TC07272

Appeal number: TC/2017/06884

INCOME TAX – discovery assessments – Taxes Management Act 1970 ss. 9A, 12B, 28A, 29, 34, 36 – onus of proof – whether discovery 'stale' – whether the condition under s 29(4) met for the ordinary time limit to be extended – income returned on an accruals basis – quantum of insufficiency varied for a timing difference – Finance Act 2007 Schedule 24 – penalty to be varied in line with quantum of insufficiency – amounts of assessment and penalty otherwise confirmed in full – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GEORGIOS KANTOPOULOS (No. 2) **Appellant**

- and -

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

TRIBUNAL: JUDGE HEIDI POON
IAN MALCOLM

Sitting in public at the Tribunal Centre, Eagle Building, Glasgow on 16 July 2018

Colin Edward, Advocate, instructed by BCAS Accountants Ltd, for the Appellant

Matthew Mason, Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Mr Georgios Kantopoulos ('GK' or the appellant) appeals against the following decisions of the respondents ('HMRC') in relation to the tax year ended 5 April 2011:

(1) A discovery assessment under s 29 of the Taxes Management Act 1970 ('TMA') to income tax for the sum of £3,318.95 issued on 29 March 2017;

(2) A penalty notice pursuant to Schedule 24 to the Finance Act 2007 ('Sch 24') issued on 4 August 2017 in the sum of £995.68.

2. The issues for determination as put forward by the parties are as follows:

(1) Whether the requisite conditions under s 29 TMA are met for the discovery assessment to be valid;

(2) Whether the quantum of the s 29 assessment is to best judgment;

(3) Whether the Sch 24 penalty is to be confirmed consequent to inaccuracy in the appellant's Self-Assessment Tax Return ('SATR') for 2010-11.

The legislative framework

3. The statutory provisions relevant to this appeal from TMA are:

(1) Section 9A gives HMRC the power to enquire into a taxpayer's return.

(2) Section 12B requires a taxpayer to keep and preserve all such records as may be required for the purpose of enabling him to deliver a correct and complete return for the year or period of assessment.

(3) Section 28A provides for the completion of an enquiry into a personal return by way of a closure notice.

(4) Section 29 provides for assessment to be raised where a loss of tax is discovered and where the requisite conditions have been met.

(5)Section 34 provides for the ordinary time limit for a s 29 assessment to be raised, which is within 4 years after the end of the tax year to which it relates.

(6)Section 36 provides for different time limits for a s 29 assessment to be raised where the loss of tax has been brought about carelessly or deliberately. The time limit is 6 years after the end of the year of assessment to which it relates if the loss of tax has been brought about *carelessly*, and is extended to 20 years in a case where the loss of tax has been brought about *deliberately*.

(7) Section 50 provides for the Tribunal's appellate jurisdiction, whereby on an appeal to the Tribunal, if the Tribunal decides that the appellant is overcharged by an assessment, *the assessment is to be reduced accordingly, but otherwise the assessment or statement shall stand good* as provided by s 50(6). Conversely, s 50(7) provides that if the appellant is undercharged by an assessment, *the assessment or amounts shall be increased accordingly.*

4. The penalty regime from 6 April 2008 onwards is under Sch 24 to FA 2007 for any inaccuracy in a document furnished to HMRC. The error penalty is calculated as a percentage of the potential lost revenue ('PLR'). The penalty percentage is determined according to the category of inaccuracy. An inaccuracy is 'careless' *if the inaccuracy is due to failure by [the taxpayer] to take reasonable care* (para 3(1) of Sch 24). The penalty percentage is reducible subject to: (a) whether the disclosure is

'prompted' or 'unprompted', and (b) the 'quality' of disclosure in respect of 'timing, nature and extent'.

Evidence

5. For the respondents, Mr Mason led the evidence of Officer Marnie Ewart, who was the officer in charge of the enquiry into the appellant's tax affairs and had raised the discovery assessment and the penalty notice for 2010-11. Her evidence, in the main, explained the basis for raising a protective assessment for 2010-11, and how she came to quantify it, and her reasoning in imposing a 30% penalty. We find Officer Ewart to be a credible witness, even though we do not agree in full the figures used in the assessment.

6. The appellant did not attend the hearing. Mr Edward was his legal representative in these proceedings, while Mr Cairney of BCAS Accountants Ltd was called as a witness. Mr Cairney provided a witness statement, and he acts as the appellant's accountant.

7. Mr Cairney put forward his views forcibly, and his evidence at times strayed beyond matters of fact, to include his arguments, opinions, and understandings in relation to the substantive issues under appeal. In these proceedings, Mr Cairney was a witness to give evidence as to matters of fact, and the weight the Tribunal can accord to his evidence is restricted to factual issues. For reasons stated below, we find Mr Cairney to be an unreliable witness in relation to certain facts in issue. These are factual matters concerning accounting practices that fall within the domain of Mr Cairney's professional expertise, and of which Mr Cairney could be expected to assist the Tribunal by providing reliable factual answers. However, we have found the contrary; the unreliability of Mr Cairney's evidence in these factual respects has significantly undermined his credibility to us as a witness in general.

8. Excepting the schedule F2/27(a), the primary documentary evidence in this appeal had originated from a third party, Giffnock Orthodontics Centre Limited ('Giffnock' or 'GO'), of which the appellant was an associate at the relevant times.

Procedural history

9. The present appeal is, in many ways, a sequel to a former appeal brought by the appellant against a discovery assessment and a penalty notice in relation to the tax year 2011-12. The discovery assessment for 2011-12 was in the sum of £15,699 (issued on 3 November 2015), and the related Sch 24 penalty was for £4,709 (issued on 28 October 2015). There were also penalties raised for the non-compliance with an Information Notice served under Schedule 36 to FA 2008 ('Sch 36').

10. The appeal against the 2011-12 assessment and penalty was heard on 20 March 2017 by the First-tier Tribunal (Judge Gemmell and Mr Sheppard; henceforth the 'FTT'). The appellant did not attend; no witness was called. In those proceedings, Mr Cairney acted as the representative for the appellant. (In contrast, Mr Cairney was called as a witness in the proceedings in front of this Tribunal.)

11. On 29 March 2017, a protective assessment and notice of penalty were issued in relation to 2010-11. On 6 April 2017, Mr Cairney appealed to HMRC on the appellant's behalf against the protective assessment and the penalty notice.

12. *Georgios Kantopoulos v HMRC* [2017] UKFTT 0437 (TC) ('the FTT Decision') was released on 10 May 2017: the appeal against the discovery assessment was allowed; the penalty under Sch 24 was vacated, but the Sch 36 penalties were upheld. Certain findings of fact made by the FTT in relation to the tax year 2011-12 are directly relevant to the present appeal, and are related as part of the factual background to this appeal. An application to appeal to the Upper Tribunal was lodged on 5 June 2017 by Mr Cairney for the appellant. HMRC did not appeal.

13. Subsequent to the FTT Decision, HMRC issued the following notices of assessment and penalty, all on the same date of 4 August 2017:

(1) In relation to 2011-12, the discovery assessment was amended to £11,919.55, and the related Sch 24 penalty was revised to £3,575.86;

(2) In relation to 2010-11, the review conclusion decision upheld the protective assessment of £3,318.95 and the penalty notice of £995.68.

14. On 1 September 2017, the appellant lodged a Notice of Appeal, stating the total amount of tax and penalty under appeal to be £19,810, which comprised the year of assessment and penalty for 2010-11, as well as the amended discovery assessment and penalty for 2011-12.

15. By letter dated 3 November 2017, HMRC notified the appellant their decision as regards the amended 2011-12 assessment and penalty notice as follows:

> 'Following the Tribunal decision, the assessment was amended to bring the figures in line with the basis discussed during the hearing. However, the Tribunal decision has been further reviewed by HMRC's Appeals Unit, who have taken the decision to cancel the 2011-12 assessment as they are of the opinion that it was the Tribunal's intention to cancel the assessment altogether and not to revise the figures. Consequently, the penalty charged on this assessment has also been cancelled.'

16. The appeal against the amended 2011-12 assessment and penalty is therefore no longer a matter in front of this Tribunal. As matters stand, this Tribunal's decision is concerned with the earlier tax year 2010-11 only. However, due to the 'accruals basis' of accounting, it is necessary for us to make certain findings of fact in relation to 2011-12 to determine the issues for 2010-11.

Appellant's application for adjournment

17. Officer Ewart's oral evidence made reference to two documents which were not included in the hearing bundle, but had been admitted at the previous hearing in March 2017. These two schedules have been admitted for this Tribunal's hearing under Folio 2 as 27(a) and 27(b):

(1) The first document (27(a)) is Mr Carney's schedule produced at the 2017 hearing as evidence of the accruals basis he had used in returning the appellant's income for self-assessment. The column headings include: income, dentist fee, motor costs, hotel and flight, professional subscriptions, telephone, depreciation, general, but only the first column for 'income' shows entries, listing monthly income for the 12 months from April 2010 to March 2011, to give the annual total of £93,114, which was used as the 'turnover' figure in the SATR for 2010-11.

(2)The second document (27(b)) is a 'Commission statement' dated 29 April 2011, and was also produced at the March 2017 hearing. This statement has been specifically referred to in some detail in the FTT Decision at [30], and its substance is detailed at §23 of this decision.

18. Mr Edward requested an adjournment, since these documents were 'new' to him, not having represented the appellant at the March 2017 hearing. The respondents opposed the application.

19. For the following reasons, the Tribunal concluded that the admission of the two documents would not cause prejudice to the appellant:

(1) The documents disclose no new facts hitherto unknown to Mr Cairney.

(2) The spreadsheet was prepared by Mr Cairney, who would have also seen the Commission statement at the previous hearing, and would be able to speak to both documents if necessary as a witness.

(3) Both documents are corroborative rather than pivotal evidence. A piece of evidence is 'pivotal' if the Tribunal would not have reached the same conclusion without the document in question. By corroborative, we mean that the documents give further weight to the conclusion that we would have reached in the absence of the documents in question.

(4) The weight we accord to the documents is that they testify how the accruals basis was applied to the appellant's income profile by Mr Cairney in the year 2010-11.

(5) The documents in question therefore support the evidence given by Mr Cairney to a certain extent, especially in relation to the income treatment that straddled between the two years 2010-11 and 2011-12.

20. In view of the above, and having regard to the respondents' objection, and the overriding objective, which includes 'avoiding delay, so far as compatible with the proper consideration of the issues, we refused the application to adjourn.

The Facts

The arrangement between Giffnock and the appellant

21. The appellant is an orthodontist, providing his service to dentists who refer patients for orthodontic treatments. The treatment of his referral patients was mostly funded by the National Health Service ('NHS'), though a small number of patients are 'private' as being self-funding. According to Mr Cairney, the appellant being an orthodontist, commands 'higher income than a dentist'. At all relevant times, the appellant worked as a self-employed and practised as an associate at Giffnock.

