Neutral Citation: [2024] UKFTT 00114 (TC)

Case Number: TC09056

FIRST-TIER TRIBUNAL
TAX CHAMBER

Alexandra House, Manchester

Appeal reference: TC/2021/00476

CAPITAL GAINS TAX – whether transaction rescinded on the basis of common mistake so that no disposal had taken place – validity of closure notice – whether appellant's tax return amended by HMRC to reflect the amendments contained in the closure notice – HMRC request to reduce the amount of gains identified in the closure notice – amount of inaccuracy penalty charged under Schedule 24 Finance Act 2008 – appeal dismissed

Heard on: 4-5 December 2023
Judgment date: 25 January 2024

Before

TRIBUNAL JUDGE ROBIN VOS
MS ANN CHRISTIAN

Between

ARSHAD MAHMOOD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: The Appellant appeared in person

For the Respondents: **PAUL MARKS** litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This appeal raises an interesting question as to whether the parties to a transaction can rescind it on the basis that they were mistaken as to the tax consequences of the transaction so that, for tax purposes, the transaction is treated as never having taken effect.

2. We have also had to consider what actions need to be taken by HMRC in order for a taxpayer to have a tax liability following the issue of a closure notice on the completion by HMRC of their enquiries into the taxpayer's tax return and, in particular, whether HMRC must amend the tax return itself on their electronic systems rather than just setting out the amendments in the closure notice.

3. The transaction in question was a transfer by the appellant, Mr Mahmood, in November 2016 of various properties to Rajay Khan Properties Limited ("RKP"), a company owned by Mr Mahmood's wife. Mr Mahmood did not report this on his tax return as he did not consider that any taxable gain arose.

4. Following their enquiries, HMRC took the view (now not disputed by Mr Mahmood) that any capital gain should be calculated on the basis that the properties should be deemed to be disposed of for a consideration equal to their market value as the disposal was to a connected person. This led HMRC, on completion of their enquiries, to issue a closure notice resulting in an additional tax liability of £303,476. They also charged Mr Mahmood a penalty of £81,938.52 (27% of the additional tax) under Schedule 24 Finance Act 2008 ("Schedule 24") for providing an inaccurate tax return.

5. In the meantime, during the course of HMRC's enquiries, Mr Mahmood and RKP agreed to "rescind" the transfer of the properties to RKP by transferring the properties back to Mr Mahmood in early 2019.

6. The purported rescission was based on both Mr Mahmood and RKP being mistaken as to the availability of the capital gains tax spouse exemption in s 58 Taxation of Chargeable Gains Act 1992 ("TCGA") which, if available, would have meant that no gain would have arisen on the transfer of the properties. Mr Mahmood accepts that this exemption is not available on the basis that the properties were transferred to a company owned by his wife rather than being transferred directly to her.

7. Mr Mahmood appeals both against the amendments made by the closure notice and against the penalty.

8. As far as the closure notice is concerned, Mr Mahmood has two grounds of appeal:

   (1) The transfer of the properties has been rescinded and so no taxable disposal has taken place.

   (2) The closure notice does not validly impose any tax liability on him as the required amendments have not been made by HMRC to his tax return.

9. Whilst defending the validity of the closure notice and the resulting tax liability imposed on Mr Mahmood, Mr Marks, on behalf of HMRC, invites the Tribunal to reduce the amount of the tax liability from £303,476 to £36,316. The reasons for the reduction are as follows:

   (1) HMRC originally valued the properties at £1,083,000. They have since obtained a more detailed valuation which values the properties at £544,750. This reduced valuation is not challenged by Mr Mahmood.

(2) HMRC had originally made no allowance for acquisition costs/expenditure when calculating the capital gain. They now accept that expenditure of £352,068 should be allowed. Again, the figure for allowable expenses is not challenged by Mr Mahmood.

(3) The tax liability had originally been calculated using a tax rate of 28% applicable to residential property. HMRC now accept that the property is not residential and so the tax rate should be 20%.

(4) Separately from the capital gain, the closure notice had disallowed property expenses of £8,239 resulting in an additional liability to income tax on the rental income from the properties. HMRC now accept that these expenses should be allowed.

10. In line with the reduction to the tax liability, HMRC also invite the Tribunal to reduce the penalty to £9,805.23, being 27% of the revised tax.

PROCEDURAL ISSUES

11. Mr Mahmood's appeal to the Tribunal was slightly later than it should have been. Mr Mahmood has explained that, at the time, he was suffering from Covid. HMRC do not object to the late appeal. The Tribunal gave permission for the appeal to proceed despite being notified to the Tribunal outside the statutory time limit.

12. Despite the time available to him to prepare for the hearing, Mr Mahmood (who was representing himself) did not appreciate the need to provide any legal authorities explaining the principles supporting his submission that the transfer of the properties had been validly rescinded by the parties and that the effect of this was that the transaction should be treated for tax purposes as never having taken place.

