[2017] UKFTT 0656 (TC)

TC06083

Appeal number: TC/2016/03233

INCOME TAX – Exercise of revenue functions by NCA – whether qualifying condition met – validity of assessments on pre-bankruptcy income addressed to trustee – whether deliberate conduct properly pleaded – validity of assessments assessing one figure on two bases – whether returns required and made – whether discovery of loss of tax - whether bankrupt was carrying on trade of money laundering from which profits arose – appeals allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MATTHEW CHADWICK (as trustee in bankruptcy of Mrs GLORIA ODUNEYE-BRANIFFE) **Appellant**

- and -

THE NATIONAL CRIME AGENCY **Respondents**

TRIBUNAL: JUDGE RICHARD THOMAS
JACQUI DIXON

Sitting in public at the Royal Courts of Justice, London on 15 and 16 June 2017, followed by post-hearing submissions considered on paper

Mr Scott Redpath, instructed by DWF LLP, for the Appellant

Mr Karl Masi, instructed by the National Crime Agency, with post-hearing submissions by Jolyon Maugham QC, for the Respondent

DECISION

1. This was the hearing of appeals by Mr Matthew Chadwick who is the trustee in bankruptcy[1] of Mrs Gloria Oduneye-Braniffe[2]. Because the assessments which are the subject of the appeals concern the tax affairs of Mrs Oduneye-Braniffe and her alleged connection with criminal conduct we refer to her as "the appellant" from now on, while recognising that all her rights of appeal vest in the trustee, who has considered that it is in the interests of the appellant's creditors to bring these appeals.

2. The appeals are against assessments to income tax for the years of assessment[3] 2004-05 to 2006-07 inclusive and the tax years 2007-08 and 2008-09 and against assessments to Class 4 National Insurance Contributions for the tax years 2004-05 to 2008-09 inclusive. (From this point on we use "tax year" to include years of assessment)

The issues

3. The issues for our decision as outlined in the Respondents' ("NCA") skeleton were:

(1) Whether NCA had shown that they had reasonable grounds to suspect that income arising to the appellant was chargeable to income tax and that it arose or accrued as a result of her or another person's criminal conduct (so that NCA could properly serve the notice on the Commissioners for Her Majesty's Revenue and Customs[4] ("HMRC") that NCA intends to carry out the general Revenue functions specified in the notice.)

(2) If they had so shown, whether the appellant had discharged the burden of proof on her to show that the assessments were excessive.

4. In view of the fact that all the assessments in this case were made on 22 April 2015 and that the normal time limit for making income tax and Class 4 NIC

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[1] Contrary to what might be assumed, Mrs Oduneye-Braniffe was not made bankrupt on the petition of the respondents or of HMRC. The petition was presented on 23 June 2011 by Harrow Borough Council who alleged that Mrs Oduneye-Braniffe owed £2,068.23 in respect of council tax on a let property of hers, 52 Bacon Lane, Edgware. NCA subsequently notified the estate of the bankrupt of a claim for over £300,000 which was charged by the assessments the subject of this appeal.

[2] It an oddity of this case that two documents which might be thought to be authoritative, the appellant's passport and marriage certificate, show her name as spelled "Braniff", like the now defunct American airline, without a final "e", but the appellant has also signed documents showing her name with a final "e". We use the one with the final "e" throughout.

[3] The term "year of assessment" was changed by the Income Tax Act 2007 to "tax year", though not with retrospective effect. "Tax year" is the term which has been used since its enactment for the same concept in the Social Security (Contributions and Benefits) Act 1992 which contains the charge to Class 4 National Insurance Contributions.

[4] Part 6 of the Proceeds of Crime Act refers to the Commissioners of Inland Revenue which it abbreviates to the "Board". By s 50(1) Commissioners for Revenue and Customs Act 2005 ("CRCA") references in any enactment to the Commissioners of Inland Revenue or to the Board are to be read as references to the Commissioners for Her Majesty's Revenue and Customs.

assessments[5] is four years from the end of the tax year, so that all the assessments in this case were made outside those time limits, we informed the parties that a further issue arose in that the burden of proof was undoubtedly on NCA to show that the assessments were properly made, including whether they were made in any of the circumstances described in s 36 Taxes Management Act 1970 ("TMA"). If we decided that they were properly made, then the burden did fall on the appellant to show that the assessments were excessive.

5. After the hearing we sought further submissions from the parties on a number of mostly procedural matters to do with the assessments. We received submissions from Mr Redpath for the appellant and from Mr Jolyon Maugham QC, who did not appear before us, for NCA.

Evidence

6. We had received skeleton arguments before the hearing in relation to an application by NCA to serve a witness statement from Mr Kevin Diedrick after the time allowed by the directions in the case. In the event Mr Redpath did not contest the application, not least because he had some further material which he wished to adduce. We admitted all the additional material.

7. We had a witness statement from Susan Jones, an officer of HMRC who had been seconded to NCA and who carried out the NCA investigation into the appellant's tax affairs. Ms Jones had returned to HMRC following her secondment to NCA and has subsequently retired. She did not give oral evidence and her statement stood as her evidence in chief. It exhibited a great deal of the documentary material that was included in the bundles before us, including the correspondence between NCA and the appellant and documents arising from Ms Jones' investigation.

8. The exhibits to her statement included a witness statement in proper form from an employee of Lloyd's Banking Group and from two officers of HMRC, none of whom were called to speak to their evidence.

9. We also had a witness statement from Mr Kevin Diedrick, an officer of HMRC who had been seconded to NCA and who replaced Ms Jones as the NCA investigator into the appellant's tax affairs. Mr Diedrick adopted Ms Jones' witness statement as his own having stated that he would not have done anything different from Ms Jones. Mr Diedrick was cross-examined by Mr Redpath.

10. We had two witness statements from the appellant and her statements stood as her evidence in chief. She was cross-examined by Mr Masi.

11. We had two witness statements from Mr Mesut Baybasin ("MB"), the appellant's husband. His statements stood as his evidence in chief. He was cross-examined by Mr Masi.

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[5] By s 16 Social Security (Contributions and Benefits) Act 1992 all the provisions of the Income Tax Acts including those relating to assessing and recovery apply to Class 4 NICs with any necessary modifications.

12. We also had what purported to be evidence from an expert witness about the mortgage lending market. We were not taken to it and it was not relied on to any great extent by either party. We disregard it entirely.

13. There were also a number of other statements exhibited which were put in evidence but which did not contain a statement of truth and where the maker was not called to give evidence.

Facts – the background to the NCA tax investigation

14. In this part of our decision we rely primarily on the evidence of Ms Jones and Mr Diedrick where they explain the reason why NCA sought to use its Revenue functions in this case, and what her investigation and its consequences consisted of.

15. In 2013 NCA conducted an investigation into the trafficking of Class A drugs by the Baybasin Organised Crime Group ("BOCG").

16. On 27 November 2013 search and seizure warrants issued under s 352 of the Proceeds of Crime Act 2002 ("POCA") were executed at 52 Bacon Lane, Edgware ("Bacon Lane") and 56 Hillside Gardens, Edgware ("Hillside"). These properties were registered to the appellant in the Land Registry.

17. On 27 November 2013 the appellant was arrested on suspicion of money laundering in relation to her interest in a company MBay Cars Ltd ("MBay"), through which it was suspected by NCA that criminal property and money were being laundered.

18. MB was also arrested at Hillside. NCA believed him to be a leading member of BOCG. He was charged with theft, kidnap and causing grievous bodily harm with 6 other individuals.

19. At Bacon Lane £7,020 in cash was found and seized under s 294 POCA. A quantity of clothing was also found there which was found to be counterfeit.

20. The appellant and MB were bailed until 16 May 2014.

21. On 25 June 2014, in a second search of Bacon Lane, NCA found an envelope marked "mortgage" in a safe with Halifax paying in slips. They showed that £55,000 in cash had been paid into the Halifax account over a period of seven months in 2011 and 2012.

22. On 13 October 2014 the appellant was told by NCA that no further action ("NFA") would be taken against her in relation to money laundering, as a result of the Crown Prosecution Service ("CPS") coming to the view that there was insufficient evidence for there to be a realistic prospect of conviction.

23. MB and associates stood trial in December 2014. MB was acquitted of all charges.

24. NCA remained of the view after the NFA notice that there were reasonable grounds to suspect the appellant of involvement in money laundering. These suspicions related to the affairs of MBay.

25. On 9 April 2015 NCA gave notice to HMRC under s 317(2) POCA. The notice was acknowledged on behalf of the Commissioners on 10 April.

26. On 22 April 2015 Ms Jones wrote to Mr Chadwick as trustee in bankruptcy of the appellant. This letter which purported to be an assessment and its attachments are described more fully at §§137 to 146.

27. Over a period of more than a year there was correspondence between NCA on the one hand and the trustee, his lawyers and the appellant's lawyers on the other, and between the trustee and the appellant's lawyers, resulting in agreement that only the trustee had the right to pursue an appeal. Accordingly on 17 May 2016 the trustee's lawyers, DWF LLP, made an appeal on the trustee's behalf in relation to all the assessments and on 27 May 2016 Ms Jones, exercising the powers in s 49 TMA accepted the appeals.

28. On 7 June 2016 the trustee notified the appeals to the Tribunal.

29. We find as fact that matters set out above. We should explain that we find that what we set out did actually happen. We do not here come to any conclusion about whether any statement or opinion mentioned is true.

Facts – the mortgage applications

30. A major plank of NCA's case against the appellant concerns a mortgage application made by her in relation to Bacon Lane in 2002 and another in relation to Hillside in 2007.

Mr Ellison's evidence

31. As far as Bacon Lane is concerned Ms Jones exhibited the witness statement of Mr John Ellison, a member of the Mortgage Fraud Prevention Team of the Lloyds Banking Group. We accepted Mr Ellison's evidence of fact.

32. He relates that the mortgage sales application which contained the majority of the personal information provided by the appellant was no longer retained. But the following information was available:

(1) In September 2002 the appellant submitted an application directly (ie with no broker intervention) to Halifax for a residential mortgage to enable her to buy Bacon Lane.

(2) The application showed that the appellant provided information that she was employed by Chesterley Ltd with an income of £68,523 pa. She included payslips for July, August and September 2002.