22. As related earlier, excepting the schedule F2/27(a), all primary documentary evidence made available to the Tribunal has originated from Giffnock. No evidence was led on the arrangement between Giffnock and the appellant. However, given the multiple confusion as regards the timing of payments made by Giffnock to the appellant that seemed to have dominated the evidence at this and the previous hearings, we consider it necessary to set out in detail the content of the document included as F2/27(b), and of the inferences we draw therefrom.

23. The Commission statement from Giffnock of 29 April 2011 states as follows; the paragraph numbering, and the bold typeface are added for ease of reference:

> '*April 2011 Commission statement for Dr G Kantopoulos (List No: 55277) at Giffnock Orthodontic Centre:*
>
> [1] April 2011 NHS Schedule (paid March 2011 – copy enclosed): **Gross [NHS] fees: £19,230.21**
>
> [2] Private fees (till 28 April 2011): [names of 8 patients followed by amounts ranging from £48 to £100]. **Total private fees £646.80**
>
> [3] **Total NHS & Private fees: £19,877.01 = Gross fees**
>
> [4] Less: Armac lab (April 2011: £203.85 – copy enclosed). Gross fees Less Armac lab = £19,673.16
>
> [5] **45% Self Employed commission** of £19,673.16 = £8,852.92
>
> [6] £8,852.92 less 4.5% (ie £3,98.38 in house lab-inclusive) = £8,454.54
>
> [7] £8,454.54 less own NHS Superannuation Contributions (£633.15) = £7,821.39
>
> [8] £7,821.9 less £291.37 (adjustment from March 2011 commission statement – last month) =
>
> [9] Total: £7,530.02 (sent to your chosen bank account)'

24. The arrangement between the appellant and Giffnock would seem to be representative of a dental practice whereby:

> (1) Giffnock was the contract provider of the services to the end users (patients referred by dentists), and GK was contracted with Giffnock to work as an associate on patients assigned to GK, in return for a 'commission' of the gross fees earned by Giffnock for those patients treated by GK.
>
> (2) Giffnock was responsible for all the overheads in relation to premises, technical equipment, in-house laboratory facilities, clinical support staff, all administrative and accounting functionalities, and so on.
>
> (3) Giffnock invoiced the NHS or individual patients for the fees for the treatments carried out under its auspices. All fees were remitted to Giffnock, and Giffnock settles account with its associates by drawing up a commission statement monthly to calculate the 'commission' due to an associate.

25. The Commission statement F2/27(b) is an example of the in-house document drawn up by Giffnock to settle accounts with GK, and related to April 2011:

> (a) Para [1] of the statement pertains to the NHS fees earned by GO for patients treated by GK – *April 2011 NHS Schedule (paid March 2011 – copy enclosed).* The wording '*paid March 2011*' would suggest that GO paid GK in April 2011, what GO had been paid by the NHS in March 2011. In other words, GO paid GK a month after NHS had paid GO for the fees earned by GK.
>
> (b)Para [2] relates to fees earned by GO from the private patients treated by GK in April 2011 *(until 28.04.2011).* Instead of a separate schedule (as with the NHS patients) the small number of private patients were listed by names with their respective fees. In terms of

timing, the fees from private patients were paid at the end of the month they were earned, without the one-month delay as with the NHS fees.

(c) Para [3] is the total of the gross fees GO had received from the NHS (in March 2011) and from private patients (in April 2011) relating to the treatments carried out by GK.

(d) Para [4] is the fee GO paid to an *external* laboratory Armac; '*copy enclosed*' would appear to refer to the invoice from Armac in relation to GK's patients. GO had defrayed the Armac lab fees in full and therefore deducted the amount from the gross fees. '*Gross fees less Armac lab*' was £19,673.16 before calculating the commission due.

(e) Para [5] is the calculation of the commission at the rate of 45%, which was applied to £19,673.16 to arrive at £8,852.92.

(f) Para [6] is a charge for '*in-house lab-inclusive*' fee, which was set at 4.5% of the commission earned by GK. The charge for £398.38 is 4.5% of £8,852.92 (the overall commission at [5]). This is distinguished from external lab fee.

(g) Para [7] relates to GK's NHS Superannuation Contributions in the sum of £633.15, which GO would pay to the pension scheme directly on GK's behalf.

(h) Para [8] concerns the deduction of £291.37, which was described as an adjustment from the March 2011 commission statement.

(i) Para [9] is to state the net 'commission', and was the amount remitted to GK's bank account in April 2011, being £7,530.02.

26. The transaction of £7,530.02 appears On Giffnock's bank statement as follows:

(a) Date: *3 May 2011*

(b) Type: *DPC* which stands for 'Direct Banking by PC'

(c) Description: *CALL REF No. 0163, DR G KANTOPOULOS, FP 28/04/11 10,* [18-digit transaction reference]

The FTT proceedings on 20 March 2017

A fact recorded regarding Mr Cairney's intention to propose settlement

27. It is relevant to our consideration that the FTT recorded as a finding of fact the following, wherein 'ME' refers to Officer Ewart, and 'BC' to Brian Cairney:

> '[9] ME called BC on 30 October 2014 when BC advised that he was due to meet with his client the following Saturday and had asked him to bring bank statements etc. to the meeting. ME called BC again on 24 November 2014, as she had heard nothing from him, when *BC advised that he had found an amount missing from sales and suggested sending in his proposals for settlement*. ME said she wanted to see the documents requested in her earlier letter.' (emphasis added)

The accruals basis for returning income

28. The FTT Decision made a finding of fact that the appellant's accounts were prepared on an accruals basis. This was a fact that only transpired in the course of the

FTT hearing in March 2017, and was related in the Decision in the following terms at [24] wherein 'ME' refers to Officer Ewart, and 'BC' to Brian Cairney:

> 'It became apparent whilst reviewing the bundles before the Tribunal and during the cross-examination of ME that BC had prepared GK's accounts and therefore his tax return using the accounting accruals basis whereas HMRC had considered that a cash basis was being used. Further confusion had arisen because according to his tax return and intimations to HMRC, GK ceased to be self-employed on 31 August 2011.'

29. After ceasing to work as a self-employed, the appellant set up his own company, known as Kantop Limited ('Kantop'). The appellant was to be employed by Kantop, and through Kantop the appellant would continue to practise under the same arrangement with Giffnock. 'Further confusion' as referred to by Judge Gemmell at [24] would seem to arise in the appellant's transition from self-employment to becoming an employee of Kantop:

> '[25] … Kantop, however, did not commence trading until 26 September 2011 leaving a period from 1 September 2011 to 25 September 2011 which HMRC considered to be unaccounted for. It was explained in evidence, that HMRC had assumed that the income during this period was attributable to GK's self-employed income whereas BC, GK's adviser had added this income to the company's accounts commencing on 26 September 2011.'

The documents in front of the FTT

30. Judge Gemmell referred to 'this difference of approach became known to the Tribunal' (at [26]) and of considering the available documents 'in light of this divergence of accounting treatment', which were:

> '[27] The bulk of the documents before the Tribunal were identified as those which HMRC had obtained from GO and which had led HMRC into carrying out their enquiries into GK's tax return. These included bank statements of GO and commission statements although these were merely printed and dated documents without showing any identification for GO.'

31. From the FTT Decision, a Sch 36 notice was served on the appellant 17 October 2014 (at [8]), but that on 9 December 2014, 'BC stated that his client had lost his records' (at [10]). Of the documents in front of the FTT in the March 2017 hearing, it was related as follows:

> '[66] Accordingly, when no documents were received HMRC, based on the information they had received from GK's 'employer', GO, issued a Discovery notice under Section 29 of the TMA.
>
> [67] When no further documents were received, which subsequently GK stated had been lost, and in relation to bank statements which were simply not produced, *until two bank statements were produced in the papers for the hearing*, HMRC raised a formal request for information under Schedule 36 of the Finance Act 2008.' (emphasis added)

32. From the above paragraphs, it would seem that GK produced no documents at all until at the hearing – *two bank statements were produced*. Consequently, the

documents HMRC relied on to raise in the discovery assessment for 2011-12 were the commission statements and bank statements, both originating with Giffnock:

> '[68] As no new information had been received by HMRC, they were working with two sources of information, namely the third party information being the commission statements and the bank statements produced by GO of their payments to GK and GK's own tax return.

The Commission statements of June 2011 and April 2011

33. Apart from the April 2011 commission statement (which this Tribunal also have sight of), the FTT was also provided with the commission statement of June 2011 (which this Tribunal have no sight of). Of the June 2011 statement, the FTT found:

> '[28] A commission statement for GO dated 30 June 2011, … showed gross fees of £24,607.19 to which were added private fees of £211 making total fees of £24,818.19. From this had been deducted "Armac lab fees of £218.80 which … was not an expense of GK but instead GO, and a 45% payment of £11,069.72 was then shown as payable. From this amount was deducted an in-house lab-inclusive cost, "own, NHS superannuation contributions" and an amount designated as "Plus CPD". The resulting total of £9,875.85 was then sent to GK's bank account, according to GO's statement.

34. From the June 2011 commission statement, the FTT observed what was referred to later in the Decision as 'ambiguity' in the following terms:

> '[29] It was unclear, from this 30 June 2011 statement, why some expenses were in effect deducted at a rate of 45%, and at all if they were not GK's expenses, but some were deducted at a rate of 100%.'

35. Another Commission statement referred to in the FTT Decision is the same one produced to this Tribunal and included as F2/27 (b), and of which the FTT observed:

> '[30] A similar statement dated 29 April 2011 headed "April 2011 commission statement for GK" referred to an amount for April 2011 but "paid in March 2011". A small number of bank statements were produced by GK for the hearing[1] and, in the statement covering the period 8 April to 7 May 2011, the payment referred to as paid in March had been, after all the deductions, sent to GK's bank account on 29 April 2011. This therefore was the first payment received into GK's bank account as submitted to the Tribunal, for the tax year 2011-2012.'

36. The differing bases used by the parties to determine whether a sum fell within one tax year or the other were remarked upon by the FTT as follows:

> '[31] The assessment accompanying HMRC's letter of 2 October 2015 stated that the first payment made on 1 April 2011 was £9,000 but this appeared on GK's bank statement as having been paid on 31 March 2011 and, therefore, was in the tax year 2010-2011. It was not, therefore, income in the year of assessment under appeal.'

[1] These bank statements would appear to be those referred to at [67], being the *two bank statements produced in the papers for the hearing*. These two bank statements are not included in our hearing bundle. The only bank statements included under Filo 5/15-31in our bundle are placed after the FTT Decision, and relate to Giffnock's account, and not the appellant's.

37. As this Tribunal is not given the sight of those two bank statements produced by the appellant to the FTT at the March 2017 hearing, we ascertain what was meant by the FTT by corroborating the entry as shown on Giffnock's bank statements made available to us. The payment of £9,000 appears on Giffnock's statement with the following details:

(a) Date: *1 April 2011*
(b) Type: *DPC*
(c) Description: *CALL REF No. 0158, DR G KANTOPOULOS,* ***FP 31/03/11*** *10 [18-digit transaction reference]*

38. The FTT stated that the payment that was recorded on Giffnock's statement by the date of 1 April 2011 had been cleared into GK's bank account on 31 March 2011, which was the date of the Faster Payment ('FP') reference showing on Giffnock's bank statement. We infer therefore that the date of the FP payment in the description was the date funds cleared into GK's bank account, which may not always coincide with the date the transaction was listed on Giffnock's bank statement. Where the dates differ, then the date the funds cleared into GK's account would be the *earlier* date by reference to the date the Faster Payment was instructed by Giffnock. On account of this timing difference by *one day*, the FTT concluded that HMRC were incorrect to have included the £9,000 in 2011-12, and that the £9,000 should be in 2010-11.

