



TC01427

Appeal number TC/2010/04384

Income Tax – Revenue amendment of appellant’s business profits - whether understated – Yes - appeal not allowed

Discovery Assessment - whether properties purchased and sold by appellant were held on behalf of himself beneficially or himself and others – capital gains - resulting and constructive trusts – appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX**

MR TARLOCHAN SINGH

Mr. Singh

- and -

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

Respondents

**TRIBUNAL: MICHAEL S CONNELL (TRIBUNAL JUDGE)
MR D ROBERTSON (MEMBER)**

Sitting in public at Manchester on 28 March 2011

Mr. C Kelly for Mr. Singh

**Mrs. Catherine Douglas and Mr. Philip Jones, Officers of HM Revenue and Customs’
Appeals and Review Unit for the Respondents**

DECISION

Decision under appeal

- 5 1. Mr. Tarlochan Singh ('Mr. Singh') appeals firstly HMRC's decision on review dated 16 April 2010 to uphold a Closure Notice issued under section 28A(1) and (2) Taxes Management Act 1970 following HMRC's amendment to his 2004/05 self-assessment and secondly a Discovery Assessment, issued under section 29 Taxes Management Act 1970 in respect of the year 2005/06.
- 10 2. The Closure Notice and Discovery Assessment are detailed below:

Year	Assessment Type	Legislation	Original Tax Due	Revised Tax Due	Additional Tax Due
2004/05	Revenue Amendment	Closure-S28A (1)&(2)TMA 1970	£0.00	£4,883.70	£4,883.70
2005/06	Discovery Amendment	NTL-Discovery – S29 TMA 1970	£0.00	£7,371.40	£7,371.40

3. At the hearing the Tribunal was supplied with an agreed bundle of documents consisting of Mr. Singh's tax returns for 2004/05 and 2005/06, enquiry correspondence, copies of Mr. Singh's bank account statements, correspondence with solicitors dealing with the purchase and sale of properties which HMRC say gave rise to capital gains, copy mortgage applications by Mr. Singh, a witness statement by Margaret Newlands HMRC's enquiry officer, relevant legislation and case law authorities. Mr. Singh and his brothers Daldar Singh ('DS') and Goljar Singh ('GS') gave evidence. Mr. Singh's accountant, Mr. Salim, and Mr. John Seddon, mortgage broker also gave evidence for Mr. Singh. Mrs. Newlands gave evidence on behalf of HMRC in accordance with her witness statement.
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Matters at issue

4. Mr. Singh acknowledged that he had submitted an incorrect tax return for 2004/05, because of erroneous expense claims and not making provision in the accounts for goods used for own consumption that had not been recorded. However, the further issue was whether unvouched deposits to his private bank account constituted additional under-declared profits which should be added to the reported income of his business.
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5. As a separate matter Mr. Singh had also purchased and sold four properties. He acknowledged that a capital gain had been made and that he had submitted an incorrect tax return for 2005/06 by not declaring a chargeable capital gain made on the sale of the properties. However the issue was whether the properties had been
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bought and sold for himself beneficially or on trust for himself and his brothers, so that the capital gain was shared between them.

The background regarding the 2004/05 return

5 6. Mr. Singh was the sole proprietor of a business trading under the name of 'Homemaker Stores' with the business being described as 'Household Goods Retail' on his 2004/05 tax return.

7. Mr. Singh's business commenced on 21 April 1997 and ceased trading on the 28 February 2005.

10 8. Mr. Singh submitted his 2004/05 tax return on 31 January 2006, declaring for the period 1 April 2004 to 28 February 2005 sales/business income of £45,239, cost of sales £24,330 and a gross profit of £20,909. After business expenses of £16,340. Mr. Singh's declared net business profit was £4651.

15 9. An enquiry was opened into Mr. Singh's 2004/05 return under section 9A TMA 1970 on 23 May 2006. All the business books and records for the period 1 April 2004 to 28th February 2005 were requested together with a copy of the accounts, an explanation of the work undertaken and records used in their preparation.

10. From the figures below it will be seen that in the six years of trading previous to 2004/05 Mr. Singh's sales/business income never fell below £80,000. Purchases had not fallen below £43,000 and gross profits had always been in excess of £33,000.

