



TC01363

Appeal number: TC/2010/6842

***INCOME AND CAPITAL GAINS TAX –under-declarations by taxpayer –
assessments upheld in principle***

FIRST-TIER TRIBUNAL

TAX

SABIR HUSSAIN

Appellant

- and -

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

Respondents

**TRIBUNAL: Mrs B Mosedale (TRIBUNAL JUDGE)
Mr M Buffery FCA, AIT (TRIBUNAL MEMBER)**

Sitting in public in Reading on 13 May 2011

Mr M Arthur of Martyn F Arthur Forensic Accountant Ltd for the Appellant;

Mrs N Parslow, Officer of HMRC, for the Respondents

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DECISION

1. Mr Hussain appeals against assessments/amendments dated 10 September 2008 as follows:

- a notice of assessment for tax year to 5.4.2001 in figure of £13,006.40 based on estimated profits from land of £50,000;
- a notice of assessment for tax year to 5.4.2002 in figure of £14,814.40 based on estimated profits from land of £50,000
- a notice of assessment for tax year to 5.4.2003 in figure of £15,992.48 based on estimated profits from land of £50,000
- amendment to self-assessment for tax year to 5.4.2004 in a closure notice in the figure of £36,921.80;
- a notice of assessment for tax year to 5.4.2005 in the figure of £38,966.98 based on estimated additional profits from land of £50,000 and capital gains of £20,000;
- a notice of assessment for tax year to 5.4.2006 in the figure of £39,392.68 based on estimated additional profits from land of £50,000 and capital gains of £20,000.

2. These assessments were based on estimated figures and HMRC, in the light of information it has subsequently received, accepts that the actual figures which it contends are payable are lower than those assessed (except in the case of capital gains). The figures that it now contends (subject to adjustments to the capital gains computations for personal allowances) should be upheld in this Tribunal are:

- year to 5.4.2001: £5,864 additional profits;
- year to 5.4.2002: £21,329 additional profits;
- year to 5.4.2003: £19,136 additional profits;
- year to 5.4.2004: £22,658 additional profits ;
- year to 5.4.2005: £30,007 additional profits ; and a capital gain of £14,295
- year to 5.4.2006: £29,652 additional profits and a capital gain of £158,419.

Were assessments properly made?

3. The first question for the tribunal is whether these assessments were properly made. We find that the enquiry into Mr Hussain's tax return for year to 5.4.2004 was opened on 13

October 2005 within the enquiry window (s9A Taxes Management Act 1970) and the amendment made by the closure notice to that enquiry.

4. Mr Hussain made self-assessment tax returns for the tax years ending in 2001, 2002, 2003, 2005 and 2006. In such a case s29 of the same Act provides that an officer of HMRC can only make an assessment where certain time limits are met (s29(5)) *or* if the under-declaration was “attributable to fraudulent or negligent conduct on the part of the taxpayer or a person acting on his behalf” (s 29(4)).

5. HMRC relied on S29(4). Although they suggested the “discovery” was made when the closure notice was issued in respect of the year ending in 2004 this is clearly not the case: the discovery assessments were based on information received from Slough Borough Council and we were not informed when HMRC received this. So if HMRC fail to make out their case on S29(4) that the omission was negligent, it follows that the assessments (but not the amendment) would fall.

6. Further, s34 of the same Act gives the ordinary time limit for raising assessments as five years after the 31st of the January next following the year of assessment to which it relates. If this time limit applied then the assessments for the tax years to 5.4.2002 and 5.4.2003 would also fail as they were made on 10 September 2008. However, s36 of the same Act provides for a twenty year time limit for assessments where they are “for the purpose of making good to the Crown a loss of income tax or capital gains tax attributable to [the taxpayer’s] fraudulent or negligent conduct...” So again the question of whether these assessments are valid turns on whether Mr Hussain acted negligently (it was not alleged he acted fraudulently so we do not consider it).

7. It is sensible to address whether Mr Hussain acted negligently when considering the evidence overall.

Reliability of evidence

8. Much of the evidence in this case was given by Mr Hussain. He gave extensive oral evidence and provided much of the documentation. We had to decide on the reliability of the explanations he gave for what had happened.

9. We considered his demeanour and whether his evidence was internally consistent and we have concluded that we cannot treat his evidence as reliable. The main reasons for this are:

- Rental income (in the form of housing benefit from Slough Borough Council) from various properties in his name was paid to his minor daughter Miss Ruby Hussain. When asked at the hearing why this had happened his answer was vague and non-committal yet it was clear to us that he must have been instrumental in organising this;
- Although vague in reply to some questions such as why rent on his properties was paid to his minor daughter, when asked about the accuracy of his estimate of the capital expenditure on some of the properties he was adamant it was “100%” right and we find the inconsistency his evidence causes us to doubt its reliability;

- Mr Hussain gave clear evidence at the hearing that his tenant Mr Illyas had left the property in 2004 and was unable to explain to our satisfaction why a letter, dated 26.1.2006 written by Mr Illyas and which Mr Hussain's agent had submitted to HMRC in 2006 to verify an expense (a new carpet), stated that Mr Illyas and his family were still in occupation of the property in 2006;
- It was clear from the above and also from the Slough Borough Council records that Mr Hussain was still being paid housing benefit on behalf of a tenant in respect of 51A Goodman Park in January 2006 which is consistent with the letter from Mr Illyas but inconsistent with Mr Hussain's oral evidence that the transfer of the property to his niece in 2004 was so that his niece could live in the home with his mother;
- On 8 June 2006 he signed and submitted a handwritten tax return for the year to 5.4.2004 and in answer to Q5 which said "Did you receive any rent or other income from land and property in the UK?" he wrote "no". He did this while (as can be seen from the evidence below) he had substantial property income. It was explained that he thought the property income did not need to be declared because his lettings were loss making but we do not find that they were loss making and in any event the question clearly asked if he received income *not* if he received profits;
- We accept Mrs Mealyer's evidence that none of Mr Hussain's earlier tax returns back to year ending 5.4.2001 showed any rental income as this was not challenged by the Appellant: at the same time we found (as explained below) that he had rental income in all this years.

