**[2022] UKFTT 100 (TC)**

# TC 08430

*CORPORATION AND INCOME TAX – assessments raised on company and participators – s455 Corporation Taxes Act charges – director's current account movements – associated income tax assessments for participators – penalties – Appeal substantively dismissed*

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**Appeal number: TC/2019/03648**
**TC/2019/03649**
**TC/2019/03651**

**BETWEEN**

**LA LUZ RESIDENTIAL HOME LTD**
**MRS M D SOTO**
**MR M A SOTO** **Appellant**

**-and-**

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

**TRIBUNAL: JUDGE AMANDA BROWN QC**
**JO NEILL**

**Sitting in public at Taylor House, 80 Rosebery Avenue, London on 26 and 27 October 2021, 31 January and 1 February 2022 with closing submissions made in writing following the final day of the hearing.**

**Mr Doshi of Doshi & Co for the Appellants.**

**Dr Timothy Heal, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents.**

## DECISION

### INTRODUCTION

1. This appeal concerns a series of closure notices, discovery assessments and associated penalties as set out in the tables below issued by HM Revenue & Customs ("**HMRC**") to each of the Appellants: La Luz Residential Home Ltd ("**LLL**"), Mr M Angel Soto ("**AS**") and Mrs MD Soto ("**MS**") (Mrs Soto appears to also go under the name Carmen) (together "**the Appellants**").

### BACKGROUND

2. From October 1995 a partnership of AS and MS carried on the business of La Luz Residential Home. The business was transferred to LLL with effect from 6 July 2009. AS is the sole director and company secretary. AS and MS each hold 50% of the ordinary shares in the company.

3. On 24 August 2015 HMRC advised LLL that they were opening an enquiry into the company's tax return for the accounting period ended (**APE**) 31 July 2014. On the same date AS and MS were notified that enquires were also being opened into their self-assessment tax returns for the tax year ended 5 April 2014. HMRC requested the provision of certain information in connection with their enquires.

4. It has been a feature of the enquiry into the 2014 returns and enquires opened into the subsequent returns for each of AS, MS and LLL that there was a failure to cooperate with HMRC's enquiry and a failure to provide information as and when requested by HMRC and in some cases at all. Set out in the annex to this decision is a list showing the number of requests for information made both informal and by way of their formal powers contained in Schedule 36 Finance Act 2008. For the purposes of this judgment it is principally only necessary to be aware of the number of requests made. Where more detail is relevant an articulation of the requested but missing information is set out in the body of this judgment.

5. It is also to be noted that there were inconsistencies across the documents, in the working papers and by reference to the copies of accounts provided to HMRC and filed at Companies House. There were accounts purportedly signed on dates which could not have been the case, for instance the amended accounts for the accounting period ended 31 March 2015 were apparently signed before the originals. This was deeply concerning for the Tribunal. It is acknowledged that a company such as LLL does not require to have its accounts audited but they should be accurate. It is also important that when coming to the Tribunal that true copies of documents are used. The Tribunal was unable to be confident as to the provenance of the accounts and documents relied on in this case. Where there was any divergence between working papers and filed accounts those filed with Companies House were preferred.

6. Without the information requested HMRC formed the view that for each of the Appellants there was an insufficiency in the self-assessment returns submitted and that the insufficiencies so identified had arisen as a consequence of the negligent or deliberate behaviour of the Appellants such that, in respect of years for which no enquiry had been opened, discovery assessments were justified.

7. On 24 January 2017 the enquiries for accounting periods ended 31 July 2014 and 2015 were closed and the self-assessments amended by reference to the conclusions reached. Assessments were also issued on the same date against LLL for accounting periods ended 31 July 2010 to 31 July 2013.

8. Similarly, on 27 February 2017 HMRC issued discovery assessments for tax years 2010/11, 2011/12, 2012/13 and 2014/15 and closed the enquiry for tax year 2013/14 in respect of each of AS and MS.

9. All assessments and closure notices were appealed. Those issued to LLL were appealed out of time however, HMRC accepted the out of time appeals.

10. Correspondence continued between the parties, HMRC continuing to request the information they considered necessary to review the assessments. Enquiries were opened into later tax years and Schedule 36 notices reissued in respect of outstanding information pertinent to the ongoing open enquiries.

11. On 31 October 2018 HMRC issued their "view of the matter" letter in respect of all years 2010/11 to 2016/17 inclusive (for each of AS and MS) and in respect of all APE 31 July 2010 – 2014 and APE 31 March 2015 – 2016 inclusive for LLL. By those letters HMRC particularised all issued identified with the relevant tax returns. HMRC also closed the open enquiries on the same date.

**Identified issues with the returns**

12. HMRC identified 10 issues with the LLL returns for APE 31 July 2014. In summary these issues were:

(1) Expenditure had been incurred in connection with a property at 5 Hazon Way which was legally owned by AS and MS. For accounting periods ended 31 July 2010 and 2011 that expenditure had been shown on the balance sheet as "other debtors" but in subsequent balance sheets it was shown as an "investment asset" under the heading of Fixed Assets of the company with the value of the putative asset increasing year on year by reference to the mortgage payments made together with expenditure associated with the property including: council tax payments, appliances such as washing machines and other expenditure on repairs and renovations. HMRC considered the expenditure to have been incurred on behalf of the director (or more particularly the shareholders/participants i.e. both AS and MS) and should have been treated as a loan to those participants. As a result of such expenditure, the balance on the director's current account was "overdrawn". HMRC considered that tax was due pursuant to s455 Corporation Taxes Act 2010 ("**CTA**") .

(2) In respect of dividends paid on ordinary A shares, HMRC noted that the dividends were only voted upon when the accounts were prepared with the consequence that in some years the credit to the directors' current account occurred later than 9 months from the end of the accounting period such that the relief against the s455 CTA tax charge (otherwise permitted under s458 CTA) was delayed beyond 9 months from the end of the accounting period. Interest was therefore due on the overdrawn balances.

(3) A dividend in respect of B shares of £111,000 had been declared in the restated company accounts for 2015 and a further dividend of £135,000 had been declared in the company accounts for 2016. In both instances the dividend had been credited to the director's current account thereby reducing the net sum due from the participants. HMRC noted that as the 2015 dividend had been voted upon only upon the restatement of the 2015 accounts on 30 March 2016 the credit to the director's loan account which reduced the overall indebtedness by the dividend was not effective until 30 March 2016 with the attendant consequences for interest on the overdrawn director's current account balance for 2015.

(4) The company had paid into a private ISA and claimed it as a purchase within LLL, the incorrect treatment required a debit to the directors' current account increasing profits of the company but also increasing the overdrawn amount on the director's current account and hence the s455 charge.

(5) Solicitors' fees in respect of the purchase of the private home of AS and MS had been claimed as a company expense; as with (4) above the company profits required to

be increased and the expense debited to the director's current account increasing the overdraft and s455 charge.

(6) Vehicles previously purchased by the partnership were not transferred to LLL; however, motoring expenses had been borne by the company, such expenses had been subject to only a small deduction for private use. Following a review of the mileage logs HMRC considered that company mileage was approximately 555 miles per year. The total claim for motoring expenses therefore needed to be adjusted downwards.

(7) Certain gardening expenses had been claimed. The expenses were unvouched and there was no information as to whom they had been paid or when. HMRC determined to disallow the expenses.

(8) A deduction had been claimed in respect of a management fee of £15,000 said to have been paid by LLL to the previous partnership in the accounting period ended 31 March 2014, as there was no evidence supporting the nature of the fee it was disallowed and debited to the director's current account.

(9) Payments made in respect of a personal loan were disallowed and debited to the director's current account.

(10) There was unidentified income of £30,000. Conflicting evidence was given as to its nature being described as personal money received in the company account, a refund relating to a mortgage and a contra entry. With no indication that the income was that of the company profits were accordingly, and in favour of LLL, reduced.

**Amendments and assessments**

13. As a consequence of the errors identified above HMRC closed the enquiry for APE 31 July 2014 and amended LLL's self assessment determining total additional tax due in the sum of £70,937.95.

14. For APEs 31 July 2010 – 31 March 2015 the accounts showed that LLL had made similar deductions in respect of expenditure on Hazon Way. HMRC considered that the same adjustments considered at 11(1) above were required in those additional years. No additional expenditure was incurred by LLL in APEs ended 31 March 2016 or 2017 in respect of Hazon Way. In May 2019 the title to Hazon Way was legally transferred from AS and MS to LLL.

15. HMRC considered, absent relevant information having been provided for other years that the errors relating to private motoring expenses were, on the balance of probabilities, likely to have been replicated in all years. As such motoring expenses were considered to have been incorrectly claimed in APEs 31 July 2011 – 31 March 2016.

16. The most significant adjustments related to the Hazon Way expenditure, and the B share dividends (determined as having been paid to AS and MS) and the associated impact on the director's current account and s455 CTA charge (after allowing relevantly for relief under either s458 CTA).

17. HMRC determined that consequential amendments/assessments were required in respect of the personal tax returns of AS and MS, in particular in respect of the payment of the B share dividends and with respect to the chargeable benefit in respect of sums treated as debited to the director's loan account and not repaid within 9 months of the end of the accounting period.

18. Further errors in the personal returns for each of AS and MS were identified:

(1) The omission of income from foreign rental properties for tax years 2010/11 – 2014/15 allocated 50:50 between each of AS and MS.

(2) Omission of bank interest for tax returns for 2011/12 and 2012/13

(3) The omission of UK letting income in respect of 4 High Street Tadworth (the property let by AS and MS to LLL but in respect of which sums shown as paid by LLL had not been treated as income by AS and MS).

(4) Incorrect treatment of pension income for 2013/14 and 2014/15.

(5) Disallowance of sums claimed as partnership losses.

