[2016] UKFTT 276 (TC)

TC05049

Appeal number: TC/2012/04558

INCOME TAX – Penalty assessment (s 95 Taxes Management Act 1970) – Relevance of Offshore Disclosure Facility – Calculation of tax difference – Appropriate levels of abatement for disclosure, co-operation and seriousness – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN HEELEY TOWNEND **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MS ELIZABETH POLLARD

Sitting in public at Leeds on 15-16 April 2015

Rory Mullan, counsel, for the Appellant

Kate Balmer, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. The Appellant appeals against penalties imposed under s 95 of the Taxes Management Act 1970 ("**TMA**") for tax years 1989-90 to 2005-06 inclusive, for
5 fraudulently or negligently delivering incorrect returns or accounts resulting in a potential tax loss.

2. The Appellant does not dispute that his tax returns for the years in question were incorrect. Nor does he dispute that he is liable to penalties under s 95 TMA in respect of the years in question. What is in dispute is the amount of those penalties.

10 3. Under s 95 TMA, the maximum penalty that can be imposed is 100% of the difference between (1) the amount of income tax and capital gains tax payable according to the incorrect returns filed, and (2) the amount of income tax and capital gains tax that would have been payable if the returns had been correct (the "**tax difference**"). The penalties were originally assessed by HMRC as 60% of the tax
15 difference. In a review decision dated 5 March 2012, they were reduced to 50% of the tax difference, such that the penalties amount to £867,659. The position of the Appellant is that in the circumstances of this case, such a penalty is disproportionate and unfair.

Background

20 4. The Appellant has at all times been resident and domiciled in the UK.

5. He was involved in the electronics business from the 1950s. He primarily carried on this business in the UK under the name of "John's Radio" in Batley, West Yorkshire. His business consisted primarily of buying and selling used electronic and telecommunications equipment. His evidence is that when the electronics business in
25 the UK declined in the early 2000s, he ceased to purchase electronic equipment and merely sold off existing stocks. He says that he had a high level of such sales in the year ending 31 December 2008, and that he subsequently sold off the last of his stock so that his electronics business effectively came to an end as of 31 March 2011.

6. The Appellant's evidence is further that when the electronics industry declined,
30 he began investing in commercial real estate, and that his current day-to-day business is as a commercial landlord.

7. At some point, possibly during the 1980s, the Appellant opened a bank account with NatWest in Jersey. He subsequently opened various other accounts in the Channel Islands.

35 8. According to the Appellant, the first account was opened for purposes of his business dealings with an American company called Tektronix, which had a factory based in Guernsey. In 1990, when Tektronix closed its Guernsey factory, it offered the Appellant the opportunity to purchase electronics from that site. The Appellant made various purchases of electronics pursuant to that offer, some of which were

made on behalf of third parties for which he took a commission. The proceeds from the sales of Tektronix stock were paid into a NatWest Jersey bank account.

9. It is an agreed fact that the Appellant underwent major surgery in 2006, and that he has since suffered serious health issues.

10. In 2007, HMRC established what is known as the "Offshore Disclosure Facility" (the "**ODF**"). Guidance on using the ODF was published in HMRC booklet DS101 dated March 2007. The booklet described the ODF as "An opportunity for those with an offshore account and undisclosed tax liabilities to come forward now and settle their affairs with HM Revenue and Customs". The booklet stated as follows:

> For a limited period, if you are within the scope of this facility, you can come forward. You must make a full disclosure of all undeclared liabilities, not just those connected with an offshore account, with the following certainty of treatment.
>
> - A fixed penalty of 10% of the tax/duties you have underpaid.
> - No penalty on disclosures of untaxed amounts totalling less than £2,500.

11. The booklet explained that a person could only use the ODF by notifying HMRC of the intention to do so by 22 June 2007, and then by making the disclosure and paying all taxes, interest and penalties by 26 November 2007.

12. On 23 November 2007, the Appellant made a disclosure to HMRC under the ODF. The disclosure related to tax years 1993-94 to 2005-06 inclusive. It disclosed the existence of two bank accounts in Jersey and offered a payment of £791,241, being the tax due with interest plus a 10% penalty on amounts in HSBC and NatWest bank accounts in Jersey. The disclosure described the primary source of the funds as "business takings".

13. In a letter to the Appellant's representatives dated 9 April 2008, HMRC advised that it had been decided to undertake a full review of the Appellant's affairs. There followed various exchanges between HMRC and the Appellant's representatives over many months.

14. It is an agreed fact that the Appellant's health issues resulted in his memory being affected, and caused difficulties in arranging meetings with him personally.

15. On 16 November 2009, HMRC informed the Appellant's representatives that HMRC's Specialist Investigations were taking over the enquiry, which would now be conducted under Code of Practice 9 ("**COP9**"). Following further exchanges, on 11 February 2010, a meeting was held between the Appellant, his representatives, and HMRC. The following day, a further "scoping meeting" was held attended by HMRC and one of the Appellant's representatives.

16. On 23 March 2010, HMRC issued a notice of assessment for the year 1989-90.

17. On 14 December 2010, the Appellant signed a formal disclosure report prepared by his accountants (the "**Disclosure Report**"), and this was sent to HMRC. It is an agreed fact that HMRC accepted the disclosure report without further enquiries.

18. On 28 February 2011, HMRC issued a notice of assessment for the year 1990-91.

19. On 25 March 2011, HMRC issued a notices of assessment for the years 1991-92 to 2005-06 inclusive.

20. According to a consolidated statement of facts prepared for the purposes of this appeal, it is an agreed fact between the parties that the Appellant has accepted these assessments and has taken steps to pay the outstanding tax and interest.

21. On 14 November 2011, HMRC issued penalties under s 95 TMA in respect of tax years 1989-90 to 2005-06, calculated as 60% of the tax difference.

22. On 6 December 2011, the Appellant appealed against the penalty determinations.

23. In a review decision dated 5 March 2012, HMRC reduced the total penalties to £821,785, being 50% of the tax difference. This was calculated on the basis that the Appellant was entitled to abatement of the maximum penalty of 15% for disclosure, 30% for co-operation, and 5% for seriousness.

24. By a notice of appeal dated 30 November 2012, the Appellant commenced the present Tribunal appeal against the penalty determinations.

Applicable legislation

25. Section 95 of the Taxes Management Act 1970 (the "**TMA**"), as in force at material times, provided as follows.

> **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 8A of this Act (or either of those sections as extended by section 12 of this Act, 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 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.

(3) The relevant years of assessment for the purposes of this section are the year of assessment in respect of which any claim to relief or exemption from tax in connection with which the statement or declarations are relevant, is made, the next following, and any preceding year of assessment.

26. Section 100 TMA relevantly provides that "an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate".

27. Section 100B TMA provides for an appeal to the First-tier Tribunal against the determination of a penalty under s 100 TMA. In the case of a penalty that is not required to be of a particular amount, s 100B(2)(b) provides that the Tribunal may:

(i) if it appears that no penalty has been incurred, set the determination aside,

(ii) if the amount determined appears to be appropriate, confirm the determination,

(iii) if the amount determined appears to be excessive, reduce it to such other amount (including nil) as it considers appropriate, or

(iv) if the amount determined appears to be insufficient, increase it to such amount not exceeding the permitted maximum as it considers appropriate.

