



**TC06629**

5

**Appeal number: TC/2017/01377**

10

***CAPITAL GAINS TAX – disposal of interest in property – resultant  
trust-discovery assessment – deliberate actions – failure to consider tax  
consequences of declaration of trust***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

15

**Mr Darius Soleimani-Mafi**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE Rachel Short  
Mrs Sheila Cheesman (Member)**

20

**Sitting in public at Taylor House 88 Rosebery Avenue London on 12 December  
2017 and 17 May 2018**

25

**Mr Modi for the Appellant**

30

**Mr Bracegirdle, instructed by the General Counsel and Solicitor to HM Revenue  
and Customs, for the Respondents**

## DECISION

5 1. This is an appeal by the Appellant, Mr Mafi, against an assessment issued on him by HMRC for the 2006-7 tax year. That assessment was issued on 29 September 2014 under s 29 Taxes Management Act 1970 (“TMA 1970”) and amounted to £109,598.

10 2. The tax in question arises from Mr Mafi’s disposal of his share of a property in London called 28 Favart Road (“Favart Road”) which was sold on 18 May 2007 for £1.8 million.

3. Mr Mafi also appeals against penalties imposed on him under s 95 TMA 1970 in an amount of £38,359 for negligently submitting an incorrect tax return for the 2006-7 tax year.

15 4. Mr Mafi appealed against the assessment and the penalty charged on him on 9 October 2014. A statutory review was requested and completed on 13 January 2017 confirming HMRC’s view. Mr Mafi appealed to this Tribunal on 3 February 2017.

5. The amounts in dispute have subsequently been adjusted by HMRC and are now £99,454.00 of tax assessed and £34,808 of penalties charged.

20 6. This assessment was issued beyond the normal time limit for issuing assessments. The first question for the Tribunal is whether this assessment was properly issued by HMRC under the rules at s 36 TMA 1970 which allow HMRC to issue assessments up to twenty years after the end of a tax year if certain conditions have been met. The relevant condition at s 29(4) and s 36(1A) TMA 1970 is whether  
25 Mr Mafi deliberately excluded chargeable gains from his self-assessment tax return for 2006-7. HMRC say that this condition has been met. Mr Mafi says that it has not.

### **Preliminary issues**

7. At the Tribunal hearing on 12 December 2017 HMRC produced two documents which had not been included in their document bundle (i) the abbreviated accounts of  
30 a company controlled by Mr Mafi, DSM Limited Investments to July 2004 and (ii) A charge document registered over a property owned by DSM Investments Limited, 104 Commercial Street. Mr Mafi objected to these documents being produced to the Tribunal. After considering the arguments of both parties the Tribunal agreed that HMRC had not demonstrated that the documents were sufficiently critical to the  
35 issues in question to allow them to be admitted at this late stage and therefore refused to admit them.

### **Background facts**

8. Mr Mafi comes from Iran and came to London with his family in the late 1970s. He has no brothers and one sister who is now divorced with two children and living in

Iran. She lived in London for a short time (1979 to 1982) but since then has only visited London.

9. Mr Mafi is also the sole director of a UK limited company – DSM Investments Limited.

5 10. Mr Mafi’s company acquired a property, 104 Commercial Street in London on 18 December 2003.

11. Mr Mafi bought Favart Road for £1.25 million jointly with a Mr Omid, contracts were exchanged on 1 December 2006 and the sale completed on 19 March 2007. This cost was met from (i) £945,000 joint loan from Natwest (ii) £178,865 from 10 Mr Mafi (iii) £178,865 from Mr Omid.

12. Mr Mafi and Mr Omid were recorded as the legal owners of Favart Road at the Land Registry.

13. By a document dated 19 March 2007 Mr Mafi declared that he held his 50% share of this property on trust for his sister Mozghan Soleimani-Mafi (“MSM”) who 15 lived in Tehran.

14. Favart Road was marketed for sale and a third party made an offer on it for £1.8 million in February 2007 and paid a deposit.

