



TC02757

Appeal number: TC/2012/03649

CAPITAL GAINS – Partnership - Disposals of Real Property – Was the Appellant a partner – Yes – Were the properties partnership assets – Yes – Appellant liable to tax on the gains accrued from the disposals – Appeal dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

IFTIKHAR HASSAN BHATTI

Appellant

- and -

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

**TRIBUNAL: JUDGE MICHAEL TILDESLEY OBE
ROGER FREESTON FRICS**

**Sitting in public at Nottingham MJC, Carrington Street, Nottingham NG2 1EE
on 19 and 20 March 2013**

**Frank Christopher Webster, Business and Tax Consultant of K L Services for
the Appellant**

Alan Hall, Presenting Officer of the Appeals and Reviews Unit, for HMRC.

DECISION

The Appeal

1. The Appellant appealed against an amendment to the 2003/04 self assessment return dated 19 December 2008 in the sum of £38,348.80 tax due, and a discovery
5 assessment for the year ended 5 April 2007 dated 18 November 2010 in the sum of £8,879.00. HMRC's statement of case dated 25 May 2012 indicated that the amendment to the 2003/04 self assessment was now £10,536.

2. The issue concerned the Appellant's liability to pay capital gains tax on the disposal of two properties, the Equinox building (2003/04), and the James Nelson
10 buildings (2006/07). The disposal in relation to the Equinox building concerned an insurance payment following the building's destruction by fire. The parties agreed for the Tribunal to restrict its decision to one of principle, namely, the question of liability.

3. The Appellant argued that the Appeal was essentially a simple case. According
15 to the Appellant, the evidence conclusively showed that the Appellant held no legal or beneficial interest in the two properties during the years in question. The legal and beneficial interest in the said properties belonged to his brothers, Messrs Ali Hassan (known also as Tony) and Maqbool Hussein Bhatti (known also as Mike). Thus the Appellant could not have made a disposal of assets within the meaning of the
20 Taxation of Chargeable Gains Act 1992 (TCGA 1992). The Appellant asked the Tribunal to determine the disputed assessments in a nil amount. The Appellant also requested the Tribunal to consider an award of costs in his favour against HMRC.

4. HMRC disagreed, stating that the three brothers were in partnership as Central
25 Properties from 24 April 1989, and that the said properties were partnership property. The Appellant had signed the partnership self assessment return for 2003/04 in his capacity as nominated partner and a self assessment return for the same year in which he declared capital gains from the Equinox building. The 2006/07 discovery assessment arose from a disclosure made by Mr M H Bhatti's agent, Pierce CA Limited, Chartered Accountants, which the Appellant purportedly agreed to abide by.
30 According to HMRC, a coherent picture had been painted over many years of the Appellant being a partner of Central Properties, and sharing in the profits and losses across the partnership activities. There was no documentary evidence to substantiate the Appellant's assertion that he was an employee of the partnership. In those circumstances HMRC requested the Tribunal to confirm its decision that the
35 Appellant was liable for capital gains on the disposals of the said properties in accordance with his share in the partnership, namely one-third.

5. The Appeal was heard over two days on 19 and 20 March 2013. The
40 Appellant's case comprised a series of detailed submissions on law and fact which Mr Webster, his representative, presented in the form of written submissions with reference to eleven indexed folders. The Appellant provided the Tribunal and HMRC with a statement of truth dated 5 October 2012 but did not give evidence. Mr Webster advised that the Appellant did not understand the technical issues raised by the

Appeal, and that he was not fit to give evidence because of ongoing medical problems, despite his attendance at the hearing.

5 6. The Appellant initially intended to call a representative of Hacker Young and Partners, Chartered Accountants, to give evidence. Hacker Young had acted as Law
of Property Act receivers for the Nationwide Building Society in respect of the two
properties. Hacker Young, however, indicated that it could only adduce evidence
confirming its understanding of the position as set out in the correspondence already
provided to the parties for which it would charge £650 per hour plus expenses. The
Appellant's representative pointed out in a letter dated 10 January 2013 that his client
10 was unable to fund the costs of attendance of a Hacker Young representative, and
respectfully asked the Tribunal to consider accepting the validity of the legal position
as confirmed in Hacker Young's correspondence.

7. On 23 January 2013 the Tribunal responded:

15 "The Tribunal may not give either party advice about how to conduct
their case or what evidence may be needed to support their position or
what evidence will or will not be accepted by the judge at the hearing
or what evidence would be sufficient to support an assertion.

20 We are therefore unable to comment on whether or not your client
would be advised to call any witnesses or indeed any particular
witness, nor can we advise you as to whether the evidence by way of a
document will be challenged by HMRC or accepted by the judge at the
hearing as to do so might be to prejudice an issue which would not be
appropriate.

25 If your client does wish us to issue a witness summons, please let us
know".

8. The Appellant did not request an issue of a witness summons and no witness was called from Hacker Young.

30 9. HMRC called David Ian Hughes as a witness following the issue of a witness
summons dated 1 March 2013. Mr Hughes was a Chartered Certified Accountant who
said that he acted for the partnership of Central Properties comprising Mr M H Bhatti,
Mr A H Bhatti and the Appellant since September 1997. Mr Hughes ceased acting for
the partnership on its cessation and for the Appellant in June 2010 when he received
a letter from Karl Jackson Accountancy. The Tribunal admitted four bundles of
35 documents in evidence.

10. At the hearing Mr Webster objected to the late production of HMRC's bundle of authorities. The Tribunal offered Mr Webster an adjournment which was declined. The authorities related to the statutory requirements of discovery assessments, which were not a material issue in this Appeal.

40 11. Mr Webster applied to make a claim under the error or mistake provisions in
respect of the alleged excessive assessment for capital gains tax on the Equinox
building pursuant to section 33 of Taxes Management Act 1970. HMRC pointed out

that the error or mistake provisions had been replaced by a new section 33 inserted by schedule 1AB of the Finance Act 2009 which came into force for any new claims for overpaid tax from 1 April 2010. Further HMRC stated that under the new section a claim for relief for overpaid tax may not be made more than four years after the end of the relevant tax in which case the Appellant was time barred from pursuing such a claim. Mr Hall for HMRC, however, invited the Tribunal to deal with the Appeal on its merits under section 50 TMA 1970 as appeals against an amendment to a self assessment (section 28A TMA 1970) and against a discovery assessment (section 29 TMA 1970). Mr Hall considered this course of action to be fair and just because HMRC had accepted the Notice of Appeal, and the Appellant would suffer no prejudice if the Appeal was dealt with it on its merits. The Tribunal adopted Mr Hall's proposal.

12. The Notice of Appeal was lodged on 23 February 2012 which was outside the 30 day time limit. The dates of the disputed decisions were 22 September 2009 and 18 November 2010. The Appellant requested permission for extending the time limit in which to appeal, stating that he could not afford professional representation. HMRC did not oppose the application. The Tribunal gives effect to the agreement of the parties and extends the time limit for making the appeal until 23 February 2012.

Overview of the Law

13. The dispute engaged the principles of partnership law, TCGA 1992 and law of property.

14. Section 1(1) of the Partnership Act 1890 defines partnership as the relation which subsists between persons carrying on a business in common with a view of profit. Section 45 states that the expression "business" includes every trade, occupation or profession.

15. Section 2 sets out three rules for determining whether a partnership exists or does not exist. Joint tenancy, tenancy in common, joint property, common property or part ownership does not of itself create a partnership as to anything so held or owned. The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business.

16. Partnership arises by agreement express or implied. Most partnerships are produced intentionally by the express agreement of the partners. A formal partnership agreement, however, is not necessary in law to form a partnership. If two or more people are working together in such a way to bring their association within section 1(1) of the 1890 Act, then they are partners in the eyes of the law. As a general rule where people share in the profits and the management of a business they are partners even if they do not realise it.

17. Section 20(1) defines partnership property as

"All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course

of the partnership business, must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement”.

18. What is partnership property is a question of fact. The crucial question is what was intended by the partners (*Barton v Morris* [1985] 2 All ER 1032, [1985] 1 WLR 1257). Section 20(1) specifies three separate tests:

- (1) Was the property originally bought into the partnership stock?
- (2) Was it acquired by purchase or otherwise on account of the firm?
- (3) Was it acquired for the purposes and in the course of the partnership business?

19. Dissolution of a partnership may occur in several ways: by agreement of all the partners, by the withdrawal of one partner (section 26 of the 1890 Act) or by court order. After dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise (section 38 of the 1890 Act).

20. The Partnership Act 1890 is merely declaratory (*British Homes Assurance Corpn Ltd v Paterson* [1902] 2 Ch 404 at 410 per Farwell J) and, except so far as they are inconsistent with the express provisions of the Partnership Act 1890, the rules of equity and of common law applicable to partnership are still in force (section 46). As a general rule, the terms of an express partnership agreement will override the provisions of the 1890 Act.

21. Section 1(1) of the TCGA 1992 provides for tax to be charged on capital gains which is defined as chargeable gains computed in accordance with the 1992 Act and accruing to a person on the disposal of assets. Section 2 states that a person shall be chargeable to capital gains tax in respect of chargeable gains accruing to him in a year of assessment during any part of which he is resident in the United Kingdom.

22. Under section 21(1) of the 1992 Act, all forms of property are assets whether situated in the UK or not. The central concept of disposal is not defined by the Act. Disposal is said to include any form of transfer or alienation of the beneficial title to an asset (whether legal or equitable) from one person to another¹. Under Section 21(2)(a) a part disposal occurs where on a person making a disposal, any description of property derived from the asset remains undisposed of. Section 22 extends the scope of disposal of assets to capital sums received under a policy of insurance for any kind of damage or injury to, or the loss of assets.