We concluded that Mr Hussain was not a reliable witness.

10. Evidence was also given by Mrs Mealyer, an officer of HMRC and the case worker in charge of the enquiry into Mr Hussain's tax affairs. As Mrs Mealyer only came to be involved in the matter after the years enquired into had ended, the relevance of her evidence was necessarily limited as she could do little more than explain how she conducted her enquiry and give evidence about the letters and documents she received from the taxpayer and his representatives during the course of the enquiry. We found her to be a reliable witness: her evidence was consistent with the documents in front of the Tribunal.

11. We note that after the hearing Mr Martyn Arthur wrote several letters to the Tribunal alleging that at the hearing Mrs Mealyer had wrongly denied the existence of documents sent to her by Mr Hussain's representative. Mr Arthur cross-examined Mrs Mealyer at the hearing and this would have been his opportunity to put to Mrs Mealyer that what she said at the hearing was not truthful, but he did not do so. Such an allegation if it is to be made should be put to the witness at the hearing as it is only natural justice that the person who is alleged to have made a false statement is given the opportunity to respond to the allegation.

12. As the allegation was not made in cross examination nor indeed even at the hearing, it would be entirely appropriate for the Tribunal to ignore it as it forms no part of the appeal. Nevertheless, we note that, contrary to the allegation that Mrs Mealyer denied the existence of the letters (referred to in paragraph 43 below), it was Mrs Parslow and Mrs Mealyer who brought to the Tribunal's attention at the hearing the paragraph in Mrs Mealyer's witness

statement which referred to the letters. Further, Mr Arthur accepted at the hearing that Mrs Mealyer's summary of the letters in her witness statement was accurate. The allegation is therefore not only made unfairly late but is unfounded.

13. The documentary evidence from Slough Borough Council was hearsay in that there was no one present from the Council to give evidence that housing benefit was paid to Mr Hussain and Miss Hussain. At the hearing and in his "Statement of Case" Mr Arthur challenged the evidence on the basis that Miss Ruby Hussain could not in law be the owner of property [nor let property] until she was 18 years of age. He pointed out that HMRC stated this to be the law in their Statement of Case. His point was that since Miss Ruby Hussain could not lawfully receive rent, Slough Borough Council must be in error in stating that it was paid to her. He said the estimated income assessable on Mr Hussain should be reduced to reflect that nothing was paid by Slough Borough Council to Miss Hussain.

14. However, while the Tribunal agrees that as a matter of common law a minor cannot own property, we had no evidence to suggest that Slough Borough Council would have checked or been aware of her age. We note that Mr Hussain did not dispute that he owned the properties, nor that they had been tenanted, nor that he had been paid housing benefit nor did he dispute the amount of housing benefit paid by the Council (save in respect of Miss Hussain). And in respect of the challenge to the receipt of housing benefit by Miss Hussain we find this was based entirely on his view (which we consider misplaced) that Slough Borough Council would not have paid her housing benefit as she was underage.

15. In conclusion, we decided to accept the evidence of housing benefit paid by Slough Borough Council as accurate.

16. Mr Hussain is assessed to income and capital gains tax. To consider the extent to which the assessments should be upheld or varied and whether Mr Hussain's conduct was negligent we set out our findings of fact on the evidence we heard in respect of the four properties concerned.

17. Although not a witness, Miss Ruby Hussain features in our decision. We find as neither party disputed this that Ruby Hussain was the Appellant's daughter and her eighteenth birthday was on 9 December 2005. Mr Hussain accepted that he was her legal guardian until that date.

5 Hillside

18. The questions for the Tribunal are whether Mr Hussain received rental income on this property and whether he is liable to capital gains tax when it was sold. To answer these questions the first thing we have to do is consider whether Mr Hussain was the beneficial owner of 5 Hillside.

19. This property was bought on 19 May 1998. Mr Hussain's evidence at the hearing was that he had part-funded the purchase. He said he paid £10,000 up front and the rest of the price was left outstanding on loan. At the hearing he said that he paid £58,000 in total for the house but in earlier meetings he claimed he had paid £50,000. At the hearing he said that the rest of the purchase price had been paid by his parents in a barter transaction: they had

transferred some land of theirs in Pakistan to the owner of 5 Hillside. Mr Hussain said he did not know how much it was worth.

20. The property was registered in the sole name of Mrs Rehmet Jan (the Appellant's mother): his father having since died.

21. Slough Borough Council paid approximately £460 in housing benefit as rent to Ruby Hussain (aged 12/13) in the year ending 5.4.2001 and approximately £1,800 to her in rent for the year ending 5.4.2004 (when aged 16/17). They also paid housing benefit to her in April-November 2004.

22. On 19 October 2004 Mrs Jan transferred 5 Hillside to the Appellant without consideration. Mr Hussain then took out a mortgage of £135,000 the proceeds from which he used to redeem his outstanding mortgages on 51A Goodman Park and 4 Hillside (see findings in relation to these properties below).

23. Housing benefit was paid to Mr Hussain in early 2005 and in the tax year 2005/6. The year with the most housing benefit was 2005/6 when some £13,781 was paid and Slough Borough Council recorded it as being a house in multiple occupation with a number of different tenants.

24. Mr Hussain then sold the property for £177,500 on 1 March 2006. Out of the proceeds he redeemed the £135,000 mortgage and kept the rest of the proceeds of sale himself.