(3) The payslips show an address for the appellant in Hestercombe Ave, London SW6, and that PAYE Code 453L M1 was used.

(4) The mortgage was for £225,000 against a purchase price of £250,000.

33. Mr Ellison says that had it been known that the appellant's income was much lower than the figure given the mortgage would not have been granted. This is to some extent an opinion, but it was clear that it was based on the bank's policy at the time and we accept it as a correct statement of that policy.

34. Mr Ellison's statement also covers the mortgage application for Hillside.

35. The application in this case was made to the Bank of Scotland "on a residential basis" and was submitted by an intermediary, First Start Ltd, whose principal was shown as a Mr Stanley Anyanwu.

36. In the application the following information was given:

(1) The appellant was self-employed trading as Richfields, and had been so trading since 1 February 1995.

(2) The bank requested information from the accountants named in the application, Guniers & Co, whose sole principal was shown as Mr Abimbola Balogun BSc ACCA.

(3) Guniers disclosed that the income from trading was £134,786 for the year ended 1 May 2005, £145,119 for the year ended 1 May 2006 and £147,012 for the trading year ended 1 May 2007.

(4) In addition rental income of £18,000pa from Bacon Lane was disclosed. This was supported by a statement from a letting agent dated 6 July 2007 which was supplied to the bank by First Start Ltd.

(5) The appellant had signed a declaration page confirming the information in the application was true to the best of her knowledge and belief.

(6) The mortgage was for £399,900 against a purchase price of £430,000. The balance was said to come from the appellant's own savings.

(7) The monthly mortgage payments were £2.093.38.

37. Mr Ellison says that had it been known that the appellant's income was much lower than the figure given or that information had been falsified, the mortgage would not have been granted. We accept this statement as fact (see §33)

38. Evidence of another mortgage application in the bundle of papers not referred to by Mr Ellison related to a further application to Halifax in January 2008. The application summary shows that:

(1) The applicant was the appellant

(2) She was shown as single

(3) She had one main employment which was classed as "executive" which she started on 1 February 1995 and she anticipated retiring at age 75.

(4) The name of the "employer/business" was given as Richfields at the address 52 Bacon Lane. She also said she was self-employed and owned 100% of the business.

(5) Income before tax from the employment/business was said to be £147,012 a year. The accountant's name was "Guners [*sic*] & Co" at an address in Barnet, and the reference there was Mr Balogun whose qualification was said to be "(Acca/Fcca)".

(6) Other income was rentals of £18,000pa.

(7) The monthly payments on outstanding commitments was said to be £1,318 to Bank of Scotland and the balance outstanding £199,136.

(8) The intermediary here was said to be "Fortress" and the purposes of the borrowing was "home improvements". The amount was £50,000.

The appellant's evidence

39. In her evidence the appellant said she was the victim of a commoner type of mortgage broker's fraud. She says that Guniers & Co presented inflated figures without her knowledge and authority. She accepted she had been introduced to Mr Stanley Anyanwu through friends and that Mr Anyanwu worked for First Start in Wimbledon. It was only he with whom she dealt.

40. She said she had never instructed or sought assistance from Guniers. In a supplementary statement she said that researches done by her lawyers showed that the principal of Guniers was not known to any professional body, including in particular the Association of Chartered Certified Accountants, a member of which he claimed to be.

41. She denied any knowledge of Richfields whether as employer or a business name for her.

42. She said that all she had done was put her signature on documents when asked by Mr Anyanwu. She trusted him to get the mortgage he said he could get, and her signature on a blank form was all he said was needed, and that they should leave it to him. The only document she was asked for was her passport.

43. She said that the Halifax Application form from 2002 in the bundle was "possibly" the form she had been asked to sign, and she agreed she must have given her bank details in order for the direct debit to be set up. She knew nothing about the payslips from Chesterley Ltd, though she agreed that the address given for Chesterley Ltd had been a temporary address of hers, when she was staying with her brother who was an investments banker and whose flat it was.

44. She maintained she had no idea of business and no idea about how to get a mortgage. When asked by Mr Masi how she thought she would get a mortgage when her income was £6,000 she said that it was a joint matter and her husband had income, so they could afford a mortgage.

45. At a late stage in the preparation of the case NCA applied to allow Mr Diedrick to put in further evidence. This related to "Richfields". He had established that a company called Richfield Expositions Ltd ("Expositions") was incorporated on 27 March 2002, with its directors being the appellant and Mr Christopher Oduneye-Braniff, who was also the company secretary and exhibited the relevant Companies House documents.

46. These showed that Expositions was in existence from 20 March 2002 to 20 January 2004 when it was struck off. It operated from 11 Hestercombe Avenue, Fulham SW6, the same address as shown on the payslip from Chesterley Ltd in support of the 2002 Bacon Lane mortgage application.

47. When she was questioned in cross-examination on this by Mr Masi she admitted that she had been involved with Expositions, explaining that it had been set up to protect the copyright in poems she wrote, but it had never operated or received any income. She maintained that her witness statement was not incorrect as she was neither employed by nor was she trading as Richfields. She agreed that that could have said that in her witness statements.

48. In relation to the 2008 additional amount from the Halifax she agreed that it was not as stated for home improvements. She did not know what it was for.

Mr Mesut Baybasin's evidence

49. MB's evidence was that Mr Anyanwu assisted them both in taking out their second mortgage. He did not recall what information Mr Anyanwu required from the appellant, only that he requested a commission of 1 or 2% of the property value. He confirmed the appellant's account that all Mr Anyanwu wanted was a signature.

50. He said that his wife never had an income of £147,012 and was never associated with an employer called Richfields.

51. He himself was not acquainted with the business of applying for a mortgage. He had acted on behalf of his family in buying properties in the UK and was involved with them, but they were always bought for cash, ie with family money and no borrowings were involved.

52. He explained in cross-examination that he did not hold property in the UK in his name because of his immigration status. This had not been clarified and although he had been given leave to remain in 2007 he was now on immigration bail following his arrest for crimes of violence.

Our findings on the mortgage applications

53. We now turn to making findings of fact in relation to the evidence about the mortgages. Courts and tribunals are cautioned against putting too much emphasis on the demeanour of witnesses when trying to determine the truth, and we have attempted to exercise that caution. But we cannot help remarking on the very different demeanours of the appellant and her husband.

54. The appellant was understandably emotional given that she had been made bankrupt and arrested. We accept that these events had depressed her and changed her outlook on life. And it was also clear to us, as it was to Mr Masi, that whenever she was asked a question that might cause her some difficulty in answering or might cause her husband some embarrassment she would look at MB rather than to Mr Masi or us. We have no doubt that her evidence was heavily influenced by what she thought her husband wanted her to say or what they had agreed she might say.

55. And while she sought to portray herself as naïve and gullible, it was clear to us that she understood some quite sophisticated matters, such as the difference between employment and self employment and between a company and its 100% shareholders, and between directors and company secretaries.

56. MB on the other hand was composed and confident.

57. In our view, having heard and seen the witnesses and reread their written testimony we find that in relation to the mortgage applications, both as to Bacon Lane and Hillside, the appellant did whatever her husband wanted her to do without questions being asked. This would include signing the mortgage applications without asking any further questions.

58. To the extent that Mr Anyanwu of First Start, Mr Adimbola of Guniers and Mr Christopher Oduneye-Braniff were involved in supplying information to the banks we find that such involvement was known about and orchestrated by MB.

59. We do not accept that MB had no knowledge about mortgages. He is clearly heavily involved in the property business and even if he did not knew when he came to the UK there is no reason at all why he could not and would not have found out.

60. We have said we do not think the appellant was quite as naïve and unknowing as she suggested. In this connection NCA pointed to the 2002 application where the appellant they say must have given her bank details to the Halifax. They were certainly given but we do not have any evidence that it was she, rather than MB, who gave he details to the bank.

61. We accept as true her evidence that she was neither employed by, nor in business as, any entity with Richfields in its name or in the name of Richfields and that the statements by Guniers were not of her doing. We find that they do not reflect the amount of her income from self-employment or that they show that she was in fact self-employed in the periods listed by Guniers.

62. Our finding on this is reinforced by what we know about the Chesterley payslips used to support the 2002 Bacon Lane application. We accept as true her evidence that she was unaware of the Chesterley payslips and had not been employed by that company. But we can go further. There is a witness statement from an officer of HMRC which shows the appellant's PAYE records for, among other years, 2002-03. This shows two employers and total earnings of £5158.80. There is no mention of Chesterley Ltd or of income at the rate shown in §32(3). The Tribunal asked Mr Diedrick if he or Ms Jones had checked HMRC's PAYE Computer to see if there was

a scheme for an employer Chesterley Ltd and a record such as a P14 for the appellant's employment showing the level of income and code number issued as in the payslips. He said he had not and there was no record of Ms Jones having done it. To us this shows that the Chesterley payslips were fictitious and concocted by those other than the appellant with an interest in the application.

Facts - MBay

Undisputed facts

63. MBay was incorporated on 14 April 2005 as MBay Cars Ltd.

64. The appellant was appointed a director on 14 April 2005 and resigned on 20 December 2012.

65. MB was appointed a director on 21 April 2008.

66. The single share in the company at incorporation was registered to the appellant. In April 2008 99 further shares were issued, 51 to MB and 48 to the appellant (giving control to MB).

67. Accounts of the company for its period of accounts ending 30 April 2006, 2007, 2008 and 2009 were put in evidence by the appellant. These show that:

(1) The business address was 52 Bacon Lane

(2) They were prepared by Graham Cohen & Co Ltd ("Cohens") of South Croydon who describe themselves as Accountants and Tax Advisors.

(3) In all years the report of the directors shows the principal activity as that of second–hand car sales.

68. The turnover was, and consisted of:

(1) 2006 £18,843, made up of £18,493 sales and £350 commission.

(2) 2007 £105,750, made up of £19,250 sales and £86,500 commission.

(3) 2008 £17,000, made up of £7,000 sales and £10,000 commission.

(4) 2009 £27,980, all sales.

69. The cost of sales was, and consisted of:

(1) 2006 £15,707, made up of purchases 24,257 less closing stock £8,550.

(2) 2007 £37,625, made up of opening stock £8,550, £3,500 purchases, £21,500 commission payable £4075 disbursements less £0 closing stock.

