[2019] UKFTT 257 (TC)

TC07097

Appeal number: TC/2018/02896

INCOME TAX – income from property – rents under tenancy agreement – whether discovery assessment validly made – yes for 3 years, no for 2 others – whether loss of tax – whether relief for interest available – whether tenancy agreement a sham: yes, it was entered into only to deceive council into paying housing benefit – appeals allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MOHAMMED KAMRAN **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
SUSAN STOTT

Sitting in public at City Exchange, Leeds on 15 February 2019

The Appellant in person

Mr Tony Burke, litigator, HM Revenue and Customs, for the Respondents

DECISION

1. This was an appeal by Mr Mohammed Kamran ("the appellant") against five assessments made on him by an officer of the respondents ("HMRC") in respect of income to which he was said by HMRC to be entitled or which he received from a business of exploiting his interest in a house in Otley St, Halifax as a source of rents or other receipts.

Evidence

2. We had one large bundle of documents prepared by HMRC containing over 800 pages. More than half of these had been supplied by the appellant, and of those about three quarters did not relate to the periods or issues in these appeals. But what we had noted in our reading of the papers before the hearing was the absence of what had clearly been crucial documents on which HMRC had relied to produce their case and which they had obtained from Calderdale Metropolitan Borough Council ("the council"), the local authority for the Halifax area. We had also noted that the appellant had disputed the authenticity of one document in particular which he was alleged to have been a party to and to have signed, but which HMRC had refused to supply to him on data protection grounds.

3. We had decided before the hearing started that if this was still the situation then, subject to hearing argument from HMRC, we would allow the appeals forthwith. Shortly before the hearing was due to start our clerk did however give us a small bundle containing the relevant documents, which Mr Burke for HMRC had given to the appellant on arrival at the tribunal building.

4. At the start of the hearing we invited Mr Burke to make an application for these documents to be admitted late, as the relevant directions had required them to be produced before then. Mr Burke explained that on reviewing the papers he had realised that the Tribunal might well take the view that we would throw out HMRC's case and had made efforts to persuade the "data guardians" for the relevant office of HMRC that the documents were vital and could and should be disclosed. This he had managed only the day before.

5. We decided to admit the documents as they were clearly highly relevant to the appeals and there was a good explanation for the delay. However we, and Mr Burke, were of the view that there was no good explanation at all for the data guardians' attitude. They were, it seems, unaware of s 18(2)(c) Commissioners for Revenue and Customs Act 2005 or s 35 Data Protection Act 1998 or paragraph 5 Schedule 2 Data Protection Act 2018 (which came into force on 25 May 2018[1]).

6. The appellant gave oral evidence. As he was not represented and his oral evidence was likely to be highly important, the Tribunal helped him lead his evidence

[1] By virtue of regulation 2(1)(b) of the Data Protection Act 2018 (Commencement No. 1 and Transitional and Saving Provisions) Regulations 2018 (SI 2018/625 (c.51)).

by asking him the kind of open questions that a representative acting for him would have been permitted to ask. Mr Burke also cross-examined him.

The chronology of HMRC's compliance check

7. On 10 December 2015 HMRC opened an enquiry into property held by the appellant over a period of years. Their focus was on both possible "capital" gains from disposal of properties and on rents received from them. The letter enclosed a number of pre-printed forms on which the appellant was invited to give detailed reports of his income from property for the years 2009-10 to 2014-15 inclusive, and ownership history for each property owned and his reasons for non-declaration of the income.

8. The forms also include one applicable to a recipient who did not own or had not owned property from which rental income was received. Such people were required to state all the circumstances

> "whereby you have received income from rent on behalf of a third party including any fees charged or non-monetary required for services given"

and

> "to state (*sic*): provide me with the full name and address of the legal owner of the property you collected rent for coupled (*sic*) with the address of the property in question."

9. There was a note about record keeping. We stress here in view of the arguments put to us that this note includes:

> "If you let out residential property you will have to keep records of rent received"

and

> "The expenses you can deduct from letting income … include … interest on property loans".

10. Finally there was a factsheet about penalties for failure to notify.

11. There followed some declaration of liability from income from property to be returned in a 2015-16 return and some details about other property transactions, and eventually on 12 May 2016 Mr Phillips, HM Inspector of Taxes, issued a Schedule 36 FA 2008 notice for information about all properties owned in the appellant's sole name or jointly with his wife since 6 April 2001.

12. On 7 June 2016 a comprehensive letter was sent in reply by the appellant. The relevant information for the purposes of this appeal is that the appellant referred to 11 Otley Street, Halifax ("Otley Street") as being a property owned by him in his sole name, that he purchased it in September 2010 and enclosed as an appendix 22 pages of correspondence including documentation from solicitors about the purchase; about the divorce of his sister Miss Shamim Akhtar; his sister's purchase of 11 Otley Street from him; and about marital issues between the appellant and his wife. He also explained that Otley Street had been purchased by him as there had been problems in his marriage; that Miss Akhtar had separated from her husband so that Otley Street was purchased

for his sister to live in and if necessary he would live in it too if his marital problems meant that it was necessary. He had sold Otley Street to Miss Akhtar in September 2015 and had, he said, got no financial gain from the property.

13. On 7 July Mr Phillips replied to the effect that he had information which appeared to be correct that the appellant had received payments as a landlord for several years in respect of Otley St and asked the appellant to consider the statement carefully.

14. On 16 July 2016 the appellant gave further information about Otley Street. He explained that his wife was his first cousin, his wife's father and his own late father were brothers and his wife's mother and his[2] mother were sisters. His marriage was arranged and took place in Pakistan 8 days after he met his wife for the first time, and that they had a joint wedding with Miss Akhtar and Mohammed Shazad, his wife's brother.

15. Miss Akhtar and Mr Shazad had marital difficulties and in 2009 Mr Shazad said he wanted a *talaq*, or Islamic divorce. The appellant said that his parents, his sister Miss Akhtar and his siblings put him under immense pressure to give a *talaq* to his own wife to effect reciprocity as a loyal brother and son. In January 2010 Mr Shazad gave a *talaq* to Miss Akhtar. The appellant enclosed letters explaining his own marital difficulties.

16. He also said that his other sister Kuser Parveen was selling her house in Otley Street, and as his parents and siblings wanted stability and security for Miss Akhtar and her two children they asked him to buy Otley Street on Miss Akhtar's behalf.

17. This was because she could not get a mortgage on her income, and so his parents and siblings proposed to fund the deposit for Miss Akhtar and asked him to get a mortgage.

18. Accordingly Otley St was purchased for £55,000 from Kuser Parveen, his sister (he provided the solicitor's documentation). He obtained a mortgage of £40,000 from Halifax in August 2010 (he provided the documentation), and the balance of £15,000 was funded by Miss Akhtar, siblings and extended family (he apologised for not having specific details).

19. His family said they would take responsibility and pay for the mortgage. He gave his debit card to Miss Akhtar for a Halifax account and enclosed the bank statements for this. He said all payments were deposited by Miss Akhtar, and that payments were made to the Halifax for the mortgage and to Homeserve for boiler/water cover and to LV for buildings insurance.

20. As to the sale of the property he enclosed solicitor's correspondence and other documents to show the valuation of £60,000 given by the surveyor for NatWest, who were then to lend to Miss Akhtar; that Miss Akhtar did not pay a deposit; that she borrowed £33,000 from NatWest; that the balance on his mortgage then was £32,400 and that the cash in the Halifax account afterwards was £652.73 so that the money borrowed by Miss Akhtar was used to repay his outstanding mortgage debt. The

[2] The letter actually says "her mother" but that cannot be right.

balance of £27,000 of the purchase price due from Miss Akhtar to him was treated as a gift of £27,000 from him to her (and he enclosed solicitor's and bank documentation to show this).

21. He said that therefore he had made no financial gain and that the Halifax account in his name had never been used for him or his own household.

22. On 27 July 2016 Mr Phillips replied. He reiterated that he had received information under "Sect 16 TMA 1970"[3] that the appellant had received payments as landlord for several years. As the appellant had said he was "the mortgagee" (*sic*) and that the Land Registry information (given by the appellant) indicated that he was the owner, any income received was assessable on him, and that he would *shortly* issue assessments under "Sect 29 TMA 1970" to "protect the department's interest".

23. He accepted though that any capital gain was covered by the appellant's personal allowances[4].

24. "Shortly" turned out to be the same day as notices of assessment dated 27 July 2016 were in the bundle[5]. There was a notice for each of the years 2010-11, 2011-12 and 2012-13 in the sums of £600, £1,000 and £960 respectively. The calculations referred to in the notice were not included in the bundle.

25. On 24 August 2016 the appellant asked HMRC to accept the letter as a formal appeal against the assessments issued for Otley St, and asked for all tax to be postponed. He asked how, if his sister was residing in the property and making the mortgage payments, that made him a landlord, and he asked for the information that showed he was. He asked how the figures were calculated and if the mortgage payments were taken into account.

26. On 24 August 2016 Mr Luke Glover wrote to the appellant as successor to Mr Phillips who had retired. In this letter he gave the appellant the amounts said to have been paid to him as landlord being £3,142, £5,385 and £4,773 for the three tax years in question. He said that these payments he was receiving from a tenant in a property he owned were regarded as "Income from Property" (Mr Glover's capitalisation) and

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[3] We who do now do not understand how an unrepresented tax payer is supposed to know what this means. We have also struggled to find the relevance of this "sect" as we explain later.

[4] This is a strange statement. How did Mr Phillips know that personal allowances would cover the gain when he must have known the appellant was taxed under PAYE? He might we suppose have meant the annual exempt amount for chargeable gains.

