Appeal number: TC/2016/00232

FIRST-TIER TRIBUNAL
TAX CHAMBER

BETWEEN

LORRAINE MCLAREN **Appellant**

-and-

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

TRIBUNAL: JUDGE HEIDI POON
JOHN AGBOOLA

Sitting in public at Eagle Building, Glasgow on 4, 5, 6 and 7 November 2019

Lorraine McLaren in person, for the Appellant

Ross Anderson, Advocate, instructed by the Office of Advocate General for Scotland, for the Respondents

DECISION

INTRODUCTION

1. This appeal is brought by Mrs Lorraine McLaren ('the appellant') against the following decisions by the respondents ('HMRC'):

   (a) Discovery assessments raised pursuant to s 29 of the Taxes Management Act 1970 ('TMA') for the ten tax years from 2002-03 to 2011-12 inclusive (the '**Discovery Assessments'**);

   (b) A notice under Regulation 72(5) of the Income Tax (PAYE) Regulations 2003 (the '**Reg 72(5) Notice**'); and

   (c) A notice under section 8(1)(c) of the Social Security Contributions (Transfer of Functions) Act 1999 (the '**Section 8(1) Notice**').

2. It is accepted that there was a valid appeal lodged against the Discovery Assessments, but no in-time appeal was lodged in relation to the Reg 72(5) Notice and the 1999 Act Notice. For reasons as set out in detail below, this Decision concerns only the Discovery Assessments.

3. Further, while the hearing had progressed on the footing that the appeal against the Discovery Assessments relates to the ten years from 2002-03 to 2011-12, the respondents stated in their submissions that HMRC would not defend against the appeal in relation to the Discovery Assessments for the four years from 2002-03 to 2005-06.

4. Consequently, the substantive matter for determination in this appeal concerns the Discovery Assessments for the six remaining years from 2006-07 to 2012-13.

PROCEDURAL HISTORY

5. The procedural history of the appeal has been protracted due to multiple stays to await the conclusion of the criminal trial of the appellant and her husband for fraud and money laundering in connection with the business conducted by 1 Move Estate Agency Limited ('**1MEAL**'). Aspects of the procedural history, so far as relevant to this appeal, are as follows.

   (1) The appellant's appeal was stayed on 11 July 2016 until 21 days after her criminal trial to avoid the tribunal proceedings from running concurrently with the criminal trial. The criminal proceedings at the High Court of Justiciary in Glasgow concluded on 13 June 2017; the appellant was convicted of one charge of common law fraud and one charge of money laundering, and was sentenced to 30-month imprisonment

   (2) Exactly a year after the conclusion of the criminal trial, an interlocutory hearing took place in Glasgow on 13 June 2018, following the respondents' application for case management directions to progress with the appeal proceedings in relation to the Discovery Assessments (and a VAT appeal that was made out of time).

   (3) At the interlocutory hearing, the appellant was represented by Donald Davidson, Advocate, who informed the Tribunal (Judge Poon) that the appellant had been granted Legal Aid for representation in the criminal proceedings, and was in the process of obtaining continuous funding for the proceedings in front of this Tribunal. Mr Davidson also advised that the appellant's appeal against the conviction and sentencing statement in the criminal proceedings had passed the sifting process as regards permission to appeal, and that the Sift delivered a negative result as respects the conviction, but leave to appeal was granted against the sentence. Mr Davidson submitted that extensive records pertaining to the appellant's financial affairs had been retained by the Crown due to the criminal trial, and that gave rise to a ground to apply for a further stay, in addition to the fact that the appellant was in the process of appealing against her sentence.

(4) The Tribunal refused to grant any further stay, and issued two sets of Directions on 2 July 2018 to progress with the tax appeal proceedings. In relation to the VAT appeal, it was directed that a hearing should be held to determine if the late appeal should be admitted. Judge Anne Scott presided over that hearing on 26 June 2019, and refused permission in a Summary Decision released in July 2019.

(5) In relation to the appeal against the Discovery Assessments, the appellant was directed to provide further and better particulars for her grounds of appeal, since the grounds as stated on the Notice of Appeal lodged on 30 July 2015 merely asserted that the self-assessment returns had stated the income correctly, but did not disclose any particulars that engaged with the substantive basis upon which the assessments to additional tax were raised.

6. Lorna McCann of McIntosh McCann, Solicitors appeared on behalf of the appellant in the interlocutory hearing for the late VAT appeal on 26 June 2019, and was representing the appellant in dealing with matters to progress with the appeal against the Discovery Assessments, including the lodgement of further particulars which was dated 23 August 2018.

7. By email dated 25 October 2019, Ms McCann wrote to the Tribunal, requesting her email to be treated as her 'formal intimation of withdrawal', and confirmed that she would not be 'representing Mrs McLaren at the upcoming Tribunal Hearing'.

PRELIMINARY MATTERS

Appellant's postponement application

8. On 13 October 2019, and before her withdrawal as representative of the appellant, Ms McCann lodged an application for an adjournment on the appellant's behalf. The grounds given were: (a) the appellant seeks to rely on financial information held by the Crown Office and Procurator Fiscal Service; (b) the pending proceedings in relation to Confiscation Proceedings for proceeds of crime has resumed, following the application against her conviction and sentence was rejected by the Supreme Court on 17 July 2019; (c) the appellant's desire to apply to the Scottish Legal Aid Board to instruct a forensic accountant; and (d) the recent deterioration of the appellant's mental health.

9. On 16 October 2019, the Office of Advocate General lodged a notice of objection to the adjournment application. On 17 October 2019, Judge Bailey refused the application for an adjournment in a five-page decision, giving as reasons for the refusal as follows:

(1) The documents retained by the Crown Office are the bank statements of IMEAL; the respondents are not relying on those bank statements. The tribunal directions of 2 July 2018 had required the list of documents relied upon by the parties to be disclosed by 28 September 2018. If the appellant had considered the IMEAL bank statements necessary, she should have applied for their disclosure at a very much earlier stage.

(2) The respondents disputed that there would be an overlap between the confiscation proceedings and with the appeal before the Tax Chamber. The appellant had not explained in what way there would be an overlap; how that overlap would cause a difficulty; why the confiscation proceedings should take priority; and why an application for postponement was not made as soon as the confiscation proceedings resumed.

(3) It is clear that Legal Aid had not been granted in her proceedings before the Tax Chamber so it was assumed (as it is not made clear in the application) that the forensic accountants' report was required in respect of the Confiscation Proceedings. The absence of such a report cannot have a bearing on the appeal before the Tax Chamber.

(4) A letter from the appellant's GP noted that she was suffering from 'low mood, anxiety and poor sleep', but that she had not been on any regular medication. The letter did not relate how the appellant's mental health was likely to improve at any time in the future. The hearing should not be postponed without medical evidence to suggest that an improvement was expected.

10. Judge Bailey directed that the appellant could renew her application for an adjournment orally at the commencement of the substantive hearing, which she did, adding as her grounds that: (a) her representative had withdrawn; (b) she was 'mentally unfit to represent herself'; and (c) there was the Legal Aid application to be made.

11. HMRC objected to the adjournment application, giving as reasons that: (a) the appellant had known about the appeal proceedings 'for a very long time'; (b) as the taxpayer she would be the person with the knowledge of her own tax affairs; and (c) representation is not mandatory for proceedings at the First-tier Tribunal.

12. After a short adjournment to consider the application, we gave our decision that we would not grant the application to postpone the hearing for the following reasons.

(1) Ms McCann as the appellant's legal representative had already lodged further particulars and the appellant's witness statement in compliance with the Tribunal's directions before the withdrawal of representation;

(2) The prospect of success of any Legal Aid application, which we understood to be for representation in these proceedings, was far from certain if not improbable;

(3) The appellant's case is not prejudiced by the absence of representation during the hearing, since this Tribunal is well accustomed to a taxpayer as the litigant in person;

(4) The substantive matter for determination in this appeal is unlikely to turn on a legal point of law, but turns on evidence which the appellant would be the key witness;

(5) No cogent case had been made that a material change to the appellant's position as regards her mental health would be effected by the grant of an adjournment;

(6) The prejudice to the respondents by a further stay could be significant due to the likely loss of institutional memory, and key witnesses moving on from their positions;

(7) The costs to public resources and judicial time weighed heavily against setting aside the four-day hearing that had been listed.

The substantive matter under appeal

13. In relation to the Discovery Assessments, an appeal was made on 30 July 2015 on behalf of the appellant by a Mr Murphy of Murphy, Robb & Sutherland based in Glasgow. The appeal was against the ten individual discovery assessment notices. However, a request had also been made for a review of the assessment notices, which resulted in a Review Decision being issued on 18 December 2015. An appeal was made specifically against the Review Decision on 15 January 2016 under the terms of s 49G of TMA. The appeal of 30 July 2015 was therefore being superseded by the appeal against the Review Decision. No issue was taken by the respondents that the appeal against the Review Decision was made in time and competent.

Matters out of time for appeal

Regulation 72(5) Notice

14. The Tribunal directions issued on 2 July 2018 required the provision of further particulars in relation to the appeal against the Discovery Assessments. In the further particulars provided, it was suggested that a Reg 72(5) Notice was under appeal. The relevant notice dated 3 July 2014 was served on the appellant as employee of 1MEAL, notifying her that HMRC had made

a direction under Reg 72(5) Condition B of the 2003 Regulations, which enabled HMRC to collect the amounts of PAYE that IMEAL had failed to deduct from the appellant.

Section 8(1) Notice

15. The Section 8(1) Notice was also served on the appellant on 3 July 2014 to notify an overall liability of £24,273.45 plus statutory interest consequent upon HMRC's decision that 1MEAL had failed to deduct sufficient Class 1 NIC from her earnings as an employee. Similar to the Reg 72(5) Notice, an in-time appeal would have to be lodged within 30 days of the issue. The appellant's further particulars made no reference to an appeal having been made.

No appeal extant for the Notices

16. The time limit to make an appeal against the Reg 72(5) Notice and the Section 8(1) Notice was 30 days from the date of issue of 3 July 2014. The time limit expired on 2 August 2014.

17. As a matter of fact, no appeal was made within the 30-day time limit. The appeal lodged on 30 July 2015 was specific to the ten Discovery Assessments, and made no reference to the Reg 72(5) or the Section 8(1) Notices. The appeal lodged in January 2016 was specifically against Review Decision, which addressed exclusively the Discovery Assessments.

18. No appeal is therefore extant in relation to the Reg 72(5) Notice or the Section 8(1) Notice. Consequently, this Tribunal has no jurisdiction to consider these two matters.

EVIDENCE

Witness evidence

19. The Tribunal heard the evidence of four witnesses in the order of:

(a) Officer Gillian Duffy, an employee of HMRC of 33 years, and since 2006, an investigator of Fraud Investigation Service ('FIS') based in Edinburgh;

(b) Officer Michael Egan, an employee of HMRC since 1986, first in Criminal Investigation, and from January 2013 in FIS in Edinburgh;

(c) Officer Alan, an employee of HMRC since 2002, who has worked as an Insolvency Investigator since January 2012;

(d) Mrs Lorraine McLaren as the appellant.

20. Officer Duffy's evidence was concluded on the first day of the hearing, followed by Officer Egan's evidence, which started in the afternoon session but was not concluded on the first day. Due to the timing of availability of Officer Bean, we heard Officer Bean's evidence first on Day 2, before resuming with Officer Egan's evidence.

21. The witness statements of all three HMRC officers were adopted as evidence in chief, and their evidence was supplemented by their answers to questions put to them by the appellant in cross-examination and by the Tribunal. We find all three witnesses to be straightforward, reliable and wholly credible, and their evidence was not challenged in any material fashion. We accept their evidence in its entirety as to matters of fact.

22. Mrs McLaren provided a two-page witness statement, and her evidence took up all of Day 3 and part of Day 4. We found Mrs McLaren to be an intelligent and highly articulate litigant in person, with exemplary command of concentration throughout the four-day hearing. She was by turns evasive and equivocal with inconvenient questions, and clear and forceful when it suited her to do so. We do not find Mrs McLaren a credible or reliable witness.

Documentary evidence

23. The joint bundle of documents is indexed into Part A of 163 items, and Part B containing 192 items. In summary, the contents of the hearing bundle cover the following areas.

Part A of the Hearing Bundle

(1) The appellant's self-assessment return for 2005-06 and PAYE for 2007-08; spreadsheets of rental income, Land Register Extracts, Companies House Directorship information, schedule on Assets/ Liabilities;

(2) Correspondence from 19 February 2014 to 4 June 2018, charting the course of enquiry, including the said Notices under Reg 72(5) and 1999 Act, the 'View of the Matter Letter' of 9 October 2015, the Review Decision of 18 December 2015, and the various changes to former representatives withdrawing from acting;

(3) Correspondence with the Tribunal Services charting the progress of the appeal, from the first lodgement of Notice of Appeal in July 2015 to Judge Bailey's refusal decision of 17 October 2019;

(4) Background documents, including P35 for IMEAL for 2005-06, the appellant's tax return calculations for the years 2002-03 to 2013-14; schedules of valuation of jewellery from 26 August 2003 to 17 August 2012 by Love for Diamonds Insurance;

(5) Invoices and cheques between IMEAL and Glasgow Solicitors Property Centre ('GSPC'); Minute of agreement between Estate Agency Solutions Ltd trading as '1 Move' and Campbell Sievewright, Solicitors, dated 22 March 2007; the appellant's correspondence with Clydesdale Bank in relation to IMEAL's bank account;

(6) Certified copy of the appellant's convictions and Sentencing Remarks by the Judiciary of Scotland in June 2017;

(7) Bank statements of the appellant's personal current account with Clydesdale Bank from January 2008 to December 2012.

Part B of the Hearing bundle

(8) Equifax Report; Summary of Property Deposits; Solicitors' Fee Sheets; Debt and Mental Health Form; Criminal Investigation Referral; Companies House records of the appellant's company appointments; Winding-up Order for 1MEAL;

(9) Land Register Extracts of properties with the appellant as the named proprietor;

(10) Notes of telephone calls to HMRC by the appellant's husband in 2014 and 2015 when he was acting for her.

24. Further documents were provided by the respondents on Day 4 consequent to Tribunal's questions as regards the actual entries on the relevant SA returns, being: (a) draft tax calculation for 2006-07 which removed all rental income; (b) HMRC's internal SA Notes with 10 entries on actions taken in May 2006 to January 2008; (c) View Returns for the SA returns for 2001-02 and prior years, (d) Summary Information for the returns for 2002-03 and 2003-04.

APPLICABLE LAW

25. The following provisions from TMA relevant to this appeal are set out in the Annex.

(1) Section 29 provides for the requisite conditions to be met for a discovery assessment to be valid.

(2) Section 34 provides for the ordinary time limit for an assessment under s 29 to be made within 4 years after the end of the year of assessment to which it relates.

(3) Section 36 provides for the ordinary time limit to be extended to 20 years after the end of the year of assessment to which it relates if a loss of income tax was brought about deliberately by a person.

(4) Section 50 provides for the Tribunal's jurisdiction on an appeal.

FINDINGS OF FACT

Background

26. On 25 January 2013, a police dawn raid took place on the appellant's then home address at Juniper Avenue, Bridge of Weir. The raid was part of Police Scotland's investigation into mortgage fraud and money laundering charges against parties involved, which included the appellant, Edwin McLaren (her husband), and IMEAL. The raid was reported in Daily Record on 26 January 2013, and the case was referred to HMRC Criminal Investigation ('CI').

27. In March 2013, Criminal Investigation considered civil action to be the best route to recovery, and decided not to pursue criminal prosecution, and referred the case to Officer Bean in FIS for civil action, on the basis that there was a lack of self-assessment returns from Mrs McLaren, and PAYE returns from IMEAL, and potentially a considerable loss of tax to HMRC.

28. Officer Bean then referred the case to Officer Duffy to coordinate the investigation efforts. As the senior investigator in FIS, Officer Duffy provided strategic advice and assistance to Officer Bean in relation to the insolvency action on 1MEAL, and technical support and advice to Officer Egan as concerns the personal tax position of Mr and Mrs McLaren.

