[2019] UKFTT 278 (TC)

TC07117

Appeal number: TC/2017/08300

INCOME TAX, CLASS 4 NATIONAL INSURANCE CONTRIBUTIONS & STUDENT LOAN REPAYMENTS – (1) Enquiry into used car selling trade for 2013-14 – whether omissions of sales – whether amendments to return correct – whether penalties due under Schedule 24 FA 2007 for deliberate conduct – appeals allowed in part (2) Compliance check into takeaway business for 2007-08 to 2012-13 – whether omissions of sales through intermediaries – whether discovery assessments valid – whether penalty under s 95 TMA for fraudulent conduct and under Schedule 24 FA 2007 for deliberate and concealed conduct due – all appeals allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

SIRFORAZ SHARIF	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE RICHARD THOMAS
RAYNA DEAN FCA

Sitting in public at Civil & Family Justice Centre, Nottingham on 13 February 2019

Mr Naseem Akram, of Advice with Accounts, accountant, for the Appellant

Mr Philip Oborne, litigator HM Revenue & Customs, for the Respondents

DECISION

1. This was an appeal by Mr Sirforaz Sharif ("the appellant") against:

(1) an amendment to his tax return made by a closure notice for the tax year 2013-14

(2) assessments to tax for the tax years 2007-08 to 2012-13 inclusive

(3) a determination of a penalty for the tax year 2007-08

(4) assessments of penalties for the tax years 2008-09 to 2013-14 inclusive

all of which were made by an officer of the respondents ("HMRC").

Preliminary matter: application to strike out

2. By an application notice dated 6 February 2019 HMRC, through Mr Oborne, applied for the appeals to be struck out. The grounds for so applying were that the appellant had failed to co-operate with the Tribunal to such an extent that the Tribunal could not deal with the proceedings fairly and justly.

3. The lack of co-operation described was the failure of the appellant or his representative to comply with the Tribunal's directions as to exchange of documents, witness statements and skeleton arguments. Mr Oborne said HMRC had so complied but the appellant had provided nothing.

4. As to "exchange of documents", the directions required two things, a list of documents that the appellant intended to rely on at the hearing and copies of any documents on that list not already provided.

5. In our view an appellant in person as Mr Sharif was (Mr Akram is not a lawyer) can be excused for thinking that if all relevant documents in the case have been given to HMRC in the course of enquiries that led to the appeals HMRC will produce them in the bundle they were directed to produce and there is no need for the appellant to do anything if there are no other documents they wish to produce. If the appellant did produce documents at the hearing about which HMRC had no notice then it would be open to HMRC to argue that they should not be admitted or that HMRC should have an adjournment to consider them.

6. The same applies to witness statements by the appellant. In this case the appellant was the only potential witness. If he said something in evidence which caught HMRC by surprise then their remedy was to submit to the Tribunal that no, or limited, weight should be put on it if they are unable to properly cross-examine the witness on it.

7. As to a skeleton, the appellant would in the normal course of things be limited to putting forward only those arguments he raised in his grounds of appeal about which HMRC are well aware.

8. As a result we did not strike out the appeals, but made it clear to Mr Akram that we would intervene, on a case by case basis, if the appellant was giving evidence or he was putting in documents that HMRC were unaware of. That in our view was sufficient to enable us to protect HMRC's interests and to give them a hearing which was fair to

them as well as to the appellant, so that we could deal with the appeals fairly and justly. It is also in accordance with rule 15(2)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules")

9. After the hearing we realised that Mr Oborne had not apparently copied the application to strike out to the appellant on 6 February but had stated in an email to the Tribunal that copies of "the Bundle" which included the application and supporting documents would be shared with the appellant on the day of the hearing. We do not think that a non-lawyer being handed the application in a 56 page bundle just before the hearing amounts to being given a proper opportunity to make representations about the application, so that rule 8(4) of the Rules meant that the Tribunal should not strike out the appeals in any event.

Evidence

10. We had a bundle prepared by HMRC containing the documentary evidence together with a witness statement by Mrs Anne English, the officer of HMRC involved in the enquiry and compliance check in succession to another officer who started the enquiry. She gave evidence and was questioned by Mr Akram and by us.

11. The appellant also gave evidence about the way intermediaries operate in the fast food business and was cross-examined by Mr Oborne.

Facts

12. We set out the background facts of the HMRC investigations from the bundle of papers prepared by HMRC and the evidence we had. Nothing we state here is in dispute and we find it as fact.

The section 9A enquiry – 2013-14

13. The appellant's tax return for 2013-14 contained entries for three sources of income:

(1) Employment income of £3,281 from a company "Autoselect" of which the appellant was, he had indicated, a director.

(2) Income from property showing a taxable profit of £13,680.

(3) Income from "self-employment" being a trade of selling used cars, a trade which the appellant began on 6 April 2013 and ended on 4 November 2013. He had used the "short" self-employment pages and had opted to use a "three line account" return on which:

(a) "Your turnover – the takings, fees, sales or money earned by your business (*sic*)" was £16,849.

(b) "Total allowable expenses" were £19,485.

(c) "Or, net loss" was £2,636.

(d) Box 33 showed that the loss from this tax year set-off against other income for 2013-2014 was £2,636.

(e) The self assessment showed income tax liability of £977.

14. By a letter of 15 June 2015 Mrs A Shah of Local Compliance Small & Medium notified the appellant that she was opening an enquiry into his tax return for 2013-14 under s 9A Taxes Management Act 1970 ("TMA"). She copied that letter to the appellant's accountants, Advice with Accounts ("the accountants"), to whom she also sent a long list of information and documents she wished to see in connection with his returned income from the trade of dealing in used cars. She asked for a reply by 20 July 2015.

15. On 17 July 2015[1] she issued a notice under Schedule 36 FA 2008 to the appellant, copied to the accountants, containing the same information and document request. The deadline was 20 August 2015.

16. On 21 August 2015 documents were received from the accountants together with the information requested.

17. On 23 September 2015 Mrs Shah asked for documentary evidence of the car sales; "your analysis how (*sic*) you have calculated the purchases" with the purchase invoices and information about purchases of cars from one particular supplier in the bank accounts totalling £27,566 and about transfers and standing orders in various bank accounts. She also asked the accountant for all his "link papers".

18. In October 2015, in a letter received by HMRC on 28 October, the accountants responded answering the requests for information and explaining that HMRC had all the documents available. The letter said that:

> "the payments of £27,566.20 from the bank account will be correct, of which some were sold and some remained in stock as at the close of the business. As a balance sheet is not required the remaining cars remained in stock and as such should not form part of the trading account. Only cars out of those purchases that have been sold have been included as I am sure this is the correct way of accounting for these?"

He was not able to supply his link papers as HMRC had all the documents.

19. On 11 November 2015 Mrs Shah sent a letter in which she said she was returning the documents she had received and asked for further explanations.

20. On 16 December 2016 the accountants replied giving explanations, particularly about the transfer of the business (ie a stock of cars) to the company Autoselect Ltd of which the appellant was owner and director (see §13(1)). They explained that the appellant did not keep a stock book.

21. On 8 February 2016 Mrs Anne English replied, having taken over the compliance check from Mrs Shah. She requested a meeting and gave an outline agenda. She said:

> "that as an incorrect tax return has been submitted[2] please ask your client to have available at the meeting the statements relating to each private

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[1] Ie before the deadline imposed by the opening letter.

[2] We do not know what she had in mind by saying that an incorrect return had been received. Nor did she say.

> account for 2013-14 together with "documentary evidence" of the source of the non-business deposits in his private account, these are …"

and she listed 5 deposits totalling £9,400.

22. On 9 March 2016 Mrs English sent a letter to the accountants agreeing to continue the enquiry by correspondence given the appellant's anxiety problems[3]. She again said "It is apparent an incorrect Tax Return has been submitted because the sales proceeds of some of the vehicles have been understated.[4]" She then asked for a great deal of further information about the trade and about property income, and asked for the completion of a pre-printed "Statement of Personal Assets and Liabilities" as at 5 April 2014. She supplied a schedule of the purchases and sales of the vehicles provided to date and asked that the appellant review it "in some detail" and that he inform her of details of any omissions or understatements. She also asked for the business bank statements sent back by Mrs Shah to be returned to her.

23. On the same day in a letter to the appellant she stated that the losses had been overstated and that the accountants had provided revised statements of sale proceeds and purchase costs and that the appellant would be liable to additional tax and interest and that she would consider the imposition of penalties. In relation to the last matter she enclosed Factsheets about the Human Rights Act and about how penalties are calculated.

24. On 19 April 2016 a response was received from the accountants. They provided responses to Mrs English's requests and queried the accuracy of her trading figure calculations.

25. On 10 May 2016 Mrs English sent a Schedule 36 notice to the appellant so that "she could progress the compliance check." This was because she had not received all the items she had asked for, the missing items being the full address of the premises where the appellant operated the business, the name and address of the landlord and the bank statements for a particular Lloyds TSB account. The deadline given was 3 June 2016.

26. On 11 May 2016 she sent a further letter to the accountants with further questions on the car sales and deposits into bank accounts.

27. On an unknown date, probably in June 2016, the accountants replied with information and documents.

28. On 19 July 2016 Mrs English replied. She said that comparing bank deposits with (car) sales and after adjusting for transfers and money refunded there is:

> "a large discrepancy. Turnover being £16,849 as declared compared with £30,714".

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[3] We do not know why she was unaware of these from the correspondence. Mrs Shah was and had agreed to correspond only with Mr Akram of the accountants.

[4] She did not explain why she thought that. Neither Mrs Shah nor Mrs English ever explained why the enquiry had been started into such a small business.

She again enclosed her calculations of the trading profit.

29. On 17 October 2016 Mrs English said that she was now in a position to put forward her proposals for settlement. In this she explained her recalculation of sales, being the £30,714 from unexplained bankings and banked car sales to which she added £5,325 which she said was sales not banked and therefore cash. Her workings were enclosed. The profits on this basis were £16,553 leading to increased tax of £5,606.62 as shown on a tax calculation which she had enclosed. She said that penalties under Schedule 24 FA 2007 would be imposed and that she considered the appellant's behaviour deliberate, giving her explanation and that he had not indicated that the sales were understated. She said that unless the accountants contacted her by 31 October 2016 she would assume the revised profits were agreed and she would issue her "decision letter" and her Penalty Explanation letter.

