TC03439

Appeal number: TC/2012/00638

Income Tax – On course bookmaker – Appeals against discovery assessments and closure notices – Whether presumption of continuity applicable – Whether sufficient evidence to displace assessments/closure notices – Penalties – Appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

RAYMOND BROWN **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
MRS SUSAN HEWETT OBE

Sitting in public at Southampton Appeals Service, Barrack Block, London Road Southampton on 27 and 28 February 2014

Martyn Arthur, of Martyn F Arthur Forensic Accountant Ltd, for the Appellant

Colin Brown, Officer, of HM Revenue and Customs, for the Respondents

DECISION

1. Raymond Philip Brown appeals against "discovery" assessments by HM Revenue and Customs ("HMRC) under s 29 of the Taxes Management Act 1970 ("TMA") for the years 2002-03, 2003-04, 2004-05 and 2007-08 and closure notices making amendments to his 2004-05 and 2006-07 self-assessment tax returns issued by HMRC under s 28A TMA. Although the sums assessed and the amendments made were originally for different amounts, following discussions between the parties, it is agreed that the amounts in dispute, and with which this appeal is concerned, are as follows:

2002-03 – £57,842.57

2003-04 – £43,818.52

2004-05 – £48,735.24

2005-06 – £50,379.89

2006-07 – £60,518.33

2007-08 – £62,562.19

2. On 19 November 2010 HMRC issued penalty determinations on Mr Brown under s 95 TMA for "negligently delivering to an officer of HMRC incorrect returns" as follows:

2002-03 – £28,921

2003-04 – £21,909

2004-05 – £24,368

2005-06 – £25,190

2006-07 – £30,259

2008-09 – £31,281

3. Mr Brown was represented by Martyn Arthur of Martin F Arthur Forensic Accountant Limited and HMRC by its presenting officer, Colin Brown.

Evidence

4. In addition to several bundles of documentary evidence which included copies of the correspondence we heard from the following who gave sworn evidence on which they were cross examined:

(1) Iola Stevens, a former officer of HMRC who, although now retired, carried out an enquiry into the 2005-06 and 2006-07 self-assessment tax returns of Raymond Phillip Brown, the appellant, and was the officer responsible for making the assessments and issuing the Closure Notices, that have given rise to this appeal;

(2) Raymond Philip Brown, the appellant;

(3) David Hancock FCA of David Hancock & Co, Chartered Accountants and Business Advisors, who was Mr Brown's accountant having acted for him since the 1990s; and

(4) Raymond Royston Brown, Mr Brown's father.

5. To prevent any confusion between the various Mr Browns, Raymond Philip Brown the appellant, his father Raymond Royston Brown and HMRC's presenting officer Colin Brown, in this decision we shall refer to the appellant as Mr Brown, his father as Mr Brown Senior and refer to the submissions on behalf of HMRC without mentioning HMRC's Mr Brown by name as would usually be the case.

Facts

6. Mr Brown is an on-course bookmaker who has been trading since 21 May 1994 when he was 21. Originally he attended greyhound races until 1999 when the rules changed and he was able to acquire pitches at racecourses. He explained that since the advent of internet betting on-course bookmakers' margins have been squeezed and their numbers have fallen from several thousand to around 400 today. Also with the closure of racecourses at Hereford and Folkestone in 2012 some 30 days of racing have been lost with the consequent drop in turnover and profits for bookmakers.

7. During 2005-06 Mr Brown said that he had attended race meetings on approximately 240-250 days in addition to operating at Portsmouth Greyhound Stadium, which was then open, some 120 nights operating on a margin of between 5% and 6%. He explained that racing, especially mid-week, was very much subject to the weather and that there was an extremely limited time before each race when bets could be taken, eg with greyhounds this would be for three minutes before each race therefore if there were 12 races in one night it would only allow for 36 minutes to take bets. In addition there were often "charity nights" most Saturdays and although this might mean more bets were taken it would not necessarily result in more profit as he would be expected to support the charity concerned.

8. When cross examined Mr Brown said that it was common for him, like all bookmakers, to carry large amounts of cash as it was needed when at the races to pay out winnings. He said that while he did not usually bet himself when at the races he did occasionally back Southampton Football Club who he supported and agreed that such bets were more a question of following his heart rather than his head.

