[2019] UKFTT 82 (TC)

TC06966

Appeal number: TC/2017/07495
TC/2017/07497
TC/2017/07509

INCOME TAX – appeals against discovery assessments and related penalties - whether taxpayer careless – no – appeals allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PANAGIOTA NEGKA **Appellant**

- and -

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

TRIBUNAL: JUDGE VICTORIA NICHOLL

Sitting in public at Taylor House on 18 October 2018

The Appellant in person

Mrs P. M. O'Reilly, presenting officer for HMRC's Solicitor's Office and Legal Services, for the Respondents

DECISION

Introduction

These appeals by the Appellant ("Ms Negka") are against discovery assessments and penalties issued by the Respondents ("HMRC") for the tax years 2013-14 and 2014-15. HMRC's assessments were made under section 29(4) Taxes Management Act 1970 ("TMA") on the basis that the situation that gave rise to the assessments was brought about carelessly by Ms Negka. I have allowed Ms Negka's appeals.

Background of the facts agreed by both parties

1. Ms Negka lived with her family at a property at 36 Perham Road W14 ("Perham Road") between 24 July 2009 and 11 October 2009. Following her separation from her husband, Ms Negka moved out of Perham Road and rented it out for a number of years before selling it on 22 May 2013.

2. On 12 July 2013 Ms Negka bought a larger property at 16 Hippodrome Mews W11 ("Hippodrome Mews") to live in with her son and mother. She lived in Hippodrome Mews between 12 July 2013 and 16 June 2014. Ms Negka and her son moved out of Hippodrome Mews on or before 16 June 2014 and it was rented out between 16 June 2014 and 23 May 2015. Ms Negka claimed the £19,772 expenses that she incurred in preparing Hippodrome Mews for rental against her rental income in her tax returns for 2013-14 and 2014-15. These expense claims were disallowed by the discovery assessments the subject of these appeals.

3. Ms Negka sold Hippodrome Mews on 16 June 2015. HMRC agreed on 7 April 2016 that Ms Negka was entitled to claim principal private residence relief ("PPR") in relation to Hippodrome Mews. This relief has since been disallowed and then allowed again by HMRC in 2017 as detailed below.

4. The relevant dates in relation to Ms Negka's tax returns and HMRC's assessments for the 2013-13 and 2014-15 tax years are as follows:

Tax year	**2013-14**	**2014-15**
SA tax return filed	20.06.14	17.04.15
Tax return amended	02.07.14	18.04.15
1st Enquiry opened	18.06.15	
1st Closure Notice	13.06.16	
1st appeal to Tribunal	29.08.16	
HMRC withdraw 1st closure notice	18.08.17	

2nd Enquiry opened	04.09.17	04.09.17
Discovery assessments	04.10.17 for £20,393.76*	04.10.17 for £3,845.60
* to be revised per HMRC's case (see paragraph 5.19)	NIL	
Penalty notices	04.10.17 for £3,059.06*	04.10.17 for £576.84
* to be revised per HMRC's case	NIL	

Note: HMRC issued a third discovery assessment under section 29(1) TMA for £145,463.90 and a Schedule 24 Finance Act 2007 penalty of £21,819.58 for the tax year 2015-16. HMRC have agreed to withdraw the assessment and notice. This was appealed under reference TC/2017/07509 and is referred to in paragraphs 32-35 below.

Findings of facts

5. I find the following facts from the evidence in the Tribunal's bundles of documents, the supplementary evidence produced and accepted at the hearing and the witness evidence of Ms Negka at the hearing:

Ms Negka

5.1 Ms Negka moved home a number of times in the years preceding the hearing because of her family circumstances. She was separated and divorced and then made arrangements for her mother to come and live with her and her son. The dates of Ms Negka's moves from Perham Road to Hippodrome Mews and the rental and sale dates of the properties are set out in the agreed facts in paragraphs 1, 2 and 3 above.

5.2 HMRC comment in their Skeleton Argument that Ms Negka "has been in receipt of rental income since November 2008. She submitted returns for 5 years prior to 2013/14 and all of these returns included rental income and expenses incurred against the properties. HMRC believe this shows a familiarity with rental income." While I accept that Ms Negka received and reported rental income from the letting of two former homes, this did not make her familiar or confident about her UK tax position with regard to rental income. Ms Negka has not reported any rental income or loss in her 2017-18 return.

