[2016] UKFTT 0785 (TC)

TC05512

Appeal number: TC/2012/06184
TC/2012/09004

INCOME TAX – HMRC alleging undeclared trading income – Discovery assessments made under s.29 TMA 1970 – whether competent – held the evidence showed that for some (but not other) years the assessments were made on an intelligible basis and so satisfied the requirement that they were made 'in the amount, or the further amount, which ought in the officer's opinion to be charged in order to make good to the Crown the loss of tax' – held the other conditions of s.29 were satisfied – the assessments found to be properly made adjusted by reference to the evidence – the penalties charged in respect of years for which the assessments were found to be properly made upheld but adjusted by reference to the adjusted assessments – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

TERRY PAUL BELL **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN WALTERS QC
MRS SHAHWAR SADEQUE

Sitting in public at Colchester on 28 March 2014, at Bedford Square, London, on 18 September 2014, and at the Royal Courts of Justice, London, on 19 November 2015 and 19 October 2016

The Appellant in person

Ms S Spencer, HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant, Mr Terry Bell, appeals against assessments to income tax for the years 1994/1995 to 2008/2009 inclusive and penalty determinations made in relation to the same years, in the case of the penalty determinations for 1994/1995 to 2007/2008 inclusive, under section 95 Taxes Management Act 1970 ("TMA"), and, in the case of the penalty determination for 2008/2009, under paragraph 1, Schedule 24, Finance Act 2007 ("FA 2007").

2. The assessments assess tax said to be payable of £437,144.73 in total, and the penalty determinations under section 95 TMA total £228,578, while a further penalty of £16,698 is claimed by the Respondents ("HMRC") under paragraph 1, Schedule 24, FA 2007.

3. The assessments are discovery assessments made under section 29(1)(a) TMA. They are said to be based on evidence of deposits made into bank accounts held in Mr Bell's name. At least one of these accounts was an offshore bank account, being an account held with the Guernsey Branch of RBS. There were also accounts held with Santander and Alliance & Leicester. We were provided with bank statements of all these accounts, which had been provided to HMRC pursuant to authority given to them by Mr Bell. It was not clear to us that the accounts with Santander and Alliance & Leicester were, in fact, offshore accounts, although they may have been.

4. We heard this appeal at four hearings. The first was at Colchester on 28 March 2014. The second was at Bedford Square, London, on 18 September 2014. The third was at the Royal Courts of Justice, London, on 19 November 2015, where we reserved our decision. The fourth hearing, on 19 October 2016, was also at the Royal Courts of Justice in London.

5. At the hearing of the appeal in Colchester on 28 March 2014, it became apparent that HMRC accepted that Mr Bell may have been overcharged by the assessments under appeal, because Mr Bell had stated at that hearing that withdrawals from the account(s) had been used to buy vehicles for resale. The Tribunal therefore adjourned the appeal to enable the parties to meet and use their best endeavours to reach an agreed settlement of all matters outstanding in the appeal.

6. The parties did meet (on 17 April 2014) but no progress was made. As a consequence the matter was relisted for hearing by us. The adjourned hearing took place on 18 September 2014 in London. At that hearing HMRC produced calculations of tax and NICs due on four alternative bases. They were that the credit items to Mr Bell's accounts represented receipts from sales which gave rise to taxable profits arising as to 10%, 15%, 20 % or 25% of the total. Ms Spencer, appearing for HMRC, made it clear that HMRC had no evidence pointing to which (if any) of these estimates was likely to be the most accurate. They gave rise to additional tax due of £34,915.06, £50,729.36, £67,642.28 or £86,695.86. It can be seen that even the highest of these estimates was considerably less that the amount actually assessed (£437,144.73).

7. Ms Spencer invited the Tribunal to fix the amount at which the appeal should be determined, choosing, in effect, between HMRC's alternative calculations. But, as we stated at the time and reiterated in the written Reasons for our Directions released following the hearing on 18 September 2014, we thought then that we had no basis for fixing the amount at any figure lower than the amount assessed, because no evidence had been provided to us which could form the basis for any such reduction. We stated that in this situation, the position in law is that the assessment ought to stand good (see: section 50, TMA). We had assumed at that stage that the assessments had been made in amounts which ought in the opinion of the issuing officer (Officer Turner) to be charged in order to make good the loss of tax (see: section 29(1) TMA). This is a matter we return to later (see below, paragraph 73 and following).

8. When the appeal came before us again, on 19 November 2015, we learned that the parties (that is, Mr Bell and Ms Lindsey Riley and Ms Sarah Baynes, both from HMRC) had met (for one hour on 23 October 2014). We were provided with a note of that meeting prepared by Ms Baynes. We have no reason to suppose that the note is not accurate.

9. The salient points arising from the meeting were as follows. First, Mr Bell had a complaint about the conduct of the investigation into his tax affairs by HMRC and was seeking compensation from HMRC in that regard. He considered that the ascertainment of the amount of tax (and, presumably, penalties) owed by him and his claim against HMRC for misconduct in the investigation were interlinked and could not be considered separately. As the officers from HMRC disagreed with this and were prepared to discuss only Mr Bell's liability, no progress towards a settlement of the case was made.

10. However, secondly, the officers did confirm that only the part of the deposits into Mr Bell's bank accounts which represented his profit was taxable and that they were inclined to accept that the assessments (said to be based on the aggregate deposits) were excessive. They made clear that they needed a basis to reduce the amounts assessed to arrive at the true profit (or an approximation to it). They suggested that Mr Bell provide whatever records he had to substantiate a statement made by him at the meeting to the effect that money was taken out of the accounts for purchases and then put back in, and that HMRC had assessed him on all the deposits when in fact there was only about £80,000 that ever went into the accounts. However, Mr Bell said that he would not send in any records. Alternatively, and on a 'without prejudice' basis, Ms Baynes suggested that the figure for the average gross profit ratio of a second hand car dealer from the Office of National Statistics (20%) might be applied. If this was done, the tax charged would be reduced to £67,000, and Mr Bell's total liability including interest and a penalty calculated at 55% of the tax due would be £151,000. Mr Bell also rejected this suggestion.

11. Officer Turner made a Witness Statement on 12 March 2015. This was presented at the hearing on 19 November 2015 and he was cross-examined by Mr Bell. We find from Officer Turner's evidence that Mr Bell did produce two ring binders of records to HMRC in December 2014. These records related to the tax year 2008/2009, but they were incomplete and unrepresentative and in some cases unreliable and so

Officer Turner was unable to compute any reliable figure for Mr Bell's profits on the basis of them.

12. Thirdly, at the meeting on 23 October 2014, Mr Bell complained that he had not been given a chance to question Officer Gary Forbes or Officer Tim Brown at the Tribunal hearing (on 18 September 2014). Officer Riley made the suggestion to Mr Bell that if he wanted to question Officer Forbes and/or Officer Brown he should ask the Tribunal to request witness statements from them and that they would be regarded as hostile witnesses. Officer Riley suggested that Mr Bell should do this without delay before the next hearing before the Tribunal, which was then scheduled for December 2014.

