[2017] UKFTT 704 (TC)

# TC06123

**Appeal number: TC/15/2086 and TC/16/3069**

***INCOME TAX – abused partner accepting nominal appointment as director – unknowingly also the sole shareholder– whether liable to tax on dividends – no, as dividends not paid to her, received by her nor was she in equity entitled to them – whether liable to tax on benefit in kind as employee – car in control of abusive partner was not 'made available' to her by company– whether liability to tax on property income in own name - appeal against assessments and penalties allowed in part – effect of s 50 TMA***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**REBECCA LOUISE VOWLES** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE BARBARA MOSEDALE**
**JULIAN SIMS**

**Sitting in public at Southampton Magistrates Court on 24-25 April 2017**

**The appellant in person**

**Mr Golder, HMRC officer, for the Respondents**

## DECISION

1. The appellant lodged two appeals with the Tribunal. The first appeal was against amendments to her tax returns for the tax years ended ('YE') 2008 and 2009 and against discovery assessments for the years 2010 and 2011 (all made on 13 November 2013). HMRC accepted in the hearing that that appeal also included three late filing penalties (for tax years ended 2008, 2009 and 2010) and penalties imposed for filing inaccurate returns for years ended 2009, 2010 and 2011. The penalties were imposed on 13 November 2014.

2. The second appeal was against amendments to her tax returns for the years ended 2012, 2013 and 2014 made on 1 February 2016 together with penalties imposed for filing inaccurate returns for the same years imposed on 8 March 2016.

3. In summary, the tax and penalties at issue in this appeal was as follows:

| **Tax year 6 April to 5 April** | **Extra tax assessed over what was declared** £ | **Late filing penalty** £ | **Inaccuracy penalties** £ |
|---|---|---|---|
| 2007-2008 | 3,063.15 | 4,114.25 | - |
| 2008-2009 | 3,099.28 | 8,588.75 | 557.82 |
| 2009-2010 | 8,480.12 | 4,176.50 | 1,608.46 |
| 2010-2011 | 19,312.98 | - | 3,717.90 |
| 2011-2012 | 43,893.77 | - | 16,898.80 |
| 2012-2013 | 39,619.79 | - | 15,253.31 |
| 2013-2014 | 3,251.50 | - | 1,251.63 |
| Total at issue in appeal | **120,720.59** | **16,879.50** | **39,287.92** |
| | **£176,888.01** | | |

4. The amendments and assessments were made on the basis that Ms Vowles had underdeclared tax in her tax returns on three types of income:

(1) Dividend payments to her;

(2) Benefits in kind received by her;

(3) Property income received by her.

The late filing penalties were charged as a percentage of the tax due on the basis that the returns were filed more than 12 months late; the first three inaccuracy penalties were charged on the basis Ms Vowles had been careless in completing her tax return; the last three inaccuracy penalties were charged on the basis Ms Vowles had deliberately completed her tax return incorrectly. We will deal with all the matters at issue in this appeal in turn.

## The Witnesses

*Mr Ashby*

5. Mr Ashby was the HMRC officer who made assessments at issue in this appeal. His evidence about what had happened was not really disputed and we accept it. His evidence was necessarily limited as he could do little more than explain the basis on which he made the assessments and give evidence about his interactions with the appellant. Accepting his evidence does not mean we accepted his opinions or that his assessments were necessarily right. As can be seen from below, we did not agree with his assessments in a number of significant respects.

*Ms Vowles*

6. To a very large extent we accepted Ms Vowles evidence: where it was challenged she was able to give a convincing explanation (see §24 as an example). With good reason, she clearly found giving evidence about her personal situation distressing, but at the same time she seemed candid, willing to accept significant responsibility for her mistakes and her evidence as a whole seemed internally consistent.

7. Our biggest concern with her evidence was what appeared to us to be some inconsistency in what she had said in 2014 to HMRC and what she said now in respect of the question of who signed certain documents, but, for reasons explained below at §45, this concern did not cause us to reject her evidence as a whole.

8. We were also aware that much of what she said concerned her ex-partner, Max Walker, who was not present in the hearing room nor a party to the proceedings, and what she said about him was not really challenged. We accepted her evidence about Mr Walker for the reasons given in the penultimate paragraph: our findings, however, only apply for the purpose of proceedings between HMRC and Ms Vowles, and cannot be used in proceedings involving other persons, such as Mr Walker, as he was not called as a witness and did not have the opportunity to put his side of the story.

## The properties

*Bishops Mooring*

9. At some point, Ms Vowles married and bought a derelict property, Bishops Mooring, with her husband, which they restored. The property was purchased with a loan of about £112,000 secured by a mortgage.

10. After having been in employment for many years, in around July 2003 Ms Vowles commenced in self-employment, doing much the same as she had done before but now on her own account. She traded under the name of 'Apricot Print'. Within a few months of commencing self-employment, she met Mr Max Walker and shortly thereafter left her husband for him.

