[2019] UKFTT 513 (TC)

INCOME TAX & CAPITAL GAINS TAX – Enquiry into 2010-11 and 2011-12 self-assessment tax returns – Information Notices issued – Penalty for non-compliance – Whether reasonable excuse – Closure notice amendments and discovery assessment issued – Validity of assessment – Whether sufficient evidence to displace amendments/assessments – Appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07309

Appeal number: TC/2014/06006

BETWEEN

TARIQ KHAN **Appellant**

-and-

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

TRIBUNAL: JUDGE JOHN BROOKS
SIMON BIRD

Sitting in public at Eastgate House, Newport Road, Cardiff CF24 on 21 June 2018, 24 and 25 April 2019 with further written submissions received from the Respondents on 30 May 2019

the Appellant in person

Glynis Millward litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. Mr Tariq Khan filed his 2010-11 and 2011-12 self-assessment tax returns on 31 January 2013. On 18 October 2013 HM Revenue and Customs ("HMRC") opened an enquiry into these returns, under s 9A of the Taxes Management Act 1970 ("TMA"). HMRC also requested further information from Mr Khan was to be provided by 20 November 2013. However, by letter dated 27 November 2013, HMRC extended the deadline for the provision of this information to 10 December 2013.

2. On 29 November 2013 Mr Khan wrote to HMRC to explain that he had not obtained the information requested and complained of the "unnecessary level of detail" required by HMRC.

3. On 18 December 2013 HMRC issued Information Notices under schedule 36 of the Finance Act 2006. The Notices required Mr Khan to produce the information and documents in relation to his 2010-11 and 2011-12 tax returns. In the absence of any response to the Information Notices, on 23 January 2014, HMRC issued a £300 penalty for non-compliance with the 2011-12 Information Notice. As the information required under the Information Notice remained outstanding on 13 May 2014, daily penalties, of £20 per day, were issued to Mr Khan.

4. On 19 June 2014 HMRC wrote to Mr Khan warning him that unless the information and documents requested in the Information Notice was provided closure notices amending his returns and an assessment would be issued.

5. As he did not reply, and as indicated in the 19 June 2014 letter, on 23 July 2014 HMRC issued a "discovery" assessment under s 29 TMA for additional tax of £24,450.60 for 2012-13. This was followed, on 25 July 2014, by the issue of closure notices, under s 28A TMA for 2010-11 and 2011-12 amending to Mr Khan's returns by increasing the tax due for those years by £26,707.20 and £31,065.80 respectively.

6. Mr Khan appeals against the Information Notices for 2010-11 and 2011-12, the penalties for non-compliance with the 2011-12 Information Notice, and the 2010-11 and 2011-12 closure notices amendments and the 2012-13 discovery assessment.

PROCEDURAL BACKGROUND

7. By a Notice of Appeal, dated 1 November 2014, Mr Khan notified the Tribunal of his appeals. On 29 May 2015 the Tribunal directed that these appeals be consolidated. HMRC filed and served their statement of case, dated 7 July 2015, in August 2015 having made an application on 30 June 2015 to strike out the appeal in relation to the Information Notices on the grounds that the information required relates to statutory records. On 18 September 2015 case management directions were issued by the Tribunal. Mr Khan made an application for 'further and better particulars' of HMRC's statement of case on 26 October 2016 and, as a result of that application, the directions were stayed on 10 December 2015.

8. A hearing was listed before Judge Short on 2 September 2016 who directed HMRC to provide further details of their case including a detailed explanation for the calculation of the assessment/amendments.

9. The appeal was then listed for hearing on 2 March 2017 before Judge Walters QC. At that hearing documents, not previously seen by HMRC, were produced by Mr Khan who was then represented by counsel. To enable consideration of these documents Judge Walters postponed the hearing.

10. On 19 June 2017 Judge Berner directed that:

(1) It having been confirmed by the Respondents by letter dated 7 June 2017 that they do not intend to make any case based on an increase to the amounts originally assessed, no such case may be made, and the Respondents are to rely on the statement of case as filed with the Tribunal.

(2) …

(3) The supplemental witness statement of Officer Lazenby dated 29 March 2017 is admitted in evidence, subject to cross-examination.

(4) …

(5) The Tribunal will list the hearing of the appeal for a two-day hearing in Cardiff in accordance with the mutually agreed dates notified to the Tribunal by letter from the Respondents dated 16 May 2019.

…

11. The hearing was subsequently listed for 10 and 11 October 2017 in Cardiff. A joint application to postpone that hearing was granted by the Tribunal to allow the parties to enter into settlement negotiations. However, because of the failure of Mr Khan to provide information requested by HMRC, this did not prove possible and an application was made by HMRC for the hearing to be reinstated.

12. Mr Khan applied for a further postponement on 5 January 2018 on medical grounds. This was opposed by HMRC in the absence of medical evidence. On 19 February 2018 the application was dismissed by Judge Kempster who, having consider the application and the Tribunal's file, observed that:

> "… the appeal was lodged in November 2014; the Respondents files their statement of case in August 2015; and the Tribunal issued case management directions in September 2015. The appeal has been listed for a substantive hearing twice … but cancelled on both occasions. Both parties have had more than adequate opportunity to prepare their respective cases. I do not see that any further delay in determining the appeal would be fair and just."