(3) 2008 £12,600, made up of £0 opening stock, £12,000 purchases, £4,800 commission payable less £4,200 closing stock.

(4) 2009 £10,199, made up of £4,200 opening stock £4,299 purchases, £1,700 commission payable less £0 closing stock.

70. Directors' remuneration was:

(1) 2006 £5,035

(2) 2007 £5,225

(3) 2008 £16,657 (Notes to the accounts and other documents show £16,000)

(4) 2009 £11,430

Documentation from Cohens shows that in 2006 and 2007 all was paid to the appellant and in 2008 and 2009 each director received 50% of the total.

71. Dividends of £11,000 were paid during the year ended 30 April 2008. This was not shown on a schedule of dividends and remuneration from MBay prepared by Cohens in 2015 for both the appellant and MB.

72. Director's loan accounts for the appellant show:

(1) 2006 £12,158 owing to her

(2) 2007 £16,476 owing to her

(3) 2008 £4,433 owing to her

(4) 2009 £2,663 owing to her.

73. Director's loan accounts for MB show:

(1) 2008 £8,867 owing to him

(2) 2009 £2,663 owing to him.

74. In 2007 and 2008 a motor vehicle costing £15,500 appears as a fixed asset.

75. The bank statements for MBay show:

(1) On 23 April 2007 2 sums of £10,000 were paid into the account at 2 different branches of HSBC, in Winchmore Hill and Southgate.

(2) On the same day £45,000 was paid in at a branch in Enfield.

(3) On 27 April 2007 £15,000 and £17,000 were credited to the account.

(4) On 9 December 2008 £1,000, £1,500 and £960 were paid in at Edgware at intervals of 4 and 2 minutes, and £3,000 was paid in at Stoke Newington.

(5) And between July 2005 and May 2009 money was banked in at least 9 separate branches of HSBC.

Ms Jones' evidence

76. Ms Jones' witness statement assets that in the light of her analysis of the bank accounts of MBay she drew the conclusion that the company was being used "by multiple individuals" as a vehicle to launder the proceeds of crime.

The appellant's evidence

77. The appellant says little or nothing about the operation of MBay, save to admit that she was a director and that she exhibited the accounts prepared by Cohens.

MB's evidence

78. MB in in his first witness statement refers to the time when "*we* established the company" [our emphasis] and in his second statements to "our company Mbay Cars Ltd".

79. In cross-examination he explained that there was a family business history of car dealing, as his family had a business in Istanbul involving Fiat. MBay was his idea and in the beginning they would buy damaged cars in the £3k to £10k range. The initial stock of MBay came from previous car dealings.

80. His wife was a director but her function was to just sign documents and cheques. He agreed that the dividends declared in 2008 were not on the Cohens schedule of pay and dividends from MBay.

81. He was asked why commissions were shown in the MBay accounts – he said it was his accountants advice.

82. He maintained that MBay did have a place of business at Bacon Lane and he produced photographs to show that there were cars in a part of the grounds behind a wall.

83. MB was asked about a cheque debit of £15,000 on 13 September 2006 in MBay's bank statements. He said this was an investment in a garage, and that letter there was a £20,000 investment in a restaurant. A credit of £3,000 from "Himenz Ltd Top Guns Ltd" was a return on an investment.

Our findings of fact about MBay

84. We now turn to making findings of fact in relation to MBay. We find that although MB referred to "our company" he and he alone was the driving force, the controlling mind, behind MBay (it is just a pointer but "M Bay" is **M**esut **Bay**basin). Although he only obtained formal shareholder control in 2008 when 51 shares were issued to him, we accept his evidence that the appellant's only function was to sign cheques etc when she was asked to. This admission of how MBay was run is consistent with our view of the appellant's role in the mortgage applications.

85. We add that had it been necessary to do so we would have held that MB was a shadow director of MBay at all times before 21 April 2008.

86. We also find that it was MB who decided what to put in the accounts. We consider that on the balance of probabilities the level and the make up of turnover, the cost of sales and credits and debits in the bank account as between 2006 and 2009 on the one hand and 2007 and 2008 on the other are indicative of some low level transactions in motor vehicles throughout and also of possible money laundering in the 2007 and 2008 accounts.

87. We do not pay any regard to a possible lack of business premises. It is not necessary to have business premises to buy and sell cars, but in any case we are not persuaded that the residential premises were not used for storing stock at times.

Facts – the appellant's financial and tax position in the NCA years

Tax records for the appellant

88. HMRC's records for the appellant as set out in a witness statement and supplied to NCA, show:

Tax year	Source	Income	Tax deducted
2004-05	Enterprise Managed Services Ltd	1,153	146.55
2005-06	None recorded		
2006-07	None recorded		
2007-08	MBay	5,225	
2008-09	MBay	8,000	393
2009-10	MBay	5,715	

The appellant's bank statements

89. Bank statements in the name of the appellant show that between March 2007 and April 2009 monthly mortgage payments of £1,320 were paid by standing order

90. Between 1 December 2004 and 3 May 2005 the appellant deposited amounts totalling £24,561, each amount being around £1200 to £1300. She continued after then to be able to cover the additional mortgage payments of £2,100 pm for Hillside Gardens from large cash deposits into her account.

91. A "snapshot" of her account, as NCA call it, for the period from 14 November 2007 to 16 December 2008 shows credits of over £220,000, including amounts of £50,000, £60,000 and £54,820. The £60,000 and £54,820 credits are essentially the same amounts, as NCA also say that £54,820 was withdrawn on the day £60,000 was credited, £54,820 was credited on the next day, and then £54,845 was withdrawn the day after.

92. Debit card payments for 2007 totalled £21,000 approximately. This includes a payment of £10,901 to CarGiant Ltd on 10 April 2007.

The appellant's evidence about her finances

93. In her second witness statement the appellant addresses NCA's concerns over the resources available to her.

94. She said that since 1994 her husband has been receiving income from rents of a business property in Turkey which is part of the family property. Originally the income was between £9,000 and £11,000 per month. As a result of problems in the

family after 2000 the rents were lower. The rents would be paid to his sister in law's account and then given to MB in cash or to the appellant directly.

95. Since 2003 MB had been receiving £24,000 a year in rents from Turkey. They also received rents of £14,000 a year from Bacon Lane after 2008 when they moved to Hillside. The rent was paid in cash to MB and he would give it to her, and she would deposit all the money in her accounts and use it for both mortgage payments and household utilities.

96. She also referred to large sums into her bank account as described in Ms Jones' witness statement. There were 7 payments she refers to from 16 March 2007 to 9 April 2008 totalling £231,820. Her explanation of them is:

(1) 26 March 2007 £20,000 (CHAPS) and 12 June 2007 £20,000 (cheque): she is unable to say.

(2) 14 August 2007 £15,000 cash: this was money withdrawn from MBay as remuneration and dividends. The amounts were deposited in her accounts to buy a Range Rover.

(3) 20 August 2007 £12,000 cash: this was the re-crediting of the balance of money withdrawn on 15 August from the £15,000.

(4) 1 February 2008 £50,000 transfer: this was the £50,000 additional borrowing from Halifax.

(5) 8 April 2008 £60,000 (CHAPS) was a gift .

(6) 9 April 2008 £54,820 was an administrative error.

97. The appellant was cross-examined in relation to these. As to (1) she maintained that she did not recall. Asked about (2) and why the dividend was not on her returns she said there was no reason for not declaring it.

98. As to (3) she was asked how much the Range Rover cost: she said £11,000. The appellant was taken to a payment on her debit card of £10,901 to Car Giant on 28 April (see §92). She said this was the Range Rover, to which Mr Masi responded that it couldn't then have been the reason for the August withdrawal.

99. As to (5) she said this was a gift from her brother Christopher who was an investment banker. As to (6) there was a cash withdrawal of £54,820 on 8 April out of the £60,000. This was paid to her husband who said he would give it back, and it was re-credited on 9 April.

100. The appellant was asked about the "problems" for the family in 2000 which resulted in the rents being decreased. She agreed that Abdullah Baybasin was imprisoned in Turkey after deportation for drug offences and that the other brother was in prison in Amsterdam for contract killing.

101. She denied that she suspected that the £24,000 was not from rental income.

MB's evidence about the family finances

102. MB in his second witness statement "confirms" that all money paid into his wife's bank account are from legitimate sources, being from a combination of his foreign income, rents from Bacon Lane and from MBay.

103. He also confirms that Mrs Nevin Baybasin and Mrs Hulya Baybasin collected his foreign income throughout the 2000s after the family problems.

104. Evidence of the Turkish rental payments and MB's status as landlord were exhibited to the appellant's second witness statement in both Turkish and in a certified English translation. There is also exhibited a statement from Mrs Nevin Baybasin who says as the appellant's sister-in-law she has known her for years. She says her husband (MB's brother) had asked her to provide him with £24,000 a year.

105. MB had returned the Turkish rents in his returns from 2008-09 onwards. Before that it was his understanding that he was only liable to tax on the rents in Turkey.

106. A number of "credit advices" of funds transfers from the tenant of the Turkish property to Mrs Nevin Baybasin had been provided. They cover a period from 4 December 2009 onwards and so are outside the NCA years. The payments appear to be monthly and of amounts in the region of £4,000.

107. There is also a letter from the tenant Dogu Deri Tex Ind & Comm Ltd of Istanbul which details payments made to MB or on his direction. The amounts for the 84 months from 1 July 2003 to 31 December 2009 are US$290,169. Also exhibited is a variation of the lease saying that rent may be paid to Mesut or to Nevin or Hasan Ferhat Baybasin or as notified to the tenant. The variation is signed by MB's representative, Solicitor M Berzan Ekinci.

Our findings of fact about the family finances

108. From the evidence we have heard and seen we find that it is more likely than not that MB was in receipt of income in cash from rents from a factory in Istanbul, whether directly or via his sister-in-law. It is irrelevant to the question of whether these receipts were what they purport to be that UK tax may not have been paid, or that Turkish tax may or may not have been deducted before payment (the lease seems to require a withholding tax deduction).

109. We also find that MB was in receipt of rents from Bacon Lane, and that both the appellant and MB drew director's remuneration from MBay (MB only from 2008) and that a dividend was paid in 2007 to each of them.