28. Section 101 TMA provides as follows:

> An assessment which can no longer be varied by the tribunal on an appeal notified to it or by order of any court is sufficient evidence, for the purposes of—
>
> (a) the preceding provisions of this Part, and
>
> (b) the provisions of Schedule 18 to the Finance Act 1998 relating to penalties,
>
> that the amounts in respect of which tax is charged in the assessment arose or were received as stated in the assessment.

29. Section 49A TMA relevantly provides:

(1) This section applies if notice of appeal has been given to HMRC.

(2) In such a case—

(a) the appellant may notify HMRC that the appellant requires HMRC to review the matter in question (see section 49B),

(b) HMRC may notify the appellant of an offer to review the matter in question (see section 49C), or

(c) the appellant may notify the appeal to the tribunal (see section 49D).

30. Section 49C TMA relevantly provides as follows:

(1) Subsections (2) to (6) apply if HMRC notify the appellant of an offer to review the matter in question.

(2) When HMRC notify the appellant of the offer, HMRC must also notify the appellant of HMRC's view of the matter in question.

31. Section 49I(2) TMA relevantly provides as follows:

(2) In sections 49A to 49H, a reference to the appellant includes a person acting on behalf of the appellant except in relation to—

…;

(b) notification by HMRC of an offer of review (and of their view of the matter) under section 49C;

HMRC policy in relation to penalties

32. Section 95 of the TMA provides that the maximum penalty that can be imposed is 100% of the tax difference. Subject to that maximum, s 100 TMA confers on an officer the discretion to impose such penalty as the officer considers is "correct or appropriate". No further guidance is given in the legislation as to how that discretion should be exercised in individual cases.

33. However, HMRC has a long-established policy setting out how it will exercise that discretion and the factors which will be taken into account. Prior to 2014, that policy was set out in the Inland Revenue Investigation Handbook at sections 5500-5551. Since 2014, it is found in the HMRC Enquiry Manual at sections 6051 to 6089.

34. Under this policy, the starting point in every case is the statutory maximum (that is, the tax difference). That sum is then reduced, if appropriate, by a process called abatement. Abatement requires HMRC officers to take account of three factors: (1) the extent of the taxpayer's disclosure (for which the penalty can be reduced by up to 20% and exceptionally, for completely unprompted disclosure up to 30%), (2) the extent of the co-operation received from the taxpayer during the enquiry (for which the penalty can be reduced by up to 40%), and (3) the seriousness of the offences (for which the penalty can be reduced by up to 40%).

The HMRC witness evidence

The evidence of HMRC Officer Karen McNaughton

35. In her witness statement, HMRC Officer McNaughton stated as follows. Her dealings with the Appellant commenced on 16 November 2009 when she took over an investigation into his tax affairs because fraud was suspected. The investigation had originally been opened on 9 April 2008 by Local Compliance following the Appellant's use of the ODF. She gives details of the meeting held on 11 February 2010 between the Appellant, his tax advisors, and officers of HMRC.

36. In examination in chief, Officer Mc Naughton added that she considered the Appellant's share dealings to be in the nature of investments.

37. In cross-examination, Officer Mc Naughton said amongst other matters as follows. At the time of the 11 February 2010 meeting, Officer Mc Naughton obtained from the Appellant what she had been expecting to obtain. At that stage, it would still have been possible for the Appellant to obtain maximum abatement for disclosure. It was not compulsory to do a disclosure report, so the Appellant was assisting voluntarily by providing one. The Disclosure Report contained everything that Officer Mc Naughton expected to see in the Disclosure Report. It was accepted that delays in the production of such a report can occur, and that the time frame within which the Disclosure Report had been prepared was reasonable in the circumstances. She accepted that the Appellant's agent had tried hard to move things on.

The evidence of HMRC Officer Stuart Atkinson

38. In his witness statement, Officer Atkinson gives details of meetings by HMRC with the Appellant and/or his advisors on 21 May 2012 and 13 November 2012. Officer Atkinson was cross-examined at the hearing.

The evidence of HMRC Officer Peter Woodham

39. In his witness statement, HMRC Officer Woodham gave details of the HMRC policy on abatement of penalties.

40. In examination in chief, Officer Woodham did not accept that the 10% penalty in the ODF was incompatible with the general HMRC policy on penalties.

41. In cross-examination, Officer Woodham said that his understanding was that the ODF would not apply where the conduct of the taxpayer was fraudulent.

The evidence of HMRC Officer Nicholas Mosley

42. In the hearing bundle was a witness statement by HMRC Officer Mosley, who did not attend the hearing to give oral evidence.

The Appellant's witness evidence

43. In his witness statement, the Appellant apologises for not paying tax when it was owed. He says that "If I could do it all over again I would do it differently". He says that "This has been a black cloud over my head", and that he was hopeful that through the ODF he could "find relief, unburden myself".

44. His witness statement adds that:

> I am more wise to business and appreciate the importance of keeping complete records of everything now. I would have accounted for these monies properly and would have paid the correct amount of tax owed if I knew back then what I know now. … At the time I put getting business and making money at the forefront of my mind without thinking about the consequences that making that money might have. I now realise that that was not the correct way to go about my business dealings and I am both sorry and disgusted by my past ways.

45. Later in his statement, he says that he was "naïve" at the time and that "I am not a financially minded person and only enjoyed work in the electronics industry". In relation to certain transactions on which he paid no tax he says in his statement that:

> Furthermore, as the monies in respect of these transactions went into and out of my Channel Islands bank account, I was under the impression at the time that these would not be subject to UK taxation and as a result I did not declare these. … The reason I thought this was because I had spoken to contemporaries at the time who gave me the impression that where monies were earned off-shore and kept off-shore I would not have to pay tax on them. At this point I cannot remember the precise source of this information but it was generally understood to be how this worked. I realise, now, that I misunderstood the position as it actually is.

46. At another point in his witness statement, he says that:

> I put this additional money straight into my Jersey account because difficulties were arising in a shortfall moneywise due to the share dealings. I admit that I knew the tax was due but I could not afford to pay it. I knew I would have to pay it at some point and that it would all come to light in the future, but this to me seemed like an easy short term solution to my money shortfall. I realise now that I should not have misdirected the money in this way and I regret behaving in that way.

47. The Appellant's witness statement acknowledges that on 30 October 2000 he made an offer to HMRC in respect of duties, penalties and interest for the years 1996/97 and 1997/98, which offer HMRC accepted. That offer included a signed statement that the Appellant had provided a complete and accurate statement of his personal assets and liabilities, despite the fact that the disclosure did not include his NatWest Jersey account(s). The Appellant explains this by saying in his witness statement:

> I think my accountants at the time… dealt with the enquiry and did the calculations on my behalf. I therefore did not give this enquiry the focus and attention that perhaps I should have. I just wanted to not deal with the fuss of the revenue and to me, it was a minor amount so I just signed the forms and paid it.
>
> .... At the time of completing the statement of assets and liabilities, I did not realise that there was a statement requiring disclosure of all my assets wherever in the world they were held.
>
> .... To the extent I considered my offshore bank accounts, it was always in the back of my mind that I might have had to declare my Channel Islands assets but I still was not sure if I had to pay tax on it.
>
> At this time, I was beginning to get concerned that I would have to declare the assets, but this was not the most appropriate moment in any event as this was a minor enquiry and the consequences of declaring the accounts could have been disastrous. I was waiting for an amnesty so that I could declare these through appropriate channels. Even at this point, there were rumours for quite a number of years that there would be an amnesty on Channel Island accounts.

