TC05715

Appeal number: TC/2015/02067

INCOME TAX & CAPITAL GAINS TAX – Investigation into omitted income from rents and interest and omitted chargeable gains – whether a tax loss justifying discovery assessments – yes – whether tax loss brought about deliberately – yes – whether penalties for fraudulent returns under s 95 TMA validly made – yes – whether abatement reasonable – yes – whether penalties under Sch 24 FA 2007 for deliberate inaccuracies valid – yes: but inaccuracies not "deliberate and concealed" – whether income from properties not held in own name assessable on appellant – yes:* Williams v Singer *& s 21A ICTA 1988/s 271 ITTOIA apply – whether HMRC profit ratios understate expenses – possibly, but as no evidence for lower ratios HMRC figures agreed – all appeals in substance dismissed though with variations to figures.

FIRST-TIER TRIBUNAL
TAX CHAMBER

GULAMMOHAMMED BOBAT **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
JOHN WILSON

Sitting in public at Leeds Magistrates and Family Court, Westgate, Leeds on 16 February 2017

Mr Jeffrey Wine of Wine & Co (Chartered Accountants) for the Appellant

Mr Alan Hall, Presenting Officer, for the Respondents

DECISION

1. This was the hearing of appeals by Mr Gulammohammed Bobat ("the appellant") against:

(1) Further (discovery) assessments to income tax under s 29(3) Taxes Management Act 1970 ("TMA") (as it was originally enacted) for the years of assessment 1994-95 and 1995-96

(2) Discovery assessments to income tax under s 29(1) TMA (as substituted by s 191(1) Finance Act ("FA") 1994) for the years of assessment 1996-97 to 2006-07 and the tax years 2007-08, 2008-09, 2009-10 and 2011-12.

(3) The amendment of his tax return for the tax year 2010-11.

(4) Determinations under s 100 TMA of penalties charged by s 95 TMA for the years of assessment 1994-95 to 2006-07 and the tax year 2007-08.

(5) Assessments under paragraph 13 Schedule 24 FA 2007 of penalties charged by paragraph 1 of that Schedule for the tax years 2008-09 to 2011-12.

In the rest of this decision we refer to years of assessment and tax years alike as "tax years", and references to "penalty assessments" are to both penalty determinations and penalty assessments unless the former are specifically referred to.

2. The appellant was not present. Mr Wine explained that the appellant did not think there was anything useful he could add. He had been notified of the hearing and was aware it was going on. In those circumstances and given that neither party sought an adjournment we took the view that in accordance with Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 it was in the interests of justice to proceed.

The issues

3. The issues were agreed to be:

(1) Was there was a loss of income tax in all tax years from 1994-95 to 2009-10 and in 2011-12?

(2) If so, did the loss of tax in those years (other than in the tax years 1994-95 and 1995-96) occur as a result of the appellant's deliberate conduct in that he knew the returns were inaccurate?

(3) In relation to the tax years 1994-95 to 2007-08 did the appellant fraudulently deliver an incorrect return?

(4) In relation to the tax years 2008-09 to 2011-12 did the appellant's returns contain inaccuracies brought about deliberately?

(5) Were the penalty assessments correctly made on the basis that there were omissions and inaccuracies in the returns arising from fraudulent or deliberate conduct?

(6) Was the amount of any reduction made in arriving at the amount of penalty assessments correct, and are any recalculations of the potential tax lost required?

(7) In HMRC's calculation of the tax lost:

(a) should it have included income in the form of rents from certain properties ("the disputed properties") which the appellant maintained were not his properties?

(b) should the level of expenses incurred in the appellant's property business used by HMRC in their calculations have been greater?

4. It was accepted by HMRC that they had the burden of showing that, on the balance of probabilities, the answers to issues 1 to 5 were all "yes". In relation to issue 6 it was accepted by the appellant that he had the burden of showing that, on the balance of probabilities, the reduction was inadequate and by HMRC that it was excessive. The appellant had the burden in relation to issue 7(a) and (b).

5. A somewhat unusual feature of this case was that there was no real challenge to the validity of either the assessments or the penalties, nor to the amounts save so far as affected by issue 7. Nevertheless HMRC had prepared on the basis that the burden of proof remained on them in relation to issues 1 to 5 and as Mr Wine for the appellant did not formally concede the issue, most of the hearing was taken up by Mr Hall's shouldering that burden.

Evidence

6. We had 9 bundles of documents from HMRC which included certain documents provided by the appellant in his list of documents to the Tribunal. It was obvious that preparation of the case had been somewhat fraught with interlocutory hearings and threats of sanctions for non-compliance with directions. Neither party had any application to make at the hearing on these matters and we did not take them into account.

7. We had a witness statement from Mr Richard Lindley, HM Inspector of Taxes of over 25 years experience and an investigator with HMRC qualified to carry out "COP9" enquiries as this was, that is civil investigations into suspected fraud. One of the bundles included Mr Lindley's statement and the exhibits attached to it.

8. We found Mr Lindley to be a thoughtful, credible and convincing witness when he was challenged on any points in his statements and we accepted his statements in full.

9. There were no witness statements from the appellant. Nor had any of the legal owners of the disputed properties (the appellant's children) produced witness statements nor were they present to give evidence.

Facts

10. A consequence of the approach to this case by the appellant (as set out in §5 and §9) is that the facts in this case and many of the inferences to be drawn from them were not in dispute. Below we set out a narrative of the events in the case and of the contents of certain documents taken almost exclusively from the exhibits attached to Mr Lindley's witness statements and from his elaboration of them and we find as fact everything set out in §§11 to 52, emphasising there the more important findings. We make separate findings in the "Discussion" section of this decision in relation to the disputed issues and in relation to some changes HMRC wishes us to make to the amounts of certain assessments.

11. The appellant had made returns for the tax years 1996-97 (the first tax year for which self-assessment was in force for income tax and for capital gains tax ("CGT")) to 2011-12. These returns showed in all years but one (2011-12) income from property business, but the rents concerned came from at most two properties (and in some years one or none). We had copies of screen shots of the pages of the returns that had been captured on HMRC's computers, showing the amount of the profits from rents, consisting of the income from the rents and certain expenses. These figures had been produced by the appellant's then accountants, Ali Mazhar.

12. Apart from income from a partnership in the tax years 1994-95 to 2002-03, said to be a DIY business, there were no other entries in the returns save from a small amount of interest (2003-04 to 2008-09) and dividends (1996-97 and 1997-98).

13. As for the two periods before self-assessment we had no copies of returns in the bundle and in relation to these two years we can make no findings of fact. Mr Hall made submissions about these two tax years which we deal with later.

14. In 2012 HMRC had begun what they call a "campaign": an investigation into tax evasion in relation to land, both as to income from the land and capital gains from disposing of it. Mr Lindley explained that he had obtained details of sales of four properties in 2010-11 where the seller's name was that of the appellant and where the sales proceeds were approximately £900,000. He could see from the appellant's return for that tax year that no chargeable gains ("CGs") had been reported. He had also obtained information suggesting that income from these and other properties had been received by the appellant but not returned.

15. On 11 July 2012 Mr Lindley wrote to the appellant informing him that HMRC had reason to believe the appellant had committed tax fraud and that he was opening a "COP9" enquiry. Mr Lindley explained that he could offer the appellant a Contractual Disclosure facility ("CDF") under which the appellant would agree to give information about his tax fraud and in return HMRC undertook that he would not be prosecuted. The agreement letter said that the disclosures must be full, open and

honest and that accurate, timely and complete information must be provided. The appellant was given 60 days to accept the CDF offer.

The outline disclosure

16. On 22 August 2012 the appellant signed the offer and made an "outline disclosure" of his fraud.

17. The "description of fraud" was:

> "Failure to disclose the sale of a number of properties which resulted in capital gains. The benefit obtained was that as a result of this action, capital gains tax was not paid on the disposals.
>
> In addition, failure to disclose rental income received from a portfolio of properties. As a result income tax was not paid on these rents."

18. The "individuals and entities involved" were said to be the appellant, his (separated) wife, his two sons and two daughters. There was added after their details:

> "the appellant's wife and children are listed above as they are named on the title deeds of properties that may be included in this disclosure"

19. The box for disclosure of "[t]he period of time over which the fraud took place" said:

> "The first undisclosed capital gains occurred in the 2010 calendar year, whilst at present it is thought that the first undisclosed property income occurred in 2006. Due to the number of properties, the position regarding rental income is not fully clear at present"

20. And in the box "Other information you think is relevant" there is the statement:

> "Currently in the process of establishing the capital gains and rental profits at stake over the years in question, with help from my recently appointed tax advisors [Eaves & Co]. Due to the volume of information it is not possible to provide an accurate estimate at this stage.

21. A box saying "I have no further errors to disclose" was ticked.

22. The disclosure is signed and Mr Wine confirmed to us that that it was the appellant's signature.

23. We informed the parties that we found as a fact that this disclosure was made by the appellant on 22 August 2012.

The 24 October meeting

24. A meeting was held on 24 October 2012 at the offices of Eaves & Co. The bundle contained Mr Lindley's Notes of that meeting. He informed us and showed us that he had sent copies of the notes to the appellant and to Eaves & Co and had asked

for any suggestions for amendments. He told us that although the appellant had said there were one or two things which might be factually incorrect, he had never received any comments.

25. Among the many things shown by the notes as having been said at the meeting were the following relevant to issue 7(a):

(1) Mr Lindley asked the appellant which properties he "had owned or had been involved in". Mr Davison of Eaves & Co confirmed a list of 11 properties. The appellant then explained that a 12th property, 27 Hirst Avenue, was not included as "this was owned by his son and the rental income was being declared by him". [We think that either Mr Lindley misreported what was said or Mr Davison made an error, as all the evidence was that the joint owner was Mrs Bobat – see §39.]

(2) Another property that was on the list of 11, 8 Church Street, was said to be owned by both the appellant's sons but was an empty shop and had not been rented out.

(3) The appellant disclosed which properties had been sold (there were four).

(4) The appellant disclosed that the sale proceeds were paid into his Santander account.

(5) Mr Lindley asked which were the two properties the rents from which were shown on the return. The appellant said they were 38 Brudenell Mount and 79 Royal Park Avenue (both on the list of 11).

(6) When asked if he was aware that he should have declared rental income from all properties and any CG from sales, the appellant said he was and that he had declared all rental income. All the properties apart from the two mentioned were either in other family members' names or were empty.

(7) Mr Lindley asked the appellant which properties were held in his wife's or children's names and which in his own. Mr Davison said they could not comment as this was an integral part of the appellant's ongoing divorce proceedings and the courts were currently trying to ascertain who owned what.

(8) Mr Lindley asked the appellant why properties had been put in other names. The appellant said it was in the event of his death. Mr Davison said they were possibly gifts, but the appellant said he wasn't sure.