13. Accordingly the appeal was listed for hearing on 21 and 22 June 2018 before us (Judge Brooks and Mr Bird).

14. A further application to postpone the hearing made on 19 June 2018, again on medical grounds, was rejected in the absence of supporting evidence. However, on 21 June 2018 at the commencement of that hearing having, confirmed that he did not wish to renew his postponement application, Mr Khan told the Tribunal that he had made an application to HMRC for the appeal to be determined through the alternative dispute resolution ("ADR") process and sought a stay in proceedings to enable HMRC to consider this application. Although Mrs Millward, of HMRC, was not aware of any ADR application she was, after a short adjournment, able to inform the Tribunal that an application had been made on 21 June 2018 and that a "facilitator" had been appointed to determine whether the appeal could be accepted into the ADR process.

15. We were extremely concerned that this appeal, which had been made in 2014 and postponed twice should not be subject to any further delays. However, as it appeared that the primary dispute between the parties concerned the amount of tax we felt that it might be suitable for ADR. Therefore, with extreme reluctance we directed that the appeal be stayed until 20 August 2018 to enable a decision to be made as to whether the appeal would be accepted into the ADR process.

16. On 17 July 2018 HMRC wrote to Mr Khan to notify him that his appeal had not been accepted for ADR. This was because:

> "… the date on which HM Tribunal Service (sic) directed the parties to submit their Statement of Case has now elapsed. As proceedings … are now at an advanced stage, we consider that the Tribunal Hearing is the most appropriate way to resolve your dispute."

17. On 8 August 2018 HMRC applied for the stay to be lifted and for the appeal to be listed for hearing. However, as the stay had expired in any event, directions were issued in September 2018 under which any party that wished to rely on any additional documents not previously disclosed to the other party was to provide that other party with a copy of any such additional document or documents not later than 19 October 2018 (direction 1) and that neither party could rely on any documents not disclosed by 19 October 2019 without the permission of the Tribunal.

18. Neither party has sought to rely on any additional documents.

19. On 14 November 2018 the parties were notified that the appeal would resume and be heard on 24 and 25 April 2019 in Cardiff with a 10:00 am start each day. On the morning of 24 April 2019, the first day of the hearing, Mr Khan, having telephoned to say he would be late, arrived at approximately 10:30 am. He explained that he had been away and had not seen the bundles but accepted that these had been sent to his address by recorded delivery and that a signature had been obtained confirming receipt.

20. As he had not had the opportunity to read the bundles (which did not contain any documents he had not previously seen) in preparation for the hearing Mr Khan requested an adjournment to do so confirming, when asked, that he need approximately one hour. We therefore delayed the hearing until 11:30 to allow him time to read the bundles.

21. However, on his return Mr Khan then asked for the hearing to be postponed to enable him to instruct counsel. Mrs Glynis Millward, for HMRC, opposed the application. Given the already considerable delay in this appeal which commenced in 2014, that the parties had been given Notice of Hearing in November 2018, which in our judgment was sufficient time to instruct counsel, and as this appeared to be no more than a further delaying tactic, we dismissed the application and proceeded to hear the appeal.

22. By the morning of the second day of the hearing it appeared that, given that the evidence had not been completed, there would not be enough time for the parties to make full oral submissions. Additionally it was felt that the provision of sequential written closing submissions would give the parties time for reflection and enable them, particularly HMRC, as Mr Khan was not represented, to assist the Tribunal in its duty to ascertain the correct amount of tax due in the light of all the evidence. Therefore, after some discussion with the parties, directions were issued for the sequential provision of written closing submissions from the parties, with those from the HMRC due by 31 May 2019 and Mr Khan by 2 July 2019.

23. Direction 3 of those directions warned the parties that:

> "… the Tribunal will not take account any written submissions received after the dates stated in [the] directions [ie 31 May and 2 July 2019]."

It was also made clear within the "reasons" for the directions that:

> "There is a strict timetable for the provision of written submissions which we consider necessary in an appeal that was commenced in 2014. We have therefore warned the parties that failure to adhere to this timetable will result in their submissions not being taken into account by the Tribunal in reaching its decision."

24. Although Ms Millward, in compliance with the directions, did provide HMRC's written closing submissions on 30 May 2019, no closing submissions have been received from Mr Khan either by 2 July 2019 or subsequently.

THE APPEALS

25. We shall consider each of the appeals in turn, first in relation to the Information Notices; secondly against the penalties imposed for non-compliance with the Information Notices; and finally in relation to the 2010-11 and 2011-12 amendments and 2012-13 discovery assessment.

Information Notices

26. Under paragraph 1 of schedule 36 to the Finance Act 2008 an officer of HMRC may, by giving notice in writing, require a taxpayer to provide information or produce a document "if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position". Although a taxpayer may appeal against such a notice (an Information Notice) paragraph 29(2) of schedule 36 provides that such a right of appeal does not apply where the information or document requested "forms part of the taxpayer's statutory records".

27. Paragraph 62 of schedule 36 provides that information or a document forms part of the taxpayer's statutory records if "it is information or a document which the person is required to keep and preserve under or by virtue of (a) the Taxes Acts, or (b) any other enactment relating to tax". Under s 12B of the Taxes Management act 1970 ("TMA") a taxpayer must keep "all such records as may be requisite for the purpose of enabling him to make and deliver a correct and complete return." Such records are required to be kept, in the case of a person carrying on a trade, profession or business, until the later of the "fifth anniversary of the 31st January next following the year of assessment" or where an enquiry has been commenced the day the enquiry has been completed (s 12B(1)(b) TMA).