The submissions by Mr Cairney at the March 2017 hearing

39. In summary, Mr Cairney submitted that the basis of the 2011-12 discovery assessment was flawed, as related at [33]– [35] of the FTT Decision (the reference of GK in these paragraphs is read as submission by Mr Cairney, given that the appellant was not present at the hearing):

> '.... GK says that … HMRC have made a disingenuous claim of discovery which has no merit or substance.
>
> GK says that … for a Schedule 36 notice to be valid it must meet the condition that an assessment to tax is or has become insufficient. GK says that [Officer Ewart] refused at the time to provide any information why this was the case … GK says that in calculating their assessment HMRC was using another taxpayer's expenses.
>
> GK says that as both the income calculations are flawed and the income expenses are flawed, then not only is the assessment flawed but so also is the penalty. …'

The conclusions drawn by the FTT

40. In relation to the discovery assessment raised for 2011-12, HMRC said that they had 'reason to suspect' that there was an insufficiency of tax based on information received from GO (at [38]- [39]). On the issue whether HMRC had met the threshold tests for the discovery assessment to be raised, the FTT found 'the conditions were satisfied for the reasons set out by HMRC' and continued as follows:

> '[74] The Tribunal had difficulty in ascertaining how there *could be certainty over what expenses belonged to whom given the lack of documentation available*. It was indeed that ambiguity that the Tribunal considered justified HMRC coming to the conclusion that there may be income which should have been assessed to income tax

> which had not been assessed and entitled them to question whether any relief which had been given had become excessive.' (emphasis added)

41. In relation to the quantum of the assessment, the FTT considered that GK had brought sufficient evidence to prove that amounts were not wholly accurate and had been based on incorrect assumptions (at [75]). These assumptions were described as:

> '[32] It was explained to the Tribunal that HMRC did not have GK's bank statements when making the assessment, because these had not been produced by GK, but only the records of GO and therefore, made assumptions which the Tribunal considered whilst justified at the time, were incorrect.'

42. Having concluded that the discovery assessment for 2011-12 did not 'stand good' because of the incorrect assumptions made by HMRC, the FTT stated the implications that its findings may have for the earlier year as follows:

> '[76] … GK had produced sufficient evidence to set aside HMRC's figures *albeit that this may have consequences for the income and expenses returned in the tax year 2010-2011* and Kantop's income and expenditure as returned in 2011-12 or 2012-13. GK had proven to the satisfaction of the Tribunal that he operated on an accruals basis and consequently that some of the income belonged to an earlier tax period and that some belonged to a different taxpayer.' (emphasis added)

Complaints lodged by Mr Cairney

43. On behalf of the appellant, Mr Cairney made several complaints against HMRC, which were included in the fact-findings of the FTT Decision. The complaints were coterminous with the enquiry into the 2011-12 SATR, and were in relation to the information requests made by HMRC. The FTT concluded:

> '[78] The Tribunal considered the submission forcibly put by GK [ie as represented by Mr Cairney] that the actions of HMRC amounted to a "fishing expedition" but in the circumstances and with the limited third-party information that they had, the Tribunal considered that HMRC had behaved in an appropriate and predictable manner.'

44. After the FTT hearing in March 2017, Mr Cairney lodged a complaint against the FTT's conduct of the hearing. Included in the bundle is a four-page long letter relating the substance of the complaints to Judge Bishopp, the then President of the First-tier Tribunal (Tax Chamber), which was originally submitted on 4 April 2017, and updated on 19 May 2017 to accompany the application for permission to appeal to the Upper Tribunal, which was dated 5 June 2017 and was against the FTT Decision released on 10 May 2017.

45. In evidence, Mr Cairney had referred to both sets of complaints, against HMRC and against the FTT. We have considered the substance of these complaints, neither of which is of relevance to the substantive issues in the present appeal, and we make no reference thereto.

Officer Ewart's evidence

Basis for raising a protective assessment

46. Officer Ewart explained that the protective assessment for 2010-11 was raised as a result of the evidence adduced at the FTT hearing in March 2017. In the main, she acted on the FTT's findings that:

> (1) The appellant's accounts were prepared on an accruals basis and not on a receipts basis.
>
> (2) The FTT had found that income receipts that HMRC had previously considered to relate to 2011-12 in fact related to 2010-11.

47. With the aid of the schedules admitted as F2/27, 27(a) and 27(b), Officer Ewart explained how she arrived at the quantum of the assessment by carrying out the following reconciliation.

> (1)The self-employed income declared on the appellant's SATR was taken to be commission received from Giffnock, and was compared with the actual amounts paid by Giffnock to GK as commission in the relevant period.
>
> (2) The difference between the declared income in the SATR and the actual total paid by Giffnock as appeared on the Giffnock's bank statements represented additional receipts to be included in 2010-11.
>
> (3) The turnover declared in 2010-11 SATR was £93,114.12, which agreed with the total on Mr Cairney's schedule (F2/27(a)). The excess of bank payments by Giffnock over the declared income was £8,094.96 and formed the basis of the protective assessment for 2010-11.

Documentary evidence relied on by HMRC

48. Included in our hearing bundle are two sets of Giffnock's bank statements. The first set covers the period from 1 April 2010 to 31 March 2011 (Folio 5/pages 15-28). The second set is *headed* with period date 1 April 2011 to 31 March 2012, but is incomplete, and ends with the last entry being on 1 June 2011 (Folio 5/pages 29-31). These bank statements are heavily redacted, with all entries blackened out except for those in relation to payments made by Giffnock to 'Dr G Kantopoulos' as stated on the bank statements.

49. Apart from these bank statements, Officer Ewart referred to three other documents, paginated as F2/27, 27(a) and 27(b):

> (1)F2/27 was a spreadsheet prepared by Officer Ewart, with three sets of figures being tabulated, to list the payments made by Giffnock to GK according to Giffnock's bank statements in the following periods:
>
> (a) 1 April 2010 to 31 March 2011, with a total of £101,208.96;
>
> (b) 1 April 2011 to 30 September 2011 (to cessation of GK's self-employment), showing a total of £62,075.70;
>
> (c) 1 October 2011 to 30 September 2012, payments to Kantop showing a total of £144,548.33.
>
> (2) F2/27(a) was produced by Mr Cairney at the previous tribunal hearing. As related at §17(1), the schedule lists the monthly income for the 12 months

from April 2010 to March 2011, to arrive at the annual total of £93,114 returned for 2010-11.

(3) F2/27(b) is the Commission statement prepared by Giffnock dated 29 April 2011, as set out in full at §23 above.

First period from 1 April 2010 to 31 March 2011

50. For ease of reference and comparison, we have combined the relevant figures from the parties' source documents F2/27 and F2/27(a) into the table as follows:

Month/ year	**Per Agent F2/27(a)**	**Transaction date**	**Per HMRC for s 29**	**FP date**	**Difference**	**Para Ref Decision**
Apr 10		30/04/10	7,942.83	29/04/10	-7,942.83	§102(1)
	1,673	01/06/10	6,203.66	31/05/10	- 4,530.66	§102(3)
May 10	4,157	30/06/10	5,156.58	29/06/10	-999.00	§102(3)
June 10	5,000	26/07/10	5,000.00	same	matched	
		06/08/10	150.08	same	-150.08	§102(4)
July 10	8,008	31/08/10	10,007.67	No detail	-2,000.00	§102(3)
Aug 10	6,882	30/09/10	6,882.15	same	matched	
Sept 10	9,950	28/10/10	9,949.56	27/10/10	matched	
Oct 10	9,999	30/11/10	9,999.99	same	matched	
		01/12/10	2,308.55	same	*3 payments*	§102(5)
		22/12/10	9,999.99	same	*matched to*	
Nov 10	15,528	24/12/10	3,220.49	same	*=15,529.03*	§102(5)
Dec 10	9,728	01/02/11	9,727.73	31/01/11	matched	
Jan 11	5,660	01/03/11	5,659.68	28/02/11	matched	
Feb 11	9,000	01/04/11	9,000.00	31/03/11	matched	§§36 - 38
Mar 11	7,530	03/05/11		**28/04/11**	+ 7,530.00	§102(2)
Total	**£93,115**		**£101,208.96**			§§104&105

51. The difference between the two annual totals: £93,114 declared in the appellant's SATR, and £101,208.96 per Officer Ewart's set of figures on F2/27, is the sum of £8,094.96, and the quantum of the insufficiency for 2010-11. (The listed monthly figures per Mr Cariney's schedule should have totalled to £93,115, and the difference of £1 is attributed to rounding.) The tax effect of the insufficiency in the income declared is calculated to be 3,318.95 for 2010-11, and is the sum of the protective assessment under appeal.

52. For completeness, we note that the date of the FP payment for the £7,530 was in fact 28 April 2011, which was a day earlier than the date of the commission statement (see §23) in relation to this payment. The date of the transaction is shown on the bank statement as 3 May 2011; the delay of 4 days after the FP date was likely to be due to the Royal Wedding on 29 April 2011, and the May Bank Holiday on 2 May 2011.

Second period from 1 April 2011 to September 2011

53. It is a point extensively contended by Mr Cairney that HMRC's figures had failed to take account of the accruals basis whereby income was returned in the SATR. For this reason, the payments in the transitional months from 2010-11 to 2011-12 form the focus in this appeal.

54. In the following table, we list the figures as evidenced in Giffnock's bank statements from April 2011 to June 2011 against the second set of figures on F2/27 prepared by Officer Ewart, which she noted as figures taken from *both* the bank statements and commission statements.

Month	**GO's Bank Statement**	**Transaction date**	**HMRC's F2/27**	**FP date**	**Returnable by Accruals**	**Para Ref in Decision**
April 11	7,530.52	03/05/11	7,530.02	28/04/11		§106(1)
May 11	9,999.99	31/05/11	0	same	+9,999.99	§106(2)-(5)
	9,999.99	31/05/11	0	same	+9,999.99	§106(2)-(5)
By BAC	9,999.99	01/06/11	9,999.99	same	9,999.99	§106(2)
	Only shown	08/06/11	790.89		790.89	
	Statement up	16/06/11	46.80		46.80	
	to 01/06/11	20/06/11	6,000.00		6,000.00	§§63(7), 122-3
June 11		30/06/11	9,875.85		9,875.85	
July 11		29/07/11	10,000.00		10,000.00	
		03/08/11	547.02		547.02	
Aug 11		01/09/11	8,500.00		8,500.00	§110(5)-(7)
		08/09/11	401.97		401.97	§110(5)-(7)
Sept 11	**Per SATR**	30/09/11	9,187.10		9,187.10	§110(5)-(7)
Total	**£26,368.00**		**£62,879.64**		**£75,349.60**	§106(7) -(9)

55. Of the comparative figures between Officer Ewart's (column 2) and the Tribunal's (column 3), we make the following observations:

(1) HMRC's total is stated at £62,075.70 on F2/27, which is out by around £800; the correct total of HMRC's figures should have been £62,879.64.