13. In the absence of any objection from HMRC, the Tribunal considered that it was in accordance with the overriding objective of dealing with cases fairly and justly to allow Mr Mahmood approximately two weeks after the end of the hearing to provide such authorities and to make written submissions in relation to them should he wish to do so. We also gave HMRC permission to file additional written submissions dealing with any points raised by Mr Mahmood by no later than 5 January 2024.

14. Both Mr Mahmood and HMRC have provided submissions and we have taken these into account in reaching our decision.

POINTS AT ISSUE

15. The issues which the Tribunal needs to determine in relation to the tax liability are as follows:

(1) Whether, as a matter of law, it was open to Mr Mahmood and RKP to rescind the transfer of the properties as a result of their common mistake as to the tax consequences of the transfer with the result that the transaction should be treated as never having taken place for tax purposes.

(2) If so, were the parties in fact mistaken as to the tax consequences and was the transfer properly rescinded?

(3) What action does HMRC have to take on completion of their enquiry into a person's tax return in order for a tax liability to arise?

(4) Did HMRC take the actions required of them?

16. As far as the penalty is concerned, Mr Mahmood does not challenge this other than on the basis that no tax is due. The penalty therefore stands or falls in line with our decision in relation to the tax liability.

THE EVIDENCE AND THE FACTS

17. The Tribunal had a bundle of documents and correspondence provided by HMRC. In addition, we heard evidence from Mr Mahmood and from two of the HMRC officers involved in HMRC's enquiry into Mr Mahmood's tax return, Carolyn Cowan and Mr Darren Ledder.

18. We were entirely satisfied that all three witnesses were honestly trying to answer the questions put to them as best they could. We should note that Ms Cowan in particular was not able to answer some of the more detailed questions put to her about HMRC's systems. This is not however a criticism and is understandable given that her involvement was over three years ago and she has since moved to another area within HMRC.

19. In any event, the relevant facts are, for the most part, uncontroversial. The only significant factual dispute between the parties was whether HMRC amended Mr Mahmood's tax return for the year ended 5 April 2017 at the time they issued their closure notice or at any time subsequently. Mr Mahmood submits that they did not whilst HMRC's position is that the tax return was amended at the relevant time. We will say more about this in due course.

20. In the following paragraphs, we summarise the relevant facts.

21. Mr Mahmood has been an accountant for 35 years. His practice mainly relates to smaller matters and, by his own admission, he has little experience relating to capital gains tax.

22. On 15 November 2016, Mr Mahmood transferred ten commercial properties which he owned to RKP which was wholly owned by his wife. His motivation for the transfer was that his wife had provided the initial funding for the acquisition of the properties and, at the time, he had health problems. He therefore wanted to ensure the properties belonged to her. Although Mr Mahmood's wife was the owner of RKP, Mr Mahmood was the sole director.

23. There was no written agreement between Mr Mahmood and RKP prior to the transfer of the legal title to the properties. However, the understanding was that the properties would be transferred for a consideration of £300,000 (representing the cost price of the properties) which would be left outstanding as a debt due from RKP to Mr Mahmood. This is reflected in RKP's financial statements for the relevant period.

24. Mr Mahmood did not report the disposal on his tax return for the year ended 5 April 2017 as he did not consider that any tax was payable. This was both on the basis that the properties were transferred at cost (so no gain arose) and that the spouse exemption in s 58 TCGA was available as RKP was owned by his wife. As we have mentioned, Mr Mahmood accepts that neither of these propositions is in fact correct and that, subject to the points which he now puts forward, tax is due on the basis that the properties were disposed of for a consideration equal to their market value at the date of the transfer.

25. Mr Mahmood submitted his electronic tax return for the year ended 5 April 2017 on 31 January 2018 using his online tax account. He made a small amendment to his tax return on 6 February 2018 as he realised he had forgotten to include some interest. Again, he did this using his online account with HMRC.

26. In April 2018, HMRC opened an enquiry into Mr Mahmood's 2017 tax return under s 9A Taxes Management Act 1970 ("TMA"). The letter explained that HMRC would be checking Mr Mahmood's capital gains tax position. This was followed by correspondence between HMRC and Mr Mahmood including the issue of three information notices in May 2018, July 2018 and July 2019. Mr Mahmood initially provided a certain amount of information but did not provide much of the information requested in the later two information notices.

27. In the absence of any further information, Ms Cowan (who had been dealing with the enquiry on behalf of HMRC for most of the relevant period) issued a letter on 29 January 2020 explaining to Mr Mahmood HMRC's conclusions in relation to the additional tax liabilities and the penalty which they proposed to charge.

28. By mistake, HMRC assessed the penalty on 26 February 2020 without having issued a closure notice. This meant that, at the time the penalty was assessed, no additional tax was due and so the penalty assessment was invalid. Mr Mahmood appealed against the penalty assessment which was withdrawn on 1 April 2020.