23. The taxation of partnership capital gains is based on a body of HMRC practice superimposed on the general capital gains rules. There are few specific references to partnerships in the capital gains legislation. Where a trade is carried on in partnership,

¹ See Simons Tiley & Collison UK Tax Guide 2002:2003 paragraph 7:01

tax is charged on each partner separately in respect of chargeable gains on the disposal of partnership assets. Each partner is treated as owning a fractional share of each asset (section 59). Consequently, a transfer of an asset to a partnership as a capital contribution by a partner is treated as a part disposal, and changes in sharing ratios result in the disposal or acquisition of a share in partnership assets by each partner as his share increases or decreases.

24. Normally the quantum of each partner's interest in the asset will be determined by the terms of the partnership agreement but in default the provisions of section 24 of the 1890 Act apply, namely, each partner has an equal share in the partnership assets.

25. Section 1(1) of the Law of Property Act 1925 provides that the only estates in land which are capable of subsisting or being conveyed or created in law are an estate in fee simple in possession or a term of years absolute. Section 1(2) defines those interests or charges in or over land which are capable of subsisting or of being conveyed or created at law and include easements, rentcharges, charges by way of legal mortgage, land tax and rights of entry. Section 1(3) states that all other estates, interests and charges in or over land take effect as equitable interests. Section 53(1)(b) of the 1925 Act requires any private trust of land to be in writing.

26. As regards registered land, the register records the ownership of the legal estate, not the beneficial interests, and the Registrar is not affected with notice of a trust (see section 78 of the Land Registration Act 2002). A person dealing with the registered proprietors can assume that they have unlimited power to dispose of the estate or charge concerned, free from any limitation affecting the validity of the disposition, unless there is a restriction or other entry in the register limiting their powers, or a limitation imposed under section 26 of the Land Registration Act 2002. Thus if two or more persons are registered as joint proprietors, a purchaser can safely acquire the legal estate from the survivor of them, unless there is a restriction to the contrary in the register. With private trusts, the duty of applying for any necessary restrictions falls on the trustees, though a beneficiary may also apply.

27. Under section 22 of the Partnership Act 1890, real property belonging to partners was regarded in equity as personalty subject to the expression of a contrary intention. Section 3 of the Trusts of Land and Appointment of Trustees Act 1996 repealed section 22 and abolished the doctrine of conversion under which a beneficial interest under a trust for sale was deemed to an interest in the monetary value of the land.

28. Where a legal estate in land is vested in partners as part of their partnership property, it is held by them as joint tenants. The legal estate in the land is accordingly subject to the rights of survivorship which are incident to a joint tenancy, but the beneficial interest in the partnership property is held exclusively for the purpose of the partnership and in accordance with the partnership agreement. Similarly where land which is partnership property is vested at law in one partner, the other partner(s) has

an equitable right to his share and thus a right to have a share in the proceeds of sale of the land².

29. Until 1 December 2003 stamp duty was charged on specific categories of instruments referred to in schedule 13 of the Finance Act 1999 including those
5 dealing with sales of land and bearer instruments referred to in schedule 15 of the Finance Act 1999. The Finance Act 2003 abolished stamp duty in relation to instruments dealing with interests in land, and was replaced by stamp duty land tax. Stamp duty of £5 continued to apply until abolished in the 2008 Finance Act to a
10 declaration of any use or trust of or concerning property except a will unless the instrument constituted a conveyance or transfer on sale.

The Facts

The Disputed Transactions

30. The Appellant declared in his self assessment tax return for 2003/04 that he was in a partnership known as Central Properties, and that he made a gain on an asset
15 known as the Equinox building, Market Street, Nelson which was acquired on 16 March 1998 and disposed of on 6 April 2003. The disposal proceeds for that asset was stated to be £335,405.99 against which the Appellant set off losses arising from the disposals of 2,4, and 22-30 Market Street, Nelson; 65 Scotland Road, Nelson and Unit 2 Lonsdale Street, Nelson. The Appellant declared a total taxable gain after allowable
20 losses and taper relief of £36,569.30.

31. The Appellant was also the nominated partner for the partnership tax return for Central Properties. The Appellant included in the partnership return for the year ending 30 April 2004 a sheet detailing the partnership disposal of chargeable assets which stated that the partnership disposed of the Equinox building, Market Street for
25 £1,007,224.00. The disposal was described as a partial disposal as a result of a fire.

32. The Equinox building was originally described as the Grand Cinema. A historical copy of the register of title LA 574212 dated 3 February 1997³ described the freehold land in the registered title as being the Grand Cinema, 2, 4 and 12 to 30
30 (even) Market and 38 Cross Street, Nelson. The registered proprietors as at 4 February 1997 were Maqbool Hussain Bhatti and Ali Hassan Bhatti. The charges register contained an entry that a lease in respect of the Grand Cinema was surrendered on 3 May 1994 with Unit 4 Cinemas as one party and Ali Hassan and others (the Landlords). There was also a registered charge in favour of the Nationwide Building Society dated 4 February 1997.

35 33. The registered title for LA 574212 as at 20 March 2002 was restricted to 2, 4 and 12 to 30 (even) Market Street and 38 Cross Street, Nelson. The registered

² See para.119 Halsbury's Laws of England (Partnership Volume 79 (2008) 5th Edition).

³ At B6.7 document file: the copy showed the entries in the register of title on 4 February 1997.

proprietors of Maqbool Hussain Bhatti and Ali Hassan Bhatti remained the same. Nationwide Building Society retained the registered charge over the property.

5 34. Subsequent enquiries of the Appellant and his agent, Mr Hughes revealed that the partnership trading as Central Properties acquired the Equinox building on 30 June 1989 at a cost of £344,955. Enhancements to the property in the value of £26,280 were carried out on 30 April 1997. The Equinox building was originally let to Apollo Cinemas and later let to TA Entertainment for use as a nightclub. The Equinox building was destroyed by fire on 28 May 2000.

10 35. Three payments were made by the insurance company following the fire to the Equinox building which were £100,000 (20 October 2000), £350,000 (9 May 2001) and £807,390.33 (6 February 2002). The last two payments were made by Salisbury Hamer Aspden & Johnson, Surveyors, Valuers, Loss Assessors, Commercial Property Agents of 20-22 Hargreaves Street, Burnley to a client premium account of Steele & Son, solicitors. The client premium account was named as *Bhatti TA Central*
15 *Properties*⁴.

36. The registered title for LA 574212 restricted to 2, 4 and 12 to 30 (even) Market Street was sold by Hacker Young, the law of property receivers for Nationwide Building Society, for £118,000 to Pendle Borough Council.

20 37. The dispute regarding the amendment to the 2003/04 self assessment concerned the gain arising from the insurance pay out on the Equinox building, and by implication the losses declared on the disposals of to 2, 4 and 12 to 30 (even) Market Street, 65 Scotland Road, Nelson (£35,000 on 11 July 2003⁵), and Unit 2 Lonsdale Street (£18,500 on 6 April 2003⁶).

25 38. The discovery assessment of 18 November 2010 arose from a disclosure made by M H Bhatti's representative, Pierce CA Limited⁷, which showed a chargeable gain of £144,555 split three ways equally between the Bhatti Brothers on the sale of James Nelson Buildings. The taxable gain attributed to the Appellant was £39,385 after the annual exemption of £8,800. According to HMRC, the Appellant did not declare the taxable gain in his tax return for 2006/07.

30 39. The James Nelson Buildings were registered under title number of LA645545. The entry as at 29 November 2001 showed that Maqbool Hussain Bhatti and Ali Hassan Bhatti were the registered proprietors, and that a purchase price of £90,000 was paid for the property on 17 September 1996. Nationwide Building Society had a registered charge over the property dated 29 November 2001.

⁴ See documents B3.3 to B3.7.

⁵ See document B1.3

⁶ See document B1.5

⁷ See document 105 where the note of phone call by the Appellant on 18 September 2010 stated that he had gone to Pierce/s same as his brother Mike.

The Partnership

40. According to HMRC, the Appellant submitted personal self assessment tax returns for years 1996/97 to 2003/04 inclusive on which he declared income/gains from the partnership Central Properties. HMRC adduced copies of the partnership
5 returns from 2000 to 2004 which named the Appellant as the nominated partner. HMRC's self assessment record of the partnership showed three partners for Central Properties: Mr I Bhatti (the Appellant), Mr M H Bhatti and Mr A H Bhatti, with a start date of 24 April 1989 and an end date of 23 November 2003. The partnership returns declared interest and other finance charges as allowable expenses against the
10 income of the partnership.

41. Mr Sidat acted as the accountant for the Bhatti brothers trading as Melbourne Guest House & Central Properties for the years ended 30 April 1992 to 30 April 1997. The income and expenditure accounts for the years ended 30 April 1992 and 30 April
15 1994 revealed two income sources, guest houses, and property and market stall lettings. Loan interest was included in the overheads for the partnership. The accounts stated that profit was allocated 40 per cent each to the Appellant and Mr A H Bhatti with 20 per cent to Mr M H Bhatti. The schedule of properties to the balance sheet as at 30 April 1994 contained an entry of Central Properties and Markets at a value of
20 £404,950. The Tribunal understands that the Equinox building was part of Central Properties.

42. Mr I Sagar, HM Inspector of Taxes, made enquiries of the partnership accounts for the three years ending 30 April 1994. Mr Sagar pointed out that the partnership should cease purchasing properties for business with a loan in the MIRAS scheme. He
25 also disallowed a claim by the Appellant for wages as a rent collector on the ground that he was a partner in the business.

43. Mr Hughes acted as the accountant for the partnership of Central Properties comprising the Appellant, Mr A H Bhatti and Mr I H Bhatti from September 1997 to 31 July 2009. Mr Hughes continued to act for the Appellant until June 2010. Mr
30 Hughes had no knowledge of the circumstances surrounding the disposal of The James Nelson Buildings.

44. At a meeting on 14 March 2007 with Miss Neczypor of HMRC, Mr Hughes and Mr M L Bhatti explained that during the 1990's the Bhatti brothers had bought various properties around the Burnley/Nelson area using mortgaged finance from The
35 Nationwide, and HSBC. Originally some of the properties had traded as Bed and Breakfast establishments but these had been sold and replaced by other properties that were let normally. The partnership had encountered difficulties in paying the mortgages, which resulted in the Nationwide appointing Hacker Young as law of property receivers in February 2002, and HSBC appointing Robson Rhodes as the receiver for Riverside Mills on 25 November 2003.