48. His witness statement says that:

> I am appealing because it is unfair that having come forward under the amnesty and cooperated fully I am facing a penalty of 50% rather than the 10% under the various amnesties which have been offered to people in my position and which I thought would be applied to me.

49. His witness statement further states as follows.

50. The events go back over twenty years and his severe health problems have led to some memory loss.

51. The Appellant only received basic advice on what records of transactions he should make and keep. Until about 1980 ex-wife used to keep the records as he had no interest in the financial side of the business. Subsequently, a close personal friend who worked for him two mornings per week had duties which included maintaining the business books and records. He used the services of an ex-accountant at year-end to complete accounts work up to trial balance stage, and his accountants then produced accounts and tax returns. While the Appellant used a small firm of accountants for year-end purposes, he did not seek specific tax advice from them and really only spoke to them annually.

52. The Appellant initially did not tell his accountant about his offshore accounts. Initially he did not view it as necessary as he thought that as he was not bringing money into the UK, he did not need to report it. Subsequently he feared that if he told his accountant that he had these offshore accounts, the accountant would disapprove and tell him that he ought to be paying tax on the money.

53. The Appellant tried to keep the number of his employees very low, had minimal clerical assistance, and did most of the work associated with the business himself.

54. The capital gains and losses from the share dealings were not originally included in the Appellant's tax returns because he thought offshore trading did not need to be declared in the UK. He did not declare the shares transactions initially in the 2007 ODF disclosure because he followed advice from accountants, but these were subsequently included in the Disclosure Report.

55. The bank account held in the Channel Islands was a business one, set up to carry out normal business transactions with Tektronix, which were relatively small transactions before the factory closed.

56. The Appellant subsequently opened further NatWest Jersey accounts because he was holding large amount of money, and was able to attract interest under fixed short-term interest accounts.

57. The monies which went into and out of the Appellant's NatWest Jersey account were:

(1) the considerable proceeds from the sale of Tektronix stock;

(2) proceeds from colossal foreign orders;

(3) diverted cash from sales to overseas customers (where the sale was a bankers draft and cash split); and

(4) spare monies at the year end which had already been subject to UK tax.

58. On 30 April 2007 the Appellant gave instructions for his main NatWest Jersey bank account to be closed because he no longer needed it.

59. The Appellant heard about the ODF in the national press at some point in 2006 or 2007. He went to see his accountant and said that he "had been waiting for an amnesty to be offered by HMRC" and told him there was a problem in that he had not disclosed interest arising on my offshore accounts within my tax returns. The Appellant says that "I was primarily concerned with the interest because, from what I understood from the press articles I had read, HMRC were only concerned with the interest". The Appellant then says:

> When meeting with Martin Cawley I asked Martin about disclosing my offshore business taking as well. He did not seem interested in discussing my offshore earning saying that they will ask for the rest later. One thing will follow another from the tax authority. I wanted to know though because the very high amount of untaxed interest would stand out like a flashing light and I knew there would be enquiries as to the source of the funds in the account.

60. The Appellant's accountant completed the ODF forms on his behalf and the Appellant "did not focus too hard on what they required" but relied heavily on the advice of his accountant. The Appellant "was not involved in the actual calculations of the interest … on each account" but discussed the forms with his accountant "to some extent". When the Appellant asked his accountant about the other implications of monies due, his accountant said HMRC would bring it up in due course. The Appellant did not have the information to be able to provide full information anyway.

He expected that HMRC would get in touch about these monies and what information they needed in relation to them. The Appellant queried with his accountant whether more information should be included in the ODF, and on the basis of his accountant's advice that this was unnecessary, the Appellant honestly thought he had complied with the ODF. The Appellant has asked his accountant to provide evidence in relation to this matter, but his accountant has declined to do so due to a dispute over fees. The Appellant had personally not read any of the material relating to the ODF. He relied on his accountant and what he had read in the press.

61. Upon hearing about the ODF, the Appellant had nothing readily available to supply to his accountants. It was a difficult procedure to get the full documentation required to complete the formal Disclosure Report. The Appellant acted quickly to meet HMRC's tight deadlines. The Appellant says:

> I did not know if there were going to be any facilities available like this in the future, but what I did know was that I wanted to put my affairs in order and this was my first opportunity.

62. After paying the amount on the ODF return, the Appellant expected that further tax charges would follow once the historic tax liabilities had been worked out and that a penalty would be applied on the same basis.

63. The Appellant was therefore not surprised when he received the 9 April 2008 HMRC letter stating that HMRC required further information. The Appellant considers that he then gave HMRC as much help as he could, and that without his efforts, HMRC would have been entirely unable to obtain the information upon which they have assessed him. The Appellant provided this help notwithstanding the serious medical issues he was facing at the time.

64. At the 11 February 2010 meeting the Appellant was told that he needed to create a formal Disclosure Report. The Appellant did this at a personal cost of some £60,000.

65. In cross-examination, the Appellant said amongst other matters as follows. Money had been of no interest to him whatsoever. His only interest had been electronics. He was only interested in making a profit because that was necessary to keep going.

66. The Appellant never considered himself knowledgeable in matters of finance and tax. He is a confident businessman but is not good with figures and always tried to keep away from the finance side. He only went to Jersey to do business and not because it was a tax haven. He never asked anyone specifically for tax advice on his business in the Channel Islands. His impression from general conversations that he had with others was that as long as he kept the money from the Tektronix sales offshore, he would not need to pay tax on it. He did not tell his accountants about the money in Jersey before 2007 because he thought they would tell him that he would need to pay tax on it and this would be disastrous. He also admitted that he realised that he would need to pay tax on this money when in 2000 he reached the settlement with HMRC referred to in paragraph 47 above. He admitted that he was aware by

about 1998 that money he earned offshore was liable to tax in the UK. Before the ODF was announced, he thought that if he went to HMRC and made the disclosure, they would “throw the book at him”. He thought that he therefore could not correct matters until an amnesty was announced. He admitted that in an e-mail to NatWest Jersey dated 30 April 2007, he was trying to move money around to prevent HMRC from seeing it. However, he denied that this was with the intention of then making only partial disclosure under the ODF. He said he relied on his accountant to complete the ODF forms, and the Appellant himself did not read them.

The Appellant's submissions

67. As to the facts, the Appellant submits that the relevant circumstances of this case are as follows. The Appellant sought to avail himself of the ODF as soon as it became available. The ODF set a deadline for full compliance of 26 November 2007. It was not apparent at the time that further similar facilities would be offered by HMRC in future. The Appellant was unable to comply in full by the stipulated deadline, but disclosed what he could within the deadline. He fully expected (given *inter alia* the amounts involved) that further HMRC enquiries would inevitably follow and that he would pay further tax, interest and penalties as a result. Consistently with this expectation, HMRC did indeed raise queries. He cooperated fully to comply in full with these enquiries as soon as he could, which led to the Disclosure Report which HMRC accepted in full.

