TC07595

PAYE – Self Assessment – Discovery assessments – penalties for failure to notify – taxable source of funds – gambling – record keeping obligations – appeal allowed

Appeal number: TC/2018/03387

FIRST-TIER TRIBUNAL
TAX CHAMBER

Mr SIMON JAMES McMILLAN **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN MANUELL
Mr MICHAEL BELL ACA CTA

Sitting in public at Taylor House, 88 Rosebery Avenue, London WC1R 4QU on 9 and 10 September 2019

Having heard Mr Laurence Sykes QC for the Appellant and Mr Christopher Vallis for the Respondents

DECISION

Introduction

1. The Appellant appealed against eight assessments issued by HMRC pursuant to section 29 of the Taxes Management Act 1970 ("TMA"), dated 5 February 2018 for the tax years 2006-07 to 2013-14 inclusive in the total sum of £290,928.56, including interest. He also appealed the related failure to notify penalties imposed, all dated 6 February 2018, totalling £132,193.25. The Appellant had not filed a tax return for any of those years, nor had he received notice to file a return under section 8 TMA.

2. The Appellant appealed promptly to the tribunal following the adverse review decision dated 16 April 2016. It has taken some time for the appeal to reach a hearing through no fault of either party.

HMRC's contentions

3. HMRC submitted that an officer of the board had made a discovery in accordance with section 29 TMA. The officer concluded on the information available to her, and in the absence of a reasonable explanation and supporting evidence, that the Appellant's bank statements revealed the existence of taxable income. The frequency and regular nature of the deposits into the Appellant's bank account suggested trading had occurred. Her conclusion was reasonable because the Appellant produced no evidence to support his claim that he was a successful gambler and his claim of consistently beating the bookmakers was improbable in any event. The Appellant's net income was calculated taking into account the Appellant's living expenses (with figures from the Office of National Statistics). The discovery assessments were attributable to the Appellant's failure to notify his chargeability in the years of assessment. The tax loss for the tax years 2006-07 to 2008-09 inclusive were attributable to the Appellant's negligent conduct. It was not alleged that the Appellant had tried to conceal his income. Disclosure was prompted and the penalties were calculated correctly.

The Appellant's case

4. The Appellant submitted that the assessments were invalid because HMRC were unable to show that there had been a loss of tax which would have permitted an assessment outside the four year time limit under section 34 TMA. The alleged source of the Appellant's funds had not been adequately pleaded: *Fairford Group plc v HMRC* [2014] UKUT 329 (TCC). In any event the Appellant had given a truthful explanation of the source of his funds. HMRC had inadvertently disclosed a review letter dated 11 April 2018 (not sent to the Appellant) in which the review officer had concluded that all of the assessment and penalty determinations should be cancelled because HMRC had failed to identify a taxable source. The review letter which was in fact sent, dated 16 April 2018, from the same review officer, stated that the

assessments and penalties should be upheld. The Appellant further contended that that as he had no income tax liability, he could not be liable to pay any penalties. The obligation on HMRC to provide a positive case as to the source of the Appellant's income had not been discharged.

The law

5. As will become clear, in the Tribunal's view this appeal turned almost entirely on factual issues. It is therefore not necessary for the Tribunal to address in detail every submission of law which was made during the hearing. The essential law was not in dispute. There is a substantial body of legislation and no shortage of case law. The main legislation applicable is section 7 TMA Notice of Liability to income tax and capital gains tax, section 29 TMA Assessment where loss of tax discovered, section 34 TMA Ordinary time limit of 4 years, section 36 TMA Loss of tax brought about carelessly or deliberately etc and section 50 TMA Procedure, section 5 Income Tax (Trading and Other Income) Act 2005 Charge to tax on trade profits and Schedule 41 Finance Act 2008 Penalties: Failure to Notify, which are set out so far as relevant in their current form as appendices to this decision.

6. It was not in issue before the Tribunal that winnings from gambling do not amount to a trade and are not taxable: see *Graham v Green* (1925) 9 TC 309 at [313-314] and HMRC Guidance "Meaning of trade: exceptions and alternatives: betting and gambling – introduction."

Burden and standard of proof

7. The initial burden of proof was on the Respondent, to the civil standard (balance of probabilities), to show a loss of tax. In the simplest of terms, once the Respondent had shown a *prima facie* case, the burden shifted to the Appellant to provide a cogent explanation. Again there was no serious dispute about that.

