



TC06616

Appeal number: TC/2015/07295

INCOME TAX – Self Assessment – tax fraud – COP9 investigation procedure – closure notices and discovery assessments – extension of time-limits to 20 years – ss. 9A, 28A, 29, 36, 50 of TMA – penalty determinations and assessments – s 95 TMA; Sch 24 FA 2007; Sch 55 FA 2009 – onus of proof as regards competence and time limit issues – onus of proof concerning quantum – whether assessments stand good; yes – penalty determinations and assessments – whether ‘negligent’ and ‘deliberate’; yes – whether penalty reduction for disclosure sufficient; yes – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DENIS MADDEN

Appellant

- and -

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

**TRIBUNAL: JUDGE HEIDI POON
MR JOHN ADRAIN**

Sitting in public at the Royal Courts of Justice, Belfast on 6 October 2017

Mr Neil Manley, of McNamee McDonnell Solicitors, for the Appellant

Mrs Kate Murphy, HMRC Solicitor’s Office and Legal Service, for the Respondents

DECISION

Introduction

1. Mr Denis Madden appeals against the income tax and penalty assessments in relation to the eleven years from 2003-04 to 2013-14. The assessments were raised following HMRC's investigation into Mr Madden's tax affairs.
2. The investigation was conducted in accordance with HMRC's Fraud Code of Practice ('COP9') on the basis that tax fraud was at issue. Under the COP9 procedure, HMRC are entitled to investigate the affairs of the taxpayer up to 20 years prior to the year of investigation enquiry.

Preliminary matter

3. A large volume of documents was provided to HMRC two weeks before the scheduled hearing. This fact was notified to the Tribunal on 27 September 2017 by Mrs Murphy as HMRC litigator in these proceedings when she confirmed that HMRC intended to proceed with the hearing scheduled for Friday 6 October 2017, notwithstanding the late production of the large volume of documents supposedly in relation to the witness statement of Mr Boyle, the accountant acting for Mr Madden.
4. A 'Supplementary Bundle of Documents' in relation to the late production of these documents was provided by HMRC for the hearing, and includes the following communications between the parties:
 - (1) By email dated 22 September 2017, Mr Fearghal Gorman from Mr Boyle's office contacted HMRC Officer Heatley as follows: 'In relation to your letter dated 18 October 2016, there are a substantial number of files in relation to the case, which we are unable to photocopy due to the sheer volume.' (HMRC's letter of 18 October 2016 was their response to the contents of Mr Boyle's witness statement.) No explanation was given as to the long delay in supplying the documents.
 - (2) On 27 September 2017, Officer Heatley as the Decision Maker, telephoned Mr Gorman to go through the details of the information made available; HMRC's note of the call of four pages long is included.
 - (3) By email on 27 September 2017, Officer Heatley confirmed the arrangement for the uplift of the records. She also detailed her request of information additional to the boxed records (as discussed with Mr Gorman) to be forwarded by email, including the bank reconciliations which Mr Gorman indicated as used in the preparation of the financial accounts.
 - (4) On 29 September 2017, Officer Heatley wrote to Mr Gorman, attaching a schedule summarising the records collected with her brief observations thereof, and requested again the bank reconciliations.
 - (5) On 4 October 2017, Office Heatley confirmed receipt of: (a) 'the bank analysis for some of Mr Madden's bank accounts for the years 05/04/09 – 05/04/14, (b) 'sales analysis of MD Fuels taken from the VAT records for the years 31/10/13 and 31/10/14', and (c) 'fixed asset register for corresponding periods'.
5. HMRC's position as respects the production of documents in October 2017 was related to the agent by Officer Heatley's email of 4 October 2017, which states:

‘... the records that you have now received (ie domestic sales invoices, bank statements and credit card statements) it would be neither reasonable nor realistic to collect and review those records in addition to the 8 boxes of records provided at the end of last week prior to the Tribunal hearing on Friday.’

6. At the hearing, Officer Heatley described the majority of the boxed records as purchase invoices and bank statements since August 2016, which therefore do not concern the relevant periods in relation to the matters under appeal.

7. Procedurally, the appellant had not made an application to postpone the hearing due to the late production of these boxed records. There was no application either from the appellant for the new information to be admitted *out of time* for these proceedings, nor did the appellant oppose HMRC’s wish to proceed with the hearing.

8. The Tribunal therefore made no decision in respect of these boxed records made available to HMRC on 22 September 2017. The hearing proceeded as scheduled based on the documents made available to the Tribunal, which included the supplementary bundle of documents recording the communications between the parties from 22 September 2017 to 4 October 2017.

Matters under appeal

9. The assessments and notices under appeal were all issued on 21 July 2015, and are as follows.

| Year | Total assessable from trades | Rental income | Revised tax liability | Decision appealed |
|-------------|-------------------------------------|----------------------|------------------------------|--------------------------|
| 2003-04 | £28,380 | £0 | £8,185.20 | S29 TMA assessment |
| 2004-05 | £25,504 | £0 | £7,491.18 | S29 TMA assessment |
| 2005-06 | £36,688 | £0 | £11,643.09 | S29 TMA assessment |
| 2006-07 | £47,399 | £0 | £15,731.83 | S29 TMA assessment |
| 2007-08 | £63,017 | £0 | £22,527.37 | S29 TMA assessment |
| 2008-09 | £62,257 | £0 | £18,519.37 | S28ATMA closure notice |
| 2009-10 | £49,671 | £0 | £12,909.16 | S28ATMA closure notice |
| 2010-11 | £44,254 | £0 | £10,688.19 | S28ATMA closure notice |
| 2011-12 | £45,934 | £0 | £11,625.28 | S28ATMA closure notice |
| 2012-13 | £87,819 | £4,500 | £29,376.82 | S29 TMA assessment |
| 2013-14 | £30,562 | £6,000 | £4,972.13 | S29 TMA assessment |

10. On 21 July 2015, a penalty determination notice was issued in relation to the tax years 2003-04 to 2007-08 under the old penalty regime in accordance with s 95(2) of TMA. The penalty was calculated at 65% on the aggregate loss of tax for the five tax years, which was based on the difference between the s 29 assessments and any tax

and Class IV National Insurance Contributions that had been paid for the said years before the revised liabilities.

11. On 21 July 2015, a penalty assessment notice was also issued in relation to the tax years 2008-09 to 2011-12 under the Sch 24 FA 2007 penalty regime, which came into force from 6 April 2008. The penalties were assessed at 61.25% of the potential lost revenue ('PLR'), which was calculated with reference to the closure notices and s 29 assessments. No penalty was imposed for the year 2013-14.

12. On 5 September 2015, a penalty assessment under Sch 55 FA 2009 was issued for failure to file a return for 2012-13. The penalty assessment has a tax-g geared element at 61.25% of the tax liability for the year as the failure to file a return continues after the end of the period of 12 months beginning with the penalty date.

13. The penalty determinations and assessments under appeal are as follows.

| Year | Applicable Legislation | Amount | Decision appealed |
|--------------------|-------------------------------|---------------|--------------------------|
| 2003-04 to 2007-08 | s 95 (1)(a) TMA 1970 | £42,624 | Penalty determination |
| 2008-09 to 2011-12 | Sch 24 FA 2007 | £32,916.96 | Penalty assessment |
| 2012-13 | s 55 FA 2009 | £16,115.30 | Penalty assessment |

14. On 23 December 2015, Mr Gerald Boyle of G P Boyle & Co ('GPB'), the accountant acting for Mr Madden, appealed against all discovery assessments, penalty determinations and penalty assessments upheld by the review conclusion letter dated 25 November 2015. The Notice of Appeal states the sum in dispute as £244,982.77.

Evidence

15. The day of the hearing was taken up principally with the evidence from the witnesses. The onus of proof for the discovery assessments and for all the penalties imposed is on the respondents, whose witness was called before the appellant's.

The respondents' evidence

16. Mrs Murphy led the evidence of Christine Heatley, who was the officer in charge of the COP9 investigation into Mr Madden's tax affairs. Officer Heatley's witness statement was dated 31 May 2016, and was adopted as the evidence in chief, and she was cross-examined by Mr Manley.

17. We find Officer Heatley to be a reliable and credible witness. With clarity and precision, she explained the methodology and rationale behind the assessments. She had an impressive grasp of the details underpinning her assessments, and was fully conversant with the facts she had relied on. Conscious of the limits of the assessments being based on best estimates, she had made sensible concessions where practical. Her command of the COP9 procedure and the implications of Mr Madden's response at each stage could not be faulted, and her detailed knowledge of the documents involved had enabled her to answer any questions, whether from the Tribunal or from Mr Manley, with alacrity and accuracy.

The appellant's evidence

18. Mr Madden's witness statement was dated 17 August 2016. The brief statement contains 11 short paragraphs only. The first paragraph states that he has been self-employed since 1995; 'have been engaged in the business of MD Fuels' from 2000; and of Modern Tyres from 2002.

19. The other 10 paragraphs all start with 'I confirm', followed by the various capital expenditure in relevant periods. Some of the confirmed figures concurred with those disclosed in Mr Madden's first and only meeting with HMRC in October 2013; other figures are omitted or revised downwards. These amounts so confirmed by Mr Madden are not supported or substantiated by any external or documentary evidence.