28. However, paragraph 62(3) of schedule 36 to the Finance Act 2008 provides:

> Information and documents cease to form part of a person's statutory records when the period for which they are required to be preserved by the enactments mentioned in sub-paragraph (1) has expired.

29. The effect of paragraph 62(3) on s 12B TMA was discussed by the Tribunal in *Sarah Duncan v. HMRC [2018]* UKFTT 296 (TC) which observed:

> "87. Our understanding of the interaction of those provisions is that, after the issuance of the Notice, time continues to run in accordance with the applicable statutory records provision, because para 62(3) explicitly provides that the time limits in the statutory records provision(s) continue to be effective. If, instead, those time limits were frozen following the issuance of a Sch 36 Notice, so that items which were statutory records on the date of the Notice retained that character, we would expect there to have been a provision to that effect in Sch 36, and there is not.
>
> 88. We find this to be a surprising conclusion, as it means that administrative delays by the parties, or in the hearing of an appeal by the tribunal, can change the items in a Notice over which the tribunal has jurisdiction. There are other complications: for example, if an appeal is heard by a tribunal in October, but the decision is issued in February, some Items may no longer be statutory records by the date of the decision, because of the interposition of 31 January between the hearing and the decision.
>
> 89. Despite those difficulties, it seems to us to be what is required by the provisions. As a result, in order to work out which documents and information are statutory records for the purposes of this appeal, we need to consider the

> position as at June 2018, when this decision will be issued. The key year is thus 2012-13, because the 31 January next following that tax year was 31 January 2014, and the fifth anniversary will be 31 January 2019. Thus, the statutory records requirements currently apply to 2012-13 and later years. When HMRC issue a notice to file under TMA s 8, that will re-establish the obligation in relation to any records remaining in Ms Duncan's possession, see TMA s 12B (2A).
>
> 90. To the extent that any of the Items are not statutory records because of the operation of these time limits, the Tribunal considers at §101-§106 below whether those Items should be upheld, set aside or varied."

30. On 18 December 2013 HMRC issued Mr Khan with a notice under paragraph 1 of schedule 36 to the Finance Act 2008 to provide the following information for 2010-11 and 2011-12:

> "Your P60 [for 2010-11 and 2011-12] from Concur Tech.
>
> Form P11D for [for 2010-11 and 2011-12] from Concur Tech, if you enjoyed taxable benefits in kind for the tax year.
>
> Copies of bank and building society accounts statements held in your name and used for business and letting purposes [for 2010-11 and 2011-12].
>
> All business records maintained for your self employed income as a sales agent [for 2010-11 and 2011-12].
>
> All records maintained for your income and expenditure for the letting of property.
>
> An analysis and breakdown of the following items claimed as a deduction against gross rents received: Rent/Rates & Insurance, repairs, loan interest, legal and professional costs, costs of services, and other Expenses. All receipts and invoices are required to support your analysis."

31. HMRC contend that the information and documents requested under the Notices comprise statutory records of Mr Khan and, as such, there is no right of appeal under paragraph 29(2) of schedule 36 to the Finance Act 2008.

32. However, although the information and documents were clearly statutory records at the time they were sought by HMRC, given the observations of the Tribunal in *Sarah Duncan*, that was no longer the case by the time of hearing in April 2019 (the fifth anniversary of the 31 January next following the year of assessment was, for 2010-11, 31 January 2017 and for 2011-12, 31 January 2018). It is therefore necessary to consider whether the information and documents sought by HMRC were reasonably required for the purposes of checking Mr Khan's tax position.

33. Mr Khan submits that the Notices were, in essence, a "fishing expedition" and as they were not clear the information sought could not be reasonably required by HMRC. He relied on comments of Judge Mckenna at [10] in *R D Utilities Ltd v HMRC* [2014] UKFTT 303 (TC) that:

> "The Tribunal takes the view that Information Notices should be expressed in clear terms and that it should be a straightforward matter for both parties to know whether an Information Notice has been complied with. That is why HMRC guidance states that the Information Notice should request facts and not opinion. In this case, the built-in assumptions on which the requests for information were based made it impossible for the parties to know whether the Notice had been complied with because the accuracy of the assumptions was disputed by the Appellant. In those circumstances, I have concluded that

> it would be fair and just to set aside the request for "information" in the Information Notice. I do so under paragraph 32 (3) (c) of Schedule 36 to the Finance Act 2008 because, in my view, information that it is impossible to supply cannot be "reasonably required" by HMRC. It is unnecessary for the Tribunal to make any order in respect of the request for documents in the Information Notice, which the Tribunal is satisfied has been complied with by the Appellant in any event."

34. However, unlike *R D Utilities*, we consider that the Information Notices in the present case are in clear and unequivocal terms. Having regard to all the circumstance, particularly that it is only due to the effluxion of time that these are no longer statutory records, we find that the information and documents listed in the Information Notices are reasonably required.

35. Although Mr Kahn did produce a bundle of documents at the hearing on 2 March 2017 it did not fully comply with the Information Notices. Therefore, his appeal against the Information Notices cannot succeed.