29. In terms of length of experience at the time of the referral in March 2013, Officer Duffy had been an FIS investigator for some 6 out of her 33 years with HMRC, while Officer Bean had moved to his role as an Insolvency Investigator in January 2012, after 10 years with HMRC (part of which in dealing with MTIC fraud cases), while Officer Egan only moved to FIS in January 2013, after 27 years of working in CI.

30. On 23 May 2013, Officers Duffy, Egan and Bean attended Police Scotland Financial Investigation Unit in Paisley to examine paper records uplifted by the police. Copies of material considered to be relevant to ascertaining the tax position of Mr and Mrs McLaren and IMEAL were requested, which included:

(a) A fee sheet from an uplifted computer detailing commissions paid from solicitors to 1MEAL from 2009 to 2013;

(b) Copy receipts and valuations for jewellery;

(c) A summary of transactions comprising the deposits for the property portfolio.

Actions by FIS after uplifting of documents

31. After review of the documents obtained from Police Scotland, FIS took follow-up actions, led by Duffy in her supervisory role, with Bean focussing on corporation tax recovery from 1MEAL, and Egan focussing on personal tax recovery from Mr and Mrs McLaren.

32. Officer Duffy described the case as having 'the hallmarks of multiple business failure and an apparent tax deficit', and asked Officer Egan to conduct an initial review by checking HMRC systems, public record information, and internal sources, supplemented by information from the liquidator of a predecessor company 1 Move Ltd (in liquidation) (19 January 2006), the Trustee in Sequestration (11 April 2005) of Edwin McLaren, and information from HMRC Criminal Investigation Unit. The facts established at this stage included the following:

(1) An excel schedule uploaded by Police Scotland listed 8 properties with the appellant as the proprietor, with a column being headed 'Tenant' (names redacted). The proprietorship was confirmed by checks with the Land Registry records.

(2) The PAYE Service Employment Details returned by IMEAL for Mrs L McLaren shows her employment as starting on 6 April 2005 and ended on 31 July 2007, with a Pay to Date of £5,000 (for 2007-08), and PAYE to date of £627.11.

(3) The P35 return last filed by IMEAL was for 2005-06, which recorded the appellant as being paid £60,000; no further P35 returns had been filed by the company since.

(4) The appellant last submitted tax return for 2005-06, with employment income of £60,000 declared subject to PAYE. The employment was her directorship of 1MEAL.

(5) Companies House records show:

(a) The appellant was the sole shareholder of 1MEAL, and a director from 4 February 2005 to 20 March 2006.

(b) Her appointment as a director of 1MEAL on 4 February 2005 described her business occupation as a manager, and that she was also a director of a company called 1Move Limited.

(c) Her appointment as a director of 1 Move Limited was on 8 January 2002 until the company was dissolved on 13 May 2008.

(6) Department of Work and Pensions ('DWP') system showed there were no benefits awards as at April 2013.

(7) At the time of the referral, the estate agent business was ongoing and the lifestyle indicators mentioned a Bentley Continental worth in excess of £100,000. Police Scotland also uplifted documents including jewellery valuations and details of let properties.

(8) On 4 April 2013, a report from Equifax system was obtained regarding the appellant. The report showed the number of bank accounts, credit cards, hire purchase and mail order arrangements, and mortgages and loans in the appellant's name, which gave rise to annual outgoings of £85,020. It was estimated that it would have required an annual gross income of £140,000 to service the spending commitments, after allowing for tax and NIC liabilities of £54,980.

33. The actions taken by FIS after the initial review in May 2013 included the following:

(1) On 13 June 2013, Duffy reviewed Egan's case registration request and supported his recommendation which was subsequently authorised by the Team Leader Officer Dr Branigan on 17 June 2013.

(2) On 14 June 2013, based on the fee sheet information, Duffy provided Bean with a quantification of corporation tax under-declared by 1MEAL totalling £433,843.

(3) On 29 July 2013, Duffy and Egan held a case conference with Branigan in an attempt to quantify the tax underpaid by Mr and Mrs McLaren. Branigan instructed that the assessments should be issued under cover of Code of Practice 8 ('COP8') procedure, and that the team should first arrange for the issue of Reg 72(5) and Section 8(1) Notices.

(4) On 31 July 2013, Officer Egan submitted a Form 64D-4, which is HMRC's internal form to request for authority to issue extended time limit assessments. The reason for the extended time limit was that HMRC considered that the condition under s 29(4) TMA that the loss of tax was attributable to deliberate behaviour of the taxpayer would be met. The years concerned were the seven years 2002-03 to 2008-09, and the quantum for each year of assessment as stated on the Form was the same as that stated on the relevant Discovery Assessment (see §48), save for 2007-08 where £5,000 credit was subsequently given as having been reported by IMEAL's PAYE (see §32(2)).

(5) On 1 August 2013 Dr Branigan authorised for extended time limit assessments.

(6) In August 2013, Bean established that the appellant had held a position of authority within 1 Move Limited and IMEAL, and considered that there was a failure by the companies to ensure that PAYE had been accounted for properly, forming the basis for issuing the Reg 72(5) and Section 8(1) Notices to enable HMRC to pursue the appellant personally for the tax and NICs that the companies had failed to deduct.

Insolvency petition of IMEAL

34. Officer Bean led the insolvency petition to wind up IMEAL, since debts owed to HMRC were approaching £30,000 by March 2013. MLM Insolvency in Glasgow was appointed as liquidator and the corporation tax arrears were served on the liquidator on 2 October 2013. However, an estate agency business continued to trade from the same premises at Unit 9, Bridgewater Shopping Centre, Erskine, ('Unit 9') as 1MEAL after the insolvency petition.

35. On 10 October 2013, Officer Bean attended an inspection visit of Unit 9 with Officer Shepherd from HMRC Hidden Economy Team, with a view of ascertaining the VAT position of the business then trading from Unit 9. The signage above Unit 9 was *iProperty* and *Sparkles*, the latter being a dry cleaning business. A man who identified himself as 'David Johnstone' answered the door, said that he was employed by Sparkles and a Gordon Pollock was the owner.

36. Officer Bean was aware from his discussions with Police Scotland that both Mr and Mrs McLaren would frequently use false names when meeting victims whilst conducting the fraud being investigated. Officer Bean made the inference that the man identifying himself as David Johnstone was actually Edwin McLaren. To check if his inference was correct, Officer Bean contacted a member of Police Scotland who had met with Edwin McLaren to attend the premises with a 'walk-by' on the same day. The police officer confirmed positively that Mr Johnstone was in fact Edwin McLaren. The police officer also identified a female who had entered iProperty to be Lorraine McLaren.

37. Later on the same day, Officers Bean and Shepherd entered iProperty to speak to the lady identified by the police officer as Lorraine McLaren. The lady gave her name as Elaine Dempster; said that she was employed in the estate agent which was newly set up in the premises for about a week; that the business was not yet trading (despite a full window display of properties for sale and let); she would not answer questions as to who was in charge, but said that the business was previously run by '1 Move'. During the visit, another female present at a desk throughout did not speak, and Officer Bean stated that the unspoken female could have been the real Elaine Dempster who was working at Unit 9, as advised by Police Scotland.

38. Officer Bean later requested passport photos of Mr and Mrs McLaren which confirmed that it was indeed Edwin and Lorraine McLaren at Unit 9 who identified themselves as David Johnstone and Elaine Dempster respectively. On 27 March 2014, Officers Bean and Shepherd visited Unit 9 again with the view of uploading business records. The appellant gave her name as 'Elaine' but would not confirm her surname or answer any questions. Officer Bean stated in his witness statement that she became 'very aggressive', and asked them to leave, and they did.

39. On 29 August 2014, IMEAL went into liquidation under a winding-up order issued by the Sheriff at Glasgow. (Its predecessor, I Move Ltd, was also wound up by HMRC in 2006.)

The issue of Reg 72(5) and Section 8(1) Notices

40. Concurrent to the insolvency petition action was effort to arrange for the Notices to be issued. Officer Duffy stated a specialist department in HMRC had the responsibility for these Notices, and submission was made in August 2013 for their issue. However, due to internal reorganisation no action was taken. Eventually Officer Bean took responsibility for the Notices.

41. In evidence, Officer Bean related he had 'no prior experience of Directions work', and the dedicated team based in Dundee, Scotland had been disbanded. He sought guidance and instructions from a colleague in Manchester on 29 August 2013, and chased for a response from Manchester at the end of September. He started gathering evidence in mid-November 2013, and contacted another colleague in Birmingham for further advice.

42. On 19 February 2014, Officer Bean wrote to the appellant indicating that HMRC held information which suggested that when she worked for IMEAL, insufficient tax and Class 1 NIC were deducted from relevant payments made to her in the years 2006-07 to 2011-12.

43. On 3 July 2014, the Reg 72(5) Notice was issued to hold the appellant as liable for the income tax failed to be deducted under PAYE by IMEAL, calculated to be at £106,991.87. On 3 July 2014, the Section 8(1) Notice was also issued to hold the appellant as liable for NIC deficit of £27,925.48.

44. The appellant was invited to make representations within 28 days of the Notices being issued and to provide any evidence to show that sufficient tax and NIC were deducted. There was no response to the invitation.

The COP8 letter and Discovery Assessments

45. On 4 July 2014, Bean emailed Egan to inform him of the issue of the the Reg 72(5) and Section 8(1)Notices, as it was understood by the team that Dr Branigan's instruction was to issue Notices before proceeding with the issue of the Discovery Assessments under COP8.

46. HMRC COP8 leaflet explains that FIS carries out civil investigations when the Code of Practice 9 ('COP9') is not used. However, if HMRC suspect or find evidence of fraud at any time during a COP8 investigation, then the COP9 procedure will be adopted with a view to a criminal prosecution.

47. On 24 July 2014, Office Egan wrote to the appellant, under the heading of 'Your Tax Affairs'. The letter informed the appellant that HMRC have information which suggested that 'there may be a serious loss of tax', and that the 'enquiry will be conducted under COP8 and may result in penalties' being assessed on the appellant. The COP8 leaflet and the Factsheet on Article 6 of the Human Rights Act 1988 ('FS9') were enclosed. The letter continued by highlighting avenues for help, as listed on FS9; namely: Community Legal Advice, Scottish Legal Aid Board or the Law Society in Northern Ireland; adding in the next paragraph, Citizens Advice Bureau, and the Tribunal Service website.

48. On 24 July 2014, ten notices of Discovery Assessments were also issued. The amounts of the additional tax sought are calculated based on two components: (a) underdeclared employment earnings; and (b) rental income receivable. The figures in brackets represent the sums that had been declared in the SA returns filed on the system, and no additional earnings were assessed for 2003-04 or 2004-05. Credit was given for £5,000 for 2007-08 as the sum being recorded under PAYE Employment records for the appellant, see §32(2).

	Tax year	**Tax sought**	**Additional Earnings**	**Rental Income**	**Rtn filed pre-2014 Date of filing**	**Rtn filed after appeal lodged**
1	2002-03	£10,541.00	£41,000	£4,000	None	None
2	2003-04	£2,000.00	(£42,000) rtn	£5,000	6 March 2008	None
3	2004-05	£2,400.00	(£38,500) rtn	£6,000	28 June 2007	31 Jan 2015
4	2005-06	£2,480.00	(£60,000) rtn	£6,200	28 June 2007	31 Jan 2015
5	2006-07	£19,340.80	£62,717	£6,300	None	31 Jan 2015
6	2007-08	£19,444.49	£60,343	£6,300	(£5,000) PAYE	31 Jan 2015
7	2008-09	£19,058.00	£64,580	£6,500	None	31 Jan 2015
8	2009-10	£19,742.00	£68,030	£6,500	None	31 Jan 2015
9	2010-11	£16,630.00	£60,000	£6,750	None	31 Jan 2015
10	2011-12	£14,810.00	£55,000	£7,000	None	31 Jan 2015

The basis for discovery of insufficiency in tax assessment

49. The quantification of the assessments had been a difficulty due to the absence of returns being filed by the appellant after 2005-06. The evidence relied on by HMRC to support an insufficiency of tax was collated from several sources, with the salient details as follows.

(1) ***Property ownership*** – nine heritable properties were owned by the appellant, and over each of which a standard security was registered with an outstanding loan. Five of these properties were tenanted. The family home at Juniper Avenue was acquired in the appellant's sole name for £762,055 with a mortgage. The appellant therefore had significant outgoings in respect of mortgage commitments for the nine properties, and was also receiving rental income from five of them. For instance, bank statements showed a monthly credit from a Mrs Docherty of £650 in 2011 and 2012, which appeared to be rental income.

(2) ***Involvement with IMEAL*** – the appellant was a director of IMEAL between February 2005 and March 2006, but her resignation from the directorship was only registered with Companies House in 2008. IMEAL continued to trade until it was placed into insolvent liquidation in September 2013, and the appellant was continually involved in the business until its liquidation.

(3) ***Companies House records*** – the appellant was listed as either a Director or the Company Secretary of 1MEAL and the predecessor companies of IMEAL.

Company Name	Date of Inc	Role	Appt date	Resig'n date
1 Move Limited (dissolved 13/05/2008)	08/10/2002	Director	08/10/2002	
Moving (Scotland) Ltd (struck off)	05/03/2001	Director	01/01/2002	10/06/2003
Gryffe Property Centre Ltd (dissolved 13/05/2005)	05/01/2001	Director Secretary	05/10/2001 07/02/2001	04/10/2001
The Big House Company (Scotland) Ltd (dissolved 25/10/2002)	19/01/2000	Director Secretary	19/01/2000 19/01/2000	
1 Move Financial Services Ltd (dissolved 13/01/2011)	06/06/2005	Director	29/09/2006	02/05/2007
1 Move Estate Agents Ltd (struck off)	04/02/2005	Director	04/02/2005	20/03/2006

(4) ***Lifestyle information*** – the appellant's bank statements for the years 2007 to 2013 showed school fees payments for two places (monthly total at £1,750 in 2009); private health insurance (monthly at £205.32 in 2009; £276.09 in 2012); subscription to St Andrew The Old Course of £906.95 (July 2009); frequent visits to beauty and hair solon (e.g. £274 in April; £95 in May; £227 in June of 2009); payments to holidays agencies (e.g. Barrhead Travel £1,503 on 12 May 2008); regular outgoings for entertainment, shoe and clothing shopping, in addition to household expenditure such as Council tax, utility bills, petrol and groceries.

(5) ***Equifax (Section 29) report delivered on 5 April 2013–*** the report indicated financial commitments undertaken by the appellant required around £85,020 in total per annum to service bank overdrafts, credit card balances, hire purchases, mortgages and loans. (For example, the appellant said the hire purchase starting on 31 October 2012 for 36 monthly instalments at £1,190 was for the Range Rover she drove, and another hire purchase starting on 17 March 2011 for 24 monthly instalments at £385 was for a BMW Mini for her daughter to drive.) Apart from the mortgages on the family home property, there were mortgage payments for other heritable properties registered in her name, as corroborated by the Land Register records.

(6) ***Bank statement credit analysis –*** unexplained annual lodgements identified were:

(a) January 2007 to 5 April 2007 – £58,770 (£28,000 alone on 5 April 2007);

(b) Year to 5 April 2008 – £102,650 (excluding £185,381 on 3 April 2008), and £25,000 was explained as for stamp duty on purchase of new home at the hearing;

(c) Year to 5 April 2009 – £143,000;

(d) Year to 5 April 2010 – £190,300 (including £20,000 from J Horsey, and £30,000 from A Horsey);

(e) Year to 5 April 2011 – £116,500;

(f) Year to 5 April 2012 – £96,500;

(g) 6 April 2012 to December 2012 (up to the police raid) – £68,000.

(7) ***Minute of Agreement to contract with a firm of solicitors*** – as recorded in the Books of Council and Session with extract registered on 11 April 2007, the agreement was between 'Estate Agency Solutions Limited 1 Move' and Campbell Sievewright & Co. based in Glasgow. The agreement set out the terms and conditions for the business dealings between the two entities, and of the calculation for fees payable to 1 Move; for example, when 1 Move referred a client to Campbell Sievewright for conveyancing. The appellant executed the deed in her capacity as a Director of Estate Agency Solutions Ltd.

