[2016] UKFTT 627 (TC)

TC05363

Appeal number: TC/2015/03323

INCOME TAX, CAPITAL GAINS TAX, NATIONAL INSURANCE – whether discovery assessments valid – whether correct amount assessed – whether penalties due and apply to national insurance contributions element – certain issues treated as preliminary issues

FIRST-TIER TRIBUNAL
TAX CHAMBER

STEPHEN ENGLAND **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS
AMANDA DARLEY

Sitting in public at The Royal Courts of Justice, Strand, London on 15 August 2016

Setu Kamal, instructed by MWS Accountants, for the Appellant

Sue Spencer, Officer of HM Revenue & Customs, for the Respondents

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DECISION

1. Mr England appeals against assessments issued under s29 of the Taxes Management Act 1970 and penalties imposed under Schedule 41 of the Finance Act 2008 as set out in the table below.

Tax Year	HMRC Decision	Date of Issue	Amount
2009-10	Assessment	12 November 2014	£70,102.65
	Penalty	16 March 2015	£41,711.06
2010-11	Assessment	12 November 2014	£57,234.05
	Penalty	16 March 2015	£34,054.25
2011-12	Assessment	12 November 2014	£66,019.60
	Penalty	16 March 2015	£39,281.65
2012-13	Assessment	12 November 2014	£86,328.80
	Penalty	16 March 2015	£51,365.63

Evidence

2. HMRC relied on witness evidence from Officer Steven Booth, a civil investigator with the Criminal Taxes Unit at HMRC. He provided a witness statement and was cross-examined by Mr Kamal.

3. Mr England gave evidence himself. He served a witness statement dated 13 August 2016, just a few days prior to the hearing. HMRC had no objection to him giving witness evidence even though that witness statement was served late and Mrs Spencer cross-examined him. It was clear from the bundle of documents that Mr England had previously provided a witness statement in connection with an earlier Tribunal hearing which had been adjourned and the statement of 13 August 2016 was different from that earlier statement. The statement of 13 August 2016 was described as Mr England's witness statement in relation to his appeal, not as an additional witness statement, and was prepared at a time when Mr England had engaged the services of counsel. Moreover, prior to Mr England commencing his oral evidence, he adopted only the statement of 13 August 2016 and did not adopt any other statement. We have, therefore treated only the statement of 13 August 2016 as Mr England's witness evidence and it was that statement on which he was cross-examined.

4. We also had various bundles of documents, some prepared by HMRC and some by Mr England and his advisers.

Findings of fact

5. We will preface our findings of fact by stating that, at least in part, Mr England's tax liabilities for the years in dispute arise from his business dealings with a Mr Matthew Jenner. Those business arrangements were complicated and opaque and have terminated acrimoniously. There is ongoing civil litigation between Mr England and Mr Jenner with each claiming sums from the other and disputing the other's account of the facts. Mr Jenner was declared bankrupt on 11 March 2015. Since we had no evidence from Mr Jenner, and such evidence as we had as to the nature of the

business arrangement was both sketchy and came solely from Mr England, we are not in a position to make findings of fact as to matters in dispute between Mr England and Mr Jenner such as the amounts (if any) that Mr England or Mr Jenner owed each other, or paid each other, in the relevant tax years.

Background to the assessments and the appeal to the Tribunal

6. Officer Booth gave evidence as to information that HMRC held on Mr England's tax history. That evidence was not challenged and we have concluded that his tax history can be summarised as follows:

(1) In the tax year 2000-01, Mr England paid tax under PAYE on gross income of approximately £8,000.

(2) Between 2001-02 and 2006-07, HMRC have no record of Mr England receiving any taxable income.

(3) In 2007-08 and 2008-09, Mr England received a gross salary of £2,870 and £5,443.80 that was subject to tax under PAYE. (In the tax year 2008-09, as detailed later in this decision, Mr England purchased a house costing £325,000.)

(4) In 2009-10 Mr England received a gross salary of £875 that was subject to tax under PAYE.

(5) In each of the tax years from 2010-11 to 2012-13, Mr England received a gross salary of £1,200 that was subject to tax under PAYE.

7. Officer Booth gave evidence to the effect that Mr England did not submit any self-assessment tax returns for the tax years under appeal and did not give HMRC any notice under s7 of TMA 1970 that he was chargeable to income tax or capital gains tax ("CGT") for those tax years. Officer Booth also said that HMRC's records indicated that HMRC had not sent Mr England a notice under s8 of TMA 1970 requiring him to deliver a tax return.

8. Mr England did not accept that he had failed to notify HMRC under s7 TMA 1970 or to submit tax returns for those tax years. In his evidence he said that his tax affairs at the time were dealt with by his previous accountant and he assumed that the accountant would have filed tax returns although he could not remember whether that had been done. He could not remember whether his accountant had asked him to sign tax returns but thought that he had. However, Mr England did not produce copies of any notices or tax returns that he said had been submitted.

9. Given that Mr England was not able to assert positively that tax returns or notices of chargeability were submitted, and was not able to produce copies of any such returns or notices, we have concluded that HMRC's records were accurate. We therefore find as a fact (i) that HMRC did not send Mr England notices under s8 TMA 1970 requiring a tax return for any of the tax years in question, (ii) that Mr England did not submit tax returns for any of the tax years relevant to this appeal and (iii) that he did not notify HMRC in accordance with s7 of TMA 1970 of his tax liability for those tax years.

10. On 12 December 2013, Mr England was sentenced to 12 months' imprisonment at Basildon Crown Court after being prosecuted by the Child Support Agency ("CSA") and found guilty on two charges of fraud by false representation. Following Mr England's conviction, the CSA sent HMRC information on his financial situation (including bank statements from two accounts that he had) which indicated that he had significant income and assets. Since Mr England had not declared any amounts of taxable income that HMRC considered to be commensurate with the financial information received from the CSA, HMRC opened an enquiry into his tax position.

