



TC06498

Appeal number: TC/2016/5057

*Income Tax – assessments under s 29 TMA: income from property –
husband and wife s 282ATA 88 – penalties
Capital Gains Tax – calculation of gain on disposal of residence - penalties*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MISS H AKAN

Appellant

- and -

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

**TRIBUNAL: JUDGE CHARLES HELLIER
NIGEL COLLARD**

**Sitting in public at Colchester on 19 January 2018 with written submissions from
HMRC of 16 April 2018**

M Billuroglu of Billur & Co for the Appellant

Philip Jones for the Respondents

DECISION

1. Miss Akan appeals against assessments in relation to income tax, capital gains
5 tax and penalties relating to income arising from, and from her disposal of, 15 Binnie
House, London SE1. We shall describe those assessments later in more detail.

The Evidence and our findings of fact.

2. We had before us bundles of copy correspondence and heard oral evidence from
Miss Akan. Mr Jones gave us an explanation of the interaction between HMRC
10 officers and the valuation office.

3. Miss Akan grew up at 15 Binnie House, a third floor flat. Her mother was a
tenant of the local council. When her mother grew older she was moved to a ground
floor flat and Miss Akan took over the tenancy of No 15. Miss Akan married Mr
Gelman and together they became joint tenants. They lived at 15 Binnie House from
15 1988. In 1996¹ Miss Akan and Mr Gelman bought a leasehold interest in 15 Binnie
House from the local council under the right to buy scheme. They continued to live
there until June 1997 when they moved to a house in Lower Mardyke Avenue and 15
Binnie House was let out.

4. The marriage ran into problems. Miss Akan found Mr Gelman to be aggressive
20 and controlling. She had a stroke in 2005 which she attributed in part to the pressures
of the marriage. In 2006 they decided to separate. It was agreed that Mr Gelman
would become the sole owner of Lower Mardyke Avenue and Miss Akan would
become the sole owner of 15 Binnie House. Pursuant to that agreement the interest in
15 Binnie House was transferred to Miss Akan on 21 December 2006.

5. However, Miss Akan and her husband had two teenage children and pressure
25 was brought to bear by family members to maintain a family home. As a result Miss
Akan remained at Lower Mardyke Avenue with the family (sleeping and living, so far
as consistent with providing a single family home for the children, separately from Mr
Gelman) until she moved out sometime around 2010 (the evidence as to the exact date
30 was not wholly clear or consistent). Miss Akan petitioned for divorce and a decree of
divorce was given in October 2011 on the basis of Mr Gelman's unreasonable
behaviour.

6. Some time after leaving Lower Mardyke Avenue Miss Akan rented a flat at
Manor Square. She maintained this tenancy until 30 November 2012.

7. 15 Binnie House was let during most of the period when Miss Akan had a
35 tenancy at Manor Square. In 2011 the tenant was a Li Zhaoyan (“LZ”). LZ was not a
satisfactory tenant and became in arrears with the rent. In January 2012 Miss Akan

¹ There is some uncertainty about the exact date in 1996. In her Notice of Appeal Miss Akan
says it was 23 January; in a letter of 8 May 2015 HMRC say it was 16 September.

started proceedings to obtain possession, and in April 2012 the court granted her an order requiring LZ to quit.

8. The agents advising Miss Akan on this action informed her that it would take a further 4 to 6 weeks before LZ would leave. Miss Akan told us that she took up residence at 15 Binnie House after LZ had left.

9. LZ however had sublet to, among others, a Miss Linh, in breach of the terms of her agreement. Miss Linh had nowhere to go on LZ's departure, and so Miss Akan permitted Miss Linh to remain until September 2012. Miss Linh paid Miss Akan rent.

10. As we shall explain later some of the reliefs which Miss Akan claims are dependent upon 15 Binnie House having been at relevant times her "main residence". For the reasons which follow we conclude that it did not become her main residence until very late in September or on 1 October 2012:

(1) Miss Akan told us that LZ was unhappy about the eviction and had returned from time to time and caused disruption. This had led to her being uncertain about living at 15 Binnie House, despite her sentimental attraction to it.

