[2021] UKFTT 0207 (TC)

TC08157

INCOME TAX – adjustments to self-assessment – discovery assessment – penalty under Schedule 24 of the Finance Act 2007 - whether discovery – yes – whether insufficiency of tax brought about deliberately – no – careless behaviour - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/07060

BETWEEN

DESMOND MALCOLM **Appellant**

-and-

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

TRIBUNAL: JUDGE NATSAI MANYARARA
LESLIE HOWARD

The hearing took place on 23 April 2021. With the consent of the parties, the hearing was held remotely by video using the Tribunal's own video hearing system. A face-to-face hearing was not held because it was not in the public interest during the pandemic to hold a face-to-face hearing and we decided that it was in the public interest for the hearing to go ahead remotely.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

The Appellant as a litigant person

Ms Gemma Milner, Litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. The Appellant is appealing against:

(1) Discovery assessments issued on 16 August 2017, pursuant to s29 of the Taxes Management Act 1970 (hereinafter referred to as 'TMA'), for the period 2008-09 to 2013-14 (inclusive) and in the amount of £124,479.94;

(2) A closure notice issued on 16 August 2017, pursuant to s28A TMA, for the period 2014-15 and in the amount of £22,758.39; and

(3) A penalty assessment issued on 18 September 2017, pursuant to Schedule 24 of the Finance Act 2007 ('Schedule 24') and in the amount of £69,708.76.

BACKGROUND

2. On 5 January 2016, the Appellant submitted his 2014-15 tax return. The turnover shown on the tax return was £59,000. On 18 November 2016, HMRC opened an enquiry into the tax return under s9A TMA ('the opening letter'). The Appellant was asked to provide bank statements for the year of enquiry. He was also asked to provide a breakdown of the figures included in his 2014-15 tax return. The Appellant responded to HMRC on 29 November 2016, explaining that he could not provide all of the information that had been requested as his computer had been corrupted by a virus. He enclosed copies of his bank statements for 2014-15 and provided a revised income breakdown of £91,179.28 for 2014-15.

3. On 20 December 2016, HMRC wrote to the Appellant asking him a number of questions in order to establish what his business expenses for the year of enquiry were. This letter was closely followed by an Information Notice, issued under Schedule 36 of the Finance Act 2008 ('Schedule 36') on 2 February 2017. The deadline given for a response was 6 March 2017. On 2 March 2017, the Appellant responded and he attached a page from his 2015-16 tax return, which showed expenses of £12,837.

4. On 9 March 2017, HMRC wrote to the Appellant again and highlighted that the 2015-16 tax return showed turnover of £86,030 and expenditure of £12,837, leaving a net profit of £73,193. HMRC further highlighted that the 2014-15 expenses totalled £44,000. The conclusion reached by HMRC was that this figure seemed high for the work undertaken by the Appellant. HMRC therefore deemed that the 2014-15 tax return needed to be amended and discovery assessments would need to be applied to earlier years. On 7 May 2017, the Appellant responded and stated that he disagreed with HMRC's views.

5. On 15 May 2017, HMRC wrote to the Appellant and repeated that the 2014-15 expenditure needed to be established. HMRC also requested bank statements from 2008-09 to 2013-14, as similar figures had been entered into the Appellant's tax returns for those periods.

6. On 22 June 2017, HMRC wrote to the Appellant and said that as no further information had been forthcoming from him, the 2015-16 tax year would be used as a comparison to 2014-15. The turnover for 2014-15 would be uplifted to £91,179 and expenditure would be decreased to £13,677, giving a net profit of £77,502. Due to a lack of any further information from the Appellant, HMRC concluded that it was likely that the earlier years were also incorrect. HMRC decided that assessments would need to be issued using the Retail Price Index ('RPI') for the turnover and the expenses would be calculated as 15% of the turnover figure for 2014-15. Following further exchanges of correspondence, HMRC issued the discovery assessments and closure notice on 16 August 2017. A notice of penalty assessment for inaccuracies was issued on 18 September 2017.

7. On 7 November 2017, the Appellant's agent appealed against the decisions and on 5 December 2017, the Appellant's agent wrote to HMRC calculating the Appellant's general expenses for 2014-15. No records were however provided by the Appellant's agent. The turnover proposed by the agent for the 2014-15 tax year was £87,000 and expenses of £29,387, taken from the bank statements. HMRC responded to the Appellant's agent outlining that receipts totalling £6,244.68 included in the bank statements had been omitted from the agent's calculations. This increased the turnover to £93,245. HMRC however proposed to keep the turnover for 2014-15 at £91,179. Whilst HMRC accepted that the expenses were reasonable, £13,752 had been claimed for train fare by the Appellant, which could not be accepted by HMRC without any further evidence. HMRC added that other expenses, such as hotels, equipment and development, required evidence as there was no record of such expenses in the Appellant's bank statements.

8. On 7 February 2018, the Appellant's agent responded and explained that the Appellant's daily commute was about 120 miles. He added that the Appellant could not get a season ticket due to the differing locations of his work assignments. He further added that credit card statements were not available due to the corruption of the Appellant's computer. On 23 April 2018, HMRC responded and said that as no further evidence had been provided, the appeal was concluded.

9. On 13 November 2018, the Appellant lodged his appeal with the Tribunal.

Respondent's Case

10. HMRC's case (as set out in the Skeleton Argument and the Statement of Case), can be summarised as follows:

(1) HMRC discovered that there had been an insufficiency of tax paid. Assessments were therefore raised under the discovery provisions of s29 TMA. The assessments were raised to make good the amount of lost tax. The Appellant under-declared income and claimed excessive expenses. A closure notice was issued for the year of enquiry.

(2) During the year of enquiry, the Appellant had under-declared turnover by £30,000. The Appellant stated that a virus had infected his computer in May 2015. His 2014-15 tax return was not filed until 5 January 2016. If the Appellant's records had been affected by a computer virus, the Appellant should have stated that the figures included in his 2014-15 tax return were estimates. The Appellant has not provided an explanation as to why the revised income figure was not available when his 2014-15 tax return was filed. The under-declared amount of £30,000 is a significant sum of money and it would have been difficult for the Appellant to miss such an under-declared amount of money.

(3) The Appellant also claimed expenses of £44,000 for the year of enquiry. He did not provide a breakdown of how his expenses were calculated and he has also claimed expenses ranging between 44% and 78% of his income, from 2008-09 to 2014-15. The Appellant could have evidenced his expenses through bank statements or credit card statements.

(4) Poor record keeping in the year of enquiry showed that the Appellant under-declared his income. The Appellant is required to keep records, in accordance with s12B TMA. His 2014-15 bank statements confirmed that income had been suppressed. The Appellant has been unable to provide sufficient records to demonstrate the accuracy of the figures included in his tax returns.

(5) HMRC considered the earlier years and concluded that it was likely that the Appellant's income would have been under-declared for the earlier years, as the income for the earlier years appeared to be estimated and consisted of round sum figures. Excessive expenses had also been claimed for the earlier years. The Appellant has not explained why his 2014-15 tax return and the tax returns for earlier years would be different from his 2015-16 tax return.

(6) The irregularities led to the conclusion that the Appellant's behaviour was deliberate.