Mr Bell's attempt to obtain evidence from HMRC

13. Probably in response to Officer Riley's suggestion made at the meeting on 23 October 2014, Mr Bell did indeed make an application to the Tribunal to issue summonses requiring four HMRC officers, Officer Forbes, Officer Brown, Officer Turner and Officer Tom Gardiner to attend the Tribunal hearing for cross-examination.

14. The Tribunal replied to Mr Bell's application by a letter dated 28 July 2015, stating that a judge (Judge Mosedale) had considered the matter and had concluded that no witness summons in relation to Officer Turner was required, as HMRC were relying on his evidence and he ought therefore to be at the hearing, and that in relation to Officer Forbes and Officer Brown, witness summonses would not be issued because Mr Bell had not specified what evidence he expected them to give and the Tribunal was not persuaded that their evidence would be relevant. The Tribunal made the point that it had no jurisdiction in a tax appeal to investigate the behaviour of officers of HMRC. As to Officer Gardiner, the Tribunal noted that HMRC had stated that he would attend the hearing voluntarily if available, but that he would not be allowed to give evidence unless the Tribunal was satisfied that he could give relevant evidence.

15. Mr Bell responded with a letter dated 6 August 2015 addressed to the Tribunals Service. He argued that the Officers' evidence would be relevant because 'HMRC's employees' behaviour throughout is part and parcel of this case' and that his reason for requiring the Officers to give evidence was 'to prove that their hypothetical figures have been built around fictional statements given by the key parties'. He also stated his belief that the Tribunal's 'reluctance to ensure the presence of these witnesses is showing clear bias in favour of HMRC and denying [him] the opportunity to prove [his] case'. He stated that the funds in the bank accounts at the heart of the case was 'purely [his] savings'.

16. This letter was treated by Judge Mosedale as an application to set aside and/or appeal and/or review her decision communicated in the letter dated 28 July 2015. She concluded that Mr Bell had no arguable case that witness summonses should be issued and so she dismissed the application (her Decision was released on 2 October 2015).

17. Mr Bell then applied (on 8 October 2015) to the Upper Tribunal for permission to appeal Judge Mosedale's decision. Upper Tribunal Judge Bishopp refused the application on the papers (his Decision Notice was dated 26 October 2015 and was issued to the parties on 27 October 2015).

18. Upper Tribunal Judge Bishopp in his Decision Notice explained that in this appeal the burden lies on HMRC to show that they have made a discovery that (in the circumstances of this case) the income shown on Mr Bell's returns was less than his true income and that one or both of the two conditions imposed by section 29 TMA is/are satisfied. He added that HMRC also have to show that there was some material from which the assessing officer could rationally form the opinion that there was an insufficiency of tax. Then the burden passes to Mr Bell to show that the assessment actually made for each year is excessive, by demonstrating that his returns are correct or, if not, that the correct amount of tax is lower than that assessed. Upper Tribunal Judge Bishopp added that the burden of showing that Mr Bell is liable to penalties also rests on HMRC, albeit Mr Bell will be required to establish that he has a reasonable excuse or that the penalty actually assessed is excessive.

19. Mr Bell renewed his application for permission to appeal to the Upper Tribunal against Judge Mosedale's decision at an oral hearing before Upper Tribunal Judge Roger Berner on 25 November 2015. This was after the third hearing of the appeal before us (on 19 November 2015), although at that hearing we were informed that the renewed application was going to take place. On the conclusion of the third hearing we directed that the appeal stood adjourned until the outcome of that renewed application was known.

20. Upper Tribunal Judge Berner issued a Decision Notice refusing Mr Bell permission to appeal, on 26 November 2015. He recorded that Mr Bell had taken him through a concise history both of this case and earlier investigations by HMRC into his affairs and noted that he investigations had gone back 10 years and that Mr Bell's complaint was that HMRC officers had submitted false evidence and had concocted false businesses and sources of income which they have attributed to him.

21. Upper Tribunal Judge Berner, echoing what Upper Tribunal Judge Bishopp had said in his Decision Notice, noted that Mr Bell's argument that evidence from the officers of HMRC to substantiate their allegations against him cannot be irrelevant betrays a misunderstanding of the burden of proof. He said that it was not for HMRC to prove that their assessment of the tax due is accurate, but for Mr Bell to show, by evidence, that the assessment is wrong. He referred to section 50(6) TMA (to which we also had made reference at paragraph 12 of our Reasons for the Directions made after the hearing on 18 September 2014) which provides that:

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

22. Upper Tribunal Judge Berner commented that this provision means that it is for the taxpayer to show, by oral and/or documentary evidence, that the assessment is wrong. He added that if the taxpayer does produce evidence in that respect, then this Tribunal would have to weigh that evidence against any produced by HMRC, which evidence the taxpayer will have the opportunity to challenge. He also said that it is a matter for HMRC to decide whether to call officers to give such evidence and that if they do not do so, then any statements of those officers which the taxpayer does not accept should be disregarded by the Tribunal.

23. It is convenient to mention at this stage that the investigation which culminated in the assessments under appeal (there had been a previous investigation) was initiated by a letter dated 14 August 2009 from HMRC Criminal Taxes Unit – Civil Compliance to Mr Bell. That letter may have been prompted by an "Evasion Referral Form" dated 22 December 2008 authored by Officer Gardiner, which is with our papers.

24. The Evasion Referral Form states that data had been received which showed that Mr Bell held two offshore accounts with approximately £180,000 capital held in the accounts and includes the following text to which Mr Bell took particular exception:

> 'Importantly background research indicates that Bell buys write off luxury end vehicles and has these re-built. These are then exported. I expect that the offshore capital is the profits from this enterprise. The original officer made a file note that Bell accidentally dropped some documents when they met that originated in Germany. Bell hurriedly removed these saying the officer was not to see them.'

25. The Tribunal's letter dated 28 July 2015 containing Judge Mosedale's original decision on Mr Bell's application for the issue of witness summonses, however, makes clear that her understanding was that HMRC does not rely on the Evasion Referral Form as evidencing the truth of any of the matters stated in it and that the Tribunal would disregard opinions stated by Officer Gardiner, when it formed its own conclusions, and would not treat the Evasion Referral Form as evidence of fact of any of the allegations stated in it. Upper Tribunal Judge Berner noted this in his Decision Notice of 26 November 2015.

26. We propose to approach the appeal in the manner suggested by Upper Tribunal Judge Bishopp and endorsed by Upper Tribunal Judge Berner, namely to consider whether HMRC have satisfied the burden on them of showing that they have made a discovery that the income shown on Mr Bell's returns was less than his true income and that one or both of the two conditions imposed by section 29 TMA is/are satisfied and that there was some material from which the assessing officer could rationally form the opinion that there was an insufficiency of tax. We will then go on to consider whether, on the basis that the discovery assessments have been validly made, the evidence before us shows that the assessment actually made for each year is excessive (the burden of proof being on Mr Bell). In relation to the penalties appealed against, we will consider whether HMRC have shown that Mr Bell is liable to penalties and (if they have) whether the evidence is that Mr Bell has a reasonable excuse or that the penalty actually assessed is excessive (again, the burden of proof being on Mr Bell).