110. In relation to the 7 credits we accept the explanation for 4 of them, (2), (3), (4) and (6). As to (5) we think the fact that MB "borrowed" most of the money but immediately replaced it goes some way to supporting the appellant's account that it was her money, and in no way his.

111. As to (1) the most that can be said about these payments is that the appellant did not seek to put forward an explanation even though she must have known from Ms Jones' witness statement that one would be asked for.

112. We accept the explanation about (5) but consider in relation to (1) and (2) that there is no explanation that would show that the receipts were not in the nature of taxable income.

Discussion – introduction

113. We set out the issues we were presented with in §3. As we say in §5 it appeared to us when hearing the case that a number of other issues arose on which we sought and received submissions. We therefore intend to deal with each issue separately and to include the relevant law in each part, rather than setting it out in one (long) chunk.

114. We also describe the submissions of counsel and where relevant any case law on which they rely in each separate section.

Discussion – the qualifying condition

115. Section 317 POCA provides:

> "**The National Crime Agency's general Revenue functions**
>
> (1) For the purposes of this section the qualifying condition is that the National Crime Agency has reasonable grounds to suspect that—
>
> (a) income arising or a gain accruing to a person in respect of a chargeable period is chargeable to income tax or is a chargeable gain (as the case may be) and arises or accrues as a result of the person's or another's criminal conduct (whether wholly or partly and whether directly or indirectly), or
>
> (b) a company is chargeable to corporation tax on its profits arising in respect of a chargeable period and the profits arise as a result of the company's or another person's criminal conduct (whether wholly or partly and whether directly or indirectly).
>
> (2) If the qualifying condition is satisfied the National Crime Agency may serve on the Commissioners of Inland Revenue (the Board) a notice which—
>
> (a) specifies the person or the company (as the case may be) and the period, and
>
> (b) states that the National Crime Agency intends to carry out, in relation to the person or the company (as the case may be) and in respect of the period, such of the general Revenue functions as are specified in the notice."

116. Thus it must be shown before anything can be done by NCA that it met the "qualifying condition" that allows it to carry out any Revenue functions, and if the qualifying condition was not met then everything done in this case is invalid.

117. For NCA Mr Masi points, as the approach to be adopted, to the decisions of the Special Commissioners in *Khan v Director of the Assets Recovery Agency* [2006] UKSPC SpC 523 ("*Khan*") as applied by this Tribunal in *Fenech v Serious Organised Crime Agency*[6] [2013] UKFTT 555 ("*Fenech*"). In *Khan* at [39] the Special Commissioners (Stephen Oliver QC and Theodore Wallace) said:

> "'The expression 'reasonable grounds to suspect' requires us to be satisfied on two counts. First, we need to be satisfied that the Director or an authorised member of her staff, here Mr Archer, had formed the genuine suspicion in his own mind that the income arose as a result of the criminal conduct of the person. Second, we need to be satisfied that what was in his mind was, viewed objectively, reasonable in the sense that it amounted to a reasonable suspicion. If confirmation for this is needed, it is found in the decision of House of Lords in *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286, a case concerned with the statutory powers of arrest conferred on a constable. *O'Hara* further establishes that the person whose decision it is entitled to rely on secondary evidence. To contend, as Mr Power does, that we need to be satisfied of Mr Khan's guilt and of his having benefited from the crime, is not supported by the words of section 317(1) on any reading."

118. In this case therefore it is Ms Jones who has to have formed a genuine suspicion in her own mind and we have to be satisfied that what was in her mind was, viewed objectively, reasonable. We did not have Ms Jones' oral testimony so we have to decide the question on the basis of what she says in her witness statement. The burden is on NCA to show that the qualifying condition is met (*Fenech* at [94]). But from *Fenech* at [100] we see that:

> "… all that s.317(1) requires is that SOCA has reasonable grounds to suspect criminal conduct, and that there is income, however indirect and however little, flowing from it. SOCA does not have to prove that any of the income assessed on Mr Fenech arose from criminal conduct; it merely has to have a reasonable suspicion that he received some income (even if only

[6] When Part 6 POCA (Revenue functions) was enacted, the person who could assume Revenue functions was the Director of the Assets Recovery Agency ("ARA"). By the Serious Crime Act 2007 references to Director of ARA were replaced in POCA by references to SOCA, the Serious Organised Crime Agency. NCA succeeded SOCA by the Crime and Courts Act 2013 and POCA, including Part 6, was amended accordingly. The person on whom notice is to be served changed from the Commissioners of Inland Revenue to the Commissioners for Her Majesty's Revenue and Customs by virtue of s 50 CRCA but no textual amendment was made.

£1) directly or indirectly from criminal conduct for that year; there is no need to trace the gain into cash."

119. Mr Masi says that the qualifying condition is "comfortably satisfied" in this case in the witness statement of Ms Jones. He adds that the fact that the appellant was "not successfully prosecuted" (she was not prosecuted at all because she was not charged) is not determinative of the question whether the qualifying condition was met in this case.

120. In paragraph [14] of her statement Ms Jones says that NCA is of the view that there are reasonable grounds to suspect that the appellant has been involved in criminality, specifically money laundering. At [15] she says that she has reasonable grounds for thinking that MBay was involved in money laundering.

121. Then at [17] she states "In the light of the appellant's suspected link to criminal activity, I believe [NCA] has reasonable grounds to suspect that she has obtained income and profits chargeable to tax (in whole or in part, directly or indirectly) from criminal conduct".

122. Ms Jones adds that she was arrested on suspicion of money laundering in connection with her interest in MBay and that it was suspected that criminal property and money were being laundered through the company. She admits that no further action was taken against the appellant for alleged money laundering, and that cash seized at Bacon Lane was returned to its owner, the then tenant.

123. She goes into more detail about MBay, noting that the appellant was the sole signatory on the bank account, that it has no physical presence, no wages or overheads paid from the account and that the principal transactions on the account are the receipt of large amounts of cash or cheque. This appeared to her to be a typical example of money laundering.

124. Further she says that her analysis of the appellant's own bank accounts shows large sums of cash being received and that she has had the benefit of undeclared income to fund her lifestyle.

125. Mr Redpath says the matters taken into account by Ms Jones were insufficient to amount to a genuine belief that alleged income arising in respect of the NCA years arose as a result of criminal conduct on the part of the appellant or anyone else. He points to the facts that:

(1) No further action (NFA) was taken following her arrest

(2) MB was acquitted of all charges which involved violent conduct

(3) The belief that MBay was used for money laundering is unsubstantiated

(4) The belief that MB was involved in money laundering is unsubstantiated.

126. We agree with Mr Masi that the NFA letter (and for that matter the acquittal of MB) is irrelevant. It was reasonable for Ms Jones to take into account that the police officer arresting the appellant would have had reasonable grounds to suspect that she

had committed an arrestable offence (money laundering), so long as she was not aware of any action having been taken by the appellant to seek to dispute the validity of the arrest on "reasonable suspicion" grounds. In that context, as in this, the threshold for reasonable grounds to suspect is far lower than that which the CPS applied in coming to the NFA decision: that decision involves considering whether the criminal standard of proof was likely to be met.

127. As it happens the decision of Stuart-Smith J in *Parker (aka Michael Barrymore) v the Chief Constable of Essex Police* [2017] EWHC 2140 (QB) was released on the day Judge Thomas wrote this part of the decision. This case contains a valuable discussion of the meaning of s 24(2) Police and Criminal Evidence Act 1984 which says:

> "If a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty of it"

128. The decision is lengthy but for our purposes we rely on [37] which says:

> "Taken together, these three examples illustrate that the Courts have given the phrase 'reasonable grounds for suspecting [the arrested person] to be guilty of the offence' a very broad interpretation. Specifically, in *Parker* the officer's thought that the person he was going to arrest 'could possibly' be someone associated with the robbery was treated as being a level of suspicion that satisfied the statutory requirement of what had to be suspected. And, in *Cumming*, the only limitation imposed on lawfully arresting a number of people clearly identified as the only ones capable of having committed the offence was if the police had information which could or should have enabled them to reduce the number further."

129. And on [21]:

> "The answer to the question 'what material can and cannot be taken into account in forming the requisite intention?' is not as simple as might at first appear. The reasonable grounds for a suspicion do not have to be or be based on the officer's own observations or on material that is in a form that would be admissible evidence at a trial: see *O'Hara* at 293C per Lord Steyn." [See §117 for another reference to *O'Hara*]

130. And finally at [32]:

> "A number of authorities have attempted to describe where the threshold for what constitutes 'reasonable grounds for suspicion' should stand. The test was stated by Sir Anthony Clarke MR in *Commissioner of the Police of the Metropolis v Mohamed Raissi* [2008] EWCA Civ 1237, [2009] QB 564:

> ‘On the other hand it is important to have in mind that, as the judge held, at para 47, the threshold for the existence of reasonable grounds for suspicion is low: see eg *Dumbell v Roberts* [1944] 1 All ER 326 , 329 a-b, per Scott LJ, where he said: ‘That requirement is very limited’; the *Hussein* case [1970] AC 942, 948g-949a, per Lord Devlin; and the *O’Hara* case [1997] AC 286, at p 293c per Lord Steyn, and p 296d-e per Lord Hope.’”

131. On the basis of, in particular, *O’Hara*, we would say that Ms Jones, and hence NCA, had in April 2015 reasonable grounds to suspect that the appellant was connected with or involved in money laundering.

132. She does not however explain why money laundering is criminal conduct within the meaning given by s 326 POCA. Subsection (1) of that section says that:

> “Criminal conduct is conduct which—
>
> (a) constitutes an offence in any part of the United Kingdom, …”

We are satisfied that money laundering is criminal conduct because Part 7 POCA provides that the activities described by Ms Jones as carried out by MBay are a criminal offence, but we expressed concern at the hearing that s 326(1) might be excluded by s 326(2) POCA which says:

> “But criminal conduct does not include conduct constituting an offence relating to a matter under the care and management of the Commissioners for Her Majesty’s Revenue and Customs[7]“.

133. The reason for our concern was the fact that HMRC had, from 2010, taken over responsibility for regulation of certain sectors under the Money Laundering Regulations 2007. Although we said at the hearing we would like submissions on the point, we decided after the hearing that any offences in relation to the Commissioners’ supervisory powers were not money laundering offences *per se* but regulatory offences and the point was not a good one.

