TC03120

Appeal numbers: TC/2013/00307, TC/2013/00309 & TC/2013/01019

INCOME TAX – 2006-07 partnership return amended following enquiry - whether profits for that tax year understated – whether partnership statements for the following four tax years should be amended in accordance with the principle of continuity – whether penalties charged should be upheld – held that profits not understated – all appeals allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR HUGH NEWELL AND MRS ICILDA NEWELL t/a TANYA'S TAKEAWAY **Appellants**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER
ANNE REDSTON

Sitting in public at 45 Bedford Square, London WC1 on 27 and 28 November 2013

Mr Martyn Arthur of Forensic Accountants Limited for the Appellants

Ms Ros Shields, Officer of HM Revenue & Customs, for the Respondents

DECISION

1. Mr and Mrs Newell were partners in a partnership trading as Tanya's Takeaway ("the partnership"). HMRC enquired into the partnership's 2006-07 return, and then issued a closure notice increasing that year's profits by a further £54,475 in addition to the reported profits of £7,088.

2. Relying on the presumption of continuity, HMRC also increased the partnership profits of the following four years by the same percentage, after adjusting for the Retail Prices Index.

3. Over the five year period from 2006-07 through to 2010-11, the partnership's reported profits totalled £36,508. HMRC increased the profits by a total of £289,618, and charged penalties of £45,255.96. The figures are as follows:

Year	**Reported profits £**	**Further profits £**	**Total profits £**	**Further tax £**	**Penalties £**
2006-07	7,088	54,475	61,563	14,881.58	7,440.00
2007-08	7,000	57,140	64,140	15,327.93	7663.00
2008-09	7,750	55,641	63,391	17,620.17	9,250.59
2009-10	8,670	58,108	66,778	18,865.15	9,904.20
2010-11	6,000	64,254	70,254	20,948.90	10,998.17
Totals	36,508	289,618	326,126	87,643.73	45,255.96

4. HMRC also issued amendments to the partnership statements for the ten previous tax years, being 1996-97 through to 2005-06, but these amendments and the related penalty assessments were withdrawn by HMRC at the inception of the hearing and are not considered further in this decision notice.

5. HMRC issued all the amendments to Mr Newell on the basis that he was the representative partner. The appeal to the Tribunal in relation to those amendments was in the name of Mrs Newell. HMRC did not seek to challenge this aspect of the appeal. The Tribunal noted that it had been accepted in *Raymond John Philips v R&C Commrs* [2009] UKFTT 335(TC) at [105] that an appeal can be made by partners other than the representative partner against amendments to the partnership return.

The issues in the case

6. The issues in the case were:

(1) whether the partnership's 2006-07 profits had been understated;

(2) if so, whether the partnership statement for the following four tax years should be increased, in accordance the principle of continuity; and

(3) whether the penalties charged should be confirmed.

The legislation

7. This section of the decision notice summarises the relevant legislation, which is set out in full in the Appendix.

8. The partnership's 2006-07 return was amended by closure notice under Taxes Management Act 1970 ("TMA"), s 28B. The partnership statements for the four subsequent years were amended under the discovery provisions in TMA s 30B.

9. TMA s 31(1)(b) gives a right of appeal against amendments made by closure notice to partnership returns under TMA s 28B; TMA s 31(1)(c) gives a right of appeal against amendments to partnership statements made under TMA s 30B.

10. TMA s 50 gives the Tribunal power to confirm, reduce or increase the amount contained in an amended partnership assessment.

11. The penalty provisions for 2006-07 and 2007-08 are at TMA s 95A. The penalty provisions for the later years are in Finance Act 2007, Schedule 24.

The evidence

12. The Tribunal was provided with a bundle of documents by HMRC and various other papers by Mr Arthur. Together, they consist of:

(1) the correspondence between Mr and Mrs Newell's representatives and HMRC, including cash flow statements and analyses of bank accounts;

(2) the partnership's accounts for the year ending 31 December 2006, which was the basis period for the tax year 2006-07;

(3) the partnership's "Simplex" records for each week of the 2006 calendar year; and

(4) statements of assets, liabilities and business interests for calendar years 2006 and 2007, for both Mr and Mrs Newell, although neither party referred to the contents of these in the course of the hearing.

13. In addition, the following witnesses gave oral evidence on oath:

(1) Mr and Mrs Newell;

(2) Mr Naresh Karia, of Karia & Karia, accountant to the partnership;

(3) Mr Richard Saunders, a taxi driver who gave evidence relating to the partnership's purchases; and

(4) Mr Kim Crisp, Officer of HMRC, who carried out the enquiry and issued the amended statements.

14. All witnesses were cross-examined, and all but Mr Saunders provided a short written witness statement in advance of the hearing. The Tribunal found all the witnesses to be credible. In particular, Mrs Newell gave compelling evidence about the day to day running of Tanya's Takeaway.

The facts

15. From the evidence provided to us, we make the following findings of fact. Unless otherwise indicated, they were uncontested.

The course of the enquiry

16. This part of our decision sets out the course of the enquiry by way of background to what follows: it does not include any findings of fact in relation to the substantive issues.

17. On 8 January 2009, Mr Andrews, an officer of HMRC, opened an enquiry into the partnership's return for 2006-07. Soon afterwards, Mr Andrews retired and responsibility for the enquiry passed to Mr Crisp.

18. In response to HMRC's request, Mr Karia provided HMRC with documents relating to the partnership, together with a cash reconciliation.

