Neutral Citation: [2024] UKFTT 00139 (TC)

Case Number: TC09074

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2020/03438

*INCOME TAX & CAPITAL GAINS TAX – meaning of 'discover' under s29(1) TMA where no returns ever filed – whether Revenue officer believed that there had been insufficiency of tax – whether extension of time limits to raise assessments – subjective and objective tests – whether quantum of discovery assessments 'stand good'– whether penalties under s 7 TMA and Sch 41 FA 2008 for failure to notify liabilities – appeal dismissed*

**Heard on:** 12 May 2023
**Judgment date:** 19 February 2024

**Before**

**TRIBUNAL JUDGE HEIDI POON**

**Between**

**STEVEN HAGUE**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Steven Hague in person

For the Respondents: Christopher Vallis, litigator of HM Revenue and Customs' Solicitor's Office

## DECISION

### INTRODUCTION

1. Mr Steven Hague (Mr Hague or the 'appellant') appeals against nine assessments (the 'Discovery Assessments') issued by the respondents ('HMRC') pursuant to s 29 of the Taxes Management Act 1970 ('TMA') for the nine consecutive tax years from 2007-08 to 2015-16. For the purposes of this appeal, the total of the nine discovery assessments stands at £67,177.01.

2. The Discovery Assessments were followed by the issue of nine penalty assessments (the 'Penalties') for failure to notify the relevant tax liabilities for the said years. The penalties are raised pursuant to section 7 of TMA (for the years 2007-08 and 2008-09), and Schedule 41 to the Finance Act 2008 ('Sch 41') (for the years 2009-10 to 2015-16). The overall quantum of penalties for the nine years is £43,665.06.

### EVIDENCE

3. Officer Raakhee Tailor is an HMRC officer in the Economic Crime Operations Team of Fraud Investigation Service ('FIS') and was the decision maker in relation to the matters under appeal. She lodged a witness statement of 24 pages with 430 pages of exhibits. She was cross-examined by Mr Hague and answered supplemental questions from the Tribunal. I find Officer Tailor to be a credible and reliable witness, and I accept her evidence as to matters of fact.

4. Mr Hague lodged a witness statement of 4 pages dated 16 September 2021, and appeared in person. He was cross-examined, and his testimony was subjected to the scrutiny of documentary evidence for corroboration. I find found aspects of Hague's evidence unreliable due to inherent consistencies, and I reserve judgment on Mr Hague's credibility as a witness.

### MATTERS UNDER APPEAL

5. The assessments for the nine years were all issued on 23 April 2018, and appealed on 9 August 2018. The original sums that were under appeal are in relation to:

(a) Income tax in the total sum of £119,566.60;
(b) Class 4 NIC in the total sum of £20,747.23;
(c) Capital gains tax in the sum of £12,738;
(d) Penalties under s7 TMA for 2007-08 and 2008-09 in the sum of £24,867.59;
(e) Penalties Sch 41 FA 2008 for 2009-10 to 2015-16 in the sum of £74,615.89.

6. For the purposes of the appeal, the respondents invite the Tribunal to reduce the quantum of the assessments and penalties in respect of each year from the original to the following:

| Original IT& NIC | Year | Assessed Pub Income | Revised IT & NIC | CGT | Revised Total | Penalty at 65% |
|---|---|---|---|---|---|---|
| £18,411.07 | 2007-08 | £11,915 | £1,739.40 | £8,392.80 | £10,132.20 | £6,585.93 |
| £29,574.64 | 2008-09 | £37,500 | £8,858.20 | | £8,858.20 | £5,757.83 |
| £12,097.40 | 2009-10 | £41,857 | £9,967.76 | | £9,967.76 | £6,479.04 |
| £65,480.89 | 2010-11 | £39,682 | £9,358.76 | | £9,358.76 | £6,083.19 |
| £30,498.38 | 2011-12 | £40,600 | £9,628.75 | | £9,628.75 | £6,258.69 |
| £1,579.80 | 2012-13 | £12,800 | £1,406.55 | | £1,406.55 | £914.26 |

| | | | | | | |
|---|---|---|---|---|---|---|
| £16,171.42 | 2013-14 | £54,194 | £14,787.03 | | £14,787.03 | £9,611.57 |
| £4,113.04 | 2014-15 | £8,300 | £30.96 | | £30.96 | £20.12 |
| £3,111.41 | 2015-16 | £20,180 | £3,006.80 | | £3,006.80 | £1,954.42 |
| **£181,038.05** | **Total** | **£267,028** | **£58,784.21** | **£8,392.80** | **£67,177.01** | **£43,665.06** |

**LEGISLATIVE FRAMEWORK**

## Discovery Assessments

7. Section 12B of the Taxes Management Act 1970 ('TMA') requires a taxpayer such as the appellant to keep and preserve all such records as may be requisite for the purpose of enabling him to deliver a correct and complete return for the year or period of assessment.

8. Section 29 TMA provides for assessment to be raised where a loss of tax is discovered and where the requisite conditions have been met. This is an appeal where there had been no returns submitted, so the relevant provision for discovery purposes is under s 29(1):

> '(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment –
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> […]
>
> the officer or, as the case may be, the Board may, … make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.'

9. Section 34 TMA provides for the ordinary time limit for an assessment under s 29 TMA to be made within 4 years after the end of the year of assessment to which it relates. Section 36 TMA 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'. HMRC rely on sub-section 36(1A)(b), which provides as follows:

> (1A) An assessment on a person in a case involving a loss of income tax or capital gains tax –
> […]
>
> (b) attributable to a failure by the person to comply with an obligation under section 7, …'

10. Section 7 TMA provides, inter alia, as follows:

> 7 **Notice of liability to income tax and capital gains tax**
> (1) Every person who –
>
> (a) is chargeable to income tax or capital gains tax for any year of assessment, and
>
> (b) falls within subsection (1A) or (1B),
>
> shall, subject to subsection (3) below, within the notification period, give notice to an officer of the Board that he is so chargeable.
>
> (1A) A person falls within this subsection if the person has not received a notice under section 8 requiring a return for the year of assessment of the person's total income and chargeable gains.
> (1B) […]'

11. The Tribunal's appellate jurisdiction is provided under s 50 TMA. 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'.

**Penalties**

12. For the tax years 2007-08 and 2008-09, HMRC rely on section 7 TMA, where sub-s 7(8) relevantly provided at the time as follows:

> '(8) If a person, for any year of assessment, fails to comply with subsection (1) above, he shall be liable to a penalty not exceeding the amount of the tax-
>
> (a) in which he is assessed under section 9 or 29 of this Act in respect of that year, and
>
> (b) which is not paid on or before the 31st January next following that year.'

13. For the tax years 2009-10 to 2015-16, HMRC rely on Schedule 41 to the Finance Act 2008 ('Sch 41') which provides:

> '(1) A penalty is payable by a person (P) where P fails to comply with an obligation specified in the Table below (a "relevant obligation").'
>
> [Obligation is defined as follows:]
>
> 'Obligation under section 7 of TMA 1970 (obligation to give notice of liability to income tax or capital gains tax).'

**THE FACTS**

**Background**

14. The appellant and Mr Paul Hague are sons of Mr Brian Hague. The following facts are concerned with the business of a public house run by the Hague family.

(1) On 16 January 2002 Wellthorpe Limited sold the operating business and freehold title to a public house known as The New Tyke ('the Pub') to Mr Paul Hague, while the day-to-day management of the Pub was carried out by Mr Brian Hague until 2013.

(2) As stated by Paul Hague in a witness statement provided for separate criminal proceedings concerning Brian Hague, it had never been Paul Hague's intention to run the Pub as Paul Hague owned and operated a quarry as his business.

(3) The Pub had a bar, a restaurant and function rooms, which were hired to members of the public. The Pub also rented out rooms.

(4) The appellant was contracted to work at the Pub.

(5) The appellant stated in a witness statement for the purposes of the same separate criminal proceedings that he was not paid his 'wages' for his work at the Pub 'on a regular basis because I gambled and [Mr Brian Hague] knew that I might lose it so it was understood that he would pay me for work that I did whenever I needed it and would hold on to it for safekeeping until then.'

15. In relation to the properties associated with the appellant, the facts not in dispute are:

(1) On 26 October 2007, the appellant sold a property at Heathcroft Crescent for £105,000; the property was purchased for £45,000 in 2006.