	31.03.99	31.03.00	31.03.01	31.03.02	31.03.03	31.03.04	31.03.05
	£	£	£	£	£	£	£
Sales	83,162	84,779	94,758	83,458	85,091	80,277	45,239
Purchase (COS)	49,988	50,669	50,820	45,636	45,830	43,335	24,330
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Gross Profit	33,174	34,110	43,938	37,822	39,261	36,942	20,909
Gross Profit %	40%	40%	46%	45%	46%	46%	46%

30 Drawings were shown on the balance sheet to the accounts as totalling £6280.

35 11. Mr. Singh could not produce all of the documents and information requested from him. There were no prime records of sales because Mr. Singh had not operated a till roll. Many of the bank statements were missing and there was no documented record of stock purchases, deposits paid into his bank account, claimed motoring costs and other expenses. Mr. Singh acknowledged in evidence that he did not maintain an adequate record of income or drawings. His accountant had to uplift Mr. Singh's net profits in order to reconcile the drawings figure and balance the accounts.

40 12. An analysis of Mr. Singh's bank statements from April 2004 to April 2005 and other information available to HMRC showed that his net profit appeared to have been under-declared by £17,692. This consisted of £254 for fuel that had been

incorrectly claimed in the year 2004/05 and £260 in respect of goods taken from the business for personal consumption, but not shown in the accounts. Mr. Singh agreed these items and that he had therefore filed an incorrect return. The difference of £17,178 related to cash deposits paid into Mr. Singh's private bank account which
5 HMRC decided should be treated as additional business income. This resulted in additional tax payable of £4,883.70.

13. Mr. Singh asserts that HMRC's decision to treat the £17,178 as additional business income is wrong. He says that the deposits to his bank account were not business income. He contends his business was failing and initially said that the
10 deposits into his bank account were paid by his two brothers to help him to pay rent to his landlord and other business costs. Subsequently he said that the deposits were in fact paid into his bank account by only one of his brothers and as a loan. Mr. Singh also says that in the final year of his business, because of intense local competition, he took very little profit from the business and depended on financial assistance from his
15 parents and brothers. He said that when he ceased trading he had to use his closing stock to pay his landlord in lieu of rent.

The background regarding the 2005/06 return

14. Mr. Singh submitted his 2005/06 tax return on 29 January 2007, declaring employment income from Didsbury Homes Ltd of £4000. No other income or capital
20 gain was declared.

15. During the course of the enquiry into Mr. Singh's 2004/05 tax return an examination of Mr. Singh's private bank accounts for the period from January 2005 to early 2007 revealed other income and substantial unexplained deposits and payments. Mr. Singh said that although the private bank account was in his name, other family
25 members used the account and that it has been primarily used for them to purchase and sell four properties in the year 2005/06.

16. During the early part of the enquiry no mention was made by Mr. Singh of the properties he had purchased and sold. Mr. Singh's accountant initially said that, as far as he was aware, no profit had been made on the sale of the properties. Subsequently,
30 however, the agent prepared a capital gains computation relating to the disposal of the four properties which showed a capital gain, but divided between Mr. Singh, his brother 'DS' and their respective wives. Later Mr. Singh's accountants said that in fact the profit should be divided between Mr. Singh, both his brothers 'DS' and 'GS' and their three wives.

35 17. The documentary record relating to the title to the properties confirmed that the four properties had been purchased in Mr. Singh's name only and that the mortgages on the properties were all in his name. There was no documentary evidence of the properties having been owned by anyone other than Mr. Singh. Nor was there any evidence that the properties had been held in trust for Mr. Singh's brothers and their
40 wives.

18. In evidence, 'DS' said he was the elder brother and that it had initially been his idea to buy the four properties. He said that it had always been their intention to share the profits, if any, made on the properties' eventual disposal but that nothing specific

had been done on completion of the sale of the properties by Mr. Singh in terms of calculating and ensuring an equal distribution of profits.

19. An analysis of the background to the purchase of the four properties revealed that Mr. Singh's brother, 'DS' remortgaged his property at 465 Kings Road Stretford Manchester on 20 January 2004 in the sum of £145,000. After redemption of his existing mortgage, the amount raised was £98,796. On 23 January 2004 the sum of £52,080 was paid by 'DS' to the solicitors acting in the purchase of the properties. Shortly prior to this, Mr. Singh's brother 'GS' had paid a £250 deposit on each of the four properties purportedly on behalf of himself and Mr. Singh (although in evidence 'DS' said that he had given these monies to 'GS' to pay the deposit). The solicitors acting in connection with the purchase of the properties were instructed by Mr. Singh and 'GS' via 'DS'. 'DS' said that, although the whole idea of investing in the properties was his, he could not be directly involved in the transactions because he already had a mortgage on his own property and that it would be unlikely he would be granted mortgage facilities. The Tribunal was not provided with a copy of the contract for sale in respect of any of the properties but it appears that contracts were exchanged in the names of Mr. Singh and his brother 'GS' on 26 January 2004. A total sum of £40,370 was paid by way of deposit for the properties. The properties were in the early stages of construction and completion was not due to take place for two of the properties until November 2004 and the other two properties until May 2005. At that stage, although Mr. Singh and 'GS' had exchanged contracts, they did not have a mortgage offer.

