



TC02176

**Appeal number: TC/2011/04433
TC/2011/04593**

INCOME TAX – GENERAL BETTING DUTY – turf accountant - alleged understatement of income – assessments to income tax, national insurance and betting duty – penalties on basis of fraudulent, deliberate and dishonest conduct – appeals dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

STEVEN GEORGE O'MALLEY

Appellant

- and -

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

**TRIBUNAL: JUDGE JONATHAN CANNAN
MR HOWARD MIDDLETON**

Sitting in public at Manchester on 24 and 25 May 2012

Mr O'Malley appeared in person

Mr Joshua Shields of Counsel appeared for the Respondents

DECISION

Introduction

5 1. HMRC have assessed the appellant, Mr Steven O'Malley to income tax,
national insurance, general betting duty and associated penalties for the years 2006-
07, 2007-08 and 2008-09. During those years they contend that Mr O'Malley has
understated the income from his business as a turf accountant. Further, they say that
10 he did so dishonestly or in the alternative carelessly so as to give rise to the penalties
which they have assessed.

2. Mr O'Malley appeals to this tribunal on the basis that he has not understated his
income and in any event that he has not acted in any way dishonestly.

3. The tax, duty and penalties assessed by HMRC and the total income alleged to
have been understated may be summarised as follows:

15

Additional Assessments	2006-07	2007-08	2008-09	Total**
	£	£	£	£
Income Tax / NIC	3,408	3,889	3,647	10,944
Income Tax Penalty	1,363	1,556	1,659	4,578
General Betting Duty*	2,954	2,289	1,339	6,564
General Betting Duty Penalty*	2,067	1,602	937	4,584
Alleged Understatement of Income	13,364	15,250	15,323	

* The amounts for general betting duty and associated penalties are for different periods of 17
months, 12 months and 7 months respectively.

** Subject to rounding.

20

4. In total therefore the tax and duty under appeal is £17,508 and the penalties
under appeal are £9,162.

5. During the course of the appeal we heard evidence on behalf of HMRC from Mr
Philip McLeod an inspector of taxes who gave evidence in relation to the income tax

assessments and penalties. Mr Charles Dunn an officer of HMRC gave evidence in relation to the general betting duty assessments and penalties. Mr O'Malley gave evidence on his own behalf. He was assisted in the course of the hearing by Mr S Nicholson of Heath & Co accountants.

5 ***Background***

6. We make the following findings of fact in relation to background matters from the oral evidence we heard and from the documents which were produced in evidence.

7. Mr O'Malley carries on business as a turf accountant trading as "*Steve's Racing*" from premises at the rear of the Shepherds Arms public house in Eaves Lane, Chorley. It is a small "back street betting office" to use Mr O'Malley's own description and takes bets mainly on horse racing. The shop is staffed either Mr O'Malley himself or, when he is away from the shop, by an employee. Bets are taken either from the customer in person in cash or by telephone on credit. Whilst there are television screens in the betting shop it does not show all live racing. Mr O'Malley does not subscribe to the Satellite Information Service which we understand offers a much wider service than terrestrial television. Many customers come from the pub next door and Mr O'Malley knows almost all of them individually. The betting shop also had a fixed odds betting terminal for a period of some 18 months as appears below.

8. The neighbourhood around the betting shop is a relatively busy high street with shops of many of the national bookmaking chains within a 20 minute walk. Mr O'Malley is able to compete by providing a personal service and also by offering to match the odds offered by other bookmakers.

9. There was evidence before us which we accept that on Saturday 4 August 2007, when HMRC carried out an invigilation of the day's trade, there were a total of 165 bets placed in the shop either by way of cash (93 bets) or credit (72 bets). The total amount staked was £1,091.51. We accept that Saturday is usually the busiest day of the week however we are unable to say to what extent that single day is representative of the business generally.

10. Mr O'Malley is married with four children aged 16, 14, 11 and 6 at the date of the hearing. His wife does not work and the family's sole income at all material times has been from the betting shop, together with tax credits and child benefit.

