



**TC03245**

**Appeal number: TC/2012/04190**

*TYPE OF TAX – income tax - capital gains tax – penalty.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**BENJAMIN GABRIEL**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE RICHARD BARLOW  
WARREN SNOWDEN**

**Sitting in public at North Shields on 25 November 2013**

**No appearance by the Appellant**

**Mr B Hone inspector of Taxes for the Respondents**

## DECISION

5 1. The appellant did not attend the tribunal but we were satisfied he had received proper notice of the hearing and had chosen not to attend so we proceeded in his absence.

2. The burden of proof is upon the appellant to prove the facts relevant to his appeal and, as he produced no live evidence, we can deal with the appeal fairly briefly by summarising HMRC's case as presented to us.

10 3. Mr Steven Hancox, an investigator employed by the respondents, gave evidence confirming his witness statement. We read the statements of Mr James Lee, Mr Edward Cape and Mr Foster Watson whose statements were presented by the appellant but who were not called to give evidence. The evidence of Mr Lee, Mr Cape and Mr Watson was not subject to cross examination and was not accepted by  
15 HMRC. In those circumstances and in view of the appellant's failure to attend we attach no weight to those three statements.

4. The appellant appealed against discovery assessments for the years ending 5 April 2002 in the sum of £4,060.00, 5 April 2003 in the sum of £4,026.95 and 5 April 2004 in the sum of £4,127.90 and against a closure notice for the year ended 5 April  
20 2005 amending his return to increase the amount due by £140,275.03. He also appealed against a penalty determination for the year ended 5 April 2006 in the sum of £48,530.00.

5. HMRC began an inquiry under Code of Practice 9 (civil investigation of serious fraud). The appellant admitted that he had traded buying, selling and overhauling  
25 machinery during the three years covered by the discovery assessments and that he had acted as an employee and director of a company called Maxifreeze in 2002. His earnings from these activities had not been declared to HMRC. He had also operated a café which made a small profit in respect of the year ended 5 April 2002.

6. Small amounts of bank interest had also been omitted from the tax returns.

30 7. An accountant had prepared figures for the investigation but we find these were incomplete and did not represent a complete disclosure. Mr Hancox assessed the tax due on very conservative estimates which were, we find, to his best judgment based on the limited information provided.

8. The larger sum determined to be due for the year ended 5 April 2006 related to  
35 a capital gain on the sale of land which had been a bus garage. Mr Gabriel had purchased it with the intention, he said, of operating a business from it but that when he cleared the land it had proved to be contaminated with oil and needed cleaning up. He said that having failed to obtain planning permission he sold it at a considerable profit. Later, HMRC were told by the planning authority that they had no record of an  
40 application by Mr Gabriel.

9. At first Mr Gabriel confirmed what his accountant had said about the land, namely that he had intended to use it for business purposes but had not begun to do so by the time it was sold. He said he had only used it to park his own vehicle. Later, and in support of a claim for business taper relief, he changed his story and began to assert he had used the land for business purposes. The witness statements referred to above were produced in support of that assertion.

10. We find that the general lack of evidence in support of his assertions about the land and the changes in the story put forward by Mr Gabriel prove that he had deliberately set out to concealed the capital gain by not declaring it on his return and that he had then concocted the story about business use with the intention of reducing his liability once it was discovered by HMRC that he had made the gain.

11. All of the assessed sums and the amendment to the 2005/06 return are upheld and we dismiss the appeals in respect of them.

12. The penalty of £48,530 is assessed as 35% of the culpable arrears of tax based only on the capital gains tax. We hold that the penalty could have been applied to the other under declared sums as well so that it was generous to Mr Gabriel to base it only on the capital gains tax. The reduction of 65% is, we hold, generous in the circumstances and we reject the appeal in respect of the penalty.

13. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**RICHARD BARLOW  
TRIBUNAL JUDGE**

**RELEASE DATE: 22 January 2014**