25. It was the Appellant's case that he was not the beneficial owner of 5 Hillside even after it had been transferred to him by his mother. It was his case that he helped finance the purchase gratuitously as his parents needed help. He said his mother lived in the property on her visits to the UK from Pakistan and that it was not rented out until after it was transferred into his name. He also said that it was only transferred to him so that he could raise a mortgage to redeem the mortgage on 51A Goodman as his mother wished to live in 51A Goodman mortgage-free (having decided not to live at 5 Hillside anymore). He said that although 5 Hillside really belonged to his mother, she had allowed him to keep the balance of the sale monies once the mortgage had been redeemed in 2006 as a gift to reflect his financial assistance with the purchase of the house back in 1998.

26. We do not accept Mr Hussain's evidence on this. He funded the purchase of 5 Hillside and ordinarily this would give him a beneficial interest in the property. That in fact it did so we find is shown by (a) his mother ultimately transferred the property to him without charge; (b) housing benefit was paid to his daughter both before and after the transfer to him and (see our other findings) we find that Miss R Hussain received rental income on other properties belonging to her father and to which he was entitled; (c) he received rents after the transfer into his name and we have no evidence he paid them to his mother; and (d) he kept all the proceeds from the mortgage and sale of the property. In particular, as we find him to be the beneficial owner of 51A Goodman Park (see below), in using the mortgage on 5 Hillside to redeem the mortgages on this property and 4 Hillside he was discharging his own debts. He admits he kept the balance of the proceeds of sale. We also bear in mind that it was Mr Hussain's evidence that he lived at 5 Hillside with a lady-friend and he did not charge her rent.

27. We considered an alternative scenario that Mr Hussain only became beneficially entitled when his mother transferred the legal title into his name in 2004. However, we reject that as the explanation for the reasons given above: Mr Hussain funded the purchase of the property in 1998 and his daughter received rental income in respect of it before the transfer to Mr Hussain. We also bear in mind that we have found Mr Hussain held other properties in the names of nominees (see our findings below).

28. At the hearing Mrs Parslow for HMRC indicated that HMRC would accept that up to the date of transfer to Mr Hussain in 2004 they would accept he was only a part-owner and would amend the capital gains tax computation to reflect this. That is a matter for HMRC. This Tribunal records that its finding of fact, in the absence of any reliable evidence that Mrs Jan contributed to the purchase of 5 Hillside and in the absence of any evidence at all of the value of Mrs Jan's contribution, that Mr Hussain was the sole beneficial owner of 5 Hillside from its purchase in 1998 to its sale in 2006.

29. liability to income tax: We find that as Mr Hussain was the beneficial owner of 5 Hillside from 1998 to 1 March 2006 (when it was sold) he was entitled to the rents paid in respect of it whether paid to him in his own name or to his minor daughter as his nominee.

30. It was Mr Hussain's case that the property was not let until it was in his own name but as mentioned above the evidence from Slough Borough Council was that Miss Ruby Hussain received housing benefit for this property for tax years 00/01, 03/04 and 04/05. The voters roll shows a Glendah Mafumhe registered as voter at this property from 2003 to the date of the print out on 14.4.5. We find that the property was let from 1998 and before it was transferred into Mr Hussain's name and that Mr Hussain failed to declare the rental income from it.

31. Although we accept that the whole of the house was not rented out because we accept his evidence that his mother, his lady-friend and himself had some occupation of it, we are not satisfied that the extent to which it was rented out changed in 2004 and therefore we find the level of rent in 2005/6 is on the balance of probability likely to be representative of the rent received at any time during the periods under assessment (as long as scaled back to allow for depreciation in the value of money).

32. He failed to declare any of these rents on his tax returns and we find he is liable to tax on the estimated rents from 6.4.2000 to 5.4.2006, the calculation of which we deal with below.

33. liability to capital gains tax: It follows from our findings above that he was the beneficial owner that in principle Mr Hussain is liable to capital gains tax on 5 Hillside calculated from the date of its purchase in 1998 to its sale in 2006.

34. It was the Appellant's contention that he had made £35,500 worth of capital improvements to the property and that these should be deducted against his gains. In particular he said he had built a wall between no 5 and no 3 Hillside and added a 14' extension to the kitchen. He accepted that he had not retained evidence of the expenditure that he incurred: his explanation for this was that he did not know that receipts would be required. Mr Arthur put the case that Mr Hussain volunteered to take photographs of the work carried out and to get an expert's report on what it would have cost: HMRC did not

take him up on this offer. He asks us to find on the balance of probability that Mr Hussain incurred the expenditure that he says he did.

35. For reasons we have already given we did not find Mr Hussain to be a satisfactory witness and we do not accept on the balance of probability that he incurred the expenditure in the claimed sums. Although it is quite possible Mr Hussain did carry out some improvements at the property, it is for him to satisfy this Tribunal of the actual cost of those works and he has not done so. Indeed Mr Arthur's "Statement of case" refers to the £35,500 being a *valuation* of the improvements: the valuation is irrelevant, it is the actual cost of the works which would be deductible. It is for Mr Hussain to satisfy this Tribunal he is entitled to the deduction: not for HMRC to satisfy us that he is not entitled to the deduction and therefore that he offered to photograph the works and/or have them valued is irrelevant as he did not actually produce these to the Tribunal nor, even had he done so, would it have given us any real idea of who carried out the work and when and what had actually been spent. We allow no deduction for improvement works to this property on the basis we are not satisfied as to Mr Hussain's actual expenditure.

36. We find that he incurred legal fees on the sale of this property in 2006 as he provided a completion certificate from a firm of solicitors. From this the fees due appeared to be £450 plus VAT and we determine that Mr Hussain is entitled to a deduction of £528.75.