Penalties

36. A person who does not comply with an Information Notice is, under paragraph 39 of schedule 36 to the Finance Act 2008 liable to a penalty of £300. If, despite the imposition of a penalty the default continues, paragraph 40(2) provides:

> The person is liable to a further penalty not exceeding £60 for each subsequent day on which the failure or obstruction continues"

37. Section 118(2) TMA provides:

> … where a person has a reasonable excuse for not doing anything required to be done, he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased , he shall be deemed not to have failed to do it if he did it without reasonable delay after the excuse has ceased.

38. As Mr Khan had not produced the documents or provided the information required under the 2011-12 Information Notice, on 27 January 2014 HMRC issued a Penalty Notice in the sum of £300. Because of the continued non-compliance with the Information Notice a further Penalty Notice was issued on 13 May 2014 imposing daily penalties of £2,080 at a daily rate of £20 for the period from 28 January 2014 to 12 May 2014 (104 days). Although Mr Khan did produce a bundle of information/documents at the hearing on 2 March 2017 it was, as we have already noted, incomplete.

39. Therefore, unless he has a reasonable excuse for his non-compliance the penalties must stand.

40. By way of background Mr Khan explained that he had lived in Cardiff most of his life but had travelled throughout the UK because of work commitments with various companies and organisations providing software solutions. Around 1999 he had rented a house share in Berkshire but would return to Cardiff on a weekly basis. In June 2001, he purchased a property in Llandennis Avenue (the Llandennis Avenue Property") in Cardiff but continued to live, during the week in the rented accommodation in Berkshire. In December 2002 Mr Kahn was married and he held his wedding reception at the Llandennis Avenue property.

41. In March 2003 he moved out of the rented Berkshire property and purchased a property in Langley. This property was let when moved out in December 2005 and purchased a house in Iver, South Buckinghamshire (the "Iver House"). In Spring 2007 Mr Khan's son was born. However, his wife's family, who were Turkish, did not want him brought up in the UK. This led to difficulties and ultimately to the breakdown of his marriage.

42. Although Mr Khan was given responsibility for the care of his son following contested divorce proceedings which Mr Khan said brought, "serious and dire financial hardship with huge debts building up in the background and mortgage payments going unpaid" causing his mental state to suffer. The Iver House was sold on 7 March 2011 as part of the divorce settlement. In December 2011 he was "let go" by his employer, Concur Technologies (UK) Limited and claimed Job Seekers Allowance.

43. However, as Mr Khan no longer wished to remain on benefits having decided that he would focus on looking after his son working around the child's schedule without deadlines from employers, he established Talktime Solutions Limited a telecoms reseller in December 2012. However, it did not prove to be a successful venture which he explained was due to increased regulation of the market resulting in a profit of £16 during its first year of operation.

44. Mr Khan also decided to spend more time on managing his properties. In addition the Llandennis Avenue Property, Iver House and property in Langley mentioned above Mr Khan had also purchased the following properties, all of which were subsequently let, at:

(1) Ffordd Ty Unnos, Cardiff ;

(2) Pen y Wain Road, Cardiff;

(3) Mackintosh Place, Cardiff;

(4) Newport Road, Cardiff;

(5) Paget Street, Cardiff (two properties); and

(6) A property in Reading.

He recalled at the time of this "mayhem and financial problems" all of his income was being used by the running costs of his properties.

45. With regard to providing the information and documents required under the Information Notice, Mr Khan said that he was not aware of all the correspondence sent by HMRC. He explained that his ex-wife, who had access to his property would remove letters and documents to create difficulties for him. He understood that letters for him were arriving at Llandennis Avenue and in Iver as well as to a friend's house in a Reading and to another of his properties, at Ffordd Ty Unnos where he had requested post be sent. He said that if HMRC letters were removed he would not know what information was required from him.

46. In addition, Mr Khan explained that on 1 August 2014 he was involved in a serious road traffic accident in which his stationary vehicle was hit from behind. This has led to "ongoing severe back and neck pain with severe migraine headaches giving peripheral tunnel view and brain fog." Despite continuing treatment his health took "a sudden and unexpected turn for the worse" in January 2016 when he became immobilised. Mr Khan described 2016 as "the most challenging and difficult year" he has experienced and explained that as a consequence of these various problems he was not able to deal with business matters as his primary focus was on trying to get back to normal and the care of his son.

47. HMRC do not accept that Mr Khan has a reasonable excuse. Although the breakdown of his marriage and his ill-health since 2014 is accepted, HMRC say as he continued to manage a significant property portfolio (for which see above) in addition to a "self-employed sales" business and undertake his child care responsibilities Mr Khan therefore could, and should, have complied with the Information Notice.

48. The Upper Tribunal in *Christine Perrin v HMRC* [2018] UKUT 156 (TCC) observed at [71]:

> "In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times (in accordance with the decisions in *The Clean Car Co* and *Coales*).

49. We consider that the circumstances described by Mr Khan, which were not seriously challenged, are, when viewed objectively, clearly sufficient to amount to a reasonable excuse for non-compliance with the Information Notice and accordingly allow his appeal against the penalties.

Closure Notice Amendments 2010-11, 2011-12 & discovery assessment 2012-13

50. Section 50(6) TMA provides:

> If, on an appeal notified to the tribunal, the tribunal decides—
>
> (a) that, the appellant is overcharged by a self-assessment;
>
> (b) that, any amounts contained in a partnership statement are excessive; or
>
> (c) 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.

The long established effect of a provision that a decision or assessment shall "stand good", is that it is for the appellant, in this case Mr Khan, to satisfy the Tribunal upon sufficient evidence that the amendments to his tax returns were erroneous. HMRC are not required to establish that these are correct (eg see *T Haythornwaite & Sons v Kelly (HM Inspector of Taxes)* (1927) 11 TC 657).