Appellant's Grounds of Appeal

11. The Appellant's grounds for appealing against the decisions (as set out in the document entitled *"Appellant Argument Outlined"* [sic]) can be summarised as follows:

(1) The Appellant has been in a depressive state for the past two years and he has been inundated with over 60 letters from HMRC, totalling over 150 pages of requests, instructions, guidelines, penalties, surcharges and debt collection notices. His state of mind was such that he could not function. It was not possible for the Appellant to comply with HMRC's requests as the Appellant has dyslexia, which was a factor in relation to understanding HMRC's requests. The Appellant can, at times, find it difficult to digest written information and he needs additional time to read through documents. He also finds it difficult to process data.

(2) The Appellant emailed his representative, Roger Harding, of Gordon Dadds, regarding his dissatisfaction with Officer Barrett (of HMRC). The Appellant trusted that his representative would follow through with his instructions. Unfortunately, that was not the case.

(3) Since lodging his appeal, the Appellant has been able to scrutinise the evidence that HMRC have relied on to base their calculations. The Appellant has found that the information that HMRC have relied on to finalise tax calculations and penalties is incorrect. Neither HMRC nor the Appellant's representative consulted the Appellant in relation to the credits and debits in his bank statements for 2015. All payments into the bank account were wrongly calculated as income. The income calculated by HMRC was £93,245.00. The actual income amounted to £86,453.48. HMRC's calculations include income from the 2013-14 tax return. HMRC's calculations also include £4,558.75 winnings from Bookmakers, as well as money from family.

(4) HMRC did not take into account the fact that invoices from the Appellant's work assignments took 14 to 30 days to process. Invoices from various government departments show late payment or non-payment for invoices greater than three months old. This would affect the income shown in the bank statements. Many invoices were not voided and remained live on the Appellant's invoicing system.

(5) HMRC have also under-calculated the Appellant's travel expenses. HMRC's calculations are based on the assumption that travel to the Appellant's work assignments were local, when 90% of the Appellant's travel was to London. He did an average of 120 miles (round trip) travelling around the United Kingdom.

(6) HMRC have under-calculated the Appellant's internet and telephone costs. The Appellant has not paid for any subscription packages since 2005-06.

(7) The Appellant is requesting recalculation of the 2008-09 to 2014-15 tax returns because additional information is now available to the Appellant. The 2006-07 diary submitted shows the Appellant's work pattern, as well as the destinations that the Appellant travelled to for his assignments. The figures used for earlier years have been taken from the 2014-15 bank statements.

12. It is clear from the grounds of appeal that the Appellant wrongly believed that he was also appealing against late filing penalties for 2016-17. This appeal however only concerns the closure notice, discovery assessments and penalty assessments.

13. At the commencement of the appeal hearing, Mr Malcolm (the Appellant) confirmed that he had been able to go through all of the documents submitted in support of the appeal. We nevertheless gave him extra time to find and consider any documents during the hearing, with sufficient breaks to enable him to do so.

APPEAL HEARING

14. Ms Milner proceeded by opening HMRC's case, as set out in the Statement of Case. She cross-referred us to the documents included in the Documents Bundle and the Authorities Bundle. We then heard evidence from Officer Neil Barrett and from Mr Malcolm.

Evidence and Submissions

15. In examination-in-chief by Ms Milner, Officer Barrett explained that he had made the decision to issue the closure notice for the year of enquiry because Mr Malcolm had provided a turnover figure which was £30,000 higher than that which he had originally declared in his 2014-15 tax return. He further added that no evidence or explanation had been provided by way of receipts, or a breakdown, for the expenditure claim of £44,000. In reaching the decision to issue the discovery assessments, Officer Barrett explained that having identified the problem with the 2014-15 tax return, he looked at earlier returns and found that there was a common theme of low turnover and high expenditure being claimed. Given the nature of Mr Malcolm's trade, he had asked for an explanation as to why any earlier years would have been different and no explanation had been provided by Mr Malcolm. Therefore, he was satisfied that the errors identified in the 2014-15 tax return would have been present in earlier years and the 2008-09 tax year was the logical starting point.

16. In further amplification of the reasoning behind his decision, Officer Barrett continued by saying that there were years where Mr Malcolm had used a round sum for his turnover. In reaching the conclusion that Mr Malcolm's behaviour was deliberate, Officer Barrett reasoned that Mr Malcolm had knowingly submitted incorrect figures, which had been estimates. He added that Mr Malcolm had the correct information available in his bank statements and the difference between the turnover originally declared was substantially less than the amended figure provided, in relation to 2014-15. In this respect, he said that Mr Malcolm could have said that the figures included in his tax 2014-15 tax return were estimates.

17. Officer Barrett's position was that Mr Malcolm's disclosure was 'prompted' because HMRC only became aware of the irregularities in the 2014-15 tax return after the enquiry had begun. A reduction had been given for 'telling', as Mr Malcolm had accepted that the turnover figure for 2014-15 had been incorrect. No admission had however been made in relation to the earlier years. In relation to the reduction for 'helping', Officer Barrett's evidence was that Mr Malcolm had initially co-operated during the enquiry, but that his co-operation had lessened as time went on. A further reduction had been made for 'giving' as Mr Malcolm had provided his 2014-15 bank statements. No other records had however been provided. In relation to the reduction in co-operation, Officer Barrett stated that some letters that he had sent to Mr Malcolm were unanswered and some responses received from Mr Malcolm did not address the questions being asked. He added that Mr Malcolm had not kept adequate records and that special circumstances did not apply.

18. Under cross-examination by Mr Malcolm, Officer Barrett said that he had reached the conclusion that Mr Malcolm would have known that the figures included in his tax return were incorrect because he (Mr Malcolm) then provided a revised figure for 2014-15. He added that a computer virus would not have contributed to incorrect figures being given and that he did not therefore need to have sight of Mr Malcolm's computer. He repeated that Mr Malcolm could have obtained the correct figure from his bank statements. He continued by saying that there was a substantial difference between the original figure included in the 2014-15 tax return and the revised figure.

19. In explaining the Retail Price Index ('RPI') to Mr Malcolm, Officer Barrett said that the RPI is what HMRC use when making assessments for earlier years, as prices change over time. He added that over a period of time, it is expected that income rises and that this was a fair way to identify a figure. He further added that Mr Malcolm had been given the opportunity to provide bank statements. Officer Barrett continued by saying that a penalty can be charged for irregularities identified in a tax return and he repeated that reductions are provided for the level of co-operation and any records provided. He concluded by saying that Mr Malcolm was required to keep any records to show his income and expenditure and that the copy of the 2006 diary provided by Mr Malcolm did not relate to the period covered by the assessments.

20. In response to questions from the Tribunal for the purposes of clarification, Officer Barrett explained that Mr Malcolm's behaviour could not be classified as 'careless' because he would have known that the turnover figure in his 2014-15 tax return was incorrect when he submitted it. He re-iterated that the information would have been available to Mr Malcolm as he could have referred to his bank statements. He repeated that Mr Malcolm could have said that the figures provided in his tax return for 2014-15 were estimates. Officer Barrett's position was that, on an analysis of all of the tax returns covered by the assessment, the figures for turnover and expenditure were incorrect.

21. There was no re-examination.

22. Mr Malcolm then opened his case and he submitted that he had responded to Officer Barrett's letters in the best way that he could. He added that he had provided the information that he had and concluded by saying that he had become overwhelmed by the amount of correspondence that he was receiving, most of which was not helpful.