9. Although he has an accountant, Mr Brown does his own bookkeeping and at the end of each year provides his accountant, Mr Hancock, with his annual summary of figures for each heading on expenditure and bookmaking results and daily costs. The business accounts are prepared, without audit, on the basis of this information without the provision of any documents although these are made available to Mr Hancock if and when any item needs clarification. However, Mr Brown includes estimates in his figures where he has not kept receipts and these are shown in his manual listings of daily costs incurred at racecourses.

10. Mr Brown does not distinguish between cash held for business and private purposes or have any written system of recording how much he holds. Also, no cash reconciliation is undertaken by Mr Hancock. This practice, as Mr Hancock explained in his letter of 26 November 2007 to Mrs Stevens of HMRC, has remained unchanged since 2001-02 when an enquiry was undertaken by the Inland Revenue (the predecessor of HMRC). At the conclusion of that enquiry a Statement of Assets was prepared, as at 21 February 2005, which confirmed that Mr Brown held £77,000 in cash.

11. Mr Brown filed his 2005-06 self-assessment tax return on 27 June 2006. He subsequently received a letter from HMRC, dated 19 October 2007, notifying him of the commencement of an enquiry into the return.

12. Mr Brown filed his 2006-07 return on 22 January 2008. A letter from HMRC dated 11 July 2008 notified him of an enquiry into that return also.

13. Records relating to the 2005-06 return were provided to HMRC and on 11 July 2008 a meeting was held between Mrs Stevens, Mr Brown and Mr Hancock. On 21 August 2008 discovery assessments were issued for 1996-97 to 2004-05 inclusive and 2007-08 with an amendment to the 2005-06 return on the basis of unexplained deposits made by Mr Brown into various bank accounts. The assessments for the previous and subsequent years were also made on this basis, applying the presumption of continuity, with adjustments made by reference to the Retail Price Index as appropriate for the earlier and later years.

14. Mr Brown appealed against all of these assessments on 16 September 2008. However, we are no longer concerned with those for 1996-97 to 2001-02 as they were withdrawn by HMRC at the time the Statement of Case was served in these proceedings.

15. Further correspondence between Mr Hancock and Mrs Stevens followed and more information was provided to HMRC which explained the source of many but not all the lodgements into the bank accounts on which the assessments had been based.

16. For example, Mr Hancock's letter of 21 October 2008 to Mrs Stevens enclosed a letter from Mr Brown Senior dated 16 October 2008. In that letter Mr Brown Senior confirms that on 1 July 2005 he had given his son, Mr Brown £25,000 in cash to "keep safe and if you need to use it you can" and that Mr Brown had used the money to buy a Cheltenham pitch on the understanding that he would repay his Father when he sold his old Cheltenham pitch. On 22 August 2009 Mr Brown Senior wrote to HMRC Portsmouth in the following terms:

> Dear Sir/Madam,
>
> I am making this statement further to my letter dated 16 October 2008 which I understand was provided to you as an attachment to Mr Hancock's letter of 21 October 2008.

> I habitually hold many thousands of pounds in cash at any given time, and this has been my practice for many years. Furthermore, over the years I have released capital from the sale of residences and I have been successful as a recreational gambler, having studied the horseracing industry for a lifetime. I do not keep records of my cash holdings at any given time as these are my private transactions and was not expecting to have to "prove" them as they are nobody else's business.
>
> I definitely provided my son Mr R R Brown (sic) with the cash loans which I understand you are querying – ie £25,000 in 2005-06, £24,300 to purchase pitches and another £16,000 in 2006-07 and a further £7,850 to purchase pitches and another £7,000 in 2007-08.

17. However, when giving evidence, Mrs Stevens made it clear that she doubted the veracity of Mr Brown Senior's assertions in these letters and did not accept that he had, in fact, made any loans to his son Mr Brown.