11. On 25 July 2014, Mr England and his accountant, Mr Gorridge, met Officer Booth and a colleague of his from HMRC. HMRC explained to Mr England that the meeting represented an opportunity for him to secure the maximum benefit from making a full and complete disclosure of all irregularities in his tax affairs. At that meeting, there was a wide-ranging discussion of Mr England's financial position.

12. Mr Gorridge and Mr England signed the notes that Officer Booth prepared of that meeting with some small amendments. Paragraphs 66 to 68 of the signed notes read as follows:

> 66. SE estimated Matthew Jenner owed him £600,000 in unpaid commission and explained how he was currently pursuing legal action through the courts to recover the money he believed he was owed. SE said Matthew Jenner was contesting this, claiming he had already paid SE the commission that was due in addition to claiming 100% ownership of a number of assets SE believed they jointly owed.
>
> 67. SB drew SE and JG's attention to the fact that whatever the court ended up ruling there was be [sic] a tax liability that needed to be accounted for.
>
> 68 Both SE and JG acknowledged [and] accepted this point.

13. Officer Booth had hoped that, following that meeting, Mr Gorridge and Mr England would look further into Mr England's financial position and send appropriate documentation to Officer Booth so that there could be an iterative process that would eventually lead to an agreement of Mr England's tax liability for the years in question. That was consistent with the note of the meeting that envisaged that, within the next 21 days, Mr England and Mr Gorridge would send Officer Booth statements of Mr England's assets and liabilities, details of bank accounts held and of credit cards operated.

14. However, progress was not as rapid as Officer Booth had hoped. On 9 October 2014, he called Mr Gorridge to express his concern at the lack of progress and explained that, in order to protect HMRC's position, he intended to issue "best judgment protective assessments" as soon as the statements of assets and liabilities were received.

15. On 4 November 2014, Mr Gorridge sent HMRC a certificate of bank accounts operated (one of the documents that Officer Booth had requested during the meeting of 25 July 2014). That document disclosed that Mr England had an interest in 10 bank accounts. Officer Booth said that, at no point in HMRC's investigation had Mr

England provided HMRC with statements for any of these 10 accounts and, since that statement was not challenged, we have accepted it. HMRC did, however, obtain some bank statements for two of the accounts from the CSA as noted at [10].

16. On 12 November 2014, Officer Booth wrote to Mr England to explain that, given the lack of progress with his enquiry, he proposed to make assessments relating to CGT, income tax and NIC and his letter enclosed formal assessments (which are summarised in the table at [1]). In the main body of his letter he set out the rationale underpinning the assessments that he made which was as follows:

> (1) He referred to Mr England's statement that Mr Jenner owed him £600,000 in commission payments. Officer Booth said that he did not believe Mr England's entire version of events as:
>
> > I am of the opinion that you did in fact receive these monies (<u>and/or other taxable income that you have also failed to declare</u>). (emphasis added)
>
> (2) Officer Booth therefore took the figure of £600,000 and spread it over 4 years so as to result in a conclusion that Mr England received additional taxable income (subject to both income tax and Class 4 national insurance contributions ("Class 4 NIC") of £150,000 in each of the four tax years 2009-10 to 2012-13.
>
> (3) Officer Booth consulted Land Registry information on four properties of which Mr England had been registered as proprietor from August 2008 onwards. That information showed the price that Mr England had paid to acquire the properties and the consideration receivable when they were sold. Officer Booth concluded that none of these properties were Mr England's principal private residence (as he lived at an address in Barnstaple Road which was not one of the properties that had been sold). He computed the gain arising on these properties, made an allowance for expenses associated with the disposal equal to 5% of the gross gain and treated the gain (as reduced by that allowance) as a chargeable gain. He then made a further allowance for the annual exempt amount and treated the balance of the gain as a chargeable gain on which capital gains tax ("CGT") was payable.

17. Also on 12 November 2014, Officer Booth sent Mr England a "penalty explanation" outlining penalties that were to be charged under Schedule 41 of Finance Act 2008 ("Schedule 41") for Mr England's failure to notify HMRC of his liability to tax and NIC. The key parts of that explanation were as follows:

> (1) Officer Booth considered that Mr England's behaviour in failing to notify was "deliberate" and that the disclosure that he gave of it was "prompted". That led to the conclusion that the penalty to be charged was in the range of 35% to 70% of the potential lost revenue.
>
> (2) Officer Booth concluded that Mr England should be given 30% of the maximum possible reduction to reflect the quality of the disclosure that he

gave during HMRC's enquiry. Therefore, he concluded that the applicable penalty percentage should be 59.5%.

(3) Since Officer Booth concluded that there were no "special circumstances" that would justify any further reduction in the penalty, he applied the penalty percentage of 59.5% to the aggregate of tax and Class 4 NIC that he considered was chargeable for the four tax years in question in order to produce an aggregate penalty due.

18. On 24 November 2014, Mr Gorridge sent Officer Booth a letter appealing against "the settlements you have raised for the years 2009/10, 2010/11, 2011/2012 and 2012/2013". Officer Booth sought clarification as to whether this was an appeal against both the assessments and the penalties. In addition, Officer Booth prompted Mr Gorridge to make an application to postpone payment of the tax in dispute. On 11 December 2014, Officer Booth wrote to Mr Gorridge acknowledging the appeal and outlining Mr England's options (broadly to provide more information in support of the appeal, to request an independent review or to notify the appeal to the Tribunal for determination).

19. On 15 January 2015, Mr Gorridge requested an independent review to be conducted. Officer Rhona Emerson of HMRC performed that review and set out her conclusions in a letter dated 2 March 2015. She upheld Officer Booth's conclusions as to the amount of Mr England's taxable income and capital gains. She considered, however, that the penalty notice referred to at [17] was invalid as it imposed an aggregate penalty in relation to four separate failures to notify chargeability. She considered that, to be valid, the penalty notice would need to set out the four penalties separately. On 16 March 2015, Officer Booth reissued the penalties as four separate penalty assessments.

