[2016] UKFTT 0395 (TC)

TC05149

Appeal number: TC/2015/03531

INCOME TAX & NATIONAL INSURANCE CONTRIBUTIONS – appellant disclosing omission from returns of rental income and chargeable gains – extent of understatement of trading income for income tax and Class 4 NICs – whether discovery assessments valid – whether penalties under s 95 TMA and Schedule 24 FA 2007 due – held: discovery assessments valid except for two years –held: s 95 TMA penalties due for two years and not for one other as no return made – held: Schedule 24 penalties due for two years and not for two other years – no potential lost revenue for those years as no valid discovery assessments.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MURAT ANIK **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
CHARLES BAKER FCA

Sitting in public at the Magistrates Court, Portsmouth on 8 March 2016

Mr Boris Patta of SBS Accountants for the Appellant

Mr Simon Bates, Presenting Officer, for the Respondents

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DECISION

1. This was a hearing of appeals by Mr Murat Anik ("the appellant") against:

(1) assessments made under s 29 Taxes Management Act 1970 ("TMA") for the tax years 2005-06 to 2009-10 and 2011-12 and 2012-13,

(2) a notice of closure containing amendments to the appellant's income tax return for the tax year 2010-11,

(3) determinations under s 100 TMA of penalties due under s 95 TMA for 2005-06 to 2007-08

(4) penalty assessments under Schedule 24 Finance Act ("FA") 2007 for 2008-09 to 2012-13.

Evidence

2. We had before us a bundle of documents prepared by the Commissioners for Her Majesty's Revenue and Customs ("HMRC"). That bundle had some serious deficiencies to which we refer later. Mr Anik briefly gave evidence, and to an extent his accountant and representative at the hearing, Mr Patta, was giving evidence of what he did for the appellant and of meetings with HMRC. Neither the HMRC officer (Mr Hollis) who conducted the investigation nor any other officer who was present at the meetings with the appellant and Mr Patta nor the reviewing officer attended and gave evidence. We were told that Mr Hollis is no longer with the department and so was not present, but we were not told why he could not be present or at least could not have produced a witness statement, or why other witnesses to the meetings could not have been present.

Background facts

3. We set out here our account of what we consider to be the relevant facts as background to the hearing. They are mostly taken from the bundle of documents and, except where they derive from letters sent by Mr Patta to HMRC, are HMRC's documents, including notes of interview. Where they are statements of opinion or the drawing of inferences we are simply accepting that they were given or drawn, not the truth of them.

4. On 2 March 2012 HMRC informed the appellant that they intended to enquire under s 9A Taxes Management Act 1970 ("TMA") into the appellant's income tax return for the tax year 2010-11. HMRC also informed the appellant that they would be checking whether he should be registered for Value Added Tax ("VAT") and also checking his employer records for 2010-11, although in neither case did they indicate under what legislation those checks were being carried out. The letter requested an interview at which certain specified documents should be made available.

5. On 22 March 2012 three HMRC officers (for income tax, VAT and employer matters respectively) met the appellant and his accountant, Mr Patta, at the appellant's place of business, the Istanbul Restaurant in Southsea.

6. HMRC referred to the appellant's tax return for 2010-11 which was "completely blank" and which stated that it was a "nil return". Mr Patta explained that he had not received any information from the appellant and that, as he could not estimate the figures, he had put in none. He explained further that he expected that HMRC would investigate which would "kick start" his client into doing something. This had, he said, been the case for a number of years.

7. Various documents such as till receipts and bank statements for the period from 2009 were given to the VAT officer who examined them in situ. She said that she was unable to reach a conclusion and would take the documents away for further examination. There was no subsequent correspondence about VAT in the bundle. The VAT officer did not attend any of the subsequent meetings described below.

8. At that meeting information was given to HMRC about a restaurant in Eastleigh, of which the appellant was the owner of the freehold premises from which it was operated. HMRC were informed that the appellant received £1,000 per month rent from the Eastleigh business. At that meeting the appellant denied any other sources of income, and explained his liabilities under mortgages and his household expenditure. He also said that he received gifts from his family of about £2,000 to £3,000 at a time.

9. Following the meeting HMRC requested further information and documents.

10. On 11 September 2012 some of the requested information was supplied by Mr Patta. These included accounts for the rents the appellant received from Eastleigh and the accounts of the Istanbul Restaurant for 2010-11. HMRC then requested mandates from the appellant to enable them to approach banks where the appellant had not provided statements.

11. On 14 February 2013 a further meeting was held at the Istanbul Restaurant. At the meeting, HMRC concluded that the business records were unreliable and that it would be necessary to calculate the profits by looking at the taxpayer's personal expenditure.

12. On 2 May 2013 HMRC wrote to Mr Patta with the results of their investigations. They had calculated the profits of the restaurant by examining the appellant's private bank account, taking all lodgements and excluding from them certain cheques unlikely to have come from the business. As private expenditure eg on utilities was not shown and there were few cash withdrawals, it was assumed that on the basis of some entries for cash withdrawal, weekly cash requirements were £250. On the basis that such expenditure was met from cash takings the profits were calculated as £35,110 for 2010-11.

13. Using (we assume) HMRC's practice of assuming continuity of errors and understatements of profits, scaled down amounts were put forward for 2005-06 to

2009-10. It was stated by HMRC that the figures in the business accounts for 2011-12 were as to turnover and purchases identical to those for 2010-11 and therefore required adjustment, but in this case the proposal was that the profits should be £37,500.

14. Figures for the Eastleigh rental income were, in HMRC's view, understated because the deduction for mortgage interest had included repayments of capital. A figure of £6,628 was proposed instead of £1,623, and this was also scaled down for earlier years and a slightly higher figure for 2011-12 proposed.

15. On 19 June 2013 HMRC's proposals were discussed. The appellant and Mr Patta accepted that the accounts as supplied were incorrect. Mr Patta said he wanted to check the proposed figures as he had not seen the bank statements for the private account.

16. As to Eastleigh, the revised figures were agreed once the appellant had understood the point about a repayment mortgage.

17. At this meeting the appellant made a disclosure about a property in Elm Grove, Southsea which he had acquired jointly with two others with his share of a joint mortgage, a personal bank loan and the proceeds for sale of the Eastleigh restaurant business to his brother.

18. There was £15,000 a year rent received from the ground floor which the appellant had no control over. But he received rents from upper storey flats of £2,000 per month paid into his private account. This was regarded as his instead of him receiving a share of the £15,000, but there would be a sorting out later.

19. Mr Patta pointed out that as the Eastleigh rents were shown as credits to the business accounts the profits calculation would have to be revisited as HMRC had assumed that all bankings not otherwise excluded were from the restaurant. Mr Patta explained that there may also be capital gains to be disclosed from sales of interests in property.

20. On 25 June 2013 HMRC provided Mr Patta with the bank statements they had used to calculate profits, and they sent as requested by Mr Patta a lifestyle questionnaire for completion by the appellant. However at the hearing Mr Patta said that he had not received these bank statements.

21. On 10 October 2013 Mr Patta met HMRC and gave them information and paperwork about the Elm Grove property.

22. On 11 April 2014 HMRC wrote to Mr Patta suggesting figures for the Elm Grove rents, a capital gain from disposal of a lease and a figure for the appellant's share of the profit of a business run from the property in 2006-07. Figures for the Eastleigh rents were also suggested.

23. As to the Istanbul Restaurant, HMRC noted that of the rent paid into an HSBC "3 way account" for rentals from Elm Grove, only at most £5,530 was available to the

appellant to cover spending or banking into his private account. It seemed to HMRC that some of the excluded bankings in the private account were in fact Elm Grove rent payments, and because these had been excluded they would not have to be "reflected in the revised calculations" which were then put forward, showing a reduction in the 2010-11 figure of about £3,500 with similar adjustments to other years.