19. Amendments and assessments due for each period and each Appellant are set out below:

| Period | LLL |
|---|---|
| Discovery assessment for APE 31 July 2010 | £17,416.00 |
| Discovery assessment for APE 31 July 2011 | £28,160.62 |
| Discovery assessment for APE 31 July 2012 | £9,222.35 |
| Discovery assessment for APE 31 July 2013 | £12,233.08 |
| Closure Notice for APE 31 July 2014 | £70,937.95 |
| Closure Notice for APE 31 March 2015 | £41,876.00 |
| Closure Notice for APE 31 March 2016 | £741.20 |
| Closure Notice for APE 31 March 2017 | £19,492.85 |
| Penalty assessments | £75,869.85 |

| Period | AS |
|---|---|
| Discovery assessment year to 5 April 2011 | £3,871.00 |
| Discovery assessment year to 5 April 2012 | £7,717.75 |
| Discovery assessment year to 5 April 2013 | £9,046.37 |
| Closure Notice for year to 5 April 2014 | £103.13[1] |
| Discovery assessment year to 5 April 2015 | £517.15[2] |
| Closure Notice for year to 5 April 2016 | £48,630.32 |
| Closure Notice for year to 5 April 2017 | £32,776.12 |
| Penalty assessments | £52,026.97 |

| Period | MS |
|---|---|
| Discovery assessment year to 5 April 2011 | £3,933.20 |
| Discovery assessment year to 5 April 2012 | £8,719.15 |
| Discovery assessment year to 5 April 2013 | £10,899.34 |
| Closure Notice for year to 5 April 2014 | £7,963.55[3] |

[1] In HMRC's statement of case this is shown as an amount due to AS not due from. However the review conclusion letter dated 3 April 2019 shows amount due from AS

[2] As for 2014 HMRC's statement of case shows sum due to rather than due from as per the review conclusion letter.

[3] As for AS and footnotes 1 and 2

| | |
|---|---|
| Discovery assessment year to 5 April 2015 | £4,899.95[4] |
| Closure Notice for year to 5 April 2016 | £41,041.22 |
| Closure Notice for year to 5 April 2017 | £28,433.07 |
| Penalty assessments | £48,616.48 |

20. Whilst it was not initially clear which of the adjustments were and were not under appeal in response to questions put to Mr Doshi by Tribunal Member Mrs Neill during the first day of the hearing Mr Doshi expressly confirmed that the only aspects of HMRC's decisions regarding the amendments/assessment which were under appeal were:

(1) HMRC's treatment of the Hazon Way expenditure – the Appellants contended that the beneficial interest to capital appreciation of Hazon Way had been transferred by AS and MS to LLL on 31 July 2011in consideration of the company reducing the sum then outstanding on the director's loan account such that all expenditure (including mortgage repayments) incurred post that date was proper to the company.

(2) To whom the B Share dividends had been paid – AS and MS contended that they were not the recipients of the dividends for 2015 and 2016 on the B Shares such that they were not liable to income tax on them, this was so despite the fact that the dividends had been credited to the director's current account. The Appellants accepted that if the Tribunal determined that AS and MS were not the recipients, the credit to the director's current account had been incorrect and s455 CTA charges and interest would be due.

(3) Motoring expenses – LLL claimed that business mileage was greater than had been allowed by HMRC.

21. During the course of the hearing and in his closing submissions Mr Doshi raised the timing of the payment of the A share dividends and the impact on the s455 charge and the associated benefit in kind charge. On the basis that when asked to articulate what matters were in dispute and which needed to be resolved by the Tribunal, Mr Doshi identified the three matters set out in paragraph 20 and then confirmed that the Appellants accepted HMRC's decision in respect of the other matters identified in paragraph 12 the Tribunal has not considered this issue.

**Penalties**

22. HMRC issued penalties pursuant to Schedule 24 Finance Act 2007 to each of LLL, AS and MS as follows:

(1) LLL

(a) In respect of the errors associated with Hazon Way (paragraph 12(1) above) on the basis that the error was a deliberate inaccuracy with a prompted disclosure. The reduction permitted for quality of disclosure was 35% represented as 10% for telling 10% for helping and 15% for giving.

(b) In respect of the errors identified at 12(2) and 12(4) - 12(10) (having taken account of the positive impact on the directors loan account of the deemed payment of the B share dividend) on the basis that the error was a careless error with prompted disclosure. The reduction permitted for quality of disclosure was 50% represented by 10% for telling, 20% for helping and 20% for giving.

(2) AS

[4] As for AS and footnotes 1 and 2

(a) In respect of the omission of foreign rental income assessed as identified at paragraph 18(1) above on the basis that the error was a deliberate inaccuracy with a prompted disclosure. The reduction permitted for quality of disclosure was 40% represented as 10% for telling 20% for helping and 10% for giving.

(b) In respect of the B share dividend income identified at paragraphs 12(3) and 16 above on the basis that the error was a deliberate and concealed inaccuracy. The reduction permitted for quality of disclosure was 20% represented as 5% for telling 10% for helping and 5% for giving.

(c) In respect of the inaccuracies concerning the remaining errors on basis that the error was a careless inaccuracy with a prompted disclosure. The reduction permitted for quality of disclosure was 50% represented as 15% for telling 20% for helping and 15% for giving.

(3) MS

(a) In respect of the omission of foreign rental income assessed as identified at paragraph 18(1) above on the basis that the error was a deliberate inaccuracy with a prompted disclosure. The reduction permitted for quality of disclosure was 40% represented as 10% for telling 20% for helping and 10% for giving.

(b) In respect of the B share dividend income identified at paragraphs 12(3) and 16 above on the basis that the error was a deliberate and concealed inaccuracy. The reduction permitted for quality of disclosure was 20% represented as 5% for telling 10% for helping and 5% for giving.

(c) In respect of the inaccuracies concerning the remaining errors on basis that the error was a careless inaccuracy with a prompted disclosure. The reduction permitted for quality of disclosure was 50% represented as 15% for telling 20% for helping and 15% for giving.

23. Each of the Appellants accept the careless penalties issued to them (i.e.221)(b), 22(2)(c), and 22(3)(c)). AS and MS accept that penalties relating to the foreign rental income at 22(2)(a) and 22(3)(a) are due but on the basis of careless prompted inaccuracies rather than deliberate inaccuracies. The Appellants also accept that if the Tribunal finds that the underlying tax in respect of the B Shares (11(3) and 16) is upheld the penalties at 22(2)(b) and 22(3)(b) are due but only on the basis that they were careless and prompted inaccuracies rather than deliberate and concealed. As regards the penalties at 22(1)(a) LLL originally appeared to accept liability to a careless but not a deliberate penalty. However, in their closing submissions it was contended that the behaviour was neither deliberate nor careless as any error arose from a complex legal issue arising under the Law of Property Act as to which see below.

24. However, with regards to all of the penalties the Appellants contend that there has been insufficient reduction given by HMRC. In particular the Appellants contend that the assessments have, as a matter of fact, been based only on the information provided by them such that the reduction for giving should be the maximum permitted (i.e. in each case 30%).

**THE LAW**

25. The is no dispute between the parties as to the relevant legal provisions or their meaning or application.

26. However, in order to facilitate understanding, it is relevant to note that broadly speaking, and so far, as relevant in this appeal, s455 CTA imposes a charge to tax on a company where that company makes a loan or advances money to a director or shareholder (participator) of the company. For the purposes of s455 CTA any debt incurred on behalf of the participator is treated as a loan to that participator. The s455 CTA tax charge is relieved where the

loan/advance is repaid within 9 months of the end of the accounting period in which it was made (by virtue of s458 CTA).

27. So far as is relevant in this appeal HMRC may issue penalties pursuant to Schedule 24 Finance Act 2007 where tax is assessed. The rate of penalty varies on whether the behaviour giving rise to the assessment is careless or deliberate and whether identification of the errors underlying the assessments were prompted or unprompted and concealed or unconcealed. Penalties may be reduced in respect of assistance given by the taxpayer to HMRC in assessing the tax under the headings telling, helping and giving.

**EVIDENCE GENERALLY**

28. The Tribunal was initially provided with four pdf files of documentary evidence (totalling 2808 pages) together with a further 3 pages from the Appellants. Subsequent to the initial listing further substantial material was produced including the full working files for each APE 31 July 2010 – 31 March 2017, together with the working papers for the partnership returns for the equivalent tax year. Office copy entries for Hazon Way and certain Companies House material was also produced. On the final day of the hearing Mr Doshi also produced an additional bundle of papers some evidential and some further legislation and authorities.

29. The Tribunal notes that there were significant inconsistencies in the documents produced. By way of example there were differences between the apparent date of finalisation of accounts produced as part of the hearing bundles and those lodged at Companies' House. The conflicting documentary material was a consistent feature of this appeal. Where relevant it is dealt with below.

30. After the first two days of the hearing the Appellant applied to be permitted to call expert evidence relating to a number of accountancy and insolvency issues perceived to have arisen in the first hearing. HMRC offered an initial objection to the calling of any expert evidence. However, the Tribunal was of the view that expert accounting evidence would greatly assist in understanding the accounting in respect of, in particular, Hazon Way, the B share dividends and more generally the entries in the director's current account. As the resumed hearing had been listed the Tribunal directed the joint appointment of a single expert with instructions to be prepared and agreed by the parties and reviewed and endorsed by the Tribunal. Though the agreement of the instructions was a tortuous process eventually Mr Raymond Davidson was appointed and produced an expert report. The Tribunal are extremely grateful to Mr Davidson for the assistance he gave.

31. On 9 February 2022, Mr Doshi served his closing submissions. However, those submissions also included significant evidential testimony as to the facts and circumstances pertaining to the production of the accounts by Doshi & Co. Assertions were made as to what had been explained to AS at the time the accounts were prepared. As had been a theme throughout the case, Mr Doshi's submissions also sought to evidence through personal representation, that errors had been made by his firm in connection with the preparation of the accounts. This was so despite Mr Doshi not formally giving evidence and not making himself available for cross examination. HMRC did not formally object to this additional and entirely new evidence. The Tribunal has read the evidence but not formally admitted it. For the reasons set out below, in connection with each of the issues, the Tribunal considered that the evidence made no difference to its decision.

32. Live evidence was taken from:

(1) Ms Dylis Woodburn - The Tribunal found Ms Woodburn to be a credible witness. She explained the investigations she undertook, and the requests made for information. She was impressively aware of the detail of all the documents in the bundle and was able

to navigate it assisting the Tribunal to fully understand what steps had been taken by her and the basis on which the assessments had been made.

(2) Mr Soto - AS's first language is not English. AS is also deaf and has health conditions that meant that sitting for prolonged periods was uncomfortable. The Tribunal treated AS as a vulnerable witness. AS was offered breaks and given the freedom and flexibility to walk around the court as needed. The Tribunal also ensured that AS had a full understanding of the questions put to him in cross examination and repeatedly sought to ensure that the answers he gave had been fully understood by the Tribunal. Despite inconsistencies in his evidence the Tribunal found AS to have given his oral evidence honestly and by reference to his recollection of events. However, that is not to say that the Tribunal accepts all the evidence he gave as set out below. It is also important to note that the Tribunal has taken no account of AS's written statement. The statement was unsigned, but the Tribunal had originally assumed that was as a consequence of the difficulties arising during the covid restrictions. However, in oral evidence AS stated that he was not aware that he had ever seen the statement, he noted that he had not signed it and, having read it, he said they were not his words.