51. However, in the case of a discovery assessment made under s 29 TMA, the Upper Tribunal held, in *Burgess & Brimheath Developments Ltd v HMRC* [2015] UKUT 0578 (TCC), ("*Burgess & Brimheath*") that it is for HMRC to establish the relevant conditions for the issue of a discovery assessment under s 29 TMA have been met. If HMRC establish the validity of a discovery assessment s 50(6) TMA then applies, as it does for in-date assessments, and the assessment "shall stand good" with the burden resting on the taxpayer to establish that it is wrong (see eg *Johnson v Scott* (*Inspector of Taxes*) [1978] STC 48 at 53).

52. As noted in paragraph 5, above, HMRC issued Mr Khan with a discovery assessment for additional tax of £24,450.60 for 2012-13 on 23 July 2014. On 25 July 2014 HMRC issued closure notices, under s 28A TMA for 2010-11 and 2011-12 amending his returns and increasing the tax due for those years by £26,707.20 and £31,065.80 respectively. HMRC contend that while it is "entirely possible" that the amendments and assessments understated his tax liability, as Mr Khan's has not adduced sufficient evidence to displace the amendments and assessment these should "stand good" and his appeal be dismissed.

53. An explanation of the amendments and discovery assessment and how these were calculated is contained in a letter, dated 19 June 2014, from Mr Steven Lazenby, HM Inspector of Taxes (who gave evidence before us), to Mr Khan in which Mr Khan was warned that unless he provided the information and documents in accordance with the Information Notices within 30 days Mr Lazenby intended to issue closure notices and amendments for 2001-11 and 2011-12 and a tax assessment for 2012-13 because tax returns for those years contained inaccuracies.

The letter (from which, although somewhat lengthy, we consider appropriate to quote almost in full) continued, setting out the following inaccuracies:

> "2010-11
>
> You failed to include the disposal liable to capital gains tax of 77 Bathurst Avenue [the Iver House] on 7 March 2011. This disposal is liable to capital gains tax because I have seen no evidence to suggest that this property was your Principal Private Residence, and, thus, I can only make the reasonable assumption that it was let as part of your property portfolio.
>
> Per Land Registry data available to HMRC via a statutory gateway you sold this property for £349,950 having purchased it for £283,500 on 16 December 2005, thus giving a chargeable gain of £66,450.
>
> HMRC believes that you were provided with free, or cheap, private medical insurance arising from your employment with Concur Tech Ltd. No such declaration was included on your tax return, and, in the absence of a form P11D, I have estimated the amount chargeable as £400.
>
> In the absence of any business records, I am treating your self-employment income for this year as nil profit/nil loss, thus disallowing the claim made against other income.
>
> I do not find the declared rental income for this year to be at all credible. In 2009-10, year in which the rent of one property was declared, you stated rent received to be £12,10. In 2010-11, this figure increased to seven properties, but only a £6,623 increase in rents received, or £86 per month per property.
>
> I have, thus, estimated your rental income as being £800 on average per month per property, not unreasonable given the locations and sizes of the let properties. This, therefore, totals rental income of £67,200 for the year.
>
> In the absence of receipts and documents to support claims made as expenses against gross rents I have made the following decisions:
>
> - Insurances estimated at £4,000
> - Repairs allowed as claimed £3,219
> - Loan interest. I find the amount claimed £54,088 to be excessive given the rental income declared. From Land Registry data available to me regarding your property portfolio, I have estimated that you hold mortgage loans totalling £542,900, with interest charged at a rate of 4.5%, this being typical of rates available in this period. Thus, I have allowed loan interest of £24,430
> - Legal and professional fees. I have disallowed the entire claim £8,992. You do not have a registered agent, and no documentary evidence has been provided to support the nature of this claim
> - Cost of services. I have allowed an estimate of £1,000
> - Other Expenses. In the absence of documentary evidence I have disallowed this claim in full
> - I have not allowed a 10% wear and tear allowance. You have not provided me with any evidence to support the claim that these properties were let furnished.
>
> I have therefore, included a profit of £43,551, this is reduced by £28,800 losses brought forward, thus providing assessable profits of £5,751.
>
> Your original self-assessment showed you had overpaid tax of £8,963.20. My amendments above would result in income and capital tax due of £17,774, an increase of £26,707.20.

The law that allows HMRC to reach such conclusions and issue closure notices is contained at s 28A(3), (4), schedule 1A paragraph 7(4) of Taxes Management Act 1970.

2011-12

You failed to include the disposal liable to capital gains tax of 48 Llandennis Avenue [the Llandennis Avenue Property] on 26 April 2011. The disposal is liable to capital gains tax because I have seen no evidence to suggest the property was your Principal Private Residence, and, thus, I can only make the reasonable assumption that it was let as part of your property portfolio.

Per Land Registry data available to HMRC via a statutory gateway you sold this property for £239,000, having purchased it for £177,000 on 29 June 2001, thus, giving rise to a chargeable gain of £62,000. No evidence has been provided to me to support any claim for allowable expenditure on this property.

In the absence of any business records, I am treating your self-employment income for this year as nil profit/nil loss, thus disallowing the claim made against other income.

I do not find the declared rental income for this year to be at all credible. Please see my comments for 2010-11 above.

