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Case Number: TC09180

FIRST-TIER TRIBUNAL
TAX CHAMBER

Birmingham Employment Tribunal
Centre City Tower
7 Hill Street
Birmingham

Appeal reference: TC/2022/02237

INCOME TAX AND NATIONAL INSURANCE CONTRIBUTIONS – discovery assessment under section 29 of the Taxes Management Act 1970 – whether assessment to tax is or has become insufficient – yes – whether insufficiency brought about deliberately – no – time limit under section 36(1A) of the Taxes Management Act 1970 – effect on penalty assessment considered – appeal against discovery assessment and penalty assessment allowed

Heard on: 25 March 2024
Judgment date: 23 May 2024

Before

TRIBUNAL JUDGE RACHEL GAUKE
TERENCE BAYLISS

Between

CHEE WHYE YIP

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Rachel Ferrari of counsel, instructed by JRB Legal

For the Respondents: Liam Ellis, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. Mr Chee Whye Yip appeals against a discovery assessment issued under section 29 of the Taxes Management Act 1970 (TMA 1970) in the amount of £120,144.80 on 6 May 2021 in relation to the tax year 2012-13. He also appeals against a deliberate inaccuracy penalty issued under Schedule 24 to the Finance Act 2007 (FA 2007) on 6 May 2021 in the amount of £55,566.97.

PRELIMINARY ISSUES AND EVIDENCE

2. In this decision we refer to the Appellant as Mr Yip. Where we refer to Mr Yip's nephew, we refer to him as Mr Darren Yip, to distinguish him from the Appellant.

3. The documents to which we were referred were a hearing bundle of 558 pages and an authorities bundle of 282 pages. We had three witness statements: from Mr Yip; from an accountant, Ms Paulette Fankam; and from the HMRC officer who issued the discovery assessments, Officer Louise Becker. Ms Fankam and Officer Becker attended the hearing. Their witness statements stood as evidence in chief and they were both cross-examined.

4. At the start of the hearing, we were informed that Mr Yip had been taken unwell and was not able to attend on that day. At the date of the hearing Mr Yip was 85 years old and we were told that he suffers from chronic metastatic prostate cancer. We saw no medical evidence, but HMRC did not dispute that Mr Yip's absence was due to illness, and we accept that this was the case.

5. We were also informed that HMRC's witness, Officer Becker, would shortly be taking an extended period of leave so that, if we were to adjourn the hearing, she would be unlikely to be able to attend on a future date.

6. Ms Ferrari proposed that we divide the hearing into what she described as the preliminary issue, covering the question of whether the conditions for issuing the discovery assessment had been met, and the substantive issue, covering whether the tax treatment adopted by HMRC in that assessment was correct. Under this proposal we could hear Officer Becker's evidence and then, if the preliminary issue were decided in HMRC's favour, adjourn to a separate hearing at which we could hear Mr Yip's evidence.

7. Mr Ellis said that he would prefer to be able to cross-examine Mr Yip, but that in the circumstances he was content to proceed in his absence.

8. We took time to consider the matter. We were mindful of the potential prejudice that would arise to HMRC from being unable to challenge Mr Yip's evidence, but against this we had the fact that Mr Ellis was content to proceed. We also considered that even if we adjourned to allow Mr Yip to attend a later hearing, there was a significant risk that he would again be unable to do so, because he is 85 years old, we understood him to be suffering from a chronic medical condition, and illness had already prevented him from attending one hearing.

9. We also considered that the parties and the Tribunal had allocated time and resources in preparing for and arranging the hearing, and that additional costs would be incurred, both by the parties and the Tribunal, if the hearing were to be adjourned. There would also be further delay. We reminded ourselves that the Tribunal's overriding objectives include avoiding delay, where this is compatible with proper consideration of the issues. Mr Yip's age and medical condition were, in our view, further reasons for seeking to avoid delay in this case.

10. We also took into account the fact that Mr Yip was represented by counsel at the hearing, and that we had his witness statement. We were satisfied that he was properly represented when he produced that statement. In accordance with the Tribunal's directions in this case, his witness statement should have contained the evidence he intended to give at the hearing, and he would have been called only to answer any supplemental questions and be cross-examined. We also had the hearing bundle containing such documentary evidence as Mr Yip wished to put before the Tribunal, and we had oral evidence from his witness, Ms Fankam.

11. A further factor we took into account was that HMRC's witness, Officer Becker, was unlikely to be available to give evidence at any future hearing. While it would have been possible for us to hear her evidence and then adjourn the remainder of the hearing, this would have necessitated re-listing the hearing in front of the same Tribunal panel, which would be likely to result in additional delay above that which would be involved in adjourning the whole hearing.

12. Having considered all of these matters we decided that it was in the interests of justice to proceed with the whole hearing in Mr Yip's absence.

13. Ms Ferrari then raised an additional preliminary issue, in that she contested the admissibility of any documentary evidence from HMRC which consisted of hearsay evidence from Mr Yip's nephew, Mr Darren Yip. Mr Ellis said that HMRC did not seek to rely on this evidence. We confirm that in making our decision we have not had regard to Officer Becker's notes of statements made to her by Mr Darren Yip in her conversations and meetings with him.

BURDEN OF PROOF

14. HMRC accept that the burden of proof is on them to show that the statutory conditions for making the discovery assessment are met. In this case, this means that HMRC must show that they discovered that an assessment to tax was or had become insufficient, and that the insufficiency was brought about carelessly or deliberately by Mr Yip or a person acting on his behalf. If they are to meet the condition regarding time limits, HMRC must also show that the resulting loss of tax was brought about deliberately by Mr Yip.

15. If HMRC establish that the discovery assessment is valid, TMA 1970, s 50(6) then applies, and the assessment "shall stand good", with the burden resting on Mr Yip to establish that he has been overcharged.

16. HMRC also accept that the burden of proof is on them to show that the conditions for charging a penalty were met in this case.

17. The standard of proof is the ordinary civil standard of the balance of probabilities.

FINDINGS OF FACT

18. We make the following findings of fact based on the documentary evidence and the evidence of the witnesses who appeared before us. We have taken account of the witness statements and of any points that emerged on cross-examination.

19. As Mr Yip was not present at the hearing, his witness statement was not made while giving oral evidence in the proceedings, and is therefore hearsay evidence. For the definition of hearsay, we are guided by section 1(2) of the Civil Evidence Act 1995, which states that "hearsay means a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated". Therefore, Mr Yip's

statement does not have the same status as the evidence of a witness who was available at the hearing for cross-examination. This means that we are not obliged to accept that the contents of his witness statement are correct, even though these have not been challenged by cross-examination.