5.3 Ms Negka is familiar with the Greek tax system and laws. She worked in government offices in Greece and she has worked in human resources in the United Kingdom. As noted in paragraph 5.1 above, I do not find that Ms Negka is confident about UK taxes, but she is a responsible taxpayer and concerned to get things right. This is demonstrated by the fact that her tax returns have been filed by the due date and, as she does not have a UK tax adviser, she reads HMRC's online guidance and manuals, tax cases and tax legislation in order to establish how she should report her

property income and gains. Ms Negka wrote many letters to HMRC. These are unusually long and detailed with information about her personal life, her property purchases, occupation, rentals and sales, and the findings of her extensive tax research online. Ms Negka called HMRC regularly for assistance with her tax queries because she considered that their advice was authoritative.

Property rentals and sales and calls with HMRC

5.4 As noted in paragraphs 1, 2 and 3 above Ms Negka lived in, rented and then sold the property in Perham Road.

5.5 After the sale of Perham Road Ms Negka bought the property at Hippodrome Mews. Ms Negka moved into the property but then decided that Hippodrome Mews was no longer suitable for her family and that she needed to rent it for income. She therefore spoke to agents to put it on the market and began to undertake works to prepare it for rental.

5.6 Ms Negka called HMRC about her change of address to Hippodrome Mews. On 9 May 2014 HMRC's SA notes show an entry 'Base Address RLS set' and on 19.January 2015 the notes state 'Base Address changed from 16 Hippodrome Mews, W11 4NN". On 6 June 2014 Ms Negka informed the HMRC PAYE team by letter that Hippodrome Mews had been here sole residence since 12 July 2013.

5.7 On 18 January 2016 Ms Negka wrote to HMRC about the capital gain on the sale of Hippodrome Mews. The letter set out the dates that she lived had there and the period when it was rented out (as set out in paragraph 2 above). She noted that she did not need to claim letting relief because PPR would apply. Ms Negka did not receive a reply and so wrote again on 4 March 2016. On 7 April 2016 HMRC Technical Support Officer Pam Thomas confirmed that no capital gains tax was due on the sale of Hippodrome Mews.

Timeline of first enquiry

5.8 On 18 June 2015 Mrs Bowman of HMRC wrote to Ms Negka to inform her that HMRC were going to check her return for the year ended 5 April 2014 under section 9A TMA. Mrs Bowman stated that she intended to "look at your failure to declare a capital gain and the amount claimed under property repairs and maintenance on your land & property page." Mrs Bowman asked for a schedule of information and documents about the acquisition and disposal and capital expenditure on Perham Road. The schedule also asked for copies of invoices to support Ms Negka's expenses claim of £19,778 with regard to property repairs and maintenance on the land & property page of her return.

5.9 On 23 June 2015 Ms Negka emailed Mrs Bowman setting out the breakdown of the £19,777.52 invoiced for the repairs and maintenance of Hippodrome Mews. She explained that she had spoken to two technicians at HMRC about this claim and "they both told me that I can either claim them in the year that they took place or I can claim them the year I started renting the property as these repairs were made with the view to rent my house." Mrs Bowman confirmed on 24 November 2015 that she had

managed to trace and listen to recordings of two of Ms Negka's calls. On 12 February 2016 Mrs Bowman wrote to Ms Negka about the content of the calls made on 11 September 2013 and 23 May 2014. Both calls included discussion of rental expenses and Ms Negka asked about costs incurred before a tenant moves in. Ms Negka was advised that the expenses would be tax deductible if they were incurred with the intention of letting out the property. In the second call it was said that a claim for allowable expenses should be made in the year the expenses were incurred.

5.10 Following further correspondence and calls between Ms Negka and HMRC, Mrs Bowman emailed Ms Pam Thomas of HMRC as she had also been in correspondence with Ms Negka about Hippodrome Mews (as noted in paragraph 5.7 above). On 4 May 2016 Mrs Bowman asked Ms Thomas for a copy of her response in relation to Hippodrome Mews. This was sent to Mrs Bowman and informed her that Ms Thomas had decided that Ms Negka was entitled to PPR in relation to the sale of Hippodrome Mews. Ms Negka had not referred to this in her correspondence with Mrs Bowman, and her correspondence address at the time was a third address where she was living with son and her husband from whom she was separated. HMRC accept that Mrs Bowman was aware that her colleague had allowed PPR in relation to the sale of Hippodrome Mews before she issued the closure notice in relation to 2013-14 in June 2016.