19. On 8 September 2009 a meeting took place between Mr Crisp, Mr Karia and Mr Newell. Mr Newell provided various information about the operation of the business and how business records were kept. In particular, he told Mr Crisp that he liked gambling, and this enabled him to put money into the partnership business.

20. On 15 September 2009, Mr Crisp wrote to Mr Karia, enclosing a daily cash-flow analysis of the business, which showed eight instances of negative cash. The letter went on to ask Mr and Mrs Newell to provide all their bank, building society and credit card statements for the calendar year 2006.

21. Correspondence continued over the next few months. Mr and Mrs Newell provided their financial records relating to six bank accounts, some of which were joint accounts. Mr Newell also provided Mr Crisp with a letter from Richard Power, an Irish bookmaker, which set out a list of payments made to Mr Newell in 2006. On 20 September 2010 Mr Crisp asked Mr Newell to sign a letter of authority, allowing him to communicate directly with Richard Power. Mr Newell provided that letter on 8 December 2012. Richard Power subsequently provided details of all transactions on Mr Newell's account in 2006.

22. At some point during the enquiry Mr Crisp checked the partnership's PAYE records and said he was satisfied with them.

23. On 18 March 2011, Mr Arthur was asked by Mr Karia and Mr Newell to assist them in dealing with the enquiry.

24. On 20 May 2011, Mr Crisp provided Mr Arthur with a document called a "Takings Build-up". This sought to compare the known cash incomings with the known cash outgoings in respect of the year to 31 December 2006. Mr Crisp said that the Takings Build-up showed that there was a substantial discrepancy between the two. This document was subsequently amended following further discussions. A final version was provided for the Tribunal which showed a "discrepancy" of £53,748.59.

25. Mr Crisp also produced various schedules setting out the deposits in the bank accounts. The final version, also provided to the Tribunal, showed "unidentified deposits" totalling £50,586.

26. On 24 May 2012 Mr Crisp amended the 2006-07 partnership return, increasing the partnership's profits to £61,563. He also issued amended partnership statements for 2007-08 through to 2010-11, together with penalty notices for each year, as set out earlier in this decision notice.

Tanya's Takeaway

27. Mr and Mrs Newell set up Tanya's Takeaway in October 1998, selling West Indian food. Day-to-day responsibility for the business mostly rested with Mrs Newell. Mr Newell did the book-keeping, some of the shopping and occasionally helped out in the takeaway if they were short-handed.

28. The premises were located in Willesden High Street. It was small and had no seating; customers bought food to take away. It did not supply any outside catering. A number of competitor businesses were located within easy walking distance, selling pizza, chicken and other take-away meals. The customer base consisted of mechanics, taxi-drivers and other local workers. Many customers were regulars, and Mrs Newell got to know them very well. The takeaway had a gross profit ratio of 53.38% compared to an average for similar businesses of 60-65%.

29. The partnership employed 4-5 people, part-time, who were paid in cash. The cook arrived at 6am and left at 1pm, so no fresh food was cooked after that time. The takeaway was open from 11.30am and closed at 9.00pm. Its busiest period was between 12-1.30pm, when, according to Mrs Newell's evidence (though on HMRC's case this is disputed), around 40 meals were sold. A meal cost between £3.50 and £4. Some customers bought cheaper items, such as dumplings (50p each), patties (£1) or swordfish fritters (£1.50). The takeaway also sold some cold food, including salads.

30. Mrs Newell also told us that after 2.00pm numbers dropped off, so that for the rest of the day there were around 30 customers in total, making an average of around 4 customers an hour for that period. The takeaway's annual turnover was £126,018, making average weekly turnover £2,462. It was open six days a week, so daily takings averaged £410. This is consistent with around 70 customers spending £5.85 each – some spent more, buying a meal and salad, and perhaps a drink. Some spent less, buying only a snack. By reference to HMRC's case, this is also disputed.

31. Meat was purchased from Smithfield in bulk, usually around 30lb at a time. Fish was bought from the fish market and other goods were bought in the cash and carry or supermarket. Most of the shopping was done by Mr Saunders, a self-employed taxi-driver who worked for Mr Newell's other business, a taxi company.

32. Mr Saunders' own takings were around £900 a week. He worked at night so was able to visit Smithfield and the fish market in the early hours, an arrangement which suited Tanya's Takeaway. Mrs Newell would usually phone through her requirements, or give him a list. Mr Saunders bought the items during his night shift, and dropped them off at the takeaway in the early morning, using his own key; he left the invoices with the purchases.

33. He told the Tribunal that he initially paid for the purchases himself, and was subsequently reimbursed by Mr and Mrs Newell, who also paid the taxi fare for the journeys to the various suppliers. Mr Saunders and Mr Newell both said that he was sometimes reimbursed after a week, but on other occasions collected his money after a longer period, sometimes up to three weeks. As a result, the amounts involved were between £200 and £1,500. Ms Shields challenged this evidence on cross-examination, but she did not submit that it was untrue. We found the evidence given by both Mr Saunders and Mr Newell to be consistent and credible, and accepted it. We therefore find as a fact that Mr Saunders did allow the debt to increase and that it sometimes was as much as £1,500 before being repaid.

34. Tanya's Takeaway had no facility to take credit cards and did not accept cheques, so all receipts were in cash. At the end of each day Mrs Newell counted the takings, checked them to the till roll, and recorded the cash collected. If there was a discrepancy between the till roll and the cash, she would ask her staff about it the next day. She had had some problems with dishonest staff. She discarded the till rolls at the end of each week.