23. In his oral evidence, Mr Malcolm explained that he is a British Sign Language ('BSL') interpreter and that the majority of the work that he does is provided by the Department for Work and Pensions ('DWP'). He also works for other government departments, such as the Home Office, the Department of Trade and Industry, the Department for International Development, the Treasury, as well as councils and charities. He used to volunteer at a deaf club in 1993 and he began to work for the DWP in 1995. He explained that the DWP pay the costs for support needed by people in the work place and when people need an interpreter at meetings. He added that he submits his claim forms for each assignment fortnightly or monthly. He explained that the DWP sometimes make an allowance for expenses (hotel or travel) but he sometimes had to pay out of his own pocket if he did not use Redfern for travel. He further added that he keeps his costs in line with the quotes that are obtained by the DWP for interpreter services. He explained that he submits his invoices with his claim forms, but the claims are not always paid in a timely manner.

24. In relation to how he receives his income, Mr Malcolm explained that he is paid by BACS transfer, directly into his bank account. He added that he receives paper bank statements each month. He however uses his computer system to keep records of his income. Mr Malcolm explained that when completing his tax returns, he would take the information from his

computer. He added that as opposed to fixing the computer that was infected by a virus, he decided to purchase a new computer to avoid costs. He now has one computer for invoices and another computer for expenses.

25. In relation to his assignments, Mr Malcolm explained that it is sometimes quicker to drive to assignments. His assignments are in various places around the country, including London, Woking, Grantham, Milton Keynes, Bradford, Manchester and Norwich. He would usually drive from Hastings and get the train from Tunbridge Wells (a distance of about 30 miles) to his assignments. He explained that he was working away from home every day of the week as he had to go to a person's place of work for his assignments. He further explained that he did not make overnight stays unless he had travelled a great distance.

26. In relation to the RPI, Mr Malcom's evidence was that he believed that HMRC were treating him like a department store. He added that there had been a recent freeze on wages at government departments. He further added that he did not know that he could access and provide bank statements for the period covered by the assessments. He explained that the 2006 diary that he had provided showed the pattern of his work and that this is the only diary that he had been able to locate as he does not always keep his diaries. He clarified that his 2014-15 bank statements included money from family, which was over and above his income for 2014-15.

27. Under cross-examination by Ms Milner, Mr Malcolm accepted that he had been aware that his computer had been infected by a virus in May 2015 and he accepted that the virus occurred before he had submitted his 2014-15 tax return. He explained that he had purchased a new computer in May 2015. He added that he did not know that he could have said that his records were affected by a virus until Officer Barrett had requested information when the enquiry was opened, as he did not know that his returns were incorrect. He further added that he simply put the information into his computer and obtained the figures included in his tax return from the information obtained from his computer. He accepted that the revised figure provided to HMRC exceeded the original figure included in his 2014-15 tax return by £30,000. He repeated that he did not know that he could obtain copies of his bank statements for the entire period covered by the assessments. He concluded by saying that he had provided all of the information that he had available.

28. No further witnesses were called.

29. In her closing submissions, Ms Milner relied on the case law and the legislation and further submitted (in summary) that:

> (1) In accordance with the case law, a discovery was made as there was an insufficiency in the assessment to tax. The requirements of s29 TMA have been met. The discovery assessments are valid and within the time limits included at s34 and s36 TMA.

(2) During the course of the enquiry into the 2014-15 tax return, an under-declaration of £30,000 had been made and an excessive claim for expenses had also been made. Mr Malcolm has been unable to provide sufficient records, or a breakdown, to substantive the accuracy of the figures claimed.

(3) The insufficiency of tax was brought about deliberately as the 2014-15 tax return was inaccurate and the discrepancy between the original and the revised figure would have been difficult for Mr Malcolm to ignore. Mr Malcolm could have said that he was providing estimates when including the figures in his 2014-15 tax return. Furthermore, the computer virus occurred eight months before the tax return was submitted. The onus is on Mr Malcolm to retain records.

(4) The conclusion reached was that income had been under-declared for previous tax years and the presumption of continuity applies. The RPI was used for earlier years.

(5) Mitigations have been provided for the penalty applied, in accordance with the legislation. No special circumstances apply.

30. In reply, Mr Malcolm submitted (in summary) that:

(1) HMRC are proceeding on the basis of their expectations in relation to what he should know. His system was simply one where he put information relating to his income into his computer. He understands that proper records are required and he kept these records on his computer. He did not keep receipts.

(2) The only time he became aware that there were any errors in his 2014-15 tax return was when he received correspondence from Officer Barrett. His behaviour was not deliberate.

(3) By using the RPI for earlier years, HMRC have treated him like a department store. He travels to various parts of the country and the treatment of his travel expenses has changed over the years. Furthermore, the situation in 2009 is going to be different from the situation in 2014.

(4) The penalty is excessive as he did not have the information that HMRC required.

31. At the conclusion of the appeal hearing, we reserved our decision, which we now give with reasons.

DISCUSSION

32. The Appellant appeals against discovery assessments raised under s29 TMA, for the periods 2008-09 to 2014-15 (inclusive) and a closure notice issued pursuant to s28A TMA, for 2014-15. The Appellant further appeals against a penalty issued pursuant to Schedule 24, for deliberate behaviour.

33. We have derived considerable benefit from hearing the oral evidence given and the submissions made. Having considered all of the evidence, cumulatively, we make the following findings of fact and give our reasons for the decision.

Findings of Fact

34. The Appellant works as a freelance BSL interpreter and his self-assessment record was set up on 2 December 1996. The majority of the work that the Appellant does is provided by the DWP (Access to Work). He began to work for the DWP in 1995. His assignments include providing interpreter services for people in the work place and at interviews. He also works for other government departments, such as the Home Office, the Department of Trade and Industry, the Department for International Development and the Treasury. He also works for various councils and charities. He used to volunteer at a deaf club in 1993.

35. The Appellant's assignments are in various parts of the country. For the majority of the time, the Appellant drives to Tunbridge Wells and takes the train to his assignments. The distance to Tunbridge Wells is around 30 miles from his home. He has been able to utilise Redfern travel in relation to travelling to his assignments on some occasions. He sometimes requires hotel accommodation if he travels greater distances. He submits his claim forms after his assignments and is paid via BACS transfer and he receives bank statements monthly. He used a computer system to record his income and he would use the information from his computer to complete his tax returns. He did not however retain any other records of his income.

36. On 5 January 2016, the Appellant submitted his tax return for the 2014-15 fiscal year. The turnover that was shown in the tax return was £59,000 and the expenditure claimed was £44,000. An enquiry into the 2014-15 tax return, pursuant to s9A TMA, was opened by Officer Barrett on 18 November 2016 ("the opening letter"). Appended to the opening letter was a document entitled *"Schedule of Information and documents needed to carry out our check"*. The documents and information requested from the Appellant were as follows:

> *"**Information and documents***
>
> *All bank statements covering the period 6/4/14 – 5/4/15, for all accounts used for business purposes.*
>
> *Please confirm on what basis the turnover figure of £59,000 was calculated and provide supporting sales invoices/records.*
>
> *Please provide a breakdown of all expenditure claimed, totalling £44,000 and provide supporting receipts and invoices.*
>
> *Please provide a brief description of the services your business offers."*

37. By a letter dated 29 November 2016, the Appellant explained that he could not provide all of the information requested by HMRC. In further amplification of his inability to provide the information requested, the Appellant stated, *inter alia*, that:

> *"The other information you have requested is not available as details of receipts were stored on my computer and <u>the paper details discard</u>* [sic] *<u>as were the originals of my bank statements</u>…*

My computer was infected by a virus that encrypted all files on my computer…

The information that I did manage to retrieve at the time of my tax return is the information that comprises my tax return.