40 45. According to Mr Hughes, the purpose of the partnership was to purchase and develop properties for resale to third parties or for local council partnership. Mr Hughes explained in evidence that he submitted partnership tax returns as instructed and approved by the partners. The Appellant was selected as the lead partner. Mr

Hughes took the guidance of the partners on their respective shares of the insurance proceeds. Mr Hughes also submitted the Appellant's self assessment tax returns with the Appellant's approval as attested by his signature on the returns.

46. Mr Hughes was told by the Bhatti brothers that they operated as a partnership.
5 Mr Hughes was not aware of the existence of a formal partnership agreement. Mr Hughes stated that none of the three brothers queried the capital gain on the insurance pay out, and their respective shares of the gain. According to Mr Hughes, the Appellant gave no intimation that he did not own the properties.

47. Mr Hughes accepted that he made no enquiries about the ownership of the
10 properties. Mr Hughes explained that the funds from the Nationwide mortgage replaced the previous funding arrangements provided by the National Westminster bank. Mr Hughes did not enquire about the arrangements of the Nationwide mortgage. Mr Hughes was unable to give a specific example of a property development undertaken by the brothers trading as Central Properties.

48. Mr Hughes in a letter dated 6 November 2002 advised Mrs Tibbles of The
15 Abbey National that the Appellant was a partner in Central Properties along with Mr M H Bhatti and Mr A H Bhatti, and that he had regular drawings of £1,666.66 per month. The accounts for Central Properties from 18 December 2001 to 15 April 2004⁸ confirmed that the Appellant and his two brothers were in receipt of monthly
20 drawings of £1,666⁹. The accounts also showed that each brother was allocated £50,000 each following the payment of £771,800 from Salisbury Hamer in relation to the insurance claim on the Equinox building.

49. Mr Hughes provided a copy of an action plan for Central Properties¹⁰ which was
25 prepared in response to HSBC's concerns about the business. The action plan was addressed to the Bhatti brothers. The plan identified a range of actions which included, amongst others, the writing of development plans for each property, a trust deed and a partnership agreement to be signed by each partner, and no decision made individually by each partner that would affect the partnership. At D3.14 the document
30 entitled *Strategy for Petty's* referred to the sale of James Nelsons' land to a house builder, and the sale of 15 apartments in James Nelsons building or sale of building for apartment scheme to a house builder.

50. In February 2012 the Appellant brought a claim against Mr Hughes for
35 professional negligence in respect of his handling of the capital gains arising from the insurance payout associated with the Equinox building. The claim was being dealt with under Mr Hughes' professional indemnity insurance.

⁸ See documents D3.18-3.28

⁹ M H Bhatti started to receive regular drawings of £1,666 along with his brothers from 2 October 2002. Mr Hughes informed the Tribunal that Mr M H Bhatti had an employed job outside the partnership which explained why on occasions he had a lower profit share and less drawings than his brothers.

¹⁰ The action plan is undated. The Tribunal considers it was drafted around 2000/01 having regard to the reference made to the Trust deed which was dated May 2001.

51. On 8 March 2012 Mr A H Bhatti contacted Mr Hughes asking him to act as the accountant for his new company. Mr Hughes declined because of the Appellant's pending claim against him. Mr A H Bhatti considered the claim ridiculous stating that

5 "I did tell you on many occasions to just get rid of them two like I had
too..... I am sure there is a partnership agreement at Steele and Sons
solicitors which states that all three brothers were responsible for any
liabilities together even though one may not have been on some of the
properties at the Land Registry. All profits from the sale of the
10 properties or from any insurance claims were divided equally as all
liabilities were".

52. The bundle included the following documents with a heading of Central Properties:

- 15 (1) A letter dated 2 May 1997 to Nationwide Building Society from A H Bhatti and M H Bhatti confirming the full and correct names of both partners.
- (2) A letter dated 17 June 1998 to Mr Wilcox of Nationwide from A H Bhatti advising on various aspects of Central Properties' business. The letter named A H Bhatti and M H Bhatti as partners. The letter also stated that Mr I H Bhatti and Miss V Ramirez now ran the management on a full time employment basis.
- 20 (3) A letter dated 8 July 1999 to David Hughes setting out various matters signed by the Appellant which named A H Bhatti, I H Bhatti and M H Bhatti as partners. The address on the letter was James Nelson Sports Complex.
- (4) A second letter with an address of James Nelson Sports Complex dated 8 July 1999 to HM VAT signed by the Appellant who gave notification to waive exemption (option to tax) in relation to the Equinox building.
- 25 (5) A letter dated 13 May 2001 to Mr McBride setting out the time schedule for the completion of office and warehousing accommodation at Livingstone Mill. The letter was signed by the Appellant and named A H Bhatti, I H Bhatti and M H Bhatti as partners.
- 30 (6) A letter dated 4 June 2001 to Mr Alty referring to a revised lease agreement for Units 4, 5 and 8 Livingstone Mill. The letter was signed by the Appellant and named A H Bhatti, I H Bhatti and M H Bhatti as partners. The lease was dated 25 June 2001 for a term of five years and granted by Central Properties.
- 35 (7) Faxes between the Appellant and A H Bhatti dated 17 and 19 September 2001 regarding the direction of the business for Central Properties. The strap line read: *Central Properties – Land, Residential, Industrial, Development and Investment*. The fax from A H Bhatti asked the Appellant to help the partnership to refinance the whole portfolio through the Appellant's contacts. A H Bhatti requested the Appellant to keep all options open including any one interested in
40 taking out Nationwide, HSBC, and the reinstatement on Market Street and Connect 4.

(8) Fax dated 6 January 2003 from A H Bhatti giving notice to the Appellant and M H Bhatti to dissolve the partnership. M H Bhatti acknowledged receipt. The Appellant did not.

53. The bundle also contained correspondence between the brothers trading as Central Properties with Barclays Bank dated 8 June 1993, and Halifax PLC dated 12 March 2001 regarding funding for the business.

54. The Appellant supplied his representative (Mr Webster) with a statement of truth dated 5 October 2012. The Appellant, however, chose not to give evidence which affected the weight given to the statement.

55. The Appellant stated that in 1996 the Nationwide took over the properties, and made title absolute in February 1997. According to the Appellant, the properties were charged to the Nationwide in the sole names of A H Bhatti and M H Bhatti and not in the Central Properties trading partnership. The Appellant asserted that he told Mr Hughes from the beginning that he did not own the properties. When the Appellant received the tax bill in August 2008 Mr Hughes told the Appellant that it had nothing to do with him and that his brothers would be liable to any shortfall due to Nationwide. The Appellant stated that he held no beneficial ownership in the properties and did not put any of his own money into acquiring the properties.

56. The Appellant asserted that in February 2002 the partnership ceased trading, and the properties were taken into receivership by Hacker Young who dealt with his two brothers and Mr Hughes direct. The Appellant pointed out that he attended Mr Hughes' office to sign the tax returns. The Appellant simply relied on his professional competence to ensure the entries were correct.

57. On 10 September 2009 the Appellant met Ms Neczypor of HMRC to discuss the capital gains computation relating to the Equinox building. The Appellant believed that the purchase price of £344,955 was understated and that it should be around £450,000. The Appellant also said that the disposal costs were £150,000 not £1,007,000. Ms Neczypor pointed out that the disposal related to the insurance pay out not the sale of the other properties to the Local Authority. Finally the Appellant said that he had not received any money from the sale of the Equinox building and that his name was not on the deeds for the property.

The Funding of the Property Portfolio and Appointment of Receivers

58. In June 1996 the Nationwide Building Society agreed to provide an advance of £890,000 for a period of 240 months to M H Bhatti and A H Bhatti for the following purposes:

(1) To re-mortgage existing National Westminster Bank and Royal Bank of Scotland loans for £660,000.

(2) To repay the existing National Westminster Bank overdraft totalling £80,000.

(3) To provide £90,000 to purchase the freehold of James Nelsons Sports Club.

(4) To provide £40,000 to level the existing sloping floor and ceiling of the Grand Cinema on Market Street, Nelson.

5 (5) To provide £20,000 towards solicitors' costs, valuation expense, arrangement fees and other expenses.

59. The Nationwide required A H Bhatti and M H Bhatti to provide security to the loan in the form of the Market Street properties, 65 Scotland Road, Prospect Buildings, Whitefield Mill, Units 1 & 3 Lonsdale Street, Bankfield Flats, Melbourne House, Woodthorpe, Pendle Lodge, Oakdene, Prairy Guest House, and James Nelson's Sports and Recreation Club.

60. It would appear that the Nationwide provided a further advance of £30,000 on 19 February 1997 and altered the mortgage arrangement to a fixed rate on 21 April 1997.

15 61. On 28 July 1998 the Nationwide corresponded with A H Bhatti and M H Bhatti about their discussions on a further advance. The Nationwide was not convinced that further borrowing was the ideal solution. The Nationwide perceived that the business was being squeezed for cash by the necessity to fund ongoing developments at the same time as income was being reduced from the residential investment properties.

20 The Nationwide suggested that the two brothers seek the advice of Hacker Young, Chartered Accountants, on the formulation of a plan to redirect the business and bring a sharper focus on the profitable areas, whilst exiting from those activities which represented a cash drain. It is not clear whether the two brothers took up the offer of help from Hacker Young, although the timing of the move away from bed and breakfast establishments appeared to coincide with the advice.

25 62. On 27 February 2002 the Nationwide appointed Hacker Young as Law of Property Receiver for the portfolio of properties used as security for the Nationwide mortgage. The portfolio at the time of the appointment comprised 2,4, and 22 to 30 (even) Market Street, 38 Cross Street, 65 Scotland Road, Prospect Buildings, 3 Raglan Street, Unit 2 Lonsdale Mill (registered proprietor was A H Bhatti alone), Whitefield Mill and James Nelson Sports Club.