35. Once counted and checked, the takings were put in a "money pan" by Mrs Newell, and put in the safe at home, other than a float of £50 which remained in the till overnight. She gave the figure for the cash collected to her husband, who entered it into the Simplex record book.

36. The takings in the safe were used to pay cash outgoings, including wages and purchases. Utility bills and PAYE were settled by cheque, and money was transferred from time to time from the safe to the bank to cover these costs. Occasionally outgoings were paid for from the till – for instance, the window cleaner was paid in this way. When this happened, a piece of paper was put in the till recording the amount of expenditure. Mrs Newell took these pieces of paper home with the cash and gave them to her husband to be entered in the Simplex record book.

37. The flat above the shop was rented out for £200 a week. This was paid fortnightly to Mrs Newell and the cash received used in the business.

38. The key point at issue in this case is the amount of money withdrawn from the business by the partners, and this is discussed later in the decision. However, the

accounts showed that Mrs Newell took regular drawings from the business, which totalled £17,926 over the year; these drawings were not in dispute. It was also accepted by both parties that capital contributions of £13,500 were made over the year, being two £3,000 cheques, together with three cash payments of £4,000, £500 and £3,000.

39. Mr Newell had been in favour of closing Tanya's Takeaway since around 2003. Mrs Newell resisted: she had built the business up from scratch and was attached to it. By 2013 Mrs Newell was 70 years old and in May 2013 the takeaway closed.

The "partner draw"

40. Mr Newell participated in a "partner draw" - a sort of club where each member pays in a fixed amount each week. The amount contributed in this particular "partner draw" was £100 a week, and there were 40 members, mostly taxi-drivers. The pot was drawn each week, and one of the members received the £4,000 contributed. Over a 40 week period, the money contributed by each member was returned to him. The "partner draw" was thus a sort of savings arrangement, allowing each member to "save" £4,000 over the period and receive it in a lump sum.

Mr Newell's income and his gambling

41. Mr Newell was the director of his own taxi business. He took out £26,000 a year as a combination of salary and dividends.

42. He has a long-standing interest in horse racing. During the 1980s he owned a share in two race horses. He is well-connected in that world, knowing jockeys, trainers and stable lads. He regularly bets on the races. He gave evidence that he used bookies on the track, high street bookmakers and an Irish bookmaker called Richard Power, but said he does not bet via the internet. Ms Shields accepted that Mr Newell was a frequent and regular gambler but said there was "no evidence" of him using bookmakers other than Richard Power. We accepted Mr Newell's oral evidence, which we found to be consistent with what one would expect of a prolific and regular gambler. We find as a fact that he used bookmakers on the track and also bookmakers other than Richard Power.

43. Mr Newell first began using Richard Power in the 1980s, having had other bookies refuse to accept bets he was making on his own horse. By 2006 he had been using Richard Power for over twenty years. He told the Tribunal that he bet for himself and also on behalf of an Irish friend who had good information about upcoming races. If Mr Newell placed the bet for his friend, he shared the winnings. If it was a joint bet, he and his friend sorted out between them the amount to which each was entitled and settled up any difference. Ms Shields again said there was "no evidence" of these arrangements. The Tribunal found Mr Newell to be a credible witness and we accepted his oral evidence. We therefore find as a fact that the arrangements with his friend were as he described them to be.

44. In the year to 31 December 2006, Mr Newell's account with Richard Power recorded some 1,500 transactions. In both January and April around 300 bets were placed; in each of March, May and November there were around 200. Fewer bets

were made in the other months, particularly between the end of June and the beginning of October.

45. In 2006 the value of the "bets to win" made with Richard Power was £305,484 and "bets to place" totalled £64,330, giving an overall figure of £369,814. Mr Newell's winnings were recorded as £240,841, with a further £80,065 of stake money returned. These two together totalled £320,907.

46. These figures indicate that Mr Newell made a loss in 2006 of £48,907 (£369,814 - £320,907). However, some of these bets were for or with his friend, so the amount by which Mr Newell himself was out of pocket – and, indeed, whether he was in fact out of pocket at all – is unclear. We thus find as a fact that Mr Newell was involved in bets of this amount, and that he was paid winnings by Richard Power, but we make no findings as to the sums which he was placing on his own behalf, or the amount of his winnings.

47. Mr Newell placed his Richard Power bets by phone and settled them by cheque; he was also paid out by cheque from time to time. Mr Newell said, and we accept as a fact, that his other bets were usually paid out and settled in cash, although sometimes he was paid by cheque. Mr Newell generally kept around £10-£15,000 in cash available for betting, and this was held in a strong box in his house, and not in the safe where the takings from Tanya's Takeaway were kept.

48. Mr Newell's evidence was that all the deposits in his bank accounts came from his gambling, from salary and dividends from his taxi business, and from the occasional lump sum pay-outs from the partner draw. The source of these deposits is a key issue in dispute, and we make no finding of fact on it at this stage of the decision.

The parties' submissions on the amended partnership statements

49. The partners' case was that the profits as included in the partnership statement were correct. Mr Newell said he did not withdraw any money from Tanya's Takeaway. He lived on the dividends and salary from his taxi business. From time to time he supplemented this with betting winnings.