[5] What exactly, we wondered, were the department's interests that needed the protection of these assessments. Phrases like this are usually used where an assessing time limit is approaching that would, if not met, put a subsequent burden on HMRC to show eg carelessness or fraud. But the normal time limit in s 34 Taxes Management Act 1970 is 4 years from the end of the tax year, so on 27 July 2016 an assessment for 2010-11 and 2011-12 would be several months beyond the time limit, but that for 2012-13 was more than eighth months away. But that is to overlook, as Mr Phillips undoubtedly did, that the time limit for assessment for the earliest year where there is a failure to notify, 2010-11, was 5 April 2031!

chargeable to income tax as rental income[6]. He also explained the calculations, being 20% on £3,000, £5,000 and £4,800[7].

27. He also suggested that the appellant would have received similar payments in 2013-14 and 2014-15. He therefore asked for details of any payments in those years and evidence to support them.

28. On 1 September 2016 he acknowledged the appeal and postponement application. He then supplied the information he said had been received. It was:

> Source: Calderdale Metropolitan Borough Council
>
> Description: Lettings payments to landlords
>
> Name: Mohammed Kamran and his address and postcode (not Otley St)
>
> Let address: 11 Otley St Halifax
>
> Amounts: 2010-11 £3142.86
>
> 2011-12 £5385.12
>
> 2012-13 £4773.60

29. Mr Glover added that an educated assumption on his part was that the payments may have been some sort of housing benefit his sister applied for which the council had to pay directly to him as the property owner and which would be regarded as income from property for tax purposes. He now asked in addition to previous requests for comments and appropriate evidence regarding the information he had given as the basis for the assessments.

30. On 14 October 2016 the appellant said the payments of £13,300 were not paid to him, and he made the assumption that they were paid to his sister. He denied receiving any payments from the local authority or otherwise.

31. On 24 October 2016 Mr Glover said that this was all the information he had from the council, but he had written to them for more.

32. On 7 November 2016 Mr Glover wrote again having, he said, received more information from the council. They had confirmed that there was a housing benefit claim in relation to the property but that there were inaccuracies in the original information. The information now given was that rent payments began on 18

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[6] The wrong way round. If they are rental income they are charged to income tax as income from a property business.

[7] Mr Burke was as perplexed as we were why in the first two years the assessments were less than the payment, but in the last were more. Mr Glover's explanation to the appellant was that Mr Phillips must have allowed some "notional" expenses and charged tax on assumed profits. If that was what Mr Phillips did, at least in the first two years, we do not see what was "notional" about allowing expenses. Any proper estimate of income from property business involves using a balance of incomings and outgoings in accordance with accounting principles, and that would include, without any need for a claim, expenses. But Mr Glover recognised that Miss Akhtar was paying the expenses including the mortgage interest, so he was obviously sceptical about what Mr Phillips had done. But he said that he would not alter or amend the assessments on that account. He overlooked the obvious fact that he had in fact no power to do that anyway.

September 2010 of £110 per week and were paid "direct to the *tenant*". There had been no claim to benefit since 2013 though the tenant remained in the property.

33. Mr Glover said that he could accept the appellant's statement that he did not receive the payments from the council and that the assessments issued were incorrect and would be addressed in due course. The new information shows that the appellant had been receiving rents from 2010 to 2013 at least. Mr Glover had checked with the council and had been told that a claimant to housing benefit would need to show proof they were paying rent and would have to supply a copy of the tenancy agreement. He therefore had the power to raise assessments on the basis that £110 per week had been received by the appellant. He also asked for the source of the deposits in the Halifax account, statements for which the appellant had supplied.

34. On 3 December 2016 the appellant recapped all his previous information about Otley Street. He said that no tenancy agreement or any other information had been supplied by him to the council, and that he had asked his sister but she had refused to comment. He also said he did not deposit the payments into the Halifax account which were made while he was at work and he showed his working hours.

35. On 5 January 2017 Mr Glover said it would be best if he was to communicate with Miss Akhtar and that the appellant would probably agree with this course of action. He said that he had information powers available under Schedule 36 FA 2008 to obtain information from a third party, but for that he needed either the approval of the appellant or of the Tribunal. He asked for the appellant's approval.

36. On 4 February the appellant responded saying that he had gone back to his sister to seek her cooperation but without success. He had discussed the position with his siblings and his mother and had got backlash and was feeling isolated. So he did not wish to give approval at the present time. He said he found the position distressing and asked HMRC to propose a settlement.

37. On 21 February 2017 Mr Glover responded to set out his view of the facts and maintained the stance that the appellant was assessable on the rents received or due to be received. In this "view" he revealed that he had seen the tenancy agreement and that it was signed by the appellant and by Miss Akhtar and was dated 18 September 2010. He therefore proposed to assess the appellant to income tax on the rent of £110 per week for 52[8] weeks, ie £5,720 for the tax years 2011-12 to 2014-15 and for 39 weeks (£3,190) for 2010-11. He asked for agreement with his proposals of the amounts to be taxed .

38. Mr Glover also warned of penalties for failure to notify and enclosed Factsheets on the subject.

39. On 21 March 2017 the appellant asked for more time as his brother had died and his sister-in-law had been injured in a house fire, and he was caring for their children.

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[8] At least one assessment must be understated by £110 as there would have been at least one 53 week year (the rent was payable, Mr Glover said, on a Friday in advance). At first glance it seems 2012 was a 53 Friday year.

Mr Glover extended time for compliance to 19 May 2017, and on 26 May a Mr L Jones write to say he had taken over the case.

40. On 25 June 2017 the appellant responded to say he was going through a difficult time as he was on bail and unable to access his post. The strain of the situation coupled with the house fire had caused difficulties in personal relationships leading to his being arrested. He enclosed copies of bail documents.

41. On 2 August Mr Jones said that as a new officer on the case he had conducted a thorough review and set out his views. He agreed with what Mr Glover had done and asked for the appellant's response[9].

42. On 5 September 2017 the appellant said he disputed the assessments.

43. On 12 October 2017 Mr "Jones said that he proposed that he amend the assessments under appeal and make assessments for the two further years. Having proposed this on the first page of his letter, he revealed on the second that he had in fact raised assessments in the amounts set out in Mr Glover's letter of 21 February 2017, and that he would be seeking a penalty.

44. On 26 October 2017 Mr Jones enclosed notices of the assessments he had raised. However for the first three years Mr Jones did not amend the original assessments but issued "notices of further assessment" with tax of £38.00, £144.00 and £184.00 respectively. The tax calculation sheets however did not reflect this as they showed simply the difference between the income "as returned"[10] and "revised figures" which was the total of the two discovery assessments for each year.

45. On 4 November 2017 the appellant appealed against all the assessments and asked for:

(1) A copy of the letter of 12 October which he had not received.

(2) A Subject Access Request ("SAR") of the information held on him under s 7 Data Protection Act 1998 ("DPA") for the five relevant tax years.

(3) The return of all original documents he had sent to HMRC

(4) An explanation for the increases in the assessments.

He asked for an independent tribunal to decide the matter.

46. On 17 November 2017 Mr Jones replied. The appellant was offered a review or told he could go to the Tribunal. He asked for further and better particulars of what was wanted under the SAR.

47. On 9 December 2017 the appellant replied and took issue with some of Mr Jones's statements. In particular:

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[9] It is not clear to what exactly the appellant was being asked to respond.

[10] In fact there was no return and so no figures "as returned" as the appellant been taxed under PAYE on his income.

(1) He denied he had acquired Otley Street "to allow" his sister to live there, he had purchased it "**for**" her. [his emphasis]

(2) He denied having signed any tenancy agreement and asked for a copy.

(3) He asked Mr Jones to find out from the council who the rent was paid to, as he had not received £110 per week every Friday.

(4) He had received no correspondence relating to housing benefit.

(5) After numerous failed attempts he had spoken to his sister and family who accepted Miss Akhtar had received housing benefit and that this was the "contribution" they had claimed to make to the mortgage and housing costs. He had thought the family was making the contributions.

(6) He said it was contradictory of HMRC to on the one hand say that they accepted the family made contributions so no expenses could be deducted, but not accept it when he said the house was never his and only in his name.

(7) If HMRC looked at the balance of probabilities and his behaviours towards paying tax they would realise that what they were alleging went against all his personal values.

(8) HMRC did not take into account that he had passed all the equity to his sister as a gift. Why would he do that if the house was his?

48. On 20 December 2017 Mr Jones said that the papers had been passed for review. On 16 January he responded to the points in the letter of 9 December. In this he said that under the DPA they could not release data where releasing it would prejudice the prevention or detection of crime; prejudice the apprehension and prosecution of offenders; prejudice the assessment or collection of any duty; or reveal the identity of another persons or information about them. Thus they were unable to release the documentation from the council[11].

49. Mr Jones insisted that as the appellant was the sole legal owner he was liable to tax on the income, and in any case they had seen "no evidence to suggest that a person other than yourself was the beneficial owner"[12].

50. On 10 April 2018 a review officer, A R Potts, gave their conclusion of the review that the appellant had requested, which was to uphold the assessments.

Findings of fact

51. Based on the documentary evidence in the main bundle and supplementary bundle and the appellant's evidence we find the following facts.

Purchase and sale of the property

52. The appellant bought 11 Otley St on 15 September 2010 from his sister for a purchase price of £55,000.

[11] HMRC do not say under which heading the refusal falls. We assume it is the last one.

[12] This statement is blatantly untrue.

53. Of that amount £40,000 was obtained by the appellant from Halifax Bank to whom he mortgaged the property. The appellant opened an account with Halifax from which the mortgage payments were made.

54. The balance of £15,000 was supplied by family members other than him.

55. In June 2015 he sold 11 Otley St to his sister for £60,000 (a market value). At that time his mortgage had reduced to £32,400 and his sister took out a mortgage for £33,000 which was used to repay and replace the appellant's mortgage. The appellant received no further amount in respect of the £27,000 equity in the house.

