Neutral Citation: [2023] UKFTT 00993 (TC)

Case Number: TC09004

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video hearing]

Appeal reference: TC/2018/02859
TC/2021/14668

INCOME TAX – time limit under section 36(1A) Taxes Management Act 1970 – whether an assessment involving loss of tax brought about deliberately – no – appeal allowed

Heard on: 13-15 December 2022
Judgment date: 21 November 2023

Before

TRIBUNAL JUDGE KIM SUKUL
DUNCAN MCBRIDE

Between

CHARLES COLLIER (1)
CB COLLIER PARTNERSHIP (2)
(CHARLES COLLIER AS REPRESENTATIVE PARTNER)

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Barrie Akin, counsel

For the Respondents: Ben Blakely, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The hearing lasted 3 days. With the consent of the parties, the form of the hearing was video using the Tribunal's Video Hearing Service platform. The documents to which we were referred were contained within the 2,403-page hearing bundle, 79-page supplementary bundle, authorities bundle and skeleton arguments from both parties. We also have a schedule of agreed figures which we requested from the parties during the hearing.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

THE APPEAL

3. The Appellants (the first Appellant ('Mr Collier') and the Second Appellant ('the Partnership') in which Mr Collier and his wife, Mrs Collier, were partners) appeal against the decisions by the Respondents ('HMRC') to issue:

(1) assessments under Section 29 Taxes Management Act 1970 ('TMA 1970') on 3 May 2017 in respect of Mr Collier's income tax returns for the years ended 5 April 2007 to 5 April 2011;

(2) penalty determinations and assessments relating to those income tax assessments issued to Mr Collier under Section 95(1)(a) TMA 1970 on 10 December 2018 for the year ended 5 April 2007, on 12 February 2019 for the year ended 5 April 2008 and on 12 February 2019 under Schedule 24 Finance Act 2007 ('FA 2007') for the years ended 5 April 2009 to 5 April 2011;

(3) amendments to the Partnership tax returns under section 30B(1) TMA 1970 on 15 April 2021 for the accounting periods ended 31 October 2006, 2007, 2009 and 2010; and

(4) penalty determinations and assessments made in respect of Mr and Mrs Collier, in their capacity as partners in the Partnership, on 15 April 2021 under Section 95A(2) TMA 1970 for the years ended 5 April 2007 and 5 April 2008 and under Schedule 24 FA 2007 for the year ended 5 April 2011.

4. The Appellants do not dispute that amounts which should have been included were omitted from those returns but contend that the omitted amounts occurred as a result of negligent conduct and/or were brought about carelessly, the consequence being that the assessments and amendments, having been made more than six years after the end of the year of assessment to which they relate, are out of time and are consequently bad.

5. Alternatively, that having sought to assess Mr Collier under section 29 TMA 1970 in respect of receipts which they knew to be receipts of the Partnership, HMRC could not subsequently make a discovery under section 30B TMA 1970 because no new knowledge had come to them and the same discovery cannot be used to make further assessments or amendments, nor can HMRC have a second bite of the cherry (see *Kelly v. HMRC* [2021] UKFTT 162 (TC) at [60] to [67]).

6. The Appellants contend that if the assessments and amendments are defective, the penalty assessments fall away.

7. For the reasons set out below, we found that omitted amounts were not brought about deliberately and we therefore allow the appeal.

8. We have referred to certain individuals who have been named in connection with this appeal by their initials only, as we do not consider it necessary to name them for the purposes of this decision.

9. In this decision, the legislation and case law are cited so far as relevant to the issues in dispute.

LEGISLATION

10. Section 34 TMA 1970 provides:

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

11. Section 36 TMA 1970 provides:

> "(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).
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> (1A) An assessment on a person in a case involving a loss of income tax or capital gains tax
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> (a) brought about deliberately by the person,
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> …
>
> may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period)."

12. With regard to the time limits for making assessments and amendments applicable in this case, there is no dispute between the parties that:

(1) The ordinary time limit is 4 years under section 34 TMA 1970.