50. HMRC's case rested essentially on the "negative cash" which Mr Crisp had identified in the cash flow statements, and the failure to retain the till rolls; and the deposits made in the bank accounts, which in turn gave rise to the "substantial discrepancy" in Mr Crisp's "Takings Build-up" schedule.

The cash flow statements

51. Mr Crisp's cashflow statement was based on the Simplex records. These are divided into five sections:

(1) business receipts on a daily basis, divided into "daily takings" and "special items";

(2) amounts paid into the bank, on a daily basis;

(3) cash paid for expenses, itemised and listed on a weekly basis;

(4) cash paid for goods for resale, itemised and listed on a weekly basis; and

(5) the weekly cash balance, based on the totals of all of the above, and giving a total cash in hand carried forwards.

52. Because the expenses were listed on a weekly basis, Mr Crisp took the total expenses as a single amount and deducted them on Friday of each week. He also included the rental income (which was used to assist with the business's cashflow, as set out earlier in this decision) every second week on the basis that it was received fortnightly on a Friday. The resulting cashflow statement identified eight days in the year when the cashflow was negative. These "negative cash" amounts ranged from £6.72 to £934.

53. Mr Karia then prepared his own version of the cashflow statement, using the original receipts for the expenses so that the expenses, like the receipts, were on a daily basis rather than being included as a single weekly amount. However, he also included the two £3,000 cheques which provided extra capital. There was also a difficulty with this spreadsheet because it did not deal properly with numbers below zero.

54. After the first day of the hearing, Mr Arthur, who had not previously worked on the Simplex records, carried out a further analysis. On the second day he told the Tribunal that he had identified a number of errors in Mr Crisp's cashflow statement, including the omission of the £3,000 cash contribution made on 26 June 2006. Mr Arthur said that the negative cashflow amounts were thereby eliminated. HMRC did not seek specifically to challenge Mr Arthur's amendments to the cashflow statement, but their closing submission remained that partnership's records had been "broken".

The failure to retain the till rolls

55. Mrs Newell said that she had never been advised that it was necessary to retain the till rolls and had thought she was following the correct procedure. Mr Arthur submitted that this failure did not mean that the records were incorrect.

56. HMRC said Mrs Newell had been negligent and the failure to keep the till rolls provided further evidence that the business was not keeping the records it was required to keep under TMA s 12B.

Bank accounts, gambling and the Takings Build-up

57. During the enquiry process Mr Crisp produced an analysis of the bank accounts. Mr Karia and Mr Arthur had succeeded in identifying some of the deposits made into those accounts. Mr Crisp accepted that gambling was the origin of receipts totalling £49,824.

58. The "unidentified deposits" which remained totalled £50,586. Apart from one amount of £127 and another of £950, the others were between £1,000 and £4,000. Using the bank accounts and other information, Mr Crisp constructed his "Takings Build-up" statement, which gave a "discrepancy" of £53,748.59. HMRC's case was that this sum was undisclosed profits from Tanya's Takeaway. In closing

submissions, Ms Shields said "HMRC doesn't say that the shortfall doesn't come from gambling: it may well have done, but there is no evidence that it did."

59. Mr Newell and his representatives said the remaining "unidentified deposits" derived from gambling, although one or more might have arisen from a "partner draw" pay-out. Mr Newell said that he did not keep receipts in relation to any of his gambling. In answer to questions about how he funded any shortfalls, for instance that which appeared to exist on his account with Richard Power, he said that he had been gambling for many years, and had a "pot of cash" to make good any losses.

60. Mr Arthur submitted that there was no requirement or reason for Mr Newell to keep records of his gambling transactions. It was not a trade or business, he was simply betting, sometimes on his own behalf, sometimes together with a friend, and sometimes on the friend's behalf. He said that it was "a fantasy" for HMRC to suggest that a small takeaway shop was able to generate around £53,000 of extra profits.

Submissions on the case law

61. Ms Shields said that the onus of proof was on the partners to show that the amendment to the partnership return was wrong, and if the amendment stands good, then the presumption of continuity applies. She cited *Jonas v Bamford* (1973) 51 TC 1, *Norman v Golder* (1944) 26 TC 293 and *Nicholson v Morris* (1976) 51 TC 95.

62. Ms Shields also drew our attention to *Brimelow v Price* (1965) 49 TC 41. Mr Brimelow had sought to argue that the increase in his assets had come from gambling and not, as HMRC had inferred, from undisclosed profits. The High Court held that:

> "It may be that, on balance, [Mr Brimelow] was a successful backer of horses and greyhounds - he certainly had sources of information not open to most people - and it may be that some part (possibly a large part) of the amounts in column 5 are really attributable to betting wins. But that is pure conjecture. He produced no evidence.
>
> If a man makes substantial sums of money in betting - and a number of people do so - it is not unreasonable to expect him to keep records of his betting transactions so that, if he is subsequently challenged by the Revenue authorities to explain an increase in his wealth, he can satisfy them that it is not due to any undisclosed taxable profits but to his betting winnings. If he chooses not to do that, he runs the risk of having attributed to taxable profits what, if he had kept records of his betting transactions, he might have been able to convince the authorities were in fact untaxable betting winnings."

63. Ms Shields said that, like Mr Brimelow, Mr Newell had produced no evidence that the "unidentified deposits" came from his gambling winnings.