(8) ***Authority to transact as Director of IMEAL –***

(a) cheques drawn on IMELA's bank account were signed by the appellant; for example, to payee GSPC for £6,365.75, and £2,189, in May 2006;

(b) instructions given in the appellant's capacity as 'Director' of IMEAL by letter to Clydesdale Bank on 27 February 2007 to rename an account as IMEAL's 'Client Account', return all processed cheques cleared on that account, and transfer all charges incurred and interest received to the 'firm's bank account' and so on;

(c) other correspondence and fax communications between Clydesdale and the appellant acting on behalf of IMEAL in the years 2006 and 2007.

(9) ***Valuations of jewellery –*** Between 2003 and 2012, the appellant and her husband had either acquired, or received valuations for insurance purposes, of jewellery with an aggregate value of some £200,660;

(10) ***Land Register and Deposit Summary –*** the Land Register searches carried out in March and April of 2013 identified 9 properties below (address number redacted) as owned by the appellant; the details on the Register are here collated with the schedule entitled '*Deposit Summary Lorraine McLaren*' (Doc. 168) uploaded from the police.

	Tax year	Property address	Date of Entry	Date of Reg'n	Consideration	Deposit
1	Home	Juniper Avenue	04/04/2008	11/04/2008	£762,055	£190,513
2	2008-09	Craigielea Road	08/04/2008	07/04/2008	£65,000	£9,750
3	2008-09	Riglands Gate	20/06/2008	27/06/2008	£165,555	£27,000
4	2008-09	Hardie Street	16/12/2008	23/12/2008	£80,000	£20,000
5	2008-09	Balcastle Gardens	08/01/2009	12/01/2009	£110,000	£27,500
6	2008-09	Garry Drive	05/02/2009	12/02/2009	£90,000	£22,500
7	2009-10	Stewart Avenue	14/04/2009	17/04/2009	£155,000	£46,560
8	2009-10	Birnam Road	06/07/2009	17/07/2009	£90,000	£22,500
9	2009-10	Hillview Terrace	03/11/2009	18/11/2009	£100,000	£25,000
				Total	**£1,617,610**	**£391,323**

The basis for quantification of the Discovery Assessments

50. Under cross-examination, Officer Egan repeated that the various sources of evidence relied upon by HMRC was to establish whether there might have been an insufficiency in the assessment of tax. He reiterated that those sources were not the basis for quantifying the extent of insufficiency. For quantification, it was principally based on what the appellant had declared in those earlier years when an SA return was filed; the quantification was simply on the same basis as what the appellant had declared as her employment and rental income.

51. Officer Egan explained the figures used for the assessments in the following terms:

> (a) additional earnings were based on the declared employment income of £60,000 in the Self-Assessment return for the year 2005-06;
>
> (b) applying the presumption of continuity to the baseline figure of £60,000, backwards and forwards from 2005-06 for other years of assessments;
>
> (c) adjust the baseline figure of £60,000 by the relevant Retail Price Index;
>
> (d) no additional assessments were made for those years (2002-03 to 2005-06) where employment income had been included in the filed returns;
>
> (e) credit of £5,000 was given for 2007-08 as identified from IMEAL's PAYE.

52. The second component in the assessments related to the rental income, whereby:

> (a) on the schedule uploaded by Police Scotland (originating with Mr and Mrs McLaren therefore) five properties were marked as 'tenanted';
>
> (b) the monthly credit of £650 into the appellant's bank account from a Ms Docherty, for example, would appear to be a rental receipt;
>
> (c) rental income was declared in the appellant's SA returns filed for three years–
>
> (i) £5,000 in 2003-04;
> (ii) £6,000 in 2004-05;
> (iii) £6,200 in 2005-06;
>
> (d) applying the presumption of continuity to the baseline figures as declared in the appellant's SA returns with modest incremental increase;
>
> (e) allowing deductible expenses and mortgage interest, to reach an estimate of an annual rental profits of £6,000 to £7,000 for five properties.

The appellant's Self-Assessment records

53. As set out at §48, the appellant filed returns for the three years 2003-04, 2004-05, and 2005-06, but subsequently on 31 January 2015, multiple nil returns were filed, including those for the years 2004-05 and 2005-06, which had formerly declared employment income at £38,500 and £60,000. The nil returns filed for 2004-05 and 2005-06 on 31 January 2015 therefore sought to negate the figures in the original returns, both filed on 28 June 2007.

54. The SA Notes maintained by HMRC's system for the appellant were produced in the course of the hearing, and material entries on the Notes are the following:

> (1) 09/05/2006: SA record set up on instructions from National Compliance PAYE Directors Unit Queensway House East Kilbride. 2002-03, 2003-04, 2004-05 manual returns issued (incl employment pages). Request on record to issue a 2005-06 SATR.
>
> (2) 07/02/2007: Case review. 03, 04, 05 SA returns outstanding but only fixed auto penalty on statement for 05. … [referral to review penalty position].
>
> (3) 09/05/2007: Determinations for 02/03, 03/04, 04/05 requested by Debt Management System ('DMS')

(4) 23/10/2007: 02/03 and 03/04 still outstanding – preparation for commissioner hearing 20/11 …

(5) 11/12/2007: Daily penalty charge for 02/03 and 03/04 requested by DMS.

(6) 11/01/2008: this is a failure to notify case – taxpayer director until 31 July 2007 – set up by PAYE directions unit at Centre 1 …

The Conviction and the Sentencing Statement

55. Under Rule 15(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, the Tribunal has flexibility and discretion in deciding whether to admit evidence, having regard to the ordinary law on civil evidence. The extract conviction, and the sentencing statement in relation to Lorraine McLaren's criminal trial are admitted as evidence for these civil proceedings in accordance the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, which provides under s 10(1) that:

> 'In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom … shall … be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings.'

56. The criminal trial of Edwin McLaren and Lorraine McLaren of 44 charges commenced at the High Court in Glasgow on 14 September 2015, and ranked as one of the longest in legal history, lasting for 320 days in total. The significant dates in relation to the criminal trial are:

(1) On 16 May 2017, the accused were convicted –

(a) Edwin McLaren was found guilty of 25 charges of fraud at common law in relation to property transactions; the total cash amount fraudulently obtained in the four years to January 2013 was £1,609,366.64.

(b) Lorraine McLaren was found guilty of two charges:

(i) Common law fraud in respect of a mortgage loan of £566,250 ('charge 1');

(ii) Money laundering contrary to the Proceeds of Crime Act 2002 with a sum involved of £128,700 ('charge 36').

(2) On 13 June 2017, Lord Stewart sentenced Edwin McLaren to eleven years' imprisonment and Lorraine McLaren to two-and-a-half years' imprisonment.

(3) On 17 July 2019, Lorraine McLaren's application to the Supreme Court against her conviction and sentence was rejected, bringing the appeal process to an end.

57. The sentencing statement handed down by Lord Stewart on 13 June 2017 included the following remarks addressed to the appellant.

(1) In relation to charge 1, Lord Stewart addressed Lorraine McLaren in these words:

> '… in March 2008 you contracted to buy the house at 9 Juniper Avenue […] at a price of £762,055.00.
>
> Your own evidence is that this was your dream house. It was to be the family home.
>
> The jury's verdict necessarily mean that you obtained a mortgage of £566,250.00 on the basis of a declared income from employment of about £160,000.
>
> You claim to have been working as an estate agent in or for a business of uncertain legal status called "1 Move". The evidence of your precise income from employment, if any, is sketchy to non-existent.

> According to the HMRC records spoken to by the fraud investigator Dr Nicholas Brannigan [sic], no employment information and no income from employment was recorded or returned for you after July 2007. […]
>
> You told the police at interview, that before the housing market crash of 2007-2008 you had an income of £36,000 a year or so from employment and, as I understand it, nothing in the way of income from actual employment afterwards. No pay records or business accounts for the business have been recovered or produced. It follows that the declaration of income from employment for the purpose of the mortgage application was a very big lie.'
>
> […]
>
> '… the jury has also accepted that when the mortgage application declared the source of the purchase price deposit to be your accumulated savings, that was a lie. The deposit was £195,805.'

(2) In relation to charge 36, Lord Stewart remarked:

> 'This was to be a capital and interest repayment mortgage. After the first month, payments were to be at the fixed rate of £3,559.97 a month working out at £42,719.64 a year till the end of year three and then at the lender's variable rate. […] the mortgage payments were financed or substantially financed by the proceeds of your husband's property transaction frauds.
>
> The Crown has proved … that proceeds of crime in the total sum of £118,700 were transferred to the bank account held by you from which the mortgage payments were made.
>
> By virtue of your conviction in terms of charge 36 the jury must have found that over the four-year period from January 2009 to January 2013 you knew or suspected that the transfers to your bank account represented the proceeds of crime.'

(3) The evidence as regards the provenance of certain funds adduced at the criminal trial is instructive for present purposes:

> 'The jury has also concluded that the £10,000 payment made to enhance your diamond ring in 2012 represented the proceeds of crime and that you knew or suspected as much.'

(4) On the basis of the conviction, the inference of the jury's verdict of Lorraine McLaren as a witness is that:

> 'The inference from the fact of your convictions must be that the jury found your presentation in the witness box unimpressive. I must proceed on the basis that the jury found you to be an outright liar through most of your evidence.'

(5) Lord Stewart's own remarks on Lorraine McLaren as a witness:

> 'On the evidence your husband was the driving force. That is a factor that I accept as mitigatory.
>
> However, you have also shown yourself to be both a strong personality with a mind of your own and to be an energetic business woman in your own right.
>
> Your defence is that you trusted and trust your husband and left all financial matters to him. The jury rejected your defence.'

THE APPELLANT'S EVIDENCE

58. In the present proceedings, the appellant gave evidence over the course of one and a half days. As stated earlier, we do not find the appellant a credible or reliable witness in the main, though we find limited aspects of her evidence specific to the operation of the estate agency

business and her role therein credible. We summarise her evidence below, and assess aspects of her evidence in conjunction with our evaluation of the substantive issues in relation to the Discovery Assessments later in the Decision.

The appellant's witness statement:

59. In accordance with Tribunal's Directions of July 2018, the appellant's then representative lodged a witness statement of Mrs Lorraine McLaren. The two-page witness statement contains eight paragraphs which are summarised as follows.

(1) She accepted that she owned nine heritable properties over which there were standard securities and five of which were tenanted;

(2) She stated that she owned a diamond ring which was inherited and valued at around £100,000.

(3) In relation to various references in the HMRC's Statement of Case, the appellant:

(a) disagreed that she had annual borrowing outgoings of over £84,000;

(b) stated that the Bentley was owned by her uncle Arthur Horsey;

(c) submitted that she was unable to verify any more the alleged unidentified lodgements in her bank account due to her change of address;

(d) asserted that the payments into her bank account were 'gifts' from her husband and her late uncle Arthur Horsey, and were not derived from income;

(e) and that any standing orders and direct debits on her bank account were for basic expenses;

(f) asserted that the aggregate value of her jewellery is inaccurate.

(4) She was not aware that 1 Move Ltd had 'wilfully failed to deduct sufficient tax and that [she] was liable to pay tax as a result', or of 'any alleged failure to deduct national insurance contributions'; and that she did not receive any remuneration from 1 Move or any successor company for the years following 2006. She stated that:

> 'Although I was a former director of One Move I had no dealings in the day-to-day running of the company. My husband Edwin McLaren dealt with all of our finances and he had sole control over the business.'

(5) She 'denied' that she received remuneration without deduction of tax from 1 Move Ltd. She asserted that her income was detailed in her SA returns; that from 2008 onwards she did not receive income from 1MEAL; that the sums deposited into her bank account were 'gifted to [her] to make payment of all outgoings and liabilities due on a monthly basis, and were from non-taxable sources'.

The estate agency operation

60. In her oral evidence and in response to the Tribunal's questions, the appellant spoke of the estate agency business structure in the following terms.

(1) When asked about her role in the estate agency business, she said: 'I tried not to sound as stupid as I come across – 1 Move Ltd, in a business sense, all I did was to sit as an estate agent; not one iota of brains the size I have; I would sign any paper work. When I was asked any questions about the companies, I feel like an idiot, I just didn't know.'

(2) When asked about the premises from which the estate agency business operated, she said in 2005-06, business was 'booming', and there were two offices: one in Neva Place, the premises was leased; one in Bridge of Weir with four desks – a negotiator; Edwin's PA; a junior receptionist, and herself. Edwin 'floated around' and had his own office above the Clydesdale Bank in Bridge of Weir.

(3) The lease for Neva Place ended. The downturn in the housing market came, and the office moved to Kilmalcolm Road in the 'downtown area' with two desks – 'I sat at one majority of the time' and 'one girl came to work in the office for 4 months, or maybe a few months – she answered the phone.'

61. When asked what services the estate agency business offered to its clients, Mrs McLaren was able to speak with a credible degree of specificity.

(1) 'I would answer the phone if anyone wanted a valuation done for a property; would go out to the properties to look at them myself, and give a verbal valuation. When back in the office, I would draft an email; state what was discussed, a standard document that reads:–

> "Dear so and so,
>
> Thank you for inviting me to your property and for your time today. The valuation of the property at [x] address would be £ [value] – list parameters in the region of £"'

(2) When asked how she arrived at her valuation opinion, the appellant replied:

> 'Print off the Land Register Service for, say, 1 Brown Crescent; do a search of properties in the neighbourhood; look at properties; what they paid for when they bought it; similar property value; I did my inspection of the property – if a very well presented property, then that would affect the valuation; use my nose – some older properties can smell, can affect the price because of damp.'

(3) When asked what role the business played in relation to the introduction of the Home Report[1] requirement for marketing a property, the reply was: 'That changed my job slightly'; 'I would give guidance to the Home Owner'; 'same as I'd always done, would do the same way, basically my opinion' and 'ultimately the valuation from the surveyor would often be similar to my guidance price'.

(4) When asked the geographical areas covered by the business, the reply was: 'very familiar with Bridge of Weir' and from the Neva Place office – covered Houston, Bridge of Weir, Kilmalcolm; Brookfield, Kilbarchan – 5 miles around.'

(5) When asked why she would be 'very familiar' with those areas, the appellant said that prior to 1996, she had 'a selling role' in property companies; she 'worked for a builder at one point, selling new build houses; the last job before her son was born was to sell new houses for a builder until November 1996'; she 'had always worked for a company'; 'always worked in properties – in selling'; and that 'prior to 1996 [had] nothing to do with Edwin McLaren's business.'

(6) When asked about the arrangements with GSPC[2] through a member firm of solicitors, the appellant stated the original firm of solicitors with which her husband did business with GSPC was 'Alan Peters & Co.' which was 'a two-solicitor firm but was no

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[1] The Home Report requirement became mandatory in Scotland from December 2008 whereby a seller must obtain a Home Report on the property before it can be marketed for sale. A Home Report is prepared by an accredited firm of surveyors and takes a standard format to cover all relevant aspects of a property as prescribed by law, and is made available to prospective buyers and their agents for the duration when a property is for sale.

[2] GSPC (Glasgow Solicitors Property Centre) was modelled after ESPC (Edinburgh Solicitors Property Centre), which functions as a consortium for member firms of solicitors to market properties placed with them for sale. It remains a common practice in and around Edinburgh that the estate agency in a property sale is brought under the umbrella of the conveyancing solicitors (and a member firm of ESPC). GSPC came into existence around 1994 to be a similar platform for its member firms of solicitors to place properties for sale in West Scotland. After 24 years, GSPC went into liquidation in September 2018 with assets being taken over by ESPC.

longer'; 'that was the first arrangement and it came to an end'; and 'we moved to Campbell Sievewright' which is 'still a firm'.

(7) When asked what she would do for clients to place a property on the market, the reply was: [she] would go out to prepare the brochure for sale; dictate the particulars; gather information for sale and send to GSPC; GSPC prepare the brochure and charge £200 upfront costs; when the property is sold, then get the commission at 1% generally; get the money after the conveyancing; fees for costs are for brochure of the particulars, advertising on GSPC website; the package of fees is the upfront costs / regular costs of £200 (£199) – that is what the client would pay in advance; standard packages – a straightforward standard – 4 page brochure; a bigger house is 6 pages; part of it was registration costs; all subsequent fees to come out of the proceeds of sale.