(2) In March 2011, the appellant purchased a property at Harrogate Road from Paul Hague for £140,000 outright without a mortgage.

16. Between 2007-08 and 2015-16 (the 'Relevant Years'), there was no record of the appellant having filed any returns to declare income received or capital gains arising.

**Enquiry to discovery assessments**

17. The key events associated with the enquiry into the appellant's tax affairs that resulted in the discovery assessments are as follows.

(1) On 19 January 2017, Officer Shuttleworth wrote to the appellant that HMRC intended to investigate his tax affairs.

(2) On 15 March 2017, the appellant and his adviser, Mr Peter Lorriman of PJ Lorriman & Co Ltd, attended a meeting at HMRC premises with Officers Shuttleworth and Cartlidge, in which the appellant stated that:

(a) He had purchased and sold the property at Heathcroft Crescent with 'the intention of doing it up and selling it on'; that he owned the property, but did not live in it for about 9 months in total before selling it.

(b) He currently lived at Harrogate Road, which was purchased outright without mortgage in 2011 for £140,000. The purchase of Harrogate Road was funded by 'a couple of gambling wins' estimated in the region of £60,000 to £80,000, and the balance funded by 'wages he received from working for his father' in the Pub.

(c) He had been living at Harrogate Road since 2011; that the property used to be his mother's home and was owned by his brother Paul.

(d) He said that his main source of income was from playing poker and he played one or two tournaments per month; that he would provide a cash stake at the tournaments and the winnings would also be paid in cash; some of the winnings were banked but most of the cash would be kept by the appellant to live on and to place stakes on future games.

(e) He was asked on the amount of his gambling wins in the year previous, but he was unable to provide an estimate. He explained that he did not have any records of the poker games he played or the money he won, as the winnings would either be spent or used on future stakes.

(f) In addition to the poker games, he also placed regular bets with bookmakers, although the majority of his money is made from being a successful poker player.

(g) He received £50,000 in cash following his mother's death in 2008.

(h) He confirmed that he had not received any loans or gifts of money from friends or family members apart from the £50,000.

(i) He received money from his father which was used to purchase Harrogate Road; that this was wages for work he had performed for his father; he explained that the wages were not declared to HMRC because 'he thought his father would have sorted that out when he paid the money to him'.

(3) On 20 March 2017, Officer Shuttleworth sent the meeting notes and requested further information and documents from the appellant, including bank statements, explanations for any large deposits where the source was unclear, and paperwork relating to the purchase and sale of properties. In relation to the meeting notes of 15 March 2017, Officer Shuttleworth wrote:

> 'If I do not receive a signed copy back within 30 days, I will assume your agreement.'

(4) On 2 May 2017, Officer Shuttleworth issued an information notice under Schedule 36 FA 2008 as the information and documents previously requested were not provided.

(5) On 16 June 2017, Officer Shuttleworth emailed Mr Lorriman informing him that the requested information and documents remained outstanding, but received no reply.

(6) On 23 June 2017, an initial Sch 36 penalty notice of £300 was issued with a copy to Mr Lorriman.

(7) On 16 August 2017, Shuttleworth issued a Notice for daily penalties at £15 per day under Sch 36 for the period from 24 June 2017 to 15 August 2017 in the sum of £795 for failure to comply with the information notice issued on 2 May 2017.

(8) On 20 September 2017, Officer Tailor contacted Mr Lorriman to advise that she had taken over the case from Officer Shuttleworth and requested an update as to when the outstanding information and documents would be provided.

(9) On 22 September 2017, Officer Tailor issued a further Notice for daily penalties at £30 per day for the period from 16 August 2017 to 21 September 2017 in the sum of £1,110 under Sch 36 for failure to comply with the information notice.

(10) On 5 October 2017, Mr Lorriman emailed Officer Tailor to appeal against the daily penalties and advised that the outstanding information would be sent by post as he had difficulty sending as email attachments.

(11) On 25 October 2017, Officer Tailor received some of the information and documents requested by post, and an appeal against the daily penalties.

(12) On 2 November 2017, Officer Tailor advised that she could not accept the appeal against the Sch 36 daily penalties as it was made out of time. (The three sets of Sch 36 daily penalties totalling £2,205 would appear to remain unpaid to date.)

*Review in 2017 of partial information made available*

18. On 16 January 2018, Officer Tailor completed the analysis of the information and documents that had been received by post, and sent a letter to the appellant and Mr Lorriman, enclosing a schedule of unexplained credits received into the appellant's bank and credit card accounts. The letter requested information by 16 February 2018 in relation to (a) the source of these unexplained deposits, and (b) expenses incurred on the sale of Heathcroft Crescent. The listing of unexplained deposits shows the following details:

(1) Deposit of cash with sequential pay-in slips for amounts ranging from £200/£500 to £5,000/£6,000 covering the years from August 2007 to July 2013.

(2) A few exceptional lodgements included £30,000 (22/8/08), £10,000 (27/5/2010), and £36,000 (on 6/3/2012); £62,000 on 16/03/2011.

(3) Some significant lodgements on the list bear various descriptions, such as 'HUNSLET LEEDS' which featured numerous times, with the bigger amounts being £10,000 on 29/8/08, another £10,000 on 26/02/08, and £18,000 on 23/12/09; 'HGATE BRADFORD' (£20,000 on 3/8/2010).

(4) Another set of descriptions featured as 'CD 1278' followed by 'W.H.' at times, or by a date, and sometimes preceded by a 14-digit number; while 'CD 1286' was followed either by a 'LOYD LEEDS CHURCH' or a 6-digit number (e.g. on

19/01/2016 deposit 'CD 1286 500038' for £1,000; on 29/01/2016 deposit 'CD 1286 50039' for £1,000.)

19. No response was received from the appellant or Mr Lorriman, and Officer Tailor wrote:

(1) On 19 February 2018 by email to Mr Lorriman for an update;

(2) On 15 March 2018, by letter to the appellant with Mr Lorriman copied, advising that if no response was received within 30 days, tax assessments under s 29 TMA for the nine years would be issued.

(3) On 20 April 2018, in the absence of any response, Officer Tailor wrote to the appellant and Mr Lorriman of her intention to raise tax assessments based on:

(a) insufficiency of capital gains tax (following the sale of Heathcroft Crescent);

(b) unexplained deposits would be treated as income received by the appellant in the absence of any explanations having been provided.

*Assessments and Penalties*

20. On 23 April 2018, Officer Tailor issued the Discovery Assessments for the tax years 2007-08 and 2015-16 inclusive. In a covering letter, Officer Tailor stated that she would be considering charging the appellant with penalties for failure to notify chargeability.

21. On 11 June 2018, Officer Tailor issued penalty explanation and calculations to the appellant with a copy to Mr Lorriman, of which the following details are relevant to the appeal.

(1) Behaviour which led to the failure to notify was 'deliberate' on the basis that:

> 'You [i.e. the appellant] have never declared any income and paid any tax to [HMRC]. However, your personal bank accounts evidence a substantial amount of credits received since at least the tax year 2007-08. I believe these credits are income received from a trade. The untaxed income that you received enabled you to invest in a property purchased in 2011 for £140,000 without the use of a mortgage. The extent of credits are [sic] such that you must have known about your obligations to inform HMRC, however, you deliberately chose not to in order to maximise your cash flow. The failure has continued for several years without any attempts by you to comply with your obligations.'

(2) For disclosure was prompted because the appellant did not tell HMRC about the failure to notify before he had reason to believe HMRC had discovered it, or were about to discover it.

(3) The penalty range for deliberate failure and prompted disclosure is from 45% to 70% as set by Schedule 41 FA 2008.

(4) A reduction of 20% for Telling (0%), Helping (10%) and Giving (10%) is applied to the difference in the penalty range of 25% (i.e. between 70% and 45%).

(5) An overall reduction of 5% is given (i.e. 20% of the range differential of 25%) against the maximum 70% penalty to give 65% as the penalty percentage.

22. The following responses were received by HMRC following the issue the Assessments.

(1) On 17 July 2018, Mr Lorriman emailed Officer Tailor to apologise for the failure to respond to correspondence due to him having been unwell for several months, and advised that information regarding the appellant's winnings from gambling would be

provided. A meeting was requested, and was agreed to by Officer Tailor on 18 July 2018, and the meeting was scheduled for 9 August 2018.