(2) HMRC's total, even after being corrected to £62,879.64, is out by some £12,500, when compared with the Tribunal's figures collated by checking against Giffnock's bank statements (from 1 April 2011 to 1 June 2011).

(3)The total income returnable for 2011-12 by the appellant before ceasing to be self-employed should have been £75,350 (rounding up for ease of reference), and is addressed in fuller detail in the discussion.

Third period from 1 October 2011 to 30 September 2012

56. The third set of figures on Officer Ewart's schedule F2/27 covers the accounting period from 1 October 2011 to 30 September 2012, and lists the payments made by Giffnock to Kantop Ltd. This set of figures are noted as taken from Giffnock's *commission statements*, (which implies no bank statements from Giffnock were available for the said period). The payment dates noted against each sum on the

schedule are therefore taken as those shown on the commission statements without reference to the dates on Giffnock's bank statements.

(1) The first payment is dated 28 October 2011 for the sum of £10,000;

(2) The last payment included in the column is dated 27 September 2012 for the sum of £13,000.

(3) There are 21 payments listed in HMRC's workings, all in the thousands, with the exception of two payments: (a) £25 dated 2 May 2012, and (b) £710.29 dated 8 May 2012.

(4) The total of these 21 payments is £144,548.33.

(5) The total turnover per Kantop's SATR is £144,523.30, which is £25.33 lower than HMRC's total.

The SA return for 2010-11

57. Included in the bundle is the appellant's submitted SATR for the year 2010-11. The entries for self-assessment purposes are contained in the Self-Employment ('SE') pages; other pages are blank or contain only standing data for record purposes. The figures for self-assessment on the SE pages are the following:

(1) Turnover: **£93,114**

(2) Car, van and travel expenses: £9,791

(3) Rent, rates, power and insurance costs: £6,600

(4) Repairs and renewals of property and equipment: £996

(5) Telephone, fax, stationery and other office costs: £1,020

(6) Advertising and business entertainment: £93

(7) Bank credit card and other financial charges: £45

(8) Accountancy, legal and other professional costs: £9,058

(9) Depreciation and loss/profit on sale of assets: £3,375

(10) Other business expenses: £353

(11) Total expenses: **£31,331**

(12) 'Net profit': £61,783, (turnover £93,114 less expenses of £31,331)

58. Annual Investment allowances of £3,600 were claimed against net profit, resulting in £58,183 as the taxable profit, on which the total tax liabilities were stated at £16,399, inclusive of Class IV NIC of £3,195.88.

59. The white box space has the following entry:

> 'Payments on account – explain why you are making a claim: ceased sole trader business. Incorporated 2011/2012.'

Schedule 24 penalty for inaccuracy in return

60. In relation to the penalty assessment, Officer Ewart's explanation in classifying the behaviour as 'careless' is as follows:

(1) Mr Kantopoulos works as an associate orthodontist and receives regular payments which are made directly into his bank account, so arriving at his sales figure should be straightforward.

(2) HMRC '*have not seen any records for 2011-12*', but '*have seen the agents workings for the previous and later year*' (emphasis added).

(3) From these workings it can be seen that there are figures which do not tie in with amounts paid by Giffnock.

(4) Failing any explanation from Mr Kantopoulos, it would appear that the records he supplied his agent with to prepare his accounts were inadequate.

(5) As adequate records have not been maintained and used in the preparation of the return, HMRC consider Mr Kantopoulos' actions to have been 'careless'.

61. For disclosure, it was considered to have been 'prompted' and no reduction for quality of disclosure has been given because in relation of:

(1) Telling: There has been no disclosure or explanation as to why the figures were wrong.

(2) Helping: Mr Kantopoulos has not co-operated in any way with the check.

(3) Giving: Records were requested; however, these had been lost. Duplicate bank statements were requested, but these were never received.

62. The penalty range for careless behaviour and prompted disclosure is from 15% to 30%. Since no reduction is given, the overall penalty percentage is set at 30%.

Mr Cairney's evidence

63. In his witness statement, Mr Cairney stated that he is a qualified senior accountant at BCAS Accountants Ltd, and has been in practice for 26 years and has acted for the appellant for some eight years. In oral evidence, Mr Cairney confirmed that he was a chartered accountant with the Institute of Chartered Accountants in Scotland ('ICAS'). The first part of Mr Cairney's witness statement covers matters in relation to the March 2017 hearing. The second half of his statement is to refute Officer Ewart's discovery assessment for 2010-11, on the ground that the quantum of the assessment is the result of multiple errors, namely:

(1) That once again, the assessment was based on cash and not on the accruals basis.

(2) The first payment being included in the assessment is £7,942.83, which was paid on 30 April 2010.

(3) The commission statement for this payment stated that 'this was earned in March 2010', therefore under the accrual accounting concept should be declared in the SATR for the year ended 5 April 2010.

(4) In total, there are 15 payments listed for what is a 12-month period, therefore her assumption that treating income being paid one month in arrears cannot be correct.

(5) HMRC stated that the under declaration was £8,094.96 for 2010-11. If the first payment is treated on an accrual basis, then this reduces the under declaration to £152.13.

(6) Contained in the list of HMRC's figures is a payment with no narrative for £150.08, which Mr Cairney claimed was a reimbursement for window cleaning fees paid by Mr Kantopoulos on behalf of Giffnock.

(7) In the previous hearing '*the decision maker failed to explain or provide any evidence of another payment contained in her list*' which she tried to include in that assessment. The payment was dated 20 June 2011 for £6,000.

64. Mr Cairney's oral evidence is summarised as follows:

(1) The accruals basis of accounting was used to arrive at the annual total since the appellant's income for a 12-month period exceeded the threshold for mandatory VAT registration; this means income is to be returned on an accruals basis. According to HMRC's guideline, the cash basis should only be used where the annual income is below the VAT registration threshold.

(2) The Tribunal asked if the appellant changed from being on a receipts basis to an accruals basis at some point, Mr Cairney said he could not recall for sure; that the appellant would most likely to have been on the accruals basis from the start of his self-employment because Mr Cairney is of the view that his dentist clients are going to account for income on an accruals basis sooner or later; that there is no impediment to be on an accruals basis even if the turnover is below the VAT registration threshold.

(3) On an accruals basis, fees relating to work carried out by the appellant in a month are deemed to have been earned in the month, even if the receipt of the fees is typically a month in arrears.

(4) According to Mr Cairney, the commission statements for the relevant 12-month period to 5 April 2011 were used as the source documents for the SA return figures, with each statement giving the relevant details as regards timing and quantum.

(5) The approach was to reckon the sum of payment on the monthly commission statement as income accrued for the previous month.

The appellant's case

65. In relation to the protective assessment issued on 29 March 2017, Mr Edward submitted that the onus is on HMRC to prove that the assessment was 'competent' in terms of s 29 TMA *(Burgess*[2]). HMRC are required to prove: (a) what discovery was made; (b) when it was made; (c) how it was made; and (d) by whom it was made (*Thomas*[3]). It is submitted that the discovery was 'stale' and rendered the assessment incompetent (*Pattullo*[4]) for the following reasons:

(1) In 2010-11, the appellant worked as a self-employed dentist and accounted for his earnings on an accruals basis.

(2) HMRC had information from the bank statements and commission statements from Giffnock before, at least, 3 November 2015, when a discovery assessment was issued for 2011-12.

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[2] *Burgess and Brimheath Developments Ltd v R&C Comrs* [2015] UKUT 0578 (TCC)

[3] *Thomas v R&C Comrs* [2015] UKUT 578 (TC)

[4] *Pattullo v R&C Comrs* [2016] UKUT 270 (TC); [2014] UKFTT 841 (TC)

(3) HMRC were aware that the appellant used the accrual basis of accounting. HMRC did not make a discovery of the basis of accounting at the FTT on 20 March 2017.

(4) The facts which constitute the discovery were known to HMRC prior to 20 March 2017.

(5) HMRC failed to act with reasonable diligence once their purported discovery was made and the assessment is therefore incompetent.

66. In relation to the quantum of the assessment, Mr Edward challenged the basis of certain receipts from Giffnock being included as taxable for 2010-11 because:

(1) Giffnock made payment to the appellant on a monthly basis, and payments made in one month related to work done by the appellant in the previous month.

(2) HMRC raised the assessment based on bank statements obtained from the appellant and had conflated the month of payment with the month of accrual.

(3) The payment made on 30 April 2010 for £7,942.83 was ascribed by HMRC to 2010-11. As that payment was for work performed in March 2010, it ought not to be assessed in the tax year 2010-11.

(4) The payment of £150.08 made on 6 August 2010 was reimbursement for a cash payment made by the appellant to Giffnock's window cleaner, and was not paid at the end of the month as other payments were.

67. In relation to the penalty assessment, the legislation provides that where a person takes reasonable care to avoid inaccuracy, he is not subject to a penalty for the non-payment of tax (para 18, Sch 24 to FA 2007). The respondents' assessment does not display any inaccuracies for a penalty to be imposable.

68. Mr Edward's submissions in summary are:

(1) Any discovery made prior to the assessment for tax was stale by the date of the discovery assessment of 29 March 2017. Such assessment is therefore not competent.

(2) In the event that the Tribunal finds the assessment was competent, it is submitted that the calculation of tax by the respondents is wrong and that no tax or penalty is due.

HMRC's case

69. In relation to the competence issue of the discovery assessment, Mr Mason submitted that:

(1) The Tribunal's decision of May 2017 found that HMRC had met the conditions of s 29 TMA, and that the same conditions apply to the tax year 2010-11 under appeal.

(2) The condition under s 29(1) TMA has been satisfied as an Officer of HMRC. In this case Ms Ewart, discovered that the appellant received taxable income which had not been assessed, and the FTT in March 2017 found that income HMRC had previously contended to relate to 2011-12 was in fact related to 2010-11.

(3) Where the taxpayer has submitted an SATR for the year in question, s 29(3) TMA prohibits the issue of such an assessment unless one of the two conditions is satisfied, namely:

(a) Either the situation was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf (s 29(4) TMA); or

(b) At the time when HMRC ceased to be entitled to open an enquiry into the 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' as defined in s 29(6) of TMA.

(4) The appellant's SATR for 2010-11 was submitted on 11 October 2011; the time limit for opening an enquiry into the year ended on 11 October 2012. No enquiry was in fact opened. Consequently, s 29(3) TMA permits the issue of an assessment under s 29(1) TMA only if any understatement of liability was made carelessly or deliberately.

(5) In the alternative, HMRC could reasonably have been expected to be aware of the understatement by 29 January 2014 on the basis of the information provided to them before that date (s 29(5) TMA).