20. Mr England notified his appeal to the Tribunal in a Notice of Appeal dated 27 April 2015 and received on 1 May 2015. That notification was made more than 30 days after the conclusion of Officer Emerson's review and was, therefore, made after the applicable statutory deadline. Although Mr England has not given any real explanation of why the appeal was notified late, HMRC have not taken any point as to the lateness of the appeal and we will, therefore, give permission under s49G(3) of TMA 1970 for the appeal to be notified late.

Mr England's transactions in property

21. At all material times, Mr England's home has been at an address in Barnstaple Road. That property was purchased for £325,000 in September 2008. On acquisition, that property was registered (and it is currently registered) in the name of a Simon Brett and is subject to a mortgage in favour of Santander UK PLC. Mr England's unchallenged evidence at the hearing was that he borrowed 10% of the purchase price from a loan company (in order to fund the deposit) and borrowed the remaining 90% from Santander, paying some £900 per month in mortgage repayments. At the hearing it was not explained how Mr England was able to obtain the mortgage even though the property was to be registered in Mr Brett's name. However, some evidence given at the trial at Basildon Crown Court suggested that Mr England was not able to get a mortgage in his own name and therefore came to some arrangement under which Mr

Brett would take out the mortgage and Mr England would meet the mortgage payments.

22. In 2009 or 2010, Mr England borrowed some £100,000 from Mr Jenner for the purpose of refurbishing that property. Mr England is arguing in legal proceedings with Mr Jenner that he repaid £10,000 of that loan but does not appear to dispute that £90,000 of it (and accrued interest) has not been repaid.

23. We were shown a "Declaration of Bare Trust" dated 27 May 2010 which indicates that Mr Brett from that date holds some interest in the property (and a figure of £100,000 is mentioned) as bare trustee for Mr Jenner. The document is not, to our mind, entirely comprehensible and there is a dispute between Mr Jenner and Mr England as to its effect. Mr Jenner appears to be arguing that the property at Barnstaple Road should be sold to enable the outstanding amount of the loan to be repaid. Mr England is resisting this.

24. Part of Mr Jenner's claim against Mr England relates to an averred joint venture in relation to two other properties at Browning Avenue and Feeches Road. Although Mr England is disputing the amount of Mr Jenner's claim, he does appear to accept that there was some kind of arrangement that involved the two of them sharing rents receivable on those properties and the ultimate proceeds of sale.

25. Mr England has also borrowed money from Mr Jenner to enable him to purchase, renovate and then sell a number of other properties as set out in the table below.

Property	**Date of Purchase**	**Purchase Price**	**Date of Sale**	**Sale Price**	**Loan from Mr Jenner**
Oban Road	4 March 2009	£41,000	24 August 2011	£89,995	June 2009 for £95,050
Glebe Way	30 March 2009	£170,000	7 December 2009	£249,995	March 2009 for £196,000
Treelawn Drive	9 October 2009	£130,000	11 November 2009	£152,500	September 2009 for £130,000
Marcus Avenue	2 June 2010	£325,000	1 October 2012	£460,000	May 2010 for two instalments of £335,678 and £100,000

26. Some explanation of this table is necessary. None of the properties was, at any point, Mr England's private residence (as he lived at Barnstaple Road). All four properties referred to in the table were registered in Mr England's name. The gains on these properties formed the basis of HMRC's assessments to CGT referred to at [16]. Finally, the evidence of the amount of loans that Mr Jenner had made came in the form of unsigned draft loan agreements whose weight as evidence is not clear (for example, the loan relating to Oban Road is evidenced by a draft loan agreement dated after the date on which that property was acquired). However, pleadings relating to the litigation between Mr Jenner and Mr England do not mention these loans at all

which suggests to us that these loans at least are not in dispute. We have, therefore, accepted that the drafts set out a broadly accurate picture of the true legal position. None of the loan agreements record any understanding that Mr Jenner was to receive any proceeds of sale of the properties and rather the loan agreements suggest that Mr Jenner's interest was purely as lender.

27. Mr England's earlier witness statement which, as noted at [3] was not adopted at the hearing, stated that slightly different amounts were lent and asserts that there was some understanding with Mr Jenner that 50% of the "uplift in value" of these properties belonged to Mr Jenner. That witness statement also stated that profits on the sale of Oban Road and Marcus Avenue went "straight to Mr Jenner" and Mr England received none of those profits. Those points were not included in Mr England's witness statement of 13 August 2016. Indeed, that witness statement scarcely mentioned the above four properties at all.

28. We have concluded from the evidence above that:

(1) The amounts of acquisition costs and disposal proceeds that HMRC have used to calculate Mr England's chargeable gain on the four properties are consistent with figures shown in Land Registry information, and are therefore correct.

(2) We were not satisfied that Mr England had anything less than a 100% beneficial interest in those properties. In his oral evidence and in his witness statement of 13 August 2016 he made no mention of Mr Jenner having any interest in those properties at all and such documents as we had (the draft loan agreements) made no mention of any such interest either. Moreover, we did not understand how proceeds of sale of Oban Road and Marcus Avenue could have gone "straight to Mr Jenner" when Mr England was himself registered as proprietor of those properties.

The Cars4All business

29. In or around 2009, Mr Jenner and Mr England decided to set up a business that involved a car dealership that could provide finance to its customers. Mr England's evidence was that it was agreed that he would receive 42.5% of the sale proceeds of vehicles and that out of this sum he would pay 15% to a Mr Barry Clements who was a salesman at the business. The remaining 57.5% of the sale proceeds of the vehicles would belong to Mr Jenner and from this sum he would meet all of the expenses of the business. He said that, while Mr Clements was to be paid cash on an ongoing basis, he (Mr England) would receive his share "down the line".