18. In his evidence, Mr Brown Senior, who had himself been a bookmaker since 1965, said that he lent money to all of his children and in reality he did not expect to get it back as "they will get it anyway" and that he did not need so much money now he was older. He explained that he derived much of his money from his successful gambling but that he had also bought and sold two properties in a sought after area of Hampshire, one of which he had built at a net cost of £63,000 and subsequently sold for approximately £575,000.

19. Because of the information required by Mrs Stevens in relation to Mr Brown's affairs it was necessary for Mr Hancock to undertake a more detailed analysis of his client's records than had previously been the case. This clear from his letter, dated 9 September 2008, to Mrs Stevens in which he writes:

> This exercise has involved me working closer with Mr Brown's affairs than I have ever done in the past.

As a result of this further analysis, Mr Hancock was able to identify errors that had been made and, as is clear from the correspondence, it was accepted that the returns filed by Mr Brown were not accurate in particular:

(1) The entry on Mr Brown's summary of wins and losses for the year to 31 March 2006 understates the income (net of losses) for betting at Portsmouth Greyhound Stadium by £8,517, Newbury Racecourse by £50 and Chepstow Racecourse by £19.60;

(2) An adjustment of approximately £6,000 was necessary to correct an understatement of his Mr Brown's business profits for 2007-08;

(3) Mr Brown's 2005-06 self-assessment tax return omitted "foreign" income of £2,300 (£2,261 interest on an Australian property deposit and £39 interest on an Australian account);

(4) The 2005-06 return also understated UK bank and building society interest by £566; and

(5) The 2006-07 return omitted "foreign" income of £40 (interest on Australian account).

20. On 26 March 2008 Mr Brown, when travelling with his parents in their car, had been stopped by UK Border Agency ("UKBA") Officers at Dover when returning from France and over £30,000 in cash that he was carrying was seized. In connection with court proceedings to recover this money Mr Hancock prepared a detailed "Cash Account and Availability of Funds Statement" for the three years ended 5 April 2006, 31 March 2007 and 31 March 2008. This report was in the form of a letter, dated 9 January 2009, from David Hancock & Co to Mr Brown

21. The dispute between Mr Brown and the UKBA was resolved without litigation by the payment by the UKBA of Mr Brown's costs and the return of his money in 2010. However, Mr Hancock's copy of the letter of 9 January 2009 containing the "Cash Account and Availability of Funds Statement" was sent by Mr Hancock as an enclosure to his letter to Mrs Stevens of 22 May 2009.

22. The 9 January 2009 letter states that:

> The purpose of this letter and the attached documents is to provide you with a response to the request made by HMRC Law Enforcement Investigation Service, Dover in their letter dated 1 April 2008 (page 1) ie
>
> "**The following is required in addition to the papers submitted to me at court:**
>
> A clear audit trail that shows precisely how, where and when the cash "float" you always carry was generated – possibly by way of a proper cash reconciliation record from a specific point in time, showing capital held, cash bets received, payouts, bankings, retained cash carried forward etc."
>
> We have prepared the attached documents by means of an examination of your records of daily bookmaking results, together with all your business and personal bank accounts, plus building society accounts and credit card statements and other relevant documents. We have also held several in-depth working sessions with you. As you are aware – on many occasions you have had to request copies from your bank of various paying-in slips and copies of cheques paid.
>
> For convenience we have divided our workings into tax years (slightly adjusted for 2006-07 and 2007-08 as it was convenient to use 31 March month end as the cut-off date).
>
> The Cash Account starts with an estimated cash holding of £86,000 at 6/4/05, the beginning of the 2005-06 tax year. We have used this figure as it can be related to the amount you included in a formal Statement of Personal Assets and Liabilities and Business Interests at 21/02/05. You counted the cash held on that date and reported £77,000 cash, to which must be added the £12,000 "Sleepers" (*Note) cash that you also held at that time. You have advised us that it is probable that the cash holding would have depleted by about £3,000 during the period 12/02/05 to 6/4/05.