I can see my tax return for April 2014 – April 2015 is inaccurate based on the information I have sent. I can only put this down to the virus"

[Emphasis added above and below]

38. The Appellant enclosed copies of his Nationwide FlexAccount bank statements for 2014-15 and a revised income breakdown of £91,179.28. This was a difference of over £30,000 from the turnover initially claimed in his 2014-15 tax return.

39. On 20 December 2016, HMRC wrote to the Appellant asking him a number of questions, in order to establish what his business expenses were, as follows:

"As part of my check, I need to consider your business expenditure, which is obviously more difficult without the receipts being available. Please confirm:

1. *Do you have a permanent office that is not your home address? If so, please confirm the full address of the office, the name and address of the landlord and details of any payments made to the landlord.*
2. *On average, how many appointments did you normally have in a fairly typical week, during 2014/15? How did 2014/15 compare to previous years?*
3. *I note that you appear to do the bulk of your work for government departments/local authorities, or similar. Is most of your travel to the same offices of these departments? Where are these offices based?*
4. *By what method do you travel to appointments? If you use your own vehicle, please confirm the make and model of the vehicle and provide the insurance document showing business usage of the vehicle is allowed.*
5. *Do you advertise your services anywhere? If so, please give details.*
6. *Please estimate your business expenditure for 2015/16…"*

40. On 2 February 2017, an Information Notice was issued by HMRC, under Schedule 36, repeating the same questions. The deadline given for a response was 6 March 2017.

41. On 2 March 2017, the Appellant responded and he attached a page from his 2015-16 tax return. He added that he did not know what his average appointments for 2014-15 were. He further added that he uses public transport to go to appointments and normally drives to a

station car park and leaves his car there, unless he has a very early start, when he drives to his appointments. He repeated that his computer had been infected by a virus in about May 2015.

42. By a letter dated 9 March 2017, HMRC set out the figures shown in the 2015-16 tax return that had been provided by the Appellant, as follows:

> *"Turnover £86,000*
>
> *Expenditure £12,837*
>
> *Net Profit £73,193*

43. HMRC also added that as no copies of business expenditure receipts had been provided, an attempt was being made to establish why the Appellant's expenditure for 2014-15 had been as high as £44,000, as claimed. As the Appellant had said that his turnover figure for 2014-15 was £91,179, and not £59,000, as previously claimed, HMRC identified that there was a problem with the recording of expenditure. HMRC further provided an outline of the figures that the Appellant had submitted in previous years, as follows:

	2015	**2014**	**2013**	**2012**	**2011**	**2010**	**2009**
Turnover	59,000	68,000	68,465	72,636	68,857	36,040	29,000
Expenditure	44,000	47,000	48,212	57,352	49,204	18,594	13,000
Net profit	15,000	21,000	20,253	15,284	19,653	17,446	16,000

44. HMRC observed that the expenses claimed by the Appellant ranged between 44% to 78% of the turnover between 2008-09 to 2013-14.

45. By a further letter dated 15 May 2017, HMRC asked the Appellant to confirm the following:

> *"1. Although you no longer have records available, are you able to give any indication of how you calculated the £44,000 expenditure given for 2014-15? What would have been your biggest expenses during the year and how much would you estimate these to be?*
>
> *2. Did the type of services you offer fundamentally change between 2014/15 and 2015/16?*
>
> *3. Did the type of services you offer fundamentally change between 2014/15 and previous years?*
>
> *4. Given that your income for 2014/15 and 2015/16 is roughly similar, what reasons can you give for your expenditure in 2014/15 being £44,000 and in 2015/16 it being £12,837?*

5. Given that we have established your turnover figure for 2014/15 was incorrect and the figures on your 2015/16 are significantly different from earlier returns, why do you believe your previous returns are correct?

6. Why was your profit in 2015/16 so much higher than in previous years? What was different about that year to all others?

I believe there are problems with your tax returns from 2008/09 onwards. You no longer have the records available for these years. However, it is possible for you to obtain copies of business bank statements for these years. Ideally, I would like to see all business bank statements covering 2008/09 – 2013/14 but I am willing at this stage to just ask for business bank statements covering 6/4/13 – 5/4/14, on the basis that if we establish problems in 2013/14, we can then use this as a basis of settlement for all earlier years. However, if you do not feel that 2013/14 is a representative year, please supply me with all business bank statements for the period 6/4/08 – 5/4/14 instead."

46. This letter was followed up by a further letter, dated 22 June 2017. HMRC then indicated an intention to issue an amendment to the 2015 tax return and to issue discovery assessments for previous years, to take account of the problems identified during the year of enquiry. The 2016 figures were to be used as a guide. As no further information had been forthcoming, HMRC revised the Appellant's turnover figures for the earlier years, as follows:

Year	**Revised Sales using RPI**	**Revised Expenditure (15%)**	**Revised Net Profit**
2014	£90,366	£13,555	£76,811
2013	£88,175	£13,277	£74,948
2012	£85,701	£12,856	£72,845
2011	£82,838	£12,426	£70,412
2010	£78,739	£11,811	£66,928
2009	£74,745	£11,212	£63,533

47. The summary of additional tax due was set out as follows:

2015	£22,758.39
2014	£20,782.12
2013	£20,083.04
2012	£20,640.79
2011	£17,662.33
2010	£16,851.85
2009	£16,204.33

48. Following further exchanges of correspondence, in which the Appellant indicated his disagreement with HMRC's conclusions, discovery assessments were issued, as follows.

Tax Year	Legislation	Description	Date	Amount
2008-09	s 29 TMA	Discovery Assessment	16 August 2017	£16,204.33
2009-10	s 29 TMA	Discovery Assessment	16 August 2017	£16,851.85
2010-11	s 29 TMA	Discovery Assessment	16 August 2017	£17,662.33
2011-12	s 29 TMA	Discovery Assessment	16 August 2017	£20,640.79
2012-13	s 29 TMA	Discovery Assessment	16 August 2017	£20,083.04
2013-14	s 29 TMA	Discovery Assessment	16 August 2017	£20,782.12
2014-15	S 28A TMA	Closure Notice	16 August 2017	£22,758.39

49. A penalty assessment was also issued under Schedule 24, for deliberate behaviour. This was included in a penalty notice and explanation.

Tax Year	Legislation	Description	Date	Amount
2008-09 to 2014-15	Schedule 24	Inaccuracy penalty	18 September 2017	£75,590.39

50. By a letter dated 7 November 2017, the Appellant's agent submitted an appeal against the assessments, closure notice and penalties. The Appellant's agent provided further information about the Appellant's turnover for 2014-15, but no further records were provided. HMRC's skeleton argument records, at para 117, that HMRC were prepared to accept that the Appellant's income for 2014-15 was £86,602. This then had the effect of reducing the turnover and the additional tax due as follows:

Tax Year	Revised turnover	Additional tax due
2008-09	£70,993	£14,896.84
2009-10	£74,786	£15,474.25
2010-11	£78,680	£16,213.39
2011-12	£81,399	£19,105.27
2012-13	£83,748	£18,503.00
2013-14	£85,829	£19,162.60

2014-15	£86,602	£21,124.59
Total		**£124,479.94**

51. This therefore also had the effect of reducing the penalty to £69,708.76.

52. The Appellant now appeals to this Tribunal. Section 50(6) TMA provides that if, on an appeal, it appears to the Tribunal that an appellant is overcharged by an assessment, the assessment shall be reduced accordingly but 'otherwise the assessment … shall stand good.'