24. On 15 May 2014 HMRC sent another letter to the appellant with proposals for settling the enquiry, we assume by way of contract settlement.

25. On 24 June 2014, in the absence of any meaningful response, HMRC notified assessments, a notice of closure, penalty determinations and penalty assessment to the appellant.

26. On 16 July 2014, at a meeting between the appellant with Mr Patta and HMRC, some minor adjustments to the figures were agreed. On the Istanbul Restaurant HMRC explained the adjustment for rents that had been made. Mr Patta and the appellant said again that there has been gifts from relatives in the period that accounted or some of the bankings, and information about them was given.

27. HMRC accepted "in the spirit of seeing the case settled today" that they would accept that in 2010-11 £6,000 to £7,000 in cash gifts had been received and that the profit would be reduced to £25,000 and scaled backwards and forwards accordingly. HMRC commented that this reduction meant that profit from the restaurant was £500 per week which he thought was "generous" (we assume in the appellant's favour).

28. On 14 August 2014 HMRC "determined your appeals under s 54 TMA 1970" in the revised figures discussed at the 16 July meeting.

29. On 19 September 2014 the appellant and Mr Patta met HMRC. HMRC were told that the appellant had received more money from his family than he had previously suggested. HMRC informed the appellant that if he was resiling ("going back" was their phrase) from their agreement he would need to make late appeals, and that convincing evidence of the money would be required.

30. On 7 November Mr Patta submitted appeals and letters from Turkey from the appellant's father and uncle which he said evidenced loans of £48,500. He also provided calculations of income from each of the sources and in which the profits of the Istanbul Restaurant were shown as £5,618 in 2005-06, £7,500 for 2006-07 to 2009-10, £7,543 in 2010-11, £8,000 in 2011-12 and £8,500 in 2012-13. He supplied no supporting evidence for these figures.

31. On 19 December 2014 HMRC said to Mr Patta that "Your late appeals against the various assessments etc issued with my letter of 14 August 2014 are accepted." They added that the letters from Turkey provided were insufficient evidence that the appellant received money from his father and uncle in 2010-11. They accepted the letter as a request for a review.

32. On 26 February 2015 HMRC's "View of the Matter" was issued. There followed a statutory review which upheld the amended assessments etc and the

notification of the appeals to the Tribunal in a conclusion letter dated 11 May 2015 and the notification of the appeals to the Tribunal was on 1 June 2015.

33. We make further findings of fact later in this decision.

Law

34. There is no dispute about the law applying here. The operation of a restaurant is a trade the profits of which are subject to income tax as trading income within Part 2 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA") and to National Insurance Contributions ("NIC") under Class 4 in accordance with s 15 Social Security (Contributions and Benefits) Acts 1992 ("SSCBA"). The receipt of rents is treated as income from a property business the profits of which are subject to income tax as property business income within Part 3 of ITTOIA. Gains from the disposal of assets are charged to capital gains tax ("CGT") under the Taxation of Chargeable Gains Act 1992.

35. Where required by a notice to do so, individuals must file a return under s 8 TMA. If not so required, they must notify liability to income tax and CGT under s 7 TMA. This is relevant in this case because it is accepted by HMRC that the appellant was either not required to file a return in 2007-08 or, if so required, did not do so. This has consequences in relation to penalties which we consider below.

36. If a return is incorrect then the person filing it may be liable to penalties under s 95 TMA (for tax years to 2007-08) and under Schedule 24 FA 2007 for subsequent years. By virtue of s 16 SSCBA these penalty provisions apply to Class 4 NICs as they apply to income tax, explicitly in the case of s 95 TMA (s 16(1)(b)) and implicitly in the case of Schedule 24 (chapeau to s 16(1)). We do not know why Schedule 24 (or Schedule 41 FA 2008) is not referred to explicitly in s 16 SSCBA given that Schedules 55 and 56 FA 2009 are (s 16(1)(c)), but there seems no doubt that Schedule 24 is part of the Income Tax Acts and so included in the general words.

37. If a return is enquired into under s 9A TMA, as happened here to the return for 2010-11, then at the conclusion of their enquiry HMRC must state their conclusions and amend the return accordingly (s 28A TMA). Those conclusions and amendments may be appealed against within 30 days (subject to HMRC or the Tribunal admitting the late giving of notice of an appeal) (ss 31A and 49 TMA). After an appeal has been made HMRC may offer a review or the appellant require one, and after the review the appellant may notify the Tribunal within 30 days of an intention to pursue the appeal (ss 49A to 49I TMA).

38. HMRC may also make an assessment (a discovery assessment) under s 29 TMA if they discover a loss of tax. In a case where the appellant has not made a return for a period there are no preconditions apart from time limits to the making of the assessment.

39. Where a return has been made, a discovery assessment may only be made if, relevantly here, the loss of tax was brought about carelessly or deliberately.

40. The relevant time limits for making assessments where there is a carelessly brought about loss of tax are 6 years from the end of the tax year concerned, and where there is a deliberately brought about loss of tax, 20 years.

41. A discovery assessment may be appealed and the same provisions as to time limits, reviews etc apply to them as apply to amendments to a self-assessment (ss 31(1)(d) and 31A(4) TMA).

42. Any appeal may be settled by agreement between the appellant or his agent under s 54(1) TMA. Any such agreement must be consensual, and may be resiled from in writing by the appellant within 30 days of the date of the notice of confirmation of the agreement. It might be thought surprising that the Tribunal has to consider s 54, but in this case it appears that a s 54 agreement on all the issues in the appeal was reached and then resiled from. We consider the implications of this below.

43. Finally we deal with the burden of proof. HMRC rightly accept in their statement of case that the burden of proof is on them in relation to the penalties and that the standard of proof is the civil one.

44. In relation to the discovery assessments they say that "in the unlikely event that the appellant challenges HMRC's right to issue the discovery assessments" the onus of proof will be on them, but if they discharge it the burden switches to the appellants to show that the assessments are excessive.

45. We would have accepted that as a correct approach had it not been for the Upper Tribunal ("UT") decision in *Michael Burgess and Brimheath Developments Ltd v HMRC* [2015] UKUT 578 (TCC) ("*Brimheath*"). In that case it was held that what the UT called the "competence" issue, that is whether the conditions required by s 29 TMA had been met, was one on which HMRC had to lead their evidence and seek to discharge the burden of proof irrespective of whether the issue had been raised by the appellant. The UT said at [43]:

> "In this case, therefore, HMRC had the duty of establishing their case on both the competence and time limit issues. The burden of proof lay on them in each of those respects. There was no obligation on the part of Mr Burgess or Brimheath to raise those issues. As Henderson J said in *Household Estate Agents*, in the absence of relevant evidence there is nothing to displace the general rule that discovery assessments (and we would add assessments outside the normal four-year time limit) may not be made."

46. The UT went on to say at [44]:

> "However, it was not open to [*HMRC*] to seek to discharge the burden that lay upon them of proving those cases by purporting to limit the issues before the FTT to the substantive issues. Nor can HMRC's assertion that there had been no appeal made by the appellants on the competence and time limit issues serve to shift the onus of making a positive case onto Mr Burgess or Brimheath. Any concession or

> waiver by the appellants on those issues would have to have been clearly given, and HMRC could not assume that silence implied any such concession or waiver. It was not incumbent upon the appellants to respond to HMRC's assumption as to what they would, and would not, be required to prove."