(9) Mr Lindley asked the appellant if he had paid for the properties and he confirmed that he had. He asked whose name was on the tenancy agreements as landlord and the appellant said there were no tenancy agreements. The appellant agreed that tenants would see him as the landlord and he would collect the rent. Mr Davison said that this did not mean that the properties belonged to the appellant. Mr Lindley agreed but pointed out that it was a potential factor to be considered.

(10) The appellant also said that 27 Hirst Avenue had been purchased by his wife with money inherited from India (by four cheques for £10,000 each).

(11) Mr Lindley asked about the property from which the DIY partnership had traded. In 2002 47 Daisy Hill had been brought with the proceeds of the previous property but is held in his sons' names and it had never opened or been occupied (this was the reason the property was not on the list of 11 properties disclosed).

26. It was agreed that there was bank interest that should have been disclosed.

27. The appellant said that no letting agent was used. As to tenancy agreements the appellant said that there was one for 81 Royal Park Avenue. All the properties were student lets except 27 Hirst Avenue which was let to "housing benefit" tenants.

28. Rents would be paid into the appellant's Barclays accounts. These also contained deposits by incoming tenants.

29. There were no records for rental income, only bank statements. Some expense invoices were available but Eaves & Co said they needed to look at them in detail.

30. Information was given about the children. The sons were born in 1978 and 1980 and the daughters in the early 80s and in 1984.

31. At the end of the meeting the appellant agreed to commission Eaves & Co to produce a disclosure report.

32. We have accepted Mr Lindley's evidence about this meeting and so we find as a fact that the statements attributed to the appellant and to his accountant were made. We consider in the discussion section below any inferences to be drawn from them about, in particular, the matters in issue 7(a).

Mr Lindley's investigation

33. No disclosure report was completed and the appellant ceased to use Eaves & Co and asked Wine & Co to assist him in the investigation which now reverted to Mr Lindley.

34. Mr Lindley explained that the only information he had had to calculate the profits from rentals was in the bank statements for periods back to 2006. He analysed them and totalled all the credits for each year, making assumptions about transactions near the year end. From the rents he deducted large deposits and deposits of less than £100 and unpaid cheques. He also omitted any receipts of obvious tenant deposits as these were not income.

35. Having calculated the rents for each year back to 2007-08, Mr Lindley made further adjustments. For 2006-07 where the bank statements began in June he made a proportionate increase to arrive at the whole year's figure. For earlier years he scaled back using the RPI. In response to questions from the Tribunal he said he was not aware of any other more suitable index.

36. He then adjusted the figures overall where properties had been bought in the period.

37. It was not, he explained, possible to identify many expenses relating to the properties from payments shown on the bank statements. He therefore had regard to the expenses shown on the tax returns and established the ratio of expenses to rental income shown there and applied this to the rental figures he had established. Because the disclosed figures for 2010-11 seemed to show an abnormally high profit rate, he used the 2009-10 ratio for that year.

Third party information

38. Mr Lindley explained that he had obtained information from a number of sources apart from the appellant and his agents.

39. He had seen the file of papers relating to the divorce proceedings. He drew our attention particularly to the Form E which was a "Financial Statement for a Financial Order or for Financial Relief after an Overseas Divorce or Dissolution". It was a sworn statement made before a solicitor and signed by the solicitor. As far as property is concerned the Form E requires in relation to each property "[d]etails of who owns the property and the extent of your legal and beneficial interest in it". Entries on the Form E for properties where the answer is not simply "Husband" (ie the appellant) say:

51 Brudenell Road	The legal Title is in the name of my daughter [*name*] but I am the equitable owner.
27 Hirst Terrace	The property is registered in the husband's and the wife's name. The wife funded half the money and has an equitable interest in half of it.
Church St	The legal Title is in the joint name of my sons [*names*]. I intended to purchase the property in my name for £125,000. I was sent to prison.
79 Royal Park Avenue	The legal Title is in the name of my daughter [*not the same one as for 51 Brudenell Rd*] but I am the equitable owner.
81 Royal Park Avenue	The legal Title is in the name of my son [*name*] but I hold the equitable interest.

40. Mr Lindley had also received a folder of documents from Wine & Co on 4 July 2016. Those documents were put in evidence and are from the appellant's solicitors

in the divorce proceedings. They include applications to forbid the appellant from disposing of assets including disputed properties and an affidavit sworn by Mrs Bobat in support of the application.

41. Mr Lindley obtained a number of landlord insurance policies and other correspondence in relation to the disputed properties. All were addressed to the appellant and the policies show him as the "policyholder". Letters from insurance brokers refer to "your instructions".

42. Mr Lindley also obtained information from the appellant's wife's solicitors. In particular there was a letter from them to the appellant's solicitors proposing a division of assets. In relation to the disputed properties the letter acknowledges the legal owners but proposes that Mrs Bobat's interest in the properties be recognised by a 50% split of sale proceeds or in the case of 79 Royal Park Avenue the property would be "effectively allocated" to Mrs Bobat while remaining in the name of their son.

43. Tenancy agreements were obtained for some of the disputed properties. These show the landlord as "Mr G Y Bobat" ie the appellant or Mr M Bobat, a name the appellant admitted to using. The agreements are all signed by the appellant.

44. Information from the Local Council about Homes in Multiple Occupation ("HMOs") shows the landlord as "Gulam Bobat" or "Mr G Y Bobat".

45. We accept Mr Lindley's evidence about the provenance of these documents and we find as a fact the contents that we have set out. We consider in the discussion section below any inferences to be drawn from them about, in particular, the matters in issue 7.

The assessments and these proceedings

46. At the meeting on 24 October 2012 Mr Lindley gave the appellant a notice that he was enquiring into the appellant's tax return under s 9A TMA.

47. At a meeting with Wine & Co and the appellant on 25 March 2013 Mr Lindley handed the appellant a discovery assessment for 2006-07 made to protect HMRC's interests as the time limit for an assessment to recover tax lost due to careless behaviour was about to expire. An appeal was made against this assessment.

48. Mr Lindley also explained that he had made a "jeopardy amendment" under s 9C TMA on the appellant to recover £157,065.10. This was made because of a risk that HMRC would not be able to collect the tax due when the enquiry was closed, given that the appellant's assets had been frozen in the divorce proceedings. An appeal was made against that amendment.

49. Following the notification on 4 August 2014 of the conclusions of his investigation, Mr Lindley caused discovery assessments (apart from that for 2006-07) and penalty assessments to be made. On 4 September 2014 he notified the appellant

of his conclusions about the section 9A TMA enquiry into the 2010-11 return, and said he had amended the tax due as shown on the return and self-assessment from £0 to £162,327.33.

50. On 10 October 2014 appeals were made against all the assessments for tax years 1994/95 to 2011/12. Mr Lindley accepted the appeals (though they were slightly out of date) and treated one of them as an appeal against the amendment for 2010-11.

51. A review was sought before the appeals were notified to the Tribunal and the reviewing officer upheld all of Mr Lindley's assessments and the amendment to the return for 2010-11. All the appeals were then notified to the Tribunal.

52. There is a minor qualification needed to that last sentence. In the HMRC Statement of Case, prepared by Mr Hall, he states in a note to a schedule of the details of the discovery assessments and the amendment that "the 2006-07 assessment … is accepted by the Appellant, but is included for clarity". By that we understand him to mean that either there was no appeal or that an appeal had been settled under s 54 TMA. It is true that in the Notice of Appeal the appellant (by Mr Wine) says that in relation to the 2006-07 and 2010-11 assessments the "figures have now been accepted" but we do not read that as saying that they are not included in the appeal notice. We also note that Mr Hall has not suggested that 2010-11 is not before us. We therefore proceed to determine the appeal against the assessment for 2006-07 along with everything else.

The law & the submissions

53. The statute law covering the issues in this case is set out in the Appendix.

54. A number of cases were cited in HMRC's skeleton but were only briefly mentioned, if at all, in Mr Hall's oral submissions. One of them, *HMRC v Khawaja*, was cited to support HMRC's view on the standard of proof. *Bi-Flex Caribbean Ltd v Board of Inland Revenue* and *Nicholson v Morris* were cited to show that the appellant had to put forward his own figures to challenge an assessment made to best judgement, and *Jonas v Bamford* in support of reliance on the presumption of continuity.

55. The propositions in these cases were not disputed and we need not burden this decision further by either quoting from them or giving citations. Other cases were cited on the question of what is meant by "deliberate" including *Kinesis Positive Management Ltd v HMRC* [2016 UKFTT 178 (TC) ("*Kinesis*") which we consider below.

56. Because issues 1 to 6 are closely related while 7a and 7b are somewhat discrete and raise very different issues we deal with the submissions on them below.

Discussion: issues 1 to 6

Issue 1: was there a loss of tax in each tax year?

57. Mr Hall argued that the appellant had admitted tax evasion in his outline disclosure, in particular that capital gains and rental income had not been returned. This was so even if (in relation to income) the disputed properties were left out of account.

58. Even in the outline disclosure the appellant had not admitted any omission of rental income going back before 2006 but he had not subsequently argued that there had not been such omissions. He had not disclosed omissions of bank interest in the outline disclosure, but these had been admitted by Eaves & Co at the meeting at which the appellant was present.

59. Mr Wine had no submissions to make on this issue.

60. We are satisfied that HMRC has shown that on the balance of probabilities that there has been a loss of tax in each of the tax years from 1996-97 to 2011-12.

61. The position for 1994-95 and 1995-96 is less clear as we did not have the appellant's tax returns for those years before us. We think it more likely than not that the returns for those years would not have disclosed the full amount of the rents that the appellant was receiving.

Issue 2: did the loss of tax occur as a result of the appellant's deliberate conduct in that he knew the returns were inaccurate?

62. Mr Hall referred us to Mr Lindley's evidence and the notes of the meeting on 24 October 2012 exhibited to it. The notes had not been disputed by the appellant and they clearly showed that he knew that he was not returning the full amount of rents nor the capital gains.

63. It was also admitted that he had not returned bank interest and he knew that was also the case.

64. Mr Wine had no submissions to make on this issue.

65. We are satisfied on the balance of probabilities that the appellant knew of the omissions and that he had omitted the income from rents and interest and the chargeable gains deliberately.

Issues 3 & 4: did the appellant fraudulently deliver an incorrect return and did the appellant's returns contain inaccuracies brought about deliberately?

66. Given what we say in §§57 to 63 we find that the answer to these questions is yes, and we so hold on the balance of probabilities. We see no relevant difference

between "fraudulent" and "deliberate" in this context. Mr Hall cited *Kinesis* as showing what "deliberate" means. In that case the FTT (Judge Jonathan Richards and Andrew Perrin) held at [58] that no "knowledge of wrongdoing" is required.