(3) Mr Raymond Davidson – who gave expert evidence as to whether the treatment of Hazon Way, the B share dividends and the director's current account was in accordance with the relevant accounting standards to be applied to LLL's accounts. Mr Davidson's evidence was clear and helpful to the Tribunal.

**Approach taken to evidence**

33. There are a number of cases which, over the last decade, have considered the approach to be taken in respect of oral evidence received, particularly concerning facts and matters which occurred many years prior to the giving of the evidence. These cases have been comprehensively reviewed in the judgment of Judge Brooks in *Hargreaves v HMRC* [2019] UKFTT 244.

34. So far as material in the present appeal the Tribunal notes, from that judgment, that a certain degree of caution is to be taken because:

> "26. …
>
> - memories are fluid and malleable, being constantly rewritten whenever they are retrieved …
> - the process of … litigation … subjects the memories of witnesses to powerful bias …
> - witnesses, especially those who are emotional, who think they are morally right, tend very easily and unconsciously to conjure up a legal right that did not exist…."

35. The judgments summarised by Judge Brooks conclude that:

> "The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. "This does not mean that oral testimony serves no useful purpose… But its value lies largely… in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

36. This approach is particularly relevant in the present appeal.

37. Ms Woodburn's evidence was entirely corroborative of the documents which were available to the Tribunal and as such can be accepted where it clarified the documentary evidence.

38. As regards the evidence of AS, it was clear to the Tribunal that he and his wife have built a successful business running a care home and that AS was passionate about providing a safe, friendly and supportive environment for those residing at the home. However, and by his own admission, he had no accounting knowledge or skills and relied exclusively, in the period relevant to this appeal, on Doshi & Co. He entirely trusted Doshi & Co to prepare his accounts and tax returns. He did not understand much of what was said to him by the accountants and, it appears, that he was content that any lack of understanding did not really matter.

39. AS found Ms Woodburn and her HMRC colleagues difficult and aggressive and he did not question that HMRC's repeated assertions that documents had not been supplied were, in fact, correct; his belief that Doshi & Co were fully co-operating on his behalf, appeared, certainly during the course of the enquiry, to be unshakable.

40. AS confirmed that the decision to set up LLL had been at the instigation of Doshi & Co, he did not claim to understand what benefit would be derived from incorporation and he had no understanding of the implications of doing so. He continued as he had done prior to the establishment of the company. He did not inform customers or suppliers of the change of status and no new bank account for the company was set up. All transactions that had previously been run through the partnership bank account continued. He noted expenditure as private or business but did not understand that different consequences arose regarding private expenditure incurred through the company and the bank account.

41. AS had no familiarity with any documentation relating to the accounts and/or his tax returns. He confirmed that he signed what needed to be signed (accounts, letters of representation, confirmation statements etc.) on the recommendation of Doshi & Co. As a consequence, the Tribunal gave less weight to AS's oral evidence where that evidence was not corroborated by the documents.

**Burden of proof**

42. In this matter, the Appellants bear the burden of proof and must establish, on the balance of probabilities that the amendments and assessments are incorrect and/or overstated.

43. The burden of proof usually rests with HMRC in the first instance to show that the circumstances justifying the issue of a penalty are met with the burden then shifting to the taxpayer to show that the quantum or mitigation are incorrect. In the present case the Appellants accepted that for the matters not contested the Appellant was liable to a penalty and, if the Tribunal upholds the assessments in respect of the contested matters similarly the Appellants are liable to penalties. As noted above the Appellant challenges that the inaccuracies in respect of the foreign income was deliberate and, in respect of the B shares arose as a consequence of deliberate and concealed behaviour and they challenge the level of mitigation permitted in respect of all penalties. HMRC have the burden of establishing deliberate and concealed behaviours.

**HAZON WAY**

**Evidence and facts found**

***Documents***

44. The property at 5 Hazon Way was purchased by AS and MS in joint names on 1 December 2008 for a purchase price of £312,000. The property was original purchased with the assistance of a mortgage but by 2016 the mortgage was repaid. The property was subject to a series of assured shorthold tenancies. Within the bundle there was an agreement dated 16

April 2015 which showed the landlord as AS and MS. The rents were payable via a letting agent but were ultimately received into MS's personal bank account.

45. For the accounting period ended 31 July 2010 expenditure in respect of Hazon Way amounted to £77,959.96. The working papers for the 2010 accounts noted that at the time of preparation of the accounts the accountants were unclear as to whether Hazon Way was a business property or personal property. The note states:

> "… If property is business related, then kindly forward us the completion statement. If property is private, please confirm so that necessary effect can be given in the accounts."

46. There is no document within the 2010 working papers which indicates what followed that query, but it was not mentioned in the final letter of representation of dated 7 February 2011 as missing information. However, the expenditure was shown as an "other debtor" separately identified from trade debtors in the accounts but not transferred to the director's current account. No related party transaction is shown regarding the expenditure.

47. By 31 July 2011 the sums shown in "other debtors" and pertaining to Hazon Way had risen to £178,738.71 representing further mortgage payments and more substantial repairs to the property. A note to the accountants' working papers references the prior year "client feedback sheet" (not available to the Tribunal despite the full working papers for each year having been provided to Mr Davidson and to the Tribunal) which confirmed Hazon Way was a buy to let property and that expenditure had been "posted separately" as other debtors. The letter of representation signed by AS on 11 September 2011 includes an express recognition that the £178,739 represents an "other debtor".

48. A further £29,894.12 expenditure was incurred in connection with Hazon Way in APE 31 July 2012. However. in the accounts to 31 July 2012, the accumulated and new expenditure is no longer shown as "other debtors". Rather, it is shown as an "investment asset" and the prior year comparison figures show the sum of £178,739 (the closing balance for "other debtors" in 2011). That change follows what is set out in an email between staff at Doshi & Co dated 22 October 2012 which states:

> "I spoke to Tushar about the above and we are of the opinion that … other debtors – 5 Hazon Way should be shown as Fixed asset investment. Please also amend the last year figure so the comparative is shown the same. Note to the accounts is also required for this fixed asset investment"

49. A Further note in the working papers for APE 31 July 2012 stated:

> "Other debtors – 5 Hazon Way: As per previous period (2010) client's feedback sheet, 5 Hazon Way is a 'buy to let' property, hence, during the year, Bank transactions and expensed relating to the property at 5 Hazon Way posted separately under other debtors as per previous year account treatment. We have reallocated it to Fixed assets investment."

50. The Tribunal was told by Mr Doshi that the restatement of the expenditure arose as a consequence of the transfer of a partial beneficial interest in the property from AS and MS to LLL. The interest transferred was said to be the right to the capital value appreciation of the property as the right to rental income was said to continue to accrue to AS and MS. The consideration for the transfer was said to be the writing off of the debt which had been shown as "other debtors" in the prior year's accounts. However, no related party transaction is noted with regard to the putative transfer. The letter of representation for APE 31 July 2012 was amended, presumably consequent upon the email referenced above, such that the balance originally noted as "other debtors" was restated as "fixed investment asset" to a value of

£208,633. That valuation was stated in the accounts to be the market value of the investment though no market valuation was undertaken of the property.

51. By letter dated 13 April 2017 Doshi & Co informed HMRC that Hazon way was:

> "… bought for the Limited company. It was an error whereby it was booked under their names in the first instance.
>
> The accounts reflect it correctly as an asset. Similarly the company owes £312,000 to Mr & Mrs Soto and this needs to be reflected in the Directors Current Account.
>
> The Rental income of this property is a rental income for the Limited company and not of Mr & Mrs Soto.
>
> We have informed Mr & Mrs Soto that they need to get the property registered at Land Registry under the Limited Company. They will be doing so very shortly."

52. In a meeting between HMRC and Mr Doshi on 21 June 2017 as recorded in a contemporaneous meeting note, Mr Doshi explained that the change in accounting treatment had been prompted by his advice to AS that AS would be required to make payment to LLL in respect of the sum shown as "other debtors" or face a s455 CTA tax charge as the sums incurred were required to be included in the director's current account. It is recorded in the meeting note that Mr Doshi accepted that there was no evidence to support that any interest in the property had been transferred and acknowledged that the rental income had not been treated as that of LLL. The meeting notes show that he proposed, at that meeting, to transfer the legal title to LLL accounting for a capital gain based on a transfer value as of 2012 and that the rents be bought into account with effect from 2012. The meeting note indicated that such treatment was not considered acceptable by HMRC.

53. In a letter dated 22 September 2017 AS confirmed, on behalf of himself and MS that LLL had not been used to pay the mortgage and that the property was a private asset. On 2 November 2017 AS accepted that the mortgage had been paid by the company but again reiterated that the mortgage payments represented personal expenditure which was not illegal provided tax was paid on it.

54. The nominal accounts for APE 31 July 2013 illustrate that all expenditure incurred in connection with Hazon Way (including the mortgage, repairs, fixtures and fittings) were met by LLL for that year. In the nominal accounts such expenditure was initially treated as "other debtors" and transferred as an addition to the "investment asset". For 2013 the total expenditure was £39,831.64. Similarly for expenditure totalling £6,413.99 for APE 31 July 2014 and £504.00 for APE 31 July 2015.

55. Legal title to 5 Hazon Way was transferred to LLL on 7 May 2019 at a recorded value of £505,000.

***Evidence of AS***

56. In his evidence AS confirmed that the property had been purchased by MS and himself in joint names. The property had been in a state of disrepair at the time of purchase and needed significant expenditure on it to bring it up to a standard where it could be let for a reasonable return. He was clear that the property was theirs and that all the repair and refurbishment expenditure on it was "private" expenditure. He confirmed that all invoices concerning the works had been marked as private in his bookkeeping system. He confirmed that invoices for the works were all paid from the business bank account which remained in the name of the partnership but into which all the trading receipts of LLL were paid. AS had no understanding that in using trading receipts from the company to meet personal expenditure he was not simply using his own money.

57. AS recollected a meeting with the accountant at which it had been indicated that he owed the business of the order of £70,000. At the time of the meeting and even in evidence he could not understand how that could be the case as all invoices for private expenditure had been marked as such. He did not recollect any further discussion on the issue at that time or subsequently.