11. As part of the divorce settlement, she agreed to buy out her ex-husband's interest in Bishops Mooring for £80,000, which led to a re-mortgage of the property for £176,000 in 2005. It was re-mortgaged in 2006 to release a further £30,000 in capital, and then re-mortgaged again in 2008 to release more capital. Ms Vowles accepted that she was aware of the 2006 re-mortgage but not the later re-mortgages; she also accepted that the purpose of the 2006 re-mortgage was to release capital to pay arrears of interest on Verona House, the property she had purchased with her new partner to live in as their home. She did not know the purpose of the later re-mortgages.

*Florida Cottage*

12. In 2002, Ms Vowles' father gifted his home, Florida Cottage, to his two children. The property was not subject to any mortgage or charge at the date of the gift. Ms Vowles' brother continued to live in half of the cottage.

13. In 2003, Ms Vowles borrowed some £228,369 from a lender secured on a mortgage on the entire property. A significant part of the loan was used to pay a deposit against Verona House, which, as we have said, was the property Ms Vowles purchased with her new partner, Mr Max Walker.

14. Florida Cottage was re-mortgaged at least twice thereafter each time releasing further capital. Except in so far as Ms Vowles accepted that most of the original loan was used to fund a deposit on Verona House, the Tribunal had no evidence of what the remainder of the loans were used for. Ms Vowles' was not even aware of the second re-mortgage at the time it was taken out and did not know for what the funds were used.

15. Ms Vowles' half of the property was let at around the time the property was first mortgaged with the intention that the rent payments would fund the interest on the loan. Mr Walker arranged the tenancy and originally arranged for the rent payments to be received into his bank account. However, as the interest payments were debited to Ms Vowles' bank account and Mr Walker did not remit the rent to her, this made her default on some of her monthly payments and, after a quarrel with him, thereafter they arranged it so that the rent was paid directly into her bank account.

*Abuse*

16. Ms Vowles gave evidence, which we accept of physical and mental abuse of her by Mr Max Walker. She described a narcissistic and controlling character. With the benefit of hindsight, she believes he attached himself to her because she owned properties and could be the source of funds for him to start a new business to fund the affluent lifestyle he desired.

17. He mentally abused her by denigrating her: he would criticise her personal appearance, and ignore her. He would always put her down verbally. Their relationship was a cycle of abuse followed by making up.

18. He controlled her finances. Around the time she became pregnant with their first child in 2005, he persuaded her to give him control of her bank cards. Thereafter, he would then only permit her to access her bank accounts when he decided and only for purchases he dictated. Often when shopping for food, she would have to call him on her mobile so that he could come to the check-out counter to pay for the groceries as he had not given her a bank card or cash to pay.

19. Mr Walker did not permit Ms Vowles to write letters; he controlled her correspondence with HMRC although she accepts that she may well have signed the letters sent to HMRC, as she signed what was put in front of her. Any letters which arrived at their home, even if addressed to her, were left for Mr Walker to open.

20. Physical abuse commenced in 2005, about 18 months after their relationship began and around the time she became pregnant. Mr Walker would spit at her and physically push her around. He once locked her in the jacuzzi with little air and she passed out. On another occasion, he hit her head against a wall, causing her to lose consciousness, yet she told the ambulance crew that she had had a panic attack. He broke her foot and collar bone.

21. She became afraid of him. Her friends and family likewise learnt to be afraid of him. Her friends referred to Verona House as the 'pink prison' and when visiting they would ensure that they had left before Mr Walker returned.

22. In 2012 Mr Walker went on holiday to Cowes Week at a cost of about £30,000: he left Ms Vowles at home with their infant children for 10 days with only £100 to spend on food.

23. Despite the abuse, Ms Vowles did not seek an end to the relationship: she said it was great when it was great, but terrible most of the time. The relationship did come to an end in 2012: she became suspicious he was having an affair as he bought a mattress. He admitted he was leaving her. With the benefit of hindsight, she believes he ended the relationship because their financial situation was becoming untenable. As she put it, the chickens were coming home to roost and he became the subject of fraud investigations (for reasons we explain below).

24. As we have said, this evidence was not really challenged and we accept it; in any event, there was some corroboration of it. Mr Ashby accepted that he had seen a contemporaneous email from Mr Walker to Ms Vowles telling her on what she could spend money. Moreover, the director's loan account appeared consistent with her evidence that large sums of money were spent on Mr Walker and his interests (for instance large sums on his sailing yacht) whereas Ms Vowles was only permitted to shop for food in Asda and for clothes in New Look. HMRC did put to her that some of the non-food shopping expenditure was hers, but Ms Vowles was able to convincingly explain that the items referred to by HMRC were in fact expenditure by Mr Walker. We also note that the story Ms Vowles told did not really reflect credit on herself: while her evidence was that she was a victim, she also accepted that her actions were foolish, that she had caused anguish and financial ruin to herself, her

father and brother, and that she rendered herself liable to accept a director's disqualification order (for reasons we explain below).

*NettexMedia.Com Ltd*

25. Ms Vowles trusted Mr Walker despite the abuse. While knowing he had been disqualified as a director, she accepted his assurance that he was not to blame with whatever had gone wrong with his previous companies. He wanted to set up a new company but, as he could not be a director of it, Ms Vowles agreed to be the director. She understood from the start, nevertheless, that it was Mr Walker's business and that she would be a mere figurehead.