27. It is in this context that we set out the facts as we find them from the evidence before us.

The facts

28. The self-assessments returned by Mr Bell for the tax years with which this appeal is concerned showed net profits from a trade of buying and selling used cars as follows:

1994/1995	£11,168.50
1995/1996	£11,168.50
1996/1997	£6,595
1997/1998	£5,062
1998/1999	£10,584
1999/2000	£8,007
2000/2001	£9,276
2001/2002	£8,048
2002/2003	£9,234
2003/2004	£8,247
2004/2005	£11,579
2005/2006	£22,337
2006/2007	£340
2007/2008	£3,089
2008/2009	£12,615

The first investigation

29. On 27 July 2006 HMRC (Anglia, Local Compliance) sent a letter to Mr Bell opening an enquiry into his tax return for 2004/2005 and asking for certain information. Mr Bell did not supply the information requested and a formal notice requiring production of certain Abbey National bank statements was sent to him on 26 September 2006. Mr Bell did produce the statements concerned and attended a meeting with HMRC on 9 November 2006. Before the meeting, Mr Bell had given HMRC access to business records, which included invoices and a cash book.

30. At the meeting, Mr Bell confirmed that he had no bank accounts apart from the account with Abbey National (which was untrue) and he said that he did not bank all his business income, as sales receipts were used to purchase cars.

31. The investigation centred on HMRC's view that the business records provided showed that a closing stock adjustment was required in the computation of taxable profits for the year 2004/2005 and that the records suggested that there had been a suppression of takings by Mr Bell, who ought also to have been registered for VAT (but had not been). The suppression of takings was suggested by a cash deficiency of £10,421 omitted sales as calculated by HMRC from the business records that had been produced.

32. There was another meeting between Mr Bell and HMRC on 22 January 2007 at which (according to Officer Tim Brown's noted dated 19 February 2007) 'some documents fell onto the desk. The documents were from Germany. [Mr Bell] hurriedly took them and said they were not for [Officer Brown] to see.' Following the meeting on 22 January 2007, Officer Brown wrote to Mr Bell (on 23 January 2007) stating that he considered that Mr Bell had been negligent in submitting his tax return for 2004/2005 and that in view of the level of suppression of takings which Officer Brown claimed to have identified, he proposed to raise assessments to claim additional income tax and NICs for 2004/2005, and also for the tax years going back to (and including) 2001/2002. Before he did so, he asked Mr Bell to provide documentary evidence to explain the cash deficiency – that is, that its source was something other than suppressed takings – or to agree an amount in settlement of the enquiry.

33. There followed a half-hour meeting between Mr Bell and HMRC on 1 February 2007 at which no progress was made. An assessment for the year 2000/2001 was made, showing tax said to be payable of £2,980.91, which Mr Bell appealed. Mr Bell also signed a Statement of Personal Assets and Liabilities in which he omitted to mention the bank accounts which are the basis of the assessments appealed against in this appeal. Another meeting between Mr Bell and HMRC was held on 27 June 2007, but again no progress was made.

34. Mr Bell told HMRC that cash he kept at home would have been used to fund the identified cash deficiency, but this was not accepted by Officer Brown on the basis that Mr Bell had not provided documentary evidence to support what he had said and also that, having reviewed Mr Bell's declared profits since 6 April 1996, Officer Brown did not believe that Mr Bell would have been in a position to accumulate significant sums of cash during the period (from 1996 to 2004). A closure notice charging tax of £11,361.47 for the tax year 2004/2005 was sent to Mr Bell on 20 July 2007. Also on that date further assessments for the years 2001/2002 to 2003/2004 inclusive were sent to Mr Bell. These assessments charged tax of £9,454.07 in total.

35. Mr Bell appealed to the General Commissioners on the grounds that the figures used by Mr Brown were 'nothing more than fabrication and [were] wildly exaggerated'. He objected to the arrangements originally made for the hearing on the basis that he did not trust the Clerk to the Commissioners. Officer Brown offered to

arrange for the hearing at a different location and Mr Bell asked him to do this. Ultimately the appeals were heard by the General Commissioners for the Rochford Division on 8 November 2007.

36. The note of the hearing of the appeal made by the Clerk to the Commissioners recorded that Mr Bell had acknowledged that there had been mistakes made. He had explained that his wife had lost her mother during the 2005 year and that, as she did much of the bookkeeping, 'not unnaturally things slid to some extent'. Mr Bell had accepted that his 2006 tax return 'was definitely wrong' and that he was trying to sort that out. He had also explained that his family had a traveller background and were suspicious of anyone enquiring what cash they had. The Commissioners adjourned the hearing of the appeal to give Mr Bell a further opportunity to produce evidence to avoid the confirmation of the assessments which might have imposed an excessive liability.

37. Unsuccessful attempts were made to settle the appeal, with each side making an offer unacceptable to the other side and the adjourned hearing of the appeal took place on 10 January 2008. At the hearing, HMRC reduced their demands for tax and the appeals were finally determined in reduced amounts, totalling £20,579 of additional taxable profits spread over the years 2001/2002 to 2004/2005 inclusive. A contemporaneous note prepared by Officer Norman stated that 'Mr Bell accepted the revised amounts determined and Mrs Martin [of HMRC] advised that she would contact him with the final figures for duty, penalties and interest'.

38. There is evidence that Mr Bell made threats of violence against various HMRC personnel, because he regarded HMRC's enquiries as ill-founded. These threats were taken seriously by HMRC, who were keen to settle the outstanding liability, and they appeared to do so at a meeting with Mr Bell on 10 March 2008 by adjusting the total liability down to the amount of £3,000 offered by Mr Bell.

The second investigation

39. It was against this background of dealings with Mr Bell that HMRC opened a second investigation into his personal tax affairs on 14 August 2009, once it had apparently come to light that Mr Bell had further bank accounts containing approximately £180,000, which had not been declared to HMRC. This second investigation was initiated under the Code of Practice "Civil Investigation into Cases of Suspected Serious Fraud" by HMRC Criminal Taxes Unit – Civil Compliance.

40. Mr Bell telephoned to HMRC on 18 August 2009 to complain that the new investigation was malicious and connected with previous investigations. He refused to cooperate with HMRC until HMRC told him what the information was which had started the new investigation. Mr Bell did attend a meeting with HMRC on 25 September 2009. At first, Mr Bell denied that there had been any irregularities in his tax returns. He was asked if he had any bank accounts outside the UK and he said he had not. The officer (Larkin) stressed to Mr Bell the importance of giving accurate information and, giving him time, asked him again if he had any offshore accounts. After further questions, Mr Bell changed his answer and admitted to having had an offshore account with Royal Bank of Scotland ("RBS").

41. Mr Bell said that the account had been funded by secret payments made to him for carrying out certain activities and that he had been told authoritatively that the payments were tax free. There had been some £155,000 in the account and he had recently transferred it back to the UK. The note of the meeting on 25 September 2009 (prepared by HMRC) states that after a lengthy discussion Mr Bell had agreed that the payments were taxable. Mr Bell signed a mandate authorising his bank(s) to send statements of his account(s) to HMRC. Pursuant to that mandate, HMRC approached Alliance & Leicester on 23 October 2009, and later (on 31 December 2009) the RBS Guernsey branch, and still later (on 5 January 2011) Santander UK.