(2) Miss Akan kept the tenancy of Manor Square until November 2012

(3) The court order for the eviction of LZ was made in April 2012 and, Miss Akan was advised, gave LZ 6 to 8 weeks to depart. Thus, by June 2012 Miss Akan would have been reasonably certain she could renounce the tenancy of Manor Road and go to live at 15 Binnie House. She told us, and we accept, that the tenancy required two months notice to terminate. Thus the earliest sensible determination of the Manor Road tenancy would have been in August 2012. The retention of the tenancy for a further two months suggested to us that Miss Akan may not have adopted 15 Binnie House as her main residence until October or November 2012.

(4) In a note to HMRC of 12 September 2016 Miss Akan says that she "was staying at [15 Binnie House] at times depending on where I was working".

(5) Miss Akan is recorded in telephone calls to HMRC of 16 April 2012 and 25 April 2012 as saying that she lived at 15 Binnie House for a "couple of months" prior to its sale in November 2012. If Miss Linh had moved out in September that would be consistent with Miss Akan assuming residence at the end of that month and giving notice to terminate the Manor Road tenancy at the same time.

11. We conclude that it is likely that 15 Binnie House did not become Miss Akan's main residence until late in September or on 1 October 2012 after Miss Linh had departed.

12. Miss Akan completed the sale of 15 Binnie House on 8 November 2012 (we had no evidence as to when an unconditional contract for its sale was made but we think it likely that it was made during 2012).

The arrangements for the letting of 15 Binnie House.

13. We have found that, after Miss Akan and her husband moved to Lower Mardyke Avenue, 15 Binnie House was let out. It was let through the remainder of the period of their joint ownership, and the letting continued after Miss Akan became sole owner. As we have related above it was let on a formal tenancy in the early part of 2012 and then more informally to Miss Linh.

14. During both the period of joint ownership, and for some of the period of Miss Akan's sole ownership, all the arrangements for the letting were undertaken by Miss Akan's husband. We accept Miss Akan's evidence that her husband exercised unfettered exclusive control of the letting in the period of their joint ownership and in some of some of the period of her sole ownership: the documents before us showed that the letting agents addressed letters only to him, and only he was shown as a landlord in the agreements with the tenants. We accept Miss Akan's evidence (as reported in letters form Billur & Co to HMRC) that from June 1997, while Mr Gelman managed the letting, the net rents were paid to, and retained by, her husband.

15. We found the evidence as to when the period of Mr Gelman's management and control ended somewhat inconsistent:

(1) In a letter of 21 April 2016 Billur & Co say that Miss Akan told them that it ended in May 2010 and that HMRC would have seen that until then her bank accounts showed no relevant receipts;

(2) An invoice from the letting agents dated July 2010 is addressed to Mr Gelman only;

(3) A letter from Mr Gelman to "whom it may concern" confirmed that up to 2007/8 he managed the property and declared the income on his tax return;

(4) In a letter of 27 December 2012 Miss Akan says that she did not take control of the property until 2011 and that it was agreed that the income would go to Mr Gelman;

(5) On 27 June 2014 Billur & Co wrote to HMRC saying that Miss Akan "commenced letting this property in her own name in the middle of 2008 and prior to that her husband was managing the property".

16. Taking all this together we conclude that it is likely that up to the end of 2008/9 Mr Gelman received all the income but thereafter it was not shown that Miss Akan did not receive or have control over the income.

17. Miss Akan understood that up to 2007/8 Mr Gelman declared 100% of the net income from the property on his tax return. While Miss Akan was living with Mr Gelman at Lower Mardyke Avenue Mr Gelman provided food for the family and Miss Akan paid for utility bills and clothing. The mortgage on Lower Mardyke Avenue was a debt of Mr Gelman alone (Miss Akan told us that she had not been considered a good credit risk because she had had a brain tumour).

18. Miss Akan gave no notification to HMRC of her chargeability to tax until 2008/9. For that and subsequent years she completed tax returns. The returns for 2008/9 and 2009/10 indicated that her tax advisor was BG Hoddy & Co.

The assessments under appeal and the grounds of appeal.

