[2016] UKFTT 504 (TC)

TC05260

Appeal number: TC/2015/00642

INCOME TAX – self assessment – closure notices – discovery assessments – whether business records adequate – whether sales omitted – whether full disclosure of bank accounts – onus of proof – presumption of continuity – Taxes Management Act 1970 ss. 9A, 12B, 28A, 29, 34, 36, 49G, 50 and 95; Finance Act 2007 Schedule 24 – whether additional assessments should stand good; yes – penalty determinations and assessments – whether 'negligent' and 'deliberate'; yes – whether penalty reduction for disclosure sufficient; yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GRAEME ALLAN **Appellant**

- and -

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

TRIBUNAL: JUDGE HEIDI POON
EILEEN SUMPTER, WS

Sitting in public at George House, 126 George Street, Edinburgh on 19 & 20 January 2016

The Appellant in person

Mrs Christine Cowan, presenting officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Mr Allan, the appellant, is a self-employed painter and decorator. His appeal relates to two closure notices for 2010-11 and 2012-13 issued under s28A of the Taxes Management Act 1970 ('TMA'), and discovery assessments issued under s29 of TMA for the four years from 2006-07 to 2009-10 (based on the closure notice for 2010-11) and for the year 2011-12 (based on the closure notice of 2012-13).

2. The related appeal is against penalties imposed in consequence of the closure notices and discovery assessments. Penalty determinations under s95 of TMA are issued for 2006-07 and 2007-08, and penalty assessments under Schedule 24 of the Finance Act 2007 ('FA 2007') for the years 2008-09 to 2012-13.

3. The Hearing focused on the year of enquiry 2010-11, and addressed issues concerning the adequacy of the appellant's business records, the disclosure of appellant's bank accounts, the lack of explanation for bank lodgements, the method of calculation to adjust assessable profits by the respondents, the application of the presumption of continuity to years outwith the enquiries, the onus of proof, and the categorisation of the appellant's behaviour for penalty purposes.

4. Mrs Cowan led the evidence of Officer Lyon, who was in charge of the enquiries, and Officer Young, who provided technical input for the enquiries. Mr Allan appeared in person; he gave evidence and submissions for his case.

Matters under appeal

5. The following notices and assessments under appeal were all issued on 18 June 2014. The closure notices and assessments for additional tax are inclusive of any additional National Insurance Contributions liability payable under Class IV.

Year	**Revised profits**	**Additional Tax**	**Appealable decision**	**Legislation**
2006-07	£18,625	£ 5,587.50	Assessment	S29 TMA 1970
2007-08	£19,089	£ 5,726.70	Assessment	S29 TMA 1970
2008-09	£ 8,359	£ 2,340.52	Assessment	S29 TMA 1970
2009-10	£30,377	£ 8,505.56	Assessment	S29 TMA 1970
2010-11	£76,772	£27,064.71	Closure Notice	S28A(1)&(2)TMA 1970
2011-12	£64,842	£23,895.02	Assessment	S29 TMA 1970
2012-13	£58,822	£20,968.99	Closure Notice	S28A(1)&(2) TMA 1970
	Total	**£94,089.00**		

6. The following penalty determinations and assessments under appeal were all issued on 6 August 2014.

Year	Additional Tax	Penalty Amount	Appealable decision	Legislation
2006-07	£ 5,587.50	£2,235.00	Penalty determination	S95(1)(a) TMA 1970
2007-08	£ 5,726.70	£1,888.00	Penalty determination	S95(1)(a) TMA 1970
2008-09	£ 2,340.52	£ 942.25	Penalty assessment	Sch 24 para 1(a) FA 2007
2009-10	£ 8,505.56	£3,594.32	Penalty assessment	Sch 24 para 1(a) FA 2007
2010-11	£27,064.71	£10,983.66	Penalty assessment	Sch 24 para 1(a) FA 2007
2011-12	£23,895.02	£ 9,617.73	Penalty assessment	Sch 24 para 1(a) FA 2007
2012-13	£20,968.99	£ 8,440.02	Penalty assessment	Sch 24 para 1(a) FA 2007
	Total	**£37,700.98**		

7. The penalties imposed under s95 TMA are at 40% of the additional tax liabilities, while those imposed under Sch 24 FA 2007 are at 40.25%, after applying a disclosure reduction of 85% to the penalty percentage range from 35% to 70% for deliberate behaviour and prompted disclosure.

Admission of a late appeal

8. By letter dated 29 August 2014, the appellant requested an independent statutory review of all assessments to tax and penalties. Prior to the request for an independent review, the appellant submitted a late appeal to HMRC on 31 July 2014 against the closure notices for 2010-11 and 2012-13. By letter dated 13 August 2014, the appellant submitted a further appeal to HMRC against the discovery assessments ensuing from the two closure notices (late), and against all the penalty determinations and notices for the relevant years (in time).

9. The decision appealed against as notified on the Notice of Appeal to the Tribunal is the review conclusion letter dated 28 November 2014. The time limit for making an appeal to the Tribunal is derived from s49G(5) TMA, which provides that an appellant 'may notify the appeal to the tribunal within the post-review period', and is defined under s49G(5)(a) as 'the period of 30 days beginning with the date of the document in which HMRC give notice of the conclusions of the review'.

10. The post-review period therefore expired on 27 December 2014, which was the Saturday immediately after the Christmas public holidays. The Notice of Appeal, dated 20 January 2015, was lodged out of time. Mr Allan made an application to extend the time limit to notify the appeal, stating as his reason that he had relied on his accountant to lodge the appeal on his behalf, and it only transpired after the New Year that the appeal had not been lodged, in part due to the accountant being on

holiday for two weeks over the festive period. The accountant, Mr Fraser, had hitherto assisted Mr Allan in dealing with the enquiries. It was Mr Allan who lodged the appeal in the end, and has dealt with the appeal himself since. The application for extending the time limit to make the appeal was granted.

Grounds of appeal

11. Appended to the Notice of Appeal is effectively Mr Allan's statement of case, which runs for five pages in dense print, and is summarised as follows:

> (1) That it is 'ridiculous' to suggest a sole trader, working as a painter and decorator, would earn the level of profits as assessed by HMRC;
>
> (2) That if there had been the undeclared turnover, why had the expenses not increased proportionate to the increased turnover;
>
> (3) That all the paperwork has been made available to HMRC in respect of the years of enquiry and yet HMRC still maintained that they did not have the complete records for the years of enquiry;
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> (4) That as at 1 July 2009 (the start of the appellant's financial year falling in the year of enquiry 2010-11), the appellant only had one bank account (number ending 368) with the Bank of Scotland, which was used for both personal and business banking in the previous two years; that the appellant had separated from his wife in 2007 and due to her debts which affected the appellant's credit rating, he was unable to open a business account.
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> (5) That on 20 August 2009 the Bank of Scotland allowed the appellant to open another account for business use, account number ending 004, which was used 'only for business and has continued to be used for my business since'. The account 368 'reverted to being the personal account only'; that the compliance officer is 'completely wrong with her assumption' that this account continues as a business account;
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> (6) In respect of account 368, the appellant states that: 'I could not possibly remember what went through my personal account from over 3 years ago'; 'I reiterated that this was my personal account and it had nothing to do with my business and as such I had no paperwork to prove what these amounts were';
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> (7) That he had requested the bank for 'copies of these payments and this would prove they were not business income', but the bank could not supply the information and had confirmed in writing to that effect; that the officer would not accept the bank's confirmation letter as proof;
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> (8) That the appellant and his agent had repeatedly told the officer that with account 368 being 'a personal account, [the appellant] *did not have to proof* [sic] *what these payments were*'; that it was 'very unfair' that these payments should then be treated as business income; that 'there was nothing else [the appellant] could do to confirm these payments were not business income'; (emphasis added)