20. Following exchange of contracts and prior to completion, Mr. Singh and his brother 'GS' appear to have decided that the properties would be purchased in the sole name of Mr. Singh. Prior to completion Mr. Singh utilized the services of a mortgage broker, Mr. John Seddon, and obtained a mortgage for each property in his own name using the Self-certification of Income Scheme available at the time. In the application forms Mr. Singh declared his income to be £18,100 per annum. He completed the purchase of two of the properties in November 2004 and the other two in May 2005. The total purchase price for the properties, ignoring costs, were £403,800, which was funded from the £1,000 reservation deposit, £52,080 contributed by 'DS', discounts given by the builders of £5,800 and total mortgage advance monies of £343,462. The balance of £1,458 (not allowing for fees and disbursements), it appears, was made up from Mr. Singh's own resources.

21. The properties were subsequently sold. Two were sold in September 2005 and two in November 2005. Mr. Singh maintained the interest-only mortgage instalments on the properties from his private account. Following redemption of the mortgages and the sale of the properties, the total net realised amount, after discharge of selling agents fees and legal costs, was £103,975, of which £60,324 represented return of capital and £43,651 represented profit, although this did not take into account interest payments which had been paid by Mr. Singh on the mortgages. Mr. Singh's accountant, Mr. Salim, produced computations in evidence to show that interest payments totaled £33,363, but the calculations of interest appear to be overstated in terms of the number of mortgage installments paid prior to sale of the properties. Nonetheless, the profit after payment of interest on the mortgages would have been reduced significantly.

22. Sometime after completion of the sale of the properties, in February 2006, Mr. Singh paid the sum of £6,000 into a joint account in the names of himself and his brother 'DS'. In September 2006, Mr. Singh paid the further sum of £40,000 to 'DS'. In November 2006 Mr. Singh also paid for a motorcar purchased in 'DS''s name for the sum of £6,900. Mr. Singh says that these payments represented repayment of the £52,080 paid in January 2004. Further payments totalling £35,000 were paid out of the balance of profits held in Mr. Singh's account over the following two years. The payments were made by way of cash withdrawals of relatively small denominations (£200-£300) and it is not known who made the withdrawals, although of course it has to be assumed that it was Mr. Singh as it was his own private bank account.

23. Mr. Singh's other brother 'GS' who had initially reserved the properties and was involved with Mr. Singh in the pre-exchange of contract correspondence with the solicitors did not appear to receive anything from the proceeds of sale of the properties, although in evidence he said that he had received his one-third share of the profits.

24. Mr. Singh's brother 'DS', shortly after paying the £52,080 to the solicitors, made further cash withdrawals totalling £45,000 from the £98,796 he had raised by way of remortgage on his own property. 'DS' says that this money was paid to his father for safe-keeping and was intended for the general benefit of his parents and brothers. 'DS' explained that, in the Sikh community, everything was shared and little emphasis was put on individual wealth or ownership. Mr. Singh asserts that this was the source of the £17,178 cash deposits paid into his private bank account in 2004/05. He says it was used to help him pay the interest payments on the mortgages. He had only been able to rent out one of the properties and that had barely covered the agent's administration costs. HMRC, he says, wrongly claim that these deposits were undisclosed business profits. However, because the deposits were in cash, the source of the deposits could not be established with any certainty.

Mr Singh's contentions

25. Mr. Singh's grounds for appeal are that the 2004/05 assessment for income tax (and class 4 NIC) and the 2005/06 Discovery Assessment are estimated and very overstated. Mr. Singh believes HMRC's decisions are wrong and that the true facts of the case have not been taken into account.