The tenancy agreement

56. The tenancy agreement given by the council to HMRC was a one page document headed "Tenancy agreement – England & Wales for an Unfurnished House or Flat on an Assured Shorthold Tenancy".

57. The property shown was "11 Otley St", the landlord was given as Mr Mohammed Kamran of 42 Rothwell Drive Halifax and the tenant Miss Shamim Akhtar, the appellant's sister. There was no guarantor and the term was 12 months. The rent was £110 per week payable in advance on the Friday of each week. The deposit was £200 which was to be registered with an authorised tenancy deposit scheme.

58. The agreement was signed on 18 September 2010 and bore the signatures of "Mohammed Kamran" and "Shamim Akhtar". The appellant admitted to us at the hearing that the signature was his, he having previously denied to HMRC that he had signed any tenancy agreement. The witness to both signatures was Samina Imran of 13 Rothwell Drive, Halifax.

The Housing Benefit claims

59. The first Housing Benefit form chronologically that we have was one completed and signed by Shamim Akhtar and received by the council on 24 September 2010. It is a "Change of Address Form" for those who were already receiving housing benefit. The form shows that Shamim Akhtar moved into Otley St on 18 September 2010, that she was renting from a private landlord and that none of the listed services (eg council tax, water rates, utilities) were included in the rent.

60. Under "Payment of Housing Benefit" the form states that:

> "If you rent your own property from a private landlord, your claim will be considered under the Local Housing Allowance. Payments of Housing Benefit under this scheme will be made to you, directly into your bank account."

61. Then in bold after this is stated:

> "All other tenants, please state if you want your Housing Benefit paid directly to your landlord".

62. Shamim Akhtar ticked the "No" box. She gave details of her bank account with Barclays.

63. On a page headed "Sharing information with your landlord" the claimant is informed that the council's Benefit Assessment Unit ("BAU") will share information with the landlord. Against the rubric asking if the claimant gave permission for the BAU to share information she ticked "Yes".

64. The first actual Housing Benefit claim form was received by the council on 13 October 2010 and is headed "Claim form for Housing Benefit [and other benefits]". The boxes showing the claim to be for Housing Benefit and Council Tax Benefit were ticked.

65. Section 2 is about "Where you live". In this section Miss Akhtar was asked "Do you own this address?" and ticked "No". It also showed that she had claimed housing benefit from her previous address.

66. Section 12 is headed "Details about your tenancy". It gives the appellant's name as landlord, the length of tenancy as 12 months, agreement that it is an assured shorthold tenancy, that the full rent is £110 per week, and there are no weeks when she does not pay rent.

67. She shows that the property is a house with 1 living room and 3 bedrooms, that it is not furnished and that she is responsible for decorating, not the landlord.

68. She asked for housing benefit to be backdated to 18 September because she had to pay rent from that date. Under a warning that the council may prosecute if she gave false information, she signed to the effect that the information was true and complete

69. The second claim form for Housing Benefit was received by the council on 14 March 2013. In section 2 ("Where you live") Miss Akhtar was again asked "Do you own this address?" and this time ticked "Yes".

70. The information given about the tenancy is the same as in the 2010 claim save that she now said that the house had 2 bedrooms. But only odd numbered pages have been copied so the page with information about the tenancy agreement itself is missing.

The information from Calderdale Metropolitan Borough Council given to HMRC

71. The information received initially by HMRC from the council which Mr Phillips had when he opened the enquiry consisted of three forms headed "Lettings payments paid to landlords".

72. The forms consisted of 15 rows and 2 columns. The first column was the type of information and the second column the specific data. The second column entries against "Name", "Address", Postcode", "Currency", "Let Address" "Let Postcode" and "Source" were the same on each, namely "Mohammed Kamran" and his address and postcode (not Otley St), "GBP", "11 Otley St Halifax", "HX1 4RB" and "Calderdale Metropolitan BC (HB00045)".

73. Row 4 was "Amount", a showed for 2010-11 £3142.86, for 2011-12 £5385.12 and for 2012-13 "£4773.6". The "Tax year" was in another row. Against a description "Hben Payment", 2010-11 showed "0", while 2011-12 and 2012-13 were blanks.

74. "Source ref" was a string of digits, 4 in 2010-11 and 18 in the other two years.

75. "Info date" was different on each form and we assume was the date the information was sent to HMRC.

76. "Assetcode" (the final row) showed:

for 2010-11 "CNI/1111_0001/Nhousben/112145"

for 2011-12 "CNI/0912_0001/Landlord/298697"

for 2012-13"CNI/1213_0001/Landlord/1227697".

Law

77. Income tax on income from property is, subject to irrelevant exceptions, charged in accordance with the provisions of Part 3 Income Tax (Trading and Other Income Act) 2005 ("ITTOIA"), the relevant provisions of which are:

> "*264 UK property business*
>
> A person's UK property business consists of—
>
> (a) every business which the person carries on for generating income from land in the United Kingdom, and
>
> (b) every transaction which the person enters into for that purpose otherwise than in the course of such a business.
>
> *266 Meaning of "generating income from land"*
>
> (1) In this Chapter "generating income from land" means exploiting an estate, interest or right in or over land as a source of rents or other receipts.
>
> (2) "Rents" includes payments by a tenant for work to maintain or repair leased premises which the lease does not require the tenant to carry out.
>
> (3) "Other receipts" includes—
>
> (a) payments in respect of a licence to occupy or otherwise use land,
>
> (b) payments in respect of the exercise of any other right over land, and
>
> (c) rentcharges and other annual payments reserved in respect of, or charged on or issuing out of, land.
>
> …
>
> *268 Charge to tax on profits of a property business*
>
> Income tax is charged on the profits of a property business.
>
> *270 Income charged*
>
> (1) Tax is charged under this Chapter on the full amount of the profits arising in the tax year.
>
> …

271 Person liable

The person liable for any tax charged under this Chapter is the person receiving or entitled to the profits.

272 Profits of a property business: application of trading income rules

(1) The profits of a property business are calculated in the same way as the profits of a trade.

(2) But the provisions of Part 2 (trading income) which apply as a result of subsection (1) are limited to the following—

In Chapter 3 (basic rules)—	
section 25	generally accepted accounting practice
section 27	receipts and expenses
section 29	Interest
In Chapter 4 (rules restricting deductions)—	
section 35	bad and doubtful debts

78. As to housing and council tax benefits they are dealt with for income tax purposes in s 677 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"):

"*677 UK social security benefits wholly exempt from tax: Table B*

(1) No liability to income tax arises on the United Kingdom social security benefits listed in Table B.

Table B Part 1

Benefits Payable Under Primary Legislation

Social security benefit	Payable under	
Council tax benefit	SSCBA 1992	Section 131
Housing benefit	SSCBA 1992	Section 130
	SSCB(NI)A 1992	Section 129"

79. As to discovery assessments, where, as in this case, a person had not made a tax return for the tax year, section 29(1) TMA provides only:

"(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 … 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."

80. This is subject to the time limits in s 36 TMA:

> "(1A) An assessment on a person in a case involving a loss of income tax …—
>
> …
>
> (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)."

HMRC's submissions

81. In the statement of case he had compiled, Mr Burke had recognised by citing s 36 TMA that, even if none of the officers in the case had mentioned it, certain of the assessments for certain of the tax years were made outside the normal time limit of four years and HMRC therefore needed to show that for those years the appellant had failed to notify liability under s 7 TMA.

82. He also noted that in relation to all the assessments HMRC had the burden of proof as they were discovery assessments, even though they did not have to meet the conditions in s 29(4) or (5). He accepted there were errors in some of the assessments but said these were not fatal to their validity.

83. HMRC said that the appellant had not been required in the tax years concerned to make and deliver a tax return to HMRC. He therefore had until the 6 October first falling after the end of the tax year to notify liability and he had not done so.

84. HMRC had discovered that for the tax years 2010-11, 2011-12 and 2012-13 the appellant had income from property of which he had not notified HMRC within the time limit. The discovery was made by the officer who received information from the council of "letting payments" to the appellant in the capacity of landlord.

85. As to 2013-14 and 2014-15 HMRC relied on the presumption of continuity (although Mr Burke's skeleton wrongly referred to consideration of "earlier years" rather than, as is the case here, later ones).

86. As to the appellant's liability under Part 3 ITTOIA, HMRC said that there were "issues surrounding the tenancy agreement". That was clearly a very serious matter but it was not part of the appeal to decide who signed the tenancy agreement.

87. The appellant is chargeable and assessable on the £110 per week rent even if he did not receive it (because it was diverted to pay the mortgage or other household expenses) as the charge is on the person receiving or *entitled* to the income – s 271 ITTOIA.

88. Even if the appellant did not receive the rents HMRC asserts that he did receive a benefit through his sister paying the mortgage and other costs, as he was the legal owner and the mortgagor.

89. In what seems to have been an alternative argument, HMRC say that these payments to the mortgage account in the appellant's name were "other receipts" within s 266(1) ITTOIA.

90. These arguments as set out in the statement of case seemed to us somewhat incoherent. We do not blame Mr Burke for that: at the time he prepared his case did so he was not able to refer explicitly to the council documentation because he had no certainty that he would be able to produce it. He was like a boxer attempting to land a knockout blow with at least one hand tied behind his back.

91. Once he was able to produce that documentation then his case on liability became much clearer and simpler. The agreement showed plainly on its face that the appellant, who had signed it, was entitled to receive £110 per week rent and was assessable on it.

The appellant's submissions

92. These were that although he had acquired the house at 11 Otley Street in his name and with a mortgage from the Halifax, he had done so for his sister, Miss Akhtar, who was the real owner.

93. That she was the real owner is shown by the sale arrangements where he had received nothing for the equity in the property, and his sister had paid off the mortgage.