26. Putting this plan into effect, Mr Walker arranged that on 15 June 2006 Ms Vowles was appointed sole director of NettexMedia.Com Ltd ('Nettex') and a share certificate was issued showing that she owned 1 A ordinary class share in that company. She took out a loan of £10,000 from a bank to provide the start-up capital.

27. We did not fully understand the nature of the company's business, what we did understand is that it was based on the internet and its purpose was to get people to sign up to a 30 free day trial membership and provide their bank card details; after the 30 days, persons would be charged £19.95 a month. We accept Ms Vowles' evidence that the company would without authorisation retain card details and – on at least one occasion – charged £1 to each person for whom it held card details without any authority whatsoever. We accept her evidence that the company was investigated for fraud and went into liquidation at about the time her relationship with Mr Walker ended.

28. Ms Vowles knew that she was the director on paper; she did not think about the legal responsibilities that that gave her. So far as she was concerned, the company was Mr Walker's and he ran it. She merely signed what she was asked to sign and left the operation of the company to him. For these actions, she later accepted that she had to agree to a director's disqualification order.

29. Mr Golder challenged her evidence that she had nothing to do with the operation of the company: he pointed out that she had run her own business (Apricot Print – see §10) and said she must have known how to run a company. She denied this. Apricot Print was a small sole trader operation with a very small number of clients and all the record keeping side of that business had been undertaken by a bookkeeper. We accept her experience with Apricot Print did not mean she knew how to manage a limited company.

30. We also accept her evidence about her position in Nettex: it was internally consistent with the rest of her evidence about her relationship with Mr Walker and his exploitation of her. We find she was only nominally a director.

31. The extent of her involvement with Nettex was that she was given a desk from which (on very much a part-time basis) she helped deal with complaints, of which there were (not surprisingly) a great many. Mr Walker permitted her to do this as she

was good on the telephone. She was occasionally allowed, when authorised by Mr Walker, to make refunds to disgruntled clients by cheques drawn on a company account.

*Director's loan account*

32. Nettex had bank accounts. There was a director's loan account ('DLA') which recorded debits from the company bank account and credits of dividends. Ms Vowles was the sole director but it was her case she knew nothing about the director's loan account nor the crediting of dividends to her.

33. HMRC accepted that Mr Walker did have access to the company bank accounts and the director's loan account reflected some spending by him. It also showed that his salary was paid into it.

34. HMRC's case was that Ms Vowles, as well as Mr Walker, had access to the DLA and they both spent money out of the company's bank accounts, such spending being ultimately being reflected in the DLA as dividends. Ms Vowles did not accept that she had access to company money or received dividends from the company.

35. Mr Golder challenged Ms Vowles' evidence that she did not have access to the company's bank account by asking her about a meeting in 2008 in which there was a reference to Ms Vowles having a bank card on a business account. However, we accept her evidence, as it was clear from the context, that the business being discussed was Apricot Print. There was nothing in this meeting note inconsistent with her evidence that she did not have access to Nettex' bank accounts.

36. Mr Golder cross-examined Ms Vowles on a number of specific expenses which presumably appeared to him more likely to be spending by Ms Vowles rather than Mr Walker, but she was able to satisfy us that each such expenditure was Mr Walker's. Her story was internally consistent: Mr Walker had an affluent life-style but there was little money for his family. She was allowed about £150 a week for family expenditure. She was not allowed expensive clothes and haircuts, except on one occasion when Mr Walker was present and authorised the expenditure because she needed to look smart for a particular event.

37. We find that in 2008 on one or two occasions a few thousand pounds was credited from Nettex' account to Ms Vowles' own bank account. Ms Vowles did not deny this but did not appear to recollect it. We note that it was at a time when she had already ceded control of her personal bank accounts to Mr Walker.

38. We accept her evidence that she did not have access to Nettex's bank accounts and in so far as she benefited from the company's money, it was only to the extent permitted by Mr Walker. She did not control the money but was merely allowed some by Mr Walker for household expenses as she was his partner and mother of his children. The fact that in 2008 some money was directly credited to her bank accounts does not change this overall picture as at that point she had ceded practical control of her bank accounts to Mr Walker.

*Who signed the disputed documents?*

39. At a meeting between HMRC and Ms Vowles on 18 February 2014, Ms Vowles disputed that various documents relevant to her tax liability were signed by her. So in July of that year, HMRC requested a forensic document examiner, Ms Kamaljit Mesuria, to consider whether those signatures (which we will refer to as the questioned signatures) were signed by the same person who signed the various specimen signatures provided by Ms Vowles (which we shall refer to as the reference signatures). The questioned signatures were on documents dated in the years 2007-2012 and the reference signatures were dated from between 2009-2014.

40. Ms Mesuria was a senior forensic document examiner employed in the Questioned Documents Group of LCG Forensics. She has a great many years' experience in comparison and identification of handwriting. Her independence and expertise was not questioned and we accept it.

41. She reached the conclusion that, although she could not be conclusive, her opinion was that there was 'strong support' for the conclusion that the same person made the questioned signatures as the reference signatures. Her conclusion was based on the fact that (a) pictorially the signatures were all similar; (b) the construction of each signature was very similar; (c) the range of variation between all of the questioned signatures was a similar range of variation as between all of the reference signatures; (d) the questioned signatures were both accurate and fluent; and (e) both sets of signatures showed a similar evolution over time.