20. Mr Madden and his legal representative must know, or ought to have, known that some of the amounts stated in Mr Madden's witness statement differ from those he previously disclosed to HMRC. It is reasonable to conclude that HMRC would not have accepted the amounts in his witness statement without further questions. It is reasonable to assume therefore that HMRC would wish to cross-examine Mr Madden for the inconsistencies between the amounts 'disclosed' and 'confirmed'.

21. It seemed that Mr Madden's non-attendance was somewhat expected by the parties, given that his engagement with the COP9 and the appeal processes had been almost completely via Mr Boyle as his accountant and Mr McNamee as his solicitor ever since the October 2013 meeting.

22. The Tribunal considers the weight that can be accorded to Mr Madden's witness statement given his non-attendance for cross-examination. We apply the principles derived from the relevant line of authority by Lord Justice Brooke in the decision of *Wisniewski v Central Manchester Health Authority* [1998] EWCA Civ 596:

'(1) In certain circumstances, a court may be able to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.'

23. Where Mr Madden's witness statement purports to introduce new figures to displace those figures, formerly disclosed by himself, and adopted in HMRC's assessments, these figures are material to the issues in the appellant's action in front of us. Mr Madden therefore has a case to answer on the issue of the authenticity of his figures in the witness statement, which are not supported by any documentary records or third-party information. The inferences we draw from his absence to be cross-

examined are adverse to his action: his absence weakens the new figures which he sought to introduce.

Mr Boyle's evidence

24. For the appellant, Mr Boyle filed a witness statement with appendices that contain unaudited financial accounts for MD Fuels and Modern Tyre Services.

25. Mr Boyle is a chartered accountant (ICAEW), and he claimed in his statement to have been in practice for 20 years, and that he had 'extensive experience in the field of forensic accounting and taxation matters'. He acted for Mr Madden from March 2012 in relation to his accounting and tax affairs after the previous agent, a Mr Marley passed away.

26. Mr Boyle's witness statement was dated 17 August 2016. The first appended set of accounts was for Mr Madden, trading as Madden Fuels and M&D Fuels Ltd (henceforth collectively as 'MD Fuels'), and covered the accounting periods from the year ended 30 September 2008 to the year ended 30 September 2012. The second set of accounts was for the company controlled by Mr Madden, known as Modern Tyres Services Ltd (henceforth 'Modern Tyres') and covered the accounting year ended 5 April 2009 through to the year ended 5 April 2014.

27. As the legal representative for the appellant in these proceedings, McNamee McDonnell Solicitors ('McNamee') applied to the Tribunal to have Mr Boyle's witness statement admitted as 'expert evidence'. HMRC opposed the application.

28. By letter dated 18 October 2016, Officer Heatley wrote to McNamee to request documentary records in respect of Mr Boyle's witness statement and the appended accounts in order that she could 'consider the accuracy of the prepared accounts'. (This was the letter referred to by Mr Gorman in relation to the production of the boxed records almost a year later in September 2017.) There was no response to the request at the time.

29. A hearing took place in front of Judge Staker on 31 March 2017 for the parties to make representations on the application to admit Mr Boyle's statement as expert evidence. On 10 April 2017, Judge Staker directed as follows:

- '1. The witness statement of Mr G Boyle is admitted.
2. Mr Boyle may give oral evidence at the hearing as to matters in his witness statement.
3. My Boyle may give evidence as to his opinions on matters within his expertise as an accountant, without prejudice to the right of the Respondents to cross-examine and of the Tribunal to reach its conclusions.'

30. The wording of direction [3] is meticulous and precise. The direction cannot be construed, in any manner or form, as having admitted Mr Boyle's witness statement and appendices as 'expert opinion evidence'.

31. Nevertheless, the appellant's case has been staked on the assumption that Mr Boyle's evidence is that of an expert witness. The standard 'Expert's Declaration' is included in Mr Boyle's witness statement furnished to the Tribunal, and states, *inter alia*, that he understood his primary duty is to assist the court and this takes priority

over any duties he may owe to the paying party, and that he endeavours to be accurate and independent in the opinions expressed to the court. At the hearing, Mr Manley continued to refer to Mr Boyle as the expert witness.

32. The Tribunal stated at the hearing that it would not treat Mr Boyle's evidence as expert opinion evidence for the following reasons. First and foremost, Judge Staker, who had heard the parties' representations, did not give directions for the evidence to be admitted as expert opinion evidence. Secondly, the Tribunal has to be satisfied that an expert witness can give unbiased opinions. We are not satisfied that Mr Boyle, who has been the appellant's adviser from the start of the investigation, can give opinions unbiased by partisan considerations. Thirdly, expert evidence can only be given if it concerns an area where competence to form an opinion can only be held by an expert. This Tribunal is a specialist tribunal with expertise in tax, and the panel member is a chartered accountant. The opinions expressed in Mr Boyle's report are not in areas that require an expertise that the panel lacks.

33. In these proceedings therefore, Mr Boyle was a witness who gave evidence of fact from which the Tribunal, as the judicial body, forms its own opinion of those facts. Any opinions expressed by Mr Boyle in his report or in his oral evidence have been duly considered as submissions.

The legislative framework

34. The statutory framework in which this appeal is to be determined is not in dispute. With the exception of the penalty assessments for 2008-09 to 2011-12 being under Sch 24 to FA 2007, and for 2012-13 being under Sch 55 FA 2009, the relevant provisions are all under the Taxes Management Act 1970 ('TMA').

35. Section 9A TMA gives HMRC the power to enquire into a taxpayer's SA returns, and the procedure for bringing an enquiry to a closure is governed by s 28A.

36. Section 12B TMA requires a taxpayer such as the appellant to keep and preserve all such records as may be requisite for the purpose of enabling him to deliver a correct and complete return for the year or period of assessment.

37. Section 28A TMA provides for the completion of an enquiry into a personal return by way of a closure notice.

38. Section 29 TMA provides for discovery assessments where the requisite conditions have been met. The first condition under s 29(4) provides that the loss of tax has been brought about 'carelessly or deliberately' by the taxpayer or his agent; this was previously stated as 'attributable to fraudulent or negligent conduct'¹. The second condition under s 29(5) provides for a 'discovery' to be made which allows a s 29 assessment to be raised, and the meaning of 'discovery' is referential to case law.

39. Section 34 provides for the ordinary time limit for an assessment under s 29 to be made within 4 years after the end of the year of assessment to which it relates.

40. Section 36 provides for different time limits for a s 29 assessment to be raised where the loss of tax has been brought about carelessly or deliberately. The time limit is 6 years after the end of the year of assessment to which it relates if the loss of tax

¹ The modification is by virtue of para 3 Sch 39 FA 2008.

has been brought about *carelessly*, and is extended to 20 years in a case where the loss of tax has been brought about *deliberately*.

41. Section 50 provides for the Tribunal's appellate jurisdiction. On an appeal to the Tribunal, if the Tribunal decides that the appellant is overcharged by an assessment, 'the assessment is to be reduced accordingly, but otherwise the assessment or statement shall stand good' (s 50(6)). The Tribunal is given the power to vary the assessment by increasing or reducing the quantum if it decides that the appellant has been undercharged or overcharged (ss 50 (7) and (8)).

42. Section 95 governs the penalties imposable in relation to the tax years up to 5 April 2008 inclusive. It provides that 'where a person fraudulently or negligently delivers any incorrect return or accounts' for purposes of assessing his tax liabilities, the penalty is the difference in the amount of tax that would have been payable had the return been correct and the amount that has been paid, subject to mitigation.

43. The penalty regime governing the tax years from 6 April 2008 onwards is under Sch 24 to FA 2007. The new regime provides for the error penalty to be calculated as a percentage of the potential lost revenue, which is the difference of the tax payable (had the return been correct) and paid (per the incorrect return submitted). The penalty percentage is determined according to the relevant category of behaviour, with 35% for 'careless', 70% for 'deliberate but not concealed', and 100% for 'deliberate and concealed'. The penalty percentage can be reduced subject to disclosure, and factors to be taken into account concern (a) whether the disclosure is 'prompted' or 'unprompted', and (b) 'quality' of disclosure in respect of 'timing, nature and extent'.

44. Schedule 55 FA 2009 provides for fixed and daily penalties to be imposed where there is a failure to submit a return by the due date. Paragraph 6 provides for a tax-geared element of the penalty charge where 'by failing to make the return, a person deliberately withholds information which would enable or assist HMRC to assess the person's liability to tax' as determined under sub-paragraphs (3) and (4).

Factual background

Section 9A TMA enquiries

45. On 31 January 2013, Mr Madden submitted his Self-Assessment returns for the four years from 2008-09 to 2011-12 (inclusive) to HMRC. The returns did not record any income as received, and were marked as provisional.

46. On 4 September 2013, HMRC opened enquiries into each of the four years under s 9A TMA.

Meeting on 1 October 2013

47. On 1 October 2013, Officers McQuarrie-Henry and Emery met with Mr Madden and Mr Boyle, during which Mr Madden made disclosures which were recorded in the meeting notes. A copy of the meeting notes was sent to Mr Madden.