5.11 On 13 June 2016 Mrs Bowman wrote to Ms Negka to advise that she had now completed her enquiry and that she had issued a closure notice under section 28A(1)&(2) TMA 1970. The closure notice amended Ms Negka's return for 2013-14 by adding in a tax charge on the sale of Perham Road as Mrs Bowman had decided that the PPR claim failed. The closure notice did not make any changes as regards Ms Negka's rental expenses claim in relation to Hippodrome Mews.

First appeal to the Tribunal

5.12 Ms Negka appealed against the closure notice and the related penalty. There was considerable correspondence between the parties preparing for the hearing of the appeal. The appeal was listed to be heard on 12 September 2017 but on 18 August 2017 HMRC withdrew the section 9a enquiry notice, the section 28A closure notice and the penalty assessment for 2013-14. The reason given was the enquiry notice failed to advise Ms Negka that the enquiry was into her amended return (the return had been amended within 2 weeks of the filing of the return - see paragraph 4 above). HMRC's presenting officer notified the Tribunal that HMRC did not wish to defend the decision the subject of the appeal. Ms Negka applied to have the appeal reinstated as she had been informed that HMRC still intended to assess the gain, but the Tribunal advised her that the matter was concluded as her appeal had been allowed following HMRC's withdrawal.

Second enquiry

5.13 On 4 September 2017 Mrs Bowman wrote to Ms Negka to open enquiries for the tax years 2013-14, 2014-15 and 2015-16. The covering letter stated that Mrs Bowman was still of the opinion that PPR was not available on the sale of Perham Road but

that there was "a further error found on your completed 2013/14 tax return in relation to your Land & Property page and the expenses claimed in relation to 16 Hippodrome Mews. Further information has since been received where you have claimed Private Residence relief for the property … when you spoke to Richard Barnes on 11 September 2013 you failed to advise him that you were actually residing in the property when the repairs and renewals were being completed. This therefore invalidates your claim for expenses incurred prior to the property being let and the expense claimed of £19,778 has been withdrawn."

5.14 The letter went on to explain that as there was now no rental loss to carry forward there was a consequent under assessment for 2014-15. The letter also stated that as the decision to allow PPR on Hippodrome Mews had been based on information from Ms Negka that did not disclose the full facts, the PPR was not available. The letter concluded with the paragraph:

"I would advise that I will be issuing Revenue Assessments for the additional tax due and penalty assessments 30 days from the date of this letter. I would suggest that any appeals against the assessments and penalties be made directly to the First-Tier Tribunal".

5.15 HMRC accepted at the hearing that Ms Negka should have been offered an independent review of the decision. HMRC claim that Mrs Bowman made her 'discovery' in relation to these matters at the time of this letter.

5.16 On 4 October 2017 HMRC issued the section 29(1) TMA discovery assessments and the Schedule 24 penalty assessments in relation to the tax years 2013-14 and 2014-15 (in the amounts shown in paragraph 4 above) and 2015-16. These assessments charged capital gains tax on the sales of Perham Road (2013-14) and Hippodrome Mews (2015-16) and disallowed the rental expenses in relation to Hippodrome Mews (2013-14 and 2014-15).

Second appeal to the Tribunal

5.17 On 9 October 2017 Ms Negka appealed to the Tribunal against the discovery assessments and penalty notices issued on 4 October 2017 in relation to 2013-14, 2014-15 and 2015-16.

5.18 Ms Negka entered into protracted correspondence with HMRC in which Mrs Bowman stated in her letter dated 22 September 2017 that:
"With regards to the expenditure incurred on 16 Hippodrome Mews this has only been added to ensure that the correct amounts are included within the assessments to be raised. As you will appreciate the claim for these expenses will only be determined once the matter of the Private Residence relief claim has been finalised. …an assessment can be made at any time where an under assessment has occurred but not more than 4 years after the end of the year of assessment to which it relates. … I do not have to prove that you have been careless to raise the assessments".