29. However, on the same day, Ms Cowan made arrangements to issue a closure notice which was sent to Mr Mahmood on 2 April 2020. The closure notice enclosed a self-assessment statement as at 1 April 2020 showing the adjustments resulting from the conclusions in the closure notice as well as a tax calculation dated the same date which showed the tax due based on the original tax return (as amended by Mr Mahmood on 6 February 2018) and the tax due following the changes made by the closure notice.

30. Following the issue of the closure notice, HMRC issued a further penalty assessment on 18 May 2020 to replace the invalid assessment which they had made in February 2020. The penalty was assessed on the basis that Mr Mahmood's inaccuracy in his tax return was careless and that his disclosure was prompted. This meant that the penalty would be between 15-30% of the additional tax.

31. HMRC gave a small reduction from 30% to 27% given their view that Mr Mahmood had failed to give much of the information which HMRC had asked for. They did not believe that there were any special circumstances which justified any further reduction in the penalty and, in the light of Mr Mahmood's compliance history and perceived lack of co-operation did not consider that it would be appropriate to suspend the penalty (if it had been suspended the penalty would not be payable if Mr Mahmood agreed to abide by certain conditions designed to prevent future inaccuracies).

32. We should note that during the enquiry, Mr Mahmood made a number of complaints about HMRC's conduct. We do not deal with those complaints except to the extent that they involve anything relevant to the issues which we have to decide. If Mr Mahmood wishes to pursue his complaints, he should take this up with HMRC or, if necessary, with the Adjudicator's Office.

33. With that background in mind, we turn now to consider the issues which the Tribunal has to determine.

MISTAKE

34. Mr Mahmood submits that, as a result of their mistake to the tax consequences of the transfer of the properties to RKP, he and RKP were entitled to agree that the transactions should be rescinded. He further submits that, as a result of this recission and the transfer of the properties back to his name, the transfer of the properties should be treated as never having taken place and that, as a result, there was no disposal for capital gains purposes and can therefore be no taxable gain.

35. For the avoidance of doubt, Mr Mahmood does not suggest that there was any requirement for the parties to go to Court to get the transaction set aside as a matter of the Court's discretion and, having been asked by the tribunal, specifically confirmed that he was not asking the tribunal to express any view as to whether a court would in fact set aside the transaction if asked to do so.

36. It is therefore apparent that Mr Mahmood is relying on the common law doctrine of what is normally referred to as "common mistake" under which a transaction may be void if

the parties enter into the transaction on the basis of a mistaken belief which is sufficiently fundamental. He is not relying on the equitable doctrine of mistake which can apply in the context of a voluntary transaction where a court of equity has a discretion to set aside a transaction where there is a mistake of sufficient gravity and it would be unconscionable to leave the mistake uncorrected (see *Pitt v Holt* [2013] UKSC 26).

37. In relation to common mistake, Mr Marks observes that the principles to be applied were set out by the House of Lords in *Bell v Lever Brothers Limited* [1932] AC 161.

38. Although the Judges in that case were divided as to the outcome, there was no real difference between them as to the principles to be applied. The focus was very much on the mistake needing to relate to the subject matter of the transaction or the way in which the contract was to be performed as opposed to some consequence resulting from the arrangements but not itself forming part of the transaction. Lord Warrington of Clyffe (who was one of Judges in the minority) for example observes at [208] that:

> "The real question, therefore, is whether the erroneous assumption on the part of both parties to the agreements… was of such a fundamental character as to constitute an underlying assumption without which the parties would not have made the contract they in fact made, or whether it was only a common error as to a material element, but one not going to the root of the matter and not affecting the substance of the consideration."

39. Lord Atkin (one of the majority) put it a different way and asked at [227] whether "the state of the new facts destroy the identity of the subject-matter as it was in the original state of facts?".

40. Lord Thankerton (also in the majority) suggested at [236] that what is important is:

> "that the matter as to which the mistake existed was an essential and integral element of the subject-matter of the contract, or it was an inevitable inference from the nature of the contract that all the parties so regarded it."

41. The question therefore is whether the mistaken assumption shared by the parties somehow affects the consideration to be provided by one or other of the parties. It is clear from the authorities referred to by the Judges in *Bell* that this could be either as a result of the subject matter of the transaction or the way in which the transaction was to be performed being different to that which was anticipated by the parties.

42. In this case, the difficulty for Mr Mahmood is that, although there may have been an underlying assumption on the part of Mr Mahmood and RKP (which, of course, was represented by Mr Mahmood as its sole director) that the transfer of the properties would not give rise to any capital gains tax and, although it may well be the case that they would not have entered into the transaction had they known that their assumption was mistaken, the liability to capital gains tax has no effect whatsoever on the terms or the subject matter of their bargain (the transfer of the properties in return for a consideration of £300,000 to be left outstanding as a debt due from RKP to Mr Mahmood) nor on the way in which the transaction was to be performed (the simple transfer of legal title from Mr Mahmood to RKP by way of standard land registry transfer forms).