58. AS explained that he understood that some interest had been or needed to be treated as belonging to LLL and that the interest was limited to the amount the property increased in value rather than a right to receive income from it. His evidence was unclear as to whether that understanding had arisen only during the HMRC enquiry or prior to it.

59. In his closing submissions Mr Doshi stated that when the 2011 accounts were discussed around October 2011 Mr Soto was informed of the s455 CTA consequences. This statement did not accord with AS's recollections. He was clear that the conversation with him about owing the company money was by reference to a sum of £70,000 not £178,000.

***Evidence in the closing submissions***

60. As indicated above Mr Doshi's closing submissions (both oral and in writing) included evidential matters.

61. In relation to Hazon Way it was asserted that when the accounts for 2012 were discussed on 9 October 2012 and the overdrawn directors current account value had risen to include the 2012 expenditure, the matter of the indebtedness was raised with Mr Soto. The submission states "Mr Soto informed [the accountant] that he and his wife had discussed matters after the last discussion on the accounts and they would be happy if the Hazon Way property can be shown as a company asset and be transferred as an asset to LLL effective date 1 August 2011". Whilst that submission was made after AS had given his evidence it was not reflective of the evidence given. AS stated, that he had no understanding of the accounting entries.

***Expert evidence***

62. Mr Davidson considered all the working papers and evidence which had been made available to the Tribunal in connection with Hazon Way and reached the following conclusions:

> "3.22 … until 7 May 2019, the property appears to have remained in Mr and Mrs Soto's joint ownership and [LLL] had no title to it whatsoever …
>
> 3.23 I have seen no references in the documents supplied to me to the 'beneficial interest' that is alleged to have been transferred 1 August 2011. Furthermore, any adjustment to reflect this arrangement in the director's current account with effect from 1 August 2011 would have been actioned in that for the year ended 31 July 2012 and I can find no such entry in the analysis contained in the accountants' working papers for the director's current account. The only entry that I can see in the accountants' working papers that indicate the change in treatment of transaction relating to the property relates to the transfer of the 'Other debtors – 5 Hazon Way' account to 'FA available for sale Investments b/fwd' and 'FA available for sale Investment additions' accounts, which was made on 31 July 2012.
>
> …
>
> 3.27 If the beneficial ownership of the Hazon Way property was transferred to [LLL] on 1 August 2011 as alleged by the Appellant, from an accounting perspective, the property should be recognised as a fixed asset of [LLL] on the balance sheet from the point of transfer…
>
> …
>
> 3.30 … the beneficial interest in the Hazon Way property should be shown under following sub-heading[s] on the balance sheet … (b) investment

> property – if the Hazon Way property was a buy to let property and was not being used for the trading activities of [LLL].
>
> …
>
> 3.34 … full related party disclosure would be required to be made in [LLL's] statutory accounts in line with [the relevant accounting standards] about the arrangement and the fact that it involved related parties …
>
> 3.35 … I have seen no evidence to support the contention that [LLL] had beneficial ownership of Hazon Way nor that LLL received any rental income from it. Consequently, in my opinion, it was wholly inappropriate to show the amounts represented as either 'Other debtors' or 'Fixed asset investment' and, instead, the amounts involved should have been charged to the director's current account in their entirety at the time the costs involved were incurred by [LLL]. Also full related party disclosures should have been made in relation to these amounts"

***Findings of fact***

63. On the basis of all of the evidence received the Tribunal finds the following facts in respect of Hazon Way:

(1) AS and MS were the legal owners on Hazon Way from 1 December 2008 to 7 May 2019. The property was purchased by them as a personal asset. Contrary to the statement in Doshi & Co's letter of 13 April 2017 it was never intended to be an asset of LLL at the time of purchase, not least of all because the company was not formed until 6 July 2009.

(2) The rental income from the property was considered by AS to be income to which he and MS were entitled though it was paid into a bank account in MS's name only. The Tribunal finds that they were jointly entitled to its receipt.

(3) All payments in respect of Hazon Way in the period prior to 1 August 2018 were made from a bank account in the joint names of AS and MS trading as La Luz Residential Home. As LLL did not have a bank account of its own, all funds credited to the bank account were trading receipts of LLL and not personal funds of AS and MS. AS considered the expenditure to be private and marked it as such on the invoices and payments.

(4) AS and MS had their own personal bank accounts.

(5) In the period to 31 July 2011 expenditure on Hazon Way amounting to £178,738.71 was incurred by LLL however, the expenditure related to a personal asset of AS and MS. That expenditure should not have been treated as "Other debtors" as AS and MS were shareholders and AS was a director of LLL. The Tribunal accepts that the evidence of Mr Davidson that the correct accounting treatment for that expenditure was by way of debiting the director's current account.

(6) At some point prior to October 2012, at the discussion of the APE 31 July 2012 accounts it was clear to Doshi & Co that despite the accounting treatment adopted by them (using "Other debtors") the director's current account was overdrawn in relation to the expenditure on Hazon Way and it was suggested that a means of managing the situation was to transfer ownership of Hazon Way from AS and MS to LLL. However, no one at Doshi & Co explained to AS and MS what was required to make the transfer.

(7) There is no written record of a purported transfer of any interest in the property. Despite this, an interest in the property was then treated, in the accounts, as if the transfer had been made.

(8) In light of the above the Tribunal finds that in the period from acquisition to 7 May 2019 Hazon Way was legally and beneficially owned by AS and MS and no interest was transferred to LLL.

(9) As such the accounting treatment of Hazon Way as a Fixed investment asset with effect from 1 August 2011 was "wholly inappropriate". The appropriate accounting treatment of the expenditure incurred for all accounting periods to APE 31 July 2015 (there being no expenditure incurred by LLL after that date) was by way of a debit to the director's current account.

**Parties' arguments**

64. The Appellants' case concerning Hazon Way changed through the hearing. The Appellants initially sought to establish that there was a transfer of a beneficial interest in the property such that no adjustment for the expenditure incurred on Hazon Way after 31 July 2011 was required and that the transfer had the effect of repaying the indebtedness which had accrued, and which should have been shown as debits on the director's current account rather than as other debtors. In this regard it was accepted that a s455 charge arose for 2010 but that no charge arose after 2011 as the transfer represented repayment of the loan within 9 months of the accounting period end.

65. By his closing submissions Mr Doshi's contended:

(1) There had been a number of mistakes made by his firm in relation to the accounting entries in respect of Hazon Way, in particular that for APE 31 July 2010 and 2011 the expenditure should have been shown as a debit to the director's loan account and not as other debtors and that when it was agreed to transfer the beneficial ownership of the property to settle the indebtedness on the director's current account that should have been shown as a related party transaction.

(2) On the basis that there had been a transfer of the beneficial interest that Mr Davidson's evidence supported treatment of the property as a fixed investment asset and that it was reasonable to value the interest by reference to the costs incurred (even where stated to be at market value).

(3) There had been a valid verbal agreement between AS and MS on the one hand and LLL on the other to transfer the beneficial ownership of Hazon Way.

(4) Whilst there had been a failure by Doshi & Co to advise AS and MS that the transfer of the beneficial interest should have been in writing, in accordance with the requirements of sections 52 and 53 Law of Property Act 1925 the effect of the accounting entries was sufficient to meet the requirements of those sections.

(5) As such the assessments on LLL insofar as they related to Hazon Way expenditure should reflect that the transfer had been made.

66. HMRC contend that as there is no formal record or other evidence of transfer of the beneficial ownership of Hazon Way and in light of the expert evidence as to the inadequacies in the accounting records and evidence regarding Hazon Way, an assessment which assumed that the property was not transferred, and that the consequent overdrawn director's current account was not repaid and is therefore subject to a s455 CTA tax charge is established. They also contended that the attendant consequences for AS by way of income tax charge on the benefit of having received an interest free loan follow and the assessments issued to AS in this regard should stand.

**Discussion**

67. On the basis of the facts as found there was no transfer of any interest in Hazon Way prior to the legal transfer on 7 May 2019.

68. It cannot even be said that there was an intention to clear the indebtedness on the director's current account so as to avoid a tax charge as, even as late as October 2012, the sums which had been incurred on Hazon Way were only shown as other debtors and not as debits to the director's current account which fails to acknowledge the nature of the debt and its consequences.

69. There is also a curiosity in what precisely was said to have been transferred. A transfer of the whole of the beneficial interest in Hazon Way would, as acknowledged by Mr Doshi in 2017, have required that all rights accruing in respect of the property, including the rental stream would have been for the benefit of LLL. And yet, by the time of the hearing, it was somehow asserted that the interest transferred was less than full beneficial ownership and limited only to the capital appreciate of the property. That shift in the position arose in order to meet concerns initially raised by the Tribunal and subsequently confirmed by Mr Davidson regarding the valuation of the interest said to have been transferred in the hands of LLL and the evidence that the whole of the beneficial interest could not have been transferred as AS and MS continued to receive the rental income.

70. Whilst it might be conceivable, at law, to sever the beneficial interest such that the right to income continued to accrue to AS and MS (albeit being paid only to MS) with the benefit of any capital appreciation accruing to LLL to do so would have required detailed legal drafting so as to sever the respective interests between the parties.

71. In any event, sections 52 and 53 Law of Property Act 1925 provide that any transfer of a beneficial interest in land must be in writing. There is no written record of the purported transfer, its nature or scope. Any attempt to contend that the accounts themselves represented such evidence in writing must be rejected for lack of particularisation of the alleged transfer or the respective interests of the parties. As noted above, AS did not understand the accounts or what he was being asked to sign and as such the accounts could not have represented a record of any transaction which might otherwise have been agreed.

72. The Tribunal notes that the property was transferred on 7 May 2019 for a sum of £505,000 such sum being credited to the director's current account. This appeal does not concern the tax due for APE 31 May 2019 or tax years 2019/20 for AS and MS. However, in light of the conclusion of the Tribunal regarding the treatment of Hazon Way prior to the transfer the effect of the transfer and the accounting entries relating to it would be a full or partial repayment of the deficit then shown on the director's current account as at that date with the attendant s458/459 CTA consequences for both LLL and AS.

73. For these reasons the appeals in respect of those parts of the closure notices and assessments regarding Hazon Way are dismissed.

