[2019] UKFTT 0367 (TC)

TC07195

Appeal number: TC/2017/03958
TC/2017/03960

Income tax - ss 29 & 36 TMA 1970 - discovery assessment - s 95 TMA and Schedule 24 FA 2007 - penalties - whether assessment appropriate and correct - yes - whether penalties correct - yes - appeals dismissed and penalties confirmed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARION LOWE **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL
MEMBER ANN CHRISTIAN

Sitting in public at the Tribunal Hearing Centre, City Exchange, Albion Street, Leeds on 7 and 8 August 2018

Mr Gary Brothers for the Appellant

Mr Keith Golder, Officer of HMRC, for the Respondents

DECISION

The Appeal

1. This is an appeal by Mrs Marion Lowe ('the appellant') against:

   (i) a discovery assessment made under ss 29 and 36 TMA 1970 for the tax year ended April 2007;

   (ii) a penalty determination under s 95 TMA 1970 for the same year;

   (ii) a penalty assessment under Schedule 24 Finance Act 2007 for the tax year ended April 2011.

2. The assessment and penalties total £23,195.30. The table below shows the amount of the assessment and penalties charged:

Year	Assessment	Penalty
2006-07	£6,019.80	£902.00
2010-11		£16,273.50
Totals	£6,019.80	£23,195.30

3. The discovery assessment has been raised due to the failure of the appellant to notify liability to Income Tax under s 7 TMA 1970.

4. The penalties have been raised due to the failure of the appellant to notify chargeability to tax for the years 2007 and 2011.

5. The matters at issue are:

   i. whether HMRC have correctly raised the discovery assessment under ss 29 and 36 TMA 1970, and

   ii. whether HMRC have correctly raised the penalty assessments under s 95(1) TMA and Schedule 24 Finance Act 2007, for failure to notify chargeability.

6. The appellant did not attend the hearing personally but was professionally represented.

Preliminary matter

7. On the day of the hearing by its own motion, the Tribunal indicated to the parties that it would give consideration to the issue of Directions to provide further documentation. We had not been provided with a copy of an option agreement (see below) the premium for which had led to the appellant receiving £33,333.33 in tax year 2006-07. Nor had we seen the appellant's SA 2011 return which the appellant agrees had not included the £33,333.33.

8. Having reviewed the appeal bundle and in particular because the substantive facts of the matter so far as they relate to the option agreement and the appellant's 2007 SA return were not in dispute, we decided that production of that additional documentation was not necessary.

Background

9. Together with her husband Peter Lowe, the appellant was a director of a number of companies in the Hadee Group, based in Holbrook, Sheffield and in Mansfield.

10. In 2012 the tax affairs of the appellant were the subject of an investigation under the Respondents' Code of Practice 8 ('COP 8') Procedure for Investigations where Civil Investigation of Fraud procedures were not used. As a result of those enquiries the respondents opened a formal enquiry into the appellant's 2010-11 tax return which had been filed with the respondents on 31 January 2012.

11. In a written response to the enquiries from the appellant's agent dated 7 August 2012 it had become apparent that the appellant had sold her shares in Halfway Engineering Limited but had not accounted for the capital gain from that sale in her 2011 tax return.

12. On 12 October 2012 a formal enquiry into the appellant's 2011 tax return was opened pursuant to s 9A TMA 1970.

13. As a result of the wider COP 8 investigation the respondents also identified that the appellant had received a gain on the grant of an option during a demerger of the Hadee Group of companies in 2006, which had not been declared on her tax return for the year ending April 2007.

2006 – The Hadee Group Companies

The Hadee Group

14. The principal activities of the Hadee Group in 2006 were steel fabrication, manufacturing and works maintenance. It was also involved in the marketing and manufacturing of waste recycling plants. The group consisted of the following companies.

Hadee (Holdings) Limited - 'HH'

15. HH was incorporated on 1 June 1971. The issued share capital of the company was 20,000 £1 ordinary shares. The appellant held 5,000 shares and her husband 10,000 shares. Both were directors of the company with others. HH carried on the trade of steel fabrication, manufacturing and works maintenance. On 8 May 1992 the trade, including stock and work in progress, was transferred to Hadee Engineering Co. Limited and HH's principal activity became that of a holding company, with it retaining the property, plant, machinery and motor vehicles used in the trade which it rented out to Hadee Engineering and another group company Civic Environmental Systems Limited ('Civic').

Hadee Engineering Co. Limited - 'Hadee Eng.'