20. Mr Ellis did not argue that we should not admit Mr Yip's statement as evidence. We have decided that we should admit it, but should consider the weight to be attributed to it. We have set out our assessment of that evidence below.

Background facts

21. Mr Yip was born in Malaysia on 18 December 1938. He arrived in the UK in 1961 and, some years after that, set up a food delivery business serving Chinese restaurants and takeaway businesses. The business operated as a partnership known as Archers Meat or Archers Supplies. In this decision we refer to this partnership as the "Archers Meat partnership". The other partners were members of Mr Yip's family.

22. Mr Yip has no accounting training or any specialist tax knowledge. He speaks English but his native language is Cantonese.

23. In January 2000, the partnership business was incorporated by being transferred to a company called Bridgeplus Ltd, of which Mr Yip was director and 100% shareholder. This company was dissolved in 2001 and its business transferred to Axecross Ltd, of which Mr Yip's nephew, Mr Darren Yip, was director and 100% shareholder. At some point between 2002 and 2005, the business was transferred again to Archers (Midlands) Ltd, of which Mr Yip's niece, Ms Nicola Yip, was director and 100% shareholder.

24. In 2006, the business was transferred to the company that plays a central role in this dispute, Archers Meat Supplies Ltd ("AMSL"). Mr Darren Yip was director and 100% shareholder of AMSL. There was a further transfer of the business in November 2013, to Archers Foods Distribution Ltd, in which Mr Darren Yip was again the director and 100% shareholder. Archers Foods Distribution Ltd ceased trading in 2019.

25. On 27 February 2012, a cash deposit of £120,000 was made into a bank account in the name of AMSL. A further cash deposit of £129,840 was made into the same account on 2 April 2012.

26. On 19 April 2012, a payment of £250,000 (the "Disputed Amount") was made from a bank account in the name of AMSL to a bank account in the name of Mr Yip and his wife. The account in the name of AMSL was different from the account into which the two cash deposits were paid on 27 February 2012 and 2 April 2012.

27. On 22 June 2012, Mr Yip transferred £295,020.78 to a law firm in connection with the purchase of a property in London.

28. Although the Disputed Amount was paid into a joint account for Mr Yip and his wife, it was accepted by both parties that any tax liability arising from this payment would fall on Mr Yip and not on his wife. As both parties agreed that this was the correct position, we accept it and make no findings on this matter.

29. Mr Yip has been within self-assessment since 1996. His tax return for the year 2012-13 did not include the Disputed Amount. The return showed that Mr Yip had received total income in that year of £24,332, which was made up of dividends, interest and pensions. He did not seek any professional advice about the tax treatment of the Disputed Amount.

30. In the years prior to the payment of the Disputed Amount, Mr Yip was working for the business but did not receive a formal salary. His responsibilities were not defined by a contract as this was a family business, but he worked in a management capacity and his responsibilities included paying suppliers. The last time when he was paid as an employee of the business was in the tax year 2004-05, when he was an employee of Archers (Midlands) Ltd.

The discovery assessment and penalty assessment

31. Our findings of fact in relation to the making of the discovery assessment and penalty assessment are based on the witness evidence of Officer Becker, relevant correspondence, and notes taken by Officer Becker of her conversations with Mr Yip. We found Officer Becker to be a credible and reliable witness and accept her evidence on matters of fact.

32. Officer Becker became involved in this matter in June 2017 when she identified a risk in respect of Mr Yip's tax affairs as a result of information provided in the course of another investigation.

33. Much of Officer Becker's correspondence in connection with Mr Yip was with an agent called Indirect Sales Ltd ("Indirect Sales"). Indirect Sales acted at various times as agent for Mr Yip and for his wife. Their letters are signed only as "Indirect Sales Ltd", and we do not know the identity of the person who wrote them. The standard of written English in the letters is poor and is consistent with the author not having English as their first language. This finding is relevant because it affects the weight we have placed, in reaching our decision, on the wording used in the letters from Indirect Sales.

34. Officer Becker received a letter dated 10 January 2020 from Indirect Sales, who at that stage were representing Mr Yip's wife. The letter referred to the Disputed Amount and described this as "Mr Chee Whye Yip's return from the business".

35. Officer Becker reviewed Mr Yip's tax return for 2012-13 and found that it did not include the Disputed Amount. She also reviewed the tax returns and accounts for AMSL and the companies that had previously owned the Archers Meat business to establish whether the Disputed Amount could be a repayment of a loan to this business. Based on the amounts of assets and debtors shown in these returns and accounts, she considered this to be unlikely.

36. On 7 February 2020, Officer Becker issued Mr Yip with an information notice under Schedule 36 to the Finance Act 2008. Indirect Sales responded on 10 March 2020, replying to some, but not all, of the questions raised in the information notice. This letter stated that the Disputed Amount had been "drawn from Archers wholesale".

37. On 11 March 2020, as she had not received all of the information and documents requested in the information notice, Officer Becker called Mr Yip to ask if he had sent anything. Mr Yip said he left all such matters to his accountant and his wife. He mentioned his age and health conditions, and that he had problems with his memory. He said he had worked for 30 or 40 years, getting up at 5am, and asked Officer Becker to show leniency.

38. On 17 July 2020, Indirect Sales wrote to Officer Becker on behalf of Mr Yip. In response to a question as to whether the Disputed Amount was the repayment of an existing loan or advance to the company, Indirect Sales said that it was a repayment of an existing loan. They also stated that:

(1) £150,000 was still owed;

(2) £400,000 was introduced by Mr Yip to Bridgeplus Ltd in the year 2000, and was subsequently transferred from Bridgeplus Ltd to Axecross Ltd, then to Archers (Midlands) Ltd, and then to AMSL;

(3) the capital took the form of stock, motor vehicles, plant, equipment, customer balances and goodwill; and

(4) this was a verbal agreement, with accounts entries, and no bank was involved.

39. Officer Becker reviewed the tax returns of the Archers Meat partnership and its partners, and the accounts of the companies through which the debt had allegedly passed, to see whether the assets and debtors shown in these returns and accounts were consistent with the explanation provided by Mr Yip's agent. She concluded that they were not.