67. We do not think that in the context of a penalty under Schedule 24 FA 2007 for inaccuracies in a document it is correct to say that there is no requirement on HMRC to show that the appellant knew that what he was doing was wrong. We observe that *Kinesis* concerned a specific penalty for the issue of a VAT invoice by an unauthorised person, "wrongdoing" that is penalised under paragraph 2 Schedule 41 FA 2008.

68. That in the context of this case (and we stress that) "deliberate" and "fraudulent" mean the same thing can we think be seen from the fact that for there to be a valid a discovery assessment relating to tax years before 2008-09 there must be deliberate conduct (ss 29(4) and 36(1A) TMA) whereas a penalty determination for those years is valid only if there is fraudulent conduct (s 95(1) TMA).

Overall conclusion on issues 1 to 4.

69. We are satisfied that all the discovery assessments that HMRC have made were made to recover a loss of tax. So far as they need to (and this relates to those for 1996-97 to 2009-10) we are satisfied that the loss of tax was brought about by the deliberate conduct of the appellant and they therefore qualify as being within s 29(4) TMA and are valid.

70. Although they were made after the time limit of four years in s 34 TMA they are nevertheless validly made within the time limit in s 36(1A) TMA (20 years) because of the deliberate conduct of the appellant.

Issue 5: Were the penalty assessments correctly made on the basis that there were omissions and inaccuracies in the returns arising from fraudulent or deliberate conduct??

(a) Section 95 TMA

71. Section 95(1)(a) TMA penalises a person who

> "fraudulently … —
>
> (a) delivers any incorrect return of a kind mentioned in section 8 … of this Act, or
>
> (b) … , or
>
> (c) submits to [an inspector or the board] OR [an officer of Revenue and Customs or the Commissioners for Her Majesty's Revenue and Customs] or any Commissioners any incorrect accounts in connection with the ascertainment of his liability to income tax or capital gains tax,

… "

72. The first alternative wording in paragraph (c) of s 95(1) applies where the submission of accounts took place before 18 April 2005 (the date of coming into force of the Commissioners for Revenue and Customs Act 2005 ("CRCA")). The second alternative wording applies to any submission on or after that date. It is not the wording on the face of the section but must be read in by virtue of s 50(1) and (2) CRCA.

73. The reason we have referred to s 95(1)(c) as well as s 95(1)(a) is that we were somewhat puzzled by the need for paragraph (c) which may be relevant as we have returns containing, as entries in the UK Property pages, "accounts", ie itemised details of income and expenses, of the appellant's UK property business for 1996-97 to 2011-12.

74. The answer we think is that s 95(1)(a) does not cover incorrect accounts in the sense we refer to them in §73. It was never the case before the introduction of self-assessment that an income tax return required a set of accounts prepared separately from the tax return, whether of a trade or of any other business, to be submitted as part of the return. Nor did the introduction of self-assessment change that, as can readily be seen from examining the additional tax return pages for self-employment (SA102) and property income (SA105 and SA106).

75. A return which omits to provide any figures in those additional pages or which provides incorrect figures (inadequate incomings or overstated outgoings) is clearly an "incorrect return" for the purposes of s 95(1)(a). The question then is what is s 95(1)(c) aimed at apart from the return?

76. Before self-assessment it was common for an assessment under Schedule D Cases I or II (income from a trade, profession or vocation) to be made on an estimated basis by an Inspector of Taxes, and an Inspector was also permitted to assess a person under Schedule A on the basis of the previous year's income. Any person wishing to challenge the assessment on appeal would be expected to send in a set of accounts, and if they failed to do so could be required by the Commissioners for the General Purposes of the Income Tax Acts[1] ("the General Commissioners") by notice (usually referred to as a "precept") under s 51 TMA to furnish their accounts to them.

77. Any such accounts so provided to an Inspector or the General Commissioners would not be part of or contained in a return, and so any inaccuracy in them would not give rise to a penalty under s 95(1)(a) but only s 95(1)(c).

78. With the introduction of self-assessment the system of appeals against estimated assessments followed by submission of a set of accounts came to an end. As mentioned above the return under self-assessment did not require a set of accounts to be provided. The notes for completion of the returns in fact told people not to send in accounts unless they were requested to do so by HMRC (or the Inland Revenue before it). Such a request would we assume be made in the course of a s 9A enquiry and

[1] Any reference to the General Commissioners includes a reference to the Special Commissioners.

could be enforced by the issue of a notice under s 20 TMA or later Schedule 36 FA 2008: it would not be a matter for the General Commissioners. Any accounts provided in this way to an Inspector of Taxes or to an officer of HMRC could only be penalised under s 95(1)(c) if they were incorrect.

79. The rôle of the General Commissioners before self-assessment in seeking and in some cases receiving accounts (in practice most accounts required by a s 51 precept would be sent directly to the Inspector) explains the rather incongruous wording in the post-CRCA wording of s 95(1)(c), "submits to an officer of Revenue and Customs or the Commissioners for Her Majesty's Revenue and Customs *or any Commissioners*".

80. Those "any Commissioners" obviously do not include the Commissioners for HMRC. It can be seen from TMA as originally enacted that references to "Commissioners" are to the General Commissioners. The question that then arises is why does s 95(1)(c) still refer to those Commissioners when they ceased to have an "accounts receiving" function after 1996 and were abolished by the Tribunals, Courts and Enforcement Act 2007.

81. This case shows that had a set of accounts for a year before 1996-97 been provided following a notice under the successor to s 51 TMA (regulation 10 of the General Commissioners (Jurisdiction and Procedure) Regulations 1994 (SI 1994/1812)) and those accounts were incorrect and had been submitted fraudulently, a penalty under s 95(1)(c) would have been competent (and one under s 95(1)(a) not). It therefore remains appropriate for the reference to "any Commissioners" to remain in s 95 TMA until all appeals against s 95 penalties are settled[2].

82. But this case is, on the basis of the analysis above, a s 95(1)(a) one in its entirety. Mr Hall's submissions on the assessments as set out in §§57 to 63 also apply to the penalties, and Mr Wine raised no challenge.

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[2] Much more puzzling than the retention of a reference to the (General or Special) Commissioners in s 95 is the way that the corporation tax ("CT") equivalents have been treated. Section 96 TMA included the words "to any Commissioners" until its repeal on replacement by paragraph 89 Schedule 18 FA 1998 introducing CT Self Assessment. Paragraph 89 reproduced with modernisation what was in s 96 and for "any Commissioners" the paragraph used "the Special or General Commissioners". It too then catered for the case where accounts had been submitted following a regulation 10 SI 1994/1812 notice. Paragraph 89 like s 95 TMA was repealed by paragraph 29 Schedule 24 FA 2007 but continued to apply where a penalty was determined in relation to conduct in a case occurring before 1 April 2008. By paragraph 265 of Schedule 1 to the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56) it was provided that "Insofar as paragraph 89(1)(b)(1) continues to apply in relation to tax years preceding the tax year 2008-09 it is to have effect as if "tribunal" were substituted for "Special or General Commissioners"".

What is wrong with that substitution is that it assumes that HMRC would be applying to the First-tier Tribunal for an order for the production of accounts (which it would not – if HMRC wanted accounts they would issue a notice under Schedule 36 FA 2008) or those responsible for the statutory instrument did not appreciate why the reference to the Commissioners was there. But if they mistakenly thought it was necessary that makes it all the more puzzling that they did not make a similar substitution in s 95 TMA (or indeed s 96).

83. We find on the balance of probabilities that the appellant fraudulently delivered incorrect income tax returns for 1996-97 to 2007-08. Our reasons for so holding are those set out in §§66 to 68, and are based primarily on the Outline Disclosure and the Notes of the Meeting of 24 October 2012.

84. Where a penalty arises under s 95 TMA a determination of that penalty may be made under s 100 TMA. This determination is equivalent to an assessment and enables the penalty to be enforced. It must however be made by "an officer of Revenue and Customs authorised by the Commissioners for Her Majesty's Revenue and Customs for the purposes of" section 100. (The awkward wording is the result of s 50(1) and (2) CRCA).

85. Mr Hall had, at our request in relation to this issue, taken us to a document showing that a Mr Mick Howlett, Mr Lindley's superior, had approved the determinations, but he had no evidence with him that Mr Howlett was so authorised. On reflection we think we may have asked the wrong question. Section 100 requires the officer making the determination to be authorised, and that officer was Mr Lindley, not Mr Howlett. We suspect that the list that Mr Hall said he had seen Mr Howlett's name on was the list of authorised officers for the purposes of Schedule 36 FA 2008.

86. Mr Wine raised no challenge on this point and did not put HMRC to proof that either or both of Mr Howlett and Mr Lindley was authorised. We follow *R v Commissioners of Inland Revenue, ex parte T C Coombs Ltd* 64 TC 124 where Bingham LJ says

> "The Revenue are, in my view, entitled to rely on the rule that, where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favour of their due execution."

87. On this basis we find that Mr Lindley and Mr Howlett are officers of HMRC authorised for the purposes of s 100 TMA and that the determinations were validly made.

88. We also accept that notices of them were served on the appellant and that they otherwise fall within the requirements of s 100(3) TMA.

89. Finally we need to consider whether the determinations were made in time, as this is a different question from whether the discovery assessments were made in time (which we have held they were: see §70). Section 103 TMA sets out the relevant time limit: a determination may be made at any time within six years after the date on which the penalty was incurred or (if later) within three years of the final determination of the relevant tax.

90. Plainly the first time limit was exceeded in all but one of the tax years, that for 2007-08, on the assumption, which we believe to be correct, that the penalty was incurred on the date the incorrect returns were submitted. However it is by these proceedings that the discovery assessments for all years (save possibly for 2007-08 as

to which see below) will be finally determined so that the penalty determinations for 1994-95 to 2005-06 are in time under section 103(1)(b) TMA.

91. In relation to 2006-07 the HMRC Statement of Case notes that the discovery assessment was made before all the others on 25 March 2013 by way of a protective measure as the six year time limit in s 36(1) TMA was about to expire. The Statement goes on to say that the assessment was accepted by the appellant but was included in a table of details for clarity.

92. If this means that it was not appealed against (and we have held that it was: see §52), then it would have been finally determined on 24 April 2013 in the absence of a late appeal. As the three year time limit in s 103(1(b) TMA expired on 24 April 2016 and the determination was made on 4 September 2014 the determination for this tax year was also in time, even on this basis.

(b) Schedule 24 FA 2007

93. Paragraph 1 Schedule 24 FA 2007 provides:

> "(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).
>
> (4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

Tax	Document
Income tax or capital gains tax	Return under section 8 of TMA 1970 (personal return).
…	…
Income tax, capital gains tax, corporation tax or VAT	Any document which is likely to be relied upon by HMRC to determine, without further inquiry, a question about—(a) P's liability to tax, …"

94. HMRC's submission is that the appellant's returns for the tax years 2008-09 to 2011-12 included inaccuracies, being the omission of income from property business and interest (all years) and chargeable gains (2010-11) and that the omissions were deliberate.