(2) On 8 August 2018, Mr Lorriman wrote in advance of the scheduled meeting to advise as follows:

> 'Mr Hague confirms that all monies received originate from gambling sources, either licensed betting establishments ie William Hill … or from cash poker tournaments. One noted win was paid out by cheque from Corel for £30,000, banked 06/03/2012 which was a win on a snooker tournament bet. Mr Hague did not keep copies of the cheques etc as he was out of the scope of Self Assessment and has no reason to keep records due to the untaxable nature of the gambling monies received.
>
> In more recent years, the main high street betting establishments have progressed to make direct payments of winnings into customers' bank accounts, … the payment of the actual bets made is taken direct from a bank/card account. Mr Hague's more recent bank statements are fully visible of the gambling payments made and received and set a precedent of the nature to Mr Hague's past and present banking activity.
>
> The poker tournaments attended by Mr Hague were initially funded by his Uncle. These tournaments were always 'Cash' only winnings and often increased in value as Mr Hague tried to progress into a career as a professional poker player. Confirmation of the financial backing by Mr Hague's Uncle can be provided in writing if so required. …'

*Meeting of 9 August 2018*

23. On 9 August 2018, in a meeting attended by Officer Tailor and the appellant. During the meeting, Mr Hague reiterated what had been similarly related by Mr Lorriman in writing on 8 August that (a) the cash deposits in his bank accounts were winnings from poker tournaments which were arranged by word of mouth, and mostly involved family and friends, and (b) cheque deposits were winnings from gambling establishments which had since made direct payments into his accounts.

24. Officer Tailor accepted that some of the unidentified credits marked 'WH' in the statements should not be included in the assessments, and to be treated as payments from 'William Hill'. The appellant was unable to provide more information in relation to the poker tournaments, nor could he provide confirmation of his uncle's financial backing when requested.

*Late appeal refused by HMRC*

25. Following the 9 August meeting, Mr Lorriman sent an appeal against the assessments by email. On 15 August 2018, Officer Tailor wrote to the appellant and Mr Lorriman, and enclosed a copy of the notes of the meeting of 9 August. At the same time, Officer Tailor advised that she was unable to accept the appeal against the assessments as the appeal was made out of time, and that a late appeal could be made to the Tribunal for consideration.

*Notices of penalty determination and assessment*

26. After the 9 August meeting, there was no further contact between HMRC and the appellant or Mr Lorriman. On 4 October 2018, Officer Tailor issued a Notice of Penalty Determination under section 7 of TMA for the tax years 2007-08 and 2008-09, and a Notice of Penalty Assessment under Schedule 41 FA 2008 for the tax years 2009-10 to 2015-16.

27. On 4 October 2018, Officer Tailor issued penalties for the tax years 2007-08 to 2008-09 under s 7 TMA for failure to notify liability to income tax and capital gains tax. She also issued penalties for the tax years 2009-10 to 2015-16 under Sch 41 FA 2008 for failure to

notify liability to income tax. The letter provided details on the appeal process and time limits.

*Application for a late appeal to the Tribunal*

28. The Notices outlined the process of appeal within 30 days of the date of the notices. There was no timely appeal to HMRC against the penalty notices. There followed the correspondence culminating in an appeal to the Tribunal.

(1) On 4 February 2019, Officer Tailor received a letter from Mr Lorriman advising that enforcement action had commenced against Mr Hague, and asked for advice on how to provide further information to 'disprove' the funds as from taxable sources.

(2) On 5 February 2019, Officer Tailor received a letter from John Howe & Co Solicitors advising that they had been instructed to act for Mr Hague.

(3) On 6 February 2019, Officer Tailor advised that Mr Hague could make an application to the Tribunal for his late appeal to be admitted.

(4) On 13 February 2019, the appellant lodged an appeal to the Tribunal including an application for the late appeal to be admitted.

29. On 24 May 2019, the Tribunal was notified by HMRC litigator Adam Moore that HMRC were willing to accept the late appeal if Officer Tailor could review the additional information which the appellant stated in the Notice of Appeal as being able to help settle the appeal.

*Further information received after lodgement of appeal*

30. On 5 July 2019, Officer Tailor requested documentary evidence to prove the source of monies received into the appellant's bank and credit card accounts, and any information and documents relating to expenses incurred on the sale of Heathcroft Crescent. The information sought by HMRC was first requested following the meeting on 9 August 2018. The appellant relied on the alleged information in lodging his appeal to the Tribunal, but HMRC had not seen any evidence of the information so relied on by the appellant as stated in the Notice of Appeal.

31. On 29 July 2019, Mr Lorriman provided partial information in response.

(1) A number of bank deposits were 'explained' as coming from:

(a) 22/08/08 – £30,000 from part inheritance;

(b) 3/8/10 – £20,000 from poker tournament winnings at New Tyke Pub;

(c) 23/2/11 – £14,500 being two deposits winnings from William Hill;

(d) 16/03/11 – £60,000 of which £39,682 was wages, and the balance of £20,318 was a loan repayment from Brian Hague;

(e) 06/03/12 – £30,000 being Corel winning in relation to snooker bet;

(f) 06/02/12 – £6,000 being Corel betting win;

(g) 22/04/14 – £12,500 as per bank statement shows from William Hill;

(h) 28/08/14 – £1,900.72 per bank statement from 'W.H.' being William Hill.

(2) That further evidence of some items can be found in the diaries and statements held by the Crown in relation to the criminal investigation against Brian Hague; that the diary of the Pub would confirm dates of poker tournaments held at the premises, and

the £60,000 paid on 16 March 2011 had been reviewed in the court proceedings concerning Brian Hague.

(3) That Mr Hague received 'a substantial inheritance' from the estate of his mother for whom he was a carer until her death; that his mother contributed to Mr Hague's low income resulting in various deposits during 2007 and 2008.

(4) In relation to the costs incurred in renovating Heathcroft, Mr Hague could only provide estimate from memory and provided a schedule of expenditure totalling £23,450:

(a) Legal fees and search fees on purchase £1,200;
(b) Boiler x2 and central heating system £5,500;
(c) Kitchen (x2 following theft) £12,800;
(d) Painting and decorating £800;
(e) Estate agency fees £2,050;
(f) Legal fees on sale £600;
(g) Utility cost £500.

(5) No documentary evidence had been retained to substantiate the capital expenditure on the property, which was sold in October 2007, and that Mr Hague was not required to keep records after the lapse of 6 years.

32. On 20 November 2019, Officer Tailor completed a review of the information provided on 5 August 2019, which enabled amendments to the Assessments that had been raised in respect of certain areas to be made, and explained where no adjustments could be made.

33. On 10 March 2020, Officer Tailor set out her revised view of the amount due for income tax, and capital gains tax, and the corresponding adjustment to the quantum of penalties.

**Enforcement action**

34. There was enforcement action to collect the sums of assessments and penalties, which prompted the instruction by the appellant to his lawyer John Howe & Co to halt the action by writing to Debt Management on 7 April 2020. In this letter, Mr Hague's lawyer stated on his behalf in relation to the procedure being adopted by HMRC in relation to the enquiry:

> '… the fact that [HMRC] first raised enquiries about the tax period from April 2013 to April 2017 but then changed this to cover the period from April 2007. It is a detriment to our Client given there is on obligation on him to keep information from such a historic tax period and in fact no notice has been given regarding the extended review.'

**Third-party statements for the appellant**

35. In an attempt to give background to some of the 'unexplained' lodgements, Mr Hague had obtained various statements from third parties for HMRC's consideration, such as:

(1) An email dated 22 March (year not shown) from a Mr Duff to Mr Lorriman, and was enclosed with Mr Lorriman's letter to HMRC of 29 July 2019. Mr Duff stated:

> 'Yes, I know Steven well; his mother was my sister.
>
> When she passed away I promised her I would [do] whatever I could to help Steven as he had been her carer for many years he was very close to her and in many ways she spoilt him. I know she helped him financially over the years.

> To keep my promise to [name of sister] I have personally lent and gifted large sums of money ranging from [not legible] to £6000 since 2010. I have never received any form of payment back.
>
> I have now told him that he has had all he is going to get … I no longer wish to see or hear from him again as he has been the cause of a few arguments in my home. I do not want to be contacted again regarding him.