Evidence

8. Two agreed bundles of documents were served, together with a bundle of authorities, which included HMRC Guidance. There was also a supplemental bundle of mainly objective evidence served on behalf of the Appellant which addressed gambling success.

9. The history of the enquiry was set out in HMRC's Statement of Case dated 30 November 2018. On 11 October 2013 a compliance check on the Appellant was made, which was followed by correspondence, meetings and service of an

information notice over the course of the next four years. Mrs J Acreman gave evidence on behalf of the Respondent, explaining that history. The HMRC officer who had opened the enquiry had since retired and Mrs Acreman took it over at a relatively late stage, in effect adopting the conclusions already reached by her colleague. When the Appellant had requested a statutory review following the issue of the assessments and penalties, the reviewing officer's initial decision had been that the Appellant's appeal could not be resisted, however Mrs Acreman had asked for that decision to be revisited and the review decision was reversed.

10. The vast majority of the Appellant's documents were bank statements from his ten separate accounts as disclosed to HMRC. In the event there was limited need to refer to the bank statements at the hearing. There was little other written evidence from the Appellant and almost nothing contemporaneous with the historic events apart from his bank statements.

11. The Tribunal heard evidence from the Appellant and six other witnesses on his behalf. One of the witnesses is the Appellant's long term partner. Another witness gave detailed evidence about the Appellant's safe in which he had stored his winnings, the contents of which the witness had seen. The Appellant's last declared employment was in or about 1998. Since then he had not been employed or self employed in any capacity. All of the witnesses confirmed that to their knowledge the Appellant had had no employment or self employment between 1998 and 2010, and had been an active gambler during that time. He had ample funds and abundant leisure. Most of the witnesses had seen the Appellant enter betting shops. One witness had hosted poker parties at his home for several years and the Appellant had attended frequently and had usually won handsomely.

12. The Appellant said that he was not required by HMRC to file self assessment tax returns and had not been served any notice to do so, which was not in dispute. He had taken up serious gambling in or about 1999, after his interest had been piqued from a discussion with some students at a Greenwich pub. His gambling took the form of (a) an elaborate system of betting on British and European football results and (b) increasingly higher stakes private poker games. All of his dealings were in cash. This continued until 2010. By then the Appellant recognised that his increasingly unhealthy style of life could no longer continue. It was affecting his relationship with his partner. He spent the next two years rearranging his life, with help from his partner, with whom he continues to live. He gradually drew his accumulated funds from his safe and distributed the money into the various bank accounts which he had opened. He had deliberately spread his money between different banks. The sums he paid in were based on what could be deposited easily on a single occasion via £20 banknotes into automated bank machines. He then purchased and restored a house. Because he had forsaken his former life, he had lost touch with most of the people within that circle. He had disposed of whatever notes he had prepared for his football betting.

Findings

13. As indicated above, the Tribunal decision turns very largely on its findings of fact. The Tribunal has considered the whole of the evidence with care. HMRC relied on an observation by Cross, J in *Brimelow v Price (1965) 49 TC 41* at [49]:

"If a man makes substantial sums of money in betting – and a number of people do so – it is not unreasonable to expect him to keep records of his betting transactions so that, if he is subsequently challenged by the revenue authorities to explain an increase in his wealth, he can satisfy them that it is not due to any undisclosed taxable profits but to his betting winnings. If he chooses not to do that, he runs the risk of having attributed to taxable profits what, if he kept records of his transactions, he might have been able to convince the authorities were in fact untaxable betting winnings."

14. The Tribunal ventures that this observation takes HMRC's case little further. By HMRC Self Assessment Guidance CH14550 (with reference to CH11200), reflecting section 12B TMA, the Appellant in summary was obliged to retain records until (a) the first anniversary of 31 January next following the year of assessment, e.g., the records for the year ending 5 April 2009 must be kept at least until 31 January 2011; (b) completion of any enquiry into the matters to which the records relate; and (c) the end of the day on which the enquiry window closes. The evidence shows that the Appellant's gambling activities ceased at latest in 2010, which meant that any records should have been kept by him until 31 January 2013. As HMRC's enquiries began in October 2013, the statutory obligation to retain records had ceased, given that concealment/fraud has not been alleged at any stage. To that extent, any record keeping issue does not arise in terms of formal obligation.