43. We therefore accept Mr Marks' submission that the nature of the mistake made by the parties in this case is not one which, under common law, is capable of allowing the parties to rescind or reverse the transaction on the basis that it is void for mistake and so that the transaction is treated as never having taken place.

44. Based on Mr Mahmood's submissions, it appears to us that he is confusing two separate principles. The first (which we have just discussed) is that a transaction may be void if it is entered into on the basis of a mistaken legal assumption, but only where the mistake affects the subject matter or the performance of the transaction and is sufficiently fundamental.

45. The second principle is that the parties to a transaction may agree to rescind the transaction for any reason. This is referred to in Chitty on contracts (35th edition at paragraphs 26-027 and 26-028). However, as the authors explain, the transaction can only be rescinded if it has only been partially executed so that one or both parties still have outstanding obligations to perform.

46. In this case, the transaction was fully executed as the properties had been transferred to RKL and registered in its name at the Land Registry and the debt of £300,000 representing the consideration for the transfer of the properties had been recorded in RKL's books. Nothing further remained to be done. Although we heard no submissions on this specific point. It is therefore questionable as to whether the parties could agree to rescind (as opposed to reverse) the transaction.

47. In any event, there is no suggestion in Chitty that rescission has the effect that any parts of the transaction which have already been carried out are treated as if they no longer had effect. Instead, rescission simply puts an end to any further obligations which have yet to be performed. Therefore, if the transaction in this case had been validly rescinded, this does not mean that the transfer of the properties can be ignored.

48. This does not of course prevent the parties from reversing the transaction by agreeing that the properties should be transferred back to Mr Mahmood. It is perhaps notable that the letter Mr Mahmood has provided from his solicitor confirming that the transaction has been rescinded notes that "Under contract law it is always open to the parties to reverse a transaction as long as both are in agreement as was the case here".

49. Whilst we agree with this statement, for the reasons which we have explained, it does not follow that the original transfer of the properties by Mr Mahmood by RKL can be treated as if it had never taken place. There was therefore a disposal of the properties by Mr Mahmood which potentially gives rise to a liability to capital gains tax.

50. We express no view as to whether the transfer of the properties back to Mr Mahmood may itself have been void as a result of a common mistake if the transfer only took place on the mistaken assumption that the original transfer was void and that Mr Mahmood was therefore entitled to have the properties back.

51. If we are wrong in our conclusion that the original transaction cannot be rescinded on the basis of mistake and, in fact, the parties were entitled to do so, Mr Marks suggests that, nonetheless, the transfer was not in fact rescinded as Mr Mahmood confirmed that RKP retained the rental income between 2016 and 2019, reported it on its tax return and paid the net profits to Mrs Mahmood as a dividend. Mr Marks submits that, had the transaction been rescinded, it is Mr Mahmood who would be entitled to the rent and that the company should therefore account to him for the rental income.

52. We do not however accept this. It is clear from the decision in *Bell v Lever Brothers* (see for example, Lord Warrington of Clyffe at [206]) that, if there is a common mistake of the kind which brings the common law principles into play, the effect is that the transaction is void (not voidable).

53. What steps the parties have taken to give effect of this result is therefore irrelevant. The fact is that the transfer would be ineffective and that, in this case, Mr Mahmood would be entitled to have the properties returned to him and to receive the net rental income for the

period when the properties were held by RKP. No doubt he would have been able to make a claim against RKP for the rental income which it has retained and it would have been up to him whether he chose to do so. This would not therefore prevent the original transfer from not having taken place had the right sort of mistake been made to render the transaction void.

54. However, as it is, the mistake which was made as to the tax consequences does not render the transaction void for the reasons which we have explained and cannot therefore be relied on to eliminate the original disposal in 2016 even though the properties have been transferred back to Mr Mahmood.

55. We should note that Mr Mahmood made the point that he first informed HMRC in February 2019 that the transaction had been reversed due to the mistake about the tax consequences. He submits that, as HMRC did not object to this nor challenge it in the Court, they should be treated as having accepted the position.

56. It is however apparent to us from the correspondence that HMRC did not accept the position. In their subsequent letters in April and May 2019, it is clear that HMRC were pursuing the potential capital gains tax liability. Although they did not refer specifically to Mr Mahmood's comment about the reversal of the transaction, it is implicit that they did not believe that the result of this was that the original disposal should be ignored.

57. In any event, the question as to whether it should be ignored is a matter of law which is not affected by whether or not HMRC do or do not accept or object to what Mr Mahmood says in his correspondence. It might perhaps be possible that HMRC could be prevented from relying on a particular point if, by their words or by their conduct they had made a clear representation that they would not do so but there was no suggestion here that that is the case.