**Penalties**

74. HMRC have assessed LLL to penalties in respect of the tax lost in connection with the incorrect treatment of expenditure incurred on Hazon Way on the basis that the errors were deliberate and prompted. Mitigation of 35% was given.

75. On behalf of LLL it is contended that the errors were neither deliberate nor careless.

76. The Appellant's rely on *Clynes v HMRC* [2016] UKFTT 369 to contend that deliberate conduct will be established by reference to the ordinary dictionary definition where the person in question acted consciously with full intent in respect of the inaccuracy.

77. It is contended that as LLL had reasonably relied on Doshi & Co, an established and reputable firm of accountants with over 20 years standing and thousands of clients, it cannot be said to have acted either deliberately or carelessly in respect of the errors concerning Hazon Way. Doshi & Co accept the mistakes made in respect of the accounting entries in respect of Hazon Way and for failing to advise that the transfer of a beneficial interest should have been in writing.

78. HMRC contend that the conduct was deliberate on the basis that the working papers indicate that there was some dialogue between AS and the accountants regarding personal indebtedness in relation to the preparation of both the 2010 and 2011 accounts. They also point to the acceptance by AS that it had been raised with him that he owed the company £70,000 and in both 2010 and 2011 the sums due were disclosed as other debtors acknowledging the indebtedness and deliberately excluding it from the director's current account which would have necessitated the s455 CTA charge. HMRC acknowledge that AS may not have understood how the indebtedness arose, but he was aware of it and permitted tax returns to be rendered which were inaccurate.

79. The definitive assessment of what amounts to deliberate behaviour was provided by the Supreme Court in *HMRC v Tooth* [2021] UKSC 17 which has confirmed that HMRC must demonstrate an intention to mislead HMRC. The Supreme Court did not definitely determine whether a taxpayer who was reckless as to whether HMRC were misled would also qualify as deliberate behaviour.

80. The Tribunal must assess the behaviours of LLL acting through its sole director AS. AS was told that there was personal indebtedness associated with expenditure incurred in connection with Hazon Way. He blindly trusted Doshi & Co to determine the correct accounting treatment and to calculate the tax owed by LLL.

81. During the hearing, and in an apparent attempt to assert that AS's behaviour was not deliberate or careless Mr Doshi admitted that his firm had 1) incorrectly included the Hazon Way expenditure as other debtors when it should have been an adjustment to the director's current account and 2) failed to account for the expenditure as a related party transaction; 3) after reclassification, incorrectly capitalised the expenditure, particularly for consumables and mortgage payments. This despite the repeated assertion that his firm was a highly reputable firm with thousands of clients. It is clear that AS's blind trust was entirely misplaced.

82. There is no direct or definitive authority that the Tribunal has been able to find as to whether reckless behaviour can be equated with deliberate behaviour in the context of Schedule 24. The Tribunal does consider that AS's failure to actively engage with his responsibilities as a director of a limited company and his blind and unequivocal reliance on his accountants was reckless. Prior to incorporation AS and MS were liable personally for the debts of the business. Incorporation bought the benefit of limited liability. Becoming a director of a limited company brings with it a range of fiduciary duties which it is important to understand. Those fiduciary duties are part of what underpin the benefits of corporate status. AS made no effort to understand what incorporation meant for the business or for him. Significant and material errors were made in the accounts and the letters of representation he signed and for which, as a matter of law, he is responsible. To absolve that responsibility, which rests with him, because he relied on Doshi & Co would create a loophole for unscrupulousness because no one would then ever be responsible to taxpayers generally for gross and obvious mistakes made in accounts.

83. The Tribunal considers that, at least in the circumstances of this case, it is right that LLL be held responsible for the failures of its accountant and, if appropriate, to take action against Doshi & Co for those failures. Mr Davidson concluded that as regards the accounting treatment of Hazon Way expenditure the accounts was wholly inappropriate and gave rise to materially

inaccurate accounts. In oral evidence Mr Davidson stated that, in his view, the accounts did not represent a true and fair view of the position of the company. The error was material. As of 31 July 2011, the debit to the sum shown as other debtors (which should have been debited to the director's current account) was £178,739 in the context of capital and reserves as at that date of £189,379. It is wrong to expect the state to run the risk that loss of tax arises from gross and reckless incompetence and a failure to produce and sign off accounts which, in the view of the expert witness in this case, do not represent a true and fair view of a company's trading or balance sheet.

84. AS's evidence was that he knew Hazon Way expenditure was private expenditure. It was not accounted for as such and HMRC were therefore misled by the incorrect accounts.

85. On that basis the Tribunal considers that a penalty on the basis of deliberate behaviour is made out.

86. LLL does not contend that the disclosure of the inaccuracy was unprompted.

87. Accordingly, the penalty applicable is 70% of the potential lost revenue subject to mitigation down to a minimum penalty of 35%. HMRC applied a 35% mitigation on the basis of 10% for telling (of a maximum of 30%), 10% for helping (of a maximum of 40%) and 15% for giving (of a maximum of 30%).

88. The Tribunal notes that there were considerable delays throughout the enquiry and, as per the schedule attached HMRC had to repeatedly request the provision of information and documentation much of which remained outstanding at the point of review, some (but not all) of which was then provided between the first part of the hearing. Further, the "story" regarding Hazon Way vacillated throughout the enquiry and right to the end was less than clear.

89. However, the assessment was based on the sums included in the other debtors and fixed investment asset additions accounts which were available to HMRC. The process of extracting information from LLL via Doshi & Co was extremely difficult but ultimately the information necessary to raise an assessment on the basis that the expenditure was private expenditure which should have been debited to the director's current account was available from the accounts themselves and the Tribunal considers that higher mitigation is reasonable.

90. On balance the Tribunal considers it appropriate to apply mitigation of 40% in total would be reasonable on the basis that the mitigation for giving should be increased from 15% of a maximum of 30% to 20%. Full mitigation for giving would be inappropriate as HMRC had to repeatedly ask for information as to the nature of the expenditure.

91. AS was assessed to a careless penalty regarding his failure to self assess for the chargeable benefit arising from the overdrawn director's current account associated with the expenditure incurred on Hazon Way. His appeal is limited to an appeal as to the level of mitigation given. HMRC gave 50% mitigation applied proportionately across telling, helping and giving. It was contended on behalf of AS that a mitigation of 70% was appropriate across all of the errors identified relating to pensions income, UK letting income, bank interest and the present benefits in kind. AS noted above in respect of LLL there was a distinct lack of cooperation from AS and his advisors with many documents remaining outstanding. AS was focused on his business and paid little attention to the accounting and tax; more engagement, seeking a proper understanding of the documents he was signing etc may have facilitated an awareness that could have avoided the tax errors. The Tribunal therefore considers 50% mitigation to be appropriate.

92. In respect of the LLL Hazon Way penalty the Tribunal accepts that mitigation of 40% should have been given and the penalty is thereby marginally reduced. The penalty raised by way of benefit in kind income tax charge on the Hazon Way expenditure is upheld in full.

**B SHARES**

## Evidence and facts found

93. In respect of the B shares it was claimed that Jose Castro Otero, Carmen Rial Barco and Carlos Castro Rial (together "**the Spanish Shareholders**") and AS and MS entered into a verbal agreement whereby LLL would essentially seed fund (up to £250,000) for the establishment of a residential care home in Spain to be operated by a corporate entity set up by the Spanish Shareholders. LLL would issue preferences shares in order to pay the seed funding by way of dividend. In return AS and MS would receive shares in the Spanish entity and would receive dividends arising from that care home's profitable operation. Mr Doshi said that AS and MS believed that they could contribute experience and knowledge in the establishment and running of a successful care home and believed there would be real benefit in having equity in the Spanish business.

94. However, the evidence regarding the B shares was patchy and in many regards conflicting.

### *Documents*

95. At a meeting with HMRC on 21 June 2017 it was stated that pursuant to the verbal agreement that three £1 B shares were issued to the Spanish Shareholders on 30 April 2014.

96. By reference to the documents available to the Tribunal it is noted that:

(1) The issue of the shares was not notified to Companies House at the time they were said to have been issued.

(2) The annual return "with full list of shareholders" filed with Companies House and made up to 30 Auguust 2014 served on 3 September 2014 showed issued share capital of 100 shares and only AS and MS as shareholders.

(3) The accounts for APE 31 July 2014 (the relevant year in which the shares were said to have been issued) filed at Companies House on 15 May 2015 too showed issued share capital of 100 shares.

(4) When the 2014 accounts were amended and refiled on 3 March 2015 there was no correction as regards the B shares alleged to have been issued on 30 April 2014.

(5) The working files for APE 31 July 2014 made no mention of the B shares.

(6) The annual return "with full list of shareholders" made up to 30 August 2015, filed on 31 August 2015 continued to show 100 ordinary shares, no B shares and only AS and MS as shareholders.

(7) The accounts for APE 31 March 2015, filed on 31 December 2015 showed share capital of 100.

(8) The amended accounts for APE 31 March 2015 filed at Companies House on 17 May 2016 for the first time showed issued share capital of £103. The prior year comparator, to 31 July 2014 continued to show issued share capital of 100 shares despite other amendments being made.

(9) In the accountants' working papers for APE 31 March 2015 there is a note that the shares were issued. It stated that they were issued on 30 April 2014 (which would have fallen into the previous accounting period).

(10) The working papers for APE 31 March 2015 it appears that the cash was initially shown as received in the LLL cash account in respect of the shares. However, the Tribunal was also told that the £3 had been debited to the director's current account. That debit would have been necessary to reconcile the cash account, but the corresponding

credit was not visible in the working papers. The working papers stated that this was done "as per email received"; however, there the email to which reference appeared to be made was not in the working papers.

(11) The confirmation statement for the period to 30 August 2016 filed on 20 September 2016 confirmed only 100 ordinary shares with AS and CS as the shareholders.

(12) However, the annual accounts for the accounting period ended 31 March 2016 filed on 23 December 2016 did show the B shares.

(13) It was not until the Confirmation Statement filed at Companies House on 17 June 2017 that the B shares were formally recorded by that means and then, by reference to an issue date of 30 April 2014.

(14) No evidence of any ordinary resolutions and other procedures required to issue shares was produced.

(15) By reference to the note of a meeting held on 21 June 2017, at which AS and MS were not present, HMRC were told by Mr Doshi that he had not advised on the B shares, that the Spanish Shareholders were old family friends. Mr Doshi also acknowledged that the formal confirmation of the shares had been overlooked but had been remediated the day before the meeting.