40. On 11 September 2020, Officer Becker issued a further information notice to Mr Yip, and also a third party information notice to his nephew, Mr Darren Yip, in both cases requesting more information on the Disputed Amount and the debt owed by AMSL as described by Indirect Sales. In response to these notices, Indirect Sales wrote to say that Mr Yip was unable to remember any of the requested information, and Mr Darren Yip called Officer Becker to say that he was unable to answer any of the questions posed.

41. On 8 March 2021, Officer Becker wrote to Mr Yip stating that it was her belief that the Disputed Amount was a payment to him by AMSL in a self-employed "consultancy" capacity, which should have been charged to income tax as an amount of "self-employment income". She also issued a penalty explanation letter on the same date, setting out her view of the penalty position.

42. On 10 March 2021, Mr Yip called Officer Becker. He discussed his health and memory problems. He said he didn't remember receiving the Disputed Amount, but that if it was true that he took it then he "earned his money". He said he paid income tax and corporation tax and understood that cleared him to take any money he needed from the business. He said he was shocked to learn that they had defrauded HMRC and that perhaps his accountants had made a mistake.

43. Officer Becker issued a discovery assessment for the tax year 2012-13 on 6 May 2021. Her grounds for doing so were as follows. To the extent that these grounds consist of facts, we have set them out as the facts she believed to be true at the time she issued the discovery assessment, and do not adopt them as our own findings of fact.

(1) Her examination of the assets and debts shown in the accounts of the Archers Meat partnership and its successor companies led her to find that Mr Yip's agent's explanation, that the Disputed Amount was a partial repayment of a £400,000 loan by Mr Yip to the business, was not credible.

(2) She decided that it was most likely that the Disputed Amount was, instead, taxable self-employment income, for the following reasons.

(a) Mr Yip had been heavily involved in the Archers business, including at times as a partner and director, for over 25 years. Accordingly he had extensive knowledge of the trade that was invaluable to the business.

(b) Mr Yip ceased being a formal employee or office holder of the business in 2004 or 2005, but continued to provide support and knowledge to the business that was valuable in its continuing success. She viewed this as a consultancy type role and considered it likely Mr Yip would have been paid for these services.

(c) Although this was not a determinative factor, she noted that the Disputed Amount had been paid through the company bank account so assumed it was reflected in the company's accounts. She thought it was likely to have been claimed as an expense and included in the figure for purchases. Treatment as an expense would, in Officer Becker's view, be in line with the likely treatment of a consultancy fee.

(3) Officer Becker considered various alternative categorisations of the Disputed Amount and decided these were not likely explanations, as follows.

(a) Dividends. In her view, the accounts of AMSL did not show sufficient profit reserves to be able to pay a dividend. Mr Yip was not the only shareholder and there was no evidence of other shareholders receiving similar sums.

(b) Employment income. Mr Yip was not reported to HMRC as an employee of AMSL, and Officer Becker's understanding of Mr Yip's role in the business was not consistent with his being an employee. The payment of the Disputed Amount as a lump sum was also not consistent with a payment of salary.

(c) A new loan. The company balance sheet did not show an increase in debtors commensurate with a loan of £250,000. The payment had been used to fund Mr Yip's lifestyle and capital costs, which did not suggest an intention to repay it. AMSL was dissolved in 2018, and if there had been a loan outstanding to Mr Yip at that point he should have declared it as a distribution, which did not happen. Officer Becker also believed that Mr Yip did not have the means to have repaid £250,000 prior to 2018.

(4) Mr Yip had not declared the Disputed Amount in his tax return for 2012-13, resulting in an underassessment of tax. In Officer Becker's view, Mr Yip acted deliberately when omitting the Disputed Amount from his return, and so she was entitled to raise assessments within the extended 20-year time limit.

44. Officer Becker calculated the amounts of income tax and national insurance contributions that were due from Mr Yip for the tax year 2012-13 on the basis that he had received, in that year, "profit from self-employment" of £250,000. The result of the calculation was £120,144.80 of tax due for the year 2012-13. Mr Yip has not challenged the calculation of this amount.

45. Officer Becker issued a penalty assessment on 6 May 2021, the same day as the discovery assessment. The penalty was assessed on the basis that Mr Yip's tax return for the year 2012-13 contained an inaccuracy that was "deliberate but not concealed", and that the disclosure was prompted. This gave a penalty range, under FA 2007, Sch 24, para 10 of 35%-70% of the potential lost revenue.

46. In accordance with her understanding of HMRC's guidance to its officers in cases where an inaccuracy is disclosed more than three years after the date of the submission of the tax return, Officer Becker restricted the maximum potential penalty reduction by 10%. This meant that the penalty to be imposed on Mr Yip would be at a rate of at least 45%. She then considered the quality of Mr Yip's disclosure, and on this basis gave him 95% of the full reduction (in the sense that the full reduction would bring the penalty rate down from 70% to 45%).

47. Officer Becker also decided that it was not appropriate to apply a special reduction to the penalty. This was because she considered that she had not been provided with, and was not aware of, any reasons to suggest a special reduction was appropriate.

48. The penalty was therefore assessed at 46.25% of the potential lost revenue. The potential lost revenue, under HMRC's analysis, was the amount of tax due under the discovery assessment, namely £120,144.80. This resulted in a penalty of £55,566.97.

Events subsequent to the issuing of the assessments

49. On 17 May 2021, Indirect Sales wrote to HMRC on behalf of Mr Yip to appeal against the discovery assessment and the penalty assessment. The agent provided information about the two cash deposits made on 27 February 2012 and 2 April 2012, and stated that it was Mr Yip who had made these deposits. The agent also stated that the Disputed Amount had not been included in the purchase figure in AMSL's accounts.

50. In response to a request from Officer Becker for more information, Indirect Sales sent a further letter to HMRC on 9 June 2021, again disputing HMRC's view that the Disputed Amount was included in the purchase figure, and stating that the payment was, instead, "contra to the two deposits".

51. Indirect Sales also enclosed a letter from Mr Yip, dated 3 June 2021, in which he stated that the two cash deposits made on 27 February 2012 and 2 April 2012 were loan repayments from "Tony Teo".

52. Officer Becker considered the new explanation provided by Indirect Sales. This new explanation was, in effect, that Mr Yip had deposited a personal loan repayment of almost £250,000 into the AMSL bank account and then transferred this amount onwards to his joint personal account. In her view, this explanation lacked credibility, for a number of reasons. These included that:

(1) this version of events was different from the original explanation that had been provided regarding the Disputed Amount;

(2) no evidence beyond Mr Yip's letter had been provided regarding the loan to Tony Teo;

(3) there was insufficient information to identify Tony Teo to assess whether it was likely that he could have afforded to make payments in the amounts of the cash deposits over a period of a few months; and

(4) the lack of a reasonable explanation as why personal monies had been deposited into the AMSL account rather than into Mr Yip's own account directly.