26. Mr. Singh contends that his business was making losses. He says that due to high overheads it was never commercially viable. He said that the whole area where the business was located started to decline economically at the beginning of 2004, with bigger shops like Aldi offering cheaper goods and many businesses closing. He said that he was unable to compete and that trade declined year on year until eventually he ceased trading in 2005 with trade debts of £31,000 which he was unable to pay. He also says that during the year in question, he found it difficult to run his business because he was suffering from family problems and stress. He contends that the documentary evidence in the form of his bank accounts and dealings with his brothers show that the various cash deposits paid into his account came from the £45,000 his brother had deposited with their parents. These monies were in part a loan to help him out and also to assist in repaying the mortgage installments on the properties pending their resale.

27. Mr. Singh initially contended that the properties disposed of in 2005/06 had been purchased jointly with one of his two brothers on behalf of themselves and their respective wives. Subsequently he said that the properties had been bought on behalf of all three brothers and their wives. He accepted that the properties were purchased and mortgaged in his sole name but said the properties were held on trust for the six
5 of them. In evidence to the Tribunal however, Mr. Singh conceded that his brothers' wives had no proprietary interest in the properties.

HMRC's contentions

28. HMRC contend that Mr. Singh has not produced satisfactory evidence of the source of the £17,178 deposited into his bank account in 2004/05, nor that the four
10 properties disposed of in 2005/06 were purchased jointly with family members. HMRC argue that, during the enquiry, formal action was required to obtain documents and information to progress the enquiry and the question arises as to why this was necessary. HMRC also argue that Mr. Singh's reluctance to provide
15 information was because he was aware that the unexplained deposits came from a taxable source and had been omitted from his return. The bank statements show that the entire sale proceeds from the sale of the four properties was paid into Mr. Singh's bank account and that although some capital had been returned to his brother 'DS' the monies which represented the net profits appeared to have been retained by him.
20 Whilst there had been approximately £35,000 withdrawn in cash from his bank account there was no evidence that this had been paid to any of his brothers.

29. HMRC also say that although Mr. Singh told HMRC that the unexplained cash deposits were in part loans from several family members, these "loans" were not shown in the Statement of Assets and Liabilities he provided as part of the enquiry.
25 Furthermore Mr. Singh was unable to identify the family members who had 'loaned' him the monies and the amounts in each case. It was only after a period of two years following commencement of the enquiry that Mr. Singh said the loans had been made by one of his brothers, 'DS'.

30. HMRC assert that there is no corroborative evidence to support Mr. Singh's 'story' which they say he changed as the enquiry progressed and purely for the purpose of attempting to reduce his tax liability.

Analysis of the facts

2004/05 Return – Business Profits

31. The onus of proof rests at common law and under section 50(6) TMA 1970 with
35 the person making the assertion. Mr. Singh asserts that HMRC's decisions in respect of both the 2004/05 tax return and the 2005/06 tax return are wrong. At the hearing of the appeal Mr. Singh acknowledged that the onus of proof is upon him to demonstrate that HMRC's decisions are wrong and also that the standard of proof is the ordinary civil standard of 'the balance of probabilities'.

40 32. With regard to the 2004/05 assessment, Mr. Kelly on behalf of Mr. Singh argued that HMRC have not, as might have been expected, undertaken a 'Business Economics Exercise' which he suggests would be the normal method by which HMRC would determine trading turnover and profits as a substitute for returned

accounts. He says it is significant that HMRC had considered, but not used, a Business Economics Exercise following the detailed investigation of Mr. Singh's business including mark ups on purchases and that this was because any extrapolated results of that exercise would have shown no greater profit than that declared by Mr. Singh in his returned accounts. Instead Mr. Kelly says HMRC turned to Mr. Singh's non business bank account, which he says (as confirmed in evidence by all three brothers) was used as a joint bank account to pay the mortgages on the properties purchased by Mr. Singh. Mr. Kelly says that cash deposits totalling £19,170 were paid into Mr. Singh's account by his brother 'DS' and a further £1,992 paid by way of cash deposits by the other brother 'GS'. Mr. Kelly said that HMRC had accepted that deposits had been paid by 'GS' to cover mortgage payments, but not monies paid in by 'DS' and that there was no rational reason for this. Mr. Kelly asserts that these payments were not unexplained deposits nor undeclared business profits but were in fact deposits specifically made to meet the outgoings of the mortgage which Mr. Singh had borne on behalf of his three brothers.