(16) In a letter dated 2 November 2017 AS informed HMRC that Mr J Castro was in fact MS's brother.

97. As regards the dividends, the following documents were available to the Tribunal:

(1) A cheque date 12 May 2017 in the sum of £111,000 made payable to Mr J and Mrs C Castero drawn on the bank account used by LLL but which, as noted above, was a joint account of AS and MS trading as La Luz Residential Home. The cheque number is 1. Bank statements for the period from 12 May 2017 to August show that the cheque was never debited by the bank.

(2) A paying in slip for a Santander bank account in the sum of £111,000 dated 22 May 2017

(3) Bank statement from the account on which the cheque was drawn but showing £111,000 as paid out against cheque number 62 on 11 August 2017.

(4) Unsigned tax vouchers provided to HMRC at a meeting on 21 June 2017 in respect of the payment of three dividends in the sum of £37,000 to each of the Spanish Shareholders dated 31 March 2015 and similarly for £45,000 to each of the Spanish Shareholders dated 31 March 2016.

(5) A note of the meeting held on 21 June 2017 (at which AS was not present) at which Mr Doshi was unable to provide any explanation for why the £111,000 dividend was credited to the director's current account, but stated that the share issue had been AS's idea and that AS had wanted the maximum dividend possible paid on those shares. Mr Doshi also stated that the £135,000 had never been paid.

(6) A second and completely different set of unsigned dividend vouchers provided in the information provided to the expert witness; they were different in format, type face etc.

(7) An unsigned minute of a board meeting noted as held on 29 February 2016. However, this unsigned minute was not disclosed to HMRC during the course of their enquiry (despite repeated requests and formal notices requesting them) the minute being

provided to the expert witness in the working papers for preparation of the 31 March 2015 accounts.

(8) Bank statement for LLL bank account showing receipt of a transfer of £111,000 from MS on 5 February 2019

98. The B share dividends were not shown in the original accounts prepared for APE 31 March 2015. However, in the amended annual accounts prepared for the APE 31 March 2015 and dated 30 March 2016 a dividend of £111,000 is shown as paid in respect of the B shares and £7000 in respect of the A shares.

99. In the working papers for APE 31 March 2015 there is recorded a note which states:

> "Dividend of £7,000 is booked towards 100 Ordinary share capital and £111,000 is booked towards B Type Shares. It represents £3,500 to Mr Angel Soto, £3,500 to Mrs Carmen Sosto, £37,000 to Jose Castro Rial, £37,000 to Carman Rial Barco and £,37,000 to Carlos Castro Rial"

100. The nominal accounts for the year to 31 March 2015 show the crediting of £118,000 to the director's current account despite the £111,000 dividend apparently having been declared as payable to the Spanish Shareholders. Together with two notes in the working papers which stated:

> "At the end of the period directors current account was overdrawn by £44,868. We have provided £118,000 towards dividend in order to reduce the overdrawn balance of director's current account." And
>
> "please confirm. We have declared £118,000 towards dividend for the year in order to resolve the overdrawn balance of director's current account"

101. For APE 31 March 2016 dividends on the ordinary shares of £64,000 were declared and a £135,000 dividend was declared in respect of the B shares. Both were recorded in the accounts. In the working papers there is a note which states:

> "Directors current account: At the end of the year, directors current account had a credit balance of £1,069. We have provided dividend of £64,000 in 100 ordinary shares and £135,000 on B type shares"

102. The credit to director's current account was made in accordance with "mail received" again no such mail was provided.

103. There was no evidence in the accountants' working papers for either of the APEs 31 March 2015 or 31 March 2016 to show that any query had been raised about why the dividends were credited to the director's current account when the directors were not the shareholders of the B shares.

104. The documents show that HMRC raised formal requests for the production of information regarding the B share dividends shown in the accounts to 31 March 2015 on 20 June 2016, the information was outstanding on 16 August 2016 (and HMRC requested it again. It remained outstanding and was the subject of a further request on 2 November 2016. The enquiry into the tax return for APE 31 March 2016 was opened on 19 January 2017.

105. By letter dated 15 February 2017 HMRC advised AS that he may wish to discuss with Doshi & Co how the dividends had been accounted for. AS's response to that letter on 21 February 2017 sought clarification as to HMRC's assertion that dividends had been received by him contending that the bank statements confirmed no payments for dividends had been made and/or that personal payments made from the bank account in the name of La Luz Residential Home were less than the dividends declared. That position was repeated in correspondence dated 6 March 2017 and 13 March 2017.

106. On 13 April 2017 Doshi & Co wrote to HMRC and stated:

> "B Shares: The accounts for 31 March 15 and 31 March 16 clearly show that There are 3 B shares.
>
> The Confirmation has not been updated by error and will Done.
>
> The £111,000 should not be debited back to Directors loan account"

107. The information requested regarding the shares and dividends remained outstanding and the request was repeated on 17 May 2017 together with copies of the dividend vouchers together with evidence as to when the dividends were voted.

108. By letter dated 23 May 2017 (but handed to HMRC at a meeting on 21 June 2017) Doshi & Co provided what was contended to be proof that the £111,000 dividend had been paid in the form of the cheque, paying in slip and unsigned dividend vouchers referred to at paragraphs 97(1), (2) and (4) above.

109. Further information requests were made in respect of the B shares and dividends by letter dated 3 August 2017, 20 October 2017 and 1 November 2017.

110. By letter from AS to HMRC dated 2 November 2017 it was stated that the £111,000 was paid to the "shareholders account" on 11 August 2017.

111. Fresh information requests regarding the B shares and dividends were issued on 22 December 2017 in light of the conflicting information and documents which had been provided. On 21 February 2018 HMRC repeated the request. The note of a meeting on 17 May 2018 indicates that Doshi & Co informed HMRC that the 2015 dividend had not been paid and was therefore shown as a director's current account entry.

112. In a meeting on 3 August 2019 (attended by AS and Mr Doshi) it is recorded that Mr Doshi stated that the dividends on the B shares had not been paid and that it was intended that the shares would be cancelled. At that meeting AS stated that he knew nothing about the shares and Mr Doshi had organised it all for him. It was at this meeting that the relationship to the Spanish Shareholders was first disclosed and HMRC were told that the share originally issued to Carlos Castro had been transferred to another family member as a consequence of Carlos being in the UK. Mr Doshi accepted at that meeting that AS and MS should be assessed in respect of the dividends but that they must therefore be used to reduce the director's loan account indebtedness.

113. Shortly prior to the first hearing two documents were served on behalf of the Appellants. The first purported to be a letter to AS dated 14 January 2015 from the Spanish Shareholders which stated:

> "we shall do business a Expresa Conjjunta. You, Carmen, Carlos and I, the three of us. We'll start the same business of … Care Home for the Elderly …Together we shall give you shares in a new Company in Spain. In return you'll give us shares in your Company in England. We nee [sic] total of £250,000 from you in the form of shares and dividends".

114. During the hearing it transpired that the document was not in fact dated 14 January 2015 but had been created shortly prior to the hearing and said to record what it was claimed had been agreed on or about 14 January 2015.

115. The second document was dated 20 January 2019. Again addressed to AS and from the Spanish Shareholders. This one stated:

> "We are very sorry. The joint venture of … Care Home for the Elderly that we intended to start does not seem possible as we could not raise the required finance for it.

> Since our plan is not going ahead, we understand that we do not need B shares issued in our name in your Company in England …
>
> Therefore we do not need the amounts of £111,000 and £135,000 which were paid as dividend for B Shares I [sic] your Company"

116. As with the first document it was accepted that it was not a document created in January 2019 and had been created shortly prior to the hearing.

117. It is of grave concern to the Tribunal that these documents were produced in circumstances in which it can only be considered was in an attempt to mislead the Tribunal. The documents were put to AS and he did not appear to know anything about them. As the Tribunal accepts that AS gave his best and honest recollection of events the origin of these documents, and their late production, would appear to have been an attempt by Doshi & Co to retrofit and create evidence of the arguments necessitated by the accounting failures of that firm.

118. For 2017 dividends for B shares were declared to the value of £39,000. These were not credited to the director's current account.

***Mr Soto's evidence***

119. AS's evidence was that there had been a verbal agreement between AS, MS and the Spanish Shareholders to assist them in establishing a successful care home in Spain. In connection with the business idea one of MS's nephews had come to work in La Luz to gain experience. The Tribunal accepts that there was such an intention.

120. However, AS also explained that how the investment was to be made, should the opportunity materialise, was suggested to him by Doshi & Co. He stated, on a number of occasions, that Doshi & Co had advised him to issue the shares and with regard to the payment of dividends. AS could provide no explanation as to why the Spanish Shareholders would want to have shares issued to them rather than there by a loan or gift.

121. During the course of his evidence AS repeatedly stated that he did not understand anything about the shares or the accounts in which the dividends were recorded. AS stated, that he did not know what a director's current account was and that he trusted his accountants to have accurately drawn up the accounts.

122. AS's recollection of what had prompted the payment of the first dividend was very unclear. He could provide no explanation as to why it had taken until May 2017 for the cheque to be raised. However, he said that a cheque (number 1) was drawn and paid into the account of his brother in law. He believed that that cheque was refused by his bank because the cheque book had been reported as stolen. He stated that a second cheque was then written and deposited into a Metro bank account in the name of MS (he produced a bank statement from the Metrobank account showing the deposit) but did not know why that was so. AS was unable to confirm whether the Spanish Shareholders were ever aware that of dividends.

***Expert evidence***

123. Mr Davidson noted, as set out above, that the annual accounts and annual returns prepared and filed at Companies' House were inconsistent. He further noted that none of the formal procedures required to be followed in connection with the issue of new shares were evidenced.

124. Mr Davidson noted that there may be circumstances in which a dividend declared to one shareholder may be paid to another. Whilst he had seen no evidence which supported a rationale for the crediting of the B share dividends to the director's current account he stated:

> "In my opinion, the absence of reasoning and documentation in the accountants' working papers in support of B share dividends being credited to

> the director's current account indicates that the B share dividends were for Mr Soto's benefit."

125. Mr Davidson noted that no creditor had been created in the accounts in favour of the Spanish Shareholders.

126. Mr Davidson confirmed that he had seen no evidence that the formal procedures for amending share capital or issuing shares had been followed.