95. Paragraph 1(3) suggests that the meaning of "deliberate" is to be found in paragraph 3. Unfortunately it isn't. Paragraph 3 does not define the adjective "deliberate": it defines "deliberate but not concealed" and "deliberate and concealed" inaccuracies by explain what concealing means but not what "deliberate" means.

96. We consider that it means the same as fraudulently in s 95 TMA (see §68) and that the crucial ingredient is that P knew that the return was inaccurate.

97. Mr Wine did not challenge HMRC's submissions.

98. We find on the balance of probabilities that the appellant deliberately included inaccuracies in relevant documents, his income tax returns for 2008-09 to 2011-12. Our reasons are those set out in §§66 to §68, and are based primarily on the outline disclosure and the Notes of the Meeting of 24 October 2012.

99. Where a penalty arises under paragraph 1 Schedule 24 FA 2007 an assessment of that penalty must be made under paragraph 13. This assessment enables the penalty to be enforced. Unlike the position for s 95 TMA "HMRC" make the assessment. "HMRC" is defined in paragraph 23 to mean "Her Majesty's Revenue and Customs." That term is not defined in Schedule 24 but is defined in Schedule 1 to the Interpretation Act 1978 to have the meaning given by s 4 CRCA and finally in s 4 of that Act we find that the term means "the Commissioners and the officers of Revenue and Customs".

100. Mr Lindley is, we have no doubt, an officer of Revenue and Customs so we accept that the assessments were validly made. We also accept that notices of them were given to the appellant and that they otherwise fall within the requirements of paragraph 13(1) and (2)(a) Schedule 24 FA 2007 and in particular that they state the tax period in respect of which the penalty was assessed. In that regard they correctly show the tax year (or in the case of the penalty relating to the omission of chargeable gains, the year of assessment) concerned.

101. As to time limits, paragraph 13(3) provides in a case such as this where the penalty is imposed under paragraph 1 that the assessment:

> "must be made within the period of 12 months beginning with—
>
> (a) the end of the appeal period for the decision correcting the inaccuracy, or
>
> (b) if there is no assessment within paragraph (a), the date on which the inaccuracy is corrected."

102. "Appeal period" is defined in paragraph 13(5) thus:

> (5) For the purpose of sub-paragraphs (3) and (4) a reference to an appeal period is a reference to the period during which—
>
> (a) an appeal could be brought, or
>
> (b) an appeal that has been brought has not been determined or withdrawn."

103. In this case appeals have been brought to HMRC against the discovery assessments for 2008-09, 2009-10 and 2011-12 so that the end of the "appeal period" for those tax years is no earlier than the date of this decision.

104. For 2010-11 an appeal has been brought to HMRC against the amendment to the return for that tax year, so that the end of the "appeal period" for this tax year is also no earlier than the date of this decision.

Issue 6: Was the amount of any reduction made in arriving at the amount of penalty assessments correct, and is any recalculations of the potential tax lost required?

(a) The s 95 TMA penalties

105. Where a penalty is issued under s 95 TMA, section 100(1) provides that the officer authorised by the Commissioners to make the determination may make it in the amount that in his opinion is correct or appropriate. In a case where the provision imposing a penalty simply sets an upper bound rather than a fixed or tax-geared amount, it follows that it is the "appropriate" amount which may be fixed by the officer (see for confirmation s 100B(2)(b)(ii) TMA).

106. Section 95(1) does set an upper bound: "he shall be liable to a penalty not exceeding the amount of the difference … ", and that difference is the difference between the tax payable based on the return as submitted and the tax that would have been payable had the return been correct.

107. In this case the determinations made by Mr Lindley charged 50% of the difference. Section 100B(2) gives us the power to confirm that figure if we think it appropriate or to increase or reduce it as seems to us appropriate.

108. Mr Wine made no submissions on this issue.

109. Mr Hall referred us to Mr Lindley's evidence. Mr Lindley had considered the level of appropriate penalty by reference to HMRC's policy in this area. There are three matters to be considered, seriousness, disclosure and cooperation. Under this policy the maximum reduction that may be made for each is 40%, 40% and 20% respectively.

110. Mr Lindley had given 5% abatement for seriousness, 25% for co-operation and 10% for disclosure and in his witness statement and in oral evidence had explained his reasons.

111. Mr Hall urged us to accept that a 40% abatement was appropriate.

112. We have considered what Mr Lindley did and his reasons and have concluded that a 40% abatement is an appropriate measure.

113. However Mr Hall brought to our attention a problem of HMRC's own making. The determinations as we have mentioned reflected an abatement of 50%. Mr Lindley's evidence was that this was a simple clerical error.

114. We accept that the determinations were made giving a 50% abatement by error and not because of any further consideration of the position whether unilaterally by HMRC or through any appeal. We therefore consider that we can and should increase the determinations as made to make the abatement 40% (and the penalty 60%) and not 50%.

(b) The Schedule 24 FA 2007 penalties

115. Paragraph 4 Schedule 24 FA 2007 sets out the amount of the penalty which must be assessed. If the inaccuracy is in category 1 (which we find: we heard no argument about it, but from paragraph 4A(1) and (4) it appears to be) the penalty for "deliberate and concealed" inaccuracies, as Mr Lindley characterised the omission of rentals in his Penalty Explanation Schedule of 4 August 2014, is 100% of the "potential lost revenue" ("PLR"), while for "deliberate but not concealed" inaccuracies, as Mr Lindley characterised the omission of interest and chargeable gains in his Penalty Explanation Schedules, is 100% and 70% of the "potential lost revenue" respectively. These are called the "standard percentage".

116. "Potential lost revenue" is defined in paragraph 6 as the additional tax due or payable as a result of correcting the inaccuracy. In other words it is essentially the same as the difference referred to in s 95(2) TMA. There is a slight awkwardness about the definition here: the tax as a result of correcting the inaccuracy is only payable when the notice of assessment reaches the taxpayer concerned, which is likely to be *after* the date on which the penalty assessment based on the PLR is made, which figure depends on what tax is payable. We propose to adopt an interpretation which makes full (and common-) sense of the provision.

117. Paragraphs 9 and 10 Schedule 24, like s 100(1) TMA, allow for reductions from the maximum figure of penalty. Paragraph 9 differs from section 95 in that as well as a ceiling on the penalty there is a floor, in this case 50% and 35% respectively.

118. Reductions are given where a person "discloses an inaccuracy". This (on the face of it) simple term is not so simple as it looks as paragraph 9(1) defines a disclosure to mean:

> "(a) telling HMRC about it,
>
> (b) giving HMRC reasonable help in quantifying the inaccuracy …, and
>
> (c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy … is fully corrected."

119. Paragraph 10 Schedule 24 then explains that where a person who is liable to a penalty under Schedule 24 has "made a disclosure" HMRC must reduce the standard percentage to a percentage that reflects the quality of the disclosure, and by paragraph

9(3) "quality" includes the timing, nature and extent of it. Making a disclosure then would seem to require all of the acts in paragraph 9(1)(a) to (c) to take place, given the "and" after paragraph (b). HMRC operate on the assumption that if one or two of "telling" "giving" or "allowing access" is not done that does not prevent there being a disclosure and we follow that sensible interpretation.

120. Schedule 24 leaves at large, just as s 100(1) TMA does, how any reduction is to be assessed by officers of HMRC. As with section 100 HMRC has published its policy by which officers determine the quality of the disclosure.

121. Each of the three matters that make up a disclosure is allocated a maximum percentage, 40% for giving reasonable help in quantifying an inaccuracy (paragraph 9(1)(b)), 30% for "telling HMRC about" the inaccuracy (paragraph 9(1)(a)) and 30% for allowing HMRC "access to records" (paragraph 9(1)(c).

122. On the Penalty Explanation Schedules issued by HMRC to the appellant, HMRC label the three matters "telling", "helping" and "giving". Telling is, we assume, the paragraph 9(1)(a) matter. But paragraph 9(1)(b) includes both "giving" and "help" and the verb for paragraph 9(1)(c), "allowing", is not mentioned.

123. However from HMRC's Compliance Handbook Manual (*sic*) at paragraph 82430 all becomes clear. "Helping" covers "giving … help", while "giving" covers "allowing access to records". The Manual very properly explains that the percentages in §121 are a guide (though we have little doubt that they are treated as if they were in statute by HMRC: just as the s 95 percentages and those for civil evasion penalties in indirect tax matters are).

124. The Tribunal of course is not bound at all by HMRC's percentages and we consider what Mr Lindley has done in this case.

125. We note first that Mr Lindley has correctly considered each type of inaccuracy separately. That this is required is apparent from the terms of paragraph 6 Schedule 24 (PLR where there are multiple errors) which we consider below.

126. For the inaccuracies involving rental income, Mr Lindley calculated an overall reduction of 50% which when applied to the "deliberate and concealed" corridor of 50% makes the percentage applicable 50% + 50% of 50% = 75%.

127. We have considered the factors that Mr Lindley took into account and the percentage reductions he made. We find that he has properly taken into account the quality of the disclosure.

128. For the inaccuracies involving the chargeable gains, Mr Lindley calculated an overall reduction of 75% which when applied to the "deliberate but not concealed" corridor of 35% makes the percentage applicable 35% + 25% of 35% = 43.75%.

129. We have considered the factors that Mr Lindley took into account and the percentage reductions he made. We find that he has properly taken into account the quality of the disclosure.

130. For the inaccuracies involving interest Mr Lindley calculated an overall reduction of 40% which when applied to the "deliberate but not concealed" corridor of 35% makes the percentage applicable 35% + 60% of 35% = 56%.

131. We have considered the factors that Mr Lindley took into account and the percentage reductions he made. We find that he has properly taken into account the quality of the disclosure. The smallest percentage reduction for this inaccuracy is a proper reflection of the quality of disclosure because of the failure by the appellant to disclose the omitted interest in his outline disclosure document.

132. As we mentioned above at §125, paragraph 6(1) Schedule 24 deals with a case where there is more than one inaccuracy which may affect the PLR. In this case as two of the inaccuracies were penalised on the basis of "deliberate but not concealed" inaccuracies, while one was calculated on the basis of "deliberate and concealed", the order in which the inaccuracies are corrected is relevant. Paragraph 6(1) provides that the less heavily penalised inaccuracies are corrected before the more heavily penalised one, with the (we assume) intended result that the PLR for the more serious behaviour is maximised, in that the PLR for the deliberately omitted income forms the highest slice of income.