48. Excerpts in respect of the use of business accounts for personal expenditure in relation to his pilot's licence and aeroplane acquired are as follows:

[17]. ... He uses his business accounts as his personal account.

[20] DM [Denis Madden] has had no family holidays in the past 6 years. He has travelled to Florida bi-annually to maintain his pilot's licence. He obtained this licence approximately 10 years ago. He estimated that this would cost approximately £20k to obtain today. DM estimated that the Florida trips would cost approximately £3-500 for flights and \$40-50 USD per night for three nights' accommodation plus spending money. DM tends to fly from Dublin to the US.

[22] DM acquired (a mid 1970s) Cessna aeroplane for approx. £45k four or five years ago off a concrete company in Derry. His paid for this by cheque from his business account.'

49. Apart from his pilot's licence obtained around 2003, Mr Madden also advised during the October 2013 meeting that he hoped to obtain his helicopter licence soon, and this was confirmed by the agent in the meeting in October 2014.

50. Disclosure of funds which were applied to acquire properties included: (a) a property at Pier Rampart from his neighbour purchased outright with funds from his business account; (b) Land at Derrytagh; (c) The Beeches for approximately £65,000 about 2 years ago from own bank account. Assets were acquired without any borrowings or gifts.

51. In respect of Mr Madden's business entities and accounts records, the following aspects were noted in the October 2013 Meeting Note:

(1) In addition to recently incorporated companies, HMRC had records of 4 other companies of which Mr Madden had been involved, three of which had been struck off; Modern Tyres (Carnesure) Ltd was still trading.

(2) One of the three companies struck off, M&D Fuel Ltd was incorporated on 1 July 2008 and struck off on 27 August 2010; it was set up specifically to sell to one section of the community, while Madden Fuels catered for the other section.

(3) Accounts for the trading entities (M&D Fuel Ltd and Modern Tyres) were still to be prepared, together with the sole trade element known as Madden Fuels; that Mr Boyle did not know the starting position.

(4) The business records were still under review and Mr Boyle was unable to comment on whether they were complete.

(5) That PAYE and NIC liabilities for up to four employees could not yet be quantified.

52. In relation to Mr Madden's sole-trade business operation, the Meeting Note records:

(1) Mr Madden's fuel business operated from Pier Rampart.

(2) A second site at Derrynose in partnership with a Tom McNally commenced about 19 months ago from premises owned by Mr McNally.

(3) One tanker operated on each site, with fuel brought from the docks.

(4) Mr Madden oversaw the record keeping and banking for both sites and was the sole signatory on the bank accounts.

(5) He reconciled the cash and did a stock take every day; there was a till at each site; payment for orders by card or cash on delivery; purchases at the pump by cash and around 2,000 to 3,000 Euro could be received per day, and

doubled in busier periods; Euro exchanged before lodging into business bank account

53. In relation to Modern Tyres Ltd business operation, the Meeting Note states:
- (1) Mr Madden confirmed that he owned the business of Modern Tyres, which operated from premises rented at £400 pm.
 - (2) The business was VAT registered from March 2002 so was trading for a minimum of 11 years when the enquiry opened.
 - (3) There was no trace of any returns having been made for the business.
 - (4) Tyres were also sold from the Pier Rampart Fuel site.
 - (5) No till was kept, and the main record was a cash book. The business took card and cash payments.

Investigation under COP9 procedure

54. By letter dated 29 April 2014, Officer Heatley wrote to advise Mr Madden that the enquiries would follow the Code of Practice 9 (2012) procedure ('COP9'). The introductory paragraphs state as follows:

'HMRC have information that gives us reason to suspect that you have committed tax fraud. ...

My investigation will cover all of your tax affairs. The Code of Practice 9 enclosed governs how HMRC investigate suspected fraud...'

55. The Contractual Disclosure Facility ('the CDF') was offered to Mr Madden:

'As an HMRC authorised officer, I am able to offer you the opportunity to make a full disclosure of any tax fraud you have committed under a contractual arrangement. Under this arrangement, HMRC will contractually undertake not to commence a criminal investigation with a view to prosecution, for any tax fraud disclosed under the contract.'

56. Enclosed with the letter was the procedure notes on COP9, and the information on the CDF offered, of which excerpts are as follows:

'This offer is made to [Mr Denis Madden at residing address] only and is made strictly on the basis of the terms and conditions set out in the current edition of HMRC Code of Practice 9.

Most importantly, this offer is made in the expectation that at all stages throughout the CDF process your disclosures to HMRC will be full, open and honest and you will provide accurate, timely and complete information to the very best of your ability.'

In exchange, the Commissioners of HM Revenue and Customs will 'not commence, or continue with, any criminal investigation of you concerning offences which may be disclosed by your Outline or Final Disclosure, and which would, but for this Offer, be investigated with a view to your criminal prosecution.'

57. A copy of the CDF acceptance letter and denial letter, together with details of the CDF on the 'Frequently Asked Questions', and Factsheet 13 on 'Compliance Checks – Publishing details of deliberate defaulters' were also enclosed.

Acceptance of CPD and Outline Disclosure

58. By letter dated 26 June 2014, Mr Boyle as the agent for Mr Madden, submitted the Acceptance letter for CDF signed by Mr Madden on 24 June 2014 on his behalf.

59. The Acceptance is by way of a standard letter which has the force of a contract, and is rendered invalid if the wording is amended in any way. There is no amendment to the wording of the standard letter signed by Mr Madden, which reads as follows:

‘I accept your offer dated 29 April 2014 made under the Contractual Disclosure Facility.

I confirm I have read, understood, and agree to the terms and conditions set out in the Code of Practice 9.

I understand that the offer by HMRC is made in the expectation that at all stages throughout the CDF process my disclosures to HMRC will be full, open and honest and I will provide accurate, timely and complete information to the very best of my ability.’

60. Accompanying the Acceptance letter was the completed signed form of ‘Outline Disclosure’, which has the following standard wording:

‘As part of my Contractual Disclosure Facility undertaking, which I signed on [24 June 2014] I admit that I have deliberately brought about a loss of tax, through conduct which HMRC may suspect to be fraudulent. In outline – [...]’

The hand-written entries under the heading ‘Description of fraud’ are as follows:

‘Failure to submit returns of income

Failure to submit and operate PAYE

Details already disclosed in an HMRC interview dated 01/10/2013

Failure to submit rental returns’

As to the ‘Individuals and entities involved’, the hand-written entries are: ‘*Denis Madden [UTR]; MD Fuels – Lurgan; Modern Tyres Ltd – Portadown*’. The entry for ‘The period of time over which the fraud took place’ is ‘*2002 to date*’.

61. The significance of the Outline Disclosure is set out in Section 4 of the COP9 Procedural Note. It states that while it is not expected to contain precise detail, it ‘needs to be an honest description of the tax fraud you are disclosing, made in good faith and to the best of your recollection with the help of any documents which are readily available.’

62. By letter dated 27 June 2014, Officer Heatley wrote to Mr Madden to confirm receipt of the CDF Acceptance letter and enclosures, and confirmed that: ‘The validity of the Outline Disclosure does not indicate HMRC’s acceptance that the tax frauds disclosed are a full, complete and accurate disclosure’, and that the investigation would proceed with an opening meeting.

63. By email of the same date, Office Heatley advised Mr Boyle that the investigation under COP9 superseded the previous s 9A Enquiry, and that ‘all tax irregularities for the past 20 years will now be dealt with under CDF’; and that a meeting would be arranged to proceed with the investigation.

64. After three failed attempts to reach Mr Boyle by telephone to arrange a meeting, Officer Heatley wrote on 8 July 2014 to arrange a meeting for 13 August 2014, and stated that 'it is necessary for Mr Madden to attend'.

65. By letter dated 16 July 2014, Mr Boyle replied to relate that: 'Mr Madden feels that he has already attended one detailed interview with HRMC [on 1 October 2013] which should be sufficient for the purpose of [the] enquiry.'

Meeting on 21 October 2014

66. The opening meeting eventually took place on 21 October 2014. Officers Heatley and McConville met Mr Boyle at his office. Mr Madden did not attend.

67. The non-attendance of Mr Madden was discussed. Officer Heatley gave her reasons for asking Mr Madden to attend the meeting, which included: to confirm with Mr Madden that the disclosure was complete; to discuss the Outline Disclosure in more detail; to talk about personal and private expenditure including all bank accounts and credit cards operated and additional businesses; to discuss the commissioning of a disclosure report to assist with the quantification of the under-declaration over the years. She explained that Mr Madden's co-operation would be taken into account when assessing penalties, and asked if there were particular circumstances which prevented Mr Madden from attending.

68. Mr Boyle confirmed that there were no other reasons for non-attendance; that it was his understanding that Mr Madden did not wish to attend a meeting as he felt he had already made a full disclosure in the previous s 9A enquiry meeting.

69. Officer Heatley explained that Madden's attendance was important to the conduct of the COP9 investigation, such as Mr Madden would need to confirm that it was his Outline Disclosure; that if co-operation was withdrawn then HMRC might need to take over the investigation; that the COP9 procedure is just one step down from a criminal investigation.