33. HMRC refer to the case of *Moschi –v- Kelly (33 TC 442)* where uncorroborated cash deposits were found to be undisclosed business income and submit that, in the absence of evidence to demonstrate that the cash paid into Mr. Singh's private account was given to him by his brother 'DS', it was a reasonable inference that they were in fact concealed business profits. HMRC also refer to the case of *Horowitz –v- Farrand (33 TC 221)* as a further case where uncorroborated amounts of cash were found to have originated from undisclosed business income and it was similarly held that the burden of proof was upon Mr. Singh to demonstrate that the monies were not undeclared business profits.

34. It is clear from the table in paragraph 10 of this decision that Mr. Singh's profits had not declined year on year as he had described. The business gross profits had been relatively stable for the previous 6 years. There may well have been a downturn in business, possibly exacerbated by Mr. Singh's own personal problems. However, Mr. Singh traded for 11 months of the 2004/05 year and, on the available evidence, it is difficult to conclude that his gross profits would have halved by comparison to previous years. Mr. Singh says that his brothers paid monies into his personal account to assist in repaying the mortgages on the properties. They may well have done so. However it is clear that Mr. Singh withdrew cash from the business without recording the withdrawals and that these withdrawals must on a balance of probabilities have at least equaled or exceeded any monies paid into his personal account by his brothers. If the attributed profits of £17,178, were added back, the total gross profits of the business would have been approximately the same as the average for the previous 6 years. Therefore, in the absence of clear evidence as to the source of the £17,178, it has to be concluded that Mr. Singh had understated his business profits.

2005/06 Return – Capital Gains

35. With regard to the 2005/06 capital gains Discovery Assessment, HMRC must first demonstrate that they are empowered to raise a Discovery Assessment. Having done so, the onus is then upon Mr. Singh to show that the assessment is wrong or that he has been overcharged. The relevant legislation is contained in section 29 TMA 1970, which provides at subsections (4) and (5) that one of two conditions must be satisfied before a Discovery Assessment may be raised. The first condition is that the further tax that is due arose from the fraudulent or negligent conduct of the taxpayer

or person acting on his behalf. The second condition is that HMRC could not have been reasonably expected on the basis of the information made available to them to be aware of the under assessment when the enquiry window closed. HMRC submit that both conditions are satisfied. Mr. Singh did not declare the capital gain on the disposal of the properties and accepts that he submitted an incorrect return. Although not specifically conceded in enquiry correspondence with HMRC, Mr. Singh also accepted that his return was negligent and had not challenged the validity of the Discovery Assessment. Quite clearly Mr. Singh was aware that he had made a capital gain on the sale of the properties and either through carelessness or otherwise did not disclose this information on his tax return. HMRC could not reasonably have been expected to know of the gain from the entries and information provided in Mr. Singh's 2005/06 tax return.

36. S1 of the Taxation of Chargeable Gains Act 1992 charges capital gains tax on the disposal of assets. The only person who can make a disposal of assets is the owner. Under English law, the owner of an asset and the person who will make a gain from its disposal is the beneficial owner.

37. Mr. Kelly argued that the legal title to the four properties is not conclusive in determining the beneficial ownership of the properties. He asserts that the properties were held by Mr. Singh as nominee, or trustee for himself and his brothers.

38. Section 60 TCGA 1992 provides

'60 Nominees and bare trustees

(1) in relation to [property] held by a person as nominee for another person, or as a trustee for another person absolutely entitled as against the trustee....this Act shall apply as if the property was vested in, and the acts of the nominee, or trustee in relation to the [property] were the acts of the person for whom he is the nominee, or trustee..

(2) It is hereby declared that references in this Act to any [property] held by person as trustee for another person absolutely entitled as against the trustee, are references to a case where that other person has the exclusive right to direct how that [property] shall be dealt with'.

Therefore disposals by nominees and their trustees are attributed to the person for whom they are nominee, or trustee and who is absolutely entitled to the asset. Chargeable gains accrue to the person who is absolutely entitled to the asset, that is, the beneficial owner.

39. HMRC say that section 60 TCGA1992 has no application in this case because they do not accept the assertion by Mr. Singh that the gain made on the disposal of the four properties should be divided between Mr. Singh and either one or both of his brothers.

40. HMRC acknowledge that English law distinguishes between the legal and beneficial ownership of property and that section 60 TCGA 1992 assesses the beneficiary to capital gains tax rather than the legal owner. However HMRC assert that the concept of beneficial ownership is only of relevance where evidence shows that the ownership of the asset has become fragmented in some way and it is shown that expressly or otherwise the beneficial ownership of the property is held by

someone other than the actual legal title owner. HMRC contend that the documentation relating to the purchase mortgage and sale of the four properties shows that it was Mr. Singh in whose name the properties were registered and that it was he who mortgaged the properties and received the proceeds of sale.