I have, thus, estimated your rental income as being £800 on average per month per property, not unreasonable given the locations and sizes of the let properties. This, therefore, totals rental income of £67,200 for the year.

In the absence of receipts and documents to support claims made as expenses against gross rents I have made the following decisions:

- Insurances estimated at £4,500
- Repairs estimated as £3,500
- Loan interest. I find the amount claimed £50,423 to be excessive given the rental income declared. From Land Registry data available to me regarding your property portfolio, I have estimated that you hold mortgage loans totalling £542,900, with interest charged at a rate of 4.5%, this being typical of rates available in this period. Thus, I have allowed loan interest of £24,430
- Legal and professional fees. I have disallowed the entire claim £5,412. You do not have a registered agent, and no documentary evidence has been provided to support the nature of this claim
- Cost of services. I have allowed an estimate of £1,000
- Other Expenses. In the absence of documentary evidence I have disallowed this claim in full
- I have not allowed a 10% wear and tear allowance. You have not provided me with any evidence to support the claim that these properties were let furnished.

I will therefore, include an assessable profit of £33,770.

Your original self-assessment showed you had overpaid tax of £6,826.40. My amendments above would result in income and capital tax due of £24,239.40, an increase of £31,065.80.

The law that allows HMRC to reach such conclusions and issue closure notices is contained at s 28A(3), (4), schedule 1A paragraph 7(4) of Taxes Management Act 1970.

2012-13

You did not declare any salary this year, having stated that you left your paid employment in the 2011-12 tax year.

However, HMRC records indicate that you commenced as a director of Talktime Solutions Ltd, which was incorporated on 10 December 2012. The company has not, as yet, submitted any corporation tax returns or accounts.

You were previously in highly paid employment, and I believe it is reasonable for HMRC to assume, in the absence of any co-operation with these enquiries, that you will still require a reasonable standard of income with which to fund a lifestyle commensurate with a good salary from previous years.

I will, therefore, for 2012-13 estimate that you received:

- Director salary £8,000
- Dividends paid amounting to £15,000

I will also assume self employed consultancy and sales profits to total £30,000 for the period and will disallow the loss claim made against other income.

In the absence of receipts and documents to support claims made as expenses against gross rents for the enquiry years, to maintain a presumption of continuity I have made the following decisions:

- Insurances estimated at £4,700
- Repairs estimated as £4,000
- Loan interest. I find the amount claimed £52,037 to be excessive given the rental income declared. From Land Registry data available to me regarding your property portfolio, I have estimated that you hold mortgage loans totalling £542,900, with interest charged at a rate of 4.5%, this being typical of rates available in this period. Thus, I have allowed loan interest of £24,430
- Legal and professional fees. I have disallowed the entire claim £5,412. You do not have a registered agent, and no documentary evidence has been provided to support the nature of this claim
- Cost of services. I have allowed an estimate of £1,000
- Other Expenses. In the absence of documentary evidence I have disallowed this claim in full
- I have not allowed a 10% wear and tear allowance. You have not provided me with any evidence to support the claim that these properties were let furnished.

I will therefore, include an assessable profit of £31,438.

Your original self-assessment showed you were not liable to income tax. My amendments above would result in income tax due of £24,450.60, an increase of £24,450.60.

Please note that the statute which that allows HMRC to raise assessments for years not under formal enquiry, when we believe that the facts show there has been an under assessment if tax is contained at s 29 Taxes Management Act 1970."

54. As we have already mentioned Mr Khan did not provide the necessary information and documents and the amendments for 2010-11 and 2011-12 and discovery assessment for 2012-13 were duly issued.

55. Mr Khan asserts that the evidence he supplied at the hearing on 3 March 2017 demonstrates that the rental income and expenses he declared in his self-assessment tax returns for the years in question were correct, that medical expenses received from his employer were

not under-declared, that there was no undeclared employment and dividend income in 2012-13 and that the returns correctly stated his self-employment activities.

56. Having considered the information supplied by Mr Khan at the 3 March 2017 hearing, which was analysed by Mr Lazenby, we find that the closure notice amendments should be adjusted as follows:

> (1) The amount of chargeable benefit from employment in 2010-11 be reduced by £55. The 2010-11 P11D provided by Mr Khan showed the cash equivalent of benefits received from Concur Technologies (UK) Limited which had been estimated at £400 was actually £345; and
>
> (2) The deduction for loan interest for 2011-12 be increased by £2,831. Loan interest was estimated by Mr Lazenby at £24,430 whereas the amount shown in the mortgage statements provided by Mr Khan show it to have been £27,261

Although the information provided by Mr Khan indicates that the actual loan interest for 2010-11 and the insurance payments for 2010-11 and 2011-12 are lower than that estimated by Mr Lazenby, as HMRC are precluded by the direction of Judge Berner from making any case for the amount to be increased (see paragraph 10, above) no adjustment is to be made.

57. Additionally, Mr Khan asserts that he is not liable to capital gains tax ("CGT") on the disposal of the Iver House on 7 March 2011 or the Llandennis Avenue Property 26 April 2011 as these were his main residences, within s 222 Taxation of Chargeable Gains Act 1992 ("TCGA") and, accordingly he is entitled to relief under s 223 of the TCGA.