35 63. Hacker Young's powers as a receiver under the Law of Property Act were restricted to the properties which were the subject of the Nationwide's legal charge. The powers included sale, collecting rent and looking after the properties, and did not extend to the business affairs of the partnership. Hacker Young had a duty to act in the interests of the Nationwide.

40 64. In a letter dated 20 April 2004 Hacker Young confirmed to Mrs Cowking of Houldsworths, Solicitors¹¹ that Lonsdale Mill, 2,4 and 22-30 Market Street, and 65 Scotland Street had been sold, and that Whitefield Mill, James Nelson and Prospect Buildings had been marketed. Hacker Young was unable to provide an accurate

¹¹ It would appear that Mrs Cowking was acting for the Appellant.

asking price for James Nelson but had received offers in the region of £1.2 million. The receiver's receipt and payments account to 5 April 2005 showed receipts of £716 million and payments of £580 million. Hacker Young said that it had no involvement with the partnership, and unable to confirm the level of partnership liabilities.

5 65. In a letter dated 12 December 2003 to Pollard Bower Solicitors, Hacker Young confirmed again that the Appellant was not a party to the Nationwide loan accounts or the receivership. Further A H Bhatti and M H Bhatti would be liable for any shortfall owing to Nationwide after the sale of remaining properties.

10 66. In a letter dated 19 February 2004 Hacker Young advised Mrs Cowking of Houldsworths Solicitors that its Mr Cook and Mr Hancock were appointed as receivers over the property portfolio subject to the Nationwide mortgage. Hacker Young was unable to provide any further information as the appointment related only to A H Bhatti and M H Bhatti and not to the Appellant.

15 67. On 10 November 2011 Mr Hancock of Hacker Young wrote to the Appellant saying that:

20 "You were not the legal owner of any of the properties in the attached list and were not subject to the liability of the mortgage either. At no time were we ever informed you were a partner, and therefore never considered you as the owner of the properties or personally liable under the terms of the mortgage due to the Nationwide Building Society".

25 68. On 25 November 2003 HSBC Bank PLC appointed Mr Escott of RSM Robson Rhodes as Law of Property Act receivers in respect of legal charges over the properties at Livingstone Mills and Riverside Mills. The legal title to Riverside Mills was in the name of M H Bhatti who took out the mortgage on the property. The legal title of Livingstone Mills was in the joint names of the Appellant, A H Bhatti, and M H Bhatti. The mortgage for Livingstone Mills was in the names of the three brothers.

30 69. The Appellant and his solicitor engaged RSM Robson Rhodes in correspondence between 23 February and 22 December 2004. In a letter dated 19 April 2004 RSM Robson Rhodes advised the Appellant's solicitors that it had no information on the total liabilities of the partnership as it was not appointed in respect of Central Properties. Robson Rhodes confirmed that its appointer, HSBC Bank Limited, was owed £379,273 in respect of the legal mortgages on Riverside Mill and Livingstone Mill. On 22 September 2004 Robson Rhodes wrote to the Appellant's
35 solicitors advising that it had written to all the partners of Central Properties including the Appellant seeking their agreement to make an initial distribution of £330,000 to be divided equally between the partners. The distribution related to the sale proceeds of both Livingstone Mills and Riverside Mills. On 17 November 2004 Robson Rhodes confirmed that it had made an initial distribution of £330,000 divided equally between
40 the three partners. On 22 December 2004 Robson Rhodes stated that it had received approval from all the partners concerning the receipts and payments account and the distribution of the remaining funds.

Deed of Declaration

70. Bundle part 4 of 4 included a Deed of Declaration of Trust dated 31 May 2001 between the three brothers. Steele and Son, solicitors, had supplied a copy of the Trust Deed which was signed by the three brothers in the presence of witnesses. The deed
5 stated that the three brothers were trading together as Central Properties.

71. The recital to the deed stated that

(1) The property described in the First Schedule hereto is vested in the sole name of Maqbool Hussain Bhatti.

10 (2) The properties described in the Second Schedule are vested in the joint names of Maqbool Hussain Bhatti and Ali Hassan Bhatti.

(3) The property described in the Third Schedule is vested in the joint names of Maqbool Hussain Bhatti, Ali Hassan Bhatti and Iftikharul Hassan Bhatti (the Appellant).

15 (4) The parties hereto have traded as partners and have acquired the properties in the First Second and Third Schedules as part of their partnership assets subject to the various charges and encumbrances applicable thereto.

(5) It has been agreed between the parties that the properties hereinafter described in the schedules hereto shall be held on the trusts and terms hereinafter declared subject to all existing encumbrances and charges.

20 72. The Deed witnessed as follows:

(1) Maqbool Hussain Bhatti declares that he holds the property in the First Schedule upon the trusts herein set out.

(2) Maqbool Hussain Bhatti and Ali Hassan Bhatti hereby declare that they hold the properties in the Second Schedule upon the trusts herein set out.

25 (3) Maqbool Hussain Bhatti Ali Hassan Bhatti and Iftikharul Hassan Bhatti (the Appellant) hereby declare that they hold the properties in the Third Schedule upon the trusts herein set out.

30 (4) The respective parties hereto declare that they will hold the respective properties as Trustees upon trust to sell the same with power to postpone such sale and that they will hold the net proceeds of sale and net rents and profits until sale upon trust for themselves as tenants in common in equal shares upon the trusts applicable thereto as part of their subsisting partnership assets of Central Properties.

35 (5) The respective parties hereby declare that all liabilities attributable to the properties shall also be borne by them in equal shares AND that they will indemnify each other in the event that any of them makes or is called upon to make any disproportionate payment or meet any disproportionate liability limited to such equalising payment or liability.

(6) The parties hereby undertake with each other to execute when called upon so to do any deed charge transfer or other document necessary to give effect to this deed at their joint expense.

73. The properties in the various schedules were as follows:

5 (1) The First Schedule: Riverside Mills

(2) The Second Schedule: Grand Cinema, 2, 4 and 12-30(even) Market Street and 38 Cross Street, 65 Scotland Road, Unit 2 Lonsdale Street, Prospect Buildings and 3 Raglan Street, Wickworth Street, and Whitefield Mill.

(3) The Third Schedule: Livingstone Mills.

10 74. At the hearing on the 19 March 2013 Mr Webster for the Appellant argued that the Deed of Declaration of Trust should not be admitted in evidence by virtue of section 14(4) of the Stamp Act 1891 which provides that an instrument shall not be given in evidence in civil proceedings unless it is duly stamped in accordance with the law in force at the time. According to Mr Webster, if the Trust Deed had been drawn
15 up on the basis of a transfer of an equitable interest or part ownership in the stated properties, stamp duty under the then Stamp Act 1891 as applied by schedule 13 of the Finance Act 1999 would have been payable.

75. Mr Webster gave no prior notice of his application. Mr Hall for HMRC considered that the document should be admitted in evidence as it was included in the
20 bundle of documents. The Appellant gave no evidence about the circumstances surrounding the execution of the Deed even though he had signed it in the presence of a witness. The bundle contained a photocopy of the Deed. The Tribunal was unaware of any attempt by either party to obtain the original Deed to ascertain whether in fact it had been stamped.

25 76. The Tribunal is satisfied that the copy Deed was genuine it was signed by the three brothers in the presence of witnesses, and prepared by solicitors, Steele and Son. The solicitor's letter dated 30 May 2001 addressed to Tony (A H Bhatti) at Central Properties indicated that the Deed had been drawn up at the behest of the three brothers, and that the Appellant held the original Deed for signature.

30 77. Mr Webster did not specify which head of charge under schedule 13 of the Finance Act 1999 applied to the Deed but left it to the Tribunal to decide. The Tribunal considers that it was more than likely that the Deed attracted a charge, particularly as paragraph 17 of schedule 13 imposed stamp duty of £5 on a declaration of trust concerning property. This charge was abolished in 2008 in respect of a Deed
35 not constituting a transfer or conveyance on sale. The Tribunal, however, takes the view when determining an application to exclude evidence the onus was on the Appellant to prove what he asserted which would include the specific head of charge.

78. As at 2001 Inland Revenue had no power to impose a penalty for a failure to stamp a document and could not sue for duty on unstamped documents. The purpose
40 of section 14(4) was to provide Inland Revenue with a means to enforce the payment

of the stamp duty. The irony with this application is that, if successful, it may prevent HMRC from recovering tax.

5 79. Rule 15(2)(a) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 enables the Tribunal to admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom. This power must be exercised in accordance with the overriding principle of treating cases fairly and justly, which involves the Tribunal in weighing up a range of competing factors.

10 80. The Tribunal's starting point is that all relevant evidence should be admitted unless there is a compelling reason to the contrary¹². The Deed contained declarations by the brothers about being in partnership and the identity of properties acquired as part of their partnership assets. The contents of the Deed were relevant to the issues in this Appeal. The admission of the Deed, if chargeable with duty, would, however, undermine the statutory policy enshrined in section 14(4), and potentially prejudice the Appellant's case.

15 81. The Tribunal refuses the Appellant's application to exclude from evidence a copy of the Trust Deed dated 31 May 2001. The Tribunal is not satisfied that the Appellant has made out the grounds of his application. He has not produced the original Deed to establish whether it was stamped or not. The solicitors at the time indicated that the Appellant held the original Deed. Further the Appellant did not specify which head of charge under schedule 13 of the Finance Act 1999 applied to the Deed.

25 82. In the alternative, the Tribunal would have exercised its discretion under rule 15(2)(a) to admit the copy Deed. The Tribunal considers that the authenticity of the Deed, and its relevance to the dispute, together with the Appellant's reluctance to enlighten the Tribunal about the circumstances of its making outweighed the potential prejudice to the Appellant, and the compromising of the statutory purpose for section 14(4).