70. Mr Boyle was given sight of the Outline Disclosure, which he confirmed was completed with his assistance; Mr Boyle confirmed his understanding of the items of disclosure as follows:

(1) For 'Failure to submit returns of income', it referred to income being omitted from Madden's SA returns from 2009 onwards and from Modern Tyres from 2002 onwards.

(2) For 'Failure to submit and operate PAYE', it related to all his businesses, namely: (a) fuel business as a sole trader, (b) fuel business as a company, (c) Modern Tyres.

(3) For 'Failure to submit rental returns', Boyle was unable to confirm which properties as there were a few of them; he acknowledged that there was undeclared rental for earlier periods.

71. The salient aspects of the meeting notes are as follows:

(1) Business entities: it was agreed that both MD Fuels and Modern Tyres should be assessed on Mr Madden as his sole trade rather than through a company.

(2) Period under investigation: HMRC's analysis of Madden's SA returns for all the years from 1997 and explained that it should be reviewed with Mr Madden to consider the accuracy of the returned figures for both income and expenses.

(3) SA return records: (a) for periods prior to 2002 Madden claimed that his income from MD Fuels had been correctly returned; (b) that no record of the contents of his SA returns prior to 2009 is held. HMRC queried how Madden can be sure that his income had been correctly returned prior to 2009 if he has not retained any record of what was returned; Boyle said he had no reason to doubt what Madden told him; that he was not the agent for the prior years.

(4) Potential VAT fraud: (a) HMRC schedules detailing VAT return figures for input and output entries for both business entities: 2002-03 to 2013-14 inclusive for Modern Tyres, and from 2005-06 to 2013-14 inclusive for MD Fuels; (b) schedules cover the VAT return periods to end on 30 September to tie in with Madden's SA accounting year ends; (c) it was 'a huge area of concern' for HMRC that no admission of VAT fraud was made in the Outline Disclosure given that in relation to the VAT return for October 2012, HMRC had identified 12 duplicated purchase invoices being claimed, resulting in an assessment for £35,000 for input VAT over-claimed; (d) consistently higher level of inputs in relation to outputs for a thriving business is not expected as the norm, and review required to confirm all expenses are allowable business expenses.

(5) PAYE: whether Madden had considered the PAYE position of all of his businesses covering the last 20 years; Boyle acknowledged that employee costs appeared to be understated from the analysis of his SA returns and undertook to discuss with Madden.

(6) Business records: (a) Boyle stated that a full set of business records exists for the last 4 to 5 years, but earlier periods limited as records not returned by the previous agent; (b) Heatley stated that it will be possible to obtain bank statements for the 20-year period; a bank mandate for completion so that HMRC may apply to the banks on Madden's behalf if necessary.

(7) Disclosure Report: whether Madden was to commission a report for the COP9 investigation; Boyle confirmed that Madden had appointed him to complete the report; Boyle had concerns over Madden's ability to fund a settlement with his restrictive ability to trade following refusal of his RDCO applications; Heatley suggested Madden to complete a statement of assets to reflect the current position. Seven copies of mandates and certificates relevant to the COP9 procedure were handed over.

72. In respect of progress with accounts preparation, Mr Boyle confirmed that:

(1) Accounts to October 2013 had been finalised for MD Fuels to enable reinstatement on the Companies Register but not for other years at the time.

(2) Accounts for Modern Tyres had been prepared for the years 2009 to 2013.

(3) Bank analysis on all personal accounts for 2011, 2012, and 2013 had been carried out, with bank statements held back to 2008.

(4) Records were held consisting of bank statements, cheque stubs, purchase invoices, sales invoices, expense receipts, credit/debit card rolls/ receipts, till rolls from fuel pumps.

73. HMRC concluded the meeting by emphasising the importance of Madden attending a meeting to progress with investigation within a specified time frame. Boyle confirmed that a full report would be possible by the end of April 2015 and the only issue to progress would be in obtaining bank statements for the earlier periods. A further meeting was agreed to take place before the end of November.

74. By letter dated 27 October 2014, Mr Madden and Mr Boyle were sent a copy of the full note of meeting which took place on 21 October 2014. Apart from the contents of the discussion during the meeting, the meeting note was accompanied by nine further pages of 'Information gained to date for the purpose of the report'. Officer Heatley was therefore making available the information HMRC had gathered so far for the 'Disclosure Report' to be provided by Mr Madden as part of his obligations under the COP9 procedure.

The VAT records

75. At the hearing HMRC produced two VAT schedules to the Tribunal when we questioned what was the basis for their concern for potential VAT fraud. The schedules summarise the sales and purchases as derived from the figures on the VAT returns submitted in the relevant quarters for each year to align with the respective accounting period ends of the two businesses.

76. For Modern Tyres, the sales and purchases from the VAT returned figures are:

| Tax Year | Period ended | Sales from Output | Purchases from Input | Difference (sales less Purchases) |
|-----------------|---------------------|--------------------------|-----------------------------|--|
| 2002-03 | 31/03/2003 | £122,589 | £156,518 | £33,929 (loss) |
| 2003-04 | 31/03/2004 | £135,900 | £116,659 | £19,241 |
| 2004-05 | 31/03/2005 | £109,513 | £86,514 | £22,999 |
| 2005-06 | 31/03/2006 | £134,358 | £98,449 | £35,909 |
| 2006-07 | 31/03/2007 | £221,978 | £169,443 | £52,535 |
| 2007-08 | 31/03/2008 | £191,235 | £130,115 | £61,120 |
| 2008-09 | 31/03/2009 | £215,693 | £167,785 | £47,908 |
| 2009-10 | 31/03/2010 | £209,873 | £170,430 | £39,443 |
| 2010-11 | 31/03/2011 | £141,658 | £115,572 | £26,086 |
| 2011-12 | 31/03/2012 | £128,017 | £96,170 | £31,847 |
| 2012-13 | 31/03/2013 | £85,257 | £4,859,502 | £14,438 |
| 2013-14 | 31/03/2014 | £83,254 Est | £64,613 Est | £18,641 Est |

77. For MD Fuels, the sales of the business included pump sales, bulk fuel sales and home heating fuel sales at the reduced VAT rate. The input VAT claim consistently exceeded the output VAT returned, resulting in a repayment situation as follows:–

| Tax Year | Period ended | Sales from Output | Purchases from Input | Difference (sales less Purchases) | VAT Repayments |
|-----------------|---------------------|--------------------------|-----------------------------|--|-----------------------|
| 2005-06 | 30/09/2005 | £204,302 | Not noted | SA return filed | Not noted |
| 2006-07 | 30/09/2006 | £315,683 | Not noted | SA return filed | Not noted |
| 2007-08 | 30/09/2007 | £1,474,279 | £1,537,248 | £62,969 | £93,234 |
| 2008-09 | 30/09/2008 | £2,946,547 | £2,950,667 | £4,120 | £167,638 |
| 2009-10 | 30/09/2009 | £2,871,881 | £2,924,743 | £52,862 | £97,588 |
| 2010-11 | 30/09/2010 | £3,296,923 | £3,320,267 | £23,344 | £193,533 |
| 2011-12 | 30/09/2011 | £3,416,303 | £3,292,977 | £123,326 | £155,283 |
| 2012-13 | 30/09/2012 | £4,649,895 | £4,859,502 | £209,607 | £247,014 |
| 2013-14 | 30/09/2013 | £6,349,039 | £6,401,787 | £52,748 | £505,669 |

Withdrawal from the CDF process

78. The next meeting for the COP9 investigation was eventually fixed for Monday 8 December 2014, but was cancelled by email from Mr Boyle on 7 December advising that he was unwell.

79. Officer Heatley emailed on 8 December to suggest alternative dates of meeting; phoned GPB's office on 10 December; no return call or reply to her communications.

80. On 19 December 2014, Officer Heatley wrote to Mr Madden to request some additional information and related the difficulty experienced in getting a response to arrange the next meeting, and asked Mr Madden to contact her to move matters on. The letter was copied to Mr Boyle on the same day.

81. On 29 January 2015, Officer Heatley wrote to Mr Madden, referring to her letters of 27 October and 19 December. As she had received no response, she deemed co-operation to have been withdrawn. She would now take over the investigation, and enclosed a Schedule 36 notice for compliance within the next 30 days, for those records held for accounts preparation as confirmed by Mr Boyle in the October 2014 meeting (see §71).

82. On 29 January 2015, Officer Heatley also wrote to Mr Boyle, asking for the accounts and analysis (see §72), which were confirmed to have been completed during the October 2014 meeting, to be forwarded to her by 4 March 2015, to include: (a) accounts for MD Fuels for the year ended October 2013; (b) accounts for Modern Tyres for the 5 years from 2009 to 2013 inclusive; (c) analysis of bank accounts for the years 2011-12 inclusive.

GP's letter and HMRC's response

83. On 16 February 2015, Boyle forwarded a letter from Madden's GP dated 17 December 2014, which referred to the 'immense stress over the past few years' from work and illness of his daughter, affecting his concentration, and that:

'In May 2014, due to events related to work he became increasingly more worried, anxious, depressed and his concentration deteriorated further.'