68. The Appellant advances four main arguments.

69. The Appellant's first main argument is that HMRC should not have applied its general policy on penalties under s 95 TMA without regard to the penalty that would have applied under the ODF and without regard to other offshore disclosure facilities.

70. The Appellant reasons as follows. The ODF provided for a fixed penalty of 10% of any previously undeclared taxes, regardless of seriousness or other factors that would normally be taken into account. The circumstances of the present case did not justify a five-fold increase in the penalty that would have applied under the ODF. Both HMRC and the Tribunal must act fairly between taxpayers, which requires that taxpayers in the same situation be treated in a similar manner, and that differences between taxpayers are rationally reflected in any difference in treatment. The ODF places a premium on disclosure, and sets the penalty at a deliberately low level so that threats of a high penalty will not discourage disclosure. Any general policy applied by HMRC must operate fairly and consistently beside the ODF and any other offshore disclosure facilities adopted by HMRC, since otherwise there is partial and unfair treatment as between different classes of taxpayers. The penalty imposed in the present case was thus irrational.

71. The Appellant's second main argument is that, for essentially the same reasons, the penalty imposed by HMRC was contrary to the European Convention on Human Rights (“**ECHR**”), Article 6, and Article 14 together with Article 1 of Protocol 1. The Appellant also relies on Article 49 of the EU Charter.

72. The Appellant's third main argument is that the penalty determinations, which are calculated as a percentage of the "tax difference", were based on an incorrect calculation of the tax difference. First, the Appellant contends that the figure taken by HMRC to be the tax difference for purposes of s 95 TMA incorrectly includes amounts of National Insurance contributions. Secondly, the Appellant contends that although losses he made in his share dealings were assumed in the Disclosure Report to be capital losses, the share dealings were in fact trading activities, such that the Appellant was entitled to set the losses off against other income and to carry such losses forward to subsequent years. The "correct" amount for purposes of s 95(2)(b) TMA would therefore be an amount that took into account that loss relief. Alternatively, the Appellant argues that the share trading losses are a relevant consideration which would justify lowering the level of the penalties.

73. The Appellant's fourth main argument is that HMRC in any event failed to apply its general abatement policy correctly. The Appellant contends that if the policy had been applied correctly, he would have been given greater abatement.

74. The Appellant contends that the correct approach in the present case would have been to start at the ODF penalty of 10%, and then to consider whether matters relevant under the ODF would justify a departure from that level penalty.

The HMRC submissions

75. The Appellant's first to third main arguments (paragraphs 69-72 above) were raised for the first time in the Appellant's skeleton argument, and should require a formal application for permission to amend the notice of appeal, which HMRC would oppose.

76. In any event, the Tribunal has no jurisdiction to determine whether HMRC acted unlawfully or irrationally in fixing the penalty that it did.

77. Article 49 EU Charter does not apply because EU rights are not engaged in respect of a tax penalty on a UK national in the present case, but the application of HMRC's policy was consistent with that Article in any event.

78. The Appellant fell outside the scope of the ODF, which was conditional on full disclosure. The Appellant's ODF disclosure was partial, and significantly understated his true liability. His explanation that he expected that disclosure of his additional liability would follow inevitably from his use of the ODF is disputed. HMRC maintain that the Appellant acted fraudulently in withholding information about offshore funds. HMRC has never made any representations that partial disclosure will result in a comparable discount to that under the ODF or that staggered discounts for different levels of disclosure could be available. A reward for partial disclosure outside the terms of HMRC's published guidance would result in potential unfairness and inconsistency.

79. The National Insurance contributions were correctly included in the "tax difference" (reference was made to s 16 of the Social Security Contributions and

Benefits Act 1992). The figures used in the assessment were taken from the Appellant's own Disclosure Report. The tax assessments issued by HMRC are a binding determination of the "correct" amount of tax, unless appealed by the taxpayer. Furthermore, a taxpayer is only entitled to loss relief under sections 380 or 385 if a timeous claim is made. Having failed to claim these reliefs when submitting his tax returns, the Appellant is no longer able to claim them or to have them taken into account in determining any tax-geared penalty. Furthermore, HMRC do not accept that the share transactions were trading rather than investments.

80. The penalty level was correct and consistent with HMRC's policy. HMRC invite the Tribunal to uphold the penalty at the originally assessed level of 60%, or even to increase the penalty upwards.

The Tribunal's findings

The "tax difference"

81. The HMRC penalty determinations take as the "correct" amount of tax for purposes of s 95 TMA the assessments issued by HMRC. It is not disputed that the figures used in the assessments were taken from the Appellant's own Disclosure Report.

82. The Appellant did not seek to dispute those figures in his notice of appeal. Indeed, in the consolidated statement of facts prepared for this appeal, it is an agreed fact that the Appellant accepted the assessments and has taken steps to pay the outstanding tax and interest.

83. Despite this, it was argued in the Appellant's skeleton and at the hearing that HMRC has calculated the tax difference incorrectly.

84. First, the Appellant argues that amounts of Class 4 National Insurance contributions have been incorrectly included in the amount of the tax difference. The Tribunal rejects that submission. Section 16(1)(b) of the Social Security Contributions and Benefits Act 1992 provides that "All the provisions of the Income Tax Acts, including in particular … the provisions of … Part X (penalties) of the Taxes Management Act 1970 … shall, with the necessary modifications, apply in relation to Class 4 contributions under this Act". Section 95 TMA is in Part X of that Act, and therefore applies also Class 4 National Insurance contributions.

85. Secondly, the Appellant contends that losses he made in his share dealings were trading activities.

86. The Appellant argues that s 101 TMA is irrelevant to this issue for two reasons.

87. First, the Appellant argues that s 101 is concerned only with the amounts on which tax is charged, and not with the question whether the amount of tax subject to charge would have been reduced by available reliefs on the assumption that a correct return had been made. The Tribunal does not accept that submission. The Tribunal

considers that the effect of s 101 is that an assessment which can no longer be varied on appeal is presumptively a correct assessment. To be a correct assessment, it must be correct not only in relation to the amount of tax subject to charge, but also in relation to any available reliefs.

88. Secondly, the Appellant argues that the assessments in this case are not assessments which can no longer be varied on appeal. The Appellant argues as follows. In a letter dated 20 April 2011, the Appellant's representatives appealed to HMRC against the assessments. In a letter to the Appellant's representatives dated 11 May 2011, Officer McNaughton responded that HMRC were unable to accept the appeal, noting amongst other matters that the amounts owing in respect of additional tax liability had been provided by the Appellant's representatives themselves and had been accepted by HMRC without amendment. That letter went on to state that the Appellant now had the choice, within 30 days, to request a review of the decision by HMRC, or to appeal to the Tribunal. Officer McNaughton sent another letter dated 11 May 2011 to the Appellant himself, starting that she had not accepted the appeal, and stating that she had written to his representatives "setting out the reasons for my decision and explaining to him what steps are now available to you in order to progress matters". The Appellant argues that this latter letter to the Appellant himself did not offer the Appellant a review of the assessments. The Appellant argues that it was not sufficient to offer a review in the 11 May 2011 letter to the Appellant's representatives, since by virtue of s 49I(2) TMA, an offer of a review made to the Appellant's representatives was not an offer of a review to the Appellant. Furthermore, the Appellant argues that even the 11 May 2011 letter to the Appellant's representatives did not unequivocally offer a review, but merely said that the Appellant had the choice of requesting a review.

