



TC01749

Appeal number TC/2009/16956/7

*income tax – undisclosed offshore bank account – source of funds –
whether understated or diverted profits – question of fact – appeal dismissed*

FIRST-TIER TRIBUNAL

TAX

**MA TAI SHEK
LAI KUEN SHEK**

Appellants

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS (INCOME TAX)**

Respondents

**TRIBUNAL: ANDREW LONG (Judge)
SHAMEEM AHKTAR**

Sitting in public at Temple Court, Birmingham B4 6EQ on 8 April 2011

Miss Poon for the Appellant

Mr Wood, Senior Officer , for the Respondents

DECISION

1. The Appellants, Mr Ma Tai Shek and Mrs Lai Kuen Shek, operated the Lucky Gate Chinese Takeaway Restaurant from premises at 41 Gartlea Road, Airdrie, Lanarkshire. They did so from 1986 to 2005, initially as consecutive sole proprietors and subsequently through two limited companies, Gartlea Catering Ltd and Lucky Gate Takeaway Ltd in which Mr and Mrs Shek were directors and shareholder. The principal activity of both the sole trades and limited companies was that of Chinese takeaway restaurant.
2. In 2005 at Glasgow Airport Mr and Mrs Shek were found to be carrying £7,050 in cash prior to boarding a flight to Hong Kong. It also transpired that Mr and Mrs Shek had a previously undisclosed bank account with the Bank of China (Hong Kong) with funds totalling £680,000 as at April 2004.
3. The principal factual issue in this case is the source of the funds in the Bank of China (Hong Kong) account. HMRC contend that the monies came from undisclosed and diverted profits from Mr and Mrs Shek's Chinese takeaway business. As a result HMRC have raised (revised) assessments for the tax years 1985-1986 to 2003-2004, thereby increasing the tax and National Insurance contributions payable. Mr and Mrs Shek contend that the profits have been fully and properly declared. They have given varying explanations as to the source of the funds. Before us they contended that the monies constituted savings out of after tax income. They therefore appeal against the assessments.

The law

4. Section 29 Taxes Management Act 1970 ('TMA') reads (so far as relevant to this case) as follows:

'(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... have not been assessed, or
- (b) that an assessment to tax is or has become insufficient
- (c) ...

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

- (2)

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

- (a) in respect of the year of assessment mentioned in that subsection; and
- (b) ...in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

- 5 (4) The first condition is that the situation mentioned in subsection (1) above is attributed to fraudulent or negligent conduct of the part of the taxpayer or a person acting on his behalf...

5. Section 36 (1) TMA , as amended, provides

10 ‘ an assessment on any person for the purpose of making good to the Crown a loss of income tax attributable to his fraudulent or negligent conduct..may be made at any time not later than 20 years after the 31st January next following the year of assessment to which it relates’

6. Section 50 TMA, as amended, provides (so far as is relevant to this case) as follows:

15 “(6) If, on an appeal notified to the tribunal, the tribunal decides...that the appellant is overcharged by a self-assessment, the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

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

20 (a) that the appellant is undercharged to tax by a self-assessment...
the assessment or amounts shall be increased accordingly...’

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

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

- 25 (a) sections 9 to 14 of the TCEA 2007,
(b) Tribunal Procedure Rules, and
(c) the Taxes Acts.’

30 7. In the case of *Jonas v Bamford* (1973) 51 TC 1, Walton J said, at page 26:‘once the Inspector comes to the conclusion that, on the facts which he has discovered, Mr Jonas has additional income beyond that which he has so far declared to the inspector, then the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation, the onus of proof of which is on the taxpayer’

8. Accordingly HMRC are only entitled to make all of the assessments if they can establish fraudulent or negligent conduct within sections 29 and 36 TMA.

35 *The background and investigation*

9. Mr Shek was born in 1954 and Mrs Shek in 1959. Mr Shek arrived in the UK in 1977 and Mrs Shek in 1979. They are married to each other and have two children;

for most of the relevant period they lived together with their children at 11 Braedale Avenue, Airdrie, Lanarkshire. Mr Shek had been employed prior to setting up the business in 1986.

5 10. The takeaway business had initially been run by Mr Shek as sole proprietor, subsequently by Mrs Shek as sole proprietor and then through two limited companies. The evidence at the Tribunal hearing was that Mr Shek was sole proprietor from commencement in July 1986 until September 1996. Mrs Shek was sole proprietor from September 1996 until incorporation of the business in December 2000. The
10 September 1996 date was different from the basis on which HMRC made the assessments which are the subject of these appeals

11. Information as to the performance of the business was limited. An analysis of the self assessment tax returns showed Mr Shek's total income as £95,903 in 1997 (including drawings of £85,314). In each of the following seven years his income (from wages and property income) was between £18,891 and £21,710. Mrs Shek had
15 negligible income in 1997. For the following four years her income (almost entirely drawings) was between £24,428 and £34,480. This meant that the family was being taxed on income of over £95,000 in 1997 and in the region of £42,000-£52,000 for the next four years.