42. Ms Vowles put it to Ms Mesuria that, Max Walker, having known her for 13 years and been trusted by her to sign documents on her behalf, would have been able to copy her signature closely. Ms Mesuria agreed that this might be so but pointed out that the questioned signatures showed a degree of variation between them which compared to the variation shown by the reference signatures: it was in her opinion unlikely that a person could imitate the degree of variation.

43. We accept Ms Mesuria's opinion. She was an expert in her field and her evidence was convincing. In any event, Ms Vowles' evidence in the hearing on what happened was not really in significant conflict with Ms Mesuria's evidence. Ms Vowles' story was that she signed whatever Mr Walker had asked her to sign while at the same time, with her knowledge and help, Mr Walker practiced her signature so that he was capable of forging, and did forge, her signature to some documents.

44. In conclusion, Ms Vowles has not proved that any one of the questioned signatures were not hers. We find it more likely than not that all of the questioned signatures were hers.

45. What concerned us, as mentioned above, is that it did not appear to us that her refusal to accept in 2014 that the questioned signatures were hers was consistent with her evidence in 2017 that she had in fact signed, without reading, whatever she was asked by Mr Walker to sign. However, her evidence was that Mr Walker had betrayed her (very misplaced) trust on many occasions, forging her signature to sign her up to liabilities (such as re-mortgages and leases) to which she had not agreed and

of which she had had no knowledge, the result of which was that she had been embroiled in litigation since the breakup of their relationship. We could understand why, in these circumstances, she had questioned whether any signatures were actually hers and, while we did not accept that it had been proved that any of the questioned signatures were not hers, we did not reject her evidence as a whole.

*Interaction with HMRC*

46. On 6 July 2010, HMRC opened a COP9 enquiry into Ms Vowles' affairs. On 12 November 2010, HMRC were advised by letter signed by Ms Vowles that Mr Walker and Mr Robson of J R Associates would act for Ms Vowles in the enquiry.

47. Subsequently, J R Associates submitted a disclosure report on 21 March 2011 which included Ms Vowles' tax returns for tax years ended 2008 and 2009. On 31 October 2011 HMRC notified Ms Vowles that they would enquire into those two tax returns.

48. On 16 February 2012 tax returns for the year ended 2010 and 2011 were filed electronically.

49. On 13 November 2013, HMRC issued discovery assessments for the years ended 2010 and 2011 and notice of closure of enquiries with amendments to the tax returns for the years ended 2008 and 2009. By this time, her relationship with Mr Walker had ended and Ms Vowles dealt with HMRC directly (although assisted by a friend).

50. A review decision of 29 January 2015 upheld the amendments and assessments and Ms Vowles appealed.

51. On 6 February 2015, Ms Vowles filed her tax returns for 2012-2014 showing nil benefits and nil dividends and a property loss each year. HMRC opened enquiries on 31 March 2015 and amended the tax returns on 1 February 2016. Ms Vowles appealed. As we have said, this second appeal was joined to the first.

52. In summary, the tax returns showed the following information:

| Tax return for year ended.... | Benefits and expenses | Profit from self-employment | Dividends (net) | Profit/(Loss) from property |
|---|---|---|---|---|
| 2008 | 21,986 | 13,929 | 40,628 | (11,043) |
| 2009 | 30,732 | 6,932 | 115,292 | (9,749) |
| 2010 | 43,903 | 4,333 | 29,929 | 7,279 |
| 2011 | 44,971 | 869 | 27,392 | 5,093 |
| 2012 | 0 | 0 | 0 | (19,040) |
| 2013 | 0 | 0 | 0 | (8,100) |
| 2014 | 0 | 0 | 0 | (7,804) |

53. The following table shows the amount by which HMRC's amendments/assessments increased the income declared:

| Tax return for year ended.... | Benefits and expenses - £ | Profit from self-employment- £ | Dividends (net) - £ | Profit/(Loss) from property £ |
|---|---|---|---|---|
| 2008 | -- | -- | -- | 18,261 |
| 2009 | -- | -- | -- | 17,299 |
| 2010 | -- | -- | 21,884.90 | 254 |
| 2011 | -- | -- | 54,056.20 | 2,929 |
| 2012 | 29,369 | -- | 129,391 | 28,010 |
| 2013 | 29,859 | -- | 117,220 | 16,570 |
| 2014 | 16,368 | -- | 15,639 | 16,274 |

The increased tax liability assessed on Ms Vowles as a result of these re-calculations of her income is shown in the table at §3.

**Our conclusions on the amendments/assessments**

*Were the enquiries validly opened?*

54. This was not an issue raised in the hearing but it was Ms Vowles' case that she was not responsible for the tax returns for the first four years in issue. She accepts she signed and submitted those for the last three in issue: they were submitted long after her relationship with Mr Walker ended in 2012. But her case on the first four returns impliedly raised the issue of whether the 2008 and 2009 tax enquiries were validly opened, because if Ms Vowles, or someone on her behalf, had not submitted the tax returns in question, HMRC would be unable to enquire into them.