89. The Tribunal also does not accept this argument. Section 49A(2)(b) TMA provides that HMRC "may" notify the appellant of an offer to review, and s 49C(1) TMA applies only "if" HMRC notify the appellant of an offer to review. This wording makes clear that HMRC are not obliged to offer a review. Indeed, it is clear from s 49A(2)(a) that if HMRC do not offer a review, the Appellant is entitled to request one, or alternatively the Appellant may notify the appeal to the Tribunal. If the Appellant is correct in arguing that the 11 May 2011 letter from HMRC to the Appellant's representatives was not a valid offer of a review under s 49A(2)(b), then the position would simply be that HMRC never offered a review of the assessments, which HMRC was not required to do. The 11 May 2011 letter still set out the Appellant's rights under s 49A(2)(a) and (c). Section 49I does not prevent such notification of rights being given to the Appellant's representatives rather than to the Appellant directly.

90. The Appellant did not request HMRC to review the assessments. Indeed, in a letter to HMRC dated 8 June 2011, the Appellant's representatives stated clearly on behalf of the Appellant, in respect of HMRC's decision that it could not accept the appeal, that "we accept your decision in this respect". The Appellant also did not within 30 days notify an appeal against the assessments to the Tribunal. The Tribunal is satisfied that the assessments can therefore no longer be varied by the Tribunal on appeal, for purposes of s 101 TMA.

91. The Appellant argues that s 101 TMA does not apply to National Insurance Contributions. However, s 101 is also in Part X TMA: see paragraph 84 above.

92. For completeness, the Tribunal would add that even if its conclusions above in relation to s 101 TMA were incorrect, it would find as follows. The amounts in the assessments were based on the Appellant's own Disclosure Report, which the Appellant claims was prepared at great cost by his own representatives who spent large amounts of time on it. On 13 October 2014, the Appellant filed in these proceedings a statement of facts, in paragraph 31 of which the Appellant contended that "The Appellant accepted the assessments and has taken steps to pay the outstanding tax and interest". The suggestion that the assessments were not correct was made for the first time in the Appellant's skeleton argument. The Tribunal considers that in those circumstances, even if the burden of proof was on HMRC to establish the correct amount of tax, that burden has been sufficiently discharged by inferences that can be drawn from these circumstances, in the absence of anything from the Appellant to show positively that the amount of tax is incorrect.

93. It follows from this that if the Appellant wishes in these proceedings to argue that the assessments are not correct, the burden in on the Appellant to establish that that is the case: see *King v Walden* [2001] STC 822. The Tribunal does not accept the argument that such a presumption is contrary to the ECHR or the EU Charter.

94. As evidence that the share dealings were in the nature of trade, the Appellant relies on a table at Appendix 11 of his Disclosure Report, showing dates of certain share purchases and sales between 21 January 2000 and 30 July 2001, and certain oral evidence given by the Appellant at the hearing, to the effect that he was buying and selling with a view to making a profit on the shares, that he was not buying with a view to receiving investment income, that one only makes a loss when shares are sold, and that he carried out the transactions through a day trading account.

95. However, it is noted that the Appellant's own Disclosure Report, at paragraphs 6.5, 6.6 and 6.8, refers to the share transactions as giving rise to "capital" gains and losses. The Disclosure Report categorises them as "capital" gains and losses, notwithstanding that it expressly notes at paragraph 6.7 that "most of the shares were only held for a relatively short time" and that "only occasional dividends were received". One of the cases relied on by the Appellant, *Marson (Inspector of Taxes) v Morton* [1986] STC 463, emphasised that "the question whether or not there has been an adventure in the nature of trade depends on all the facts and circumstances of each particular case and depends on the interaction between the various factors that are present in any given case", and that "in each case it is necessary to stand back, having looked at those matters, and look at the whole picture". That case identified 9 "badges of trading", but emphasised that these are not comprehensive and that none of them was decisive.

96. The Tribunal considers that the very limited evidence relied on by the Appellant in relation to this issue comes nowhere near discharging the Appellant's burden of proving that the losses from the share trading transactions were trading losses. Indeed, the Appellant's argument appears to rest primarily on the premise that in the

circumstances of the present case the burden of proof in on HMRC, a premise which the Tribunal has rejected.

97. The Tribunal therefore considers that there is no prima facie merit to the Appellant's arguments in relation to the share transactions, and that these arguments would fall to be rejected by the Tribunal in the event that the Tribunal were to entertain them.

98. HMRC submit that the Appellant's arguments concerning the share transactions were not raised in the notice of appeal, but were raised for the first time in the Appellant's skeleton argument, and that to advance this argument the Appellant requires permission to amend the notice of appeal, which should be refused. The Tribunal also accepts this submission.

99. For all of the reasons above, the Tribunal rejects the Appellant's arguments that the penalty has been calculated on the basis of an incorrect tax difference.

The relevance of the 10% penalty under the ODF

100. The Tribunal is a creature of statue, and has only such jurisdiction as has been conferred on it by statute. The Tribunal's jurisdiction in an appeal against a penalty imposed under s 95 TMA is conferred by s 100B TMA.

101. The Tribunal understands its function under s 100B TMA to be to determine what is the correct amount of the penalty. Both parties agreed at the hearing that the Tribunal has the power not only either to affirm or to reduce the penalty, but also to increase the penalty, with the result that the Appellant could be worse off for having appealed against the penalty. It must follow from this that the Tribunal's function is not confined to determining whether or not the penalty decision of HMRC was flawed when considered in the light of the principles applicable in proceedings for judicial review. Indeed, if the Tribunal's role is to make its own independent determination of what it considers to be the correct penalty, it is entirely immaterial whether or not the decision of HMRC was flawed in that sense, since even if the HMRC penalty decision was entirely lawful and rational, the Tribunal would still be entitled to be of a different view. Accordingly, the Tribunal does not propose to consider this question.

102. HMRC did not suggest that the Tribunal, in the exercise of its jurisdiction, is bound to apply the HMRC policy on abatement of penalties, which has no statutory basis. However, HMRC argues that HMRC's policy and the abatement factors "have been considered, without disapproval" in recent cases including *Harbron v HMRC* [2010] UKFTT 127 (TC); *Malhi & Kaur v HMRC* [2011] UKFTT 220 (TC); and *William Stockler v HMRC* [2012] UKFTT 404 (TC). The Tribunal considers it to be appropriate, in the interests of consistency of treatment of different taxpayers, to apply the abatement factors in the HMRC policy.

103. The Appellant argues that HMRC should also give consideration to the 10% penalty provided for in the ODF. Having considered all the various arguments advanced by the Appellant, the Tribunal concludes as follows.

104. The Appellant did not come within the terms of the ODF. The Appellant does not seek to argue otherwise. HMRC booklet DS101 stated expressly that in order to benefit from the ODF, it was necessary by the deadline of 26 November 2007 "to make full disclosure of all undeclared liabilities" and to make payment of the full amount disclosed including interest and a 10% penalty. The Appellant did not in his disclosure under the ODF make full disclosure of all undeclared liabilities. He did this only in his Disclosure Report in December 2010, some 3 years later. Furthermore, even by the date of the Disclosure Report, he had not made payment of the full amount disclosed in the Disclosure Report.