12. The lease of the business premises was sold in April 2005 for £20,752.47.

20 13. In this case, events during the investigation are relevant. By May 2005 HMRC had received information indicating that Mr and Mrs Shek had a bank account with the Bank of China, Hong Kong and the balance in that account in June 2002 was stated to exceed £650,000. This information came from Mr and Mrs Shek having been routinely searched at Glasgow Airport as set out at paragraph 2 above. For reasons
25 given below the exact amount in the account was not supplied to the Tribunal, though it was accepted that the figure is broadly correct.

14. Following a review of Mr and Mrs Shek's taxation affairs, neither the existence of this account nor any interest arising from the amount had been returned for income tax purposes by Mr and Mrs Shek. In view of the substantial amount held in the
30 accounts, and as Mr and Mrs Shek's level of income did not appear consistent with the accumulation of such funds, the case was registered for investigation with a suspicion of serious tax fraud, with Mr Mourning appointed as the investigator.

15. On 1 July 2005 HMRC wrote to Mr and Mrs Shek setting out clearly that
35 "information is in the hands of the Department that suggests that your tax returns or the accounts of the business in which you are or were associated may be incorrect". The letter indicated that an enquiry would be carried out under Code of Practice 9. The relevant procedure was set out, including the fact that criminal proceedings would not result provided Mr and Mrs Shek made full disclosure of their tax affairs and any irregularities. The letter was copied to Mr and Mrs Shek's then advisers, Whitelaw
40 Wells & Co. The letter also invited Mr and Mrs Shek to take professional advice.

16. Mr and Mrs Shek exercised their right not to attend a meeting with HMRC, despite HMRC's request for such a meeting. It was stated by Mr Chok of Whitelaw Wells & Co that Mr Shek spoke very little English and that he would require an interpreter who was fluent in Cantonese. Accordingly HMRC issued both the Hansard
5 extract detailing HMRC's policy with regard to serious fraud, together with the formal questions referred to in the Code of Practice, by letters dated 4 August 2005, again copied to Mr and Mrs Shek's advisers. The notice included 'the Board (of HMRC) will accept a money settlement and will not pursue a criminal prosecution if the taxpayer, in response to being given a copy of this Statement by an authorised officer,
10 makes a full and complete confession of all irregularities'.

17. The answers to all five questions, in documents dated 30 August 2005 signed by both Mr and Mrs Shek, was 'yes'. These answers confirmed that business and personal tax returns and business records were correct and complete (confusingly, the answer to the first question was also 'yes' when the question asked whether any
15 transactions had been omitted or incorrectly recorded in the business books. It appears that the substance of the answer was intended to be the opposite).

18. In September 2005 Mr and Mrs Shek appointed new accountants, Javid & Co. On 26 October 2005 Mr Javid told HMRC that Mr and Mrs Shek now admitted that their returns were incorrect as they had not returned interest from an account with the Bank
20 of China. The balance in the account was reported to be around £40,000. This is understood to be a reference to an account with the Glasgow branch of Bank of China. This Glasgow account is different from the account held with the Hong Kong branch. Subsequently there was no further material from Javid and Co and no HMRC meeting with Mr and Mrs Shek.

19. On 30 November 2005 HMRC raised extended time limit assessments for the years 1985-6 to 2003-4 on Mr Shek and from 1990-1 to 2003-4 for Mrs Shek under sections 29 and 36 TMA. The assessments were calculated on the basis that all of the monies in the Hong Kong account were the product of diverted and undeclared profits from the business during that period. The assessments were for gradually increasing
25 amounts starting at £15,000 on Mr Shek alone for 1985-6. From 1991 onwards both Mr and Mrs Shek were assessed with the figure rising to £27,000 (on each of them) by 2001. Accordingly, significantly increased income tax (and national insurance contributions) was being charged.
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20. Those assessments were appealed by Javid and Co on behalf of Mr and Mrs Shek on 20 December 2005. The stated reasons for appeal in each case were "the amounts are estimated and not in accordance with the data in hand".
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21. On 31 January 2006 Javid and Co wrote a three sentence letter to HMRC. The second sentence read "our clients have indicated that they do not have bank accounts or business outside the United Kingdom".

22. HMRC decided to initiate a criminal investigation. In the course of that enquiry the Hong Kong authorities obtained and provided information from the Bank of China (Hong Kong) in respect of the account held by Mr and Mrs Shek. The basis on which
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the information was supplied was that it could (in effect) only be used in support of criminal proceedings.

23. Subsequently the criminal investigation was discontinued. The investigation was returned to Mr Mourning at Specialist Investigations on a civil basis. No further
5 information was forthcoming from Javid and Co and no meetings took place between HMRC and Mr and Mrs Shek.

24. The appeals were referred to the General Commissioners. A series of hearings were subsequently arranged but no full hearing of the issues before the commissioners took place, ultimately resulting in the matter being dealt with by this Tribunal. The
10 proposed hearing dates before the General Commissioners were respectively 13 December 2007, 28 April 2008, 7 July 2008 and 16 October 2008.