15. HMRC's primary contention was that the Appellant had engaged in trade. No trade conducted or engaged in by the Appellant was identified by HMRC prior to the hearing, nor in any of the evidence. The Tribunal can draw no proper inference showing a trade, identified or otherwise, carried on by the Appellant from the evidence it saw. That indeed was the point made by the reviewing officer in the (unsent) letter dated 11 April 2018. At most, there was circumstantial evidence in the form of the Appellant's bank deposits in a substantial sum, which invited further enquiry and explanation.

16. It is of significance in the Tribunal's view that (a) the Appellant has cooperated fully with HMRC's throughout their protracted enquiries and there was no suggestion to the contrary and (b) the Appellant's case as to the source of the sums challenged by HMRC has never changed in its essential elements, although there was far more detailed evidence available by the hearing, as might reasonably be expected where a properly arguable appeal exists.

17. The Appellant had and has consistently denied any taxable income source for any part of the relevant period. His money was entirely winnings from gambling, football bets and poker. No records had been kept by him of those winnings. Such records as he had kept for the purpose of the analysis behind his football bets had been discarded in 2010 when he forsook his previous manner of life. He had at all

times operated in cash so as to avoid unwelcome attention and possible recognition at bookmakers, which might have endangered his system. Poker had also been played in cash, as was customary.

18. As a matter of the Tribunal's initial impression, as noted above, several elements of the Appellant's case gave rise to justified suspicion and invited further enquiry. Successful gamblers, particularly over the longer term, tend to be an exception. That is perhaps obvious enough. Relatively few people have the *sangfroid* to habitually risk large sums of money. There were regular deposits into the Appellant's various bank accounts of identical sums, whose amounts resembled profits or income, at least at first glance. The Appellant's style of life suggested ample funds, available over a significant period of time. The Appellant's claim that his cash was kept in a safe at the country home of a friend at some distance away tended towards the implausible. The Tribunal has kept those points closely in mind when assessing the evidence, as they were the stronger elements of HMRC's case.

19. The Appellant and his witnesses were unshaken under thorough cross examination. Each witness was calm and measured, kept strictly to facts within his/her own knowledge, and made every effort to assist the Tribunal. The Tribunal considered that the evidence given by the Appellant and by his witnesses was truthful.

20. While it is probably a truism that consistently successful, long term gamblers are the exception, the Appellant gave a detailed and lucid explanation of the system he used for his football bets, which involved careful research and calculation, not hunches or guesses. If conditions were unpropitious in a particular week, no significant bets were placed. The Appellant's mode of operation was in the Tribunal's view well beyond the skill or sophistication of the average sports gambler, and was credible. Similarly, the Appellant demonstrated deep experience and knowledge of high stakes poker, corroborated by an independent and credible witness. In the Tribunal's view the Appellant was revealed as a shrewd and intelligent person. There would almost certainly have been some degree of mixed pleasure or satisfaction derived by the Appellant from his gambling above and beyond the monetary reward. On his own evidence some of the stress of the constant gambling was relieved by alcohol, and he had received counselling for addiction. It is also notable that his style of life was not one of reckless or wasteful extravagance. Entertainment of his friends was typically in pubs rather than 3 star establishments.

21. When a full explanation of the Appellant's use of his safe to deposit his funds at the friend's country home was considered, the apparent implausibility was dispelled. In the first place, there was independent corroboration of the actual existence and location of the safe and of the circumstances in which it was acquired and used by the Appellant. The Appellant's movements were explained and access to the safe by him by no means necessarily involved inconvenient and/or lengthy travel, not that ordinary time constraints applied to him. The Appellant believed he had reason to avoid using banks and so operated in cash. Those reasons had no connection with any untoward intentions in concealing income, as there was no taxable income from gambling. Indeed, no allegation of concealment was made by HMRC.

22. The Tribunal accepts the evidence given by the Appellant and on his behalf in full. The summary which is set out above stands as the Tribunal's findings of fact.

23. The Tribunal is satisfied that that the Appellant had no taxable income source (save for any bank interest) for any of the periods for which the discovery assessments under appeal were raised. HMRC have not shown that the Appellant was employed or was engaged in any trade. This means that none of the assessments and the related penalties can stand. They are not valid. A further assessment will need to be carried out by HMRC if it is considered that any bank interest declared by the Appellant is material. The Tribunal so finds.

24. It follows that the appeal must be allowed.

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.