(9) That he wanted to co-operate fully with the enquiry, and had handed over the statements for both his personal and business accounts and he had nothing to hide;

(10) The last paragraph runs continuously for nearly two pages and contains statements such as – the compliance officer 'blatantly lied to me'; 'I have a large list of mistakes she has made throughout this enquiry'; that the officer said 'she had found this Double Glazing Company in my name on the internet, I denied this completely'; that it was his estranged wife who 'has got in touch with HMRC and accused me of this'; that the wife 'had set up a Double Glazing Business on the internet in my name and then informed HMRC that I owned it and was not declaring the profits'; that the officer 'wrongly accused me again of owning 5 houses and renting them out and not declaring the rental'.

Issues for determination

12. The Tribunal made it clear to the appellant from the outset that his grounds of appeal include certain allegations about the conduct of the investigations and the competence of the officers. These issues are outwith the Tribunal's jurisdiction and would not be addressed at the hearing. The substantive issues relevant to this appeal fall into four areas.

13. The first issue for the Tribunal's determination is whether the self-assessment returns filed by the appellant for the years of enquiry 2010-11 and 2012-13 are incorrect and incomplete.

14. The second issue is whether adjustments for omitted sales are required to the appellant's assessable profits for the tax years 2006-07 to 2012-13 inclusive in respect of the unexplained lodgements to the appellant's bank accounts.

15. The third issue is whether the appellant had been 'negligent in failing to take reasonable care' in submitting correct returns for the years 2006-07 and 2007-08, and for the years 2008-09 to 2012-13, whether the inaccuracies in the returns have been caused by behaviour that was 'deliberate'.

16. The fourth issue is whether the penalties have been correctly imposed under the terms of the legislation.

The legislative framework

17. The statutory framework within which this appeal is to be determined is not in dispute, and the relevant provisions are all under TMA 1970, with the exception of the penalty assessments from 2008-09 onwards, which fall under Sch 24 to FA 2007.

18. Section 9A TMA gives HMRC the power to enquire into a taxpayer's return, and notice was duly given on 24 September 2012 in relation to the appellant self-assessment return ('SA return') filed for the year 2010-11, which covered the accounting period from 1 July 2009 to 30 June 2010. The enquiry into 2010-11 was commenced pursuant to s9A within the normal statutory time limits provided.

19. Section 12B TMA requires a taxpayer such as the appellant to keep and preserve all such records as may be requisite for the purpose of enabling him to deliver a correct and complete return for the year or period of assessment.

20. Section 28A provides for the completion of an enquiry into a personal return by way of a closure notice, and s29 provides for assessment to be raised where a loss of tax is discovered and where the requisite conditions have been met. Under s29(4), the relevant condition requisite to the present case is that the loss of tax has been brought about 'carelessly or deliberately' by the taxpayer or his agent; this was previously stated as 'attributable to fraudulent or negligent conduct'[1].

21. Section 34 provides for the ordinary time limit for an assessment under s29 to be made within 4 years after the end of the year of assessment to which it relates. Section 36 TMA provides for different time limits for a s29 assessment to be raised where the loss of tax has been brought about carelessly or deliberately. The time limit is 6 years after the end of the year of assessment to which it relates if the loss of tax has been brought about *carelessly*, and extended to 20 years in a case where the loss of tax has been brought about *deliberately*.

22. The Tribunal's appellate jurisdiction is provided under s50 TMA. On an appeal to the Tribunal, if the Tribunal decides that the appellant is overcharged by an assessment, *the assessment is to be reduced accordingly, but otherwise the assessment or statement shall stand good* as provided by s50(6). Conversely, s50(7) provides that if the appellant is undercharged by an assessment, *the assessment or amounts shall be increased accordingly.*

23. Section 95 governs the penalties imposable in relation to the tax years up to 5 April 2008 inclusive. It provides that *where a person fraudulently or negligently delivers any incorrect return or accounts* for purposes of assessing his tax liabilities, the penalty is the difference in the amount of tax that would have been payable had the return been correct and the amount that has been paid, subject to mitigation.

24. The penalty regime governing the tax years from 6 April 2008 onwards is under Sch 24 to FA 2007. The new regime provides for the error penalty to be calculated as a percentage of the potential lost revenue, which is the difference of the tax payable (had the return been correct) and paid (per the incorrect return submitted). The penalty percentage is determined according to the relevant category of behaviour, with 35% for 'careless', 70% for 'deliberate but not concealed', and 100% for 'deliberate and concealed'. The penalty percentage can be reduced subject to disclosure, and factors to be taken into account concern (a) whether the disclosure is 'prompted' or 'unprompted', and (b) 'quality' of disclosure in respect of 'timing, nature and extent'.

Case law authorities

25. The appeal concerns the enquiries into two tax years that resulted in closure notices, which in turn led to discovery assessments being issued under s29 for earlier

[1] The modification is by virtue of para 3 Sch 39 FA 2008.

years. A prerequisite to the making of those additional assessments under s29 is that there had been 'a loss of tax discovered'. The burden of proof is on HMRC to establish that the requisite 'discovery' has been made, and a s29 assessment can be raised on the satisfaction of a threshold condition, such as the taxpayer's 'fraudulent or negligent conduct' (previous formulation in case law for 'carelessly or deliberately'), and a loss of tax is attributable to that condition.

26. Whether the relevant threshold requirement has been satisfied for a discovery assessment to be raised has been the subject of much case law. A key authority is *Cenlon Finance Co Ltd v Ellwood* ('*Celon Finance*') in which the House of Lords rejected an argument that a discovery entailed the ascertainment of a new fact. In the words of Viscount Simonds:

> 'I can see no reason for saying that a discovery of undercharge can arise only where a new fact has been discovered. The words are apt to include any case in which it newly appears that the taxpayer has been undercharged and the context supports rather than detracts from this interpretation.'[2]

The threshold for there being a discovery is therefore low, as stated by Walton J in the High Court decision of *Jonas v Bamford* ('*Jonas*'): 'In law, indeed, very little is required to constitute a case of "discovery".'[3]

27. Once the threshold requirement is satisfied for there to be a 'discovery' of loss of tax, the presumption of continuity applies in the raising of assessments for earlier years. The onus is on the taxpayer to rebut the presumption. The reasoning for the shift of onus from HMRC (once the requisite threshold of discovery is met) to the taxpayer (in rebutting the presumption of continuity) is set out by Walton J in *Jonas*:

> '… so far as the discovery point is concerned, once the Inspector comes to the conclusion that, upon 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 clearly on the taxpayer.'[4]

28. Not only is the onus on the taxpayer to rebut the presumption of continuity, but also that on appeal against an assessment raised under s28 or s29, the burden of proof is on the taxpayer to show that he has been overcharged by such an assessment pursuant to s50(6) TMA. In *Norman v Golder* ('*Norman*'), the taxpayer sought to argue that the onus of establishing the correctness of the assessment lies upon the Crown, and that the onus of proving that the assessment is incorrect does not lie on the taxpayer. Lord Greene MR firmly rejected the notion – 'The point really is not

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[2] *Cenlon Finacne Co. Ltd v Ellwood* (1962) 40 TC 176, at page 204.