70. In the instant case, HMRC contend that both requisite conditions under s 29 TMA are met because:

(1) The understatement of liability was made carelessly, in that the appellant failed to declare fully his earnings from Giffnock in his 2010-11 SATR thereby the condition under s 29(4) is satisfied.

(2) The information of the payments made to the appellant came from the records of Giffnock. HMRC contend that an Officer of the Board could not reasonably have been expected to be aware of any insufficiency from the entries on the appellant's return(s) before 11 October 2012; hence the condition under s 29(5) is also satisfied.

71. As to the time limit in raising a discovery assessment, HMRC consider the loss of tax was brought about carelessly and as such the legislation permits the issue of assessments within 6 years after the end of the year of assessment to which it relates. The time limit for a discovery assessment in relation to 2010-11 was before 5 April 2017. The discovery assessment was raised on 29 March 2017 and was made within the statutory time limit of 6 years.

72. HMRC contend that the discovery assessment is not 'stale' because:

(1) It was only at the hearing on 20 March 2017 that HMRC discovered that the appellant operated on an accruals basis.

(2) The FTT of the March 2017 hearing observed at [76] of the Decision that:

> '… GK had proven to the satisfaction of the Tribunal that he operated on an accruals basis and consequently that some of the income belonged to an earlier tax period …'

(3) HMRC issued the protective assessment on 29 March 2017, which was only 9 days after the hearing; ten days is not such a delay that the discovery could be considered to have become 'stale'.

73. As to the quantum of the assessment, the shortfall in turnover declared in the return for 2010-11 was calculated according to the evidence produced at the March 2017 hearing and the respondents submitted that it was a credible basis for a best judgement assessment.

74. In respect of the penalty, HMRC consider the appellant's behaviour in submitting an incorrect return for 2010-11 to be careless, which gives rise to the penalty range of 15% to 30%. Mr Mason submitted that:

> (1) No reduction was given to the maximum penalty percentage of 30% for reasons as explained in the Penalty Explanation.
>
> (2) Based on the information held by HMRC, no special circumstances exist which would merit a special reduction.
>
> (3) While HMRC may agree to suspend a penalty, if conditions can be set that would avoid penalties in the future. As the appellant has ceased self-employment, HMRC consider that no conditions could be set that would help the appellant avoid penalties in the future.

Discussion

The burden of proof

75. The issues for determination have been set out at §2 of the decision. The burden of proof refers to 'the duty which lies on a party either to establish a case or to establish the facts upon a particular issue': *Burgess* at [14]. The burden of proof in relation to each issue in this appeal is as follows:

> (1) The first issue concerns the validity of the discovery. On this issue, HMRC bear the burden of proof: *Household Estate Agents*[5] at [48]. HMRC need to establish a positive case that the conditions are satisfied in relation to both the 'competence' and 'time limit' issues as outlined in *Burgess*. If the burden is not discharged, then the discovery assessment is invalid, and the appeal falls away[6].
>
> (2) The second issue concerns the quantum of the discovery assessment. If HMRC have discharged the burden of proof in relation to the first issue, then it is necessary for the Tribunal to consider the substantive issue of quantum. The discovery assessment stands good unless the appellant discharges the burden to the requisite standard that he has been overcharged for the assessment to be displaced or varied.
>
> (3) The third issue concerns the quantum of the penalty assessment, which is pitched to the amount of tax loss as quantified by the discovery assessment.

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[5] *R&C Comrs v Household Estate Agents Limited* [2008] STC 2045, Henderson J at [48]: 'it seems to me that the burden of establishing that paras 43 or 44 apply must rest on HMRC, because in the absence of any evidence of fraud or negligent conduct (para 43), or of material to satisfy the test of objective non-awareness (para 44), there would be no basis for a conclusion that either of those paragraphs applied, and nothing to displace the general rule that discovery assessments may not be made.' (The equivalent provisions to s 29 TMA for corporation tax are under paras 41-54 of Sch 18 to FA 1998.)

[6] Citing *Phipson on Evidence* (18th edition) at 6-03, the UT in *Burgess* observed at [14] that 'one effect of the burden of proof is that if the party bearing the burden has not pleaded a positive case, the other party need not plead and prove that alternative states of affairs do not exist'.

The burden is on HMRC to prove that the penalty has been validly imposed according to the terms of the legislation. The burden then reverses to the appellant why the penalty assessment is invalid or excessive.

The first issue: the validity of the discovery

76. There are two aspects to the validity issue, referred to as the 'competence' and 'time limit' issues by the Upper Tribunal in *Burgess*. We apply the law to the facts in this case to determine each aspect.

The competence aspect

77. Section 29(1) sets out the scope of what constitutes a discovery. For present purposes, the relevant definition comes under s 29(1)(b): if an officer of HMRC discovers, as regards the appellant, that the assessment to tax for 2010-11 '*is or has become insufficient*'.

78. Where a taxpayer has furnished a return, s 29(3) precludes the raising of a discovery assessment '*unless one of the two conditions mentioned below is fulfilled*'. The requisite conditions are set out under s 29(4) and s 29(5), whereby:

> '(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.'

79. The right of appeal against a discovery assessment is provided under s 29(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 that on an appeal against the assessment.'

80. The discovery in question is that the assessment to tax for 2010-11 has become insufficient. As summarised below, case law authorities have held that the threshold for there to be a discovery is low, while the issue of 'newness' of a discovery in each case would turn on its particular facts:

(1) In *Cenlon Finance v Ellwood*[7] the House of Lords set out the threshold of a discovery in the following terms:

> 'I can see no reason for saying that a discovery of undercharge can arise only where a new fact has been discovered. The words are apt to include any case in which it newly appears that the taxpayer has been

[7] *Cenlon Finance Co. Ltd v Ellwood* (1962) 40 TC 176.

undercharged and the context supports rather than detracts from this interpretation.' (at p240)

(2) In the High Court decision of *Jonas v Bamford*[8], Walton J held: 'In law, indeed, very little is required to constitute a case of "discovery"' (at p23).

(3) In *Charlton*[9], the Upper Tribunal similarly stated that the requisite threshold for there to be a discovery is low. However, it also held that for the assessment to be valid, a discovery should not lose its 'essential newness':

> '[37] … no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself. If an officer has concluded that a discovery assessment should be issued, but for some reason the assessment is not *made within a reasonable period after that conclusion is reached, it might*, depending on the circumstances, be the case that the conclusion would *lose its essential newness* by the time of the actual assessment …' (emphasis added)
>
> [44] … a discovery assessment can be made merely where the original officer of HMRC changes his mind or where a different officer takes a different view.'

(4) In *Pattullo*, the UT considered the issue of the freshness of a discovery with reference to *Charlton*, and Lord Glennie observed:

> '[52] … The word "if" … has a variety of shades of meaning. It may be purely conditional. But it may equally have a temporal aspect, as in the expression "if and when" … I do not regard this as stretching the meaning of "if". The context makes it clear that an assessment may be made if and when it is discovered that the assessment to tax is insufficient. It would, to my mind, be absurd to contemplate that, having made a discovery of the sort specified in s 29(1), HMRC could in effect just sit on it and do nothing for a number of years before making an assessment just before the end of the limitation period specified in s 34(1).
>
> [53] However, the word "if", as used in this way in the sub-section, does not mean "immediately". … The UT in *Charlton* at para 37 recognise that the decision in each case will be fact sensitive.'

(5) In *Beagles*[10] the UT followed Lord Glennie's interpretation in *Pattullo*:

> '[59] … the decision of the Upper Tribunal in *Pattullo* is not obiter. … and so we follow it.
>
> [60] It seems to us, given the state of the authorities at the Upper Tribunal level, the question of whether a discovery is capable of becoming "stale" is a matter best reviewed by the higher courts. We recognise both sides of the argument, particularly, on the one side, the point that it seems wrong not to require HMRC to make an assessment

[8] *Jonas v Bamford* (1973) 51 TC 1.

[9] *R&C Comrs v Charlton and others* [2012] UKUT 770 (TCC)

[10] *Beagles v HMRC* [2018] UKUT 380 (TC).

> promptly once a discovery has been made, and, on the other, the simple point that the legislation does not make any expression provision for any kind of limitation period except that specified by s 34 TMA and so in *Pattullo* the Upper Tribunal pressed the word "if" into action to achieve that end.'

81. In evidence, Officer Ewart stated that she learned of the fact that the appellant returned his income on an accruals basis at the hearing on 20 March 2017. We found Officer Ewart to be reliable and credible, and we accept her evidence that she was unaware of the accruals basis prior to March 2017, and this was a fact 'new' to her.

82. The subjective opinions of the assessing officer, however, play no part in the operation of s 29, as stated in *Harkinson*[11], in which the Court of Appeal affirmed the decision of the Upper Tribunal (Warren J and Judge Bishopp). The Upper Tribunal in *Harkinson* held that whether either or both of the conditions in s 29(4) and (5) were satisfied was a question of *objective* fact:

> '[23] In our view, s 29 is not concerned with the subjective view of the assessing officer (or the Board) [sic but] about fulfilment of either or both of the conditions specified in sub-ss (4) and (5). The officer must, of course, have made a discovery. Unless he has does so, he cannot raise an assessment; but subject to that, if he does raise an assessment its validity is to be tested by reference to those two conditions. … The subjective opinions of the assessing officer or the Board about fulfilment of the conditions have no part to play in the operation of s 29. We consider this to be the only conclusion consistent with sub-s (8): the subject matter of an appeal is whether or not either of the conditions is fulfilled, without any form of qualification. If neither is fulfilled, the assessment should not have been made and will be invalid. …
>
> [26] … the conditions are to be viewed objectively. Accordingly, the officer's supposed duty to raise an assessment is one which depends not on his own assessment of whether the conditions are fulfilled, but on whether they are in fact fulfilled….'

83. In relation to the competence issue of the discovery assessment, we make the following findings of fact:

(1) There was no enquiry opened into the tax year 2010-11.

(2) At the FTT hearing on 20 March 2011, Mr Cairney explained that he used the accruals basis to return the appellant's income for self-assessment, but in relation to the later year 2011-12.

(3) By accruals basis, we understand Mr Cairney to mean that fees 'received' by the appellant in a month (say April 2010) was accounted for as income 'earned' in the previous moth (i.e. March 2010), and included as the last month of income for the tax year 2009-10, albeit that the income would be remitted by Giffnock a month later in April 2010.

(4) From the SA return submitted for 2010-11 made available to the Tribunal, it is clear to us that nowhere in the return did it specify that the accruals basis for returning income was used.

[11] *Harkinson v R&C Comrs* [2011] EWCA Civ 1566; [2010] UKUT 361 (TCC).

(5) In any event, the primary cause of insufficiency (as stated in our findings of fact related later in the decision) has little to do with the accruals basis as set out in our findings of fact below.

84. Furthermore, the appellant had not made any records available in relation to 2011-12 prior to the March 2017 hearing. In these circumstances, HMRC could not have inferred from Giffnock's records *alone* prior to the hearing that the appellant returned his income on an accruals basis.

85. The fact which emerged during the FTT hearing in March 2017 was that the appellant's income had been returned on an accruals basis, contrary to Officer Ewart's assumption that the basis period for returning income for self-assessment purposes corresponded to the dates of payments shown on Giffnock's bank statements.