HMRC agreement of PPR for Perham Road and Hippodrome Mews

5.19 On 22 November 2017 Mrs Paula O'Reilly (HMRC litigator and the presenting officer at the hearing of this appeal) advised Ms Negka that "having taken advice HMRC will allow your claims for private residence relief against the disposals of 36 Perham Road and 16 Hippodrome Mews." Mrs O'Reilly said that the 2015-16 assessment and penalty would be withdrawn. The discovery assessment and penalty notice for 2013-14 are to be reduced to nil in relation to the capital gains tax charge, so that the amended assessment only disallows the rental expenses claim. The assessment for 2014-15 was not affected by the allowance of the PPR claims.

Case management leading to these appeals

5.20 On 29 October 2017 the Tribunal directed that Ms Negka's appeal against the 2013-14 discovery assessments and penalty (TC/2017/07495) should be consolidated with the appeal against the 2014-15 discovery assessment and penalty (TC/2017/07497). These are the appeals the subject of the hearing and concern the rental expenses.

5.21 The hearing list also includes TC/2017/07509 notwithstanding the directions made on 2 January 2018 refusing HMRC's application dated 8 December 2017 to consolidate the third appeal with the two consolidated appeals for 2013-14 and 2014-15. The third appeal is against the 2015-16 capital gains tax assessment for Hippodrome Mews (TC/2017/07509). HMRC's application post-dated Mrs O'Reilly's letter of 22 November 2017 which stated that HMRC would withdraw the 2015-16 amended assessment and penalty "in due course" as they had now agreed that PPR was available.

5.22. HMRC confirmed in their submissions that the 2015-16 discovery assessment and penalty will be reduced to nil.

Submissions

6. HMRC submit that they were entitled to make discovery assessments for 2013-14 and 2014-15. This is because the expenses claimed in Ms Negka's 2013-14 self-assessment return were not incurred wholly and exclusively for the purposes of letting Hippodrome Mews as Ms Negka was living in the property at the time. The expenditure was therefore for a domestic and private purpose and not allowable. As these expenses are not deductible in 2013-14 there is no rental loss to be carried forward and used against rental income in 2014-15, so that there is an insufficiency in the assessment.

7. HMRC submit that this situation arose because Ms Negka was careless and that she should have made clear that she was living in the property when she spoke to HMRC about claiming the rental expenses. HMRC submit that the penalty is due and charged in accordance with Schedule 24 Finance Act 2007.

8. Ms Negka raised a considerable number of arguments in her Skeleton Argument and submissions at the hearing. I have not addressed her submissions about the timing of the assessments as it was made clear at the hearing that the discovery assessments were issued within the time limit in section 34 TMA. During the course of the hearing Ms Negka also made it clear that she accepts that she made a mistake when she claimed expenses for renovating the property that she was living in as her home. Her submission is that this claim was a mistake that she made despite taking reasonable care. Ms Negka submits that the discovery assessments are therefore invalid.

Relevant law

9. The relevant provisions in **Section 29 TMA** ("Section 29") are:

(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
(b) that an assessment to tax is or has become insufficient, or
(c) that any relief which has been given is or has become excessive,
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.
…
(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.
(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
(5) The second condition is that at the time when an officer of the Board—
(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or
(b) in a case where a notice of enquiry into the return was given—
(i) issued a partial closure notice as regards a matter to which the situation mentioned in subsection (1) above relates, or
(ii) if no such partial closure notice was issued, issued a final closure notice,
the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.
…

10. **Section 118(5) TMA** provides that for the purposes of the TMA (and therefore section 29 TMA) a loss of tax or a situation is brought about carelessly by a person if the person fails to take reasonable care to avoid bringing about that loss or situation.

11. **Section 34(1) TMA** sets out the time limits for making assessments as follows:

"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."

12. The deduction of expenses against income is subject to **section 34 Income Tax (Trading and Other Income) Act 2005** ("Section 34 ITTOIA") which provides as follows:

"(1) In calculating the profits of a trade, no deduction is allowed for—
(a) expenses not incurred wholly and exclusively for the purposes of the trade, or
(b) losses not connected with or arising out of the trade.
(2) If an expense is incurred for more than one purpose, this section does not prohibit a deduction for any identifiable part or identifiable proportion of the expense which is incurred wholly and exclusively for the purposes of the trade."