58. On the face of it there was therefore a taxable disposal by Mr Mahmood in November 2016 and we now need to consider whether the closure notice issued by HMRC in April 2020 has crystalised a liability to tax.

THE CLOSURE NOTICE REGIME

59. HMRC may open an enquiry into an individual's tax return under s 9A TMA. This is the procedure adopted by HMRC in this case in respect of Mr Mahmood's tax return for the year ended 5 April 2017. Mr Mahmood does not suggest that there was no valid enquiry.

60. In accordance with s 28A TMA, such an enquiry comes to an end when HMRC issues a final closure notice. The requirements for a final closure notice are set out in s 28A(2) TMA as follows:

> "28A(2) A ... final closure notice must state the officer's conclusions and–
>
> (a) ...
>
> (b) make the amendments of the return required to give effect to his conclusions."

61. Mr Mahmood submits that the effect of 28A(2)(b) is that no tax liability can arise unless the HMRC officer actually amends the taxpayer's tax return. In support of this submission, Mr Mahmood referred us to paragraph 8 of Schedule 1A to TMA which is headed "Claims Etc Not Included In Returns".

62. Paragraph 8(1) of Schedule 1A provides as follows:

> "(1) An officer of the Board or the Board shall, within 30 days after the date of issue of a closure notice amending a claim other than a partnership claim under paragraph 7(2) above, give effect to the

> amendments by making such adjustment as may be necessary, whether-
>
> (a) by way of assessment on the claimant, or
>
> (b) by discharge of tax...".

63. Mr Mahmood argues that the result of this is that HMRC have 30 days from the date of the issue of the closure notice to amend his tax return and that, if they fail to do so (which he says in this case they have not), there is no liability to tax.

64. On the first day of the hearing, the Tribunal referred both parties to the decision of the Court of Appeal in *The Queen on the application of Archer v HMRC* [2017] EWCA (Civ) 1962, an authority mentioned to by Mr Mahmood in his grounds of appeal for the Tribunal.

65. That case considered the requirements for a valid closure notice in circumstances where the taxpayer's revised tax liability was not specifically stated in the closure notice issued by HMRC but where HMRC had in fact amended the taxpayer's online tax return to show the revised amount of tax due in line with the conclusions set out in the closure notice.

66. The Court of Appeal concluded at [22] that the closure notice must state the amount of tax for which the taxpayer is liable and also made it clear that it is the closure notice itself which must amend the taxpayer's tax return:

> "Section 28A(2)(b) requires the amendment of the return to be made by the closure notice itself; not merely by an officer of HMRC. So, unless incorporated by reference, Mrs Cook's amendment of the online return cannot itself satisfy the words of the sub-section."

67. The Court of Appeal explained at [27] that, although there is now a single step by which the closure notice itself amends the taxpayer's return, there had previously been a two-step process under which the closure notice set out HMRC's conclusions, following which either the taxpayer or HMRC then amended the taxpayer's self-assessment. We do wonder whether Mr Mahmood had this previous procedure in mind when he submitted that, in order for a tax liability to arise, there must be both the issue of a closure notice and an amendment to his tax return.

68. However, based on what is said by the Court of Appeal in *Archer*, it is clear to us that all that is needed is the issue of a closure notice which states the officer's conclusions, sets out the amendments to be made to the tax return and states the amount of tax which is now due as a result of the amendments. There is no requirement in s 28A TMA or anywhere else that the taxpayer's tax return should itself be separately amended in order for a tax liability to arise.

69. This is in accordance with the clear words of the legislation. Section 28A(2) specifically provides that the final closure notice must make the amendments of the return to give effect to the officer's conclusions.

70. That it is the closure notice which amends the return is also apparent from the right of appeal which is contained in s 31 TMA. Section 31(1)(b) confirms the right of appeal against "any amendment made by a closure notice under s 28A". It is not a right of appeal against a separate amendment to the tax return made by the relevant HMRC officer. It is a right of appeal against the amendment which is made by the closure notice.

71. In our view, Mr Mahmood's reference to Schedule 1A is misconceived. That schedule clearly relates to the process to be followed where HMRC wish to enquire into a claim made by a taxpayer where that claim is not contained in a tax return.

72. Paragraph 5 of Schedule 1A gives HMRC the power to enquire into any such claim and paragraph 7 provides that such an enquiry comes to an end when the officer gives the taxpayer a closure notice which sets out their conclusions. Because the enquiry and the closure notice relate to a claim which is not contained in a tax return, there needs to be some mechanism for collecting any tax due as a result of the officer's conclusions.

73. This is why paragraph 8 of Schedule 1A requires the officer either to make an assessment or to discharge the relevant tax liability with 30 days of the issue of the closure notice. No such mechanism is needed in the case of a closure notice under s 28A TMA since, as confirmed by the Court of Appeal in *Archer* the closure notice must itself amend the taxpayer's tax return and state the amount of tax due.