84. On 4 March 2015, Heatley telephoned Boyle to discuss the position; the call was not returned.

85. On 5 March 2015, Heatley wrote to Madden and Boyle to advise that having regard to his GP's letter, Madden would not be asked to meet with her to progress with the enquiry, but the information request under Sch 36 Notice remained in force, with the compliance date being extended to 19 March.

86. On 24 March 2015, a protective assessment for 1994-95 for tax and NIC in the sum of £17,453 was raised; Madden and Boyle advised of basis for the assessment.

87. On 24 March 2015, a Sch 36 Notice was served on Mr Boyle as a third party to provide, by 23 April, the same information as requested on the Notice to Mr Madden.

Discovery assessments and penalties

88. On 27 May 2015, Officer Heatley wrote to Mr Madden advising that since 29 April 2014 when she opened the investigation under COP9, and the Outline Disclosure received of 24 June 2014, there had only been the one meeting on 21 October 2014 with Mr Boyle. Since then, co-operation was withdrawn and the Sch 36 information requests had not been complied with. It was therefore her intention to raise discovery assessments based on information held, and the letter set out the methodology that would be adopted in raising the assessments (see below).

89. Mr Madden was invited to comment or provide any further information within 30 days of the date of the letter, after which the assessments would be raised.

90. By letter dated 7 July 2015, Officer Heatley wrote to Mr Madden to set out her intention to issue penalty determinations and assessments, and gave her explanations of the proposed penalty percentages. The s 95 TMA penalty percentage was set at 65%, while the Sch 24 penalty percentage was set at 61.25%.

91. For mitigation under Sch 24 penalty regime, Officer Heatley gave an overall 25% to the quality of disclosure (15% for Telling; 10% for Helping; 0% for Giving). The 25% mitigation was applied to the penalty range of 35% to 70% for 'deliberate but not concealed' behaviour that has caused the loss of tax, giving an overall reduction of 8.75% against the maximum 70%, to arrive at 61.25% as the percentage.

92. On 23 July 2015, the s 29 TMA assessment notices, the s 28 TMA closure notices, the penalty determinations under s 95(1)(a) TMA, and penalty assessments under Sch 24 FA 2007 for the years as detailed at §9 and §13, save for the adjustments the following review conclusion letter, were issued.

93. On 9 September 2015, a further penalty notice pursuant to Sch 55 FA 2009 in relation to 2012-13 was issued. The tax-g geared element of the Sch 55 penalty was set at 61.25% in line with the Sch 24 FA 2007 penalty.

Appeal to HMRC and review conclusion

94. By letter dated 11 September 2015, Mr Boyle appealed against all assessments and determinations issued on 23 July 2015 and requested an independent review. The late appeal was accepted.

95. By letter dated 14 September 2015, the Sch 55 penalty assessment was also appealed as 'excessive and not reflective of the true income and expenditure'.

96. On 21 October 2015, Officer Heatley wrote to Madden and Boyle acknowledging the appeals and confirming that all disputed assessments remained unchanged as no further information or documentation had been received in support of the appeal.

97. By letter dated 25 November 2015, the statutory review conclusion letter was issued. The review upheld the decisions as to all matters under appeal, and made the following adjustments:

(1) Assessment for 2012-13 for £30,856.78 reduced by £1,479.96 to take account of the liability that has been declared in the SA return for the year; revised assessment downwards to £29,376.82.

(2) Assessment for 2013-14 for £7,477.03 reduced by £2,504.90 to take account of the liability that has been declared in the SA return for the year; revised assessment downwards to £4,972.13.

(3) Sch 55 penalty to be adjusted to account for the automatic 12-month late filing penalty already raised by the Self-Assessment system.

Appeal to the Tribunal and review of Mr Boyle's witness statement

98. By notice dated 23 December 2015, the appeal was notified to the Tribunal.

99. Mr Boyle's witness statement with the appended sets of accounts were provided to HMRC by letter dated 17 August 2016, and were reviewed by Officer Heatley in preparation for the hearing.

100. By letter dated 18 October 2016, Officer Heatley requested sight of the accounting records to substantiate the figures included in Mr Boyle's sets of accounts. The two-page letter itemised the list of records required but was not responded to. This was the letter subsequently referred to on 22 September 2017, two weeks before the scheduled hearing, when HMRC were asked to upload eight boxes of records.

101. The lists of documents requested by Officer Heatley to review Mr Boyle's unaudited accounts appended to his witness statement are summarised as follows:

(1) Modern Tyres Accounts years 2008-09 to 2013-14 inclusive: (a) business records used; (b) documentary evidence to substantiate the business expenditure claimed (ie invoices and receipts); (c) motor insurance certificates; (d) VAT invoices for expenses incurred; (e) a break-down of

motor expenses claimed with business mileage confirmed; (f) business account bank statements.

(2) MD Fuels Accounts years 2008-09 to 2013-14 inclusive: (a) details of the underlying records reviewed in the preparation of the accounts; (b) business records used; (c) details of how the turnover was calculation and records relied upon for support of the turnover; (d) invoices and receipts to confirm business expenditure claimed; (e) details of any haulier costs incurred for fuel deliveries; (f) details of business mileage and records retained to confirm; (g) invoices to support the repairs claimed; (h) an explanation of the differing level of sales in comparison to outputs returned for the 2-year period to 30 September 2012; (i) business account bank statements for all years.

(3) Personal spending and acquisitions: (a) bank and credit card statements for all personal accounts for the total period concerned (ie 6 April 2003 to 5 April 2014); (b) documentation to confirm the acquisition costs of: (i) Pilot's licence in 2003-04; (ii) Vehicle purchases – Passat in 2004-05, Golf in 2008-09, Passat in 2009-10, Audi in 2011-12; (c) documentation confirming the cost of retaining aircraft at Aldergrove and details of how payments were made.

102. As set out earlier, there was no response at the time to the request for sight of these documents as itemised in the letter dated 18 October 2016. It was almost a year later on 22 September 2017 when Mr Gorman of GPB's office contacted Officer Heatley in relation to the production of the eight boxes of documents.

HMRC's case

103. At the first s 9A enquiry meeting on 1 October 2013, the appellant disclosed that that he had failed to declare several sources of income over (at least) the previous 12 years, and that high-value assets were acquired without financing over the same period which far outweighed the known and declared business activities.

104. On 24 June 2015, the Outline Disclosure further disclosed that there had been a failure to operate PAYE, and to declare rental income.

105. The appellant failed to: (a) attend any meeting under the COP9 procedure; (b) supply a full disclosure or any records or documents to help ascertain the extent to which he had omitted income over the period, (c) comply with the formal Sch 36 Notice issued. The agent had failed to comply with the same Notice served on him as a third-party.

106. In the absence of actual figures, HMRC employed reasonable estimates based on the information available from VAT and SA returns submitted by the appellant.

107. The level of penalties is appropriate taking into account the scale of the omissions and all the circumstances of the case. The appellant's health problems do not appear to have prevented him from expanding his business activities in recent years, nor to undertake the bi-annual flights to Florida to maintain his pilot's licence obtained circa 2003. HMRC consider that a flight of this length in the Cessna aircraft of its age and size would be tiring and require a high level of both physical and mental stamina as well as good concentration.

The basis of assessments

108. She observed that in the absence of business records being provided to her, Officer Heatley had relied on the VAT returned figures as the basis of her assessment for Modern Tyres, and for comparison when assessing MD Fuels.

109. While Officer Heatley noted that the sales for MD Fuels, according to the VAT returned figures, increased significantly after 2007-08, she did not base the assessments on the VAT returned figures. She adopted a more conservative approach by only indexing up the profits as declared on the SA return submitted for 2007-08.

110. The factors and figures which form the basis of HMRC's assessments are summarised as follows:

(1) **Modern Tyres:** the business was registered for VAT from March 2002; no income from this source was ever declared on SA returns; assessment raised based on the VAT returns for the net amounts (ie output less input VAT) for the years ended 31 March 2004 inclusive to 2014; Mr Madden was invited to provide other expenses incurred as appropriate, but no evidence was provided; amounts assessed based on VAT returned figures:

2003-04 - £6,837
2004-05 - £25,504
2005-06 - £36,688
2006-07 - £47,399
2007-08 - £63,017
2008-09 - £49,498
2009-10 - £36,231
2010-11 - £30,114
2011-12 - £31,305
2012-13 - £16,968
2013-14 - £15,137

(2) **MD Fuels:** For the years up to and including 2007-08, Mr Madden made a return of income from this source in his SA returns. For all later years no return of income from MD Fuels was made. The VAT returns for those years without a return of income confirmed that profits increased significantly in those later years. In the absence of any information (other than the VAT returns), HMRC adopt a pragmatic approach by applying the Retail Price Index ('RPI') on profits from 2007-08 to the later years. The resultant profits are conservative given the high level of increased sales per the VAT returns.