30. On 4 November Mrs English wrote again to the accountants, having spoken to Mr Akram of the accountants on the phone and agreed to explain her recalculation of sales which she did. She extended the deadline for agreement to 26 November.

31. On 13 January 2017 there was a meeting between Mr Akram and Mrs English. The notes prepared by Mrs English on 18 January 2017 said that Mr Akram had requested the meeting to attempt to agree the profits. Mrs English told him she had treated all unidentified deposits into the bank account as from sales of cars. Mr Akram had said that there were explanations for many of the deposits and that Mrs English agreed to look at them again.

32. Mr Akram said he would not be in a position to reply until after 31 January as he was busy with SA returns.

33. On 19 January 2017 Mrs English wrote to the appellant and said that she intended to issue a closure notice for 2013-14 and a penalty assessment for the same year. She had recalculated the revised profits from car sales as £12,549, having accepted some of Mr Akram's explanations for deposits. She attached a schedule which she said outlined her recalculation of sales and showed the additional tax and Class 4 NICs due at £3,468.46.

34. Also[5] on 19 January 2017 Mrs English wrote another letter to the appellant and said that she intended to issue a closure notice for 2013-14 and a penalty assessment for the same year. She had recalculated the revised profits from car sales as £12,549, having accepted some of Mr Akram's explanations for deposits. She attached a schedule which she said outlined her recalculation of sales and showed the additional tax and Class 4 NICs due at £4,651.46.

35. She also sent a penalty explanation letter dated 20 January 2017 explaining that she was giving a reduction of 65% for the quality of the disclosure. The potential lost revenue was £3,468.46 and the penalty £1,638.84.

[5] We are now certain that these letters were issued in the order we have described them, although in the bundle the letter described in §34 was before that in §33. That confused us for some time.

36. On 3 February 2017 she issued a penalty assessment for 2013-14 in the amount of £2,197.81[6].

37. On 6 February 2017 she sent a closure notice under s 28A TMA containing her conclusions from her check which were to recalculate the profits of the trade and her amendments to the tax return which showed tax of £4,651.46 was payable.

The compliance check into the 6 years 2007-08 to 2012-13

38. In a letter of 11 May 2016 Mrs English had said that, under the heading "Companies" in his Statement of Personal Assets and Liabilities, the appellant had referred to his interest in "Auto select Ltd" (*sic*) but that from her review[7] she understood that he was a sole director of Motorplus Notts Ltd from July 2013.

39. She then stated that "this is a full compliance check"[8] and that she was examining all sources of income, and she asked four questions about Motorplus Notts Ltd.

40. The accountants replied saying that the appellant had tried to rent premises at 188 Northgate for Motorplus Notts Ltd but that fell through and the company he had set up never traded, and he enclosed bank statements showing that.

41. Mrs English responded on this matter on 19 July 2016 saying that she understood that the appellant had tried to rent premises at 188 Northgate but that fell through. She had contacted the local council and found the address did not exist so she had asked for additional checks under s 29(3) Data Protection Act[9].

42. That train of enquiry petered out. But the notes of the meeting between Mr Akram and Mrs English on 13 January 2017 mentioned that she had referred to an investigation into Mr Sharif's wife's[10] affairs and to the fact that

> "from examination of her accounts it was noted that whilst Mr Sharif was trading as a takeaway[11] Just Eat, Hungry House and Fillmybelly.com had been deposited into her bank accounts".

43. Mr Akram said the Just Eat etc income would have been included in the accounts of the takeaway, and Mrs English said she would need evidence of that to show the audit trail of the takings declared.

44. On 19 January 2017, in the same letters as referred to at §33 and §34, Mrs English said she intended to issue [punctuation corrected]:

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[6] The discrepancy between this figure and that in §35 is explained later, in §143 and §144.

[7] We do not know of what she had conducted a review.

[8] We do not know what she meant by that term, and how and why it differed from the enquiry started by Mrs Shah. She did not tell the appellant.

[9] Even if Mrs English is not familiar with Nottingham (though she worked there), it would not have taken much (in fact Google Maps) to discover that there is a 188 *North Gate* (sic) NG7 7FT.

[10] The appellant's wife is referred to as both Mrs Sharif and Miss Shaikh. In this decision both are references to the appellant's wife.

[11] This must be a reference to years before 2013-14.

(1) "Revenue Assessments[12] for years 2007/08 to 2012/13"

(2) Penalty Determination year 2007/08

(3) Penalty Assessment 2008/09 to 2013/14

45. The basis for these was this:

> "**Income from the Takeaway**
>
> During the course of my enquiries it has been discovered that you banked business income into two of your wife's bank accounts. The sources are from Hungry House, Just Eat and Fillmybelly Ltd. I have used the known income for the month of April 2011 £1,170.74 x 12 months = annual sales £14,048. I have calculated the additional sales for other years by reference to retail price index to take account of inflation. I have excluded the year of commencement. This results in an increase in profits."

The letter then gave a table showing the results of this exercise, revealing that the profit so calculated increased from £12,397 to £14,453 over the six years.

46. She then said that to protect the interests of HMRC, discovery assessments were being issued under s 29 TMA. The additional tax and Class 4 NICs due was £2,691.40.

47. She also enclosed a Penalty Factsheet about s 95 TMA penalties for the tax year 2007-08. She then showed how she calculated the abatement from the standard penalty (which was 100% of the amount of tax) giving one of 60% and a resulting penalty of £1,449.15.

48. As to Schedule 24 penalties, she also enclosed a factsheet about Managing Serious Defaulters and, she said, a penalty explanation schedule. That was in fact sent under cover of a letter of 20 January and showed that the inaccuracy was said to be:

> "Income from Just Eat, Hungry House and Fillmybelly has been banked into two bank accounts in your wife's name."

49. Under the heading "Behaviour" Mrs English had said that the behaviour was deliberate and concealed. The total reduction given was 75% so the penalty percentage was 62.5%.

50. She added that if the appellant wished to supply any information to explain why the penalties should be reduced or cancelled he would need to let HMRC have the information by 3 February 2017[13].

51. On that date, 3 February 2017, Mrs English wrote[14] to say that penalty assessments would follow under separate cover. The notice of assessment covering six tax years (including 2013-14) was also dated 3 February.

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[12] We assume she meant s 29 TMA "discovery" assessments, which is the usual term.

[13] 16 days seems a very short time given the time it notoriously takes for HMRC's letters to reach taxpayers.

[14] Without waiting for her deadline to pass.

52. On 6 February it seems that a penalty determination under s 95 TMA was issued. The copy in the bundle does not refer to any period in respect of which the penalty was issued.

Matters after the issue of assessments etc

53. On 7 February 2017 the accountants wrote to Mrs English. Mr Akram had looked at the calculations for car sales and referred to points which he felt had not been addressed.

54. Mrs English replied on 10 February saying that the letter had been accepted as an appeal and that he should send further information in an effort to reach agreement.

55. On 13 March 2017 Mrs English wrote to the appellant, copied to the accountants, extending the deadline for the provision of further information to 24 March 2017.

56. On that date Mr Akram sent a letter saying that as he had not had bank statements back from HMRC[15], he could not tell what amount from the sale of the takeaway business for £11,000 might have explained the deposits. As to the takeaway accounts Mr Akram showed that the total deposited into both Mr and Mrs Sharif's accounts in the years 2010-11, 2011-12 and 2012-13 were lower than the declared takings.

57. On 28 March 2017 Mrs English explained that these calculations were not what she was looking for. It was an audit trail to prove that the amounts deposited in Mrs Sharif's bank account were included in the takeaway accounts, and she wanted to see "the daily takings records identifying the adjustment made for the income paid directly into Miss Shaikh account".

58. On 4 May, in the absence of any information, Mrs English reissued her letter of 19 January and sent a number of factsheets[16]. She said that the appellant had until 5 June to ask for the decision to be reviewed or to send his appeal to the Tribunal. If she did not hear from him, the matter would be settled by agreement under s 54 TMA[17] and all tax and penalties released for collection.

59. On 2 August 2017 Mr Akram said in a letter "to whom it may concern" that the appellant would like to make an appeal. His lateness was explained by his anxiety which meant that Mr Akram was not instructed within the allocated timeframe.

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[15] These statements were given by the appellant to Mrs Shah who sent them back, and then Mrs English asked for them back (why they were not copied before Mrs Shah sent them back, which is the inference we draw from Mrs English's action, we do not know.

[16] These were about compliance checks generally which had already been issued – it was surely too late to be of relevance; publishing details of serious defaulters and managing serious defaulters and about the "old" penalty provisions (s 95 TMA) (but no Human Rights factsheet was sent in relation to the takeaway "investigation"). These factsheets were issued then because Mrs English said the appellant would find them "useful". Given that the penalty assessments and determination had already been issued and the matters were under appeal, we find it difficult to see how they could have been useful.

[17] Oh no it wouldn't! Spot the lack of logic here. You cannot settle something by agreement unless both parties agree – silence is NOT consent.

60. It seems that on 13 July 2017 Mr Akram had asked for ADR (Alternative Dispute Resolution), but in a letter of 9 August Steven Leyland of that team said the case could not be admitted because there was no appeal to the Tribunal.

61. On 22 September Mrs English said that she had received no notification from the tribunal that an appeal had been notified.

62. On 16 November 2017 the appeals were notified to the Tribunal. In the notice the appellant (wrongly) said that his appeal to HMRC was late and he was asking for permission to make a late appeal. As to late notification the appellant blamed his anxiety for the problem.

Law

63. The law on enquiries into a return, discovery assessments and penalties for inaccurate returns is lengthy, and likely to be relatively familiar to most readers of this decision, so we have put it in an Appendix. Specific relevant parts of it, and other law, will be reproduced at the relevant place.

Submissions

Car sales

64. In relation to the closure notice Mr Akram said in the grounds of appeal that Mrs English had not taken a tenant deposit of £3,000 and the proceeds of sale of business of £11,000 into account in calculating the profits from omitted sales.