15. The sale of Favart Road to the third party purchaser completed on 18 May 2007 for £1.8 million.

20 16. On 9 July 2007 Mr Mafi and Mr Omid purchased a property at 83 Fulham Park Gardens for £1.35 million. Mr Mafi’s share of this property was 39.2%.

17. Mr Mafi did not declare the proceeds of the sale of Favart Road on his self-assessment tax returns for either the 2006-7 or 2007-8 tax years. Mr Mafi’s tax return for the 2006-7 tax year was submitted on 31 January 2008.

25

### **Procedural background**

18. HMRC found out about Mr Mafi’s sale of Favart Road only as a result of enquiries which were triggered by information which they obtained about the sale of 83 Fulham Park Gardens acquired by Mr Mafi and Mr Omid in July 2007.

30 19. On 5 October 2010 HMRC opened an enquiry into Mr Mafi’s 2008-9 self-assessment tax return under s 9A TMA 1970. HMRC issued an information notice under Schedule 36 Finance Act 2008 to Mr Mafi on 20 October 2011, but this was returned undelivered.

35 20. It was during the course of this enquiry that they became aware of the Favart Road sale in 2007.

21. HMRC raised an assessment on 5 April 2012 on Mr Mafi in respect of his share of the gains arising on the sale of Favart Road for the 2007-8 tax year.

22. Trust documents relating to Favart Road and 83 Fulham Park Gardens were provided to HMRC on 18 June 2012.

5 23. After further meetings and correspondence and discussions with their internal trusts experts HMRC issued an assessment on Mr Mafi for the gains arising on his disposal of his share of Favart Road to his sister in the 2006-7 tax year on 29 September 2014.

### Points in issue

10 24. There is no dispute that a gain was generated on the disposal of Mr Mafi's interest in Favart Road, but Mr Mafi says that this is not his chargeable gain, because his share of Favart Road had always been held on trust for his sister. HMRC accept that Mr Mafi entered into a deed of trust over Favart Road on 19 March 2007 in favour of his sister, but do not accept that any trust in her favour existed before that date. HMRC say that Mr Mafi made a disposal to his sister on 19 March 2007 of his interest in Favart Road and this gave rise to a capital gains tax charge of £99,454.00 which Mr Mafi failed to declare on his tax return for the 2006-7 tax year.

15 25. Mr Mafi says that there was no disposal on 19 March 2007 because Favart Road had always been held on trust for his sister, on the basis of an oral agreement between them. Any gain on the sale of Favart Road belongs to his sister, who is not a UK resident and so there were no gains for him to declare in his tax return for the 2006 -7 tax year.

### Law

25 26. s 29 TMA 1970: This is the provision which allows HMRC to raise an assessment when a loss of tax has been discovered. The specific conditions at s 29(4) and (5) need to be fulfilled in order for HMRC to raise an assessment under these rules:

30 "29(4) The first condition is that the situation mentioned in sub section (1) above [tax which ought to have been assessed has not been assessed] was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf."

HMRC say that Mr Mafi was acting deliberately so this condition is fulfilled.

35 "29(5) The second condition is that at the time when an officer of the Board –  
(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

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

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above”

5

27. HMRC say that they were not aware that Mr Mafi had any interest in Favart Road until December 2011 as a result of their own enquiries so this condition is fulfilled.

10

28. s 36(1A) TMA 1970: This is the provision which extends the time limit for HMRC to make an assessment to 20 years if a person has acted deliberately in bringing about a loss of income tax or capital gains tax.

29. s 95 Taxes Management Act 1970 is the law as it applied to the 2006-7 tax year which sets out the penalties which can be applied by HMRC if a taxpayer delivers an incorrect return as HMRC say Mr Mafi did for the 2006-7 tax year:

15

“95(1) Where a person fraudulently or negligently –

(a) delivers any incorrect return of a kind mentioned in section 8 or 8A of this Act.....

20

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

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

25

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.....and

30

(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.”