Consideration

53. The Appellant's case is that the assessments and amendment are not correct, and that the findings are excessive and not in accordance with the information given, or the explanations provided, to HMRC.

54. The issues therefore raised in this appeal are:

(1) Was there a discovery?

(2) If so, was the insufficiency of the assessment brought about "carelessly" or "deliberately" by the Appellant?

(3) Have HMRC correctly issued a closure notice for the 2014-15 fiscal year?

(4) Does the presumption of continuity apply?

(5) Have HMRC correctly applied the Schedule 24 penalty?

55. In order to determine whether there has been a discovery, it is further necessary to consider the following:

(1) Did the officer who raised an assessment, at the time that the discovery assessment was issued, have a belief that there was an insufficiency of tax?

(2) Was that belief, objectively, a reasonable one?

56. In relation to s29 TMA, the burden of proof is on HMRC to establish that discovery assessments and amendment were validly made. Once this issue is discharged, the onus is on the Appellant to displace the assessments and amendment, and to disprove the presumption of continuity. The standard of proof is the civil standard; that of a balance of probabilities.

Q. Was there a discovery?

57. If HMRC 'discover' income which ought to, but has not, been assessed for income or corporation tax, they may make an assessment in that amount to make good the loss of tax. Section 29(3) TMA provides that a taxpayer who has made a self-assessment return can only be assessed under a discovery assessment if one of two conditions is met. Section 29(4) TMA provides for one of the conditions which must be satisfied for a valid discovery assessment in a case where a return had been made; namely that the loss of tax was brought about 'carelessly' or 'deliberately' by the taxpayer, or a person acting on his behalf.

58. Section 29(5) TMA provides an alternative condition, based on what a hypothetical HMRC officer might 'reasonably have been expected to have been aware of' from certain information supplied. In these circumstances, the relevant cut-off time is the time at which the officer ceased to be entitled to enquire into the return. For the purposes of the condition in s29(5) TMA, the information that is treated as made available to the hypothetical HMRC officer is set out in s29(6) TMA which, in summary, is the information that is contained in the return or accompanying documents provided by the taxpayer, or information the existence of which and the relevance of which as regards the insufficiency of tax could reasonably be expected to be inferred by the officer from the return and any accompanying documents.

59. HMRC's case is that a discovery had been made within the meaning of s29 TMA. The discovery assessment which HMRC purported to make in the present case was on the basis that an officer had discovered, as regards the Appellant, that an assessment to tax was or had become insufficient. HMRC submit that the prohibition in s29(3) was overcome because the first condition (i.e., that specified in s29(4)) was satisfied, namely that the insufficiency of the assessment had been brought about deliberately by the Appellant. HMRC further, and alternatively, rely on s29(5) if sufficient information had not been sent with the Appellant's returns, so as to satisfy s29(6). It is trite law that if there is no inaccuracy, then there is no deliberate inaccuracy either.

60. A discovery assessment is not the only way in which HMRC can go behind past assessments to tax or claims to relief. HMRC can launch an enquiry into a return under s9A TMA. Enquiries under s9A extend to anything contained in the return, or required to be contained in the return, including a claim or election included in the return. The time-limit for s9A enquiries is, in broad terms, 12 months from the filing of the return.

61. The provisions as to self-assessment and as to the power of HMRC to enquire into a self-assessment were summarised by Patten LJ in *Sanderson v Revenue and Customs Commissioners* [2016] STC 638, at [25]. There, he said, *inter alia*, that the exercise of the s29(1) power is made by a real officer who is required to come to a conclusion about a possible insufficiency based on all the available information at the time when the discovery is made. The officer must therefore believe that the information available to him points in the direction of there being an insufficiency of tax. The court in *Sanderson* considered that:

> "10 Section 29 TMA is designed to deal with inaccuracies in the process of self-assessment. The taxpayer (in the case of an individual) is required by section 8 TMA to make and file a return containing the information which is reasonably required in order to establish the amounts of income and capital gains tax in which he is chargeable and, for that purpose, to deliver with the return such accounts and other documents relating to the information as may be reasonably required. The return must include a self-assessment of the amounts in respect of which the taxpayer is chargeable on the basis of the information provided and taking into account any reliefs claimed: section 9(1). It must also include a declaration that the return is, to the best of the taxpayer's knowledge, correct and complete: see section 8(2).
>
> 11 The taxpayer's obligation is therefore to provide a correct assessment of his tax liabilities and to support that assessment with such information as may be necessary to substantiate the figures. The Revenue has power under section 9ZB to amend a return in order to correct obvious errors of principle and calculation. There is also an unlimited power under section 9A to enquire into a section 8 return within the time limits specified in section 9A(2). In the present case, this was the quarter day next after the first anniversary of the delivery of the return. An inquiry extends to: "anything contained in the return, or required to be contained in the return, including any claim or election included in the return": see section 9A(4).
>
> 12 Section 9C TMA gives an officer power to amend the self- assessment return during an inquiry in order to prevent the loss of tax but where, as in this case, no inquiry was commenced within the section 9A(2) time limit or an inquiry was closed then the Revenue's only power to amend the return is by way of discovery assessment under section 29."

62. The legal approach as to whether there is a discovery is adequately set out in the decision of the Upper Tribunal in *HMRC v Charlton* [2012] UKUT 770 (TCC); [2013] STC 866, at [37], where the Upper Tribunal said this:

> "37. In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight."

63. Furthermore, in *Charlton* at [28], the Upper Tribunal held that the word 'discover' connotes change in the sense of a threshold being crossed. At [35], the Upper Tribunal referred to the need for the officer to act "honestly and reasonably". The officer's belief is therefore required to be one which a reasonable officer could form: *Anderson v HMRC* [2018] STC 1210, at [111] (Morgan J and Judge Berner) in relation to there being an objective test with a subjective element. In the earlier case of *Hankinson v HMRC* [2011] EWCA Civ 1566, the Court of Appeal held that the threshold for a discovery was that an officer came to a conclusion, or satisfied himself, as to an insufficiency of tax. The authorities have further established that there is also an objective test which must be satisfied before a discovery is made.

64. The requirement for the conclusion to have 'newly appeared' is implicit in the statutory language 'discover'. As observed from the authorities, the discovery must be of one of the matters set out in (a) to (c) of s29(1). A discovery assessment is therefore not validly triggered because the officer has found a new reason for contending that an assessment is insufficient, or because he or she has decided to invoke a different mechanism for addressing an insufficiency in an assessment which he or she has previously concluded is present: *Beagles v HMRC* [2019] STC 54 (Birrs J and Judge Greenbank), at [100] to [106], [113] and [122], in reliance on Patten LJ's summary of the authorities.

65. Section 29(1) therefore focuses on the state of mind of the individual officer of HMRC who makes the assessment.

66. On 5 January 2016, the Appellant submitted his 2014-15 tax return. We have found that the turnover that was shown in the tax return was £59,000 and the expenditure claimed was £44,000. In response to the opening letter, the Appellant enclosed copies of his Nationwide FlexAccount bank statements for 2014-15 and he provided a revised income breakdown of £91,179.28. This was a difference of over £30,000 from the turnover initially claimed in his 2014-15 tax return.