55. As we understood it, it was Ms Vowles' case that at the time the first four returns in issue were made, Mr Walker was entirely in control of her life and she had signed whatever she was asked to. We understood her case to be that the tax returns were not her returns in any real sense. Moreover, she did not read the post sent to Verona House, so HMRC had not in a real sense given notice of the opening of the enquiry to her, as required by S 9A TMA.

56. As we have said, we have not been satisfied that any particular signature was not Ms Vowles'. So we find she did sign the tax returns in 2008 and 2009.

57. And our overall conclusion is that in so far as Ms Vowles' case was that the tax returns were not hers, we reject it. While we accept that she was the victim in an abusive relationship, and in practice did not know the contents of the tax returns nor read the post sent to her, we consider that as a matter of law she would have to show duress in the sense of fear of imminent danger in order to vitiate her consent to Mr Walker acting on her behalf in completing her tax returns, reading her post, and

corresponding with HMRC. We make this finding of law on the basis of an analogy with the law of contract as explained in cases such as *Szechter (otherwise Karsov) v Szechter* [1970] 3 All ER 905 and *Singh v Singh* [1971] 2 All ER 828.

58. On the facts, her evidence was not that she stayed in the relationship, nor that she signed whatever she signed, out of fear: her evidence is that she originally consented to Mr Walker acting on her behalf because she trusted him completely and in any event did not consider she understood tax matters sufficiently to be able to deal with them herself; while the implication of her evidence was that at some point she ceased to trust him, she did not pin down when that was and, in any event, although she was frightened of him, she never suggested that at any point in their relationship she signed documents out of imminent fear for her safety.

59. So we find that it was not under duress that she consented to Mr Walker acting on her behalf and signed the documents. Therefore, we find that the tax returns for those four years were her returns for the purposes of s 9A and s 29 TMA. HMRC were entitled to enquire into them. By sending post to her address they gave her due notice of the enquires under s 115 TMA, even if she did not open her post. But did HMRC open the enquiries timeously?

*Were enquiries opened timeously?*

60. Ms Vowles did not suggest that HMRC's various assessments and enquiries were out of time, but HMRC invited the Tribunal to consider the matter. We find that the various relevant dates were as follows – they were not in dispute:

| Y/E | Tax return filed | Enquiry opened | Closure notice/ determination | Discovery assessment |
|---|---|---|---|---|
| 2008 | 21/3/11 | 31/10/11 | 13/11/13 | |
| 2009 | 21/3/11 | 31/10/11 | 13/11/13 | |
| 2010 | ?/2/12 | -- | -- | 13/11/13 |
| 2011 | ?/2/12 | -- | -- | 13/11/13 |
| 2012 | 6/2/15 | 31/3/15 | 1/2/16 | |
| 2013 | 6/2/15 | 31/3/15 | 1/2/16 | |
| 2014 | 6/2/15 | 31/3/15 | 1/2/16 | |

61. The tax returns for 2008 and 2009 were late so the applicable time limit in which to open an enquiry is contained in S 9A(2)(b) which gives over a year from the filing date in which to open an enquiry. HMRC were clearly within time as they opened an enquiry less than eight months after the date the returns were filed.

62. There were no enquiries into the returns for 2010 and 2011.

63. The returns for 2012-2014 were all filed late so again the applicable time limit is in s 9A(2)(b). The returns were opened within three months of the actual filing date and therefore were clearly in time.

*Were the discovery assessments within the 4 year time limit?*

64. While the appellant did not suggest that the assessments were out of time, HMRC again invited the Tribunal to consider the matter. S 34(1) TMA provides that:

> '....an assessment to income tax....may be made at any time not more than 4 years after the end of the year of assessment to which it relates'

65. Amendments following enquiries are not assessments so that the 4 year time limit does not apply to them. However, the two discovery assessments are subject to this time limit. We find that, as both assessments were made on 13 November 2013, and the earliest relevant end of year of assessment was 5 April 2010, both discovery assessments were in time.

*Did HMRC make a discovery?*

66. HMRC also asked the Tribunal to consider whether the discovery assessments were made properly under s 29 TMA; and the decision in ***Burgess and Brimheath Developments Ltd*** [2015] UKUT 0578 (TCC) may suggest they were correct to raise this issue as they have the burden of proof even though the appellant had not expressly queried the matter.

67. Whether the discoveries were within s 29(1) TMA is a more complex matter than the timing questions. HMRC must prove that there had been a discovery. What is a discovery? S29 provided as follows:

> (1) If an officer of the Board or the board discover, as regards any person (the taxpayer) and a year of assessment
>
> (a) That any income which ought to have been assessed to income tax...have not been assessed, or
>
> (b) That an assessment to tax is or has become insufficient....
>
> 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.

We consider that case law has shown that to be a 'discovery' within s 29 HMRC must prove the following (see *Atherton* [2017] UKFTT 831 (TC) at §206-218*)*:

> (a) An HMRC officer has crossed a threshold from non-awareness to awareness of an insufficiency;
>
> (b) He acted reasonably when so doing;
>
> (c) HMRC as a body did not previously have the awareness of the insufficiency;
>
> (d) The assessment must be proximate to the discovery.