25. The first hearing before the General Commissioners was due to take place on 13 December 2007. In November 2007 HMRC were notified that Mr and Mrs Shek had appointed a new accountant, Mr Poon of Octopower 2000 Ltd. On 12 December 2007
15 a meeting took place between HMRC, Mr Poon and Mr Shek (Mrs Shek was not present). At that meeting Mr Shek said that he had a bank account in Hong Kong with the Bank of China. However, the discussion did not make much further progress, and the meeting was terminated shortly thereafter. The General Commissioners hearing on 13 December 2007 was adjourned, apparently to allow Mr Poon to familiarise himself
20 with the case and papers.

26. In February 2008 Mr and Mrs Shek made a formal claim to be treated as non-domiciled for UK tax purposes. Mr and Mrs Shek had not previously completed the domicile box in their respective tax returns. The form DOM 1 dated 21 February 2008 and signed by Mr Shek clearly states that there is income in the form of bank interest
25 arising from assets abroad.

27. On 27 March 2008, in preparation for a meeting of the General Commissioners due to take place on 28 April 2008, there was a meeting between Mr Lipman of Octopower 2000 Ltd and HMRC. In that meeting Mr Lipman is recorded as saying that "he had been told by Mr Poon that Mr Shek was now admitting that he had an
30 account in Hong Kong and was claiming that the monies in the account had come from a family inheritance"

28. On 11 April 2008 Octopower 2000 Ltd sent to HMRC what was described as a disclosure statement by Mr and Mrs Shek. It was signed by Mr Shek to confirm its accuracy. It set out a personal history. Importantly it contained a capital statement for
35 the period 6 April 1996 to 5 April 2004. The capital statement showed an increase in capital of £699,750 over those eight years. Bank accounts in 1996 were said to be only £1,700 but by 2004 bank accounts in Hong Kong contained £680,000 and UK bank accounts £22,750 .

29. There was also a purported reconciliation of the capital statements. This showed
40 that the principal element of the increase was "trust funds set up in Hong Kong" of £500,000. That figure was supported by the personal history which recorded the sale

in 1994 of boats leased to Mr Shek's uncle being sold for approximately £100,000. In 1996 residential properties owned jointly by Mr Shek's father and uncle had been sold for a significant amount, of which approximately £400,000 belonged to Mr Shek's father.

5 30. The purported reconciliation of increased capital also showed UK income (in five
schedules) against estimated outgoings. The income showed drawings and dividends,
rental income from properties and employment income. It also included rent-a-room
receipts of £32,000 (£4,000 per year) over the eight years. There was then a deduction
10 for estimated outgoings from after tax income which, with the exception of £15,000,
allegedly provided an explanation of the difference in capital.

31. A Statement of Case was prepared on behalf of Mr and Mrs Shek for the hearing
due in July 2008 before the General Commissioners (it was supplied on 28 June but is
dated 18 April). The Statement of Case read as follows "1. The Appellants have never
concealed any bank statement within a pair of tights. 2 The Appellants' tax affairs in
15 the United Kingdom are in order. 3. The amount in the Bank of China (Hong Kong)
Limited is the trust fund arising from the disposal of properties of Mr Shek's
forefathers. 4. The Appellants are non-domiciled in the United Kingdom as they
intend to return to Hong Kong permanently. Conclusion. They are non-domiciled in
the United Kingdom, their tax affairs in the United Kingdom are in order. The amount
20 in the Bank of China (Hong Kong) Limited is the trust fund arising from the disposal
of properties of Mr Shek's forefathers, hence the amount are not liable for UK tax".

32. The Statement of Case was supported by the material in the disclosure letter and
also importantly a signed statement from Mr Shek. The third sentence of that
statement read "the money in the bank of China (Hong Kong) Ltd was the trust fund
25 arising from the disposal of properties from my forefathers". There was also a
document purporting to be from China Law (Hong Kong) Centre, signed by an
authorised signatory (whose name was not clear). The letter explained that Mr Shek's
mother had been told about the inheritance by them and that Mr Shek's father and
uncle had allocated "certain amounts in the region of £500,000 to her family. We
30 advised her to set up a trust fund to avoid the potential inheritance tax in Hong Kong
and UK"

33. In fact, the purported reconciliation raised as many questions as it answered. For
example, the sum of £500,000 had been in the bank account for many years. It would
have generated interest, but there was no reference to any interest in the
35 reconciliation. Further, it appears from an analysis of the reconciliation that Mr and
Mrs Shek were claiming an excess of income over outgoings, (outgoings were
estimated, without any supporting evidence, at £20,000 per year). However the
narrative and statements only relied on the inheritance, not an excess of income over
expenditure.

40 34. HMRC decided to carry out enquiries, principally because they doubted the
veracity of the document from China Law (Hong Kong) Centre. HMRC's letter to
China Law (Hong Kong) Centre received no reply. A search using Google and a
search of the Hong Kong Yellow Pages found no trace of the firm or company.

Further, HMRC wrote to the Law Society of Hong Kong who replied on 30 September 2009 indicating that no firm of that name was registered with the Law Society of Hong Kong.

5 35. The 7 July 2008 General Commissioners hearing was further adjourned, due to lack of time to hear the case. The Commissioners however directed Mr Shek to provide statements of the Bank of China (Hong Kong) account.