2008-09 - £12,759
2009-10 - £13,440
2010-11 - £14,140
2011-12 - £14,629
2012-13 - £15,051
2013-14 - £15,425

(3) **Annual expenditure:** in the absence of any exact details, this was estimated for a family of 4 to 5, taking into account the usual costs (such as mortgage, rates, electricity, gas/oil, phone, TV/Internet, insurance, food, hobbies, general spending and the cost of running 2 cars) at £28,000 per annum in line with recognised average spending for a family of this size, which was a conservative estimate based on the lifestyle displayed by Mr Madden, including the upkeep of his aircraft, family holidays, property purchases and maintenance costs.

(4) **Wife's contributions** to household expenditure: estimated at £14,000 (net of tax) for 2003-04, and increased by £600 every year to £19,600 for 2013-14.

(5) **Shortfall in income to fund expenditure:** funds required to acquire the following assets were confirmed to have come from cash sourced from business income. Assets disclosed to have been acquired included:

- (a) Property at Pier Rampart from neighbour
- (b) Land at Derrytagh
- (c) Cessna aircraft in 2007-08 for £45,000
- (d) Funding for two children at university from 2007-08 to 2012-13
- (e) Deposit for house in Liverpool in 2008-09 for £20,000
- (f) Purchase of property at The Beeches in 2012-13 for £65,000
- (g) Passat (2-year-old) in 2004-05
- (h) VW Golf in 2008-09 for £1,500
- (i) Passat (new) in 2009-10
- (j) Audi (new) in 2011-12
- (k) Bi-annual trips to Florida to renew pilot's licence
- (l) Pilot's licence in 2003-04 for £20,000.

111. Profits from Modern Tyres and income from MD Fuels were added together, and provision was given for the additional household income from Mr Madden's wife for all years. The estimated funds available were then compared with the level of income required for both the asset acquisitions and general spending.

112. In two of the years (ie 2003-2004 and 2012-13) there was a shortfall. For these two years where the expenditure exceeded the estimated income from Modern Tyres and MD Fuels, the assessments were raised based on spending.

113. For the year 2003-04, the major expenditure was the costs of acquiring a pilot's licence and HMRC had used the £20,000 as the figure disclosed by Mr Madden in October 2013. For 2012-13, the expenditure (other than general household spending) was set at £79,000 to include the £65,000 paid for acquiring The Beeches, £10,000 for contributions to maintaining children at university; and £4,000 for the bi-annual flights to Florida.

114. Except for 2003-04 and 2012-13, all other years' assessments were based on profits from figures on the VAT returns (for Modern Tyres), and on profits as declared on SA returns (for MD Fuels up to 2007-08, then indexed up to 2013-14).

The appellant's case

115. The grounds of appeal as stated on the Notice of Appeal are:

‘Mr Madden believes that the Assessments are excessive and do not reflect the true income and expenditure and contain significant inaccuracies in their calculations.’

116. For ‘Result’ in box 7 of the Notice of Appeal:

‘The outstanding liability for the period of appeal is estimated at £27,553.90. A request for postponement of the balance has been made dated 25 September 2015.’

Mr Boyle’s report

117. Mr Boyle’s report contains a critique of HMRC’s methodology used to raise the assessments, with the salient points being the following:

(1) **Modern Tyres:** VAT returns do not include expenditure that are not chargeable to VAT such as insurance. The appended accounts for Modern Tyres (covering 6 April 2008 to 5 April 2014) show total profit of £132,026 for the years concerned, compared to £179,246 assessed for those years. On average the annual profit is 74% of the assessed profits, and 74% is applied to reduce the assessed profits for 2004 to 2008, (which had no accounts).

(2) **MD Fuels:** the appended accounts gave rise to what Mr Boyle considered to be taxable profits or losses for the tax years from 2008-09 to 2013-14 of:

2008-09 – loss of £14,638

2009-11 – loss of £24,836

2010-11 – loss of £18,237

2011-12 – profit of £9,889

2012-13 – profit of £9,889

2013-14 – £0 (it is unclear why £nil profit was stated; though the appended accounts are made up to the accounting period ended 30 September 2012, and do not include a basis period for 2013-14 tax year.)

(3) **General spending:** that £28,000 to cover the average spending of a family of this size was high; Mr Boyle would assert that a figure of £25,000 was more appropriate, to be reduced by 5% per annum for inflation from 2004 to 2014, making the figure for 2003-04 at £15,348.

(4) **Additional income to cover shortfall:** this flawed method of calculation was flawed as it took no account of the years in which a surplus was achieved and effectively attempted to tax an individual twice on the same income.

(5) **Assets and acquisitions** revised figures:

2003-04 – pilot’s licence not £20,000, Madden would assert the total cost was £80 per hour for 40 hours as the minimum, which equates to £3,200, with the cost of two trips to Florida to obtain training to bring the total to £5,000.

2004-05 – Madden asserts that the Passat was 9 years old and not 2 and purchased for £1,800.

2006-07 – £4,000 included when there is no reference to any acquisition in 2007.

2007-08 – £45,000 to purchase aircraft accepted.

2008-09 – £35,500 included while the only items were the £20,000 deposit for a house in Liverpool and the purchase of a VW Golf which Madden asserts to be at £1,500 only, making the total £21,500 instead.

2009-10 – £30,000 included for a Passat (new) while Madden would assert that the car was a 4-year old damaged repair purchased for £4,000.

2010-11 – £24,000 included, Mr Boyle stated in his witness statement: ‘however no supporting information to substantiate this figure ... I am therefore removing this figure from my calculations.’

2011-12 – £35,000 included, same statement as to ‘no supporting information to substantiate this figure’ and removed.

2012-13 – £79,000 included when the ‘only supporting information’ is the reference to the purchase of The Beaches for £65,000; figure therefore reduced by £14,000.

Discussion

The onus of proof

118. In relation to the s 28A Closure Notices for the four years from 2008-09 to 2010-11, the Tribunal’s jurisdiction is provided under s 50(6) of TMA:

‘If, on an appeal notified to the tribunal, the tribunal decides – ... that the appellant is overcharged by an assessment other than a self-assessment, the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.’

119. The onus of proof rests with the appellant to prove that he has been overcharged by the s 28A assessments, and the standard of proof is on the balance of probabilities.

120. In relation to the s 29 Discovery assessments for all other years, the onus of proof rests with HMRC to establish that the conditions under s 29(4) and (5) TMA have been met. These conditions are referred to as the competence issue in *Burgess and Brimheath v HMRC* (*‘Burgess’*)².

121. The first condition as respects competence is under s 29(4), which concerns the proof that the loss of tax was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf. The Acceptance letter for the Contractual Disclosure Facility signed by Mr Madden included a declaration that there was a loss of tax which was brought deliberately by him as the taxpayer. By virtue of the Acceptance letter and the Outline Disclosure with ‘the description of fraud’ signed and completed by Mr Madden on 24 June 2014, the issue has been conceded by the appellant. To that end, HMRC have discharged the onus of proof as respects the s 29(4) condition.

122. The second condition in relation to the competence issue under s 29(5) is that HMRC have made a ‘discovery’ that there was a loss of tax. The key authority of *Cenlon Finance Co Ltd v Ellwood* (*‘Cenlon Finance’*) by the House of Lords sets out the threshold of a discovery in the following terms:

² *Burgess and Brimheath Developments Ltd v R&C Comrs* [2015] UKUT 0578 (TCC)

‘I can see no reason for saying that a discovery of undercharge can arise only where a new fact has been discovered. The words are apt to include any case in which it newly appears that the taxpayer has been undercharged and the context supports rather than detracts from this interpretation.’³

The requisite threshold for there to be a discovery is therefore low, and is not dependent on any new information, of fact or law: ‘All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment’ (*Charlton*⁴ at [37]). As stated by Walton J in the High Court decision of *Jonas v Bamford* (*Jonas*): ‘In law, indeed, very little is required to constitute a case of “discovery”.’⁵ In the present case, HMRC discovered that sources of income failed to be declared by Mr Madden. The Outline Disclosure conceded the failures, and the onus in meeting the s 29(5) condition has been discharged.

123. As to the time limit issue, the reference is to s 36(1A)(a) TMA in the present appeal, which provides that a discovery assessment ‘may be made at any time not more than 20 years after the end of the year of assessment to which it relates’ if a loss of tax was ‘brought about deliberately by the person’. All discovery assessments were issued on 21 July 2015, and are within the time limit of 20 years allowed where the loss of tax was ‘deliberately brought’ as conceded by the Outline Disclosure.

124. Where the burden of proof as regards the competence and time limit issues has been met by HMRC, the assessments are then validly made in terms of s 29 TMA. The onus for any substantive issues in relation to a discovery assessment rests with the appellant. The substantive issue here is that the assessments raised by HMRC, though valid in law, are excessive; the challenge is therefore one of quantum.

125. The onus of proof as regards all the penalty determinations and assessments rests with HMRC that the penalties in question have been imposed according to the terms of the relevant legislation.

Case law on the substantive issue of quantum

126. The provisions of s 50(6) TMA apply to a discovery assessment as to a closure notice, and have the effect that an assessment stands good unless the appellant meets the onus in displacing the assessments that have been validly made.