The parties' submissions on the penalties

64. Ms Shields submitted that said that the partners had not taken appropriate action to retain the records as required by law; there were inaccuracies in the records, and they had understated their taxable income. As a result, they had been "negligent" in

relation to 2006-07 and 2007-08, with penalties assessed under TMA s 95, and had been "careless" in relation to the next three years, with penalties assessed under FA07, Sch 24.

65. Ms Shields accepted that, since the penalty assessments made under FA 2007, Sch 24 had in fact been calculated on the basis that the partners' behaviour had been "deliberate" rather than "careless", a higher level of mitigation was likely to be appropriate when calculating those penalties than the figures shown on the penalty assessments.

66. Mr Arthur submitted that there was no negligence, but rather the contrary: he said that the partnership's Simplex records had been kept with great care and propriety.

Discussion

HMRC's amended profits

67. The Tribunal accepted Mrs Newell's unchallenged evidence about the number of and type of customers and the price of meals sold by Tanya's Takeaway. This is a small takeaway business with a customer base consisting of local people such as mechanics and taxi drivers. The average price of a meal is no more than £4 and many customers only spend between 50p and £1.50. There are around 70 customers a day. We also accepted the unchallenged evidence of both Mr Newell and Mr Karia, that £13,500 was invested in the business as a capital contribution during the year.

68. HMRC did not explain how they thought the partnership had generated the extra net profit which had been included in the amended return. They relied on the fact that the onus of disproving the increase rested with the partners. Mr Arthur and Mr Newell said that it was impossible for this small takeaway business to have generated these extra profits. The Tribunal considered whether they were correct.

69. At its simplest, the extra profits could represent extra meal sales without any extra purchases or other expenses - in other words, that the existing expenditure was sufficient to generate a much higher level of turnover. HMRC amended the partnership return to include an increase in profit of £54,475. Taking an average price of a meal at £4, that would imply a further 13,619 meals in a year, or something like 260 additional meals in a week. On the basis of a six-day week that would represent a further 43 meals in a day. That would amount to a very significant increase on the estimate of daily custom given to us by Mrs Newell in her evidence. Put at its lowest, which is the basis of this calculation, we would have to have concluded that an additional 43 meals could have been produced and sold on a daily basis, without additional cost. Most of those meals would have to have been sold in the busy period between 12 noon and 1.30 pm, implying a doubling, to 83 meals, of custom in that time. The premises were so small that it had no room for tables and chairs. We do not consider it probable that such an increased volume could have been sustained on a consistent basis. We accept Mrs Newell's evidence, and reject the notion of an increase in sales.

70. Furthermore, we do not consider that increased profit of the nature alleged by HMRC in this case could, in these circumstances, have been generated with no additional costs of sales. We take the view that there would have been an inevitable increase in staff costs and purchases, and that when those increased costs are taken into account, the figure for sales would have to grow even further if the net profit included by HMRC in the partnership statement were to be achieved. As a result, the total daily sales of meals would have to have exceeded the 83 meals discussed in the previous paragraph. That is an even more improbable hypothesis, and it is one that we reject in favour of the clear and compelling evidence of Mrs Newell, which we accept in all respects.

71. Although it is not possible to extrapolate from these numbers to obtain an exact gross profit ratio, increasing the net profit to £61,653 would have meant that the business dramatically exceeded the average of other similar businesses instead of being slightly below that average.

72. We also noted that Tanya's Takeaway did not accept cheques, so the cheques deposited in Mr and Mrs Newell's bank accounts cannot have come from the takeaway. Finally, had the business in fact been making profits of £61,563, there would have been no need for repeated capital injections.

73. We are required by TMA s 50(6)(b) to consider whether the amount contained in the partnership statement is "excessive". For these reasons set out above, we find that this small takeaway business did not have total profits of £61,563. This figure is excessive and cannot stand.

Whether the original profits require amendment

74. We are also required by TMA s 50(6)(b) to "reduce [the profits] accordingly". We therefore went on to consider whether we should reduce the HMRC figure to the original profits, or to some intermediate figure.

75. Mr Arthur submitted that the profit figure as reported was correct. HMRC did not retreat from their submission that the records were broken and thus the profits as declared could not be relied upon. This submission was based on the cashflow statements and the failure to keep the till rolls.

76. We find that the cashflow statements were unreliable. They included the entries for expenses in the Simplex record book, either on a weekly basis (Mr Crisp's analysis) or on a daily basis (Mr Karia's analysis). Where the goods had been purchased by Mr Saunders, he left the invoice with the goods, and the partners entered these in the Simplex record book. However, the actual cash to settle these invoices was not paid out until the partners had settled up with Mr Saunders. As a result, none of the cashflow statements reflects the actual payment of these invoices and are therefore distorted. Furthermore, rental income was received fortnightly and included in the Simplex accounts in the weeks when it was received, but the day of receipt is not included. Mr Crisp made an assumption that the £400 was invariably received on Friday of the week in which it was included in the Simplex book, but this was an

assumption. A slight delay in receipt, or a slight advance in receipt, would change the cashflow statement.

77. We also agreed with Mr Arthur that Mr Crisp's cashflow statement had overlooked £3,000 paid into the business on 26 June 2006. The maximum negative balance on Mr Crisp's statement was £934. Although, as set out in the previous paragraph, the cashflow statement does not reflect the true cash position because of the pattern of Mr Saunders' payments and possibly the timing of the rental receipts, we find that it is nevertheless extremely unlikely that the partnership's cashflow would have been negative once a further £3,000 of cash had been added. In so finding we note that the first instance of negative cash Mr Crisp identified was on 29 June 2006, three days after the overlooked capital contribution of £3,000.