10 36. On 13 October 2009 HMRC sent a decision letter to Mr and Mrs Shek. The decision upheld the assessments subject to two points. First, the original assessments included estimated bank interest arising on the capital held in the bank account in Hong Kong. It was accepted that Mr and Mrs Shek were not UK domiciled and therefore not liable to tax on interest arising in Hong Kong. Secondly the 2005 assessments had been prepared on the basis that Mr and Mrs Shek had been proprietors throughout, whereas the 13 October letter accepted that from December 2000 the business was run through limited companies.

15 37. The 13 October 2009 letter offered Mr and Mrs Shek a review of the case by a different officer within HMRC. The offer of a review was accepted. The outcome notified on 20 November 2009 of the review was that the decision in the letter dated 13 October 2009 was upheld.

The bank statements

20 38. In this case the bank statements for the Bank of China (Hong Kong) account would be key evidence. There are competing versions from the parties as to how the substantial sum of money was accumulated in that account. The build up of the monies may (or may not) be consistent with one, but not another, version of events.

25 39. Surprisingly, the bank statements have not been made available to this Tribunal. There was no documentary evidence by way of any current statement, nor statement of account, within the material before the Tribunal. It would normally be expected that someone holding sums of money in excess of £500,000 would carefully retain evidence of the establishment and retention of those monies, not least for the purposes of when they wanted to withdraw those sums. Moreover, one would have thought that
30 the Appellants would be able, at some stage since 2005, to obtain a full set of statements, or at least going back some years.

40. HMRC have also tried to obtain the statements. An attempt in 2008 with a consent form from Mr and Mrs Shek ultimately foundered because the Bank wrote to Mr and Mrs Shek in November 2008 stating that there was no longer any account information
35 "on date hereof". It seems that the most likely explanation is that by then the account had been closed and/or all the monies transferred elsewhere.

41. Subsequently HMRC made further efforts to obtain the bank statements. The end result was that some information has been obtained but it was not possible to show the Tribunal what HMRC received. This was because the material had been obtained
40 pursuant to the requests in a criminal investigation and could not be used for civil proceedings without the consent of the account holders, the Appellants. The

Appellants, despite being given the opportunity to do so, have failed to give that specific consent. The reason given was difficult to understand; it appears from their letters dated 15 and 17 March 2010 that the Appellants wanted HMRC to provide them with copies of the statements and information held, before agreeing to release
5 HMRC from its commitment to the Bank of China under which the material was obtained.

42. HMRC set out the position in their letter dated 17 March 2010. This letter included "Mr and Mrs Shek know perfectly well what is in the bank statements as they would have received at least the original copies from the bank. Likewise Mr
10 Lipman's computation clearly shows the balance of the account at 5 April 2004 so he has seen at least some of the statements. HMRC obtained copies of bank records from The Hong Kong Justice Department through international government exchange and there is no requirement, unless the taxpayer is being charged with a criminal offence, to see or have copies of any information in documents obtained through this process.
15 Notwithstanding this I am nonetheless perfectly happy to give you copies of the documents but in order to do so I need the permission of the Hong Kong authorities to reveal and use the documents. As stated previously if you let me have a signed authority I will be able to give you copies."

43. The issue of the bank statements was dealt with at the directions hearing held in
20 October 2010. Hearing Direction 4 stated "unless the Appellants provide to the Respondents no later than 15 November 2010 the signed mandate in the form contained at tab 37 of the bundle prepared by the Respondents for the postponed hearing, then the document at tab 31 of the said bundle shall be redacted so as to remove all transaction details. If the said mandate is so provided the bundle to be
25 prepared for the hearing shall include both (i) all the Bank of China bank statements and (ii) those documents listed in paragraph 4 of the application handed up by the Appellant at the 21 October hearing." The reference to the mandate is a mandate drafted by HMRC and provided to the Appellants' advisers.

44. The direction for provision of the signed mandate was, it appears, not complied
30 with. Accordingly, and as envisaged by Direction 4 of October 2010, this Tribunal was not allowed to see any such statements. Tab 31 was redacted so as to remove all transaction details for the hearing.

45. The Appellants' position on this was sustained into the written closing
35 submissions. Paragraph 21 of those submissions reads " the Respondents... spent the majority of the time trying to get the Bank of China statement which shows X amount. They could not show the statement at the Tribunal as they obtained the document through the criminal unit. Whilst Mr Shek confirmed that he would in his power let the bank statements into the tribunal, it should be noted that we asked the Respondents for a copy to see what Mr Shek was going to sign his agreement to. The
40 respondents refused to provide copies and as the contents of the bank statement couldn't be verified, Mr Shek would not sign". That does not seem to us to be a reasonable basis for refusing to sign the mandate.

The evidence

46. The documentary material before us was contained in three principal bundles. This included the assessments, appeal documentation and the material exchanged by the parties in the course of the investigation. There was also the material supplied by the Appellants shortly before the hearing.

47. The oral evidence given to us was from Mr Shek, and on behalf of HMRC by Mr Mourning, the specialist investigator and from Mr Kirby, an HMRC officer on duty at Glasgow Airport when Mr and Mrs Shek were stopped. Each witness had made a written statement. There was no evidence from Mrs Shek and she did not attend the Tribunal hearing.