47. In this case neither the appellant nor Mr Patta has, as far we can tell, disputed HMRC's suggestion that the appellant's (and his) actions in filing nil returns was deliberate and did bring about a loss of tax. But he has certainly not clearly waived or conceded the point. Whether or not it was unlikely that the appellant would challenge HMRC on the competence issue, we are we think bound to hold that the burden of proof remains on HMRC. We consider whether they have discharged that burden later.

Submissions of the parties

48. HMRC argue that it is common ground that the appellant submitted incorrect tax returns, and they submit that the omissions of rents and capital gain and omission of income from the restaurant is prima facie evidence of deliberate conduct on the appellant's part.

49. HMRC have, they say, already made adjustments for family gifts without evidence in calculating the restaurant profits and they reject any further claims for gifts in the absence of corroborating evidence.

50. They argue that "knowing submission" of incorrect documents warrants the penalties.

51. For the appellant Mr Patta argued that the "unexplained" deposits in Mr Anik's bank account for the tax year 2010-11 were gifts from his father and uncle and had been supported by notarised and translated documents from Turkey. The profits for the year were therefore far lower than those calculated by HMRC and he proposed figures for all years disclosing much lower profits.

52. In the course of his submissions to us Mr Patta argued that HMRC's submissions on profits should not be accepted because the calculations from the private bank account that they had said they carried out had never been given to the appellant and that HMRC's starting point of unexplained deposits of £35,000 was not accepted or supported by evidence. The Tribunal should therefore take Mr Anik's evidence and his own calculations of the profit as the correct ones.

53. The appellant did not dispute HMRC's arguments and calculations in relation to rental income and capital gains.

Further findings of fact

54. In relation to the Istanbul Restaurant the evidence of Mr Anik and Mr Patta given to us at the hearing is as follows.

55. Mr Anik took over the Istanbul Restaurant in Southsea in July 2005. The previous operator had failed and had abandoned the business to Mr Anik, who paid nothing for it. The restaurant is in Osborne Road, which used to be a thriving centre full of restaurants. When Gunwharf Quays opened in 2001, much of the trade went there but the restaurants remained open. Consequently, competition for the reduced trade is intense.

56. The business struggled from the outset. Mr Anik had tried a coffee shop format but that was a failure. He had tried a conventional restaurant format but that also failed. His family urged him not to close and promised their help. The business began to pick up only when he tried the barbeque format for a Turkish restaurant.

57. Mr Anik kept records of his takings in a book. In 2008-09, his takings were typically £300 to £500 per week. By 2012-13, they were typically £1,200 per week. Currently they are £1,800 to £2,100 per week but more when the festival is on.

58. There was no challenge to any of this evidence and we find as fact everything in their evidence.

59. In relation to rents and capital gains, Mr Anik and for him Mr Patta did not deny that he had received or was entitled to rents from Elm Grove and Eastleigh properties or that he had made a chargeable gain from a lease.

60. We find as a fact, as it was not denied, that Mr Anik did receive rents and that the income from them was as stated by HMRC in its assessments. As to the capital gain, we note from the documents that HMRC told Mr Anik that the gain was "effectively" £10,000. We think by this he meant the approximate gain after taking into account the annual allowance.

61. In notes of meetings and correspondence there was some unfortunate confusion between gross receipts, gross gains, net proceeds, gains after exemption and rental income (that was co-incidentally of a similar amount). We find as a fact that the correct position was set out in the HMRC letter of 15 May 2014, ie that Mr Anik's share of the taxable gain, after the annual exemption, was £10,453.

62. Mr Anik submitted tax returns as follows:

Year	Comment
2005-06	No copy was provided to the Tribunal. HMRC SA calculation shows no income and no tax.
2006-07	In the trading income pages on the screen printout of the return the restaurant turnover was shown as £52,920 with a profit of £6,174. No rents or capital gains are shown.
2007-08	HMRC requested a return on 22 September 2009 but it was never submitted.

2008-09	There were no figures on the screen printout of the return. There was a white space comment "this is a nil return, as the client did not have any self employment in this current year."
2009-10	There were no figures on the screen printout of the return and the white space was blank.
2010-11	There were no figures on the screen printout of the return. There was a white space comment "THIS IS A NIL RETURN"
2011-12	The return showed restaurant turnover of £54,056 and a profit of £6,248. The return showed rents before expenses of £12,000.
2012-13	The return showed restaurant turnover of £58,427 and a profit of £5,327. The return showed rents before expenses of £21,688.

63. We note that the 2012-13 turnover figures are roughly commensurate with Mr Anik's evidence about his weekly takings in that period.

64. We find as a fact that the returns for 2005-06 to 2010-11 (excluding 2007-08 a year for which there was no return) were incorrect as they omitted, at least, rents and capital gains.

65. We also find that Mr Patta knew they were incorrect, and that the statement in the 2008-09 return that there was no income from self-employment was false.

66. We consider that, on the balance of probabilities, Mr Anik, the appellant, also knew they were incorrect. In relation to the restaurant where the profits were shown as "nil" we note that in the initial meeting on 22 March 2012, Mr Hollis of HMRC put it to the appellant that he knew the tax returns were incorrect. The appellant did not demur then or since (either by himself or through Mr Patta). We do note that Mr Patta's remarks in that meeting explaining why he had submitted nil returns, that he had wanted to spark an investigation to force Mr Anik to give him the records, suggested to us at first that the appellant was ignorant of what Mr Patta was doing and why. But we think that, even if that was Mr Patta's motive for putting what he did on the returns, it does not follow that the appellant was unaware that the returns were inaccurate.

67. We also consider that the appellant must have known that the rents he was receiving were not on the returns and that they should have been.

Discussion – have HMRC discharged the burden of proof on them?

68. We deal here with what were described in *Brimheath* as the "competence" and "time limit" issues.

Was there a discovery?

69. We first look at the assessments to see if HMRC have in fact made a discovery.

70. In relation to 2005-06 to 2009-10 inclusive it is quite clear to us that HMRC have discovered a deficiency in that income and gains that ought to have been (self-) assessed have not been assessed. This is true of the rents and the chargeable gain and it is also true of the restaurant trade since even on Mr Patta's figures there are profits that were not returned, except in relation to 2006-07.

71. For 2007-08 this holding is sufficient to show that HMRC have discharged any burden of proof on them. But for the other years the provisions of s 29(2) TMA apply, so that HMRC are required to show, in this case, that the condition in s 29(4) TMA is met. That requires HMRC to show that the loss of tax which we have accepted occurred was brought about carelessly or deliberately.

72. We note in passing that those adverbs were substituted for "fraudulent or negligent conduct" by paragraph 3 Schedule 39 FA 2008 which came into force on 1 April 2010 by virtue of article 2 of the Finance Act 2008, Schedule 39 (Appointed Day, Transitional Provision and Savings) Order 2009 (SI 2009/403 (c.24)). By "came into force" we take the order as meaning that the adverbs apply where any assessment is made on or after that date and not whether the tax year for which the assessment is made ended before then. Where the order wished to refer to tax periods it did so, as in article 7. There is one caveat to this, which is that in relation to the assessment for 2007-08 the coming into force date may be 1 April 2012 (article 10(2)). In any event all the assessments were made in 2014 so it is clear that the new wording applies.

73. As we have found that both the appellant and Mr Patta knew that the returns that were made (that is for all the years except 2007-08) were wrong, we find that for those years the loss of tax was brought about deliberately by "a person [the appellant] or a person acting on [the appellant's] behalf [Mr Patta]". This wording comes from s 29(4) TMA and provides that it is sufficient that, even if a loss of tax cannot be said to have been brought about by the person who made the return, an agent's conduct falls within the statutory description. That indeed seems to have been HMRC's contention in the enquiry and so they have discharged the burden of proving it.