86. We reject Mr Edward's submission that HMRC could have made the relevant discovery as early as November 2015, when the discovery assessment was issued for the year 2011-12. It is clear from the FTT Decision that HMRC had made the wrong assumption when raising the 2011-12 assessment, since they only had the documents from Giffnock to go by.

87. In cross-examination, Officer Ewart was criticised for issuing the amended discovery and penalty assessments for 2011-12 on 4 August 2017, only to retract them later; the criticism was reiterated by Mr Cairney in his evidence. We do not consider those facts relating to the amended assessments for 2011-12 impinge on the competence of the discovery as regards 2010-11.

88. The protective assessment was raised on 29 March 2017, which was nine days after the hearing on 20 March 2017, and before the release of the decision of those proceedings. On any view, the discovery cannot be said to be 'stale'. Our conclusion in this respect in effect means that the condition under s 29(5) is met.

The time limit issue

89. The ordinary time limit for raising a discovery assessment is four years after the end of the assessment to which it relates. For the tax year 2010-11, the ordinary time limit expired on 5 April 2015.

90. The discovery assessment in the present case is brought under s 36 TMA, whereby the time limit is extended to six years after the end of the year of assessment to which it relates where a loss of tax was brought about 'carelessly'. The six-year time limit for the year of assessment 2010-11 expired on 5 April 2017. The protective assessment was raised on 29 March 2017, and was within the six-year time limit if the loss of tax is proved to have been brought about 'carelessly'.

91. If the discovery assessment had been made within the ordinary time limit of four years, then it would have been sufficient for HMRC to meet the condition under s 29(5) alone to render the discovery valid. While we are satisfied that HMRC have met the onus in respect of the 'competence' issue under s 29(5), the onus remains for HMRC to establish that the condition under s 29(4) is also met in order that the time limit can be extended to six years.

92. Whether the condition under s 29(4) is met is a question of fact. In this regard, the Tribunal needs to a finding of fact in relation to:

(1) whether there was an insufficiency of tax; and

(2) whether it was brought about carelessly.

93. If the Tribunal can make the relevant findings of fact in the positive, then the condition under s 29(4) is necessarily met for the time limit to be extended to six years. If the Tribunal is unable to make the relevant findings of fact that the facts in issue will then be determined by the burden of proof, to the civil standard of on a balance of probabilities.

The second issue: the quantum of the assessment

The conclusions reached by the FTT in March 2017

94. From the FTT Decision (see §39), it would seem that Mr Cairney had advanced arguments at the March 2017 hearing to the effect that 'both the income calculations are flawed' and 'the income expenses are flawed' (at [35]). In turn, the FTT concluded that there was 'ambiguity' as concerned 'what expenses belonged to whom given the lack of documentation available' (at [74], §40), and that 'GK had produced sufficient evidence to set aside HMRC's figures' in relation to 2011-12 (at [76], §42).

95. We have regard to the conclusions reached by the FTT in relation to 2011-12 because the evidence presented to this Tribunal is fundamentally the same as that presented to the FTT in March 2017. There are minor differences, in terms of quantity, for example, the June 2011 Commission statement and the two bank statements from the appellant are not produced to this Tribunal. Nonetheless, the evidence originating from Giffnock remained the core evidence in both appeals.

96. The FTT would seem to have accepted Mr Cairney's arguments that both the income and expenses were 'flawed', as observed:

> '[70] The Commission statement produced by GO were also not clear. They showed a date when a payment was made and also a date to which the period referred. Accordingly, if the reader did not understand that the accounts were based on an accrual basis the period in which to allocate the income was unclear.
>
> In addition, certain expenses, said to be GO expenses, were deducted from the income GO received form the National Health Service before they were allocated by means of a 45% share to GK. Thereafter, further expenses were deducted from this total so that it appeared that some expenses were deducted to the extent of 100% from GK's 45% of the income, less expenses which may or may not have been attributable to GO.' (sub-paragraphing inserted)

97. Given that we have been presented with materially the same evidence as the FTT in March 2017, the conclusions drawn by the FTT should be persuasive on this Tribunal. However, having considered the evidence available to us, we disagree with the FTT's conclusions in relation to 2011-12 in all significant respects.

(1) 'GK had produced sufficient evidence', by which the FTT was referring to the two bank statements from the appellant and Mr Cariney's schedule F2/27(a). So far as discernible from the FTT Decision, these 3 documents would appear to be 'sufficient' to set aside HMRC's figures. We disagree:

(a) The accruals basis of returning income seemed to have dominated the evidence session (as it did with this Tribunal). However, the accruals basis alone was not sufficient to set aside HMRC's figures, since the accruals basis could explain no more than timing differences which occurred in the transitional months from one tax period to the next.

(b) The limited relevance of the accruals basis in explaining any timing differences meant that the appellant had not produced sufficient evidence to explain the full extent of the discrepancy in relation to 2011-12.

(c) The real elephant in the room, namely the glaring omission of certain payments into GK's account in 2011-12 would seem to have gone unnoticed, and escaped any scrutiny, as detailed in full below.

(2) In relation to expenses, there was no ambiguity as Mr Cairney made out to the FTT in March 2017:

(a) The *external* laboratory fees to Armac were deducted at 100% from the gross fees received by Giffnock, before calculating the commission due to GK. This was in recognition that out of the gross fees Giffnock had borne the external laboratory fees in full, and that the appellant's commission is due only after the defrayment of the laboratory fees paid to an external agency.

(b) The *internal* laboratory fees were charged to GK at 4.5% of the commission payable in a given period. This would seem to recognise that for GK to earn the related commission, Giffnock had provided routine in-house laboratory facilities to be reckoned at a set percentage.

(c) To settle the external laboratory fees at 100% against the gross fees before calculating the commission due at 45%, and to charge 4.5% on the commission as in-house laboratory fees must have been part of the agreement between Giffnock and GK.

(d) Since the parties to the commission agreement did not dispute the figure on each commission statement (after the manner in which the external and in-house laboratory expenses were deducted), there was no basis to set aside the 'payment' figure on the commission statements as correct for the purposes of returning GK's income.

(e) Indeed, Mr Cairney's F2/27(a) would seem to have adopted the figure on the relevant commission statement to be the returnable income for the relevant month – that is to say, in so far as his figures corresponded to the Giffnock's bank statements.

98. For the above reasons, we are not persuaded by the conclusions reached by the FTT in consequence of the March 2017 hearing, which means it is necessary for us to make our own findings of fact from the evidence we have heard.

Insufficiency in relation to income alone

99. In relation to the SA return for 2010-11 (see §50), no issue has been taken as regards the amounts of expenditure claimed in the SA return (such as £3,375 which

could either be for 'depreciation' or for 'loss on sale of assets'). HMRC's case of insufficiency of tax is solely staked on the discrepancy between the turnover declared in the SATR, and the sum of payments identified from Giffnock's records as falling in the tax year. The discrepancy does not concern any relief or expense claims. We therefore confine our fact-findings to the 'turnover' aspect of the evidence.

100. For the appellant, Mr Cairney's evidence was to say that there was no under declaration of turnover. The supposed discrepancy of £8,093 was explained by:

(1) The receipt of £7,942.83 on 30 April 2010 being wrongly included by Officer Ewart, who had once again failed to grasp the fact that the appellant's income was returned on an accruals basis;

(2) The other difference being the small sum of £150.08 and was reimbursement from Giffnock for window cleaning.

The evidence relied upon by HMRC to quantify insufficiency

101. The weight of evidence lies in its cogency and probative value in relation to the fact in issue. The fact in issue here is the correct figure for inclusion as the appellant's returnable income for 2010-11. The evidence relied upon by HMRC originated from Giffnock as a third party to these proceedings. We weigh the records from Giffnock highly, both in terms of its cogency and probative value because:

(1) As a third party to these proceedings, Giffnock has no direct interest in the outcome of the appeal, and its evidence is likely to be impartial.

(2)The commission statements were generated for the purpose of settling accounts with the appellant. Both sides had an interest in monitoring the accuracy of these commission statements; Giffnock would not want to overpay GK; and GK would ensure that he was not underpaid.

(3) There was a remarkable consistency between the sums stated as payable on the commission statements and the sums appeared as paid to GK in Giffnock's bank statements. In doing so, Giffnock was fulfilling its contractual obligations to GK as its associate.

(4) If there were any inaccuracies in the commission statements, it was likely to be followed up by either side, and subsequently adjusted. The minor sum of adjustment of £291.37 on the April 2011 statement was a debit to GK, while the £150.08 in June 2010 would appear to be a credit to GK.

(5) In the absence of any substantive records from GK, the Giffnock's records represent the alternative to establish the appellant's income in terms of *completeness* and *accuracy*.

(6) Giffnock's commission statements would appear to be the basis used by Mr Cairney in returning income for the appellant. His schedule F2/27(a) lists payments that largely corresponded with those collated by HMRC from the commission statements, save for those discrepancies noted for the earlier months in 2010-11.

(7)Indeed, from Kantop's return for the year 30 September 2012, the truth and fairness of the commission statements is borne out by the turnover figure of £144,523 in Kantop's SA return, compared with the total of £144,548.33 collated by HMRC from commission statements for the relevant period.

The year 2010-11

102. We refer to the tabulated figures at §50 for the period from April 2010 to March 2011. Our findings of fact in relation to each discrepancy between the parties' figures as listed in the 'Difference' column are as follows:

(1) £7,942.83 paid by GO on 29 April 2010 (FP date) would have been returned as earnings in March 2010 *if* the appellant was consistent in applying the accruals basis in returning his income. The sum belonged to the tax year *2009-10*. (On an accruals basis, HMRC were incorrect to have included this sum in the 2010-11 total.)

(2) £7,530 paid by Giffnock (FD 28 April 2011) would have been included as earnings in March 2011, and therefore returnable for *2010-11*. (While Mr Cairney's schedule F2/27(a) did include this sum as income for 2010-11, his evidence said nothing about HMRC's omission of this sum.)

(3) The differences between GO's records and Mr Cairney's schedule of **£4,530.66, £999**, and **£2,000** *cannot* be explained by the accruals basis. The timing of these payments fell squarely within the basis period, the inclusion of these payments into 2010-11 cannot be in doubt. (These differences total £7,529.66, of which Mr Cairney did not once address.)

(4) £150.08 is to be treated as a credit 'minor adjustment' by GO to GK in the absence of any proof to the contrary. A similar adjustment is stated in the commission statement made available to the Tribunal (see §23), and at [8] of the commission statement, an adjustment of £291.37 was made: this time Giffnock had overpaid the appellant; hence a deduction.

(5) Mr Cairney emphasised the fact that 15 payments were included in HMRC's schedule for a basis period of 12 months, and that there must be over-counting. Nothing turns on this fact, since there were 3 payments made by Giffnock in December to the appellant for £2,308.55 (on 1st), £9,999 (on 22nd) and £3,220.49 (on 24th) which total £15,529.03 and matched exactly the November total of £15,528 (subject to rounding) on Mr Cairney's schedule.