65. HMRC said that they did not understand the appellant to be disputing HMRC's figures and so were not in dispute. They did not mention the penalty.

Takeaway

66. As to the discovery assessments on the profits of the takeaway business, the appellant said that all the money in the appellant's wife's bank accounts had been included in the accounts of the business, and that HMRC had simply taken one month's figures, multiplied them by 12 and extrapolated backwards and forwards by the RPI.

67. HMRC said that a discovery had been made that income had not been assessed, and that the situation was brought about deliberately.

68. That was because the amounts deposited into Mrs Sharif's bank accounts, that is to say the amounts paid by Just Eat etc, were from sources connected with the appellant's takeaway business. No evidence had been provided by the appellant to show that they were included in his accounts.

69. This alleged diversion of takings was deliberate and no evidence has been provided to the contrary.

70. HMRC relied on the presumption of continuity for the calculation of the suppressed income and would show their calculations are reasonable.

Discussion

Late appeal permission application

71. In their statement of case dated 19 February 2018 HMRC said that the appeals were made late to HMRC. In his skeleton however Mr Oborne had changed tack, rightly. He had realised that in fact Mrs English had accepted that the appellant had made appeals well within the 30 day limit. No doubt he was confused originally by the appellant's saying that he had notified HMRC late, something also repeated by the Tribunal.

72. In his skeleton however Mr Oborne argued that the appeals had been notified to the Tribunal late and so permission of the Tribunal was required. He argued this on the basis that the appellant had been offered a review on 4 May 2017 but, having not accepted the offer, had not notified the appeals until November, some 5 months late.

73. We do not agree that the notification was late. The appellant was not offered a review. He was told he could request one, something completely different in income tax appeals, if not for VAT[18]. If a person is not offered a review and does not request one then there is no time limit for notifying an appeal to the tribunal. Hence they were not and could not have been late, and no permission was required.

Was there a justiciable dispute about the conclusions of, and amendments made by, the closure notice?

74. HMRC confidently asserted that there was no dispute about the closure notice and its consequential amendments to the return. We assume Mr Oborne simply wanted us to hold that the amendments made stand good under s 50(6) TMA.

75. This is not the message we take from the grounds of appeal so we need to consider whether in fact the assertion is correct.

76. The conclusion stated in Mrs English's letter of 6 February 2017 which called itself a closure notice was that she had recalculated the profits on the used car sales business and as a result of that conclusion she had amended the return to show that an additional £4,651.46 was due. From other documents, though not from the closure notice itself, we can see that the amount of profit which led to this figure was £12,549, and we have also seen how Mrs English arrived at this figure (see §33).

77. After issue of the closure notice Mr Akram queried the calculations on which the amendments had been based suggesting that Mrs English had not taken several matters into account when calculating omitted sales from deposits in the bank accounts. Mrs English accepted this as an appeal (under s 31(1)(b) TMA) and asked Mr Akram to provide more detail about what he had said should have been taken into account.

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[18] See the decision of the Upper Tribunal in *HMRC v NT-ADA Ltd (formerly NT Jersey Ltd)* [2018] UKUT 59 (TCC) (Judges Roger Berner and Sarah Falk) at [46] and [47].

78. He said that he was unable to do this as HMRC had the bank statements. He also asked for confirmation that certain matters had been taken into account by Mrs English.

79. She then ceased corresponding and "offered" a review or said the appellant should go to the tribunal. The two matters which Mr Akram had raised as affecting the profit calculations were included in the grounds of appeal. It follows that the amendments to the return are still in dispute.

Was there a valid closure notice?

80. Although we have held that there was an appeal against the conclusion stated and the amendments made by the closure notice, we entertain doubts about whether it was in fact a valid closure notice.

81. These doubts stem from our reading of the judgment of the Court of Appeal in *R (on the application of Archer) v HMRC* [2017] EWCA Civ 1962 ("*Archer*"). In that case, giving the only reasoned judgment, Lewison LJ referred at [14] to the closure notice which said:

> "**Information about our check of your Self Assessment tax return for the year ended 5 April 2002**
>
> I have now completed my check of your Self Assessment tax return for the year shown above. This letter is a closure notice issued under Section 28A(1) and (2) of the Taxes Management Act 1970. Thank you for your help during my check.
>
> I have sent a copy of this letter to your tax adviser.
>
> **My decision**
>
> **Relevant Discounted Security Loss Claim**
>
> No relief is due for the loss you claimed to have sustained on a relevant discounted security. [The reasons for my conclusion reflect the decision of the Court of Appeal …]. Viewing these facts realistically, and having regard to the purpose of the relevant legislation …, no loss was made in respect of a relevant discounted security.
>
> **Other issues**
>
> Benefits in kind charges arise from the use of a gardener employed by the company £4,598 and for relocation expenses £7,602.
>
> **I am amending your return to reflect all of the above.**"

82. Lewison LJ then said:

> "**Did the notices comply with section 28A?**
>
> 17. There are two express statutory requirements of a closure notice. The first, under section 28A(1), is that the officer must "state his conclusions". The second, under section 28A(2), is that the closure notice must either (a) state that in the officer's opinion no amendment of the return is required, or (b) make the amendments of the return required to give effect to his conclusions. We are concerned with the requirement in section 28A(2)(b)."

83. We should also refer to a case mentioned by Lewison LJ in *Archer*, *Wong Yau Lam and Sau Yau Lam (t/a Sunlight Takeaway) v HMRC* [2016] UKFTT 0659 (TC) (Judge Sarah Falk (as she then was) and Julian Sims FCA CTA) ("*Sunlight*"). At [30] the First-tier Tribunal said:

> "30. We therefore need to consider the content of the letter dated 18 February 2015 which HMRC rely on as the closure notice. This was a letter from Mr Corbett (whose status as an officer of the Board was not challenged before us) and was addressed to Mr Lam. Since Mr Lam was also the person to whom the original notice of enquiry was given he is the "taxpayer" for these purposes, within s 28B(1). The heading of the letter refers to s 28B(1) and (2) TMA. The key parts of the letter read:
>
> > "I have now completed my check of the Partnership Tax Return for Sunlight Takeaway Meals for year ended 5 April 2007…
> >
> > **My conclusion**
> >
> > The return is incorrect as sales have been omitted.
> >
> > I have amended your partnership profit figure to reflect this. The figure for your partnership profit is as follows:
> >
> > • The original Partnership profit figure was £40,673.00
> >
> > • The Partnership profit figure is now £108,654.00"

84. In this appeal the closure notice said this:

> "**My decision**
>
> I have re-calculated the profits on (*sic*) your used car sales business
>
> I have amended your tax return in line with my decision:
>
> - It previously showed that you were due to pay £977.00 tax
> - It now shows that you were due to pay £5,628.46
> - The difference is £3,651.46"

85. As Lewison LJ points out in *Archer* at [17] there are two requirements in s 28A TMA. The first is that HMRC must set out their conclusions. In the decision of the Administrative Court which the Court of Appeal in *Archer* was considering, Jay J had referred at [100] to the brevity of the conclusions – they were:

> "**My decision**
>
> **Relevant Discounted Security Loss Claim**
>
> No relief is due for the loss you claimed to have sustained on a relevant discounted security. [The reasons for my conclusion reflect the decision of the Court of Appeal …]. Viewing these facts realistically, and having regard to the purpose of the relevant legislation …, no loss was made in respect of a relevant discounted security.
>
> **Other issues**
>
> Benefits in kind charges arise from the use of a gardener employed by the company £4,598 and for relocation expenses £7,602.
>
> I am amending your return to reflect all of the above."

86. Jay J (and Lewison LJ) agreed this passage was sufficient despite its brevity to show the appellant what the conclusion was. But in this case no conclusion at all was stated. What was stated was that Mrs English had recalculated the profits, but that was not a conclusion: it was the consequence of a conclusion. It doesn't even go as far as the very brief conclusion in *Sunlight* that the return was incorrect as sales had been omitted.

87. However although we think that the requirements of s 28A(2)(a) are not met here we do not intend to uphold the appeal on that basis. This is because the appellant did not raise any objection or suggest that he did not know why the profits were recalculated by Mrs English or was otherwise misled: in *Archer* and *Sunlight* there were strenuous objections to the closure notice. It is also because, having just noticed the point, we should, if we are going to find against them on this point, allow HMRC to make submissions on it.

88. We also note that while the closure notice did set out the tax implications of the conclusion (a matter which *Archer* said must be done) it did not set out any other amendments that were to be made to the rest of the return, as distinct from the self-assessment. These should have been to amend Box 9 (turnover), put a figure in Boxes 21 and 31 (net profits), reduce Boxes 22, 32 and 33 (losses and claim to sideways relief) to nil, all in the SA103 "self-employment" pages. These required amendments are reflected in a tax calculation though and we think that s 114 TMA would rescue the situation as it did in *Archer*.

89. We therefore hold that there was a valid closure notice, but that is despite the sloppiness in what HMRC did, an attribute which is by no means confined to this issue.

What was the profit from car sales?

90. Our task on an appeal to us governed by TMA is to decide whether the appellant is overcharged by the self-assessment, and if he is, to reduce it accordingly, and if he is not overcharged to let it stand good (s 50(6) TMA). But we may also decide that the appellant is undercharged in which the self-assessment is to be increased (s 50(7)).

91. By "self-assessment" in these sections there is meant self-assessment as amended by a closure notice (see *D'Arcy v HMRC* [2006] SpC 549 (Special Commissioner Dr John Avery Jones)). That was in relation to s 50(6) TMA. In relation to s 50(7) the implied amendment is a bit more questionable. However it is not impossible, though unlikely, that HMRC, having amended a self-assessment in a closure notice, would seek to increase the amount of tax charged by that amendment.

92. But the Avery Jones modification of the wording of s 50(6) and (7) TMA, coupled with changes made to s 50 in 2009, does suggest to us that the tribunal may take the initiative in increasing the amount of the amended self-assessment. Before changes made by paragraph 31 Schedule 1 to the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56) these subsections required the relevant body of Commissioners to be satisfied from examination of the appellant on oath or affirmation or from other lawful evidence that the appellant was overcharged, but for them to increase an assessment it merely needed to appear to them that there was an undercharge.