48. Mr Mourning gave evidence in accordance with his statement. He set out the progress of the enquiry described above and his reasons for making the assessments. The main disputes on his evidence were as to the conclusions he had drawn, rather than as to the substantive facts of what he had done or obtained. Mr Mourning did concede that he had made no substantive investigations into the business of the takeaway operated by Mr and Mrs Shek. He also accepted on behalf of HMRC that Mr and Mrs Shek were not domiciled in the UK and that, contrary to the earlier assessments, some significant allowance ought to be made for interest that would have accumulated in Hong Kong over the years from diverted profits.

49. Mr Mourning's evidence, and some of the material from HMRC, suggested that Mr Poon of Octopower 2000 Limited had been aggressive in meetings and had caused HMRC staff to be fearful for their safety. We do not think that it is necessary for us to investigate or determine those allegations. We note however, that, throughout the period, there was no meeting between the parties at which Mr Shek fully set out his version of events and was open to questioning.

50. Mr Kirby's statement recites the events which took place on 7 March 2005 at Glasgow airport. Ultimately we do not think that much turns on the apparent conflicts of evidence arising from Mr Kirby's statement and cross examination. It is apparently agreed that Mr and Mrs Shek were travelling with a substantial sum in cash. Mr Kirby records that the amount was £7,050. Mr Kirby also says that Mr and Mrs Shek gave an inaccurate description (£5,000) of the amount of cash that they were carrying. He also records that Mr Shek gave an explanation that the cash was for spending money and also for an operation his mother may need in Hong Kong. Mr Kirby also recorded the finding, in a pair of tights, of a bank statement from the Bank of China (Hong Kong) The statement showed a series of deposits in June and July 2002 which brought the total in the account to £651,627.29 in 2002. As set out above, it appears now to be common ground that a sum of this magnitude had been accumulated in Mr and Mrs Shek's Hong Kong account. Mr Kirby also accepted that part of his statement was produced as a result of what he had been told by others.

51. Mr Shek's evidence. For the hearing before us Mr Shek provided a statement dated and signed on 7 April 2011, the day before the hearing commenced. The statement in full reads "my date of birth is 6 January 1954. I am non-domicile, my

5 father was born in Hong Kong and I was born in Hong Kong. I do not have the intention of staying in the UK. I came to the UK in 1977. I started trading in the UK from 1986 from the premises at 41 Gartlea Road, Airdrie. The property at 41 Gartlea Road Airdrie is a small takeaway where I would serve Chinese food. All the money I made minus personal expenses from the declared income of the takeaway and rent was deposited in my private bank account. I did not under declare any of the takeaway or rental income."

10 52. The statement was supported by a capital statement for Mr and Mrs Shek. This showed a total of £714,000 accumulated in five ways. These were (a) £380,000 for 1986 – 2005 trading i.e. 19 years @ £20,000 per year. (b) interest in bank accounts of £250,000 (c) wages 1977-1986 of 9 years @ £5,000 per year = £45,000 (d) celebration of the birth of children £30,000 (e) 1993-2005 rent a room income of 12 years @£4,000 per year = £48,000.

15 53. Surprisingly the material from Mr Shek did not explain why he had for so long denied the existence of the Bank of China (Hong Kong) account. Nor was there any reference to the inheritance, nor why he had said in 2008 that the capital in Hong Kong had accumulated since 1996, whereas he was now contending that it had been accumulated over a 19 year period going back to 1986. The clear implication of the Statement was that Mr Shek was abandoning the contention that the source of the monies in Hong Kong was an inheritance. He had however previously signed a statement stating that that was the source and also provided a document apparently from Hong Kong lawyers purporting to verify an inheritance of £500,000. Mr Shek's statement was also supplemented by the Appellants' skeleton argument. That document purported to set out a calculation of how the money in the Bank of China (Hong Kong) account could have been accumulated over time out of UK income (without any reference to any inheritance).

Evaluation of the witnesses

54. We found both Mr Mourning and Mr Kirby to be careful, reliable, accurate and consistent witnesses, making concessions where appropriate.

30 55. Mr Shek gave evidence through an official interpreter (the interpretation at times assisted by a representative of the Appellants). The process was difficult; the natural complications of interpretation were compounded by Mr Shek's tendency to answer questions with his own questions or requests for clarification. By the time that such a clarification had been through the interpretation process (both ways) the thrust of the question had sometimes been lost. Moreover, Mr Shek often did not give direct answers to the questions he was being asked. The hearing inevitably overran (it having been listed on the basis that Mr Shek would not be giving oral evidence) resulting in the closing submissions being made in writing after the hearing.

40 56. We concluded however that we could not rely on Mr Shek's evidence. There were a number of reasons for this. The main reason was that he had previously given explanations that could not be true and which he must have known were untrue. We

came to this conclusion after giving due allowance for the difficulty of giving evidence through an interpreter.