103. From our findings of fact as detailed above, there was an insufficiency of tax brought about by the understatement of income in the SA return for 2010-11. If we take as the starting point Mr Cairney's schedule F2/27(a) and compared the monthly sums against the payments made by Giffnock, then the understatement is the sum of the differences as highlighted above:

(a) £4,530.66,
(b) £999,
(c) £2,000,
(d) £150.08.
(e) a total **£7,680** (rounding up from £7,679.74)

104. When the shortfall of £7,680 is added to the declared income of £93,115, the returnable income on an accruals basis for 2010-11 should have been £100,795.

105. The schedule F2/27(a) is corroborative, and not pivotal to our conclusion. We would have reached the same conclusion by using HMRC's column of figures alone, and made two adjustments for the timing differences as follows.

(1) We are satisfied that the annual total £101,208.96 is true and fair, with each sum being vouched by the payment details on GO's bank statements.

(2) The first payment on 28 April 2010 (FD date) of £7,942.83 is removed as having been accounted for as income in March 2010; and hence, in 2009-10.

(3) On an accruals basis, the payment of £7,530 on 28 April 2011 is added to include the sum as income returnable for March 2011; and hence 2010-11.

(4) All other payments made by Giffnock in the intervening period (between the two adjustment payments in April 2010 and April 2011) fell squarely within the basis period for 2010-11 and require no further adjustments.

(5) The total income returnable for 2010-11 should therefore be £100,796, (being £101,208.96 minus £7,942.83 plus £7,530).

(6) The extent of under declaration is therefore £7,680, (being £100,796 minus £93,115 rounded down).

(7) In other words, the discrepancy explained by the accruals basis of returning income amounted to merely £412.83, being the difference of £7,942.83 (receipt in April 2010) and £7,530 (receipt in April 2011).

The tax year 2011-12: the basis period of six months to September 2011

106. On a similar basis, the tabulation of figures at §54 establishes the extent of the understatement of income in 2011-12 to be **£48,981**:

(1) The first payment of £7,530.02 on 3 May 2011 is removed from HMRC's tallying of 2011-12 income, as this payment should have been included in 2010-11 as accrued income, as explained earlier.

(2) On Giffnock's bank statement (F5/31 of the bundle), there are three payments of £9,999.99 each.

(3) The first two were consecutive payments, both on 31 May 2011, which HMRC omitted completely in the tallying exercise. (It was probably due to the capping limit in a sum of Faster Payment that the total of nearly £20,000 had to be processed as two separate transactions.)

(4) Giffnock's bank statements made available to us cover only the period from 30 April 2010 to 1 June 2011, of which April 2011 to 1 June 2011 would relate to the year 2011-12.

(5) From the limited coverage of 2011-12 in bank statements, the Tribunal has checked that the omitted sums of £9,999.99 have different transaction ID references, and were genuine payments out of Giffnock's bank account as reflected by its reduced bank balance.

(6) The other entries in the column headed as 'Returnable by Accruals' are taken from Officer Ewart's schedule F2/27, which she noted as '*figures taken from bank statements and commissions statements*'.

(7) The total income 'returnable by accruals' for 2011-12 should have been **£75,349.60**, after removing £7,530 and adding 2 times of £9,999.

(8) The turnover figure in the SATR submitted for 2011-12 is £26,368.

(9) In the absence of any evidence to the contrary, the income omitted to be declared for 2011-12 is the difference between £75,349 and £26,368, equating to £48,981. (The figure of £26,368 is understood to be the 'turnover' figure declared in the SATR for 2011-12 covering a five-month trading period from 1 April to 31 August 2011.)

107. The period concerned was the six months before Kantop was incorporated on 26 September 2011 to be the trading vehicle. The magnitude of the insufficiency represents two-thirds of the returnable total; the understatement of income represents nearly 185% of what was declared; or in broad terms, for £1 of income declared, almost £2 had gone undeclared as the turnover under self-employment for 2011-12.

108. The FTT Decision noted the complications caused by the appellant ceasing self-employment on 31 August 2011 *before* Kantop was incorporated on 26 September 2011. Mr Cairney had proffered the explanation to the FTT that fees arising in the transition period (ie 1 to 25 September 2011) were simply 'lumped' into the first month of Kantop's accounts. We reject this explanation in its totality, having examined Kantop's returned income for the accounting period from October 2011 to September 2012, as set out below.

Kantop's first trading year to September 2012

109. The corroborative evidence from the income returned for Kantop for the accounting period 1 October 2011 to 30 September 2012 (see §56) supports the magnitude of under-declaration in relation to the 6-month period before the appellant incorporated his practice.

(1) The income returned for Kantop for the 12-month period was £144,523.

(2) The tallying of payments made to Kantop from Giffnock's commission statements amounts to £144,548.33.

(3) The difference is £25.33, due to rounding and the omission by the appellant of a £25 payment made on 2 May 2012.

110. From the figures in relation to Kantop for the year to 30 September 2012, we draw the following conclusions:

(1) The net payment figures on Giffnock's commission statements are the figures used by HMRC in tallying Kantop's turnover. The annual total for Kantop's first period of trading corresponds to the figure arrived at by Mr Cairney in returning Kantop's turnover, as evidenced by the matching annual total of £144, 523 (save for the £25 difference) between the two parties.

(2) The £144,548 represents the 12-month turnover of Kantop from 1 October 2011 to 30 September 2012, and half thereof is £72,262. The half-year average of Kantop's first trading year is comparable to the £75,349 for the 6 months from April 2011 to September 2011 (being the last period of GK's self-employment) as found to be returnable on an accruals basis.

(3) The omission of £25 by Kantop explains the difference between the parties' totals. This would appear to be a minor adjustment, in that Kantop was owed £25. We are of the view that the £150.08 paid on 6 August 2010 represents a similar kind of adjustment as the £25 for Kantop, and is returnable as income.

(4) The FTT in March 2017 was told by Mr Cairney that he had 'lumped in' the income received between 1 September and 25 September 2011 into Kantop's accounts. This could not have been true, since Kantop had returned income of £144,523, which matched exactly the tallying by HMRC of payments made by Giffnock from October onwards, with the first payment being noted as made on 28 October 2011.

(5) If Cairney's explanation had been true, then the returned income for Kantop should have been *more* by £18,089, being the total of the following payments made in September 2011 (see §54), which Cairney claimed to have been 'lumped in' with Kantop's accounts:

(a) On 1 September 2011 of £8,500;

(b) On 8 September 2011 of £401.97; and

(c) On 30 September 2011 of £9,187.10.

(6) Not only was the 'lumping in' not borne out by the evidence in relation to what Kantop had included as income in October 2011, the 'lumping in' explanation plainly contradicted Mr Cairney's assertion that all income was returned by GK on an accruals basis.

(7) If the accruals basis had been consistently applied, then the payments made by Giffnock to GK in September 2011 should have been income returned as earned in August 2011 anyway, and fully within the period of GK's self-employment that ended on 31 August 2011, and should have been included in GK's SATR for 2011-12. (In other words, to say that September 2011 receipt was 'lumped' into Kantop's October receipt plainly contradicts the claim that the appellant reckoned his income as when earned, which was a month ahead of actual receipt.)

Whether insufficiency carelessly brought about

111. There are two elements in the condition under s 29(4) TMA; the first is that there was an insufficiency of tax, and the second is that the insufficiency was brought about carelessly. To that end, the definition of 'careless' for penalty purposes is apposite to our consideration in relation to s 29(4) TMA condition.

112. An inaccuracy is 'careless' if it is due to failure by the taxable person to take reasonable care, as defined by para 3(1)(a) of Sch 24. The test whether a taxpayer has taken reasonable care is the one formulated in *Anderson (deceased)*[12]:

> '[22] The test to be applied, in my view, is to consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done.'

113. In *Hanson*[13], Judge Cannan considered 'carelessness' for Sch 24 penalty purposes at with reference to case law on 'negligent conduct' for the predecessor provision of s 29(4) of TMA:

> '[19] In my view carelessness can be equated with "negligent conduct" in the context of discovery assessments under section 29 Taxes Management Act 1970. In that context, negligent conduct is to be judged by reference to the reasonable taxpayer.'

114. For clarity, the reference of 'negligent conduct' in *Hanson* is a reference to the former statutory wording for sub-s 29(4) of TMA, which stated:

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[12] *Anderson (deceased) v HMRC* [2009] UK FTT 206.

[13] *Hanson v HMRC* [2012] UKFTT (TC).

> 'The first condition is that the situation mentioned in subsection (1) above [is attributable to fraudulent or negligent conduct on the part of] the taxpayer or a person acting on his behalf.'

The words within the square brackets were substituted by the words '*was brought about carelessly or deliberately by*' in the current provision of sub-s 29(4) with effect from 1 April 2010[14].

115. Where an agent is involved, as in the present case, the consideration of 'carelessness' is more nuanced, as observed by Judge Cannan observed in *Hanson*:

> '[21] What is reasonable care in any particular case will depend on all the circumstances. In my view this will include the nature of the matters being dealt with in the return, the identity and experience of the agent, the experience of the taxpayer and the nature of the professional relationship between the taxpayer and the agent.'

116. The shortfall arising in 2010-11 was largely explained by the variants in stating the amounts received in May, June and August of 2010 by £4,530, £999 and £2,000. In other words, the relevant sums were returned as lower amounts when compared to what was stated in the commission statements and vouched by the relevant entries in the bank statements. Mr Cairney offered no explanations as how these variants occurred between his schedule F2/27(a) and the corresponding entries on Giffnock's bank statements. In the absence of any credible explanations, we are of the view that the insufficiency was at least carelessly brought about by the appellant, if not more.

Conclusion on the quantum of assessment

117. The condition under s 29(4) TMA is that the situation mentioned in subsection 29 (1) was brought about carelessly the taxpayer or a person acting on his behalf. In the light of the evidence in front of us, in relation to the year 2010-11 (and in conjunction with the evidence for 2011-12), we find as a fact that the condition under sub-s 29(4) TMA is met.

118. In *Haythornthwaite and Sons Ltd v Kelly* ('*Haythornthwaite*'), Lord Hanworth MR stated similarly, that 'it is quite plain that the Commissioners are to hold the assessment standing good unless the … Appellant – establishes before the Commissioners, by evidence satisfactory to them, that the assessment ought to be reduced or set aside'.[15]

119. In *Johnson v Scott* ('*Johnson*'), the High Court judgment by Walton J affirming the Commissioners' decision in favour of the Crown was upheld by the Court of Appeal. The pertinent remark by Walton J in this case highlights why the onus of proof has to lie with the taxpayer, because –

> '… it is quite impossible to see how the Crown, in cases of this kind, could do anything else but attempt to draw inferences. The true facts are known, presumably, if known at all, to one person only, the taxpayer himself. If once it is clear that he has not put before the tax

[14] Words substituted by FA 2008 s 118, Sch 39 paras 1,3 with effect from a April 2010, subject to transitional provision in SI 2009/403 art 10(2) (where art 10 applies the appointed day is 1 April 2012).

[15] *Haythornthwaite and Sons Ltd v Kelly* (1927) 11 TC 657, at page 667.