53. She also considered AMSL's accounts for the year ending 28 February 2012. The first cash deposit, of £120,000, was made on 27 February 2012, just before the accounting year end. In Officer Becker's view, if this amount had been credited to Mr Yip's loan account, she would have expected to see the creditors figure in those accounts increased by around £120,000 and reduced by as much the next year. However, this figure was generally consistent year on year.

54. Having considered these factors, on 28 June 2021 Officer Becker issued a "view of the matter" letter to Mr Yip, stating that she was unable to accept the new explanation and that her view remained as per her letters of 8 March 2021 and 6 May 2021.

55. The matter was referred to an independent HMRC officer, who upheld the decision to issue the discovery and penalty assessments.

MR YIP'S EVIDENCE REGARDING TONY TEO

56. The evidence in Mr Yip's witness statement in relation to Tony Teo was as follows.

(1) Tony Teo was a Malaysian businessman based in Switzerland. Mr Yip had a business relationship with him which developed over a number of years.

(2) In 1997, Mr Yip agreed to lend Mr Teo £250,000 to develop his business in Malaysia and Europe. The loan was made in cash and was not reduced to writing, but was based on trust. This is not uncommon in Malaysian Chinese business relationships.

(3) This was a personal loan from Mr Yip and not connected to his business. This is why there is no record of the loan in the company records.

(4) Mr Teo repaid the loan in two amounts. The two cash deposits on 27 February 2012 and 2 April 2012 were loan repayments from Mr Teo.

57. We are unable to accept Mr Yip's evidence that the Disputed Amount was the repayment of a personal loan which he had made to Tony Teo. As his witness statement is hearsay, we are entitled, in estimating the weight to place on this evidence, to have regard to the fact that Mr Yip had a motive to represent matters in a manner that would result in the assessments being discharged, and that this may render aspects of his evidence unreliable.

58. We have also taken into account that the witness statement was made in 2023 but related to events a long time earlier (in 1997 and 2012), and that, according to Ms Ferrari's own submissions, Mr Yip suffers from memory issues. Officer Becker's contemporaneous notes of her phone calls with Mr Yip on 11 March 2020 and 10 March 2021 also record that Mr Yip said he had problems with his memory. We accept that these notes are accurate records of these comments by Mr Yip. These are further factors indicating that Mr Yip's witness statement may not be reliable.

59. We regard it as highly unlikely that Mr Yip would have made a personal loan, in cash, of £250,000 in 1997 without documenting this in any way. It was Mr Yip's evidence that this was not uncommon in Malaysian Chinese business relationships, but given our finding that his witness statement may not be wholly reliable, and in the absence of any corroborating evidence, we are unable to accept this at face value.

60. We had Mr Yip's tax return for the year 1996-97, which showed that he received total income that year of £84,798. We accept Ms Ferrari's submission that we had no evidence about the value of any assets he owned at the time, and that therefore we do not know whether he could have afforded to make a loan of £250,000. However, that does not alter our finding that it is unlikely that any such loan would not have been documented.

61. We also take into account that Mr Teo has not been produced as a witness and that we had no evidence of his identity, or existence, besides Mr Yip's witness statement.

62. We do not consider the two cash deposits to be evidence of the existence of the loan to Tony Teo because we have no information, besides Mr Yip's statement, of the source of this money, nor of who made the deposits.

63. We also do not consider that depositing the money into a business bank account, and then transferring it to a personal account, is consistent with this being the repayment of a personal loan. We had no explanation as to why Mr Yip did not simply deposit the funds into his personal account in the first place. We agree with Mr Ellis that the fact that the cash was deposited into the company's bank account means that it is more likely that the deposits were related to the business of the company, rather than to Mr Yip in his personal capacity.

64. Officer Becker, in her witness statement, described the deposits as "atypical and therefore less likely to just be deposits of Archers Meat Supplies's trading income". Ms Ferrari submitted that this was consistent with the deposits being repayments of the loan to Mr Teo. We agree it is consistent in the sense that two unusually large cash deposits were

made into the AMSL bank account, but it does not provide us with any information on where the money came from.

65. We also consider it to be significant that the explanation involving the loan repayment by Mr Teo was different from the original explanation offered to HMRC as to the reason for the payment of the Disputed Amount to Mr Yip. The original explanation, provided to Officer Becker by Mr Yip's agent, Indirect Sales, in their letter dated 17 July 2020, was that the Disputed Amount was a partial repayment of a loan of £400,000 made by Mr Yip to the Archers Meat partnership, and subsequently transferred to the companies which later operated the Archers Meat business. Where we refer in this decision to the "original explanation", we mean this explanation as set out in Indirect Sales' letter of 17 July 2020.

66. Ms Ferrari submitted that the differences between the two explanations can be ascribed to crossed wires and confusion. She said that the answers supplied in the letter dated 17 July 2020 related to Bridgeplus Ltd. She also submitted that the two explanations were consistent with one another in the sense that both involve the Disputed Amount being the repayment of a loan due to Mr Yip.

67. We do not accept these submissions, and find as a fact that the information provided in the letter dated 17 July 2020 related to the payment of the Disputed Amount from AMSL to Mr Yip. It is clear from the correspondence, including the numbering of the questions in the information notice and of the answers in the letter from Indirect Sales, that the original explanation was provided in response to HMRC's request for more information about "the £250,000 that you received from Archers Meat Supplies Ltd in April 2012"; in other words, the Disputed Amount.

68. We also do not accept that the fact that the two explanations both involved the Disputed Amount being the repayment of a loan means that the explanations should be regarded as consistent with one another. The original explanation was that the loan was for £400,000 and was made in the context of Mr Yip introducing capital to the business. The second explanation was that the loan was for £250,000 and was a personal loan from Mr Yip. We have considered the letter from Indirect Sales carefully and do not accept that any potential language barrier should alter our finding that the two explanations both relate to the Disputed Amount, and are substantially different from one another.