93. By contrast with s 50(6) as originally enacted and in force until 2009, there is no limitation on the tribunal such as was there found, and indeed under rule 15(2)(a) of the Rules the Tribunal may admit evidence which is not admissible in a civil trial in the United Kingdom.

94. This all suggests that the Tribunal is entitled to look beyond what it is asked to do by either party, especially where one party is a litigant in person. That is 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* [1936] 1 KB 487 at 493). That public interest has in no way been altered by the introduction of self-assessment."

95. The point that has caused us to consider whether we should increase the amended self-assessment or limit any reduction we might otherwise make is this.

96. The cash basis option box on the return has not been ticked. The entries on the return must therefore be calculated in accordance with generally accepted accounting practice ("GAAP") as required by s 25 Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"). The figures that are missing are those for the cost of the stock of vehicles which were transferred to Autoselect Ltd in November 2013 and for the sale or other transfer of those vehicles. UK GAAP requires those entries to be made.

97. The appellant has said that the transfer was at the figure of cost. If that is the correct figure to use for tax purposes then of course it makes no difference to the appellant's profits as the purchase and sale prices are the same for tax purposes, and that may be why Mr Akram did what he did[19]. But this was a transfer of stock and it is necessary to examine the rules in Chapter 12 Part 2 ITTOIA, of which the relevant ones are:

> "173 Valuation of trading stock on cessation
>
> (1) If a person permanently ceases to carry on a trade, in calculating the profits of the trade—
>
> (a) trading stock belonging to the trade at the time of the cessation must be valued, and
>
> (b) the value must be determined in accordance with sections 175 to 178 (bases of valuation).
>
> …

[19] We note that he did make a tentative enquiry to Mrs Shah about this – see §18 – but got no response.

175 Basis of valuation of trading stock

(1) The value of trading stock belonging to the trade at the time of the cessation is determined as follows.

(2) If the stock is sold to a person who—

(a) carries on, or intends to carry on, a trade … in the United Kingdom, and

(b) is entitled to deduct the cost of the stock as an expense in calculating the profits of that trade for income or corporation tax purposes,

the value is determined in accordance with section 176 (sale to unconnected person), 177 (sale to connected person) or 178 (election by connected persons).

…

177 Sale basis of valuation: sale to connected person

(1) The value of trading stock is determined in accordance with this section if—

(a) it is sold to a person who carries on, or intends to carry on, a trade … in the United Kingdom and is entitled to deduct the cost of the stock as an expense in calculating the profits of that trade for income or corporation tax purposes,

(b) the buyer is connected with the seller, and

(c) no election is made under section 178 (election by connected persons).

(2) The value is taken to be the amount which would have been realised if the sale had been between independent persons dealing at arm's length.

178 Sale basis of valuation: election by connected persons

(1) The value of trading stock is determined in accordance with this section if—

(a) it is sold to a person who carries on, or intends to carry on, a trade … in the United Kingdom and is entitled to deduct the cost of the stock as an expense in calculating the profits of that trade… for income or corporation tax purposes,

(b) the buyer is connected with the seller, and

(c) an election is made under this section.

(2) The parties to the sale may make an election under this section if the value of the stock determined under section 177 exceeds both—

(a) its acquisition value, and

(b) the amount in fact realised on the sale.

(3) If an election is made, the value is taken to be—

(a) its acquisition value, or,

(b) if greater, the amount in fact realised on the sale.

(4) An election under this section must be made by both parties on or before the first anniversary of the normal self-assessment filing date for the tax year in which the cessation occurred.

(5) The "acquisition value" of trading stock means the amount which would have been deductible as representing its acquisition value, in calculating the profits of the trade, on the following assumptions—

(a) that the stock had been sold in the course of the trade, immediately before the cessation, for a price equal to the value of the stock determined under section 177, and

(b) that the period for which those profits were to be calculated began immediately before the sale.

…

181 Meaning of "sale" and related expressions

(1) In sections 175 to 178 (except in s 178(5) references to a sale include a transfer for valuable consideration.

(2) In relation to a transfer which is not a sale—

"amount realised on the sale" means the value of the consideration given for the transfer,

"buyer" means the person to whom the transfer is made, and

"seller" means the person who makes the transfer."

98. As the appellant was connected with Autoselect Ltd[20], s 177 ITTOIA applies unless a s 178 election was made. There is nothing in the papers to suggest such an election was made, and obviously it is highly unlikely that one *was* made given the way the return was compiled. So what should be brought into account is the arm's length value of the stock transferred. There are two possible escapes from this situation. If the transfer was not for valuable consideration it was not a "sale" within the meaning in s 181. We do not have the accounts of Autoselect Ltd, but it follows, it seems to us, that if the stock transferred is properly to be reflected in GAAP accounts of Autoselect Ltd then either the cost of them is recognised in equity or more likely in a director's loan account, there apparently being no cash in the company to pay for the cars. It would seem to follow then that there was valuable consideration and so the amount to be brought into account was the arm's length value of the cars not cost.[21]

99. The second point is the possibility of a late election under s 178 ITTOIA, notwithstanding the time limit in s 178(4) which plainly passed some time ago. Section 43(2) TMA permits a claim to be made where it could not have been allowed but for an assessment and allows the claim to be made up to the end of the tax year following that in which the assessment was made. But no assessment was made in this case.

100. However s 43C TMA provides that:

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[20] He is, or was, the sole shareholder.

[21] If there wasn't a transfer for valuable consideration, the provisions in Chapter 11A of Part 2 ITTOIA, the alleged codification of the rule in *Sharkey v Wernher*, might have applied to require an arm's length value to be used.

"43C Consequential claims etc

(1) Where—

(a) a return is amended under section 28A(2)(b) …, and

(b) the amendment is made for the purpose of making good to the Crown any loss of tax brought about carelessly or deliberately by the taxpayer or a person acting on his behalf,

sections 36(3) and 43(2) apply in relation to the amendment as they apply in relation to any assessment under section 29.

(2) Where—

(a) a return is amended under section 28A(2)(b) …, and

(b) the amendment is not made for the purpose mentioned in subsection (1)(b) above,

sections 43(2), 43A and 43B apply in relation to the amendment as they apply in relation to any assessment under section 29.

(3) References to an assessment in sections 36(3), 43(2), 43A and 43B, as they apply by virtue of subsection (1) or (2) above, shall accordingly be read as references to the amendment of the return.

(4) Where it is necessary to make any adjustment by way of an assessment on any person—

(a) in order to give effect to a consequential claim, or

(b) as a result of allowing a consequential claim,

the assessment is not out of time if it is made within one year of the final determination of the claim.

For this purpose a claim is not taken to be finally determined until it, or the amount to which it relates, can no longer be varied, on appeal or otherwise.

(5) In subsection (4) above "consequential claim" means any claim, supplementary claim, election, application or notice that may be made or given under section 36(3), 43(2), 43A or 43D(6) (as it applies by virtue of subsection (1) or (2) above or otherwise)."

101. In this case the amendment of the return was not made for the purposes in subsection (1) so it is necessary to see if either of s 43(2) or 43A applies (s 43B is a limitation on s 43A).

102. Section 43(2) however does not apply to an election. Section 42(10) which equates an election with a claim applies for the purposes of that section, but not s 43. And in any case even if it did apply by reference to the amendment of the return, that was made in 2016-17, so the time limit for a claim under that subsection was 5 April 2018, so this section could not assist.

103. Section 43A does allows an election to be made but again only within one year of the from the end of the amendment year, so again the limit was 5 April 2018. Section 43B provides that where an election may affect the liability of another person, that person has to give consent and since Autoselect Ltd had been struck off that would not no longer be possible.

104. The conclusion then is that there is no escape from an additional liability equal to the excess of the market value of the cars over their cost.

105. We have decided that in the circumstances of this case, where HMRC for whatever reason did not even notice the issue or include it in their conclusions and did not seek to argue for an undercharge in the self-assessment as amended, we will not make any adjustment either.

106. Thus our concern now is solely with the recalculations made by Mrs English of the profits from the cars sold before the transfer. This recalculation is as follows:

Deposits into bank a/c to 04/11/2013	£24,914
Unidentified banking's add cash banked into wife's account not matched with cash rents[22]	£7,120
Re-calculated sales	£32,034
Less as declared	£16,849
Increase to profits	£15,185
Less loss as accounts	£2,636
Taxable profits	£12,549

107. This needs some explanation. The deposits into bank are not the total amounts credited to the bank account in the period, but those credits which Mrs English did not allocate to another heading: transfer, capital introduced, refunds and standing orders. She accepted that credits under those headings were not sales of cars. It can be seen that of the deposits some £8,065 could not have been declared in the return (£24,914 less £16,849).

108. The amount of £7,120 arises because of an assumption made by Mrs English about an examination, not carried out by her, of *Mrs* Sharif's accounts in connection with *her* failure to disclose cash receipts from rents. That examination had shown cash deposits in excess of the rents so the only possible source for them (asserted Mrs English) was cash from her husband's car sales. She added that she had also determined that £5,325 of car sales had not been banked. She does not actually say that this amount must be included in the £7,120 but that is the clear implication.

109. We take the second matter first. Mrs English is wrong about unbanked sales. There were four sales she identified where she said not all the sale proceeds were banked. In two cases the exact amount of the sale price in the accounts *was* banked: amounts of £900[23] (YL05FND) and £1,440[24] (MT04ULC) are shown clearly in the bank account. Mrs English is though quite right to say that not all the sales figure in the accounts for a Škoda was banked. The bankings figure was £799 but the accounts figure was £800, which Mr Akram said was rounding. Mrs English however said that

[22] This is what it actually said. We attempt a translation at §§107 and 108.

[23] Page 3 Statement 93 Credit 8/7/13.

[24] Page 4 Statement 96 Credit 4/10/13 "K Blades Nissan purchase"

the whole £800 had not been banked. The final case was a sale in the accounts for £4,000 where only £1,400 was banked. Given that Mrs English had accepted that there were part exchange sales and that Mr Akram had correctly accounted for them by returning the gross, in our view it is more probable than not that this was a part exchange. We think this because the £1,400 was paid in otherwise than by a cash deposit at a branch of Lloyds TSB in Sneinton Dale, Nottingham on 30 August 2013[25] which does not otherwise appear on the statements.