134. Thus we agree that the criminal conduct which Ms Jones links the appellant to is such conduct as is referred to in s 326(1) POCA. That however is not enough. NCA has to show that there is reasonable grounds for suspecting that income arising to the appellant arises as a result of her or another’s criminal conduct. Ms Jones does not explicitly indicate what income she had reasonable suspicions about that arose from the criminal conduct. The closest to any indication is in [16] of her statement

[7] We refer to the Commissioners in this text to reflect a non-textual amendment made by s 50 CRCA 2005. However in CRCA 2005 the Commissioners no longer have “care and management” of the tax system as the Board of Inland Revenue did, but responsibility for “collection and management” of revenue. We do not think this makes any difference.

where she states that her investigation has revealed that the appellant has had the benefit of undeclared income to find her lifestyle.

135. We have no doubt that Ms Jones held that suspicion. The question for us is whether that was a suspicion that it was objectively reasonable to have on the basis of what was known to her. We think it was on the basis of the large sums appearing in the appellant's bank statements which were not commensurate with her known income. In fact we think it would only have been necessary for her to point to the director's remuneration and dividends she received from MBay.

136. We therefore agree with NCA that the qualifying condition in s 317(1) POCA was met.

Discussion – the assessments

The notice of intention to exercise Revenue functions

137. A notice under s 317(2) POCA was served on HMRC on 9 April 2015. It informed the Commissioners that NCA was taking over the general Revenue functions specified in the notice. The notice referred to the appellant as "Gertrude Baybasin (nee Oduneye-Braniff)" even though nowhere else in the bundle is she referred to in that way. The functions the notice specified were "all" and it referred to the tax "types" as being limited to Income Tax, National Insurance (*sic*) and "capital gains" (*sic*). HMRC were obviously not misled by these errors.

138. Section 324(3) POCA provides that NCA must apply any interpretation of the law which has been published by HMRC and any published concession. Section 324(4) requires NCA to take into account any other material published by HMRC, which we take to include HMRC's guidance to its staff, especially in this situation its Enquiry Manual and Compliance Handbook. We remark that any sanction for non-compliance by NCA with either subsection is not obvious.

The first exercise of the functions

139. The first exercise of those functions came when on 22 April 2015 Ms Jones wrote to Mr Chadwick (the trustee in bankruptcy of the appellant) informing him that NCA had adopted the Revenue functions of HMRC as notified to them. The letter said that one of its purposes was to assess the income tax and Class 4 NICs for the NCA years and it also informed Mr Chadwick of interest that was outstanding.

140. The enclosures included notice of assessment, the tax calculations relating to each year, an interest summary and other information.

141. The letter then set out NCA's reasons for making the assessments in the amounts specified, rights of appeal etc and added that further copies were enclosed for Mr Chadwick to forward to the appellant.

142. The part headed "decision" is important. It reads:

> "I will now explain why I think income tax and class 4 national insurance contributions are due.
>
> I believe that all or part of the income, profits or gains have arisen or accrued (directly or indirectly) as a result of criminal conduct (including the conduct of a third party) has been received over many years and has not been declared to HMRC.
>
> Your declared self employed income, verified by your accountant, on Mortgage Application [*number*] in respect of property, 56 Hillside Gardens, for the years ended 1 May are as follows:
>
> 2005 £134,786
>
> 2006 £145,119
>
> 2007 £147,012
>
> The declaration was signed by you on 5 June 2007 confirming that the information set out in the application, was to the best of your knowledge and belief, true and complete and contained no material omissions or falsehoods."

143. Ms Jones then explained that for 2004 and 2008 she had applied "the usual presumption of continuity" (citing *Nicholson v Morris (HM Inspector of Taxes)* 51 TC 595 and *Jonas v Bamford (HM Inspector of Taxes)* 51 TC 25) and had extrapolated the 2005 figure backwards reducing it by applying the RPI and had extrapolated the 2007 figure forwards and increased by the RPI.

144. She then listed the appellant's "declarations" for the NCA years (the figures in the first five rows of the table at §88).

145. From this information she said:

> "There is a clear disparity between the declared income on your successful mortgage application, the funding of the mortgage repayments for both properties … and the transactions identified via your bank account statements, to that identified with HMRC. I therefore believe you knowingly failed to declare your correct income to HMRC."

The making of the assessment and the serving of the notices of assessment

146. The five notices of assessment are in identical form apart from the tax years and figures. They show:

(1) They were addressed to Mr Chadwick at his offices.

(2) They were dated 22 April 2015

(3) They were headed "Notice of assessment of tax under section 29 of the Taxes Management Act 1970".

(4) The assessment notified was an assessment to income tax under s 5 and/or in the alternative s 687 Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"); or in the alternative pursuant to s 319 POCA.

(5) A table set out the tax year; the figure of income/profit with "(E)" next to it, explained as meaning "estimated"; the net tax payable; the Class 4 NIC and the total due.

(6) The letter said it was "issued to you personally as required by law".

(7) The notice for 2004-05 said it was an assessment to income tax under "Section 18 (Schedule D) of the Income and Corporation Taxes Act 1988 under Case I and/or in the alternative Case VI; or in the alternative pursuant to s 319 POCA".

(8) Rights of appeal to be exercised within 30 days were given and a form enclosed for so doing.

147. Before setting out the parties' submissions on the letter and the notices of assessment we make some observations on matters which were not referred to in either the original submissions or the supplementary ones.

148. We note that the letter of 22 April 2015 purports to be the actual assessments, as distinct from the notices attached to the letter which says that they are notices of assessment. We do not think the letter itself can be the assessment, or more precisely, five assessments.

149. It has been held authoritatively (in the Court of Appeal in *Burford v Durkin (HM Inspector of Taxes)* 63 TC 645) that in the days before computers were used by HMRC:

> "As a formal matter it has been common ground in this Court that an assessment … is finally 'made' when a certificate recording the entry of the relevant assessment in the assessment book is signed, and that it was Mr. MacEnhill who actually signed the certificate in the present case."

150. As to the "modern era", in *Corbally-Stourton v HMRC* [2008] SpC692 Special Commissioner Charles Hellier said:

> "THE MAKING OF THE ASSESSMENT
>
> 90. In the days before widespread computer use, when an inspector made an assessment he did so by writing it in the assessment book. In *Honig v Sarsfield* (*Inspector of Taxes*) [1986] STC 246 the Court of Appeal held that for the purposes of the then provision of s 29 TMA (which differ from those relevant to this appeal) an assessment had been made when the inspector signed the certificate in the assessment book stating that he had made an assessment. In *Burford v Durkin* (*Inspector of Taxes*) [1991] STC 7 the Court of Appeal held that an assessment was made by an inspector who took the decision to

assess even though the assessment book was signed, at his direction, by another.

91. Dr Branigan told me that no longer is an assessment book maintained. HMRC's practice now is that the relevant officer will write to the taxpayer indicating that an assessment is to be made and will key into HMRC's computers the amount of the assessment. That was what had happened with the appellant. Once keyed into the computer the amount appears in a record maintained by the computer (and capable of being printed out) of the taxpayer's statement. I was shown a printout of the appellant's statement which showed an entry for an 'adjustment from [self-assessment] return 18 October 2004' recording the entries made when the appellant was notified that she would be assessed.

92. Mr Barnett put the respondents to proof that the appellant had been assessed.

93. It seems to me that Dr Branigan made the assessment when, having decided to make it, he authorised the entry of its amount into the computer. I find that the assessment was made."

151. It was not explained to us how an officer of NCA could make an assessment, and whether Ms Jones used the HMRC SA computer system to make the assessments in this case or entrusted the procedural aspects to another person in NCA or HMRC. But no objection was taken by the appellant to the validity of the process of Ms Jones making the assessments by coming to the decision to assess on the basis and in the amounts that were shown on the notices. We therefore accept that assessments for each year were made by Ms Jones and that a computer printout out of the data stored on the relevant computer would show what was in the notices.

Was the right person assessed?

152. This was one of the matters on which we required submissions. We noted that the notices of assessment were addressed to and served on Mr Chadwick in his capacity as trustee in bankruptcy of the appellant "for the years stated above" (ie 2004-05 to 2008-09). Further copies (of what was not said) were enclosed to enable the trustee "to forward to Gertrude Oduneye-Braniff if you consider this necessary".

153. Mr Maugham QC for NCA accepts that it is the bankrupt who is assessable and he cites *Hibbert v Fysh (HM Inspector of Taxes)* 40 TC 305 per Plowman J at 311 in support of this view. It is, he says, the case that it is the trustee who has vested in him any right of appeal.

154. He argues that by virtue of s 114(1) TMA the error, assessing the trustee, is of no consequence, as both the appellant and NCA clearly understood that the intent was to assess her to tax. She cannot have been misled or confused (citing *Donaldson v HMRC* [2016] EWCA Civ 761).

155. Mr Redpath agrees that it is the bankrupt who is assessable. He cites *Khan* to the effect that the assessment is thereby invalid. In *Khan* it was said:

> "14. Does s 50(6) restrict the jurisdiction of the Special Commissioners to simply reducing an assessment assessed on the grounds that the assessment is excessive: or does it authorize the Special Commissioners to examine an assessment with a view to deciding its validity and, if it is invalid, to reduce the amount assessed to a nil figure? We do not read s 50(6) as limiting our jurisdiction to the former role. Nor do we see that s 317(4) of PoCA restricts us in this respect; that provision deals not with the jurisdiction of the Special Commissioners, but with the Director's administrative powers to carry out general Revenue functions.
>
> 15. The jurisdiction of the Special Commissioners is not limited to situations where the taxpayer claims to have been overcharged by a valid assessment. The jurisdiction covers situations where the taxpayer contends that there is no charge on grounds that the document purporting to be the assessment is invalid or ineffective. The most usual case is where the assessment is challenged as being out of time. *Another example is where the taxpayer contends that the assessment is on the wrong person (eg where the assessment is on him as an individual whereas he claims he should have been assessed as a trustee).* [Our emphasis] A further example of a challenge to the validity of the assessment that falls within the Special Commissioners' jurisdiction is where the taxpayer contends that the assessing officer did not have had the Board's authority to make the assessment. The words of s 50(6) do not, expressly or by necessary implication, restrict the scope of the appeal commissioners and prevent them from examining the validity of the assessment on those grounds. Indeed s 29(8) expressly provides for an appeal on the grounds that neither of the conditions in subsections (4) and (5) are fulfilled."