TRIBUNAL JUDGE MANUELL
RELEASE DATE: 22 OCTOBER 2019

APPENDIX

Key statutory provisions

[Relevant extracts and current versions only reproduced]

Taxes Management Act 1970 (as amended)

7 Notice of liability to income tax and capital gains tax

(1) Every person who—

(a) is chargeable to income tax or capital gains tax for any year of assessment, and

(b) falls within subsection (1A) or (1B),

shall, subject to subsection (3) below, within [the notification period], give notice to an officer of the Board that he is so chargeable.

(1A) A person falls within this subsection if the person has not received a notice under section 8 requiring a return for the year of assessment of the person's total income and chargeable gains to file under section 8 for the year of assessment.

(1B) A person falls within this subsection if the person—

(a) has received a notice under section 8 requiring a return for the year of assessment of the person's total income and chargeable gains to file under section 8 for the year of assessment, and

(b) has received a notice under section 8B withdrawing the notice under section 8.

(1C) In subsection (1) "the notification period" means—

(a) in the case of a person who falls within subsection (1A), the period of 6 months from the end of the year of assessment, or

(b) in the case of a person who falls within subsection (1B)—

(i) the period of 6 months from the end of the year of assessment, or

(ii) the period of 30 days beginning with the day after the day on which the notice under section 8 was withdrawn,

whichever ends later.

(2) In the case of persons who are chargeable as mentioned in subsection (1) above as the relevant trustees of a settlement, that subsection [and subsections (1A) to (1C) have effect as if references to a notice under section 8 were references to a notice under section 8A.

(2A) A person who—

(a) falls within subsection (1A) or (1B), and

(b) is notified of a simple assessment for the year of assessment,

is not required to give notice under subsection (1) for that year unless the person is chargeable to income tax or capital gains tax for the year of assessment on any income or gain that is not included in the assessment.

(3) A person shall not be required to give notice under subsection (1) above in respect of a year of assessment if for that year —

(a) the person's total income consists of income from sources falling within subsections (4) to (7) below,

(b) the person has no chargeable gains, and

(c) the person is not liable to a high income child benefit charge.

(4) A source of income falls within this subsection in relation to a year of assessment if—

(a) all payments of, or on account of, income from it during that year, and

(b) all income from it for that year which does not consist of payments,

have or has been taken into account in the making of deductions or repayments of tax under PAYE regulations.

(5) A source of income falls within this subsection in relation to any person and any year of assessment if all income from it for that year has been or will be taken into account—

(a) in determining that person's liability to tax, or

(b) in the making of deductions or repayments of tax under PAYE regulations.

(6) A source of income falls within this subsection in relation to any person and any year of assessment if all income from it for that year is—

(a) income from which income tax has been deducted; or

(b) income from or on which income tax is treated as having been deducted or paid, . . .

and that person is not for that year liable to tax at a rate other than the basic rate, the dividend nil rate, the Scottish basic rate, a Scottish rate below the Scottish basic rate, the Scottish intermediate rate, the Welsh basic rate, the dividend ordinary rate, the savings nil rate or the starting rate for savings.

(6A) A source of income falls within this subsection in relation to any person and any year of assessment if for that year—

(a) all income from the source is dividend income (see section 19 of ITA 2007), and

(b) the person—

(i) is UK-resident,

(ii) is not liable to tax at the dividend ordinary rate,

(iii) is not liable to tax at the dividend upper rate,

(iv) is not liable to tax at the dividend additional rate, and

(v) is not charged to tax under section 832 of ITTOIA 2005 (relevant foreign income charged on remittance basis) on any dividend income.

(7) A source of income falls within this subsection in relation to any person and any year of assessment if all income from it for that year is income on which he could not become liable to tax under a self-assessment made under *section 9* section 8 or 8A of this Act in respect of that year.

. . .

(9) For the purposes of this Act the relevant trustees of a settlement are—

(a) in relation to income (other than gains treated as arising under Chapter 9 of Part 4 of ITTOIA 2005), the persons who are trustees when the income arises and any persons who subsequently become trustees; and

(aa) in relation to gains treated as arising under Chapter 9 of Part 4 of ITTOIA 2005, the persons who are trustees in the year of assessment in which the gains arise and any persons who subsequently become trustees; and

(b) in relation to chargeable gains, the persons who are trustees in the year of assessment in which the chargeable gains accrue and any persons who subsequently become trustees.

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, 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) Where—

(a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and

(b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,

the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made (or, where the error or mistake is in an end of period statement forming part of the return, if that statement was provided on the basis of or in accordance with the practice generally prevailing at the time when it was provided).