42. Officer Larkin's note of a telephone call between himself and Mr Bell on 21 January 2010, states that during the call 'it was established' that the actual amount of the secret payments was only £20,000 or £30,000 and the balance of the £154,000 in the offshore bank account had been built up by business income, possibly diverted sales over the life of Mr Bell's business.

The Alliance & Leicester accounts

43. Statements of two bank accounts in the name of Mr Bell were provided by Alliance & Leicester to Officer Larkin of HMRC under cover of a letter dated 20 November 2009.

44. The statements of the first bank account ran from 2 December 2008 to 24 February 2010. They show fairly regular deposits of round-sum amounts of between about £1,500 and about £3,000, together with some transactions indicating that the account was used to hold larger sums (£11,000, £20,000 and £25,000) before transfer out to other account(s). There are also many payments out of the account, particularly to www.copart.co which we understand to be a vehicle sales website. Generally the balance on this account was in credit in amounts in the low thousands of pounds. It appears to us, and we find, that this was a business account operated by Mr Bell, to which sales proceeds were credited and business expenses debited.

45. The statements of the second bank account ran from 16 July 2009 to 6 October 2009. The account appears to have been first operated on 20 July 2009 with a deposit of £10. However a deposit of £24,990 and five deposits of £25,000 each were made between 20 July 2009 and 25 July 2009. This account appears to be a savings account operated by Mr Bell, but it is irrelevant to this appeal because the statements relate to a period after the last tax year in issue (2008/2009). Nevertheless it appears that these deposits made in July 2009 were made when Mr Bell's account with RBS was closed and may have represented transfers of funds from that account.

46. We review the entries in the statements of the first bank account between 2 December 2008 and 5 April 2009, which are the entries within the period relevant to this appeal. Cash deposits in round sums feature as credits to this account and, although there must be some doubt, we find on the balance of probabilities that these represent the sale proceeds of cars and we record them on the basis that they do so. We do not record the larger deposits which we have noted above, which (as we have said) appear to represent transfers of funds between accounts by Mr Bell, rather than

receipts of sale proceeds. The account was interest bearing and net payments of interest were received.

2008/2009 (part)	Sales proceeds £16,700	Net interest received £38.30

47. There was a short (five-minute) meeting between Mr Bell and Officers Larkin and Forbes on 24 March 2010. From the note of that meeting prepared by Officer Larkin on 31 March 2010, it appears that Mr Bell had told the officers that the money in the offshore accounts 'was earmarked for a particular purpose but was not his business profits and was not taxable'. Mr Bell claimed that he and his family were the subject of a 'campaign by the government against him' and Officer Forbes appears to have been short with Mr Bell informing him that in view of his rejection of HMRC's offer of coming to an informal settlement 'he (Mr Bell) could leave the meeting right now'. Mr Bell later (on 25 March 2010 and on later occasions) complained about Officer Forbes's conduct.

The Santander account

48. Statements of an account held at Santander UK by Mr Bell were provided to Officer Larkin by Santander under cover of a letter dated 20 January 2011. Santander indicated that the account concerned was one of five accounts currently open or active in the name of Mr Bell. The statements in evidence run from 18 January 2005 to 29 March 2007 (that is, they cover part of the tax year 2004/2005, the tax year 2005/2006 and part of the tax year 2006/2007). The account was heavily used with frequent credits of amounts predominantly between £1,000 and £3,000 and even more frequent debits, generally in small amounts, of items of which the nature could generally not be ascertained from the statements and apparently included both private and business expenditure. The balance on this account varied from about £4,200 in credit to about £1,400 in debit and was often overdrawn. Although the account appears to have been one on which interest was paid by the bank, the amounts of interest credited in the period covered by the statements are wholly negligible – being measured in pence.

49. We review the amounts credited to this account as recorded in the statements, which appear to us probably represent the proceeds of sales of cars (and we so find).

2004/2005 (part)	Sales proceeds £15,080.35
2005/2006	Sales proceeds £38,192.11
2006/2007 (part)	Sales proceeds £82,654.42

The RBS premium account statements

50. A precursor letter to a notice to produce documents was sent by HMRC (Officer Larkin) to RBS, Guernsey Branch on 4 April 2011. It required production of the

statements of a stated account held in the name of Mr Bell ('the RBS premium account'). The statements, covering the period 29 May 1990 to 15 January 2010 were sent by RBS to Officer Larkin under cover of a letter dated 21 April 2011. (We noticed a gap in the series of statements in our bundle between 28 June 2002 – when the balance on the account was £38,991.03 – and 29 October 2002 – when the balance was £67,491.03) The account was 'emptied' by a cash withdrawal at Chelmsford Branch of £1,412.54 on 30 October 2009, soon after the second investigation was opened by HMRC on 14 August 2009.

51. This account never in the period between 1994/1995 and 2008/2009 inclusive (the period covered by this appeal), for which we have bank statements, had a balance of more than £131,939.56. This was the balance on 6 January 2008.

52. The statements show a pattern of generally round sum amounts of under £10,000 being credited sporadically, and cheque payments being made in various sums, as to which we have no information as to the nature of the payments.

53. It appears from the statements we have seen that Mr Bell operated one or more additional accounts with RBS in the period with which this appeal is concerned. The first indication of this was a debit entry on 16 May 1996 of £44,000 which was paid "to G90 A/C". This payment effectively "emptied" the RBS premium account at that time. On 11 November 1996, and again on 27 November 1996, significant sums (£35,000 and £16,905.09) were transferred to the credit of the RBS premium account from another numbered account. £10,000 was withdrawn from the RBS premium account on 4 February 2004 and apparently transferred to another RBS account. Similarly £80,000 was transferred to another RBS account on 6 February 2004, reducing the balance of the RBS premium account from £89,000 to £9,000. A further withdrawal for transfer to the same account of £5,000 was made on 4 March 2004.

54. £6,000 was withdrawn from the RBS premium account for payment "To Gold" on 16 May 2005, while £8,000 was paid into the RBS premium account from "G60" on 27 May 2005. Further withdrawals of £10,000, £5,000, £5,000, £8,000, £5,000, £5,000 and £10,000 were made to make payments "To Gold 60" on 5 July 2005, 26 September 2005, 20 October 2005, 26 January 2006, 23 February 2006, 17 August 2006 and 13 November 2006 respectively. Further credits into the RBS premium account from "Gold 60" were made - £8,000 on 6 December 2004, £4,000 on 15 November 2005, £3,000 on 29 June 2006, £1,000 on 20 December 2006, £1,000 on 31 January 2007 and £117,877.38 on 22 October 2008.