30. Mr England said that Mr Jenner suggested that Mr England's personal bank account be used to deal with cashflows associated with the business. In accordance with this arrangement Mr Jenner would pay money into Mr England's bank account, that would be used to buy cars and meet other expenses of the business. As and when cars were sold, Mr Clements would receive his 15% share and the remainder would be sent back to Mr Jenner. Mr England said that he did not withhold any amount on account of his 27.5% share as he did not believe he was entitled to under his

agreement with Mr Jenner. In any event, Mr England said that the proceeds going through his account were not sufficient both to meet the expenses of the business, pay Mr Clements his share and pay Mr England his 27.5% of gross sales. In fact, Mr England said that he had to apply £10,000 of his own money in order to meet expenses of the business.

31. As part of the ongoing litigation between Mr England and Mr Jenner, Mr England is seeking recovery of amounts due under the business arrangement set out at [29] which he says have not been paid. He told the Tribunal that he has had difficulty in quantifying that claim as he considers that Mr Jenner has the relevant financial information on the business and is not prepared to share it with him. However, Mr England has been able to estimate the amount due by working out how much Mr Clements has been paid and multiplying that by $\frac{27.5}{15}$ as Mr Clements was due 15% of gross sales and Mr England was due 27.5% of gross sales. Applying that methodology he considers that Mr Jenner owes him £436,385.12 plus reimbursement of the £10,000 referred to at [30] and points out that this is less than the £600,000 figure on which HMRC have based their assessments. However, this amount is disputed and, as noted at [12] above, Mr Jenner's position is that Mr England has been paid everything that he is due.

32. Officer Booth conducted an analysis of the bank statements for the two accounts that HMRC received from the CSA referred to at [10]. He concluded that in each of the tax years 2009-10 to 2011-12, over £1m was paid into these two accounts (but has not expressed any conclusions as to the total amount paid out of the accounts). It was not suggested that his analysis was faulty or at odds with the underlying financial information and we have therefore accepted his conclusion.

33. Mr England did not put forward any evidence of his own as to the sums received into, or paid out of, these accounts. Nor did he put forward any explanation of amounts received into any of the other eight bank accounts which he evidently has.

The purchase of a bar

34. In or around July 2010 Mr England borrowed some £90,000 from Mr Jenner to enable a company with which Mr England was associated (South Essex Hospitality Limited) to purchase a bar. Mr Jenner does not consider that the principal and interest due under that loan has been repaid. Mr England maintains that £30,000 has been repaid. Mr England maintained in his witness statement that the bar was unsuccessful. In cross-examination, Mrs Spencer put to him the report of a meeting of creditors of South Essex Hospitality Limited which stated as follows:

> Throughout the Company's trading history, Mr England has provided personal funds to the business as and when required, which has been used to manage the Company's cash flow requirements. As at the date of Liquidation, it is understood that Mr England is owed approximately £220,000. As a result of the financial support from Mr England, no other capital or finance was required.

Mr England was not able to explain the figure stating that he had not seen it before and did not know where it had come from. However, he did not put forward any evidence that suggested the figure of £220,000 was incorrect and, since the figure came from a formal report prepared in connection with the liquidation of the company (that was prepared following consultation with the company's directors), we have concluded that the statement above was correct.

Mr England's lifestyle

35. As already noted, we have concluded that, in the 2008-09 tax year and despite ostensibly having an annual salary of only £5,743.80 at that time, Mr England purchased a house costing £325,000 and took on an obligation to meet mortgage payments of some £900 per month.

36. Mr England accepted that he had purchased a Bentley motor car in 2011 for £50,000 and sold it a few months later for around £36,000.

37. Officer Booth referred, in his witness statement, to a schedule from the CSA that indicated that Mr England's personal and domestic expenditure was £61,140.41 in the tax year 2011-12 and stated that this figure had been used in the criminal proceedings against Mr England. Since Mr England did not seek to challenge this evidence, we have concluded that it is correct.

38. The two sets of bank statements received from the CSA showed that Mr England received £181,800 between 31 December 2012 and 8 April 2013 from the bookmaking company William Hill. Those payments were described as "William Hill Online Refund 4393". Mr England said that these amounts represented gambling winnings, although he was not able to remember how much he had originally deposited in his William Hill account or how much he had lost in order to be able to win this sum. Perhaps surprisingly given the description of the payments as a "refund" (rather than as winnings), the vagueness of Mr England's recollection and the short period of time in which such a large sum was ostensibly won, Mrs Spencer did not challenge Mr England's evidence. We have, therefore, accepted that this amount did indeed represent gambling winnings.

39. We have considered carefully what the gambling winnings reveal about Mr England's financial position. They were received in the 2012-13 tax year and therefore did not fund his lifestyle in earlier tax years. £60,000 was received on 31 December 2012. There were then five further receipts, all an exact multiple of £1,000, ranging in amount from £15,000 to £35,000 received between 12 March 2013 and 8 April 2013. It is of course possible for a person to make large gambling winnings without losing, or suffering the risk of losing, a large amount. Someone playing the National Lottery, for example, obtains a very low chance of winning a large amount of money and does not risk losing more than a couple of pounds. However, bets on "long shots" such as this are extremely unlikely to win as the low expected financial loss is matched by a very low chance of success. At the other extreme, someone betting on red or black on a roulette table can expect to win around 50% of the time but will also expect to lose 50% of the time lost and the amount lost with each losing bet will be the same as the potential winnings.

40. We do not believe that Mr England's winnings can have come from "long shots" as he won consistently between the dates in question. We had no evidence as to the nature of the bets, but we are satisfied that, in order to win such a large sum of money, Mr England must either have made other losing bets that cost him a material sum of money or, at very least, have taken a significant risk of losing a material sum of money.