30. **Authorities referred to**

(1) *Derry v Peek* [1889] LR 14 app.cas.337

35

(2) *Charlton & Anor v Revenue & Customs Commissioners* [UKUT] 770 (TCC)

(3) *Hankinson v Revenue & Customs Commissioners* [2012] 1 WLR 2322

(4) *Rebecca Thomas & Sarah Thomas* [2014] UKFTT 980 (TC)

(5) *Mr Anthony Clynes* [2016] UKFTT 369(TC)

(6) *Raymond Tooth* [2016] UKFTT 723(TC)

## **Evidence**

5 31. We heard oral evidence from Mr Rodgers of HMRC and Mr Mafi the Appellant.

### **Mr Rodgers – HMRC**

10 32. Mr Rodgers explained the background to HMRC's investigations into Mr Mafi's tax affairs and why he believed that HMRC had properly issued their assessment on Mr Mafi for the 2006-7 tax year.

15 33. We saw Mr Rodgers' witness statement dated 21 July 2007 which described the procedural background of HMRC's enquiries into Mr Mafi's tax affairs, explaining that Mr Rodgers became aware in December 2011 that Mr Mafi's 2007-8 tax return could be incorrect because he had not declared gains on his disposal of Favart Road. He knew from other HMRC records that Mr Mafi owned this property and discovered from a property sale website that it had been sold in May 2007 for £1.8 million. Mr Rodgers issued an assessment for the 2007-8 tax year in respect of capital gains tax arising on the sale of Mr Mafi's share of Favart Road on 5 April 2012.

20 34. HMRC were informed by Baker Tilly, (acting on behalf of Mr Mafi) as a result of an appeal against this assessment in June 2012 of the existence of a trust over Mr Mafi's share of his property in Favart Road in favour of his sister, (referred to as MSM). Further information was provided at a meeting with Mr Mafi and his advisers on 21 October 2012 when Mr Mafi explained more details of why he had put his share of the property in trust for his sister.

### **HMRC's investigations**

25 35. Mr Rodgers explained that it was only when the March 2007 deed of trust was obtained by HMRC in June 2012, after having obtained further information and documents from Mr Mafi and having talked to their internal trust experts, that they concluded that a chargeable gain had arisen at the time when Mr Mafi disposed of his share in Favart Road to his sister. As a result HMRC issued the assessment which is now under appeal on Mr Mafi on 29 September 2014 for the earlier, 2006-7 tax year on the basis that chargeable gains arose to Mr Mafi at the time when he entered into the declaration of trust in favour of MSM on 19 March 2007.

### **Deliberate behaviour**

35 36. Mr Rodgers said that it was his view that the omission of the chargeable gain from Mr Mafi's tax return for 2006-7 was deliberate; Mr Mafi would have been aware that he held a 50% share in Favart Road and would have known that the trust deed transferred the ownership to MSM. This was an act voluntarily undertaken by Mr

Mafi and he should have considered its implications. Mr Mafi should have been aware from his previous property transactions of the implications of exchanging contracts in property transactions and had already reported gains from the sale of another UK property on his tax return for 2007.

- 5 37. Mr Mafi would have been aware of his obligation to notify HMRC of a disposal of an asset and the omission of the gains on Favart Road from his 2006-7 tax return was a deliberate omission.

### **Penalties**

- 10 38. Mr Rodgers explained how HMRC had calculated the penalty charged on Mr Mafi;

(1) Disclosure: a 15% rebate was given for disclosure because Mr Mafi did not volunteer any information to HMRC about his interest in Favart Road until HMRC raised queries.

- 15 (2) Co-operation: A rebate of 30% was given for co-operation because Mr Mafi only provided the information requested to HMRC after they issued an information notice on 20 October 2011. The evidence provided by Mr Mafi contained inconsistencies.

- 20 (3) Seriousness; A rebate of 20% was given for seriousness and size because the inaccuracy was large in relative and absolute terms and Mr Mafi had acted fraudulently.

This gives rise to a total abatement of 65% resulting in a penalty at 35% of the tax assessed.