57. Mr Shek has given three substantive responses to the enquiries about monies held in Hong Kong. First that there was no such account. This was untrue and he must
5 have known that it was untrue. The assertion ('the First Explanation') was made most clearly in the letter dated 31 January 2006 from Javid and Co which stated "our clients have indicated that they do not have bank accounts or business outside the United Kingdom".

58. The First Explanation letter was written with the benefit of professional advice; it
10 was written after Mr and Mrs Shek had received the notification of the HMRC enquiry, the Code of Practice 9 procedure and the possibility of a criminal prosecution. Mr and Mrs Shek had by then been advised by two sets of accountants about the enquiries into their affairs and had disclosed the bank account with the Glasgow branch of Bank of China. The letter was therefore written at a time when it
15 could not have been clearer how important it was for the answers given on their behalf to be complete and accurate; instead, the letter written was the direct opposite of the truth.

59. The next explanation given ('the Second Explanation') was that the monies in the Hong Kong branch of the Bank of China were the product of a £500,000 inheritance.
20 It appears from Mr Shek's 2011 capital statement, from his evidence to us and the submissions on his behalf that the Second Explanation has since been abandoned.

60. The Second Explanation was given at an advanced stage, in preparation for a meeting of the General Commissioners. It was first made orally by Mr and Mrs Shek's advisers. It was made at a time when Mr and Mrs Shek were advised (by this third set
25 of advisers). The admissions were made through their advisers. The Second Explanation was given and confirmed in a disclosure statement dated 11 April 2008. It was fully recorded – and constituted the main reasoning – in the capital statement attached. Details were given in the personal history of how the sum of £500,000 arose.

30 61. The Second Explanation was repeated in the Statement of Case before the General Commissioners. There was a signed statement from Mr Shek saying "the money in the Bank of China (Hong Kong) Ltd was the trust fund arising from the disposal of properties from my forefathers". This could not have been a clearer statement of the source of the monies.

35 62. Mr Shek gave no real explanation as to why he gave the Second Explanation, which he has now abandoned. Moreover, the inheritance was supported by a document purportedly from lawyers in Hong Kong. No proper explanation has been given as to how that document came into existence if, as now appears to be Mr and Mrs Shek's case, the money in their Hong Kong account is not in any way related to
40 an inheritance. In evidence Mr Shek said that the document had been given to him by his mother; even if true, that would not explain why he relied on a document that he knew was not the true explanation for the source of the monies.

63. In giving the First and Second Explanations Mr Shek has therefore given inconsistent, unreliable and untruthful accounts twice in this investigation. Furthermore, there is the issue of the bank statements of the account with the Hong Kong branch of the Bank of China. The bank statements would have extensive probative value in determining competing versions of how the monies were accumulated. They would have been very helpful to the Tribunal. It was within the power of Mr and Mrs Shek to allow those statements, such as they are, to be produced to the Tribunal. We conclude that there has been no proper reason for Mr and Mrs Shek's failure to allow them to be used. We can only conclude that there is/are something(s) in the statements which Mr and Mrs Shek do not wish us to see.

64. Mr Shek's oral evidence was also unsatisfactory. It failed to provide an explanation of why he had given versions which were untrue. The oral evidence also lacked the substance and detail necessary to constitute a credible version.

65. Accordingly, we treat Mr Shek's evidence with caution, especially where it is not corroborated. Further, where there is a conflict of evidence between Mr Shek and respectively Mr Mourning or/Mr Kirby, and in the absence of any independent evidence, we would prefer the evidence of Mr Mourning and Mr Kirby. However, those conflicts are, in our view, not central to the case. First, in relation to Mr Kirby's evidence, Mr Shek is very clear in some statements that the cash that was being carried through Glasgow airport was not hidden in a pair of tights. A careful reading of Mr Kirby's statement shows that he did not make such an assertion; instead he was saying that the *bank statement* was in the tights. Similarly HMRC state that Mr and Mrs Shek gave an inaccurate description of the amount of money that they were holding in cash at the time. We think that it is perfectly possible that there was some misunderstanding or confusion over this and we do not make any finding that Mr and Mrs Shek deliberately misled in this regard.

The Third Explanation- savings

66. The explanation given by Mr Shek to this Tribunal was that largely contained in his Statement and attached capital statement submitted the day before the hearing. The substance of the explanation ('the Third Explanation') was that the capital of £714,000 had been accumulated by an excess of income over expenditure since Mr Shek had been in the UK from 1977.

67. The capital statement showed that the £714,000 had been accumulated from five sources.

68. Mr Shek contended that he had received £48,000 by way of rent a room income of £4,000 per year for the 12 years from 1993 to 2005. There were a number of difficulties with this contention. First, the space in the house. His house was a three-bedroom house which contained his own family including his wife, two children and brother (although not all were present all of the time). Secondly, Mr Shek gave evidence that the calculation in the capital statement was exactly right, namely that £4,000 per year was received in each of the 12 years i.e. that the amount received was identical throughout the period from 1993 to 2005. It seemed inherently unlikely that

identical rent would be charged throughout a 12 year period. The impression given was that Mr Shek's evidence was concentrating on complying with what was in the capital statement. Thirdly, there was no documentary record of receipts of the monies. Fourthly, there was no documentary evidence such as a written agreement to rent out the room or rent book. Fifthly, there was no evidence or confirmation from any tenants. Finally, apart from one year, there was no claim for rent a room relief on Mr Shek's tax return. Overall the claim to have received £48,000 in this way in renting out a room seemed unlikely and there was no real supporting evidence.