> *"Sleepers" is a term for a punter who fails to collect his winnings. We understand that you are legally bound to hold this cash in readiness for repayment to the winning punter should he ever claim it.
>
> The Cash Account was constructed by starting with your business records of daily wins/losses and then adding columns for other known cash receipts and payments. Your cash float has never distinguished between business and personal cash – but is instead treated by you as one Cash Float.
>
> …
>
> Given the retrospective nature of this exercise, it is recognised that the individual daily cash balances shown … [in] the Cash Accounts will not be correct to the penny, and they are not intended to create that impression. The overall picture however is clear enough for the purpose of judging whether the sun of money you were carrying on 26 March 2008 is consistent with the records of your legitimate business and your established day-to-day practice. There are still some areas where further work could have resulted in a marginal increase in the overall accuracy of the attached schedules, but we have come to the point where additional accountancy costs cannot be justified given that a reasonable conclusion can be drawn on the basis of the work that has now been done.

23. On 27 September 2010 Mr Hancock wrote to Mrs Stevens requesting that she close the enquiry, Mrs Stevens replied on 20 October 2010 setting out HMRC's revised conclusions taking account of the information that had been provided and reduced the assessments accordingly. Also, on 20 October 2010, closure notices were issued for 2005-06 and 2006-07 together with a discovery assessment for 2007-08.

24. Although the parties did attempt to settle the matter through an alternative dispute resolution this did not prove possible and a statutory review was undertaken by HMRC which upheld the assessments and amendments stated in closure notices. Mr Brown was notified of the outcome of the review by letter dated 25 November 2011.

25. On 21 December 2011 Mr Brown appealed to the Tribunal.

Law

26. Under s 9A TMA HMRC may, on giving notice to the person who has submitted a tax return, open an enquiry into that return provided that notice has been given within the statutory time limit, which for 2006-07 return was 12 months after the filing date for a return delivered on or before that date and for subsequent returns is 12 months from the date the return was filed.

27. Section 28A TMA provides that an enquiry under s 9A TMA is completed when an officer of HMRC *"by a notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions.*" A closure notice takes effect when it is issued and must state either that no amendment to the return is required or

make the amendments required (as in the present case) to give effect to the officer's conclusions (see s 28A(2) TMA).

28. Insofar as it applies to this appeal, s 29 TMA provides:

> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.
>
> (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.
>
> (4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
>
> 5) 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 taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or
>
> (b) informed the taxpayer 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.
>
> (6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—
>
> (a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

> (b) it is contained in any claim made as regards the relevant [year of assessment] by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;
>
> (c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer, whether in pursuance of a notice under section 19A of this Act or otherwise; or
>
> (d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above –
>
> (i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or
>
> (ii) are notified in writing by the taxpayer to an officer of the Board.

29. Therefore, if HMRC "discover" income, which ought to have, but has not been assessed for income tax they make an assessment in that amount to make good the loss of tax. If a return has been submitted HMRC may only make an assessment for this purpose if the loss of tax has been brought about as a result of the careless or deliberate action of the taxpayer or a person acting on his or its behalf or at the time the enquiry window had closed, or an enquiry was completed, 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 insufficiency of tax. Information is made available to an officer only if it is of a type specified in s 29(6) TMA. It is clear from *Langham v Veltema* that s 29(6) TMA constitutes an exhaustive list of the sources of information available and not merely an inclusive definition.

30. Unlike a discovery, which depends on an individual inspector reaching a conclusion that there has been an insufficiency, as Auld LJ said in *Langham v Veltema*, at [44]:

> "… the subsection provides an objective test of awareness of insufficiency, expressed as a negative condition in the form that an officer "could not have been reasonably expected … to be aware of the" insufficiency. It also allows, as section 29(6) expressly does, for constructive awareness of insufficiency, that is, for something less than an awareness of an insufficiency, in the form of an inference of insufficiency."

31. The approach of the Tribunal to assessments has been considered by the Court of Appeal, albeit in a VAT context in *Khan (trading as Greyhound Dry Cleaners) v Customs and Excise Commissioners* [2006] STC 1167 in which Carnwath LJ (as he then was), said, at [69]:

> "The position on an appeal against a "best of judgment" assessment is well-established. The burden lies on the taxpayer to establish the correct amount of tax due:
>
> > "The element of guess-work and the almost unavoidable inaccuracy in a properly made best of

> judgment assessment, as the cases have established, do not serve to displace the validity of the assessments, which are *prima facie* right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right." (*Bi-Flex Caribbean Ltd v Board of Inland Revenue* (1990) 63 TC 515, 522-3 PC per Lord Lowry).