[3] *Jonas v Bamford* (1973) 51 TC 1, at page 23.

[4] *Jonas v Bamford* (1973) 51 TC 1, at page 25.

arguable'; the statute 'makes it clear, beyond possibility of doubt, that the assessment stands, unless and until the taxpayer satisfies the Commissioners that it is wrong'.[5]

29. In *Haythornthwaite and Sons Ltd v Kelly* ('*Haythornthwaite*'), Lord Hanworth MR stated similarly, that 'it is quite plain that the Commissioners are to hold the assessment standing good unless the … Appellant – establishes before the Commissioners, by evidence satisfactory to them, that the assessment ought to be reduced or set aside'.[6]

30. In *Johnson v Scott* ('*Johnson*'), the High Court judgment by Walton J affirming the Commissioners' decision in favour of the Crown was upheld by the Court of Appeal. The pertinent remark by Walton J in this case highlights why the onus of proof has to lie with the taxpayer, because –

> '… it is quite impossible to see how the Crown, in cases of this kind, could do anything else but attempt to draw inferences. The true facts are known, presumably, if known at all, to one person only, the taxpayer himself. If once it is clear that he has not put before the tax authorities the full amount of his income, as on the quite clear inferences of fact to be made in the present case he has not, … what the Crown has to do in such a situation is, on the known facts, to make reasonable inferences.'[7]

In other words, once the Crown has made a fair inference on the known facts as to the potential lost revenue, the onus of showing that the assessments raised are incorrect shifts to the taxpayer.

31. The question of 'negligence' is relevant for the purposes of imposing a penalty under s95 TMA, for determining if the requisite condition under s29(4) TMA for a discovery assessment to be raised is met with reference to case law[8], and for the setting of time limit to 6 years within which a discovery assessment can be raised under s36 TMA. The test for negligence as formulated in *Anderson v HMRC* ('*Anderson*')[9] is to consider 'what a reasonable taxpayer, exercising due diligence in the completion and submission of the return, would have done'. The question of whether the conduct leading to the loss of tax was 'deliberate' is relevant for the imposition of Sch 24 FA 2007 penalties in the present case, (and could have also been relevant to the setting of time limit to 20 years within which discovery assessments could have been made within the terms of s36 TMA had HMRC chosen to do so).

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[5] *Norman v Golder* (1944) 26 TC 293, at page 297.

[6] *Haythornthwaite and Sons Ltd v Kelly* (1927) 11 TC 657, at page 667.

[7] *Johnson v Scott* [1978] STC 48, at 56(j) to 57(a).

[8] The test of negligence remains the relevant test for 'carelessness' in respect of the new wording for s29(4) TMA condition.

[9] *Anderson v HMRC* [2009] UKFTT 206, at [22].

HMRC's evidence

32. The evidence of Officers Lyon and Young was led by Mrs Cowan, much of which covered the course of the enquiry into 2010-11 to the issue of the related closure notice, and the method of calculation for the adjustments to assessable profits. The background and chronology of events leading to the issue of the discovery assessments and the determination of penalties are detailed in the annex.

33. At the material time, Mr Fraser was engaged as Mr Allan's accountant and was the agent preparing and submitting Mr Allan's SA returns for the tax years 2009-10 to 2012-13, and that Mr Allan had confirmed to HMRC that the same system of business records was supplied to his previous agent before he moved over to Mr Fraser.

34. The SA return for 2010-11 stated turnover at £26,900 and expenses at £16,226, resulting in an assessable profit of £10,674, with the basis period being the accounting period from 1 July 2009 to 30 June 2010. On 24 September 2012, HMRC opened an enquiry into the 2010-11 SA return within the statutory time limit.

35. From HMRC's evidence, we make the following findings of fact in respect of Mr Allan's business records for the year of enquiry 2010-11:

(1) Bank statements from two separate accounts were interspersed in chronological date order to appear as if they were consecutive statements from a single account;

(2) The interspersed set of statements was presented to Mr Fraser to prepare the 2010-11 SA return; Mr Fraser was unaware of there being two separate accounts; no bank reconciliation was carried out and only the lodgements on the presented set of statements were used as the sales total;

(3) On collation of the two complete sets of bank statements for each of the accounts (BOS-368 and BOS-004) by HMRC, unexplained lodgements by cheques and cash totalling £77,444.86, and transfers from undisclosed account(s) totalling £23,299.66, were identified;

(4) Purchase invoices were retained in full to enable input VAT and expenses to be claimed; Mr Fraser had to increase turnover by more than £10,000 in view of the high level of expenses claimed in the accounting period ended 30 June 2010 (and also for years ended 2011 and 2012);

(5) No records of sales invoices, or estimates, or daily diary, were available, (despite sales invoices being provided to customers even when not requested); Mr Fraser confirmed that due to incomplete records, estimates were used in preparing the SA return;

(6) Two vehicles were in use and all related expenses claimed without business and private usage apportionment;

(7) Rental income received was not declared; Mr Fraser was unaware of the existence of a rental property.

36. In summary, the Tribunal finds as facts that for the year of enquiry 2010-11, Mr Allan did not keep full business records; he received substantial sums of money into

his bank accounts for which he could not account; he provided inaccurate information to his accountant for the purposes of preparing his SA return; his SA return for 2010-11 was therefore incomplete and inaccurate.

37. Apart from the above findings which impinge directly on the completeness and accuracy of the 2010-11 SA return, three aspects in HMRC's fact-finding meeting in October 2012 are worth noting for the purpose of assessing Mr Allan's evidence:

(1) Mr Allan stated that he received no financial assistance from family members. In a subsequent meeting (June 2013) Mr Allan claimed his mother was the origin of some of the substantial credit transfers totalling £23,299.26 after the omitted bank statements were collated;

(2) Mr Allan stated that he took no foreign holidays in the year of enquiry. The omitted bank statements show foreign transactions in Mexico (August 2009), Grand Canaria (January 2010), and Turkey (May 2010).

(3) Mr Allan stated there was a Swedish account, and that he was unsure whether it was in his partner's name only; HMRC requested sight of this account, even if it was just in his partner's name, but there seemed to be no further information on file concerning this Swedish account.

The Single Compliance Process

38. The details of the fact-finding meeting in October 2012 were recorded in a five-page document by HMRC. In cross-examination, Mr Allan questioned Officer Lyon why he had never been sent the meeting notes. It was explained that the October 2012 meeting fell within the trial period for the Single Compliance Process (SPC), which was implemented for trial in January 2012, and lasted well into 2013.

39. The Tribunal was taken through the *Single Compliance Process Briefing Paper for Tax Agents*, published on 24 June 2011 with two appendices. The purpose of the SCP was to run a limited trial for an improved compliance enquiry process, aiming to reduce the compliance burden on businesses and their agents, and to increase the efficiency of the enquiry process. New features were proposed for the trial, including that notes of discussions, while being made at the time, HMRC '*will not issue type-written notes unless asked to do so*'.[10] Neither Mr Allan nor Mr Fraser requested the meeting notes and they were not sent out as a result.