74. Discovery assessments were also made for 2011-12 and 2012-13. For these years we have been informed that returns were made (see §62). We cannot see in the bundle any indication when they were made: there is no "Return Summary" or "SA Notes" for these years as there is for some earlier ones. The enquiry into the 2010-11 return was opened on 2 March 2012, before the end of 2011-12, so obviously before any return for 2011-12 would have been submitted. We can find nothing in the bundle that indicates when that return was made and nothing to show that any enquiry into the return was begun. In a letter of 2 May 2013 HMRC mention that the 2012 figures are virtually identical to those for 2011, so at that time the return must have delivered. While HMRC say those figures need to be adjusted they do not say on what basis and do not indicate that a s 9A enquiry was opened into that year.

75. The 2012-13 return is mentioned by HMRC first in a letter of 15 May 2014 which set out how HMRC were going to proceed to finalise the enquiry. After setting out proposed figures of income from rents and trading for 2005-06 to 2011-12 HMRC say that "I note that your 2012-13 return has been submitted showing a profit figure of

…. In accordance with my views and figures above I intend assessing a revised profit figure of £35,000." There is no indication that a s 9A enquiry was begun.

76. Discovery assessments for 2011-12 and 2012-13 were made on 24 June 2014. The question we have is whether a discovery assessment can be made in these circumstances. It seems to us that it can, but only if the condition on which HMRC rely is that in s 29(4) TMA, that the inadequacy in the self-assessment was brought about deliberately or carelessly. It cannot be made under the s 29(5) condition because that requires that the situation at the close of the enquiry period be considered, and we were not informed when that date was (the period had clearly not ended for 2012-13 in June 2014).

77. It seems clear to us that HMRC was of the view that there was a loss of tax in that the self-assessment was inadequate in both 2011-12 and 2012-13 as, based on their calculation, the restaurant profits were substantially in excess of the returned ones. Is that sufficient or must there be further objective evidence that the return was inadequate? The wording of s 29(5) suggests there must as it requires that the "situation mentioned in subsection (1)" (the inadequacy of an assessment) was brought about deliberately etc.

78. Section 29(8) TMA requires that objections on the grounds that a condition was not met must be taken at an appeal hearing. Mr Patta did not in terms object to the raising of the discovery assessment for these two years on the grounds that the conduct was not deliberate or careless. But we do not think this matters. Section 29(8) does not say that objections about the conditions can only be considered if explicitly raised, and *Brimheath* shows, if it needed showing, that the burden of proof on the s 29(5) condition will always be with HMRC.

79. Have they discharged it? The returns made for the two years are correct as to rentals. For the restaurant profits they embody Mr Patta's figures calculated on the basis of the records. HMRC have not enquired into the basis of the profit calculations at all. They have relied for these two years on the presumption of continuity following what they say about the 2010-11 figures.

80. In our view they have not shown that there was a loss of tax arising from an inadequacy in an assessment, the relevant self-assessment, for the years, but even if they had shown that, they have come nowhere near showing that it was deliberately brought about by Mr Patta or Mr Anik. Mr Patta's figures for the restaurant profits were we were told based on the records for that year and they have not been challenged by HMRC. So HMRC have not met either of the conditions in s 29(4) and (5), and the discovery assessments must fall.

Were the time limits breached?

81. But we also need to consider time limits for making the discovery assessments. The assessments for the years we still have to consider here were made in June 2014. That date is more than four years after the end of the tax year 2009-10 and all earlier years, so the "ordinary" time limit in s 34 TMA does not apply to these years. Section 36(1A) and (1B) TMA allows assessments to be made within a period of 20 years

where a loss of tax is brought about deliberately by a person or by someone acting on that person's' behalf. This provision also came into force on 1 April 2010 and so applies in this case where the assessments were made in June 2014. Since we have already held that the loss of tax justifying the discovery assessments for these years was deliberately brought about (see §73), we also hold that the time limit for the assessments is 20 years and so they are all in time. HMRC has discharged the burden on it in this regard.

Were the penalties validly determined or assessed? (1) Section 95 TMA.

82. So far as concerns penalties, for tax years 2005-06 to 2007-08 the relevant provision is s 95 TMA. That requires us to consider whether:

> "a person fraudulently or negligently—
>
> (a) delivers any incorrect return of a kind mentioned in section 8 … of this Act …, or
>
> …
>
> (c) submits to an [officer of HMRC] any incorrect accounts in connection with the ascertainment of his liability to income tax or capital gains tax"

83. We cannot see anything in s 95 TMA (and we were not told by HMRC of anything) which extends the "person" to someone acting on their behalf. We note though in *Stayton v HMRC* [2016] UKFTT 345 Judge Redston held at [215] that:

> "… If he acts through an agent, and the return is inaccurate because the agent falls below the standard required, is the taxpayer negligent?
>
> 216. As a matter of general law a person who carries out particular acts through an agent remains liable for torts, including negligence. …"
>
> 217. There is no reason why this general principle does not also apply to an agent's submission of an SA return. We observe that any resulting harshness is more apparent than real, because TMA s 95 must be read with TMA s 118(2). In other words, a taxpayer found to be negligent because of the actions of his agent may then be able to claim the defence of reasonable excuse."

84. We do not think that this approach necessarily applies where the conduct is fraudulent rather than negligent. We say that for three reasons. One, the protection of s 118(2) TMA is not available in cases involving conduct which is fraudulent. Two, fraudulent conduct by agents is covered separately in s 99 TMA. Three, Schedule 24 FA 2007 includes a specific provision (paragraph 18) for agents which also appears to cover only careless (ie negligent) conduct and not deliberate (which includes fraudulent) conduct on the part of an agent.

85. On the other hand it is clear from *Pleasants v Atkinson (HM Inspector of Taxes)* 60 TC 228 ("*Pleasants*") that where a statute (in that case s 36 TMA as it stood in the 1970s) refers to fraud or wilful default being committed on behalf of a person there is

nothing to prevent an accountant's wilful default being attributed to the principal, and on the face of the statute there is nothing to prevent an accountant's fraudulent conduct being attributed to the principal.

86. In this case the "nil returns" and the white space entries were made on his own admission by Mr Patta. We hold, based on our findings in §65, that Mr Patta's conduct amounted to at least wilful default. We know from *Regina v General Commissioners of Income Tax for Havering (ex parte Knight)* 49 TC 161 at 174/5 that in s 95 "fraudulent" includes "wilful default", so bringing the case within the scope of the decision of the High Court in *Pleasants*.

87. But where s 95 TMA is in point we do not of course need to consider the agent's conduct if we can characterise the conduct of the appellant as within the extended concept of "fraudulent" in s 95 TMA. Based on our findings in §§66 and 67 we hold that the appellant's conduct also amounted to wilful default.

88. It follows from this that we consider that HMRC have discharged the burden on it and that the s 95 penalties for the tax years 2005-06 and 2006-07 were justified in principle. We do not consider that a s 95 penalty for 2007-08 was justified as there is no evidence that a return was delivered by the appellant or that incorrect accounts were submitted.

89. The time limit for s 95 penalties is found in s 103 TMA. Section 103(1) allows a determination to be made within six years of the date the penalty was incurred or if later within three years of the final determination of the tax by reference to which the penalty is calculated. Since it is only by these proceedings that the tax is determined then the penalty determinations were clearly in time.

90. We add that we were not given in the bundle any copies of the determinations. Mr Patta did not take any point about their validity in accordance with s 100 TMA and neither do we. But they should nevertheless have been provided.

Were the penalties validly determined or assessed? (2) Schedule 24 FA 2007.