(2) The time limit for a loss of tax brought about carelessly (previously by negligent conduct) is 6 years under section 36(1) TMA 1970.

(3) The time limit for a loss of tax brought about deliberately (previously by fraudulent conduct) is 20 years under section 36(1A) TMA 1970.

BURDEN OF PROOF

13. HMRC accept that the burden of proof rests with them to demonstrate that the statutory conditions for making the assessments and amendments are met. In the circumstances of this case, this means that HMRC must show the loss of tax to have been brought about deliberately (to meet the condition regarding time limits) and that HMRC discovered a loss of tax (to meet the condition regarding discovery).

14. HMRC also accept that the burden of proof rests with them to demonstrate that the penalty determinations and assessments are correct and appropriate. In the circumstances of this case, this means that HMRC must demonstrate that the statutory conditions for making the assessments and amendments are met to show they are entitled to impose penalties based on the assessments and amendments.

15. Although no submissions were made by HMRC on the issue of fraud, HMRC's investigation in this case was conducted under Code of Practice 9 into suspected tax fraud

and the Appellants argue that the cogency of the evidence required to meet the standard of proof depends upon the seriousness of the allegations (see *Hornal v. Neuberger Products Ltd* [1957] 1 QB 247 at 263 (CA) as referred to in *Rochester (UK) Limited v. Pickin* [1998] STC (SCD) 138). However, we consider the standard of proof in this case to be the ordinary civil standard, simply on the balance of probabilities (see *Re B (Children)* 2009 AC 11 at [70]).

EVIDENCE

16. The bundle of documents for the hearing comprised of the correspondence between the parties and tribunal documents, including the notices of appeal, statements of case and tribunal directions. The bundle also contained the statements of the witnesses, who were all present at the hearing. The outcome of this appeal is based on our factual findings. We therefore consider it to be appropriate to set out the witness evidence adduced in some detail.

Mr Collier

17. We heard witness evidence from Mr Collier. We found him to be a credible witness and accepted his evidence. Mr Collier stated that:

> "4. I have been involved in property development for over 40 years. I have a particular interest in brown field redevelopment. I have also bought and sold properties. In some instances I have let residential properties before selling them. I have operated as a sole trader, I have been in partnership and I have been a shareholder and director of various companies set up for particular projects. (Exhibit 1)
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> 5. From 2006 until 2012 I was employed as a managing director of Bovale Limited. For the prior ten years I had worked with Bovale under a Land Agent contract which involved payment by an annual retainer and then payment by commission according to the sites which I brought to the business. The move to become managing director extended that role. As managing director, my main duties for Bovale Limited were to find sites for the company to develop and to help to develop them prior to sale. I was paid a salary and expenses but the main element of my remuneration was through a success fee of 10% on the net profit of site sales. (Exhibit 2).
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> 6. The annual turnover of Bovale Limited was around £100m. My own annual income, as reflected in tax returns from 2005 – 2012, was regularly in six figures and in tax year 2008/09 was over £2m [Exhibit 3]. The income came from employment at Bovale, from partnership income, from dividends, from rental income and from interest. The latter two sources generated only small amounts of income. The work for Bovale and the partnership, together with the work from the various transactions being carried out through special purpose corporates meant that my working week was regularly in excess of 70 hours and sometimes more.
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> 7. Over the course of my career I have developed relationships with a band of professionals. I am very dyslexic. I was diagnosed as a child. I have a reading age of 12. Consequently it is very important for me to work with a small team of people together with a range of professional firms whom I trust. Over the period 2005 -12 the core team for my business consisted of myself, Sally Topham and [PD]. Accountancy services were generally provided by [PC] although for some companies which I had set up other accountants were used….
>
> I first worked with [PC] in the late 1980s when he was at [an accountancy firm]. He had been recommended to me by [solicitors] in Bristol as someone who was competent and thorough. This proved to be the case. When he moved [firms] in April 2001 I followed him. (Exhibit 4). When he

set up his own business… in September 2004 I again followed him (Exhibit 5). I believe that I was his first client in his new venture. I remained with [PC] as he moved from firm to firm because I valued and trusted his judgement. …