### **Mr Mafi**

- 25 39. We saw a written statement from Mr Mafi dated 28 July 2017. Mr Mafi gave oral evidence to the Tribunal and was cross-examined by Mr Bracegirdle.

- 30 40. Mr Mafi explained his family situation and his need to provide for his sister, as her only brother. He was adamant that HMRC had ignored the wider context of his need to protect his sister's investments in London and failed to properly understand that her money was tied up in the Favart Road property.

- 35 41. Mr Mafi accepted that 104 Commercial Street had been bought in the name of his company, but said that since his sister had provided money to his company, that should be traced through to the purchase of 104 Commercial Street and then to the Favart Road property. He said "*I would be very happy if Mr Rodgers can focus on her [his sister's] investment rather than creating his own version of the case. It is very simple that the Favart Road transaction and making a good profit was my sister's deal*"

42. Mr Mafi accepted that his sister was not a shareholder of his company but strongly insisted that because she had helped to fund the purchase of 104 Commercial Street it had always been his intention to protect her investment and that she had to be seen as having an interest in Favart Road.

5 43. In his written statement Mr Mafi said: *“The purpose of the deed of trust between me and my sister at all time was purely for her and me, if anything happens to my marital status or in case of my death this was to protect her investment”*

10 44. Mr Mafi explained that he had obtained a standard form trust deed from his solicitors in 2003 who had told him that this could be used to regulate his agreement with his sister. He had not taken any other legal or tax advice about creating the trust for his sister.

45. In his view there was no need to discuss the trust with his accountants, the lawyers dealing with Favart Road, the lending bank or Mr Omidi’s financial adviser because it was purely a matter between him and his sister.

15 46. Mr Mafi’s explanation for why Favart Road had been purchased only in his name was that the bank would only offer a mortgage in his name, not in his sister’s.

20 47. Mr Mafi told us that after obtaining advice from Baker Tilly after the Favart Road deal, his lawyers had said that they would deal with the trust deed for any future purchases and ensure that it was done properly, which they had done for the purchase of Fulham Park Gardens.

25 48. Mr Mafi pointed out that the next deal in which his sister had been involved had made a loss, so it could not be true that he had only involved her in order to avoid paying capital gains tax when a property made a profit. His pattern of dealing was the same for all his properties; a declaration of trust in favour of his sister was made on completion. Mr Mafi denied any suggestion that he had used his sister to ensure that no tax was paid on the sale of Favart Road.

30 49. Mr Mafi said that his intention in having a trust for his sister had been to protect her interests and not for any tax purpose. Mr Mafi accepted that he did not understand and had not taken advice about the tax implications of the trust for his sister. He did tell us that he understood as a basic fact that non-UK residents did not pay capital gains tax on the disposal of property in the UK. He also said that he knew that the rental from any investment property was subject to tax in the UK and he had paid the tax on the rental generated from his properties.

**Documentary evidence seen:**

35 50. Declaration of Trust between Mr Mafi and MSM over Favart Road dated 19 March 2007.

51. Declaration of Trust between Mr Mafi and MSM over 104 Commercial Street dated 20 February 2004.



52. Contract for the sale of Favart Road dated 1 December 2006.

53. Email in the name of MSM, from Mr Mafi's email address, stating her intentions over Favart Road dated 5 March 2014

5       *"When I sold my flat at Lexham Garden back in 2003 as the flat was not  
adequate for my needs. I was looking to keep my proceeds from the sale in the  
UK and in London specifically as I was planning to return to London with my  
kids once my divorce was finalised. My brother and his friend Amin Omidi  
found a house in Favart Road .....which suited my needs very well.. At the  
time as I was not able to raise finance/mortgage for the purchase my brother  
10       was happy to help me on that side....."*

54. Advisers' letters

(1) Letter from Ms Sherifa Gabbanni to Mr Mafi and Mr Omidi 18 December 2006.

15       (2) Letters from solicitors Unsworth Rose to Mr Mafi and Mr Omidi 4  
December 2006 and 1 March 2007.

(3) SDLT return over Fulham Park Gardens.