58. Section 223 TCGA provides that no part of a gain to which s 222 applies shall be chargeable to CGT. Insofar as it applies in the present case s 222 TCGA provides:

> **222 Relief on disposal of private residence**
>
> (1) This section applies to a gain accruing to an individual so far as attributable to the disposal of, or of an interest in—
>
> (a) a dwelling-house or part of a dwelling-house which is, or has at any time in his period of ownership been, his only or main residence,
>
> …
>
> (5) So far as it is necessary for the purposes of this section to determine which of 2 or more residences is an individual's main residence for any period—
>
> (a) the individual may conclude that question by notice to an officer of the Board given within 2 years from the beginning of that period but subject to a right to vary that notice by a further notice to an officer of the Board as respects any period beginning not earlier than 2 years before the giving of the further notice,
>
> (6) In the case of an individual living with his spouse or civil partner—
>
> (a) there can only be one residence or main residence for both, so long as living together and, where a notice under subsection (5)(a) above affects both the individual and his spouse or civil partner, it must be given by both,

59. In *Moore v HMRC* [2010] UKFTT 445 (TC) Judge Walters QC, at [38], conveniently summarised the authorities in relation to the issue of 'residence', saying:

> "A residence for these purposes must be a person's 'home' (*Sansom v Peay*, *ibid.* at 6G), 'a place where somebody lives' (*Frost v Feltham*, *ibid*. at 13I). However, 'even occasional and short residence in a place can make that

> [place] a residence' (*Moore v Thompson*, *ibid.* at 24E). *Goodwin v Curtis* is more helpful in assisting a resolution of the problem on the facts of this appeal. The Court of Appeal in that case was unanimous in the view that 'there must be some assumption of permanence, some degree of continuity, some expectation of continuity to turn mere occupation into residence' (*ibid.* at 508I, 510H)."

Millet LJ in *Goodwin v Curtis* [1998] STC 475 said, at 480:

> "[T]he question whether occupation is sufficient to make him resident is one of fact and degree for the [Tribunal] to decide"

60. Although Mr Khan did refer us to elections dated 27 December 2001, 8 February 2006 and 23 October 2010 for the Llandennis Avenue Property, the Iver house and the Llandennis Property respectively to be regarded as his principal residence for CGT purposes Mr Lazenby confirmed that HMRC does not have any record of these elections having been received. As such we find that as these elections were not received by HMRC, Mr Khan has not given notice to an officer of HMRC. It is therefore necessary to consider all the circumstances to determine whether he is entitled to relief from CGT.

61. The Iver House was purchased on 16 December 2005 and sold on 7 March 2011. In support of his claim that it was his principal residence between 8 February 2006 to 22 October 2010, Mr Khan relies on a planning application for a single storey side and rear extension dated 25 August 2006, a letter, dated 29 March 2007 from an architect in relation to a proposed loft conversion, a letter, dated 30 March 2010, from a Chartered Loss Adjustor in relation to an insurance claim for malicious damage on 16 February 2009 and a letter, dated 11 January 2011 from solicitors for his ex-wife warning of potential repossession proceedings. In addition he relies on various household bills including those for the provision of broadband, telephone and utility bills as well as a sample of police records where officers attended the property.

62. However, during the period that Mr Khan contends that the Iver House was his main residence he was receiving correspondence from HMRC at the Llandennis Avenue Property and the property in Berkshire that he rented. He was also receiving correspondence from BUPA, SWALEC electricity and correspondence in relation to his personal pension at the Llandennis Avenue Property.

63. The Llandennis Avenue Property was purchased on 29 June 2001 and sold on 26 April 2011. Mr Khan's evidence was that he did not reside at the property during the period from when he acquired the property until he purchased the Iver house when he lived in the rented Berkshire property and the house in Langley (see paragraphs 40 and 41, above). As such the Llandennis Avenue property cannot have been his residence, let alone his "main" residence during this time. Although Mr Khan has provided copies of correspondence sent to him at the Llandennis Avenue Property in support of his assertion that it was his main residence from 23 October 2010, as he also received correspondence at this address when, on his case, it was not his main residence we do not consider it to be sufficient to establish that it was his main residence.

64. Although we accept that Mr Khan did, indeed, occupy both the Iver House and the Llandennis Avenue Property at various times throughout his period of ownership, we are unable, on the evidence before us, to fund that that there was some assumption of permanence, some degree of continuity or some expectation of continuity to turn mere occupation into residence. As such, we conclude that he is not entitled to relief under s 223 TCGA.

65. Other than the adjustments we have identified above (at paragraph 56), we are unable to find that Mr Khan has adduced sufficient evidence to displace the amendments further and, subject to these adjustments, confirm the amendments.

66. Turning to the 2012-13 discovery assessment it is first necessary to consider whether it is valid. Insofar as it applied at the time it was issued s 29 TMA provided:

> **29 Assessment where loss of tax discovered**
>
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax,][2] have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.
>
> (2) …
>
> (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—
>
> (a) in respect of the year of assessment mentioned in that subsection; and
>
> (b) in the same capacity as that in which he made and delivered the return,
>
> unless one of the two conditions mentioned below is fulfilled.
>
> (4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
>
> (5) The second condition is that at the time when an officer of the Board—
>
> (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or
>
> (b) in a case where a notice of enquiry into the return was given—
>
> 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.
>
> (6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—
>
> (a) it is contained in the taxpayer's return under [section 8 or 8A][2] of this Act in respect of the relevant [year of assessment][2] (the return), or in any accounts, statements or documents accompanying the return;
>
> (b) it is contained in any claim made as regards the relevant [year of assessment][2] by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;
>
> (c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by

an officer of the Board, are produced or furnished by the taxpayer to the officer …[5]; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) In subsection (6) above—

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes—

(i) a reference to any return of his under that section for either of the two immediately preceding chargeable periods; and

ii) where the return is under section 8 and the taxpayer carries on a trade, profession or business in partnership, a reference to any partnership return with respect to the partnership for the relevant year of assessment or either of those periods; and

(b) any reference in paragraphs (b) to (d) to the taxpayer includes a reference to a person acting on his behalf.