11. On 1 May 2007 an officer of HMRC carried out a visit to Mr O'Malley's business in connection with Betting Duty. A further visit was carried out on 4 August 2007 at which the invigilation referred to above was carried out. It was noted during the course of those visits that credit slips were not stamped in accordance with directions which HMRC issued to bookmakers in *Notice N451*. This requires all betting slips to be sequentially numbered and to record, at the time the bet is taken, the date and time at which it was taken.

12. The officer regarded the results of the invigilation as inconclusive. Whilst he appears to have felt that the drawings declared by Mr O'Malley could not support his lifestyle it was recorded that "*there was no evidence on which to base an assessment*".

5 13. On 14 November 2008 Mr McLeod opened an enquiry into Mr O'Malley's self assessment return for 2006-07. Mr O'Malley thought that this enquiry had been prompted by the HMRC betting duty team and their failure to find any evidence of undeclared betting income. However we accept Mr McLeod's evidence that it was generated by a risk analysis project which identified Mr O'Malley's business by reference to certain specific parameters. In any event little if anything turns on the
10 circumstances in which the business was selected for enquiry. Mr McLeod had certain concerns about the business records and there was a meeting with Mr O'Malley and his accountant, Mr Nicholson on 21 April 2009 at which those concerns were put to Mr O'Malley. The meeting covered in particular the record keeping of the business, the pattern of hedge and personal betting by Mr O'Malley and Mr O'Malley's
15 personal expenditure. In due course Mr O'Malley authorised Mr McLeod to obtain copies of his personal bank statements.

14. A further meeting took place on 17 November 2009. The focus of that meeting was Mr O'Malley's hedge and personal betting.

20 15. A final meeting took place on 27 April 2010. Mr Nicholson was invited but did not attend on the basis that there was little that he could contribute. The meeting covered both betting duty and income tax. The focus of this meeting was Mr O'Malley's personal bank accounts, his personal income and expenditure and his hedge and personal betting.

25 16. Following the final meeting Mr McLeod wrote to Mr O'Malley on 24 May 2010 with a calculation itemising Mr O'Malley's personal outgoings for the year ended 31 July 2006. This was based on what Mr O'Malley had said at previous meetings and he was invited to agree the calculation. Mr O'Malley did not reply and on 20 July 2010 Mr McLeod sent Mr O'Malley "*preliminary calculations*" of understated income in the three tax years. Before any assessment was made he invited Mr O'Malley to
30 "*provide any further information that you consider relevant, or to make any observations on the method of calculation adopted*". Mr O'Malley was given until 16 August 2010 to respond. Again there was no response.

35 17. Betting duty assessments and penalties were issued by a Mr Taylor on 22 November 2010. These were based on the same understatements of income calculated by Mr McLeod. Apparently there was then some delay due to internal procedures. Income tax penalties for the three years of assessment were not issued until 24 January 2011. The closure notice for 2006-07 and the assessments for 2007-08 and 2008-09 were not issued until 26 January 2011.

40 18. Mr Nicholson on behalf of Mr O'Malley lodged appeals and/or requests for a review of all these decisions. The result of those reviews was to confirm the assessments and penalties as issued and the appeals to this tribunal followed.

19. In summary, Mr O'Malley appeals the assessments and penalties on the basis that all betting income has been declared. He further contends that the assumptions made by Mr McLeod in calculating the alleged undeclared betting income are flawed and unreliable.

5 ***The Issues***

20. The following broad issues arise for determination by us on this appeal:

(1) Has Mr O'Malley understated his income and if so what is the amount of the understatement in each year of assessment for both income tax purposes and betting duty purposes?

10 (2) If there was an understatement of income was it fraudulent/deliberate/dishonest or negligent/careless on the part of Mr O'Malley such that liability to penalties arises?

(3) If Mr O'Malley is liable to penalties, what is the appropriate level of those penalties for the purposes of both income tax and betting duty?