16. Hadee Eng. was incorporated on 6 February 1980. The issued share capital of the company was also 20,000 £1 ordinary shares; HH held 15,000 shares and Peter Lowe held 5,000 shares. Both Peter Lowe and the appellant are directors of the company, with others. The appellant held no shares. On 8 May 1992, Hadee Eng. took over the group's trade, of steel fabrication, manufacturing and works maintenance, including stock and work in progress.

17. Hadee Eng. had researched and developed a new type of waste recycling plant - an aerobic digestor system ('ADS'). Hadee Eng. owned the intellectual property rights attached to the ADS which consisted of patents, know-how and copyrighted designs.

Civic Environmental Systems Limited

18. Civic was incorporated on 22 October 2002. It traded in the marketing, sale and construction of waste recycling plants. It had issued share capital of 100 £1 ordinary shares which were 100% owned by HH. Peter Lowe was a director but the appellant is not.

Civic used the intellectual property owned by Hadee Eng. in constructing the recycling plants. Civic also provides spare parts to customers who had purchased recycling plants. The selling price for a waste recycling plant was upwards of £3m.

The demerger and option agreement

19. Funding the development and manufacture of the ADS system took significant financial resources. The combination of the investment required and the risk that this could pose to the group's remaining activities meant that it could not develop the ADS business further without the additional resources of a third party partner.

20. In early 2006 it was decided to demerge and separate the various parts of the group in order to create distinct businesses; one concentrating on steel fabrication etc. and the other on ADS.

21. At around the same time X Company offered Hadee Group £100,000 for the grant of an option to acquire part ownership of the worldwide rights (excluding North East USA) to the ADS business and associated intellectual property. If the option was exercised then it was proposed that the consideration would be £5,000,000.

22. The Hadee Group was also approached by individuals in the United States who wanted to form a separate US Company which would be granted an exclusive licence to use, market, manufacture and distribute waste recycling plant using the ADS technology in North East USA.

23. The proposed demerger involved the formation of a new UK company ('Halfway Holdings') which would acquire the issued share capital of HH in exchange for shares issued to the existing shareholders of HH i.e. Peter Lowe and the appellant, in exactly the same proportion as those then held.

24. Three new companies would be formed to undertake the separate activities - ('Newco l', 'Newco 2' and 'Newco 3').

25. Halfway Holdings would then be placed into a members' voluntary liquidation and the liquidator would distribute Halfway's assets under s 110 Insolvency Act 1986 as follows:

a. the recycling plant manufacturing business and the intellectual property to Newco l ('ADR Waste') in exchange for an issue of shares in Newco l to the shareholders of Halfway Holdings limited. Hadee Eng. would transfer the intellectual property relating to the ADS to Halfway Holdings on inter-company loan.

b. the shareholding in HH to Newco 2 ('Halfway Engineering') in exchange for an issue of shares in Newco 2 to the shareholders of Halfway Holdings.

c. an exclusive licence to use the intellectual property in North East USA to Newco 3 in exchange for an issue of shares in Newco 3 to the shareholders of Halfway Holdings.

26. The shareholdings in Newco's 1, 2 and 3 would reflect the original shareholding in new holding company Halfway Holdings Limited.

27. On 2 May 2006 the directors decided to go ahead with the demerger and option agreement.

28. On 7 June 2006 the restructuring was completed by means of written resolutions, a business transfer agreement, and other requisite documentation, all of which were signed by the appellant.

29. On 16 August 2006 the grant of the option was also completed. The £100,000 option premium was paid by X Company. A third share i.e. £33,333.33 was deposited into a bank account held jointly by the appellant and her husband whose two thirds share of £66,666.67 was deposited into his own account on the same day.

30. On 31 August 2006, with other monies, the £33,333.33 was transferred to Peter Lowe's sole account.

31. It is not clear from the documentation in the bundle how or why the option premium was paid to the appellant and her husband. Clearly any option to sell the IP rights to the ADS system would normally have had to be granted by the company which held those rights i.e. Newco 1 (ADR Waste) but it was not disputed that the directors Peter Lowe and the appellant had received the monies personally. There was no evidence or argument that the monies had been re transferred to the company.

32. The appellant failed to declare receipt of the capital gain of £33,333.33 in her tax return for the year ending 2007. She does not dispute that the £33,333.33 was received and omitted from her 2007 SA return and has not disputed the amounts of lost tax calculated by HMRC.

33. By letter dated 7 November 2014, HMRC assessed the tax due as £6,019.80 and HMRC informed the appellant that a penalty would be issued pursuant to s 95(1)(a) TMA 1970, for delivering to HMRC a fraudulent or negligently incorrect tax return.