94. He had not received any rent from his sister, and the mortgage had been paid off by contributions from the family and his sister, using a bank account for which he had given her a card.

95. Therefore he was not liable to income tax.

Further findings of fact from the appellant's evidence

96. We start by saying that all of the appellant's evidence was consistent with what he had told HMRC and with the documents he had produced to them, but for one matter. He denied he had signed a tenancy agreement, but accepted he had when he saw it at the hearing. We do not think that this one fact changes our assessment of his credibility. We have found below that he was pressurised into signing a document but we do not find that he knew what the document was or what it would be used for. We do not think he would have insisted that HMRC show him the tenancy agreement and asked for a SAR if he knew it would show his signature and so show him to be wrong. We therefore find him a credible witness and accept his evidence.

97. We find that, as was the appellant's case, the purchase of the property was something he was pressured into by his and his wife's family. We find as fact that it was decided in the family that his sister, Miss Akhtar, should have a place of her own with her two children, but in 2010 she was not in work and could not get a mortgage in her own name, whereas he was in work and would qualify for a mortgage. We find this

as a fact as we accept the appellant's unchallenged evidence that this is what happened and about the complex relationships and dynamics within the extended family (see §14)

98. We find as fact that it was always intended that Miss Akhtar would be responsible for payment of all the household costs and would make the mortgage payments. We base this particularly on the banking arrangements: the statements which we have examined bear out what the appellant said about how it was operated.

99. We find that although the appellant was told that the payments would be met by contributions from the family, the intention of the family was that Miss Akhtar would claim housing benefit to meet the payments. We find that it was recognised in the family that to get housing benefit there would have to be a tenancy agreement and that this was drawn up by members of the family, not the appellant. We find as fact that on the balance of probabilities the appellant was told to sign a document which he did, without knowing its contents. We base this finding on the unchallenged evidence of the appellant that the first he knew of the housing benefit claim was when, after numerous failed attempts, he had spoken to his sister and family who accepted that Miss Akhtar had received housing benefit (see §47(5)).

100. We find that the appellant never received any rent under the agreement. We base this partly on the bank statements which do not show weekly payments of £110, but show larger payments paid irregularly by people other than the appellant (given the timing).

101. We find that the mortgage payments were made to Halifax from the account with them in the name of the appellant, and that the appellant gave his bank card (debit card) to his sister and she had control over the account.

102. We find that what appellant had said to HMRC, and said to us, that the purchase of Otley St was by him in name only and was intended to be his sister's house was true. It is corroborated by all the documentation put forward by the appellant, in particular a letter of 25 March 2015 from Liddy's, his solicitor, a letter of 25 May 2015 to Miss Akhtar from her solicitors, and a letter from Halifax to the appellant of 3 July 2015 about the repayment of his mortgage. These letters document the arrangements for the sale whereby the equity in those was not paid for by Miss Akhtar but was treated as a gift by the appellant. We do not accept that this was in fact a gift, but was a recognition that Miss Akhtar was the beneficial owner of the house.

103. Following on from that we find that Miss Akhtar was always intended to be, and was, the beneficial owner of 11 Otley Street. We base this finding on the facts that the appellant did not, and the wider family did, pay the excess of the purchase price, that Miss Akhtar did not pay anything to acquire the equity in the house and arranged for her mortgage to repay the appellant's and that she, through the housing benefit, paid the mortgage and other household bills.

Discussion

The council information

104. We start with the information received by HMRC from the council that prompted the enquiry and its effect on HMRC's conduct of the case.

105. The returns that HMRC received were headed "Letting payments to landlords" and had, according to Mr Phillips, been supplied under the requirements in s 16 TMA on third parties to make information returns. That is odd on two counts. Section 16 was repealed with effect from 1 April 2012 by paragraph 51(2)(e) Schedule 23 FA 2011, so on the assumption that returns under s 16 for a tax year are issued in April after the tax year, notices for 2011-12 onwards if made under s 16 were invalid. More significant however is that neither s 16 nor its successor, paragraph 9 Schedule 23 FA 2011, seem to have any relevance to the payments made by the council. Taking paragraph 9, the relevant payments for the return are payments by a person carrying on a business (which includes the activities of a local authority) for or in connection with services provided by persons who are not employed by it. Neither the appellant nor his sister were providing services to the council, so we cannot see on what legal basis the council made returns of these payments to HMRC.

106. However, the information form for 2012-13 had some words written on it which we thought might throw some light on this matter. Someone, we know not who, has written on the form "now ROPL – Rents, Other Property Income + Lettings".

107. Those words bear a resemblance, but are not identical to, the heading of paragraph 18 Schedule 23 FA 2011 which is "Rent and other payments arising from land". That paragraph replaced s 19 TMA. The paragraph provides that the following are data holders who may be required to make returns:

> "Each of the following is a relevant data-holder—
>
> (a) a lessee (or successor in title of a lessee),
>
> (b) an occupier of land,
>
> (c) a person having the use of land, and
>
> (d) a person who, as agent, manages land or is in receipt of rent or other payments arising from land."

108. But none of these categories of person covers the council in relation to the payments it made and which it returned to HMRC.

109. What the council were doing in 2010 onwards in this case was to pay housing benefits to Miss Akhtar – the claim form shows that notwithstanding that she had said "no" to payments direct to the landlord, that could not in fact even be done in her circumstances.

110. So we wonder why the council felt that they had to make returns of payments of housing benefit to HMRC and in particular what they were told by HMRC about their statutory duty to do this. For our part we cannot conceive of any reason why HMRC would want to know of payments of housing benefit made to a tenant, given that the benefit is exempt from tax (see s 677 ITEPA). Nor can we understand why the council

called the payments "letting payments to landlords" when they knew they were paid to the person who said they were a tenant and who had produced a tenancy agreement in support of their claim for benefit.

111. We are also unable to understand the figures on the council's returns. For the year 2011-12 when a full year's housing benefit and rent was payable, the figure on the form is £5,385.12. That figure divided by 52 is £103.56 per week[13], not £110. The figure for 2010-11 is £3,142.86. The claim was from 18 September 2010, so was for approximately 28 weeks which gives £112.24 per week. If it was 29 weeks it was £108.37 but not £110 per week. The figure for 2012-13 was £4773.60 so even lower than the 2011-12 figure. Even if we assume that Calderdale Council thought that the appellant had agreed that payment of housing benefit would go direct to the landlord, it is difficult to see how these figures could represent payments to meet rent of £110 per week.

112. We therefore conclude that the information HMRC received was wrong. Not just slightly wrong but wholly misguided and misleading. Mr Glover seemed to have come to that conclusion too as he effectively abandoned Mr Phillips' rationale for his assessments.

Reasonableness & Bi-flex

113. We have therefore considered whether an officer of HMRC can be said to have validly made a discovery assessment if the only basis on which the assessment was made was false information, which was the case for the original assessment for 2010-11, 2011-12 and 2012-13.

114. HMRC's submission on the discovery assessment issue is that Mr Glover's estimate of the tax due based on rents of £110 per week is reasonably based on the information available. Mr Burke referred to one case, *Bi-flex Caribbean Ltd v Board of Inland Revenue* (1990) 63 TC 615 ("*Bi-flex*"), a case heard by the Privy Council on appeal from Trinidad and Tobago. But he didn't explain what passages in that case we should be guided by, or indeed why a case from Trinidad and Tobago relating to the 1970s law there should be relevant to the UK tax system in the 21st century. We think that he is referring in particular to the citation by Lord Lowry, giving the judgment of the Board, of what Lord Donovan had said in *Argosy Co. Ltd. (In Voluntary Liquidation) v Inland Revenue Commissioner* [1971] 1 WLR 514 ("*Argosy*"), also a decision of the Privy Council, this time on appeal from Guyana:

> "Once a reasonable opinion that liability exists is formed there must necessarily be guess-work at times as to the quantum of liability. A resident may be known to be living well above the standard which his declared income would support. The commissioner must make some estimate, or guess, at the amount by which the person has understated his income. Or reliable information may reach the commissioner that the books of account of some particular taxpayer have been falsified so as to reduce his tax. Again the commissioner may have to make some guess of the extent of the reduction. Such estimates or guesses may still be to the best of the commissioner's judgment — a phrase which

[13] If it was a 53 week year then the weekly figure is £101.60

> their Lordships think simply means to the best of his judgment on the information available to him. The contrast is not between a guess and a more sophisticated estimate. It is between, on the one hand, an estimate or a guess honestly made on such materials as are available to the commissioner, and on the other hand some spurious estimate or guess in which all elements of judgment are missing. The former estimate or guess would be within the power conferred by section 48 (4): the latter without."

115. Section 48(4) of the Income Tax Ordinance (c. 299) of Guyana was in the following terms:

> "Where a person has not delivered a return and the commissioner is of the opinion that the person is liable to pay tax he may, according to the best of his judgment, determine the amount of the chargeable income of that person and assess him accordingly, …"

116. The relevant legislation in *Bi-flex* was s 39(2)(b) of the Income Tax Ordinance of Trinidad and Tobago which provided:

> "(2) Where a person has delivered a return, the Board may—
>
> (a) accept the return and make an assessment accordingly; or
>
> (b) refuse to accept the return and, to the best of its judgment, determine the amount of the chargeable income of the person and assess him accordingly."