That was confirmed by this court, after a detailed review of the authorities, in *Customs and Excise Commissioners v Pegasus Birds Ltd* [2004] STC 1509; [2004] EWCA Civ 1015. We also cautioned against allowing such an appeal routinely to become an investigation of the bona fides or rationality of the "best of judgment" assessment made by Customs:

> "The tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the Tribunal should not allow it to be diverted into an attack on the Commissioners' exercise of judgment at the time of the assessment." (para 38(i)).

It should be noted that this burden of proof does not change merely because allegations of fraud may be involved (see e.g. *Brady v Group Lotus Car Companies plc* [1987] STC 635, 642 per Mustill LJ)."

32. With regard to the presumption of continuity in *Jonas v Bamford (HM Inspector of Taxes)* (1973) 51 TC 1 Walton J said (at 24):

> "… once the inspector comes to the conclusion that, on the facts which he has discovered, Mr Jonas has additional income beyond which he has so far declared to the Inspector, then the usual presumption on 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 clearly on the taxpayer."

However, as the Tribunal noted in *Guide Dogs for the Blind Association v HMRC* [2012] UKFTT 687 (TC) and *Aeroassistance Logistics Ltd v HMRC* [2013] UKFTT 214 (TC) the presumption of continuity is only a presumption which may be rebutted.

33. Section 50(6) TMA provides that if, on an appeal, it appears to the Tribunal that an appellant is overcharged by an assessment the assessment shall be reduced accordingly but "*otherwise the assessment … shall stand good.*"

34. A liability to a penalty arises under s 95 TMA where a person "*fraudulently or negligently*" delivers an incorrect return with the penalty being the difference between the tax shown on return and the amount of tax that would have been payable if the return had been correct.

35. In the present case there is no suggestion of fraud on the part of Mr Brown, rather HMRC's case was that he had negligently delivered incorrect returns. In such circumstances, as Judge Berner said in *Anderson (Deceased) v HMRC* [2009] UKFTT 258 (TC) at [22]:

> "The test to be applied, in my view, is to consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done."

36. The decision of Tax and Chancery Chamber of the Upper Tribunal in *Colin Moore v HMRC* [2011] UKUTT 239 (TCC) confirmed that the application of this test is a question of fact for the Tribunal. It is accepted that it is for HMRC to establish that Mr Brown was negligent in order for the penalties to be upheld.

37. The amount of the penalty is determined under s 100 TMA by an officer of HMRC setting it "*at such amount as, in his opinion, is correct or appropriate*." Although the Tribunal does not have the power to mitigate a penalty under s 102 TMA, s 100B TMA provides that if a penalty appears to be excessive the Tribunal may "*reduce it to such other amount … as it considers appropriate*."

Discussion

38. It is accepted that HMRC have made a "discovery" and were entitled to issue assessments under s 29 TMA. It is also accepted that HMRC were entitled to make the amendments to Mr Brown's 2005-06 and 2006-07 self-assessment tax returns. Also, it is not disputed that the underlying business records were not wholly reliable, arithmetical mistakes were made and the summary of Mr Brown's income from which the returns were completed was not accurate resulting in a loss of tax. As such, as is clear from *Khan (trading as Greyhound Dry Cleaners) v Customs and Excise Commissioners* and the cases cited in that decision, our primary task is to find the correct amount of tax, so far as possible on the material properly available to us. Furthermore, until Mr Brown shows that they are wrong and shows positively what corrections should be made in order to make them right, or more nearly right, the assessments and amendments shall "stand good".

39. Also, given there has been no material change in the way that Mr Brown has operated over the years concerned, we consider that it was appropriate for HMRC to apply the presumption of continuity when making the assessments and amendments in this case and that nothing has been advanced on behalf of Mr Brown to rebut that presumption.

40. HMRC's case was based on unexplained bankings of £139,414 made by Mr Brown, which, it is contended, should be treated as additional business income and hence profit.