37. Mr Hussain claimed he was entitled to principle private residence relief in respect of 5 Hillside.

38. The Taxation of Chargeable Gains Act 1992 provides at s 223(1) that an individual can claim relief over the entire gain on a dwelling house that has been that individual's only or main residence throughout the period of ownership. There are also provisions for partial relief where the property has been the only or main residence for only part of the period of ownership but this do not concern us on the facts of this case.

39. The issue is whether 5 Hillside was Mr Hussain's only or main residence. The Act gives no definition of "only or main residence" but provides at s 222(5):

"So far as it is necessary for the purpose of this section to determine which of 2 or more residences is an individual's main residence for any period –

(a) the individual may conclude that question by notice to an officer of the board given within 2 years from the beginning of that period but subject to a right to vary that notice by a further notice to an officer of the Board as respects any period beginning not earlier than 2 years before the giving of the further notice

(6) In the case of an individual living with his spouse or civil partner –

(a) there can only be one residence or main residence for both, so long as living together and, where a notice under subsection (5)(a) above affects both the individual and his spouse or civil partner, it must be given by both."

40. It was not Mr Hussain's case that he had ever notified HMRC that 5 Hillside was his only or main residence (indeed he made no tax return of its sale). It was, as we understand, his case that 48 Sussex Place had ceased to be his residence in 1998 and did not resume being

his residence until 2006 and that 5 Hillside was his only residence during that time. In particular it was his case that 1998-2006 he was not living with his wife and that 48 Sussex Place was her home and 5 Hillside was his home where he lived with his mother and lady-friend.

41. It was his evidence that 5 Hillside was bought to be his mother's home when she visited in the UK (she was a widow who also lived in Pakistan). Mr Hussain's case was that someone had to live with her to look after her when she visited as she was elderly and unable to cook on an oven. It was also his case that he had long-standing matrimonial differences with his wife that had culminated in his living at 5 Hillside not only with his mother but also his lady friend. He says that when he sold 5 Hillside, his family persuaded him to return to his wife.

42. We had witness statements from a number of persons whom Mr Hussain informed us were neighbours at 5 Hillside or in one case a gardener and in another case the purchaser. The statements all said that Mr Hussain occupied 5 Hillside. HMRC did not object to the witness statements although the witnesses were not called by the Appellant. As the Tribunal did not have the benefit of the evidence of these witnesses it does not place much weight on their statements. We accept that Mr Hussain would have been known to these people as his mother stayed in the house but in the absence of the witnesses we do not really place any reliance on their statements that Mr Hussain occupied or lived at 5 Hillside and note that in any event none address the issue of whether he also had a residence at 48 Sussex Place nor whether he was separated from his wife.

43. It was Mr Hussain's case that his bills were sent to him at 5 Hillside. In a letter to HMRC undated (but a reply to HMRC's letter of 15.10.09) he stated that his representative had sent to HMRC Thames water bills, building insurance bills, council tax bills and gas and electric bills up to 2000. Most but not all of this evidence was produced to the Tribunal although we find that HMRC had seen it as it was referred to in paragraph 57 of Mrs Mealyer's witness statement. As the Appellant wished to rely on this evidence at the hearing Mr Arthur should have put them on the Appellant's list of documents but did not.

44. Nevertheless, even without sight of the documents, we find they existed as they are referred to in Mrs Mealyer's evidence. Secondly, at the hearing Mr Arthur on behalf of the Appellant indicated that the Appellant accepted what Mrs Mealyer recorded about the documents in her witness statement was accurate, so we accept these documents said what Mrs Mealyer recorded they said. The relevant documents were:

- (not in bundle) two British Gas Bills addressed to Mr Hussain at 5 Hillside (date unspecified but we infer must have been between 1998 and 2006 as those are the dates he had an interest in the property).
- (not in bundle) a Thames Water bill dated 26.6.2009 and related to gas used at 5 Hillside in 2004-06. It was sent to 48 Sussex Place but this tells us nothing as all parties agree that Mr Hussain was living at that address in 2009. Mr Hussain's evidence was that this bill was only a duplicate (which we accept) and that the original would have been sent to him at 5 Hillside. Without any documentary evidence of this, however, we do not accept this evidence as we have already found Mr Hussain to be an unreliable witness.

- (in bundle) a letter from Zurich Personal Insurance dated 18 December 2005 addressed to Mr Sabir Hussain at 5 Hillside notifying him that his home solutions insurance policy had lapsed;
- (in bundle) a Halifax mortgage statement dated 31-1-05 was sent to Mr Hussain at 5 Hillside;
- (in bundle) a statement of account in respect of council tax for the years 2004-2006 from Slough Borough Council to Mr S Hussain at 48 Sussex Place dated 17 July 2009 which does not state to which property it relates. It was recorded in Mrs Mealyer's statement that it related to 5 Hillside and records payments of substantial council tax in 2004 and 2005 and refers to "your Council Tax account" in a letter addressed to Mr Hussain.