117. The Trinidadian legislation will be familiar to older readers as very similar to s 29(1)(b) TMA as originally enacted, while the Guyanan legislation in *Argosy* is an amalgam of s 29(1)(b) and (3) TMA as originally enacted. Both provisions contain a reference to the best of the Commissioner's or Board's best judgment, as did s 29(1)(b) TMA of the inspector making the assessment. It should be noted that s 29(1)(b), like the Guyanan and Trinidadian legislation in question, does not refer to "discovery" at all. Section 29(1) TMA, as it stands since it was substituted for the original words in FA 1994, on the other hand does not refer to "best judgment" of any person, but to an officer's opinion. We do not think the decision of the Board in *Bi-flex* and those quoted in it assist us very much when determining whether an assessment under the current s 29(1) TMA has to be "reasonable"

118. The wording in the current s 29(1) TMA has been considered by the Upper Tribunal in *HMRC v Charlton Corfield & Corfield* [2012] UKUT 770 (TCC) (Norris J and Judge Roger Berner) where at [37] the Tribunal said:

> "37. In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment."

119. This could be read as requiring honesty and reasonableness only in the process of making the discovery, and not in the process of deciding what the amount of the tax loss to be assessed is. But we do not think that s 29(1) TMA should be artificially divided up in this way. Once the officer has come to the honest and reasonable view

that he had made a discovery of a tax loss, he must in our view continue to be reasonable, and not capricious or arbitrary, in arriving at the amount of the assessment.

Discovery – 2010-11 to 2012-13

120. We do not doubt that Mr Phillips made a discovery. He found out from the returns made by the council that they had claimed to have made "letting payments to landlords" to the appellant. But did he discover from the returns that tax which should have been assessed had not been assessed? He would, or should, have noticed from the returns that the council were paying housing benefit (the form said "Hben Payment" on a pre-printed line, and the reference started "HB") direct to the landlord, the appellant. He would or should know that housing benefit is exempt from tax (something he could have found out by looking at his Employment Income Manual at paragraph 76100). Was it reasonable for him to assume that housing benefit, although exempt from tax, became income chargeable to tax as rent if it was paid direct to a landlord?

121. In our view an officer giving the matter any thought might reasonably have come to the view that a payment of housing benefit direct to the landlord discharged the tenant's obligation to pay rent, otherwise there could be double receipt. Some support for that view would have been found by the officer had he looked in regulation 95(2) of the Housing Benefit Regulations 2006 (SI 2006/213) even though that regulation applied in the periods in question only in very limited circumstances. Thus such an officer could reasonable have come to the view that rent was paid to the landlord, payment being effected by the council transferring money to the landlord in the form of a "rent allowance", a form of housing benefit, even though housing benefit is exempt. It is exempt however we think only in the hands of the person entitled to it, although s 662 ITEPA (Person liable for tax) is somewhat ambiguous as it refers to the chargeable person (and so the exempt person) as "the person receiving or entitled" to the benefit[14]. We think the better view is that a landlord to whom a local authority is paying a rent allowance is not in receipt of the benefit for the purposes of Part 10 ITEPA.

122. But we have no evidence that Mr Phillips went through these thought processes. He simply saw the words "letting payments to landlords", saw the name Mohammed Kamran and decided that the appellant was liable to tax on the payments. In our view, given the subjective nature of the test in s 29(1) TMA, "in his opinion", we think it was reasonable for Mr Phillips to make the assessments he did. We also think that it was reasonable for him to consider that in those circumstances the appellant had failed to notify liability, so that there was a loss of tax.

123. What we and Mr Glover failed to understand was why he did not make the assessments in the figures in the returns. Mr Glover thought it might be a matter of an allowance for expenses, but whatever it was it was not the 10% wear and tear allowance or anything to do with mortgage interest and other payments made from the Halifax account. And the 2012-13 assessment could not have been different from the payment figure on account of expense because it exceeded it.

[14] We consider this phrase in the context of Part 3 ITTOIA below.

124. The important question it seems to us is whether it was reasonable for Mr Phillips to make an assessment on the gross payments without any expenses being taken into account. Where we do think *Bi-flex*, or rather *Argosy*, helps is in saying that the officer making the assessment must take into account all the materials they had. What material did Mr Phillips have about expenses?

125. He was told on 16 July 2016 that the appellant's family would take responsibility and pay for the mortgage. He does not mention expenses at all before making the assessments and while he did not explain the basis for them he obviously did not give relief for the mortgage interest that had been incurred. Given the statement made by the appellant we do not think it is unreasonable (or capricious or arbitrary) not to take it into account

126. We do not however consider that the fairly minor differences between the assessment and the payments shows any failure to properly address the matter he had to decide, which was the amount in which he ought to make the assessment to recover the loss of tax. There was no lack of judgement and certainly no improper motive for making them in the figures that he did.

127. We conclude therefore that the original assessments for these three years were validly made, notwithstanding Mr Glover's views, which we think was what Mr Burke was referring to in his remarks reported at §82.

128. There were also additional assessments for the three original years made by Mr Jones in paltry amounts. We did not, and neither we suspect did Mr Burke, think that it was an efficient use of HMRC's resources to make an assessment for £48, as one of them was, but they were made and the grounds were not spurious. But were they in time? They were made more than four years after the end of the last tax year, so they must necessarily rely on s 36(1A). They must be made to recover a tax loss brought about by the failure to notify, but the original assessments did that. Why then were these later ones made?

129. They were made because Mr Glover had found out the truth about what the council had done, which was to make payments of housing benefit to Miss Akhtar on the strength of a tenancy agreement shown to them by Miss Akhtar.

130. But it is clear he did not take expenses into account. What material did Mr Jones have about expenses? In his first and introductory letter of 24 August 2016 he refers to the mortgage interest and the boiler and building insurance paid from the Halifax account and says that he does not think they are allowable because they were paid for the family. For an expense to be deductible it had, Mr Glover had said, to "be wholly and necessarily incurred by yourself". No further arguments about expenses were put by the appellant before Mr Jones made his additional assessments. Whether Mr Glover's formulation of his reasons for saying there was no relief for the expenses is correct is at this stage neither here nor there. It was we think reasonable for Mr Glover and Mr Jones to reasonably assume that there were no expenses to be set against the rents.

131. In our view it was therefore reasonable of Mr Jones to make the assessments, however paltry the figures.

Discovery – 2013-14 and 2014-15

132. However we do not think that the assessments for 2013-14 and 2014-15 were valid. Mr Glover and Mr Jones relied on the presumption of continuity. But there could be no presumption in relation to a social security benefit claim such as this as a claim may not be renewed, it may be denied or circumstances of the tenant may change. But most importantly, housing benefit is means tested[15] as those officers must know. It is telling that no returns were made by the council for these years and that they informed Mr Glover that no claim had been made (see §32). It seems that Miss Akhtar was in employment in 2015 when she was able to get a mortgage, so it may well have been in 2013 when this started and she was no longer eligible for housing benefit.

133. The assessments were based therefore on no evidence at all and the presumption of continuity was misapplied. The appellant's evidence, and that of the council, was that there were no benefit claims after 2013 and Mr Burke very properly said that he did not seek to support the assessments for these years.

Consideration of the assessments and the computation of profits from a property business

134. Mr Burke submitted that the burden of showing that the assessments are wrong is on the appellant. The appellant denies that he received any rents, but says that HMRC are being contradictory in charging him on the rents and not allowing any expenses.

135. In this part of the decision we are making the assumptions that there was a tenancy agreement in force and that Miss Akhtar made, out of her housing benefit, payments into the Halifax account in the appellant's name which were payments of rent due under the agreement, though not paid at weekly intervals. We examine whether the assessments correctly captured the amount of profit from exploitation of land on this basis. This is not simply a matter of the burden of proof. Our task is to find, so far as possible, the correct amount of tax and to make a decision under s 50 TMA accordingly, an approach endorsed by Moses LJ in *HM Revenue & Customs v Tower MCashback LLP 1 & Anor* [2010] EWCA Civ 32 where at [28] he said:

> "The retention of s.50 in terms which closely follows that of its predecessor is a powerful indication that Parliament did not intend to change the jurisdiction of the Commissioners in as dramatic a fashion as the introduction of a system of self-assessment might have suggested. As Henderson J remarked, the public interest is that taxpayers pay a correct amount of tax (see [115]). In the exercise of their statutory functions the Commissioners are not deciding a case inter partes; they are determining the amount on which, in the interests of the public, the taxpayer ought to be taxed (see *R v Income Tax Commissioners ex-parte Elmhurst*[16] [1936] 1 KB 487 at 493). That public interest has in no way been altered by the introduction of self-assessment."

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[15] See s 130 Social Security Contributions and Benefits Act 1992.

[16] In fact the applicant for a writ of prohibition in that case was Mr Leonard Elmh**i**rst, the founder, with his rich American wife Dorothy, of the Dartington Hall Trust.

136. We turn thus now to the correct computation of profits from a property business. The combined effect of Mr Phillips' and Mr Jones' assessments for 2010-11 to 2012-13 was to treat as the profit from exploiting the land at 11 Otley Street by way of rent the gross amount of the rents accruing under the tenancy agreement.

137. Tax is charged under Chapter 3 Part 3 ITTOIA on the "full amount of the profits arising in the tax year". The word "full" here is redundant[17] but the phrase has been taken in cases arising in relation to trades to require a balance to be struck of incomings and outgoings[18].

138. This striking of a balance must be done in accordance with UK generally accepted accounting practice (s 272(2) ITTOIA importing s 25 ITTOIA) so that the rents will be brought into account on an accruals basis, whether or not received. Where rents are payable weekly in advance then in a year where the tenancy agreement was in force throughout, receipts and accruals may well be the same, taking one such year with another, but in the year when the tenancy agreement starts there may well be a difference between the two. In this case the starting year was 2010-11 and the final Friday in that year was on 1 April. Thus the receipt on that Friday of £110 needed to be divided up so that only £78 fell to be brought into account. 2011-12 was a 53 Friday year so the correct amount for assessment there is £5,830.

139. HMRC say that the appellant is not entitled to any expenses including for interest on the mortgage, as it was payments by his sister into the mortgage account that enabled it to be paid. The same goes for payments out of the Halifax account to insurance providers.