5 41. HMRC argue that there is no evidence that a trust existed nor that any oral agreement in that regard between Mr. Singh and his brothers was subsequently recorded or otherwise evidenced in writing. They contend that there is no documentary evidence, legal or otherwise, to show that the brothers of Mr. Singh held any proprietary or beneficial interest in the properties whatsoever.

10 42. Mr. Kelly acknowledges that there is no formal documentary evidence of a trust but argues that a constructive trust or a resulting trust existed in relation to the four properties and referred the Tribunal to s 53(2) of the Law Property Act 1925.

43. S53 of the Law Property Act 1925 provides :

‘s53 Instruments required to be in writing

15 (1) subject to the provisions hereinafter contained with respect to the creation of interests in land by parol

(a) no interest in land can be created or disposed of, except by writing signed by the person creating or conveying the same, by his agent thereunto lawfully authorised in writing, or by will or by operation of law

20 (b) a declaration of trust respecting any land, or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such a trust or by his will

25 (c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.

(2) This section does not affect the creation or operation of resulting implied or constructive trusts’.

44. S.53 (2) makes it clear that s.53 does not affect the creation or operation of resulting implied or constructive trusts. HMRC, in their statement of case and submissions to the Tribunal, do not address the issue as to whether or not, on the acquisition of the properties by Mr. Singh, a resulting or constructive trust arose in favour of one or both of his two brothers, other than to say that they have not seen any evidence that a trust existed. HMRC says that, ‘whilst an agreement could initially be made orally, it must be followed up in writing prior to the disposal of the asset’. No case law authority for this particular proposition was offered by HMRC and it is not one with which the Tribunal would necessarily agree. The Tribunal’s view is that, under a resulting trust, the interest held under trust must have been created at the date of acquisition of the property and, in the case of a constructive trust, prior to the property’s disposal.

40 45. Mr. Kelly on behalf of Mr. Singh sought specifically to rely upon the provisions of section 53(2) arguing that a resulting or constructive trust had arisen on the acquisition of the four properties. He referred extensively to the case of *Stack v Dowden* [2007] 9 ITELR 81. In that case, the property in question had been purchased for £190,000 of which Miss Dowden had paid £125,000, the remaining £65,000

having been met by a mortgage advance. The property was held jointly. The court had to decide firstly whether there was a joint tenancy in equity or a tenancy in common and secondly the proportions of the respective beneficial shares of the parties.

5 46. This appeal largely turns on different issues. The essential ingredient of both
resulting and constructive trusts is ‘common intention’, that is an intention common to
both, the legal estate holder and the claimant to a beneficial interest, that the claimant
acquired an interest in the property. The distinction between resulting and
constructive trusts is that in resulting trusts this common intention is presumed from
10 the situations which give rise to the trust (see *Gissing v Gissing* [1971] AC 886).
Whenever the legal title to land is purchased in the name of one (or more) person, but
is actually paid for (in whole or in part) by another (or others), the titleholder will
hold on trust for himself and the other contributor in proportions reflecting their
contributions. As a general principle the consideration paid or contributed (or at least
15 the common intention which lies behind the payment or contribution) must exist at the
time of acquisition of the legal estate. Payment of a deposit by someone other than the
legal estate holder would raise the presumption of resulting trust.

47. Resulting trusts are therefore founded on contributions of money towards the
acquisition of the legal title to the property. Any other form of contribution would fall
20 under constructive trusts or ‘implied common intention’, so that for example,
mortgage payments made after the acquisition of the property would not be regarded
as payments towards the purchase price. Thus, if the intention does not arise until
after the acquisition of the legal title, the Courts would normally consider there to be a
constructive trust rather than a resulting trust.

25 48. In this case, Mr. Kelly argues that a presumed intention existed and in
consequence a resulting trust arose upon payment of the £52080 by ‘DS’ but that a
constructive trust also arose which overrode the resulting trust. He argues that a
constructive trust arose firstly because of the £52080 contribution by DS, secondly
because of the contributions to the mortgage installments which he contends were
30 partially or even entirely defrayed from cash payments to Mr. Singh’s private bank
account by ‘DS’ and ‘GS’, and thirdly because of the whole course of dealing
between the brothers regarding the acquisition and disposal of the properties,
evidenced their common intention to own them jointly.