(8) When asked how she would know when the commission fees were due in, the reply was: 'I can email' [to find out].

(9) When asked during the period 2005-06 when the business was 'quite busy', how many properties would be coming through for valuation purposes, the reply was: 'always I went out' [to do valuation]; 'if it was busy, might be 4 properties, a few days of the week, sometimes 4 properties over a day'; that her 'children went to school locally'; 'could do anything 1 want to do Monday to Friday – Flexibility'.

(10) When asked again to describe the forms of communications involved in providing a client with a valuation, the reply was: 'all valuation enquiries come into the office would be captured'; 'I would intimate the valuation verbally during the visit when I did the valuation'; then by email when back in the office; followed by an 'after valuation letter' containing the 'report' being the valuation and costs – 'sent out by me or other girls'; the 'after valuation letter' would go out with 'the valuation and standard packages (2 versions) whether buying or selling'.

(11) When asked to describe the process from the after-valuation letter to getting a brochure in place, the reply was that she would go out for 'a second visit to [the property] to take photos – with dicta-phone, camera and laser measure, all in a kit bag; £200 for photos and dictation [of sale particulars], and collect a cheque made payable to GSPC'; 'brochure would come back from GSPC straightforward'.

(12) When asked to describe what the business was like after moving to Kilmalcolm Road, the reply was: '2007 very quiet it was dead' – from 'a very buoyant to nothing'; 'the economy of estate agents closed down'; there were 'not as many estate agents as before' – 'the lease [at Neva Place] no longer affordable, it was a cheaper property and the new location on the outskirt'; 'some weeks, no valuation, or very little'.

The appellant's role in the business

62. From her description of how the business operated, the appellant was clearly playing an important role in the estate agency business. The following questions were then put to her.

(1) When asked what she received in return for what she did in the business, the reply was – 'yes, I still thought I was getting paid'; 'I knew there was no estate agency business; not that gullible', but 'I was still getting paid for the legitimate business – new business in 2007-08 started this business advertising in the papers for people who are in financial difficulty'; but 'the money through my accounts was to pay the mortgage from his legitimate business'.

(2) When asked why she had said 'not knowing anything going on in the company', she replied: 'I know more now than I did then that he was a director.'

(3) When asked whether she knew she had been the sole shareholder of IMEAL, she replied: 'he used me; I knew about his bankruptcy in 2001; he was made bankrupt for £2,500; children quite young at that stage'.

(4) It was put to her that she was a Director of 1 Move Ltd in 2002, which would tally with the fact that her husband could not be a director because of his bankruptcy in 2001. 1MEAL was incorporated in 2005 with her as Director, and the termination of appointment as a director was on 20 March 2006; she was asked whether she recalled signing the termination of appointment document. She replied: 'he would put the paper in front of me to sign; didn't have a clue why he would ask me to sign'.

(5) When asked if she carried on working after resigning as a director, she replied: 'even after the resignation – continued to work in 1MEAL'; that she being the 'more approachable type of person', she was 'working by default when he [her husband] got involved in estate agency business'; that it was 'not deliberate' but 'drafted in by default'.

(6) When asked whether it was her signature on the cheques to GSPC dated 31 May 2006, she replied: 'it is my signature but I am not a director according to this not my handwriting, so I did not write the cheque out but it is my signature'; she said that there would be a cheque book and she would sign 'all blank cheques'.

(7) When asked why she would sign blank cheques, she replied that she would do as 'asked to do and not think of anything' – 'sometimes I signed blank cheques'; then added: 'at this moment in time, can't remember singing anything. When evidence was given [at the criminal trial] did remember signing blank cheques – a number of cheques signed by me after I resigned as a director – that did come up; it jogged my memory – he did get me to sign blank cheques from time to time'.

False capacity and false name

63. In relation to the signature on the Minutes of Agreement with Campbell Sievewright, the appellant stated: 'definitely my signature' and 'Adam Pollock was the secretary' (the other signatory on the agreement). The material fact is that at the time (in April 2007) when the Minutes of Agreement with Campbell Sievewright was signed, the appellant was no longer a director of 1MEAL (resigned on 20 March 2006).[3]

64. It was put to her by Mr Anderson: 'You were signing a document bearing the role as director when you were not director – you were not authorised to sign', and she accepted that was indeed the case. She added: 'I signed numerous paper work when I shouldn't have done'; 'the only person who could ask me anything was Edwin McLaren – the only person – have signed many things and not read them'. She added: 'I bet Edwin McLaren was with me at the meeting [to sign the agreement]', and 'Adam Pollock worked for Edwin for a number of years'.

65. Mr Anderson then asked the appellant why she gave a false name on the two occasions when Officer Bean visited the premises of iProperty in October 2013 and March 2014. She replied that the police raid had brought along the Sunday newspapers, and it was bad publicity. She said: 'shouldn't have done it; no, something I have never done before, but I did.' When it was put to her whether she meant it was 'a stupid thing to have done', she replied: 'not a style

[3] We note that the agreement was executed between 'Estate Agency Solutions Limited 1 Move' and Campbell Sievewright and Company. The appellant was therefore purportedly as a director of Estate Agency Solutions Limited 1 Move', which is not an entity identifiable on Companies House records (see §49(3)). The only directorship coterminous with the date of execution of the agreement was the appellant's directorship (29/9/2006 to 2/5/2007) with 1 Move Financial Services Ltd, which was dissolved on 13 January 2011.

I would adopt, on both dates.' When it was put to her that one characterisation of what she did was being 'dishonest', she replied: 'Yes, I gave a false name'.

Earnings from business

66. A host of questions were put to the appellant in relation to her earnings and her mortgage application, and her replies were the following:

(1) When asked that she was an 'experienced estate agent' and whether she had ever received payslips, she replied: 'there were two parts of my working life – before and after my son was born in November 1996 – before it was "conventional working" with tax and NIC; and after son was born I took time off'; 'unfortunately for me ended up working in Edwin McLaren's type of thing'; being 'a collator and dealt with all the paper work'.

(2) When asked that Edwin McLaren could not be a director of any company at this time, and that only Lorraine McLaren was the Director, what happened after 2005-06, she replied: 'in the time I was involved working in the organisation I dealt with all the paper work in those years. After 2005-06 I continued – carried on when we moved to Kilmalcolm Road – clearly not doing the estate agency business; not bringing in any fees. As far as I was concerned, any money given to me was legitimate, any tax due on it done and dusted, as had been in previous years'.

(3) When asked about the timing of purchasing the 'dream house' in March 2008 at a time the market condition was difficult and fees were not coming in, she replied: 'we lived in rental property – the Grange in Kilmalcolm with rent around £2,500 to £3,000 per month. When Juniper Avenue came up, Edwin felt confident that the new business would generate new income and he (in my name) would keep up the mortgage payment, because the purchase was done in my name.'

(4) When asked why the mortgage application came to be in her name, she replied: 'the mortgage was done with a financial adviser known by Adam Pollock for 20 years by the name Brian Ferguson, and was a self-certification mortgage done online'. When it was put to her that the application was 'fraudulent' as found in the criminal trial, she replied: 'my husband dealt with the mortgage application – I knew that – the details of it I was not involved with'.

(5) When asked why the judge in the criminal trial would call her a liar if she was not involved with the application, she replied: 'all was left to husband' – 'salaried at £60,000 in previous years – genuinely thought that the mortgage application put in for me was for £60,000' – 'I still thought I was being salaried properly at £60,000' – 'the point is although the mortgage and house was in the name of Lorraine McLaren, it was *not* Lorraine McLaren – it was really Edwin McLaren – he and Brian Ferguson admitted that I did not give the figure – I did not give any figures; Brian Ferguson input all information – it was a self-certification mortgage – decree was granted by the Bank of Scotland.'

(6) It was put to her that the explanations of 'loans' or 'gifts' for her bank lodgements had originated from her husband who made several phone calls to HMRC in late 2015 in relation to the notices of assessments served on both of them. One such conversation was on 30 November 2015 with Inspector Agg, in which Mr McLaren said that various lodgements into his wife's bank account were not taxable income but 'loans' from his uncle, said to have been supporting them for five or six years. She did not disagree.

(7) The appellant rounded off this part of her evidence by saying: 'I am here because HMRC said that I had earned, but Dr Branigan testified that I had no earnings [at the criminal trial]. He was the Crown's witness and he quite rightly said that there had been zero income.'

67. Mr Anderson clarified to the appellant that the testimony of Dr Branigan in the criminal trial was to vouch to the court that no returns were filed for Lorraine McLaren after 2005-06, which was not the same as to vouch that there was no income earned by the appellant after 2005-06. Given the purchase price of Juniper Avenue was £760,000, and with a deposit of £190,000, the mortgage application for £580,000 required her earnings to be £160,000 to be approved. The appellant was then asked how she thought she could afford the mortgage when she thought she was 'salaried' at £60,000, which would seem to concur with what she told the police at interview that her annual income was £36,000, being £60,000 net of tax and NIC. To these questions, she replied:

> 'At police interview, I was made aware that it was not a legitimate salary – they made me aware of it.'
>
> 'I then had a separate discussion with Edwin McLaren when I discussed with him after the police involvement and he told me – "because you didn't earn anything".
>
> 'What I thought was completely different from what happened!'

68. The appellant was asked what she meant by 'not a legitimate salary', to which she replied:

(1) 'When the estate agency business declined and the 2007 financial crisis, [Edwin McLaren] set up the other business, … to be fair, there was overlap with the boom petering off … there being an overlap when he saw somebody down south having this type of business around the same time as the decline that he started the new business.'

(2) When asked whether much of the proceeds were paid to Arthur Horsey as referred to in Lord Stewart's statement, she replied: 'yes, Arthur Horsey was used.'

(3) 'Before police involvement the true explanation given by Edwin was that money was a "loan, gift" but ultimately it was criminal money – the majority of money into my bank account was criminal money– that was the crux of it.'

69. Mr Anderson then referred the appellant to what Lord Stewart described her, showing herself 'to be both a strong personality with a mind of [her] own' and 'an energetic business woman in your own right'. The appellant objected to these attributes as relevant to her, saying:

> '… strong women are not bullied … [or] being controlled …
>
> I define a business woman in her own right as someone like Karren Brady … a woman like me worked for a company and her husband. I am not stupid, but I am not a Karren Brady. …'

Origin of funds in bank account

70. Various questions were put to the appellant in relation to the funds appearing in her bank account, and her replies were:

(1) 'Arthur Horsey – my mother's sister's husband – he dealt with all banking mail; and did any banking to be done, worked on the direction of Edwin in Prieston Road, not in the Estate agency office – above Clydesdale bank on Prieston Road in Bridge of Weir.'

(2) That husband 'dealt with all finances'; 'I would sign anything'; that he 'used to put me through the book for £60,000'; 'would use the debit card for basic shopping'; 'any money into my bank account I did originally think it was classed as earnings'.

(3) That 'I assumed monies entering my account from legitimate business sources'.

(4) 'These credit entries paid into my account they came from Arthur Horsey's account'; 'husband would do everything; he would arrange all that; he would have the statement monthly, would have my card, I can categorically say it – Barrhead Travel was

Edwin McLaren's doing – I knew he was doing it; I knew he would be "interacting" with the account; he and Arthur Horsey "interacted" with the account'; 'Barrhead Travel – £1,503 paid in April 2008 for a summer cruise Italian Mediterranean for the four of us'.

(5) When asked what she meant by 'interacting' with the account, she said: 'hundreds of pay-in slips and pay-in books, all relating to money going into this account', but that she 'never checked the account' and her husband 'would arrange all that'.

(6) Mr Anderson put to the appellant: 'It is not credible that you never looked at the bank statements; it is not a credible account that you are not aware of the credits being paid into your account'. She replied that the 'money was a gift as suggested by Edwin McLaren and paid in by Arthur Horsey', to cover the monthly mortgage payment at £3963.07 from April 2008, for example.

(7) She also said that the jewellery was gifted as well; that there was duplication in the jewellery valuation; a couple of items husband had upgraded over the year; or at some point traded in; certain items not accurate; that her diamond jewellery included one pair of earrings, one bracelet, one necklace with two pendants, a diamond solitaire which was her engagement ring worth £40,000 and was inherited; jewellery taken by the Crown.

Properties owned and tenanted

71. Mr Anderson reminded the appellant that she had said earlier that she believed her tax affairs after 2005-06 to be 'done and dusted as previous years', and that in previous years there had been rental income declared in the submitted returns. She was asked whether she owned properties in earlier years. Her reply was that she owned 'Nursery Grove in Edinburgh, and Hawthorne Crescent in joint names in Erskine; but no Buy-to-let prior to 2008'.

72. In relation to the nine properties registered in the appellant's name, she stated:

(1) One was an office premises in Gordon, and was leased rather than owned; another commercial premises in Erskine were rebranded as iProperty and was the one visited by Officer Bean;

(2) 5 out of 9 properties were tenanted between 2008-2012; that 'would have been the knowledge I had at the time – not that I had visited the properties';

(3) £595 from Learmonth Ltd, which was a letting agent, was for Riglands Gate; with a mortgage payment around £264 per Equifax – 'so, yes, there was more coming in than going out' with Riglands Gate;

(4) She said her father moved to Riglands Gate which was bought in her name; when her father died Oct 2009, it was vacant for a while and then let to Ms Doherty at £650 monthly from May 2011 to January 2013;

(5) Craigielea Road was tenanted over the years; that she would speak more about these two properties (i.e. Riglands Gate and Craigielea Road) because she 'probably treated them differently from the other properties' – that is to say, 'they were not bought from people in criminal cases' – that they did 'not feature in the criminal cases' and so she 'separate[ed] them mentally';

(6) All the other properties are 'fraudulent properties' which she explained as follows:

> 'the majority of the indictments against Edwin [were fraudulent properties] although they were put in my name; he was accused of having fraudulently acquired them; … with a 5-year pay off – the original owners stayed in the majority of them they stayed for a couple of years, now all held by the Crown.'

(7) When asked that it would not make economic sense to have interest only mortgage without rental money coming in, she replied: 'The deal struck with these people was for a rent-free period; they transferred the house and stayed on rent free; different deals for different owners in debts – some of them were getting repossessed and being far on in the stages of repossession – can't tell when the free-rent period ended.'

On the illegitimate business

73. The final part of the appellant's evidence was an account of her understanding of the 'illegitimate' business for which her husband was convicted for fraud and money laundering.

(1) 'It was a shambolic system Edwin worked' to get the money to pay mortgages;

(2) 'I thought at the time I was getting £60,000 and everything was done and dusted';

(3) 'The money and deposits for the two properties – obviously I dealt with solicitors in relation to the purchase of Craigielea Road and Riglands Gate – Edwin would purchase 90 properties – what he did with me and with other family members and friends, was to allow him to put properties in their names and for the deposits – to generate the deposit he would buy a house from an individual for £140,000; [existing] mortgage would be paid off say £80,000; only deal with properties with equity; he would transfer the equity [of £60,000] ultimately he would make a payment as promised to [a friend or a relative he had used] some of the equity; [they got some money] without having to put a penny down; and they all have multiple mortgages like me';

(4) 'My name was used; that was the nature of his business – he saw an advertisement in newspapers; then copied the idea, which companies still do to this day, but they do it advertising for properties in financial difficulty with equity; then buy the property and rent back; money generated was the fees being the equity in arranging the transaction – people did not want to be homeless – that was the way put to you – I thought he was buying the properties and renting them back with big fees involved; I thought estate agency not generating much income; so in a way was still paying me, not generating from him selling houses as would be traditionally done.'