14. The centrality of [PC] to my financial affairs is reflected in the fact that when I asked [solicitors] to prepare a will for myself, they wrote to [PC] on 9 February 2009. They explained their understanding of the assets held in my estate and how they proposed to deal with them. They asked for [PC]'s views before drafting the will. (Exhibit 13)

15. Given the depth of [PC]'s involvement in the business, a regular flow of information between us was essential. He also prepared tax returns on behalf of my wife. About once a month my wife and I would collect together all documentation relating to our business and personal affairs and put it in a ring folder. This included a wide range of information including: invoices issued; expenditure including car, hotel, entertainment and school fees; credit card receipts; bank statements from the various accounts which we used; correspondence with solicitors and completion statements; my wife's NHS wage slips. This was collected together over a period of about 3 months. Additionally, where bank statements or phone bills had been received by post at our home in Aberdovey after the file had been provided but which related to that period, my wife would post these to [PC].

16. As I say at paragraph 7 above, I am very dyslexic. I prefer face-to-face meetings to written correspondence. Regular meetings were held with [PC] to anticipate the quarterly VAT reporting for the C B Collier Partnership which was the responsibility of [PC]. At these meetings, I would bring the ring folder with the documentation gathered over the preceding three months. [PC] would take that and return the ring folder which had been provided for the previous period.

17. Apart from dealing with VAT, these quarterly meetings were used to provide a general catch up on progress in my various business interests. The quarterly meetings would be attended by [PC] and myself. I was always accompanied by Ms Sally Topham or [PD] or both…. documentation would be provided to [PC] reflecting monies into and out of the business and that would be reconciled to bank statements. Progress on current transactions and future plans would be discussed and cash-flow forecasts prepared…

20. Until the mid 2000s I had been very satisfied with the services being provided by [PC] as reflected in my following him from firm to firm. However, there was a deterioration in quality of the work from the mid 2000s. At the time this was felt to be understandable following the death of his son… who was 22 at the time… The death seemed to have resulted from a fall from a roof but there was some suggestion that an unknown party had caused the death, a suggestion which may have compounded the blow to [PC] and his wife.

21. In these circumstances, the missing of information provided (Exhibit 16) and the late preparation and filing of accounts (Exhibits 17 -19) which began to appear in his work was understandable. Unfortunately, these became the norm. He had regular absences from his office and was difficult to contact (Exhibit 20). As indicated above, my business interests are complex and wide-ranging. My team were regularly chasing [PC] for figures, filing penalties were being incurred, there was a lack of consultation over figures appearing in accounts and last minute changes were being made.

22. It has been suggested by HMRC that, given this deterioration in the quality of his work, I should have replaced [PC] earlier than I did. With the benefit of hindsight, I can only agree. However, at the time each missed deadline or each difficulty of contacting him was viewed separately. By the mid 2000s I had been working with [PC] for over 15 years, a period of time in which I had grown to rely on him and trust his abilities. That confidence is not something that is readily sloughed off. Also, given the apparent link between the death of his son and the decline in work standards and given the long-standing relationship between myself and [PC], I was reluctant to terminate the relationship. However, after months of deliberation, after discussing the position with [solicitors] and in consultation with Ms Topham, it was felt that perhaps the move to running his own practice meant that [PC] was missing the back-up available in a larger firm and we began to move some of the corporate work to other accountancy firms (Exhibit 21).

23. Young & Co began to deal with work... Given the clear difference in standards, and given the on-going problems with [PC]'s work, all accounts were moved to Young & Co in October 2011. …

29. The period following the financial crash of late 2007 to 2012 was therefore a difficult time. With the move to Young & Co in 2011, I believed that the various business consequences arising from the deterioration in [PC]'s services such as late filings and financial penalties were behind me and the business could move forward on a more stable footing. At the Code of Practice 9 meeting with HMRC on 2 July 2013 (Exhibit 42), when I was asked whether I had a disclosure to make of any tax irregularity I replied "No" with some confidence.