13. The penalties the subject of this appeal were imposed under **Schedule 24 Finance Act 2007** ("Schedule 24").

14. The burden of proof is on HMRC to establish, on the balance of probabilities, that the conditions of section 29 that are required to be satisfied to allow the discovery assessments to be made have been met, and that the penalties are due and charged in accordance with Schedule 24. Once this is proved, it is for the taxpayer to show that, on the balance of probabilities, they have been overcharged by the assessments.

Discussion

15. Ms Negka's appeal addressed a number of issues that reflect the history of her appeals but the only questions before this Tribunal are whether HMRC were permitted to issue the assessments under section 29 TMA and whether the related penalties are due. I have considered these questions in the light of the relevant law summarised above and the facts. I have not considered the availability of PPR on the sale of Perham Road and Hippodrome Mews as this was unconditionally agreed by HMRC in Mrs O'Reilly's letter dated 22 November 2017. The allowance or refusal of the PPR claims has however driven HMRC's decisions to make the assessments the subject of this appeal as Mrs Bowman made clear to Ms Negka (see paragraphs 5.13 and 5.18 above), and it is discussed below in this context.

Section 34 ITTOIA

16. Ms Negka concedes that she made a mistake when she claimed expenses for repairs that were incurred when she was living at Hippodrome Mews as they had improved her home. The deduction of the expenses claimed in 2013-14 is disallowed

in accordance with section 34 ITTOIA as they were "not incurred wholly and exclusively for the purposes of the trade". The reason why this mistake was made is discussed further in the context of section 29(4) TMA below, but it resulted in a under assessment that HMRC consider should be assessed under section 29(1) TMA.

Section 29(1) TMA

17. Section 29(1) TMA allows HMRC to raise an assessment where HMRC "discovers" 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, has not been assessed, or where an assessment to tax is or has become insufficient, or where any relief which has been given is or has become excessive. In *Charlton & others v HMRC* [2013] STC 866 the Upper Tribunal considered the meaning of "discovers" and concluded that "all that is required is that it has newly appeared to an officer acting honestly and reasonably that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight."

18. HMRC submit that the 'discovery' was the correction of an oversight when Mrs Bowman decided to withdraw the first section 9A TMA notice and section 28A assessment and then issue the section 29(1) assessments disallowing the rental expenses. HMRC claim that the situation arose because Ms Negka had been careless.

19. I have considered the correspondence and case law and conclude that Mrs Bowman did make a discovery within section 29(1) TMA when she decided that the rental expenses related to repairs carried out while Ms Negka was living in Hippodrome Mews. It is clear that Mrs Bowman was focussed on assessing the capital gains on Perham Road and, in due course, Hippodrome Mews. Her view of Ms Negka as experienced in the rental market may have led to her oversight of the rental expenses until shortly before the September 2017 hearing date.

20. Ms Negka is not represented and did not raise the question of whether the discovery by Mrs Bowman was 'stale' or had lost its 'newness' as discussed in *Charlton*, by October 2017. However, as I was referred to the decision in *Charlton* that refers to this issue, I have considered the evidence in order to find the relevant facts.

21. The discussion in *Charlton* and later cases concerns the question of whether a 'discovery' by an officer can lose its 'newness' and no longer satisfy the test in section 29(1) TMA. The 'discovery' the subject of these appeals is the subjective decision by Mrs Bowman to disallow the expenses claim, as opposed to the earlier dates on which HMRC became aware of the PPR claim on Hippodrome Mews and the rental expenses claims which are relevant for the hypothetical officer test in section 29(5). In the absence of evidence from Mrs Bowman, I have reviewed the 2015 and 2016 correspondence in the bundles to determine when the 'discovery' was made.

22. The correspondence between the parties suggests that Mrs Bowman was focussed on the capital gains (as noted in paragraph 19). The decision to issue the section 28A

closure notice that only disallowed the PPR on Perham Road (and not the rental expenses) in June 2016 was not changed even though Mrs Bowman was aware at that time that another officer had allowed the PPR on Hippodrome Mews. It appears that it was the preparation for the 2017 appeal hearing that prompted Mrs Bowman to change her view or correct the oversight. HMRC attributed the withdrawal of the first enquiry notice and section 28A closure notice to the fact that the enquiry notice had failed to advise that the enquiry was into Ms Negka's amended return. As the original return included the rental expenses and the amendment (made a couple of weeks later) only increased the amount of the claim, it suggests that it was at this time that Mrs Bowman focussed on the expenses claim and raised this point. Both the closure notice and the later discovery assessment disallow the PPR on Perham Road. The 'discovery' was to also disallow the rental expenses. This is recorded in HMRC's letter of 4 September 2017, but the 'discovery' threshold must have been reached earlier and some time before Mrs Bowman decided to withdraw the enquiry notice and section 28A closure notice in August 2017.