(5) She gave details of where Edwin McLaren placed advertisement: 'in lifestyle magazine such as Eureka circulated in Kilmalcolm and Bridge of Weir – he only used National newspapers targeting big, wide areas of the type of persons, looking for Daily Records or The Sun, places like these advertisers, Interior Design and Local Business';

(6) 'Prior to the purchase of Juniper Avenue on a couple of occasions, while market was still buoyant and before the [illegitimate] scheme, [husband] had bought repossessed properties, freshened them up, and sold them with a profit and it was his money';

(7) 'BMW Mini was a first car for daughter when she was 17 and a half in March 2011 and Father drove it as well; he always had a nice car since 1990s; had Ford Fiesta 'nice ordinary affordable' but upgraded to X5 BMW, then to 3 Series BMW, then to Range Rover Evoke, Ford XR3 Sporty Car';

(8) 'He is quite a materialistic type of person; very early on he would arrange to have a more sporty car which was a "flashier" type of car – sporty; we had three cars in the family when daughter passed her test';

(9) 'I knew he was using me as a director [due to his bankruptcy in 2001]; participated in taking and signing standard security to all these properties; and the proceeds had gone into my bank account';

(10) 'Edwin was deliberately misleading me. He had no role on paper; but he was the master manipulator'.

THE APPELLANT'S CASE

74. The appellant's stated grounds on the Notice of Appeal are the following:

(a) All tax returns have been submitted and that tax is not due.

(b) This tax bill has resulted in a fraud investigation by the Police.

(c) They have all my records, bank statements, leases and I cannot give or get the information to show my position.

(d) Any money that I have received into my account was from my uncle or husband and I do not regard it as income.

75. In response to the Tribunal's directions dated 2 July 2018, Lorna McCann (then acting as representative) lodged 'Further Particulars' on 23 August 2018, which state the grounds of appeal under five headings.

(1) Deposits were from a non-taxable source – the appellant was unable to provide vouching that deposits into her bank account were from a Mr Horsey as she did not have access to her bank accounts; nor to produce documentation and vouching as her personal possession, bank account statements had been retained by the Crown.

(2) Remuneration – from 2008 onwards the appellant did not receive income from 1MEAL; the sums deposited in her account were from Mr Horsey and were 'gifted' to make payment of all outgoings due to be paid from the appellant's bank account on a monthly basis.

(3) Rental income – the respondents have failed to specify the extent of any purported income the appellant received from rental income.

(4) Ruling under Reg 72(5) – any tax due to the respondents is the liability of the employer and recovery should be made against the employer and not the appellant in her capacity as an employee. The appellant was unaware that the employer wilfully failed to deduct income tax and contributions. There is no evidence that the appellant's conduct amounted to 'deliberate or careless behaviour'.

(5) Access to bank account statements – had the appellant been in a position to access and exhibit her bank statements, she would be in a position to disclose that the income the respondents are seeking to rely on was derived from non-taxable source.

76. The appellant's oral submissions during the hearing are summarised below.

(1) 'I don't know if I were the only shareholder. I continued to work after I had resigned as a director; I presumed that I continued with the £60,000; I knew that it would not be coming from the estate agency business at that period; the possibility of getting £60,000 the money would not be from the sale of properties.'

(2) 'Police Scotland seized documents; raided multiple offices; no evidence was identified for payslips, or anything else related to the earnings; absolutely no details to speak of';

(3) 'My position since 2013 is that "willy-nilly", or "recklessly", but I stick by everything I said that I did not act in any way in a director's role – I was "legitimately ignorant" of the filing of accounts and of returns';

(4) All the points about jewellery are not relevant;

(5) 'No legitimate income coming from 4 days of evidence – all criminal money – the point is that no legitimate income – my submission is that all monies through my account

were proceeds of crime – we lived off criminal enterprise – no benefit to come here in any shape or form – how can there be tax due if I have not earned a legitimate penny?'

(6) 'My defence is that HMRC can't find any proper legitimate income.'

(7) 'Another legal matter – no rent received for the mortgages taken on fraudulent properties – the salary was by self-certification but ultimately a mortgage was taken out of a commitment from my husband to supply the money to pay it.'

HMRC'S CASE

77. The Tribunal was directed by the respondents to seven authorities in total; namely: (i) *Pattullo v HMRC* [2016] UKUT 270 (TCC); (ii) *Charlton v HMRC* [2012] UKUT 770 (TCC); (iii) *HMRC v Tooth* [2019] EWCA Civ 826; (iv) *Kothari v HMRC* [2019] UKFTT 0423 (TC); (v) *England v HMRC* [2016] UKFTT 627 (TC); (vi) *Tower MCashback LLP 1 and another v HMRC* [2010] EWCA Civ 32; and (vii) *Lindsay v CIR* [1933] SC 33. We record the authorities produced for the respondents here as a way to identify, by exception, the additional authorities (referenced by footnotes), which are referred to as a result of the Tribunal's own deliberations.

78. HMRC would no longer defend against the appeal against the assessments for the years 2002-03 to 2005-06. Except for 2002-03, these were the years for which returns had been filed. It is conceded that the appeal in relation to the four years to 2005-06 is therefore allowed. As regards the remaining six years, Mr Anderson submitted that the condition for there to be a 'discovery' under s 29(1) TMA was met whereby:

(a) Officer Duffy had overview of a complex, multi-faceted investigation.

(b) Officer Egan first started in his role in March 2019, and was 'thoughtful, careful, and diligent' in his approach by seeking out more information and supportive evidence beyond what was collected from Police Scotland.

(c) For the purposes of making the discovery of insufficiency for those years where no returns were originally submitted, the evidence relied on was – nine heritable properties, Equifax material, income required to cover outgoings.

(d) The request for an extension of time limit was made on the basis that the insufficiency was brought about by the taxpayer's deliberate conduct. The key point is that there had been returns then stopped all of a sudden when outgoings increased quite dramatically.

(e) In a narrow sense, there was deliberate conduct as the basis for extension of time under s 36(1A); such a conclusion was open to Officer Egan and is one that the Tribunal shall find has been fulfilled.

79. The authorisation for extended assessments was made in August 2013; the Discovery Assessments were issued in July 2014. On the issue of 'staleness' as concerns the discovery, it was submitted there was, in no sense, a sitting on the Discovery Assessments, because:

(a) Much was being done in relation to the affairs of the appellant, her husband and 1MEAL of which she had been a director. At the time there had been no returns since 2005-06; there was thus an issue of quantification.

(b) The approach adopted was to issue the Reg 72(5) Notice and Section 8(1) Notice first, before the Discovery Assessments were to be issued.

(c) A warning letter was sent on 19 February 2014 on the matter of Reg 72(5) Notice, and the letter gave the appellant 28 days to respond. The warning letter was important. Had the appellant responded, it could well have provided a clearer explanation of the position, either as to liability, or to quantification.

(d) No response to that letter was received.

(e) In July 2014, the Reg 72(5) Notice was issued. The Discovery Assessments followed on 24 July 2014. Officer Egan's understanding of the position was that he would not be able to issue the Discovery Assessments until a Reg 72(5) Notice had been issued.

(f) It is immaterial whether that understanding was right or wrong. But the reasons are relevant to the question of whether the Discovery Assessments were made within a reasonable time.

(g) Officer Egan's evidence is indicative of an officer who was intending to notify his discovery assessments, and in the context of a very wide, multi-agency investigation, it is submitted that the notification of the assessments within a year is not unreasonable.

(h) On the hypothesis that the discovery took place in August 2013, it is submitted that, in the context of the many issues that arose in this case, the issuing of the Discovery Assessments within a year was within a reasonable time. The length of delay is unlike other examples, such as *Kothari*, in which an argument based on staleness has been sustained where delays of years were involved.

80. On the issue of quantum, Mr Anderson averred that:

(a) The figures employed have an objective basis in the tax actually paid by the appellant in the last year for which she declared an income.

(b) It is submitted that the approach adopted, in the absence of assistance from the appellant, is the best that could be done in the circumstances: *England v HMRC* at [65] refers to established authority.

(c) It is significant that the quantum of the assessments made no reference to the actual sums of money going into the appellant's bank account.

(d) Furthermore, it is to be emphasised that the alleged gifts from the appellant's uncle in order to meet her monthly outgoings (according to her Further Particulars) have formed no part of the calculations by the respondents' officers whatsoever.

(e) The Reg 72(5) Notices are of some importance in this regard, for they were issued on the basis that the appellant was personally responsible for the sums of PAYE income tax and NIC due in respect of her income at 1MEAL for the years ending 2007 to 2012. These notices were never appealed and it is not now open to the appellant to seek to argue either that she was not in fact employed by 1MEAL or that her income was some other figure.

(f) There is difficulty with any evidence provided by the appellant given that she has subsequently made a return for 2005-06, which understated the tax which she indeed paid in 2005-06 as set out in her P35.

(g) Lord Stewart's description of the appellant's evidence at her long-standing criminal trial is apposite to the position she has adopted in this case. In the result, because the appellant's evidence on quantum must be considered to be both incredible and unreliable. There is no sound evidential basis for interfering with the clear objective basis adopted by the respondents in respect of quantification.

(h) The quantification was based entirely on the £60,000, that being the appellant's own position and estimate: that being the factual quantum to give the *prima facie* amount as relevant to consider sufficiency in tax assessment.

(i) Mrs McLaren's own evidence is that she too thought she was 'going through the books' of 1MEAL at £60,000 per annum.

(j) The position that the income she received was in fact all 'gifts' from her husband or uncle was first suggested to her by her husband only after the Police raid in January 2013. That *ex post facto* explanation cannot change the nature of any income received for the years.

(k) Once the character of a business has been ascertained as being of the nature of trade, the person who carries it on cannot found upon elements of illegality to avoid the tax: *Lindsay v CIR*.

(l) Rentals assessed at £6,300 for 52 weeks have already taken into account the difference between receipts and outlays, and that is to include an element of profit in the context of nine properties in the appellant's name, are not irrational figures.

(m) Whether there were properties rented out before 2007-08 and 2008-09 might be a short point on the basis of information gathered, but it is noted that not all of the financial commitments were captured in the Equifax report; for example, it is noted that the financial arrangements with KPLC, was not on the Equifax at all.

(n) There is positive evidence that rentals were received from Ms Docherty and via letting agent Learmonth Ltd.

(o) It is submitted that the appellant has not discharged the burden to remove income from furnished properties.

(p) In relation to the year 2006-07 specifically, if the Tribunal were persuaded that the appellant had discharged the burden in relation to quantification, the respondents have provided an alternative calculation of income tax liability for that year by removing rental income altogether (see §24).

DISCUSSION

The scope of the remaining appeal

81. The appeal was originally against ten Discovery Assessments covering the tax years 2002-03 to 2011-12, of which returns had been filed only for the three years from 2003-04 to 2005-06. Where a taxpayer has delivered a return for the relevant year, and no enquiry has been opened into the submitted return, an additional condition under either s 29(4) or s 29(5) is required to be met for a discovery assessment to be valid.

82. Had HMRC decided to defend the appeal against those three years 2003-04 to 2005-06 for which returns were submitted prior to the issue of the relevant Discovery Assessments, then we would have to consider whether an additional condition under either s 29(4) or s 29(5) was satisfied in relation to each of these three years. HMRC have decided not to defend the appeal against the first four years of assessment from 2002-03 to 2005-06, leaving the later six years from 2006-07 to 2011-12 as the subject matters in this appeal for the Tribunal's determination.

83. In relation to the remaining appeal, no Self-Assessment ('SA') returns had been filed for any of the six years *prior* to the issue of the Discovery Assessments in July 2014 for the provisions under s 29(4) or s 29(5) to be engaged. Given that the remaining appeal concerns only those years for which no returns had originally been submitted, we need only to consider whether s 29(1) condition is satisfied.

84. For the avoidance of doubt, we note that the appellant subsequently filed nil returns for each of these six years in question. However, these nil returns were filed on 31 January 2015 after the Discovery Assessments were issued on 24 July 2014. Consequently, these nil returns post-dating the Discovery Assessments are not relevant to our consideration.

85. The relevant issues for determining the remaining appeal, and the respective burden of proof to the standard of the balance of probabilities are as follows:

(1) HMRC bear the burden to establish the validity of the discovery assessment under:

(a) s 29(1) TMA as concerns the 'discovery' of insufficiency of tax, and

(b) the 'time limit' issue under both s 34 and s 36 TMA.

(2) If HMRC discharge the burden as regards the validity of the assessments, then the burden reverses to the appellant to displace the assessments; otherwise the assessments stand good by virtue of s 50(6) TMA.

The 'discovery' issue

Section 29(1) condition

86. The Discovery Assessments issued on 24 July 2014 are pursuant to s 29 TMA, which confers the power on HMRC to raise a back duty assessment if the condition under s 29(1) obtains: *If an officer of the Board or the Board discover,* as regards any person (the taxpayer) and a year of assessment an '*insufficiency*'[4].

87. In relation to the meaning of discovery for the statutory condition under s 29(1), the salient precepts from established authorities are the following:

(1) The Divisional Court (Bray J, Avory J, Lush J 1913) in *R v Kensington Comrs* as applied by the Divisional Court (Lord Reading CJ, Avory J, Lush J in 1915) in *R v Bloomsbury Comrs* (at 779-780):

> 'What meaning is to be given to the word "discovers" in [s 52 TMA 1880][5]? … Bray J. was of opinion that the words "if the surveyor discovers" mean "if the surveyor comes to the conclusion from the examination he makes and from any information he may choose to receive"; Avory J. thought that that words "discovers" … means "has reason to believe"; Lush J. took the word as equivalent to "finds" or "satisfies himself".

(2) No new information, of fact or law, is required for the threshold to be crossed, as found by the House of Lords in *Cenlon Finance*[6]:

> 'I can see no reason for saying that a discovery of undercharge can arise only where a new fact has been discovered. The words are apt to include any case in which it *newly appears* that the taxpayer has been undercharged and the context supports rather than detracts from this interpretation.' (Viscount Simonds)
>
> 'Mr Shelbourne [for the taxpayer] said that "discovery" means finding out something new about the facts. It does not mean a change of mind about the law. He said that everyone is presumed to know the law, even an inspector of taxes. I am afraid I cannot agree with Mr Shelbourne about this. It is a mistake to say that everyone is presumed to know the law. The true proposition is that no one is to be excused from doing his duty by pleading that he did not know the law. Every lawyer who, in his researches in the books, finds out that he was mistaken about the law, makes a discovery. So also does an inspector of taxes.' (Lord Denning)

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[4] The word *insufficiency* is used here as a shorthand for the contents under s 29(1)(a), (b) and (c).

[5] Section 52 of the Taxes Management Act 1880, as amended by s 23 subs 2 of the Finance Act 1907, provides that if a person chargeable to income tax has not delivered a statement of his profits and gains from foreign possessions to the Commissioners, the district Commissioner where the taxpayer resides have jurisdiction to assess him in respect thereof'.

[6] *Cenlon Finance Co. Ltd v Ellwood* (1962) 40 TC 176, at page 204.

(3) The requisite threshold for there to be a discovery is low. 'In law, indeed, very little is required to constitute a case of "discovery"': Jonas *v Bamford*[7].

(4) In *Hankinson*[8] Lewison LJ stated the test under s 29(1) is a 'subjective' one, as pertaining to the actual officer who has formed the view that there was an insufficiency.

> '[18] That section 29(1) is dealing with the *subjective views* of the officer concerned is borne out by the consequence of the making of a discovery viz. that he may make an assessment of the amount "which ought in his … opinion" to be charged to make good the loss of tax.' (italics added)

(5) The Court of Appeal in *Hankinson* also confirmed that the meaning of 'discovery' has not changed in relation to the self-assessment regime.

> '[15] … Although the conditions under which a discovery assessment can be made have been tightened in recent years following the introduction of the self-assessment regime, *the meaning of the word "discovers" in this context has not changed* ... it meant "comes to the conclusion from the examination he makes and from any information he may choose to receive"; … it was equivalent to "finds" or "satisfies himself". …' (italics added)

(6) Discovery concerns the crossing of a 'threshold' from non-awareness to awareness of the existence of an insufficiency: *Charlton*[9].

> '[28]… the word "discovers" does connote change, in the sense of a threshold being crossed. At one point an officers is not of the view that there is an insufficiency such that an assessment ought to be raised, and at another he is of that view. That is the only threshold that has to be crossed. … It is, we think, evident that the relevant threshold for there to be a discovery may be crossed as a result of a "eureka" moment just as much as by painstaking research.'