140. These points raise a tricky issue. The appellant entered into the mortgage agreement and came under an obligation to pay the interest. It seems that he also must have entered into the insurance agreements. Mr Glover, when denying deductibility, said that the payments had to "be wholly and necessarily incurred by yourself". We assume that "necessarily" was a slip for "exclusively", but with that correction, Mr Glover is still wrong. The "wholly and exclusively" rules relate to the purpose of incurring the expenditure not to the identity of who incurred it, but even if they related to the persons incurring the expenditure, there is no one but the appellant who can possibly be said to have incurred it in the sense of becoming liable to pay it. If Mr Glover had it in mind that the appellant had to pay it out of his own resources, he is also wrong. But in any case it was paid out of his bank account which would be an asset of the business in any balance sheet created using UK GAAP.

141. What Mr Glover was probably struggling to express was that because the Halifax account had been funded by payments made by Miss Akhtar and her family, those payments should be treated as incomings in GAAP accounts and so as receipts of the property business. But it is a necessary pillar of HMRC's primary case that what went into the Halifax account was in fact the rents. They have not shown that if there was

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[17] Anyone interested to know why is referred to "What is the full amount?" (Richard Thomas) in Chapter 2 Studies in the History of Tax Law Volume 6 ed. Prof. John Tiley (Hart, Oxford, 2013).

[18] Indeed until the Income Tax Act 1952 the phrase used was the "full amount of the *balance of* profits and gains".

an excess of incomings in the account over rents that they had either the quality of items that should be in a profit and loss account, and if they were that they were receipts of a property business.

142. Thus in our judgment any calculation of the profits must take into account, on an accruals basis, the interest payable on the mortgage and the premiums to the insurers.

143. The discussion above about what UK GAAP dictates is somewhat unreal in that most individuals with income from property do not produce GAAP accounts for their own purposes and do not supply them to HMRC with a tax return. In fact HMRC have long recognised (see their Property Income Manual at paragraph 1101 in a version that predates 2017) that for smaller cases where GAAP accounts are not required by any other body, such as Companies House, the receipts and expenses basis or cash basis is perfectly acceptable. So much so in fact that the practice or concession of allowing a cash basis was legislated for by Part 2 Schedule 2 Finance (No. 2) Act 2017. But before the cash basis was put on a statutory basis, this tribunal had no jurisdiction to apply that basis if HMRC insisted on the GAAP basis.

144. In this case however it is unlikely that the cash basis would make much difference. But for what we say below we would have said that in principle the profits for each relevant tax year are to be computed as follows:

> Rents of £110 per week on an accruals basis, less
>
> Mortgage interest payable on an accruals basis, and
>
> Insurance premiums payable on an accruals basis.

145. Although we have the figures for rents which we could use, we do not have readily available the figures for the expense items and we would have left it to the parties to agree.

Directions

146. In the discussion above we made a number of assumptions, and in particular that there was a valid tenancy agreement under which rents were paid by Miss Akhtar to the appellant. But we needed to consider the strenuous arguments of the appellant that he had bought the property in his name for the appellant and gained no financial benefit from it, as they might have a bearing on his liability to tax. Because of this we made directions allowing HMRC to make submissions on two issues. The questions on the first were:

> (1) Do the circumstances of the appellant's acquisition and disposal of 11 Otley St, Halifax in 2010 and 2015, his passing of control of his mortgage account and his conduct generally demonstrate that, while undoubtedly being the legal owner of the property, he was holding the property on (bare) trust for his sister?
>
> (2) Assuming the answer to question (1) is "yes", does that make any difference to HMRC's analysis of the tax consequences of his having legal ownership?

147. The second issue related to the tenancy agreement alone and asked:

(1) What are HMRC's arguments for saying that the agreement was not a sham?

148. HMRC did not avail themselves of the opportunity to make any submissions in response.

Was the tenancy agreement a sham?

149. We think it is more convenient to deal with the sham issue first, as if the agreement for a tenancy is a sham, then there is no need to consider the trust issue. The concept of a sham has been considered in surprisingly few binding decisions of courts and tribunals in tax cases[19].

150. In *Dickenson v Gross (HM Inspector of Taxes)* 11 TC 314 (1927) Rowlatt J considered a case where a farmer, Mr Dickinson, had entered into a written deed of partnership with his three sons for the avowed purpose of enabling four personal allowances to be set against the income from the business. The Inspector of Taxes argued before the General Commissioners for the Division of Whitchurch in the County of Salop that no partnership existed, that the appellant had the use and was the occupier of the lands in question (relevant for Schedule B[20] purposes) and that the appellant was the sole proprietor of the business. The General Commissioners agreed and said there was no partnership and the deed had been completely disregarded.

151. On appeal to the King's Bench Division of the High Court, Rowlatt J, in a three paragraph decision (plus one were he told the Solicitor-General he need not trouble him), said:

> "A partnership, of course, is a legal position and a legal result, but like every other legal position it depends on facts, and what the Commissioners are saying here is: 'The facts are not those from which a legal partnership results, because although there was the deed they are not acting on it; it is not governing their transactions; they are not paying the slightest attention to it. They are going on just as before.' They have not used the word 'fictitious,' and they have not used the word 'sham,' but I think they have put it even more clearly. They say: 'The facts here were not a partnership although there was a bit of paper in the drawer, which if the facts had been according to it, would have shown there was a partnership.'"

152. It is clear from this that had the Commissioners held that the deed was a sham, Rowlatt J would have had no difficulty in supporting them.

153. *Martin v Davies* [1952] 42 TC 314 did not involve the Inland Revenue as a party. In it the Court of Appeal (Sir Raymond Evershed MR, Jenkins and Hodson LJJ) were

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[19] There were a number of findings of "sham" against taxpayers by the Special Commissioners in the 1980s which were not appealed to the High Court and so remained unreported. See in this regard reference to the defeat of Ronald Plummer's (of Rossminster fame, or rather, infamy) Deferred Purchase Capital Loss Scheme in 1981 in "In the Name of Charity: The Rossminster Affair" by Michael Gillard at page 257.

[20] Until the Second World War farmers were taxed under Schedule B to the Income Tax Act 1918 (tax on income from the occupation of land) on a fraction of the net annual (ratable) value of their land.

dealing with an appeal from Willesden County Court (Judge Leon). The headnote in HMSO Tax Cases says:

> "On 2nd January, 1950, M and D entered into an agreement purporting to be for the sale of a flat in a house for the sum of £6,500 payable by 600 monthly instalments of £10 16s. 8d. each. M was the tenant of the premises under a lease with 60 years to run when he bought it in 1936, but the agreement contained no conditions as to tenure or length of title. M was to be entitled to re-enter and the contract was to be determined if (inter alia) any payment was in arrears for one month or if D vacated the premises before the completion of all the payments.
>
> On a claim to possession by M on the ground of default in payment by D and a counterclaim by D on the ground that the premises were within the protection of the Rent Acts and the monthly payments constituted rent in excess of the standard rent, the County Court Judge found that the true transaction between the parties was one of letting and not of sale. M's claim was accordingly dismissed, and, the standard rent having been assessed at 25s. per week, judgment was given for D on the counterclaim. M appealed to the Court of Appeal."

154. Jenkins LJ said:

> "The substantial issue in the case is whether the agreement of 2nd January, 1950, was a genuine agreement for sale, *or was merely a sham or pretence to make what was in fact a transaction of letting look like a sale, so as to evade the restrictions and protective provisions of the Rent Acts.* The learned Judge, having heard the Plaintiff give evidence, having considered the terms of the agreement and a letter and certain rent books, to which reference is made in the evidence and in his judgment, came to the conclusion that there was in this case no genuine sale, and that in truth, according to the real substance and effect of the transaction, the Defendant was a tenant at the rent of £10 16s. 8d. per month, with the consequences I have already stated.
>
> In my judgment there was clearly evidence before the learned Judge on which he could properly come to the conclusion to which he came. Therefore, so far as it is a conclusion of fact the decision is one with which this Court should not interfere, and indeed cannot interfere. So far as it is a conclusion of law, having given the best consideration I can to the circumstances of this case, and to the really extraordinary document constituting the agreement of 2nd January, 1950, I have myself reached the same conclusion as the learned Judge.
>
> …
>
> The document I think does more credit to Mr. Martin's ingenuity than to his judgment. Of his ingenuity there is no doubt, and he has set the Court a puzzle of some little difficulty, but in the end I have no doubt that the learned Judge, on the evidence and on this document, that is the agreement of 2nd January, 1950, came to a right conclusion, and that the true view of Mr. Davies's rights, according to the real substance and effect of the transaction between the two parties, is that he was at all material times, and is, tenant of these premises at a rent of £10 16s. 8d., and inasmuch as that rent exceeds the standard rent, the consequences indicated by the learned Judge, and the relief he granted,

> must follow as a matter of course, and it equally follows as a matter of course that the claim for possession must necessarily fail." [*emphasis added*]

155. In *King v Walden (HM Inspector of Taxes) and Johnson v Walden (HM Inspector of Taxes)* 68 TC 387 (1993/5) the Special Commissioners (Mr Brian O'Brien and Mr THK Everett) considered the existence of a partnership in which (non-resident) relatives were said to be partners and to have supplied loans. The narration of the facts is lengthy and for that reason we have put it in an Appendix, but the decision of the Special Commissioners was this:

> "Mr King acknowledged that "tax reasons" were behind these strange arrangements. He was, of course, relying in 1972-1973 on his mistaken understanding of the law. Such reasons do not, by themselves, invalidate the arrangements — provided that the arrangements were real. *But we have come to the conclusion that the "partnership" was a complete sham.* In saying that, we do not found heavily on the tender years of most of the "partners": though an element of near farce is introduced thereby. The whole of the conduct of the business points towards Mr King's beneficial ownership; and *the overwhelming evidence that Mr King retained in his own hands the power of nominating "partners" (and, it seems, of removing them) shows how unreal was his vesting of the beneficial ownership in others.* In answer to the first question, we find that at all material times the beneficial owner of the Warwick Guest House business was Mr King." [Emphasis added]

156. They also found that a loan to Mr King's business purportedly from Mr King's father was in fact Mr King's own money, in these terms:

> First, we cannot bring ourselves to believe that the £28,000 sterling, in cash, originated with Mr King senior. We have had no reliable evidence to suggest that Mr King senior would have been able to raise such a sum in England; and there would not appear to be any reason for him to effect such a substantial transaction in cash. On the other hand, we have much evidence of the holding of cash by Mr King. On any footing we believe that Mr King must have been party to the raising of the cash sum and we do not credit his assertion that he knew nothing about it. *We are convinced that Mr King provided his father with the money and that the latter's participation in the matter was (as it had been in connection with 10 Fielding Terrace) a sham designed (hopefully) to enable Mr King senior's New Zealand residence to be prayed in aid for tax purposes.* [Emphasis added]

157. Both the High Court (Evans-Lombe J) and the Court of Appeal (Peter Gibson and Kennedy LJJ and Sir Iain Glidewell) had no doubt that it was impossible to say that the Special Commissioners had not reached the right decision on the facts.