55. Financial documents

(1) DSM Limited Accounts to 31 July 2005, 2006 & 2007

20       (2) Loan Agreement between Mr Mafi and Natwest Bank of 12 March 2007,  
including statements that the customer's money contributed towards the  
purchase of the property subject to the mortgage, Favart Road, *"come from the  
Customer's own resources and have not been borrowed from any third party"*

(3) Mortgage Deed over 104 Commercial Street dated 21 June 2006.

25       56. Various letters between HMRC and the Appellant's advisers from 5 October  
2010 until 1 February 2017 including:

(1) HMRC's letter of 5 April 2012 *"It has come to my attention that you owned  
a share in a property known as 28 Favart Road London which was disposed of  
during the tax year ended 5 April 2008"*

30       (2) 30 April 2012 letter from the Appellant's advisers to HMRC saying:

*"With regard to your reference to the 28 Favart Road property, on behalf of our  
client we appeal against the assessment raised..... on the grounds that the  
amount has been estimated for a transaction in which Mr Mafi, although he  
moved into the property, did not have a beneficial interest"*.

35       (3) Letter from Appellant's advisers to HMRC dated 18 September 2014 setting  
out the basis on which they believed a resulting trust existed for Mr Mafi's  
sister prior to the signing of the deed of trust on 19 March 2007, because of her

investment in DSM Investments Limited through the loan made to that company on the sale of her property, Lexham Gardens.

(4) HMRC notes of meeting with Mr Mafi, Baker Tilly and Mr Rodgers of 24 October 2012.

5

### **Mr Mafi's arguments**

57. Mr Mafi and Mr Modi on his behalf made fairly brief submissions to the Tribunal, merely re-iterating what had been stated by Mr Mafi in his witness evidence. Mr Mafi accepted that what he had done with the trust deed, both in the  
10 2004 document (referring to 104 Commercial Street) and the 2007 document might not have been absolutely legally correct, but that he believed there was no requirement to include capital gains relating to Favart Road in his 2006-7 self-assessment return because those gains belonged to his sister under the trust and not to him.

15 58. Mr Modi did stress that although MSM did not appear as a creditor in the accounts of Mr Modi's company which had been provided to the Tribunal, she was involved with the company and HMRC had only seen the abbreviated accounts of the company and had not asked to see the full accounts.

### **HMRC's arguments**

20 59. HMRC's assessment on Mr Mafi was raised under s 29(4) TMA 1970 because they believed that Mr Mafi had acted deliberately in failing to include the gains from the sale of Favart Road in his tax return for 2006-7.

60. In HMRC's view the conditions at s 29(4) and (5) TMA 1970 were met. Mr Mafi had not provided HMRC with information about the disposal of Favart Road in  
25 his tax return for 2006-7 and an officer had discovered a loss of tax which was brought about carelessly or deliberately.

61. In HMRC's view no trust existed in favour of MSM at the time when Favart Road was acquired, but only came into existence when Mr Mafi entered into the deed of trust on 19 March 2007. At that point Mr Mafi made a disposal of his share of that  
30 property, giving rise to chargeable gains.

62. The time limit for making an assessment at s 36(1A) TMA 1970 applied because Mr Mafi's omission had been deliberate.

63. Mr Bracegirdle explained why HMRC believed that Mr Mafi's actions in failing to include the capital gains on his 2006-7 tax return had been "deliberate".

35 64. Mr Bracegirdle referred us to two other First-tier Tribunal decisions (*Robert Tooth* and *Anthony Clynes*) which had considered the meaning of "deliberate", suggesting that it required a known and intentional action, that someone had acted

consciously or in a considered way, referred to in *Tooth*: “deliberately means intentionally or knowingly”

5 65. Mr Bracegirdle said that this could be extended to deliberately failing to do something, or deliberately failing to find out what the tax consequences of specific transactions were.