83. Mr Webster made other submissions about the legal effect of the Deed, which will be examined later in the decision.

30 ***The Grand Cinema Site (the Equinox building) and 12-20 Market Street***

84. In July 1999 the Appellant dealt with the voluntary registration of Central Properties for VAT in connection with the letting of the Equinox building as a nightclub. The Appellant declared himself as a partner in the business when completing the questionnaire on the voluntary registration.

35 85. On 10 May 2001 Salisbury Hamer who handled the insurance claim following the fire at the Equinox building sent a fax to the Appellant and his two brothers

¹² Per Lightman J in *Mobile Export 365 ltd and another v Revenue and Customs Commrs* [2007] EWHC 1737 (Ch) at paragraph 20. LCJ Goddard in *Kuruma, Son of Kaniu v The Queen* [1955] AC 197 said ... the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.

confirming that he had passed onto the insurance company their willingness to accept a final settlement of all claims relating to this incident, on the basis of a cash settlement at £1,250,000.

5 86. On 8 December 2004 Inghams, solicitors, wrote to Mr Hughes advising him that they acted on behalf of the three brothers in connection with the sale of the Grand Cinema site in Market Street, Nelson. Mr Hughes was asked to confirm that the brothers had not elected to charge VAT on the consideration, and are not in fact VAT registered.

10 87. On 20 December 2004 Inghams informed the Appellant that there was £99,823.34 from the proceeds of the sale which was divisible between the brothers. Inghams enclosed a cheque to the value of £33,274.4 payable to the Appellant in respect of his one third share from the proceeds.

Consideration

15 88. Section 1(1) of TCGA 1992 provides that tax shall be charged in respect of capital gains accruing to a person on the disposal of assets. The Appellant did not dispute that the assets which gave rise to the disputed assessments had been disposed of, and that their disposals in the particular years resulted in an overall capital gain.

20 89. In the amendment to the 2003/04 self assessment, the disposal was the receipt of a capital sum under a policy of insurance in relation to the damage to the Equinox Buildings. Under section 22(4) of the 1992 Act the receipt of such a capital sum constituted a disposal even though no asset was acquired by the insurance company on payment of the sum of the money. The Appellant in his 2003/04 self assessment return set off the purported capital gains from the insurance payment against losses in connection with the disposals of 2,4, and 22-30 Market Street, 65 Scotland Road, and
25 Unit 2 Lonsdale Street. The fact of those disposals was evidenced by the letter of Hacker Young at B1.13, and not challenged by the Appellant.

30 90. The 2006/07 discovery assessment involved the disposal of the James Nelson Buildings which was evidenced by means of a chargeable gain computation supplied by M H Bhatti's representative, Pierce CA Limited. Mr Webster for the Appellant questioned whether Pierce CA Limited had the necessary authority to release such information. The Appellant did not, however, challenge the fact of the disposal.

35 91. The issue in this Appeal was whether the Appellant was the person to whom the capital gains accrued from the disposal of assets referred to in the above two paragraphs. The Appellant contended that he had no legal title or beneficial interest in the above properties, and that his representatives at the times in question had erroneously attributed to him one third of the capital gains arising from the disposal of the said properties. Thus the Appellant did not own the assets, and not entitled to the proceeds of their disposal.

40 92. HMRC accepted that the legal titles to the Equinox building, James Nelson Buildings, 2, 4, and 22-30 Market Street, 65 Scotland Road, and Unit 2 Lonsdale

Street were registered in the names of the Appellant's two brothers, A H Bhatti, and M H Bhatti. HMRC, however, argued that the Appellant's liability for capital gains tax arose from his position as a partner in partnership with his two brothers trading as Central Properties. According to HMRC, the assets in question constituted partnership property, which meant that the Appellant had a beneficial interest in the said assets. The Appellant was, therefore, treated as disposing his fractional shares of the assets when they were disposed to an outside party and liable to tax on a proportion of the gains made in accordance with the ratio of his share in the assets.

93. Mr Webster for the Appellant considered the partnership issue to be a red herring which was introduced by HMRC as a deliberate act to mislead the Tribunal.

94. The Tribunal disagrees with Mr Webster's assessment of the significance of the partnership issue. The Tribunal considers the determination of this issue central to the resolution of the dispute, involving the examination of the following two questions:

(1) Did the Appellant, A H Bhatti and M H Bhatti under the name of Central Properties carry on a partnership within the meaning of the Partnership Act 1890?

(2) Were The Equinox Buildings, James Nelson Buildings, 2, 4, and 22-30 Market Street, 65 Scotland Road, and Unit 2 Lonsdale Street partnership property belonging to the three brothers?

Central Properties – a partnership?

95. Mr Webster for the Appellant argued that the word "partner" had an everyday usage. The mere fact that individuals who jointly owned property may refer to each other as partners did not render them a partnership under the Taxes Acts. Mr Webster referred to HMRC's advice on *When does a Partnership Exist* (PIM 1030) which said:

"Most cases of jointly owned property will fall short of the degree of business organisation needed to constitute a partnership. To accept that a partnership exists you would have to be satisfied that there is a similar degree of business organisation as in an ordinary commercial business. This means more than treating rental income as derived from a business of letting property – it must be a business apart from that.

On the other hand, where it has been accepted that a partnership already exists and has income from property belonging to the partnership, the presumption would normally be that the letting is part of the partnership business and there is more than mere joint ownership".

96. According to Mr Webster, the brothers trading as Central Properties did not undertake any adventure in the nature of a trade. The brothers used Central Properties as an administrative name for the purposes of collecting their own individual legal entitlement to rental income derived from the letting of their personally owned property. Mr Webster asserted that the brothers operated in a personal capacity of

landlord and carried out the letting of each property using the name of Central Properties.

5 97. Mr Webster contended that the income from the letting of properties was not trading income for taxation purposes. Such income was assessed to tax under Schedule A (section 15 of Income and Corporation Tax Act 1998), and now under sections 268 to 272 of Income Tax (Trading and Other Income) Act 2005. Mr Webster stated that in 1996 when the brothers gave up offering services of bed and breakfast under the trading name of Melbourne Guest House they ceased to be a trading partnership. Since that date the only source of income was from the letting of properties, which did not constitute trading income within the definition of section 45 of the Partnership Act 1890. Essentially Mr Webster's argument was that a partnership cannot exist if its only source of income was from property because that did not constitute a trade within the meaning of the Taxes Acts.

15 98. Mr Webster also submitted that the Appellant in any event ceased to be a partner with his brothers when the property portfolio was re-mortgaged with the Nationwide. Mr Webster relied on correspondence from Hacker Young which stated that the Appellant was not a party to the mortgage, and had no legal interest in the properties given as security. Mr Webster also referred to a letter dated 17 June 1998 to Mr Wilcox of Nationwide which stated that the Appellant and Miss V Ramirez ran the management of Central Properties on a full time employment basis.

25 99. The existence of a partnership depends upon whether the requirements of the Partnership Act 1890 have been met. Section 1(1) of the Partnership Act 1890 defines partnership as the relation which subsists between persons carrying on a business in common with a view of profit. Section 2(3) of the 1890 Act states that the receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner of the business.

30 100. *R v Robson* (1885) 16 QBD 137 at 140 described a partnership as a joint operation for the sake of gain. In *Fenston v Johnstone (HM Inspector of Taxes)* 23 TC 29 at 34 & 35 Mr Justice Wrottesley cited with approval a passage from *Lindley on Partnership*:

35 " Now turning to Lindley on Partnership, page 44 of the Tenth edition, I find these words: An agreement to share profit and losses in the sense of making good the losses if they are sustained, may be said to be a type of partnership contract. Whatever difference of opinion there may be as to other matters, persons engaged in any trade, business, or adventure upon the terms of sharing the profits and making good all losses arising therefrom are necessary to some extent partners in that trade, business or adventure, nor is the writer aware of any case (unless it be Jane) in which persons who have agreed to share profits and losses in this sense have held not to be partners".

40 101. The existence of a business is essential to a partnership, and for this purpose business includes every trade, occupation or profession (section 45 of the 1890 Act). Thus business is a very wide term, embracing almost every commercial activity, and

is much wider than trade or profession alone. It includes a business of making investments.

102. Section 2(1) of the Partnership Act 1890, however, appears to put a brake on what can be regarded as a partnership by stating that jointly owned property or the fact that the joint owners receive a share in the rents from the property does not of itself create a partnership.

103. The question posed by section 2(1) is the effect that it has on restricting the scope of ventures that can constitute a partnership. The implication of Mr Webster's submission was that ventures with an income source of rental receipts could not in law amount to a partnership because such income was not derived from a trade. In this respect the decision of Mr Justice Vinelot in *Griffiths v Jackson* [1983] STC 184 is of assistance.

104. In the *Griffiths* case the issue before Mr Justice Vinelot was whether income derived from the exploitation of proprietary interests in land constituted income from a trade as defined by the Taxes Act. Although the decision was not concerned with the interpretation of the Partnership Act, Mr Justice Vinelot made some telling observations on the meaning of business:

“I may perhaps be permitted to add that I am not without sympathy for the taxpayers. It is a peculiar feature of United Kingdom tax law that the activity of letting furnished flats or rooms, while it may be a business and, in this case, a demanding and time-consuming business, is not a trade. Formerly the principle operated in favour of the taxpayer whose liability to tax on the proceeds of exploitation of his proprietary rights was exhausted by the Sch A assessment. Now the proceeds of letting are taxable under Sch A and the rule operates to the disadvantage of the taxpayer; his income is not earned income and he is not entitled to capital allowances and to the rollover relief for capital gains tax purposes afforded to a person carrying on a trade. The business may, as in this case, occupy much of the taxpayer's free time or even be one which requires his whole time and attention. The taxpayer may put as much or more work into his business as, for instance, someone whose business consists in arranging licences to fix vending machines on the property of others and who daily or at less frequent intervals collects the proceeds and replenishes the machines. It is not too easy to see why in the modern world a business consisting of the exploitation of the right of property in land should be treated differently from a business consisting of the exploitation of other assets. However, the principle is now too deeply embedded in the law to be altered except by legislation”.