158. In *Hitch and others v Stone (HM Inspector of Taxes)* 73 TC 600 (1999/2001) ("*Hitch*") Mr Hitch entered into an avoidance scheme devised by the notorious peddler of such things, Mr TPD Taylor using his tame life assurance company, Monarch Assurance Ltd. The headnote gives sufficient flavour of the facts and the decision of the Special Commissioners:

> "Three members of the H family owned, as tenants in common, a farm most of which they wished to sell for development. In 1983 they engaged T, a solicitor specialising in tax avoidance. T devised an avoidance scheme and took part in the negotiations for the sale.
>
> On 10 April a form of agreement (''the 1984 Agreement'') was signed by the H family by which they agreed to sell long leasehold interests to two companies, CP and MA, managed and/or controlled by T. T signed that agreement on behalf of the companies on 16 April. The agreement contained several difficulties of interpretation and several unfilled blanks, and some of its terms were never carried out.
>
> On 16/17 April agreement was reached with the Crest Group for sale of a large block of land. Under the written agreement made on 17 April (''the Red Land Agreement'') the vendor was expressed to be MM, another of T's companies.
>
> Later on that day T's three companies made an agreement (''the 17 April Internal Agreement'') by which CP agreed to assign to MM the benefit of the 1984 Agreement. The 17 April Internal Agreement also had unfilled blanks.
>
> On 22 June 1984 the H family, T's three companies and two members of the Crest group executed a deed (''the 1984 Deed'') by which the Red Land Agreement was completed and sundry provisions were made in relation to the other land (''The Green land''). Recitals (2) and (3) of the 1984 Deed referred to the 1984 Agreement and the 17 April Internal Agreement. Various subsequent transactions took place, including sales of parts of the Green land to outsiders.
>
> Appeals against assessments to capital gains tax for 1984–95 were made by one of the members of the H family, by the husband of the second, and by the executrix of the third. By agreement between the parties the Special Commissioners made a decision only in respect of the Crown's contention that certain of the documents relied on by the taxpayers were of no legal effect. The Crown's primary contention was that those documents were shams, and that the true arrangement between the H family and T was a wider financial arrangement by which T, personally or by his companies, acted at all times as agent or banker for the H family, and that T (or his companies) held the proceeds of sale on, in effect, a bare trust for the H family. The Commissioners did not accept all of the evidence given by one member of the H family and by T. The Commissioners decided that the 1984 Agreement was a sham in the sense that it was ''…intended … to give the appearance of creating between the parties legal rights and obligations different from the legal rights and obligations (if any) which the parties intended to create'' (*Snook v. London and West Riding Investments Ltd*. [1967] 2 QB 786, 802C, per Diplock L.J.). The Commissioners concluded that it followed them from that finding that the 17 April Internal Agreement was also a sham, and likewise recitals (2) and (3) of the 1984 Deed."

159. In the High Court Jonathan Parker J overturned the decision of the Special Commissioners, and the Inspector appealed to the Court of Appeal. Giving the only reasoned decision, Arden LJ (with whom Kay LJ and Sir Martin Nourse agreed) set out

useful (and of course binding) "principles which are in my judgment the relevant principles as respects sham transactions."

> "63. The particular type of sham transaction with which we are concerned is that described by Diplock L.J. in *Snook v. London and West Riding Investments Ltd*. [1967] 2 QB 786 above. It is of the essence of this type of sham transaction that the parties to a transaction intend to create one set of rights and obligations but do acts or enter into documents which they intend should give third parties, in this case the Revenue, or the court, the appearance of creating different rights and obligations. The passage from Diplock L.J.'s judgment set out above has been applied in many subsequent decisions and treated as encapsulating the legal concept of this type of sham. Mr. Price Q.C. referred us to *Sharment Pty Ltd. v. Official Trustee in Bankruptcy* (1988) 82 ALR 530 in which the Federal Court of Australia drew on Diplock L.J.'s formulation of sham in *Snook's* case.
>
> 64. An inquiry as to whether an act or document is a sham requires careful analysis of the facts and the following points emerge from the authorities.
>
> 65. First, in the case of a document, the court is not restricted to examining the four corners of the document. It may examine external evidence. This will include the parties' explanations and circumstantial evidence, such as evidence of the subsequent conduct of the parties.
>
> 66. Second, as the passage from *Snook* makes clear, the test of intention is subjective. The parties must have intended to create different rights and obligations from those appearing from (say) the relevant document, and in addition they must have intended to give a false impression of those rights and obligations to third parties.
>
> 67. Third, the fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. A distinction is to be drawn between the situation where parties make an agreement which is unfavourable to one of them, or artificial, and a situation where they intend some other arrangement to bind them. In the former situation, they intend the agreement to take effect according to its tenor. In the latter situation, the agreement is not to bind their relationship.
>
> 68. Fourth, the fact that parties subsequently depart from an agreement does not necessarily mean that they never intended the agreement to be effective and binding. The proper conclusion to draw may be that they agreed to vary their agreement and that they have become bound by the agreement as varied: see for example *Garnac Grain Co. Inc v. H.M.F. Faure and Fairclough Ltd.* [1966] 1 QB 650, at pages 683–4 *per* Diplock L.J. which was cited by Mr. Price.
>
> 69. Fifth, the intention must be a common intention: see *Snook's* case above. This is relevant to issue 3 below."

160. These are the principles by which we shall judge the tenancy agreement in this case.

161. In *The Brain Disorders Research Limited Partnership and another v HMRC* [2017] UKUT 176 (TCC) (Birss J and Judge Colin Bishopp) ("*Brain Disorders*") considered an appeal against, among other things, a finding of fact by the First-tier Tribunal that parts of a research agreement and the provisions for pricing in it were a sham, designed to vastly inflate a claim for capital allowances. The Upper Tribunal held that there was no error of law in the First-tier Tribunal's findings, and made other comments. They first said that principles set out by Arden LJ in *Hitch* were not in dispute, having set out the same paragraphs as we have. They added at [24]:

> "We agree with Mr Prosser that the FTT's finding of sham is a finding of fact and that we may interfere with it only on *Edwards v Bairstow* grounds (see *Edwards v Bairstow* [1956] AC 14 itself and the long line of authority following it). We are, however, conscious that a finding of sham, even if it does not imply dishonesty in the ordinary sense, necessarily requires the fact-finding tribunal to be satisfied of an intention to deceive or, at least, to make things appear other than as they are. This is a point to which we shall need to return; for the moment we merely observe that, because of this consideration, we have examined the detail of the FTT's findings with particular care."

162. They also considered arguments by the appellants that sham had not been properly pleaded, starting at [28]:

> "… Contrary to Mr Bremner's submission it is clear that HMRC's Statement of Case before the FTT and its skeleton argument before the hearing referred to sham expressly and it is equally clear that the point was put to the Appellant's witness Mr Hardy.
>
> 29. Mr Bremner is correct to say that the FTT did not make any finding of dishonesty; on the contrary, it described Mr Hardy, at [34], as "basically honest". We do not, however, and despite the note of caution we have sounded, consider that a finding of sham necessarily implies dishonesty. The pretence here was that 96 or 99 might have been spent on research, but the parties did not go further by pretending that it had in fact been spent on research. This was a tax avoidance, or deferral, scheme, and not evasion, and there was no attempt, as there would be in the case of evasion, to conceal what actually happened, however the parties chose to dress it up. One might disapprove of what was done; but we do not consider it could be said to have crossed the threshold into dishonesty."

163. We could also refer to many tens of reported cases where the court or tribunal has remarked that the Inland Revenue or HMRC had not argued for sham (even in those cases where the judge's remarks make it clear that they could, or even should, have done). What makes this case different from all those cases, and the cases we have cited (apart from *Martin v Davies*) is that it is not in HMRC's interests to argue that the agreement is a sham: quite the contrary, the assessments are based on the unspoken proposition that it is not, and that there is a genuine entitlement to (taxable) rents. We are conscious of what the Upper Tribunal said about pleading in *Brain Disorders.* The party in this case in whose interests it is to argue for a sham is the appellant, who was a litigant in person. In our view, having examined the documentation and in particular the letters sent by the appellant, drafted we understand by his wife, a civil servant in a relatively senior position though not a lawyer, and having considered what the appellant

said in his notice of appeal and at the hearing, we consider that he was arguing that the agreement was a sham, though he did not use those words.

164. We now consider the tenancy agreement in accordance with Arden LJ's principles.

165. First, we have considered matters outside the four corners of the agreement. In particular we have considered the documentation relating to the purchase, sale and mortgage payment arrangements, and answers given in the housing benefit claims. We have also considered the appellant's evidence about these matters.