34. Penalties can be issued for up to 100% of the difference between the tax originally charged and that which should have been charged. The maximum possible penalty in this case is therefore £6,019.80. Reductions in the amount of penalty are then applied to account for the amount of disclosure and co-operation given by the tax-payer and to account for the seriousness of her failure to properly account for tax.

35. Applying its discretion, the respondents reduced the penalty amounts by 85% as follows:

Disclosure (max. 30%)	20% reduction because the omission was discovered by HMRC and not voluntarily disclosed by the appellant. The discovery, however, was not disputed when put to the Agent at a meeting with HMRC on 10 October 2013.
Cooperation (Max. 40%)	35% reduction because despite the appellant's affairs in this period being straightforward and the issue first being raised in October 2013 with attempts to settle from May 2014 no progress was made and formal action was necessary.
Seriousness (Max. 40%)	30% reduction because the omitted gain was significant being almost double the amount of the appellant's declared income.

36. A penalty was therefore imposed for tax year ending 2007 for £902 being 15% of the total difference between the tax originally charged and that which would have been charged had the appellant submitted a correct tax return.

37. The appellant's case is that the discovery assessment is out of time and that omission of the capital gain was not 'fraudulent or negligent' (s 95 TMA) and that therefore no penalty is payable

Burden of proof

38. HMRC bear the burden to the ordinary civil standard for showing the competence for the discovery assessment and penalty determination. Once that onus has been discharged the onus of proof passes to the appellant to show that she has been overcharged by the assessment and the penalty. Section 50(6) TMA places the ultimate onus on the appellant to show that the assessment is incorrect.

Legislation

39. The Taxes Management Act 1970, provided that at the relevant time, in pertinent parts as follows:

Section 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

(b) that an assessment to tax is or has become insufficient, or 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

(2) [not applicable]

(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) informed the taxpayer that he had completed his enquiries into that return,

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.

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).

95 Incorrect return or accounts for income tax or capital gains tax

(1) Where a person fraudulently or negligently-

(a) delivers any incorrect return of a kind mentioned in section 8 or 9 of this Act (or either of those sections as extended by section 12 of this Act or section 39(3) of the principal Act (husband and wife)), or

(b) makes any incorrect return, statement or declaration in connection with any claim for any allowance, deduction or relief in respect of income tax or capital gains tax, or

(c) submits to an inspector or the Board or any Commissioners any incorrect accounts in connection with the ascertainment of his liability to income tax or capital gains tax,

he shall be liable to a penalty not exceeding the aggregate of-

(i) £50, and

(ii) the amount, or, in the case of fraud, twice the amount, of the difference specified in subsection (2) below. (2) The difference is that between-

(a) the amount of income tax and capital gains tax payable for the relevant years of assessment by the said person (including any amount of income tax deducted at source and not repayable), and

(b) the amount which would have been the amount so payable if the return, statement, declaration or accounts as made or submitted by him had been correct.

Finance Act 2007, Schedule 24 provided at the relevant time, in pertinent parts, as follows:

Paragraph 1 - Error in taxpayer's document

(1) A penalty is payable by a person (P) where-

(a) P gives HMRC a document of a kind listed in the Table below, and

(b) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads

to-

(a) an understatement of a liability to tax,

(b) a false or inflated statement of a loss ..., or

(c) a false or inflated claim to repayment of tax.

(3) Condition 2 is that the inaccuracy was careless or deliberate on P's part.

(4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

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

[Table A includes Income tax and the obligation to make a return under s8 of TMA 1970 personal return]

Paragraph 4 Standard amount

(1) This paragraph sets out the penalty payable under paragraph 1.

(2) If the inaccuracy is in category 1, the penalty is-

(a) for careless action, 30% of the potential lost revenue,

(b) for deliberate but not concealed action, 70% of the potential lost revenue, and

(c) for deliberate and concealed action, 100% of the potential lost revenue.

Paragraph 9 – reductions for disclosure

(A1) Paragraph 10 provides for reductions in penalties under paragraphs 1, 1A and 2 where a person discloses an inaccuracy, a supply of false information or withholding of information, or a failure to disclose an under-assessment.

(1) A person discloses an inaccuracy, a supply of false information or withholding of information, or a failure to disclose an under-assessment by-

(a) telling HMRC about it,

(b) giving HMRC reasonable help in quantifying the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment, and

(c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy, the inaccuracy attributable to the supply of false information or withholding of information, or the under-assessment is fully corrected.