30. Subsequent evidence showed that there were tax irregularities. These are accepted. However, I was not aware of them at the time and there was no intention on my part to file incorrect returns or to provide inaccurate responses to the HMRC enquiries. I have cooperated in an HMRC enquiry which has lasted almost 10 years and I have provided very large amounts of information and documentation. I believe that the large amounts of information and documentation gathered by HMRC support my position that I have always acted in good faith in providing my tax returns.

…my assumption is that expenditure would be reconciled to the bank statements including [Bank of Scotland] statements by [PC] as part of his preparation of business accounts. My clear recollection is that at the quarterly meetings held with [PC] he would be provided with both bank statements and cheque stubs. This procedure has been followed with Young and Co. [PC] would cross-reference these and make hand-written notes on the cheque numbers as to what the expenditure related. He would retain the bank statements while preparing accounts and these would then be returned.

48. Business records, including bank statements, were initially stored at my property in Aberdovey. Following my move to Switzerland in 2013, that property was sold and business records together with personal effects and furniture were moved into storage in 2014. The move was organised by Britannia Removals with storage being arranged in a warehouse in Stafford. That warehouse was destroyed by fire in 2016, an event that received considerable coverage in the local media (Exhibit 32) and my records together with the rest of my belongings were destroyed. My subsequent insurance claim was for an amount in excess of £90,000.

49. Following the start of the COP 9 enquiry and the HMRC concerns that deposits into the [Bank of Scotland] account had not been reflected in the

> business accounts, HMRC requested copies of [Bank of Scotland] statements. I did not hold copies because of the warehouse fire. However, Young & Co said that they did hold copies from the working papers of [PC] passed to them. These were provided to HMRC. HMRC pointed to the fact that the statements did not cover the full period under review. I therefore approached the Bank which provided the missing statements and these were passed on to HMRC…
>
> 53. I accept that the above amounts were underdeclared in my personal tax returns and in the accounts of the Partnership. However, it has been explained to me that to be valid assessments, HMRC need to show that the failure to report accurately was brought about by my deliberate behaviour. I do not accept that any failure to report accurately was the result of my deliberate behaviour. I have at all times acted in good faith and believed the tax returns were correct when they were submitted…
>
> 86. I accept that it was my responsibility to exercise reasonable care in ensuring my tax returns were correct. In respect of the amounts of underdeclaration relating to bank interest and to rental income, the amounts involved were minor, I knew that interest and rental income were being declared on my tax returns and had no reason to doubt whether the figures being declared on the returns were correct. In respect of the commissions, the amounts involved were more substantial. At the payment dates of these commissions I was heavily involved in the affairs of Bovale Limited, a company which often had an annual turnover in excess of £100m. My own income was also substantial consisting of employment income, dividends and partnership income as well as small amounts of interest and rent. When accepting these returns I believed any professional problems with [PC], while inconvenient and time consuming, were timing related. He had been my accountant for many years, had full knowledge of my business affairs and full access to my financial records. I did not doubt that the figures in the accounts were correct and I did not identify any concerns when considering the tax return for the periods."

18. In cross-examination, Mr Collier said that he did see the accounts but did not discuss them before the submission of the tax returns. He said that his accountant ('PC') would have the figures and was paid to fill in the returns. Mr Collier accepted that he had signed the returns as accurate and complete. He said that he did so under the guidance of his accountant, who he paid to do the work for him. He stated that he has no GCSEs and does not read very well, so it would be wrong for him to do it. Mr Collier also stated that he would pass all the bank account information to his accountant and that he did not destroy documents after the appeal. He could not recall seeing some of the documents that were put to him and said that Ms Topham looked through the papers collected from PC. He said that he was never going to go through the papers because it would not be appropriate and the records were vast. He knew there would have been invoices but said that he would not see the invoices. Regarding omitted commissions, he said that he did not prepare the schedules and did not go into that detail. He would have known if a large deposit was a commission and he had explained what the payment was for and that it was invoiced and paid into the bank. It was a discovery by Young and Co not by HMRC. He would not have read the letters in detail but would have had them explained to him. He commented that he had juggled deposits to make sure bank accounts were kept manageable and overdrafts were not too high. Mr Collier was not challenged on the circumstances which he had set out in his evidence and it was not put to him that he deliberately brought about the omissions, although it was suggested that he led HMRC and PC to believe he made a loss, which he denied.