5 (a) *Assessments on income from 15 Binnie House.*

19. On 29 March 2016 HMRC issued assessments under section 29 TMA 1970 in respect of rental income from 15 Binnie House for 2008/9 and 2009/10, and then on 1 June 2016 assessments, also under section 29, in relation to 1997/8 to 2004/5, 2010/11, and 2011/12. Also on 1 June 2016 HMRC, having commenced an enquiry
10 into her 2012/13 return, issued a closure notice amending Miss Akan's self-assessment for 2012/13 inter alia by adding to it rental income in respect of 15 Binnie House.

20. We understood that the parties agreed to the gross figures used in the calculation of these assessments. They agreed figures for: the rentals which arose and the
15 expenses of service charges, repairs, agents' fees and wear and tear. But the following matters were disputed:

- (i) for the period 1997/8 to 2004/5 HMRC treated 50% of the net taxable profit as taxable income of Miss Aken. Miss Akan argued that all the income had been received by her husband and that it was wrong to tax her on any of it;
- 20 (ii) for the period 2008/9 to 2009/10 HMRC had treated Miss Akan as taxable on 100% of the net income arising. Miss Akan argued that she should not be taxable on that income because it had all been received by her husband;
- (iii) in relation to 2012/13 Miss Akan argued that the income received from Miss Linh was not taxable as a result of the rent a room relief scheme; and
- 25 (iv) in 2012/13 Miss Akan had had the expense of rent on Manor Square which she would not have had had LZ moved out. That expense, it was argued, should be deducted in determining her net taxable income.

(b) *Capital gains tax on the disposal of 15 Binnie House in 2012.*

21. In the closure notice for 2012/13 HMRC included a capital gain on the sale of
30 15 Binnie House calculated at £116,715. HMRC had used an acquisition price of £15,180 in the computation of that gain.

22. Miss Akan agreed the figures for disposal proceeds and incidental expenses of sale in the calculation of that gain, but contended that a purchase price of £39,000 should have been used in the computation rather than the £15,180 used by HMRC. In
35 particular she argued that a 2006 valuation should have been used because that was when she acquired full ownership on the transfer to her of her husband's interest in the property.

(c) *Penalty assessments.*

23. HMRC assessed penalties in respect of 1997/8 to 2004/5 under section 7(8) TMA 1970 for the failure to notify assessable income in respect of those years. The penalties were determined at 45% of the assessed additional tax on each of the years -
5 - giving a mitigation of 10% for disclosure, 20% of the cooperation and 25% for seriousness.

24. HMRC also assessed penalties for 2008/9 to 2012/13 under schedule 24 FA 2007 on the basis that the omission of the rental income from Miss Akan's returns for those periods was deliberate. Mitigation to 40.25% of the amount of tax was applied.

25. In relation to these penalties Miss Akan argues that her behaviour was not
10 deliberate and that, given that the income was received (and she understood in the period up to 2007/8, declared) by her husband, it was iniquitous to penalise her for not disclosing it.

26. HMRC also assessed a penalty in respect of 2012/13 for the nondisclosure of
15 the capital gain arising on the disposal of Binnie House. It was assessed at 20.75% of the tax on the gain.

Discussion

(a)(i) the attribution of 50% of the net income from 15 Binnie House to Miss Akan between 1997/8 and 2007/8.

27. Between these dates section 282A TA 1988 provided:

20 “(1) Subject to the following provisions of this section, income arising from property held in the names of a husband and wife...shall for the purposes of income tax be regarded as income to which they are beneficially entitled in equal shares.

25 (2) Subsection (1) above shall not apply to income to which neither the husband nor the wife ... is beneficially entitled.

(3) Subsection (1) above shall not apply to income -

(a) to which either the husband or the wife ... is beneficially entitled to the exclusion of the other, or

(b) to which they are beneficially entitled in unequal shares,

30 if a declaration relating to it has the effect under section 282B.

[(4) and (5) are presently irrelevant]

(6) References in this section to a husband and his wife are references to a husband and wife living together ...”

28. The effect of the tailpiece of subsection (3): " if a declaration has effect under
35 section 282B" is, in our view, that only if such a declaration is in effect can income which actually belongs beneficially wholly to only one of the couple be so treated for tax purposes. The drastic nature of that provision makes clear that the mere receipt by

one of a couple of more or less than half the relevant income cannot displace the deeming effect of subsection (1).