Other relevant evidence was:

- Mr Hussain reported himself as married (and not separated) in his tax returns for tax years ending in 2002 – 2006;
- His 2004 tax return (signed 8.6.4) requests any repayment to be made to his wife;
- His tax returns were sent to this 48 Sussex Place and he did not notify HMRC of a change of address;
- Mr & Mrs Hussain made a joint tax credit application for tax years ending 5.4.2004 and 23.4.2003;
- That when 5 Hillside was sold, he accepts that after that date he was resident at 48 Sussex Place with his wife;
- The address on Mr Hussain's P60 for year ended 5.4.2004 is 48 Sussex Place (showing this was the address he gave to his employers);
- His Nationwide building society statements provided to HMRC for 21.4.2003 to 21.4.2004 show 48 Sussex Place as his address;
- Mr Hussain was not on voters roll at 5 Hillside; but was on voters roll at 48 Sussex Place from 1995 to (at least) date of print (5.11.4);
- His purchase on 19.5.5 of the plot of land at George Green Road records Mr Hussain's address as 48 Sussex Place.
- the land registry transfer records Mr Hussain as being of 48 Sussex Place on 19.10.04;
- The Inland Revenue form returned on the transfer of 4 Hillside dated 22.2.2001 shows no name for the transferee but gives his address as 48 Sussex Place. Mr Hussain was clearly the transferee as this was not in dispute and in any event this is shown on the land registry print out;

- the power of attorney granted to him by his cousin Mr Shah referred to below referred to Mr Hussain as of 48 Sussex Place.

45. We accept Mr Hussain's evidence that he had had long-standing matrimonial difficulties and to some extent and for undefined periods he would stay at 5 Hillside together with his mother and a lady friend.

46. Nevertheless, we note that the evidence from Slough Borough Council is that housing benefit in respect of 5 Hillside was paid to his minor daughter in 2000 – at a time when he is claiming 5 Hillside was his only residence. When asked about this at the hearing, he said he knew nothing about it but suggested there might have been a private arrangement between her grandmother and his daughter which only applied for a few weeks. Yet if 5 Hillside were truly his sole residence he would know if his grandmother had lodgers in the same house. We note that substantial sums of housing benefit was paid to Ruby in 2003 and 2004 in respect of 5 Hillside so we do not believe it was not let for a considerable period during the time Mr Hussain says it was his sole residence and during which, he says, there were no lettings.

47. The Tribunal concludes that he was an unsatisfactory witness and his evidence on what happened at 5 Hillside in particular is unreliable. Giving little weight to what he said as we have found it to be unreliable, we look at the other evidence (listed above) of where Mr Hussain lived 1998-2006. The balance of the evidence suggests to us that he was resident at 48 Sussex Place. The most significant in favour of residence at 5 Hillside is that it appears Mr Hussain had a council tax record at 5 Hillside but it is not apparent to us on what basis the tax would have been charged. We note that the council tax records for 48 Sussex Place were not produced. Overall, we conclude that Mr Hussain has not established to the satisfaction of this Tribunal either that at any time 48 Sussex Place ceased to be his only or main residence nor has he established that at any time 5 Hillside became his only or main residence.

48. Further, we are not satisfied that he was separated from his wife. His evidence was unreliable and although we accept his evidence that he had matrimonial difficulties and that he had a lady-friend it appears from the documentary evidence that he not only continued to be resident at 48 Sussex Place he also represented himself as not separated from his wife. Under s222 a husband and wife can only have only or main residence and as it is not suggested Mrs Hussain lived at 5 Hillside, that residence could only be 48 Sussex Place.

49. Further, even were we satisfied (which we are not) that Mr Hussain did not live with his wife, as has been mentioned no election was made by Mr Hussain that 5 Hillside should be treated as his main residence under s 222(5) and it is too late to make such an election now.

50. In conclusion we find that 5 Hillside was not Mr Hussain's only or main residence at any time and Mr Hussain is not entitled to principle private residence relief.

51A Goodman Park

51. Mr Hussain bought this property on 19-7-2002 for £140,000. He took out a mortgage for approximately £108,750 and the rest of the money came from his family. He redeemed this

mortgage on 27 November 2004/14 December 2004 after the transfer to him of 5 Hillside. As mentioned already, he took out a mortgage on 5 Hillside and used some of the proceeds to redeem the mortgage on this property.

52. He transferred 51A Goodman Park for no consideration to his niece (Miss Iqbal) in March 2005 when it had an estimated value of £160,000 (HMRC do not dispute the valuation).

53. Mr Hussain estimated that this property was first let in April 2003. Housing benefit in respect of this property was paid to Miss Ruby Hussain (aged 16/17) in the sum of £7,425.21 in tax year 2003/4; further housing benefit was paid to her the following year. Other sums of housing benefit were paid to IPS/Property Bank in respect of the Hussains for 2002/3 (£7,615.60) and 2003/4 (£7,234.82). Housing benefit was paid to Mr Hussain in respect of this property for the year to 5.4.2005 and for the year to 5.4.2006 (the last year being after transfer to Miss Iqbal in March 2005). The year with the maximum amount of housing benefit paid was 2003/4 when some £11,233.01 was paid in housing benefit by the Council.

54. Professional bookkeeping Services were employed by Mr Hussain to represent him when the dispute with HMRC originally arose. They wrote to HMRC on 3 May 2006 and said:

“property no 2 (51A Goodman Park Slough) was first let on December 2003 to Mr Mohammed Ilyas with monthly rent of £725.00 p/m”

Accounts produced by them on behalf of the Appellant show letting income on Goodman Park of some £8,650 to year ended 5.4.04 but state expenses led to a loss. At this point there was no mention that Mr Hussain did not consider himself to be the beneficial owner: that claim was made a few months later.

55. It was the Appellant’s case that the property and the rent did not belong to him. It was his case that the property was bought by him on behalf of his brother Altav (father of Miss Iqbal) who lived in Pakistan. He gave it to his niece on his brother’s instructions because his mother wished to live there with his niece when visiting the UK. We note his explanation was not entirely consistent in the details: at one point he wrote a letter to HMRC saying he had transferred the property to his brother’s son and in a meeting said he had transferred it to his brother. The transfer was not produced to the hearing although HMRC did not dispute that it had taken place.

56. In the hearing Mr Hussain admitted he received the rent on the property but says he kept it for the real owner. No evidence of this was produced.