Ms Topham

19. The evidence given by Sally Topham, a qualified solicitor who had worked for the Appellants since 2004, was not challenged by cross-examination and is therefore accepted. She gave evidence regarding the meetings Mr Collier had with PC, which she had attended. Those meetings were held on a quarterly basis to precede the VAT quarter for the Partnership and followed a set format, which included providing financial records to PC and discussing business activities. Ms Topham stated that over the course of 2010, Young and Co were also appointed as accountants to other corporate entities in which Mr Collier had an interest. She referred to the "regularity of delays and errors" which had been appearing in PC's work, which meant that she no longer had confidence in him. She stated that:

> "I was concerned at the constant late filing of accounts and was not comfortable that often filing of accounts seemed to depend on a last minute review. The decision to move work away from PC was only taken after substantial discussion between Charles and myself. PC had been with Charles for many years. We both had a lot of sympathy for PC and his grief over his son's death in 2006 which affected him very deeply. However, in my role as company secretary this had to be put aside. Similarly, Charles' duty as director meant he had to consider what was the right thing for the various companies. After our initial involvement with Young & Co the difference in quality of work became clear and the decision was taken to move all work away from PC."

Mr King

20. We heard evidence from Danny King, Partner at Young & Co accountants and auditors who represent the Appellants. We found him to be a credible witness and accepted his evidence. He said that:

> "Charles Collier transferred all of his remaining personal and business affairs from his current advisor [PC] in October 2011 to Young & Co. I have remained heavily involved in Charles Collier's affairs throughout his time with the Practice…
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> Simon Moody [HMRC officer] arranged to collect the records from [PC]'s offices in early 2012. Handover information in relation to the accounts and personal tax return was provided. I emailed [PC] as I had some queries on the handover information. [PC] provided some responses, but he asked me if I could improve on his record keeping. His records were extremely messy and not very organised, I even found notes relating to some of his other clients within Charles Collier's records…
>
> When the 2011 accounts were prepared on 7th December 2012, errors were discovered in the 2010 accounts. It also took quite a substantial time to reconcile balances at 31st October 2010, prepared by [PC], to opening balances…
>
> myself and HMRC couldn't even work out how [PC] had calculated interest…
>
> In the assessments raised by HMRC, undeclared annual rental income of £1,100, £2,128, £2,959, £1,272 and £1,267 in years ended 5 April 2007, 2008, 2009, 2010 and 2011 respectively was included. These were banking's made into the Bank of Scotland account and HMRC took the approach of assuming where there were regular banking's for similar amounts these were rental income. I could not disagree with this approach, as I could not find evidence to support otherwise. When trying to review whether these amounts

were included in Charles Collier's previous tax returns, prepared by [PC], his records lacked detail to support the tax return submissions…

an undeclared capital gain of £30,658 on the sale of a property, St Chads, in year ended 5 April 2007 was included. The undeclared element of this sale relates to £110,000 banked into the Bank of Scotland account. [PC]'s records included a capital gains tax calculation, but the proceeds were incorrect by £110,000. I found in [PC]'s records the draft calculation which is based on the incorrect proceeds. I also found the completion statement which displayed the correct proceeds which should have been declared on Charles Collier's original tax return, prepared by [PC]…

undeclared commissions for the accounting periods ended 31 October 2006, 2007, 2009 and 2010 and tax years ended 5 April 2007, 2008 and 2011 were included. These relate to six payments into the Bank of Scotland account. It has been agreed that these payments were omitted from the accounts. Four of these reflect invoices presented by HMRC at the opening meeting in July 2013 (Exhibit 40). The other two payments relate to payments which I discovered had been missed in my review of the accounts following the meeting with HMRC. I informed Charles Collier of these omissions and we informed HMRC.