166. Second, we have accepted the appellant's evidence that he did not intend to enter into a landlord-tenant relationship with his sister, and we have not seen any evidence that his sister intended to enter into such a relationship. In particular we think her answer on the 2013 benefit claim form that she owned the house was a slipping of the mask. They had entered into the relationship they intended which was that the appellant acquired the house with a benefit of a mortgage but was doing so entirely on behalf of his sister. The sale arrangements in particular show that this was the real relationship. At that time the reality was that Miss Akhtar owned the equity in the house worth £27,000 for which she paid the appellant nothing, and she redeemed the mortgage taken out by her brother the appellant.

167. As to deception it is our clear finding that the agreement was entered into by Miss Akhtar with the support of her wider family to deceive Calderdale Metropolitan Borough Council into granting Miss Akhtar housing benefit, something she would not be able to obtain without a tenancy agreement. We will ensure that a copy of this decision is sent to the council.

168. As to the third principle this is not relevant as there is no suggestion that the tenancy agreement was itself artificial or uncommercial. Nor is the fourth principle (departure).

169. Bringing all these matters together we find that the tenancy agreement is a sham. It is like the piece of paper that Farmer Dickenson kept in his drawer and did not follow.

170. As there never was a tenancy agreement the appellant is not liable to tax on rents to which he was entitled, as he had no such entitlement.

171. This finding does not however answer HMRC's alternative argument, that the payments which Miss Akhtar, with or without contributions from the family, paid into the appellant's mortgage account, were "other receipts" within the scope of s 266(1) ITTOIA. This argument is an alternative in case the Tribunal held that the appellant was not entitled to any rents. It seems to have been based on the wording of s 271 ITTOIA that the person liable for any tax charged under Part 3 of that Act is the person *receiving or* entitled to the profits.

172. This contention overlooks a number of matters.

173. First, the alternatives "receiving" or "entitled" relate to "profits", rather than rents or other receipts. Thus the question posed by s 271 is not "are there receipts to which

the person is not entitled but which fall to be taken into account as part of the computation of profits in accordance with UK GAAP" but "what is the relationship between the person and the profits"[21].

174. Second, the "receiving" case, the charge to tax on the person receiving the rents (which has been part of the tax code since at least 1803[22]) is for those who are not entitled to the profits because they are trustees or otherwise holding the assets from which the profits arise in a fiduciary capacity (see eg *Martin v CIR* 22 TC 330)[23].

175. Third, these receipts are not in the specific category of receipts in s 266(3) ITTOIA.

176. On the alternative view of HMRC these payments are not of rent, but are payments made by Miss Akhtar from either her housing benefit or from other family donated resources to enable the mortgage interest and other expenses to be paid to the Halifax and others by being paid into the appellant's bank account with the Halifax. It is impossible to see how on this basis the payments arose from any exploitation by the appellant of his interest in land for the purpose of generating them or how a GAAP-compliant set of accounts for a property business could be created from them.

Was there a trust?

177. As to the first question we asked of HMRC (see 146(1)) it is not necessary to make a decision on this independently of the sham argument. But we set out our views lest we be overturned on the sham issue. Based on our findings of fact in §96 to §103, and especially that last paragraph, we consider that the appellant held the entire interest in the property on trust for his sister, ie a bare trust. That could have given rise to some perplexing issues about capital gains tax in 2015 when the appellant sold his legal interest in the house to his sister, but as the gain was only £5,000 it did not have any real world consequences[24]. Nor do we intend to untangle the conundrum posed by such a finding as far as rents under the agreement (on the assumption that the agreement was

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[21] See in this connection the very helpful decision of this Tribunal in *Maureen Hepburn v HMRC* [2013] UKFTT 445 (TC) (Judge J Gordon Reid QC FCIArb and Dr Heidi Poon CA CTA PhD – the member of the tribunal as she then was – now Judge Poon).

[22] Section 134 Income Tax Act 1803 Schedule (D)., third paragraph:

> "[Schedule D] shall extend to every Description of Property or Profits which shall not be chargeable or charged to either of the said Duties contained in Schedules (A), (B), or (C), and to every Description of Employment of Profit not chargeable or charged to the Duty herein-after mentioned, contained in Schedule (E), and not specially exempted from the said respective Duties, and shall be charged annually on and paid by the Person or Persons, Bodies Politick or Corporate, Fraternities, Fellowships, Companies, or Societies, whether Corporate or not Corporate, *receiving or entitled* unto the same, his, her, or their Executors, Administrators, Successors, and Assigns respectively."

[23] This is also HMRC's view in their Business Income Manual at BIM 15015 in relation to the identical wording in s 8 ITTOIA for trades. They say it is for trustees and personal representatives of a deceased person.

[24] We think the answer is to be found in s 60(1) Taxation of Chargeable Gains Act 1992 which ignores for the purposes of that Act any acquisition of an asset by the person absolutely entitled from the trustee. It doesn't in terms say that the disposal by the trustee to the person absolutely entitled is disregarded, but it does say that the acts of the trustee are treated as the acts of that person, so the person absolutely entitled would be disposing of their beneficial interest in the asset to themselves, which is a nonsense.

not a sham) are concerned, but the logical conclusion would seem to be that the appellant was receiving rents from Miss Akhtar as trustee for her, the one paying them. However one resolves that conundrum, and it may be insoluble, the fact that we find it so puzzling merely reinforces our view that the tenancy agreement was a sham.

Decision

178. Under section 50(6) TMA 1970 we cancel all assessments made.

Appeal rights

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

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 09 APRIL 2019

APPENDIX

The Special Commissioners' findings of fact in *King v Walden*

We now take up again the history of the purchase of 10 Fielding Terrace (and its business). Towards the end of 1972, Mr King paid a visit to his parents in New Zealand and, after the matter had been discussed with their), he decided to buy that property. By an agreement [R5b] dated 12 April 1973 Mr King agreed to purchase the freehold premises, the goodwill of the business known as The Warwick Guest House carried on there, and fixtures and fittings etc for a total price of £31,000. It appears from an opening balance sheet [A3a] prepared many years later by Mr AC Wood (on information which can only have been furnished by Mr King) that the total price was apportioned between the three elements of the purchase, £20,000, £10,750 and £250 respectively. (The goodwill figure was, we understand, subsequently reduced to £10,250.) The same balance sheet credits £6,000 of the £11,000 attributable to the business to Mr King's capital account; and the £5,000 balance to a loan advanced jointly by "New Zealand relations".

It is clear that there was no such loan. The purchase of 10 Fielding Terrace and the business was initially funded as to £21,000 by loan on mortgage to First National Securities Ltd as to £6,000 by loan on second mortgage to the Bank of New Zealand, and as to the balance by other funds which we find were Mr King's. (As to part, that finding is dependent on our answer to question 3 below.) In due course the bank loans were paid off; but there were no contributions from New Zealand towards that, or towards the servicing of the loans while they remained outstanding.

It is also clear that upon completion, the legal title not only to the premises (10 Fielding Terrace) but also to the business (Warwick Guest House) became vested in Mr King. The question thus arises as to how, as Mr King claims, the beneficial interest in the business became vested in others. The answer does not lie in the provision of funds; and, as we see it, the claim must be founded on gift.

Despite the evidence of the opening balance sheet, Mr King says that he never had a beneficial interest in the business, which belonged from the beginning to others. In 1973, the candidates for ownership were limited to Mr King senior and David (both of whom were then in New Zealand--it is not suggested that Mr King's mother was a part-owner of the business. In support of this contention Mr King produced copies of applications for registration under the Registration of Business Names Act 1916, and Particulars of Ownership as required by s 29, Companies Act 1981. The earliest of the applications (1974) states that Mr King senior (and he alone) was the proprietor of the business (Mr King being the "Manager"). Applications made in 1977 and 1981 name the proprietor as "William Harold King and Associates" (WH King being Mr King senior). Those three applications were signed by Mr King on behalf of his father. The first of the Particulars of Ownership (1982) names seven proprietors: Mr King senior, a Mr Jacobsen (a friend of Mr King's in New Zealand who had made a loan to Mr King in connection with his King Enterprises Engineering & Hardware business some time before 1973), David (then aged about 21), and Mr King's four elder children by Miss Johnson (the eldest of whom was then aged about 7). Peter had not yet been born. The

second set of Particulars before us (1986 or later) lists eight proprietors: Mr King's two brothers (New Zealand residents: at Mr King's request they took the place of Mr King senior, who had died in 1985), David, and all five of Miss Johnson's children. Mr Jacobsen's name had been removed. Mr King told us that each of Miss Johnson's children had had her or his name added to the list as soon as they were born. We accept that these Particulars of Ownership were exhibited on the premises--all the children spoke to that. They also said that they were "partners"; but they must have been told that, because knowledge of such a relationship is not to be derived from the Particulars Unsurprisingly, the children did not have any material understanding of what being "a partner, meant.

On the other hand, if Mr King was only the manager or secretary in relation to the Warwick Guest House, and accountable to others, it is difficult to explain the absence of any accounts on a regular basis (until eventually, late in 1984, the Inspector's activities obliged Mr King to go to Mr Wood). Mr Wood's accounts also show that Mr King made drawings on Warwick Guest House for his own purposes. Further, during the course of the hearing there emerged a Lloyds Bank loan account (not appearing on the Schedule BA, but which we will call "A/c 22a") which was serviced in part by the Warwick Guest House business. The loans comprised in that account were used, first for paying off so much of the First National Securities debt (purchase of 10 Fielding Terrace) as remained outstanding, and later, for assisting the purchase of Wolverton and Twyford. The alleged proprietors of the Warwick Guest House business were not concerned in the ownership of any of those premises.