(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—

(i) issued a partial closure notice as regards a matter to which the situation mentioned in subsection (1) above relates, or

(ii) if no such partial closure notice was issued, issued a final closure notice,

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 of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(aa) it is contained in any information provided by the taxpayer to HMRC under regulations under paragraph 7 of Schedule A1 (periodic updates);

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer. . .; 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; . . .

(ia) . . .

(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.

(7A) The requirement to fulfil one of the two conditions mentioned above does not apply so far as regards any income or chargeable gains of the taxpayer in relation to which the taxpayer has been given, after any enquiries have been completed into the taxpayer's return, a notice under section 81(2) of TIOPA 2010 (notice to counteract scheme or arrangement designed to increase double taxation relief).

(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 in respect of which the claim was made.

34 Ordinary time limit of 4 years

(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains tax may be made at any time not more than 4 years after the end of the year of assessment to which it relates.

. . .

(2) An objection to the making of any assessment on the ground that the time limit for making it has expired shall only be made on an appeal against the assessment.

(3) In this section "assessment" does not include a self-assessment.

36 Loss of tax brought about carelessly or deliberately etc

(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).

(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax —

(a) brought about deliberately by the person,

(b) attributable to a failure by the person to comply with an obligation under section 7, . . .

(c) attributable to arrangements in respect of which the person has failed to comply with an obligation under section 309, 310 or 313 of the Finance Act 2004 (obligation of parties to tax avoidance schemes to provide information to Her Majesty's Revenue and Customs), or

(d) attributable to arrangements which were expected to give rise to a tax advantage in respect of which the person was under an obligation to notify the Commissioners for Her Majesty's Revenue and Customs under section 253 of the Finance Act 2014 (duty to notify Commissioners of promoter reference number) but failed to do so,

may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period).

(1B) In subsections (1) and (1A), references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person.

(2) Where the person mentioned in subsection (1) or (1A) ("the person in default") carried on a trade, profession or business with one or more other persons at any time in the period for which the assessment is made, an assessment in respect of the profits or gains of the trade, profession or business in a case mentioned in subsection (1A) or (1B) may be made not only on the person in default but also on his partner or any of his partners.

(3) If the person on whom the assessment is made so requires, in determining the amount of the tax to be charged for any chargeable period in any assessment made in a case mentioned in subsection (1) [or (1A)] above, effect shall be given to any relief or allowance to which he would have been entitled for that chargeable period on a claim or application made within the time allowed by the Taxes Acts.

(3A) In subsection (3) above, "claim or application" does not include an election under . . . any of sections 47 to 49 of ITA 2007 (tax reductions for married couples and civil partners: elections to transfer relief). . .

(4) Any act or omission such as is mentioned in section 98B below on the part of a grouping (as defined in that section) or member of a grouping shall be deemed for the purposes of subsections (1) and (1A)] above to be the act or omission of each member of the grouping.

50 Procedure

. . .

(6) 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.

(7) If, on an appeal notified to the tribunal, the tribunal decides—

(a) that the appellant is undercharged to tax by a self-assessment . . .;

(b) that any amounts contained in a partnership statement . . . are insufficient; or

(c) that the appellant is undercharged by an assessment other than a self-assessment,

the assessment or amounts shall be increased accordingly.

(7A) If, on an appeal notified to the tribunal, the tribunal decides that a claim or election which was the subject of a decision contained in a closure notice under section 28A of this Act should have been allowed or disallowed to an extent different from that specified in the notice, the claim or election shall be allowed or disallowed accordingly to the extent that the tribunal decides is appropriate, but otherwise the decision in the notice shall stand good.

(8) Where, on an appeal notified to the tribunal against an assessment (other than a self-assessment) which—

(a) assesses an amount which is chargeable to tax, and

(b) charges tax on the amount assessed,

the tribunal decides as mentioned in subsection (6) or (7) above, the tribunal may, unless the circumstances of the case otherwise require, reduce or, as the case may be, increase only the amount assessed; and where any appeal notified to the tribunal is so determined the tax charged by the assessment shall be taken to have been reduced or increased accordingly.

(9) Where any amounts contained in a partnership statement are reduced under subsection (6) above or increased under subsection (7) above, an officer of the Board shall by notice to each of the relevant partners amend—

[(a) the partner's return under section 8 or 8A of this Act, or

(b) the partner's company tax return,

so as to give effect to the reductions or increases of those amounts.