69. Ms Ferrari also sought to distance Mr Yip from the original explanation provided by Indirect Sales, suggesting that once HMRC heard directly from Mr Yip himself (in his letter of 3 June 2021) the explanation involving Tony Teo was made consistently. Ms Ferrari did not go so far as to suggest that Indirect Sales had fabricated the original explanation. We were not provided with a reason as to why the original explanation from Indirect Sales would have originated anywhere other than with Mr Yip himself, and are unable to accept that the agent misrepresented the position without Mr Yip's knowledge or approval.

70. Another factor we have taken into account is that the original explanation was provided in response to a formal information notice. The information notice was sent to Mr Yip as well as to his agent, Indirect Sales. The letter enclosing the information notice stated that the information and documents requested were required by law and that carelessly or deliberately providing inaccurate information or documents may result in a penalty. In our view this language increases the likelihood that Mr Yip would have taken the information notice seriously and discussed the response with his agent before it was sent to HMRC.

71. We find that it is more likely than not that Mr Yip was responsible for the original explanation and that Indirect Sales were acting with his authority when this explanation was provided to HMRC.

72. We have also considered that Mr Yip had a lengthy conversation with Officer Becker on 10 March 2021, at which point he had received her letter explaining her view that the Disputed Amount was a payment for services provided in a self-employed "consultancy" capacity. He made no reference in that call to the loan to Mr Teo, nor did he or his agent write to HMRC to offer this explanation until after the assessments were issued on 6 May 2021.

73. Ms Ferrari submitted that this omission can be explained by Mr Yip's memory, in that the call was about something a long time ago and that the documentary evidence (the letter from Mr Yip dated 3 June 2021, and his witness statement) is more important. However, while we accept that more consideration is likely to be given to a written statement than to a spoken one, in this case both are equally reliant on Mr Yip's memory. If, by 3 June 2021, Mr Yip could remember the loan to Tony Teo, we consider it likely (although put it no higher than likely) that he would have referred to this in his call with Officer Becker on 10 March 2021.

74. The only other piece of evidence we have in relation to the loan to Tony Teo, besides Mr Yip's witness statement, is Mr Yip's letter dated 3 June 2021. We do not accept that this letter is reliable evidence. It was made nearly two years earlier than the witness statement, but still relates to events that took place nine years or more before the letter was written, and postdates both of the calls in which Mr Yip told Officer Becker of the problems he was having with his memory. In other respects, our reasons for not accepting the letter as reliable evidence are the same as the reasons we have given above in relation to the witness statement.

75. Taking all of the above into account, our finding of fact is that, on the balance of probabilities, the Disputed Amount was not the repayment to Mr Yip of a personal loan to Tony Teo.

THE ACCOUNTING EVIDENCE

76. We heard submissions from both parties about how the Disputed Amount was treated in AMSL's accounts. In reaching her decision to issue the discovery assessments, Officer Becker came to the view that it was "likely" that the amount was included in the purchase figures, but said that this was not a determining factor in her decision. Ms Ferrari's position was that the Disputed Amount was reflected in AMSL's accounts for the year ending 28 February 2013 under "other creditors". According to Ms Ferrari, this treatment was consistent with the Disputed Amount being the repayment of a personal loan.

77. We had witness evidence on this matter from Ms Paulette Fankam, who prepared AMSL's accounts for the year ending 28 February 2013 and at that time had five years' experience as an assistant accountant. Ms Fankam was cross-examined at the hearing.

78. Ms Fankam stated in her witness statement that while she was preparing the accounts, Mr Yip informed her that the two cash deposits on 27 February 2012 and 2 April 2012 related to a loan repayment. On cross-examination, however, she said that she had not been told this personally by Mr Yip. She said that other people at her accountancy practice prepared the underlying workings on which the accounts were based, and that they would have held this information. We therefore find that, contrary to what is said in her witness statement, Mr Yip did not inform Ms Fankam that the two cash deposits related to a loan repayment.

79. Ms Fankam's evidence was that the cash deposits were not shown as sales of AMSL, but were recorded as "other creditors". However, we are unable to accept this evidence, because we were not provided with a convincing reason as to why she believed this to be the

case. When asked questions in cross-examination as to how the "other creditors" amount had been calculated, she said that this was based on the workings carried out by her colleagues, indicating that this information was not within her personal knowledge. We also took account of the fact that she was giving evidence about events that took place around ten years previously, and that this would make her recollection less reliable.

80. In cross-examination, Mr Ellis put to Ms Fankam the view set out by Officer Becker in her "view of the matter" letter of 28 June 2021 relating to the first cash deposit, of £120,000, and the fact that this was made on 27 February 2012, just before the accounting year end. Mr Ellis suggested to Ms Fankam that, if this amount had been credited to Mr Yip's loan account, the creditors figure in the AMSL accounts for the year ending 28 February 2012 would have increased by around £120,000 and reduced by as much the next year, but that this did not happen.

81. Ms Fankam disagreed with this suggestion and we accept that there may have been other reasons, relating to other movements in creditors in the relevant year, why there was not a simple increase in creditors of £120,000 in the year in which the cash deposit was received, and a corresponding decrease the year after.

82. We were referred to various documents relating to the accounts. These included a one-page document entitled "movement in other creditors". This showed a debit amount of £250,000 (the same sum as the Disputed Amount) reflecting a transfer between two different accounts in the name of AMSL, and a credit for the same sum reflecting a transfer of this amount to the joint account of Mr Yip and his wife. However, Ms Fankam was not able to tell us whether this document was part of AMSL's statutory accounts, and did not explain to our satisfaction how this document related to the separate "other creditors" figure in the notes to AMSL's statutory accounts for the year ending 28 February 2013.

83. We also considered a document which Ms Ferrari handed to us in the hearing. Mr Ellis did not object to this document being admitted as evidence. This document was produced by Ms Fankam and purported to clarify how the "other creditors" figure had been calculated, by showing that it included figures for trade creditors, PAYE/NIC, accruals and a bank overdraft. However, we derived no assistance from this document on the question of whether this figure included the Disputed Amount.

84. Mr Yip stated, in his witness statement, that he understood the Disputed Amount was reflected in the Archers records but that he relied on his accountant to record the transactions properly. He did not provide any information on how the accounts had been prepared or the manner in which the Disputed Amount may have been reflected in those accounts.

85. Our conclusion on the accounting evidence is that we were unable to make a finding that the Disputed Amount was included in AMSL's accounts as a purchase, as a creditor, or at all. We therefore find that the accounting evidence did not assist either party's case, and have reached our decision on the other evidence before us.