110. We therefore find as a fact that what was deposited in Mrs Sharif's account was not cash sales from her husband's business. The assumptions made by Mrs English had no basis in fact.

111. This still leaves the £8,065 in unexplained deposits into the appellant's bank account. It is true that Mrs English having carried out various calculations gave the appellant the opportunity to explain them, and that she accepted that some £5,800 of the total deposits she originally included in her calculations were explained to her satisfaction. Mr Akram nonetheless gave further explanations seeking the removal of £3,250 which he said were rents paid in cash and later banked which Mrs English had not taken into account, although she had accepted that this happened. We find that on the balance of probabilities that that amount of deposits was further rents already declared in the tax return and so must be deducted from the excess.

112. Mr Akram's final throw of the dice was to point out that the appellant had sold his takeaway business for £11,000 and part of that that could explain the balance left of about £4,815. Mrs English asked for documentary evidence, but Mr Akram pointed out in his letter of 24 March 2017 that he had not had the bank statements back from HMRC so could not determine how much was paid in cash. As far as we can tell he was never given them. This point about the £11,000 is one of the grounds of appeal (the other being the matter in §111).

113. Mr Oborne rightly pointed out that in the case of a closure notice the appellant has the burden of proof. The appellant in turn had raised the issue of the sale of the takeaway as a source of deposits into the account which cannot be unexplained car sales. While HMRC rightly required to be satisfied by further evidence of the bona fides of the claim, the appellant had not done so because, he said, he lacked the bank information which HMRC had held on to.

114. What Mrs English apparently did not realise (she did not mention it in her witness statement) is that she had the documentary evidence about the £11,000. In her Schedule 36 notice of 10 May 2016 (see §25) she asked for statements of a specific Lloyds TSB account, which were supplied by Mr Akram in June 2016. He explained that this account was:

> "a feeder account (savings act) where his main account which have already been given to you transfers to this one and back again".

115. The single statement for this account show a receipt paid in of £11,000 on 27 February 2013. Following that there are transfers of £3,000 on 20 March, £3,500 on

[25] Page 2 Statement 95 Credit 30/8/13.

28 March, £2,500 on 15 April and £2,000 on 16 April 2013 to account ****8612 which is the business account for the car sales. Mrs English's schedule of deposit into that account starts on 5 April 2013 so the first two transfers are not included. Both the amount of £2,500 received on 15 April 2013 and that of £2,000 next day were included by her as transfers and not included as unidentified deposits. It follows that the £11,000 from the sale of the business cannot account for unexplained deposits otherwise treated as sales by Mrs English.

116. Going back to the £4,815 balance still unexplained, we have found from our examination of the feeder account statements that had Mr Akram been given them by Mrs English as he had asked, he would have been unable to show the audit trail Mrs English was asking him for, while at the same time she was depriving him of the ability to produce that which she had the means of finding out for herself.

117. We therefore consider that, in the absence of any explanation, £4,815 of the excess bankings not otherwise explained were from the sales of cars. Applying this to Mrs English's figures in §106 the recalculated sales are £21,664 and the increase to profits £4,815, so that after accounting for the loss of £2,636 as declared the profit would become £2,179.

118. But that is not the end of the story[26]. We have noted from individual sales records for the cars disclosed in the accounts that the average mark up on the purchase price was 16% (though there were wide fluctuations either side). But there was a purchase price for every sale in the various schedules produced by HMRC and the appellant. The revised excess of takings over purchases in Mrs English's figures show on its face a more than 100% mark-up, but that is a misleading comparison because it was obvious that Mrs English's figures gave no credit at all for the purchase price of the cars that she said must have been sold outside the books and accounts.

119. Were this a matter of HMRC making a discovery assessment under s 29 TMA in the amount of the additional tax that Mrs English said was due, we would have had no hesitation in saying that her assessment would not have been to the best of her judgment. An officer making a discovery assessment is required to make a fair estimate of the tax loss – as was said in *Johnson v Scott (HM Inspector of Taxes)* 52 TC 383:

> "When, in para 7(b) of the Case Stated, the Commissioners state that (with certain exceptions) the Inspector's figures were 'fair', that is, in my judgment, precisely and exactly what they ought to be - fair. The fact that the onus is on the taxpayer to displace the assessment is not intended to give the Crown carte blanche to make wild or extravagant claims. Where an inference, of whatever nature, falls to be made, one invariably speaks of a 'fair' inference. Where, as is the case in this matter, figures have to be inferred, what has to be made is a 'fair' inference as to what such figures may have been. The figures themselves must be fair."

120. There is in our view no distinction to be drawn between a discovery assessment and an "assessment"[27] under s 28A of the additional amount of tax due following the

[26] Which is why we said "would become" in §117.

[27] Lewison LJ regarded it as a variety of assessment in *Archer* at [26].

conclusion of an enquiry[28]. Fair inferences must always be drawn even if there is no evidence to support them[29].

121. So while we agree that Mrs English has shown that it is more likely than not that the figures in the tax return and the accounts supplied subsequently are incorrect (beyond their overstating sales by £1[30]), we consider that what has been omitted is the profit on sales of £4,815, not just the sales. Given the facts of the appellant's known trading we draw the inference that the omitted sales gave rise to a margin on cost of 20% so that the additional profit is one-sixth of £4,815, ie £802, from which we deduct the overstatement of £1 to arrive at £801. That additional profit is still less than the loss as returned so the effect of our findings is that the loss is reduced to £1,835.

122. Having held this we have to say by how much we should reduce the amended self-assessment in order to fulfil the duty put on us by s 50 TMA. We know from the closure notice of 6 February 2017 that the amended figure of tax in the self-assessment was £5,628.46, but in the correspondence section of the bundle no calculation of how this figure was reached was attached. What appears to be the calculation showing this figure was tucked away in the bundle in the tax return for 2013-14 and shows a revised figure of income tax of £4,014 and Class 4 NICs of £431.46 (both based on a trading profit of £12,549) but in addition there is a figure of £1,183 called "student loan repayments". Mrs English mentioned this in a letter to the accountants of 6 February 2017, the same date as the closure notice, saying about it:

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[28] We note with interest that this Tribunal has come to the same conclusion in *Vadamalay v HMRC* [2019] UKFTT 241 (TC) (Judge Marilyn McKeever and Mrs Caroline de Albuquerque) – see [1] and [51].

[29] The words of that great judge Billings Learned Hand of the US Second Court of Appeals in the case of George M Cohan, the famous Broadway producer etc etc are apposite here:

> "In the production of his plays Cohan was obliged to be free-handed in entertaining actors, employees, and, as he naively adds, dramatic critics. He had also to travel much, at times with his attorney. These expenses amounted to substantial sums, but he kept no account and probably could not have done so. At the trial before the Board he estimated that he had spent eleven thousand dollars in this fashion during the first six months of 1921, twenty-two thousand dollars, between July first, 1921, and June thirtieth, 1922, and as much for his following fiscal year, fifty-five thousand dollars in all. The Board refused to allow him any part of this, on the ground that it was impossible to tell how much he had in fact spent, in the absence of any items or details. The question is how far this refusal is justified, in view of the finding that he had spent much and that the sums were allowable expenses. Absolute certainty in such matters is usually impossible and is not necessary; the Board should make as close an approximation as it can, bearing heavily if it chooses upon the taxpayer whose inexactitude is of his own making. But to allow nothing at all appears to us inconsistent with saying that something was spent. True, we do not know how many trips Cohan made, nor how large his entertainments were; yet there was obviously some basis for computation, if necessary by drawing upon the Board's personal estimates of the minimum of such expenses. The amount may be trivial and unsatisfactory, but there was basis for some allowance, and it was wrong to refuse any, even though it were the traveling expenses of a single trip. It is not fatal that the result will inevitably be speculative; many important decisions must be such. We think that the Board was in error as to this and must reconsider the evidence."

Cohan v. Commissioner of Internal Revenue, 39 F.2d 540, 543-44 (2d Cir. 1930).

[30] See §109.

> "I have included a revised figure of additional duties for the year 2013/14 because student loan figure has changed".

123. The change must of course have been from nil, as this was a totally new item. It puzzled us so we had to research it to find out why it was there in the closure notice tax but had not been explicitly mentioned[31] before 6 February.

124. The answer is that the tax calculation with the closure notice reflected a calculation made by the HMRC computer system when the figures for the amended profit were input into it. Under the Education (Student Loans) (Repayment) Regulations (SI 2009/470) ("SL Regulations") there is a liability to repay a portion of any student loan and the amount of the repayment is 9% of so much of a person's income as exceeds the relevant threshold.

125. Regulations 30 and 31 of the SL Regulations provide:

> "30. For the purposes of establishing the amount of the repayment which a borrower is required to make for a tax year under regulation 29, HMRC may require the borrower—
>
> (a) to include such information as may reasonably be required, in a return required to be made and delivered under section 8 of the 1970 Act; and
>
> (b) to deliver with the return such accounts, statements and documents as may reasonably be required relating to information contained in the return as a result of paragraph (a).
>
> *Returns to include self-assessment*
>
> 31.—(1) Subject to paragraph (2), every return made and delivered by a borrower under section 8 of the 1970 Act must include a self-assessment, namely—
>
> (a) an assessment of the amount of the repayment which, on the basis of the information contained in the return and taking into account any relief or allowance mentioned in regulation 29 the borrower is required to make for the tax year under regulation 29; and
>
> (b) an assessment of the amount payable by the borrower by way of repayment, being the difference between the amount of the repayment which the borrower is assessed to make for the tax year under sub-paragraph (a) and the aggregate amount of any repayments deducted from earnings under Part 4 during that year.
>
> (2) Section 9(2) to (3A) (self-assessment) and section 9A (power to enquire into returns) of the 1970 Act apply to a self-assessment under this regulation as they apply to a self-assessment under section 9(1) of that Act, and any references in the Taxes Acts to those sections is to be construed as a reference to them as extended by this regulation."

126. The appellant's self-assessment of his student loan repayment would have been nil. The section 9A enquiry letter in this case referred to it being a check to ensure that

[31] By implication it was the reason for there being two letters issued on 19 January 2017 – see §33 and §34.

the appellant was paying the right amount of "tax", and that he would be told if there is additional "tax" to pay.