Conclusion on s 29(1) condition

88. While Officer Egan was the actual officer who issued the Discovery Assessments, other officers (Branigan, Duffy, Bean) had been closely involved in the investigatory and procedural aspects of the Discovery Assessments. It seems to us that the discovery of the insufficiency was the culmination of the collective efforts of these key officers, in co-ordination with various branches of HMRC, from Criminal Investigation to Fraud Investigation Service, and with departments maintaining the records for PAYE and NIC, and for corporate and personal taxes.

89. The condition under s 29(1) is not vitiated by the fact that the discovery is arguably not made by Officer Egan alone. '*If an officer of the Board or the Board discover*' – the statutory wording of s 29(1) is encompassing in this respect to cover a situation as in the present case, where the task of discovery requires and involves the co-ordinated and collective efforts beyond the actual officer who raises the discovery assessment.

90. As the officer attributed to have made the discovery, Officer Egan spoke to the evidence in front of him that had been gathered from multiple sources: Land Registry, Companies House, Equifax, the Books of Council and Session recording the Minute of Agreement with Campbell Sievewright, seized documents by Police Scotland, correspondence and account statements from Clydesdale Bank. These sources of evidence are either public records, or private

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[7] *Jonas v Bamford* (1973) 51 TC 1, at page 23.

[8] *Derek William Hankinson v HMRC* [2011] EWCA Civ 1566

[9] *R&C Comrs v Charlton and others* [2013] STC 866, [2012] UKFTT [sic] 770 (TCC); (the neutral citation as inserted on the released decision notice continues to bear the incorrect reference of FTT instead of UT).

documents emanating from the appellant, or from entities associated with the appellant. To that end, the body of evidence relied upon by HMRC are highly reliable and credible.

91. The external sources of evidence were then corroborated with the internal records maintained by HMRC in relation to 1MEAL's PAYE and Mrs McLaren's self-assessment records. These internally and externally obtained records provided Officer Egan with a firm foundation to establish the essential primary facts, which we find to be:

(1) That Mrs McLaren had been *continually* associated with an estate agency business, which traded under various names at different points in time, and she was an office holder; she had formerly declared employment income from this estate agency business;

(2) That there were *regular* outgoings to service borrowing commitments (per Equifax report) and to meet daily and monthly expenditure (per bank account statements).

92. From these primary facts, Officer Egan made the critical inference that there would have been continual earnings from the estate agency business after the last return was filed for the year 2005-06, as evidenced by the appellant's continual (and increasing) levels of expenditure commitments. However, there had been no declaration of earnings under PAYE by 1MEAL for Mrs McLaren after 2005-06, other than the £5,000 declared in 2007-08. On these obtainable primary facts, Officer Egan formed the view that there had been an insufficiency in relation to Mrs McLaren's tax position.

93. Case law has consistently referred to the threshold condition pertaining to s 29(1) as setting a low bar for the burden to be discharged. Recently, the Upper Tribunal ('UT') in *Jerome Anderson*[10] was required to consider the taxpayer's appeal in relation to 'whether a higher or a lower threshold' is applicable for the concept of 'discovery', and the UT reiterated that the threshold test sets a low bar for the burden to be met. The UT concluded that the FTT in *Jerome Anderson* had 'applied a stricter test than was necessary', namely, by asking itself 'whether [the actual officer]'s belief that there had been an insufficiency of tax was a reasonable belief'. The UT stated 'the correct test' at [43] to be: 'whether [the officer]'s belief was one which a reasonable person could form on the information available to [the officer]'.

94. Applying *Jerome Anderson*, we conclude that Officer Egan's belief that there was an insufficiency in relation to Mrs McLaren's tax position was one which a reasonable person could form, acting on the information available to him. We are satisfied that due weight had been accorded to the body of evidence relied upon to underpin Officer Egan's discovery of insufficiency of tax. To that end, HMRC have met the burden of proof in relation to the threshold condition under s 29(1).

The issue of 'staleness'

The facts pertaining to the case

95. From the witness evidence for HMRC, the 'threshold' of discovery was crossed at some point in July 2013, from non-awareness to awareness of an insufficiency in relation to Mrs McLaren's tax position. The submission on 31 July 2013 of Form 64D-4 for authorisation to extend time limits was indicative of the timing that the threshold of discovery had been crossed, in forming a view that the insufficiency concerned periods beyond the ordinary time limit. The Discovery Assessments were eventually issued on 24 July 2014.

96. Mr Anderson made submissions that the Discovery Assessments were not rendered 'stale' by the passage of a year between the threshold being crossed, and the assessments being issued. Mr Anderson made it clear that he raised the issue of staleness because he considered

[10] *Jerome Anderson v HMRC* [2018] UKUT 159 (TCC)

that it was an argument which was open to the appellant, who was unrepresented. He referred in particular to the UT decision in *Pattullo*, which is held to have created the precedent for the concept of staleness as capable of vitiating a discovery assessment, and the Court of Appeal decision in *Tooth* (at [61]). In fairness to the appellant who was unpresented, the Tribunal has considered in some detail the legal basis of the concept of staleness. As set out at §77, the Tribunal was directed to seven authorities by the respondents in total, and all other authorities referred to are consequent on the Tribunal's own deliberations.

Where did the concept of 'staleness' come from?

97. The origin of the concept of staleness is often attributed to *Corbally-Stourton*[11] where the Special Commissioner (Charles Hellier) observed:

> '[44] There is one other aspect of the word "discover" to which I should refer. This arises from *Cenlon Finance Co Ltd v Ellwood* […]: a "discovery" is something newly arising, ***not something stale*** and old. The conclusion that it is probable that there is an insufficiency must be one which newly arises (from fresh facts or a new view of the law or otherwise).' (emphasis added)

98. On one interpretation, the Special Commissioner's attempt to paraphrase the meaning of 'discovery' as delivered by the House of Lords in *Cenlon Finance* would seem to have introduced the adjective 'stale' into the case law meaning for 'discovery' for s 29(1) purposes. However, as remarked by the UT at [45] in *Beagles*[12], the reference in *Corbally-Stourton* to 'a discovery requiring a quality of "newness" could be read as limited to the nature of the discovery at the time at which it is made.' We agree; the paraphrasing at [44] in *Corbally-Stourton*, without more, does not give rise to the concept of 'staleness' as capable of vitiating a discovery assessment.

99. We are reminded, however, of another instance of judicial paraphrase in *Corbally-Stourton*, which has been singled out for comment by the Court of Appeal in *Lansdowne*[13]. Moses LJ in *Lansdowne* expressed his 'polite disapproval' and cast 'doubt' on the judicial paraphrase at [59] of *Corbally-Stourton*, which was then adopted by the Outer House in *R (oao Pattullo)*[14] (at [101]). The 'danger' of any judicial paraphrase of a statutory condition is highlighted by Moses LJ in the following terms.

> '[70] I also wish to express polite disapproval of any judicial paraphrase of the wording of the condition at Section 30B(6) or Section 29(5). I think there is a danger in *substituting wording appropriate to standards of proof for the statutory condition*. The statutory condition turns on the situation of which the officer could reasonably have been expected to be aware. ***Awareness is a matter of perception and understanding, not of conclusion***. I wish, therefore, to express doubt as to the approach of the Special Commissioner in *Corbally-Stourton* ... and of the Outer House in *R(on the application of Patullo [sic])* …, namely, that *to be aware of a situation is the same as concluding that it is more probable than not*. The statutory context of the condition is the grant of a power to raise an assessment. In that context, the question is whether the taxpayer has provided sufficient information to an officer, with such understanding as he might reasonably be expected to have, to justify the

[11] *Corbally-Stourton v Revenue and Customs Commissioners* [2008] STC (SCD) 907

[12] *Clive Beagles v HMRC* [2018] UKUT 380 (TCC)

[13] *HMRC v Lansdowne Partners Limited Partnership* [2011] EWCA Civ 1578

[14] *R (on the application of Pattullo) v HMRC* [2009] CSOH 137, [2010] STC 107

exercise of the power to raise the assessment to make good the insufficiency.' (emphasis in bold and italics added)

100. The judicial paraphrase commented on by Moses LJ is at [59] of *Corbally-Stourton*:

> 'In summary, it seems to me that I must approach sections 29(1) and (5) thus: –
>
> The inspector may raise an assessment under section 29 only if:
>
> (i) he newly comes to ***the conclusion that it is probable*** that there was an insufficiency; and
>
> (ii) at the relevant time an officer of the Board could not reasonably have been expected, taking into account the general knowledge and skill that might reasonably be attributed to him, and on the basis only of the section 29(6) information, to have ***concluded that it was probable*** that there was an insufficiency.
>
> And I note that the test is *objective awareness* of "an officer of the Board", not the objective awareness of the inspector who made the assessment.' (emphasis in bold and italics added)

101. *Lansdowne* was concerned with the construction of s 29(5), and Moses LJ's comments at [70] are to be read as directed at [59](ii) of *Corbally-Stourton*, wherein the statutory condition for s 29(5) '*to be aware of* the situation mentioned in subsection (1)' is paraphrased as '*to have concluded that it was probable* that there was an insufficiency'.

102. Although the Special Commissioner did note in the tailpiece at [59] of *Corbally-Stourton* that 'the test is [the] objective awareness of "an officer of the Board" [and] not the objective awareness of the inspector who made the assessment', the tailpiece to the paraphrase which refers back to the statutory condition being one of 'awareness' is often omitted in the citation of [59] of *Corbally-Stourton*, as was the case in the judicial review decision in *R(oao Pattullo)*.

103. When the Outer House considered the judicial review claim in *R(oao Pattullo)* in 2009, Lord Bannantyne at [101] adopted the 'two-step process' set forth in *Corbally-Stourton* at [59](i) and (ii), but the tailpiece at [59] where the Special Commissioner re-phrased that it is the 'objective awareness' of a notional officer for s 29(5) purposes was omitted. It is thus that judicial paraphrasing can inadvertently supplant the actual statutory wording, and hence the 'danger', as warned by Moses LJ, that 'to be aware of a situation is the same as concluding that it is more probable than not', which is a qualitatively different formulation of the statutory condition under s 29(5).

104. 'Awareness is a matter of perception and understanding, not of conclusion'– that seems to be the crux of the substantive criticism against the paraphrase at [59] of *Corbally-Stourton*. *Lansdowne* was handed down on 20 December 2010, and earlier in February 2010, Moses LJ gave the leading judgment in *Tower MCashback* (citation at §77) where the Court of Appeal had to consider the 'conclusions' that had closed the enquiry in question. With *Tower MCashback* in mind, it may explain why Moses LJ went out of his way to distinguish 'conclusion' from 'awareness'. The procedural and legal connotations pertaining to an officer reaching a 'conclusion' after opening an enquiry are significantly different from the threshold of 'awareness' being crossed in the context of 'discovery'.

105. Moses LJ warned of the 'danger in substituting wording appropriate to standards of proof for the statutory condition', and emphasised that the statutory context for s 29 is 'the grant of a power to raise an assessment'. As we infer, the judicial paraphrase of the statutory condition relevant to s 29 in terms as set out at [59] *Corbally-Stourton* runs the danger of blurring the distinction between the two statutory procedures available to the Revenue to address an insufficiency in tax assessment. The procedural routes are mutually exclusive; it is either by a closure notice (when an in-time enquiry has been opened), or by a discovery assessment (when

an in-time enquiry has been missed). A closure notice following an enquiry is based on a *conclusion* being reached by the enquiring officer; a discovery assessment is based on the subjective *awareness* of an actual officer who makes the discovery of insufficiency.

106. We fully register that Moses LJ's remark in *Lansdowne* was in relation to the construction of s 29(5) and not overtly on s 29(1). Further, we agree, as observed by Patten LJ at [25] of *Sanderson*[15] that ss 29(1) and (5) do not 'import the same test', and as observed in *Cyrus Contractor*[16] at [101], the distinguishing features of the tests under ss 29(1) and (5) include:

> '(a) *Conferment v. restriction* – s 29(1) confers the power to make a discovery assessment, while s 29(5) places a restriction on the exercise of that power;
>
> (b) *Positive v. negative* – s 29(1) provides for a positive condition to be met for the exercise of the power, while s 29(5) is expressed as a negative condition for the restriction to operate;
>
> (c) *Subjective v. objective* – s 29(1) is a subjective test pertaining to a real officer, while s 29(5) is an objective test as applied to a notional officer;
>
> (d) *Binary v. evaluative* – s 29(1) is a binary test of a threshold being crossed from non-awareness to awareness of an insufficiency by an actual officer, while s 29(5) is a evaluative test as to what a hypothetical officer could reasonably be expected to be aware of, based on the information available;
>
> (e) *Variable v. fixed point in time* – the time reference of s 29(1) is at the variable point in time of discovery when the actual officer has crossed the threshold of awareness, while s 29(5) is concerned with what a notional officer could reasonably be aware of, based on the information available at a fixed point in time as defined by the statute.'

107. Notwithstanding the distinguishing features between the two tests, the nature of the statutory condition for both s 29(1) and (5) is one of *awareness*. The provision under s 29(5) is to serve as a safeguarding condition against the exercise of power under s 29(1), and the two tests are mirror tests in order that s 29(5) can serve as a check on s 29(1).

108. 'Awareness is a matter of understanding and perception, not of conclusion'. It follows therefore that Moses LJ's criticism of *Corbally-Stourton* at [59](ii) as a paraphrase of the s 29(5) condition applies with equal force and validity to the paraphrase at [59](i) of the s 29(1) condition, where the statutory wording of 'an officer … discover[s]' is rendered into '*he newly comes to the conclusion that it is probable*'. This is so because the essential *nature* of the statutory condition apposite to s 29(5) is the same as the condition under s 29(1) – both tests are concerned with *awareness*, not with conclusion.

109. Rather than the judicial gloss at [44] of *Corbally-Stourton*, we are of the view that the concept of staleness is a derivation from [59](i) of *Corbally-Stourton* (2008) as a paraphrase of s 29(1) TMA, and that judicial paraphrase was developed into a line of reasoning in *Charlton* (2012), which was then applied to interpret s 29(1) by the UT in *Pattullo* (2016).

From paraphrase, to obiter, to ratio

110. *Charlton* was concerned with both s 29(1) and s 29(5). The reasoning in *Charlton* attributed to have given rise to the concept of staleness is considered to be *obiter*, since the case was decided on the grounds that the condition under s 29(5) was not satisfied. The critical paragraph in *Charlton* containing the *obiter dictum* in relation to s 29(1) is at [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 <u>*newly*</u> appeared to an officer,

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[15] *Sanderson v HMRC* [2016] EWCA Civ 19

[16] *Cyrus Contractor v HMRC* [2021] UKFTT 0054 (TC)

> ***acting honestly and reasonably***, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. *The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself. If an officer has concluded that a discovery assessment should be issued, but for some reason the assessment is not made within a* ***reasonable*** *period after that conclusion is reached, it might, depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment….*' (all emphasis added)

111. Neither 'stale' nor 'staleness' features at [37] of *Charlton* to give an overt formulation that a discovery can become stale. The words that recur most at [37] are 'conclusion', 'newly'/ 'newness', and are reminiscent of the key terms used in the judicial paraphrase at [59](i) of *Corbally-Stourton*: '[the officer] *newly comes to the conclusion*'. It seems to us that three key components are introduced to develop the paraphrase into a line of reasoning.

(1) Firstly, the terms 'conclusion' and 'newly'/ 'newness' are yoked, by bringing into existence a 'requirement' for *newness* which relates to *the conclusion itself*.

(2) Secondly, a temporal framework is inserted into s 29(1) as a gauge for the 'newness' requirement of the 'conclusion', and is by reference to the time lapse between reaching the conclusion and issuing the assessment.

(3) Judicial review overtones are introduced by the use of connotative terminology such as: (i) 'an officer, [is expected to be] *acting honestly and reasonably*', and (ii) 'the assessment is [expected to be] made *within a reasonable period*'.