One payment was for £311,936.04 made into the Bank of Scotland account and was received on 25th May 2007 (Exhibit 31). This was in the accounting year to 31st October 2007 and tax year ending 5th April 2008. No invoice has been found for this to date, but Charles Collier confirmed it was for a commission. Charles Collier's original tax return prepared by [PC] declared partnership profits of £1,875,792 which does not reflect the payment of £311,936.04. With a lack of detailed accounting papers, it was difficult to establish why it had been omitted from [PC]'s original accounts. There was a second banking of £58,750 made in to the Bank of Scotland account on 17th May 2006 (Exhibit 31). I assumed this was a commission invoice as it worked out as £50,000 plus VAT. I did not redraft the accounts to 31st October 2006, but I could not see this included in [PC]'s limited record keeping. It was therefore agreed that this should be assessed as it seemed likely it had not been included in the original tax returns.

…HMRC believed that various deposits had been made which should have been, but were not, reflected in the business accounts. Following the start of the HMRC enquiry it was agreed that an analysis of the Bank of Scotland account was required. I checked the working papers which I had received from [PC]. These contained some Bank of Scotland statements from that account dating from 2005. I believe these statements would have been obtained from [PC]'s records when they were collected from his offices in early 2012."

21. In cross-examination, Mr King could not recall details regarding some of the discussions held. He accepted that HMRC were not told where that Bank of Scotland statements were found.

Mr Baines

22. HMRC's Officer, Alex Baines, gave evidence that he currently works in HMRC's Fraud Investigation Service and started in this role in November 2015. He set out the background to HMRC's enquiries conducted by his predecessor, Mr Alan Levy, stating that on 10 December 2012, Mr Levy "issued the Appellant with Code of Practice 9 and an invitation to enter into the Contractual Disclosure Facility as HMRC had a suspicion that tax fraud had occurred". The case was allocated to Mr Baines on 8 October 2019 due to Mr

Levy's retirement from HMRC. Mr Baines stated that he had reviewed the information available to Mr Levy and has arrived at the same conclusion. He considers that these inaccuracies were the result of the Appellant's deliberate behaviour on the basis of statements made by the Appellant in the meeting with HMRC on 2 July 2013, statements made by PC in the meeting with HMRC of 2 September 2015 and a letter from PC to Young & Co, dated 15 August 2013 and provided to HMRC, in which PC stated that he was 95% sure that he did not raise the invoices in question and that the monies were not paid into the main business/private account, and nor to the business e-savers account and therefore were not in the partnership accounts for the relevant period.

23. In cross-examination, Mr Baines accepted that his knowledge on the case was limited to what he had read in the files since he took over the case. He was not briefed by his predecessors and he never met Mr Collier or PC. He also accepted that his views of PC are based on the files, PC's correspondence and the meeting notes and that he could not say anything about PC's behaviour or demeanour at the meetings. He did not agree that his conclusions were entirely based on PC's statements but accepted that they played a significant role.

24. Although we consider Mr Baines to be a credible witness, we consider his evidence to be of limited value. He was not involved with HMRC's initial enquires and he was not present at the meetings to which he has referred. He is therefore unable to give direct evidence regarding those matters.

FINDINGS OF FACT

25. Having carefully considered the evidence adduced in this case, we have reached the following factual findings on a balance of probabilities:

(1) Mr Collier has a diagnosis of dyslexia and a reading age of 12 years.

(2) Mr Collier relies upon the services of a small group of trusted professionals for business purposes, including the preparations and submission of his personal tax returns and the Partnership tax returns.

(3) PC is a Chartered Accountant and Chartered Tax Adviser who has been involved with the Appellants' tax affairs since the late 1980s.

(4) PC prepared and submitted the relevant tax returns on behalf of the Appellants.

(5) PC and Mr Collier held regular meetings at which PC was provided with the documentation necessary for him to prepare tax returns and accounts.