23. I find on the facts that it newly appeared to Mrs Bowman that the rental expenses may not meet the test in section 34 ITTOIA in the summer of 2017. As the section 29(1) TMA assessments were issued in October 2017, the 'discovery' had not become 'stale' in the intervening months.

24. Having established that there was a discovery within section 29(1) TMA, the next step is to consider whether an assessment can be made. Section 29(3) TMA makes clear that where a taxpayer has made and delivered a return in respect of a year of assessment "he shall not be assessed under [section 29(1)] … unless one of the two conditions mentioned below is fulfilled." In other words, an assessment under section 29(1) is an exception to the scheme of tax legislation that gives a taxpayer closure after the filing of a tax return or the closure of an enquiry window, and as noted above, it is for HMRC to prove that either section 29(4) or section 29(5) or both of the conditions is satisfied.

25. In this case HMRC submit that the condition in section 29(4) TMA is met because Ms Negka was careless. Ms Negka was concerned whether HMRC had conceded that the condition in section 29(5) TMA was not satisfied and so she made submissions and referred to the cases of *Fisher & Ors v HMRC* [2014] TC 03921 and *Freeman v HMRC* [2013] UKFTT 496 (TC). Mrs O'Reilly replied that these cases were not relevant as HMRC's case is under section 29(4). I confirm for clarity that on the facts of this case it is clear that a hypothetical officer had sufficient information to be aware of the situation before HMRC closed the first enquiry. The condition is section 29(5) is not met.

Section 29(4) TMA

26. Turning to the condition in section 29(4) TMA, Ms Negka is right to emphasise that it is not met simply because she made a mistake and there is an under assessment of tax or relief given that is or has become excessive. It is only met if she brought the situation about carelessly or deliberately, which she denies. HMRC do not submit that the situation was brought about deliberately and so the question is whether, applying

the interpretation assistance in section 118(5) TMA, it was brought about carelessly by Ms Negka because she failed "to take reasonable care to avoid bringing about that loss or situation."

27. HMRC submit that Ms Negka was careless because she failed to disclose that she was living at Hippodrome Mews when she called HMRC for guidance about her rental expenses claims. Mrs O'Reilly read out a script of what Ms Negka might have said when she spoke with HMRC officers to ask about her rental expenses and this would have made clear that she was living in the property concerned.

28. Ms Negka submits that she told HMRC that she was living at Hippodrome Mews before she filed her return for 2013-14 and that Mrs Bowman was aware of this before she closed the first enquiry. Ms Negka does not think that she should be responsible for HMRC not working as one body. Further, she understood from her calls with HMRC that the only requirement to claim rental expenses was that she intended to rent the property or that it was available for rent. Ms Negka believes that she took reasonable care to inform, and obtain advice from, HMRC and she relied on the advice from HMRC when she claimed the rental expenses in her tax returns. It did not occur to Ms Negka to say that she was living at the property when she had her calls with HMRC about the expenses. Ms Negka said that this was because she was not aware of the restriction on expenses that are also for private purposes. She said that there is no similar restriction in relation to rental expenses in Greece

29. Ms Negka referred me to the First-tier Tribunal's decisions in the cases of *David Collis* [2011] UKFTT 588 (TC), *While v HMRC* [2012] UKFTT 58 (TC) and *Alan Anderson v HMRC* [2016] UKFTT 0335 (TC) to support her claim. In *Anderson* the taxpayer relied on the advice of a corporate finance team of a leading firm of accountants. In *While* the taxpayer had relied on the judge in an employment case referring to an award being of a 'net of all deductions'. In both these cases the Tribunal found that the condition in section 29(4) was not met. HMRC replied that the advice in this case was given by HMRC without full knowledge of the facts.

30. In *Anderson* the Tribunal considered how it should apply the careless test and referred to the guidance of Judge Berner in *Collis* that "the standard by which [the careless test [in relation to penalty provisions in that case] falls to be judged is that of a prudent and reasonable taxpayer in the position of the taxpayer in question." Judge Morgan went on to add that this meant that the taxpayer should be attributed with an awareness of the obligation to include all income and gains in a tax return and account for the tax due on it and "to be mindful to take reasonable steps to fulfil that obligation".