RELEVANT LAW

86. HMRC's powers to issue a discovery assessment derive from section 29 of the Taxes Management Act 1970 (TMA 1970), which for an assessment for the tax year 2012-13 relevantly provided as follows.

> "29 Assessment where loss of tax discovered
>
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—

> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.
>
> […]
>
> (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—
>
> (a) in respect of the year of assessment mentioned in that subsection; and
>
> (b) in the same capacity as that in which he made and delivered the return,
>
> unless one of the two conditions mentioned below is fulfilled.
>
> (4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf..."

87. TMA 1970, s 34 provides that the ordinary time limit for HMRC to make a discovery assessment is four years from the end of the year of assessment to which it relates.

88. TMA 1970, s 36 provides for this four-year time limit to be extended where the loss of tax has been brought about carelessly or deliberately. The time limit is six years after the end of the year of assessment to which it relates if the loss of tax has been brought about "carelessly", and is extended to 20 years in a case where the loss of tax has been brought about "deliberately".

89. TMA 1970, s 118(7) provides that in that Act, references to a loss of tax or a situation brought about deliberately by a person include a loss of tax or a situation that arises as a result of a deliberate inaccuracy in a document given to HMRC by or on behalf of that person.

90. In this case, the discovery assessment was made on 6 May 2021, which was more than six years after the end of the tax year to which the assessment related (2012-13). Consequently HMRC seek to rely on the 20-year time limit which applies where a loss of tax is brought about deliberately.

91. In *HMRC v Tooth* [2021] UKSC 17 ("*Tooth*") at [47], the Supreme Court held:

> "…for there to be a deliberate inaccuracy in a document within the meaning of section 118(7) there will have to be demonstrated an intention to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement or, perhaps, (although it need not be decided on this appeal) recklessness as to whether it would do so."

92. In *CF Booth Ltd v HMRC* [2022] UKUT 217 (TCC) ("*Booth*") at [36], the Upper Tribunal considered the meaning of a "deliberate inaccuracy" and agreed with the following comments of the First-tier Tribunal in *Auxilium Project Management Limited v HMRC* [2016] UKFTT 0249 (TC) ("*Auxilium*") at [63]:

> "In our view, a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time."

93. The rules on penalties for inaccuracies in tax returns are contained in FA 2007, Sch 24. Under these provisions, a penalty is payable where a person submits a tax return containing an inaccuracy which leads to an understatement of a liability to tax, and the inaccuracy was careless or deliberate on the part of the person submitting the return.

94. The amount of the penalty is set as a percentage of the "potential lost revenue", which is defined, so far as relevant to this case, as the additional amount due or payable in respect of tax as a result of correcting the inaccuracy. The percentage varies depending on a number of factors, one of which is whether the inaccuracy was careless or deliberate.

Discussion

95. In making our decision, we have considered all of the evidence, but have not found it necessary to refer to every argument advanced or all of the authorities cited.

96. As we have stated above, HMRC bear the burden of showing that the statutory conditions for making the discovery assessment are met.

Whether an assessment to tax is or has become insufficient

97. We first consider whether HMRC have established, for the purposes of TMA 1970, s 29(1), that an assessment to tax is or has become insufficient.

98. HMRC's case is that the Disputed Amount was a payment for consultancy or management services provided to AMSL by Mr Yip in a self-employed capacity. HMRC submit that the payment should have been declared as such on Mr Yip's tax return for 2012-13, and would have been subject to income tax and national insurance contributions. Their reasons for reaching this view are set out above at paragraph [43].

99. It was not disputed that Mr Yip received a large payment from the company that operated the family business for which he had worked for much of his life, and from which he had received no formal salary for a number of years. In these circumstances we agree with HMRC that, in the absence of a credible alternative explanation, it is more likely than not that the payment was a reward for, or in recognition of, his services to the business.

100. We observe that, while there is ample authority (including classic cases such as *Greyhound Racing Association (Liverpool) Ltd v Cooper (Inspector of Taxes)* [1936] 2 All ER 742, and more recent decisions such as *Looney and another v HMRC* [2020] UKUT 119 (TCC)) that a lump sum may be correctly characterised as a revenue receipt for tax purposes, it would be relatively unusual for a consultancy or management fee that relates to services provided over a number of years to be paid in a single amount. However, Mr Yip's case was that the Disputed Amount was the repayment of a loan to Tony Teo, and Ms Ferrari did not ask us to consider an alternative analysis under which the Disputed Amount should be treated as a capital receipt even if we rejected Mr Yip's explanation. We have therefore not given this question further consideration, but accept that the Disputed Amount should be treated as income for tax purposes.

101. While we were not shown any direct documentary evidence, such as a written contract, that the Disputed Amount was a payment for consultancy or management services, this is not a requirement if the evidence which we do have is sufficient to support this finding. In this case the evidence is the circumstances of the payment, and in particular Mr Yip's relationship with the paying company. It is, by no means, the case that the only possible explanation for the Disputed Amount is that it was a payment for consultancy or management services. There are many possible alternative explanations. However, we have found that the explanation supplied by Mr Yip was not credible.

102. Ms Ferrari submitted that whilst Mr Yip did not receive a formal salary from AMSL, this does not mean that he received nothing from the business. We were shown Mr Yip's tax calculations for the tax years 1996-97 to 2015-16 inclusive, which show that in each of those years he received some dividends. We understood Ms Ferrari to be suggesting that if Mr Yip were receiving income from AMSL, in the form of dividends, he would be less likely to seek an additional payment, in the form of the Disputed Amount, for his services.

103. However, we had no evidence as to which company or companies paid the dividends, and the amounts were relatively low: for the four tax years prior to the payment of the Disputed Amount, the maximum annual amount of dividends received by Mr Yip was £7,444, and for the four years before that the maximum annual amount was £26,916. We also do not see why a person who provides consultancy or management services to a company in which they also hold shares would not seek to receive, from that company, both a consultancy fee and dividends. We therefore do not consider that the fact that Mr Yip received dividends, from a company or companies that may or may not have included AMSL, makes it less likely that the Disputed Amount was a payment for consultancy or management services.

104. In his witness statement, Mr Yip said that once he reached retirement age he continued working for the business but was not paid. He said that he was not concerned about receiving payment. However, we find that this statement is not consistent with Officer Becker's note of her conversation with Mr Yip on 10 March 2021, in which he told her that he had worked hard for his money. We have taken account of the fact that the note of this conversation is not a transcript, and that English is not Mr Yip's first language, but nonetheless accept that he made this statement. We accept it because: the note was made contemporaneously with, or shortly after, the conversation took place; the idea of working hard for one's money is not a complicated concept that may lose nuance due to a language barrier; and because we believed Officer Becker when she said, in cross-examination, that she had been at pains to ensure that the note was a fair reflection of the conversation, despite the language barrier.