127. It does not seem to us that regulation 31(2) of the SL Regulations has the effect of making that enquiry letter an enquiry into the student loan parts of the return and self-assessment. They are treated a separate matters, and the tailpiece to regulation 31(2) does not turn an income tax s 9A TMA enquiry into one into income tax and student loans. We find that as no separate s 9A enquiry was made into student loan repayment issues, the closure notice showed an incorrect amount of "tax" as becoming due for payment. HMRC's computer was also wrong to amend the return and self-assessment to show an amount of student loan repayment. The remedy for HMRC in this was a discovery assessment of the student loan repayment under s 29 TMA as applied with necessary modifications by regulation 34(1) of the SL Regulations.

128. The SL Regulations contrast with the position for Class 4 NICs, also relevant here. Section 16 Social Security Contributions and Benefits Act 1992 ("SSCBA") provides:

> "16.—(1) All the provisions of the Income Tax Acts, including in particular–
>
> (a) provisions as to assessment, collection, repayment and recovery, and
>
> (b) the provisions of Part VA (payment of tax) and Part X (penalties) of the Taxes Management Act 1970; and
>
> …
>
> shall, with the necessary modifications, apply in relation to Class 4 contributions under this Act … as if those contributions were income tax chargeable under Chapter 2 of Part 2 of the Income Tax (Trading and Other Income) Act 2005 in respect of the profits of a trade, profession or vocation which is not carried on wholly outside the United Kingdom."

129. Thus a s 9A TMA enquiry into the income tax parts, particularly the self-employment parts, *does* encompass an enquiry into Class 4 NICs matters.

130. The upshot of all this is that we need therefore to reduce the income tax in the self-assessment from £4,014 to £1,137.20, that is by £2,876.80.

131. And we need to reduce the Class 4 NICs from £431.46 to nil, as the revised trading profit is below the Class 4 lower earnings threshold of £7,755.

132. We also reduce the purported amended self-assessment of a student loan repayment amount from £1,183 to nil, on the basis that it was invalid. But we would have made that reduction anyway in the light of our findings about the profit, as we have no information from HMRC to show how it was calculated and so we do not know what the relevant income threshold was in 2013-14 for the appellant's type of plan.

133. The need to show the reduction in the amount of tax in our decision is confirmed by the decision in *R (oao Archer) v HMRC* [2017] EWCA Civ 1962 per Lewison LJ at [22].

The Schedule 24 FA 2007 penalty for 2013-14

134. The penalty explanation schedule ("PES") issued by Mrs English on 19 January 2017 in relation to the car sales trade said that the appellant's behaviour in omitting income from car sales was deliberate. This was she said because:

> "You traded in the sale of used cars for a short period. From a detailed analysis of the deposits into the bank account after deduction all known sources of deposits and cash rents the deposits exceeded recorded sales. It is apparent that have also used 2 bank accounts held in your wife's name to bank cash income. You must have known at the time you submitted the Tax Return that it was inaccurate because you had sole responsibility for the running of the business and must have known how many cars were sold."

135. What is said here about the appellant's behaviour would if correct justify a penalty of the basis that the inaccuracy in the return as to the amount of the loss or profit was careless. But for the penalty to be deliberate HMRC has to show that the behaviour was tantamount to fraud, ie that the appellant knew that what he did was to make an inaccurate return and that he did so dishonestly. That requires some compelling evidence not mere assertion that "he must have known". In any case a major factor in leading HMRC to call the behaviour deliberate was the use of the appellant's wife's bank accounts to hide cash sales and we have found this was not the case.

136. We therefore hold that any penalty must be on the basis of a careless inaccuracy. We agree that the disclosure was prompted and so the penalty range is 15% to 30%.

137. Mrs English gave a reduction of 65%. We are not bound to agree with this reduction or how she calculated it – and we do not agree.

138. For telling HMRC about the inaccuracy in the return Mrs English gave 10% of a maximum allowed by HMRC of 30%. We are not sure why she gave even that given that at no stage has the appellant accepted that there was an inaccuracy. But somewhat more strange was the 20% she gave in relation to the omissions from the takeaway profits where again any inaccuracy was denied. We cannot then see why 20% was not given in relation to the car sales, and so we give 20%.

139. For "helping" HMRC to quantify the inaccuracy, she gave the full 40% that HMRC allot to this aspect of disclosure. We do not dissent.

140. For "giving" access to records, she gave 15% out of a possible 30%. She acknowledged that business records and bank statements were provided but she cut the amount in half because formal powers were required to obtain some additional information. We do not understand this. The power in Schedule 36 FA 2008 was first exercised by Mrs Shah three days *before* the deadline for supply of a voluminous amount of information in the initial enquiry letter. It cannot be said that formal powers were "required", or that the use of them at that early stage of an enquiry.

141. Mrs English took over the compliance check in February 2016, and sought a meeting. On being told that the appellant suffers from anxiety attacks and did not want a meeting, on 9 March Mrs English requested a large amount of material and information including all private bank statements, the source of funding of the vehicles

and statements of assets and liabilities, and the source of bank deposits in his business account, for supply by 18 April 2016. On the same day she sent the appellant a letter about his Human Rights, including the right to silence.

142. On 19 April 2016 the appellant's accountant replied and sent "50 plus pages" according to the note made by HMRC for them to be scanned. On 10 June 2016 Mrs English issued a Schedule 36 notice for what she said was the missing information. This was the full address of the premises from which the appellant operated his car sales business, the name and address of the landlord and bank statements for one account.

143. Of these all were in fact supplied by the accountants on 10 June 2016. There was absolutely no need for Mrs English to issue this notice. And even if there was a need, it was, in the context of the whole enquiry, a ludicrous overreaction to reduce the abatement of the penalty for giving help by 50%.

144. We give the full 30%.

145. That makes the reduction 90% of the range and so a penalty of 16.5% (the 15% minimum plus 10% of the difference between that and the maximum).

146. The 16.5% is applied to the "potential lost revenue", which in this case is given by paragraphs 6 (normal case) and 7 (losses) Schedule 24 FA 2007 as the "additional amount due or payable in respect of tax[32] as a result of correcting the inaccuracy". In her PES Mrs English gave this figure of PLR as £3,468.86. This is the figure in Mrs English's first letter of 19 January 2017 as the amount of additional "duties" (said to be tax and Class 4 NICs) for 2013-14. It is the amount on the actual closure notice after deducting the £1,183 for the student loan repayment.

147. But there was a second letter of 19 January 2017 which was identical to the first in all respects except that the figure of "duties" was £4,651.46 – the actual total of the closure notice including student loan repayments. No explanation was given for the increase to the PLR as between the letters. And when the Schedule 24 assessment was issued it showed the penalty as £2,197.81 which is 47.25% of £4,651.46, the figure of "tax" in the second letter. This PLR includes the student loan repayment amount, and that is appropriate because of regulations 13(3)(b) and 40(4) SL Regulations:

> "**13**—(3) For tax years—
>
> …
>
> (b) commencing on or after 6 April 2008, where the date on which the return is due to be filed[33] is on or after 6 April 2009, Schedule 24 to the Finance Act 2007 (penalties for errors) applies in relation to the assessment of penalties and appeals against the assessment of

[32] It seems that "tax" includes Class 4 NICs by virtue of the generality of s 16(1) Social Security Contributions and Benefits Act 1992, as it applies all the provisions of the Income Tax Acts as if Class 4 NICs were income tax, and Schedule 24 is arguably part of the Income Tax Acts as "relating to income tax" (Schedule 1 Interpretation Act 1978) though the relationship is a fairly tenuous one.

[33] There is nothing in SI 2009/470 to indicate what "file" means. It is not a verb which appears in TMA, where the term is "make and deliver" in relation to a return. Nor does it appear in Schedule 24 FA 2007.

penalties in connection with Part 3 as it applies to penalties in connection with income tax.

40—(4) For tax years commencing on or after 6 April 2008, where the date on which the return is due to be filed is on or after 6 April 2009, Schedule 24 to the Finance Act 2007 (penalties for errors) applies—

(a) in relation to anything done for the purposes of or in connection with the ascertainment of liability of a borrower to make a repayment under this Part as it applies for the purposes of or in connection with the ascertainment of liability to income tax; and

(b) in the case of returns, statements, declarations, accounts, information or documents for the purposes of repayments under this Part as it applies for the purposes of income tax."

148. But as a result of our decision the PLR becomes £160.20, and so the penalty is £26.43.

149. In the PES Mrs English had stated that the amount of the penalty which she would suspend was £0.00. This was a correct decision as suspension is only possible where the penalty is for careless conduct, not deliberate conduct. We have held that the conduct was careless, so does that mean we can consider suspending the penalty?

150. Paragraph 15(3) Schedule 24 FA 2007 allows an appeal against a decision of HMRC not to suspend a penalty. But paragraph 17(3) provides that on an appeal under paragraph 15(3) the tribunal may order HMRC to suspend the penalty only if it thinks that HMRC's decision not to suspend was flawed. The difficulty with this formulation is that in a situation where HMRC say the conduct was deliberate, the obvious interpretation is that the decision not to suspend was not flawed because HMRC were obliged not to suspend it.

151. It would however be unfair if HMRC could suspend a penalty where they agree the conduct is careless, but the Tribunal could not do so where they find that the conduct was in fact careless, not deliberate as HMRC had argued. In our view a "flawed decision" here must encompass a case where HMRC have made an error as to the nature of the conduct. But that is not all that is required: the decision has to be flawed when considered in the light of the principles applicable in proceedings for judicial review (see paragraph 17(6)). Here our view is that there was no evidence, or no sufficient evidence, available to the decision-maker on which, properly directing herself as to the law, she could reasonably have formed the view that the conduct was deliberate, and so her decision was flawed in the judicial review sense.

152. We can therefore decide whether to order the suspension of the penalty by HMRC. We have decided not to so order, but simply because of the amount involved, £26.43. The cost to HMRC of arranging for the suspension, setting conditions and then monitoring them and the cost to the appellant of complying with any conditions set would be out of all proportion to the value of the penalty.

Tax years 2007-08 to 2012-13: were there valid discovery assessments?