105. Mr Justice Vinelot also referred to two decisions of the Court of Appeal in support of his proposition that the letting of property was a business:

“In *Fry (Inspector of Taxes) v Salisbury House Estate Ltd* the taxpayers' activities could be described as the carrying on of a business. All the members of the court of appeal recognised that a

landlord who lets out a number of properties or parts of a property can be fairly described as carrying on a business.

Slessor LJ pointed out ([1930] 1 KB 304 at 332, 15 TC 226 at 301):

5 'As it seems to me, every landlord who lets out habitually more than one house, or part of a house, may be said to be carrying on a business, and I would rely upon what Lord Loreburn said in *Smith v Lion Brewery Co* ([1911] AC 150 at 155, 5 TC 568 at 590) ... "You cannot, by saying that a man carries on the business of owning house property, shift the method of assessing that property for
10 Income Tax from Sched. A to Sched. D".'

More recently, in *American Leaf Blending Co Sdn Bhd v Director-General of Inland Revenue* [1978] STC 561 at 565, [1979] AC 676 at 684 Lord Diplock said:

15 'On the other hand their Lordships do not think that the dicta to be found in some of the speeches in the *Salisbury House* case ([1930] AC 432 at 451, 470, 15 TC 266 at 316, 331) and in particular those of Lord Warrington of Clyffe and Lord Macmillan on which the Federal Court relied and which suggest that the letting of land does not constitute a "trade", have any relevance to the question whether
20 the letting of land by the company in the instant case amounted to the carrying on of a "business" within the meaning of the [Malaysian Income Tax Act 1967]. "Business" is a wider concept than "trade"; and in the *Hanover Agencies* case ([1967] 1 AC 681) the Board uttered a warning against seeking to apply these dicta
25 outside the narrow context of British income tax law and in particular that of Schedule D."

106. The Tribunal draws the following propositions from the decision in *Griffiths v Jackson*: confirmation that business is a wider term than trade, and that the application of the meaning of trade within the Taxes Acts should be restricted to those Acts. The
30 Tribunal concludes that the definition of business in the Partnership Act 1890 is not the same as that of trade within the Taxes Act. The question posed by the Partnership Act is whether the activities of the Bhatti brothers constituted a business or whether they were mere co-owners of properties in receipt of rents. In the Tribunal's view the key to the correct interpretation of the restriction in section 2(1) of the 1890 Act is the
35 use of the phrase "*of itself*" which suggests that it is directed at property holdings which are not run on commercial lines.

107. The issue of whether the Appellant, A H Bhatti and M H Bhatti under the name of Central Properties carried on a partnership is essentially one of fact. The Tribunal concludes that there was a clear intention on the part of the three brothers to operate
40 together as a partnership under the trading name of Central Properties with a view to gain, and that they had been so operating for a significant number of years. There were clear agreements in place between the brothers regarding the sharing of profits and losses. The Tribunal's conclusion was based on the following findings:

45 (1) The income and expenditure accounts for the years ended 30 April 1992 and 30 April 1994 prepared by Mr Sidat demonstrated that the Bhatti brothers had been trading as a partnership under the name of Melbourne Guest House &

Central Properties. The accounts also showed that the brothers had agreed to share profits from the joint enterprise which was allocated 40 per cent each to the Appellant and Mr A H Bhatti with 20 per cent to Mr M H Bhatti.

5 (2) The three brothers, Mr I Bhatti (the Appellant), Mr M H Bhatti and Mr A H Bhatti, had been registered with HMRC for self assessment as a partnership under the trading name Central Properties from 24 April 1989 to 23 November 2003. The partnership returns for ending 30 April 2000 to 2002 inclusive declared turnovers of £195,000, £149,453, and £165,032 respectively for the business. The turnover for 30 April 2004 was £47,419. In each of the returns
10 except the year ended 30 April 2000 the profit/losses were shared equally between the brothers. The profit declared for the year ended 30 April 2000 was shared equally between the Appellant and A H Bhatti.

15 (3) The brothers have consistently held themselves out to be a partnership trading as a business under the name of Central Properties to banks and building societies (Barclays (1993), Nationwide (1996, albeit a partnership of A H Bhatti and M H Bhatti), Halifax (2001) and Abbey National (2002)).

20 (4) The three brothers declared in a Trust Deed dated 31 May 2001 that they were trading together as Central Properties. The brothers also stated that they would hold the net proceeds of sale and net rents and profits until sale upon trust for themselves as tenants in common in equal shares upon the trusts applicable thereto as part of their subsisting partnership assets of Central Properties.

(5) The accounts for Central Properties from 18 December 2001 to 15 April 2004 demonstrated that the Appellant and his two brothers were in receipt of monthly drawings of £1,666¹³ from the business.

25 (6) Mr Hughes had acted for the brothers trading as Central Properties as their accountant since 1997. The brothers advised Mr Hughes that they operated as a partnership, and instructed him to file partnership tax returns. Mr Webster sought to discredit his evidence by reference to the Appellant's claim against Mr Hughes for professional negligence. The Tribunal considers the alleged
30 circumstances of the claim did not undermine Mr Hughes testimony about what he was told by and the instructions given by the brothers.

(7) The individual statements of Mr M L Bhatti and Mr A H Bhatti about the existence of a partnership made respectively at the meeting on 14 March 2007 with Miss Neczypor of HMRC and in the e-mail to Mr Hughes on 8 March
35 2012.

108. Mr Webster's submission that the brothers had operated as individual landlords collecting the rents from each of their separately owned properties was without factual foundation. The Appellant chose not to give evidence. The documents relating to the Nationwide mortgage upon which Mr Webster placed weight showed that A H Bhatti

¹³ M H Bhatti started to receive regular drawings of £1,666 along with his brothers from 2 October 2002. Mr Hughes informed the Tribunal that Mr M H Bhatti had an employed job outside the partnership which explained why on occasions he had a lower profit share and less drawings than his brothers.

and M H Bhatti were holding themselves out to be partners trading as Central Properties albeit without the Appellant, not as individual landlords¹⁴.

109. Equally the Tribunal was unconvinced by Mr Webster's contention that the Appellant ceased to be a partner when the property portfolio was re-mortgaged with the Nationwide in 1997. There was no evidence that the partnership had been dissolved in 1997. The only reference to dissolution was a fax dated 6 January 2003 in the bundle from A H Bhatti giving notice to the Appellant and M H Bhatti to dissolve the partnership but it appeared that the notice had not been followed through.

110. The evidence relied on by Mr Webster for his contention was a representation in a letter dated 17 June 1998 from Central properties to Nationwide about the Appellant being an employee, and correspondence with Hacker Young. The representation of the 17 June 1998 was undermined by the wealth of evidence pointing to the contrary. This evidence included the Central Properties correspondence since July 1999, the self assessment and partnership tax returns, and the Trust Deed dated 31 May 2001 in which the Appellant held himself out to be a partner in Central Properties. The Appellant's purported employee status was also contradicted by his action in taking regular drawings from Central Properties as revealed in the accounts from 18 December 2001 to 15 April 2004. The Tribunal did not consider the Hacker Young correspondence helpful in determining whether the Appellant was a partner. Hacker Young in its capacity of Law of Property receivers was not interested in the affairs of partnership¹⁵.

111. The Tribunal considers the above findings met the essential requirements of a partnership contract between the brothers as being an agreement to share profits and losses from a joint venture. The question that remains is whether the brothers' joint venture was a business within the meaning of Partnership Act 1890 or simply a situation of the brothers sharing the profits from the properties that they co-owned.

112. The history of the brothers' joint venture indicated that they originally built up a portfolio of guest houses, and property and market stall lettings. The comparison of the schedule of properties for the properties for the year ended 30 April 1992¹⁶ with the schedule of those properties given as security for the Nationwide mortgage¹⁷ showed that the brothers had sold existing properties, and purchased new ones with the effect of increasing the number of properties in the portfolio. The activity of buying and selling properties continued after the Nationwide mortgage with the acquisition of land and buildings at Livingstone Mills and at Riverside Mills, and the disposal of Bankfield flats, Melbourne House, Woodthorpe, Pendle Lodge, Oakdene and Prairy Guest House, and only came to a halt with the appointment of the Law of Property Receivers.

¹⁴ For example see documents B7.14, 7.19, 7.26, 7.28 9.8, & 9.27.

¹⁵ See letter of 20 April 2004 to Mrs Cowking.

¹⁶ See D14.4

¹⁷ See B9.10 & B9.11

113. The brothers' rationale for their buying and selling activities was to maximise the profits from the property portfolio and to realise new opportunities. The Appellant in his letter about future strategy dated 19 September 2001 to his brother, A H Bhatti, suggested selling loss making properties whilst maintaining a secure rental income on all sites and examining opportunities for expansion possibly in the Midlands. The strategy for *Pettys*¹⁸ referred to the sale of James Nelsons to a house builder with different sale values dependent upon the grant of planning permission. The plan drawn up for HSBC¹⁹ proposed the preparation of development plans for each property.

114. The activities of Central Properties were described in the strap line to the documented faxes as *Land, Residential, Industrial, Development and Investment*, which mirrored Mr Hughes' depiction of the brothers' joint venture as property development. The correspondence under the heading of Central Properties from 17 June 1998 to 4 June 2001 showed that the property portfolio was being actively managed by the brothers, which included alterations to commercial premises to meet the requirements of prospective business tenants.

115. The Appellant did not give evidence on the activities of Central Properties. Mr Webster asserted that a venture which derived its income from rental receipts could not in law amount to a partnership. Mr Webster also criticised Mr Hughes for his inability to give a specific example of property development undertaken by the brothers.

116. The Tribunal finds on the above facts that the brothers were jointly engaged in the buying and selling of properties and the management of the property portfolio with a view to exploit rental and developmental opportunities. The brothers were not simply holding properties and receiving the rents therefrom. The Tribunal is satisfied that the brothers' joint venture constituted a business within the meaning of section 45 of the Partnership Act 1890.