105. Nevertheless, the Appellant argues that although he did not fall within the terms of the ODF, the 10% penalty provided for in the ODF should provide the starting point for the determination of any penalty in this case. The Appellant argues that it would be unfair, and indeed, contrary to the ECHR and EU Charter, not to take into account that the Appellant would have been entitled to a penalty of only 10% under the ODF. This is said to be because he had wanted to avail himself of the ODF and had made a disclosure under the ODF within the deadline, and because the reason why he did not make full disclosure at that time was because he was unable to do so in the time available and because his accountant advised him that this was unnecessary.

106. The Tribunal notes that it not uncommon for public authorities to offer amnesties in respect of unlawful conduct. Such amnesties have the result that those who come forward within a stated deadline and who otherwise comply with the conditions of the amnesty will not be penalised in respect of that unlawful conduct in the same way as those committing similar conduct but who did not or could not avail themselves of the offer of amnesty.

107. The Appellant has not cited any authority that establishes, as a general proposition, that such amnesties are unfair, or contrary to the ECHR or EU Charter, on the ground that they provide for disparate treatment of persons whose circumstances are relevantly similar, or on grounds that they discriminate between those who can and do comply with the terms of the amnesty, and those who cannot, or who choose not to do so.

108. The Appellant has not cited any authority that establishes, as a general proposition, that fairness or the ECHR or EU Charter could require the penalty that would apply under an amnesty to have some kind of influence on the penalty to be applied to persons who do not satisfy all of the requirements of the amnesty.

109. The Tribunal therefore rejects the argument that the 10% penalty under the ODF should be treated as the starting point for the penalty in this case. The Tribunal also rejects the argument that the penalty that would otherwise apply under the abatement policy should be reduced in some way having regard to the fact that the penalty under the ODF was only 10%. The fact is that the Appellant did not satisfy all the requirements of the ODF, and that he therefore does not benefit from the 10% penalty under the ODF. The normal abatement policy therefore applies.

110. In any event, the Tribunal does not accept the Appellant's claims as to why he did not comply with the terms of the ODF.

111. The Appellant argues that he was unable in the time available to make full disclosure by the stipulated deadline of 26 November 2007. However, DS101 stated expressly that "If your records are incomplete you should make your best estimate of the undeclared income and gains and use this to make your disclosure by 26 November". The Appellant knew that he had significant undeclared liabilities that were not reflected in any way in the ODF. In his witness statement at paragraphs 113-114 he says that he discussed other liabilities with his accountant at the time, and that his accountant said that HMRC would "bring it up in due course". On the basis of the evidence, the Tribunal is satisfied that the Appellant knew, at the time that his disclosure under the ODF was made, that it did not contain full disclosure of all of his undeclared liabilities. Despite this, the disclosure that was submitted under the ODF contained no indication at all that there were any other undeclared liabilities.

112. The Appellant says that his ODF disclosure was prepared by his accountant, and that he merely acted on his accountant's advice. On the evidence before it, the Tribunal is not persuaded that this is what occurred. Booklet DS101 stated clearly that "Disclosures that are found to be materially incorrect or incomplete when checked for accuracy and completeness" would be unlikely to be accepted for settlement through the ODF. Booklet DS101 went on to explain what should be done in cases where records were incomplete (see previous paragraph). The Tribunal finds it improbable, given the very clear terms of DS101, that a professional accountant who was aware that there were additional undeclared liabilities would advise a client that it was unnecessary even to mention in the ODF disclosure that any further liabilities existed. The Tribunal considers the much more likely explanation to be that the Appellant consciously intended that the ODF disclosure should not indicate that there were any further liabilities, in the hope that HMRC would accept the ODF disclosure and not enquire further.

113. The Appellant also says that he was suffering health problems at the time of the ODF disclosure. The Tribunal notes that the Appellant provided a letter from his doctor dated 11 December 2009 confirming that he had major surgery in 2006, and suffered various subsequent complications. It is an agreed fact that the Appellant has had serious health problems since that date, and the Tribunal is sensitive to this fact. However, the evidence does not establish that the Appellant has been incapable of attending to tax affairs for the whole of the period since 2006. For instance, HMRC notes of a meeting between HMRC and the Appellant's accountants dated 10 December 2009 record that HMRC asked after the state of the Appellant's health at that time, and that the Appellant's accountant responded that "his client's health was as well as could be expected and he continuing to take medication". There is no evidence as to the state of the Appellant's health at the specific time that the 2007 ODF disclosure was prepared. The Tribunal is not persuaded on the evidence before it that the state of the Appellant's health was the reason why the ODF disclosure did not indicate that there were also other undeclared liabilities. The Appellant's own evidence is in fact that he discussed additional liabilities with his accountant (see paragraph 111 above).

114. For all of the above reasons, the Tribunal rejects the argument that the penalty that would otherwise apply in this case should be reduced in some way by reference to the fact that the penalty provided for under the ODF was 10%.

115. For all the reasons above, the Tribunal does not need to consider the Appellant's arguments concerning the (in)compatibility of the ODF and the general HMRC policy of abatements of penalties.

116. The Appellant also argues that the ODF somehow induced him to waive his privilege against self-incrimination. The Tribunal does not consider this to be a tenable argument. At the time of making the disclosure he was on notice that "Disclosures that are found to be materially incorrect or incomplete when checked for accuracy and completeness" would be unlikely to be accepted for settlement through the ODF (see paragraph 112 above). It was the Appellant's own choice to make a disclosure under the ODF, and having made an incomplete disclosure the consequences were exactly those of which he had been forewarned.

117. The Appellant also suggests that the 10% penalty under the ODF should apply to so much of the tax difference as was disclosed in the ODF. The Tribunal also rejects that suggestion. As the Appellant was warned could be the case, his ODF disclosure was not accepted because on investigation the disclosure was found to be incomplete. Accordingly, the ODF does not apply to any of the tax difference.

Consideration of abatement: Disclosure

118. The abatement policy in the paragraphs of the Inland Revenue Investigation Handbook and in the HMRC Enquiry Manual referred to in paragraph 33 above are in materially similar terms. For convenience, quotes below are taken from the HMRC Enquiry Manual.

119. Paragraph 6070 of the HMRC Enquiry Manual provides in respect of abatement for disclosure amongst other matters as follows:

> Circumstances will range from the extremes of
>
> - a complete and voluntary disclosure, made spontaneously by a taxpayer who has not been challenged and who has no reason to fear early discovery (when an extra 10 percent should be given …) to
> - no admission of irregularities even though the tribunal has determined appeals against discovery assessments and enquiry amendments in HMRC's favour (when no abatement for disclosure should be given).
>
> Between these extremes there will be a variety of circumstances calling for differing degrees of abatements, including the following.
>
> - A voluntary and complete disclosure by a taxpayer who has some reason to suspect early discovery. A disclosure made in response to an enquiry notice would fall into this category.

- Full disclosure on challenge.
- A voluntary disclosure which turns out to be partial.
- Partial disclosure on challenge.
- Denial of irregularities on challenge, but disclosures subsequently made.

> The list is not comprehensive and you should take into account any other relevant circumstances.
>
> If there are no other relevant factors, it may be appropriate to allow 20 percent for a case within the first two categories, and 5 percent if the disclosure is very belated under the final category.