31. I agree that the test to be applied is what a reasonable hypothetical taxpayer would do in these circumstances. This means that it is not correct to look at Ms Negka's failure to mention that she was living in the property in isolation, but to consider all the circumstances of the case which include the following:

31.1 Ms Negka called and wrote to HMRC to tell them that she was living at Hippodrome Mews between 12 July 2013 and 16 June 2014 (see paragraph 5.6).

31.2 Ms Negka chose to call HMRC for advice repeatedly as she was unsure about claiming expenses before a tenant had moved in and she wanted to be sure that her claim was correct.

31.3 The transcripts of the calls demonstrate that she was told that she could claim the rental expenses if the property was available to rent. Ms Negka intended to rent the property and she had contacted agents to let it. PPR and rental of a property are not mutually exclusive, and Ms Negka was aware that both could be claimed in respect of the same property as she referred to the fact that she did not need to claim letting relief when she wrote to HMRC about her PPR claim in January 2016.

32. I have concluded that Ms Negka did not fail to take reasonable care and that she took the steps of a prudent and reasonable taxpayer. HMRC have suggested that a prudent person would have appointed a tax adviser in these circumstances, but I cannot accept that she was careless because she made a mistake that would have been avoided if she had used a tax adviser. Ms Negka researched her tax obligations and took advice from HMRC to make sure that her rental expenses claims complied with the rules and the relevant information was provided to HMRC. Ms Negka made a mistake, but HMRC have not established that Ms Negka failed to take reasonable care. The condition in section 29(4) TMA is not met and the appeals against the section 29(1) assessments for 2013-14 and 2014-15 are allowed.

33. Given my conclusion that the condition in section 29(4) TMA on which HMRC relies for the issue of the discovery assessments for 2013-14 and 2014-15 is not met, there is no inaccuracy that was careless or deliberate, with the result that no penalties arise under Schedule 24. The decisions to charge the penalties are cancelled.

TC/2017/07509 – 2015-16

34. I have considered to the position in relation to the appeal under reference TC/2017/07509 against the section 29(1) TMA assessment of the capital gain on the sale of Hippodrome Mews in 2015-16 and the related penalty under Schedule 24. As noted in paragraph 5.21 above, the appeal was not consolidated with the appeals against the assessments for 2013-14 and 2014-15 but it was listed for this hearing.

35. HMRC have written to Ms Negka on 22 November 2017 and confirmed at the hearing that they will withdraw the discovery assessment of the capital gain that arose on the disposal of Hippodrome Mews in 2015-16 and the Schedule 24 penalty. I therefore allow the appeal.

36. Ms Negka raised her concern that if I allow her appeal HMRC may make a further discovery in relation to the capital gain on Hippodrome Mews notwithstanding their unconditional letter of 22 November 2017 allowing the PPR claim. This is because HMRC's treatment of the claim for PPR on the sale of Hippodrome Mews has not been straightforward. As set out in paragraph 5 above, the PPR claim was allowed in 2016, then disallowed following the second enquiry in 2017 and then allowed in the correspondence prior to the hearing of Ms Negka's appeal. Further, she notes that in 2017 HMRC had advised her, and the Tribunal, shortly before a hearing that they

would withdraw the assessment the subject of the appeal, only to open the second enquiry and issue discovery assessments after the first appeal had been concluded by their withdrawal.

37. In view of the vast amount of correspondence and the procedural history of the PPR claim the subject of this appeal, I note for Ms Negka that any further discovery that PPR is not available for the gain on the property would be 'stale' and therefore invalid because this discovery has already been made, and the appeal has been allowed.

Decision

38. The appeals are allowed for the reasons set out above. The condition for the issue of section 29 TMA assessments and the penalties imposed under Schedule 24 for 2013-14 and 2014-15 are not met. The appeal under reference TC/2017/07509 is allowed as HMRC have agreed to withdraw or have already withdrawn the section 29 assessment and Schedule 24 penalty for 2015-16.

39. 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.

VICTORIA NICHOLL
TRIBUNAL JUDGE

RELEASE DATE: 05 FEBRUARY 2019