117. In view of its findings in paragraphs 111 and 116 the Tribunal is satisfied that the brothers (the Appellant, A H Bhatti, M H Bhatti) trading as Central Properties were carrying on a business in common with a view of profit. They constituted a partnership within the meaning of the Partnership Act 1890.

Partnership Property?

118. Section 20(1) defines partnership property as

“All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, must be held and applied by the partners

¹⁸ See D3.14

¹⁹ See D3.29

exclusively for the purposes of the partnership and in accordance with the partnership agreement”.

119. Section 20(1) specifies three separate criteria for determining the existence of partnership property:

- 5 (1) Was the property originally bought into the partnership stock?
- (2) Was it acquired by purchase or otherwise on account of the firm? The fact that a purchase was made with partnership monies raised a rebuttal presumption that it was made on account of the partnership.
- 10 (3) Was it acquired for the purposes and in the course of the partnership business? If so, it was partnership property even though the purchase money might have been provided by one of the partners out of his own pocket.

120. The Court of Appeal in *Don King Productions inc v Warren and others* [1999] 2 All ER 218 emphasised what is partnership property depends upon the intention of the partners and their agreement:

15 “For the purposes of s 20 of the 1890 Act, property which was not assignable might, nevertheless, be partnership property, and similarly whether an asset was 'brought into the partnership stock or acquired ... on account of the firm ... or for the purposes and in the course of the partnership business' did not depend on whether it was assignable at law. Thus, partnership property within the meaning of the section

20 included that to which a partner was entitled and which all the partners expressly or by implication agreed should, as between themselves, be treated as partnership property, and it was immaterial, as between the partners, whether it could be assigned by the partner in whose name it

25 stood to the partners”.

121. The importance of identifying the partners’ intention for determining whether property was partnership property was also highlighted in the High Court decision of *Barton v Morris* [1985] 2 All ER 1032:

30 “Although a joint tenancy could be severed by a course of dealing sufficient to intimate that the interests of the joint tenants were mutually treated as constituting a tenancy in common, the deceased’s inclusion of the property in the accounts as a partnership asset did not show an intention on the part of the deceased or the defendant that the property was thenceforth to be held as tenants in common

35 proportionate to their cash contributions to the purchase of the property, since that would have represented a fundamental change in the parties’ intention at the time of the purchase, which was that there should be a joint tenancy, and there was no evidence that either party had since changed that intention. In the circumstances, the accounting records kept for the partnership business was merely formalities for tax

40 purposes and in reality did not represent the parties’ true relationship”.

122. Mr Webster argued that as the legal titles to the disputed properties were in the names of A H Bhatti and M H Bhatti, and that they purchased properties with a mortgage in their own names from the Nationwide conclusively demonstrated that the

properties were not partnership property. The Appellant had no legal or beneficial ownership in the said properties which was confirmed by Hacker Young, the Law of Property Receivers for the Nationwide. The Appellant also told Ms Neczypor at a meeting on 10 September 2009 that his name was not on the deeds for the Equinox buildings. Given those circumstances Mr Webster stated that the Appellant was not liable to capital gains tax on the insurance pay out for the Equinox building and the sale proceeds of the James Nelson buildings because he was not the owner or part owner of the assets in question.

123. The picture painted by Mr Webster, however, was a partial one and did not reveal the true extent of the brothers' intentions and agreement about the ownership of the disputed properties.

124. The Tribunal places weight on the contents of the Deed of Declaration of Trust made on the 31 May 2001 between the three brothers. In the Deed the brothers declared that they had traded as partners and had acquired the properties which included the Equinox building and the James Nelson buildings²⁰ as part of their partnership assets. The brothers further declared that they would hold the respective properties as Trustees upon trust to sell the same and that they would hold the net proceeds of sale, net rents and profits until sale upon trust for themselves as tenants in common in equal shares upon the trusts applicable thereto as part of their subsisting partnership assets of Central Properties.

125. The Tribunal considers that the terms of the Deed were unequivocal and represented an express agreement between the brothers as to what constituted partnership property and their respective share in the named properties, which was one third. The terms of the Deed demonstrated that the Appellant held equitable interests in the Equinox building and the James Nelson buildings.

126. The terms of the Deed showed that the properties were acquired for the purposes and in the course of the partnership business which fulfilled the requirements of section 20(1) of the 1890 Act. In those circumstances it mattered not whether the properties were funded by one or two of the partners. Although Messrs A H and M H Bhatti were personally liable to pay the Nationwide mortgage on the Equinox building and the James Nelson buildings they were entitled under the terms of Deed to treat that expense as a partnership liability with each partner including the Appellant paying an equal share of that debt.

127. The Appellant did not give evidence challenging the authenticity of the Deed or the truth of its contents. The Tribunal is satisfied that the Appellant was aware of the Deed and understood its contents. The Deed was drafted by solicitors, Steele & Sons, at the instructions of the brothers. The Appellant held the original document, and signed it in the presence of witness, L A Chadwick, a legal clerk with Steele & Son.

²⁰ The full terms of the Trust Deed are set out in paragraphs 71-73 above. The disputed properties are included in the Deed see second schedule.

128. Although the Appellant did not challenge the accuracy of the Deed, Mr Webster argued that the Deed was of no legal effect. Mr Webster referred to the provisions of the Law of Property Act 1925 arguing that a legal interest in land can only be transferred by means of a conveyance or transfer. According to Mr Webster, there was no evidence that A H Bhatti and M H Bhatti had transferred their legal title in the properties to the partnership or that Central Properties had acquired title to the properties by means of a transfer or conveyance.

129. The Tribunal considers Mr Webster has misunderstood the purposes of the Law of Property Act and the effect of section 20(1) of the 1890 Act. Essentially the 1925 Act drew a distinction between legal estates and equitable interests in land, and established a legal process whereby the legal estate in a property could be transferred to a third party overreaching the equitable interests in the land. This is best illustrated by the provisions of the Land Registration Act under which the register records the ownership of the legal estate, not the beneficial interests, and the Registrar is not affected with notice of a trust unless a restriction is placed on the register. Thus there is no requirement for an equitable interest in land to be created or transferred by means of a transfer or conveyance. The equitable interest in partnership property arises from the intention of the parties and may be evidenced by an express agreement which in the case of an interest in land must be in writing if it is to be enforceable (section 53(1) of the Law of Property Act 1925).

130. In this case the agreement was in writing in the form of a Declaration of Trust dated 31 May 2001 and represented a binding statement by the partners who were the legal owners of the properties that they held the legal title for the benefit of the partners as tenants in common. Thus in relation to the disputed properties, A H Bhatti and M H Bhatti retained the legal title but they did so for the benefit of all three partners with the Appellant entitled to a one third share of the proceeds of sale and the profits from the properties.

131. Mr Webster pointed out that there was no restriction on the Register of Title for the said properties about the Trust Deed. The fact of no restriction did not affect the validity of the Trust. The partners were not legally required to give notice of the Trust to the Registrar. The legal effect of no restriction is that a third party can acquire the legal title to the properties without being affected by the terms of the Trust Deed.

132. The fact that the partners gave no notice of the Trust to the Registrar did not affect the existence of the Trust. It is not for the Tribunal to speculate about the reasons why the partners did not give notice. The reasons must be based on the evidence. The Appellant chose not to give evidence. The same considerations applied to Mr Webster's question about why the existence of the Trust was not brought to the attention of the Nationwide, the mortgagee for the properties. As an aside, the Tribunal notes that the partners have not always observed the niceties of mortgage requirements (see the comments of Mr Sagar, Inspector of Taxes, on purchasing properties for business with a loan in the MIRAS scheme²¹). Equally the Tribunal

²¹ See D14.8

attaches no weight to the comments of Hacker Young which as Law of Property Receivers were only concerned with the legal title to the properties.

133. Mr Webster's final argument on the Trust Deed was that the brothers had not implemented Clause 6 of the Deed which required them to execute when called upon so to do, any deed, charge, transfer or other document necessary to give effect to the Deed at their own joint expense. According to Mr Webster, there was no evidence that the partners had taken any action to transfer the equitable interest in the properties which meant that the Deed was void because the legal title to the properties had not been transferred to the partnership. Mr Webster has misconstrued Clause 6. There was no requirement for the partners to transfer the legal title to the properties in order to create the equitable interests in the properties. The Deed declared those equitable interests. The purpose of Clause 6 was to give effect to the Trust, for example, if the properties were sold the relevant partners would execute the necessary transfer to realise the proceeds which would then be shared equally between the three partners.

134. The Trust Deed, however, was not the only evidence of the brothers' intention to hold the properties on trust for themselves as tenants in common in equal shares.

135. The Appellant's declaration dated 31 January 2005 in his 2003/04 tax return that he was entitled to one third share of the gain from the insurance pay out on the Equinox building corroborated the existence of an agreement between the brothers about having shared equitable interests in the Equinox building. This was also confirmed by the evidence that Salisbury Hamer paid the insurance proceeds to the account of *Bhatti TA Central Properties*²², and that the Appellant drew from those proceeds²³ which contradicted his statement to Ms Neczypor that he received no monies in relation to the Equinox building.

136. Mr Webster's response was that the Appellant did not have any technical knowledge and relied on Mr Hughes' expertise to complete the 2003/04 return. It was for the Appellant to give this evidence not Mr Webster. The response, however, did not explain the receipt of the proceeds by the partnership and the Appellant's action in drawing from those proceeds. Further, the facts of the Appellant's status as a partner and receiving monies from the insurance proceeds were not, in the Tribunal's view, difficult technical matters upon which the Appellant was incapable of forming a view without advice. It is also significant that the Appellant was fully aware at the time he approved the tax return that he did not have legal title to the properties mentioned in the capital gains pages having received legal advice²⁴ but he nevertheless signed the return which suggested that the Appellant considered the return to be accurate.

137. There were two other instances of where the Appellant received a share of the proceeds from the disposal of properties to which he had no legal title. Robson Rhodes, the Law of Property Receivers for HSBC, distributed the surplus funds from

²² See documents B3.3 to B3.7.