67. We find that there had been an insufficiency in tax in relation to the Appellant's tax return for 2014-15 (the enquiry year) and that Officer Barrett discovered this during the enquiry. This is because, by his own admission, the Appellant's 2014-15 contained an inaccurate figure in relation to turnover. At the time that the Appellant filed his 2014-15 tax return, he did not state that the turnover figure was an estimate or provisional figure. We find that the revised figure provided by the Appellant after the enquiry was opened is a significantly higher figure than that originally declared in his tax return. We further find that at the time that the Appellant filed his 2014-15 tax return, by his own evidence, his computer had already been infected by a virus.

68. The Appellant provided bank statements for 2014-15. We are further satisfied that Officer Barrett had newly discovered that the assessment was insufficient on the basis of the additional income shown in the bank statements for 2014-15, as accepted by the Appellant (following various revisions).

69. As explained by Moses LJ in *Tower MCashback LLP 1 v HMRC* [2010] STC 809, at [17]-[18], the taxpayer's self-assessment constitutes the final determination of his liability, subject to three circumstances; namely, an amendment to the return, an enquiry by HMRC or a discovery assessment. Thus, a taxpayer making a self-assessment must take care to get the assessment right. He must take care to get it right both as to matters of fact and matters of law. Even if he gets it wrong, and in his favour, it may turn out that his wrong figure will constitute the final determination of his liability. If the taxpayer gets the assessment wrong, and in his favour, he will lose the benefit of that assessment being final, and in his favour, if there is a discovery assessment.

70. The Appellant's 2014-15 tax return was made in accordance with s8 TMA and s29 TMA is, accordingly, on point. Accordingly, we hold that there was a discovery for the purposes of section 29 (1). We further hold that that the closure notice for 2014-15 was correctly issued.

Section 29(4): Was the loss of tax was brought about 'carelessly' or 'deliberately' by the Appellant or a person acting on his behalf?

71. HMRC submit that the inaccuracies in the Appellant's tax return were deliberate. HMRC rely on s118(7) TMA in support of their argument on the 'deliberateness' issue. Section 118(7) is a deeming provision, which means that HMRC can establish the relevant intention by showing that there was a deliberate inaccuracy in a document given to HMRC by or on behalf of the taxpayer, and that the loss of tax followed *"as a result of"* the deliberate inaccuracy. The normal time-limit for an assessment imposed by s34 TMA is extended by s36 TMA, where the insufficiency in the self-assessment is brought about carelessly or deliberately by the taxpayer or a person acting on his behalf. The deliberateness requirements of s29(4) and s36(1A)(a) TMA require HMRC to prove that the taxpayer intended to bring about a particular fiscal result. In the case of s29(4), it is an "intention" to bring about a situation in which an assessment to tax is "insufficient", and in the case of s36(1A) (a), it is an "intention" to bring about a "loss of tax".

72. The term 'deliberate inaccuracy' is to be interpreted according to the usual principles of statutory interpretation. Our attention was drawn to a number of decisions which dealt with the concept of deliberateness. It is clear that this concept is well-established in case-law. In *Duckitt v Farrand* [2001] Pens LR 155, at [9], it was held that "deliberately" means "intentionally". We were also drawn to a number of decisions by the First-tier Tribunal, which we consider be persuasive rather than binding.

73. The meaning of 'deliberate' was considered, *obiter*, in *Tooth v HMRC* [2019] EWCA Civ 826; [2019] STC 1316. Floyd LJ, giving the lead judgment of the court said, at [86], that it is clear from the wording of s29 and s36 TMA that they both "require HMRC to prove that the taxpayer intended to bring about a particular fiscal result".

74. At [80], the Court of Appeal in *Tooth* said this:

> "80. Nevertheless, I agree with the UT that, in order to determine whether there is an inaccuracy in a document it is necessary, as in all exercises of interpretation, to read the document as a whole. The question is whether the document, understood as a whole, conveys inaccurate information to HMRC…"

75. Males LJ disagreed with Floyd LJ holding that there was an inaccuracy in the return because the document should not be considered as a whole. The statutory question nevertheless is whether there is an inaccuracy in a document given to HMRC. Although Floyd LJ had not thought that s118(7) helped HMRC in showing there was an inaccuracy, he said that s118(7) was a deeming provision — which meant that once it was established that there was a deliberate

inaccuracy in a document given to HMRC, no further enquiry about the taxpayer's intention was needed. The question to be asked was whether the inaccuracy was deliberate, and then, separately, whether this resulted, in fact, in the insufficiency of the assessment. In *Beagles*, the court held that if there was an inaccuracy, it was deliberate.

76. The Supreme Court considered the deliberate inaccuracy issue in *Tooth* at [2021] UKSC 17. Lord Briggs and Lord Sales gave a joint judgment, with which the other members of court agreed. There, the Supreme Court held, at [24], that whether the insufficiency to tax has been brought about deliberately depends upon construing ss29(4) and 118(7) TMA. Section 29(4) requires that the insufficiency of tax *'was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf*'. However, s118(7) TMA provides that '*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 […]'*.

77. Whether there was an inaccuracy depends on what "in a document" means. The Supreme Court disagreed with the Court of Appeal's conclusion that it was enough if the deliberate inaccuracy could be found somewhere in the document, interpreted on its own without regard to the rest of the document. The Supreme Court held that there is no reason to depart from the usual approach to interpreting a document as a whole. The Supreme Court continued by saying that deliberate inaccuracy in a document in section 118(7) TMA means a statement which, when made, was deliberately inaccurate, rather than a deliberate statement which was inaccurate.

78. We find that there was an inaccuracy in the Appellant's tax return. This is because by his own admission, the turnover figure included in the 2014-15 tax return was incorrect. We have found that the revised figure for the 2014-15 turnover was significantly higher than that initially provided when the Appellant's tax return was filed. The error led to an under-declaration of tax. We are satisfied that there is a causal connection between the inaccuracy and the resultant loss of tax in this appeal.

79. Whilst we find that there was an inaccuracy, we find however, on the basis of all of the evidence, that the behaviour in this appeal was careless, as opposed to deliberate. This is because we are satisfied that the Appellant failed to take reasonable care to ensure that his records were accurate. In this regard, we find that the Appellant failed to exercise prudence.

80. There are many decided cases as to what amounts to carelessness in relation to the completion of a self-assessment tax return. The cases indicate that the conduct of the individual taxpayer is to be assessed by reference to a prudent and reasonable taxpayer in his position: *Atherton v HMRC* [2019] STC 575 (Fancourt J and Judge Scott), at [37]. The issue as to 'carelessness' must be considered and decided in the relevant context and the tax return must be read as a whole. The context in the present case is the delivery of a self-assessment tax return pursuant to ss 8 and 9 TMA. Under s8(2), the person making the return is required to declare that to the best of his knowledge, the return is correct and complete.

81. Carelessness can take the form of omissions, as well as positive acts. Whether acts or omissions are careless involves a factual assessment, having regard to all the relevant circumstances of the case. If the assessment to tax (as contained in the self-assessment tax return) states the wrong figure as to the tax payable and the wrong figure is stated as a result of carelessness, then the insufficiency in the assessment to tax is brought about by that carelessness. The question as to whether something is *"brought about"* and whether that happened as a result of carelessness is dealt with in s118(5) TMA, which provides that a relevant situation is brought about carelessly by a person if the person *"fails to take reasonable care to avoid bringing about"* that situation. This subsection makes the obvious point that a failure to take care to avoid a situation amounts to carelessly bringing about that situation.