49. ‘DS’ paid the sum of £52,080 to the solicitors acting on behalf of Mr. Singh and
35 ‘GS’ in connection with the purchase of the four properties. Clearly, that was a
substantial contribution towards the purchase price and was paid to the solicitors
rather than, for example to Mr. Singh. The monies were plainly not a gift and were
intended to be used towards the 10% deposit payable for the four properties which
totaled £40,380. The copy documentation provided to the Tribunal did not include any
40 information as to what the balance of £11,700 was to be used, but the natural
inference is that these monies were intended to cover the balance of purchase monies
for the properties on completion, legal fees, mortgage and administration costs.

50. ‘GS’ paid the sum of £1000 (that is £250 per property) by way of reservation
deposit which ‘GS’ and his two brothers say was on behalf of all three brothers. ‘DS’
45 says that in fact he paid these monies. No other contribution was made by ‘GS’.
However, ‘GS’ said in a written statement to HMRC during the enquiry that he

received a one-third share of the profit from the sale of the properties in the form of cash and mortgage payments on his house by Mr. Singh. He did not however quantify what that one-third was or precisely how it had been paid.

5 51. HMRC have not sought to argue that there may have been a presumption of advancement in respect of either the £1000 or the £52,080 'deposit monies'. Where equity imposes a moral duty upon one party to provide for another, for example a father to support his child, the doctrine of advancement raises a presumption of gift so that the equitable interests follow the legal title. In such circumstances, no resulting trust will arise in favour of the person who has provided the money. Clearly in this case there is no presumption of advancement with regard to the deposit monies paid by 'DS'.

15 52. Much of the correspondence with the solicitors acting in the acquisition of the properties and the associated legal documentation, for example the contract and deed of transfer, was not copied to the Tribunal. The copy documentation was limited to the 'client care letter', a letter confirming receipt of contract documentation with a 'pre-exchange of contracts report', a letter enclosing an authority instructing the solicitors to proceed to an unconditional exchange of contracts (despite the fact that a mortgage had not at that stage been arranged), a letter confirming unconditional exchange of contracts and finally a letter following completion of the purchase of the property which enclosed the NHBC insurance certificate in respect of one of the properties.

25 53. The Tribunal noted that it was 'DS', who initially contacted and instructed the solicitors but on behalf of Mr. Singh and 'GS'. Mr. Singh says that this was because the purchase of the properties was the idea of 'DS' and that because 'DS' had already remortgaged his property for a substantial sum, he would not have been able to participate in the acquisition of the properties and act as a co-mortgagor. The Tribunal also noted that, although the final letter from the solicitors which enclosed the NHBC certificate for one of the properties was addressed to 'Messrs G & T Singh', the property, along with one of the other properties, had by then already been acquired in 30 Mr. Singh's sole name.

54. Following completion, it was Mr. Singh who arranged for the properties to be let and the rental monies to be paid to him pending a resale of the properties. Rental monies were paid into his private account.

35 55. A constructive trust will arise where an agreement or common intention can be inferred from all the circumstances. Direct contributions to the purchase price whether initially or for example by payment of mortgage instalments generally justify the inference necessary for the creation of a constructive trust, (see *Passee v Passee* [1988] *Fam Law* 132). However the fundamental question which must always be resolved is whether independently of any inference to be drawn from the conduct of the parties during the course of dealing with the property, there must at some time prior to disposal of the property have been an agreement or understanding between them that the equity in the property is to be shared beneficially. The finding of an agreement or arrangement in this regard can be based on evidence of discussions between the individuals concerned, however imprecise the terms may have been. 45 Once a finding to this effect is made it is only necessary for the contributor to show

that he has acted to his detriment, or significantly altered his position on the basis of that understanding or agreement in order to give rise to a constructive trust.

56. Without doubt, a resulting trust arose in respect of the £52,080 contribution by 'DS'. The issue is whether Mr. Singh also held the property on constructive trust for himself and either one or both of his brothers pursuant to their alleged common intention to share the beneficial ownership of the properties. A distinction must be drawn between resulting and constructive trusts when calculating the parties' beneficial shares. A resulting trust only recognises the actual payments made. For a constructive trust there must be a finding of either an implied common intention resulting from a substantial contribution or an express common intention between the parties, of shared beneficial ownership in the property, plus an act of detrimental reliance on that intention by the party or parties not on the title. Only where such a common intention cannot be found can a resulting trust be inferred from financial contributions towards the acquisition of the property. If a common intention and thus a constructive trust is found, a court can ascertain the individual beneficial shares at its discretion.