(6) PC was aware of the existence of Mr Collier's Bank of Scotland account and that it was used for both business and non-business transactions.

(7) PC was provided with information and statements in connection with Mr Collier's Bank of Scotland account.

(8) Following a family tragedy in 2006, PC suffered a decline in the standards of his professional work.

(9) Mr Collier was not aware, at the time of submission, of the omissions in the tax returns submitted by PC on behalf of the Appellants.

DELIBERATE

26. We consider the fundamental issue before the Tribunal to be whether the assessed loss of tax was brought about deliberately. The word "deliberate" is not defined within the statute. However, we consider the cases that discuss the meaning of "deliberate inaccuracy" to be

helpful. We agree with the view set out in *Auxilium Project Management Limited v HMRC* [2016] UKFTT 0249 (TC) ('*Auxilium')* at [63]:

> "In our view, a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time."

27. We have also considered the comments made by the Upper Tribunal in *CPR Commercials Ltd v HMRC* [2023] UKUT 61 regarding blind-eye knowledge and recklessness:

> "23. In our view, where a taxpayer suspects that a document contained an inaccuracy but deliberately and without good reason chooses not to confirm the true position before submitting the document to HMRC then the inaccuracy is deliberate on the part of the taxpayer. If it were otherwise then a person who believed there was a high probability that their return contained errors but chose not to investigate would never be subject to a deliberate penalty. However, the suspicion must be more than merely fanciful. Lord Scott of Foscote urged caution in this context in *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2001] UKHL 1 at [116]:
>
> > "In summary, blind-eye knowledge requires, in my opinion, a suspicion that the relevant facts do exist and a deliberate decision to avoid confirming that they exist. But a warning should be sounded. Suspicion is a word that can be used to describe a state-of-mind that may, at one extreme, be no more than a vague feeling of unease and, at the other extreme, reflect a firm belief in the existence of the relevant facts. In my opinion, in order for there to be blind-eye knowledge, the suspicion must be firmly grounded and targeted on specific facts. The deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe. To allow blind-eye knowledge to be constituted by a decision not to enquire into an untargeted or speculative suspicion would be to allow negligence, albeit gross, to be the basis of a finding of privity."
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> 24. Although the concepts of blind-eye knowledge and recklessness as to the truth or falsity of a statement may intersect, they are clearly not identical. As we have already stated, HMRC did not ask us to consider whether an inaccuracy is deliberate where a taxpayer is reckless as to whether the document contains any errors. In the absence of any argument on the point from HMRC, and because it is not necessary for the purposes of this decision, we do not consider whether recklessness is a sufficient basis for determining that an inaccuracy is deliberate further in this decision, and make no comment either way."

28. On the basis of our findings on the facts at [25] above, we do not consider Mr Collier to have knowingly brought about the loss of tax and we therefore do not find that the legal test set out in *Auxilium* to have been met.

29. HMRC contend that the loss of tax was brought about deliberately by Mr Collier because he knew that previous returns contained inaccuracies due to errors caused by PC and he chose not to find out whether each of the returns with which the appeal is concerned were accurate, when history dictated that they would likely contain inaccuracies. HMRC argue that this is demonstrated by an email exchange on 25 November 2009 between Ms Topham and

PC, where PC confirmed that a property transfer had not been reflected in Mr Collier's personal return for the year ended 5 April 2008 or the relevant accounts for 2008. We do not consider the email exchanges between Ms Topham and PC reliably demonstrates what Mr Collier knew or what actions he did or did not take.

30. HMRC also argue that the amounts involved means that it would have been immediately apparent to Mr Collier that there were omissions in the returns which needed to be corrected. Having reviewed the agreed schedule of omissions provided to us by the parties after the hearing, we accept the Appellants' submission that the amounts involved are not sufficiently significant in absolute terms or in relative terms (considering Mr Collier's overall business activities) so as to demonstrate that it would have been apparent to Mr Collier (taking into consideration his dyslexia diagnosis and his reading age) that the returns contained omissions which required correction. We are not satisfied, based on the evidence before us, that Mr Collier had a suspicion, firmly grounded and targeted on specific facts, that the returns in question contained omissions and we are unconvinced that he took the deliberate decision to avoid obtaining confirmation of facts regarding those omissions, in whose existence he had good reason to believe. We therefore do not consider Mr Collier to have blind-eye knowledge that demonstrates he deliberately brought about the tax loss.