156. *Khan* does not say that an assessment made on an individual in his own right when it should have been made on him in his capacity as trustee will be invalid, only that it is open to the person assessed to challenge the validity of the assessment before (now) this Tribunal (as successor to the Special Commissioners). It is then necessary to examine the effect of s 114 TMA on this particular circumstance:

> "(1) An assessment … which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is

designated therein according to common intent and understanding.

(2) An assessment … shall not be impeached or affected—

(a) by reason of a mistake therein as to—

(i) the name or surname of a person liable, or

(ii) the description of any profits or property, or

(iii) the amount of the tax charged, or

(b) by reason of any variance between the notice and the assessment …"

157. We say first that while s 114(2)(a)(ii) looks relevant, it is not, because there is no mistake in the name or surname of the person assessed as liable.

158. As to s 114(1) we have considered *Donaldson* on the question of s 114(1). It does not assists us very much except that it endorses the approach of Henderson J (as he then was) in *Pipe v Revenue and Customs Commissioners* [2008] STC 1911 and in that case the judge considered a number of other cases.

159. We have read those other cases and from them draw the following conclusions.

(1) A mistake in a document which requires a high degree of formality such as an assessment is less likely to be excused than a clerical slip in a letter (see also *HMRC v Mabbutt* [2017] UKUT 289 (TCC) ("*Mabbutt*")).

(2) A gross error which is capable of misleading cannot be cured by s 114(1) (*Pipe* and elsewhere).

(3) An error as to the correct year of an assessment will be such a gross error (*Baylis (HM Inspector of Taxes) v Gregory & Weare* 62 TC 1).

(4) A mistake as to the nature of the income assessed may be excused (*Fleming (HM Inspector of Taxes) v London Produce Co Ltd* 44 TC 582) if there is no likelihood of misleading.

160. We note here that none of the cases referred to above deals with the precise issue here, the name of the person assessed. Section 114(1) was briefly discussed in *Hart (HM Inspector of Taxes) v Briscoe & others* 52 TC 53 where the wrong trustee was assessed in relation to a discretionary trust. In the High Court Brightman J held that the mistake was cured by s 114(1) as no one was misled and that it was clear that HMRC intended to assess the trustees of the specific trust and everyone realised that. The trustees themselves did not argue for there being no remedy for the mistake.

161. In our view the error here was one which cannot be cured by s 114(1) because the assessments and the notices were not "in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts" (in particular ss 29 and 30A TMA). NCA clearly intended to assess Mr Chadwick. They referred to "you" in the letter as meaning him, not the appellant, and it is absolutely clear from the statement

that further copies were enclosed for the appellant "should you consider this necessary".

162. This was a gross error because Mr Chadwick was never assessable on the income assessed. Indeed it may be argued that NCA's notification to HMRC of their adoption of Revenue functions in relation to the appellant did not permit them to assess someone other than the appellant.

163. It was an error that was capable of misleading the appellant, and Mr Chadwick. Whether it actually did mislead is immaterial (*Baylis*) but it is certainly possible that the appellant could have thought that she was not liable to pay the tax and NICs assessed and that the trustee would take care of it.

164. It is noteworthy that it was not until 17 May 2016 that solicitors acting for Mr Chadwick made an appeal against the assessments. In that letter they explain the very unusual circumstances, in particular that the trustee had no knowledge of the matters on which he was assessed or the basis on which they had been assessed.

165. We therefore hold that the assessments are invalid and must be cancelled.

Discussion – what if we are wrong?

166. As *Mabbutt* shows it is possible that our decision on this point is wrong and might be overturned on what we suspect is the inevitable appeal. We therefore go on to consider the other issues in this case.

Has the appellant been notified of the assessments?

167. This is really part and parcel of the previous discussion. But assume that an assessment on a trustee in bankruptcy of tax for pre-bankruptcy years is valid because it mentioned the name of the bankrupt and is as a result to be treated as an assessment on the bankrupt. Section 30A(3) TMA requires the notice of assessment to be served on the person assessed. The notices were only served on Mr Chadwick. The fact that they may have been brought to the attention of the appellant is immaterial, as Mr Chadwick had no authority to accept the notices on behalf of the appellant.

168. Failure to serve the notice of assessment does not invalidate the assessment per se. It does mean that any recovery action is invalid – s 59B(6) TMA – as no notice of assessment will have been given to the right person. It does not prevent an appeal being made, as s 31A TMA is in the passive voice, and the requirement in s 30A(3) TMA to give the date by which an appeal may be made does not, if not given to the right person, prevent appeal rights being exercised.

Can one assessment charge on alternative bases?

169. As mentioned in §146 there is only one assessment for each NCA year. Taking 2007-08 as an example it says on its face that it is made "under s 5 and/or in the alternative s 687" ITTOIA. It shows only one amount of income being £147,012. The calculation attached shows this to be made up of £141,787 profit from

self-employment and £5,225 "Pay from all employments"[8]. There is a tax figure of £50,219.20 calculated by deducting the personal allowance and applying the various tax rates. There is also a calculation of Class 4 NICs charging tax at rates of 8% and 1% on £136,562.

170. In the post-hearing direction for submissions we asked "Is it permissible for NCA to purport to make alternative assessments but to include them all in one notice and tax calculation?" We added, to assist the parties, that it would by no means follow that the tax payable would be always be the same under alternative bases of assessment, even if it were true in this case of s 5 and s 687 ITTOIA.

171. Mr Maugham points out correctly that alternative assessments in two documents is commonplace and that there is no reported case that he could find where alternative assessments in one document had been made. There is though, he says, nothing to prevent it being done, and if the tax turns out to be different that can be adjusted using s 50 TMA.

172. Mr Redpath agrees that alternative assessments can be made in principle, but he refers to *CIR v Wilkinson* [1992] STC 454 ("*Wilkinson*") where it is said by Scott LJ in the Court of Appeal:

> "It is established, therefore, that there is nothing objectionable in principle about alternative assessments. There would, however, be a legitimate objection to attempts by the Revenue to raise cumulative assessments on the same item or items of income unless cumulative assessments were specifically provided for by some charging statute."

173. In *Wilkinson* however there were three separate documents for each year, each charging the same amount but under different bases.

174. We do not think that NCA meant to charge cumulatively, and that they would accept that by issuing one assessment only they cannot obtain tax twice. In our view the only possible legitimate way of making alternative assessments in one document would be where the tax payable was inevitably the same and the alternative bases were both indicated in the tax calculation. Even so we are inclined to think it is not a legitimate way of proceeding.

175. And the question whether alternative assessments where the same taxable amount is shown are valid does not in any event need to be decided by us, because here the tax is different. The assessments all charge Class 4 NICs, but that can only

[8] We do not understand why Ms Jones showed the figures in this way. £147,012 is obviously the amount said to arise from self-employment in the Guniers' letter to Bank of Scotland in relation to the mortgage application. That letter nowhere says or implies that the appellant's director's remuneration from MBay was included in that figure. So an arbitrary reduction from the figure of £147,012 has been made leaving a spuriously accurate figure of £141,787. That figure was also used as the basis for the Class 4 NICs charge. This is hardly the exercise of best judgment.

be charged where the income tax assessment is on trading income – paragraph 2 Schedule 2 Social Security and Contributions and Benefits Act 1992.

176. And what is more the tax calculation only refers to income from self-employment. Self-employment in the tax context means a trade, profession, vocation or (probably) a property business. It is a condition of the charge under s 687 ITTOIA (and Case VI Schedule D) that the income arises from none of those activities.

177. In our view then what the assessments do is to charge the person assessed on the profits of a trade, and only that.

The effect of section 319 POCA

178. The notices of assessment including the tax calculations do not specify in any way what trade the "profits of self-employment" derive from. Nor do they give any clue what the nature of the s 687 ITTOIA or Case VI income is.

179. We asked for submissions on the questions:

(1) Does s 319(1) POCA permit an assessment to be made by NCA under Case I of Schedule D or Part 2 ITTOIA without specifying the nature of the trade carried on?

(2) If Case VI/Part 5 ITTOIA is relied on [which NCA said it was in the alternative to their primary argument that Case I/Part 2 applies] is NCA required to show that some services falling short of trading have been provided by the appellant to justify the assessment and if it is what is the nature of those services?

180. Section 319 provides:

> "**319 Source of income**
>
> (1) For the purpose of the exercise by the National Crime Agency of any function vested in it by virtue of this Part it is immaterial that the National Crime Agency cannot identify a source for any income.
>
> (2) An assessment made by the National Crime Agency under section 29 of the Taxes Management Act 1970 (assessment where loss of tax discovered) in respect of income charged to tax under Chapter 8 of Part 5 of the Income Tax (Trading and Other Income) Act 2005 must not be reduced or quashed only because it does not specify (to any extent) the source of the income."

181. Mr Maugham says that the purpose of s 319 is to reduce the disadvantage that NCA may have about the quality of information available to it, compared with that available to HMRC, and that s 319 was designed to prevent the subject of NCA's exercise of the Revenue functions taking advantage of this information deficit.

182. Moreover there is no general rule that an assessment must specify the source of the income assessed.

183. As to s 319(2) he says that not all s 687/Case VI income need be derived from services, and that it may arise as interest or receipts from the sale of goods.

184. Mr Maugham adds that there is evidence that the appellant was engaged in money laundering, dealing in counterfeit clothing and mortgage fraud, and that it may well be that the Tribunal will conclude that she is engaged in a trade of money laundering. But if the Tribunal is unable to reach that conclusion it is sufficient for the Tribunal to find that the sums assessed are of an income character.

185. Mr Redpath says that the effect of s 319(2) is that where assessments not within s 687 ITTOIA or Case VI are concerned, the source of the income should be specified, and he cites *Rose v Director of the Assets Recovery Agency* [2006] SpC 543 ("*Rose*") in support.