112. Pausing here, the statutory wording of s 29(1) itself makes no reference to the actual officer 'acting honestly and reasonably', nor provides for a time frame to evaluate what is 'within a reasonable period'. To that extent, there is no statutory basis to these qualifications to the term 'discover' under s 29(1) as articulated at [37] of *Charlton*.

113. If s 29(1) is juxtaposed against s 29(5), the negative condition under s 29(5) applicable to the hypothetical officer is cast in terms that: (i) he *could not have been reasonably expected* to be aware of the insufficiency, and (ii) *when* an officer *ceased to be entitled to give notice of his intention to enquire into the taxpayer's return* as prescribed under s 29(5)(a). The two qualifications pertaining to *reasonableness* and the imposition of a *temporal framework* are relevant to the condition under s 29(5) and are expressly provided for in the statutory wording.

114. If s 29(1) condition is supposed to operate with the equivalent qualifications as suggested at [37] of *Charlton* in relation to the actual officer's mode of behaviour in making a discovery, and to issue the assessment within a temporal framework, it is plainly inconceivable that the draughtsman would not have set it out in express wording in like manner as has been done for s 29(5), which is itself highly articulated, with 'footnotes' being provided under s 29(6).

115. By introducing two equivalent qualifications to construe s 29(1), whereby (i) the actual officer is to act 'honestly and reasonably' and (ii) an assessment is to be issued within 'a reasonable time period', has the line of reasoning at [37] of *Charlton* crossed over to the territory of s 29(5)? If so, these qualifications attached to s 29(1) would simply be conflating s 29(1) with s 29(5), and call into question as to whether the judicial reasoning at [37] of *Charlton* has stepped beyond the statutory confines of the provision that is under s 29(1).

116. Furthermore, if *Charlton* at [28] is juxtaposed against [35], the meaning of 'discover' has been taken beyond the threshold test as stated at [28], and has delivered a new meaning to the condition, namely, in the words of Moses LJ, '*to be aware of a situation is the same as concluding*'. This new strand of meaning then gives rise to the pronouncement that a conclusion

can 'lose its essential newness' if an assessment is not raised within 'a reasonable period', with the implication, as summarised in *Beagles* at [46]:

> 'The first case which expressly raises the prospect that a discovery might lose its quality of newness with the result that an assessment could not be made under s29(1) even though the statutory time limit had not expired is *Charlton*.'

117. Coincidentally, *Charlton* was released on 20 December 2012, on the first anniversary of *Lansdowne* by the Court of Appeal. If *Charlton* had predated *Lansdowne*, it would seem plausible that Moses LJ's comment at [70] might have included paragraph [37] of *Charlton*.

118. The concept of staleness as capable of overriding the statutory time limits to debar a s 29 assessment became a precedent binding on this Tribunal when the Upper Tribunal (Lord Glennie) in *Pattullo* found the FTT to have erred in law by deciding that the 'staleness' of a discovery was determined only by reference to the statutory time limit of s 34 TMA. Lord Glennie found the relevant passages he was referred to in *Corbally-Stourton* (at [44]) and *Charlton* (at [37]) 'highly persuasive', and went on to construe s 29(1) as follows:

> '[52] … the requirement for the discovery to be acted upon while it remains fresh appears to me to arise on the natural meaning of s 29(1) itself. That sub-section provides that "if" HMRC discover certain matters then they may, subject to what follows later in the section, makes an assessment in the amount needed to make good the loss of tax. The word "if" … may equally have a temporal aspect, as in the expression "if and when" … I do not regard this as stretching the meaning of "if". …It would, to my mind, be absurd to contemplate that, having made a discovery of the sort specified in s 29(1), HMRC could in effect just sit on it and do nothing for a number of years before making an assessment just before the end of the limitation period specified in s 34(1).'

119. It seems that *Pattullo* is trying to impart some statutory justification for adopting the line of reasoning at [37] of *Charlton*. If a statutory basis for the concept of staleness is supposed to have been established by *Pattullo*, that basis is so tenuously poised by implying, or 'forcing'– as some commentators put it, that the statutory wording under s 29(1) where it states: '*If*' an officer discovers is to be interpreted as to mean '*If and when*' an officer discovers.

The statutory basis for the time-bar issue

120. Coterminous with the UT decision in *Pattullo* was the FTT decision in *Gakhal*[17] (Judge Bailey) which was released in April 2016. *Gakhal* effectively reached the same conclusion as the FTT (Judge Reid QC) in *Pattullo*, in that there is no statutory basis for the concept of staleness, and the time-bar issue is determinative with reference to statutory time limits only.

> '[103] … We have carefully considered Section 29 TMA 1970 but we can find no justification in the wording of that section for holding that the assessment must be raised within a certain period of making the discovery as well as meeting the requirements of Section 34 TMA 1970. In our opinion the only statutory constraint relating to time is that the assessment must be raised within the prescribed by Section 34. We conclude that the concept of a discovery becoming stale has no relevance insofar as lack of staleness is proposed as an additional condition which must be met in order to raise a discovery assessment.'

121. The FTT in *Miesegaes*[18] (Judge Mosedale, May 2016) agreed with *Gakhal* in concluding that the time-bar issue is to be determined by reference to statutory time limits. These FTT

[17] *Gakhal and Others v HMRC* [2016] UKFTT 356 (TC)

[18] *Simon Miesegaes v HMRC* [2016] UKFTT 375 (TC)

decisions were reached unencumbered by the UT precedent in *Pattullo*, a month or two before *Pattullo*'s release in June 2016.

122. In *Beagles* (Birss J and Judge Greenbank, November 2018) the UT considered the question of whether a discovery is capable of becoming 'stale', but cannot reach a definitive conclusion other than to say: 'given the state of authorities at the Upper Tribunal level [it] is a matter best reviewed by the higher courts' (at [60]).

123. In *Good & Ryan*[19] the FTT (Judge McNall, January 2020) has commented at [79]: 'There has been much recent judicial discussion in the higher courts as to the meaning and effect of TMA s 29. It is possible that the position is not yet entirely settled.'

124. In the Court of Appeal decision on *Tooth* (on appeal to the Supreme Court), Floyd LJ has remarked at [60] on the parties' acceptance that 'the legal approach to whether there is a "discovery" is correctly set out' at paragraph [37] of *Charlton*. The awaited judgment of the Supreme Court on *Tooth* may not determine the appeal by ruling on the issue of staleness.

125. We are conscious that by precedent we are to follow *Pattullo*, but we are not alone in being troubled by the concept of staleness as without any statutory basis. The parenthesis in the last sentence of its substantive judgment is similarly suggestive of the reservations of the UT in *Beagles* on this matter.

> '[126] … In our judgment, *if there is a concept of staleness at all*, then we believe it arises on the facts of this case.' (italics added)

126. Other tribunals differently constituted have concluded that the time-bar issue is determinative by reference to statutory time limits alone. As a matter of construction, the concept of staleness is not supported by the statutory wording under s 29(1). It remains for us to consider whether the concept of staleness is supported by the statutory context, even if its derivation appears to be by way of judicial paraphrase, and not from statutory wording.

The statutory context for s 29(1)

127. The self-assessment regime was introduced with effect from the year 1996-97. The changes that gave the current statutory context of s 29 are summed up by Stanley Burton J in *R (oao Johnson)*[20].

> '[15] … The power conferred by section 29 is very substantially qualified. It is so qualified no doubt because Parliament considered that generally a taxpayer who has honestly provided a Tax Return under the self-assessment scheme should not be indefinitely liable to a demand for the payment of an amount of taxes beyond that which, by his Return, he has disclosed is payable by him.'

128. Where a taxpayer has filed a return for a relevant year, the power under s 29(1) to raise a discovery assessment is curtailed by the imposition of additional pre-conditions under ss 29(4) and (5). Section 29(4) pre-condition requires the Revenue to establish that the tax insufficiency 'was brought about carelessly or deliberately' by the taxpayer or his/her agent.

129. Section 29(5) pre-condition is far more involved, and the Court of Appeal decision in *Veltema*[21] (2004) is the earliest key authority on the interpretation of the then 'new' sub-sections 29(5) and (6). Giving the leading judgment, Auld LJ considered ss 29(5) and (6) are to be interpreted in the light of the purpose of the new statutory scheme, which is 'to simplify and

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[19] *Thomas William Good & James Sean Ryan v HMRC* [2020] UKFTT 0025 (TC)

[20] *R(oao Johnson)(et al) v Branigan (HMIT)* [2006] EWHC 885 (Admin)

[21] *Langham (Inspector of Taxes) v Veltema* [2004] EWCA Civ 193, [2004] STC 544

bring about early finality of assessment to tax, based on an assumption of an honest and accurate return and accompanying documentation by the taxpayer' (at [31]).

130. If the 'new' statutory context has resulted in the power conferred by s 29 being 'very substantially qualified', has the meaning of 'discovery' for s 29(1) purposes also changed as to incorporate a time-bar element? In *Hankinson* the leading judgment by Lewison LJ observed:

> '[15] … I began with section 29(1). This sub-section comes into operation if an officer of the Board "discovers" an undercharge. The word "discovers" in this context has a long history. Although the conditions under which a discovery assessment can be made have been tightened in recent years following the introduction of the self-assessment regime, *the meaning of the word "discovers" in this context has not changed*. …' (italics added)

131. The meaning of the word 'discovers' under s 29(1) has not changed even in the 'new' statutory context of self-assessment. The substantially qualified power under s 29(1) is achieved by way of express statutory provisions within s 29 itself. These are the 'statutory limitations' under ss 29(4) and (5), to the exercise of power under s 29 TMA, as summarised in *Tower MCashback*:

> '[24] … There are statutory limitations as to the time at which the sufficiency or otherwise of the information must be judged. These provisions underline the finality of the self-assessment, a finality which is underlined by strict statutory control of the circumstances in which the Revenue may impose additional tax liabilities by way of amendment to the taxpayer's return and assessment.'

132. Apart from the provisions within s 29 itself, the statutory context for a discovery assessment to be validly made includes the express provisions for different time limits under ss 34 and 36 TMA, as set out later in this Decision.

'Staleness' unsupported by the statutory context

133. In the light of the authorities from the Court of Appeal as a higher court than the UT, the concept of staleness is unsupported by the statutory context for the following reasons.

(1) The meaning of 'discovery' for s 29(1) purposes has not changed in the new statutory context of self-assessment. The only test in relation to 'discovery' was, and is, a *low* threshold test. A threshold test is designed to be a bright-line test. The binary outcome intended for a threshold test would be subverted by additional parameters, such as a spectrum test involving a sliding scale referential to a time frame by way of staleness.

(2) If the notion of staleness were to be implied into the meaning of 'discovery' under s 29(1), such as by construing 'If' to mean 'If and when', it is highly peculiar that the statute should be completely silent on how the time-bar element under sub-section (1) is to interact with the express provisions for time limits under ss 34 to 36 of TMA.

(3) The current enactment of section 29 TMA contains a suite of provisions, which as a whole, are highly articulated, and tightly drafted, with each sub-section progressing in a linear manner. There is no express provision of a time-bar element under s 29(1) as an *additional* pre-condition. To apply the concept of staleness would have the operative effect of trumping the 'statutory control of the circumstances' under sub-sections (4) or (5). In other words, the concept of staleness would take precedence over ss 29(4) and (5).

(4) The s 29(1) threshold test concerns the subjective awareness of an actual officer who has made the discovery. To incorporate the concept of staleness into s 29(1) condition involves an evaluative test, and requires two temporal points of reference. The first temporal point is the precise juncture *when* the discovery is supposed to have been made. It is antithetical to the nature of a simple threshold test that the judicial mind is to

become encumbered by having to scrutinise the conscious mind of the actual officer to pinpoint the precise timing of his crossing the threshold of awareness in order to locate one end of the temporal references for evaluating staleness.

(5) The other temporal reference in relation to the concept of staleness is the timing of the issuance of a tax assessment *consequent* upon the discovery. The two temporal points required to evaluate staleness in effect conjoin the eureka moment of awareness with the subsequent action of raising an assessment. By conflating 'discovery' with 'assessment', the logical and linear progression from discovery to assessment would be supplanted by the circular strand of meaning, whereby the s 29(1) pre-condition comes to be defined by its consequence – s 29(1) as a *pre*-condition *before* the issuance of an assessment would become incoherent by being circular.[22]

(6) Of greater significance is the fact that there is no way of applying the concept of staleness without this first-instance tribunal embarking on a judgment call of whether an actual officer, having made the discovery, had acted expeditiously in issuing the related assessment within a reasonable time frame after the discovery. What amounts to being 'expeditious'; what is a 'reasonable' time frame between discovery and issuance; what are the relevant factors to take into account; what may be considered to be a reasonable delay, and so on? It is a multi-factorial evaluation by the judiciary of the conduct of an HMRC officer, or the Board – a public body. There is no other way to characterise this judgment call by way of evaluating whether a discovery has become stale other than that it requires this tribunal to perform a judicial review function.[23]

(7) The jurisdiction of this tribunal is created by statute, and any judicial review function *must* be expressly provided in the relevant legislation. Section 50 TMA contains no such provision. If the tribunal were to adopt the concept of staleness as integral to the meaning of 'discovery' for s 29(1) purposes, it would be to appropriate a judicial review function inadvertently through judge-made law. It follows that to import the concept of staleness into s 29(1) is *ultra vires*.

'Staleness' unsupportable in the absence of judicial review jurisdiction

134. Not only is the concept of staleness unsupported by the statutory context, our gravest concern is that it is unsupportable as a matter of jurisdiction. If Parliament had intended this Tribunal to have a supervisory jurisdiction in determining whether s 29(1) condition is met, it is inconceivable that there is no express statutory provision to that effect.

135. If we were to apply the concept of staleness in the present case, the Tribunal would be called upon to make an evaluative judgment of the conduct of HMRC in the investigation process, of Dr Branigan's direction to adopt the COP8 procedure, and of the manner in implementing the COP8 procedure by the team of FIS officers (Duffy, Bean and Egan). The tribunal would need to assess whether Officer Egan who issued the assessments, or the Board of officers (to include Branigan, Duffy, Dean and others) had acted 'expeditiously'. We would need to form a view as regards the reasonableness of an internal management decision of

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[22] A parallel example of circular incoherence can be discerned when a time-bar element is injected into the statutory meaning of 'completion' by HMRC to debar a claim for input VAT by DIY Housebuilders under reg 201 of the Value Added Tax Regulations 1995. See *Farquharson v HMRC* [2019] UKFTT 0425 (TC), *Dunbar v HMRC* [2019] UKFTT 0747 (TC), and *Fraser v HMRC* [2019] UKFTT 0573 (TC). Within the body of case law from the First-tier Tribunal, there is now a lack of consensus as to the meaning of 'completion' for the Scheme.

[23] Similarly, the time-bar factor inserted into the statutory meaning of 'completion' for the DIY Housebuilders Scheme has resulted in judges stepping into the role of a quasi-expert assessor of 'completion' for building controls purposes, and decisions becoming much lengthier as in *Neil Proffitt v HMRC* [202] UKFTT 0120 (TC) and *Wedgbury v HMRC* [2020] UKFTT 0125 (TC).

HMRC to disband the special unit based in Dundee, which was tasked and was requested to issue Reg 72(5) notices. We might have to consider why there was no internal mechanism to cover the work of the disbanded unit to ensure that there should have been a seamless transfer of expertise; why the Manchester colleague consulted by Officer Bean failed to answer his query more promptly, which resulted in further delay, and so forth. It seems to us that all these considerations are in the orbit of judicial review for which this Tribunal has no jurisdiction.

136. From HMRC's evidence, the apparent delay in issuing the discovery assessment was occasioned by a procedural necessity, that of issuing the Reg 72(5) and Section 8(1) Notices *before* the Discovery Assessments. We heard no evidence or submissions as to whether that was the necessary procedural order, and we can make no finding of fact thereon.

137. It is not just because the factual matrix in relation to the internal operation of HMRC was more complicated in this case that we consider that this Tribunal would be overreaching by trying to evaluate whether the issuance of the related assessments was within a 'reasonable' time frame after the discovery threshold was crossed. The more complex factual matrix of the present case merely accentuates the issue why the notion of staleness could not have been intended by Parliament for the purposes of s 29(1) as a matter of law.