82. We find that the Appellant solely relied on his computer to complete his tax returns. By his own evidence, the Appellant did not retain or refer to bank statements, credit card statements or invoices to verify the accuracy of any computer records. However, in order for the Appellant's behaviour to have been deliberate, we find that the Appellant must have, in a subjective sense, acted with some level of knowledge or consciousness as regards the inaccuracy. We find that this is not the situation that has occurred in the appeal before us. We find that, for whatever reason, the Appellant wholly relied on his computer records, which he believed to be accurate. The Appellant however completely failed to have a contingency plan in place and failed to keep records.

Section 29(5) and Section 29 (6): Could the hypothetical officer reasonably be expected to have been aware of the insufficiency?

83. We have found that there was a discovery in this appeal. Applying the principles from case law to the facts of the present case, the question is whether from the information in and accompanying the return, a hypothetical officer could not reasonably have been expected to be aware of the insufficiency.

84. Section 29 (5) requires that a taxpayer should make sufficient disclosure in order to enable an officer to make an informed decision as to whether an insufficiency existed, sufficiently to justify in the words of Moses LJ in *Revenue & Customs Comrs v Lansdowne Partners Limited Partnership* [2012] BTC 12, at [69]. A taxpayer is protected against discovery provided adequate disclosure has been made: *Sanderson* per Patten LJ, at [25]. The senior courts have, in the past, found that s29(5) TMA did not preclude HMRC from raising a further assessment because a taxpayer/agent had not clearly alerted HMRC to the insufficiency of the assessment. In the circumstances, the officer could not 'reasonably be expected' to infer that the assessment was correct based on the information given: *Langham v Veltema* [2004] STC 544, which considered the sufficiency of the information made available to a hypothetical officer for the purposes of the test in s29(5) TMA.

85. The purpose of s29(5) is to strike a balance between the protection of the revenue on the one hand and the taxpayer on the other. Section 29(5) therefore focuses primarily on the adequacy of the disclosure by the taxpayer. What constitutes adequate disclosure for the purposes of s29(5) will vary from case to case. It depends on the nature and tax implications

of the arrangements concerned and not on the assumed knowledge (or lack of knowledge) of the hypothetical officer. The obligation is on the taxpayer to make the appropriate level of disclosure as befits a self-assessment system. The disclosure must be from the sources referred to in s29(6) (as amplified by s29(7)). HMRC are protected because they can raise a discovery assessment if adequate disclosure has not been made.

86. The greater the level of disclosure, the greater the officer's awareness can reasonably be expected to be. The expertise of the hypothetical officer remains that of general competence, knowledge or skill, which includes reasonable knowledge and understanding of the law.

87. In *Charlton*, the Upper Tribunal held that all that was necessary was for the officer to be able to infer from the return and accompanying documents that the information existed and that it was relevant to the determination of the insufficiency in the return ([76]). The Upper Tribunal emphasised that there were limits on the application of s29(6)(d)(i). The Upper Tribunal also said this, at [78] and [79]:

> "78 The correct construction of s 29(6)(d)(i) is that it is not necessary that the hypothetical officer should be able to infer the information; an inference of the existence and relevance of the information is all that is necessary. However, the apparent breadth of the provision is cut down by the need, firstly, for any inference to be reasonably drawn; secondly that the inference of relevance has to be related to the insufficiency of tax, and cannot be a general inference of something that might, or might not, shed light upon the taxpayer's affairs; and thirdly, the inference can be drawn only from the return etc. provided by the taxpayer.
>
> 79 As we have described, the balance provided by s 29 depends on protection being provided only to those taxpayers who make honest, complete and timely disclosure. That balance would be upset by construing s 29(6)(d)(i) too widely. Inference is not a substitute for disclosure, and courts and tribunals will have regard to that fundamental purpose of s 29 when applying the test of reasonableness."

88. The information that is treated as available to the officer is therefore the information that is contained in the return or accompanying documents provided by the taxpayer. This is extended, by s29(6)(d), to information, the existence of which and the relevance of which, as regards the insufficiency of tax could reasonably be expected to be inferred by the officer from the return and any accompanying documents.

89. The other principal authorities on s29(5) and (6) are *Hankinson v Revenue and Customs Commissioners* [2012] 1 WLR 2322; *Revenue and Customs Commissioners v Lansdowne Partners Ltd Partnership* [2012] STC 455*; Sanderson* (at [17] (2), (3) and [23]) and, most recently, *Beagles*. In *Beagles*, the Upper Tribunal endorsed the view expressed in *Charlton*.

90. Having considered all of the evidence, cumulatively, we find that between the opening of the enquiry and the issuing of the amendment and the assessments, Officer Barrett tried to obtain records to ascertain the income earned by the Appellant. No further information or documents were forthcoming from the Appellant, apart from the bank statements for 2014-15 and the dairy for 2006. The bank statements triggered a revision of the figures for 2014-15. We find that Officer Barrett was effectively left in the position of having to proceed on the information that he had and we are satisfied that prior to the enquiry, Officer Barrett could not reasonably have been expected to have been aware of the insufficiency from the information in the returns.

91. We have considered the words of Buckley LJ, in *Woodrow v Whalley* 42 TC 249, at p257:

> "…it seems to me that the very fact that the taxpayer himself admitted that his earlier returns were erroneous is a ground for saying that when that admission was made the Inspector discovered that to be the case. There is nothing to show in any way that he had grounds for knowing that that was the case until his suspicions were aroused."

92. And, at page 258:

> "…it seems to me that, whatever view I might have taken in the circumstances, the view which the Commissioners did take was one which was open for them to take. Consequently, I do not think that their decision can be disturbed as regards those unidentified credits and that part of the assessment which results from them."

93. We therefore find that section 29 (5) is also met in this appeal. This is because at the time an officer of the board ceased to be entitled to give notice of an intention to enquire into the Appellant's tax returns in respect of the relevant years of assessments, the officer could not have been expected, on the basis of the information made available to him at the time, to be aware of the loss of tax. We have focused on the information that was made available to the hypothetical officer.

Time-limits

94. There have been a series of Upper Tribunal cases in which it has been concluded that a discovery assessment may be invalid where the discovery has lost its newness, or become stale: *Charlton v Revenue and Customs Commissioners* [2013] STC 866, *Patullo v Revenue and Customs Commissioners* [2016] STC 2043 and *Tooth*. A discovery could become "stale" before the expiry of the statutory time-limit for a discovery assessment in s34 TMA 1970, applying *Patullo*. In *Tooth,* the Supreme Court held that the statutory time-limits depend on different levels of culpability, on a reading of the ordinary use of the language, the leading authorities and the statutory scheme.

95. Section 34 TMA provides that an assessment to income tax or capital gains tax may be made at any time not more than four years after the end of the assessment. Section 36 extends the time limit to 6 years, for careless behaviour. We have found that the Appellant's behaviour was careless. We therefore find that the discovery assessments issued for the period 2010-11 to 2013-14 are valid. The assessments for the period 2008-09 to 2009-10 are, as a result of our findings, out of time.

Presumption of Continuity

96. HMRC have assessed the earlier years by applying the presumption of continuity. In *Jonas v Bamford* 51 TC 1, Walton J said this, at p26:

> "……But so far as the discovery point is concerned, once the Inspector comes to the conclusion that, on the facts which he has discovered, Mr Jonas has additional income beyond that which he has so far declared to the Inspector, then the usual presumption of continuity will apply.