133. But an additional consideration when calculating the PLR in this case is that the inaccuracies in relation to income relate to the omission of two types of income, interest and rents. By virtue of s 16(3) Income Tax Act ("ITA") 2007, "savings income" such as interest is treated as a higher slice of income than non-savings income such as rents. In six of the tax years that were under enquiry (2003-04 to 2008-09) interest in modest amounts was included in the returns, so that when additional non-savings income such as rents is added to total income, the disclosed interest becomes part of a higher slice of income than all of the rents, and that slice includes the undisclosed interest.

134. We further note that where there are dividends, the assessment of undisclosed non-dividend income can have the effect of making the higher rate of income tax apply where it did not apply before and can change the rate at which dividends are taxed as they always form the highest slice of income above non-dividend savings income (see s 16(5) ITA). We have already noted that there are dividends returned in three tax years, 1996-97 to 1998-99 but not later so this does not seem to be an issue here, although we also note that at the meeting of 24 October 2012, Eaves & Co disclosed that there were dividends not returned. This does not seem to have been pursued and we need to consider the issue of dividends in Schedule 24 tax years no further.

135. We have therefore examined the calculations of PLR for the tax years concerned and compared the figures with those given by HMRC in their penalty calculations. First we have examined the discovery assessments and the amendment to the return (for 2010-11) and found them to be correct in accordance with the ordering rules set out in §133.

136. Then we have to apply paragraph 6(1). Starting with 2008-09 the "rental" PLR is shown as £44,484.40 and the "interest" PLR £1,305.07. These figures are the amounts shown on the discovery assessment for each type of income, so that the figure for interest is calculated at 40% less 20% deducted at source, while for rents, the whole personal allowance is allocated against them. This seems to be wrong, as in accordance with paragraph 6(1) Schedule 24 the additional interest income is treated as corrected first, before the rents, so that there is a notional discovery assessment to be made on the additional £6,400 interest which would fall to be taxed after deducting the remaining part of the personal allowance of £488 with the balance taxed at 20% less tax deducted of 20%, so that the PLR would be £0. A second notional discovery assessment would then be made on the rents so that no personal allowance would be given and a commensurate increase would then be made to the tax on the rents so that no personal allowance would be given and more rents would be taxed at 40%.

137. The same reorganisation of slices of income in other years using successive "corrections" has the same effect. This all depends though on whether the effect of paragraph 6(1) is really to alter the allocation rules in s 16 ITA 2007. Why should the second correction, to bring in the rents, not require the interest that was included in the first "correction" to move up the total income and resume its place as top slice. On the other hand if that did happen it is difficult to see what paragraph 6(1) actually does.

138. But fortunately that is not all that we need to consider in relation to the PLR or indeed the relevant percentage of the penalty. In his witness statement Mr Lindley shows that his calculation of the penalty for the inaccuracies regarding rentals was on the basis of a "deliberate and concealed" inaccuracy. Mr Hall explained that in the course of preparing the case the penalty schedules had been reconsidered and it was decided that the characterisation of the inaccuracies as concealed could not be supported. Mr Hall had produced revised figures showing what HMRC now contends for and was asking us to agree to a revised percentage penalty for rentals which is 52.5% not 75%. We agree that such a reduction in the penalty percentage is appropriate, and we informed the parties that we would have made this reduction ourselves if Mr Hall had not mentioned it.

139. That means we do not have to rework the PLR on the basis that paragraph 6(1) applies. We therefore consider that the PLR in the Penalty Explanation Schedule sis correct.

Discussion: issue 7a

140. This is the main area of contention between the parties. The issue is: should HMRC have included in its tax loss calculations income in the form of rents from certain properties ("the disputed properties") which the appellant maintained were not, or not wholly, his properties?

141. In his skeleton argument Mr Wine simply contends that not all the properties are owned by the appellant and in view of this not all the rental income should be assessed on him.

142. In earlier correspondence Mr Wine had argued that the evidence in Form E should be disregarded as the divorce was acrimonious. Likewise he said to us that documents emanating from Mrs Bobat should not be trusted for the same reason.

143. Mr Wine's other contentions on this point were that to assess someone who was not the legal owner or did not hold the title was unfair as the legal owner might also be assessed leading to double taxation. He also argued that Mr Lindley had agreed at the meeting on 24 October 2012 that the disputed properties did not belong to the appellant.

144. Mr Hall put forward essentially the reasons Mr Lindley had given in two witness statements for assessing all the income from the disputed properties on the appellant (except 47 Daisy Hill where the 50:50 split between the appellant and Mrs Bobat was recognised). The first witness statement dealt with his reasons for assessing the whole income and the second was his reaction to a letter from Wine & Co of 10 November 2015. Mr Hall also produced a helpful analysis for each property of the items of evidence which supported HMRC's view of the matter.

145. Mr Lindley's reasons were:

(1) The entries on Form E, a sworn document, disclosed that the appellant had the whole of the beneficial or equitable interest in the disputed properties.

(2) The documents from Mrs Bobat's Solicitors operated on the assumption that, so far as she was concerned, the appellant was the owner of the properties with the ability to sell them and share proceeds with her.

(3) The fact that the appellant used his own funds to purchase the properties.

(4) The fact that all the rents went into the appellant's bank account and that there were, as far as Mr Lindley could see, no transfers from the bank accounts to the children that might be rents.

(5) The facts that the appellant was shown as landlord in the tenancy agreements, that the appellant was named as landlord and policyholder on the insurance policies and in the HMO details from the councils.

(6) The total absence of any involvement of the children in the properties.

146. In response to Wine & Co's letter of 10 November 2015 Mr Lindley had given evidence that his remarks about the appellant and the properties made at the meeting were taken out of context, and that he said that what he had agreed was that the appellant being regarded as the landlord did not of itself mean that the properties were the appellant's. We agree with Mr Lindley about this.

147. There was no evidence from the legal owners of the property, but taking all the available evidence together our clear finding is that for the reasons we set out at §§148 to 152 the appellant was the beneficial owner of the disputed properties in that he had the entire equitable interest in them. It follows from that finding that the children's position was that they were simply the legal owners and that they held the properties as nominees or bare trustees for the appellant.

148. First, we would be happy to rely only on Form E (but do not). It is inconceivable to us that anyone faced with an acrimonious divorce would overstate their assets and there is no reason at all to believe that the appellant was not telling the truth in Form E.

149. We do not however give much weight to Mrs Bobat's documents. We do not know on what she based her beliefs and her proposals could have been based on a desire to get as much from the appellant as possible.

150. We do however put a great deal of weight on the evidence of what happened "on the ground". The documents such as tenancy agreements, HMO registers and insurance policies are not conclusive but in the absence of any other convincing explanation for the appellant's name being shown as landlord or owner we think they are strongly corroborative of the Form E. It was suggested by Mr Wine to Mr Lindley that the appellant could have been an agent for the children, but in response Mr Lindley said that there was no evidence he had seen of agency status and no evidence that if the rents were truly those of the children that they had received any.

151. We also give a great deal of weight to the fact that the appellant provided the funds for the purchase of the houses, and had the rents paid into his bank account (and no evidence of them going out to his children was put forward).

152. We did not of course have any evidence from any of the children (some of whom were minors when the properties were purchased in their names).

153. The further question that arises however and which neither party[3] had any answer for is what is the effect in (tax) law of our finding? Is income which accrues to the equitable owner of land taxable on him under Schedule A in the Income and Corporation Taxes Act 1988 ("ICTA") or under Part 3 of the Income (Trading and Other Income) Act 2005 ("ITTOIA").

154. There is some guidance to be found on the first question in *Williams (Surveyor of Taxes) v Singer* 7 TC 387. In that case the trust in question was not a bare trust but one where Winneretta Singer, Princesse de Polignac was the beneficial tenant for life in possession. The Princess was not resident in the UK in 1915/16 but the trustees were and the assets and income of the fund were not UK source assets or income. The Inland Revenue assessed the trustees on the income and it was against this assessment that the trustees appealed. In the House of Lords Viscount Cave said:

> "Counsel for the Appellants relied principally upon the language of Schedule D to the Income Tax Act, 1853, which provides that the duties thereby imposed are to be deemed to be granted and made payable 'for and in respect of the annual profits or gains arising or accruing to any person residing in the United. Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere,' and upon the first general rule in Section 100 of the Income Tax Act, 1842, which provides that the duties upon profits

[3] The reviewing officer seems to be the only person who addressed this issue.

> imposed by Schedule D are to be charged on and paid by the persons 'receiving or entitled unto' such profits: and they contended that, as the income in question in the Cases under appeal 'accrued' to the trustees as the legal holders of the investments, and the trustees are the persons legally entitled to 'receive' it, they are the persons chargeable under the Act. Indeed, I understood Mr. Cunliffe to go so far as to say that, when funds are vested in trustees, the Revenue Authorities are entitled to look to those trustees for the tax and are neither bound nor entitled to look beyond the legal ownership.
>
> … The fact is that, if the Income Tax Acts are examined, it will be found that the person charged with tax is neither the trustee nor the beneficiary as such, but the person in actual receipt and control of the income which it is sought to reach. The object of the Acts is to secure for the State a proportion of the profits chargeable, and this end is attained (speaking generally) by the simple and effective expedient of taxing the profits where they are found. If the beneficiary receives them, he is liable to be assessed upon them. If the trustee receives and controls them, he is primarily so liable. If they are under the control of a guardian or committee for a person not sui juris or of an agent or receiver for persons resident abroad; they are taxed in his hands. But in cases where a trustee or agent is made chargeable with the tax, the statutes recognise the fact that he is a trustee or agent for others, and he is taxed on behalf of and as representing his beneficiaries or principals."

155. Section 100 of the Income Tax Act 1842, referred to by Counsel for the Inland Revenue, remains on the statute book. It became s 59 ICTA and is now in s 8 ITTOIA. They apply respectively to Case I and II of Schedule D or trading income charged under Part 2 ITTOIA. But in both ICTA and ITTOIA there is an equivalent for Schedule A or income from property chargeable under Part 3 ITTOIA. For the periods in question here the provisions are, successively:

> *ICTA 1988 15(1) Schedule A Head 2 [to 1997-98]*
>
> "2 Tax under this Schedule shall be charged by reference to the rents or receipts to which a person becomes entitled in the chargeable period."
>
> *ICTA 1988 [from 1998-99 to 2004-05]*
>
> "21A(1) Income tax under Schedule A shall be charged on and paid by the persons receiving or entitled to the income in respect of which the tax is directed by the Income Tax Acts to be charged."
>
> *ITTOIA 2005 [from 2005-06]*
>
> "271 The person liable for any tax charged under this Chapter is the person receiving or entitled to the profits."