127. He concluded:

> "With regard to B shares, I conclude that Company's statutory accounts failed to provide information about their issue in April 2014 and provide wholly misleading information about the recipients of the dividends. Accordingly, the statutory accounts do not conform with the reporting standards. …"

128. In oral evidence and in response to questioning from Mr Doshi, Mr Davidson confirmed that it was the Spanish Shareholders who were legally entitled to receive the B share dividend however, he confirmed that the accounts did not acknowledge that entitlement and were inconsistent with LLL respecting such entitlement. As above the accounts reflected that the participators had benefited from the dividend as their indebtedness had been reduced when the dividends were credited to the director's current account.

***Findings of fact***

129. The Appellants were advised by Doshi & Co in respect of the issue of the shares and the declarations of the dividends. AS was insufficiently aware of the arrangements for them to have been conceived by him.

130. There is no evidence that the shares were issued on 30 April 2014. The first evidence that the shares had been issued was in the amended accounts for APE 31 March 2015 which were dated 30 March 2016. The accounts were filed at Companies' House on 17 May 2016. That was 4 days after HMRC opened their enquiry into the 2015 tax return and further formal notices to produce information and documentation in connection with the returns for APEs 31 July 2013 and 31 July 2014. Those requests explicitly required production of information regarding the recording of private expenditure and the calculations for and reconciliation of the director's current account.

131. The formalities regarding the issue of shares were not followed. There is a question, whether at law the shares were issued and whether any dividend could therefore have been payable on them. However, for the reasons set out below that question need not be determined.

132. The documents and oral evidence corroborate that a cheque was raised on 12 May 2017 for £111,000 in favour of two of the Spanish Shareholders and was paid into a Santander account. That cheque was never processed and, by reference to that cheque, no funds left the La Luz (partnership) bank account.

133. The Tribunal considers it more likely than not that the cheque was raised as a consequence of HMRC's enquiry and information requests. The Tribunal considers that it is possible that the cheque was not, in fact, written on 12 May 2017 but was actually written after receipt of HMRC's letter dated 17 May 2017 requesting evidence of the payment of the dividend. As indicated above the Tribunal found that AS was an honest witness. He never actually confirmed that the cheque had been raised on 12 May 2017 and repeatedly said he had done what was suggested by Doshi & Co. However, the Tribunal remains uncomfortable with the coincidence that the cheque was deposited in the Santander account 10 days after it was apparently drawn and the day before Doshi & Co prepared a letter to HMRC providing the copy as the evidence of payment.

134. A second cheque (number 62) was later drawn on the La Luz (partnership) bank account showing as having cleared on 11 August 2017. That cheque was paid into a bank account held by MS and not as stated in the letter dated 2 November 2017 from AS into "the shareholders account".

135. £111,000 was returned by MS to the La Luz (partnership) bank account on 5 February 2019.

136. No amount was ever physically paid in respect of the £135,000 2016 dividend from the La Luz (partnership) bank account nor were the Spanish Shareholders shown as creditors in respect of this sum which was credited to the director's current account.

137. There is no evidence that the meeting recorded in the unsigned minute of 29 February 2016 ever took place or that the resolution recorded in it was made.

138. As none of the dividend vouchers are signed and on account of there being two materially different versions of them there is no reliable documentary evidence that they were ever formally declared in favour of the Spanish Shareholders.

139. However, as the adjustment to the director's loan account was made so as to "resolve" the overdrawn balance the Tribunal finds that the participators (i.e. AS and MS) benefited directly from the adjustment made to the director's loan account in the accounts for the accounting periods ended 31 March 2015 and 2016.

**Parties' submissions**

140. On behalf of the Appellants it is contended that the company had the power under its memorandum and articles of association to issue the B shares and it was claimed that such shares were issued on 30 April 2014 following the conversation between AS, MS and her brother, sister in law and nephew earlier that year. Mr Doshi accepted that the shares had not been registered with Companies' House at that time, or until 20 June 2017, but he contended that that the failure to register, whilst rendering the company/the directors liable to an offence under s557 Companies Act 2006 did not invalidate the share issue or the declaration of the dividend in favour of the Spanish Shareholders.

141. On the basis that LLL had distributable reserves, had declared the dividends and issued dividend vouchers in respect of them, it was submitted that the true recipients of the dividends were the Spanish Shareholders, and it was the Spanish Shareholders alone who were liable for such tax as fell due in consequence of receipt of the dividend income pursuant to sections 382 – 385 Income Tax (Trading and Other Income) Act 2005 (**ITOIA**).

142. By reference the terms of the articles of association it was claimed that the dividends did not require to be paid immediately and if unclaimed after a period of 12 years after the due date for payment the directors were entitled to treat them as forfeit. As such the fact that the Spanish Shareholders had not received any of the dividends did not carry any implication that they were not entitled to them, and the dividends could be claimed by them at any time within the 12 year period. This submission was made on the basis that Doshi & Co had made mistakes in the accounting by recording the credit for the dividends in the director's current account rather than other creditors.

143. It was accordingly contended that as regards LLL HMRC were entitled to assess for a s455 CTA tax charge in respect of the sums calculated as overdrawn on the director's current account after the credits in respect of each of the £111,000 and £135,000 dividends were revered. However, neither AS nor MS were assessable to income tax on receipt of the dividends which were proper to the Spanish Shareholders.

144. HMRC contended that pursuant to section 385 of ITOIA the person liable to a charge to income tax in respect of a distribution is either the person to whom it is made or treated as

made or the person receiving or entitled to it. In *Bostan Khan v HMRC* [2021] EWCA Civ 624 the Court of Appeal confirmed that where a person receives a dividend/distribution even where they are not entitled to do so HMRC are entitled to assess the recipient to tax on the receipt.

145. On the facts of this case HMRC contended that because the B share dividends had been credited to the director's current account and that no sums had ever actually been paid to the Spanish Shareholders the recipient and beneficiary of the distributions were the participants in LLL and as such HMRC's decision to treat both AS and MS as the recipients was appropriate.

146. HMRC noted that the provisions of s385 ITOIA address who is to be charged to income tax but that such determination was separate from LLL's position under s458 CTA. HMRC noted that strictly LLL had not claimed the relief due under s458 CTA. However, HMRC submitted that they had reasonably treated the crediting of the director's loan account as a claim made pursuant to s458 CTA and the LLL assessments was based on that pragmatic view.

**Discussion**

147. The timeline for the issue of the B shares is decidedly dubious. As set out above the first mention of the shares is in the accountants working papers for the accounts for APE 31 March 2015. The first 2015 accounts were filed on 31 December 2015 and almost 4 months after the HMRC enquiry was opened. At the meeting on 5 December 2015 HMRC had raised concerns regarding the directors current account which, at that time showed an overdrawn balance. The shares and the dividends were not included in the first iteration of the accounts. On 13 May 2016 an enquiry was opening into the return for APE 31 March 2015. Amended accounts, showing the shares and the dividend were filed shortly thereafter.

148. Dividends were shown as declared in the accounts for APE 31 March 2015 and 2016, this was despite the fact that none of the legal formalities were followed on the issue of the shares and absent any minutes regarding either the issue of the shares the declaration of these very significant dividends. However, the accounts did not show the dividends, which were not "paid" out in cash to the Spanish Shareholders, as being to their credit (i.e. there was no creditor for them), rather they were credited to the director's current account.

149. The Tribunal has found that AS and MS benefited from the credit to the director's current account. No s455 CTA charge was declared by LLL in its tax return for either APE 31 March 2015 or 31 March 2016 having assumed the benefit of the dividend. This was presumably so in the case of APE 31 March 2015 on the basis that the original accounts were signed on 31 December 2015 and therefore within 9 months of the accounting period end. However, the Tribunal notes that the original accounts did not show the B shares as issued. There are two copies of the amended APE 31 March 2015 accounts, those in the bundle for the hearing were dated 30 March 2016. Those at Companies' House were dated 31 March 2016 but were not actually filed until 12 May 2016. Whichever date is used it is outside 9 months. No explanation was provided for the differing dates or for why the accounts were not filed immediately (as was the case with most other accounts). HMRC treated the indebtedness on the director's current account as repaid to the extent of both the ordinary and B share dividends by reference to the accounts provided to them i.e. those dated 30 March 2016 and permitted relief from the s455 CTA charge from that date. Despite the inconsistency of filing but consistent with the approach identified at paragraph 4 above the Tribunal treats the dividends to have been declared on 31 March 2016. For APE 31 March 2016 the accounts were signed on 23 December 2016 such that no s455 CTA charge would have arisen, on the basis that indebtedness had been repaid within 9 months and no s455 CTA charge arose to the extent of repayment by reference to the 2016 ordinary and B share dividends i.e. the repayment is treated for these purposes as having been made by the end of the accounting period (31 March 2016).

150. In accordance with the direction provided by the Court of Appeal in *Bostan Khan* the Tribunal must determine whether it was reasonable for HMRC to treat both AS and MS as the persons to whom the distribution arising from the credit to the director's current account was or was treated as made and/or who were entitled to or recipients of the distribution. Both AS and MS are shareholders and thereby participants for the purposes of s455. The indebtedness on the director's current account arose in connection with expenditure on Hazon Way which was a joint personal asset, and also in connection with pension expenditure, personal ISAs, etc. On the basis that such indebtedness was incurred in respect of both AS and MS it is entirely reasonable to conclude that the credit by way of repayment was for the benefit of both parties and as such that each of AS and MS was a 50% as recipients of the distribution.

151. The Tribunal considered whether MS should be treated as the sole recipient of the £111,000 dividend given that she had been paid the dividend into her bank account in August 2017. However, the cheque was written after the credit to the director's current account, and it was repaid. Accordingly, the Tribunal considers the approach adopted by HMRC was not only reasonable but also correct.

152. However, the Tribunal notes that HMRC's recalculated tax liability for both AS and MS appears to mis-allocate both the ordinary and B share dividend for APE 31 March 2016 to tax year 2017. As set out above at paragraph 149 the effect of s455, 458 and 459 CTA is that the repayment of indebtedness is treated as having been made on 31 March 2016 despite the dividend having been declared on 31 December 2015 with the consequence that the benefit accruing to AS and MS was effective from 31 March 2016. For the 2015 dividend the benefit of repayment (and hence relief from the s455 CTA charge) also accrued on 31 March 2016 (date of declaration of dividend outside 9 months). As such the dividends were received and were assessable in the tax year ended 5 April 2016 together with the dividends.