(2) Disclosure-

(a) is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy, the supply of false information or withholding of information, or the under-assessment, and

(b) otherwise, is "prompted".

(3) In relation to disclosure "quality" includes timing, nature and extent.

Paragraph 10

(1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a "standard percentage") has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it-

(a) in the case of a prompted disclosure, in column 2 of the Table, and

(b) in the case of an unprompted disclosure, in column 3 of the Table.

Standard %	*Minimum % for prompted disclosure*	*Minimum % for unprompted*
30%	15%	0%
45%	22.5%	0%
60%	30%	0%
70%	35%	20%
105%	52.5%	30%
140%	70%	40%
100%	50%	30%
150%	75%	45%
200%	100%	60%.

Paragraph 11 - Special reduction

(1) If they think it right because of special circumstances, HMRC may reduce a

penalty under paragraph I, 1A or 2.

(2) In sub-paragraph (1) "special circumstances" does not include-

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to-

(a) staying a penalty. and

(b) agreeing a compromise in relation to proceedings for a penalty.

Paragraph 14 – Suspension

(1) HMRC may suspend all or part of a penalty for a careless inaccuracy under paragraph 1 by notice in writing to P.

(2) A notice must specify -

(a) what part of the penalty is to be suspended,

(b) a period of suspension not exceeding two years, and

(c) conditions of suspension to be complied with by P.

(3) HMRC may suspend all or part of a penalty only if compliance with a condition of suspension would help P to avoid becoming liable to further penalties under paragraph 1 for careless inaccuracy.

(4) A condition of suspension may specify-

(a) action to be taken, and

(b) a period within which it must be taken.

(5) On the expiry of the period of suspension-

(a) if P satisfies HMRC that the conditions of suspension have been complied with, the suspended penalty or part is cancelled, and

(b) otherwise, the suspended penalty or part becomes payable.

(6) If during the period of suspension of all or part of a penalty under paragraph 1, P becomes liable for another penalty under that paragraph, the suspended penalty or part becomes payable.

2007 Return

HMRC's contentions

40. Section 1(1) Taxation of Chargeable Gains Act ('TCGA') 1992 provides that tax will be charged in respect of capital gains on the disposal of assets.

41. By virtue of s 21 TCGA 1992, assets for the purposes of s 1(1) includes options in respect of property.

42. Where it is discovered that a chargeable gain which ought to be assessed for Capital Gains Tax has not been assessed or that an assessment of tax is insufficient, then s 29 TMA 1970 provides authority for HMRC to make an assessment of tax in order to make good to the Crown, the loss of tax which ought to have been assessed.

43. HMRC, by virtue of s 29(3) TMA, shall only make an assessment where the failure to include income in the tax return was brought about carelessly or deliberately by the tax-payer or someone acting on her behalf.

44. TMA 1970, s 36 (1A) provides that an assessment, involving a loss of income tax which was brought about by a person carelessly or deliberately pursuant to s 29, can be made at any time not more than 20 years after the end of the year of assessment to which it relates.

45. HMRC contend that there was a discovery of the chargeable gain, that is the £33,333.33, which ought to have been assessed. The appellant's omission to declare the chargeable gain was deliberate for the following reasons:

i. The appellant was a director of HH and Hadee Eng. before the demerger. Thereafter she was a director of the Newcos and was aware of her responsibilities as a director. She was the owner of one third of the company shares and therefore entitled to a one third share of the profits from the sale of any company assets.

ii. She signed the Business Transfer Agreement which contains reference to the sale of intellectual property rights.

iii. She had knowledge of the group restructuring - she acted to voluntarily wind-up Halfway Holdings Limited and create the Newcos.

iv. The option payment represented 172% of the appellant's declared income for that year. £33,333.33 is a significant sum.

46. It is more likely than not that when the appellant completed her 2007 tax return, she knew that she had received a capital gain but nevertheless omitted to declare this.

47. The appellant knew or should have known that she ought to account for that capital gain on her tax return and that a reasonable person in the appellant's position would have accounted for the gain. It is inconceivable that a capital gain of that amount could have "slipped the mind" of a reasonable tax-payer.

48. Therefore, there was a discovery of chargeable gains which ought to have been assessed and which were not assessed. That chargeable gain had been omitted from the appellant's 2007 tax return deliberately and so HMRC were entitled to make good that loss of tax to the Crown and did so within the time limit prescribed under s 36(1A)(a).

49. The appellant asserts that any penalty liability under s 95 TMA 1970 is tax geared and if the assessment of the unpaid tax fails then the penalty must also fail. This proposition is wrong as a matter of law.

50. For HMRC to issue a penalty under s 95 TMA 1970, two conditions must be fulfilled. Firstly, that an incorrect tax return has been made and secondly that the making of the incorrect return was attributable to the carelessness or deliberate action

of that person. It follows that if those two conditions are satisfied, then a person is liable for a penalty.

Appellant's Contentions

51. The appellant is, ostensibly, a housewife and was aged 72 years old at the date of the appeal. As is common in many small family businesses, as spouse of the major shareholder she held shares on a minority basis and is a "passive" director.

52. As part of the respondent's enquiries various papers were requested and provided. The respondents at no time sought any information from any involved third party or used its formal information powers to obtain any relevant information or documents. As such, all of the respondent's decisions have been based on the papers voluntarily provided to the respondent.

53. The respondents claim that the appellant received and omitted to declare receipt of the disposal proceeds of the option, which is denied by the appellant as factually incorrect.

54. The respondent's case for the omission by the appellant of her disposal of an "option" for capital gains tax purposes is without foundation. There is, in fact, no evidence to show that she, personally, owned any "option" which she could then go on to dispose of. Moreover, all of the evidence that is available shows that the option was in fact, owned by Newco 1 [ADR Waste] and not by the appellant.

55. In the alternative, if there has been some sort of, unevidenced, transfer of an option from ADR Waste, then the appellant could not, in fact, receive any money personally. The banking information clearly shows that the appellant did not, in fact, receive or personally retain the monies.

56. Even if the appellant has indeed disposed of the option, and received and retained the monies, there is no evidence that the appellant acted "carelessly or deliberately". The effect of this absence of "careless or deliberate" conduct is that, even if the precursor conditions (that is the option was the appellant's to dispose of and she received monies for that disposal) are met, then the respondent is not within time by virtue of the extended time limit assessing powers within s 36 TMA 1970.

57. In support of the submissions, the appellant relies upon the following authorities:

> *Auxilian Project Management Ltd* [2016] UKFTT 0249 (TC) - a deliberate inaccuracy only occurs when a taxpayer knowingly provides HMRC with a document that contains errors, which is a subjective test.
>
> *Contractors 4 U Ltd* [2016] UKFTT 017 (TC) – "deliberate" means an action taken consciously where there is an appreciation that there is a choice.

Kinesis Positive Recruitment Ltd [2016] UKFTT 0178 (TC) - an analysis of what should be considered to highlight "deliberate conduct".

Munford [2017] UKFTT 019 (TC) - HMRC need to show a loss of tax is brought about deliberately and that the conditions of s 36 TMA 1970 are properly met.

Tooth [2016] UKFTT 0723 and [2018] UKUT 0038 - a "deliberate" inaccuracy must relate directly to an inaccuracy in the return and that deliberately means "intentionally" or "knowingly".

2011 - Sale by the appellant of her shares in the holding company

58. Following the demerger in 2006, Newco 2 i.e. Halfway Engineering Limited ('HEL') was the holding company for all other companies in the Group. Its shareholders were Peter Lowe who owned 67% of the ordinary share capital and the appellant, Marion Lowe who owned 33%, that is, the same proportionate shareholdings as they held in HH.

59. Nigel Lowe and Sharon Gordon (nee Lowe) the son and daughter of Peter and Marion Lowe, had been employees of HEL. They formed a new company Mosborough Limited in which they wholly owned the entire share capital. The appellant wished to retire and dispose of her 33% shareholding in HEL to Mosborough Limited in exchange for an equal value of loan notes issued by the company.

60. The loan notes were to be non-interest bearing, unsecured and repayable equally every six months over a five year period, subject to flexibility of repayment terms to accelerate or defer payments depending upon Mosborough's future performance and profitability.

61. Mosborough would also acquire the entire remaining share capital of HEL (held by Peter Lowe) by way of a share exchange. The share transfer would again take place at market value.

62. The appellant would resign as a director of HEL and Nigel and Sharon would be appointed directors of HEL as well as Mosborough Limited.

63. On 2 December 2010 the solicitors acting for HEL made an application for clearance to HMRC in respect of the proposed shares for loan notes transaction.

64. On 31 January 2011 the transaction was completed. The appellant:

i. Signed a Share Purchase Agreement for the shares with Mosborough Ltd.

ii. Received a Loan Note certificate for £1,100,000.

iii. Gave verbal instructions that the loan note was to be used to go towards her husband's director's loan account.

iv. Subsequently confirmed her verbal instructions (as above) in writing.