127. In *Haythornthwaite and Sons Ltd v Kelly* (*Haythornthwaite*), Lord Hanworth MR stated similarly, that ‘it is quite plain that the Commissioners are to hold the assessment standing good unless the ... Appellant – establishes before the Commissioners, by evidence satisfactory to them, that the assessment ought to be reduced or set aside’.⁶

128. In *Johnson v Scott* (*Johnson*), the High Court judgment by Walton J affirming the Commissioners’ decision in favour of the Crown was upheld by the Court of

³ *Cenlon Finance Co. Ltd v Ellwood* (1962) 40 TC 176, at page 204.

⁴ *R&C Comrs v Charlton and others* [2012] UKUT 770 (TCC)

⁵ *Jonas v Bamford* (1973) 51 TC 1, at page 23.

⁶ *Haythornthwaite and Sons Ltd v Kelly* (1927) 11 TC 657, at page 667.

Appeal. The pertinent remark by Walton J in this case highlights why the onus of proof has to lie with the taxpayer:

‘... it is quite impossible to see how the Crown, in cases of this kind, could do anything else but attempt to draw inferences. The true facts are known, presumably, if known at all, to one person only, the taxpayer himself. If once it is clear that he has not put before the tax authorities the full amount of his income, as on the quite clear inferences of fact to be made in the present case he has not, ... what the Crown has to do in such a situation is, on the known facts, to make reasonable inferences.’⁷

129. In *Nicholson v Morris* (*‘Nicholson’*)⁸, the Court of Appeal affirmed the High Court decision by Walton J. The case concerned a clerk to barristers, Mr Nicholson, who had under-declared his fees earned. As to the quantum, Goff LJ interpreted the force of s 50(6) TMA as that the Commissioners are ‘legally bound’ to confirm the additional assessments, unless it appeared to them that the appellant was overcharged.

130. In *Nicholson*, the question of whether the appellant can upset the conclusion that he was guilty of fraud or wilful default in respect of all the years of assessment was considered by the Court of Appeal. On the evidence before the Commissioners, the question was not so much whether it was right to find fraud or wilful default at all, ‘but whether it should be inferred in respect of all the years’. Goff LJ concluded that the Commissioners were fully entitled to draw the inference that this ‘was a continuing course of conduct on Mr Nicholson’s part which had begun earlier and persisted throughout the years in question’ on the evidence that there were ‘very substantial discrepancies between Mr Nicholson’s returns and what he received’.

131. The question of quantum was also considered in *Nicholson* by the High Court and the Court of Appeal. Concerning Revenue’s assessments, Walton J observed that:

‘I do not think anybody pretend that those figures are anything other than estimates or guesses. They are the best that the Revenue can do on the materials in front of them and they may very well, for aught I know, be a very poor approximation to the truth indeed. But the situation here is that once leave has been given to make the additional assessments and the additional assessments have been made, the onus is on the taxpayer to show that they represent over-assessments.’

132. In view of the taxpayer’s election not to give evidence, Walton J’s observations in *Nicholson* are as apt for the present appeal:

‘Even supposing that I were myself to think that the amounts were wrong ... what on earth could I or anybody else at this stage, in the total absence of evidence, substitute for them? The answer is that it is a complete and utter impossibility; and that is why, of course, the Taxes Management Act throws upon the taxpayer the onus of showing that the assessments are wrong. It is the taxpayer who knows and the taxpayer who is in a position ... to provide the right answer, and chapter and verse for the right answer.’

133. At the Court of Appeal, Goff LJ cited with approval Walton J’s remarks on the taxpayer’s election not to give evidence, and remarked that ‘the Appellant has only

⁷ *Johnson v Scott* [1978] STC 48, at 56(j) to 57(a).

⁸ *Nicholson v Morris* (Ch.D.) [1976] STC 269; (C.A.) [1977] STC 162.

himself to blame'. Referring to the one year, where the Commissioners did not merely affirm the additional assessment but increased it by some £5,000, Goff LJ confirmed that 'there were ample grounds to justify the exercise of that power'.

134. As to the presumption of continuity that has been applied in assessing the income from MD Fuels for the years after 2007-08 by applying the RPI, the onus is again on Mr Madden to rebut the presumption as explained by Walton J in *Jonas*:

'... so far as the discovery point is concerned, once the Inspector comes to the conclusion that, upon the facts which he has discovered, Mr Jonas has additional income beyond that which he has so far declared to the Inspector, then the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly on the taxpayer.'⁹

The appellant's proof on the substantive issue

135. In the present case, HMRC have met the onus in establishing the discovery of loss of tax, given that there were known sources of income for which no declaration had been made. Indeed, the appellant did not dispute that there had been under-declaration of income by virtue of his failure to make a return for income from Modern Tyres since its commencement in 2002 and for MD Fuels after 2007-08.

136. The stated grounds of appeal are that the assessments are 'excessive', 'contain significant inaccuracies in their calculations', and 'do not reflect the true income and expenditure'. In similar vein, Mr Boyle's report asserted the 'inaccuracies' in HMRC's assessments, and more than once, criticised HMRC for using figures with 'no supporting information to substantiate'.

137. In *Norman v Golder* ('*Norman*'), the taxpayer sought to argue that the onus of establishing the correctness of the assessment lies upon the Crown, and that the onus of proving that the assessment is incorrect does not lie on the taxpayer. Lord Greene MR firmly rejected the notion, describing '[t]he point really is not arguable' because the statute 'makes it clear, beyond possibility of doubt, that the assessment stands, unless and until the taxpayer satisfies the Commissioners that it is wrong'¹⁰.

138. Similarly, the premise upon which Mr Boyle has stated the appellant's case that HMRC's assessments are 'inaccurate' simply is not arguable, especially in a situation where there was a lack of supporting information that could *only* have been provided by Mr Madden. HMRC do not assert that the assessments are anything but estimates, but as Walton J remarked, the assessments represent 'the best that the Revenue can do on the materials in front of them'.

139. Given the lack of relevant supporting information that could only have been provided by Mr Madden as the taxpayer, we conclude that the basis of Officer Heatley's assessments was the best that could be done. It is upon the appellant to prove to the Tribunal on the balance of probabilities that he has been overcharged by the assessments, otherwise the assessments stand good.

⁹ *Jonas v Bamford* (1973) 51 TC 1, at page 25.

¹⁰ *Norman v Golder* (1944) 26 TC 293, at page 297.

140. Mr Boyle's witness statement and the appended accounts seek to displace the quantum of the assessments. However, the credibility of Mr Boyle's figures remains in doubt in the absence of any supporting documents to vouch for their veracity. As it stands, all the figures in the unaudited accounts remains unproved.

141. Officer Heatley had written on 18 October 2016 to ask for extensive documentation to enable her to review the accounts; none of the relevant documents had been provided at the time; the boxed records made available on 22 September 2017 did not appear to be relevant to the years concerned. The lack of proof means that the figures contained in the appended accounts are no more than assertions.

142. It is to no avail to assert alternative figures in front of the Tribunal without putting each figure to proof, whether it was the pilot's licence at first disclosed at £20,000 and later asserted to be no more than £5,000, or arguing that the general expenditure should be revised from £28,000 to £25,000 (for 2013-14) and reduced by 5% per annum to £15,348 (for 2003-04). For the appellant to displace the £20,000 as the fee for pilot's licence, he has to produce documents to prove the lower figure. Nor is it open to the appellant to merely assert his living expenditure was lower without extensive proof to the contrary to displace the £28,000 adopted by HMRC for all years. It was open to the appellant to make full disclosure at the time of the investigation that could influence HMRC's basis of assessment, but the appellant had decided not to make any further disclosure after the initial meeting in October 2013.

143. In the absence of credible accounting records to vouch for the veracity of the figures, the Tribunal has grave reservations over the veracity of the accounts produced by Mr Boyle. For this reason alone, the appellant has failed to satisfy the Tribunal that he has been overcharged by the assessments. The assessments therefore stand as nothing credible has been produced in the alternative to displace HMRC's figures, or to enable the Tribunal to reduce the assessments.

144. As to other criticisms made by Mr Boyle of the methodology adopted by HMRC, it is not necessary for us to address them point by point. The burden is entirely on the appellant to produce an alternative methodology with the integrity and credibility conferred by adequate documentary proof and reliable sources of information. For completeness, we make some observations of the consideration we have given to the points made by Mr Boyle's statement:

(1) It is accepted that to use the VAT returns for Modern Tyres as the basis for assessment would not have given allowance for expenses incurred that are exempt from VAT, such as insurance. However, for any allowance to be given to the exempt purchases, such as insurance claimed for 2009 of £8,402, the Tribunal would require sight of the insurance document to verify whether the expenses were all in relation to business assets, and whether there was any private element in the use of assets to disallow a portion of the expense. The same applies to any motor expenses claimed of £8,106 for 2009; the breakdown of the total, whether in relation to business assets and business mileage only.