74. In effect, the closure notice operates as an amendment to the taxpayer's self-assessment contained in their tax return. This is confirmed by s 59B(5)(a) TMA which refers to the amendment of a self-assessment under s 28A, thus indicating that the closure notice operates as the amendment of a self-assessment.

75. The only question therefore is whether the closure notice satisfies the requirements established by the Court of Appeal in *Archer* and set out at paragraph [62] above.

76. In this case, the closure notice dated 2 April 2020 explains (admittedly somewhat opaquely) that the disposal of the properties should have been returned on the basis that a market valuation consideration had been received. The closure notice then states that "this final closure notice amends your self-assessment tax return for the year ended 5 April 2017 based on the conclusions shown above". Under the heading "How your return has been amended", the closure notice explains that box 6 on the capital gains tax pages has been increased from £0 to £1,083,000. Finally, it is stated that the tax due as a result of this is £303,476 which "is the result of the amendment to your self-assessment tax return made by this final closure notice".

77. It is therefore absolutely clear on the face of the closure notice that it constitutes an amendment to Mr Mahmood's tax return for the year ended 5 April 2017 as required by the legislation and also states how much tax is payable as a result. For good measure, it attaches a detailed tax calculation showing how much tax is due together with an up-to-date self-assessment statement which again shows the relevant tax liabilities.

78. Based on this, we are satisfied that the requirements of the legislation have been met and that, subject to the Tribunal agreeing the reduction now proposed by HMRC, the tax shown in the closure notice is due and payable by Mr Mahmood.

79. On that basis, we do not strictly need to reach a conclusion on the main area of factual dispute which is whether Ms Cowan or another HMRC officer did in fact amend Mr Mahmood's tax return on 1 April 2020 which is when Ms Cowan initiated the issue of the closure notice. Her evidence was that she had asked a junior "progression officer" to make the amendments and that she would have checked that the amendments had been made before issuing the closure notice.

80. Mr Mahmood challenges this, primarily on the basis that, in February 2022, when making an application to the Tribunal for an extension of time, the relevant individual from HMRC's Solicitor's Office sent the Tribunal a copy of Mr Mahmood's tax return which had not been amended. An amended version of Mr Mahmood's tax return was only provided by HMRC in September 2022. Based on this, he submits that the return cannot have been

amended by February 2022 as HMRC would otherwise have provided the Tribunal with the amended version at that stage.

81. Whilst we accept that this is one explanation for the fact that an amended version of the return was provided in February 2022, based on the other documentary evidence, we think a more likely explanation is that this was simply a mistake on the part of the relevant individual at HMRC.

82. For example, the amended version of Mr Mahmood's tax return for the year ending 5 April 2017 contained in the bundle has at the front of it a sheet from HRMC's computer system which shows that it was the third version of Mr Mahmood's tax return (the first being the original version filed by Mr Mahmood on 31 January 2018 and the second being the amended version submitted by him on 6 February 2018), that the version was created on 1 April 2020 and that this resulted from a "revenue amendment".

83. In addition, the self-assessment statement which accompanied the closure notice and which was dated 1 April 2020 clearly reflects the amendments made by the closure notice. Mr Mahmood himself submitted that HMRC's systems were automatic and that the amendments to the relevant tax return would feed into the various statements and calculations produced by HMRC. Nobody was able to explain in a satisfactory way exactly how HMRC's computer systems work but we suspect that Mr Mahmood may well be right and so the fact that the self-assessment statement reflects the amendments said to be made to the tax return clearly supports the inference that the tax return must have been amended on or before 1 April 2020 as Ms Cowan confirmed in her evidence.

84. Based on this evidence, our conclusion is that it is more likely than not that Mr Mahmood's tax return for the year ended 5 April 2017 was indeed amended on 1 April 2020 and that the production of an unamended version in February 2020 was a simple mistake. However, for the reasons we have explained, nothing turns on this conclusion as the closure notice was sufficient to impose a tax liability on Mr Mahmood whether or not the tax return had itself been separately amended.

85. Although we have already concluded that the closure notice was effective without any separate amendments to Mr Mahmood's tax return, there are some other points which he raised which we should address as we would not want Mr Mahmood to think that we have ignored them.

86. Mr Mahmood produced a print out from his own self-assessment online account which he accessed on the day of the hearing and which only refers to the amendment to his tax return for the year ended 5 April 2017 which he made on 6 February 2018. It makes no mention of any amendment by HMRC.

87. This seems surprising, particularly in the light of the submission by HMRC in *Archer* at [16] that the taxpayer's agent would be able to see the amendments which HMRC had made to the tax return through their online account. Again, nobody from HMRC could explain the reasons why Mr Mahmood's online account did not appear to show the HMRC amendments but, based on documentary evidence provided by HMRC which we have already referred to, we remain of the view that, on the balance of probabilities, it is more likely than not that the return was indeed amended by HMRC in April 2020.