(2) A statement dated 14 June 2020 by a Ms Gilfoyle who worked at the Clayton branch of "Bet Fred" from 5 August 2015 to 26 December 2016 wherein she stated that during her employment, she had come to know Mr Hague 'as a regular client', and had 'served or witnessed Mr Hague placing numerous bets over this time'; that he was 'a regular large payout customer'; and 'some bets require further authorisation from the back office due to the size of the potential win'; that she had witnessed the bets placed by Mr Hague 'return him large sums of money'; that any winnings can be paid to the customer by cash, cheque, card refund or BACs'; and 'it is very rare for any customer to request winning bet refund receipts'. (The substance of the statement is typed with manuscript entries of details concerning the licensed bookmaker and the employee.)

(3) Another statement by a Mr Troy of Corel, who was employed from 20 May 2015 to 16 November 2019 at its branch at Little Horton. Apart from the manuscript entries, the statement has identical typed wording as Ms Gilfoyle's.

(4) A letter from the 'Retail CDD Team' of William Hill at branch address at St John's Centre in Leeds is dated 10 July 2020, and enclosed a letter from the 'Customer Due Diligence Team' to be given to 'the customer known as Mr Steven Hague'. The due diligence letter is two-page long with references to the obligation placed on licensed bookmaker under the Gambling Act 2005 to carry out due diligence checks when 'any customer's gambling reaches certain levels of activity' and give instructions for Mr Hague to provide the necessary documents and other steps required for the check.

(5) An email by Brian Hauge dated 27 July 2020 addressed to the appellant's lawyer John Howe & Co. states as follows; (the content was turned into a witness statement signed and dated on 28 September 2021):

> 'I paid Steven £60,000 in March 2011 this amount was made up of £21,318 loaned from [h]is mother's money and the balance was made up of amounts owed for helping me when proprietor of the new tyke, after my wife his mother passed away in [J]an 2008 and I wasn't in a frame of mind to continue on a full time basis, this continued for over 3 years and I keep any money due for [h]is assistance over that period because I New [sic] he would have been likely to gamble it. After this payment in 2011 Steven [h]as not been to the premises or received any money whatsoever from myself or new tyke, and didn't have any communication till after my prison sentence in June 2016.'

**Mr Hague's evidence**

36. Mr Hague's witness statement dated 16 September 2021 states, inter alia, the following:

(1) He worked for his mother in her flower shop after leaving school, and then at the New Tyke pub between 2008 and mid-2011.

(2) He was a carer for his mother until she passed away in January 2008; that his mother was a gambler and contributed to his living expenses throughout his life; and he received a cash inheritance of at least £50,000.

(3) In August 2006, his mother purchased Heathcroft Crescent for him with the intention that the property would be 'a quick flip' to 'make a profit and move on'. It took about 8 months to do the house up; that the house was flooded after a new bathroom was installed; the ceiling in a room was bowed, and everything new that had been installed had to be ripped out, including the boiler; that he had to start the renovations all over again after the flood. He moved into the property until it was sold in October 2007, and 'my wife and kids also stayed with me there at times'; that his 'wife had her own property where she lived with our kids'. (A statement dated 28 September 2021 by a plumber allegedly attending to the emergency call out to deal with the flood in 2006 is lodged.)

(4) After his mother's death, his uncle who is his mother's brother, had provided the stakes for the appellant to play poker, and put him in tournaments.

(5) The appellant believed that he was working for his father at the New Tyke form 2008, but he was not paid wages because he had money from his wins, and his father was 'holding' his wages.

(6) While he was working for his father at the Pub, there were numerous poker nights where he won a lot of money. He remembered the biggest win from a tournament where the stake to enter was £5,000 each for the 20 players, and he won the first place with the prize being £60,000, (£25,000 to second place and £15,000 to third place).

(7) In the relevant period, he also had 'a nice run' with football bets and snooker bets.

(8) He, his father, and two brothers 'all started falling out during 2011', and he stopped working at the Pub in mid-2011. He had not set foot in the pub since and had not spoken to his father until 2017, and he has no communications with his brothers to this day.

(9) When he 'walked out' of the Pub, he did not walk out with his wages; the cheque came afterwards, and he received £60,000 from his father, being repayment for fees to a firm of solicitors he had made for his father in the sum of £20,318, and the balance was his wages for three and a half years. He was 'under the impression' that the figure was his 'wages net of tax and deductions'; that his father was 'insistent' that the tax had been deducted from his wages.

(10) In early 2011, he bought Harrogate Road which was owned by his brother and rented out to his parents.

(11) He has not worked after 2011, but continued to gamble selectively, because he said: 'If you gamble every day you will lose money. … Gambling is luck but poker is skill'; that he was recently banned from the bookies because of his consistent trend in winning.

(12) He believed it was in 2012 that his father was arrested for growing cannabis, but he did not know anything about it until he received a phone call to tell him that his father's conviction and sentencing was in the newspaper in 2016-17, which seemed to have triggered the enquiry into his tax affairs.

37. An earlier witness statement provided by Mr Hague in the ongoing proceedings of Brian Hague at Leeds Crown Court is included as an exhibit to Officer Tailor's witness statement. The copy exhibited is undated, but according to Mr Vallis' skeleton argument for HMRC, the witness statement for those proceedings was dated 13 March 2018, wherein Mr Hague stated:

> 'I recall that in 2009 I paid a cheque to [a firm of solicitors] as a loan to my father. This can be seen in my bank statement. … it was paid back to me by my father by cheque in March 2011. The cheque that he gave me was for £60,000 because he also owed me a large amount of wages from me working at the Tyke for him for a number of years. I had been working at the pub whenever I was needed between 2008 and 2011/12. He had not paid wages to me on a regular basis because I gambled and he knew that I might lose it so it was understood that he would pay me for work that I did whenever I needed it and would hold on to it for safekeeping until then.'

**Officer Tailor's evidence**

38. Officer Tailor set out her discoveries in some detail in her 23-page witness statement dated 17 September 2021. The conclusion that there had been a loss of tax to the Crown over a 9-year period is based on the following facts.

(1) The appellant has never submitted a tax return and HMRC records show only one employment held with Di Nero's Ltd for a brief period during the year to 5 April 2011, in which his pay from employment was £275.

(2) The appellant's bank accounts show deposits into his bank and credit card accounts during the tax years 2007-08 to 2015-16 for which the source has not been identified.

(3) The appellant has offered explanation of most of the unidentified credits as winnings from gambling, particularly poker tournaments held at the Pub, and claimed some of the payments have come from his uncle and other family members, but the explanations are vague and very little documentary evidence has been provided in support of the credits received into the accounts.

(4) Although it is evident that a significant proportion of the 'turnover' within the appellant's accounts derives from gambling, information held by HMRC indicates that the appellant has worked at the New Tyke Pub for several years.

(5) The appellant has acknowledged on a number of occasions that he did work in the New Tyke Pub, initially in statements given to the police and then during the course of the tax enquiries, which includes the initial meeting with the appellant on 15 March 2017, when the appellant stated that part of the funds used to purchase his property was from ages received from working at his father's pub. From the information held by HMRC, it can be established that he worked at the New Tyke Pub at least until some point in 2011.

(6) The discovery assessments raised on 23 April 2018 include the tax chargeable based on the table of unexplained credits plus interest calculated up to 23 April 2018, which totalled £181,038 originally, but has been revised to £67,177 (before interest).

(7) The table below show the total amounts of unidentified credits in the appellant's bank and credit card accounts during the tax years 2007-08 to 2015-16, which were used to re-calculate the Discovery Assessments on revisal of the original (see column 3 at §6).

| Year | Account 1 | Account 2 | Account 3 | Account 4 | Account 5 | Total |
|---|---|---|---|---|---|---|
| 2007-08 | 11,265 | | | | 650 | £11,915 |
| 2008-09 | 50,270 | 23,500 | | | 1,320 | £75,090 |
| 2009-10 | 20,298 | 21,000 | | | 559 | £41,857 |
| 2010-11 | 29,000 | 52,800 | 62,000 | | 3,000 | £146,800 |

| | | | | | | |
|---|---|---|---|---|---|---|
| 2011-12 | 13,310 | 43,000 | 5,780 | | 19,109 | £81,199 |
| 2012-13 | 3,100 | 3,000 | | | 6,700 | £12,800 |
| 2013-14 | 10,700 | 17,500 | 13,800 | 9,622 | 2,572 | £54,194 |
| 2014-15 | 20,400 | | | 2,300 | | £22,700 |
| 2015-16 | 16,780 | | | 3,400 | | £20,180 |

***Recalculation for income and capital gains***

39. In evidence, Officer Tailor explained the considerations she took into account in reducing the quantum of her tax loss calculation.