153. In her witness statement Mrs English described her discovery thus:

> "During the course of my enquiries it has been discovered that business income from the 3 intermediaries Hungry House, Just Eat and Fillmybelly Ltd was banked into a bank account held in the name of Miss Fatema Shaikh the wife of Mr Sharif. Mr Sharif ran the takeaway business from 9 October 2006 to 11 February 2013. In the absence of any satisfactory evidence that the income was included in the daily gross takings figure I have come to the conclusion this was omitted business income of the takeaway business run by Mr Sharif."

154. We noted the use of the agentless passive voice in the first sentence here. Mrs English was not enquiring into Miss Shaikh's returns, nor was she enquiring into the appellant's income tax returns for years before 2013-14. The first mention of this "discovery" was in Mrs English's note of the meeting on 13 January 2017 where she said that "from examination of her bank accounts it was noted that whilst Mr Sharif was trading as a takeaway Just Eat, Hungry House and Fillmybelly.com had been deposited into her bank accounts".

155. On 11 May 2016 she had said that an enquiry into Miss Shaikh's returns was being carried out by a colleague, Mrs Richardson. In a letter of 19 January 2017 she also used the passive voice. She also said that to protect the interests of HMRC discovery assessments were being issued – passive voice. Nowhere does she claim to have herself made a discovery.

156. But assuming that she it was who was claiming to have made a discovery, we think she did in fact make one. She may not have herself obtained the bank statements of Miss Shaikh herself, but she did examine them and find the entries which it was reasonable for her to suspect related to Mr Sharif's business.

157. But can it be said that she honestly and reasonably made the assessments she did in the amounts she did in order to recover the tax loss she had discovered? We do not think it can be said that she did. We say this for four main reasons.

158. The first is her decision to calculate the tax loss for six tax years on the basis of one month's figures extrapolated to six years, firstly by multiplying one month's figures by twelve and then applying the RPI upwards and downwards to the month's figures. In doing this she was allegedly applying the "presumption of continuity".

159. The second reason is not just that she had taken one month's figures as representative of six years, but that her one month's figures were in fact nothing of the sort.

160. Mrs English's witness statement says this under the heading "Income from the takeaway":

> "I have used the known income from these sources for the month of April 2011 for Fillmybelly & Hungry House and April 2013 for Just Eat £1,170.74 x 12 months to arrive at the annual sales £14,048. I have calculated the additional sales for other years by taking the additions for the year 2011/12 and relating these back and forwards by reference to retail price index to take account of inflation. I have excluded the year of commencement being 2006/07. …"

161. Under the heading "Conclusion" she said:

> "In March 2017 the missing bank statements for the wife's account were received and an analysis prepared of the deposits into her account from intermediaries for the tax years 2007/08 to 2012/13. I compared the actual figures from this source with the estimates included in my settlement proposals. I have increased sales by £79,634 and the total banking's (sic) are £62,766. In 2012/13 the declared sales are £50,278 and the combined deposits into Mr & Mrs Sharif's accounts are £51,535 being greater than that total of declared sales. This casts serious doubts over the agent's explanations.
>
> The agent maintained that these sales had been declared I requested the sales record and an explanation of how the additional deposits into the wife's account had been recorded. This was not received and no adjustments have been made to the original figures as shown in this witness statements."

162. Mr Akram raised the question of the use of one month's figures in the grounds of appeal. He also raised with Mrs English in cross-examination the use of Just Eat figures from a different month to that for the Hungry House and Fillmybelly figures. We asked Mrs English to take us to her workings.

163. These showed that in the calendar month of April 2011 there were receipts of £705.79 from Hungry House and Fillmybelly, but none from Just Eat (and this was apparent from the bank statements).

164. They also showed that in the calendar month of April 2013 there were receipts from Just Eat of £464.95, but none from Hungry House and Fillmybelly (and this was also apparent from the bank statements).

165. We also noted that in 2011 there were Just Eat figures in only February and March 2012 of £69 and £103 respectively.

166. We asked Mrs English why she had taken Just Eat figures from another year. She had no explanation other than that there were no Just Eat figures in April 2011.

167. We consider that what she did was not just unreasonable but was a wholly wrong thing to do. She was in fact taking two months' figures and multiplying them by 12 to get an annualised figure.

168. They did not get any anyway near justifying the assessments she caused to be made. It is of no consequence that in some years the actual figures in Miss Shaikh's account were higher than even the figures Mrs English used.

169. The third reason is that a presumption of continuity exercise is a relevant thing to do when HMRC are unable to get the information they need to calculate a more accurate figure[34]. Yet Mrs English must have had the bank statements in front of her for at least 2011-12 onwards and probably we think from mid-2007. We say this even though there

[34] For the reasons for this statement see *Choudhry (as representative partner of Continental Food Store) & Ors v HMRC* [2019] UKFTT 38 (TC) (Judge Richard Thomas and Tony Hennessy FCA) at [210] – [232].

is a reference to "missing statements" being received in Mrs English's witness statements (see §161). This seems to be a reference to a statement made by Mrs English in a letter of 13 March 2017 to the appellant in which she said:

> "During the telephone conversation Mr Akram confirmed the bank statements for your wife's account have been received but he needs more time to go through them[.] …"

170. It seems to be too much of a coincidence for the reference to "missing statements" in the witness statement to be a reference to Mrs English herself receiving them to allow her to carry out an analysis – especially as Mr Akram later provided his analysis and referred to being unable to obtain statements from HMRC as well as the bank, but only for some early 2007 statements.

171. We conclude therefore that Mrs English must have had the bank statements for all the years to which she applied the "presumption of continuity" exercise even if some were missing for the first part of 2007-08. We also assume that the reason why she did not make assessments for 2006-07, the first year of the takeaway, was because she didn't have any bank statements for that year.

172. The fourth reason for finding that what she did was not a reasonable way of proceeding, not to best judgment and based on an unreasonable opinion, was the undue haste in which things were done.

173. She said she had to protect the interests of HMRC[35] and so was making the assessments for six years. What interests needed protecting at that time? In January 2017 she was in time to make an assessment for 2012-13, indeed she had two more months at least in which to make the assessments. But she went much farther than assessing 2012-13. She assessed the five years before then. Yet all the years before 2012-13 were already out of date for assessing, so how was she protecting the interests of HMRC in relation to those years? The HMRC practice of making "protective" assessments refers to the making of an assessment shortly *before* the expiry of the normal time limit (see Enquiry Manual EM 3341) and protects the interests of HMRC in the sense that it may not have been possible at the stage of an enquiry reached, and it may not become possible, to establish careless or deliberate conduct so as to justify an assessment by reference to the tests in s 36 TMA.

174. The more questionable aspect of "undue haste" is this. On 13 January at their meeting Mrs English had just told Mr Akram of her concern "recently transpired" about Miss Shaikh's accounts. Mr Akram said the credits were in the accounts and Ms English asked him for an audit trail. Mr Akram said he would not be in a position to reply until after 31 January because of the SA filing season.

175. Despite this, on 19 January, 6 days later and well before 31 January, the date Mr Akram had told her he would be very busy filing SA returns, Mrs English said she was going to raise assessments and gave her figures. She did not refer to the audit trail she had requested. She accused the appellant of dishonesty over the matters in question in a PES also issued on 19 January.

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[35] See §46.

176. In his letter of February 2017 in response Mr Akram gave an explanation for the use of the appellant's wife account to receive payments from the takeaway intermediaries and added:

> "… you have not even given the client a chance to prove whether he has declared these or not in any of his years.
>
> So Mr Sharif would like to compile the paperwork for this for each year to show he has shown them in his accounts and that he is given a chance not just a wild assessment without any evidence whether it has been included in his accounts."

177. We agree with Mr Akram's characterisation of what Mrs English did. We do not agree that Mr Oborne succeeded in his mission to show that "the calculation of the suppressed income is reasonable".

178. Finally we note that Mr Oborne did recognise in his skeleton that which Mrs English didn't, that to succeed in showing that the discovery assessments for years before 2012-13 HMRC, and Mrs English in particular, would have to justify them by reference to the appellant's conduct in omitting the income being at least careless (2010-11 and 2011-12) or deliberate, ie fraudulent, for years before 2010-11. She made no pretence, contrary to HMRC's instructions[36], of saying why she thought that careless or deliberate conduct was involved.

179. We have no hesitation in holding that the discovery assessments failed to meet the requirements of s 29(1).

180. Had we not done so, Mr Oborne would have had to rely on s 29(4) (careless or deliberate conduct) for years before 2012-13 and s 29(5) (insufficient disclosure of a tax loss) for 2012-13. We are also unhesitating in saying that had it been necessary to consider these under subsection (4), we would have found that HMRC had not shown that the conduct of Mr Sharif in relation to the takeaway business was careless or deliberate. It is not sufficient for them to say that that the appellant had not shown the audit trail: it is for HMRC to show that the amounts in the accounts of Mr Sharif's wife were not included in the accounts (*Burgess & anor v HMRC* [2015] UKUT 578) and that was because of his carelessness or fraud[37]. They have come nowhere near to doing so.

Penalties under Schedule 24 FA 2007

181. These obviously fall. There is no potential lost revenue as result of our decision on the assessments. We do not think that there is any point in trying to decide whether, had we upheld the amendment for 2013-14, we would have been convinced by HMRC's arguments that the behaviour of the appellant was deliberate. So it is irrelevant that at the hearing Mr Akram and Mr Sharif expanded on the explanation they had given to Mrs English and which in the interests of justice we allowed them to do. But we would have accepted their explanation had it been necessary.

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[36] EM 3347.

[37] In fact Mr Oborne forswore using s 29(5) for 2012-13 and carelessness for the two years before that.

182. As to the discovery assessments, we say the same, but we do make a point about one matter.

183. In the PES for the amendments HMRC had said that the behaviour was deliberate but not concealed. In that for the discovery assessments they say it was "deliberate and concealed" something which leads to higher penalties. The reason given for the "concealed" description is that the appellant used his wife's bank account to conceal the business income. Yet that is also what he was accused of in relation to the car sales where the behaviour was not "concealed". We would have held that the inaccuracies in the return were not concealed.