88. This is supported by the fact that it is clear from the documents that some amendments have been made by HMRC to Mr Mahmood's tax return for the year ended 5 April 2017 whether those changes were made in 2020 or in 2022. However, Mr Mahmood has not been able to see those changes from his online account.

89. We accept that Mr Mahmood was understandably confused by what he could see (and what he did not see) when looking at his online account. However, in our view, the more likely explanation is that Mr Mahmood simply cannot see the HMRC amendments from the page he was accessing in his online account.

90. We should note that Mr Mahmood also provided us with a print out from his self-assessment online account in relation to his tax return for the year ended 5 April 2022 which he had original filed on 24 January 2023 but had amended on 21 December 2023. The print out showed that an amendment had been made on 21 December 2023.

91. However, this does not take matters any further as it just confirms that amendments made by the taxpayer show up on the particular page of the online self-assessment account. It does not provide any evidence as to whether any amendment made by HMRC as a result of issuing a closure notice would show up on the same page (or anywhere else on the online self-assessment account) and does not therefore assist in answering the question as to whether HMRC did in fact amend Mr Mahmood's tax return for the year ended 5 April 2016 to reflect the conclusions set out in their closure notice.

92. As far as the amendments to the tax return itself are concerned, although the return shows the specific amendments listed in the closure notice, the section of the amended tax return headed "self-assessment" does not show any figures in boxes 1 and 5 for the total amount of income tax which is due and the total amount of capital gains tax which is due. Mr Mahmood submits that this demonstrates that the tax return has not been properly amended and that, as a result, no tax is due.

93. Whilst we accept that it is surprising that the amendments to the tax returns do not feed through to the self-assessment section of the tax return, for the reasons we have already explained, this cannot affect the validity of the closure notice and therefore Mr Mahmood's liability to tax. The position would be different if the liability to tax depended on the self-assessment section of the tax return being completed with the updated figures for the tax liability but the Court of Appeal in *Archer* confirmed that it is the closure notice itself which must state the amount of the tax liability and not the tax return.

94. As further evidence of any amendments not having been properly made, Mr Mahmood referred to subsequent self-assessment statements of account which, although the amendments to Mr Mahmood's tax return were said to be made on 1 April 2020, show the relevant tax liabilities against the dates 31 January 2017, 31 July 2017 and 31 January 2018. Mr Mahmood questions how HMRC's systems can be manipulated to show liabilities arising at a date which is earlier than the issue of the closure notice particularly given that s 28A(3) TMA states that a closure notice takes effect when it is issued (and, by implication, not before).

95. However, both Ms Cowan and Mr Ledder explained that the reason for this is that 31 January 2017, 31 July 2017 and 31 January 2018 are the dates when the relevant tax liabilities became due (the first two dates being the dates for the payments on account in respect of the 2016/17 tax year and 31 January 2018 being the date when any balancing payment, including capital gains tax is due). They also made the point that the self-assessment statement clearly shows that the amounts arise as a result of an enquiry amendment made on 1 April 2020.

96. We accept this explanation. Far from suggesting that any amendments have not been properly made, these entries in the self-assessment statements in our view confirm that the amendments were indeed made in the way that they should have been. The amendments were made on 1 April 2020 and the effect of those amendments was that tax liabilities arose on 31 January 2017, 31 July 2017 and 31 January 2018. These are the dates when the tax

should have been paid and are therefore the dates from which, for example, interest is calculated.

97. In relation to interest, Mr Mahmood makes the point that, although interest on the unpaid tax is shown on his self-assessment statements, this interest is not shown in a schedule of interest charged printed out by Mr Mahmood from his self-assessment online account. Again, the HMRC witnesses were not able to explain this and nor are we. However, Mr Mahmood clearly had access to his self-assessment statements which do show the relevant interest amounts. The fact that they are not shown on the particular page from his online account identified by Mr Mahmood does not mean that those amounts of interest are not due and it cannot be inferred from this that the amendments to Mr Mahmood's tax return were not correctly processed.

98. Similarly, Mr Mahmood draws attention to the fact that the penalty which has been charged in relation to the year ending 5 April 2017 does not appear in the list of penalties which he has printed out from his online self-assessment account. Again, it is clear that he is right in this respect. The HMRC witnesses suggested that one reason why the penalty does not appear is that he has appealed against it and so its collection is suspended. Whether this is the correct explanation or not, we cannot say but it is clear from the documentary evidence that the penalty has been properly assessed and notified and that, subject to Mr Mahmood's appeal, it is due and payable.

99. One final point made by Mr Mahmood was that the summary page preceding the third version of his tax return (being the amended version) contained a space for an "E amendment time stamp" but did not contain any time stamp. He submits that this is a legal requirement and that, without such a time stamp, the document is not valid. In support of this, he refers to s 7B Electronic Communications Act 2000.