41. In cross-examination, Mrs Spencer pressed Mr England on how he was able to fund his lifestyle despite the ostensibly low amount of his taxable income and his assertion that he had received no profit from the Cars4All venture with Mr Jenner. His answer was that initially he met mortgage repayments out of a gift that his mother made him after she had received an inheritance. During cross-examination he was somewhat vague as to the amount of the inheritance and when it was received although his witness statement mentioned an amount of £90,000. Then, in 2009, he borrowed £100,000 from Mr Jenner to refurbish his house as noted at [22]. However, rather than spending all of that on the house, he used some to fund his living expenses. Mr England's evidence, therefore, was that he funded his lifestyle out of £90,000 from his mother (it was not clear whether this was a loan or a gift) and an unspecified part of the loan of £100,000 from Mr Jenner which he diverted from its intended purpose. He did not mention his gambling winnings or the profits that he made from buying or selling properties as a source of financial support.

42. Mrs Spencer did not suggest to Mr England in cross-examination that the account at [41] was untruthful or mistaken. She did not suggest to Mr England that he was either lying or was mistaken when he said (as we have recorded at [30] above) that he had received no payment of commission from the Cars4All business. Rather, she suggested to Mr England that, in the absence of proper records, the loans of £100,000 and £90,000 that Mr Jenner advanced were not loans at all, but were properly regarded as payments of commission from the Cars4All business. Mr England denied this, pointing out that since Mr Jenner is still demanding repayment of these loans, they could not have been intended to be payments of commission.

43. Given the extent of Mrs Spencer's cross-examination, we have no alternative but to accept Mr England's evidence insofar as it was not challenged. However, it is important to be clear as to the nature of that evidence. Mr England's evidence that he funded his living expenses out of loans and/or gifts from his mother does not of itself say anything about the amount of taxable income that he received in the years in question. For example, a wealthy individual who earns an annual salary of £500,000 might receive an inheritance of £10,000 and, having received that inheritance might choose to book a holiday costing £10,000. Colloquially, that individual might say that the he or she used the inheritance to pay for the holiday. However, a lawyer would say that the individual paid for a holiday costing £10,000 out of a mixed fund consisting of £510,000 of which £500,000 was taxable income and £10,000 a tax-free inheritance. Therefore, the mere fact that Mr England considered that he was spending borrowed money on living expenses does not of itself demonstrate that he had no other taxable income.

44. In a similar way, Mr England's evidence that he did not receive any commission from Mr Jenner, even though not challenged, is only a statement of Mr England's belief that he received no commission. Mr Jenner disputes Mr England's statement and evidently considers that all amounts due have been paid. Moreover, there have been a number of dealings between Mr England and Mr Jenner. Some £4.5m has been paid into the two accounts of which HMRC are aware over the tax years at issue. The question of whether any of those sums actually represented payments of commission (or whether they should be allocated to other business dealings between Mr Jenner and Mr England) is a mixed question of fact and law that can be determined only by analysing the amounts paid into that account in the light of the terms of the agreement (if any) between Mr England and Mr Jenner and then applying legal principles to decide which particular receipts should be allocated to which particular debts.

The law

45. We consider that HMRC have the burden of proving that the conditions necessary to issue the discovery assessments and the penalty assessments were satisfied. Mr England has the burden of proving the amount of tax and Class 4 NIC due and of establishing any defence that prevents the penalties being due.

Relevant provisions relating to assessments

46. Section 29 of TMA 1970 provides relevantly as follows:

> **29 Assessment where loss of tax discovered**
>
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> …
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.
>
> (2) Where—
>
> (a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and
>
> (b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,
>
> the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

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

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

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

unless one of the two conditions mentioned below is fulfilled.

47. Since we have found that Mr England did not submit any returns for the relevant tax years, the qualifications to HMRC's power to assess set out in s29(2) and s29(3) of TMA 1970 are not relevant. Therefore, our focus in considering s29 will be on whether an officer of the Board has made the requisite "discovery" for s29 to apply and, if so, whether the assessment made otherwise meets the requirements of s29(1).

48. Section 34 of TMA 1970 sets out the "ordinary time limit" within which an assessment must be made as follows:

34 Ordinary time limit of 4 years

(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax 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.

…

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

…

49. The relevant time limit had previously been six years from the end of the relevant year of assessment but was reduced to four years in the Finance Act 2008 with effect from 1 April 2010. The only assessment under s29 of TMA 1970 that was made outside the "ordinary time limit" was that relating to the 2009-10 tax year (which, as noted in the table at [1] above was made in November 2014, later than four years after 5 April 2010.

50. Section 36 of TMA 1970, contains provisions for assessments to be made within an "extended time limit" as follows:

36 Loss of tax brought about carelessly or deliberately etc

(1) An assessment on a person in a case involving a loss of income tax 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).

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

Penalties

51. Section 7 of TMA 1970 sets out the requirement to notify chargeability as follows:

> **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.

52. The relevant penalty provisions are set out in Schedule 41 of Finance Act 2008. Paragraph 1 of Schedule 41 provides as follows:

> A penalty is payable by a person (P) where P fails to comply with an obligation specified in the Table below (a "relevant obligation").

The table in question specifies the obligation under s7 of TMA 1970 as a "relevant obligation" and it therefore follows that breach of that obligation attracts a penalty.

53. Paragraph 5 of Schedule 41 sets out various degrees of culpability. A failure by a taxpayer to comply with a relevant obligation is defined as "deliberate but not concealed" if the failure is deliberate, but the taxpayer concerned does not make arrangements to conceal the situation giving rise to the obligation.

54. Paragraph 6 of Schedule 41 sets out the standard amount of penalty chargeable. Since the penalties under appeal involve matters purely of UK taxation, the standard percentage of penalty chargeable for a "deliberate but not concealed" failure is 70% of the potential lost revenue.