²³ See paragraph 48 above

²⁴ See paragraphs 65 & 66 above

the sales of Livingstone Mills and Riverside Mills equally between the three partners. The Appellant gave approval to the distribution²⁵. Although Livingstone Mills was in the joint names of the three brothers, Riverside Mills was not, the legal title being vested in M H Bhatti alone who was also personally liable to pay the mortgage on the property. Similarly the Appellant received an equal share of the proceeds from the sale of the Grand Cinema Site, the legal title of which was held by A H Bhatti and M H Bhatti, with the Appellant receiving his share of £33,274.46 direct by cheque drawn on the account of Inghams solicitors²⁶.

138. The copies of the partnership accounts included in the bundle showed that the various properties were included in the accounts. The notes to the balance sheet for the year ended 30 April 1994 referred to Central Properties (the Equinox building) and Markets. The balance sheet for Central Properties as at 30 April 2000 referred to Central Properties market, James Nelson and Lonsdale Street, amongst others. The notes to the accounts for the year ended 5 April 2004 referred to the disposals of 2 Lonsdale Street, 65 Scotland Road, and 2-4, 22-30 Market Street. The other accounts in the bundle related to the receiverships which were not concerned with the partnership.

139. There was no indication in the bundle that the accounts had been signed off by the partners, which affected the weight to be attached to them. Nevertheless the fact that the various properties had been included in the partnership accounts added to the picture built by the other evidence that the said properties were part of the partnership assets.

140. The Tribunal, therefore, finds that

(1) The Appellant and his brothers had expressly agreed that they would hold the Equinox building, the James Nelson Buildings, 2,4, and 22-30 Market Street, 65 Scotland Road and Unit 2 Lonsdale Street as Trustees upon trust to sell the said properties upon trust for themselves as tenants in common in equal shares.

(2) The terms of the Trust Deed dated 31 May 2001, the Appellant's receipt of monies from the disposals of properties to which he had no legal title, his declaration in 2003/04 tax return regarding the Equinox building, and various copies of the partnership accounts confirmed the existence of the agreement.

(3) The Equinox building, the James Nelson Buildings, 2,4, and 22-30 Market Street, 65 Scotland Road and Unit 2 Lonsdale Street formed part of the assets of the partnership trading as Central Properties with the partners being the Appellant, A H Bhatti and M H Bhatti.

(4) The Appellant held equitable interests in The Equinox building, the James Nelson Buildings, 2,4, and 22-30 Market Street, 65 Scotland Road and

²⁵ See paragraph 69 above

²⁶ See paragraph 87 above.

Unit 2 Lonsdale Street which equated to one third share in the beneficial ownership of the said properties.

The 2006/07 Discovery Assessment

141. HMRC has the burden of proving that the conditions for the issue of a discovery assessment have been met. If HMRC discharges that burden, the onus to prove on the balance of probabilities that the assessment was excessive passes to the Appellant. HMRC had no such obligation in respect of the 2003/04 assessment which was an amendment to the Appellant's self assessment return following the issue of a closure notice. In respect of the 2003/04 assessment, the Appellant had the responsibility of demonstrating that the assessment was excessive.

142. Under section of 29 of the Taxes Management Act 1970 which authorises the issue of a discovery assessment, HMRC is required to establish the fact of the discovery of the insufficiency of tax, and that one of two conditions have been met. The first condition is that the insufficiency of tax was brought about carelessly or deliberately by the Appellant or a person acting on his behalf (section 29(4)). The second condition is that where the period to enquire into the Appellant's tax return has expired, an HMRC officer could not have been reasonably expected on the basis of the information made available to him before the expiry of the enquiry period to be aware of the insufficiency of tax (section 29(5)).

143. The facts were that the Appellant made no declaration of capital gains in his 2006/07 return. HMRC made no enquiries into the return. On 13 February 2008 HMRC sent the Appellant a nil assessment for the tax year ending 5 April 2007. In 2010 Ms Neczypor of HMRC entered into discussions with Pierce CA Limited, Chartered Accountants, for the Appellant's brother, MH Bhatti, regarding the property disposals made by Central Properties. On 13 September 2010 the Appellant phoned Ms Neczypor to say that he had gone to Pierce CA Limited for advice, the same as his brother. At sometime in 2010 Pierce C A Limited disclosed to HMRC the capital gain on the disposal of the James Nelson Buildings in 2006/07 which revealed that the Appellant's share of the capital gain was £39,385 giving an amount of undeclared tax of £8,879. On 18 November 2010 Ms Neczypor informed the Appellant of the discovery and issued an assessment in the sum of £8,879.

144. Mr Webster's challenge to the discovery assessment was confined to representations that HMRC has the burden of proving the assessment and that Pierce & Co had no authority to release the details of the capital gain to HMRC. The Appellant has not challenged the facts as set out paragraph 143 above.

145. The Tribunal would have preferred to have had sight of the nil 2006/07 return but as the facts as outlined by HMRC at the hearing regarding the non-declaration of the gain in the return were not challenged by the Appellant, the Tribunal finds that there has been a discovery of an insufficiency in tax. The Appellant did not declare the gain in his 2006/07 tax return, and the first time that HMRC knew about the gain was when it was revealed by Pierce & Co in 2010. This discovery was after the expiry of the period of enquiry into the 2006/07 return, which meant that the condition in

5 section 29(5) had been met. The Appellant's failure to include the gain in his return was prima facie evidence of carelessness. The Tribunal, however, only has to be satisfied that one of the two conditions had been met. In those circumstances it is unnecessary for the Tribunal to determine whether the condition in section 29(4) has also been established.

10 146. Mr Webster did not advance a case on the relevance of the "unauthorised disclosure" by Pierce and Co to the prior conditions for the issue of a discovery assessment. In any event the Tribunal is not satisfied that the disclosure was unauthorised. According to Ms Neczypor in her letter of 18 November 2010, the Appellant was prepared to accept the decision she agreed with the Appellant's brother and his agent. That being case it was for the Appellant to give evidence to resolve the conflict. The Appellant chose not to do so.

147. The Tribunal, therefore, finds that the discovery assessment dated 18 November 2010 in the sum of £8,879 satisfied the legal requirements of section 29 TMA 1970.

15 **Decision**

148. The issues in this Appeal were whether the Appellant was liable to tax on the gains from the partial disposal of the Equinox Building in 2003/04 and the disposal of the James Nelson buildings in 2006/07. Once HMRC had discharged its burden of demonstrating that the legal requirements for a discovery assessment had been met, 20 the Appellant had the responsibility of proving on the balance of probabilities that he was not liable to capital gains tax. The Appellant was ably represented by Mr Webster who presented the Tribunal with detailed and well thought out legal representations. The Tribunal, however, found that Mr Webster's submissions were not supported by the evidence.

25 149. The Tribunal decides that:

- (1) The discovery assessment dated 18 November 2010 in the sum of £8,879 satisfied the legal requirements of section 29 TMA 1970.
- (2) The brothers (the Appellant, A H Bhatti, M H Bhatti) trading as Central Properties were carrying on a business in common with a view of profit. They 30 constituted a partnership within the meaning of the Partnership Act 1890.
- (3) The Appellant and his brothers had expressly agreed that they would hold the Equinox building, the James Nelson Buildings, 2,4, and 22-30 Market Street, 65 Scotland Road and Unit 2 Lonsdale Street as Trustees upon trust to 35 sell the said properties upon trust for themselves as tenants in common in equal shares.
- (4) The terms of the Trust Deed dated 31 May 2001, the Appellant's receipt of monies from the disposals of properties to which he had no legal title, his declaration in 2003/04 tax return regarding the Equinox building, and various 40 copies of the partnership accounts confirmed the existence of the agreement that the partners were holding the properties upon the trust for themselves as tenants in common in equal shares.

(5) The Equinox building, the James Nelson Buildings, 2,4, and 22-30 Market Street, 65 Scotland Road and Unit 2 Lonsdale Street formed part of the assets of the partnership trading as Central Properties with the partners being the Appellant, A H Bhatti and M H Bhatti.

5 (6) The Appellant held equitable interests in The Equinox building, the James Nelson Buildings, 2,4, and 22-30 Market Street, 65 Scotland Road and Unit 2 Lonsdale Street which equated to one third share in the beneficial ownership of the said properties.

10 150. There was no dispute that there had been disposals of the Equinox building, 2,4, and 22-30 Market Street, 65 Scotland Road and Unit 2 Lonsdale Street in 2003/04. The disposal in respect of the Equinox building was a partial one and took the form of a capital payment (insurance for destruction of the asset by fire) in accordance with section 22 of the 1992 Act. Equally the disposal of the James Nelson buildings in 2006/07 was not contested.

15 151. In view of the Tribunal's finding that the said properties were assets of the partnership, trading as Central Properties, with the partners being the Appellant, A H Bhatti and M H Bhatti, the Appellant was liable to the capital gains or entitled to the capital losses on the disposal of the properties in accordance with his fractional share of the assets, which was one third. **The Tribunal, therefore, dismisses the Appeal.**

20 152. The parties requested the Tribunal to restrict its decision to one of principle, namely, liability. The Tribunal directs the parties to reach an agreement on the basis of this decision in respect of the quantum of the assessments. In the absence of an agreement, leave is given to either party to reinstate the Appeal before the Tribunal to determine the quantum.

25 153. The Appellant applied for a costs order against HMRC. The Tribunal operates effectively a no costs regime, and can only order costs in standard cases where one party has acted unreasonably in the conduct of the Appeal (rule 10(1)(b) of the Tribunal Procedure Rules 2009). It is a power that should only be made exceptionally. The Appellant's principal justification for the costs order was that HMRC had been
30 negligent in making the assessments. In view of the Tribunal's determination, there are no grounds for making a costs order.

154. 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
35 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.

5

**MICHAEL TILDESLEY OBE
TRIBUNAL JUDGE**

RELEASE DATE: 19 June 2013

10