57. As mentioned above the Appellant had given to HMRC a letter from Mr Mohammed Ilyas dated 26.1.2006 saying “I with my wife and children reside in 51A Goodman Park Slough from July 2003 and are tenants of Mr Sabir Hussain of 48 Sussex Place Slough.” The purpose of the production of the letter appeared to be Mr Ilyas’ statement that Mr Hussain had spent money on changing the carpets. Although we have already discounted letters written by other persons who did not appear as witnesses, we are inclined to put more weight on this because the evidence about who was Mr Ilyas’ landlord is incidental to why the letter was written and in any event we were given undisputed evidence from an Experian print-out that Mr M Ilyas was on voters register at 51A Goodman Park from 2002 to April 2005 (date

of print) which is consistent with what his letter says. At the hearing Mr Hussain said that Mr Ilyas left in 2004 but in view of the unreliability of Mr Hussain's evidence and the contradictory evidence just referred to, we do not accept this.

58. We consider the question of whether Mr Hussain was the beneficial owner of the property and find that he has not satisfied us that he was not. We take into account that the mortgage of the property was in Mr Hussain's name and that he has not satisfied us that the balance of the purchase price, which he says came from his family, was not given to him as a loan or gift. We take into account that Mr Hussain accepts he received the rent on this property and that (apart from his evidence which we have found to be unreliable) we have no evidence that he accounted for it to the person he says was the real owner.

59. We consider whether he ceased to be the beneficial owner when the transfer to Miss Iqbal took place. In view of the fact:

- that Mr Hussain submitted to the Tribunal a letter from Mr Ilyas stating Mr Hussain was his landlord still in 2006 after the date of the transfer of the property;
- and that therefore Mr Hussain's explanation that his niece and mother were to live in the property after the transfer in March 2005 is also unreliable;
- and that housing benefit was paid to Mr Hussain after the date of transfer of the property to Miss Iqbal;
- and that (see our findings elsewhere) Mr Hussain had rent paid to his daughter on other properties belonging to him to his daughter

we find Mr Hussain has not satisfied us that Miss Iqbal was anything other than his nominee and we find Mr Hussain was and is the beneficial owner of this property.

60. liability to income tax: We find that as Mr Hussain was the beneficial owner of 51A Goodman Park from 19-7-2002 until after the periods under assessment. He was entitled to the rents paid in respect of it whether paid to him in his own name or his daughter's or Miss Iqbal's as they were we find his nominees.

61. We note that the evidence on when the property was first rented out is confused: Mr Hussain estimated the date to be April 2003; his earlier representatives had said December 2003. However, we find he bought the property in July 2002 and it would not have been in Mr Hussain's interests to leave it empty. We also note that housing benefit of £7,615.60 was paid to the Hussains by Slough Borough Council in the period to 1 April 2003 which was slightly more than paid in the following 12 months. In conclusion on the balance of probability we find the property was let from 1 January 2003.

62. For the reasons given above in respect of Mr Ilyas' occupation, we do not accept that Mr Hussain ceased to rent out the property on the transfer of legal title to Miss Iqbal and consider on the balance of probability that the property remained rented out by Mr Hussain for the remainder of the periods under assessment.

63. He failed to declare any of these rents on his tax returns and we find he is liable to tax on the estimated rents in the period 1.1.2003 to 5.4.2006, the calculation of which we deal with below.

64. Liability to capital gains tax: Mr Hussain claimed deductions for costs in making capital improvements. There was retrospective planning consent for construction of a wall at 51A Goodman Park. Mr Hussain provided a receipts to HMRC of which HMRC accepted £5,705 related to capital expenditure at the property and this was not disputed at the hearing. At the hearing Mr Hussain produced a further invoice dated 24 August 2003 from Pieczak Piotr & Partners Builders for £4,320.00 relating to the installation of a kitchen, bathroom fittings and some re-wiring. His evidence was that this was a duplicate invoice produced some 6 weeks before the hearing by the building firm which had supplied the works and who were able to reconstruct the invoice from their records.

65. At the hearing HMRC indicated that they would accept this as evidence of capital expenditure and therefore by consent this expenditure falls to be deducted in the capital gains tax computation were one to be made. HMRC also accepted Mr Hussain's legal fees of £631 in respect of this property should be deducted from the capital gains computation as an allowable expense.

66. However, in light of our finding above that Mr Hussain was and remained the beneficial owner of 51A Goodman Park no liability to capital gains arises as he did not dispose of the property when he transferred the legal title to his niece.

14 Charles Gardens

67. We had no evidence of when this property was purchased. It was purchased in the name of Mr Mukhtar Hussain Shah who is the cousin of the Appellant. Mr Shah granted the Appellant a power of attorney on 17 April 2000. The Appellant transferred this property to his daughter Ruby on 20 August 2003 (when she was aged 15). The transfer document records consideration of £56,550 but (this was not in dispute) we find it was transferred for no value. There was no mortgage on this property.

68. At the hearing it was the Appellant's case that he was not the beneficial owner of this property. He said that the owner was Mr Shah who lived in the property when in the UK, but as Mr Shah's family lived in Pakistan he frequently returned there and needed Mr Sabir Hussain to manage the property for him in his absence which is why a power of attorney was granted. In a meeting with HMRC he said Mr Shah had lived in the property but gave Mr Hussain the power of attorney when he had a work accident and decided to return to live in Pakistan. The two men planned for Miss Ruby Hussain to marry Mr Shah Hussain's son. In order to acquire a visa for his son, Mr Shah Hussain instructed the Appellant to transfer the house to Ruby so that he could say on his application that he had somewhere to live in the UK. At the hearing Mr Hussain said that the marriage still had yet to take place.