68. The discovery assessments were for years ended 2010 and 2011 and related only to dividend and property income. HMRC's case is that they discovered that the dividends paid to Ms Vowles were greater than she had declared when Nettex filed its

annual returns for years ended 2010 and 2011 and that Ms Vowles had overstated the deductible interest on her property income when she filed her returns for those two years.

69. So far as conditions (a)-(c) are concerned, we consider that HMRC have met them. they could not have known of the under-declarations (if they were under-declarations) before these occasions referred to in the previous paragraph. However, were the discovery assessments proximate to the discoveries (condition (d)), as they are required to be by *Pattullo* [2016] UKUT 270 (TC) at [52]?

70. The discovery assessments in so far as they related to dividends depended on the discrepancies between Ms Vowles' returns and the dividends shown in the company's accounts filed at Companies House for years ended 30 November 2010 and 2011 (as they covered periods covered by Ms Vowles returns for tax years 9/10 and 10/11). The corporate accounts for these years were submitted on 25 May 2012 and Mr Ashby did not suggest that HMRC received them at a later date. (The evidence before the Tribunal included the DLA but that was not available to HMRC until long after the discovery assessments were made). So far as the discrepancies in the rental profits were concerned, these were discovered by comparing what HMRC already knew about the properties to Ms Vowles' tax returns submitted in February 2012. The discovery assessments were made on 13 November 2013.

71. Mr Ashby's evidence (which we accept) was that he took over responsibility for the COP9 enquiry into Ms Vowles in May 2013 and actually started to work on the file in August 2013. It was only then that he discovered (what he believed to be) under-declarations of dividend and rental income. While Mr Ashby clearly did not himself discover anything before August 2013, as commented at §67, Mr Ashby's discoveries do not matter if preceded by earlier discoveries made by others in HMRC, and in particular by Ms Naish, who was the officer who had previous responsibility for the investigation into Ms Vowles. Mr Ashby's evidence did not make clear what was known to Ms Naish and when: and it seems from the dates in the previous paragraph that Ms Naish could have discovered in mid-2012 the discrepancies which Mr Ashby assessed in November 2013. HMRC have not satisfied the Tribunal, therefore, that the discovery took place later than mid-2012. Is that sufficiently proximate to the assessments in November 2013?

72. In *Pattullo* at [53] the Judge said:

> But I consider that [counsel for the appellant] was right to accept that it would only be in the most exceptional of cases that in action on the part of HMRC would result in the discovery losing its required newness by the time that an assessment was made.

73. In this case, it was clear that Ms Naish and then Mr Ashby were actively dealing with Ms Vowles file during 2012 and 2013, and corresponding with Ms Vowles, and in no way could it be said that the discovery, even if it was made by Ms Naish in mid-2012, had lost its 'freshness' by November 2013 in the particular circumstances of the case. Our conclusion, therefore, is that the discovery met the formal requirements of s 29(1).

*Other conditions for discovery*

74. HMRC rely on s 29(4) to justify the discovery assessments: in other words they allege Ms Vowles (or someone on her behalf) carelessly completed her tax returns for tax year ended 2010 and 2011. We will deal with this part of their case when considering penalties: §§120-121.

*The dividends*

75. HMRC compared the dividends declared in Ms Vowles' tax returns to the records held at Companies House, based on Nettex' returns up to 30/11/10. Later, in 2014 HMRC obtained from Nettex' liquidator copies of the director's loan account which showed the crediting of a dividend to Ms Vowles. Combining these two sources showed that Ms Vowles was credited with dividends by Nettex as follows:

| **Tax year ended** | **Net dividend as shown in returns and director's loan account** | **Dividends (net) declared on tax return** |
|---|---|---|
| 2008 | 40,628 | 40,628 |
| 2009 | 115,292 | 115,292 |
| 2010 | 51,813.90 | 29,929 |
| 2011 | 81,448.2 | 27,392 |
| 2012 | 129,391 | 0 |
| 2013 | 117,220 | 0 |
| 2014 | 15,639 | 0 |

76. Ms Vowles does not dispute the accuracy of these figures: her case is that she never received the dividends, even those declared in her own tax returns. We have found that, save for relatively small sums in 2008, the dividends were not paid to accounts in Ms Vowles' name but reflected expenditure out of Nettex' bank accounts by Mr Walker (see §§32-38), albeit Ms Vowles benefited from that expenditure to some extent in that, amongst other things, it was used by Mr Walker to pay household expenses.

77. The Income Tax (Trading and Other Income) Act 2005 ('ITTOIA') provides that tax is chargeable on dividends (s383). It provides at s 385:

> **S385 Person liable**
>
> (1)The person liable for any tax charged under this Chapter is –
>
> (a) the person to whom the distribution is made or is treated as made (see Part 6 of ICTA and s 386(3) and 389(3)), or
>
> (b) the person receiving or entitled to the distribution.

The reference to Part 6 of ICTA and s 386(3) and 389(3) are irrelevant: they concern group companies and unit trusts. So the effect of s 385, so far as this appeal is concerned, is that the dividend is taxable on the person to whom the distribution is made, or who receives it or who is entitled to receive it.