153. Accordingly, the Tribunal determines that

(1) AS and MS are each liable to income tax in the tax year 2015/16 on the following dividends: a) APE 31 July 2014 (an ordinary dividend of £104k each) as the deemed date of receipt is 15 May 2015 when the original accounts showing the ordinary dividends were signed by the director, which is more than 9 months after the year end; b) APE 31 March 2015 (an ordinary dividend of £3.5k each and B dividend of £55.5K each) as the deemed date of receipt is 31 March 2016 when the amended accounts were signed by the director, which is more than 9 months after the period end; c) APE 31 March 2016 (an ordinary dividend of £32k each and B dividend of £67.5K each) as the deemed date of receipt is 31 March 2016 as the accounts were signed by a director on 23 December 2016, which is less than 9 months after the period end. All dividends paid in the tax year 2015/16 are liable to be grossed up by 10% Had HMRC's allocation of the 2016 dividends to tax year 2016/17 been correct (by reference to a received date of 23 December 2016 the receipt should not have been grossed up by 10%). The reduction in the assessments for 2016/17 and associated increase in the assessments for 2016/17 are permissible within the terms of section 50 Taxes Management Act 1970.

(2) The credit in respect of the £135,000 had the effect of repaying relevant indebtedness on the directors current account as of 31 March 2016 such that no s455 CTA charge arose on LLL and no associated benefit in kind charge on the participants.

(3) HMRC acted reasonably in treating the credit in respect of the £111,000 as a claim pursuant to s458 CTA with the appropriate consequences for the s455 CTA charge and benefit in kind income tax charge on indebtedness on the director's current account on the basis of "repayment" of that sum as at 31 March 2016.

(4) Accordingly, save to the extent of the adjustment of the tax year to which receipt of the 2016 dividend (including, though not under appeal, the ordinary share dividend), the appeal on the treatment of the B share dividends is dismissed.

**Penalties**

154. The penalties arising from the errors associated with the B share dividends were assessed on the basis of deliberate, concealed and prompted behaviour for AS and MS vis a vis the dividend income.

155. The only submission made in connection with the penalties in connection with the B share dividends by AS and MS were that the tax was not due so there should be no penalty. For the reasons given the tax is due.

156. Applying the *Tooth* test of deliberate behaviour it is right to conclude that the dividend income was consciously excluded from AS and MS's personal tax returns on the basis that it was alleged that the Spanish Shareholders were the persons entitled to each of the £111,000 and £135,000 dividends. This was so despite the credit having been made to the director's current account, the benefit taken from such credit by way of a reduction in the s455 CTA charge and the complete failure comply with the legal formalities for the issue of the shares and/or associated accounting.

157. As was the case for Hazon Way AS and MS may have relied completely on Doshi & Co who failed to advise and/or undertake the correct procedures and accounting practices. However, such behaviour is unacceptable certainly for a director of a limited liability company.

158. As indicated above information was requested repeatedly over a period of years in order to establish the true position as to the shares and the dividends. Information remained outstanding right up to the hearing. Further, documentation was produced immediately prior to the hearing which purported to be contemporaneous documents recording the agreement with the Spanish Shareholders and AS and MS, but which turned out to be retrofitting.

159. There can be no question, in the circumstances, that the behaviour associated with the declaration and treatment of the dividends for income tax assessment purposes was deliberate and concealed – the Appellant does not contend that it was unprompted.

160. No final submissions were made on mitigation. However, the Tribunal considers that the 20% given by HMRC to be more than generous in the circumstances.

161. The liability to penalties in this regard is upheld subject to the reallocation of the 2016 dividend to tax year 2015/16 and the appeal dismissed.

**MOTORING EXPENSES**

**Evidence and facts found**

162. The motor vehicle used by AS was privately owned however, all expenses associated with it were incurred by LLL.

163. At the meeting on 21 June 2017 Mr Doshi suggested that expenses be reversed out of the LLL accounts, and that AS was entitled to claim milage by reference to mileage records maintained.

164. Ms Woodburn reviewed the mileage logs and calculated that business mileage (excluding commuting mileage) was of the order of 555 miles pa. and allowed that mileage at the permitted 45p per mile. On the basis that a similar error would have occurred in each year similar adjustments were made by way of disallowance of expenditure.

165. In oral evidence AS claimed that he used the car to commute between home and the care home and for daily trips to ASDA and for other errands on behalf of residents. He estimated

that the daily mileage was 16 miles including the 4 miles from home to work and the corresponding 4 miles from work to home.

166. By the submissions made on LLL's behalf it was claimed that AS worked in the business 232 days per year. Mileage at 8 miles per day for 232 days at £0.45 per mile is £835.20 as compared to the £250 permitted by HMRC.

167. HMRC contend that the mileage records provided show that on the days where additional provisions or errands were required 8 miles is reasonable but that was not every day.

168. A review of the general ledger in the working papers indicates that sundry trips and errands were more frequent than the 69 days at 8 miles permitted by HMRC and on balance the Tribunal considers a reasonable sim to be £600 pa. To this extent only the Tribunal allows the appeal in respect of motoring expenses.

**OTHER PENALTIES**

**LLL**

169. LLL was issued with two schedules of penalties: schedule 1 – with regard to Hazon Way; and schedule 2 – regarding s455 CTA charges in respect of other amounts which had not been debited to the director's current account.

170. The Hazon Way penalties are dealt with above.

171. The schedule 2 penalties were on the basis of careless prompted behaviour with a 50% reduction. On behalf of LLL the Tribunal were told that they dispute only the level of mitigation given. However, in the final written submissions it was claimed that the s455 CTA charge was calculated incorrectly on the basis that interim dividends had been declared which reduced the indebtedness and thereby the s455 CTA charge in year.

172. To so claim was to bring a substantive issue in by the back door without permission to do so and the Tribunal has not thereby considered the impact of the treatment by HMRC of such alleged dividends.

173. The Appellant also baldly asserted that 100% mitigation would be given on the basis that LLL had provided the information to determine the exact quantum.

174. To so claim fails to take account of the number of information requests which had to be made and the failure to co-operate. AS may have believed that Doshi & Co had provided the requested information however, on repeated issue of the information requests it should have been plain that the information had not been provided. HMRC have given a 50% reduction which adequately reflects that the quantum was readily determined and penalises for the lack of co-operation generally. A 50% reduction is therefore reasonable.

175. The appeal on the balance of the penalty in respect of schedule 2 for LLL is dismissed.

**AS and MS**

176. Both AS and MS were penalised in respect of the non-disclosure of income from a rental property owned in Spain. AS explained that the income had not been declared as they understood that the income could be declared in Spain rather than the UK. He also, however, acknowledged that it had not been declared in Spain. Only after HMRC began their enquiry was he told that it would be "better" to declare the income in the UK. There was no question that AS was aware that tax was due on the income.

177. In terms of the disclosure finally made, incorrect information as to the quantum of the income was initially provided to HMRC. The accurate detail of the income was only provided many months into the enquiry and after a number of information requests had been issued.

178. HMRC assessed penalties on the basis that the errors in relation to this income were deliberate and prompted. 40% mitigation was permitted.

179. AS effectively admitted that he was aware that tax was due on the income and had not been declared, the Tribunal therefore considers that in doing do the *Tooth* test of deliberate behaviour was met. The income was not disclosed in the UK on the basis that it could be disclosed in Spain but was not so disclosed. It was therefore hidden from both tax authorities.

180. Whilst it is to be acknowledge that the assessments are raised on the basis of income figures finally supplied by AS and MS as indicated above numerous requests had to be made before it was supplied and, on that basis, a 40% mitigation of the penalty is considered appropriate.

181. Finally, AS and MS were issued with penalties in respect of failures to declare UK letting income, pensions, etc and in connection with the benefit in kind charge associated with the repayment of on overdrawn director's current account more than 9 years after the accounting period end. These were careless penalties which were accepted by AS and MS who limited their challenge to the level of mitigation set. A 50% reduction had been applied by HMRC.

182. As noted above the penalty amount and allocation to tax year will need to be adjusted in respect of the 2016 ordinary share dividend which should have been treated as received in tax year 2015/16.

183. Simply by reference to a review of the number and nature of requests for information and the difficulties and general lack of cooperation during the enquiry the Tribunal considers a 50% reduction in the maximum mitigation to be reasonable.

**QUANTUM**

184. The Tribunal has not considered the calculations and quantum of the assessments or penalties.

185. Mr Doshi provided recalculated sums on the basis of his own hypothesis of the correct taxing outcome. HMRC were requested to also recalculate on the basis that any of the Appellants' substantive arguments were correct. The quantum so calculated did not agree with that prepared by Mr Doshi and Mr Doshi requested 30 days in which to agree the calculations in the event that any part of the appeal was successful.

186. The Appellants have failed to satisfy the Tribunal in respect of the three matters under consideration. The Tribunal has reallocated the dividend income for the 2016 dividends from tax year 2016/17 to 2015/16 and made a minor amendment to the motoring expenses. Increased mitigation was also given for the Hazon Way penalty. The parties are therefore directed to agree the consequences of these amendments on quantum with liberty to apply should agreement not be possible.

**DISPOSITION**

187. Save to the limited extend identified in respect of the mitigation on LLL's Hazon Way penalty and regarding the mileage charges and reallocation of the 2016 dividend income the appeal is dismissed for the reasons set out above.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

188. 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.

**AMANDA BROWN QC**
**TRIBUNAL JUDGE**

**Release date: 16 MARCH 2022**

## SCHEDULE OF INFORMATION REQUESTS

Information requests were issued to the Appellants as follows:

| Party | Date |
|---|---|
| LLL, AS, MS | 24 August 2015 |
| LLL, AS, MS | 15 September 2015 |
| LLL | 4 February 2016 |
| LLL | 23 March 2016 |
| LLL, AS, MS | 13 May 2016 |
| LLL, AS, MS | 14 June 2016 |
| LLL, AS, MS | 27 June 2016 |
| LLL | 28 July 2016 |
| LLL, AS, MS | 16 August 2016 |
| LLL, AS, MS | 2 November 2016 |
| AS, MS | 7 December 2016 |
| LLL, AS, MS | 17 May 2017 |
| LLL | 3 August 2017 |
| AS, MS | 15 September 2017 |
| AS, MS | 29 November 2017 |
| LLL, AS, MS | 22 December 2017 |
| LLL, AS, MS | 2 February 2018 |
| LLL, AS, MS | 21 February 2018 |
| LLL | 20 March 2018 |
| LLL, AS, MS | 12 April 2018 |