156. We hold that from the facts we have found and the evidence we have seen, the appellant is a person to whom the provisions above apply. He is the person receiving and entitled to the profits. In a case such as this if the legal owner had been assessed it would or should be as trustee. If the beneficiary of the bare trust who received the income would be doing so after deduction of tax and if the trustee gave him a suitable

voucher such as a Form R185 a repayment or set off could be made. This is the answer to Mr Wine's point about double taxation (§143)

157. The appellant is therefore liable to tax on all the income arising from letting the disputed properties.

Issue 7b:

158. The issue here is: should the level of expenses incurred in the appellant's property business used by HMRC in their calculations have been greater?

159. Mr Wine argued that it was wrong for HMRC to use the profit ratio from the income disclosed in the appellant's returns as the basis for calculating the profits from the undisclosed properties.

160. He had suggested to Mr Lindley that he should not have used the figures from the return because it was, he said, obvious that the appellant's accountant had simply put in "any old figures" plucked from the air and had understated the true amounts.

161. He also argued that it was his firms' experience from looking at a number of clients with student lets that the expenses of such properties are high and that the achieved profit ratio was between 50% and 70%, not the level shown in Mr Lindley's figures.

162. Finally he said that it was hypocritical to at the same time accuse the appellant of being a liar and a tax fraud and then to say the best evidence of the profit ratio was the appellant's own figures on his tax return, the return of a proven liar.

163. Mr Hall argued that Mr Wine had not produced his evidence to HMRC nor explained why it was relevant to the appellant's own circumstances. Mr Lindley had explained that he was unable to recreate the expenses from the bank statements as the items were not identified apart from a few handwritten notes that Mr Wine had pointed to. He submitted that in the absence of any other evidence Mr Lindley's method was the only one available.

164. No evidence was available in support of Mr Wine's submission that a student let would generally produce a lower profit ratio than the one used by Mr Lindley.

165. Nor do we think it hypocritical of Mr Lindley to use the appellant's own figures. In using the appellant's own figures as the basis of his calculation of expenses Mr Lindley was using the only relevant information available to him and had no reason to believe that the appellant would overstate the net rental income that he did choose to show on his tax returns.

166. We therefore do not make any adjustment to the figures for expenses deducted from gross rents used by Mr Lindley.

167. There are some other minor points of computation. Mr Hall produced a schedule of the assessed amounts and the amounts HMRC was now contending for. Apart from the major changes to the penalties referred to in §§113 and 114 and in §138 there were four small changes to tax figures which we accept without explanation.

168. A rather more important figure related to the tax charged for 1997-98. On 17 October 2014 Mr Lindley wrote to the appellant and explained that Mr Wine had pointed out that a wrong figure had been used for the profits of that year: it should show that the tax was lower by £791.60. We will take this into account in setting out our decision for that year.

169. Even larger was a figure of tax of £1,795.60 by which we were being asked to increase the tax (and consequently the penalty) in 1998-99. See §192 for our decision on this.

Decisions

170. In this section we set for each tax year our decision showing the correct amount of tax or penalty. We set out any particular considerations explaining a decision before the decision itself. But we deal first with the question of the form our decisions should take.

171. In the case of the assessments to tax our power to give a decision is to be found in s 50 TMA. This provides that in the case of a discovery assessment:

> "(6) If, on an appeal notified to the tribunal, the tribunal decides—
>
> …
>
> (c) that the appellant is overcharged by an assessment …
>
> the assessment … shall be reduced accordingly, but otherwise the assessment … shall stand good.
>
> (7) If, on an appeal notified to the tribunal, the tribunal decides—
>
> …
>
> (c) that the appellant is undercharged by an assessment …,
>
> the assessment … shall be increased accordingly.
>
> (8) Where, on an appeal notified to the tribunal against an assessment … which—
>
> (a) assesses an amount which is chargeable to tax, and
>
> (b) charges tax on the amount assessed,
>
> the tribunal decides as mentioned in subsection (6) or (7) above, the tribunal may, unless the circumstances of the case otherwise require, reduce or, as the case may be, increase only the amount assessed; and where any appeal notified to the tribunal is so determined the tax

charged by the assessment shall be taken to have been reduced or increased accordingly."

172. In the case of an amendment to a return (including a self-assessment) section 50 also applies:

> "(6) If, on an appeal notified to the tribunal, the tribunal decides—
>
> (a) that ... the appellant is overcharged by a self-assessment;
>
> …
>
> the assessment … shall be reduced accordingly, but otherwise the assessment … shall stand good.
>
> (7) If, on an appeal notified to the tribunal, the tribunal decides—
>
> (a) that ... the appellant is overcharged by a self-assessment;
>
> …
>
> the assessment … shall be increased accordingly."

173. In this section as it applies to a self-assessment the reference to an assessment is to be taken as a reference to a self-assessment as amended by the closure notice given under s 28A TMA (see *d'Arcy v HMRC* [2006] SPC00549 at [10]).

174. For penalties charged under s 95 TMA the power we have resides in s 100B(2) TMA:

> "(2) …. on an appeal against the determination of a penalty under section 100 above section 50(6) to (8) of this Act shall not apply but—
>
> (a) …
>
> (b) in the case of any other [not fixed] penalty, the First-tier Tribunal may—
>
> (i) if it appears ... that no penalty has been incurred, set the determination aside,
>
> (ii) if the amount determined appears ... to be appropriate, confirm the determination,
>
> (iii) if the amount determined appears ... to be excessive, reduce it to such other amount (including nil) as it considers appropriate, or
>
> (iv) if the amount determined appears ... to be insufficient, increase it to such amount not exceeding the permitted maximum as it considers appropriate."

175. And for Schedule 24 FA 2007 the power is in paragraph 17:

> "(1) On an appeal under paragraph 15(1) the appellate tribunal may affirm or cancel HMRC's decision.
>
> (2) On an appeal under paragraph 15(2) the appellate tribunal may—
>
> (a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make."

176. We now consider the application of these powers.

1994-95

177. There are appeals by the appellant against the discovery assessment for this year and the s 95 penalty. We would in normal circumstances see no reason for doing anything other than considering the arguments put before us and coming to a decision on what we have found. In this case we would have confirmed the further assessment and determination of penalties as made by HMRC.

178. But in their Statement of Case HMRC say that for 1994-95 to 1995-96 "HMRC do not seek to impose these penalties." Mr Hall explained that in the absence of evidence that there were returns for these years HMRC could not show that there were incorrect returns. They do not say anything about the assessments and we accept that for periods before the introduction of self-assessment a discovery assessment may be made whether or not a return was made.

179. Accordingly we decide that the assessment to tax stands good in the absence of any evidence that there was an undercharge. In accordance with s 50(6) TMA the amount of the assessment therefore stands at £22,903 and the tax at £6,572.05.

180. As to the penalty, in accordance with s 100B(2)(b)(i) we reduce it to £0.

1995-96

181. The situation here is as it is for 1994-95.

182. In accordance with s 50(6) TMA the amount of the assessment therefore stands at £31,451 and the tax at £9,901.25.

183. In accordance with s 100B(2)(b)(i) the amount of the penalty is therefore £0.

1996-97

184. For this tax year and all tax years to and including 2009-10 together with 2011-12 section 50 TMA applies to the discovery assessments. It might be thought that we could find the amount in which the assessment stands good by simply looking at the assessment. In the years before self-assessment that would be true as a further assessment would then have consisted of a three-column document (Form 310) that shows the originally assessed income as well as tax, the new total amounts of income and tax and the differences. Under self-assessment this is not so. The letter notifying the discovery assessment merely shows the amount of income originally self-assessed and the revised figure of income, although it does show the difference between the tax figures. To find the amount of income assessed by the discovery assessment we therefore have to perform an arithmetical exercise.

185. In accordance with s 50(6) TMA the amount of the assessment stands at £32,371 and the tax at £10,920.72. HMRC's schedule has transposed two digits and shows £10,290.72 – we have used the figures on the assessment and tax calculation.

186. For the tax years 1995-96 to 2007-08 s 100B TMA applies to penalties. The original determination for 1996-97 is of a penalty of £5,460. We have accepted that HMRC have shown that this should be increased to reflect the intended abatement of 40% rather than the 50% actually applied in the assessment.

187. In accordance with s 100B(2)(b)(iv) we increase the penalty to £6,552 (based on the figures in the assessment).

1997-98

188. This year falls to be amended as a result of HMRC's error pointed out by Mr Wine (see §168).

189. In accordance with s 50(6) TMA the amount of the assessment is reduced from £47,169 to £42,680 and the tax from £17,839.49 to £17,047.89.

190. In accordance with s 100B(2)(b)(iv) we increase the penalty to £10,228.73.

1998-99

191. The discovery assessment for this year dated 4 September 2014 shows an increased amount of income of £50,242 and tax of £16,856.95. The bundle however also includes a tax calculation dated 9 June 2015 showing additional income of £54,731 and tax of £18,652.55. This larger figure is the one included in the Statement of Case. That Statement refers to "minor arithmetical errors" but we don't think, even in this case where the total tax and penalties are in the region of £1 million that an additional amount of tax of £1,795.60 plus the knock on effect on penalties is a minor arithmetical amendment. We have not been able to find in the voluminous bundles any explanation for the revised calculation.

192. In accordance with s 50(6) TMA the amount of the assessment stands at £50,242 and tax of £16,856.95

193. In accordance with s 100B(2)(b)(iv) we increase the penalty to £10,113.60 (60% of £16,856.95.

1999-2000

194. In accordance with s 50(6) TMA the amount of the assessment stands at £55,438 and the tax at £18,322.66

195. In accordance with s 100B(2)(b)(iv) we increase the penalty to £10,993.60.

2000-01

196. Here there is said to be a minor difference (£53.70) in the tax compared with that shown on the discovery assessment. As it in the appellant's favour we take account of it. In accordance with s 50(6) TMA the amount of the assessment stands at £68,689 and the tax is reduced to £23,422.40.

197. In accordance with s 100B(2)(b)(iv) we increase the penalty to £14,053.44.

2001-02

198. In accordance with s 50(6) TMA the amount of the assessment stands at £74,326 and the tax at £26,569.58.

199. In accordance with s 100B(2)(b)(iv) we increase the penalty to £15,941.75.

2002-03

200. In accordance with s 50(6) TMA the amount of the assessment stands at £78,951 and the tax at £26,557.93.

201. In accordance with s 100B(2)(b)(iv) we increase the penalty to £15,934.76.

2003-04

202. In accordance with s 50(6) TMA the amount of the assessment stands at £104,547 and the tax at £36,350.10.

203. In accordance with s 100B(2)(b)(iv) we increase the penalty to £21,810.06.

2004-05

204. In accordance with s 50(6) TMA the amount of the assessment stands at £106,535 and the tax at £37,045.87.

205. In accordance with s 100B(2)(b)(iv) we increase the penalty to £22,227.52.

2005-06

206. In accordance with s 50(6) TMA the amount of the assessment stands at £98,042 and the tax at £32,034.66.

207. In accordance with s 100B(2)(b)(iv) we increase the penalty to £19,220.86.

2006-07

208. In accordance with s 50(6) TMA the amount of the assessment stands at £94,171 and the tax at £31,429.60.

209. In accordance with s 100B(2)(b)(iv) we increase the penalty to £18,857.76.

2006-07

210. In accordance with s 50(6) TMA the amount of the assessment stands at £94,171 and the tax at £31,412.00.

211. In accordance with s 100B(2)(b)(iv) we increase the penalty to £18,857.76.

2007-08

212. Here also there is said to be a minor difference (£0.20) in the tax compared with that shown on the discovery assessment. As it in the appellant's favour we take account of it. In accordance with s 50(6) TMA the amount of the assessment stands at £117,477 and the tax at £39,899.00.