91. For the tax years 2008-09 to 2012-13 assessments have been raised under Schedule 24 FA 2007. The condition for assessing these penalties is that:

> "**1—**(1) A penalty is payable by a person (P) where—
>
> (a) P gives HMRC a document of a kind listed in the Table below, and
>
> (b) Conditions 1 and 2 are satisfied.
>
> (2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—
>
> (a) an understatement of P's liability to tax,
>
> …
>
> **…**

(3) Condition 2 is that the inaccuracy was careless or deliberate (within the meaning of paragraph 3).

…

Table

Income tax or capital gains tax	Return under section 8 of TMA 1970 (personal return).
Income tax or capital gains tax	Accounts in connection with ascertaining liability to tax.

3—(1) Inaccuracy in a document given by P to HMRC is—

(a) "careless" if the inaccuracy is due to failure by P to take reasonable care,

(b) "deliberate but not concealed" if the inaccuracy is deliberate but P does not make arrangements to conceal it, and

(c) "deliberate and concealed" if the inaccuracy is deliberate and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

92. On the question of agency, paragraph 18 Schedule 24 provides:

"(1) P is liable under paragraph 1(1)(a) where a document which contains a careless inaccuracy (within the meaning of paragraph 3) is given to HMRC on P's behalf.

…

(3) Despite sub-paragraph[ ] (1) […], P is not liable to a penalty in respect of anything done or omitted by P's agent where P satisfies HMRC that P took reasonable care to avoid inaccuracy (in relation to paragraph 1) …..

(4) In paragraph 3(1)(a) (whether in its application to a document given by P or, by virtue of sub-paragraph (1) above, in its application to a document given on P's behalf) a reference to P includes a reference to a person who acts on P's behalf in relation to tax.

…"

93. It is apparent from the reference in sub-paragraph (1) of paragraph 18 to "a careless inaccuracy" and the reference in sub-paragraph (3) to paragraph (a) alone of sub-paragraph (1) of paragraph 18 that paragraph 18 applies only to careless inaccuracies and not to deliberate ones.

94. Based on our findings in §§66 to 67 we consider that the appellant's conduct was deliberate. Mr Patta's conduct was also, we find, deliberate, but, as we have just noted, we consider that to be irrelevant for the purposes of Schedule 24. We are conscious that there is an apparent inconsistency here because s 29(4) TMA clearly allows an agent's deliberate conduct to be taken into account when determining whether the condition for raising a discovery assessment is met. But it is one thing to permit an assessment to recover that which is due to HMRC as the correct amount of

tax for a year: it is another to impose a penalty on a person on top of that on the basis that the person was not personally involved in deliberate conduct, and so any inconsistency is in our view justified.

95. For 2008-09, 2009-10 and 2010-11 in our opinion HMRC have discharged the burden of showing that there was an inaccuracy in the returns in not returning the rents or restaurant profits and that the inaccuracy was brought about by the deliberate conduct of Mr Anik.

96. In relation to 2011-12 and 2012-13 we have found that the discovery assessments for these years were not validly made. It follows that can be no potential lost revenue (see paragraph 5 Schedule 24 FA 2007). Therefore the whole basis of the penalty assessments for these two years is destroyed.

97. In summary, in relation to penalties HMRC have discharged the burden of showing that a penalty had been incurred in relation to 2005-06, 2006-07, 2008-09, 2009-10 and 2010-11. In relation to 2007-08, 2011-12 and 2012-13 they have not discharged that burden.

Discussion – has the appellant discharged the burden of proof on him in relation to the amount of the profits?

98. Once HMRC have discharged the burden of showing that the discovery assessments are justified, the burden of proof is on the taxpayer to show that he is overcharged to tax by the assessment or by a closure notice amending a self-assessment. This follows, it has been said many times, from s 50 TMA:

> "(6) If, on an appeal notified to the tribunal, the tribunal decides—
>
> (a) that, the appellant is overcharged by a self-assessment;
>
> …
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good."

99. Lord Lowry said in giving the judgment of the Privy Council in Bi-Flex *Caribbean v The Board of Inland Revenue* 63 TC 515 (at p 522) ("*Bi-Flex*"):

> "The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgment assessment, as the cases have established, do not serve to displace the validity of the assessments, which are prima facie right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right. It is also relevant, when considering the sufficiency of evidence to displace an assessment, to remember that the facts are peculiarly within the knowledge of the taxpayer."

100. We think that this statement needs to be taken with a modicum of caution. The provision of the Trinidad and Tobago law with which the Privy Council was concerned was very similar to s 29 TMA as it stood before the introduction of self-assessment. Also, s 50 TMA as it stands currently is somewhat different from the version that applied before the establishment of this Tribunal. Nonetheless we observe that in this case the appellant not only takes issue with HMRC's figures and its approach to this case but he has also put forward figures of his own.

101. We also refer to the fact that HMRC's investigations were of one tax year only, 2010-11 and that in this year we are concerned with an amendment to a self-assessment not a discovery assessment. All other assessments are discovery assessments which have been made by taking the figures calculated by HMRC for that year and scaling them up or down for subsequent or previous years. This approach is normally justified by HMRC by reference to the "presumption of continuity" discerned from a number of tax cases. In this case when HMRC's Statement of Case was submitted to the Tribunal, the Tribunal asked HMRC to explain the "presumption of continuity" and to provide any legislation and case law underpinning its use. In its revised Statement HMRC say "There has been no presumption of continuity on the part of the Respondents as it is common ground that the "nil" return submitted by Mr Anik do not accurately reflect the restaurant's business activities during the period in point". We will consider this argument later.

The genesis of HMRC's figures

102. HMRC have put forward in their Statement of Case no reasons to justify their contention that the records produced to them for 2010-11 by the appellant were unreliable. In the bundle we can see that following the initial meeting on 22 March 2012, HMRC wrote on 11 April asking for accounts for the year ended 5 April 2011, along with all the supporting documents. They then issued a formal notice on 22 June and a penalty warning on 31 July. On 11 September 2012 Mr Patta wrote enclosing the accounts of the restaurant business that he had prepared and the supporting documents and various other information.

103. There was no copy of those accounts in the bundle. There was an indirect indication of what they might have said. In the HMRC letter of 2 May 2013 there is the comment "[t]he 2012 figures are virtually identical to those for the year ended 5 April 2011 (the turnover and purchases figures are identical) …"

104. There was a follow-up meeting on 14 February 2013 and HMRC's notes of the meeting said:

> "**Business accounts**
>
> These were based on the few records held. The turnover was based on the daily takings figures recorded on notepad pages.
>
> Anik confirmed that he had calculated these from the till totals.
>
> Hollis pointed out that this could not be correct. There were takings recorded for the 30th and 31st February. These days did not exist even

in a leap year. There were no missing days in March to balance this out.

As result the figures provided could not be relied upon. Hollis would now need to calculate what he thought the likely true results of the business were.

Methods

There were various methods that could be used to do this. Given the lack of records Hollis was going to look at the likely spending requirements of Anik and his wife. The government carried out expenditure surveys and the results of these surveys had been used in other cases to arrive at profit figures.

Anik accepted the basis of what Hollis was saying.

Accountant

At this point Patta arrived and apologised for his lateness.

Hollis ran over what he had discussed with Anik so far."

105. Thus the HMRC case is that the business records seen in March 2012 were unreliable solely because of the reference to takings on two days that did not exist and the reference to those days could not be accounted for as an error. Accordingly, although there were several methods of establishing the correct figures the preferred way of calculating the profits was, as we can see from the bundle, to look at the deposits into the private bank account together with the cash requirements for living. That would give the total drawings from the business, which in turn would represent the profits earned.