29. We considered whether, because "income arising from property" in subsection must fall be construed as the net taxable income arising, it might be the case that a
5 portion of the gross income which accrued, for example as a management fee to one of the couple, would reduce the amount of the net income to be divided equally. Thus if one of a couple makes a charge for work done in relation to the property the 50:50 division might, depending on the precise facts, be struck after that charge. Whilst we consider that in appropriate circumstances this may well be the case, it would be the
10 case only if that charge were an expense wholly and exclusively incurred for the purposes of the property business. In the present case however, there was nothing to suggest that Miss Akan's husband made such a charge or that if he did it was born wholly and exclusively for the purposes of the letting of 15 Binnie House.

30. There was no evidence before us to suggest that any formal declaration within
15 section 282A had been made. We therefore conclude that while Miss Akan and her husband were "husband and wife" for the purposes of section 282A, this provision requires that Miss Akan be treated as taxable on half of the net taxable income from 15 Binnie House even though she received none of it.

31. Subsection (6) provides that references in section 282A to a husband and wife
20 are references to a husband and wife living together. Section 282 provides that a husband and wife should be treated as living together unless separated by an order of a court or if they "are in fact separated in such circumstances that the separation is likely to be permanent". We find, on the evidence before us, that Miss Akan and her husband were not so separated until 2010.

25 32. As a result we find that for the period 1997/8 to 2004/5 the law required 50% of the net income from 15 Binnie House to be treated as the taxable income of Miss Akan.

(a)(ii) The period after December 2006.

33. In this period Miss Akan was the sole proprietor of the leasehold interest of 15
30 Binnie House.

34. In this period if Miss Akan had beneficially received income from the letting of 15 Binnie House it would unquestionably have formed part of her taxable income.

35. We have concluded that up to 2008/9 Mr Gelman received and had control over the income from the flat but that thereafter it accrued to Miss Akan .

35 36. By section 272 ITTOIA the taxable profits of a property business fall to be calculated in the same way as the profits of the trade - in particular: in accordance with generally accepted accounting practice (section 25) and with deductions for bad debts only to the extent that a debt is bad or estimated to be such (section 35).

37. A question arises as to whether Mr Gelman had been *given* the net profits by Miss Akan (or had agreed that he would keep them as part of the arrangements for the support of the family), or whether he had acted as her agent, or whether he had received and retained the income without her free consent. We have accepted that
5 Miss Akan found Mr Gelman controlling and abusive and from that we conclude that she did not voluntarily consent to his retention of the net profits; we have concluded that he managed the property and her acquiescence in that activity made him in our view her agent. We consider that if an agent appropriates property belonging to his principal he becomes liable to repay his principal.

10 38. The starting point for determining the profits of a trade is to take the amount of its profit for the period determined in accordance with generally accepted accounting practice. It seemed to us that the income of letting business of 15 Binnie House would be reflected in accounts prepared in accordance with generally accepted accounting principles by a debt due from Mr Gelman. In accordance with such principles the
15 collectability of that debt would be assessed and provision made against it if it was reasonably considered that it would not be fully collectable.

39. We have accepted that Miss Akan received none of the income and have recorded the nature of the relationship between Miss Akan and Mr Gelman. We consider that it would have been very unlikely that Miss Akan could have recovered
20 the debt due to her from Mr Gelman in full for any of these years. In our opinion a prudent accountant would have made a provision of at least 80% of the amount of the net profits due from Mr Gelman.

40. As a result we concluded that in period 2006/7 to 2008/9 only 20% of the calculated net return from the letting of 15 Binnie House was taxable profit of Miss
25 Akan

(a)(iii) Rent a room relief

41. Sections 784 to 802 ITTOIA 2005 provide for "rent a room relief". It applies to "income for the use of furnished accommodation in an individual's only or main residence". We have found that 15 Binnie House was not Miss Akan's main residence,
30 during her period of sole ownership, until after September 2012. As a result of this relief cannot apply to any of the income from the property arising before that time. There was no such income arising after September 2012. As a result, the relief has no application.