Bank statements for the accounting period to 30 June 2009

40. The statements for BOS-368 account in relation to the tax year 2009-10, covering the accounting period 1 July 2008 to 30 June 2009, were also examined in detail by HMRC. Similar pattern of unexplained lodgements was identified – cheque deposits of £40,264.70; cash deposits of £8,074.87; transfers-in of £6,271.26; total credits of £54,610.83. The sales declared in SA return for 2009-10 was £23,375; the shortfall was £31,235.83.

[10] See Appendix 1 outlining the 'Five Stages of the SCP', and under 'Stage 3 – Process', page 6 of the Briefing Paper. The Tribunal was informed that since the end of the trial period, the default position is to send out meeting notes.

Bases adopted for discovery assessments

41. Two different bases were adopted in finalising the calculations for additional profits for the relevant years:

(1) The analyses of the two BOS accounts –368 and –004 (from 1 July 2009 to 30 June 2010) form the basis of amendments to SA return for 2010-11, and the assessments for *later* years 2011-12 and 2012-13;

(2) The analysis of the one BOS account –368 (from 1 July 2008 to 30 June 2009) form the basis of amendments to SA return for 2009-10, and the assessments for *earlier* years 2006-07 to 2008-09.

42. The following table sets out the differences between the two bases:

	Year 2010-11	**Year 2009-10**
Unexplained lodgements	**77,444.86**	**48,339.57**
Transfers from other accounts	**23,299.26**	**6,271.26**
Sales invoices not included	352.75	
Revised Sales figure	101,096.87	54,610.83
Declared turnover on SA return	26,900.00	23,375.00
Additional Sales	**74,196.87**	**31,235.83**
Add: cash sales assumed at 5%	5,054.00	2,730.00
Less: added expenses and VAT	2,478.00	3,588.00
Total additions for the year	**£76,722.00**	**£30,377.33**

The appellant's evidence

43. Mr Allan's produced three letters from the Bank of Scotland summarised as:

(1) Dated 7 May 2013 stating that: 'Mr Allan had only two open accounts during the period of June 2009 to June 2010. Transfers that accrued on these accounts during this period were internal transfers done in branch from his mothers [*sic* mother's] account.'

(2) Dated 12 July 2013 enclosing copy statements from January 2007 to March 2009 and confirming that the bank was unable to obtain copies of cheques paid into account during 2009 and 2010.

(3) Dated 2 December 2013 apologising for the incorrect information given regarding third party cheques; confirming that the bank was unable to retrieve third party cheques.

Appellant's analyses of bank lodgements submitted by letter dated 17 December 2014

44. In response to HMRC's review conclusion letter of 28 November 2014, Mr Fraser submitted by letter dated 17 December 2014 the bank lodgement analyses[11] prepared by Mr Allan himself.

45. The first analysis listed lodgements into the BOS-368 account for the period from 1 July 2009 to 30 June 2010. The majority of the credits and almost all of the higher value credits are marked as business income. For example, in the month of August 2009, lodgements including cheques of £500 and £1,872.47, and CHAPS of £5,169.25 were all marked business. The basis period concludes with two credit entries on 18 June 2010 of £3,458 and £1,100, both being business income.

46. The complete listing of the credit entries in July 2009 illustrates the pattern:

Business or Other	Date	Business Income	Amount
Bank deposit/ cheque	1/7/2009	Yes	**£1,893.76**
Child Benefit	7/7/2009	No	£80.00
Bank deposit/ cheque	10/7/2009	Yes	**£900.00**
Transfer	21/7/2009	Yes	**£1,000.00**
Transfer	28/7/2009	Yes	**£2,800.00**
Bank interest	31/7/2009	No	£1.33

47. Summarising the BOS-368 account, Mr Allan stated that the total credits amount to £92,852.47, of which £33,762.52 '*can be proved*' to be non-business. In conclusion, Mr Allan conceded to the difference of £59,089.95 being business income 'because at present [he] cannot account for this amount due to various reasons, (i.e. copy cheques from bank ect [sic])'.

48. A similar analysis for BOS-004 account, starting at 20 August 2009 when the account was opened and ending at 23 June 2010, gives total lodgements of £40,152.45 of which Mr Allan identified £6,283.76 as non-business and the balance of £33,868.69 is described by Mr Allan as 'assumed income for account-004'.

An undisclosed RBS business account

49. Mr Allan started his oral evidence by relating the time in 2007 when he separated from his wife; that he had a joint account with her at the time of separation but this could not be closed as it was overdrawn and a matter of dispute in the divorce. Prior to this, he had always used the joint account as the personal account and had kept his RBS business account quite separate; that the BOS-368 account was opened later as a designated personal account to replace the joint account.

[11] Documents bundle pages 153 to 161.

50. At this juncture of his evidence, the Tribunal interjected by asking Mr Allan whether it meant there was *yet* another account with the Royal Bank of Scotland (RBS) that he had not disclosed.

51. Mr Allan agreed that this account had not been previously mentioned and he told the Tribunal that this account had been dormant and overdrawn; that since 2007 it had kept the same overdrawn figure; that he was told by his solicitor to discontinue the use of the RBS account for business purpose because it might complicate matter because of his wife's bad credit rating.

52. Mr Allan then told the Tribunal that it was a temporary arrangement that the BOS-368 account had to be used for business and personal purposes; that when he opened the BOS-004 account in August 2009 it became the sole business account and the BOS-368 account became the personal account only; that the lodgements in the BOS-368 account could not therefore be business income because it became the personal account when the BOS-004 account became the business account.

53. Mr Allan asserted the distinction in the designation of his two BOS accounts as material in defining what could constitute his business income; that the -368 account was his personal account and the -004 account his business account; that by the way he had distinguished the two accounts for their separate purposes, HMRC were not entitled to assume that the lodgements in the -368 account was business income.

54. Furthermore, Mr Allan argued that HMRC were wrong to revise the profits for the later years (2011-12 and 2012-13) on the basis that he carried on having two accounts; that those years should be based on the fact that he only had *one* account, and that being the -004 account; that the presumption of continuity as applied to the earlier years (2006-07 to 2009-10) by basing the revision of profits on there being only one account should apply to later years; that he had therefore been over-charged.

The appellant's arguments on proof

55. The chief tenet of Mr Allan's submissions is reflected in his grounds of appeal, in which he has stated that with account -368 being 'a personal account, [he] *did not have to proof* [sic] *what these payments were*'; that it was 'very unfair' that these payments should then be treated as business income.

56. The Tribunal tried to impress on Mr Allan that he alone had the knowledge of the source and origin of these unexplained lodgements, and if these credits did not represent business income, he alone could provide the evidence that they were not. Mr Allan's reply was that the bank could not provide him with the third party cheques as proof; he relied on the bank's position as his categorical defence – that 'there was nothing else [he] could do to confirm these payments were not business income.'

57. The Tribunal then gave examples of the kind of evidence that could prove that the capital sums of credit were not business income; such as, documents related to an insurance claim to vouch for a lodgement being insurance proceeds; a legacy payment from a solicitor under the terms of a will. In reply, Mr Allan said, 'I cannot prove it'; 'my hands are tied'.