(10) Where an appeal is notified to the tribunal, the decision of the tribunal on the appeal is final and conclusive.

(11) But subsection (10) is subject to—

(a) sections 9 to 14 of the TCEA 2007,

(b) Tribunal Procedure Rules, and

(c) the Taxes Acts.

Income Tax (trading and Other Income) Act 2005

5 Charge to tax on trade profits

Income tax is charged on the profits of a trade, profession or vocation.

Finance Act 2008

SCHEDULE 41 PENALTIES: FAILURE TO NOTIFY AND CERTAIN VAT AND EXCISE WRONGDOING

Section 123

Failure to notify etc

1

A penalty is payable by a person (P) where P fails to comply with an obligation specified in the Table below (a "relevant obligation").

Tax to which obligation relates	*Obligation*
Income tax and capital gains tax	Obligation under section 7 of TMA 1970 (obligation to give notice of liability to income tax or capital gains tax).

Degrees of culpability

5

(1) A failure by P to comply with a relevant obligation is—

(a) "deliberate and concealed" if the failure is deliberate and P makes arrangements to conceal the situation giving rise to the obligation, and

(b) "deliberate but not concealed" if the failure is deliberate but P does not make arrangements to conceal the situation giving rise to the obligation.

(2) The making by P of an unauthorised issue of an invoice showing VAT is—

(a) "deliberate and concealed" if it is done deliberately and P makes arrangements to conceal it, and

(b) "deliberate but not concealed" if it is done deliberately but P does not make arrangements to conceal it.

(3) The doing by P of an act which enables HMRC to assess an amount of duty as due from P under a relevant excise provision[, or to assess an amount of landfill tax as due from P under section 50A of FA 1996,] is—

(a) "deliberate and concealed" if it is done deliberately and P makes arrangements to conceal it, and

(b) "deliberate but not concealed" if it is done deliberately but P does not make arrangements to conceal it.

(4) P's acquiring possession of, or being concerned in dealing with, goods on which a payment of duty is outstanding and has not been deferred or (as the case may be) chargeable soft drinks in respect of which a payment of soft drinks industry levy is due and payable and has not been paid is—

(a) "deliberate and concealed" if it is done deliberately and P makes arrangements to conceal it, and

(b) "deliberate but not concealed" if it is done deliberately but P does not make arrangements to conceal it.

Amount of penalty: standard amount

6

(1) This paragraph sets out the penalty payable under paragraph 1.

(1A) If the failure is in category 0, the penalty is—

(a) for a deliberate and concealed failure, 100% of the potential lost revenue,

(b) for a deliberate but not concealed failure, 70% of the potential lost revenue, and

(c) for any other case, 30% of the potential lost revenue.

(2) If the failure is in category 1, the penalty is—

(a) for a deliberate and concealed failure, 125% of the potential lost revenue,

(b) for a deliberate but not concealed failure, 87.5% of the potential lost revenue, and

(c) for any other case, *30%* 37.5% of the potential lost revenue.

…

(4) If the failure is in category 3, the penalty is—

(a) for a deliberate and concealed failure, 200% of the potential lost revenue,

(b) for a deliberate but not concealed failure, 140% of the potential lost revenue, and

(c) for any other case, 60% of the potential lost revenue.

(5) Paragraph 6A explains the 4 categories of failure.

6A

(1) A failure is in category 1 if—

(a) it involves a domestic matter, or

(b) it involves an offshore matter and —

(i) the territory in question is a category 1 territory, or

(ii) the tax at stake is a tax other than income tax or capital gains tax.

(A1) A failure is in category 0 if—

(a) it involves a domestic matter,

(b) it involves an offshore matter or an offshore transfer, the territory in question is a category 0 territory and the tax at stake is income tax or capital gains tax, or

(c) it involves an offshore matter and the tax at stake is a tax other than income tax or capital gains tax.

…

(5) A failure "involves a domestic matter" if it results in a potential loss of revenue and does not involve either an offshore matter or an offshore transfer.

(6) If a single failure is in more than one category (each referred to as a "relevant category") —

(a) it is to be treated for the purposes of this Schedule as if it were separate failures, one in each relevant category according to the matters or transfers that it involves, and

(b) the potential lost revenue in respect of each separate failure is taken to be such share of the potential lost revenue in respect of the single failure (see paragraphs 7 and 11) as is just and reasonable.