(a)(iv) The expense of Miss Akan's accommodation

35 42. The effect of section 272 and section 34 ITTOIA is that an expense is deductible only if it is incurred wholly and exclusively for the purposes of the letting business. The expense of Miss Akan's accommodation, whilst potentially enabling the letting of 15 Binnie House, was also plainly incurred for the purposes of giving her somewhere to live. It was thus not incurred wholly in and exclusively for the purposes
40 of the business and so is not deductible.

(b) (i) Capital Gains tax – the acquisition cost of 15 Binnie House

43. Miss Akan was unable to produce any documentary evidence relating to the acquisition of 15 Binnie House in 1996. The evidence before us was the following:

(1) Miss Akan told us that she thought that a mortgage of about £20,000 had been obtained to make the purchase;

5 (2) In correspondence Mr Billuroglo had, on behalf of Miss Akan, put forward a cost of £39,000;

(3) In letters of 30 March 2015 and 27 June 2014 HMRC had proposed a cost of £25,000 based on a record (which we did not see) of the sale of a similar flat in December 1996 for £59,000 and a 58% right to buy discount;

10 (4) On 6 March 2015 Miss Akan's advisers had reported her recollection that the market value was £85,000 from which a discount was taken to get to the purchase price. A 58% discount would result in a purchase price of some £34,000.

15 (5) Mr Billuroglo provided us with copies of Land registry price indices which showed that between April and December 1996 the average sale price of a flat in Southwark was between £82,000 and £84,000. With a 58% discount that would, if the flat were average suggest a price of some £34,000.

20 (6) HMRC's letters indicate that after March 2015 they obtained a figure for the sale price in December 1996 of £15,180 from the valuation office. The report of this figure in the letter indicates that it as an exact figure rather than an estimate or valuation. We had no evidence from HMRC as to how this figure was collected or how accurately it had been recorded or transmitted.

(7) At a meeting with HMRC on 15 February 2015 Miss Akan and her accountant are recorded as appearing to accept a figure of £15,180.

25 (8) We have noted at footnote 1 to paragraph [3] above the difference between the date which HMRC record the valuation office giving for the purchase (September 1996) and the date given on the Notice of Appeal (January 1996)

30 44. In matters of this nature the onus of proof is on the taxpayer: it is up to the taxpayer to provide evidence to show that her figure is right. Miss Akan has provided her recollection, which is a starting point, although we believe that it is often difficult to remember accurately monetary amounts relating to events which occurred more than 20 years ago unless there is some other recollection which supports a memory (in this context we also note a statement attributed to Miss Akan in HMRC's note of a meeting on 15 April 2014, that since her stroke she found it difficult to remember dates). There is some support for Miss Akan's recollection in the Land Registry figures, but those figures are of average prices, and we had no evidence on which we could conclude that 15 Binnie House was an average Southwark flat.

35 45. Set against that is HMRC's figure which they say came from the valuation office. But we had no way to test the accuracy of that record or of its reporting.

46. The evidence is thus unsatisfactory in both sides. In such a case we ask ourselves whether it is shown that HMRC's figure is wrong. We conclude that it has not been, and thus that the acquisition cost must be taken as £15,180.

(b) (ii) Acquisition cost – the transfer from Mr Gelman of 50% in 2006

5 47. Section 58 TCGA provides that if a person living with his spouse disposes of an asset to that spouse both shall be treated as if the asset were transferred for a sum such that no gain or loss would be made on the disposal.

48. The effect of this provision is that, if it applies, and Mrs Akan is to be treated as if only the costs incurred by her husband in relation to his 50% interest were incurred
10 by her in relation to that interest, the actual value of the property at the time of transfer and any consideration actually given are irrelevant.

49. We have found that Miss Akan was living with Mr Gelman in 2006. They were married. Therefore, the section applies.

15 50. As a result, Miss Akan's acquisition cost is to be treated as the sum of the amounts paid in 1996 by herself and her husband.

(c) Penalties.

(i) Penalties under section 7 (8) TMA for the years 1997/8 to 2004/5.

51. Section 7(8) TMA provided that, if a person who had not received a tax return failed to notify HMRC within six months of the end of the year of assessment that she
20 was chargeable to income tax, she would be liable to a penalty "not exceeding the amount of tax" assessed when the deficiency was discovered.

52. In assessments dated 3 June 2016 HMRC assessed penalties under section 7 (8) of 45% of the amount of tax in each year which had been assessed in relation to the letting profits for the year.