97. In *Syed v HMRC* [2011] UKFTT 315 (TC), Judge Helier said, at [38]:

> "38…It seems to us that Walton J is instead expressing a commonsense view of what the evidence will show. In practice it will generally be reasonable and sensible to conclude that if there was a pattern of behaviour this year then the same behaviour will have been followed last year. Sometimes however that will not be a proper inference: there will be occasions when the behaviour related to a one off situation, perhaps a particular disposal, or particular expenses; in those circumstances continuity is unlikely to be present. In the circumstances of *Jonas v Bamford* there had been undeclared income in a particular year. It was not unreasonable to conclude that the same habit of concealing income had been followed in previous years."

98. Lastly, in *Choudhry v HMRC* [2019] UKFTT 0038 (TC), the tribunal considered *Jonas,* as follows:

> "224. *Jonas* was, as we have said, the first tax case to refer to the presumption. It is notable that Walton J in his dictum refers to the "usual" presumption of continuity.

99. The tribunal in *Choudhry* also referred to Phipson on Evidence. At [227], the tribunal summarised the principles and the court's task to determine whether there was evidence on which the Commissioners could properly have reached the decision they did to infer from the evidence (or lack of it) that the conduct continued after, or had occurred before, the years for which there was an accepted discovery of a tax loss. The tribunal concluded that it is ultimately a question of fact.

100. We find that the Appellant has not suggested that there has been any change in the operation of his business practices. The Appellant did not suggest that the year of enquiry was the only year during which he relied on the information included in his computer. Indeed, by his own evidence, once he put information into his computer, he did not retain any other records. We find that the Appellant has not provided bank statements for the period covered by the assessments. This strongly suggests that it is not his practice to cross-refer to his bank statements to ensure that any information from his computer is accurate. The 2014-15 revised turnover was used to revise the turnover for earlier years, using the RPI. We are satisfied that the presumption of continuity has correctly been applied in this appeal. We find that the 2006 diary is of little or no probative value to the Appellant's case.

101. It is submitted by the Appellant that the assessments were excessive and did not accord with the information provided to HMRC. In *Hull City (Tigers) Ltd v HMRC* [2017] UKFTT 0629 (TC), the tribunal explained the burden of proof in an assessment following an enquiry, as follows, at [57] – [58]:

> "57. In the case of an appeal within Part 5 TMA against an assessment (and therefore a regulation 80 determination), section 50(6) provides that the tribunal may reduce the assessment if it concludes that the appellant has been overcharged, "*but otherwise the assessment shall stand good*". Section 50(7) allows the tribunal to increase the assessment if it concludes that the appellant has been undercharged to tax. In relation to a section 8 decision, regulation 10 of the 1999 Regulations allows the tribunal to vary the decision if it concludes that it should, "*but otherwise [the decision] shall stand good*".
>
> *The significance of an assessment "standing good"*
>
> 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 taxpayer's 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.

102. In the Court of Appeal decision in *T Haythornwaite & Sons v Kelly (HMIT)* (1927) 11 TC 657, Lord Hanworth MR said this, at 667:

> 'Now it is to be remembered that under the law as it stands the duty of the Commissioners [and from 1 April 2009 the Tribunal] who hear the appeal is this: Parties are entitled to produce any lawful evidence, and if on appeal it appears to a majority of the Commissioners by examination of the Appellant on oath or affirmation, or by other lawful evidence, that the Appellant is over-charged by any assessment, the Commissioners shall abate or reduce the assessment accordingly; but otherwise every assessment or surcharge shall stand good. Hence it is quite plain that the Commissioners are to hold the assessment as standing goods unless the subject – the Appellant – establishes before the Commissioners, by evidence satisfactory to them, that the assessment ought to be reduced or set aside.'

103. Similarly, in *Moschi v Kelly (HMIT)* (1952) TC 442, in which the Court of Appeal upheld the decision of the General Commissioners that the unexplained source of a taxpayer's wealth was business profits which he had not declared, Somervell LJ said:

> '… of course, the onus was on the taxpayer to satisfy the Commissioners that the assessments were excessive.'
>
> …
>
> 'It seems to me, looking at the matter broadly, as it was before the Commissioners, they were fully entitled to say that the taxpayer had not discharged the onus which lay upon him of establishing his contention that his money came from assets brought in from 1933.'

104. The Appellant provided bank statements for 2014-15. The explanation given by the Appellant for some of the deposits going into his bank account is that these constituted bookmaker income and payments from family. The Appellant is of the view that the income is therefore being wrongly counted by HMRC. We find that the Appellant was provided with numerous opportunities to provide further evidence, such as bank statements or credit card statements, to corroborate his claimed turnover and expenditure for the period covered by the assessments. It is the taxpayer who knows and the taxpayer who is in a position to provide the right answer. We are satisfied that it would have been a relatively simple and straightforward matter for the Appellant to request bank statements and credit card statements to substantiate his case.

Schedule 24 penalty

105. A penalty is payable by a person who gives HMRC a return that contains an inaccuracy, which amounts to, or leads to, an understatement of liability to tax. The penalty regime in Schedule 24 was introduced by the Finance Act 2007 to provide a more uniform penalty system across a range of taxes. The categories of penalty used in Schedule 24 are "careless" and "deliberate". HMRC have imposed a penalty for deliberate inaccuracy. HMRC concluded that the Appellant's disclosure of the inaccuracy in his 2014-15 tax return was 'prompted'. This is because the information from the Appellant was provided after the enquiry into his tax return had opened. Pursuant to para 10 of Schedule 24, the minimum percentage disclosure for prompted to disclosure is 35%. Various reductions were allowed for 'telling', 'helping' and 'giving'.

106. The Appellant was given a reduction of 10% for 'telling', as the Appellant accepted that the turnover figure for 2014-15 was incorrect. The Appellant was however found to have failed to provide sufficient information for the expenses incurred in earlier years. A further reduction of 20% was given for 'helping'. This was because the Appellant had initially co-operated with the enquiry. The conclusion reached however was that no real assistance was given by the Appellant once concerns were raised by HMRC. The final reduction given was 10% for 'giving' as the Appellant had provided bank statements for 2014-15. No other records had however been provided. The penalty was calculated at 56% of the £124,479.94 of the Potential Lost Revenue ('PLR'), as revised. The PLR in respect of an inaccuracy in a document is the additional amount due, or payable, in respect of tax. The penalty charged was therefore £69,708.76 (as revised).

107. We have however found that there was a careless inaccuracy on the Appellant's part. The maximum penalty for careless action is 30% of the PLR. We therefore set aside the deliberate penalty.

108. We have found that there was a discovery in this appeal. We uphold the assessments in respect of the period 2010-11 to 2013-14, on the basis of the Appellant's careless behaviour. If the Appellant's behaviour was careless, then this has the effect of reducing the penalty.

CONCLUSION

109. We are satisfied that s29(1)(b) is met in this appeal. We are further satisfied that the condition imposed by s29(3) is met by way of either s29(4), or s29(5). In relation to s29(4), we hold that the loss of tax was brought about carelessly by the Appellant. We find that the presumption of continuity applies. We therefore hold that the discovery assessments for 2010-11 to 2013-14 (inclusive) (in the revised amount of £94,108.85) and the closure notice for 2014-15 (in the amount of £22,758.39) were correctly issued. We leave it to HMRC to consider the revised amount of the penalty, in light of our findings as to the Appellant's careless, as opposed to deliberate, behaviour.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

110. 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.

NATSAI MANYARARA
TRIBUNAL JUDGE

RELEASE DATE: 03 JUNE 2021