Findings of fact

58. Based on Mr Allan's documentary and oral evidence, the Tribunal makes the following findings of fact:

(1) The Tribunal finds most of Mr Allan not to be credible; there was a general lack of candour that characterised Mr Allan's behaviour to HMRC and a lack of consistency that compromises the overall credibility of his evidence; see for example §37;

(2) At the hearing Mr Allan disclosed (probably inadvertently) the existence of a third bank account (the RBS business account) in the relevant period which had not previously been disclosed to HMRC;

(3) Mr Allan's oral evidence asserting that the BOS-368 account reverted to being his personal account contradicts his own documentary analysis submitted in December 2014 in which he concluded the majority of the lodgements into BOS-368 were business income;

(4) The retrospective assertion at the hearing that the BOS-368 account reverted to being purely a personal account after the BOS-004 account was opened as his business account is also at odds with Mr Allan's inclusion of some of the BOS-368 bank statements to his agent at the time for the purpose of making up his trading account;

(5) The assertion that the failure of the bank to provide third party cheques as the only proof for the lodgements not being business income is untenable, since these third party cheques (even if produced) bearing the details of different payers making capital sums of payments in thousands of pounds would seem to prove *positively* rather than disprove these payments being business income;

(6) The substance of the very brief bank letter of May 2013 (quoted verbatim at §43(1)) referring to the transfers being from Mr Allan's mother is insufficient to vouch for the origin of these transfers, being £13,892 into BOS-368 and £9,407 into BOS-004; the Tribunal heard no evidence from the bank manager, and knew nothing of the information being given by Mr Allan that led to the letter being produced; the claim of Mr Allan's mother financing him to the extent of £23,299 in the period is improbable and grossly contradicts Mr Allan's clear statement in his first meeting with HMRC that he received no financial assistance from any family members (other than small gifts to his children);

(7) Mr Allan's own bank analyses submitted in December 2014 for the accounting period to 30 June 2010 conceding £59,089 from BOS-368 and £33,368 from BOS-004 being business income would seem to support rather than displace the inferences drawn by HMRC.

Discussion

59. We set out the four issues for determination in this appeal under §13 to §16, and we will address the first two in conjunction with the onus of proof.

First: whether the SA return in 2010-11 and 2012-13 were incorrect and incomplete

60. Based on our findings in fact as set out at §35, there is a *prima facie* case that the SA return for 2010-11 prepared by Mr Allan's agent had been based on incomplete and inaccurate records. The interspersed bank statements from two separate accounts presented to the agent, and the woefully inadequate records to document sales, are two prime examples illustrating the incompleteness of Mr Allan's business records.

61. Where expedient, Mr Allan was fully capable of keeping business records, as demonstrated by keeping his purchase invoices to enable expenses and input VAT to be claimed. He informed HMRC that every customer would receive an invoice, even when not requested, yet he had chosen not to maintain any sales invoice register to allow the matching of sales to deposits into his bank accounts. Mr Allan has not met his statutory obligations under s12B TMA, which requires a taxpayer to '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'.

62. Since similar pattern of record keeping and return preparation was observed for the year 2012-13, amendments are therefore required to his SA returns for the two years of enquiry of 2010-11 and 2012-13.

Second: whether adjustments required for the years 2006-07 to 2009-10 and 2011-12

63. Once there is a discovery of loss of tax due to Mr Allan's negligence (by not keeping complete records), the requisite condition under s29(4) TMA is met for HMRC to raise discovery assessments in relation to those years prior to the years of enquiry within the time limits as set out in s36 TMA. The onus of proof then shifts to Mr Allan to prove that the amendments and assessments raised are excessive.

64. In different ways and with various degrees of strain, Mr Allan has repeatedly asserted that (a) HMRC have not proved the unexplained lodgements are business income; (b) HMRC have not proved their calculations are correct; and (c) it is wrong to raise assessments for the later years on the presumption that he continued to have two bank accounts for business lodgements.

65. The Tribunal tried to invite Mr Allan to provide explanations of the origin or source of these capital sums of lodgements (many of them in thousands of pounds), if they were not business income. It was to no avail – Mr Allan would not consider that he alone had the knowledge of how and why these lodgements ended up in his bank accounts, and sought to shift the burden to HMRC to prove that the lodgements were indeed business income.

66. No matter how much Mr Allan laboured under the notion that the burden did not lie upon him as the taxpayer, but on HMRC, this notion has no basis in law. As Walton J in *Johnson* puts it – 'it is quite impossible to see how the Crown, in cases of this kind, could do anything else but attempt to draw inferences. *The true facts are known, presumably, if known at all, to one person only, the taxpayer himself*.'

67. Walton J continues by stating that once it is clear that the taxpayer has not put before the tax authorities the full amount of his income, (as it is quite clear on inferences of fact in Mr Allan's case), then what the Crown has to do in such a situation is to make reasonable inferences on the known facts. The Tribunal considers the inferences made by HMRC on the known facts that the unexplained lodgements represent business income are entirely reasonable.

68. Apart from asserting that HMRC had not proved the lodgements being business income, Mr Allan sought to make the case that the bank held the key to the answer of the origin of the lodgements by attaching great significance to the fact he was unable to procure a copy of the third party cheques from the bank. The Tribunal explained to him that the production of third party cheques would be of little assistance to disprove the lodgements as business income. The contrary is more likely to be the case, that the third party cheques would provide the evidence of them being customers' payments.

69. Secondly, concerning the correctness of the assessments, the onus lies with Mr Allan to provide evidence that HMRC's assessments should be displaced, otherwise they stand good. The statute 'makes it clear, beyond possibility of doubt, that the assessment stands, unless and until the taxpayer satisfies the Commissioners that it is wrong' (*Norman*). That HMRC should have to prove their calculations are correct is a point that is simply not arguable, given that the *only* person who knows the true extent of his tax affairs is Mr Allan; HMRC can only draw inferences from the facts found and it is up to Mr Allan to prove an alternative basis for the assessments.

70. Mr Allan has not provided the Tribunal with any substantive and credible evidence as an alternative basis to displace HMRC's assessments. On the contrary, his own bank deposits analyses (§45-48), though produced at a late stage after the conclusion of HMRC's review, represent the most substantive evidence from Mr Allan of the extent of his business activities. The analyses and conclusions drawn by Mr Allan himself would seem to support rather than displace the basis of HMRC's amendments to his SA returns and the discovery assessments.

71. Thirdly, on the presumption of continuity, Mr Allan asserted that it was wrong to assume that he continued to have two business accounts and to raise discovery assessments on the basis of there being two bank accounts for the later years. He argued that the earlier years had been based on there being only *one* bank account; that the year 2010-11 was an *exception*; that the presumption of continuity should have been applied on the basis that there had also been only *one* account for the years 2011-12 and 2012-13.

72. Once it has been established that there has been additional income beyond what has been declared, the usual presumption of continuity will apply. 'The situation will be presumed to go on until there is some change in the situation' (*Jonas*), and the onus of proof is on the taxpayer to rebut the presumption of continuity. Mr Allan has produced no evidence to rebut the presumption that his business continues to operate with lodgements into two separate bank accounts. Instead of evidence, Mr Allan sought to argue that the BOS-368 account became the personal account and the BOS-004 account was the only business account; that the profit re-calculations should

therefore be based on the presumption that one account, and not two, operated in the later years; that HMRC were wrong to treat the lodgements into his -368 account as business income because these lodgements have been paid into his *personal* and not the business account.