120. In the present case, the initial disclosure in the ODF was not made as the result of a challenge by HMRC, such as an enquiry. On the other hand, it was also not entirely spontaneous. The Appellant's own evidence was that he was aware at least from about 1998 that he had undisclosed tax liabilities. Paragraph 105 of the Appellant's witness statement indicates that he had decided that he would wait for an amnesty before making a disclosure. In the end, he waited some 8 years before making his disclosure under the ODF. Thus, he did not make the disclosure at the earliest opportunity, but deliberately waited for many years until such time as he was provided with an opportunity to settle his affairs on a basis much more to his own advantage.

121. Furthermore, the Tribunal considers that by the time that the ODF disclosure was made, the Appellant was concerned that he was now at heightened risk of detection by HMRC. In April 2007, not long before making the disclosure under the ODF, he was moving money around in an attempt to prevent HMRC from seeing it (see paragraph 66 above). He had also been warned by HMRC booklet DS101 that after 22 June 2007, HMRC would in its enquiry work "target holders of offshore bank accounts who do not disclose".

122. Despite this, the Appellant made only partial disclosure under the ODF. The Appellant says that this was because he acted on his accountant's advice, and because he fully expected that HMRC would contact him in due course to ascertain the full extent of his undeclared tax liabilities. The Tribunal has already found that it does not accept that this is the case (see paragraphs 110-113 above).

123. By a letter to the Appellant's accountants dated 9 April 2008, the Appellant was advised that HMRC were now undertaking a full review of his tax affairs. In the course of this review, the Appellant ultimately made full disclosure in his Disclosure Report.

124. If events from 9 April 2008 were considered in isolation, it might be said that this was a case of "full disclosure on challenge", for which the maximum abatement of 20% could be appropriate.

125. However, the Tribunal does not consider that events from 9 April 2008 can be considered in isolation. The HMRC review of the Appellant's tax affairs was

prompted by his ODF disclosure. The Tribunal has found that the Appellant acted deliberately in making only partial disclosure in the ODF disclosure. The Tribunal has not accepted the Appellant's claim that he expected HMRC would inevitably respond by making a full enquiry into his tax affairs. The Tribunal is satisfied that the Appellant hoped that by making partial disclosure under the ODF, that would be an end to the matter (see paragraph 112 above).

126. In all the circumstances, the Tribunal finds that abatement for disclosure of 15% is appropriate.

Consideration of abatement: Co-operation

127. Paragraph 6075 of the HMRC Enquiry Manual provides in respect of abatement for disclosure amongst other matters as follows:

> The abatement you give should reflect the extent to which the taxpayer has
>
> - been prepared to co-operate throughout the enquiry, and
> - thus help bring it to a speedy and accurate conclusion.
>
> The time taken to reach a settlement, in so far as it has been influenced by the actions of the taxpayer or his agent, will therefore be the starting point for your consideration of abatement.
>
> It should be recognised that
>
> - it will inevitably take longer to settle a taxpayer's affairs where they are more than ordinarily complicated, and
> - the length of the enquiry period is often influenced as much by the enquiry officer as by the taxpayer.
>
> It is not practical to lay down any fixed time limit to govern abatement. Age, health, absence or general complexity may have to be taken into account.
>
> You should compare
>
> - the time that could have been taken and that which has actually elapsed
> - the co-operation which might have been expected and that which has been given.
>
> Against this background, you should bear in mind the presence in the case (or the absence from it) of the following features.
>
> - General delay, prevarication and procrastination.
> - Concealment of assets, piecemeal disclosures, and truthfulness.
> - Willingness to attend meetings.
> - Number of occasions formal information powers used.
> - Necessity for making discovery assessments or jeopardy amendments or closure notices.

> - Persistence in uncorroborated stories of gifts, cash hoards, betting wins etc.
> - Necessity to have the liabilities determined by the tribunal.
> - Irregularities continuing during the course of the enquiry.
> - Payments on account.
>
> A genuine disagreement over the interpretation of a set of facts or the statute is not a lack of co-operation. Neither is an appeal for assistance from a third party, including the local MP or seeking a closure notice.
>
> However a different view would be taken if there is a deliberate policy of obstruction, accompanied by clear evidence of attempts to mislead those authorities as well as HMRC.

128. The HMRC case in relation to co-operation is that after the Appellant's initial ODF disclosure in November 2007, it took more than two years from for him to provide full disclosure of his Jersey assets during the COP 9 investigation meeting in February 2010. The difficulty with this submission is that Officer McNaughton accepted in cross-examination that at the February 2010 meeting she obtained what she would have expected to obtain from the Appellant by that stage, and that it would still have been possible at that stage for the Appellant to have obtained full abatement for cooperation.

129. HMRC also accept that the Appellant subsequently made full disclosure in his Disclosure Report, which HMRC accepted. HMRC accept that the Appellant was not required to produce a disclosure report, which he did at some considerable expense to himself.

130. HMRC contend that there were delays in the production of the disclosure report. At the 12 February 2010 scoping meeting it was envisaged that the disclosure report would be provided by 31 August 2010. Ultimately, it was provided only on 14 December 2010. However, the Tribunal is not persuaded on the evidence that the delay in producing the Disclosure Report, which was only a delay of two and a half months, was due to lack of cooperation by the Appellant or his accountants.

131. Under the abatement policy, payments on account are also a matter of relevance. The Appellant made a payment under the ODF £789,241 on 23 November 2007. At the 11 February 2010 meeting, he was advised by HMRC that a payment on account would impact on the abatement of penalties. The Appellant subsequently made a payment on account of £25,000 by cheque in June 2010 (which was resent in August 2010 when the first cheque was lost), and a further payment on account of £10,000 in November 2010. However, the payments on account of £35,000 in 2010 were a very small fraction of the additional duties subsequently disclosed in the Disclosure Report. The Appellant's case is that he was unable to make further payments on account as his assets were tied up in the property market and were not able to be sold quickly due to the economy. HMRC do not accept that the Appellant was unable to pay, and argues that even if this was true, this would not prevent the failure to make greater payments being taken into account in assessing the penalty.

132. On this issue, the Tribunal accepts the HMRC argument. The additional tax liability of the Appellant that was established through the Disclosure Report was a very significant amount. The vast majority of this amount remained unpaid, even at the time that the Disclosure Report was provided, which was three years after the ODF disclosure and over two and a half years after the Appellant was advised on 9 April 2008 that HMRC was undertaking a full review of his tax affairs. Had the Appellant provided a much more substantial payment on account at the very outset, he would no doubt have expected this to have been reflected in the amount of abatement for co-operation. The converse of this is that he cannot expect full abatement for co-operation when such a significant amount remained outstanding for such a long period, even if the Appellant could not be blamed for delays in the production of the Disclosure Report itself. As a matter of general principle, the Tribunal does not consider that a person who is financially unable to make a payment on account should be given the same level abatement as a person who has made a substantial payment on account.

133. The Tribunal therefore considers that although the Appellant should be given significant abatement for cooperation, this is still not a case where the Appellant can be given maximum abatement for co-operation.

134. In the circumstances, the Tribunal finds that abatement for co-operation of 30% is appropriate.

Consideration of abatement: Seriousness

135. Paragraph 6080 of the HMRC Enquiry Manual provides that abatement in respect of the seriousness of the offence requires an appraisal of all of the circumstances that have resulted in a loss of tax under the headings "size" and "gravity".