78. While s 385 appears to contemplate that more than one person could be subject to tax on the same dividend (for instance, where one person received it but another person was entitled to receive it), a better reading is that only one person is liable to tax on the same dividend. Any other reading gives rise to double taxation.

79. We consider whether the dividend distribution was made to Ms Vowles, whether she was entitled to it and whether she received it.

80. HMRC's case is that she spent directly from the company's bank account, and was then credited with a dividend in the DLA. However, we have already found that Ms Vowles did not spend money from the company's bank accounts. While she did benefit to some extent from the company's money (the family food bills, for instance) she did not control access to the money and anything spent was spent by Mr Walker.

81. HMRC also said she had consented to Mr Walker and Mr Robson acting for her on her tax affairs (see §§46-48) and they clearly considered she had received a dividend. We don't accept that. She had consented to Mr Walker acting for her in certain capacities but we find he did not act in her best interests: therefore, we would not accept his assessment of her liability. It was also unclear who was the person who actually drew up the accounts: while Ms Vowles thought Mr Robson prepared accounts for Nettex, he now denied he had anything to do with the company. In any event, there was no reason to suppose that whoever drew up the accounts was acting for Ms Vowles in doing so: she did not actually exercise her authority as director of the company.

82. HMRC also say that Ms Vowles must have known that the dividends were credited to her because she would have seen and signed the company accounts and companies house returns. However, we accept her evidence that she signed what she was asked to sign without reading the documents.

83. We have accepted Ms Vowles account that she was unaware that she was the shareholder of Nettex and in any event, that she understood that so far as she was concerned, she was a mere figurehead in respect of the company, which was in reality Mr Walker's company. He ran the company, controlled its finances and spent its profits, whether lawfully or unlawfully obtained, while Ms Vowles did not have access to the company's funds save to the extent Mr Walker permitted her to spend money.

84. Our finding is that while in law she was the shareholder, in equity it is clear that she held that share on trust for Mr Walker, even though neither party, not being lawyers, would have thought about the matter using such terminology. But the situation Ms Vowles described was clearly one where her name was used, but she had no beneficial interest in the company. While she was supported financially with some of the profits from the company, this was at Mr Walker's choice and as his partner and mother of his children, in order that they could live, and it was not money paid to her by the company as a shareholder. It was clear to us that neither Mr Walker nor Ms Vowles saw Ms Vowles as having any role in respect of the management of the company, and certainly neither saw her as an owner actually entitled to a share in the

profits (whatever Mr Walker decided it was expedient for the company's accounts to show). We do not consider her the beneficial owner of the share in her name.

85. In conclusion, it was clearly Mr Walker to whom the dividend was paid. He controlled the director's loan account and the dividend was credited to the director's loan account. Further, the dividends were clearly received by Mr Walker. He controlled the company's bank accounts and decided how the profits should be spent (including in 2008 making a few direct payments into Ms Vowles's account albeit at a time when he had possession of her bank cards). Ms Vowles did not have access to the company bank accounts and did not receive the dividends. Lastly, Ms Vowles was not entitled to receive the dividends because she held her share on behalf of Mr Walker, who was in equity the person entitled to receive the dividends.

86. In short, we find that Ms Vowles was not the person liable for the tax on the dividends. While we think s 385 must be read as giving liability to a single person, in any event our finding is that whichever test in s 385 is applied, Ms Vowles was not the person liable to the tax. The dividend was not paid to her, it was not received by her and she was not in equity entitled to it.

87. In the hearing, Mr Golding asked us what he appeared to consider a rhetorical question which was that, if Ms Vowles was not the person liable for tax on the dividends, then who was? But the answer to that question is quite obviously Mr Walker: we think that if HMRC had actually listened to what Ms Vowles has quite clearly being saying to them for years, they should have realised that, on her version of events, Mr Walker was the one with the tax liability on the dividends.

*Did Ms Vowles receive the benefits in kind?*

88. Ms Vowles accepted that she had had use of a company car belonging to Nettex. Her story was that she had bought herself a Mercedes just before she met Mr Walker, and shortly after getting together, he persuaded her to give it to his business associate, Mr J Bell, on the understanding she would be able to drive Mr Walker's X5. In 2010, Mr Walker presented her with the keys to a Range Rover, the car at issue in these proceedings. The next day, Mr Walker made it clear to her that she had to share the Range Rover with Mr Bell (even though he still had her Mercedes). Ms Vowles and Mr Bell both had a key to the Range Rover and it was kept some of the time at Mr Bell's property and some of the time at Verona House. Her evidence was that Mr Bell used the car more than she did, and, indeed, that she was only allowed it when it suited Mr Walker. It meant that she frequently had to rely on friends to get herself and her children around. She entirely lost the use of the car in October 2013, sometime after they had split, when Mr Walker told her it was being repossessed (although she discovered later that this was untrue).