Potential lost revenue

7

(1) "The potential lost revenue" in respect of a failure to comply with a relevant obligation is as follows.

(1A) In the case of an obligation under section 7 of TMA 1970 which arises by virtue of subsection (1B) of that section, the potential lost revenue is so much of any income tax or capital gains tax to which P is liable in respect of the tax year in question as is, by reason of the failure to comply with the obligation—

(a) where the period specified in subsection (1C)(b)(ii) of that section applies and ends after the relevant date, unpaid at the end of that period, or

(b) in any other case, unpaid on the relevant date.

(1B) For the purposes of sub-paragraph (1A) the relevant date is—

(a) 31 January following the tax year, or

(b) if, after that date, HMRC refund a payment on account in respect of the tax year to P, the day after the refund is issued.

(2) In the case of a relevant obligation relating to income tax or capital gains tax and a tax year[(not falling within sub-paragraph (1A)), the potential lost revenue is so much of any income tax or capital gains tax to which P is liable in respect of the tax year as by reason of the failure is unpaid on 31 January following the tax year.

(3) In the case of a relevant obligation relating to corporation tax and an accounting period, the potential lost revenue is (subject to sub-paragraph (4)) so much of any corporation tax to which P is liable in respect of the accounting period as by reason of the failure is unpaid 12 months after the end of the accounting period.

(4) In computing the amount of that tax no account shall be taken of any relief under section 458 of CTA 2010 (relief in respect of repayment etc of loan) which is deferred under subsection (5) of that section.

11

(1) In calculating potential lost revenue in respect of a relevant act or failure on the part of P no account is to be taken of the fact that a potential loss of revenue from P is or may be balanced by a potential over-payment by another person (except to the extent that an enactment requires or permits a person's tax liability to be adjusted by reference to P's).

(2) In this Schedule "a relevant act or failure" means—

(a) a failure to comply with a relevant obligation,…

Reductions for disclosure

12

(1) Paragraph 13 provides for reductions in penalties—

(a) under paragraph 1 where P discloses a relevant failure that involves a domestic matter, and

(b) under paragraphs 2 to 4 where P discloses a relevant act or failure.

(1A) Paragraph 13A provides for reductions in penalties under paragraph 1 where P discloses a relevant failure that involves an offshore matter or an offshore transfer.

(1B) Sub-paragraph (2) applies where P discloses—

(a) a relevant failure that involves a domestic matter,

(b) a non-deliberate relevant failure that involves an offshore matter, or

(c) a relevant act or failure giving rise to a penalty under any of paragraphs 2 to 4.

(2) P discloses the relevant act or failure by—

(a) telling HMRC about it,

(b) giving HMRC reasonable help in quantifying the tax unpaid by reason of it, and

(c) allowing HMRC access to records for the purpose of checking how much tax is so unpaid.

(2A) Sub-paragraph (2B) applies where P discloses—

(a) a deliberate relevant failure (whether concealed or not) that involves an offshore matter, or

(b) a relevant failure that involves an offshore transfer.

(2B) P discloses the failure by—

(a) telling HMRC about it,

(b) giving HMRC reasonable help in quantifying the tax unpaid by reason of it,

(c) allowing HMRC access to records for the purpose of checking how much tax is so unpaid, and

(d) providing HMRC with additional information.

(2C) The Treasury must make regulations setting out what is meant by "additional information" for the purposes of sub-paragraph (2B)(d).

(2D) Regulations under sub-paragraph (2C) are to be made by statutory instrument.

(2E) An instrument containing regulations under sub-paragraph (2C) is subject to annulment in pursuance of a resolution of the House of Commons.]

(3) Disclosure of a relevant act or failure—

(a) is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the relevant act or failure, and

(b) otherwise, is "prompted".

(4) In relation to disclosure "quality" includes timing, nature and extent.

(5) Paragraph 6A(4) to (5) applies to determine whether a failure involves an offshore matter, an offshore transfer or a domestic matter for the purposes of this paragraph.

(6) In this paragraph "relevant failure" means a failure to comply with a relevant obligation.

13

(1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a "standard percentage") has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it—

(a) for a prompted disclosure, in column 2 of the Table, and

(b) for an unprompted disclosure, in column 3 of the Table.

(3) Where the Table shows a different minimum for case A and case B—

(a) the case A minimum applies if—

(i) the penalty is one under paragraph 1, and

(ii) HMRC become aware of the failure less than 12 months after the time when the tax first becomes unpaid by reason of the failure, and

(b) otherwise, the case B minimum applies.