105. HMRC, in their submissions, made much of the statement in the letter from Indirect Sales dated 10 January 2020 which described the Disputed Amount as Mr Yip's "return from the business". HMRC's position was that this description was consistent with the Disputed Amount being self-employment income. Mr Yip, in his witness statement, said that the word "return" was not being used in a formal sense, but was used solely to mean that the money was being returned to him. Mr Ellis submitted that Indirect Sales were a firm of accountants, and that they would know what a "return from a business" meant even if Mr Yip did not.

106. We consider that there is some force in both of these arguments. The letters from Indirect Sales are brief and often not grammatical. In this case the full sentence reads: "on 19 April 2021 £250,000 bank received from Archers meat supplies ltd missing from your statements, this amount was Mr Chee Whye Yip's return from the business". In these circumstances we are disinclined to place much weight on a single phrase in this letter. On the other hand, "return from the business" is an unlikely choice of words for a payment that

included no element of recompense from the paying business. On balance we consider that this phrase provides some support for HMRC's interpretation, but would not be conclusive in the absence of the other evidence regarding the circumstances in which the Disputed Amount was paid.

107. We do not consider that the two cash deposits paid into the AMSL bank account on 27 February 2012 and 2 April 2012 indicate that the Disputed Amount was not a payment for consultancy or management services. Ms Ferrari submitted that the fact that the money was paid into the AMSL account and then paid straight out again (albeit from a different AMSL account) suggests that this money did not come from the business. However, we have been unable to make a finding as to the source of the two cash deposits, and the fact remains that the Disputed Amount was paid out of an AMSL bank account. In the absence of a credible alternative explanation, we find it more likely than not that the payment was made in connection with the business.

108. For the reasons given, we find that HMRC have discharged their burden to prove that Mr Yip's self-assessment to tax for the year 2012-13 was insufficient.

Whether the insufficiency was brought about deliberately

109. Mr Yip submitted a tax return for the year 2012-13. TMA 1970, s 29(3) therefore has the effect that HMRC may not issue a discovery assessment in respect of that year unless one of the two conditions in ss 29(4) or 29(5) is fulfilled. HMRC submit that the condition in s 29(4) is met because the insufficiency in Mr Yip's tax return was brought about by deliberately by him, or a person acting on his behalf.

110. We find that HMRC have not proven, on the balance of probabilities, that the insufficiency was brought about deliberately, for the reasons that follow.

111. The effect of the guidance from the Supreme Court in *Tooth*, and from the Upper Tribunal in *Booth*, is that to succeed in this case HMRC must demonstrate that when Mr Yip submitted his tax return for 2012-13, he knew that it contained an error, and intended to mislead HMRC. The question is not whether he behaved reasonably, but depends on his knowledge and intention at the time.

112. HMRC submitted that £250,000 is a large sum, so Mr Yip must have known he had received it, yet failed to include it on his return. In her witness statement, when giving her reasons for having decided that Mr Yip acted deliberately, Officer Becker said: "On the basis that it was self-employment income, he would also have been aware that it should have been included on his tax return. He would therefore have known that omitting this income would render the return incorrect and cause an underassessment of tax."

113. We consider that there is an erroneous assumption underlying this position, which is that because HMRC concluded (and we have accepted) that the Disputed Amount was taxable as a payment for consultancy or management services, that Mr Yip would have viewed it in the same way. For HMRC to establish that the discovery assessment is valid, they must demonstrate not only that the Disputed Amount was taxable, but that Mr Yip knew it was taxable. We find that the evidence provided to us does not establish that this was the case.

114. Mr Yip knew he had received a large sum of money from the family business, but we saw no evidence to suggest that he had given any consideration to whether it was taxable. HMRC submitted that he had experience in the self-assessment regime, having been registered for self-assessment since 1996, and had also had experience in the past of including self-employment income on his tax return. Therefore, according to HMRC, he

knew that income from self-employment was taxable, and so was aware that the Disputed Amount should have been declared on his return.

115. We do not accept that Mr Yip's previous experience of the self-assessment regime means that he would have given consideration to the tax consequences of the Disputed Amount. We take account, in this context, of Mr Yip's lack of sophistication in tax matters, and of Officer Becker's notes of her conversations with him on 11 March 2020 and 10 March 2021. We do not know the timings of these calls but it is clear from the notes that they were reasonably lengthy; in cross-examination, Officer Becker agreed with Ms Ferrari when she suggested that in these conversations Mr Yip was "open", even "verbose", and not "shifty".

116. The notes record Mr Yip saying that he left all business matters to his accountant, paid taxes every year, and was shocked to learn that they had "defrauded" HMRC. He said he did not recall having received the Disputed Amount. He also talked at length in the calls about his health issues, poor memory and how hard he had worked through his life. The impression we obtained on reading the notes was of a taxpayer who was eager to put forward his point of view, rather than of someone intending to mislead HMRC.

117. We have observed above that it is unusual for a payment in respect of consultancy or management services supplied over a number of years to be made in a single lump sum. This does not prevent the payment from being correctly characterised as income, but when it comes to Mr Yip's knowledge and intentions, we consider that the fact that he received the Disputed Amount as a lump sum would make it less likely that he would have appreciated that it was subject to income tax.

118. We have referred above to the fact that we had no evidence that that there was any written agreement between Mr Yip and AMSL under which he would supply consultancy or management services in return for payment. We consider that this increases the probability that he would not have viewed the Disputed Amount in this way.

119. HMRC submitted that it does not require specialist tax knowledge to know that self-employment income is taxable. However, we find that HMRC has not demonstrated that Mr Yip knew that the Disputed Amount was income from self-employment, and we do not accept that he must necessarily have considered its tax treatment.

120. We have found that Mr Yip did not seek advice on the correct tax treatment of the Disputed Amount. HMRC submitted that, given the amount of money involved, if Mr Yip had a genuine belief that it was not taxable, HMRC would expect him to seek confirmation from a professional, or from HMRC. Therefore, HMRC submitted, Mr Yip did not hold this belief, and knew the payment was subject to income tax.