41. However, Mr Brown was insistent that on the margins at which he operated, some 5% or 6% on 2005-06, it would not have been possible for him to generate enough revenue to have achieved such a profit and that to do so, if expenses were taken into account, he would need to have had a turnover of over £4 million.

42. Although Mr Brown's evidence appeared to be credible, and we do not doubt its sincerity or honesty, it was not supported or corroborated by any independent or documentary evidence despite his statement in the Notice of Appeal that:

> ... any Bookmaker will tell you that it is a mathematical impossibility for an on-course Bookmaker such as me to achieve [such] sustained profits … It is impossible because of the combinations of the volumes of business that would be necessary and the mathematics of the odds involved.

In the absence of any such independent or documentary evidence in relation to the betting industry in general and on-course bookmaking in particular we are unable to find that Mr Brown has adduced sufficient evidence to completely displace the assessments and amendments, although it does not follow that these should stand without any alteration given that there is relevant evidence contained in the "Cash Account and Availability of Funds Statement" prepared by Mr Hancock to enable the correct amount of tax to be ascertained.

43. HMRC dispute the opening balance to the Cash Account of Mr Hancock's document and also whether Mr Brown did, in fact, receive a loan from his father Mr Brown Senior.

44. Unlike Mrs Stevens we have had the benefit of having heard from and seen Mr Brown Senior who gave his evidence on oath. We accept his evidence of how he often "lent" money to his children, usually without expecting it to be repaid, and find that he did make the loans to Mr Brown that he said he did. As such these sums cannot therefore be attributed to the business income of Mr Brown and should not be taken into account in relation to the assessments and amendments.

45. The other matter raised by HMRC, the increase of £12,000 in the cash held by Mr Brown as shown in the Cash Account in April 2005 compared to that shown in Statement of Assets on 21 February 2005 was explained by Mr Brown as cash he held in relation to "sleepers", ie money owed to those who had not collected their winnings to which he was not legally entitled. He said that as it was not his money to use it could not be treated as an asset of his although it still formed part of his cash flow.

46. HMRC contended that Mr Brown is seeking to "have it both ways" and that Mr Brown's claim was contradictory. We do not agree. Clearly it would be incorrect to include "sleepers" in a Statement of Assets as the cash does not belong to him and therefore cannot be an asset of Mr Brown. However, it is cash held by him and as such does form part of the analysis of his cash movements as shown in Mr Hancock's Cash Flow document

47. Turning to the penalties, we have already noted that there were errors in the returns, arithmetical mistakes were made and the summary of Mr Brown's income from which the returns were completed was not accurate. In our view this is not what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done. Therefore, in the circumstances we find that the returns were negligently prepared and that Mr Brown is liable to penalties.

48. Mrs Stevens explained that HMRC have a system of abatement for penalties of 20% for disclosure; 40% for co-operation and 40% for "seriousness" which is based on the size of omissions and seriousness of the "offence".

49. In this case in the absence of a positive, voluntary and useful contribution to HMRC's knowledge of irregularities HMRC gave Mr Brown 10% abatement for disclosure, an abatement of 20% for Mr Brown's co-operation and 20% for seriousness, a total abatement of 50% reducing the penalties for each year.

50. Adopting the same basis on abatement as HMRC we consider, having regard to the circumstances of the case, that there should be greater abatement for co-operation, given that Mr Brown attended a meeting with HMRC and taking into account the work undertaken by Mr Hancock. We would therefore increase this from 20% to 30%. However, we accept the view of HMRC with regard to disclosure and seriousness. As such the total abatement of the penalties should be increased from 50% to 60%.

Decision and Direction

51. Having regard to the circumstances of the case we allow the appeals in part and direct that the parties use their best endeavours to determine the figures in respect of the assessments, amendments and penalty determinations in the light of our findings, in particular in relation to the loan from Mr Brown Senior and opening balance on the Cash Account prepared by Mr Hancock (see paragraphs 43-46, above). However, should this not prove possible an application may be made to the Tribunal for this purpose, with any such application to be made within 90 days of the release of this decision.

Right to Apply for Permission to Appeal

52. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 25 March 2014