138. In view of the 'very substantially qualified' power under the current enactment of section 29, we are reminded of two salient remarks by the former President of the Supreme Court, Baron Neuberger of Abbotsbury, in *The Power of Judges* (2018, Haus Publishing). First, it is that the balance between judicial intervention and judicial restraint is key to the judges' role. Secondly, judges must protect citizens from unlawful actions, but in so doing, must not over-reach themselves.

139. If the concept of staleness exists as a challenge to the validity of a discovery assessment, then that is a judicial review challenge to be brought at the High Court or the Outer House, which has jurisdiction to hear a judicial review claim. The onus is then on the taxpayer claimant to prove the case to the requisite standard, and for HMRC to defend against the claim. It is not for this Tribunal to consider the concept of staleness within the confines of s 29 TMA.

140. It is our view that the judicial paraphrase at [59](i) of *Corbally-Stourton* underpinned the reasoning at [37] of *Charlton*, which gave rise to the concept of staleness for the s 29(1) condition. The 'disapproval', the 'doubt', and the 'danger' against any such judicial paraphrase, as expressed by the Court of Appeal in *Lansdowne*, deserve to be taken with utmost seriousness by the lower courts, since such censure would only have come after considerable deliberation.

141. The 'danger' of any judicial paraphrase, as we infer from the concern raised by Moses LJ, is that a paraphrase of a statutory condition can deviate ever so slightly from the statutory wording to begin with, but as gloss is laid upon gloss, the statutory meaning in question may start to take a different turn, and may be propelled onto a trajectory of meaning which is ultimately unsupported – and unsupportable – by the statutory context. The danger, as we see it, is that the adoption of the concept of staleness for s 29(1) purposes amounts to an appropriation of judicial review jurisdiction by this Tribunal, which is plainly *ultra vires*.

142. Nevertheless, and in case we were wrong on our understanding of the statutory context in which s 29(1) is to be construed, and '*if there is a concept of staleness at all*' as the UT in *Beagles* phrased it, we make a finding of fact that the discovery in this present case was not rendered stale by virtue of the passage of time of some 12 months between the crossing of the threshold in July 2013, and the issuance of the assessments in July 2014.

143. We are satisfied that the very nature of the investigation was complex and multi-faceted, involving the supervision and co-ordination of departmental efforts, and that the logistics in

following the correct procedure for implementation meant that the requisite time taken for the issuance of the assessments was reasonable.

The time limit issue

144. The validity of a discovery assessment is subject to statutory time limits as provided under s 34 and s 36 TMA. Under s 34, the general position is that an assessment under s 29 TMA may not be raised more than four years after the end of the year of assessment to which it relates. The 'ordinary time limit' is extended to six years in a case where the loss of tax was brought about carelessly by a taxpayer (s 36(1) TMA), and further extended to twenty years where the loss of tax is brought about deliberately (s 36(1A) TMA).

145. The relevant time limits for the remaining appeal as concerns the six years of assessments are as follows.

> (a) Assessments for 2010-11 and 2011-12, the ordinary time limit under s 34 expired on 5 April 2015 and 2016 respectively, being four years after the end of the year of assessment ended on 5 April 2011 and 2012.
>
> (b) Assessments for 2008-09 and 2009-10, the extended time limit under s 36(1) expired on 5 April 2015 and 2016 respectively, being six years after the end of the year of assessment ended on 5 April 2009 and 2010.
>
> (c) Assessments for the years 2006-07 and 2007-08, the extended time limit under s 36(1A) will expire on 5 April 2027 and 2028, being 20 years after the end of the year of assessment ended 5 April 2007 and 2008.

146. The assessments for the two years 2010-11 and 2011-12 were issued on 24 July 2014, which were before the ordinary time limit of four years expiring on 5 April 2015 and 2016.

147. As to the years 2008-09 and 2009-10, HMRC need to establish that the conduct of the appellant was 'careless' in bringing about the insufficiency. To that end, the appellant had accepted that she owned nine heritable properties, at least two of which were let during the relevant periods. However, no return was filed to declare the rental income for the two years. There is a *prima facie* case for the time limit to be extended to six years due to the 'careless' conduct on the appellant's part in failing to file a return of the rental income for the said years.

148. As to the years 2006-07 and 2007-08, HMRC need to establish that the conduct that brought about the loss of tax was 'deliberate'. In this respect, we reject the appellant's assertions that she was ignorant that no PAYE had been returned on her earnings, or that she simply left everything to her husband. From her evidence to the Tribunal, we do not find the appellant to be a credible witness. We are of the view that she was actively involved in the affairs of the estate agency business, and that she knew, or should have known, that PAYE had not been returned on her earnings. To that end, the Tribunal considers the appellant to have constructive knowledge that she had employment earnings, and that there should have been returns of her employment income with tax deducted at source. We are satisfied that HMRC have proved to the requisite standard that on the balance of probabilities, the tax insufficiency in relation to 2006-07 and 2007-08 was brought by the deliberate conduct of the appellant.

Whether the assessments stand good

The burden of proof

149. The Tribunal's jurisdiction on appeal is under s 50(6) TMA, which provides that if the tribunal decides that the appellant is over charged by the s 29 assessment, then the assessment shall be reduced accordingly, otherwise the assessment 'shall stand good'.

150. The significance of an assessment 'standing good' in relation to burden of proof is explicated by Judge Gammie in *Hull City*[24]at [58].

> 'This "stand good" language has been part of the Management Acts since at least section 57 of the Taxes Management Act 1880. It is the statutory basis for concluding that the taxpayer has the legal burden of demonstrating that he is overcharged by an assessment. The justification for placing this burden on the taxpayer, even though it may be the Revenue which is asserting that tax is due, is that the taxpayer and not HMRC is ordinarily in possession of the relevant facts and figures. Essentially, HMRC are entitled to call for an explanation from the taxpayer of the circumstances surrounding the determination of his tax position and ultimately put the taxpayer to proof of the facts behind those circumstances. In that respect HMRC may issue an assessment because they are in possession of particular evidence suggesting that the taxpayers explanation is untrue but it may also be that HMRC are not satisfied that what the taxpayer is telling them fully explains the particular circumstances with which they appear to be confronted. That is the justification but it is the particular statutory language used that places the legal burden on the taxpayer to satisfy the tribunal that the assessment is wrong and should be reduced or discharged.'

Whether the burden discharged by the appellant

151. Case law authorities have repeatedly held that the burden lies on the taxpayer to establish the correct amount of tax due in an appeal against a discovery assessment.

(1) In *Norman v Golder*, the taxpayer sought to argue that the onus of establishing the correctness of the assessment lies upon the Crown, and that the onus of proving that the assessment is incorrect does not lie on the taxpayer. Lord Greene MR firmly rejected the notion: 'The point really is not arguable'; the statute 'makes it clear, beyond possibility of doubt, that the assessment stands, unless and until the taxpayer satisfies the Commissioners that it is wrong'.[25]

(2) In *Haythornthwaite v Kelly*, Lord Hanworth MR similarly stated, that 'it is quite plain that the Commissioners are to hold the assessment standing good unless the … Appellant – establishes before the Commissioners, by evidence satisfactory to them, that the assessment ought to be reduced or set aside'.[26]

(3) In *Johnson v Scott*, the High Court judgment by Walton J affirming the Commissioners' decision in favour of the Crown was upheld by the Court of Appeal. The pertinent remark by Walton J in this case highlights why the onus of proof has to lie with the taxpayer, because: 'The true facts are known, presumably, if known at all, to one person only, the taxpayer himself.'[27]

(4) In *Van Boeckel*, Woolf J stated that:

> '… unless the situation is one where no material is before the commissioners on which they can reasonably base an assessment, the commissioners are not

[24] *Hull City (Tigers) Ltd v HMRC* [2017] UKFTT 0629 (TC)

[25] *Norman v Golder* (1944) 26 TC 293, at page 297.

[26] *Haythornthwaite and Sons Ltd v Kelly* (1927) 11 TC 657, at page 667.

[27] *Johnson v Scott* [1978] STC 48, at 56(j) to 57(a).

> required to make investigations. If they do make investigations, then they have got to take into account the material disclosed by those investigations. …' [28]

(5) In *Bi-Flex Caribbean*, Lord Lowry stated that:

> 'The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgement assessment, as the cases have established, do not serve to displace the validity of the assessments, which are *prima facie* right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right.'[29]

The basis of quantification

152. In relation to the salary element in the quantum of assessment, we have regard to the following facts.

(1) Officer Egan adopted the employment income figure of £60,000, that being the amount declared for the year 2005-06 on the appellant's SA return and on 1MEAL's P35.

(2) The appellant stated that she earned £36,000 when interviewed by Police Scotland, which can be fairly inferred from a gross salary of £60,000 less tax and NIC of £24,000.

(3) In evidence to the Tribunal, the appellant referred several times to the fact that she thought she was paid £60,000 for working in the estate agency business, and that the tax due thereon was paid – 'done and dusted'.

153. The relevant facts in relation to the rental element, are the following.

(1) The years for which returns had been filed (2003-04 to 2005-06), rental income was declared for each of the three years at £5,000, £6,000 and £6,200.

(2) The fact that rental income was declared for the three years to 2005-06 was indicative that rental properties were held in the appellant's name in those years.

(3) The Land Registry search established that there were nine heritable properties under the name of the appellant as the proprietor, which is not contested by the appellant.

(4) The Land Registry search was carried out in April 2013. While the nine properties on record at the time of the search were all acquired between April 2008 and November 2009, that was not a proof in itself that no properties were held in the appellant's name prior to April 2008 for rental income to be continual.

(5) In evidence, the appellant had stated that she owned Nursery Grove in Edinburgh and Hawthorne Crescent in Erskine prior to 2008 (see §71).

The appellant's contentions

154. We consider the appellant's grounds of appeal in relation to the quantum issue as follows.

(1) *Bank deposits were from a non-taxable source* – We accept that monies were channelled through the appellant's bank account for the purchase of various properties, but the basis of quantification in no way makes any reference to the bank deposits.

(2) *Monies were gifts to fund outgoings* – We note outgoings from school fees of some £1,700 monthly to regular beauty solon expenditure, to living expenses and utility bills, to hire purchase commitments for motor vehicles, to holiday spending. On one level, by stating this ground of appeal, the appellant acknowledged that there were regular

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[28] *Van Boeckel v Customs and Excise Commissioners* [1981] STC 290, at 296.

[29] *Bi-Flex Caribbean v The Board of Inland Revenue* [1990] 63 TC 515, at 522.

expenses to be met as an individual, a parent, and a householder, which the bank account statements testified to these expenses being met. We note that the quantification makes no reference to the actual expenditure, other than that there would have been earnings to fund such expenditure. We do not accept that it was a credible explanation that all monies were gifts or loans to fund the household expenditure for the long duration of 6 years.

(3) *All the points about jewellery irrelevant* – We agree, but HMRC placed no reliance on the valuation documents for the purpose of quantifying the assessments. It is unnecessary to establish whether there was duplication in valuation or what the overall value of Mrs McLaren's jewellery collection was.

(4) *All criminal money* – from the criminal trial the appellant was convicted of two charges: (a) common law fraud in relation to obtaining the mortgage for Juniper Avenue, and (b) money laundering in deploying the proceeds of crime to service the mortgage for Juniper Avenue. The money laundering Charge 36 identified the specific sum derived from proceeds of crime to service the capital and interest repayment mortgage to the tune of £128,700. This contention is not relevant since the mortgage payments had not been taken into account as having been met by the appellant's earnings.

(5) *Not earned a legitimate penny* – the estate agency business had been continuing alongside the 'illegitimate' activities for which Edwin McLaren was charged. There was no indication that the normal business of marketing properties as an estate agent was not continuing just because the fraudulent activities were happening at the same time. The appellant spoke eloquently and competently of her professional engagement as an estate agent – that she was the 'approachable' face for potential clients; that she was the valuer to give price guidance; that she conducted the site visits to prepare the brochures; that she would see to the sale particulars being drawn up and despatched. All those were legitimate activities of an estate agency business for which HMRC consider that employment income would have arisen, and on which tax should have been paid. In any event, and as held by established authorities such as *Lindsay v CIR*: 'The frauds on the Customs Authorities [*in Lindsay*] were only incidents of that "trade".' We similarly adopt the dictum of Lord Haldane in the Privy Council judgment in the *Canadian Minister of Finance v Smith*[30] as related by Lord Sands in *Lindsay v CIR* once the character of the business of 1MEAL had been ascertained as being of the nature of trade, and that the frauds committed by Edwin McLaren were 'incidents of that trade', then the appellant 'cannot found upon elements of illegality to avoid the tax'.

155. We have considered carefully the evidence put forward for and by the appellant that she was overcharged; we are not satisfied that the appellant has discharged the burden that she was overcharged.

156. The Tribunal records that HMRC have provided a draft computation (§24) to reduce the quantum of assessment by removing the rental element for the year 2006-07. We have made relevant findings of fact at §153 in relation to the quantification of rental income. We do not find the appellant a credible and reliable witness in general, and we have no credible documentary evidence from the appellant to provide an alternative basis of quantification. On the other hand, we have positive evidence based on the declared income (employment and rentals) in the returns filed for the three years to 2005-06. In the light of the quantification being referential solely to the appellant's own declared income, and underpinned by external sources of evidence, we have no reason to displace the quantum of these assessments.

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[30] *Canadian Minister of Finance v Smith* [1927] AC 193 at p 197.

157. While we are of the view that the quantum of the overall assessment is conversative, it is not our intention to revise the quantum upwards by exercising our jurisdiction under s 50(7).

158. We determine the appeal by reference to s 50(6) only, by concluding that the appellant has not satisfied us that she was overcharged. Consequently, the assessments for the remaining appeal as concerns that years 2006-07 to 2011-12 are confirmed in full.

DISPOSITION

159. The appeal is allowed in part.

(1) The Discovery Assessments for the four years 2002-03 to 2005-06 are discharged, on account of the respondents no longer defending the appeal against the said years.

(2) The Discovery Assessments for the six years 2006-07 to 2011-12 are confirmed in full, the quantum of which is detailed at §48.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

160. 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.

DR HEIDI POON
TRIBUNAL JUDGE

Release date: 30 April 2021

Amended pursuant to Rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 14 July 2021

ANNEX

LEGISLATION

Section 29 TMA

29 Assessment where loss of tax discovered

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

(a) That any income which ought to have been assessed to income tax, … have not been assessed, or
(b) that an assessment to tax is or has become insufficient, or
(c) [not relevant]

the officer or, as the case may be, the Board may, … 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) [not relevant]

(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 [not relevant]

(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.' (italics added)

(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) […];

(c) […]; 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 2 immediately preceding chargeable periods; and

(ii) [not relevant]; and

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

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

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

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

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

Time Limit Provisions

34 Ordinary time limit of 4 years

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

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

[…]

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) …

(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) – (d) […]

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

Tribunal's jurisdiction

50 Procedure

[…]

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

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

(b) that any amounts contained in the partnership statements are excessive; or

(c) that the appellant is overcharged by an assessment other than a self-assessment,

the assessment or amounts shall be reduced accordingly, but *otherwise the assessment or statement shall stand good.* (italics added)

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

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

(b) that any amounts contained in the partnership statements are excessive; or

(c) that the appellant is over charged by an assessment other than a self-assessment,

the assessment or amounts shall be increased accordingly.

Interpretation provisions relevant to this case

118 Interpretation

[…]

(5) … a loss of tax or a situation is brought about carelessly by a person if the person fails to take reasonable care to avoid bringing about that loss or situation.

(6) Where –

(a) – (b) […]

(c) that person fails to take reasonable steps to inform Her Majesty's Revenue and Customs,

any loss of tax or situation brought about by the inaccuracy shall be treated for the purposes of this Act as having been brought about carelessly by that person.

(7) In this Act references to a loss of tax or a situation brought about deliberately by a person include a loss of tax or a situation that arises as a result of a deliberate inaccuracy in a document given to [HMRC] by or on behalf of that person.