> authorities the full amount of his income, as on the quite clear inferences of fact to be made in the present case he has not, … what the Crown has to do in such a situation is, on the known facts, to make reasonable inferences.'[16]

In other words, once the Crown has made a fair inference on the known facts as to the potential lost revenue, the onus of showing that the assessments raised are incorrect shifts to the taxpayer.

120. In *Norman v Golder ('Norman*'), the taxpayer sought to argue that the onus of establishing the correctness of the assessment lies upon the Crown, and that the onus of proving that the assessment is incorrect does not lie on the taxpayer. Lord Greene MR firmly rejected the notion – 'The point really is not arguable'; the statute 'makes it clear, beyond possibility of doubt, that the assessment stands, unless and until the taxpayer satisfies the Commissioners that it is wrong'.[17]

121. As a matter of fact, we are satisfied that HMRC's assessment for 2010-11 is sound and based on credible evidence; it stands good, save for the minor adjustment for the timing difference of £412.83.

Whether the appellant's evidence sufficient to displace the assessment

122. Like the appellant in *Norman*, Mr Cairney had likewise argued that HMRC had 'failed to explain or provide any evidence of another payment contained in her list' (witness statement §63(7)) by referring to the £6,000 included in Officer Ewart's list for 2011-12 (see §54).

123. From Officer Ewart's schedule F2/27, this payment of £6,000 was noted as 'additional payment' for June 2011, while another payment dated 30 June 2011 for £9,875.85 was noted as the main payment. As we understand, the £6,000 was included as a payment by Officer Ewart because there was a commission statement dated 20 June 2011 to that effect, (even if HMRC did not have the relevant page of Giffnock's bank statement to verify the payment). We have given due regard to the weight of evidence relied upon by HMRC, especially in view of the remarkable convergence between Kantop's returned turnover for the year to 30 September 2012 and HMRC's total collated solely from the relevant commission statements.

124. We reject in all manner Mr Cairney's forceful submission that HMRC had failed to explain or provide any evidence for their figures in relation to 2010-11. As a matter of law, as set out in *Norman* this point is simply not arguable, since *'[t]he true facts are known, presumably, if known at all, to one person only, the taxpayer himself*'. As a matter of fact, we are satisfied that HMRC's discovery assessment for 2010-11 stands good, and we are not satisfied that the appellant has produced 'sufficient evidence' to set aside the assessment.

125. It is material to our consideration that there is a dearth of substantive evidence from the appellant in relation to the issue of quantum:

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[16] *Johnson v Scott* [1978] STC 48, at 56(j) to 57(a).

[17] *Norman v Golder* (1944) 26 TC 293, at page 297.

(1) HMRC stated that they have not seen *any records for 2011-12*, but have seen the agent's workings for the previous year (ie 2010-11) and later year (ie 2012-13); (see Penalty Explanation at §60(2)).

(2) For this hearing, the only piece of documentary evidence originating from the appellant is Mr Cariney's schedule F2/27(a).

(3) For the March 2017 hearing, it would appear that in addition to F2/27(a), two bank statements of the appellant's were produced, which were not reproduced to this Tribunal.

126. In terms of documentary evidence originating from the appellant for this appeal, it amounts to the body of correspondence by Mr Cairney at various stages of the enquiry and the tribunal proceedings in relation to both 2010-11 and 2011-12. These letters challenged the basis of HMRC's information requests, raised objections to HMRC's calculation of the quantum of shortfall, and lodged complaints about the conduct of HMRC's enquiry and the tribunal proceedings of March 2017. None of these documents constitute primary evidence in support of the appellant's appeal.

127. We wonder why there was such a reticence and lack of candour on the part of the appellant; why the records for 2011-12 should be 'lost' in isolation of two bank statements (for the year 2010-11) being produced; why only the agent's workings were made available for the previous and later years, and not for 2011-12 which was the focus of the previous appeal. There was a persistent refusal to provide the information requested by HMRC, and the Sch 36 Notice was forcibly contended by Mr Cairney as a 'fishing expedition' by HMRC at the March 2017 hearing.

128. The evidence relied on by the appellant is therefore Mr Cairney's witness evidence. Mr Cairney was a forceful witness. The forcefulness with which Mr Cairney put forward his representations was also remarked upon by Judge Gemmell; (at [78]). That forcefulness, coming from a chartered accountant, of whose professional integrity in assisting the Tribunal as a trier of fact can be reasonably expected (until proven otherwise), would have made his explanations very persuasive indeed, were this Tribunal not equally qualified in matters of accounting to discern that in material aspects, Mr Cairney's evidence had been most misleading.

129. In our judgment, too much had been made of the accruals basis as the explanations for the multiple discrepancies identified in 2010-11, (and to an even greater extent for 2011-12), so much so that Mr Cairney's forceful explanations in this respect had beclouded the real issue at the heart of both appeals. In the final analysis, what needs to be found is whether *all* income had been declared by the appellant in terms of *completeness* and *accuracy*. Timing differences do not explain the material understatements presented to us by the cogent evidence from Giffnock.

130. The fundamental difference between the accruals and the receipts basis is in the *timing* of reckoning a sum for accounting purposes. If a sum is not included in one year, it should be in another. By way of example, for 2010-11 the overall difference explained by the accruals basis was only £412.83; the difference between £7,942.83 (April 2010 if on a receipts basis) and £7,530 (April 2011 if on an accruals basis).

131. We are troubled by having to make a finding of fact that Mr Cairney's evidence was unreliable if not misleading. We have been given explanations by a professional accountant of Mr Cairney's calibre which were plainly incommensurate with his truthful understanding of the real cause of the various discrepancies, as illustrated by:

(1) Attributing the overall discrepancy in 2010-11 to the April 2010 payment of £7,942 being wrongly included, while ignoring the fact that the April 2011 payment of £7,530 had been wrongly omitted by HMRC represents a *one-sided* adjustment incommensurate with an experienced accountant;

(2) especially in view of Mr Cairney's own schedule F2/27(a) which had included £7,530 as returnable income for 2010-11; and

(3) to suggest that the September 2011 payments by Giffnock had been 'lumped' into Kantop's accounts is incompatible with the fair understanding of a professional accountant,

(4) since this suggestion (of lumping into the *later* month of October) was going in the contra direction from the accruals basis (which is to reckon income a month *earlier* than the actual payment);

(5) This 'lumping in' was contradicted by Kantop's returned turnover for the first year of trading concurring with HMRC's total collated on a receipts basis, since HMRC's total did not include any September 2011 payments, Kantop's returned total could not have included any suggested 'lumped in' payments made by Giffnock in September 2011 either.

132. If we had only the figures of 2010-11 to go by, we might have been inclined to think that this was a slip in professional discernment. However, the magnitude of the under declaration in relation to 2011-12 of nearly £49,000 (being two-thirds of the appellant's turnover in that period) presents us with the inevitable conclusion that a qualified accountant of Mr Cairney's experience was unlikely to be ignorant of the extent of under declaration.

133. Indeed, as related at §27 the FTT recorded that Mr Cairney acknowledged that he had identified 'missing' sales: '*ME called BC again on 24 November 2014, … when BC advised that he had found an amount missing from sales and suggested sending in his proposals for settlement*' (at [9]). Between November 2014 and the FTT hearing in March 2017, there was clearly a change in the course of action agreed between Mr Cairney and the appellant, from 'sending proposals for settlement' to advancing arguments that had the effect of beclouding the real issue for 2011-12, while both agent and appellant would appear to be at all times fully aware that sales had been omitted in the SA return for 2011-12.

134. We note that for Kantop's first period of trading immediately following the gross under declaration for 2011-12, the returned turnover would appear to be complete save for £25. Was the year 2011-12 an aberration? Viewed in the context of the under declaration for 2010-11, the year 2011-12 would appear to be a culmination before the move to incorporate the trade. Instead of omitting returnable sales, it was probable that the change to trade via a personal service company has afforded the appellant with more scope in reducing his overall tax liabilities, such as by being remunerated in part by dividends distribution from Kantop.

135. We are conscious that our conclusion as regards the appellant's evidence is contrary to the decision of the FTT in relation to the 2011-12 appeal. We have due regard that two tribunals facing materially the same evidence should have reached concurrent decisions.

136. We have given careful consideration to all aspects of the FTT Decision; we are of the view that the appeal for 2011-12 was wrongly determined. In particular, we are of the view that the appellant did not produce sufficient evidence (as the FTT had found) to set aside the discovery assessment for 2011-12, and that the timing issue as regards the accruals basis was not sufficient to discredit the fundamentally sound basis of HMRC's assessment.

137. It is anathema to justice and fairness if forceful representations of falsehood were to carry the day. As said earlier, the accruals-versus-receipts bases of accounting explain merely timing differences, and the elephant in the room had escaped notice. The real issue in the 2011-12 appeal was the glaring omissions of sales, which Mr Cairney had indeed at one point conceded as having been identified. We have set out our findings of fact in relation to 2011-12 at §§106-108, in the event that HMRC decide to pursue the matter pursuant to s 36(1A)(d) of TMA, and possibly to include any years prior 2010-11 on the presumption of continuity.

Third issue: whether Sch 24 penalty to be confirmed

138. In relation to the penalty under Sch 24, if the inaccuracies are 'careless', we need to ask whether they are attributable to the agent to render the defence under para 18 of Sch 24 relevant, whereby:

> 'P is not liable to a penalty under paragraph 1 or 2 in respect of anything done or omitted by P's agent where P satisfies HMRC that P took reasonable care to avoid inaccuracy … or unreasonable failure …'

139. We have found as above that the inaccuracy for 2010-11 is at least carelessly caused. We consider that there was a propensity to carelessness in the light of the under declaration for 2011-12, the magnitude of which would not have gone unnoticed by the appellant, who must be regarded as a professional with considerable intellectual acumen. Nor is it credible that the magnitude of under declaration would have gone unnoticed by an able professional such as Mr Cairney acting on the appellant's behalf. In view of what Mr Cairney said of the appellant, being an orthodontist and earning more than a dentist, a fall in income to one-third of the expected level in the six-month period to September 2011 would have required an explanation beyond mere carelessness.

140. Against the backdrop of 2011-12, we consider that the appellant had a propensity to carelessness (and beyond). We do not consider that the appellant in this case would have taken reasonable care to avoid the inaccuracy, and the defence under para 18 of Sch 24 is therefore not available to him. The general lack of candour and cooperation which characterised the appellant's response to HMRC's enquiry meant that no reduction had been given, and we agree that there is no basis for reducing the penalty that is set at 30%.

Disposition

141. The appeal is accordingly dismissed. The discovery assessment for 2010-11 stands good, save for the minor adjustment to vary the amount of under declaration to £7,680 (from the figure assessed of £8,094.96). The tax effect is to be recalculated accordingly for the s 29 TMA assessment. The penalty under Sch 24 is likewise confirmed, and to be revised in line with the recalculated potential lost revenue.

Application for permission to appeal

142. 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.

DR HEIDI POON
TRIBUNAL JUDGE

RELEASE DATE: 19 JULY 2019