106. Mr Anik had been able to provide only a small number of statements for the private bank account. He had signed a mandate to allow HMRC to obtain statements from the bank. HMRC had done so and prepared an analysis of those statements. In his letter of 2 May 2013, the HMRC officer stated that the credits to the private account were £25,460. Adjusting for cheques and cash requirements outside of the private bank account, he concluded that the profit for the year ended 5 April 2011 was £35,110. In subsequent meetings and correspondence, the officer revised this figure down, on account of some of the credits being of rent not restaurant takings.

Mr Patta's objections: absence of calculations

107. Mr Patta said that he had twice asked to see the calculations and the bank statements on which they were based so he could comment upon them. He had asked at the meeting on 19 June 2013 and the HMRC officer had promised to send them, but had not done so. We note that the HMRC letter of 25 June 2013 said that it was enclosing the bank statements (both business and private) for the year ended 5 April 2011. It did not mention the calculations. We cannot see evidence in the bundle of a second request, though we do see in meeting notes that Mr Patta continued to dispute HMRC's conclusions on the restaurant profit.

108. The bundle did not contain the HMRC analysis. Nor did it contain the bank statements on which the analysis was based. Mr Bates, as the HMRC presenting

officer, said that he was handicapped by not having access to those documents. We would say that was an understatement.

109. What we did have were copies of HSBC statement number 148 for the private bank account covering the month from 22 May to 22 June 2010 and statement number 158 covering the month from 22 October 2010 to 22 November 2010. On the first statement were two deposits of £500 each. On the second statement were two more deposits of £500 and one of £460. We have noticed that the two deposits in June were both at the Eastleigh branch of HSBC. That is where Mr Anik's brother has his business, some twenty miles from Southsea, a business from which rents are paid to the appellant. In any event, those two statements are far too small a sample from which we can draw any conclusion.

110. Mr Patta pointed out that the bundle contained three bank statements for a commercial mortgage account covering the period 29 November 2009 to 29 November 2011. He wondered whether HMRC had included the deposits into that account as part of their calculations. He pointed out that the deposits into the commercial mortgage account were direct transfers from the business bank account and pointed to the corresponding entries on the statements for that account.

111. In summary, HMRC's profit calculations start with the conclusions of an analysis, which we have not seen, of a longer run of bank statements, which we have not seen. HMRC ask us to take on trust the assertion that the HMRC officer drew the right conclusions. We decline to do so in the absence of the officer or his evidence and the absence of the calculations he made.

Mr Patta's objections: Inclusion of income from other sources

112. In their letter of 2 May 2013, HMRC set out their calculation of the restaurant profits for the year ended 5 April 2011. Their initial estimate was £35,110. This was revised by £3,330 to £31,780. This represented bankings that could have come from the newly disclosed Elm Grove rent.

113. Mr Patta made the point that it is not clear whether HMRC allowed for the rent from the Eastleigh premises. The apparent surplus of receipts over payments in the year to 5 April 2011 was £1,623. The taxable amount was higher because the payments included a capital repayment element on the mortgage.

Mr Patta's objections: loans and gifts from Turkey

114. Mr Patta argued that HMRC's figures were wrong because they had not taken into account evidence from Mr Anik's relatives. With his letter of 7 November 2014, Mr Patta had provided HMRC with two sworn statements in Turkish with certified translations. One statement is from Mr Celal Anik, paternal uncle of the taxpayer. It states that he has lent the taxpayer £18,500. At the outset, it implies that he made the loan during the year ended 31 March 2011. Later it states that the loan reached that balance during that year. "I have sent these monies to Murat ANIK at different times and by means of friends and relatives whilst they were travelling between Turkey and England …" The other statement is from Sidik Anik, the taxpayer's father. That is

still more vague on timing "The total of the money given with regular intervals to his son MURAT ANIK is thirty thousand (30,000.-) Sterling Pounds."

115. Mr Anik stated that in both cases, the money came in Sterling cash by the hand of travelling friends or relatives.

116. Mr Bates pointed out that HMRC's revised calculations had already made some (arbitrary) allowance for gifts or loans from family members, whether in the UK or Turkey.

117. We accept that the taxpayer received financial support from his family in Turkey. That forms a background context when considering the credibility of the proposed income figures. Given the lack of detail on timing and the lack of traceability of the transfers, it is not possible to draw any more specific conclusion.

Our concerns about the HMRC methodology and calculations

(a) Cash requirements

118. The HMRC calculations assume cash drawings from the business in addition to the bankings to the private account. The assumption was cash drawings of £250 for each of 52 weeks, less £1,050 withdrawn from the private account to give a net £11,950. HMRC did not offer any justification for that assumption. It was purely arbitrary. Neither did Mr Patta offer an alternative. The difficulty of using assumed expenditure as a measure of income is that it is a circular argument. In the long run, individuals have to restrict their expenditure to a level that is supported by their actual income.

(b) Whether VAT an issue?

119. We asked whether HMRC agreed that there was no liability to VAT. We noted that HMRC had calculated profits from the drawings in the bank account on the assumption that there was no liability to VAT. It would we suggested clearly be unfair to charge income tax on a gross income only for HMRC to make a later claim for VAT.

120. Mr Bates said that, as far as he was aware, HMRC were not claiming VAT. Mr Patta confirmed that the business was not registered for VAT. On his figures, the turnover had always been below the registration limit. At the meeting on 22 March 2012, the HMRC officer reviewing the VAT position had reviewed recent till rolls. The notes of the meeting record that she was unable to confirm whether or not Mr Anik should be registered for VAT because the till rolls were incomplete. Mr Patta said that the reviewing officer had taken away some records but he had heard nothing further.

121. Given that nearly four years have passed since that meeting with no further action, we conclude that HMRC must have accepted that the business had not been liable to register for VAT, at least up to 22 March 2012.

(c) Business economics calculation

122. We asked whether HMRC had used a business economics model as a cross-check on their private side methodology. Mr Bates told us that they had not. He commented that the use of such models by HMRC was declining.

123. We are both aware from other hearings in the Tribunal that one common comparison that is made in both VAT and income tax investigations of restaurants is the split between card and cash sales. Card sales are more difficult to suppress than cash sales since they have to be reported to the card company and are paid into bank accounts.

124. We can see from the document bundle that the one aspect of this trade that is reliably documented is the card sales. They appear on the business bank statements as "DUALITY-E" or "MAESTR-E". Based on the three months business bank statements from 12 April 2010 that are in the bundle, we can see that the annual rate of credit card sales was about £37,600. Given access to sufficient samples of the till rolls showing a split between cash and card, or even applying ratios that are well attested by HMRC officers in similar investigations, we consider that it ought to have been possible to cross-check and produce a good estimate of the total sales. We consider that such an exercise should have been done to cross-check the private side based calculations.

Mr Patta's profit calculations

125. Mr Patta explained that Mr Anik had struggled with the business. He got behind with the bills. He received loans from his family to keep going. He had operated with his wife and son unpaid. HMRC had conducted observations of the premises and found it quiet. Essentially Mr Anik had buried his head in the sand.

126. Mr Patta had prepared the accounts for 2011-12 for that year from purchase records, expenses and a record of sales. The daily takings were recorded in an account book. This included the takings from the till roll and the credit card machine. Mr Patta had seen the business bank statements. Having prepared accounts for 2011-12, he scaled the results back to estimate the profits for previous years.

127. We noted that the profit Mr Patta now proposed for 2011-12 was greater than the figure put on the tax return. He stated that there was an adjustment for private use. That seemed to us to be an unsatisfactory explanation. Firstly, it was vague. Secondly, the profit declared on the tax return is supposed to be the profit after making all necessary adjustments for private use.