73. The Tribunal explained to Mr Allan that it is of no consequence whatsoever how the bank accounts have been labelled for his purposes; the fact remains that these accounts are in his name only, and large sums of money have been paid into them, and he alone has access and control of the funds; the lodgements are paid to him, no matter how the accounts may be labelled for his own purposes. Mr Allan has failed to rebut the presumption that there have been two accounts in use for lodging money.

74. Mr Allan's argument on this point has raised the fundamental query why there should be two bases (see §42) for raising the discovery assessments. Assessing the available evidence in its entirety, it would seem more likely than not that the habitual mode of operation for Mr Allan's business was to lodge money into two different accounts, especially in view of the disclosure of the existence of the RBS business account (formerly unknown to HMRC until the hearing).

75. The Tribunal is of the view that the presumption of continuity that Mr Allan had been operating with two bank accounts for the *earlier* years could have been applied with equal validity as to the later years on the following facts:

(1) The total lodgements for 2010-11 based on two accounts (BOS-368 and -004) was **£100,744.12**, of which £77,444.86 was by cheques/cash and £23,299.26 by transfers-in;

(2) Compared with the total of **£54,610.83** for 2009-10 based on one account (BOS-368), of which £48,339.57 was by cheques/cash and £6,271.26 by transfers-in;

(3) The disjuncture in the figures for the two years is £29,105 for cheque/cash lodgements; and **£46,133.29** if inclusive of transfers-in;

(4) The pattern of split between the two accounts in the accounting period to 30 June 2010, according to HMRC (§15 of Annex), is £62,734 to BOS-368 and *£38,010* to BOS-004;

(5) Compared with the pattern of split from Mr Allan's own analyses of £59,089 and *£33,868* to the respective accounts;

(6) That in evidence Mr Allan disclosed there had been a business account with RBS being in use for the earlier years, though no investigations into its lodgements had been carried out.

76. The presumption of continuity that two accounts had been in operation even for the earlier years would have addressed the anomalies in the two bases adopted for adjustments, represented by an income gap of some £29,000 (counting cheques/cash deposits only), or £46,000 (if inclusive of transfers-in).

77. HMRC's analyses give a split of total lodgements for 2010-11 into £62,734 to £38,010 between the two BOS accounts, with the new BOS-004 account receiving 37.73% (being £38,010 / £100,744) of the total lodgements. Mr Allan's own analyses

of the total 'business income' for 2010-11 between the two BOS-accounts give a split of £59,089 to £33,868, with the 'new' BOS-004 account receiving 36.43% (being £33,868 / £92,957) of the total income conceded as business.

78. The lodgements into BOS-368 account for the tax year 2009-10 total £54,610, and if that had represented only 63% (being 100% less 37%) of the total lodgements for 2009-10, based on there being two accounts, it would mean a 'second' account was receiving income of around £32,072, representing 37% of the year's total. The figure of £32,072 is comparable to the level of business receipts into the BOS-004 account in 2010-11. It is quite probable that the RBS business account had been the predecessor of the BOS-004 account, and would have been the 'second' account for those earlier years, accounting for the income gap of around £34,000 (Mr Allan's figure) to £38,000 (HMRC's figure). The equivalent receipts into what was the earlier 'second' account would have removed the stark disjuncture in the two sets of basal figures for the years 2010-11 and 2009-10 as tabulated at §42. That there had been two accounts in use for the earlier years as well as the later years would have given a more sensible continuum for the presumption of continuity as emanating from the year of enquiry 2010-11.

79. The general lack of candour and consistency from Mr Allan as a witness cast considerable doubt over the completeness of his disclosure. As a matter of fact, nothing is known of the nature and origin of the lodgements over the years into the RBS business account, or the Swedish account (even if it is in his partner's name only). Mr Allan has not given any credible evidence to rebut the presumption that there had been (at least) two accounts receiving lodgements in the later years.

80. As regards Mr Allan's first ground of appeal that it is 'ridiculous' to suggest he could have the level of turnover for 2010-11 working as a painter decorator. While not all the income might have been attributable to Mr Allan's business as a decorator, it is not a matter for HMRC to prove how Mr Allan had earned his entitlement to those deposits into his bank accounts. Mr Allan alone would have the knowledge how he came to be entitled to receive the money. Whether it was by working as a painter or by other subsidiary business does not affect the Tribunal's conclusion that HMRC have made reasonable inferences from the facts so far as available that the unexplained lodgements are to be treated as business income. Neither is there any need for HMRC to establish the extent of expenses proportionate to the profits added to the assessments; the onus is on Mr Allan, having failed to keep complete business records in the first place, to produce credible evidence of the true extent of his business expenses to displace HMRC's assessments.

81. Having examined Mr Allan's arguments in turn, we conclude that he has not produced any satisfactory or credible evidence to displace the amendments to his SA returns and the discovery assessments. Furthermore, the only substantive evidence he has produced, namely, the bank analyses of the two accounts for 2010-11 would seem to support rather than displace the amendments and assessments.

82. Notwithstanding the provisions under s50(7) TMA conferring powers on the Tribunal to increase an assessment if it considers that the appellant is undercharged,

we have stated our conclusions as above not with a view of increasing the assessments for earlier years by basing them on there being two accounts in operation. The Tribunal's analysis of what it considers to be the correct presumption of continuity to apply is primarily to give the reasons why the Tribunal will not reduce the assessments for the later years to bring them in line with the earlier years. To do so would be to apply what we consider the wrong presumption of continuity that there had only been a single account into which business income had been lodged.

83. We are of the view that HMRC have been lenient in assessing the earlier years on the presumption that there had only been one bank account for business lodgements. It should also be noted that the time limit for discovery assessments to be raised in Mr Allan's case could have been extended to 20 years on the basis that the loss of tax was attributable to 'deliberate' action on his part. HMRC, however, have restricted the time limit to six years for the raising of discovery assessments.

Third: whether appellant's behaviour 'negligent' and 'deliberate'

84. For the earlier years 2006-07 and 2007-08, penalties under s95 TMA are imposed at a percentage of the tax under-assessed. The charging provisions turn on whether the appellant was *negligent* in causing an inaccuracy in his tax return that had led to an understatement of his liabilities. The test for negligence is to ask 'what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done' (*Anderson*).

85. For the tax years 2008-09 to 2012-13, the provisions for error penalties under Sch 24 to FA 2007 categorise behaviour that has caused any inaccuracies resulting in a loss of tax into 'careless' or 'deliberate'.

86. From our findings of fact, Mr Allan was negligent by not maintaining adequate business records to enable accurate and complete tax returns to be prepared. We have found as a fact that the bank statements from the two different bank accounts were interspersed in such a manner to appear as a set of consecutive bank statements from a single account. That action was 'deliberate' and had caused inaccuracies in the submitted returns.

Fourth: whether penalties correctly imposed

87. The s95 TMA penalty is determined at 40% for the years 2006-07 and 2007-08. This is closely matched by the penalty percentage assessed at 40.25% for the years 2008-09 to 2012-13 inclusive.

88. Under Sch 24 FA 2007, the maximum penalty percentage is at 70% for 'deliberate but not concealed'. Reduction at 85% has been applied to the penalty range of 35% (being the difference of the lowest percentage at 35% and the highest at 70%) to give an overall reduction of 29.75% against the maximum 70% chargeable.