78. HMRC also criticised Mrs Newell for not keeping the till rolls, saying she had destroyed the "primary records". We did not find that the failure to retain the till rolls, of itself, meant that the records kept by Mr and Mrs Newell were incorrect, or that it led to the conclusion that the accounts produced by Mr Karia were incomplete. We also found Mrs Newell to be a transparently honest person, and we believed her when she said she had not understood that she was supposed to keep the till rolls.

79. Ms Shields frequently referred the Tribunal to the partnership's statutory obligations as set out in TMA s 12B. We note, however, that in 2006-07[1] the section included at subsection (4), the following:

> "…the duty under subsection (1) or (2A) above to preserve records may be discharged by the preservation of the information contained in them; and where information is so preserved a copy of any document forming part of the records shall be admissible in evidence in any proceedings before the Commissioners to the same extent as the records themselves."

80. Mr and Mrs Newell transferred the information from the till rolls to the Simplex book each day, other than where there was a difference between that figure and the actual cash received, when Mrs Newell entered the latter figure and raised the discrepancy with her staff on the following day. In our judgment, with the exception of these occasional differences, Mrs Newell met her statutory obligation by preserving the till roll figures in the Simplex cash book. In any event, this was not a case about a breach of TMA s 12B, but an appeal against an amendment to the 2006-07 partnership statement.

81. We have found as a fact, on the basis of Mr Crisp's unchallenged statement, that the partnership's gross profit was lower than that for other similar businesses. We do not have any difficulty in accepting that the partnership's profits were likely to be lower than those of other takeaway businesses because of the extent of local competition, the small size of the operation, the somewhat restricted opening hours and the lack of any facility to use a credit card.

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[1] The section was amended, so as to remove these words, by FA 2008 s 115, Sch 37 paras 1, 2 with effect from 1 April 2009 (by virtue of SI 2009/402).

82. As a result, we find that the partnership's reported profits do not require amendment, whether because of the cashflow statements, or because of the failure to retain the till rolls, or because of the relatively low gross profit ratio.

Mr Newell's gambling

83. In essence, HMRC's case by the end of the hearing rested on the "unidentified deposits" made into Mr Newell's bank account, and Mr Crisp's refusal to accept that Mr Newell's gambling was the source of these receipts. It was evident from the Richard Power information that Mr Newell was a serious gambler, and that he bet significant sums often on a daily basis. HMRC accepted this, and also accepted that over £50,000 of the deposits did come from gambling. They refused to accept the balance on the basis that they had "no evidence".

84. As stated earlier in this decision notice, Mr Newell had given very clear oral evidence that he gambled, not only with Richard Power, but also with other bookmakers and on the track. We accepted his evidence, and we also accepted his evidence that some of the gambling was carried out on behalf of a friend.

85. HMRC did not seek to argue that Mr Newell had any other source of income, such as an undisclosed trade or business, which would have given rise to these deposits, and there was no evidence of any other such sources. Having refused to accept that the deposits came from gambling, and in the absence of any alternative source, HMRC had proceeded on the basis that the money had come from Tanya's Takeaway.

86. For the reasons we have already given, this submission was not supported by the very clear factual evidence about the nature and size of that business. Some of the deposits were third party cheques, yet Tanya's Takeaway does not accept cheques; neither does it do outside catering. The cash deposits mostly ranged between £1,000 and £4,000: we have already found that these sums did not arise from the sale of small value meals and snacks. It is, however, entirely reasonable that both cash and cheques came from Mr Newell's gambling, given the scale and frequency with which it was undertaken, and the fact that he shared his friend's profits when he had placed a successful bet on his behalf.

87. Ms Shields drew our attention to *Brimelow v Price*. In that case Mr Brimelow had no records whatsoever to substantiate his alleged betting; Mr Newell has a record of over 1,500 transactions in a single year with one of a number of book-makers. He gave cogent oral evidence, which we accepted, that he had been gambling for over twenty years, and that he was not only placing bets on his own behalf, but also for and with a friend, who rewarded his efforts with a share of profits. All cases of this nature have to be decided on the facts, and the facts in this case are very different from those in *Brimelow.*

Decision

88. Ms Shields correctly stated that the burden of proof in relation to 2006-07 rests with the partners, to show that the revised assessment was wrong. We find that they

have satisfied that burden. We restore the partnership statement to its original figures, and we allow the appeal in relation to 2006-07.

89. HMRC's amendments to the partnership statements for the later years relied on the principle of continuity. As we have found there is no amendment to the 2006-07 partnership return, the later statements do not require amendment under that principle, and the appeals in relation to those years are also allowed.

90. Since the partners have not been negligent or careless, the appeals against the penalties for each year are also allowed.

Application for permission to appeal

91. 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.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 13 December 2013

THE LEGISLATION

Taxes Management Act 1970

12B Records to be kept for purposes of returns

(1) Any person who may be required by a notice under section 8, 8A, 13 or 12AA of this Act (or under any of those sections as extended by section 12 of this Act) to make and deliver a return for a year of assessment or other period shall—

(*a*) keep all such records as may be requisite for the purpose of enabling him to make and deliver a correct and complete return for the year or period; and

(*b*) preserve those records until the end of the relevant day, that is to say, the day mentioned in subsection (2) below or, where a return is required by a notice given on or before that day, whichever of that day and the following is the latest, namely—

(i) where enquiries into the return are made by an officer of the Board, the day on which, by virtue of section 28A(1) or 28B(1) of this Act, those enquiries are completed; and

(ii) where no enquiries into the return are so made, the day on which such an officer no longer has power to make such enquiries.