184. We also say that to allege in the PES that the behaviour of the appellant was not only deliberate but concealed, within a few days of finding out that the payments were in his wife's account but without waiting to hear any explanation was outrageous. Mrs English's superiors must be aware that to make such an accusation is to allege serious fraud yet they allowed her to do so without any evidence at all.

Penalty under s 95 TMA

185. To establish this HMRC needed to demonstrate that the appellant's conduct was fraudulent. Mrs English seemed not to know this because she told the appellant that she considered his behaviour deliberate, and did not seem to know at the hearing that this amounted to an accusation of fraud. HMRC had not therefore made out any grounds to support the penalty determination.

Decisions

186. Under s 50(6) TMA 1970 we reduce the amount of income tax in the appellant's self-assessment by £2,876.80 for the tax year 2013-14. This is as a consequence of our finding that the loss the appellant claimed to set sideways under s 64 Income Tax Act 2007 is reduced from £2,636 to £1,835, rather than as HMRC had said, eliminated and a profit of £12,549 added to the return.

187. Under s 50(6) TMA 1970 (as applied by paragraph 8 Schedule 2 SSCBA) we reduce the amount of Class 4 NICs in the appellant's self-assessment by £431.46 for the tax year 2013-14.

188. Under s 50(6) TMA 1970 (as applied by regulation 34 the Education (Student Loans) (Repayment) Regulations 2009) we reduce the amount of the student loan repayment in the appellant's self-assessment by £1,183 for the tax year 2013-14.

189. Under s 50(6) TMA 1970 (including as applied paragraph 8 Schedule 2 SSCBA) we reduce the assessments to tax and Class 4 NICs for the tax years 2007-08 to 2012-13 inclusive as follows:

Tax year	Income Tax reduction (£)	Class 4 NICs reduction (£)
2007-08	2,631.10	991.76
2008-09	2,450.40	966.40

2009-10	2,581.20	961.60
2010-11	2,715.60	1,085.60
2011-12	2,809.60	1,088.20
2012-13	2,890.60	1,090.80

190. Under s 100B(2)(b)(i) TMA (including as applied by s 16(1)(b) SSCBA) we set aside the determination of penalties under s 95 TMA for the tax year 2007-08

191. Under paragraph 17(1) Schedule 24 FA 2007 (including as applied by s 16(1) SSCBA 1992) we cancel the decisions of HMRC to make assessments of penalties under that Schedule for the tax years 2008-09 to 2012-13 inclusive.

192. Under paragraph 17(2) Schedule 24 FA 2007 (including as applied by s 16(1) SSCBA 1992) we substitute a decision that the assessment of the penalty is in the amount of £26.43 for HMRC's decision to make an assessment of a penalty under that Schedule for the tax year 2013-14.

Appeal rights

193. 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: 26 APRIL 2019

APPENDIX

Enquiries into a return

"9A Notice of enquiry

(1) An officer of the Board may enquire into a return under section 8 … of this Act if he gives notice of his intention to do so ("notice of enquiry")—

(a) to the person whose return it is ("the taxpayer"),

(b) within the time allowed.

(2) The time allowed is—

(a) if the return was delivered on or before the filing date, up to the end of the period of twelve months after the day on which the return was delivered;

…

(3) A return which has been the subject of one notice of enquiry may not be the subject of another, except one given in consequence of an amendment (or another amendment) of the return under section 9ZA of this Act.

(4) An enquiry extends to—

(a) anything contained in the return, or required to be contained in the return, including any claim or election included in the return,

…

…

(6) In this section "the filing date" means, in relation to a return, the last day for delivering it in accordance with section 8 …

…

28A Completion of enquiry into personal or trustee return

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

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

(2) A closure notice must either—

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

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

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

…"

"Discovery" assessments

"*29 Assessment where loss of tax discovered*

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—

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

…

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

…

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

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

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

unless one of the two conditions mentioned below is fulfilled.

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

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

…

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) In subsection (6) above—

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes—

(i) a reference to any return of his under that section for either of the two immediately preceding chargeable periods; and

…

(b) any reference in paragraphs (b) to (d) to the taxpayer includes a reference to a person acting on his behalf.

…

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

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

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

…

34 Ordinary time limit of 4 years

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

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

36 Loss of tax brought about carelessly or deliberately etc

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

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

(a) brought about deliberately by the person,

…

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

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

…

(3) If the person on whom the assessment is made so requires, in determining the amount of the tax to be charged for any chargeable period in any assessment made in a case mentioned in subsection (1) or (1A) above, effect shall be given to any relief or allowance to which he would have been entitled for that chargeable period on a claim or application made within the time allowed by the Taxes Acts.

(3A) In subsection (3) above, "claim or application" does not include an election under … any of sections 47 to 49 of ITA 2007 (tax reductions for married couples and civil partners: elections to transfer relief)

…"

Penalties under s 95 TMA

(1) Where a person fraudulently or negligently—

(a) delivers any incorrect return of a kind mentioned in section 8 … of this Act …, or

…

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

(2) The difference is that between—

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

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

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

100 Determination of penalties by officer of Board

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

…

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

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

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

100A Provisions supplementary to section 100

…

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

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

100B Appeals against penalty determinations

(1) An appeal may be brought against the determination of a penalty under section 100 above and, subject to …the following provisions of this section, the provisions of this Act relating to appeals shall have effect in relation to an appeal against such a determination as they have effect in relation to an appeal against an assessment to tax except that references to the tribunal shall be taken to be references to the First-tier Tribunal.

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

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

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

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

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

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

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

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

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

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

103 Time limits for penalties

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

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

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

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"PART 1 LIABILITY FOR PENALTY

ERROR IN TAXPAYER'S DOCUMENT

1—(1) A penalty is payable by a person (P) where—

(a) P gives HMRC a document of a kind listed in the Table below, and

(b) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—

(a) an understatement of a liability to tax,

(b) a false or inflated statement of a loss …,

…

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

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

Tax	Document
Income tax …	Return under section 8 of TMA 1970 (personal return).
Income tax …	Return, statement or declaration in connection with a claim for an allowance, deduction or relief.
Income tax …	Accounts in connection with ascertaining liability to tax.

DEGREES OF CULPABILITY

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

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

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

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

(2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate on P's part when the document was given, is to be treated as careless if P—

(a) discovered the inaccuracy at some later time, and

(b) did not take reasonable steps to inform HMRC.

PART 2 AMOUNT OF PENALTY

STANDARD AMOUNT

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

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

(a) for careless action, 30% of the potential lost revenue,

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

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

4D—Paragraphs 5 to 8 define "potential lost revenue".

POTENTIAL LOST REVENUE: NORMAL RULE

5—(1) "The potential lost revenue" in respect of an inaccuracy in a document … is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy ...

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

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

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

(3) In sub-paragraph (1) "tax" includes national insurance contributions.

POTENTIAL LOST REVENUE: LOSSES

7—(1) Where an inaccuracy has the result that a loss is wrongly recorded for purposes of direct tax and the loss has been wholly used to reduce

the amount due or payable in respect of tax, the potential lost revenue is calculated in accordance with paragraph 5.

…

(3) Sub-paragraphs (1) and (2) apply both—

(a) to a case where no loss would have been recorded but for the inaccuracy, and

(b) to a case where a loss of a different amount would have been recorded (but in that case sub-paragraphs (1) and (2) apply only to the difference between the amount recorded and the true amount).

REDUCTIONS FOR DISCLOSURE

9—(A1) Paragraph 10 provides for reductions in penalties under paragraph[ ] 1 … where a person discloses an inaccuracy...

(1) A person discloses an inaccuracy … by—

(a) telling HMRC about it,

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

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

(2) Disclosure—

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

(b) otherwise, is "prompted".

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

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

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

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

(b) in the case of an unprompted disclosure, in column 3 of the Table.

Standard %	Minimum % for prompted disclosure	Minimum % for unprompted disclosure
30%	15%	0%
70%	35%	20%

SPECIAL REDUCTION

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

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

(a) ability to pay, or

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

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

(a) staying a penalty, and

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

PART 3 PROCEDURE

ASSESSMENT

13—(1) Where a person becomes liable for a penalty under paragraph 1 … HMRC shall—

(a) assess the penalty,

(b) notify the person, and

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

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

(2) An assessment—

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

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

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

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

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

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

…

(5) For the purpose of sub-paragraph[ ] (3) … a reference to an appeal period is a reference to the period during which—

(a) an appeal could be brought, or

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

…

SUSPENSION

14—(1) HMRC may suspend all or part of a penalty for a careless inaccuracy under paragraph 1 by notice in writing to P.

(2) A notice must specify—

(a) what part of the penalty is to be suspended,

(b) a period of suspension not exceeding two years, and

(c) conditions of suspension to be complied with by P.

(3) HMRC may suspend all or part of a penalty only if compliance with a condition of suspension would help P to avoid becoming liable to further penalties under paragraph 1 for careless inaccuracy.

(4) A condition of suspension may specify—

(a) action to be taken, and

(b) a period within which it must be taken.

(5) On the expiry of the period of suspension—

(a) if P satisfies HMRC that the conditions of suspension have been complied with, the suspended penalty or part is cancelled, and

(b) otherwise, the suspended penalty or part becomes payable.

(6) If, during the period of suspension of all or part of a penalty under paragraph 1, P becomes liable for another penalty under that paragraph, the suspended penalty or part becomes payable.

APPEAL

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

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

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

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

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

(2) Sub-paragraph (1) does not apply—

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

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

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

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

(a) affirm HMRC's decision, or

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

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

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

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

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

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

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

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

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

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

(a) may affirm the conditions of suspension, or

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

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

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

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

PART 5 GENERAL

INTERPRETATION

22—Paragraphs 23 to 27 apply for the construction of this Schedule.

23—HMRC means Her Majesty's Revenue and Customs.

23A—"Tax", without more, includes duty.

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

…

28—

In this Schedule—

…

(c) "direct tax" means—

(i) income tax,

(ii) capital gains tax, …

(iii) corporation tax, and

(iv) petroleum revenue tax,

…

(e) a reference to a loss includes a reference to a charge, expense, deficit and any other amount which may be available for, or relied on to claim, a deduction or relief,

…

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

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

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

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

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