89. While the appellant's behaviour could have been construed as 'concealed' on more than one occasion, which would have warranted a higher percentage of penalty, the Tribunal agrees that the percentage should be set on the whole for 'deliberate but not concealed'. The reduction at 85% is with reference to the quality of disclosure and

whether the disclosure is prompted and unprompted. We consider the disclosure was entirely prompted, and had occasioned the issue of Schedule 36 notice (see §14 of Annex). The quality of disclosure was more often than not less than satisfactory; (for example, the inconsistencies noted as regards financial assistance from family members and foreign holidays taken; unforthcoming information on the Swedish account; the non-disclosure of the RBS business account). For these reasons, we consider the reduction at 85% in this instant case is far more than sufficient.

Decision

90. For the reasons as stated, the amendments and the assessments for each of the years from 2006-07 to 2012-13 inclusive, as set out in paragraph 5 of this decision, are upheld.

91. The amounts of penalty under determinations and assessments for each of the years from 2006-07 to 2012-13 inclusive, as set out in paragraph 6 of this decision, are confirmed.

92. The appeal is accordingly dismissed.

93. 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.

DR HEIDI POON

TRIBUNAL JUDGE
RELEASE DATE: 20 July 2016

Annex to the Decision

Background and chronology

Enquiry into SA return 2010-11

1. Mr Allan commenced trading as a decorator on 25 June 1990. On 24 September 2012, HMRC opened an enquiry into the 2010-11 SA return within the statutory time limit. The return stated turnover at £26,900 and expenses at £16,226, and assessable profit at £10,674.

2. A fact-finding meeting attended by Mr Allan and his agent, Mr Fraser, and Officers Lyon and Young took place on 18 October 2012. Mr Allan confirmed at the meeting that his SA return was accurate and complete.

3. During the meeting, Mr Allan was questioned about ownership of any properties other than the matrimonial home, and admitted to owning a flat at Spey Drive, Dundee. Mr Fraser confirmed he had no knowledge of the property, and rental income had not been included in the SA return. Officer Lyon explained the implications for penalties, and handed Mr Allan factsheets CC/FS7a and CC/FS9 on penalties and human rights.

4. Concerning the operation of his business, Mr Allan confirmed that he had no subsidiary activities and had no knowledge of the 'double glazing' advertisements bearing his name on the internet. He advised that his ex-wife had also reckoned that he was operating two businesses and that she had been making life extremely difficult for him. (The couple separated in 2006, and were going through divorce proceedings at the time of the meeting.)

5. Mr Allan advised that he operated as a sole trader with his cohabiting partner whom he met in Sweden in 2007 when on holiday. He had returned to Sweden and stayed for about 5 months in the accounting period ended 30 June 2008, and that his SA return for the year 2008-09 would only reflect the turnover of 7 months of trading.

6. As for his business activities, Mr Allan said 95% of work was undertaken in private houses and the remainder in retail or office premises; his customers were located within a 40-mile radius of home; he confirmed he had no separate trading premises, that materials were kept in his transit van; that no stock was carried and materials purchased for specific jobs; that customers pay mainly by cheque, and occasionally by cash and BACS.

7. The business records kept by Mr Allan, and of the accounting between private and business expenses for the year of enquiry are summarised as follows:

> (1) No sales invoices were kept for the year of enquiry or previous years; (though Mr Allan maintained that every customer received a hand-written invoice even when an invoice was not requested); an invoice register has been kept from 2011 on the advice of agent;

(2) Bank statements were used by agent to establish total earnings for the basis period; no bank account reconciliation was carried out;

(3) All purchase invoices were retained and passed on to agent quarterly for VAT claim;

(4) Estimates were provided, but no record of written estimates kept for the year of enquiry;

(5) No daily diary maintained so no record of customers or jobs carried out in the year of enquiry; that customers paid at the end of a job;

(6) Bank accounts – a business and a personal account with the Bank of Scotland ('BOS'); RBS account for rental income and mortgage repayments for the rental property; account in Sweden (unsure if in partner's name only; Officer Young requested sight of the account even if in partner's name only);

(7) Two BOS credit cards; that credit card repayments made by direct debit from BOS personal account and none settled by business;

(8) The transit van was purchased in 2007-08; a Jeep Landrover was the family car but also used for carrying out quotes; all vehicle expenses charged to business (and claimed for VAT); no apportionment between business and private.

8. Mr Allan confirmed that the same system of business records was supplied to the previous agent before he moved over to Mr Fraser.

9. For the year of enquiry, Mr Allan confirmed that there were no legacies, winnings, insurance policies maturing or sale of assets; that he received no financial assistance from family members, other than clothes or treats purchased for his children by grandparents.

10. Mr Allan also confirmed that he had two children under five and the various tax credit and benefits claimed totalled £13,436.05 were paid in the year of enquiry; that his normal working hours were 8am to 4pm Monday to Saturday; that he took no official holidays and operated all year round; and tended to finish a job before taking a few days off; that he made no additions to his pension plans with SERPS and Barclays in the year of enquiry or since.

11. At the meeting, it was queried why the SA return for 2009-10 was still outstanding. Mr Fraser checked and confirmed it was an oversight. A copy of the 2009-10 SA return was printed off and Mr Allan signed it. Mr Fraser advised, 'take it for what it's worth', explaining that sales figure had been estimated by him because he was unable to tie it up with bankings; that Mr Allan did not keep any sales invoices prior to 2011; that the sales figure was arrived at by adding up bank deposits in the business account.

Bank of Scotland accounts and statements

12. The set of statements used by Mr Fraser to prepare Mr Allan's SA return for 2010-11 were handed over to HMRC during the October meeting. On review, Officer

Lyon noted that the presented set of statements actually related to two different BOS accounts, ending 368 and 004. The pages of BOS statements from these two separate accounts were interspersed in date order, and appeared to represent the statements from one bank account instead of two.

13. On 19 October 2012 Mr Fraser confirmed to Officer Lyon that he was unaware that the statements were from two separate accounts; that he had simply totalled the incomings on the statements given to him to arrive at Mr Allan's turnover for his 2010-11 SA return. Mr Fraser pointed out that he had been unable to use any other business records to prepare the return as the records were incomplete.

14. By letter dated 19 October 2012, Mr Allan was requested to provide the missing statements for both the accounts ending -368 and -004. Two telephone reminders were made to Mr Fraser on 18 and 29 November 2012, and a formal written request under Schedule 36 FA 2008 was issued to Mr Allan on 10 January 2013. The statements were eventually received on 8 April 2013.

15. On collating the figures from the two sets of statements, the total credits of **£62,733.95** into BOS-368 account from 1 July 2009 to 30 June 2010 are analysed as:

(1) Cash/cheque deposits total £40,748.82;

(2) A CHAPS payment of £5,169.25;

(3) A Bank Giro Credit of £1,015 from Horan Properties Ltd; another Giro Credit of £1,909 from P2430 Unit 1;

(4) Two transfers into the account from undisclosed bank account(s) total £13,891.88.

In respect of the BOS-004 account, opened on 20 August 2009 to 30 June 2010, the total credits of **£38,010.17** are broken down as:

(5) Cash/cheque deposits into total £28,602.79;

(6) Transfers into the account from undisclosed account(s) total £9,407.38.