65. The appellant's agent submitted a SA return on 31 January 2012 with no capital gain pages completed, but subsequently accepted that the appellant's return was incorrect and submitted an unsigned amended return, with a claim to Entrepreneurs Relief for a £1,095,000 net gain on gross disposal proceeds of £1,100,000.

66. On 19 November 2012, HMRC pointed out that the unsigned return was not a valid claim to Entrepreneurs Relief and that HMRC would require a signed copy by 31 January 2013.

67. After a further exchange of correspondence, on 30 January 2013, Mr Peter Lowe personally delivered an amended return to HMRC with a claim to Entrepreneurs Relief signed by the appellant.

68. On 10 October 2013, HMRC had a meeting with the appellant's tax advisers Independent Tax and Forensic Services LLP ('ITFS'). HMRC raised the point that no evidence had been provided of the appellant's intention to transfer the value of the loan note to her husband's Director's Loan Account.

69. ITFS provided a signed letter from the appellant dated 16 April 2014 confirming that she was prepared to allow her loan note to be credited to the Loan Account of her husband.

70. On 7 November 2014 HMRC wrote to ITFS summarising the tax due on the gain of £1,095,000 which was £108,490. HMRC also outlined their view that the error was in the 'careless' range of 15-30% and asked for comments on quality of disclosure.

71. On 28 September 2015 HMRC issued a closure notice for the 2010-11 enquiry and that £108,490 tax was due.

72. On 16 November 2015 HMRC wrote to the appellant with proposed penalty loadings for the 2010-11 return and asked for a response.

73. On 7 March 2016, HMRC issued a notice of penalty assessment for 2010-11 in the sum of £16,273.30, (15%) adopting the same reasoning as set out in paragraphs 35 and 36 above regarding the undeclared option payment.

74. On 5 April 2016 ITFS appealed the penalty assessment and requested a formal review. This was passed for an independent review within HMRC which was conducted by Officer Cecilia Jessop who concluded that the 2011 penalty assessment should be upheld.

HMRC's contentions

75. A person will be liable to a penalty under FA 2007, Schedule 24 if that person gives the respondents a document which contains an inaccuracy and that inaccuracy was careless or deliberate on that person's part.

76. For the purposes of Schedule 24 a "document" includes a return for Income Tax or Capital Gains Tax made pursuant to s 8 TMA 1970. An inaccuracy will be careless if the person fails to take reasonable care.

77. There was an inaccuracy in the appellant's 2011 tax return. The appellant did not declare her gain from the sale of shares in Halfway Holdings Limited. These shares were sold on 31 January 2011 and the appellant thereby received a gross capital gain of £1,100,000.

78. The appellant accepts that the tax return she submitted for the year ending April 2011 contained an inaccuracy. An amended return, accounting for the omitted capital gain, was made to fully account for under-declared tax.

79. The respondents contend that the inaccuracy contained in the tax return was at least careless on the appellant's part. The respondents make that contention on the basis of the following facts:

a) The appellant's tax return for the year ending 2011 included £100,975 dividend income, £17,361 employment income and £9,475 pension income. The respondents therefore contend that the omission of the capital gain in respect of the sale of shares must be at least careless.

b) The appellant signed the share purchase agreement and other relevant documentation. She therefore knew of the sale and expected payment; and

c) The loan note provided as consideration for the sale of the shares was used to clear the appellant's husband's director's loan account. The appellant confirmed in writing that this was her intention.

80. The appellant has provided no evidence that she was instructed to omit the £1,100,000 gain from her return by her agents and so could not rely on their advice for an explanation of the omission.

81. The appellant was fully aware of the transaction, evidenced by signing a legal agreement, attending a board meeting and confirming the transfer to her husband's loan account.

82. The appellant declined the opportunity to engage in Code of Practice 8 to correct any other errors in her returns. HMRC checked her taxation history, to see if there were any other capital gain disposals, and there were none.

83. The appellant had not acted as a prudent or reasonable taxpayer when she omitted the tax due on the sale of her shares from the return.

84. The evidence clearly shows that the appellant was aware of the various transactions in which she was involved from early December 2010 to the end of January 2011 when they were completed. The appellant must have known that her return was incorrect at the time it was submitted as the sum involved was so large she could not fail to be aware of it. She had used the value to clear her husband's loan with the company.

85. The respondents contend that the appellant knew of the capital gain, but carelessly omitted that gain from her tax return for the year ending April 2011. The appellant is therefore liable for a penalty pursuant to FA 2007, Schedule 24.

86. If the inaccuracy in the appellant's 2011 tax return was deliberate rather than careless the penalty in respect of that error could be increased. The maximum penalty for a deliberate error under FA 2007, Schedule 24 for a deliberate but not concealed inaccuracy is 70% of the PLR. In this case that would be £75,943.

Penalty Suspension

87. The appellant contends that the penalty for inaccuracies in her tax return for year ending 2011 should have been suspended by the respondents pursuant to FA 2007, Schedule 24, paragraph 14.

88. The respondents assert that its discretion not to suspend the penalty has been correctly applied and the decision is not flawed within the meaning of FA 2007, Schedule 24, paragraph 17(6).

89. In making that assertion the respondents have considered the following relevant factors:

a) The respondents have considered returns for a 10 year period and the appellant has never declared any capital gains. The respondents therefore considered that any conditions of suspension are unlikely to help the appellant avoid becoming liable to further penalties.

b) The appellant did not attend an interview when invited to do so by the respondents to give her account for inaccuracies in returns. The respondents have therefore been unable to fully establish how any suspension conditions might help the appellant avoid liability for further penalties for careless inaccuracies.

90. If the inaccuracy in the appellant's 2011 tax return was deliberate rather than careless as the respondents contend, then the Tribunal need not consider whether a penalty suspension is appropriate as suspension is not applicable to cases of deliberate inaccuracy.

91. There was no basis for suspension of the penalty. As the appellant had not engaged with HMRC, there had been no opportunity to consider if there were suitable conditions of suspension that would help the appellant avoid becoming liable to further penalties under FA 2007 Schedule 24 paragraph 1.

The appellant's contentions

92. The appellant denies that she was "careless". The mistake arose despite her having taken reasonable care.

93. In the alternative, in cases of "careless" inaccuracy, then Paragraph 14 of Schedule 24 FA 2007 affords the respondent the opportunity to suspend any penalty, subject to the setting of conditions.

94. The authorities show that the respondents' approach to "suspension" is flawed in principle. It would be very simple for the respondents and the appellant to agree suitable conditions:

> *Eastman* [2016] UKFTT 0527 (TC) - it is not always for Tribunal to set suspension conditions, but to expect taxpayer and HMRC to do that once suspension is agreed.
>
> *Testa* [2013] UKFTT 151 (TC) – HMRC's stated policy to "one off" inaccuracies is incorrect and too narrowly drawn. Moreover, such analysis and application by HMRC is "flawed" for Schedule 24 proposes.
>
> *Boughey* [2012] UKF'TT 398 (TC) – "one off" errors can attract suspended penalties and that HMRC adopt far too narrow a view in such cases.
>
> *Hall* [2016] UKFTT 0412 - suspension does not need to relate to the same type of inaccuracy and whether it may occur or arise again.

95. Paragraph 11 of Schedule 24 FA 2007 introduces a "Special Reduction" rule that, should the respondent accept that there are special circumstances behind an inaccurate document that has been provided, then they may stay or agree a compromise in relation to penalties. The respondents do not appear to have considered a special reduction

Conclusions

The 2007 assessment and penalty

96. The primary onus of proof is on the appellant to prove that the assessment is incorrect or excessive (s 50(6) TMA 1970). If the appellant cannot prove that on the balance of probabilities the assessment is incorrect or excessive, the assessment must stand good.

97. The appellant does not dispute the fact that the £33,333.33 was paid into the personal joint account that she held with her husband.

98. The £100,000 which represented a premium for the grant of the option was not paid into the company account of ADR Waste Limited, which owned the intellectual property rights. There is no evidence or assertion by the appellant that the monies were subsequently transferred by them to ADR Waste Limited. They were received by Peter Lowe and the appellant and because they owned that company's shares on a two thirds, one third basis, one third of the premium must be regarded as having been paid to the appellant irrespective of the fact that she later transferred those monies to her husband.

99. It is argued on behalf of the appellant that she did not "dispose of" the option, but that is to misunderstand the nature of an option. An option to purchase is granted, not disposed of. It does not exist until created by the option agreement.

100. The appellant would have been fairly well acquainted with the companies' structure, its activities and the annual documentation formalities that were necessary, in particular the filing of corporate and her personal tax returns, albeit prepared by her accountants. She would have been aware of the ADR system that had been researched and developed by Hadee Eng. which was transferred to Halfway Holdings Ltd and then to ADR Waste Limited on the demerger. The value of the ADR system was clearly significant and in fact the cost of its development was a fundamental reason for the demerger. To grant an option to a third party to purchase the intellectual property rights of the ADR system was a very significant event. She signed the relevant documentation that gave rise to the option agreement and must be regarded as having understood and consented to the terms of the agreement.

101. For the purposes of a discovery assessment under s 29(3) TMA, the test is whether the conduct was 'careless or deliberate' by the appellant or a person acting on his or her behalf. Under s 95(1)(a) TMA for the purposes of the imposition of a penalty the test is whether the conduct was 'fraudulent or negligent'.

102. Mr and Mrs Lowe must have decided that the option premium of £100,000 should be paid as to two thirds into Mr Lowe's account and as to one third into Mr and Mrs Lowe's joint account. Their respective account details must have been provided to the grantee or the grantee's solicitors on completion of the option in order that the payments could be made. The monies were not subsequently transferred to ADR Waste Limited, but were retained by Mr and Mrs Lowe. The appellant's 2007 SA return did not include the one third share of the option premium.

103. The appellant's accountants perhaps omitted the £33,333.33 from the appellant's 2007 personal return because they were unaware of it (it would not have been shown as either a receipt in the bank account of ADR Waste Limited or as a transfer out to the appellant). The payment had been made direct to the appellant. Nonetheless the obligation was on the appellant to ensure that her self-assessment tax return was correct. The omission of the one third share of the option premium from her return was a direct consequence of the appellant's deliberate act of accepting the £33,333.33 into her personal account. As a result, the appellant filed an incorrect tax return for 2007. There was clear proximity between that event and the omission of the capital receipt from her return. At the very least, this amounted to negligence. "Deliberate" can include a taxpayer choosing not to ascertain the correct position.

104. We therefore agree with HMRC that the appellant has not discharged the burden imposed on her under s 50(6) TMA 1970 to show that the discovery assessment is out of time or excessive. We find that the discovery assessment was competent.

105. The appellant failed to notify her chargeability to income tax and fraudulently or negligently submitted an incorrect personal SA return for 2007. We therefore find that the penalty determination is correct and appropriate.

The 2011 penalty

106. A person will be liable to a penalty under FA 2007, Schedule 24 if that person gives the respondents a document which contains an inaccuracy and that inaccuracy

was careless or deliberate on that person's part. An inaccuracy will be careless if the person fails to take reasonable care.

107. There was an inaccuracy in the appellant's 2011 tax return. The appellant did not declare her gain from the sale of shares in Halfway Holdings Limited. The appellant received a net capital gain of £1,095,000. That is clearly a very significant sum to omit from a SA return.

108. The appellant accepts that the tax return she submitted for the year ending April 2011 contained an inaccuracy. An amended return, accounting for the omitted capital gain, was subsequently made to fully account for under-declared tax.

109. Mr Brothers for the appellant argues that she was not "careless". He says that the mistake arose despite her having taken reasonable care. However there is no explanation as to what reasonable care she took. Reasonable care simply amounts to taking steps to check that a return is correct and whilst a small error can perhaps be regarded as an excusable mistake, the omission of £1,095,000 cannot.

110. For the reasons argued by the respondents in paragraphs 81 – 86 above we concur that the appellant was careless.

111. The penalty imposed by the respondents is 15% of the PLR which is the minimum amount for a prompted disclosure. We consider this to be appropriate.

112. There were no circumstances relating to the appellant's careless omission of the £1,095,000 from her return for the purposes which may have warranted a 'special reduction' under paragraph 11 of Schedule 24 FA 2007.

113. Careless penalties are capable of being suspended to encourage and support future compliance by giving the individual an incentive to improve their systems to avoid careless penalties in the future. A penalty can only be suspended where specific conditions can be set which will improve a process or record keeping to prevent future inaccuracies. Conversely, a penalty cannot be suspended where is it not possible to set specific conditions because the same type of error is unlikely to happen in the future.

114. As HMRC assert, the error did not occur as a result of a system error. The inaccuracy arose because the appellant did not declare all the taxable income she received in 2011. This was not caused by a systemic problem. HMRC properly conclude that they cannot identify a measurable condition i.e. a change to a system or process that could be implemented to prevent a repeat of the facts giving rise to the omissions from her SA returns in the future. In any event there was very little likelihood of a similar type of inaccuracy occurring again. As HMRC concluded, the appellant may at some time receive monies in circumstances which give rise to capital gains, but following her retirement it is less likely that there would be any involving shares sales. HMRC therefore did consider suspension properly.

115. The assessments and penalties charged against the appellant were therefore lawfully made and are correct. The Tribunal dismisses this appeal and upholds the assessment and penalty amounts as set out in paragraph 2 above.

116. 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.

MICHAEL CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 10 JUNE 2019