100. However, this legislation merely provides that in legal proceedings an electronic time stamp is admissible as evidence as to whether the communication or data existed at a particular point in time. It has no effect on the validity of the document in question and it does not preclude the possibility of proving the existence of a document at a particular time by the use of other evidence. Mr Marks made it clear that he did not rely on the existence or otherwise of a time stamp to establish that the amendments to Mr Mahmood's tax return for the year ended 5 April 2017 were in fact made on 1 April 2020 given the other evidence which he referred to in relation to this point.

101. As to the reason for the absence of a time stamp, Mr Ledder in his evidence, speculated that HMRC's systems only created a time stamp when an amendment was made by the taxpayer and not when an amendment was made by HMRC. Mr Marks subsequently took us to version 2 of Mr Mahmood's tax return (the version amended by him on 6 February 2018) where the summary page does indeed contain an entry against the "E amendment time stamp" heading and so Mr Ledder's explanation may well be correct (it is at least consistent with the evidence).

102. However, for reasons we have explained, whether his explanation is right or not makes no difference to the outcome as the lack of a time stamp does not affect the validity of the documents or the amendments and the question as to whether or not the tax return was amended separately from the closure notice does not affect the validity of the closure notice nor the liability to tax imposed as a result of the amendments contained in the closure notice.

103. The final point we need to deal with in relation to the closure notice is HMRC's request to reduce the amount from £303,476 to £36,316. It is clear that, in accordance with s 50(6) TMA, if the Tribunal is satisfied that the appellant is overcharged by a self-assessment (the

closure notice being an amendment to the self-assessment), the amount of that assessment should be reduced accordingly.

104. We accept that, in this case, Mr Mahmood has been overcharged the amendment in self-assessment made by the closure notice for the reasons explained by Mr Marks and recorded at [9] above. Mr Mahmood does not challenge HMRC's revised figures. We therefore agree that the amount shown as due by the amended self-assessment should be reduced to £36,316.

PENALTY

105. Despite a number of invitations from the Tribunal to do so, Mr Mahmood did not in any serious way challenge the penalty other than on the basis that no tax was due.

106. In response to a question from the Tribunal, Mr Mahmood did suggest that he had not been careless on the basis that it was common knowledge that a transfer to a spouse was exempt from capital gains tax and so there was no reason for him to check the position.

107. However, in our view, in circumstances where the transfer was to a company owned by his wife and where he did not himself have any detailed knowledge of the capital gains tax rules, a responsible taxpayer would have checked the position with someone who knew the rules. Such a transaction is very different to a direct transfer to a spouse and we do not consider it to be objectively reasonable for Mr Mahmood to have assumed that the exemption would be available, and not to have checked this, particularly given the number of properties involved.

108. We have also briefly considered the amount of the penalty and accept that, subject to adjustment to reflect the reduced amount of tax, HMRC's assessment is appropriate. In particular, we consider that:

(1) HMRC's limited reduction from 30% to 27% is appropriate bearing in mind Mr Mahmood's persistent failure throughout 2019 to provide information requested by HMRC in order to conclude their enquiries.

(2) HMRC were reasonable to conclude that there are no special circumstances which would justify a further reduction in the amount of the penalty.

(3) HMRC's conclusion, as set out in Ms Cowan's letter to Mr Mahmood dated 23 July 2020 that the penalty should not be suspended is also reasonable and cannot therefore be interfered with by the Tribunal.

109. Based on the above, the amount of the penalty is reduced from £81,938.052 to £9,805.32.

CONCLUSIONS

110. It is not open to Mr Mahmood and RKP to rescind the transfer of the properties by Mr Mahmood to RKP in November 2016 on the basis that they were mistaken as to the tax consequences of the transfer so that the transfer is therefore void.

111. Whilst the transfer may have been reversed by the transfer of the properties back to Mr Mahmood, this does not have the result that the original transfer can be treated as if it had not taken place. That transfer did therefore constitute a disposal by Mr Mahmood for capital gains tax purposes and, as accepted by Mr Mahmood, is treated as having taken place for a consideration equal to the market value of the properties.

112. The closure notice issued by HMRC on 2 April 2020 is valid and is all that is needed to amend Mr Mahmood's tax return and to increase his self-assessment to reflect HMRC's

conclusion. In particular, no separate amendment to his tax return for the year ended 5 April 2017 is necessary for the relevant tax liability to arise.

113. The amount of the amended self-assessment should however be reduced to £36,316 to reflect the reduced amount of the gain, the lower tax rate of 20% and HMRC's acceptance that the property expenses claimed are allowable.

114. The associated penalty should accordingly be reduced to £9,805.32.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

115. 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.

ROBIN VOS
TRIBUNAL JUDGE

Release date: 25th JANUARY 2024