(1) The appellant has stated that a cheque paid into his account for £60,000 on 16 March 2011 included wages of £39,682 from the Pub. In his witness statement provided to the Crown in relation to his father's confiscation case, he stated that the wages were for work done from 2008 to 2012. He also stated that in February 2010, his father gave him £17,500 for purchases and running of the pub whilst he was away; that he worked there on a day-to-day basis, including weekends until 2am.

(2) During the interview under caution on 21 December 2009, following an incident where the appellant's vehicle was stopped by PC Picken and he was found to be in possession of 'green vegetable matter' that smelled of cannabis, two canisters and a large amount of cash. Mr Hague stated during this 2009 interview that:

(a) He was employed by his brother for the last 12-13 years.
(b) The cash found on him (at least £1,000) from the pub and derived from party bookings and takings, and £400 wages.
(c) The pub takings not locked in the safe; he keeps it and banks it.
(d) He gets paid depending on takings and has been there for 10 years.
(e) He has had no other paid jobs.
(f) He gets paid in cash from the pub.
(g) He has no bank and building society accounts.

(3) Based on the above, the unidentified credits figure of £146,800 in 2010-11 is reduced to £39,682 (the appellant's figure). Although the appellant stated that the wages were for work done during the previous 3-4 years, Officer Tailor considered that the appellant's statement in 2009 interview under caution that he got paid depends on the takings and working on a day-to-day basis including late weekends, it is reasonable to assume that the appellant had an active role in the pub and this amount was his annual salary for the year.

(4) To bring the figures for other years in line with the 2010-11 figure of £39,682, Officer Tailor has assumed that 50% of the unidentified credits assessed during the tax years 2008-09 and 2011-12 is income from the Pub.

(5) No changes have been made to the amount assessed during 2009-10 as the figure of £41,857 is not far off from the appellant's figure of £39,682 for 2010-11.

(6) No adjustments to other remaining years as the unidentified credits levels are relatively low.

(7) The figure for 2014-15 has already been reduced to account for the amounts received from William Hill.

40. In terms of income tax loss, Officer Tailor considered that over the 9 years, the adjusted quantum for the discovery assessments gives the appellant an average annual income from

the New Tyke Pub of £29,770, and the basis for her belief is set out at paragraphs 73 to 75 of her witness statement:

> 'I believe that this is a reasonable amount of income that a person would be expected to earn from a pub, based on the fact that the Appellant has admitted that he has worked at the pub for several years prior to the period covered by HMRC's investigation, none of this income has been declared let alone taxed.
>
> The Appellant has never declared any income to HMRC or paid any taxes.
>
> The Appellant, from his own admissions, has played an active role in the pub, has admitted that he gets paid in cash from the pub and I therefore believe that at least some of the cash deposited in his accounts is income from the pub.'

41. Officer Tailor also recalculated the capital gains tax by giving relief on legal and professional fees on purchase and disposal, and renovation costs as follows:

(a) Net proceeds on 26 October 2007 = £102,500
(b) Purchase costs on 4 August 2006 = £47,500
(c) Costs for renovation = £10,863
(d) Total gain in 2007-08 = £44,137
(e) Less Annual Exemption of £9,200
(f) Chargeable gain = £34,937

42. In summary, Officer Tailor's belief that there was an insufficiency of tax is at paragraph 58 of her witness statement:

> 'Despite numerous requests for the appellant to provide information and documents into the source of the credits received into his accounts and in relation to the acquisition and sale of his properties, including through the use of Schedule 36 Information Notices and subsequent penalties for failure to comply with the Information Notices, I received either little or no cooperation from either the Appellant or Mr Lorriman and I therefore concluded that there was a loss of tax to the Crown.'

***PC Picken's statement***

43. HMRC rely on Officer Picken's witness statement dated Sunday 20 December 2009. At the relevant time, PC Picken was a Traffic Constable stationed on the Force Operations Roads Policing Team and was authorised in the use of Tactical Pursuit and Containment (TPAC). The statement was made in relation to an incident on 20 December 2009 at 17:40 hours where a sliver Audi driven by Mr Steven Hague (henceforth 'SH') was stopped.

44. The 'Short descriptive note of tape-recorded interview' of SH by the police is exhibited for the purposes of this appeal, and the content of which includes the following:

(a) SH said he used cannabis and spend £40 per day on it.

(b) [Qt] 'You say you smoke 40 a day?'
[Ans] 'Yeah. I get it from work to pay for it. Employed by my brother 12-13 years … intention to smoke it … I wouldn't sell it.'

(c) [Qt] 'When arrested you were found with lots of cash.'
[Ans] '£600 bundle …Loose £400 wages and money.'

(d) [Qt] 'Do you always carry wages from the pub?'
[Ans]: 'Yeah, takings not locked in safe … keep it and bank. My brother doesn't work on a night. He does food and goes home. Had two parties and a 21st and it was from that. // I live at the pub. I don't own a house. I'm not

married. I own a motor vehicle – the one I was stopped in. Purchased 12 months ago. Paid £1000 for it. …

(e) [Ans]: 'I get paid depending on the takings how much I get paid. Been there 10 years. Held no other paid jobs. No child allowance. No partner. All rest etc covered by brothers. … get paid cash from the pub – has no bank account.

***Failure to notify liabilities***

45. Officer Tailor stated the basis for her belief that the appellant's failure to meet his obligations to tax is the result of deliberate behaviour, based on the following considerations.

(1) The appellant has been given ample opportunity to provide explanations and evidence to support his position and has failed to do so.

(2) The appellant has failed to comply with formal information notices even though penalties totalling £2,205 have been issued for non-compliance.

(3) The penalties remain outstanding to date, and this demonstrates that the appellant's continued behaviour of deliberately avoiding his responsibilities.

(4) No action was taken by the appellant to cooperate until enforcement action had commenced in February 2019. It was also at this time that Mr Lorriman claimed that the appellant had not received any of HMRC's correspondence, but there was no mention of this at the meeting held in August 2018.

(5) The appellant has contradicted himself on several occasions. This includes in relation to whether he was living at Heathcroft Crescent, and in relation to when he was working at the New Tyke Pub. Officer Tailor believes that 'this is a deliberate act to avoid his liabilities'.

(6) In his interview by the Police under caution, such as in relation to not having any bank accounts are evidently untrue, and this indicates a history of deliberate non-compliance and dishonesty.

(7) The appellant has acknowledged that he has worked at the New Tyke Pub for several years. However, he made no attempts to contact HMRC to notify his liabilities.

(8) The size, scale and periods of the credits received into the appellant's accounts suggests that he would have known that it would attract the attention of tax authorities at some stage and not keeping any records and failing to cooperate is 'a deliberate act to disguise his underlying behaviour'.

(9) None of the income received from the pub has been taxed elsewhere. It is Officer Tailor's belief that a reasonable person would have some expectation of a tax liability, but the appellant has never declared any income despite having openly admitted to working at the New Tyke Pub for several years.

(10) The appellant has admitted to being paid for his work at the pub in cash. Officer Tailor believes that the appellant would have been aware that no tax had been deducted as the amounts were received in cash and no payslips and P60s had been issued.

***Assessment to penalties***

46. For the two years ended 5 April 2008 and 2009The penalty assessments have been raised pursuant to s 7(8) TMA, whereby penalties can be charged up to 100% of the tax loss with mitigation being given as follows:

(1) Disclosure – maximum 20% – Officer Tailor has not allowed any mitigation for disclosure because the appellant has failed to make a disclosure or offered any adequate

explanation as to why the disclosure has not occurred. The appellant has maintained throughout the investigation that all of the credits received into his accounts are non-taxable, while acknowledging that he did work in the Pub on several occasions.

(2) Co-operation – maximum 40% – mitigation of 20% given to reflect that the appellat has agreed to attend meetings but only provided some of the information required following the issue of Schedule 36 notice. Since October 2017, all requests for information went unanswered until the appeal was lodged against the assessments.

(3) Seriousness – maximum 40% – mitigation of 15% allowed. The appellant has never declared any income or paid any tax and the failure to notify has continued over a significant number of years, while having openly admitted that he worked in the New Tyke Pub and was paid wages for his work.

(4) The penalty percentage is set at 65%, after allowing a total reduction of 35% against the maximum 100%.