186. Where Case VI/s 687 is relied on, he says that while NCA need not specify the particular source, a particularised description of the income is still necessary to establish that the amounts are in the nature of income and do not fall within another charge to tax.

187. In this case, he says, the assessments do not go far enough to identify how the amounts received were in the nature of income, what taxable activity the bankrupt was carrying on which gave rise to the charge to tax and on what basis the sums should have been charged to tax. Thus the assessments are defective and invalid.

188. Particularly where there is speculation by counsel as to the mischief which a particular provision of an enactment is aimed at remedying, then it is permissible to examine such materials as the Explanatory Notes accompanying the relevant Bill (*Westminster City Council v National Asylum Support Service* [2002] UKHL 38 per Lord Steyn). Here the Notes say:

> "**Section 319: Source of income**
>
> 455. Assessments to income tax raised by the Inland Revenue *are required to specify the source of the income in question, such as a particular trade.* [Our emphasis] This is not the case for capital gains tax or corporation tax. This section enables the Director to raise income tax assessments where he discovers a loss of tax even where he cannot identify the source of the income in question.
>
> 456. The section does not extend to the assessments raised by the Inland Revenue, whose practice and powers will remain unaffected. Because of this, the section stipulates that when the case is transferred back from the Director to the Inland Revenue, any 'no-source' assessment made by the Director is invalid."

189. In *Rose* the Special Commissioner, Mr Adrian Shipwright, said:

> "18 The ARA have specifically assessed Mr Rose under Case 1 Schedule D. The question arises then whether or not Mr Rose was carrying on a trade of dealing in drugs.
>
> 19 I find as a matter of fact that this was not the case and that on the balance of probabilities there was no trade carried on by Mr Rose.
>
> 20 The issue then arises whether 319 POCA makes this immaterial and validates the assessment. By section 319(1) 'For the purpose of the exercise by the Director of any function vested in him by virtue of this Part it is immaterial that he cannot identify a source for any income'. However, in this case a source has been identified and relied on. It is not an assessment under section 319(2) POCA as it is not an assessment as 'Other Income' (previously described as Case VI of Schedule D) but as trading income.
>
> 21 As it has been found as a fact on the balance of probabilities that there was no trade of drug dealing and section 319 POCA does not save them the estimated assessments cannot stand."

190. What we take from the Explanatory Notes and *Rose* is that an assessment must ordinarily identify the specific trade said to be carried on, but an assessment made by NCA need not identify a particular trade if NCA *cannot* identify what the trade is[9]. But s 319(1) does not allow them to simply point to unexplained receipts and say, without further evidence, they are the profits or turnover of an unidentified trade. Nor does it help NCA if they have in fact identified a source of trading. Here NCA have said that the trade they consider the appellant was carrying on and which was therefore the source of unexplained sums in the appellant's bank account was the trade of money laundering.

191. NCA has at various time identified other activities as criminal conduct with which the appellant is involved, including mortgage fraud and it appears from Mr Maugham's submission, but nowhere else that we can see, dealing in counterfeit clothing. As to the latter we point out simply that the counterfeit clothing were found in 2014 nor in any of the NCA years. We also point out that mortgage fraud is not a trade, nor does it give rise to any income unless a participant is paid for their part in it.

192. In a case such as this where only one trade is alleged and it is not one with specific income tax rules (such as eg farming) then the failure to name it in the assessment is we consider something which can be cured by s 114 TMA so long as other contemporary evidence makes it clear what the trade is. The nature of the trade

[9] Judge Thomas has had experience in the past of Inland Revenue making assessments on the subject of a "back duty" investigation using the description "general trading". This term however, as was well known to tax inspectors, accountants and General Commissioners, meant someone whose activity was making a profit by buying cheap and selling dear anything they could lay their hands on, the leading fictional examples being Private Walker and Del Boy (and see *Rutledge v CIR* 14 TC 490 where Mr Rutledge purchased a million rolls of toilet paper on spec).

is important, we agree, when it is alleged that unidentified receipts or deficiencies in available money to meet lifestyle expenditure are relied on. A trade of property dealing or car dealing is likely to be characterised by large one off receipts, unlike say a running a corner shop or bookmaking.

193. We do not need to consider s 319(2) in any depth, as we say that there is no s 687/Case VI assessment. But we would say that we disagree with Mr Maugham that a s 687 charge can arise on the basis of sales of goods falling short of trade – see *Leeming v Jones (HM Inspector of Taxes)* 15 TC 333 – or on interest, except by the specific provisions set out in s 687 such as those relating to the accrued interest scheme. Case law establishes in our view that a s 687/Case VI charge can only arise (outside the specific provisions) where there is the provision of a service that falls short of being by way of trade.

Conclusions from this section

194. If we are wrong that the assessments are invalid because they were made on Mr Chadwick, not the appellant, then we consider that the assessments are competent to charge trading profits to tax (and only trading profits) and to charge Class 4 NICs, but those profits must arise from a trade of money laundering.

195. This conclusion is subject to the issues concerning discovery of loss of tax and time limits, to which we turn.

Discussion - discovery and time limit issues

196. The only indication in Ms Jones' letter of 22 April 2015 and its attachments that there may be threshold competence issues about the assessments is in the fact that the heading of the notices referred to the assessments being made under s 29 TMA.

197. There was nothing in the papers disclosed to show that Ms Jones had sought the authorisation of her manager to make out of time assessments (as required by Enquiry Manual EM3345) and nothing in the letter to notify the person assessed about the extended time limit assessments (contrary to EM3347).

198. Neither the Statement of Case nor Mr Masi's skeleton mentioned anything about the requirements of s 29 and 36 TMA. Both documents maintained that the onus of proof rested on the appellant by virtue of s 50(6) TMA without any mention of the requirements of those sections.

199. Mr Redpath referred in opening to s 36 and *Michael Burgess & anor v HMRC* [2015] UKUT 578 "*Burgess*"). *Burgess* makes it absolutely clear that the burden of proof is on HMRC and therefore NCA to show that there was in the circumstances of this case either deliberate conduct that led to a loss of tax.

200. At this stage we set out the relevant law. Section 29 provides:

> "**29 Assessment where loss of tax discovered**
>
> (1) If an officer of the Board or the Board 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 … [has] not been assessed, …

…

the officer … 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 or 8A 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.

…

(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.

(9) Any reference in this section to the relevant year of assessment is a reference to—

(a) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) above, the year of assessment mentioned in that subsection; …

…"

201. Section 36 provides:

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

…

(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,

(b) attributable to a failure by the person to comply with an obligation under section 7, …

…

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."

202. The term "deliberately" is not defined, but s 118(7) TMA says:

"(7) In this Act references to a loss of tax or a situation brought about deliberately by a person include a loss of tax or a situation that arises as a result of a deliberate inaccuracy in a document given to Her Majesty's Revenue and Customs by or on behalf of that person."

203. There are saving provisions in the Finance Act 2008, Schedule 39 (Appointed Day, Transitional Provision and Savings) Order 2009 (SI 2009/403 (C. 24)). Article 7 says:

"Section 36(1A)(b) and (c) of TMA 1970 (fraudulent and negligent conduct[10]) shall not apply where the year of assessment is 2008-09 or earlier, except where the assessment on the person ("P") is for the purposes of making good to the Crown a loss of tax attributable to P's negligent conduct or the negligent conduct of a person acting on P's behalf."

204. The effect of this Order is we think to require s 36(1A) to be read as if it said:

"(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,

(b) attributable to the negligent conduct of a person in failing to comply with an obligation under section 7, …

…

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)."

205. Section 7 relevantly provides:

"7 Notice of liability to income tax and capital gains tax

(1) Every person who—

[10] It is odd that the drafter of this Order uses as a parenthetical description of s 36(1A)(b) and (c), or indeed s 36(1A) as a whole the phrase "fraudulent or negligent conduct" when those words, the sidenote for s 36 as originally enacted, had been changed to "Loss of tax brought about carelessly or deliberately etc" by paragraph 9 Schedule 29 FA 2008.

(a) is chargeable to income tax or capital gains tax for any year of assessment, and

(b) has not received a notice under section 8 of this Act requiring a return for that year of his total income and chargeable gains,

shall, subject to subsection (3) below, within six months from the end of that year, give notice to an officer of the Board that he is so chargeable.

…

(3) A person shall not be required to give notice under subsection (1) above in respect of a year of assessment if for that year his total income consists of income from sources falling within subsection (4) to (7) below and he has no chargeable gains.

(4) A source of income falls within this subsection in relation to a year of assessment if—

(a) all payments of, or on account of, income from it during that year, and

(b) all income from it for that year which does not consist of payments,

have or has been taken into account in the making of deductions or repayments of tax under PAYE regulations.

(5) A source of income falls within this subsection in relation to any person and any year of assessment if all income from it for that year has been or will be taken into account--

(a) in determining that person's liability to tax, or

(b) in the making of deductions or repayments of tax under PAYE regulations.

(6) A source of income falls within this subsection in relation to any person and any year of assessment if all income from it for that year is—

…

(c) income chargeable under Chapter 3 of Part 4 of ITTOIA 2005 (dividends etc from UK resident companies etc),

and that person is not for that year liable to tax at a rate other than the basic rate, the dividend ordinary rate or the starting rate.

(7) A source of income falls within this subsection in relation to any person and any year of assessment if all income from it for that year is income on which he could not become liable to tax under a self-assessment made under section 9 of this Act in respect of that year."

206. When we referred to the "requirements" of s 29 TMA in §198 we specifically did not mean just the conditions in s 29(4) and (5), but everything in s 29. This is because there is confusion about the position regarding tax returns filed by the appellant:

(1) In favour of the view that no returns were filed we can see that the witness statements by officers of HMRC about their records for the appellant refer only to PAYE records and not to self-assessment records (by contrast the information provided by HMRC about MB does refer to a self-assessment record for him for 2008-09). Ms Jones however referred to the information in those records as the income "declared".

(2) There is a return for the appellant for 2008-09 in the bundle of documents. It was completed in, it says, May 2009 and shows a UTR (a reference number which is only given where a person is required to make an income tax return). The return came from the files of Cohens. This return shows director's remuneration from MBay and also includes a dividend from MBay (this despite the fact that the accounts of MBay and the appellant's bank accounts show the a dividend as being received in 2007-08 and no dividend being declared for 2008-09 or paid in that year).