10 66. HMRC did not accept Mr Mafi’s argument that no gains arose on the entry into the deed of trust in March 2007 because a trust already existed; Mr Mafi had done a number of things which suggested that the trust in favour of his sister did not exist before March 2007, including confirming to the bank that he was the sole owner of his share of the property. There was no evidence, other than Mr Mafi’s own statements, that a trust existed in favour of MSM prior to 19 March 2007.

15 67. HMRC also contended that the purported trust in favour of Mr Mafi’s sister over 104 Commercial Street entered into on 20 February 2004 was not validly made, because the trust was made by Mr Mafi in his own name, while the property was held through his company, DSM Investments Limited.

20 68. Mr Bracegirdle said that Mr Mafi had known that there were capital gains arising on the sale of Favart Road and had intentionally put the trust in place in March 2007 at the time when those gains arose. It was reasonable to conclude that Mr Mafi knew the implications when a trust was set up for his sister. By executing the deed of trust in March 2007 Mr Mafi knowingly sought to evade paying capital gains tax on the disposal of his share of Favart Road.

69. At best, Mr Mafi had intentionally failed to make any enquiries about the correct tax implications of the trust deed and whether any taxable gains arising from the disposal of Favart Road should be included in his 2006-7 return.

25 70. Mr Mafi had dealt with property transactions before and so understood how and when capital gains arose. Mr Mafi had not taken advice from either his legal or accounting agents in respect of the trust deed and in fact had not told either them or his bank or Mr Omidi’s financial adviser that the trust even existed.

30 71. Mr Mafi had knowingly and deliberately completed his 2006-7 self-assessment return without including the taxable gains from the disposal of his share of Favart Road. Mr Bracegirdle said that this was deliberate and fraudulent behaviour on his part.

72. Mr Bracegirdle referred to Mr Roger’s methodology for applying mitigation to the penalty charged on Mr Mafi as reasonable.

35 **Findings of fact**

73. On the basis of the evidence heard and seen the Tribunal finds as a fact that

(1) None of the written documents which were produced relating to the sale and purchase of Favart Road referred to Mr Mafi's sister having a beneficial interest in that property.

5 (2) Mr Mafi's first reference to the existence of the trust in favour of his sister was in his adviser's letter to HMRC of 30 April 2012 and no reference was made to the idea of a resulting trust until his adviser's letter to HMRC on 18 September 2014.

(3) The only written document referring to the trust in favour of Mr Mafi's sister was the deed of trust dated 19 March 2007.

10 (4) Mr Mafi took no advice about the tax implications of entering into this deed of trust, from his accountants, his solicitor or his financial adviser.

(5) The only advice which Mr Mafi obtained about the legal implications of the trusts which he entered into was to obtain a standard form trust deed from his solicitors in 2003.

15 (6) Mr Mafi is a businessman who had experience of buying and selling property in the UK before the sale of Favart Road.

## **Decision**

### **The discovery issue**

20 74. When did HMRC "discover" that Mr Mafi's tax assessment for 2006-7 was incorrect because chargeable gains which ought to have been assessed had not been assessed?

25 75. HMRC can only issue this assessment on Mr Mafi if they can demonstrate that they have fulfilled the requirements at s 29 TMA 1970 and that a relevant fact has been newly discovered by them.

30 76. HMRC say that Mr Mafi made no mention of his disposal of his interest in Favart road in his tax returns for 2006-7, 2007-8 or 2008-9 and they were aware that Mr Mafi disposed of his share of Favart Road only as a result of their investigations in December 2011 and from information from external sources. They were aware of Mr Mafi's declaration of trust in favour of MSM only in April 2012 and saw the relevant trust deed in July 2012. It was only as a result of further correspondence and advice from their own trust experts that they concluded that a disposal should be treated as occurring at the date of the written declaration of trust, 19 March 2007.

35 77. We accept that this amounts to a discovery of new information by HMRC and that the conditions at s 29(4) and (5) TMA 1970 are met for HMRC's assessment of 29 September 2014 on Mr Mafi for the 2006-7 tax year.