15

21. There are a number of subsidiary issues of both law and fact which arise in considering these broad issues and we deal with these in the course of our decision. Before considering the issues we set out the law in so far as it affects the way in which we must deal with the issues.

20

Legal Framework

1. Income Tax and National Insurance

22. We summarise below the relevant legal framework in relation to the income tax and national insurance assessments and penalties which HMRC seek to impose on Mr O'Malley.

25

23. For 2006-07 HMRC opened an enquiry pursuant to *section 9A Taxes Management Act 1970* ("*TMA 1970*"). They were entitled to do so during the enquiry window as defined by that section. For present purposes the enquiry window expired on 31 January 2009 and the enquiry was opened in time.

30 24. For 2007-08 and 2008-09 the returns were lodged by Mr O'Malley on 8 October 2008 and 31 August 2009 respectively. The enquiry windows closed on 8 October 2009 and 31 August 2010 respectively. No enquiries were opened and HMRC rely on *section 29 TMA 1970* to make what are known as "discovery assessments" in relation to these years. In order to make a discovery assessment one of two conditions must be satisfied. The first condition in 2007-08 is that an understatement of tax is attributable to the fraud or negligent conduct of the taxpayer. In 2008-09 the first condition is that the understatement of tax is attributable to deliberate or careless conduct on the part of the taxpayer. The second condition in each of those years is that at the time the

35

enquiry window closed an officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the understatement of tax. For these purposes the information available to the officer is limited to that referred to in *section 29(6)*.

5 25. An appeal against an assessment to this tribunal is brought pursuant to *section 31 TMA 1970*. The tribunal has power to affirm, reduce or increase an assessment by virtue of *section 50 TMA 1970*. There is a burden on HMRC to satisfy us in relation to tax years 2007-08 and 2008-09 that one or other of the conditions for making a discovery assessment are satisfied. Subject to that, by *section 50(6)* the burden is on
10 the appellant to satisfy us that the assessments in each of the tax years are excessive (see also *Norman v Golder 26 TC 293*, *Hurley v Taylor 71 TC 268* and *Johnson v Scott 52 TC 383*).

15 26. As far as penalties are concerned, liability to a penalty for tax years 2006-07 and 2007-08 arises pursuant to *section 95 TMA 1970*. A penalty will be chargeable where an incorrect return was delivered fraudulently or negligently. The maximum amount of the penalty is 100% of the undeclared tax.

27. In relation to tax year 2008-09 liability to a penalty arises pursuant to *Schedule 24 Finance Act 2007*. By way of summary, a penalty arises under this provision if there is an understatement of tax which was deliberate or careless. The penalty is
20 fixed by reference to the ‘potential lost revenue’ which generally speaking is the amount of tax understated. The amount of penalty will depend on a number of factors, namely:

(1) Whether the understatement of tax was careless, deliberate or deliberate and concealed. For present purposes HMRC allege that the understatement was
25 either deliberate or careless. They do not suggested that the understatement was deliberate and concealed,

(2) Whether the taxpayer has made a prompted or unprompted disclosure of the understatement, and

(3) The quality of the disclosure.

30 28. The burden is on HMRC to satisfy us that the conditions for assessing a penalty are satisfied. Namely that Mr O’Malley fraudulently/deliberately or negligently/carelessly understated his income liable to tax.

2. *General Betting Duty*

35 29. This section deals with the legal framework in relation to the general betting duty assessments and penalties.

30. An excise duty known as General Betting Duty (“Betting Duty”) is chargeable in accordance with the *Betting and Gaming Duties Act 1981* (“*BGDA 1981*”). The amount of duty is calculated by reference to the net stake receipts.

31. The provisions by which HMRC can assess Betting Duty are contained in *section 12(1) Finance Act 1994* (“FA 1994”). Briefly, they may do so where a person has failed to keep proper accounts. Any assessment must be made to best judgment. The burden is on Mr O’Malley to satisfy us that the assessments are excessive.