(5) The quantum of the penalty for 2007-08 and 2008-09 has been revised downwards after the recalculation of tax loss as tabulated at §6 above.

47. For the seven years ended 5 April 2010 to 2016, the penalties have been assessed under Schedule 41 FA 2008.

(1) The penalty range is stated by Officer Tailor as between 45% and 70% based on the behaviour being deemed to be 'deliberate' with 'prompted disclosure'.

(2) For mitigation under the headings of Telling (maximum 30%), Helping (maximum 40%) and Giving access (maximum 30%), Officer Tailor has allowed the following:

(a) Telling 0% – the appellant has not made any disclosure or offered explanation as to why the failure occurred.

(b) Helping 10% – the appellant did help by responding to the initial letter and agreeing to attend a meeting.

(c) Giving access 10% – the appellant provided some information but only after the use of information powers and following enforcement action.

(3) The total mitigation of 20% allowed is applied to 25% (being the difference of 70% and 45% in the penalty range used in Officer Tailor's calculation).

(4) An overall reduction of 5% is given, calculated as 20% of 25%.

(5) The penalty percentage is set at 65%, being maximum penalty percentage of 70% minus 5% reduction given.

**HMRC'S CASE**

48. In relation to whether HMRC have met the burden to raise the discovery assessments, Mr Vallis' submissions focus on the s 29(1) tests being met, whereby:

(1) The subjective test is met in that Officer Tailor believed that the information available to her pointed in the direction of an insufficiency of tax, and supported by her witness evidence.

(a) As concerns the capital gains tax arising from the sale of Heathcroft Crescent in 2007-08, Office Tailor concluded that there had been a loss of tax since the property had not been lived in by the appellant.

(b) As concerns the income tax arising during the Relevant Years, Office Tailor conclude that certain deposits into the appellant's bank accounts represented income from the Pub.

(2) In terms of the objective test, it is submitted that the conclusions reached by Officer Tailor are conclusions that a reasonable officer could form on the information available that there had been an insufficiency of tax.

(a) It is clear that the appellant did work at the Pub and did not declare the income received. The unexplained deposits continued until 2015-16 and it is entirely reasonable for an officer to be pointed in the direction that the unexplained deposits relate to work in the Pub;

(b) When asked for explanations of these unexplained deposits, no response was received. Once again, any reasonable HMRC officer could conclude that the deposits relate to working at a business where the appellant was known to have worked without declaring his income, especially when the appellant, after having been given repeated opportunities to justify deposits, provides no response.

(c) As for the capital gains tax assessment, it is 'entirely reasonable' for an HMRC officer to conclude that there was an insufficiency of tax where the proceeds exceeded the purchase price after annual exemption, and where the appellant could not provide documentary evidence of expenditure.

49. It is submitted that the penalty assessments should be upheld because:

(1) Section 7 TMA gives rise to an obligation to every person chargeable to income tax or capital gains tax to give notice to HMRC that he is so chargeable.

(2) The appellant was chargeable to income tax as regards all the years of assessment and to capital gains tax as regards 2007-08.

(3) The appellant therefore had an obligation to notify HMRC of this chargeability which he did not do so. As such, his conduct falls within section 7 TMA and Schedule 41 to FA 2008.

(4) The respondents contend that the appellant acted deliberately in failing to notify his chargeability because:

(a) he was aware that he was receiving income from the Pub;
(b) he was aware that tax had not been paid on the income received; and
(c) he was aware of his obligation to pay tax and still took no steps to do so.

(5) The failure falls within category 1: para 6(2)(b) of Schedule 41.

(6) For reduction, the Tribunal is invited to amend the penalties with the maximum penalty at 70% of potential lost revenue ('PLR') and 35% being the minimum, and 5% reduction being given for disclosure to take into account helping and giving.

**APPELLANT'S CASE**

50. In relation to the income tax assessments, the stated grounds of appeal are as follows:

(1) Mr Hague was and remains a gambler and most of the cash lodgements into his accounts were cash winnings from gambling and not income. No income tax payable on winnings from gambling, and the appellant is not obliged to keep records of his wins.

(2) It has been wrongly assumed that Mr Hague's income is from the New Tyke Inn. Mr Hague has confirmed that he did work there for a short period of time but the New

Tyke Inn was not his source of income. There was one payment in the sum of £60,000 from his father, Mr Brian Hague, of which £20,318 was a loan repayment and the balance was wages earned by Mr Hague while working at the New Tyke, which Mr Hague understood represented the net figure after deduction and payment of tax.

(3) Mr Hague received a cash inheritance from his mother who was also a gambler and prior to her death, Mr Hague acted as her carer, and his mother contributed to his low income by various deposits in 2007 and 2008, and as such is not income.

(4) Mr Hague was given various sums of money from his uncle by way of loans and gifts following the death of his mother.

51. As to the capital gains tax assessment, it is contended that a loss was incurred on the renovation of Heathcroft Crescent which was sold in October 2007, and no capital gains arose.

52. The penalties assessed are not due, as put forward by Mr Lorriman in one of his letters, the appellant had never been in self-assessment, and that he had assumed that his father had dealt with the tax deduction before making payment for his wages to him in March 2011.

53. In the event that any tax is deemed payable, which is denied, the level of mitigation that has been applied is not reasonable and appropriate in the circumstances.

**DISCUSSION**

## Issues for determination

54. The appeal is to be determined by considering the following issues in the order of:

(1) Whether the discovery of a loss of tax for the years concerned valid in terms as provided under s 29(1) TMA with an extension of the time limit as under s 36(1A) TMA;

(2) Whether the appellant has proved the contrary for the assessments to be displaced or varied if HMRC discharge the burden in relation to the validity of the assessments;

(3) Whether the quantum of the penalty assessments to be confirmed.

## Whether discovery under s 29(1)

55. In *Jerome Anderson v R&C Comrs* [2018] UKUT 159 (TCC), the Upper Tribunal reviewed relevant authorities, and set out the subjective and objective tests that must be satisfied for a discovery assessment under s 29(1) to be valid.

56. In relation to the subjective test, the UT in *Anderson* observed as follows:

> '[25] It is clear that before an officer makes a discovery assessment, he must have formed a certain state of mind ...
>
> [26] Any test which is devised as to the necessary subjective belief on the part of the officer must be a practical and workable test. The expression of the test has to recognise that at the time when an officer thinks that it is desirable to make a discovery assessment, the officer may appreciate that in certain respects he may not be in possession of all the relevant facts. …'

57. After a review of earlier authorities, the UT in *Anderson* gave the formulation of the subjective element to the exercise of s 29(1) power:

> '[28] … it is helpful to elaborate the test as to the required subjective element for a discovery assessment as follows:
>
> "The officer must believe that the information available to him points in the direction of there being an insufficiency of tax."

> That formulation, in our judgment, acknowledges both that the discovery must be something more than suspicion of an insufficiency of tax and that it need not go so far as a conclusion that an insufficiency of tax is more probable than not.'

58. The UT in *Anderson* then summarised the objective test in relation to s 29(1) TMA:

> '[29] The authorities establish that there is also an objective test which must be satisfied before a discovery assessment can be made. In *R v Bloomsbury Income Tax Commissioners* [[1915] 3 KB 768], the judges described the objective controls on the power to make a discovery assessment. Those controls were expressed by reference to the principles of public law. …
>
> [30] The officer's decision to make a discovery assessment is an administrative decision. We consider that the objective controls on the decision making of the officer should be expressed by reference to public law concepts. Accordingly, as regards the requirement for the action to be "reasonable", *this should be expressed as a requirement that the officer's belief is one which a reasonable officer could form. It is not for a tribunal hearing an appeal in relation to a discovery assessment to form its own belief on the information available to the officer and then to conclude, if it forms a different belief, that the officer's belief was not reasonable*.' (HMRC's emphasis.)

59. By reference to the UT's explication of s 29(1) power in *Anderson* at [30], Mr Vallis submits that 'once the Tribunal is satisfied that the officer in question believed that the information available points in the direction of there being an insufficiency, the Tribunal must then assess whether the conclusion is one which a reasonable officer could form on the information available to them', and that it is 'not necessary for the Tribunal to agree with the conclusion in order for it to be "reasonable".'

***Conclusion on discovery under s 29(1) TMA***

60. In relation to the subjective test, and in accordance with the UT's formulation in *Anderson*, the Tribunal is to consider whether Officer Tailor must believe that the information available to her points in the direction of there being an insufficiency of tax.