128. In the table below, we summarise the various proposals for taxable profits of the Istanbul Restaurant.

Year	Profit on the tax return	Mr Patta's proposal of 7 Nov 2014	HMRC proposal

Year	Profit on the tax return	Mr Patta's proposal of 7 Nov 2014	HMRC proposal
2005-06 (from July 2005)	0	5,618	15,000
2006-07	6,174	7,500	18,000
2007-08	0	7,500	20,000
2008-09	0	7,500	22,000
2009-10	0	7,500	24,000
2010-11	0	7,543	25,000
2011-12	6,248	8,000	26,000
2012-13	5,327	8,500	27,000

We note that Mr Patta's proposals are higher than the corresponding figures on the tax returns. We take that as an implicit admission that the tax return figures are unreliable. As described earlier, we know that accounts were prepared for 2010-11. We have not seen them but HMRC commented that the following year's figures were virtually identical.

Our conclusions on the restaurant profits

129. We have come to the conclusion that we cannot rely on HMRC's calculation of the profit of the restaurant for 2010-11. We have grave doubts about whether the amendments made to the appellant's tax return and self-assessment in relation to this income can be said to have been made by Mr Hollis to the best of his judgment, but in his absence we were unable to hear his side of the story.

130. It does not matter because we consider that by pointing out the lack of disclosure of the calculations and the methodology used as well as other weaknesses in the HMRC case, such as its reliance on two dubious entries in a takings record to damn the entire list, Mr Patta has discharged the burden on the appellant of showing that the HMRC figures cannot stand. That he has done so is reinforced by the answers to our own questions and by observations on the business bank statements by Mr Baker, the expert member of this Tribunal. We would add here that it seems incomprehensible to us (and supportive of Mr Patta's submissions) that HMRC failed to carry out cross-checks using different and familiar methodologies, and seemed to have completely ignored the business bank statements, records of purchases and all the other documents Mr Hollis was supplied with.

131. Not only has Mr Patta argued that HMRC's figures should not stand, he has produced his own figures, thus meeting the strict requirements set out by Lord Lowry in *Bi-Flex*.

132. We referred earlier to the "presumption of continuity". Despite HMRC's Statement of Case that the presumption was not applied in this case, we consider that it clearly was. No investigation of any sort was carried out into the restaurant profits for any other period, but discovery assessments were raised for them on the basis that there was a loss of tax. That loss of tax was not demonstrated from a check or investigation into the records of those years, even just of the drawings to the private bank account. It can only have been present in HMRC's mind because they presumed that what they had discovered in 2010-11 must have also been present in the other years.

133. It follows from what we say that the appellant, through Mr Patta, has discharged the burden of showing that the HMRC figures for the restaurant profits are incorrect in all other years. Mr Patta has produced figures for these years, including figures that are in excess of those used in the returns, and we accept them as the correct figures.

Procedural concerns

134. We first address some concerns we have had about the procedures adopted in this case relating to assessments and appeals and about the failure to include important documents associated with the assessments and appeals in the bundle. These are in addition to the concerns we expressed in §§74, 90, 103 and 108.

135. On 15 May 2014 Mr Hollis wrote to the appellant (there is no trace in the bundle of a copy having been sent to Mr Patta) with his proposal for settling the enquiry. In the letter he produced figures for each of the three sources of income (two property businesses and a trade) for all years 2005-06 to 2011-12 and of a capital gain for 2007-08. He also proposed restaurant profits for 2012-13. He also shows what the appellant's liability to penalties was and what reductions would be made.

136. The final page of the letter states in bold that Mr Hollis he did not hear from Mr Anik within 30 days "I will proceed with these notices". We cannot find any reference in the letter before this statement to notices of any kind or of any synonym such as assessments or amendments.

137. The letter goes on to say that the appellant would have the right of appeal against any formal notices issued.

138. The next communication from HMRC is a letter of 24 June. It says that in the absence of meaningful co-operation "I am therefore closing my enquiry by way of formal notices" and adds "Please find enclosed: Notices of assessment to tax …, Notice of closure of my enquiry into your 2010/11 return, penalty determination notices … Notice of penalty assessments…".

139. Apart from the conclusions of the enquiry stated in the letter, none of the notices referred to are in our bundle nor is the amendments of the return and SA.

140. At a meeting on 16 July 2014 Mr Hollis agreed to reduce the assessments and to consider a reduction in the penalties. He said that "amendments would be issued shortly with determinations of appeals". From this we infer that the appellant had made appeals against all the assessments etc and that these had been given to HMRC and accepted as valid. Mr Hollis reports Mr Patta as saying that he did not agree with some of the figures in Hollis' letters and it seems that this statement was taken (correctly in our view) to constitute appeals against the relevant assessments etc.

141. On 14 August 2014 Mr Hollis wrote to Mr Patta. He said he had revised the assessable profits and given a further reduction in the penalties. He enclosed revised assessments and penalty determinations and added:

> "I hereby determine your appeals under s 54 TMA".

This appears to be an attempt to unilaterally impose a s 54 agreement as there is no evidence that Mr Patta accepted the revised figures.

142. The amended assessments etc are in the bundle and are dated 14 August. But there is no trace of a further amended self-assessment for 2011-12.

143. Why, it might be asked, if there is a s 54 agreement are all these appeals before the Tribunal? The answer is that at a meeting on 19 September 2014 Mr Patta was told that if he disagreed with the figures set out in the letter of 14 August and its attachments and was "going back" on the previous agreement he would have to submit late appeals and explain the reason. Mr Patta submitted appeals on 7 November 2014. These were apparently accepted as a review was then carried out.

144. The problem with this is that when there has been a s 54 agreement, the way in which "going back" on it is effected is by resiling from the agreement under s 54(2). That simply requires that notice in writing be given within 30 days of the date of agreement, but the 30 days had already passed. The only notice given by Mr Patta is his letter of 7 November which was accepted as being his appeals.

145. Assuming that the letter of 7 November should have been notice of resiling and that HMRC waived any issue of lateness, the effect was that there were revived the appeals against the June 2014 assessments etc. They could be reviewed at any time and were. Before the review Mr Hollis, correctly, gave his view of the matter in which he said that the assessments to be reviewed were those where the August figures applied. The reviewing officer also stated incorrectly that the matters under review were the August amended assessments.

146. In the end this does not really matter – much, though it is very unsatisfactory. The correct position is that the Tribunal must exercise its powers under various provisions in TMA and in FA 2007 by reference to the June figures not the August ones.

Decisions – in detail

147. We now need to go on and carry out this exercise of determining what we should do under the powers we have in the light of our conclusions. We need to consider each tax year separately in this exercise, and we consider tax and the penalties separately. Before we do so we should say that at the hearing we expressed surprise and dismay that the bundle did not contain any explanation of how HMRC calculated the figures of tax and Class 4 NIC that they were asking us to uphold. After a search through his file, Mr Bates was able to find calculations and provide us with copies. Unfortunately as it now turns out these are the August figures, not the June ones.

Income tax & CGT assessments

2005-06

148. There is a valid discovery assessment charging to income tax income of £22,118 made up of £118 and £5,500 rents and £16,500 trade profit. The figures we determine are £7,500 rents (Mr Patta's figures) and £5,618 trade profit, totalling £13,118. In accordance with s 50(8) TMA we leave it to HMRC calculate the tax resulting.

149. There is a valid discovery assessment charging to Class 4 NIC trade profits of £11,605. The figure we determine is £723. In accordance with s 50(8) TMA we leave it to HMRC calculate the NIC resulting.