(2) The day referred to in subsection (1) above is—

(*a*) in the case of a person carrying on a trade, profession or business alone or in partnership or a company, the fifth anniversary of the 31st January next following the year of assessment or (as the case may be) the sixth anniversary of the end of the period;

(*b*) in any other case, the first anniversary of the 31st January next following the year of assessment

(2A) Any person who—

(*a*) is required, by such a notice as is mentioned in subsection (1) above given at any time after the end of the day mentioned in subsection (2) above, to make and deliver a return for a year of assessment or other period; and

(*b*) has in his possession at that time any records which may be requisite for the purpose of enabling him to make and deliver a correct and complete return for the year or period,

shall preserve those records until the end of the relevant day, that is to say, the day which, if the notice had been given on or before the day mentioned in subsection (2) above, would have been the relevant day for the purposes of subsection (1) above.

(3) In the case of a person carrying on a trade, profession or business alone or in partnership—

(*a*) the records required to be kept and preserved under subsection (1) or (2A) above shall include records of the following, namely—

(i) all amounts received and expended in the course of the trade, profession or business and the matters in respect of which the receipts and expenditure take place, and

(ii) in the case of a trade involving dealing in goods, all sales and purchases of goods made in the course of the trade; and

(*b*) the duty under that subsection shall include a duty to preserve until the end of the relevant day all supporting documents relating to such items as are mentioned in paragraph (*a*)(i) or (ii) above.

(4) Except in the case of records falling within subsection (4A) below, the duty under subsection (1) or (2A) above to preserve records may be discharged by the preservation of the information contained in them; and where information is so preserved a copy of any document forming part of the records shall be admissible in evidence in any proceedings before the Commissioners to the same extent as the records themselves.

(4A) The records which fall within this subsection are—

(*a*) any statement in writing such as is mentioned in—

(i) subsection (1) of section 234 of the principal Act (amount of qualifying distribution and tax credit), or

(ii) section 495(1) or 975(2) or (4) of ITA 2007 (statements about deduction of income tax), which is furnished by the company or person there mentioned, whether after the making of a request or otherwise;

(*b*) any certificate or other record (however described) which is required by regulations under section 566(1) of the principal Act to be given to a sub-contractor (within the meaning of Chapter IV of Part XIII of that Act) on the making of a payment to which section 559 of that Act (deductions on account of tax) applies;

(*c*) any such record as may be requisite for making a correct and complete claim in respect of, or otherwise requisite for making a correct and complete return so far as relating to, an amount of tax—

(i) which has been paid under the laws of a territory outside the United Kingdom, or

(ii) which would have been payable under the law of such a territory but for a relief to which section 788(5) of the principal Act (relief for promoting development and relief contemplated by double taxation arrangements) applies.

(5) Subject to subsections (5A) and (5B) below, any person who fails to comply with subsection (1) or (2A) above in relation to a year of assessment or accounting period shall be liable to a penalty not exceeding £3,000.

(5A) ....

(5B) Subsection (5) above also does not apply where—

(*a*) the records which the person fails to keep or preserve are records falling within paragraph (*a*) of subsection (4A) above; and

(*b*) an officer of the Board is satisfied that any facts which he reasonably requires to be proved, and which would have been proved by the records, are proved by other documentary evidence furnished to him.

(6) For the purposes of this section—

(*a*) a person engaged in the letting of property shall be treated as carrying on a trade; and

(*b*) "supporting documents" includes accounts, books, deeds, contracts, vouchers and receipts.

28B Completion of enquiry into partnership return

(1) An enquiry under section 12AC(1) of this Act is completed when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions.

In this section "the taxpayer" means the person to whom notice of enquiry was given or his successor.

(2) A closure notice must either—

(a) state that in the officer's opinion no amendment of the return is required, or

(b) make the amendments of the return required to give effect to his conclusions.

(3) A closure notice takes effect when it is issued.

(4) Where a partnership return is amended under subsection (2) above, the officer shall by notice to each of the partners amend—

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

(b) the partner's company tax return,

so as to give effect to the amendments of the partnership return.

(5) –(7) …

30B Amendment of partnership statement where loss of tax discovered

(1) Where an officer of the Board or the Board discover, as regards a partnership statement made by any person (the representative partner) in respect of any period—

(a) that any profits which ought to have been included in the statement have not been so included, or

(b) that an amount of profits so included is or has become insufficient, or

(c) that any relief or allowance claimed by the representative partner is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (3) and (4) below, by notice to that partner so amend the partnership return as to make good the omission or deficiency or eliminate the excess.

(2) Where a partnership return is amended under subsection (1) above, the officer shall by notice to each of the relevant partners amend—

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

(b) the partner's company tax return,

so as to give effect to the amendments of the partnership return.

(3) Where the situation mentioned in subsection (1) above is attributable to an error or mistake as to the basis on which the partnership statement ought to have been made, no amendment shall be made under that subsection if that statement was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

(4) No amendment shall be made under subsection (1) above unless one of the two conditions mentioned below is fulfilled.

(5) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by[2] —

(a) the representative partner or a person acting on his behalf, or

(b) a relevant partner or a person acting on behalf of such a partner.