61. Officer Tailor's 23-page witness statement clearly sets out the process whereby she came to form the view that there had been a loss of tax to the Crown in the Relevant Years. Her witness statement is supported by exhibits totalling some 430 pages, which include information emanating from sources other than directly from the appellant. I have no difficulty finding that Officer Tailor must believe that the information available to her points in the direction of there being an insufficiency of tax.

62. As to the objective test for s 29(1) purposes, the critical distinction is as highlighted by the UT in *Anderson*: that the exercise of the s 29(1) power by HMRC is by reference to public law concepts. The Tribunal is to consider whether a reasonable officer would have formed the view that there had been a loss of tax based on the information available to the officer. The crucial distinction is that it is not for the Tribunal hearing the appeal to form its own belief on the information available to the officer.

63. The first-instance decision in *Anderson v HRMC* [2016] UKFTT 565 (TC) observed that 'HMRC are not required to be certain of all relevant facts in order to have a reasonable belief for the purposes of s 29(1)' (at [51]), and that the 'reasonable belief' required for the purposes of s 29(1) is 'something more than a suspicion but less than certain knowledge'.

64. In relation to the objective test, I make the following findings of fact which lead me to conclude that a reasonable officer would have formed the view that there had been a loss of tax based on the information available.

(1) In December 2009, when Mr Hague was interviewed under caution in a context unrelated to the tax investigation, he stated in this interview that he worked in the Pub and was paid in cash for his 'wages', and for variable amounts according to the takings.

(2) In the 2009 interview, Mr Hague said that he had worked in a pub for 12 to 13 years for his brother, which meant that he had been working in a pub since 1997.

(3) Mr Hague's own evidence is that from 2008 to mid-2011, he had worked for his father in the Pub, and the sum of £39,682 from the cheque for £60,000 paid by his father to him in 2011 was, by his own admission, for his wages.

(4) HMRC's records show that no income tax had ever been paid by Mr Hague on his earnings received from working whether in a pub prior to 2008, or in the New Tyke since 2008. In the absence of any records that there had been income tax and NIC paid in relation to the Relevant Years, a reasonable officer would form the belief that there had been tax loss to the Crown during the Relevant Years.

(5) In relation to the purchase of Heathcroft Crescent, Mr Hauge said that it was bought for £45,000 in 2006 to make 'a quick flip', to be done up and sold on for a profit. The property was sold in October 2007 for £105,000, £60,000 over the purchase price before allowable expenditure.

(6) Even allowing the expenditure of £23,450 as claimed by Mr Hague, there was still a gain realised of £36,550 before annual exemption of £9,200, giving rise to a chargeable gain which was not notified, and a reasonable officer would form the belief that there had been a loss of tax in relation to the sale of Heathcroft Crescent.

***Time limit for the assessments***

65. The procedure for applying the relevant time limits has been followed in relation to the assessments, which were all issued on 23 April 2018.

(1) The assessments for the tax years 5 April 2015 and 5 April 2016 were within the ordinary time limit of 4 years under s 34 TMA.

(2) All tax years prior fall under s 36(1A)(b) TMA, as the loss of tax assessed was attributable to a failure by the appellant to notify chargeability. It is not in dispute that the appellant did not notify chargeability under section 7 TMA.

(3) For the years 2007-08 and 2008-09, to rely on section 36(1A)(b) TMA, HMRC must also prove that the assessments were '*for the purposes of making good to the Crown a loss of tax attributable to [the appellant's] negligent conduct*' (see Article 7, Schedule 39 (Appointed Day, Transitional Provision and Savings) Order 2009, FA 2008).

66. HMRC contend that the appellant did so negligently conduct himself because:

(a) The appellant was aware that he was earning income from the Pub;

(b) The appellant was aware of his obligation to pay tax on the income;

(c) Nonetheless, the appellant did not contact HMRC with a view to finding out how to go about satisfying his obligation.

67. In the alternative, HMRC rely on section 36(1A)(a) TMA that the loss of tax was brought about 'deliberately' for the same reasons that are set out for the penalty assessments.

68. As a matter of fact, the appellant received wages in cash, and made a gain on the disposal of Heathcroft Crescent, but no income tax was paid on the wages and no gains were declared. To that extent, I find the appellant to be negligent in not taking any steps to meet his obligations as a taxpayer. Section 36(1A)(b) can therefore be relied upon to extend the time limit for raising the discovery assessments for the years 2007-08 to 2013-14.

**Whether the assessments stand good**

69. On an appeal of the discovery assessments, the Tribunal's jurisdiction is provided under s 50(6) of TMA:

> 'If, on an appeal notified to the tribunal, the tribunal decides – ... that the appellant is overcharged by an assessment other than a self-assessment, the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.'

70. The original amounts of the discovery assessments were calculated prior to the information provided by the appellant and Mr Lorriman that came to Officer Tailor's attention only after the enforcement action by Debt Management. Based on the information provided after April 2020, Officer Tailor had re-calculated the quantum of tax loss for most of the Relevant Years. In particular, I have regard to Officer Tailor's conclusion to calculate the income tax loss by reference to the figure of £39,682 as the annual salary paid to the appellant for working in the Pub, and to assume that there would be a similar level of earnings from other years received by the appellant for working in New Tyke.

71. While the appellant has asserted that the £39,682 represented wages for working in the Pub from 2008 to mid-2011, there has no credible or reliable evidence produced to support the assertion that his annual earnings were in the region of £11,000 for those years. On the other hand, there were circumstantial factors that support an assessment of annual earnings being higher than the £11,000. The appellant had stated on various occasions that his earnings were paid in cash, and there would appear to be no formal record maintained to ascertain the true extent of his wages taken from cash takings. The appellant also stated that his father was absent from the business for protracted periods following his mother's death, and that he was working in the business on a day to day basis and till 2am at weekends. It is a reasonable inference drawn by Officer Tailor that the appellant played a key role in running the pub business, and for HMRC to adopt the appellant's figure of £39,682 as earnings on an annual basis, as commensurate with the level of the appellant's involvement in running the pub business.

72. Based on the appellant's figure of £39,682, HMRC have applied the presumption of continuity in attributing the balance of unexplained credits to earnings for the related years, the onus is on the appellant to rebut the presumption. The reasoning for the shift of onus is set out by Walton J in *Jonas*:

> '… so far as the discovery point is concerned, once the Inspector comes to the conclusion that, upon the facts which he has discovered, Mr Jonas has additional income beyond that which he has so far declared to the Inspector, then the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly on the taxpayer.'[1]

73. Not only is the onus on the appellant to rebut the presumption of continuity, but the burden of proof is on the taxpayer to show that he has been overcharged by such an assessment pursuant to s 50(6) TMA.

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[1] *Jonas v Bamford* (1973) 51 TC 1, at page 25.

(1) In *Norman v Golder*, 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'.[2]

(2) In *Haythornthwaite v Kelly*, Lord Hanworth MR similarly stated, 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'.[3]

(3) In *Johnson v Scott*, 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 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.'[4]

(4) In *Van Boeckel*, Woolf J stated that:

> '… unless the situation is one where no material is before the commissioners on which they can reasonably base an assessment, the commissioners are not required to make investigations. If they do make investigations, then they have got to take into account the material disclosed by those investigations. …' [5]

(5) In *Bi-Flex Caribbean*, Lord Lowry stated that:

> 'The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgement assessment, as the cases have established, do not serve to displace the validity of the assessments, which are *prima facie* right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right.' [6]

74. To make his case, the appellant has produced various statements from third parties: employees at licensed bookmakers, his father, his uncle, and a plumber. Insofar as these statements pertain to gambling wins which are not to be treated as taxable, Officer Tailor has already made those adjustments in her revised calculations. These third-party statements do not assist the appellant in quantifying any further amounts that can be reduced than what Officer Tailor has already done in revising the quantum of the discovery assessments.

75. For instance, I have regard to the significant reduction in the revised amount that the Tribunal is invited to confirm for 2008-09:

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

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

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

[5] *Van Boeckel v Customs and Excise Commissioners* [1981] STC 290, at 296.

[6] *Bi-Flex Caribbean v The Board of Inland Revenue* [1990] 63 TC 515, at 522.