69. The Tribunal had no evidence that Mr Hussain had ever accounted to Mr Shah for the rental income.

70. He said that after the transfer Ruby declared and paid tax on the rental income from the property. Mrs Mealyer's evidence was that HMRC had no record of Ruby declaring any income from this property. We accept Mrs Mealyer's evidence in view of the fact it is for Mr Hussain to make out his case and he brought no documentation to substantiate this claim and has been found to be an unreliable witness.

71. Slough Borough Council paid rent (as housing benefit) in the tax year ending 5.4 2002 and 5.4.2004 for the "Hussains" to their agent IPS/Property Bank. Further housing benefit was paid in the tax year to 5.4.2004 and the following year to Ruby Hussain (and since 2000 the Council has paid over £35,000 to Ruby in respect of this property by way of housing benefit). The year with the maximum amount of housing benefit paid was 2004/5 when some £7,479.50 was paid.

72. It was HMRC's contention that he was the beneficial owner of this property or assessable on it as Ruby's guardian.

73. We find that Mr Hussain has not satisfied us that he was not the beneficial owner of this property nor has he satisfied us that he ceased to be the beneficial owner when it was transferred to his minor daughter. We take into account that we do not know how the purchase was funded and that it was in Mr Shah's name, but we also take into account that Mr Hussain held a power of attorney and transferred the property to his minor daughter; that he received the rent and there was no evidence he paid it over to anyone else, and that he held other property (5 Hillside) in the name of a nominee. We find that his cousin Mr Shah was merely a nominee and Mr Hussain was the beneficial owner of this property.

74. Liability to income tax: although we do not know when this property was purchased it was clear that it was before April 2000 when Mr Hussain was given a power of attorney in respect of it. We find therefore that Mr Hussain's beneficial ownership of it started at or before the periods under assessment and (because we do not accept that his daughter was anything other than his nominee) continued after the periods under assessment.

75. It follows that he is liable to pay tax on the rents received in respect of this property whether paid to him or to his daughter (as we find she was his nominee).

76. He failed to declare any of these rents on his tax returns and we find he is liable to tax on the estimated rents in the period 6.4.2000 to 5.4.2006, the calculation of which we deal with below.

4 Hillside

77. This was acquired on 22 February 2001 by Mr Hussain for £58,800. It was acquired with a mortgage of £31,250. It was repaid on 30 November 2004 (from the 5 Hillside mortgage) and the property was sold on 15 June 2005 for £115,000.

78. Professional bookkeeping Services were employed by Mr Hussain to represent him when the dispute with HMRC originally arose. They wrote to HMRC on 3 May 2006 and said:

"no 4 Hillside Slough was first time let on 04/01/02 to Mr Brantas with monthly rent £410.00 and 05/01/03 rented to Mr Yasin Khan. There was no

rental agreement as council was paying £525.00 per month on Mr Khan behalf.”

Accounts produced on behalf of the Appellant show letting income on 4 Hillside of some £6,300 to year ended 5.4.04 but show expenses exceeding income. In a meeting on 18.6.09 Appellant’s agent suggested that the letting had commenced in June 2001.

79. Slough Borough Council record housing benefit payments made to the Hussains (without differentiating between Mr Hussain, Miss R Hussain and his other daughter Miss A Hussain) in years 2002/3, 2003/4. The year with the most benefit paid was 2004/5 when some £7,347.21 was paid. A separate record of payments of housing benefit shows a payment just in Miss R Hussain’s name in year to 6.1.2005.

80. liability to income tax: We find that as Mr Hussain was the beneficial owner of 4 Hillside from 22.2.2001 until 15.6.2005. We find he was entitled to the rents paid in respect of it whether paid to him in his own name or his daughters’ as, we find, they were his nominees.

81. There is no evidence housing benefit was paid in respect of this property before 6.4.2002. However, the letter from Professional Bookkeeping Services’ of 3 May 2006 stated letting commenced on 4.1.2002 and in a meeting on 18.6.2009 with HMRC the Appellant’s representative suggested letting commenced in June 2001. The evidence is thin and contradictory and, bearing in mind it would not have been in Mr Hussain’s interest for the property to have stood empty, we find we are not satisfied on the balance of probability that the letting commenced any later than 1.6.2001

82. Mr Hussain failed to declare any of these rents on his tax returns and we find he is liable to tax on the estimated rents in the period 1.6.2001 to 15.6.2005, the calculation of which we deal with below.

83. liability to capital gains tax: as the Appellant was the beneficial owner of this property he is liable to capital gains tax on its sale.

84. The Appellant claimed to have made capital improvements to this property *valued* by him in the sum of £21,530 but has no documentary evidence to prove his actual expenditure on the property. He points out that the property increased substantially in value between purchase and sale and this was, he says due to improvement works.

85. While the Tribunal accepts that he may have carried out some improvements to the property, we had no evidence whatsoever of the expenditure actually incurred by the Appellant. It is for the Appellant to satisfy us of his expenditure and, taking into account that we did not find him to be a satisfactory witness and in any event Mr Arthur’s statement of case that the £21,530 was what Mr Hussain *valued* the work as and is therefore not a statement of expenditure, Mr Hussain has failed to satisfy us of the amount of any deduction which should be allowed for capital improvements to the property.

86. The Appellant claimed to have incurred legal fees but has no documentary evidence. Although HMRC earlier disputed this claim, at the hearing they conceded that they would allow a deduction for estimated legal costs. By consent this deduction is therefore allowed

for legal fees on the purchase but as in a letter written by the Appellant on 27.10.09 he stated that he had no solicitor acting on the sale, no deduction is allowed for legal fees on the sale.

CGT loss

87. Mr Hussain had claimed a loss on some land he had purchased from a company that had later gone into liquidation. At the hearing Mr Arthur said the Appellant dropped this claim as he accepted that the subsequent liquidation of the vendor did not mean there had been a disposal of the land.