55. Also, the statements show withdrawals to pay, and payments in from, "Collins Stewart". It appears that this was another account operated by Mr Bell. We were given no information as to the purpose of that account. £10,034.49 was withdrawn from the RBS premium account to make a payment to Collins Stewart on 24 January 2000, and £15,529.73 was withdrawn for the same purpose on 10 February 2000. Withdrawals of £20,871.75, £9,999.42, £20,101, £8,951.42 and £5,119.31 were made for the same purpose on 31 May 2000, 13 June 2000, 6 November 2000, 15 December 2000 and 11 December 2001 respectively, while payments of £11,403.34, £12,989.15

and £36,634.75 were made into the RBS premium account from Collins Stewart on 24 July 2000, 23 August 2000 and 28 September 2000 respectively.

56. At the beginning of the period with which the appeal is concerned, there are two credit items referenced "Payroll" in the statements for the RBS premium account - £324.30 on 13 July 1994, £200 on 28 February 1995.

57. We note that the statements are addressed to Mr Bell at what we take to be his old address up to April 1995, and from that date at his current address. We notice that there was a credit payment of £41,050 made into the RBS premium account on 25 May 1995 and we assume (and find, on the balance of probabilities, thus giving Mr Bell the benefit of the doubt) that the source of this is the sale proceeds of his old home. He said in the course of the hearing that a source of the funds in the account was such sale proceeds.

58. There were regular payments of interest made to the credit of the RBS premium account. We will review these when we consider the position year by year.

59. There were also withdrawals from the account by Mr Bell, most often in cash - £1,000 on 27 June 1995, £2,000 on 1 November 1996, £5,250 on 27 November 1996, £2,500 on 8 January 2007, £700 on 21 February 1997, £2,700 on 14 April 1997, £3,100 on 25 February 2001, £26,003.88 on 26 June 2002, £3,100 on 4 December 2003, £2,000 on 18 December 2003, £1,200 on 24 December 2003, £2,000 on 5 January 2004, £4,000 on 27 January 2004, £1,500 on 26 March 2004, £1,000 on 20 April 2004, £2,000 on 7 July 2004, £2,500 on 13 August 2004, £1,500 on 17 August 2004, £1,276 on 10 September 2004, £2,500 on 15 September 2004, £200 on 28 September 2004, £2,500 on 4 October 2004, £2,600 on 13 March 2004 and £7,000 on 13 June 2004.

60. There were some significant payments into the RBS premium account, of amounts much more than the generally round sum amounts of under £10,000, which we have already mentioned, which we take to have been the proceeds of sales of individual cars. The first of these credits was the sum of £41,050, paid in on 25 May 1995. We have already mentioned that the source of this payment was likely to have been the sale of Mr Bell's old home.

61. Other significant credits to the RBS premium account were the transfers from another numbered account which we have already mentioned. Besides these, there were credits of £38,119.89 on 30 September 1997, £42,461 on 31 December 1997, £67,460.02 on 11 January 1999, £28,151.27 on 27 July 1999, £30,141 on 19 August 1999, and £21,000 on 23 December 2003.

62. There were also significant debit entries in the statements, which we identified as being payments to solicitors or other professionals. Thus £17,600 was paid to Nigel Broadhead on 13 November 1996, and £20,000 was paid to Wortley Redmayne on 14 March 2003.

63. We record that in a telephone call on 2 August 2010, according to a note prepared by Officer Larkin, Mr Bell told Officer Larkin that the funds credited to his RBS

account were 'not taxable as he was lodging them from someone else's taxed income and therefore they could not be taxed twice'.

64. We now review the generally round sum amounts, which we find to have been the proceeds of sales of cars, recorded as credits to the RBS premium account, and the interest payments received to the credit of the RBS premium account, on a year by year basis. We have excluded the significant credits referred to above, which appear to us to be exceptional and unlikely to represent proceeds of sales of cars (again, giving Mr Bell the benefit of the doubt, because it is possible that they represent taxable receipts) and also credit entries which appear on the statements to be movements of funds between accounts operated by Mr Bell.

1994/1995	Sales proceeds £26,887.50	Interest received £304.82
1995/1996	Sales proceeds £48,648.77	Interest received £1,816.01
1996/1997	Sales proceeds £43,005.37	Interest received £504.21
1997/1998	Sales proceeds £63,060.24	Interest received £2,237.60
1998/1999	Sales proceeds £25,029.18	Interest received £1,386.77
1999/2000	Sales proceeds £45,875.42	Interest received £2,010.52
2000/2001	Sales proceeds £73,512.78	Interest received £1,328.08
2001/2002	Sales proceeds £65,643.87	Interest received £875.60
2002/2003[1]	Sales proceeds £16,700.00	Interest received £1,150.38
2003/2004	Sales proceeds £65,976.46	Interest received £747.42
2004/2005	Sales proceeds £42,920.30	Interest received £569.43
2005/2006	Sales proceeds £59,695.00	Interest received £56.51
2006/2007	Sales proceeds £32,410.00	Interest received £95.64[2]
2007/2008	Sales proceeds £NIL	Interest received £45.02

[1] As mentioned above, the statements for the tax year 2002/2003 are incomplete. The figures given are derived from the statements which were before us. The figure for sales proceeds is therefore likely to be too low. The figure for interest is probably correct because in the years before and after 2002/2003 only one receipt of interest appears in the statements and the statements before us include an interest payment for 2002/2003.

[2] Up to and including 2005/2006, the interest receipts are marked "GRS" on the statements, which indicates to us that they are gross payments from which no tax has been deducted. From the payment on 2 May 2006 (in 2006/2007) the interest payments are marked "NET" on the statements, which indicates to us that they are payments net of withholding tax.

2008/2009	Sales proceeds £11,200.00	Interest received £46.27

HMRC's assessments

65. The detail of the uplift in profits forming the basis for HMRC's assessments on Mr Bell which are under appeal is given in the following table. For each of the tax years 1994/1995 to 2006/2007 inclusive, HMRC say they have calculated a figure for Mr Bell's 'Offshore Lodgings' – which we understand are intended to reflect the amounts said to have been credited by Mr Bell to the undisclosed bank accounts, and have treated that figure as additional profits (uplift in profits) subject to income tax and National Insurance Contributions. For each of the tax years 2007/2008 and 2008/2009 HMRC have used what they describe as an 'average figure'. The table also gives the totals for each tax year of the sales proceeds which we have identified above from the various bank statements.

Tax year	HMRC's figure for the uplift in profits	Total identified sales proceeds
1994/1995	£28,166.62	£26,887.50
1995/1996	£102,175.07	£48,648.77
1996/1997	£94,604.67	£43,005.37
1997/1998	£145,879.43	£63,060.24
1998/1999	£93,875.97	£25,029.18
1999/2000	£106,178.21	£45,875.42
2000/2001	£135,868.10	£73,512.78
2001/2002	£66,519.47	£65,643.87
2002/2003	£64,850.38	£16,700[3]
2003/2004	£99,126.00	£65,976.46

[3] As mentioned above, the statements for the tax year 2002/2003 are incomplete. The figures given are derived from the statements which were before us. The figure for sales proceeds is therefore likely to be too low.