(1) The original quantum of the tax and NIC assessment was at £29,574.64;

(2) The original quantum was based on unidentified credits of £75,090;

(3) The revised quantum of the tax and NIC assessment is at £8,858.20;

(4) The revisal is based on an assessable income of £37,500;

(5) The reduction of taxable income is attributable to accepting that some receipts would have come from gambling and betting wins from Corel and on football matches in 2008-09: see §18(3) and receipt of part inheritance: see §31(1)(a).

76. Furthermore, there is the issue of reliability of the appellant as a witness. On the whole, the inconsistencies in Mr Hague's evidence given to this Tribunal upon corroboration with his evidence given in other contexts severely undermine the reliability of Mr Hague's evidence on the whole. The inconsistences in his evidence include:

(1) The appellant stated to PC Picken during interview under caution that he had no bank accounts in 2009, which was plainly false.

(2) The appellant also stated to PC Picken that he was not married, had no children, but in his witness statement to this Tribunal in relation to Heathcroft Crescent, he stated that his 'wife and kids' lived with him at Heathcroft for some of the time.

(3) In the December 2009 interview, the appellant stated that he had worked in a pub for his brother for 12-13 years prior. His evidence in this appeal was to say that he had only worked for the period of 2008 to mid-2011 for his father (and not for his brother).

(4) The appellant stated to HMRC in his initial meeting that he did not live in Heathcroft Crescent. His witness statement lodged for this appeal said that he had lived in the property after the flood, and sometimes with his wife and children.

(5) The appellant maintained that he believed any earnings from the pub would have tax deducted, but there was no evidence, such as regular payslips and annual P60s to support this belief.

77. To the extent that the appellant has asserted that the majority of the unexplained credits were gambling wins, due allowance has already been given to remove significant amounts of credits as non-taxable. Insofar as HMRC have treated the residual unexplained credits evidenced from bank and credit card statements as taxable income, the appellant has not proved the contrary that the residual unexplained credits were not taxable income, especially in the light of his own admission that he was due wages for the work he did at the Pub.

78. In any event, apart from the £39,682 that was expressly paid by the £60,000 cheque from his father, the appellant had variously stated that he received his wages in cash. It is not an unreasonable inference to draw that the appellant might not have paid all his wages received in cash into his bank accounts to be part of the unexplained credits from Officer Tailor's analysis of his bank and card statements. In other words, it is plausible that some of the cash receipts for wages have not left any documentary trail for HMRC to identify as 'unexplained credits' to be included as part of the discovery assessments.

79. Given the foregoing, it is clear that HMRC have made 'best judgment' assessments based on the information made available by the appellant or gathered from other sources, while the appellant has not provided any alternative basis to reduce the assessments further or to nil. I conclude therefore that the revised quantum of discovery assessments should stand good.

**Whether penalties to be confirmed**

80. The penalties are assessed for failure to notify chargeability to tax. The Tribunal is not concerned here whether the appellant has provided returns or documents which contain inaccuracies. On the basis that I have concluded that s 29(1) TMA discovery had been made for the Relevant Years that there had been an insufficiency of tax being paid by the appellant, there is a *prima facie* case that the appellant had failed to notify his chargeability to tax for s 7 TMA and Sch 41 FA 2008 to be applicable.

81. The disclosure was clearly 'prompted', and the reduction given by Officer Tailor under the two penalty codes is not unreasonable. The appellant put forward any cogent grounds for further reduction to be given for Telling, Giving, and Helping. There is no reason for the Tribunal to intervene therefore with the level of mitigation, when it is plain that as the enquiry officer, Officer Tailor is in the best position to assess the reduction to be given from the responses received from the appellant in the course of the enquiry.

82. The remaining question for me to consider is therefore whether the failure was 'deliberate' for setting the penalty percentage. The appellant asserts that he had thought his father had deducted tax from his wages before giving the monies to him. However, it was the appellant's evidence (a) to this Tribunal that his father was not at hand in running the pub business after his mother passed away, and the appellant ran the business on a day-to-day basis for his father, and (b) in December 2009 to PC Picken the appellant stated that the cash found in his possession was takings from the pub of which £400 was his wages.

83. These aspects of the appellant's evidence do not support the assertion that his father would have deducted tax from his wages and accounted the tax deduction to HMRC before giving them to the appellant. On the contrary, if the appellant's own evidence in 2009 was that he was taking possession of the cash takings (as there was no safe in the Pub), and allocating £400 of the cash takings as his wages (which could vary depending on the takings), in a period when his father was absent most of the time from the running of the business, his belief that his father would have dealt with all the tax deduction (and paid the tax to HMRC) seems to be devoid of any factual basis.

84. From the appellant's own evidence, albeit given in different contexts, it is a reasonable inference to draw that during the period from January 2008 when his mother passed away, to mid-2011 when he fell out with his father, the appellant was playing a key role in the running of the pub business, and had direct access to the cash takings, and that there was no proper record being kept of what was allocated to be his wages from the takings.

85. Even if I were to take the appellant's belief in this respect as genuine, and not to make a finding of fact that he had actual knowledge that his wages had not borne any tax, I have no difficulty in finding that the appellant had constructive knowledge that the wages he received from his work at the Pub had borne no tax. It is apt to cite what Lord Scott stated in *Manifest Shipping Company v Uni-Polaris* [2001] UKHL 1 for a definition of 'blind-eye knowledge', which is a form of knowledge:

> '[112] "Blind-eye" knowledge approximates to knowledge. Nelson at the battle of Copenhagen made a deliberate decision to place the telescope to his blind eye in order to avoid seeing what he knew he would see if he placed it to his good eye. It is, I think, common ground – and if it is not, it should be – that an imputation of blind-eye knowledge requires an amalgam of suspicion that certain facts may exist and a decision to refrain from taking any step to confirm their existence. Lord Blackburn in *Jones v Gordon* (1877) 2 App Cas 616, 629 distinguished a person who was "honestly blundering and careless" from a person who "refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his

> own secret mind – I suspect there is something wrong, and if I ask questions and make farther inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover". Lord Blackburn added "I think that is dishonesty".'

86. In the recent decision of *Canada Square Operations Lt v Potter* [2023] UKSC 41, Lord Reed observed that wilful or Nelsonian blindness corresponds to constructive knowledge and would provide the necessary intentionality for deliberate behaviour. I confirm therefore that the appellant's failure to notify his chargeability to tax was deliberate on the basis that his close involvement in the running of the pub business meant that he had actual or constructive knowledge that the wages he received from the Pub had not borne any income tax or NIC, which renders his failure to notify his chargeability 'deliberate'.

87. As to the capital gains he realised on Heathcroft Crescent, it is unnecessary to make a finding of fact whether on the balance of probabilities, the appellant had to incur renovation expenses twice. The appellant has not produced any documentary evidence to support the claim that there was theft and flood to the property, such as police report or insurance claims. Suffice it to note that even by the appellant's estimates of expenses from memory, there was a chargeable gain realised. The appellant's intention to make 'a quick flip' on the property suggests that the profit motive was a main reason for purchasing Heathcroft Crescent. With the intentionality to profit from the transaction in the fore, the appellant's failure to take the necessary steps to discharge his obligations as a taxpayer in reporting the chargeable gain on the disposal of the property took on that selfsame intentionality as to render it deliberate.

88. For the sake of completeness, I note the minor error in HMRC's Sch 41 penalty assessments whereby a penalty range of 45% to 70% was applied, while the statute provides for the relevant range to be 35% to 70%. Applying the correct penalty range would have given an overall reduction of 7% (instead of 5%). However, I do not consider it appropriate to adjust the overall reduction of 5% given by Officer Tailor, given that the enquiry officer is best placed to assess the reduction to be given. Furthermore, I observe that the current calculation with a 5% reduction has resulted in the two penalty regimes reaching the consistent 65% as the overall penalty percentage for all years concerned. The uniformity of 65% as the overall penalty percentage has the merit of consistency, and is hereby confirmed as applicable to all years.

**CONCLUSION**

89. The discovery assessments stand good for the years 2007-08 to 2015-16, and the quantum of each assessment as tabulated at §6 in the revised total for the nine years of £67,771 is confirmed in full.

90. All penalties imposed under s 7 TMA for the years 2007-08 and 2008-09, and under Sch 41 FA 2008 for the years 2009-10 to 2015-16 as tabulated in the last column at §6 are likewise confirmed in full.

91. The appeal is accordingly dismissed.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

92. 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: 19th FEBRUARY 2024**