Negligence

88. As mentioned above, the discovery assessments were only validly made if HMRC satisfy us that Mr Hussain acted negligently. In this context negligence has its ordinary meaning of exercising a lesser standard of care with respect to his tax obligations than would be expected of a person in the taxpayer's position (in other words an ordinary person with no special knowledge of tax).

89. We find (referring to the evidence set out in length) that he did act negligently because:

- He completed tax returns for all the years in question but failed to declare that he received property income even though the form specifically asks if property income was received and despite receiving substantial property income for all the years in question;
- He completed tax returns for the year to 5.4.2006 but failed to declare that he made capital gains on 4 & 5 Hillside in that year;
- He received rental income via nominees in all years under assessment and did not declare it.

We therefore find the assessments were made in time: under s 29(4) the discovery made by HMRC was attributable to the taxpayer's negligence and for the same reason HMRC can rely on extended time limits. We also consider the assessments were properly raised as Mr Hussain had underdeclared income as explained above. But under s50(6) and (7) Taxes Management Act 1970 we go on to consider what should be the correct amount of the assessments.

The amount of the assessments

90. As mentioned, the assessments themselves were based on rough estimates of income with no facts and HMRC do not now consider they are in the correct amounts. Therefore, HMRC recalculated the amount they thought the assessments should be (although did not issue revised assessments). These revised calculations are on the basis that Mr Hussain's property income was not solely made up of receipts from housing benefit but included private rent payments as well. We find that was a reasonable assumption to make: it is a matter of common knowledge that housing benefit payments may only make a contribution to the full rent and in any event it is clear that Mr Hussain did have some tenants who received no housing benefit (eg Mr Brantas at 4 Hillside).

91. In reaching the revised calculations, HMRC looked at each property separately and calculated the maximum amount of housing benefit paid in any one year and assumed that the total rents (including housing benefit) in any other year would not have been lower than this, having allowed for changes in the value of money (ie scaling down the estimated rental figures for the years before and increasing them for the years afterwards). We consider this a reasonable method of estimating the income received where no other evidence is available: although it is possible that the year with the highest amount of housing benefit may in fact have had higher total rents, on the other hand this potential underestimation builds in the possibility of periods between tenants with no rent.

92. HMRC also made allowances for deductions, in particular estimated mortgage interest, repairs & maintenance (where supported by evidence), accountants' fees, rates, wear and tear. These deductions were not challenged other than the Appellant making a higher claim for repairs and maintenance, which we do not accept in the absence of written evidence. In regards mortgage interest, Mr Hussain was unable to supply a complete set of statements showing mortgage interest paid, but HMRC used the available information to estimate what the payments would have been. Mr Hussain did not challenge these calculations and we find them to be a reasonable estimate in the face of lack of evidence.

93. Mr Hussain has not submitted any accounts or other evidence of his letting income in the years 2000/1, 2001/2 2002/3. Accounts were submitted after the commencement of the enquiry by his then bookkeepers for the years 2003/4, 2004/5 and 2005/6. These show letting income of £14,950 , £14,409 and £17,140 respectively. They show liability to tax in respect of the property letting income of (£38), £3,119 and £5,892. HMRC allege (and we find) they are inaccurate as letting income is omitted and unverified and/or capital expenses are claimed.

94. It is for Mr Hussain to adduce evidence to show that the estimate is wrong. Apart from the accounts mentioned above which we find unsatisfactory, he made no attempt to estimate what his income actually was.

95. We uphold HMRC's principle of calculating the rent (on the basis of using the year of highest housing benefit scaled back (or forward) with the RPI to reflect changes in the value of money. We agree that the allowances HMRC have made on sheet M2 under "Revised" for mortgage interest, repairs & maintenance, accountants fee, rates and wear & tear should be allowed. However, HMRC's calculations should be revised to reflect the dates of when the letting commenced and ceased as we have set out above.

96. If the parties are unable to agree on the figures, they are at liberty to revert to the Tribunal.

Capital gains tax assessment

97. The capital gains assessment on Mr Hussain for both 4 & 5 Hillside is upheld in principle as set out above but should be revised to allow for legal fees and personal allowances. If the parties are unable to agree on the figures, they are at liberty to revert to the Tribunal.

Footnote

98. HMRC's case in the alternative was that Mr Hussain would have been assessable on any rents paid to Miss Hussain before 9 December 2005 even if she (rather than Mr Hussain) was beneficially entitled to them because of the provisions of s72 Taxes Management Act 1972:

“(1) The trustee, guardian, tutor, curator or committee of any incapacitated person having the direction, control or management of the property or concern of any such person, whether such person resides in the UK or not, shall be assessable and chargeable to income tax in like manner and to the like amount as that person would be assessed and charged if he were not an incapacitated person.”

99. Miss Hussain was an incapacitated person until her 18th birthday on 9 December 2005 because s118 of the same Act provides that an incapacitated person is an infant, and that an “infant” is anyone under the age of 18 years. If, of course, Mr Hussain were taxable under this section it would be at the rates and with the allowances applicable to Miss Hussain. As we have found Mr Hussain was beneficially entitled to the rents paid to Miss Hussain, this point did not arise.

100. Further, although HMRC did not raise this at the hearing, we note that in so far as it was Mr Hussain's case that he received the rents of in respect of 5 Hillside, 51A Goodman Park, and 14 Charles Garden on behalf of persons who were not resident in the UK, he would have been liable to pay tax on the rents at basic rates under the provisions of s42A Income and Corporation Taxes Act 1988 in any event. As it was, we found he received the rents on his own behalf so the point did not arise.

Appeal rights

101. 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.

Barbara Moredale

TRIBUNAL JUDGE
RELEASE DATE:

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