69. Mr Shek also asserted that he had received £30,000 by way of gifts as celebrations of the birth of his children. As with the claim for rent a room relief this had also been included in the capital statement provided in the disclosure statement in 2008 (along then with the claim that there had been a £500,000 inheritance). Mr Shek could provide no documentary evidence of receipt of those monies nor any satisfactory details of how and from whom and in what amounts the monies were received. Further those monies would have been retained for a very long time; Mr Shek did not explain in what form or account those monies had been retained.

70. Mr Shek also contended that £250,000 of the monies constituted interest that had accrued over time. This assertion could easily have been tested by production of the bank statements. In fact, as a proposition, it seems that it may be broadly correct; substantial sums of money held for substantial periods are likely to produce substantial interest. In HMRC's skeleton argument it was accepted by/on behalf of the Inspector Mr Mourning that, at reasonable interest rates, £211,000 of the monies would be accumulated interest. The effect of this is to significantly reduce the diverted (or saved) amounts necessary to produce the Hong Kong monies.

71. The calculation in the capital statement also included £45,000 by way of surplus wages accumulated from 1977 to 1986 at the rate of £5,000 per year. However, Mr Shek's case was that some of the wages had been used to purchase the business; therefore not all of the £45,000 would have been available to him by way of capital.

72. The principal element in the build up of capital was said to be a surplus of income over expenditure from the 19 years trading from 1986 to 2005 totalling to £380,000 i.e. 19 years at £20,000 per year. There were a number of problems with this explanation. The first is that it contradicts the signed statement of Mr Shek in 2008 which says, in effect, that there was no capital in 1996. No explanation has been given by Mr Shek as to how these versions can be reconciled.

73. There was an absence of documentary evidence in support of the version that Mr and Mrs Shek saved £20,000 per year from after tax income. Such an explanation should be supported by details of in what amounts, when and how this money was accumulated and transferred to Hong Kong. If the monies were held in and transferred from an account, there would have been records. Conversely if the amounts were retained and transferred in cash without leaving any record at all, then an explanation for this secretive conduct could and should have been given. Mr Shek does not give any details whatsoever in his statement. We are asked to conclude that there was

sufficient surplus to enable this to happen – however, the fact that it might have been possible does not necessarily mean that it did happen.

74. In the Appellants' skeleton argument at paragraph 13 details are given of the accumulation of £42,922.27 withdrawn from the business account in 1999-2003 to " a
5 different Bank of China account". There was a summary of the business bank account showing these transfers. These monies were transferred after having been the subject of taxation. The skeleton argument asks us to extrapolate from that. First, however, this should be a matter of evidence not argument. It fails to explain the process – the monies had gone to a different bank account and not to the Hong Kong account. If
10 this explanation were true the route could have been described and we could have been shown the transfers to the relevant accounts. Further the amounts involved are significantly smaller than would have been necessary to generate the total in the Hong Kong account

HMRC's version-undisclosed and diverted profits

15 75. HMRC contended that the monies in the Hong Kong account were the product of undisclosed and diverted profits. This version was attacked in a number of different ways. First, it was said on behalf of the Appellants that the Third Explanation could have been correct in that there was enough income out of which to generate such savings. That was largely a matter of speculation; the point could have been
20 established by details of the expenditure patterns, and indeed records of the amounts saved and transferred to Hong Kong. There was no real substantive evidence in relation to that apart from that referred to in the previous paragraph.

76. Another line of attack in the Appellants' skeleton was that the gross profit rate for the business was said to be 68%. It was said that this is a high gross profit rate and
25 that it would have been difficult, if the figures were accurate, to divert cash takings without the gross profit rate becoming much and unrealistically higher. This is a reasonable point. However, it is based on the assumption that the Appellants' records are themselves accurate; the skeleton accepts and emphasises the cash nature of receipts and expenditure. As the accuracy of the records is in doubt, this point is not
30 decisive.

77. It was also said that it would be unrealistic to expect the takeaway to produce surplus profits sufficient to generate the monies accumulated in Hong Kong. Paragraph 15 of the skeleton says that the average taxable net profit for years 1994-
35 2001 was £31,001. Details were given of the extent of local competition and the number of potential customers in the locality. There was no expert evidence on the issue, so we were being asked to speculate. It did not seem to us entirely unrealistic that such a business might generate net profits of the amounts produced by HMRC figures, particularly after the figures were reduced to make allowance for interest accumulated on diverted profits.

40 78. It was also argued that the sale price of the business of £20,752.40 in April 2005 was inconsistent with a business generating the level of profits necessary to accumulate over £600,000 in Hong Kong over 20 years. There was no expert

evidence in support of this contention. It seems to us that, in the absence of expert evidence, the sale price and income generation potential do not necessarily correlate. Moreover, the sale of the business is likely to have been based on the business accounts which, by definition, do not include any diverted profits.