31. HMRC also argue that Mr Collier was reckless as to the accuracy of the returns which HMRC say is tantamount to deliberately submitting a return and intending for them to rely upon an inaccurate return as accurate. They refer to the remarks made by the Supreme Court in *HMRC v Tooth* [2021] UKSC 17 at [47] that "for there to be a deliberate inaccuracy in a document… there will have to be demonstrated an intention to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement or, perhaps, (although it need not be decided on this appeal) recklessness as to whether it would do so". In support of their argument on recklessness, HMRC submit:

> "34. As regards the Supreme Court's reference to recklessness in the context of deliberate conduct, this topic had already been discussed in a few First-tier Tribunal cases. In [*Clynes v HMRC* [2016] UKFTT 369 (TC)], the Tribunal considered that the definition of 'deliberate inaccuracy' extends beyond actual knowledge of the inaccuracy [86]:
>
> > "…Our view is that, depending on the precise circumstances, an inaccuracy may also be held to be deliberate where it is found that the person consciously or intentionally chose not to find out the correct position, in particular, where the circumstances are such that the person knew that he should do so. A person cannot simply escape liability by claiming complete ignorance where the person clearly knew that he should have taken steps to ascertain the position. We view the case where a person makes such a conscious choice not to take such steps with the result that an inaccuracy occurs, as no less of a 'deliberate inaccuracy' on that person's part than making the inaccuracy with full knowledge of the inaccuracy."
>
> 35. This interpretation was supported by the First-tier Tribunal in [*Soleimani-Mafi v HMRC* [2018] UKFTT 451 (TC)] in which it was held that as the appellant had information which indicated that there may be tax consequences resulting from his actions, his failure to establish the correct legal and tax implications of his actions meant that he deliberately submitted an incorrect return [88] et seq.
>
> 36. Further support can be found in the First-tier Tribunal decision of [*Cation v HMRC* [2021] UKFTT 311 (TC)] in which it was held that the appellant would have had the awareness and the means to gather information

> related to his claim for tax relief, his failure to do so meant that the inaccuracy in question was 'deliberate' [86] et seq."

32. We do not agree with HMRC's submission that the First-tier Tribunal cases referred to address the issue of recklessness. We consider those cases to refer to blind-eye knowledge amounting to deliberate inaccuracy (as we have considered at [30] above). We are not satisfied that HMRC's submissions demonstrate that recklessness is a sufficient basis for determining that an inaccuracy is deliberate or that a loss of tax was brought about deliberately. If there is such a basis, in view of our factual findings, we do not consider Mr Collier to have been reckless as to whether a loss of tax was brought about.

33. We therefore accept the Appellants' submission that the omitted amounts occurred as a result of negligent conduct and/or were brought about carelessly, the consequence being that the assessments and amendments are required to be made no later than six years after the end of the year of assessment to which they relate.

34. It is our conclusion that HMRC have failed to discharge their burden to show that the assessments and amendments were brought about deliberately and we find that the requirements for the application of section 36(1A) TMA 1970 are not satisfied. The assessments and amendments, having been made more than 6 years after the end of the year of assessment to which they relate, are therefore out of time and invalid. Consequently, the penalty assessments and determinations, which are based upon the out of time assessments and amendments, are also invalid.

DISCOVERY

35. Given our conclusion that the assessments and amendments are out of time, which determines this appeal, it is not necessary to consider the Appellants' alternative argument on the discovery point.

CONCLUSION

36. For the reasons set out above, we allow this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

37. 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.

KIM SUKUL
TRIBUNAL JUDGE

Release date: 21st NOVEMBER 2023