**S 29(4) TMA 1970 and s 36(1A) TMA 1970**

78. Was Mr Mafi acting deliberately in failing to include his share of the capital gains which HMRC say arose from the disposal of his share of Favart Road in his 2006-7 self-assessment tax return?

5 79. The onus is on HMRC to demonstrate that Mr Mafi was acting deliberately in failing to include the gains from the disposal of his share of Favart Road in his 2006-7 self-assessment tax return.

80. There was no dispute between the parties that a gain arose on the disposal of Mr Mafi's share in Favart Road, but there was a dispute about to whom and when those  
10 gains arose.

**When did Mr Mafi transfer the beneficial interest in Favart Road to his sister?**

81. Mr Mafi's position was that he believed that there was no obligation to declare these gains in his 2006-7 tax return, or at all, because they did not arise to him, but to his sister under the trust in her favour.

15 82. Mr Mafi provided us with a number of explanations for why he did not believe that he needed to declare his share of the gains arising on Favart Road, all based on the fact that this actually belonged to his sister. He stressed his need to protect his sister's financial position and traced her financial involvement with his property investments back to her financial investment in his company's property at 104  
20 Commercial Street, after she had sold her own London property (Lexham Gardens). He was adamant that the declaration of trust in favour of his sister for Favart Road was not done for tax avoidance purposes, but to protect her. He was also adamant that the oral trust had been in place since her money from the sale of her London property (Lexham Gardens) had been used to purchase 104 Commercial Street.

25 83. As to why he did not think he needed to include the disposal of his share of Favart Road on his 2006-7 tax return, Mr Mafi said that in his mind it was not related to his tax return and he did not need to discuss this with his accountants because it was owned by his sister. He understood that as a foreign resident she did not have to pay UK capital gains tax. This in his view was "a basic fact" on which he did not need  
30 to obtain advice.

84. We accept that UK property law and trust law is a complex area and not one in which a layperson such as Mr Mafi could be expected to have much expertise. We accept that Mr Mafi did not fully understand the implications of declaring a trust in favour of his sister or how that might work for UK legal and tax purposes. We also  
35 accept that he may have been driven by the understandable desire to protect his sister's financial interests.

85. However, we are sceptical about whether the oral trust referred to by Mr Mafi did actually exist before the trust was formalised in writing in March 2007. Rather than suggesting that such a trust did exist, all of the evidence which we were taken to  
40 indicated that it did not, including in particular Mr Mafi's statements to Natwest at the

time of the purchase of Favart Road that the funds to purchase the property came from his own resources.

86. We have concluded on the basis of the evidence that we have seen, that it is improbable that an oral trust existed in favour of MSM before 19 March 2007.

5 87. For that reason, we agree with HMRC that the correct legal analysis is that Mr Mafi made a disposal of his part share in Favart Road on the date when the written declaration of trust was entered into on 19 March 2007 and a taxable gain arose on that date.

**Did Mr Mafi deliberately submit an incorrect return for 2006-7?**

10 88. We accept that Mr Mafi may not have completely understood whether and why a gain should be treated as arising during the 2006-7 tax year; even HMRC told us that they concluded that the gain should be treated as arising in 2006-7 rather than 2007-8 only after having consulted with their trust experts.

15 89. However, in our view the real question for us is whether, in failing to establish what the correct legal and tax implications of his actions were, however those actions might have been motivated, Mr Mafi deliberately submitted an incorrect return.

90. We agree with HMRC that the relevant question in these circumstances is whether a failure to make enquiries, or turning a blind eye to tax consequences, can be treated as a “deliberate” action for the purposes of s 36(1A) TMA 1970.

20 91. A deliberate action suggests that some consideration has been given to the consequences of that action, as the authorities to which Mr Bracegirdle referred us suggest; a person who says he has no information about what those consequences could be, cannot be said to be acting deliberately to bring about any particular consequence, although he may be acting foolishly.

25 92. We do not think that Mr Mafi can be said to be in quite that position. Mr Mafi did have some information about the consequences of his actions:

30 (1) He was a business person who had run his own business and bought and sold properties in the UK prior to his purchase of Favart Road. He must at the very least be taken to have been aware of the need to consider the tax implications of property transactions in the UK, even if he did not know exactly what those tax implications might be.