25 53. Paragraph 25 schedule 41 FA 2008 requires section 7(8) TMA to be omitted. Section 123 FA 2008 provided that Schedule 41 should come into force on a day to be appointed by Treasury Order. Paragraph 2 of the Finance Act 2008 Schedule 41 (Appointed Day and Transitional Provisions) Order 2009 SI 2009/511 provided that the appointed day was 1 April 2010. Paragraph 3(a) of the Order provided that the
30 repeal applied to obligations arising after 1 April 2010 .

54. We sought submissions from the parties as to whether the effect of these provisions was that by 3 June 2016 section 7(8) had been repealed so that there was no statutory authority for the imposition of these penalties. We received submissions from HMRC only.

35 55. In their submission HMRC drew our attention to section 16(1)(e) Interpretation Act 1978 which provides that unless the contrary intention appears where an Act repeals an enactment the repeal does not affect any legal proceeding in respect of any

obligation or liability incurred under the repealed enactment, and permits any such legal proceeding to be continued as if the repealing Act had not been enacted

56. . No contrary intention appears, and indeed para 3(a) of the Order may be read as preserving the operation of section 7(8) in respect of obligations arising prior to 1
5 April 2010. We find that section 7(8) was authority for the imposition of these penalties.

57. Section 118(2) TMA provides that a person shall be deemed not to have failed to do something if she had a reasonable excuse for the failure, and where the excuse ceased to have done it without unreasonable delay thereafter.

10 58. In these years Miss Akan was living with Mr Gelman who managed the letting and controlled the income. We have found that it was a controlling and abusive relation ship and that Mr Gelman told her that he was declaring the income. In these circumstances we consider that Miss Akan had a reasonable excuse for failing to notify her deemed receipt of taxable income in these years, and that the shadow cast
15 by the relationship meant that that excuse continued until the time when Miss Akan provided details of her income to HMRC as part of their investigation.

59. We therefore allow the appeal in relation to these penalties.

(ii) Penalties under schedule 24 FA 2007 for the years 2008/9 to 2012/13.

60. In respect of each of these years HMRC assessed penalties: (i) of 40.25% of the
20 amount of the amount of tax on the letting income, and (ii) of 21.75% on the amount of tax on the capital gain assessed by the amendments in the 2012/13 closure notice.

61. Paragraph 1 schedule 24 FA 2007 provides that a person is liable to a penalty if she gives HMRC a tax return which contains an inaccuracy which leads to an understatement of a liability to tax and the inaccuracy was careless or deliberate.
25 Paragraph 4 determines the maximum amount of the penalty in a case such as that of Miss Akan. It is:

- (1) 30% if the inaccuracy was careless;
- (2) 70% if the inaccuracy was deliberate but not concealed;
- (3) 100% if the inaccuracy it was deliberate and concealed.

30 62. Paragraph 10 permits the percentage to be reduced where a person has made a disclosure - with a reduction depending upon whether the disclosure was prompted and the quality of the disclosure..

63. HMRC's assessments of penalties on Miss Akan were made on the basis: that
35 Miss Akan deliberately failed to declare her rental income in these years (in all of which she made a tax return), that the disclosures she made in the course of HMRC's investigation were prompted, and that she had been careless in her failure to put the capital gain on the sale of 15 Binnie House in her 2012/13 return, and that the disclosures she made in relation to it were prompted.

64. It seems to us that Miss Akan's return was deliberately inaccurate if she knew that she should have included certain amounts in it but did not. An inaccuracy is "careless" if it is due to a failure to take reasonable care (paragraph 3(1)(a) Schedule 24).

5 65. In the period after the transfer of her husband's interest in 15 Binnie House to her in 2006 and up to Miss Akan's divorce - the period up to October 2011 - Miss Akan must have known that income was arising from the letting of her flat. She accepted at a meeting with HMRC on 18 February 2015 that she knew that the income was taxable. In relation to periods before 2008/9 she said that she believed
10 that Mr Gelman declared it as his income, and as a result she suggested that there was no need for her to declare it. But that was not the case for 2008/9 and subsequent years. Thus when she signed her tax returns for 2008/9 and subsequent years she must have known that they should have included the income from the flat because she understood that it was no longer being declared by Mr Gelman, yet she did not declare
15 that income. That omission was therefore in our view a deliberate inaccuracy.