2006-07

150. There is a valid discovery assessment charging to income tax income of £25,576 made up of £5,750 rents and £24,000 trade profit less already self-assessed £6,174 making £19,826. The figures we determine are £5,750 rents and £1,326 (£7,500 less £6,174 already self-assessed) trade profit, totalling £7,076. In accordance with s 50(8) TMA we leave it to HMRC calculate the tax resulting.

151. There is a valid discovery assessment charging to Class 4 NIC trade profits of £19,826. The figure we determine is £1,326 In accordance with s 50(8) TMA we leave it to HMRC calculate the NIC resulting.

2007-08

152. There is a valid discovery assessment charging to income tax income of £35,836 made up of £9,836 rents and £26,000 trade profit and to capital gains tax gains of £19,633. The figures we determine are £9,836 rents and £7,500 trade profit totalling £17,336 and chargeable gains of £19,633. In accordance with s 50(8) TMA we leave it to HMRC calculate the tax resulting.

153. We have reduced the gain to the figure given by HMRC after the annual allowance, because we consider Mr Hollis misled Mr Patta about the figure of gain.

154. There is a valid discovery assessment charging to Class 4 NIC trade profits of £20,775. The figure we determine is £2,275. In accordance with s 50(8) TMA we leave it to HMRC calculate the NIC resulting.

2008-09

155. There is a valid discovery assessment charging to income tax income of £40,805 made up of £6,285 and £6,250 rents and £28,000 trade profit. The figures we determine are £6,285 and £6,250 rents (Mr Patta's figures) and £7,500 trade profits, totalling £20,035. In accordance with s 50(8) TMA we leave it to HMRC calculate the tax resulting.

156. There is a valid discovery assessment charging to Class 4 NIC trade profits of £22,565. The figure we determine is £2,065. In accordance with s 50(8) TMA we leave it to HMRC calculate the NIC resulting.

2009-10

157. There is a valid discovery assessment charging to income tax income of £46,461 made up of £9,961 and £6,500 rents and £30,000 trade profit. The figures we determine are £9,961 and £6,500 rents (Mr Patta's figures) and £7,500 trade profits, totalling £23,961. In accordance with s 50(8) TMA we leave it to HMRC calculate the tax resulting.

158. There is a valid discovery assessment charging to Class 4 NIC trade profits of £24,285. The figure we determine is £1785. In accordance with s 50(8) TMA we leave it to HMRC calculate the NIC resulting.

2010-11

159. There is an amended self-assessment charging to income tax income of £48,541 made up of £10,133 and £6,628 rents and £31,780 trade profit. The figures we determine are £10,133 and £6,628 rents (Mr Patta's figures) and £7,543 trade profits, totalling £24,304. The tax charged is £3,565.80.

160. There is an amended self-assessment charging to Class 4 NIC trade profits of £26,065. The figure we determine is £1,828. The Class 4 NIC resulting is £146.24.

2011-12

161. There is a discovery assessment charging to income tax income of (we assume) £26,752, being the difference between the estimate made by HMRC on the basis of the presumption of continuity of restaurant trade profits of £33,000 and those in the return and self-assessment made showing a profit of £6,248.

162. We have held that HMRC had no power to raise a discovery assessment, and as they have not enquired into the return we simply say that under s 50(6) TMA the appellant is overcharged by the discovery assessment and reduce it to nil.

163. The same applies so far as the discovery assessment charges Class 4 NIC.

2012-13

164. There is a discovery assessment charging to income tax income of (we assume) £29,673 being the difference between the estimate made by HMRC on the basis of the presumption of continuity of restaurant trade profits of £35,000 and those in the return and self-assessment made showing a profit of £5,327.

165. We have held that HMRC had no power to raise a discovery assessment, and as they have not enquired into the return we simply say that under s 50(6) TMA the appellant is overcharged by the discovery assessment and reduce it to nil.

166. The same applies so far as the discovery assessment charges Class 4 NIC.

Penalties

2005-06

167. We have held that s 95 TMA penalties are competent for this year. The penalty as assessed contained a mitigation percentage of 45%. In his letter of 14 August Mr Hollis reduced this to 55%.

168. We have found no reason to quarrel with this latter figure.

169. In accordance with s 100(2)(b)(iii) TMA we vary the determination of the penalty so that it is 45% of the s 95(2) difference resulting from our determination of the appeal against the discovery assessment.

2006-07

170. We have held that s 95 TMA penalties are competent for this year. The penalty as assessed contained a mitigation percentage of 45%. In his letter of 14 August Mr Hollis reduced this to 55%.

171. We have found no reason to quarrel with this latter figure.

172. In accordance with s 100(2)(b)(iii) TMA we vary the determination of the penalty so that it is 45% of the s 95(2) difference resulting from our determination of the appeal against the discovery assessment.

2007-08

173. Because there was no return delivered in this tax year, s 95 TMA cannot apply, and in accordance with s 100(2)(b)(i) TMA we set the penalty aside.

2008-09

174. We have held that Schedule 24 FA 2007 penalties are competent for this year. The penalty as assessed is of an amount equal to 52.5% of the tax and Class 4 NIC

payable on that assessment (the potential lost revenue - "PLR"). In his letter of 14 August Mr Hollis reduced this to 47.25%. We see no reason to change the percentages for the quality of disclosure so the penalty should be 47.25%.

175. There is no indication in the papers that either Mr Hollis or the reviewing officer gave any thought to whether a special reduction might be due under paragraph 11 Schedule 24 FA 2007. Their failure to consider whether a special reduction is due is therefore arguably a flawed decision within the meaning of paragraph 17(6) of that Schedule. The Tribunal is therefore able to come to its own conclusion. We do not think there are any circumstances which would allow us to reduce the penalty further.

176. We note also that no suspension of the penalty was offered. Suspension is not possible if the conduct was deliberate, and HMRC were of course proceeding on the basis that it was. We have found that the conduct was deliberate so we have no need to consider suspension further.

177. As we have varied the discovery assessment for this tax year it follows that the PLR (the equivalent of the s 95(2) TMA difference – see paragraph 5(1) Sch 24) in this case is lower then the figure HMRC have used in their penalty assessment. Therefore in accordance with paragraph 17(2)(a) Schedule 24 FA 2007 we substitute for HMRC's decision a decision that the penalty is 47.25% of the actual PLR as determined from our decision about the assessment.

2009-10 & 2010-11

178. In accordance with paragraph 17(2)(a) Schedule 24 FA 2007 we substitute for HMRC's decision a decision that the penalty is 47.25% of the actual PLR as determined from our decision about the assessment and the amendment to the self-assessment respectively.

2011-12 and 2012-13

179. In relation to 2011-12 and 2012-13 there is no PLR as there is no discovery assessment. Therefore in accordance with paragraph 17(1) Schedule 24 FA 2007 we cancel HMRC's decisions and so no penalties are due.

Summary of decisions

180. We set out here in tabular form the decisions described in detail §§148 -179: we trust there are no differences but if there are the detailed decisions are to be followed.

TAX & NICS

	Income	Profits liable to Class 4 NIC	Chargeable gain
2005-06	13,118	723	
2006-07	7,076	1,326	
2007-08	17,336	2,275	19,633

2008-09	20,035	2,065
2009-10	23,961	1,785
2010-11	24,304	1,828
2011-12	Nil	Nil
2012-13	Nil	Nil

PENALTIES

	s 95 TMA	Sch 24 FA 2007
2005-06	45%	
2006-07	45%	
2007-08	None	
2008-09		47.25%
2009-10		47.25%
2010-11		47.25%
2011-12		None
2012-13		None

181. These penalty percentages are of the potential lost revenue which is to be found by reference to the tax and NICs amounts to be calculated by HMRC on the basis of the figures determined by us in this decision.

182. 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 THOMAS

TRIBUNAL JUDGE
RELEASE DATE: