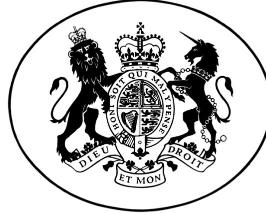

TC02528

Appeal number: TC/2010/00769

INCOME TAX – whether interest earned on joint account in names of taxpayer and family members all properly to be assessed on taxpayer alone as the provider of the funds –yes; resulting trust; settlements legislation; s.29 TMA 1970 – out of time assessments set aside; penalties inappropriate- no negligence.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANDREW JOHN BINGHAM **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER HACKING
PETER WHITEHEAD

Sitting in public at Birmingham on 11, 12, 13 and 14 June 2012

Robert Grierson, counsel, for the Appellant

Aparna Nathan, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. This was an appeal by Mr Andrew John Bingham against a decision made by HMRC on 20 May 2009 and confirmed by an Appeals and Review Officer of HMRC on 27 November 2009 that all interest accruing on bank accounts of which the Appellant, his wife and children were signatories was properly assessable on the Appellant.

2. The hearing of this appeal occupied some 3½ days. 5 full ring binders of pleadings and evidence were presented in substantially agreed bundles. 2 further full ring binders of legal citations were also placed before the tribunal.

3. Mr Bingham gave evidence both by way of written statements and oral testimony. Further evidence was heard from Mrs Bingham and from Gemma Louise Turner, one of the Appellant's daughters. A brief written statement from Mr Kenneth Fenton, Mr Bingham's accountant completed the evidence on the Appellant's behalf.

4. The Revenue for its part did not call any witnesses but there was in evidence a short statement from the head of corporate governance for HMRC's Enforcement and Compliance arm, Andrew Lawrence, concerning a specific point raised at an earlier stage in the proceedings and relating to the Revenue's policy concerning the retention of documents. Substantially the Revenue relied on the correctness of the assessments as drawn there being no material conflict between the parties as to the relevant facts.

5. Mr Bingham is a solicitor who has successfully practised as such, mainly in the field of conveyancing, for some years. By reason of this success Mr Bingham has been able to accrue substantial funds which he has placed on deposit at a bank and Building Society so as to earn interest. The accounts with which this appeal is concerned were in the joint names of Mr Bingham, his wife and, at different times, 2 or all 3 of his children (2 daughters and a son).

6. It is the Revenue's case that, as the funds for these accounts were supplied exclusively by Mr Bingham, the responsibility for accounting for interest earned thereon is his and his alone. It is not, says the Revenue, open to Mr Bingham to do as he has done and to apportion the income amongst his other family members and account holders who have then accounted for their respective shares of the interest at their respective top marginal tax rates.

7. The material facts concerning this appeal are not at issue. They are agreed and will therefore be set out in narrative form by way of providing a background to the arguments advanced by each party.

The background to the appeal

8. As indicated above Mr Bingham is a family man. He has a wife, Jennifer, who he married in August 1967 and 3 children: Samantha born on 18 March 1975, Gemma

born on 3 August 1976 and Christopher born on 8 November 1981. The family has lived at its present address at 26, Desford Road, Kirby Muxloe, Leicester since 1971.

9. Mr Bingham told the tribunal that he had qualified as a solicitor in 1967. He was for nearly 9 years in partnership with another solicitor (now deceased) but has practised as a sole practitioner since 1981 and, since 1984, under the business style Bingham & Co. Mr Bingham appears to have gained the trust of members of Leicester's Asian community having dealt with a great many transactions involving house purchase and other types of legal work for members of that community over many years.

10. Other work undertaken by Mr Bingham in his practice included wills, probate and business leases. He covered what he described in evidence as "a broad spectrum" of work of a type usual for a high street solicitor but with the emphasis on property related work. He makes no claim to expertise in the field of tax law.

11. Together with his wife, Mr Bingham also has an interest in a property company, Greenleach Properties Limited. Mr Bingham owns only 1% of the issued share capital of the company, the rest of the shares being his wife's. This company was engaged in the business of purchasing, renovating, selling and letting properties. The business was very successful and was run by Mrs Bingham with some help from Mr Bingham. More recently their son Christopher has become involved in the running of the company. This appeal does not however concern this business. It is mentioned only to underscore what will be said about Mr Bingham's motivation in making the banking arrangements described below.

12. Mr Bingham explained to the tribunal that to help in the process of building up his conveyancing practice he would, when personal funds allowed, place sums of money with a number of building societies. This practice led to referrals of so called "solicitor free" client introductions and was also instrumental in facilitating the offer of mortgage finance to his clients. Mr Bingham also placed substantial monies with building societies on overnight deposit. These were funded from his solicitors' client account which at any one time could be expected to be in substantial credit. These were, Mr Bingham stressed, practices then common in the legal profession and perfectly legitimate. There was no suggestion that this was not so.

13. The net assets of Bingham & Co rose from just under £180,000 in the year 1994-95 to £2,324,719 in the year 2006-07. Over this time Mr Bingham amassed deposits of well over £1M of personal funds divided between the many building societies in which he and his wife maintained accounts. Apart from these monies there were monies on deposit with Mr Bingham's bankers, Midland Bank Limited (subsequently HSBC). In 1984 the sum on deposit there was £43,371. This rose to £223,924 in 1990 and by 2010 the balance of monies held in accounts funded by Mr Bingham at HSBC exceeded £1.6M.

14. In 1994 Mr Bingham together with his wife began to consider how best they might protect their children should some unhappy circumstance result in their deaths. They were also concerned about the possible impact of Inheritance Tax. This was at a

time when the Binghams were beginning to enjoy the fruits of their hard work and take occasional trips overseas with their family. Mr Bingham also had an eye to his retirement for which he had made provision in the form of funded pension policies which would mature when he was 60 in 2002.

15. The fact that Mr Bingham had so many personal deposit accounts led to difficulty in that between the tax years 1991-92 and 1994-95 he had omitted to account for the interest on one or more of these deposit accounts, a fact established when his affairs were the subject of a detailed Inland Revenue enquiry in 1995. The matter was eventually settled in January 1999 with a payment of tax interest and penalties in the sum of £14,700 being made by Mr Bingham to the Revenue at that time. Mr Bingham is clear both in his written statements and in the evidence he gave to the Tribunal that in the course of this enquiry he made full disclosure to the Revenue of all of his accounts being those both held alone and those in the joint names of his wife and himself. The omission was he says quite inadvertent and was the result of the confusion caused simply by having so many accounts. There was no evidence before the tribunal that this was not the case.

16. Because of this difficulty and to simplify his affairs for the future Mr Bingham decided to consolidate his savings by placing the sum of these monies with the (then) Midland Bank and investing this in the money market on a monthly basis. He did so in the joint names of himself and his wife. Mrs Bingham had in fact been a joint proprietor of an account with her husband at Midland Bank since as long ago as 1972.

17. Mr Bingham described the operation of his accounts with what is now the HSBC. The principal joint account is now Account Number 9326283. This is known as the "Money Market Account" Whilst this was originally opened in the joint names of Mr and Mrs Bingham the children were added as signatories, Samantha and Gemma in 1994 and, subsequently, Christopher in 2002 on his attaining his majority. This account had until 3 April 2003 been designated "Money Market Depositor Account" under Account Number 9117600. At that time with Christopher being added as a further signatory a new account (the 9326283 account) had to be opened as the former account only accommodated 4 signatories.

18. Earnings from Mr Bingham's practice were transferred into the Money Market Account. It is accepted by Mr Bingham that he was the sole provider of funds into this account and all other accounts with which this appeal is concerned.

19. The interest earned on the Money Market Account was transferred monthly into another account at HSBC being Account Number 21261355. Again the signatories to this account are Mr Bingham and his children. This account was interest bearing. Transfers were made from this account to a third account – Account Number 71261347. This was a current account and cheques were drawn on this account. Once again the account was in the names of Mr Bingham, his wife and children.

20. For ease of reference the terms "the bank accounts" and "the HSBC accounts" shall be taken to be references to the jointly held bank accounts at HSBC referred to above.

21. In 2004 Mr Bingham discussed with his accountants (then Haines Watts) the inclusion of his daughters as signatories to the bank accounts. This was in the context of the more general consideration which he was giving to the matters of Inheritance tax and the financial security of his family in case of death. As part of Mr Bingham's plan to provide for his children in the event of his and/or his wife's death the names of the children were added to the joint accounts by which the investments on the money market were made. Samantha was added on 10.10.1994; Gemma on the same date and Christopher on attaining his majority in April 2002.

22. Initially interest earned was apportioned as between the several account holders according to how many persons held the account: if there were 4 then each would include 25% of the interest earned in their tax returns: if there were 5 then the returns would be for 20% each. As will be seen this approach appears to have been accepted , indeed even encouraged, by the Revenue.

23. Subsequently Mr Bingham in seeking to explain his approach to the question of the interest earned declared the income apportioned between the account holders in proportions which were such as to take the maximum advantage of the lower marginal rates of tax payable by his wife and children. He would therefore apportion sums to each so as to enable them to make use of their personal allowances and of the lower rate tax bands. The amounts apportioned in this way would change from year to year according to the individual circumstances of the account holders.

24. The Bingham family is and, according to Mr Bingham's evidence, has always been, a very close one. It was evident from what the tribunal was told by not only Mr Bingham but by his wife and daughter that financial matters affecting the family were often discussed and agreed at informal family meetings. Mr Bingham explained that the monies with HSBC were in the nature of a family resource. He had himself no need for or interest in making use of these monies after his pensions became payable in 2002. At that time he became entitled to a yearly income of £63,591 together with a tax free sum of over £210,000. In his statement of evidence Mr Bingham says of these family monies:

" Please note there was no trust. It was an outright gift for IHT planning. All persons named on the accounts had access to the capital and interest and as such they received funds from the accounts..."

25. It was Mr and Mrs Bingham's plan that the monies in the accounts could be used by any of their children should the need arise. In his statement Mr Bingham explains why he kept his name on the accounts. He says:

"I kept my name on the accounts after 2002 because the accounts could not be operated in the event of death/terrorism and FSA guarantee applies to each account holder"(sic)

The assessments appealed

26. The Revenue's claims cover an extended period from the tax year 1996-97 to and including 2009-10, some 14 tax years in all. Penalties and interest are also claimed. At the time of the hearing no formal Notice of Appeal had been served by Mr Bingham in respect of the penalties claimed. With the agreement of the Revenue and the Tribunal this defect was rectified by the Tribunal's agreement to extend the time for service of the notice and its subsequent service. This further aspect of the Revenue's claim was consolidated with this appeal number TC/2010/00769 by directions of the Registrar on 28 September 2012. The Tribunal has no jurisdiction with respect to the interest due on any of the assessed sums which it might uphold as being payable.

27. It should also be noted that the claims in respect of the later years had not been the subject of a properly notified appeal by Mr Bingham. At a Directions hearing on 9 June 2011 the Revenue indicated that it would not object to the joinder of an appeal in respect of the years from 2006/2007 to 2009/2010 and a Notice of Appeal dated 28 June 2011 was served. This too now forms part of the consolidated appeal.

28. The following summary tables set out the Revenue's claims to additional tax payable, the interest thereon and the penalties: (but see note below)

Year	Nature	Tax	Penalty 30%	Interest to 15.12.2009
1996/1997	ETL	11,725.20	3,517.50	9,846.47
1997/1998	ETL	32,395.20	9,718.50	24,149.38
1998/1999	ETL	32,134.60	9,640.20	21,514.97
1999/2000	ETL	25,048.80	7,514.70	14,645.83
2000/2001	ETL	26,298.00	7,889.40	13,397.41
2001/2002	NTL	22,053.10	6,615.90	9,801.38
2002/2003	NTL	23,582.80	7,074.90	9,027.57
2003/2004	NTL	20,006.13	6,001.80	6,277.33
2004/2005	NTL	24,719.80	7,416.00	6,001.93
2005/2006	NTL	37,146.22	11,143.80	6,454.96
Sub-totals		**255,109.85**	**76,532.70**	**121,117.23**

Year	Nature	Tax	Penalty 30%	Interest to 31.08.2011
2006/2007	NTL	36,383.38	10,915.01	5,307.80
2007/2008	NTL	43,030.27	12,909.08	3,250.84
2008/2009	NTL	36,353.28	10,905.98	1,724.04
2009/2010	NTL	26,145.60	7,843.68	455.57
Sub-totals		**141,912.53**	**42,573.75**	**10,738.25**
Total		**397,022.38**	**119,106.45**	**131,855.48**

Note: The above figures have **not** been fully agreed between the parties but are set out to indicate the order of the tax, interest and penalties concerned

29. Given the time over which these claims are made it is clear that a number of the tax years are outside the normal period during which the Revenue may challenge an assessment. In these instances the Revenue rely on discovery assessments made under s 29 Taxes Management Act 1970 (TMA), a matter considered later in this decision.

5 30. Following a letter from the Revenue to Mr Bingham dated 20 September 2007 discovery assessments under s.29TMA were raised for the years 1996-1997 to 2002-2003 and for 2004-2005 on 30 October 2007. Closure Notices for the years 2003-2004 and 2005-2006 were also issued. References to "out of time" or "s 29 TMA" assessments are to all of the assessments for the years from and including 1996-1997 10 to and including 2004-2005. Mr Grierson in his Revised Statement of Case refers to section 36 TMA by which the Revenue may seek to make good tax lost where there has been fraud or wilful default. The Revenue has not made any such allegation in this appeal and inconsequence rests its case on the provisions of s 29 TMA and in particular on the allegation of negligence on the part of Mr Bingham. It is therefore to 15 that issue that the Tribunal will direct itself in its consideration of the out of time assessments.

The issues

31. In considering this appeal the Tribunal has necessarily to address a number of 20 issues in a logical order.

32. The first of these issues which requires determination is the substantive legal question whether all interest accruing on the HSBC bank accounts concerned being accounts held in the joint names of Mr Bingham and other family members are properly assessable as the income of Mr Bingham alone.

25 33. Second, if such interest is properly to be assessed on Mr Bingham alone, the question arises whether the section 29 TMA assessments are valid so as to include within the Revenue's claims the extended time limit assessments. This in turn requires a consideration of two main issues – whether there was a "discovery" of the tax shortfall by the Revenue and, if so, whether any such discovery was due to negligence 30 on the part of Mr Bingham. As already indicated the Revenue accepts that this is not a case in which fraudulent conduct is involved.

34. Third, the Tribunal is required to consider, if there is a liability on the part of Mr Bingham to account for interest which ought to have been paid, whether the penalty sought by the Revenue is appropriate.

35

Is the whole of the interest on the HSBC accounts properly to be assessed on Mr Bingham?

35. It is agreed that the funds supporting the accounts were provided exclusively by Mr Bingham from his earnings as a solicitor as described above. Mr Bingham has testified to this fact.

36. At all times material to the assessments appealed the accounts were held in the names of Mr and Mrs Bingham and either their two daughters Samantha and Gemma or all four of them together with Christopher, Mr and Mrs Bingham's son. It would appear, subject only to what is said below, that Mr Bingham's practice in reporting income received, to his accountants and thereafter to the Revenue, was simply to apportion the interest earned on the accounts according to the number of signatories to the account. When there were 4 signatories (i.e. Mr and Mrs Bingham and the two daughters) the interest was split so far as returns to the Revenue were concerned as to 25% to each of them. When, on attaining his majority, Christopher became a co-signatory to the accounts the split became 20% on the returns of each family member.

37. Mr Bingham states in his evidence that in 2003 he "gave up" to his son his 20% share in the account so that Christopher would thereafter have a 40% share and his Mother and sisters a 20% share each. From that time onwards it is Mr Bingham's contention that he had no beneficial interest in the accounts. He accepts however that he remained a signatory. This disposition to Christopher was not marked by any documentation or other formality as indeed was the case with respect to the addition of the daughters as co-signatories many years earlier (leaving aside any bank documentation such as mandates and specimen signature forms).

38. At a yet later stage (January 2006) when the question of the proper treatment of interest earned on the accounts had been raised by the Revenue and Mr Bingham was being pressed to explain the beneficial ownership of each family member in the accounts, Mr Bingham wrote to the Revenue stating:

> "The monies are held jointly with no specific documentation setting out the share except that the intention was to use the allowances allowed by law to the maximum whilst the children were undergoing education at college….
>
> The capital is held in unequal shares and the amount each person holds is calculated annually according to the tax position and the interest allocated. The interest in the account has been declared and tax has been paid on it"

39. Subsequently in April 2006 Mr Bingham produced documents referred to as "Declarations" as to the manner in which the interest and amounts standing to the credit of the accounts was supposedly held in the 2002-03 and 2003-04 tax years. This is apparently at odds with the earlier statement suggesting that no relevant documentation concerning this matter was in existence.

40. The position taken by the Revenue concerning these jointly held accounts is quite straight forward. It argues that as the monies funding the accounts were exclusively furnished by Mr Bingham then, in the absence of any clear evidence to

the contrary, the beneficial owner of the funds remains Mr Bingham and it is he who should therefore account to the Revenue for the whole of the interest earned.

41. In support of this contention reference is made to the general charging provisions of s 18(3) Income and Corporation Taxes Act 1988 (ICTA) (dealing with Schedule D tax) so far as concerns the tax years up to and including 2004-05 and the corresponding provisions of Part 4 of Income Tax (Trading and Other Income) Act 2005 (ITTOIA) for the subsequent years (see s.369-370) . In both cases income tax on interest earned is charged on persons "receiving or entitled to" the interest.

42. As authority for the proposition that Mr Bingham is a person "receiving" the interest Miss Nathan took the Tribunal to the case of *Aplin v White* [1973] STC 322 but stated that she considered it more appropriate in the particular circumstances of this appeal to charge Mr Bingham on the footing that he was the person "entitled" to receive the interest. It is central to the Revenue's case that Mr Bingham is the only person "entitled to receive" the interest as he and he alone is the owner of the underlying capital fund from which the interest is generated.

43. There is, says the Revenue, as regards the capital sum held in the accounts a resulting trust in favour of the Appellant who bears the burden of displacing the presumption of such a trust. This presumption is said to arise in accordance with general legal principles. Authority for this proposition is said to be found in *Young v Sealey* [1949] Ch 278; *Aroso v Coutts & Co* [2001] EWHC 443 9 Ch [220] AER 241 and at paragraphs 9 to 85 et seq of *Lewin on Trusts* (18th Edition). The difficulty Mr Bingham faces in seeking to rebut the presumption is, the Revenue asserts, that he remained a signatory to the accounts and there is no evidence that he took any steps to effectively divest himself of his interest in the accounts.

44. Other possible ways in which the presumption of a resulting trust might be displaced include, suggested counsel for the Appellant, a rebuttable presumption that the funds were the subject of advancements in favour of the Appellant's wife and children or that when looked at as a whole it would not be unreasonable to consider that Mr Bingham's intention was to settle the monies in the account on his family

45. Miss Nathan both in her skeleton argument as well as in the Amended Statement of Case for the Respondents argues that neither of these contentions are tenable. The suggestion of advancement does not assist Mr Bingham because it would result in the ownership of the amount standing to the credit of the jointly held accounts passing on Mr Bingham's death and not during his lifetime: *Marshall v Crutwell* (1875) LR 20 Eq 328 and *Re Figgis* [1969] 1Ch 123. Further, even if the presumption had effect it does not apply to alter the ownership of the income arising on the joint bank accounts. The ownership of such income does not pass to the spouse or children during the lifetime of the transferor: *Re Hood* [1923] Ir R 109.

46. The Revenue, relying on what it contends is the proper construction of the settlements legislation in (inter alia) s 660A ICTA 1988 and (inter alia) s 619 ITTOIA 2005, argues that this too is of no assistance to the Appellant. Even if a settlement could be established it is clearly the case that the settlor (Mr Bingham) by remaining a

signatory to the account, at all times retained an interest in the settled funds so that he and he alone would be responsible to account for tax on the interest earned on the accounts under the provisions of s 624 (1) ITTOIA 2005.

47. The matter of the "Declarations" was also considered by the Revenue to be ineffective as evidence of an effective gift of the capital as these had been produced after the Appellant had stated that he had no relevant documentation concerning the beneficial interests in the funds in the accounts and also because they were declaratory of a capital position which was dependent on and calculated by reference to each account holder's personal tax position in relation to the interest earned. This was, said Miss Nathan, fundamentally at odds with the correct way in which this matter ought to be considered. The first step was to ascertain who owned the capital in the accounts. It was this share which would in each case dictate the entitlement to interest and not, as Mr Bingham had suggested, the other way round.

48. For the Appellant, Mr Grierson contended that evidence to the effect that it was the Appellant's intention to transfer a beneficial interest in the funds to his wife and children will suffice to rebut the presumption of a resulting trust. He extended this argument to contend that the assertion by the Revenue that Mrs Bingham and the children have no such interest represented an attempt to deprive the wife and children of their beneficial interests and a breach of the Protection of Property provisions of Article 1 of the Human Rights Act 1998.

49. There were significant references by both parties to the law as it concerns devices such as trusts and settlements which if properly constituted or reasonably to be implied might rebut the presumption of a resulting trust in favour of the Appellant. A number of authorities were referred to, some at length. In fact however Mr Grierson did not assert that Mr Bingham had set out to create either a trust or a settlement. What he had done was simply to add to the account held in the names of himself and his wife, the names of his children. In so doing it was Mr Bingham's understanding that the account holders would simply become joint tenants or possibly tenants in common of the account. Beyond this there was no suggestion that the Appellant had in a conscious way sought to establish a trust or settlement of the funds in the account.

50. Mr Grierson argued that in adding his children to the accounts formerly in the names of himself and his wife, Mr Bingham was taking steps consistent with his intention of transferring a beneficial interest in the funds to his family members. This was entirely consistent with Mr Bingham's own evidence

51. In answer to this suggestion Miss Nathan contended that even if Mr Bingham could establish that his true intent was to transfer a beneficial interest in the funds to his family members that transfer would itself be subject to the settlement provisions of ICTA 1988 and ITTOIA 2005 referred to above. Those provisions were sufficiently broad to encompass even a single transaction which represented an element of "bounty". A gift to family members would be caught by the provisions.

The Tribunals consideration of the question whether interest on the jointly held account is properly to be assessed as that of the Appellant

52. By reason of the centrality to this appeal of the question of liability to account for interest it is desirable to address this matter at this point rather than dealing with other issues to which this appeal gives rise.

53. Having heard Mr Bingham's testimony to the Tribunal as well as that of his wife and of his daughter Gemma, the Tribunal fully accepts that it was Mr Bingham's intention to constitute the fund of monies in the HSBC account a "family fund" on which any member of the family being an account holder might draw for whatever purpose might be needed. The only exception to this would be Mr Bingham himself. He had made clear to his family that his personal circumstances were such that he did not and would not need to have access to the account. There was no suggestion by the Revenue that Mr Bingham had personally withdrawn funds from the account. Nevertheless Mr Bingham did remain as an account holder even after the point at which he says that he "gave up" his 20% share in the account to his son Christopher. This does appear to the Tribunal to be somewhat inconsistent as, if Mr Bingham truly had no interest in the accounts having gifted them to his family, he would not have any interest which could be "given up" to his son as he said he did when Christopher came of age.

54. Mr Bingham struck the Tribunal as a truthful witness as did his wife and daughter. He showed no tendency to orient his evidence in a way which might perhaps have been of assistance to him. He told the Tribunal in a very straightforward way what he had tried to do in adding his children's names to the accounts at HSBC. He said that his accountant was aware of what he was doing and, in consequence, assumed that this was a reasonable thing to do. He had subsequently understood from the Revenue who had advised him in writing to that effect, that each family member would have to account for a share of the interest earned on the account in his or her self assessment tax return. It was clear to the Tribunal that the suggestion that he alone might be responsible to account for all of the interest was something he had not appreciated and of which he was unaware prior to the Revenue's enquiry leading to these proceedings.

55. The Tribunal is drawn inevitably to the conclusion that it was Mr Bingham's intention to establish a jointly held fund accessible to all family members except himself for whatever purpose might at the time seem reasonable in the general interests of the family and no doubt the particular interests of the applicant for the monies. Evidence was given by Mr and Mrs Bingham and by their daughter Gemma as to examples of the use of the fund to assist in a property development as well as in the purchase of a property and for other more immediate purposes. There would generally be a family discussion prior to a proposed withdrawal from the accounts followed by agreement. Mr Bingham and his wife would be involved in these discussions and it was mainly Mrs Bingham who would sign the required cheque from a cheque book kept at their home.

56. It is significant that the children did not themselves hold cheque books for the accounts. Mrs Bingham wrote the cheques when required although Gemma was given the key to the locked drawer in which the chequebook was held when Mr and Mrs Bingham were away from home.

5 57. Gemma could only recall two occasions on which she had in fact used the chequebook. On both occasions her parents were away. One involved urgent repairs required to a property and the other a car breakdown.

58. In legal terms this arrangement could not be considered as other than an informal family settlement of which Mr Bingham was the ultimate settlor. The 10 expression "ultimate" settlor is apt because it is the case that, prior to the addition of the children's names to the accounts, both Mr and Mrs Bingham were the account holders. By section 282 ICTA 1988 income from assets held in joint names is split 50/50 where a married couple live together. They do not have a general option to split income in any way they like and can depart from the standard 50/50 split only where 15 each spouse is in fact beneficially entitled to a share other than 50/50 in the asset and the income and the beneficial share which the spouse has in the income is the same as the beneficial share that he or she has in the capital. Accordingly the protection afforded to both Mr and Mrs Bingham by this provision ceased to be effective on the addition of other family members to the account on the establishment, as the Tribunal 20 finds, of a family settlement.

59. Although Mr Bingham stated that he had no personal interest in the fund nevertheless he remained a signatory and was as entitled as any other member of the family to sign away monies from the fund. That he did not do so is not, in the finding of the Tribunal, relevant. The fact remains that he retained an interest in the fund and 25 as the settlor this renders Mr Bingham personally responsible to account for the interest earned on the fund.

60. Specifically for the years up to and including 2004-05 section 660A ICTA 1988 provides:

> (1) Income arising under a settlement during the life of the settlor shall be treated for all 30 purposes of the Income Tax Acts as the income of the settlor and not as the income of any other person unless the income arises from property in which the settlor has no interest.
>
> (2) Subject to the following provisions of this section, a settlor shall be regarded as having an interest in property if that property or any derived property is, or will or may become, payable to or applicable for the benefit of the settler or his spouse in any circumstances whatsoever

35 Relevantly section 660G ICTA 1988 provides:

> (2) A person shall be deemed for the purposes of this chapter to have made a settlement if he has made or entered into the settlement directly or indirectly, and, in particular but without prejudice to the generality of the preceding words if he has provided or undertaken to provide 40 funds directly or indirectly for the purpose of the settlement, or has made with any other person a reciprocal arrangement for that other person to make or enter into the settlement.

61. Provisions having the same effect appear in section 619 and 620 et seq ITTOIA 2005 in relation to the tax year from 2005-6 and the following years.

62. Even if Mr Bingham had been able to satisfactorily demonstrate that his intention was to transfer to each of his family members a beneficial interest in the fund the Tribunal would likely have arrived at the same conclusion. The gifts necessarily involve an element of "bounty" and as such would potentially have been caught by the settlement provisions set out above. In particular section 660 G ICTA 1988 includes in subsection (1) a definition of "settlement" thus:

> (1) ……… "settlement" includes any disposition, trust, covenant, agreement, arrangement **or transfer of assets,…."** *(empahasis added)*

63. It is clear from the correspondence passing between Mr Bingham and the Revenue and from his appeal as pleaded that the fact of assessing all of the interest arising on the accounts to Mr Bingham alone gives rise to an apparently unfair result so far as Mrs Bingham is concerned. To the extent to which Mr Bingham can show that he made a beneficial gift to his children they too are said to be dispossessed as a result of the approach taken by the Revenue. This says Mr Grierson invokes a consideration of Article 1 in Part II of Schedule 1 of the Human Rights Act 1998 (dealing with the protection of property). Mr Grierson argues that the Revenue seeks to deprive Mrs Bingham and the children of their beneficial interests in the accounts in transferring them to Mr Bingham. There is in the view of the Tribunal nothing to suggest any such deprivation. The provisions on which the Revenue rely are taxation provisions which are effectively excepted from the scope of the Human Rights Act which properly recognises the right of the State to raise taxes.

64. The above contentions have no appeal to the Tribunal. It is not by any means clear that there ever was any transfer of any part of the capital funds standing to the credit of the accounts either to Mrs Bingham or to the children. There has been an expression of intent on the part of Mr Bingham but that does not by itself operate to transfer a beneficial interest. Indeed the acts undertaken by Mr Bingham are actually inconsistent with a transfer of a beneficial interest in the fund. Mr Bingham remained as a signatory to the accounts; he retained even by his own account a 25% or 20% interest in the accounts (at different times) and *de facto* control was exercised over the accounts by virtue of the family discussions which would precede any substantial dealing with the monies from time to time standing to the credit of the accounts. None of this speaks of a transfer of a beneficial interest in the ownership of the fund by family members of which they could be said to have been deprived.

65. Mr Grierson has also suggested that the Revenue's approach to the taxation of interest is at odds with a proper construction of section 282A ICTA 1988 (now section 836 Income Tax Act 2007). The argument he invites the Tribunal to embrace is that the Tribunal should extend the approach taken under section 282A (which concerns the tax treatment of interest on a holding in the joint names of a husband and wife) to a similar joint holding where children's names have been added. All account holders should, he suggests, be treated as beneficially entitled to an equal share of the capital and income of the account. This is, he argues, the only just and reasonable approach

to the present case to prevent double assessment. To seek, as the Revenue does, to apply the settlement provisions to this situation would be, says Mr Grierson, to “drive a coach and horses” through the clear intent of Parliament as expressed in section 282A ICTA .

66. We are unable to accept this approach. Section 282A ICTA 1988 includes the important words precedent “shall be treated for income tax purposes”. The provision is not by its terms one which is capable of transferring a beneficial interest in property. It does not have that effect. It is essentially a concessionary taxing provision by which a married couple living together will be treated without further enquiry as joint owners of the account and taxed as to 50% of the income arising. It is concessionary as it may well have the effect of shifting income from a higher rate taxpayer to one who is a taxed at a lower rate. Significantly the provision is limited to husbands and wives. It says nothing about children. To extrapolate its provisions so as to extend to children of the family as Mr Grierson has suggested is unjustified and wholly without authority.

For all of these reasons we find therefore that Mr Bingham is liable, subject only as hereafter appears, to account to the Revenue for the whole of the interest earned on the jointly held bank accounts detailed above during each of the years of assessment under appeal.

The “discovery” assessments – section 29 Taxes Management Act 1970

67. As is clear from the Respondents Amended Statement of Case a number of the assessments (the out of time assessments) are made under the “discovery assessment” provisions of section 29 TMA 1970.

68. The provisions of section 29 so far as relevant to this Appeal are as follows:

“Section 29 Assessment where loss of tax discovered

29(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.

29(2) Not applicable

29(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.

29(4) The first condition is that the situation mentioned in subsection (1) above is attributable to fraudulent or negligent conduct on the part of the taxpayer or a person acting on his behalf.

29(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

69. It is accepted by the Revenue that this is not a case in which fraudulent conduct is alleged. Mr Bingham has, it is said, been negligent in the completion of his self assessment tax returns. The Revenue, said Miss Nathan, had only discovered the information on which the assessments had been raised following enquiries made into the tax returns submitted by Mr Bingham and his family. Contrary to the suggestion made by Mr Grierson on his client's behalf the Revenue had at no time been in possession of documents from which the incorrect approach to the reporting of income from the joint account could have been ascertained. Mr Bingham in his dealings with the Revenue had not "put all his cards on the table" but had been economical in the disclosure of information relevant to a proper determination of his tax liabilities. Indeed the Revenue described Mr Bingham's conduct in seeking to apportion the capital and income of the family members in the accounts in such a way as to minimise the tax payable as egregious.

70. Mr Bingham refers in his Revised Statement of Case to a number of items of correspondence written to him by the Revenue from which he says it is plain that the Revenue fully understood the essential facts now forming the basis of its disputed assessments. There was in effect, he says, no question of the Revenue having made any "discovery" as it was already in possession of all of the information necessary to form a proper understanding of Mr Bingham's tax position. In particular Mr Bingham asserts that the Revenue had been aware of the situation since the early 1990's at the time of the earlier enquiry into his tax affairs. The Revenue had failed to produce documents from this period on which Mr Bingham believed he might well be able to rely. It was for this reason that a witness statement was produced by the Revenue signed by Andrew Lawrence, Head of Corporate Governance for the Enforcement and Compliance arm of HMRC stating that the documents in question had been destroyed in accordance with the Revenue's general policy relating to the destruction of

documents. In essence Mr Lawrence states that the documents concerned would have been destroyed because they were no longer needed as part of an ongoing enquiry.

71. The attention of the Tribunal was drawn by Mr Grierson to the correspondence from the Revenue in which there were repeated references to the fact that each of the signatories to the accounts had a "share" in them. In a letter dated 7 December 2004 reference is made to "Mrs Turner's share of the interest" (Turner is Gemma Bingham's married name). In letters dated 21 February 2005 and 5 May 2005 the Revenue referred to "your share of the interest" when writing to Mr Bingham.

72. In a letter dated 4 August 2005 the Revenue went further writing:

> "If you are named as a shareholder in an account you have a legal entitlement to any interest generated from that account and as such you are taxable on your share, whether or not you choose to use it"

In further letters from the Revenue dated 8 and 16 August 2005 there are yet further references which make clear the fact that the Revenue was at least aware of the fact that joint bank accounts were operated in which Mr Bingham and others were entitled to a share. The letter of 8 August 2005 states:

> "….it will be necessary to address the allocation of the interest. Interest on joint accounts is allocated in equal shares"

73. The letter of 16 August 2005 is even more specific in its terms thus:

> "The normal basis of assessment for interest from an account would be based on your entitlement to that interest. In the case of the two family accounts, which are held in the names of five family members, I would expect you to be chargeable on a fifth of the interest paid each year"

74. In a letter dated 21 December 2005 to Mr Bingham the Revenue wrote:

> "The fact that you have placed monies in a joint account would suggest that each joint account holder owns an equal share of the capital unless a different apportionment was agreed and documented…………As one of 5 joint account holders you were entitled to one fifth of the interest, so that amount must be treated as part of your income for the relevant year"

75. In a letter dated 21 December 2005 addressed to Mr Bingham's daughter Gemma (Mrs G L Turner) the Revenue wrote

> "I am writing to you further to my letter dated 10 November 2005 in relation to the allocation of bank interest.
>
> Jointly held property, and that includes real property, shares and cash held in the names of two or more persons can be held in one of two ways:
>
> 1. Joint tenancy basis
>
> This is where all of the persons own the whole of the property. When one of them dies the survivors are left owning the whole until you are left with the last survivor solely owning the whole of the property. Interest arising on the capital is split in equal shares.
>
> 2. Tenancy in common

This is where all persons own an identifiable share. When one of them dies their share falls into their estate to be disposed of in accordance with their will. The survivors are left owning their own specific shares. They might inherit some or all of the deceased person's shares but that is not the same as in the joint tenancy situation. Interest arising on the capital is split according to the ownership of the shares.

5 Bank and building society accounts in two or more names are normally opened on a joint tenancy basis. In order to establish the way in which the account was opened, please obtain a copy of any form completed to open the account and any instructions given at the time, together with the signature requirements for any of the joint account holders to withdraw funds from the account. This should clarify the basis of ownership and also the number of names originally included. If the account was 10 originally opened in 4 names then you should forward a copy of the documentation used to add the 5th name to the account.

If the account in question is held on a joint tenancy basis then we have no option but to split the income in equal shares for all joint account holders. It does not matter if the whole of the monies invested might have come from only one of the tenants.

15 It is open to joint tenants to sever their joint tenancy so as to make themselves tenants in common in specific shares. Income would then be attributed on the basis of those shares. If this had been done, documentary evidence would be required. We would not accept a document which had retrospective effect.

Clearly the basis of the ownership needs to be clarified in order to establish the allocation of the 20 interest between the joint account holders. I look forward to receiving the requested documents in this respect"

76. A letter dated 10 March 2006 addressed to Mr Bingham continues:

"I can however confirm that on the information provided to date you will be liable to tax on your share of the interest credited to your accounts. In the absence of any documents to the contrary the 25 account will be treated, as is normal in bank accounts held in more than one name, as on a joint tenancy basis

77. The Revenue wrote on 14 March 2006 to the Appellant in the following terms:

"all bank and building society accounts in the UK held by married couples are held by them as joint owners and any interest arising is paid to both parties jointly.

30 …..I can however confirm that on the information provided to date you will be liable to tax on your share of the interest credited to both accounts. In the absence of any documents to the contrary, the accounts will be treated as is normal in bank accounts held in more than one name, as on a joint tenancy basis"

78. The basis on which Mr Bingham thus expected his interest in the joint accounts 35 to be assessed at that time was as described by the Revenue in its correspondence, namely that he was a joint tenant to the extent of one fifth of the accounts and would expect therefore to have to pay tax on one fifth of the interest earned on the accounts.

79. Mr Grierson for Mr Bingham says that this correspondence coupled with the fact that the Revenue had previously conducted a detailed enquiry into Mr Bingham's 40 tax affairs indicates that the Revenue was well aware of the existence of the joint accounts and had indeed guided him to what he understood to be the proper treatment of interest earned in his tax return. It is noted that the cheque paid in settlement of the

agreed sum of £14,100 following the earlier enquiry was itself drawn on one of the jointly held accounts bearing the names of Mr Bingham's daughters.

80. In legal terms Mr Grierson contends that it is not open to the Revenue to deny knowledge of the way in which the accounts were operated. More particularly there was no discovery such as is required by section 29 (1) (a) and/or (b) TMA 1970. Further says Mr Grierson, the Revenue is estopped from denying the knowledge it clearly possessed concerning the way in which Mr Bingham dealt with the accounts and the matter of interest earned in his tax return. Mr Bingham had in fact been guided by the Revenue in this matter.

81. For its part the Revenue looks to the language of section 29 and in particular to sub section (6) of section 29 which deals with the matter of information made available to the Revenue . The sub section provides:

> *(6) For the purpose of sub section (5) above, information is made available to an officer of the Board if –*
>
> *(a) it is contained in the taxpayer's return under [section 8 or 8A] of this Act in respect of the relevant [year of assessment] (the return), or in any accounts, statements or documents accompanying the return;*
>
> *(b) it is contained in any claim made as regards the relevant [tear of assessment] by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;*
>
> *(c) it is contained in any documents accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the tax payer to the officer, whether in pursuance of a notice under section 19A of this Act or otherwise; or*
>
> *(d) it is information the existence of which and the relevance of which as regards the situation mentioned in sub section (1) above –*
>
> *(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above: or*
>
> *(ii) are notified in writing by the taxpayer to an officer of the Board*

Miss Nathan referred the Tribunal to the case of *Langham v Veltema* [2004] EWCA Civ 193 [2004] STC 544. The purpose of section 29 TMA as a counterweight or balance to the light touch regulation applicable to the self assessment regime was emphasised. There was a very real requirement that taxpayers should ensure that their tax returns are both complete and accurate. In relation to that case and in particular to the statutory test in the second condition of section 29 (5) Auld LJ observed:

> "More particularly, it is plain from the wording of the statutory test in s29(5) that it is concerned, not with what an Inspector could reasonably have been expected to do, but with what he could have been reasonably expected to be aware of. It speaks of an Inspectors objective awareness from the information made available to him by the tax payer, of the situation mentioned in s29(1) namely an actual insufficiency in the assessment, not an objective awareness that he should do something to check whether there is such an insufficiency, as suggested by Park J. If he is uneasy about the sufficiency of the assessment, he can exercise his power of enquiry under s 9A and is given plenty of time in which to complete it before the discovery provisions of s 29 take place"

82. It is the Revenue's position that Mr Bingham did not place all his cards on the table in a way which would have resulted in a different approach to the question of his liability to pay tax on interest paid on the bank accounts he held jointly with his family members. Counsel referred the Tribunal to other cases which elucidate the proper judicial approach to the interpretation of section 29 including *Household Estate Agents Limited* [2007] EWHC 1684 [2008] STC 2045 and *Corbally-Stourton v Revenue & Customs Commissioners* [2008] STC (SCD) 907 a case decided by Special Commissioner Charles Hellier. The decision in this latter case in relation to the matter of the meaning of a "discovery" includes the following:

> "It seems to me clear that both these judges and the legislation do not require the inspector to be certain beyond all doubt that there is an insufficiency; what is required is that he comes to the conclusion on the information available to him and the law as he understands it, that it is more likely than not that there is an insufficiency. I shall call this a conclusion that it is probable that there is an insufficiency. It is clear however that mere suspicion, something short of a conclusion that it is probable that there is an insufficiency is not enough"

The above is followed some paragraphs later by this:

> "It seems to me that however generally unfair it might seem that an inspector, who knew he could have assessed at the relevant time but did not, can raise a later assessment because the s 29 (6) information was not sufficient on its own to enable him to reach that conclusion, it is impossible to read the legislation as not having that effect. That is for the following reasons:
>
> (i) the reference in s 29 (5) is not to a particular officer of the Board but to "an" officer. The test is more theoretical than personal;
>
> (ii) the judgments quoted above make it clear that s 29(5) is about the objective awareness of an officer rather than the actual awareness of a particular officer.
>
> (iii) the judgments make clear that the purpose of s 29(5) is to confine the relevant material to that in s 29(6). There would be no point in such a restriction if actual awareness by an officer that he could on the basis of other information, have assessed was enough.

83. From the case law reviewed by counsel for the Revenue in her skeleton argument she concludes that

"It is clear from the foregoing that in order for a discovery assessment under s29(5) TMA to be validly made:

a A hypothetical officer must be aware of "an actual insufficiency"; and

b This awareness must result from the documents and returns as exhaustively set out in s29(6) provided to the officer."

Section 29 (4) TMA - Fraudulent or negligent conduct

84. The definition of negligence suggested by Alderson, B in the case of *Blyth v Birmingham Waterworks* (1856) 11 Ex 781 is frequently cited as representing a fair description of what can reasonably be said to amount to negligence even today, more than 150 years later:

> (1) “Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do”

5 85. The Revenue says that Mr Bingham was negligent in completing his tax returns and that in consequence he satisfies the first of the conditions set out in s. 29(4) TMA 1970. This coupled with the fact that Mr Bingham is unable to satisfactorily establish that he had “put all his cards on the table” in his dealings with the Revenue means, it is said, that the requirements for extended time limits for the assessments raised are
10 met

86. Mr Bingham says that he acted as would any other person in a similar situation. He had completed his tax return in the way he thought correctly recorded his interest in the accounts and had, latterly, by the correspondence set out above been guided by the Revenue itself as to how he should complete his tax return and those of his family
15 members in relation to the jointly held accounts. He had not held anything back. His understanding was that an appropriate proportion of the interest on the accounts should be included in the returns depending on the number of signatories to the accounts (i.e. 4 or 5). That is what the Revenue told him and that is what he did.

87. The Revenue says that he is not entitled to rely on the statements made in that
20 correspondence as he had not put the Revenue in possession of all of the material facts relating to his tax position. In support of this position the Miss Nathan relies on *R v IRC ex parte Matrix Securities* [1993] STC 774 and *R v IRC ex parte MFK Underwriting Agencies Ltd* [1989] STC873. The question of disclosure was considered in this last case by Bingham L J at pp 892 -0 893 thus:

25
> “I am however, of the opinion that in assessing the meaning, weight and effect reasonably to be given to statements of the Revenue the factual context, including the position of the Revenue itself, is all important. No doubt a statement formally published by the Revenue to the World might safely be regarded as binding, subject to its terms, in any case falling clearly within them. But where the approach of the Revenue is of a less formal nature a more detailed enquiry, is in
30 my view necessary. If it is to be successfully said that as a result of such an approach the Revenue has agreed to forgo, or has represented that it will forgo, tax which might arguably be payable on a proper construction of the relevant legislation it would, in my judgment, be ordinarily necessary for the taxpayer to show that certain conditions had been fulfilled. I say “ordinarily” to allow for the exceptional case where different rules might be appropriate, but the
35 necessity in my view exists here. First it is necessary that the taxpayer should have put all his cards face upwards on the table. This means that he must give full details of the specific transaction on which he seeks the Revenue’s ruling unless it is the same as an earlier transaction on which a ruling has already been given. Second, it is necessary that the ruling or statement relied on should be clear unambiguous and devoid of relevant qualifications. In so stating these
40 requirements I do not, I hope, diminish or emasculate the valuable developing doctrine of legitimate expectation, particularly if he acted on it. If in private law a body would be in breach of contract in so acting or estopped from so acting a public authority should generally be in no better position. The doctrine of legitimate expectation is rooted in fairness. But fairness is not a one way street. It imports the notion of equitableness, of fair and open dealing, to which the
45 authority is as much entitled as the citizen. The Revenue’s discretion, while it exists, is limited. Fairness requires that its exercise should be on the basis of full disclosure. Counsel for the applicants accepted that it would not be reasonable for a representee to rely on an unclear or equivocal representation. Nor, I think, on facts such as the present, would it be fair to hold the Revenue bound by anything less than a clear, unambiguous and unqualified representation”

The Revenue says that it was unaware of the source of the funds in the bank accounts or of the relationship between the signatories. Consequently it is not possible for the Appellant to seek to rely on the correspondence set out above when completing his tax return or in claiming that the Revenue is in some way estopped from seeking to
5 collect tax properly due now that it has become aware of the true position.

The Tribunals consideration and findings on the validity of the section 29 discovery assessments

88. The issues which the Tribunal is called upon to determine include whether on a proper consideration of the known facts it can be said that there was in fact no
10 "discovery" of matters relevant to the assessments because the Revenue was already aware of the position. The more precise requirements to be satisfied in this respect are set out above in s.29(6) TMA 1970 above. If Mr Bingham had effectively made a full disclosure of all relevant facts then that is an end of the matter so far at least as the out of time assessments are concerned.

15 89. If the Tribunal is not satisfied that Mr Bingham had made such a complete disclosure so as to defeat the suggestion that a "discovery" was made by the Revenue then the Tribunal needs to consider whether Mr Bingham has acted negligently so as to satisfy the requirements of the first condition set out in s29(4) TMA1970.

90. Although the assessments date back to as long ago as 1996 the enquiry
20 concerning this matter was only inaugurated in 2005. This appeal has a long history. Mr Bingham has not in our view helped himself by ignoring what he has been told during the course of the latter stages of this enquiry about the tax treatment of jointly held accounts. He has, we find, had in his head the fixed idea that he had effectively given away his capital and that he was entitled therefore to apportion this, initially as
25 if the monies were held as joint tenants but subsequently with a rather more sophisticated apportionment which addressed the individual tax positions of his children. He had not been advised as to this by his accountants although we accept that his accountants were aware of the joint accounts and were presumably in much the same position as the Revenue in giving in its correspondence an indication as to
30 how it believed the apportionment of the account should be dealt with.

91. It is clear from the correspondence that from September 2005 the Revenue had been trying to clearly establish the necessary information concerning the accounts so as to enable it to properly assess what tax was due and from whom. (See letters dated 28 September 2005 and 21 December 2005 from Mrs A M Stark to Mr Bingham and
35 Ms Bingham respectively. Also Mrs Stark's letter of 24 May 2007.) This matter has been long in gestation. That is in no small way due to Mr Bingham's resolute resistance to the notion that he might in fact be responsible for the payment of the tax sought. There have been allegations and counter allegations as to whether it was one party or the other which has made the conduct of this matter difficult. That however
40 would be a fruitless enquiry and the Tribunal does not propose to comment on this aspect .

92. What the Tribunal must do and now does is to make findings about the key issues addressed above.

93. First we are not persuaded that the Revenue was aware of the fact that Mr Bingham was the sole provider of the funds into the account when the enquiries were first commenced by the Revenue in 2005. That Mr and Mrs Bingham had formerly been joint tenants of accounts held at the bank must have been known to the Revenue. It seems likely that it was also known to the Revenue at the end of 1998 when the settlement cheque was sent to it that there were then additional account holders but the basis of their participation in the account or indeed the relationships between the account holders may well not have been known. The correspondence supports the finding that the Revenue was finding it difficult to extract from Mr Bingham precise information as to the beneficial ownership of the accounts as opposed simply to the names of the signatories to those accounts.

94. It would we think have been quite possible for Mr Bingham in answer to the Revenue's letter of 28 September 2005 which asked for information about the "Family accounts" to have clearly set out what the position was. He did not do this however. What he did do was to reply that the accounts had been opened for many years omitting to point out that his daughters had only been added as signatories on their attaining their majority in 1994. In subsequent correspondence Mr Bingham went on to discuss his "apportionments" of the interest in a way which we consider to be confusing.

95. We cannot find in any of the documents referred to by Mr Grierson a sufficiently clear complete and unequivocal statement of the information concerning the accounts which would enable us to conclude that Mr Bingham had made such disclosure as would preclude the Revenue from making a "discovery" of the insufficiency of tax paid within the meaning of s 29 (1) TMA 1970.

96. This takes us then to the question of whether the Tribunal finds that Mr Bingham was negligent in the completion of his tax return. Mr Bingham's evidence was given in a straightforward manner. He dealt with cross examination by Miss Nathan satisfactorily answering directly, without hesitation and in the affirmative, the very first question put to him concerning whether he was the sole provider of the funds with which the appeal was concerned. Mr Bingham was taken at some length through his witness statements by Miss Nathan and asked what his purpose was in placing the funds in the joint names of not only his wife and himself but also his children's names. In answer to this question Mr Bingham observed that if he had instead opened up 4 or 5 separate accounts " we wouldn't be here today"

97. That reply was interesting as it demonstrated the fact that Mr Bingham still had little appreciation of just what the Revenue was alleging. It is apparent to the Tribunal that whilst the Revenue has now made clear the fact that it was substantially relying on the settlements legislation, Mr Bingham had failed to understand this or at least failed to understand how that legislation was relevant to his situation. That appears to be the position from a reading of the quite extensive correspondence between Mr Bingham, his accountants and the Revenue. It is open to speculation whether if Mr

Bingham had in fact opened up 4 or 5 separate accounts the Revenue would not still have asserted that he ought to return all the interest on those accounts as the interest payments represented gifts exhibiting an element of "bounty" and would equally be liable to be caught by the settlements provisions of ITTOIA and its predecessor legislation.

98. At one point in his evidence Mr Bingham said that he had never understood the position of the Revenue in relation to this matter. He was not a tax lawyer. The information he gleaned as to how he might achieve his objective of providing for his family and divesting himself of some of his assets was largely from the press – the Daily Mail and the Daily Telegraph. Copies of articles from the former were produced in evidence. They dealt with a number of tax mitigation possibilities legitimately open to taxpayers. It has to be observed that nowhere in these articles was it suggested that a taxpayer might usefully add the names of his children to a bank account so as to mitigate his tax liability. There were however a number of references to the husband and wife provisions of section 282 ICTA 1988 and clearly Mr Bingham felt that this treatment would be equally available to his children if they were to become joint account holders.

99. Mr Bingham stated in his evidence that his intention was to try and divest himself of some of his assets. He had discussed this with his accountant, Mr Fenton, when the question of Inheritance tax and his family's financial security were both considered. The evidence suggests that he received no advice to the effect that the settlement provisions of the tax legislation might be invoked or that what he was proposing was in any way problematic. It was unfortunate that the Tribunal did not have the opportunity of hearing from Mr Fenton who it was understood was living in London but was not well. Regrettably Mr Fenton's written statement does little to illuminate the position.

100. Asked why he kept his name on the accounts Mr Bingham said that he did so simply to be able to operate the accounts if his children should suffer a serious car crash when travelling together. There might be a need for urgent nursing care.

101. The existence of the FSA guarantee was another consideration for retaining his name on the accounts as this applied to each of the named signatories and had the effect of increasing the amount covered by the Government guarantee in case of bank failure.

102. What the Tribunal is required to consider is whether in dealing with his tax returns Mr Bingham has been negligent according to the test in *Blyth v Birmingham Waterworks* (see above). The Tribunal is in this respect concerned with the tax years for which the assessments are out of time – that is to say the years between 1996/ 1997 and 2004-2005. During this period the accounts had at different times been held jointly by Mr and Mrs Bingham and the two daughters or by all 5 of the family members. Interest was returned to the Revenue on the tax returns of each holder as to 25% or 20% of the whole interest allowed on the accounts. The Tribunal is far from confident that a reasonable person might not consider this to have been a perfectly acceptable way to deal with the matter. Although the detailed correspondence with the

Revenue referred to above took place at a later date it does appear to be the case that as a practical matter the Revenue would generally treat joint accounts as either held by the signatories as joint tenants or possibly as tenants in common requiring in either case a return of interest for the relevant proportion according to the number of account holders.

103. The question of which holder might have provided the funds is not one which appears to have any particular significance in this essentially administrative approach. Hence there appears in the letter of 21 December 2005 from the Revenue to Miss Sarah Bingham a letter concerning joint tenancy where there might be "two or more persons" as holders of an account::

> "If the account in question is held on a joint tenancy basis then we have no option but to split the income in equal shares **for all joint account holders**. **It does not matter if the whole of the monies invested might have come from only one of the tenants.** *(emphasis added)*

104. There is, the Tribunal finds, no basis for suggesting that in this respect Mr Bingham acted negligently. His appreciation of the true legal position concerning the jointly held accounts may have been at fault but that does not mean he was negligent. Mr Bingham may well have had in mind the concept of joint tenancy as understood in the context of conveyancing transactions. The rather different treatment of ownership of jointly held bank accounts no doubt eluded him in much the same way as Miss Nathan contends Mr Grierson has misunderstood the position in his citation of real property based cases which he had sought to argue in support of the law as it concerns the joint ownership of a bank account.

105. Mr Bingham had, he believed, placed the funds into a family account and had also believed that the apportionment of the interest according to the respective shares of each family member in the accounts was the correct way in which to deal with the matter of each member's tax return. He saw nothing unusual in all of this and was to a degree subsequently encouraged in that belief by the Revenue in its correspondence as related above. He was mistaken but his mistake was, the Tribunal finds, an honest one.

106. The burden of proof in establishing that a discovery has been made as to the insufficiency of tax paid is on the Revenue. The standard of proof is the normal civil standard of the balance of probabilities. Applying that standard the Tribunal finds that the facts essential to a proper assessment of Mr Bingham's tax liability were not known to the Revenue and that there was as regards the years covered by the out of time assessments a "discovery" as to the insufficiency of tax paid by Mr Bingham as required by (now) section 29A TMA 1970. We find however that there was no negligence on the part of Mr Bingham who had an honestly held but incorrect belief that he was properly entitled to apportion the interest earned on the accounts according to what he believed were the relevant beneficial interests of his family members in the accounts.

Penalties

107. The Tribunal was very briefly addressed by counsel on the matter of penalties at the close of the hearing. At the time of the hearing no formal appeal against the imposition of penalties had been notified to the Tribunal. This was, by agreement of the parties and with the consent of the Tribunal, rectified subsequently so that this matter does need to be addressed.

108. The Revenue has imposed a penalty of 30% of the difference between the tax paid by Mr Bingham during the years the subject of this appeal and the tax which he ought to have paid on the basis that the whole of the interest on the accounts should have been assessed to him and to him alone. The sum is not insubstantial as can be seen in the schedules appearing at paragraph 28 above.

109. The penalties which have been charged have for the most part been raised under the provisions of section 95 TMA 1970. On 1 April 2008 a new penalty regime was introduced by which the test of "negligence" was replaced by a test as to "careless or deliberate" conduct with discounts allowed from the maximum penalty for such matters as the cooperation of the taxpayer in the enquiries and whether the disclosure was prompted or unprompted. However at the date of the hearing the Penalty Notices which it is understood the Revenue intended to serve in respect of the most recent years had not in fact been issued. It is not clear whether the further penalty notices have now been issued and served or not. Miss Nathan indicated that the Revenue was minded to assess penalties post 1 April 2008 on the basis that the failure to include the whole of the interest on Mr Bingham's tax return was careless and the disclosures were prompted. The table at paragraph 28 above suggests a 30% penalty but whether in fact such a penalty has been raised for the years 2008-2009 and 2009-2010 is unclear and the Tribunal does not propose therefore to make any finding as to the question of Mr Bingham's liability to penalties post 1 April 2008 beyond the observations made below. Should it be the case that penalties have been raised for this period which Mr Bingham contests, the parties are at liberty to apply to the Tribunal for a determination of the issue. Hopefully however what we have to say about penalties generally in relation to this appeal will be of assistance in resolving any such issue.

110. Section 95 TMA requires the Revenue to establish negligence on the part of the taxpayer. For the reasons given above the Tribunal does not make such a finding. Mr Bingham has been wrong in his appreciation of the true position but that position involves the application of quite technical rules concerning settlements which the Tribunal considers would be outside the normal considerations which a taxpayer would have in mind when making a return to the Revenue. What he did was known to his accountants who did not, it appears, take issue with him or in any way alert him to the problems he might, and indeed, did, face.

111. The Tribunal is concerned that the basis on which Mr Bingham has been held liable to account for additional interest is itself somewhat unusual. It is seen as other than routine to be dealing with an appeal based on an enquiry as to the beneficial ownership of a jointly held bank account. The Tribunal enquired of counsel for the Revenue who was supported by a small team from the Revenue's legal department whether any of them was aware of any other cases of a similar nature. The reply was

that there had been similar cases but only in relation to jointly held real property – not bank accounts and those cases had in any event been the subject of negotiated settlements

112. We strongly suspect but cannot assert with confidence, that enquiry by the Revenue into the underlying beneficial interests in jointly held bank accounts where the other signatories may be family members is unusual. That this would then on any regular basis invoke the application of the complexities of the settlements legislation again seems to the Tribunal to be something of a rarity. We are consequently not altogether surprised by the response of Mr Bingham to the lengthy enquiries made. That he might have helped himself by cooperating to a greater degree with the Revenue is not doubted but his general confusion and expressed frustration is to an extent understandable.

113. The Tribunal does not believe that this is a suitable case for the imposition of penalties. Mr Bingham may have been wrong in his approach to the reporting of interest earned on the accounts and the submission of his tax returns but the Tribunal has found that he acted honestly and, more relevantly, he had not been negligent. Had what he did been clearly wrong he might have expected to have been alerted to this by his accountant. Some at least of the correspondence from the Revenue suggested that the approach he actually took was appropriate. The deep significance of the source of the funding only became apparent when the concept of a resulting trust emerged. It was not fully appreciated by Mr Bingham nor would it necessarily be appreciated by anyone who was not alive to the existence and nature of resulting trusts and the potential for taxation on the basis of the settlement provisions of ICTA and ITTOIA.

114. However correct as a matter of law the Revenue may be as to its approach to the taxation of the interest on the jointly held accounts the technical nature of the basis on which additional tax becomes payable is not proper material for the suggestion of negligence which underpins the claim to penalties and more generally in the view of the Tribunal the particular circumstances giving rise to this appeal are not those which ought properly to attract the sanction of a penalty. Mr Bingham was not in the finding of the Tribunal negligent nor, although this aspect is at the present time possibly academic only, would we be prepared to hold that he was either careless or deliberate in his conduct. It will however be apparent from our finding that Mr Bingham should include all of the interest earned on the account during the period he continues to be a signatory to the account. His failure in the future to do so could only be considered as deliberate conduct which would attract penalties under the current penalty provisions of Schedule 24 Finance Act 2007 as a "relevant inaccuracy".

115. One further matter does need to be addressed and that concerns an issue which arose in correspondence between the Revenue and those advising Mr Bingham and which was also briefly referred to at the close of evidence given by Mrs Bingham to the Tribunal. It appears that there has been a suggestion made by the Revenue that whilst Mr Bingham is liable to account to the Revenue for the whole of the interest earned on the accounts, the tax paid by the other family members who were joint proprietors of the accounts may not be repaid or taken into account as a credit against the tax payable by Mr Bingham. This, says Mr Grierson, is wholly unfair as it would

result in an unjust enrichment of the Revenue. The Tribunal agrees and expresses the earnest hope that the Revenue will not pursue this course. If it does it is the view of the Tribunal that the excess tax resulting would be recoverable as "money had and received" for no consideration at common law.

116. Appeal allowed in part.

- The assessments for the years 2005-2006 to 2009-2010 are confirmed. The Appellant is liable to account for the whole of the interest on the accounts for these years

- The extended time assessments for the years 1996-1997 to 2004-2005 are discharged

- The penalty assessments are set aside.

It was acknowledged at the close of the hearing that there remained some issue as to the correctness of the assessment figures (as shown in paragraph 28 above). Again it is hoped that this matter has by now been resolved but if it has not the parties are at liberty to apply to the Tribunal for a determination if this would be of assistance.

117. 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

CHRISTOPHER HACKING

TRIBUNAL JUDGE
RELEASE DATE 11 February 2013