2004/2005	£45,920.00	£42,920.30
2005/2006	£59,695.90	£59,695.00
2006/2007	£35,210.00	£32,410.00
2007/2008	£62,365.88	£NIL
2008/2009	£61,637.31	£11,200.00

66. It can be seen that generally the figures of total sales proceeds which we have identified are much lower than HMRC's figures for the uplift in profits. It is, however, to be noted that the figures for the tax years 2004/2005 and 2005/2006 are virtually identical, and the figures for the tax years 1994/1995, 2001/2002 and 2006/2007 are close.

67. We return to the approach to this appeal suggested by Upper Tribunal Judge Bishopp and endorsed by Upper Tribunal Judge Berner.

Section 29, TMA

68. We first consider whether HMRC have satisfied the burden on them of showing that they have made a discovery that the income shown on Mr Bell's returns was less than his true income and that one or both of the two conditions imposed by section 29 TMA is/are satisfied and that there was some material from which the assessing officer could rationally form the opinion that there was an insufficiency of tax.

69. The position under section 29 TMA so far as is relevant to this appeal is that where HMRC discover (in relation to a particular year of assessment) that income which ought to have been assessed to income tax has not been assessed, and (as here) the taxpayer has made a tax return in respect of that year of assessment, HMRC can assess the income provided one of the two conditions mentioned in section 29(4) and (5) TMA is satisfied.

70. The first of these conditions is that the situation that income has gone unassessed was brought about carelessly or deliberately by the taxpayer or a person acting on the taxpayer's behalf (section 29(4) TMA).

71. The second of these conditions is that at the time when HMRC ceased to be entitled to give notice of an enquiry into a taxpayer's tax return for a particular year of assessment, or informed the taxpayer that the enquiry was completed, the officer of HMRC concerned could not have been reasonably expected on the basis of the information made available to him before that time to be aware of the situation that income had gone unassessed (section 29(5) TMA).

72. We have no doubt that HMRC's discovery of Mr Bell's undeclared accounts, particularly the offshore RBS premium account, entitled HMRC to raise discovery assessments for all the years in question. The condition in section 29(4) TMA is

satisfied in relation to all the tax years between 1995/1996 and 2008/2009 inclusive. Mr Bell's return for each of those years was incorrect by reference to the income attributable to the undeclared accounts and the situation that, in consequence, that income has gone unassessed was, we find, brought about carelessly or deliberately by Mr Bell, or by his partner (now his wife) acting on Mr Bell's behalf.

73. We reject Mr Bell's submissions that the undeclared accounts are not evidence of undeclared income. The probability (we find) is that they are, and Mr Bell has not provided any credible evidence that they are not.

74. We mention that the Tribunal received a letter from Mr Bell dated 23 October 2016 (following the fourth hearing of this appeal) for the attention of the Tribunal Judge, reasserting Mr Bell's case that 'the account under scrutiny contains savings', that tax has been paid on the money in the account, and that HMRC's case should be completely dismissed. However, no credible evidence to support these statements is before the Tribunal. Mr Bell appears, even at this stage, still to misunderstand the burden of proof in these proceedings, as pointed out by Upper Tribunal Judge Berner in his Decision Notice dated 26 November 2015, referred to at paragraphs 20 and 21 above.

The assessments

75. The power to make discovery assessments under section 29 TMA is a power 'to make an assessment in the amount, or the further amount, which ought in [the officer's or the Board of HMRC's] opinion to be charged in order to make good to the Crown the loss of tax'.

76. We have felt embarrassed in this case because, as we have noted at the beginning of this Decision, HMRC were not able to support the quantum of the assessments at the hearing and suggested that we adjust the amount charged by the assessments to figures representing 10% to 25% of the amounts assessed – but without pointing to any evidence on the basis of which we could do so.

77. Of course, the normal outcome in a case where a discovery assessment is made which an appellant challenges, but where the appellant does not adduce evidence showing what, on the balance of probabilities, the correct amount is which is required to make good the loss of tax, is for the assessment to be upheld by the Tribunal. If the appellant has adduced evidence – as here, in the form of the bank statements – the assessment is normally adjusted to the amount of profits indicated by that evidence.

78. As we indicated in our Directions released following the hearing on 18 September 2014, our view then was that if there was no evidence before us on the basis of which we could fix the amount taxable at an amount lower than the amount assessed, then the position in law was that the assessment ought to stand good, in accordance with section 50(6) TMA. Since the hearing we have looked in detail at the bank statements and have taken them into account in considering the amounts charged by the assessments.

79. However, in the course of writing up the Reasons accompanying the Directions released on 1 June 2016, we also decided that a prior question to be answered was whether all the assessments had been made in the amount(s) which, in the opinion of the officer making them, ought to be charged in order to make good to the Crown the loss of tax. This is an issue which the burden of proof lies on HMRC.

80. A generous degree of latitude is allowed by the law to the assessing officer as to the amount which in his opinion ought to be charged to make good to the Crown the loss of tax. The correct principle is expressed in the judgment of Latham CJ in the Australian case of *Trautwein v Federal Commissioner of Taxation* (1936) 56 CLR 63 at 87 – a passage cited with approval by Lord Lowry, delivering the judgment of the Privy Council in *Bi-Flex Caribbean Ltd v Board of Inland Revenue* (1990) 63 TC 515. Latham CJ said:

> 'In the absence of some record in the mind or in the books of the taxpayer, it would often be quite impossible to make a correct assessment. The assessment would necessarily be a guess to some extent, and almost certainly inaccurate in fact. There is every reason to assume that the legislature did not intend to confer upon a potential taxpayer the valuable privilege of disqualifying himself in that capacity by the simple and relatively unskilled method of losing either his memory or his books.
>
> The application of the [relevant provision permitting a best of judgment assessment to be made] is not, in my opinion, excluded as soon as it is shown that an element in the assessment is a guess and that it is therefore very probably wrong. It is prima facie right – and remains right until the appellant shows that it is wrong. If it were necessary to decide the point I would, as at present advised, be prepared to hold that the taxpayer must, 'at least as a general rule', go further and show, not only negatively that the assessment is wrong, but also positively what correction should be made in order to make it right or more nearly right. I say 'as a general rule' because, conceivably, there might be a case where it appeared that the assessment had been made upon no intelligible basis even as an approximation, and the court would then set aside the assessment and remit it to the commissioner for further consideration.'

81. *Bi-Flex Caribbean* has since been cited with approval in domestic litigation, for example in *Momin v Revenue and Customs Commissioners* [2008] STC 2456, a decision of David Richards J (as he then was).

82. The question therefore arose whether all the assessments in this case have been made on an intelligible basis as an approximation – and it was for HMRC to show that they have. Mr Bell's case, of course, is that they have not.

83. Following the (third) hearing on 19 November 2015, we released, on 1 June 2016, Directions with Reasons, requiring the appeal to be relisted for a hearing (the fourth hearing) and for Officer Neil Turner (the officer who had given evidence in the appeal and who had raised the assessments appealed against) to make a further Witness Statement showing why the assessments made for identified tax years were made on

an intelligible basis, and giving his full reasoning for arriving at the amount of the penalty charged in respect of the tax year 2008/2009. We stated in terms that in his Witness Statement 'the Officer should show as exactly as possible how the amounts assessed related to evidence of funds received by Mr Bell'.