55. Paragraph 7 of Schedule 41 defines "potential lost revenue". In the context of this appeal the relevant definition is that set out in paragraph 7(2) namely:

> so much of any income tax or capital gains tax to which P is liable in respect of the tax year as by reason of the failure is unpaid on 31 January following the tax year.

We note that this definition does not expressly include Class 4 NIC which remains unpaid. Section 16 of the Social Security and Benefits Act 1992 referred to at [60] below treats Class 4 NICs as income tax for certain purposes. However, as noted in more detail below it is not clear to us that this treatment applies for the purposes of Schedule 41.

56. Paragraphs 12 and 13 of Schedule 41 permit HMRC to reduce penalties chargeable where P discloses a relevant act or failure. Disclosures are divided into two categories with an "unprompted" disclosure being defined as a disclosure that is made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure and a "prompted" disclosure being any other disclosure. Paragraph 13 of Schedule 41provides that a penalty cannot be reduced below a minimum level. However, paragraph 14 of Schedule 41 permits HMRC to reduce a penalty beyond the minimum level that would otherwise apply where there are "special circumstances".

57. Paragraph 16 of Schedule 41 deals with the procedure for making a penalty assessment and the time limit within which it must be made. Even though HMRC considered that they needed to be reissued, the penalty notices were validly issued within the applicable time limits.

58. Paragraph 20 of Schedule 41 sets out a defence of "reasonable excuse".

59. Paragraph 19 of Schedule 41 sets out the scope of the Tribunal's jurisdiction on an appeal. The Tribunal is entitled to affirm HMRC's decision, or substitute for HMRC's decision another decision that HMRC had power to make. However, the Tribunal's power to depart from HMRC's conclusion as to the amount of "special reduction" due under paragraph 14 of Schedule 41 is limited and can typically only do this if HMRC's original decision was "flawed" when considered in the light of principles applicable in proceedings for judicial review.

Class 4 NIC

60. Section 16 of the Social Security (Contributions and Benefits) Act 1992 provides as follows in relation to Class 4 NIC:

> **Applications of Income Tax Acts and destination of Class 4 contributions**
>
> (1) All the provisions of the Income Tax Acts, including in particular—
>
> (a) provisions as to assessment, collection, repayment and recovery, and
>
> (b) the provisions of Part VA (payment of tax) and Part X (penalties) of the Taxes Management Act 1970,

(c) the provisions of Schedules 55 and 56 to the Finance Act 2009 and of Schedule 38 to the Finance Act 2012 and

(d) the provisions of Part 4 (follower notices and accelerated payments) and Part 5 (promoters of tax avoidance schemes) of the Finance Act 2014,

shall, with the necessary modifications, apply in relation to Class 4 contributions under this Act and the Northern Ireland Contributions and Benefits Act as if those contributions were income tax chargeable under Chapter 2 of Part 2 of the Income Tax (Trading and Other Income) Act 2005 in respect of the profits of a trade, profession or vocation which is not carried on wholly outside the United Kingdom.

61. It is by no means clear to us whether the effect of this provision is that Class 4 NIC is to be treated as income tax for the purposes of computing "potential lost revenue" and hence the amount of any penalty chargeable under Schedule 41. We note that other penalty provisions, for example paragraph 5(3) of Schedule 24 of Finance Act 2007, provide expressly that NICs are included within the scope of "potential lost revenue". We heard no argument on this point and, for reasons we will come on to, we do not necessarily need at this stage to make a determination as to the actual amount of penalty to which Mr England is subject. Therefore, for the time being we will simply note that it is not clear to us that Schedule 41 is a provision for "assessment, collection, repayment and recovery" (and so embraced within s16(1)(a)). Nor is it clear to us why Parliament has determined that Class 4 NIC should be treated as income tax for the purposes of particular penalty provisions (such as Schedule 55 and Schedule 56 of Finance Act 2009, Schedule 38 of Finance Act 2012 and Part X of TMA 1970) but has said nothing about Schedule 41 of Finance Act 2008.

Discussion

62. Mr Kamal made the following arguments in support of Mr England's appeal:

(1) He did not accept that HMRC had satisfied the requirements necessary to make a valid assessment under s29 TMA 1970.

(2) He submitted that HMRC had based their assessments on Mr England's statement that he believed Mr Jenner owed him £600,000 (referred to at [12] above). However, they were aware that this was an estimate only and Mr England has since clarified that he is seeking only £436,385.12 (plus interest) from Mr Jenner. In the circumstances, HMRC have not acted with due diligence in making the assessment and could not have an honest belief that the amount of the assessment was correct with the result that the assessment is invalid. He relied on the decision of the Special Commissioners in *Scott and another (trading as Farthings Steak House) v McDonald (Inspector of Taxes)* [1996] STC (SCD) 381.

(3) HMRC have reached the conclusion that Mr England received commission from Mr Jenner by considering only sums paid in to Mr England's bank accounts. If they wished to treat gross payments into his account as taxable receipts, they should have given him an allowance for payments of business expenses made out of that account.

(4) Mr England's tax liability can only be determined by reference to what his actual rights against Mr Jenner were and how much he actually received in pursuance of those rights (and he referred to *Bainbridge* v *Bainbridge* [2016] EWHC 898 in this respect).

(5) Without prejudice to the arguments above which he considered demonstrated that the assessments were either invalid, or made for the wrong amount, he argued that the Tribunal proceedings should be stayed pending resolution of the legal proceedings between Mr Jenner and Mr England.

63. Mr Kamal made no submissions relating to the assessments to CGT or in relation to the penalties. Having considered Mr Kamal's submissions, we will divide our decision into three parts dealing with the validity of the assessments, the amount of the assessments and the penalties.