213. In accordance with s 100B(2)(b)(iv) we increase the penalty to £23,939.40.

2008-09

214. In accordance with s 50(6) TMA the amount of the assessment stands at £135,625 and the tax at £45,789.47.

215. In accordance with paragraph 17(2)(b) Schedule 24 FA 2007 we reduce the penalty to £24,085.15.

2009-10

216. In accordance with s 50(6) TMA the amount of the assessment stands at £143,632 and the tax at £48,545.60.

217. In accordance with paragraph 17(2)(b) Schedule 24 FA 2007 we reduce the penalty to £25,504.71.

2010-11

218. For this tax year there is no discovery assessment. The return was the subject of an enquiry under s 9A TMA which started on 24 October 2012, within the time limit for opening such an enquiry. On 25 March 2013 Mr Lindley made an amendment to the return under the power in s 9C TMA ("jeopardy amendment") which allows an amendment to be made during the course of an enquiry (something otherwise not permitted). Section 9C(2) allowed such an amendment to be made only where Mr Lindley formed the opinion that the amount stated in the self-assessment contained in the return as the amount of tax payable was insufficient *and* that unless the assessment was immediately amended there was likely to be a loss of tax.

219. The notification of the amendment by Mr Lindley gave no reason for his having formed an opinion that a risk of tax loss was likely. But in the note of his meeting with the appellant and Mr Wine on the same day, Mr Lindley records that in view of what seemed difficulties in obtaining money from the courts (the appellant had said that his assets had been frozen in the divorce proceedings) he would be issuing the jeopardy amendment, which was in the amount of £157,056.10, predominantly CGT.

220. The appellant, through Mr Wine, appealed against the amendment (as he is entitled to do under s 31(1)(a) TMA), but his grounds of appeal did not query whether Mr Lindley was justified in making it, and as the amendment has not been so challenged we do not have to decide the matter. No steps were then taken in relation to the appeal such as offering a review or notifying the appeal to the Tribunal: these steps could not be taken until the end of the enquiry (s 31(2) TMA).

221. The appellant did however make a postponement application under s 55(1)(a)(i) TMA to postpone the whole of the tax. HMRC determined under s 55(3)(a) TMA that no tax should be postponed, the only response possible as the appellant did not specify what tax he considered was in dispute, as he was required to do by the second sentence of s 55(2). Mr Lindley added that to postpone the collection of the tax would frustrate the purpose of s 9C TMA especially as there seemed to be substantial agreement about liability[4].

222. Following this refusal the appellant referred the issue to the Tribunal under s 55(3)(b) TMA, but eventually the reference was withdrawn.

223. On 4 September 2014 Mr Lindley notified the appellant of the conclusions of his enquiry into the return. The conclusions were that the appellant had understated his rental income and omitted chargeable gains from his return, and that accordingly he had amended the return in line with his decision. The amendment demonstrated, he stated, that the tax previously shown was £0.00 and was as a result of the amendment £162, 327.33.

224. We do not think this is right. It presumes that the jeopardy amendment did not exist or had been superseded as if it had not existed. There is nothing in TMA about amendments to a return comparable to the position where a determination under s 28C TMA is made and then "superseded" (the word used in s 28C). Nor is there any bar to making more than one amendment to a return – the prohibition on amendment in s 30A(4) TMA only applies to assessments which are not self-assessments.

---

[4] We tend to agree with Mr Lindley that the ability to postpone the tax charged by a jeopardy amendment would frustrate the purpose of the amendment. We find it very surprising that a postponement is possible in these circumstances (which it clearly is by virtue of s 55(1)(a)(i)). Judge Thomas had, many decades ago, involvement in the Keith Committee's investigation of the possibility of introducing jeopardy assessments to the UK, and he seems to recall that no country that then used the notion allowed the tax to be postponed, for the reasons Mr Lindley mentions.

HMRC's remedy, which Mr Lindley employed in this case, is to deal robustly with the postponement application and if there is a reference to the Tribunal to try to ensure that it is dealt with as a matter of urgency.

225. We think therefore that Mr Lindley should have said that the closure amendment changes the tax payable from £157,056.10 to £162,327.33. We do not suggest that this affects the validity of what Mr Lindley did. But taking the view, if it is HMRC's view, that a s 28A amendment supersedes a jeopardy amendment may have other consequences.

226. It seems for example that by treating the jeopardy amendment as superseded HMRC may have moved forward the date on which the tax included in the jeopardy amendment is payable (see paragraphs 4 and 5 Schedule 3ZA TMA). That in turn may have consequences for interest for late payment of tax, though we are not about to embark on an analysis of the complex provisions of s 101 and Schedule 53 FA 2009).

227. It seems to us from what we have said in the last few paragraphs that there is before us an appeal against the jeopardy amendment and an appeal against the amendment in the closure notice.

228. We therefore decide that, as to the jeopardy amendment, in accordance with s 50(6) TMA the amounts charged to tax in the self-assessment as amended by the jeopardy amendment stand at income of £84,520 and chargeable gains of £651,425 and the amount of income tax at £23,738 and of CGT at £133,327.10.

229. And we decide as to the further amendment made by the closure notice, in accordance with s 50(6) TMA the amounts charged to tax in the self-assessment as amended by the jeopardy amendment and this amendment stand at income of £93,203 and chargeable gains of £664,571. The amount of additional income tax is £3,473 and of additional CGT is £2,453.28.

230. As to the penalty, in accordance with paragraph 17(2)(b) Schedule 24 FA 2007 we reduce the penalty to £73,364.30.

2011-12

231. In accordance with s 50(6) TMA the amount of the assessment stands at £103,285 and the tax at £30,502.25.

232. In accordance with paragraph 17(2)(b) Schedule 24 FA 2007) we reduce the penalty to £16,134.97.

Final observation

233. Officers of HMRC are sometimes criticised by this tribunal, occasionally heavily, for a variety of shortcomings. We however want to put on record that we think that Mr Lindley's conduct of the investigation into the appellant's affairs was exemplary.

234. 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: 15 MARCH 2017

Appendix 1: Legislation

TAXES MANAGEMENT ACT 1970

9C *Amendment of self-assessment during enquiry to prevent loss of tax*

(1) This section applies where an enquiry is in progress into a return as a result of notice of enquiry by an officer of the Board under section 9A(1) of this Act.

(2) If the officer forms the opinion—

(a) that the amount stated in the self-assessment contained in the return as the amount of tax payable is insufficient, and

(b) that unless the assessment is immediately amended there is likely to be a loss of tax to the Crown,

he may by notice to the taxpayer amend the assessment to make good the deficiency.

(4) For the purposes of this section the period during which an enquiry is in progress is the whole of the period—

(a) beginning with the day on which notice of enquiry is given, and

(b) ending with the day on which the enquiry is completed.

28A *Completion of enquiry into personal or trustee return*

(1) An enquiry under section 9A(1) of this Act is completed when an officer of Revenue and Customs by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions.

In this section "the taxpayer" means the person to whom notice of enquiry was given.

(2) A closure notice must either—

(a) state that in the officer's opinion no amendment of the return is required, or

(b) make the amendments of the return required to give effect to his conclusions.

(3) A closure notice takes effect when it is issued.

29 *Assessing procedure [applicable for 1994-95 and 1995-96]*

…

(3) If an officer of Revenue and Customs or the Commissioners for Her Majesty's Revenue and Customs discover—

(a) that any profits which ought to have been assessed to tax have not been assessed, or

(b) that an assessment to tax is or has become insufficient

… the officer or, as the case may be, the Commissioners may make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged.

(5) Notice of any assessment to tax shall be served on the person assessed and shall state the date on which it is issued and the time within which any appeal against the assessment may be made.

(6) After the notice of any such assessment has been served on the person assessed, the assessment shall not be altered except in accordance with the express provisions of the Taxes Acts.

(8) In this section "profits"—

(a) in relation to income tax, means income,

(b) in relation to capital gains tax means chargeable gains,

29 *Assessment where loss of tax discovered* [*applicable from 1996-97 onwards - s 199(2)(a) FA 1994*]

(1) If an officer of Revenue and Customs or the Commissioners for Her Majesty's Revenue and Customs discover, as regards any person (the taxpayer) and a year of assessment—

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed,

…

the officer or, as the case may be, the Commissioners may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

(3) Where the taxpayer has made and delivered a return under section 8 … of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) ... in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

30A *Assessing procedure* [*applicable from 1996-97 onwards - s 199(2)(a) FA 1994*]

(1) Except as otherwise provided, all assessments to tax which are not self-assessments shall be made by officer of Revenue and Customs.

(2) All income tax which falls to be charged by an assessment which is not a self-assessment may, notwithstanding that it was chargeable under more than one [Schedule] OR [Part or Chapter of ITEPA 2003 or ITTOIA 2005], be included in one assessment.

(3) Notice of any such assessment shall be served on the person assessed and shall state the date on which it is issued and the time within which any appeal against the assessment may be made.

(4) After the notice of any such assessment has been served on the person assessed, the assessment shall not be altered except in accordance with the express provisions of the Taxes Acts.

31 *Appeals: right of appeal* [*from 1996-97 onwards - SI 1998/3173 and as amended by FA 2001*]

(1) An appeal may be brought against—

> (a) any amendment of a self-assessment under section 9C of this Act (amendment by Revenue during enquiry to prevent loss of tax),
>
> (b) any conclusion stated or amendment made by a closure notice under section 28A … of this Act (amendment by Revenue on completion of enquiry into return),
>
> (d) any assessment to tax which is not a self-assessment.

(2) An appeal under subsection (1)(a) above against an amendment of a self-assessment made while an enquiry is in progress shall not be heard and determined until the enquiry is completed.

(4) This section has effect subject to any express provision in the Taxes Acts, including in particular any provision making one kind of assessment conclusive in an appeal against another kind of assessment.

34 *Ordinary time limit of four years*

(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains tax may be made at any time not more than 4 years after the end of the year of assessment to which it relates.

(2) An objection to the making of any assessment on the ground that the time limit for making it has expired shall only be made on an appeal against the assessment.

36 *Loss of tax brought about carelessly or deliberately etc*

(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).

(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax—

(a) brought about deliberately by the person,

may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period).

(1B) In subsections (1) and (1A) references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person.

50 *Procedure* [*from 1996-97 onwards s 199(2)(a) FA 1994*]

(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 … shall stand good.

(7) If, on an appeal notified to the tribunal, the tribunal decides—

(a) that the appellant is undercharged to tax by a self-assessment ...

…

(c) that the appellant is undercharged by an assessment other than a self-assessment,

the assessment … shall be increased accordingly.

(8) Where, on an appeal notified to the tribunal against an assessment (other than a self-assessment) which—

(a) assesses an amount which is chargeable to tax, and

(b) charges tax on the amount assessed,

the tribunal decides as mentioned in subsection (6) or (7) above, the tribunal may, unless the circumstances of the case otherwise require, reduce or, as the case may be, increase only the amount assessed; and where any appeal notified to the tribunal is so determined the tax charged by the assessment shall be taken to have been reduced or increased accordingly.

95 *Incorrect return or accounts for income tax or capital gains tax* [*repealed by paragraph 29(a) Schedule 24 FA 2007 in relation to relevant documents relating to years of assessment 2008-09 onwards*]

(1) Where a person fraudulently or negligently—

(a) delivers any incorrect return of a kind mentioned in section 8 … of this Act (or either of those sections as extended by section 12 of this Act ...), or

…

(c) submits to an officer of Revenue and Customs or the Commissioners for Her Majesty's Revenue and Customs or any Commissioners any incorrect accounts in connection with the ascertainment of his liability to income tax or capital gains tax,

he shall be liable to a penalty not exceeding the amount of the difference specified in subsection (2) below.

(2) The difference is that between—

(a) the amount of income tax and capital gains tax payable for the relevant years of assessment by the said person (including any amount of income tax deducted at source and not repayable), and

(b) the amount which would have been the amount so payable if the return, statement, declaration or accounts as made or submitted by him had been correct.

(3) The relevant years of assessment for the purposes of this section are, in relation to anything delivered, made or submitted in any year of assessment, that, the next following, and any preceding year of assessment; ...

100 *Determination of penalties by officer of Board*

(1) ... an officer of Revenue and Customs authorised by the Commissioners for Her Majesty's Revenue and Customs for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate.

(3) Notice of a determination of a penalty under this section shall be served on the person liable to the penalty and shall state the date on which it is issued and the time within which an appeal against the determination may be made.

(4) After the notice of a determination under this section has been served the determination shall not be altered except in accordance with this section or on appeal.

(5) If it is discovered by an officer of Revenue and Customs authorised by the Commissioners for the purposes of this section that the amount of a penalty determined under this section is or has become insufficient the officer may make a determination in a further amount so that the penalty is set at the amount which, in his opinion, is correct or appropriate.

100A *Provisions supplementary to section 100*

(2) A penalty determined under section 100 above shall be due and payable at the end of the period of thirty days beginning with the date of the issue of the notice of determination.

(3) A penalty determined under section 100 above shall for all purposes be treated as if it were tax charged in an assessment and due and payable.

100B *Appeals against penalty determinations*

(1) An appeal may be brought against the determination of a penalty under section 100 above and, subject to … the following provisions of this section, the provisions of this Act relating

to appeals shall have effect in relation to an appeal against such a determination as they have effect in relation to an appeal against an assessment to tax.

(2) … on an appeal against the determination of a penalty under section 100 above section 50(6) to (8) of this Act shall not apply but—

(a) in the case of a penalty which is required to be of a particular amount, the First-tier Tribunal may—

(i) if it appears .. that no penalty has been incurred, set the determination aside,

(ii) if the amount determined appears … to be correct, confirm the determination, or

(iii) if the amount determined appears … to be incorrect, increase or reduce it to the correct amount,

(b) in the case of any other penalty, the First-tier Tribunal may—

(i) if it appears … that no penalty has been incurred, set the determination aside,

(ii) if the amount determined appears … to be appropriate, confirm the determination,

(iii) if the amount determined appears … to be excessive, reduce it to such other amount (including nil) as it considers appropriate, or

(iv) if the amount determined appears … to be insufficient, increase it to such amount not exceeding the permitted maximum as it considers appropriate.

103 *Time limits for penalties*

(1) Subject to subsection (2) below, where the amount of a penalty is to be ascertained by reference to tax payable by a person for any period, the penalty may be determined by an officer of Revenue and Customs, or proceedings for the penalty may be commenced before the tribunal or a court—

(a) at any time within six years after the date on which the penalty was incurred, or

(b) at any later time within three years after the final determination of the amount of tax by reference to which the amount of the penalty is to be ascertained.

Schedule 24

Penalties for Errors

Part 1

Liability for Penalty

Error in taxpayer's document

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 a liability to tax,

…

(3) Condition 2 is that the inaccuracy was … deliberate (within the meaning of paragraph 3) or deliberate on P's part.

(4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

Tax	Document
Income tax or capital gains tax	Return under section 8 of TMA 1970 (personal return).
Any of the taxes mentioned above	Any document which is likely to be relied upon by HMRC to determine, without further inquiry, a question about-- (a) P's liability to tax,

Degrees of culpability

3—(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is—

…

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

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

Part 2

Amount of Penalty

Standard amount

4—(1) This paragraph sets out the penalty payable under paragraph 1.

(2) If the inaccuracy is in category 1, the penalty is--

…

(b) for deliberate but not concealed action, 70% of the potential lost revenue, and

(c) for deliberate and concealed action, 100% of the potential lost revenue.

Potential lost revenue: normal rule

5--(1) "The potential lost revenue" in respect of an inaccuracy in a document (including an inaccuracy attributable to a supply of false information or withholding of information) or a failure to notify an under-assessment is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

(2) The reference in sub-paragraph (1) to the additional amount due or payable includes a reference to—

(a) an amount payable to HMRC having been erroneously paid by way of repayment of tax, and

(b) an amount which would have been repayable by HMRC had the inaccuracy or assessment not been corrected.

Potential lost revenue: multiple errors

6— (1) Where P is liable to a penalty [under paragraph 1][1] in respect of more than one inaccuracy, and the calculation of potential lost revenue under paragraph 5 in respect of each inaccuracy depends on the order in which they are corrected—

(a) careless inaccuracies shall be taken to be corrected before deliberate inaccuracies, and

(b) deliberate but not concealed inaccuracies shall be taken to be corrected before deliberate and concealed inaccuracies.

(2) In calculating potential lost revenue where P is liable to a penalty under paragraph 1 in respect of one or more understatements in one or more documents relating to a tax period, account shall be taken of any overstatement in any document given by P which relates to the same tax period.

(3) In sub-paragraph (2)--

(a) "understatement" means an inaccuracy that satisfies Condition 1 of paragraph 1, and

(b) "overstatement" means an inaccuracy that does not satisfy that condition.

Reductions for disclosure

9—(A1) Paragraph 10 provides for reductions in penalties under paragraph[ ] 1 … where a person discloses an inaccuracy, a supply of false information or withholding of information, or a failure to disclose an under-assessment.

(1) A person discloses an inaccuracy, a supply of false information or withholding of information, or a failure to disclose an under-assessment by—

(a) telling HMRC about it,

(b) giving HMRC reasonable help in quantifying the inaccuracy…, and

(c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy… is fully corrected.

(2) Disclosure—

(a) is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy…, and

(b) otherwise, is "prompted".

(3) In relation to disclosure "quality" includes timing, nature and extent.

10—(1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a "standard percentage") has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it—

(a) in the case of a prompted disclosure, in column 2 of the Table, ..

Standard %	Minimum % for prompted disclosure
70%	35%
100%	50%

Special reduction

11—(1) If they think it right because of special circumstances, HMRC may reduce a penalty under paragraph 1 ….

(2) In sub-paragraph (1) "special circumstances" does not include—

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

Part 3

Procedure

Assessment

13—(1) Where a person becomes liable for a penalty under paragraph 1, 1A or 2 HMRC shall—

(a) assess the penalty,

(b) notify the person, and

(c) state in the notice a tax period in respect of which the penalty is assessed…

(1A) A penalty under paragraph 1 … must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.

(2) An assessment—

(a) shall be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Act),

(b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

(3) An assessment of a penalty under paragraph 1 … must be made before the end of the period of 12 months beginning with—

(a) the end of the appeal period for the decision correcting the inaccuracy, or

(b) if there is no assessment to the tax concerned within paragraph (a), the date on which the inaccuracy is corrected.

(5) For the purpose of sub-paragraphs (3) and (4) a reference to an appeal period is a reference to the period during which—

(a) an appeal could be brought, or

(b) an appeal that has been brought has not been determined or withdrawn.

(6) Subject to sub-paragraphs (3) and (4), a supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of potential lost revenue.

Appeal

15—(1) A person may appeal against a decision of HMRC that a penalty is payable by the person.

(2) A person may appeal against a decision of HMRC as to the amount of a penalty payable by the person.

(3) A person may appeal against a decision of HMRC not to suspend a penalty payable by the person.

(4) A person may appeal against a decision of HMRC setting conditions of suspension of a penalty payable by the person.

16—(1) An appeal under this Part of this Schedule shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

17—(1) On an appeal under paragraph 15(1) the ... tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 15(2) the ... tribunal may—

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the ... tribunal substitutes its decision for HMRC's, the ... tribunal may rely on paragraph 11--

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the ... tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed.

(4) On an appeal under paragraph 15(3)—

(a) the ... tribunal may order HMRC to suspend the penalty only if it thinks that HMRC's decision not to suspend was flawed, and

(b) if the ... tribunal orders HMRC to suspend the penalty—

(i) P may appeal against a provision of the notice of suspension, and

(ii) the ... tribunal may order HMRC to amend the notice.

(5) On an appeal under paragraph 15(4) the ... tribunal—

(a) may affirm the conditions of suspension, or

(b) may vary the conditions of suspension, but only if the ... tribunal thinks that HMRC's decision in respect of the conditions was flawed.

(5A) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 16(1)).

(6) In sub-paragraphs (3)(b), (4)(a) and (5)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(7) Paragraph 14 (see in particular paragraph 14(3)) is subject to the possibility of an order under this paragraph.

Part 5

General

Interpretation

24 An expression used in relation to income tax has the same meaning as in the Income Tax Acts.

28 In this Schedule--

(g) "tax period" means a tax year, accounting period or other period in respect of which tax is charged,

(h) a reference to giving a document to HMRC includes a reference to communicating information to HMRC in any form and by any method (whether by post, fax, email, telephone or otherwise),

(i) a reference to giving a document to HMRC includes a reference to making a statement or declaration in a document,

(j) a reference to making a return or doing anything in relation to a return includes a reference to amending a return or doing anything in relation to an amended return, and

(k) a reference to action includes a reference to omission.