(3) The tax calculations that go with the discovery assessments show as the first column "Tax Calculation for 200X-0Y (year ended 5 April 200Y) (*based on returned figures*)" [our emphasis] for each of the NCA years. However neither the column for 2007-08 nor for 2008-09 reflect the dividend shown in the accounts or that in the 2008-09 tax return, and we cannot be certain that the words which we have emphasised are not standard wording on the form which an officer of HMRC or NCA cannot alter or simply that the officer chose the wrong version of the form.

207. We find from this information that no returns were required and none filed for 2004-05 to 2007-08 inclusive. We also find that, on the balance of probabilities, the 2008-09 return, while required and completed, was not filed. A copy obtained from accountants is not evidence that it has been filed and the lack of any reference to a self-assessment record for the appellant is also telling.

208. The consequence of this finding is that the conditions in s 29(4) and (5) do not have to be met, as they only apply where a return has both been sought and filed (s 29(3) TMA). However NCA still have to show that there was a discovery of a loss of tax and that the loss of tax was either brought about deliberately by the appellant (s 36(1A)(a) TMA) or was attributable to a negligent failure to notify liability under s 7 TMA (s 36(1A)(b) TMA as modified by Art. 7 SI 2009/403). The latter point is only capable of being the case for the NCA years other than 2008-09 as for that year a return was required (s 7(1A) TMA).

209. For 2008-09 then it is necessary for NCA to show that the appellant's conduct in not making the tax return she was required to make was deliberate. "Deliberate" connotes knowingly. It is a term which the legislation introduced in FA 2007 and continued in 2008 and 2009 following the HMRC review of its powers. In this particular context it replaced wording in s 36 TMA which had used the adjective

"fraudulent"[11]. We are satisfied that if NCA allege deliberate conduct in the context of a loss of tax they are alleging fraud.

210. For 2004-05 to 2007-08 NCA must show that the appellant's conduct in failing to notify her liability was either deliberate or negligent conduct.

211. For these reasons we sought submissions on the question whether NCA had properly pleaded that it was alleging deliberate conduct.

212. Mr Maugham accepted that NCA was obliged to specifically plead deliberate conduct but maintained that it had done so in its Statement of Case.

213. Mr Redpath submitted that there is no specific case pleaded in the Statement of Case.

214. The paragraphs in the Statement of Case to which Mr Maugham points are:

> "25. The bankrupt made minimal returns to HMRC of income received for the relevant period.
>
> 32. The Appellant's failure to fulfil her obligations under the Taxes Act is deliberate and significant. She has failed to disclose her liability to tax and her true tax position."

The first such is not correct as the bankrupt made no returns to HMRC.

215. As to the second paragraph quoted in §214 this is a pleading that can be read as referring to both failure to notify liability and failure to make a return as deliberate as those are the relevant obligations in the NCA years. In our view this was sufficient to enable the appellant to understand what it was she was being accused of.

216. Negligent conduct was not pleaded for 2004-05 to 2007-08 but in our view it does not have to be. Neither NCA nor HMRC have specifically to plead carelessness where that is the basis of any claim: there is support for that proposition in *Ingenious Games LLP and ors v HMRC* [2015] UKUT 105 (TCC)) at [40] and [62] where Henderson J (as he then was) distinguished between dishonesty which had to be properly pleaded and less serious misconduct which did not, carelessness clearly being a less serious form of behaviour in his eyes (and ours). Thus if we were to find that appellant was negligent but no worse in those years we would hold that s 36(1A) properly applied.

217. We next consider the s 29(1) question before looking at deliberate and negligent conduct.

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[11] It should be noted that if HMRC were to seek to impose a penalty for incorrect tax returns for the NCA years it would be under s 95 TMA which uses the adverb "fraudulently". We add though that in this case the only penalties that might be sought are not ones which use that term (see s 7(8) and 93 TMA). Art. 7 of SI 2009/703 is also some evidence that HMRC (a member of whose Solicitor's Office will have drafted the Order) at least equate "fraudulent" with "deliberate".

218. That question is whether in relation to each of the NCA years Ms Jones discovered a loss of tax. It is obvious from the figures in the assessments which were in the amounts which in Ms Jones' opinion were the right amounts to enable the loss of tax to be remedied that the loss of tax alleged is the tax on the figures of income from self-employment given to the Bank of Scotland in relation to the Bacon Lane mortgage application.

219. Ms Jones is in effect taking the appellant at her word, and that that word included the notification to the bank of her income from money laundering (although of course the source was never vouchsafed to the bank for obvious reasons). There are three difficulties for NCA here.

220. The first is that having heard the appellant and considered the documentary evidence we found (§§57 to 61) that these statements by Guniers & Co were made without the appellant's knowledge and are false.

221. The second is that, as Mr Maugham says, the criminal conduct with which the appellant is linked includes mortgage fraud. That this has been alleged is shown in the extract from the NCA investigation log (Tab 53, pp 230 and 231) where it states:

> "It is alleged that ODUNEYE-BRANIFF does not have a legitimate income that would enable her to obtain a mortgage advance for either property, had she been truthful. She provided false information in order to gain herself funding for the properties"

The alleged connection is also shown on the Police National Computer record for the appellant

222. However we note that neither in the Statement of Case, Ms Jones' witness statement nor Mr Masi's skeleton and oral presentation is mortgage fraud said to be criminal conduct with which the appellant is said to be connected. We do not speculate on the reason for this possible change of approach, save to say that it is very difficult to see how income could arise from a mortgage fraud.

223. We therefore ignore the obvious contradiction between alleging mortgage fraud and saying that the evidence of earnings supplied to the bank is true.

224. The third problem is that money laundering is a trade only if carried out by someone other than the criminal, and that it is a service, not a dealing in goods. It involves receiving property which is not the launderer's and converting that property into some other form eg into a debt owing by a bank in a tax haven or an investment in a business (such as the car wash in "Breaking Bad"). The launderer will be rewarded by a commission, which they may take out of the property to be laundered, much like the commission charged by a currency exchange.

225. If a money launderer were to use her own bank account as the vehicle for laundering then one would expect that the taxable earnings would be only a percentage of the receipts.

226. Ms Jones does not rely just on her assertion that the Guniers' statement is true. She has said that there are unexplained bankings of large amounts in the appellant's bank account which must be treated as receipts of the trade (see §95 and §§102 to 111). These amounts all bar £20,000 fall in the accounting period ended 1 May 2008 and total £231,820, comfortably more than the level of earnings shown in the Guniers' statement as arising in earlier periods.

227. We have however found as fact that of these sums only £40,000 cannot be explained as from sources other than trade and so cannot be receipts of a trade.

228. The first unexplained amount is £20,000 received in the appellant's bank account on 26 March 2007. It is a CHAPS transfer in and on 27 March £20,017.50 leaves the account. The rubric is "Intl Tx" with a string of numbers, presumably of the recipient account. "Intl Tx" is we assume International transfer.

229. The second amount is also £20,000 received in the account as a cheque on 12 June and which clears on 15 June. There is a cash withdrawal on 19 June of £10,000. There is no further large amount activity until 14 August when £15,000 is paid in and on £15 August £23,237 cash is withdrawn which makes the account overdrawn. The £15,000 is the money received from MBay.

230. In our view the receipt of the second amount of £20,000 and the withdrawal of it is not indicative of money laundering, and we find that as a fact. It is an odd money launderer who launders a cheque (easily traceable) and then waits two months to dispose of half of it.

231. We have more doubt about the first transaction. Whether it is money laundering in the criminal sense we cannot say, but it does seem to us that the appellant was carrying out a service here of receiving an amount into her account and transferring it almost immediately to a foreign account. But that does not make the £20,000 the receipts of a trade of carrying out that service or even of an activity that gives rise to s 687 ITTOIA income. The transaction may well have been done for personal or family reasons with no expectation of reward or it may have been done for reward. Given the evidence we have heard and seen of the transactions carried out by the Baybasin family we consider on the balance of probabilities that it was a family transaction done for no reward.

232. We have also considered the contentions by NCA that the appellant did not have the resources to meet the mortgage payments and living expenses, as her known income was minimal as shown by the PAYE records. We have also considered the explanations and documents given by the appellant and MB as to the resources available to both of them. We have found that there was money received by the appellant and MB from a number of sources which explains the ability to fund the mortgage payments (and we bear in mind that until the end of 2007 it was only the Bacon Lane mortgage that was in existence) and other living expenses.

233. We have no doubt that in this period MB may well have been in receipt of other funds that could have been given to the appellant to fund the expenses.

234. We therefore hold that NCA has not shown that there was a loss of tax for any of the NCA years. The only years where the bank accounts demonstrate any substantial level of prima facie unexplained sums are 2006-07, 2007-08 and 2008-09 and these sums we have found do not derive from a trade. For the earlier years there is simply no evidence, not even bank statements to cast doubt on the explanations given which we have in any case accepted.

235. We did ask in our directions for submissions on the issue of the "presumption of continuity" which NCA invoked to justify the assessments for 2004-05 and 2008-09. We do not need to consider the submissions we received, save to say that we would have had difficulty is seeing how that presumption could apply in 2004-05 at least given the evidence and the nature of the trade being alleged.

236. Since we have found that there was no loss of tax which Ms Jones could discover it is immaterial whether the appellant's conduct was deliberate or negligent. And Ms Jones' failure to follow HMRC guidance (see §197) is not we think something which can affect the validity of the assessments, despite that being a failure to comply with s 324(4) POCA (see our remarks in §138).

237. But we point out that for 2008-09 the conduct which has to be deliberate was the appellant's failure to make a tax return when required to file. While this was pleaded in the statement of case, NCA's evidence did not address this conduct or point to any evidence that she had deliberately failed to file a return.

238. And for the other years while it seems clear that if the appellant was carrying on a trade of money laundering in those years there was a failure to notify liability to both income tax and Class 4 NICs, there was no evidence led by NCA to show that the appellant was either negligent or had deliberately failed to notify.

Decision

239. In accordance with s 50(6) TMA we reduce the assessments for each of the tax years 2004-05, 2005-06, 2006-07, 2007-08 and 2008-09 to nil.

240. 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 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: 30 AUGUST 2017