(6) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the representative partner's partnership return; or

(b) informed that partner that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(7) Subsections (6) and (7) of section 29 of this Act apply for the purposes of subsection (6) above as they apply for the purposes of subsection (5) of that section; and those subsections as so applied shall have effect as if—

(a) any reference to the taxpayer were a reference to the representative partner;

(b) any reference to the taxpayer's return under Section 8 or 8A were a reference to the representative partner's partnership return; and

(c) sub-paragraph (ii) of paragraph (a) of subsection (7) were omitted.

(8) An objection to the making of an amendment under subsection (1) above on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the amendment.

(9) In this section— "profits"—

(a) in relation to income tax, means income,

(b) in relation to capital gains tax, means chargeable gains, and

(c) in relation to corporation tax, means profits as computed for the purposes of that tax;

"relevant partner" means a person who was a partner at any time during the period in respect of which the partnership statement was made.

(10) Any reference in this section to the representative partner includes, unless the context otherwise requires, a reference to any successor of his.

31 Appeals: right of appeal

(1) An appeal may be brought against—

(a) …

(b) any conclusion stated or amendment made by a closure notice under section 28A or 28B of this Act (amendment by Revenue on completion of enquiry into return),

(c) any amendment of a partnership return under section 30B(1) of this Act (amendment by Revenue where loss of tax discovered), or

(d) any assessment to tax which is not a self-assessment.

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[2] For years before 2009-10, the words here were “the fraudulent or negligent conduct on the part of”.

(2) - (3) ….

(4) This section has effect subject to any express provision in the Taxes Acts, including in particular any provision making one kind of assessment conclusive in an appeal against another kind of assessment.

48 Application to appeals and other proceedings

(1) In the following provisions of this Part of this Act, unless the context otherwise requires—

(a) "appeal" means any appeal under the Taxes Acts;

(b) a reference to notice of appeal given, or to be given, to HMRC is a reference to notice of appeal given, or to be given, under any provision of the Taxes Acts.

(2) In the case of—

(a) an appeal other than an appeal against an assessment, the following provisions of this Part of this Act shall, in their application to the appeal, have effect subject to any necessary modifications, including the omission of sections 54A to 54C and 56 below;

(b) any proceedings other than an appeal which, under the Taxes Acts, are to be subject to the relevant provisions of this Part of this Act, the relevant provisions—

(i) shall apply to the proceedings as they apply to appeals;

(ii) but shall, in that application, have effect subject to any necessary modifications, including (except in the case of applications under section 55 below) the omission of section 56 below.

(3) In subsection (2), a reference to the relevant provisions of this Part of this Act is a reference to the following provisions of this Part, except sections 49A to 49I and 54A to 54C.

50 Procedure

(1)–(5) …

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

(a) that the appellant is overcharged by a self-assessment;

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

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

the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

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

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

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

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

the assessment or amounts shall be increased accordingly.

(7A) …

(8) …

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

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

(b) …,

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

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

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

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

(b) Tribunal Procedure Rules, and

(c) the Taxes Acts.

95A Incorrect partnership return or accounts

(1) This section applies where, in the case of a trade, profession or business carried on by two or more persons in partnership—

(a) a partner (the representative partner)—

(i) delivers an incorrect partnership return, or

(ii) –(iii) ….and

(b) either he does so fraudulently or negligently, or his doing so is attributable to fraudulent or negligent conduct on the part of a relevant partner.

(2) Each relevant partner shall be liable to a penalty not exceeding the difference between—

(a) the amount of income tax or corporation tax payable by him for the relevant period (including any amount of income tax deducted at source and not repayable), and

(b) the amount which would have been the amount so payable if the return, statement, declaration or accounts made or submitted by the representative partner had been correct;

and in determining each such penalty, regard shall be had only to the fraud or negligence, or the fraudulent or negligent conduct, mentioned in subsection (1)(b) above.

(3) Where, in respect of the same return, statement, declaration or accounts, penalties under subsection (2) above are determined under section 100 of this Act as regards two or more relevant partners—

(a) no appeal against the determination of any of those penalties shall be brought otherwise than by the representative partner or a successor of his;

(b) any appeal by that partner or successor shall be a composite appeal against the determination of each of those penalties; and

(c) section 100B(3) of this Act shall apply as if that partner or successor were the person liable to each of those penalties.

(4) In this section—

"relevant partner" means a person who was a partner at any time during the relevant period;

"relevant period" means the period in respect of which the return was made.

Finance Act 2007, Schedule 24[3]

1. Error in taxpayer's document

(1) A penalty is payable by a person (P) where—

(a) P gives HMRC a document of a kind listed in the Table below, and

(b) Conditions 1 and 2 are satisfied.

(2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—

(a) an understatement of a liability to tax,

(b) a false or inflated statement of a loss, or

(c) a false or inflated claim to repayment of tax.

(3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part.

(4) Where a document contains more than one inaccuracy, a penalty is payable for each inaccuracy.

Tax	***Document***
…	…
Income tax or capital gains tax	Partnership return.
Income tax or capital gains tax	Statement or declaration in connection with a partnership return.
….	….

3. Degrees of culpability

(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is—

(a) "careless" if the inaccuracy is due to failure by P to take reasonable care,

(b) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and

(c) "deliberate and concealed" if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).

(2) ….

[3] This is the wording which applied from 1 April 2009. Slightly different wording was in force from 1 April 2008 to 31 March 2009, but the difference is not material in the context of this decision.