Validity of assessments

64. We consider that it is clear that there was a requisite "discovery" for the purposes of s29(1) of TMA 1970. Officer Booth became aware that Mr England, who had not submitted tax returns for the years in question, and had previously paid only modest amounts of tax, had a large amount of money passing through his bank accounts and owned, or had previously owned, a number of valuable properties. At the meeting of 25 July 2014 referred to at [11] both Mr England and Mr Gorridge acknowledged that Mr England owed some tax. It is clear, therefore, that Officer Booth made the requisite "discovery" for s29 to entitle him to make assessments. Having made that discovery, he acted with diligence in seeking to ascertain the amount of tax and Class 4 NICs that should be assessed.

65. In *Bi-Flex Caribbean Ltd v The Board of Inland Revenue* (1990) 63 TC 515, the Privy Council considered that an element of guesswork would often be needed where discovery assessments are made. Lord Lowry, with whom all members agreed, said as follows:

> The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgment 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. It is also relevant, when considering the sufficiency of evidence to displace an assessment, to remember that the facts are peculiarly within the knowledge of the taxpayer …'

66. Given the authority above, we have not accepted Mr Kamal's arguments that the validity of the assessments is vitiated by the fact that they were based on estimates as to the amount of money that Mr England was due from Mr Jenner. Officer Booth adopted an entirely rational approach to the making of the assessments based on the extremely limited information with which he was provided. Mr England had not submitted tax returns for the tax years in question. Nor had he submitted full information on his financial position to HMRC. As we have found at [15], he had not

given any information as to the amounts held in his various bank accounts to HMRC and such information as HMRC had had come to them from the CSA. The analogy that Mr Kamal drew with the case of *Scott and another (trading as Farthings Steak House) v McDonald (Inspector of Taxes)* is not at all apt. That case concerned a situation where the Special Commissioners found that the Revenue officers involved had acted in bad faith. It was not suggested to Officer Booth in cross-examination that he did not have a genuine belief in the correctness of the assessments he made and there is no evidence at all that Officer Booth acted in bad faith. In fact the contrary is true: as we have found at [18], he prompted Mr Gorridge to appeal against both the penalties and the assessments and reminded him of the importance of applying to postpone payment of the tax at issue. To Officer Booth's credit, he has helped Mr England to pursue his appeal even though Mr England has been less than forthcoming about his own tax liabilities.

67. Finally, the assessment for 2009-10 relies upon the extended time limit set out in s36 of TMA 1970 applying. In that tax year, quite apart from any sums that he was due from Mr Jenner, Mr England disposed of two properties (Treelawn Drive and Glebe Way) and made a material capital gain. His failure to tell HMRC that he had a liability to capital gains tax or to income tax in a year in which over £1 million was paid into two of his bank accounts and in which he made significant capital gains on the sale of properties is, on its face, the kind of "deliberate" behaviour with which s36(1A) of TMA 1970 is concerned. Mr England has not put forward any explanation for why he did not tell HMRC about his tax liabilities beyond his rather vague statements set out at [8] above. He has not suggested that he was in any doubt as to the nature of his tax obligations and has not put forward any convincing evidence that suggests a genuine belief that his tax affairs were in order. In those circumstances, we are satisfied that the loss of tax that Officer Booth identified when he made his assessment for 2009-10 was brought about deliberately by Mr England with the result that the extended time limit in s36 of TMA 1970 applies.

68. It follows from what we have said at [64] to [67] that all of the assessments that Officer Booth made were valid and in-time. It is therefore necessary to consider the separate question of whether they were made for the right amount.

Whether the assessments are for the right amount

69. Mr Kamal made no submissions to the effect that HMRC had miscalculated the amount of CGT that Mr England owed on disposal of the four properties. The findings of fact that we have made at [25] to [28] have caused us to conclude that HMRC have assessed the correct amount of CGT due. In particular, no evidence was put forward to the effect that HMRC gave insufficient allowances for the costs of acquisition or disposal (for example solicitors' fees and stamp duty land tax).

70. Applying the approach set out in *Bi-Flex Caribbean Ltd v The Board of Inland Revenue* referred to at [65], we do not consider that Mr England was in a position, at the hearing before us, to discharge his burden of showing positively what corrections need to be made to the assessments relating to income tax and Class 4 NIC. Mr Kamal criticised HMRC for seeking to assess Mr England on an amount of income that was in excess of the amount he is claiming from Mr Jenner and, more generally, criticised

those figures as mere estimates and as failing to give appropriate relief for expenses. However, those arguments do not demonstrate what the correct amount of Mr England's trading income was. Moreover, HMRC are not seeking solely to assess Mr England on income that they consider he has received from Mr Jenner. HMRC have made their assessments with a view to assessing the total amount of income that Mr England has from all sources in circumstances where (i) Mr England has not notified them of his liability and (ii) HMRC do not have a full picture of Mr England's financial position but know that he enjoys a good lifestyle and has a number of other bank accounts for which he has not provided bank statements. That was made abundantly clear in HMRC's letter of 12 November 2014 referred to at [16]. In those circumstances, in order to discharge his burden of proof, Mr England would have to do much more than simply provide a high level critique of HMRC's figures.

71. The amount of Mr England's entitlement to receive commission from Mr Jenner and the amount of commission he actually received are relevant to his tax liability for the tax years in question. This is not for the reason that Mr Kamal put forward, as *Bainbridge v Bainbridge,* on which he relied, is concerned with the doctrine of mistake rather than the computation of taxable profits. Rather, the relevance of entitlement and receipt come from the taxing statutes themselves. Under s25 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"), Mr England would be obliged to compute profits of his trade in accordance with generally accepted accounting practice ("GAAP"). We had no evidence as to how those principles would apply, but it is common knowledge that GAAP can require amounts to be received in the future to be accrued for. If Mr England wished to satisfy us that his arrangement with Mr Jenner was so speculative that, in the tax years in question, GAAP would not have required him to accrue amounts due from Mr England he would have needed to advance accounting evidence to this effect.