Standard %	*Minimum % for prompted disclosure*	*Minimum % for unprompted disclosure*
30%	case A: 10% case B: 20%	case A: 0% case B: 10%
70%	35%	20%
100%	50%	30%

13A

(1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a "standard percentage") has made a disclosure, HMRC

must reduce the standard percentage to one that reflects the quality of the disclosure.

(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it—

(a) for a prompted disclosure, in column 2 of the Table, and

(b) for an unprompted disclosure, in column 3 of the Table.

(3) Where the Table shows a different minimum for case A and case B—

(a) the case A minimum applies if HMRC becomes aware of the failure less than 12 months after the time when the tax first becomes unpaid by reason of the failure;

(b) otherwise, the case B minimum applies.

Standard %	*Minimum % for prompted disclosure*	*Minimum % for unprompted disclosure*
30%	case A: 10% case B: 20%	case A: 0% case B: 10%
37.5%	case A: 12.5% case B: 25%	case A: 0% case B: 12.5%
45%	case A: 15% case B: 30%	case A: 0% case B:15%
60%	case A: 20% case B: 40%	case A: 0% case B: 20%
70%	45%	30%
87.5%	53.75%	35%
100%	60%	40%
105%	62.5%	40%
125%	72.5%	50%
140%	80%	50%
150%	85%	55%
200%	110%	70%

Special reduction

14

(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any of paragraphs 1 to 4.

(2) In sub-paragraph (1) "special circumstances" does not include —

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to —

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

Interaction with other penalties and late payment surcharges

15

(1) The amount of a penalty for which P is liable under any of paragraphs 1 to 4 shall be reduced by the amount of any other penalty incurred by P, or any surcharge for late payment of tax imposed on P, if the amount of the penalty or surcharge is determined by reference to the same tax liability.

(1A) In sub-paragraph (1) "any other penalty" does not include a penalty under Part 4 of FA 2014 (penalty where corrective action not taken after follower notice etc) or Schedule 22 to FA 2016 (asset-based penalty).

(2) If P is liable to a penalty under section 9 of FA 1994 in respect of a failure to comply with a relevant obligation, the amount of any penalty payable under paragraph 1 in respect of the failure is to be reduced by the amount of the penalty under that section.

(3) Where penalties are imposed under paragraph 3(1) and (2) in respect of the same act or use, the aggregate of the amounts of the penalties must not exceed 100% of the potential lost revenue.

Assessment

16

(1) Where P becomes liable for a penalty under any of paragraphs 1 to 4 HMRC shall—

(a) assess the penalty,

(b) notify P, and

(c) state in the notice the period in respect of which the penalty is assessed.

(2) A penalty under any of paragraphs 1 to 4 must be paid before the end of the period of 30 days beginning with the day on which notification of the penalty is issued.

(3) An assessment—

(a) shall be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Act),

(b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

(4) An assessment of a penalty under any of paragraphs 1 to 4 must be made before the end of the period of 12 months beginning with—

(a) the end of the appeal period for the assessment of tax unpaid by reason of the relevant act or failure in respect of which the penalty is imposed, or

(b) if there is no such assessment, the date on which the amount of tax unpaid by reason of the relevant act or failure is ascertained.

(5) In sub-paragraph (4)(a) "appeal period" means the period during which—

(a) an appeal could be brought, or

(b) an appeal that has been brought has not been determined or withdrawn.

(6) Subject to sub-paragraph (4), a supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of potential lost revenue.

(7) The references in this paragraph to "an assessment to tax" are, in relation to a penalty under paragraph 2, a demand for recovery.

Appeal

17

(1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

18

(1) An appeal shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or the Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

(a) so as to require P to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Act.

19

(1) On an appeal under paragraph 17(1) the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 17(2) the tribunal may—

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 14—

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 14 was flawed.

(4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(5) In this paragraph, "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 18(1)).

Reasonable excuse

20

(1) Liability to a penalty under any of paragraphs 1, 2, 3(1) and 4 does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC or [(on an appeal notified to the tribunal) the tribunal] that there is a reasonable excuse for the act or failure.

(2) For the purposes of sub-paragraph (1) —

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the relevant act or failure, and

(c) where P had a reasonable excuse for the relevant act or failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the relevant act or failure is remedied without unreasonable delay after the excuse ceased.