66. For a deliberate and unconcealed inaccuracy Schedule 24 prescribes a penalty of between 35% and 70% where, as in this case, the disclosure of information was prompted. HMRC set the relevant percentage at 45% given the course of the investigation and the help and information Miss Akan provided. We see no reason to
20 change that figure. None was suggested by or on behalf Miss Akan.

67. In relation to the capital gain on the sale of the flat in 2012/13 HMRC considered that Miss Akan's failure to disclose it in her tax return was careless. Miss Akan had said that she had thought that the gain was exempt because the flat had been her residence. We consider that it would have been reasonable to check this with a
25 qualified adviser - or even with HMRC. That she did not do so was, in our view, a failure to take reasonable care. We agree that the inaccuracy (the omission of the gain) was careless.

68. For a careless inaccuracy Schedule 24 prescribes a penalty at the rate of between 15% and 30% where the disclosure was prompted (as it was in the case of the gain on the sale of the flat) with the eventual figure depending on the quality of
30 disclosure. HMRC sets the percentage of 21.75%. We see no reason on the evidence before us to change this, nor was one suggested.

(d) Other matters

(i) the conditions for the issue of assessments under section 29 TMA 1970

35 69. Assessments may be made under section 29 TMA only where various conditions are satisfied.:

70. The first condition is that an officer of the board discovers that income or capital gains which ought to have been assessed to tax have not been assessed or that an assessment (including self-assessment) is or has become insufficient.

71. The onus is on HMRC to show that there was such a "discovery". Looking at the history of HMRC's investigation into Miss Akan's affairs it seems clear to us that there was such a discovery. It is also clear that it was acted on in a timely manner: the discovery was still fresh when the assessments were made.

5 72. The second condition is that if the taxpayer has delivered a return a tax return then either:

(1) the insufficiency of tax was brought about carelessly or deliberately by the taxpayer or

10 (2) when at the time when an officer ceased to be entitled to open an enquiry into the taxpayer's return he could not reasonably have been expected to be aware of the insufficiency of tax.

73. The onus is on HMRC to show that the relevant condition is satisfied.

74. Before us Mr Jones relied upon the first condition, namely that the insufficiency of tax was brought about carelessly or deliberately by the taxpayer.

15 75. In relation to the period from 2008/9 onwards we have already found that the omission of the rental income from the tax return was deliberate.

76. In relation to the period before 2008/9 Miss Akan did not deliver a tax return and the ability to assess is not subject to the condition that she acted carelessly or deliberately.

20 77. Thus we find that these conditions were satisfied in relation to the assessments.

78. The third condition is that the assessment is made in time. Section 34 TMA provides an ordinary time limit of four years. Section 36 extends that to six years where the loss of tax was brought about carelessly and to 20 years where the loss of tax was brought about deliberately or because of a failure to notify HMRC of chargeability to income tax.

25 79. In relation to the period 1997/98 to 2004/5 Miss Akan had failed to notify HMRC of the chargeability to income tax in relation to the flat. The 20 year period thus applies and the assessments were made in time.

30 80. In relation to 2008/9 onwards Miss Akan completed tax returns notifying chargeability to income tax even though she did not disclose the income arising from 15 Binnie House. We have found in relation to these years that Miss Akan's omissions were deliberate. As a result, the 20 year period applies and the assessments were made in time.

35 81. We therefore find that the conditions for the issue of the assessments were satisfied.

Conclusions

(i) The assessments

(1) We uphold the assessments for the period 1997/8 to 2004/5.

(2) We reduce the assessment for the period 2008/9 by 80%.

5 (3) We uphold the assessments and the closure notice in relation to the periods thereafter.

(ii) The penalties

82. We dismiss the appeals against the penalties in relation to the periods 2008/9 onwards.

10 83. In relation to the penalties for the periods 1997/98 to 2004/5 we allow the appeals.

Rights of appeal

15 84. 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.

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**CHARLES HELLIER
TRIBUNAL JUDGE**

RELEASE DATE: 14 May 2018

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