…

(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

(9) Any reference in this section to the relevant year of assessment is a reference to—

(*a*) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) above, the year of assessment mentioned in that subsection; and

(*b*) in the case of the situation mentioned in paragraph (c) of that subsection, the [year of assessment][2] in respect of which the claim was made.

67. Although the appellants in *Burgess & Brimheath* had not challenged the validity of the discovery assessment the Upper Tribunal observed, at [37] after noting that under s 29(8) TMA (discovery) and s 34(2) TMA (time limits) objections to a discovery assessment may only be made on appeal against the assessment, that:

> "We do not construe those provisions, however, for competence or time limits to be in issue, an appellant is required to make an express objection or challenge to the validity of the making of an assessment."

The Upper Tribunal continued:

> "44. … it was not open to [HMRC] to seek to discharge the burden that lay upon them of proving those cases by purporting to limit the issues before the FTT to the substantive issues. Nor can HMRC's assertion that there had been no appeal made by the appellants on the competence and time limit issues serve to shift the onus of making a positive case onto Mr Burgess or Brimheath. Any concession or waiver by the appellants on those issues would have to have been clearly given, and HMRC could not assume that silence implied any such concession or waiver. It was not incumbent upon the

> appellants to respond to HMRC's assumption as to what they would, and would not, be required to prove.
>
> …
>
> 49. For HMRC to succeed before the FTT, either the competence and time limit issues had to be determined in their favour, or those issues had to have been conceded by the appellants. There was no such express concession and, in our judgment, none can be inferred. HMRC were wrong to assume, as it appears from their statement of case that they did, that the absence of reference by the appellants to the competence and time limit issues in their respective grounds of appeal, meant that those issues, on which HMRC's case depended, did not have to be determined in their favour. Those matters formed an essential element of HMRC's case, on which HMRC bore the burden of proof, and which if not proved would fail to displace the general rule that the assessments could not validly have been made. They were wrong too, once the appellants' first skeleton argument had been received, not to have appreciated that, far short of there being any concession on matters relevant to the competence and time limit issues, those matters were clearly the subject of dispute. The assertions on behalf of the appellants that they had not deliberately understated profits may not have been expressed in the form of challenges to the competence and time limit issues, but it should have been clear to HMRC that that was their effect."

68. The Upper Tribunal, having allowed the appellants' appeal, concluded:

> "58. … In the absence of HMRC having put a positive case to the FTT on the competence and time limit issues, the only course open to the FTT was to allow the appellants' appeals. …
>
> 59. The result, viewed objectively, may appear unsatisfactory. Each of the appellants has been found by the FTT to have seriously understated their taxable income over an extended period. That taxable income will remain untaxed. It must be recognised, on the other hand, that the assessment system that Parliament has legislated for is designed to provide a balance between HMRC and the taxpayer. Part of that balance is the requirement, in relation to discovery assessments and assessments outside the normal time limits, that HMRC satisfy the FTT that the relevant conditions for those assessments to have been validly made have been met. If HMRC fail to do so, for whatever reason, the fact that a taxpayer might escape tax that would otherwise have been due is simply the consequence of the operation of a system that provides such a balance. It is not for this tribunal to seek to achieve any result other than that prescribed by the law."

69. As in *Burgess & Brimheath*, HMRC's statement of case in the present case, under the heading "Onus and Burden of Proof", referred to s 50(6) TMA and the onus of proof being on the appellant to prove the assessment is excessive. Similarly, HMRC's skeleton argument, dated 9 April 2019 whilst referring to s 29 TMA states that "it falls upon the appellant to prove that the amendment is excessive as provided for in s 50(6) TMA. And, goes on to state that if the appellant is unable to show the assessment is excessive, then the assessment shall stand good." However, the skeleton argument does not address the s 29 TMA conditions and neither are they addressed in HMRC's written closing submission.

70. Although, like Mr Burgess and Brimheath, Mr Khan did not challenge the validity of the discovery assessment, it is still for HMRC to satisfy us that the relevant conditions for the discovery assessments have been met but, in failing to advance a positive case or even address these matters, have not done so in this case.

71. As such, as the Upper Tribunal recognised in *Burgess & Brimheath* the only course open to us is to allow the appellant's appeal against the discovery assessment.

SUMMARY OF CONCLUSIONS

72. For the reasons above:

(1) the appeals against the 2010-11 and 2011-12 Information Notices are dismissed;

(2) The Closure Notices for 2010-11 and 2011-12 are to be adjusted in accordance with the findings set out in paragraph 56, above and therefore the appeals against these are allowed in part; and

(3) Mr Khan's appeal against the 2012-13 discovery assessment and the penalties imposed for non-compliance with the Information Notice are allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

73. 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.

JOHN BROOKS
TRIBUNAL JUDGE

Release date: 06 AUGUST 2019