(2) If he knew that there were likely to be tax consequences arising from this property transaction, Mr Mafi had professional advisers from whom he could have obtained advice, but he did not do that.

35 93. In the circumstances we have concluded that Mr Mafi must have had some indication that there may be tax consequences as a result of signing the trust deed with his sister and that a failure to properly consider those consequences was a deliberate action on his part. Allowing his accountants to complete his tax return for 2006-7 on

his behalf without taking account of those potential consequences was a deliberate action.

94. We agree with HMRC that Mr Mafi acted deliberately in failing to properly investigate the tax consequences of his disposal of his share of Favart Road in order to complete his tax return for 2006-7 and therefore the extended 20 year time limit at s 36(1A) TMA 1970 applies for the purposes of issuing an assessment for the 2006-7 tax year.

### **The amount of the assessment**

95. At the Tribunal hearing on 12 December 2017 Mr Mafi made clear, despite some earlier confusion, that his appeal concerned not only the basis on which HMRC could make an assessment on him for the 2006-7 tax year, but also the quantum of that assessment.

96. The onus is on Mr Mafi to demonstrate that HMRC's assessment for the 2006-7 tax year is incorrect. Mr Mafi's argument in respect of the quantum of HMRC's assessment focused on whether the oral trust which he said was made in favour of his sister could be respected. He did not advance any arguments concerning the details of how HMRC had calculated the £99,454.00 of tax owing.

97. HMRC pointed out that other than Mr Mafi's statements about the existence of that trust, no documentary evidence exists other than the March 2007 declaration of trust. Other facts about the way in which the Favart Road property was acquired are not consistent with the existence of a trust:

(1) There is no evidence that any of the money for the purchase of Favart Road came from Mr Mafi's sister; it came from Mr Mafi himself, a loan from Natwest and Mr Omid.

(2) There is no evidence in any other documents relating to Favart Road that Mr Mafi's sister has benefited from its purchase or sale. Even Mr Omid's lawyers seem not to have been aware of her involvement in that property.

(3) If any money can be traced back to Mr Mafi's company, that is a separate legal entity and his sister's interest cannot be traced back via this corporate veil.

98. For these reasons we have concluded that HMRC's assessment is correct and that Mr Mafi is properly subject to tax on the chargeable gains arising on the date when he transferred his beneficial interest in his part share of his property at Favart Road to his sister, on 19 March 2007.

### **Penalties**

99. The penalty charged on Mr Mafi has been charged on the basis of fraudulent behaviour. Mr Bracegirdle said that in this context "fraudulent behaviour" included deliberately failing to provide information as Mr Mafi had done.

100. Mr Mafi's response to the way in which the penalty had been applied by HMRC was merely to re-state the fact that no penalty should be due and that he had not intentionally failed to provide the information; he genuinely believed that he did not need to declare the income because of the trust in favour of his sister.

5 101. We have already stated our reasons for not accepting that Mr Mafi's belief that he did not need to include these gains on his tax return as a sufficient explanation for failing to include these chargeable gains in his tax return in circumstances where he has failed to make reasonable enquiries about the tax implications of his property transactions.

10 102. Mr Modi said that Mr Mafi had co-operated with HMRC and attended all the meetings which had been requested, but other than that, Mr Mafi did not make any specific representations about the way in which HMRC had applied the penalty.

15 103. In the face of a lack of detailed submissions from Mr Mafi, and based on the evidence provided by Mr Rodgers about Mr Mafi's failure to provide information about his disposal of an interest in Favart Road, we have accepted HMRC's approach to the mitigation of penalties as reasonable and the penalty charged on Mr Mafi of £38,359 is therefore confirmed.

20 104. 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.

25

**TRIBUNAL JUDGE RACHEL SHORT**

30

**RELEASE DATE: 20 June 2018**

**© CROWN COPYRIGHT 2018**

35