(2) HMRC had expressed their 'huge concern' over VAT fraud. From Modern Tyres' returns for the quarter 10/12, it was found that 12 duplicated purchase invoices have been claimed. Given the history of tax fraud associated with Mr Madden, HMRC were entitled to draw the inference that a continuing course of conduct would characterise the input VAT claims. While HMRC

had not pursued the issue of potential VAT fraud, the possibility of input VAT being over-claimed over the years was not conclusively ruled out either. If indeed input VAT had, as a pattern of tax fraud, been over-claimed, that would have meant the purchases for Modern Tyres forming the basis of net profits would have been overstated in any event.

(3) As to MD Fuels, based on the output figures on the VAT returns, sales increased from £1.47m (year end 30.9.07) to £2.94m (y.e.2008), and exceeded £3m (y.e.2010), soared to £4.6m (y.e.2012) to £6.3m (y.e.2013). The unaudited accounts show sales figures at £2.94m (y.e.2008), at £2.87m (y.e.2009), at £2,986,580 (y.e.2010), and oddly *identical* sales total of £2,986,580 for a 24-month period from 1 October 2010 to 20 September 2012.

(4) The sales figure for the year end 2010 and a 24-month period being identical is, of itself, peculiar if not inexplicable, and undermines the coherence of the entire set of accounts. We also observe that the 24-month period of accounts would mean sales for 2011 and 2012 averaged to £1.49m, when the VAT returns for the equivalent periods showed sales at £3.29m (2011) and £3.4m (2012). There are substantial totals being claimed for Implement repairs or repairs and renewals: at £36,523 for (y.e.2010), and £33,762 for (2 years to 2012). These claims of expenses are not substantiated.

(5) Losses are reported in the unaudited accounts for MD Fuels for three consecutive years: £14,638 (y.e.2008), £24,836 (y.e.2009) and £18,327 (y.e.2010). For the inconsistencies noted as regards sales, and the lack of supporting documents for all expenses claimed, the credibility of these trading losses is in doubt.

(6) The consecutive years of losses would have undermined Mr Boyle's argument that Mr Madden had surplus from trading to acquire his assets.

(7) In any event, the annual household expenditure figure and the acquisition of assets were used as a comparison to ascertain if the assessment for a said year would be sufficient to cover the known expenses as estimated. Only in two of the eleven years did HMRC raise additional assessments due to the 'shortfall'. The two instances of shortfall were in 2003-04 for the £20,000 pilot's licence, and in 2012-13 for a total of £79,000 (being £65,000 for the Beeches, £10,000 for maintenance contributions to children at university, and £4,000 for bi-annual trip to Florida to maintain pilot's licence). The basis of all these items of expenditure was as disclosed by Mr Madden in October 2013.

145. The assessments stand good therefore, since the appellant has not proved on the balance of probabilities that he has been overcharged. If anything, the following evidence suggests that the appellant has been under-charged by HMRC's assessments:

(1) The Outline Disclosure stated that failure to make PAYE returns for all the years; HMRC have not pursued the PAYE liabilities. As confirmed by Mr Boyle, for 'Failure to submit and operate PAYE', it related to all of Mr Madden's businesses, namely: (a) fuel business as a sole trader, (b) fuel business as a company, and (c) Modern Tyres.

(2) The 'huge concern' over VAT fraud in MD Fuels, not only by the proven over-claim of input VAT with the 12 duplicated purchase invoices in the VAT return for period 10/12, but also by the pattern of sizeable repayment claims for consecutive years as indicated by Officer Heatley's summary schedule.

The reason for the concern over VAT fraud, as stated by Officer Heatley in the opening meeting with Mr Boyle, is that a thriving business is not expected to be in a continuous repayment situation, even if the business made supplies to domestic householders at the reduced rate.

(3) Mr Madden had disclosed that his fuel business also operated from a second site at Derrynose from 19 months ago at the time of the October 2013 meeting. HMRC's assessment on MD Fuels was based on the declared profits in the SA return for 2007-08, which would not have allowed the secondary source of profits from Derrynose to be included.

(4) From 1 July 2008 to 27 August 2010, M&D Fuel Ltd was in operation to allow Mr Madden to operate two branches of his fuel business to sell to different sections of the community. The basis period for the SA return for the tax year 2007-08 would have been the accounting period to 30 September 2007, and would not have included any trading profits from M&D Fuel Ltd. The methodology adopted by HMRC by indexing the declared profits in SA return for 2007-08 would have omitted any profits accruing from the second branch of Mr Madden's fuel trade arising from M&D Fuel Ltd.

(5) The VAT returns showed sales for MD Fuels increased by over four times from the £1.47m sales (2007-08) to £6.35m (2013-14). It is unlikely that the four-fold increase in turnover would only have translated into increase in profits that were merely index-linked, as HMRC have assessed.

146. The Tribunal is of the view that the assessments as they stand are conservative in quantum. While the Tribunal has the jurisdiction to vary the quantum by increasing the assessments, it is not our intention to do so other than to state that we are satisfied that Mr Madden has not been overcharged by these assessments.

147. As to the result of the appeal sought by Mr Madden to have the overall assessments reduced to £27,553.90, it is a complete and utter impossibility (to use Walton J's phrase) for the Tribunal to do so without sufficient proof. Substantive evidence to support the reduced quantum is singularly lacking to lend credence to the set of figures put forward by Mr Boyle. We can only conclude that the appellant has not met the onus required to displace the figures used by HMRC in their assessments.

Whether all penalties confirmed

148. The question of 'negligence' is relevant for the purposes of imposing a penalty under s 95 TMA. The test for negligence as formulated in *Anderson v HMRC* ('*Anderson*')¹¹ is to consider 'what a reasonable taxpayer, exercising due diligence in the completion and submission of the return, would have done'. The question of whether the conduct leading to the loss of tax was 'deliberate' is relevant to the imposition of Sch 24 FA 2007 penalties, and for setting time limit to 20 years within which discovery assessments could be made.

149. Mr Madden disclosed at the October 2013 meeting that he oversaw the record keeping and banking for both sites for the fuel business; that he was the sole signatory on the bank accounts; that he reconciled the cash and did a stock take every day; that he made the payment for orders by card or cash on delivery; that the daily takings from purchases at the pump were around 2,000 to 3,000 Euro and doubled in busier

¹¹ *Anderson v HMRC* [2009] UKFTT 206, at [22].

periods; that he would exchange the Euro before lodging the cash into business bank account. From these disclosures, it is clear that Mr Madden was actively and closely involved with the day-to-day running of his fuel business. From the VAT returns for MD Fuels, it is plain that Mr Madden had also successfully grown the business by quadrupling its turnover from £1.47m (y.e.2007) to £6.35m (y.e.2013).

150. It is clear that Mr Madden is a businessman with acumen and considerable capacity. Not only did he grow his sole trade business by doubling its turnover every three years since 2007, he was starting up and running the business of Modern Tyres in parallel since 2002, albeit with the assistance of employees. He developed the second site for fuel sales in Derrynose around the start of 2012. He bought properties as investments, from neighbour at Pier Rampart, another one in Liverpool, and at least a third one, The Beeches in June 2012.

151. Aside from his business undertakings, Mr Madden obtained his pilot's licence in 2003, and had maintained his licence by undertaking bi-annual trips to Florida. He purchased the Cessna Jet in 2008-09, and was planning to obtain a helicopter licence in the near future as indicated at the October 2013 meeting. In the review conclusion letter dated 25 November 2015, the review officer quoted from the Civil Aviation Authority ('CAA') website which states:

'Anyone wishing to train for a private pilot's licence will need to obtain an initial Class 2 or LAPA medical certificate or an NPPL medical declaration as part of the licensing requirements.'

The physical and mental fitness of Mr Madden in the decade from 2002 to at least October 2013 can be readily inferred from what he had achieved as a private pilot.

152. The letter from Mr Madden's GP referred to events related to work in May 2014 leading to depression and deterioration in concentration, which would seem to coincide with the timing of HMRC's enquiry being escalated to fraud investigation. The medical letter may explain why Mr Madden withdrew from engaging with the COP9 procedure after he returned the Acceptance letter and Outline Disclosure in June 2014, but the penalties are imposed referential to past behaviour that had led to the historical failures in making a complete and accurate declaration for tax liabilities.

153. The tax fraud in this appeal involved a continuous course of conduct stretching over a decade, by a very able businessman who had been in Self-Assessment since at least 1995 when he became self-employed. The culpability of behaviour has been categorised correctly according to the relevant legislation in imposing the penalties. Against the context of the business, investment and recreational activities undertaken by Mr Madden in the decade before May 2014, and the extent of the tax fraud by a taxpayer who had access to the services of professional advisers, the mitigation given by HMRC is fair and reasonable. There is no justification for the Tribunal to reduce the penalty percentages further, either under s 95 TMA or Sch 24 FA 2007.

Decision

154. The closure notices under 28A TMA and the assessments under s 29 TMA, for the years 2003-04 to 2013-14 inclusive, stand good, and all amounts confirmed in full.

155. All penalties imposed, under s 95 TMA, Sch 24 FA 2007, and Sch 55 FA 2009 are likewise confirmed in full.

156. The appeal is accordingly dismissed.

157. 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 HEIDI POON
TRIBUNAL JUDGE**

RELEASE DATE: 26 JULY 2018

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