72. The question of receipt is, however, relevant to Mr England's tax liability as, if he did not receive what he was owed he would have been entitled to some deduction under s35 of ITTOIA. Nevertheless, since Mr England has not satisfied us either as to the amount that he was due from Mr Jenner, or the amount he actually received from Mr Jenner in relation to the Cars4All business, we are not satisfied on the evidence that HMRC have overstated his tax liability by denying a deduction to which he is entitled. On a similar note, if Mr England wished to establish that particular sums paid out of his account were deductible expenses of his trade, he would have needed to explain precisely what those expenses were, and why they were deductible. He has not done so.

73. Moreover, there was ample evidence before us that Mr England had significant resources available to him. He enjoyed a good lifestyle, bought a house in 2008, purchased a luxurious car and promptly sold it for a large loss. He was able to gamble and make large gains in a short space of time which indicates that he had the financial strength to cope with material gambling losses that he had either made, or ran the risk of making. There was also the troubling fact that he clearly had other bank accounts about which both the Tribunal and HMRC know absolutely nothing. South Essex Hospitality Limited indicates that it owes Mr England more money than he originally invested in the bar (as noted at [34]) which suggests he had other funds available to

invest in this venture. We were not satisfied that a lifestyle such as this could be sustained simply by relying on the loans or gifts that Mr England referred to.

74. Mr England's sketchy account of his finances has not advanced his case. Mr England did not challenge Officer Booth's evidence at [37] that he spent £61,140.41 in the 2011-12 tax year. Clearly Mr England's living expenses for the period he was in prison would have been lower. However, even making allowances for this, we do not see how, even on Mr England's account, £90,000 from his mother plus an unspecified part of the £100,000 loan from Mr Jenner could have funded this order of living expenses over four tax years.

75. If matters had ended there we would, in all likelihood, have upheld the assessments that HMRC made. However, during the hearing the question of whether these proceedings should be stayed behind the civil litigation between Mr Jenner and Mr England was raised and Mrs Spencer indicated that she did not object to this suggestion. The outcome of that civil litigation has the potential to be relevant to Mr England's tax liability as it might determine either the nature of Mr England's entitlement (if any) against Mr Jenner and how much (if any) of that entitlement had been paid to date. However, while potentially relevant, we do not consider it to be inevitable that this litigation would be of material assistance in determining Mr England's tax liability. Mr Jenner is now bankrupt and it may, therefore, be doubted whether either Mr Jenner's trustee in bankruptcy will wish to continue to fund the litigation, or whether Mr England will wish to pursue it. The litigation may simply be compromised with one party agreeing to pay an undifferentiated lump sum to the other. Such a settlement would not of itself explain to the Tribunal either the nature of the arrangement between Mr England and Mr Jenner or the amounts (if any) that Mr England received under that arrangement which would be relevant to this tax appeal.

76. Given that Mrs Spencer has not objected to the idea of a stay we will consider it. However, in view of the points made above, we need more information on the status of that litigation, and the likelihood of it materially assisting in the determination of this appeal. We have, therefore, released separate directions requiring the parties to make further representations both as to whether a stay should be granted and, if so, on what terms. Pending receipt of those submissions, we will treat this decision as determining a number of issues as preliminary issues with the question of Mr England's income tax and Class 4 NIC liability (and matters flowing from that) to be determined after we have decided whether to stay proceedings.

The penalties

77. Mr Kamal made no submissions at all in relation to the penalties. However, since HMRC have the burden of proving that the conditions necessary to charge the penalties are satisfied, we will make the following determinations of matters relevant to the calculation of the penalties as preliminary issues:

> (1) We are satisfied that Mr England did not give notice of his liability to income tax, capital gains tax or Class 4 NIC in accordance with s7 of TMA 1970 (see [9] of this decision) and that, accordingly, a penalty is chargeable under paragraph 1 of Schedule 41 of FA 2008.

(2) The penalty notices were validly issued within applicable time limits.

(3) For reasons that are essentially the same as those set out at [67], we have concluded that the Mr England's failure to notify chargeability was "deliberate but not concealed".

(4) We have concluded that HMRC have correctly concluded that Mr England's disclosure of the relevant failure was "prompted" given that Mr England only provided HMRC with information on his tax position after the point at which HMRC, having obtained information from the CSA, were already looking into his tax position.

(5) We have concluded that HMRC have properly mitigated the penalties to reflect the quality of the disclosure that Mr England provided.

78. Since we have concluded that Mr England's behaviour was deliberate, no question of "reasonable excuse" under paragraph 20 of Schedule 41 arises (and, in any event, there was no evidence that was capable of supporting a defence of "reasonable excuse").

79. HMRC's penalty explanation notices indicated that they had considered whether a "special reduction" to the penalties should be made under paragraph 14 of Schedule 41 and concluded that none should be made. If Mr England wished to challenge that aspect of HMRC's decision, he would first need to show that it was "flawed" when considered in the light of principles applicable in proceedings for judicial review. No submissions were made, or evidence led, which suggested to us that HMRC's decision was "flawed" and, accordingly, we will not make any reduction to the penalties charged on the basis of "special circumstances".

Conclusion

80. We have separately released directions requiring the parties to make observations on whether the appeal should be stayed. Pending determination of that issue, as preliminary issues under Rule 5(3) of the Tribunal Rules we have concluded as follows:

(1) The discovery assessments and penalty assessments were all validly issued within applicable time limits.

(2) HMRC have correctly assessed Mr England in relation to capital gains he made in relation to the four properties set out in the table at [25].

(3) Our decisions on preliminary issues relating to the penalties are as set out at [77] to [79]. We do, however, wish to receive further submissions on the issue set out at [55] (namely whether unpaid Class 4 NIC counts as "potential lost revenue") and directions we are releasing today request the parties' observations on that issue.

81. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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.

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JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 8 SEPTEMBER 2016

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