5 79. Further, HMRC accepted that they had not investigated the business or its
accounts but have relied on inference from the Hong Kong monies. Whilst it would
have been possible to examine the accounts, it would not have been possible for
HMRC to carry out an investigation which involved e.g. test purchases to see whether
they were recorded. This is because the business was sold by Mr Shek in April 2005
10 before the HMRC investigation got under way.

Which version is correct?

80. It is for us to determine the issue of fact as to which of the versions given at the
Tribunal is correct. HMRC ask us to accept the inference that, from the existence of
the monies and the lack of a credible alternative explanation, the monies come from
15 diverted and undeclared profits.

81. The Appellants put forward some arguments in their closing submissions which
we ought specifically to deal with. In paragraph 1 of the closing submissions it was
suggested that, as a matter of law, "you cannot accuse somebody of having money
and saying that this money is fraudulent without any proof of criminal activity". The
20 statement in *Angus –v- United Kingdom Border Agency [2011] EWHC* was cited in
support "a customs officer does have to show that the property seized was obtained
through conduct of one of a number of kinds each of which would have been
unlawful conduct". We did not find this case helpful or relevant; it is a decision about
the provisions of the Proceeds of Crime Act 2002. We have to apply different
25 legislation.

82. Paragraph 2 of the Appellants' closing submissions referred to the abandonment
of the criminal proceedings. That does not decide this case, which is to be determined
on the civil standard of proof i.e. on the balance of probabilities.

83. Paragraph 7 of the closing submissions suggests that evidence is lacking because
30 of the absence of the bank statements. That is a problem entirely of the Appellants'
own making. Paragraph 10 of the closing submissions refers to the absence of tax
returns prior to 1997, which apparently have been destroyed by HMRC. In relation to
both points we take into account and decide the case on the basis of the evidence
available to us.

35 84. The Appellants also contended that the assessments had been wrong on the dates
when respectively Mr and Mrs Shek were sole proprietors. The evidence on this was
far from clear. However, in their written submissions HMRC adjusted the figures to
reflect such a change to their understanding.

85. The final paragraph (23) of the Appellants' closing submissions made what
40 appears to be a 'floodgates' argument. This contends that 'you will effectively be
closing the doors to all the taxpayers which have sufficient income over their

expenditure...it is not sufficient to state that an amount found in a bank account is under declared profits with no verification..if the Tribunal allow this assessment the Respondents would in effect be allowed to have free rein and go to every single person in the UK without any other evidence of under declared profit and force an assessment on an amount found in their bank accounts '. We reject that submission. The task is for the Tribunal to make findings of fact based on the evidence in each individual case, evaluating the credibility of the explanation of the source of undeclared assets and drawing inferences where necessary or reasonable.

Finding of fact

86. We find as a fact, and on the balance of probabilities, that the monies accumulated in the Hong Kong branch of the Bank of China were the product of undeclared and diverted profits from the Appellants' takeaway business.

87. The reason for coming to this conclusion is that this is the natural inference from the other facts. It is, in our view a far more likely version than the alternative suggested by the Appellants to the Tribunal. In the absence of a credible alternative for the accumulation of the funds, we draw the reasonable inference that the monies came from the Appellants' cash business.

88. In coming to that conclusion we reject the written and oral evidence given by Mr Shek. We reject his evidence because we found him to be an unreliable, inconsistent and untruthful witness. He failed to explain why he had given earlier inconsistent versions. His explanation to the Tribunal was given very late in a statement completely lacking in detail. He prevented the Tribunal from seeing key facts in the form of the bank statements. The version that he gave as to the accumulation of the funds lacked detail, inherent likelihood in some places and there was no real documentary evidence in support.

Fraudulent or negligent conduct

89. We conclude that the need for additional assessments arose from "fraudulent or negligent conduct" by the Appellants within sections 29 and 36 TMA 1970. It was at least negligent, on the part of each of the Appellants, to fail to disclose the additional profits that were being made and diverted to Hong Kong. Accordingly HMRC were entitled to raise the assessments going back to 1985-6.

90. HMRC had previously relied on the failure to disclose the interest arising on the Hong Kong bank account. HMRC now accept that the Appellants are not domiciled in the UK. HMRC have not contended that the income or interest arising was remitted to the UK. Accordingly it appears that that interest would not be subject to UK tax. The Appellants had failed to declare their non-domiciled status; but we do not need to decide whether that, in itself, would have amounted to "negligent conduct".

The amended assessments

91. It follows from the above that the appeals will be dismissed. However, there are two principal adjustments to the assessments. First, the assessments were made on the

basis that the monies in Hong Kong did not include any interest. HMRC now concede (rightly in our view) that the sums would include substantial accumulated interest. The effect is to significantly reduce the total of diverted profits.

5 92. Secondly, the dates when Mr and Mrs Shek were respectively sole proprietors appeared different in evidence from the basis on which the original assessments had been made.

93. HMRC's closing submissions set out adjusted assessments in the table attached thereto, taking into account both points above. We do not see any reason to further revise those adjusted figures.

10 *Conclusion*

94. The appeals are dismissed.

15 95. 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.

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TRIBUNAL JUDGE
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