136. As to "size", this paragraph states:

> '**Size**' will be both absolute and relative in any case. The offence of a well-to-do trader who extracts £10,000 a year, representing only a relatively small proportion of the true profits of the business, is serious because of the magnitude of the omissions. That of a taxpayer of more modest means, whose omissions are considerably less but amount to as much as a third or a half of his true profits, is also serious.

137. In the present case, the tax difference was some £1.7 million. The Tribunal finds that this case falls at the top end of the scale of seriousness in terms of size.

138. As to "gravity", this paragraph states:

> '**Gravity**' means, broadly speaking the degree of culpability, ranging from a minor degree of negligence to a case of serious fraud with a variety of intermediate steps.

139. The paragraph goes on to state that the abatement in cases in which fraud cannot be proved should not normally be less than 15 percent, and that in cases where fraud

can be established, an abatement not normally exceeding 15 percent should be given. The paragraphs states that in cases of serious fraud, abatement will often be considerably below the 15 percent figure. It states that in any case, it should be rare for the full abatement of 40 percent to be given, although there may be the exceptional case. As such an exceptional case, the example is given of omissions at a time when the taxpayer was aged or infirm.

140. The Appellant contends, in relation to the issue of whether he acted fraudulently rather than negligently at any or all material times, that the burden of proof is on HMRC to establish fraud. The Appellant contends that therefore no inference can be drawn from his failure to call witnesses to establish that he did not act fraudulently. The Tribunal accepts that both of these propositions are correct. However, the Tribunal also finds that HMRC, in order to discharge their burden, are not necessarily required to adduce positive and direct evidence of fraud on the part of the Appellant. The Tribunal is able to make a finding of fraud by drawing inferences from the evidence as a whole, provided those inferences are capable of sustaining such a finding to the required standard of proof (see, eg, *Kendricks Planning Ltd v Revenue & Customs* [2014] UKFTT 767 (TC) at [63]-[65]).

141. In the present case, the Appellant admitted in cross-examination that he knew that he had undisclosed tax liabilities in relation to funds in his Jersey account by about 1998. He accepted that he knew this at the time of the October 2000 settlement referred to in paragraph 47 above. In connection with that matter, he signed an Inland Revenue statement of personal assets and liabilities and business interests. That form clearly stated on page 1 that the statement should include "all assets, wherever in the world they are held", and that "False statements can result in prosecution". At the end of the form, the Appellant signed a certificate stating that "I have read the notes on page 1 and certify that to the best of my knowledge and belief this is a complete and accurate statement of my assets and liabilities, and business interests". However, the form did not include the Appellant's Jersey account.

142. The explanation given for this by the Appellant in his witness statement is set out at paragraph 47 above. The Tribunal finds that the Appellant gives two contradictory explanations. On the one hand he says that he considered this October 2000 matter to be a minor matter to which he gave little attention, and that he did not realise that there was a statement requiring disclosure of all his assets wherever in the world they were held. On the other hand he says that he realised that the consequences of declaring the offshore accounts in October 2000 could have been disastrous, and that he therefore wanted to wait for an HMRC amnesty rather than declare them in connection with the HMRC enquiry in October 2000.

143. Having regard to the evidence as a whole, including the Appellant's clear evidence that he was aware at the time that he had undeclared tax liabilities in relation to his offshore business, and making allowance for the possible effects of the Appellant's health at the time of making his witness statement, the Tribunal is quite satisfied that at the time that he signed the October 2000 document, he made the knowing and deliberate decision not to mention his offshore assets. The Tribunal is equally satisfied that this was with the deliberate intention of preventing HMRC from

gaining knowledge of his undeclared tax liabilities. The Tribunal finds that his conduct in this period was fraudulent, rather than negligent. The Appellant accepted in argument that conduct would be fraudulent for purposes of the abatement policy if the Appellant realised that what he was doing was dishonest according to the ordinary standards of reasonable and honest people (referring to *R v Ghosh* [1982] 1 QB 1053).

144. The Tribunal also notes that in the years after 1998 to which this appeal relates, despite the fact that the Appellant now knew that his offshore earnings were subject to UK tax, he continued to fail to disclose offshore tax liabilities in his tax returns. The Appellant argues that this was "partly driven by fear of the consequences of his earlier mistaken view". The Tribunal considers that even if this were true, it would not be material. If a person deliberately and knowingly omits to declare a tax liability in a tax return, that conduct is no less dishonest as a result of the fact that it is intended to cover up a past wrongdoing, even if the past wrongdoing was not dishonest. The Tribunal finds that even on his own account, the Appellant consistently acted fraudulently in failing to declare significant tax liabilities.

145. The Tribunal also recalls that in April 2007, not long before the Appellant's ODF disclosure, the Appellant was trying to move money around to prevent HMRC from seeing it (see paragraphs 66 and 121 above). The Tribunal finds that this was also dishonest conduct.

146. The Tribunal finds that it must take this dishonesty into account as one consideration when assessing the Appellant's evidence that prior to 1998, he was not aware that his offshore earnings were liable to UK tax.

147. The Tribunal notes that taxpayers are under a general obligation to be aware of their tax obligations. It must have been evident to the Appellant that all of his business activities could have potential tax implications in the UK, and that he needed to obtain appropriate professional advice in relation to all of those activities if he himself lacked the necessary expertise or time to devote to the matter. The Appellant's claim that he was naïve and lacked any knowledge of tax matters, and did not employ or engage the services of anyone who had the necessary knowledge, even if true, would amount to serious negligence on the part of the Appellant. However, on its consideration of the evidence as a whole, and having regard to the matters above, the Tribunal does not accept the Appellant's account. The Tribunal is satisfied on a balance of probability that from the outset, the Appellant was aware that he had significant tax liabilities in connection with his offshore business and accounts, and that he deliberately and dishonestly failed to declare these in his tax returns.

148. The Tribunal has taken into account the evidence of the Appellant's health. However, there is no suggestion that he was suffering health problems when the fraudulent conduct began, or for instance, when he signed the October 2000 declaration.

149. The Appellant disputes that this is the most serious category of fraud, "given the simplicity of what was done (cash was simply diverted to offshore accounts)". The Appellant argues that "There was a lack of co-ordination with other parties and a lack

of other more detailed falsifications which might be expected to be apparent in more serious, less opportunistic frauds". The Tribunal has given what weight it can to that submission. The Tribunal accepts that no matter how serious a case of fraud may be, it will always be possible to imagine an even more serious case. However, the Tribunal does not accept that this means that there can never be 0% abatement on the grounds of seriousness. There must be a threshold of cases beyond which any abatement for seriousness is no longer appropriate, notwithstanding that there might be other cases that are even more serious still. The question is whether this case reaches that threshold.

150. Having regard to all of the circumstances as a whole, the Tribunal considers that this case is very near that threshold, but does not quite meet it. Abatement of 5% for seriousness is appropriate.

Conclusion

151. For the reasons above, the Tribunal finds that there has been no error in the calculation of the tax difference. The Tribunal finds that the appropriate abatement is 50% (15% for disclosure, 30% for co-operation, and 5% for seriousness).

152. The appeal is therefore dismissed.

153. 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.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 22 APRIL 2016