84. HMRC have told us that the assessments are 'based upon the lodgements to two offshore bank accounts held by [Mr Bell]' (to quote from a submissions document prepared for the third hearing by Ms Spencer). However, except in the cases of the tax years 1994/1995, 2001/2002, 2004/2005, 2005/2006 and 2006/2007, the differences between HMRC's figures (given above) for the uplift in Mr Bell's profits and the figures which we have identified from the evidence before us as the total undeclared sales proceeds, year by year, are so substantial, that we could not accept, without more, that the assessments for the tax years concerned - that is, 1995/1996, 1996/1997, 1997/1998, 1998/1999, 1999/2000, 2000/2001, 2002/2003, 2003/2004, 2007/2008 and 2008/2009 - have been 'made on an intelligible basis, even as an approximation'.

85. We concluded, following the third hearing, that were we to find that those assessments had not been made on an intelligible basis, even as an approximation, it would follow that they had not been properly made in the exercise of the power provided by section 29 TMA and that we should be bound to set them aside, and remit the matter to HMRC for further consideration – involving, presumably, the making of fresh assessments made on an intelligible basis.

86. However, we were aware that HMRC may have been misled, when we made our Directions released following the (second) hearing on 18 September 2014, to the effect that we accepted that the only issue was whether there was any basis to adjust the assessments to a figure more approximate to the amount necessary to make good the loss of tax in this case. We therefore considered that the proper course was to direct that the appeal be re-listed to give HMRC an opportunity to show that the assessments concerned were made on an intelligible basis in accordance with the dictum from *Trautwein* as cited in *Bi-Flex Caribbean*. We refer below, at paragraphs 95 and following, to how this issue was addressed at the fourth hearing

87. As to the tax years 1994/1995, 2001/2002, 2004/2005, 2005/2006 and 2006/2007, we find that the assessments for those tax years have been made on an intelligible basis and we uphold them, subject to the adjustments necessary to reflect profits attributable to sale proceeds in the figures we have identified for those years respectively – see paragraph 64 above.

Summary of our findings in relation to the undeclared income and profits

88. Ample opportunity has of course already been given to the parties to address this issue and we considered after the third hearing that it would not be right to leave it open any longer. We have been able to examine the evidence which has been adduced and therefore gave in the Reasons supporting the Directions released on 1 June 2016 our provisional decision on it – provisional in the sense that the issue would arise for decision in relation to the tax years 1995/1996, 1996/1997, 1997/1998, 1998/1999, 1999/2000, 2000/2001, 2002/2003, 2003/2004, 2007/2008

and 2008/2009 if we were to decide that the assessments for those tax years were made on an intelligible basis.

89. One of the difficulties of this case is that the thrust of Mr Bell's arguments has been much more vigorous on showing that the assessment is wrong – he has claimed that the figures assessed are fantastic and a product of HMRC's imagination – than on showing what correction should be made in order to adjust the assessments to give a figure which would make good the loss of tax to the Crown.

90. At many times he has asserted that there has been no loss of tax to the Crown. At other times he has accepted that there has been a loss of tax to the Crown – for example at the hearing before the General Commissioners on 8 November 2007 when he accepted that his 2006 tax return was 'definitely wrong' and in the telephone call to Officer Larkin on 21 January 2010 (see: paragraph 42 above).

91. The arguments he has advanced to explain the source of the funds in the offshore RBS bank account have been different at different times. First, as noted at paragraph 41 above, on 25 September 2009 Mr Bell said that the source of the funds was secret payments. Then, on 21 January 2010, as noted in paragraph 42 above, Mr Bell is reported to have said (and we find he did say) that the actual amount of the secret payments was £20,000 to £30,000 and the balance had been built up from business income. On 24 March 2010, as noted in paragraph 47 above, Mr Bell told HMRC that the moneys were 'earmarked for a particular purpose but was not his business profits and was not taxable'. This was a suggestion that the funds were lodgements made from the taxed income of other persons who shared Mr Bell's political views. Mr Bell has produced no evidence confirming this assertion, and we reject it. At a meeting on 30 January 2012, Mr Bell said that the funds in the offshore RBS bank account had been built up by Mr Bell and his wife out of savings at the rate of £50 per week, but provided no evidence to support the assertion (see his letter dated 6 August 2015 to the Tribunal referred to at paragraph 15 above). We reject this explanation as implausible. At the hearing on 28 March 2014 Mr Bell said that a source of the funds was the sale proceeds of his old home. As noted at paragraph 57 above, a credit of £41,050 made into the RBS premium account on 25 May 1995 may be attributed to the sale of the home. We have ignored that payment in calculating the figure of probable sale proceeds appearing in the table at paragraph 64. At the meeting on 23 October 2014, Mr Bell said that only about £80,000 ever went into the accounts (see paragraph 10 above). This statement also, has not been substantiated, and we reject it.

92. We find that the true position is that (at least) the amounts recorded in the table at paragraph 64 were received by Mr Bell as sale proceeds in a taxable trade. The amounts of interest also noted in the table at paragraph 64 were also received by him. These interest payments were received gross up to and including the tax year 2005/2006, and net of income tax thereafter. He also received the payment of net interest noted at paragraph 46 above. Mr Bell also apparently received two payments of employment income, of £324.30 on 13 July 1994 and of £200 on 28 February 1995 (see paragraph 56 above).

93. We accept that the figures given as sale proceeds in the table at paragraph 64 do not represent taxable profits. Having regard to the state of the evidence as to purchases which, as Mr Turner states in his Witness Statement, is highly unreliable, we consider that the appropriate course is to have regard to the evidence that the average gross profit ratio of a second hand car dealer from the Office of National Statistics is 20% (see paragraph 10 above) and we find that the taxable profits arising in Mr Bell's trade over and above those originally returned and self-assessed by him in each of the years 1994/1995 to 2006/2007 and 2008/2009 is 20% of the figure given for sales proceeds in that table (the figure given for the year 2007/2008 is nil).

94. We note that at the fourth hearing, Mr Bell repeated his point that the evidence of the average gross profit ratio of a second hand car dealer from the Office of National Statistics should not be applied, because it did not relate to his business. He emphatically reiterated this point in his letter to the Tribunal dated 23 October 2016. Mr Bell, however, has produced no other reliable evidence as to what his gross profit percentage is and we adopt the figure of 20% from the Office of National Statistics rather than finding that assessments charging turnover figures should stand good. We make the point that our adopting this figure benefits Mr Bell. The alternative would be to uphold the amounts of assessed profits (where assessments had been made on an intelligible basis) without any reduction.

Have the assessments for the years 1995/1996, 1996/1997, 1997/1998, 1998/1999, 1999/2000, 2000/2001, 2002/2003, 2003/2004, 2007/2008 and 2008/2009 been 'made on an intelligible basis, even as an approximation'?

95. This was the issue which the fourth hearing was arranged to address. In response to the Directions issued on 1 June 2016, Officer Turner made a further Witness Statement and attended to give oral evidence. He was cross-examined by Mr Bell.