5 32. Liability to penalties arises pursuant to *section 8(1) FA 1994* where a person has dishonestly engaged in conduct for the purposes of evading duty. The burden is on HMRC to satisfy us that Mr O’Malley dishonestly engaged in such conduct. The amount of the penalty is a maximum of the amount of the duty sought to be evaded.

10 33. The right of appeal in relation to Betting Duty and penalties follows the review procedure in *section 15B FA 1994*. This appeal is governed by *section 16(5) FA 1994* and Mr Shields for HMRC agreed that we have a full appellate jurisdiction in relation to both the review of the assessments and the penalties. In other words we are not limited to intervene only if we are satisfied that the review decision is unreasonable. We can substitute our own decision for that of HMRC if we are satisfied that the
15 review decision is wrong.

34. It is also relevant to note the following:

(1) Where a bet is laid off by a bookmaker it is not taken into account when calculating the net stake receipts for Betting Duty purposes. In contrast the stakes and winnings should be accounted for in the profit for income tax
20 purposes.

(2) *Paragraph 6(1) Schedule 1 BGDA 1981* makes provision for HMRC to issue directions as to the books records and accounts that a general betting business should keep. The directions issued by HMRC in this context are described in *Notice 451* referred to above.

25 3. *Generally*

35. Betting Duty is allowable as a deduction from profits for the purposes of income tax. The assessments made by Mr McLeod take this relief into account.

30 36. Our findings of fact in relation to all matters on this appeal, including whether or not Mr O’Malley has acted fraudulently or dishonestly, are to be made by reference to the balance of probabilities.

Decision

37. We summarise below the basis upon which the income tax assessments and penalties were made. The starting point is the evidence from which Mr McLeod concluded that Mr O’Malley had failed to declare all his takings from the betting
35 activities of the business. This evidence formed the basis upon which HMRC contend that Mr O’Malley’s conduct was either fraudulent or deliberate so as to give rise to income tax penalties. It also formed the basis upon which HMRC contend that Mr O’Malley dishonestly sought to evade Betting Duty so as to give rise to penalties under *section 8(1) FA 1994*.

38. Having summarised the basis upon which Mr McLeod made his assessments we make our detailed findings of fact relevant to the first issue identified above. We then deal with the second and third issues. In making our findings of fact we have carefully considered the oral and documentary evidence placed before us. In hearing that evidence we have formed a view as to the reliability and credibility of the witnesses.

Basis upon which Mr McLeod made his assessments

39. Mr McLeod described the details of his enquiries and the basis upon which he made the assessments to income tax and penalties. We have already briefly described the path his enquiry took. We are satisfied that he was a reliable and truthful witness. To a large extent his view of the evidence is now irrelevant because we have heard and seen the evidence ourselves and we must come to our own view on the basis of everything we have heard and seen.

40. Mr McLeod noted the following from his inspection of the business records, his interviews with Mr O'Malley and his analysis of Mr O'Malley's personal expenditure.

(1) Credit bets were not recorded in the business records at the time of transactions in the prescribed manner. Rather they were recorded at the end of the day. What ought to have happened is that details of credit bets should have been recorded on a slip including the date and time they were placed and the slips should have been allocated consecutive serial numbers. Mr McLeod considered that this gave Mr O'Malley an opportunity to manipulate his records, for example by not declaring losing credit bets.

(2) There appeared to be 5 weeks when no returns for credit bets were recorded.

(3) Mr O'Malley had no record of personal drawings from the business. The figure for drawings in the annual accounts prepared by Mr Nicholson was a balancing figure. The records did not include any figures for cash brought forward or cash carried forward or any periodic cash reconciliation.

(4) Mr O'Malley did not have any record of hedged bets which he made. Hedged bets are bets which Mr O'Malley would make to spread the risk of having to make a large payout on a winning bet. This process is otherwise known as laying off.

(5) The gross profit rate of the business was less than the industry norm.

(6) The business profits were not sufficient to support Mr O'Malley's personal expenditure. He did not consider that Mr O'Malley's explanation in terms of profits from personal betting was credible.

(7) Mr O'Malley had failed to include commission on a Fixed Odds Betting Terminal ("FBOT") in his accounts.

41. In the light of all these factors, and against the background set out above, Mr McLeod considered that the profits of the business were understated. He quantified the understatement by making an estimate of Mr O'Malley's personal family

5 expenditure for the year ended 31 July 2006. Based upon what Mr O'Malley told him in interview Mr McLeod estimated that expenditure to be £39,766. He then compared this to the resources available to Mr O'Malley to fund that level of expenditure. The resources available comprised drawings from the business of £14,617, commissions from the FBOT of £1,183, and non-business income comprising tax credits and child benefit of £10,602. This comparison produced a shortfall as follows:

	£	£
		39,766
	Personal Expenditure	
	Less: Drawings	14,617
10	FBOT Commission	1,183
	Non-Business Income	10,602

		(26,402)

15	Shortfall	£13,364

42. Mr McLeod then assumed that the same level of expenditure continued in the following two tax years, subject only to an uplift by reference to the retail prices index. He compared that to the net profit of the business (the net drawings figure was not available as such) for those tax years and the known non-business income for those years. There was no FOBT machine in the premises for those years. From this he identified a shortfall in income of £15,250 and £15,323 respectively.

43. Mr O'Malley did not challenge the arithmetical basis of Mr McLeod's calculations. He did challenge the underlying factual basis and assumptions used by Mr McLeod. We now set out our findings of fact in relation to the allegation that there was an understatement of income.

Issue 1 – Findings of Fact

44. Mr O'Malley made various challenges to the basis upon which Mr McLeod had reached a conclusion that there was an understatement of income. We deal with each of these challenges in turn. Overall we found Mr O'Malley's evidence to be vague and evasive, even making allowances for the passage of time. In a number of respects his evidence was not credible and on those points we did not accept it.

45. Mr O'Malley did not accept that his personal expenditure was at the level of £39,766 for the year ended 31 July 2006. He accepted that he had given Mr McLeod information from which Mr McLeod arrived at that figure but he contended that Mr McLeod relied on unsubstantiated and unreasonable estimates. He did not however particularise which estimates he felt were unreasonable and why he considered them to be unreasonable. During the course of the hearing Mr O'Malley was given the opportunity to challenge the estimates used in this calculation but did not do so. We attribute this to evasiveness on his part.

46. Mr McLeod made contemporaneous handwritten notes of Mr O'Malley's answers and estimates of personal expenditure on a pro forma document prepared for the purpose. We are satisfied that those notes accurately record what Mr O'Malley told Mr McLeod at the interview on 27 April 2010. For example Mr O'Malley gave
5 an estimate of £100-150 spent on food each week. In his final calculation Mr McLeod used an estimate of £120 per week.

47. We find as a fact that the estimate of £39,766 is a reasonably accurate estimate of Mr O'Malley's personal expenditure for the year ended 31 July 2006. It was based in part on actual figures provided by Mr O'Malley (in some cases supported by
10 documentation), in part on estimates provided by Mr O'Malley and in part on estimates made by Mr McLeod which were not challenged by Mr O'Malley.

48. Mr O'Malley sought to explain the shortfall identified by Mr McLeod's calculations by vague reference to personal betting winnings or resources available from previous years. We do not accept those explanations.

15 49. We accept that Mr O'Malley did engage to a marked degree in personal betting. Some of this betting was funded from a Nationwide account which was used to make bets with well known online bookmakers. The remainder was cash bets made by Mr O'Malley either in other bookmakers or on-course, although there was no evidence as to the level of such cash betting. The evidence showed and we find that in the 12
20 months to 31 July 2006 Mr O'Malley made a loss on betting through his online accounts of £21,414. The loss was funded in part by cash deposits into the Nationwide account totalling £32,960. This comprised 11 deposits in that period, almost all of them being round sum amounts of several thousand pounds. They included 4 separate deposits in June 2006 totalling approximately £17,000.

25 50. We find that the vast majority of betting activity in the Nationwide account was personal betting rather than hedge bets in connection with the business. Mr O'Malley told us that he would not have cause to lay off bets often, but it did happen. In general the need to lay off arose where a customer had made an accumulator bet on several races and had picked winners in the first few races. When Mr O'Malley did lay off
30 bets it would mostly be done with cash. Mr O'Malley did not keep a record of laid off bets even though he should have taken payments and receipts into account for income tax purposes. He maintained that it was not practical to keep a record of such bets. We disagree, especially given the relatively limited extent to which he laid off bets.

35 51. If personal betting winnings was the explanation for a shortfall in income it would follow that the winnings must all have come from cash bets. That in turn suggests that for some reason Mr O'Malley's cash betting was much more successful than his online betting. There is no reason why that should be the case, and Mr O'Malley did not suggest any reason why it should be the case. Indeed he accepted that his online betting was the same sort of betting as his cash betting.

40 52. There was no direct evidence as to the source of the cash deposits into the Nationwide account. Mr O'Malley "*was not 100% sure where they were from*" but thought that they were mainly winnings from cash bets. We do not accept that

explanation. We do not find it credible that Mr O'Malley would be unsure where the £17,000 deposited in June 2006 came from.

53. We accept that there is no legal requirement for Mr O'Malley to keep any record of his personal betting. However, given the nature of his business he must have realised that it was important to be able to distinguish personal betting from hedge betting connected to the business.

54. We do not accept Mr O'Malley's suggestion that expenditure in the year ended 31 July 2006 was funded by resources available from previous years. There was no decrease in the bank balances over the course of that year that could explain the shortfall. Mr Nicholson who prepared the annual accounts accepted in the course of submissions that there were no accrued profits from the business in previous years that could explain the expenditure. Nor was there any evidence of other resources being used to fund personal expenditure.

55. Mr O'Malley challenged Mr McLeod's assertion that the gross profit of the business was less than the industry norm. Mr McLeod gave evidence that the industry norm was a gross profit percentage of 16-18%. No evidence was produced by HMRC in support of this statistic and we are not satisfied that this factor supports HMRC's case that there was an understatement of income.

56. Mr O'Malley suggested that the FOBT commission income of £1,183 had been included in the accounts. We saw no evidence to suggest that this was the case and we do not accept Mr O'Malley's evidence in this regard. It is true that there was a discrepancy of exactly £1,000 between turnover in the annual accounts produced by Mr Nicholson and turnover shown by the betting shop records. However there was no evidence as to the nature of that discrepancy and in correspondence Mr Nicholson suggested that it was due to hedged bets. In any event, we are satisfied that the assessments raised by HMRC do not include the commission income from the FOBT.

57. Mr O'Malley placed great reliance on the results of the invigilation carried out on Saturday 4 August 2007. The results of that exercise and a comparison to the records for other Saturdays at that time are shown in the following table:

Date	Cash Bets £	Credit Bets £	Total Bets £	Credit Bets %
07/07/2007	282.85	274.00	556.85	49.21%
14/07/2007	346.55	571.10	917.65	62.24%
21/07/2007	629.55	509.85	1,139.40	44.75%
28/07/2007	476.08	625.77	1,101.85	56.79%
04/08/2007	474.51	617.00	1,091.51	56.53%

30

58. We find as a fact that the results of the invigilation for 4 August 2007 and the records produced by Mr O'Malley for the other dates were as set out in this table. Mr O'Malley contended that the declared takings on the four Saturdays in previous weeks were consistent with the results of that invigilation. That, he said, supported the integrity of his records. We accept that his declared takings on two of those days were greater than his takings on the day of the invigilation. However we do not accept that the results of the invigilation lend any significant support to the declared takings for other dates. On two of those dates there was a noticeably lower proportion of credit bets declared in terms of value.

59. Further, the table above does not show the number of cash and credit bets taken on each day. On 4 August 2007 there were 165 bets taken, of which 72 (44%) were credit bets. That is consistent with Mr O'Malley's oral evidence that in broad terms credit bets were approximately 50% of all betting. However on 28 July 2007 the records show that there were 199 bets taken, of which only 42 (21%) were credit bets. Looking at the results of this exercise as a whole we are not satisfied either that the date of invigilation was representative of Saturday takings generally, or together with the records for other Saturdays that any reliable pattern of takings could be established.

60. Mr O'Malley submitted that additional profit of £14,000 in a year was wholly unrealistic. He said that it would involve him suppressing turnover of several hundred thousand pounds but that there is no evidence that he has suppressed such a high level of turnover. We do not accept the basic premise of that submission. It assumes that both winning and losing bets would be suppressed. In fact, in order to suppress the additional profit it would only be necessary to suppress £14,000 of losing bets.

61. We accept Mr O'Malley's explanation as to the apparent lack of returns to winning credit bets being recorded over a period of 5 weeks. In each case the returns were recorded in the following week. More significant, however, is that Mr O'Malley did not keep any record of individual credit bets received apart from a weekly record which was disposed of and not retained in his records. We can see no legitimate reason not to retain those records. Similarly, the credit betting slips themselves were destroyed after 6 months. We accept that for Betting Duty purposes the period of retention for such records is specified in *BGDA 1981* as 6 months. However Mr O'Malley's failure to comply with HMRC's direction in relation to the recording of credit betting slips clearly gave him the opportunity to suppress the income from losing credit bets.

62. Mr O'Malley's explanation for his failure to comply with the HMRC direction in relation to credit betting slips was that it was impractical to record the details in that way in a busy betting shop. We do not accept that evidence. We find as a fact that for the dates referred to in the table above the total number of bets taken ranged from 85 to 199. Within those totals, the number of credit bets ranged from 24 to 72. Given that this was the busiest day of the week we do not accept that there would have been any real obstacle to recording the date and time of credit bets on sequentially numbered slips.

63. By way of submission, and in relation to the quantum of the assessment, Mr Shields relied on the following quote of Cross J in *Brimelow (Inspector of Taxes) v Price (1965) 49 TC 41*:

5 *“If a man makes substantial sums of money in betting – and a number of*
people do so – it is not unreasonable to expect him to keep records of his
betting transactions so that, if he is challenged by the Revenue authorities
to explain an increase in his wealth, he can satisfy them that it is not due
10 *to any undisclosed taxable profits but to his betting winnings. If he*
chooses not to do that, he runs the risk of having attributed to taxable
profits what, if he had kept records of his betting transactions, he might
have been able to convince the authorities were in fact untaxable betting
winnings.”

64. That point assumes more importance in the context of a turf accountant such as Mr O’Malley, who seeks to establish that the explanation for an apparent shortfall in
15 income is his personal betting winnings.

65. The failure to record hedged bets, which are part of the business activities and fall to be taken into account for income tax purposes is another example of inadequate record keeping. Mr O’Malley offered no credible explanation for this failure.

66. The failure to record cash drawings or to keep track of cash in the business is
20 yet another example of inadequate record keeping. Whilst there is no specific requirement to keep such records, the failure to do so illustrates at best a casual attitude to record keeping, and at worst provides an opportunity to suppress takings.

67. Mr O’Malley submitted that the results of the invigilation demonstrated that the
25 assessment was excessive. For the reasons given above we are not satisfied that the results of one day of invigilation in August 2007 are representative of the business throughout the year. Mr O’Malley also said that he had given HMRC the opportunity to carry out further invigilation on other days but they refused. Given the opportunity for manipulation we do not consider that further invigilation would have assisted us in
30 making our findings of fact or HMRC in identifying and quantifying any understatement.

68. Mr Shields submitted that the gap between expenditure and income was wholly unexplained. We accept that submission. On the basis of the evidence as a whole we are satisfied that there was a failure to declare all the profits of the business. The best estimate of the understatement is the calculation produced by Mr McLeod. We are
35 therefore not satisfied that the assessments to income tax, national insurance or Betting Duty are in any way excessive.

Issue 2 – Are penalties justified?

69. The various statutory provisions in relation to penalties referred to above require
40 the conduct of a taxpayer to be fraudulent, deliberate, or dishonest. We find that Mr O’Malley’s conduct satisfied each of those descriptions so as to justify the penalties which have been applied.

70. On the basis of all the evidence we are satisfied that Mr O'Malley deliberately fail to declare all his betting income from the business.

71. There is no explanation for the shortfall in income to fund his personal expenditure. The level of understatement which we have found in this case effectively
5 doubles Mr O'Malley's net profit available for drawings. An understatement of income to that extent is a factor which points towards deliberate suppression on the part of Mr O'Malley. Mr O'Malley initially contended that the shortfall could be explained by personal betting winnings. Whilst there are no records of the personal betting we can see from the online betting activity that it was not successful. Mr
10 O'Malley was forced to suggest that his cash betting was more successful than his online betting. He was unable to suggest any reason why that should be the case.

72. The records maintained were inadequate and we have come to the conclusion that Mr O'Malley deliberately failed to maintain adequate records, in particular records of credit bets and cash drawings. He also ensured that there was no clear
15 dividing line between hedge bets and his own personal betting. The failure to maintain adequate records gave Mr O'Malley the opportunity to suppress his takings and we find that this was a matter of design rather than inexperience or carelessness.

Issue 3 – Level of penalties

73. Mr McLeod said in his evidence that Mr O'Malley had been extremely co-
20 operative in the exercise he carried out to obtain details of personal expenditure. Indeed he described Mr O'Malley as having been very forthright in this regard. We have taken this into account not only for the purposes of considering the appropriate level of penalties, but also in our assessment of the credibility of Mr O'Malley's evidence.

74. The income tax penalties for 2006-07 and 2007-08 were arrived at following a
25 reduction of 60%. There was a 5% reduction to reflect disclosure, a 35% reduction to reflect co-operation and a 20% reduction to reflect the seriousness of the conduct.

75. The income tax penalty for 2008-09 was arrived at on the basis that the conduct
30 was deliberate. There was a prompted disclosure so that the penalty range to be applied was between 35-70% of the potential lost revenue. A reduction of 70% of the difference was given to reflect the quality of disclosure leading to a penalty of 45.5% of the potential lost revenue.

76. The penalty in respect of Betting Duty was based on a 30% reduction. No credit
35 was given for an early and truthful declaration because the review officer was not satisfied this had happened. The 30% reduction was given for co-operation. The review officer considered that Mr O'Malley had not sought to obstruct the enquiry at all and had attended meetings and provided information when asked.

77. We are satisfied that the level of each of the penalties is appropriate, taking into
40 account Mr O'Malley's co-operation with HMRC during the course of their enquiries.

Further Matters

78. Neither Mr O'Malley nor Mr Nicholson suggested that the assessments were in any other way invalid. However we have considered whether the conditions in *section 29* were satisfied so as to justify discovery assessments for 2007-08 and 2008-09. We have found above that Mr O'Malley's conduct was fraudulent and deliberate so that the first condition in *section 29 TMA 1970* is satisfied. As such the discovery assessments were justified.

79. The enquiry windows for those returns closed on 8 October 2009 and 31 August 2010 respectively. At 8 October 2009 an officer could not have been reasonably expected, on the basis of the information made available to him before that date, to be aware of the understatement of tax. The second condition was therefore also satisfied in relation to the 2007-08 assessment.

80. By 16 August 2010 Mr McLeod was in a position to issue an assessment for 2008-09. The second condition was therefore not satisfied in relation to the 2008-09 assessment. However as we have found that the first condition was satisfied the assessment was justified.

81. In conclusion and for the reasons set out above we dismiss the appeals.

82. 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.

**JONATHAN CANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 9 August 2012