'Summary of Position' letter of 25 April 2013

16. A summary of position letter dated 25 April 2013 was sent to Mr Allan and Mr Fraser, along with a copy of the bank analyses.

17. Mr Allan was advised that the deposits by cash, cheque, CHAPS and Bank Giro Credits from the two accounts total £77,444.86, and the transfers-in of £23,299.26 would be treated as business income unless evidence to the contrary was provided.

18. Two payments from the sales invoices provided by Mr Allan were not deposited in either of the declared bank accounts; that there was a standing order from a Miss Taylor into the BOS-368 account; that the omitted bank statements show foreign transactions in Mexico in August 2009, in Gran Canaria in January 2010, and Turkey in May 2010.

Meeting on 13 June 2013

19. On being asked why he merged statements from two bank accounts, Mr Allan replied that the statements must have got mixed up; and that he had presented the statements to Mr Fraser without advising him that they related to two bank accounts.

20. On being asked to explain the substantial transfers of money into his two bank accounts from undisclosed account(s), Mr Allan replied that he could not explain this as he only had the two BOS accounts and produced a letter from the bank confirming this. He then went on to say that his mother had frequently transferred money from her own account to his accounts in order to help him out financially. When asked if he could obtain the relevant bank statements from his mother to confirm the transfers as originating from her, Mr Allan replied that he did not wish to involve his mother due to her age and ill health.

21. Mr Allan maintained that the large sums of deposits and transfers into his two BOS accounts could not have been derived from his business. He said if he had tried to suppress his business sales, then his business expenses would have been much higher. Officer Lyon explained that Mr Allan's declared expenses were considered high, more than 50% of his declared sales with a similar pattern in earlier and later returns. Mr Allan was reminded of the fact that during the October 2012 meeting, Mr Fraser had advised that he had increased the turnover figures in the accounts for the years ended 2010, 2011 and 2012 by more than £10,000 in each year to account for the high level of expenses claimed.

22. Mr Allan had previously advised that he did not take holidays during the period of enquiry. He was asked why there were transactions shown on the omitted bank statements from both accounts in Mexico, Gran Canaria, and Turkey during the period, Mr Allan replied that he had been mixed up with the dates.

23. The relevant bank statements covering the accounting periods immediately before and after the year of enquiry were requested at the meeting.

Bank statements for the accounting period to 30 June 2009

24. On 5 September 2013, the statements for BOS-368 account covering 1 July 2008 to 30 June 2009 were received. Mr Allan explained the delay as caused by the time taken for applying for a set of duplicate statements from the bank.

25. Turnover declared in the SA return for 2009-10 was £23,375 against total lodgements identified of £54,610.83; that is £40,264.70 by cheques, £8,074.87 by cash and £6,271.26 transfers-in from unspecified account(s).

26. The BOS-004 account, having been opened in August 2009, did not form part of the analysis for this accounting period.

Letter of 18 October 2013 and discovery assessments

27. By letter dated 18 October 2013, Officer Lyon summarised her findings to Mr Allan. The principal adjustments concerned the business income are as follows:

(1) For the year of enquiry 2010-11 covering the accounting period to 30 June 2010, the declared turnover on the SA return is £26,900 while the total deposits into the two accounts amount to £100,744.12;

(2) For the year 2009-10 covering the accounting period to 30 June 2009, the declared turnover is £23,375 while the total deposits amount to £54,610.83.

28. In respect of the year of enquiry 2010-11, Mr Allan was informed that his SA return would be amended to reflect the shortfall in declared turnover based on the bank lodgements in the accounting period to 30 June 2010. Allowance for input VAT on the costs of sales in relation to the added profits was given before the amendment, and the same formula of VAT adjustment would apply to all other years.

29. As for the tax year 2009-10, a discovery assessment under s29 TMA would be raised to reflect the shortfall in declared turnover for the accounting period ended 30 June 2009.

30. In the letter, Mr Allan was also informed of the proposed figures for further discovery assessments for the three years 2006-07, 2007-08, 2008-09; the proposed additions for sales in these three years would be based on the shortfall applied to 2009-10, on a 5% decreasing basis each year.

31. The addition of turnover to the year 2008-09 was calculated on the basis of there being only 7 months of trading in the basis period ending 30 June 2009 due to Mr Allan's sojourn in Sweden for 5 months of the period.

Meeting on 16 January 2014

32. A third meeting attended by Mr Allan and Mr Fraser and Officers Lyon and Young was held on 16 January 2014, for the purposes of confirming the basis of the discovery assessments for 2006-07 to 2009-10, and the implications for penalties.

33. During the meeting, Mr Allan identified two non-business deposits in his BOS-004 account, £1,015 being rent deposit and £500 being maternity payment to his partner. Documentation vouching for the nature of these lodgements was produced. These two deposits did not change the figure of £77,444.86, as the rental receipt was separately assessed from the trading profits, and the maternity payment had not been included as business income in the first place. (Apart from these two lodgements, Mr Allan did not produce other documentation.)

34. Mr Fraser confirmed that he had reviewed the figures provided by HMRC to date and agreed with the basis of the calculations for the amendments to 2010-11 SA return and for the discovery assessments for prior years. He explained to Mr Allan that had adequate business records been maintained, including pay-in books for bank deposits, the true business turnover could have been established.

35. After the discussion with Mr Fraser, Mr Allan read and signed a Certificate of Full Disclosure.

36. The matter of penalty was raised with Mr Allan. HMRC considered Mr Allan's behaviour in submitting incorrect returns to be deliberate. By interspersing the bank statements from two accounts to give the impression of there being only one account, Mr Allen's agent had been misled in preparing his return for 2010-11 based on incomplete records. Mr Allan denied having deliberately misled both his agent and HMRC, but could not offer any explanation as to why his behaviour, objectively viewed, should not be considered deliberate.

37. Since Mr Fraser had indicated that the SA return for 2011-12 had been prepared on the same basis as that for 2010-11, it was confirmed during the meeting that an enquiry would be opened into the SA return for 2011-12 and 2012-13 as well.

Enquiry into 2011-12 and 2012-13

38. On 19 February 2014, the enquiry notices under s9A TMA for 2011-12 and 2012-13 were served.

39. The covering letter summarised the key points from the meeting in January 2014, and explained that the basis of the amendments to the SA returns for 2011-12 and 2012-13 would be based on the shortfall identified for the year 2010-11.

Closure notices, discovery assessments and penalties

40. On 21 May 2014, Officer Lyon wrote to Mr Allan, enclosing revised tax calculations for each of the years from 2006-07 to 2012-13.

41. On 18 June 2014, closure notices for years 2010-11 and 2012-13 were issued, together with discovery assessments for the four years 2006-07 to 2009-10, plus the year 2011-12. A penalty explanation letter and schedule for relevant years were served on 18 June 2014; the penalty determinations and assessments were issued on 6 August 2014.

Appeal and internal review

42. Mr Allan made a late appeal with HMRC against all assessments and determinations on 31 July 2014. An internal review by an officer not previously involved in the case was offered by Officer Lyon.

43. A formal request for a review was received on 4 September 2014. The review conclusion by Officer Vallance was documented in a six-page letter dated 28 November 2014, upholding all the assessments and amendments, and is the decision noted on appeal to the Tribunal.