57. The difficulty in this case is that, whilst it is fairly clear that at the outset the three brothers shared a common intention to purchase the four properties, it is not clear whether that intention continued up to completion of the purchase. 'GS' only provided £1000 towards acquisition costs, but 'DS' says it was he who paid the £1,000. Although it was 'GS' and Mr. Singh who exchanged contracts to purchase the properties, it was Mr. Singh who completed the purchase utilising mortgage funds arranged in his sole name. 'GS' says that he had a bad credit record and that this was the reason he could not act as co-mortgagor whereas Mr. Singh was self-employed and could easily secure mortgage facilities by means of a 'self-certificated' annual income confirmation. 'DS' was not involved in the purchase of the properties at all other than to initially contact the solicitors and provide the 'deposit monies' of £52,080 although of course on acquisition of the properties these monies effectively represented the entire equity in the properties. Perhaps Mr. Singh and his brothers were not advised as well as they could have been as there was no reason why the deed of transfer (form TR1) could not have contained a simple declaration that the beneficial interest in the property was held by Mr. Singh on behalf of himself and either one or both of his brothers in whatever proportions they chose.

58. Although it seems clear that 'DS' was repaid his contribution of £52,080 in one form or another, it is not clear that he was also paid a one third share of the profits. Mr. Singh says that the profit element was paid to 'DS' in small denominations of £200 or £300 by ATM cash withdrawals from his account. 'GS' says he was paid his share of the profits in similar manner. All three brothers say they ended up with a one-third share of the profits but none of them was able to say how much that was after allowing for payment of mortgage interest and acquisition and disposal costs. Significantly, in evidence, Mr. Singh said that he could not specifically remember how the profit was divided. He said it was a 'family transaction' and that he paid money from the proceeds of sale to his brothers as and when they needed it. The application of the proceeds or profits is however a separate matter and irrelevant to how those proceeds or profits were actually owned.

59. Mr. Singh's account of the acquisition of the properties varied throughout the course of the enquiry. Initially, he suggested that the monies paid into his account were a loan but that was at a stage in the enquiry when HMRC were unaware of the capital gain made on the properties. Following the Discovery Assessment, he said that the properties were purchased firstly by himself, then with one brother and their respective wives and then with two brothers and their three wives. Finally, in evidence, he said the properties were purchased by him for himself and his two brothers.

60. Whatever Mr. Singh said to HMRC during the course of the enquiry with regard to ownership of the properties it is clear to the Tribunal that DS would not have remortgaged his property for a substantial sum simply to effect a gift of £52,080 to his brother. It is equally unlikely, given the evidence overall that these monies were intended to be a loan. No loan agreement had been drawn up but that was because there was mutual trust between the brothers. Plainly, DS was interested in the purchase and disposal of the properties in order to make a profit. DS played a significant role in the acquisition of the properties. On the other hand, GS was only peripherally involved and following exchange of contracts took no further part in the transaction.

61. The Tribunal concluded that a resulting trust must have arisen in respect of the £52,080 contribution made by 'DS', but that the resulting trust gave way to a constructive trust derived from the implied common intention of Mr. Singh and DS, as inferred from the whole course of dealing between them and their respective contributions towards the purchase price. However imperfectly recalled and imprecise Mr. Singh may have been in recounting to HMRC exactly on whose behalf the properties had been purchased, it would be unreasonable to conclude that DS was not expecting to receive a substantial part of the profits. Mr. Singh and DS therefore held the beneficial interest in the properties equally. It is unclear whether GS paid £1000 towards the purchase of the properties. It seems clear that there was an intention at one stage that he should share in the acquisition of the properties. However he subsequently withdrew from any involvement and crucially, unlike DS there was no detrimental reliance by him on an agreement that he should participate in the beneficial ownership of the properties. GS therefore had no beneficial interest in the properties.

62. The Tribunal therefore finds that :

- (i) Mr. Singh submitted an incorrect tax return for each of the years 2004/05 and 2005/06;
- (ii) that the closure notice issued by HMRC for 2004/05 is correct;
- (iii) that the Discovery Assessment for 2005/06 should be amended to reflect the fact that the beneficial interest in the four properties was held by Mr. Singh and Daldar Singh equally so that the capital gain is accordingly apportioned between them on that basis.

63. 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.

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MICHAEL S CONNELL

TRIBUNAL JUDGE

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