96. The Tribunal had required Officer Turner in his further Witness Statement to show why the assessments made for these years had been made on an intelligible basis and to give his full reasoning for arriving at the amount of the penalty charged in respect of the tax year 2008/2009. As recorded above (at paragraph 83) the Tribunal directed in terms that in his Witness Statement 'the Officer should show as exactly as possible how the amounts assessed related to evidence of funds received by Mr Bell'.

97. Officer Turner explained in his further Witness Statement that the RBS premium account had been 'the focus of [his] attention with regard to Mr Bell's suspected undeclared income'. His evidence was that he began his calculation of assessable profits by adopting the calculations of Officer Larkin from whom he had inherited the case. Officer Larkin's calculation had been based on the information obtained by him, which was contained in incomplete statements for the period (according to Officer Turner's Witness Statement) from 2003/2004 to 2008/2009. However, Officer Turner's oral evidence was that the incomplete statements for the period from 2003/2004 to 2006/2007 had been the basis for Officer Larkin's calculation. Officer Larkin, considering the incomplete nature of the information before him, had calculated 'a median figure of £52,807 per annum in order to seek to estimate the deposits over the longer term'. We were shown a summary (Folio 1 annexed to Officer Turner's further Witness Statement) of Officer Larkin's calculations. Officer

Turner could not tell us how the median figure was calculated. It was different from an average figure (which would have been £59,988).

98. Officer Larkin had taken his calculated median figure (£52,807) and adjusted it by reference to a Retail Prices Index both backwards (for the years 1992/1993 to 2001/2002) and forwards (for the years 2007/2008 and 2008/2009) to arrive at estimations of the uplift in Mr Bell's taxable profits which ought to be assessed. He took the Retail Prices Index as at 5 April 2003 as the basis for his adjustments, whereas it appears to us that he should have taken the index figure as at 5 April 2005 – the point midway in the period for which he calculated his median figure.

99. Before he made the assessments, Officer Larkin had obtained information about the actual deposits to the RBS premium account from the Guernsey branch of RBS. His evidence was that he therefore substituted what he called the 'actual deposits figures' for Officer Larkin's calculated figures, for the years 1994/1995 to 2003/2004. He accepted that, in error, he did not replace Officer Larkin's calculated figures for the years 2004/2005 to 2006/2007, but observed that this error was in Mr Bell's favour because the actual deposits for those years were higher than Officer Larkin's calculated figures for those years.

100. Officer Turner also left in place Officer Larkin's calculated figures for the years 2007/2008 and 2008/2009 because he had noted from the information received from RBS, as he stated in his further Witness Statement, 'the almost complete cessation of deposits in 2007/2008, coinciding with the first HMRC enquiry conducted by Mr Brown, and made a presumption of continuity. By this [he meant] that [he] presumed that Mr Bell had not altered his behaviour, but had altered the destination of the proceeds of his undeclared trading'.

101. The schedule (annexed as Folio 3 to his further Witness Statement) showing Officer Turner's figures for the periods from 1994/1995 to 2003/2004, which he used to make the assessments of undeclared income which he issued on 28 March 2012 mirror exactly (except for a few pence in some cases) the figures we had already given as HMRC's figures for the uplift in profits in the Reasons for our Directions issued on 1 June 2016. They are reproduced at paragraph 65 above.

102. At the fourth hearing, held specifically to examine this matter, Officer Turner was unable to show the Tribunal what evidence of 'actual deposits' supported the figures in the schedule referred to in the previous paragraph.

103. Because of this, we have concluded that HMRC has failed to discharge the burden of proof on them of showing that the assessments for the years 1995/1996, 1996/1997, 1997/1998, 1998/1999, 1999/2000, 2000/2001, 2002/2003, 2003/2004, 2007/2008 and 2008/2009 been 'made on an intelligible basis, even as an approximation'.

104. It follows that the assessments for these years have not, in our judgment, been properly made in the exercise of the power provided by section 29 TMA and we are bound to set them aside and remit these years to HMRC for further consideration.

The penalties

105.In relation to the penalties appeal against, with regard to the tax years 1994/1995 to 2007/2008 inclusive, section 95 TMA charges a penalty where a person delivers an incorrect tax return fraudulently or negligently. Having regard to the whole history of the case as recorded in this Decision, we find that Mr Bell delivered his tax returns for those years fraudulently or negligently and so is liable to penalties under that section. That penalty was charged under the penalty determination dated 16 July 2012 at 55% of the undisclosed profit. Section 95 TMA permits HMRC to charge a penalty up to 100% of the undisclosed taxable income and profits. Having regard to Mr Bell's limited compliance we regard the figure of 55% as appropriate. That percentage will, of course, have to be applied to the revised (lower) taxable trading profits assessable (together with interest and employment income).

106. In relation to the penalty appealed against, with regard to the tax year 2008/2009, a penalty of £16,698 has been charged (by a notice issued on 16 July 2012). The relevant legislation (paragraph 1, Schedule 24, FA 2007) charges a penalty where a tax return containing an inaccuracy is made, and the inaccuracy leads to an understatement of a liability to tax and the inaccuracy was careless or deliberate. HMRC contend that the inaccuracy was deliberate and concealed within the meaning of paragraph 3, Schedule 24, FA 2007 – that is, that the submission of an inaccurate tax return by Mr Bell was deliberate, and Mr Bell has made arrangements to conceal the inaccuracy. HMRC point to the fact that Mr Bell did not disclose the existence of the RBS premium account in the course of the first investigation (commenced on 27 July 2006) and only did so reluctantly and under challenge in the second investigation – at the meeting on 25 September 2009. We accept HMRC's contentions on this point and find that the inaccuracy was deliberate and concealed, and that Mr Bell's disclosure of it was 'prompted' for the purposes of the reductions for disclosure in paragraphs 9 and 10, Schedule 24, FA 2007. However, a penalty can only be chargeable if HMRC are able to show that the assessment for 2008/2009 was made on an intelligible basis and we have held above (at paragraph 104) that it was not so made. Accordingly the appeal against this penalty is allowed.

107.We find that Mr Bell has not shown any reasonable excuse which would defeat the imposition of a valid penalty for any of the tax years in issue in the appeal.

Disposition

108.For the reasons given above, we allow the appeal in part. The assessments for the tax years 1995/1996, 1996/1997, 1997/1998, 1998/1999, 1999/2000, 2000/2001, 2002/2003, 2003/2004, 2007/2008 and 2008/2009 are set aside. We adjust the figures charged by the assessments for the tax years 1994/1995, 2001/2002, 2004/2005, 2005/2006 and 2006/2007 to tax at the appropriate rate(s) on the amounts calculated by applying a factor of 20% to the figures for sale proceeds for those tax years given at paragraph 64 above, and adding in, as appropriate, figures for unassessed interest received and unassessed employment income. We affirm the penalties charged for the years 1994/1995, 2001/2002, 2004/2005, 2005/2006 and 2006/2007 under section 95 TMA in the amounts of 55% of the figures charged by the assessments for those years respectively, as those figures fall to be adjusted in accordance with this Decision. The appeals against the penalties charged for the other years are allowed.

109. 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.

JOHN WALTERS QC
TRIBUNAL JUDGE

RELEASE DATE: 28 November 2016