121. We do not agree with this analysis. While it is possible that he knew the Disputed Amount was taxable and so deliberately chose not to disclose it to his accountant, the fact that he did not seek advice on this point is equally consistent with him not having thought about the tax treatment of the Disputed Amount at all. We therefore do not accept that Mr Yip not having sought advice is evidence that he knew the Disputed Amount was taxable.

122. Although HMRC did not raise this point in submissions, we mention for completeness that in her witness statement Officer Becker drew attention to a statement by Mr Yip in one of her calls with him, to the effect that he paid income tax and corporation tax every year, and understood that this cleared him to take any money he needed from the business. Officer Becker appeared to interpret this statement as meaning that Mr Yip thought that so long as he paid some tax, he could take as much money as he wanted from the business without a further tax liability arising.

123. We do not accept this interpretation, because we do not consider it to be sufficiently clear what Mr Yip meant by this statement. We keep in mind that Officer Becker's note is not a transcript and that English is not Mr Yip's first language. We would also observe that even taken at face value, the statement appears to indicate that Mr Yip thought the Disputed Amount was not taxable, whereas HMRC's case is that he knew that it was.

124. Both parties made submissions concerning the possible reasons for the Disputed Amount being paid in a single amount, and sought to draw conclusions from this. Ms Ferrari said that this indicated that Mr Yip was not trying to hide the Disputed Amount, and that if he had been trying to hide it he could have broken it down into smaller amounts. Mr Ellis said that Mr Yip may well not have expected HMRC to see the relevant bank statements. Mr Ellis suggested that the apparent transparency of making a single payment may have been for other purposes, possibly connected with Mr Yip's subsequent purchase of a property in London.

125. We have not been able, on the evidence before us, to make any findings as to the reasons why the Disputed Amount was paid in a single amount. We therefore do not accept either party's submissions on this matter, as we consider that they are based on speculation as to what these reasons might have been.

126. We note that, for the condition in TMA 1970, s 29(4) to be met, the deliberate behaviour can be either by the taxpayer, or by a person acting on the taxpayer's behalf. We have found that HMRC have not demonstrated the necessary deliberate behaviour by Mr Yip. Mr Ellis did not submit, in the alternative, that the insufficiency was brought about deliberately by Mr Yip's agent. We note that we would have been unable to make any such finding in relation to Mr Yip's agent, not least because we had no evidence as to the identity of the person or business who completed Mr Yip's 2012-13 tax return on his behalf.

Remaining points on the discovery assessment

127. We have found that the insufficiency in Mr Yip's self-assessment to tax for the year 2012-13 was not brought about deliberately by Mr Yip, or by a person acting on his behalf, for the purposes of TMA 1970, s 29(4). HMRC did not argue, in the alternative, that the insufficiency had been brought about carelessly.

128. We would, in any event, have found that this was not a case in which a loss of income tax had been brought about deliberately by Mr Yip for the purposes of TMA 1970, s 36(1A), which means that the assessment was made out of time. We would make this finding for the same reasons as we have given above, in the context of TMA 1970, s 29(4), for our conclusion that the insufficiency was not brought about deliberately by Mr Yip or a person acting on his behalf.

129. In these circumstances we do not need to consider whether there was a "discovery" for the purposes of TMA 1970, s 29(1). We also do not need to consider whether Mr Yip was overcharged by the assessment for the purposes of TMA 1970, s 50(6).

130. For the reasons we have given, the discovery assessment is invalid and should be discharged.

The penalty assessment

131. Ms Ferrari's submission was that if the discovery assessment were found to be invalid, the penalty assessment would fall away. Mr Ellis did not submit that, if we were to find the discovery assessment to be invalid, we should nonetheless uphold the penalty assessment.

132. The effect of the decision of the Upper Tribunal in *HMRC v Robertson* [2019] UKUT 202 (TCC) ("*Robertson*") is that HMRC need not raise a valid assessment to tax for there to be potential lost revenue for the purpose of calculating a penalty. *Robertson* was concerned with the rules on "failure to notify" penalties in Schedule 41 of the Finance Act 2008 (FA 2008), rather than with the rules on penalties for inaccuracies in FA 2007, Sch 24. We note that the definition of "potential lost revenue" in FA 2008, Sch 41 is worded differently from the definition of the same term in FA 2007, Sch 24.

133. If we were to find that the invalidity of the discovery assessment did not automatically invalidate the penalty assessment, we would in any event find, for the same reasons as we have given above in the context of TMA 1970, s 29(4), that the inaccuracy in Mr Yip's tax return was not deliberate. This means that the penalty assessment, which was raised by HMRC on the basis that there was a deliberate inaccuracy, cannot stand.

134. Where there is an appeal against the amount of a penalty, this Tribunal has the power, under FA 2007, Sch 24, para 17(2), to substitute for HMRC's decision another decision HMRC had power to make. This means that, if the other conditions for issuing a penalty assessment were met, we would have the power to impose a penalty for a lesser amount, if we were to find that the inaccuracy was careless on Mr Yip's part.

135. However, HMRC have not argued that Mr Yip's inaccuracy was careless, only that it was deliberate. We consider that we are bound by the guidance of the Upper Tribunal in *HMRC v Ritchie and another* [2019] UKUT 71 (TCC) not to consider whether Mr Yip was careless, if HMRC have not specifically pleaded carelessness.

136. In these circumstances, in our view it would not be appropriate for us to make findings on these points without inviting further submissions, and potentially further evidence, from the parties at a reconvened hearing. We considered whether we should adopt this course of action, but concluded it would not be in the interests of justice to do so. In light of our observations above, HMRC would have a number of hurdles to overcome, relating both to the correct interpretation of the law and to the need to establish Mr Yip's carelessness, and could at best only succeed in imposing a lower penalty based on a careless, rather than a deliberate, inaccuracy.

137. Against this we have weighed the inevitable cost and delay associated with a further hearing. In our view, Mr Yip's age and ill-health mean that avoiding delay is particularly important. The circumstances relating to the preparation of Mr Yip's tax return for 2012-13 were many years ago, and a significant amount of time has elapsed even since the issuing of the disputed assessments. HMRC had the opportunity to present their case at the hearing, and we consider that it is in the interests of justice to bring this matter to a conclusion.

138. We therefore discharge the penalty assessment.

DISPOSITION

139. We allow the appeal against both the discovery assessment and the penalty assessment.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

140. 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.

RACHEL GAUKE
TRIBUNAL JUDGE

Release date: 23rd May 2024