89. While HMRC did not really challenge this evidence, they considered that she was liable for tax on the benefit of having a car (list price of £65,113) together with fuel benefit. HMRC considered that her tax returns for 2010 and 2011 correctly reflected the benefit of having the use of this car. However, no benefit was declared in her tax returns for 2012-2014 even though she accepted that she had had some use

of the car until 21 October 2013. HMRC, therefore, amended these three tax returns to include the following taxable benefits, the benefit for 13/14 being apportioned to reflect that she lost any use of the car about half way through the tax year:

| y/E | Company car benefit | Company fuel benefit |
|---|---|---|
| 2012 | £22,789 | £6,580 |
| 2013 | £22,789 | £7,070 |
| 2014 | £12,362 | £4,006 |

90. Ms Vowles did not challenge the calculations. She objected to being charged for the benefit of the car at all.

91. As we have said, HMRC did not challenge her evidence that she shared the car with J Bell who had it more often than she did: indeed, Mr Golder indicated HMRC would be prepared to consider an apportionment of the benefit.

92. We accept Ms Vowles' evidence about the car. It was not challenged and it was consistent with all her other evidence about her relationship by Mr Walker and that he would spend as little as possible on her. So is she liable to pay tax in respect of the car? The Income Tax (Earnings and Pension) Act 2003 ('ITEPA') s 114 charges employees to tax if a car 'is made available' to the employee 'by reason of the employment' for private use.

93. ITEPA provides at s 5(1) that 'offices' are 'employments', and references to being employed must be taken to include holding an office. Was she an employee and/or an office holder? She clearly held office as director, but we accept her evidence that her directorship was nominal and in reality she did not act as a director. However, we find she did act as an employee as she worked for the company on a part-time ad-hoc basis (§31) albeit this work would have been unpaid unless, of course, the car amounted to payment in kind.

94. There is also no doubt that she had the car for private use: she did not suggest she used it for business purposes.

95. However, was the car 'made available by reason of the employment'? S 117 ITEPA provides that where a car was made available by an employer, it was to be treated as made available by reason of the employment unless the employer was an individual. That exception clearly does not apply here as the employer was a company (Nettex). But s 117 still begs the question of whether the car was made available to Ms Vowles *'by [her] employer'*. We have found that the car was only available to her when Mr Walker said so and only when it suited him. That means it was not Nettex which made the car available. On the contrary, Nettex made the car available to Mr Walker, as Mr Walker was the person who determined who used the car. In other words, Nettex made the car available to Mr Walker and he made it available (when it suited him) to Ms Vowles. Mr Walker ought to have been taxed on the car benefit rather than Ms Vowles. We allow the appeal with respect to the car benefit.

96. So far as the fuel benefit was concerned, although this was declared on her behalf in her earlier returns we set no store by this as we have found Mr Walker did not in practice represent her. Her evidence was that she was not provided with fuel by the company and this was not challenged. We accept it and therefore allow the appeal in so far as it was concerned with fuel benefit.

*Property income*

97. Two issues arise with Ms Vowles' two properties, Florida Cottage and Bishops Mooring:

(1) Was the interest payments on the loans secured on the properties deductible?

(2) Was the full rental income declared?

*Liability to tax on full rental income?*

98. Chapter 3 of ITTOIA deals with the profits of a property business. It provides at s 271 that:

> The person liable for any tax charged under this Chapter is the person receiving or entitled to the profits.

99. Ms Vowles' was the owner of that part of Florida Cottage which was let; she was the owner of Bishops' Mooring. While we accept that she was not the shareholder of Nettex in any real sense, that was not true in so far as the properties were concerned. She owned them both before she met Mr Walker; she still owns them today. On her own evidence the rent from these properties was (apart from for a short period) paid into her personal bank account (from which it funded the mortgage interest liability).

100. We find she both received and was the person entitled to receive the profits on the rentals of these two properties.

101. For the first four years in question (2008-2011), Ms Vowles' returns had shown just over £16,000 per year in rental income on the two properties. HMRC did not question those figures; however, her last three returns showed only about £7,000 per year in rent. Nevertheless, in discussions on the telephone with Mr Ashby on 13 April 2015 Ms Vowles accepted both rental streams totalled around £15,252 per annum. We find she had omitted the rent from one of the properties.

102. HMRC were correct to amend her returns 2012-2014 to reflect the actual level of rents received.

*Deductibility in interest*

103. S 272 of ITTOIA provides that:

(1) The profits of a property business are calculated in the same way as the profits of a trade

104. The provisions on calculating the profits of a trade include s 34 ITTOIA which provides:

(1) In calculating the profits of a trade, no deduction is allowed for -

(a) expenses not incurred wholly and exclusively for the purposes of the trade.....

105. HMRC's case is that none of the interest paid on the mortgages on Florida Cottage were deductible, and none of the interest paid on the mortgages on Bishops Mooring other than the re-mortgage in 2005 (§11) when she bought out her ex-husband.

106. Ms Vowles did not have an answer to this case. We have accepted her evidence, and her evidence was that in so far as she knew the purpose of the loans on Florida Cottage it was to release funds to pay the deposit on their residence (Verona House) or to pay the interest on the mortgage on Verona House. The mortgages were not used for the purpose of the property rental business. So the interest on these mortgages should not have been allowed in Ms Vowles' tax computations.

107. HMRC have accepted it was correct to deduct the interest on the re-mortgage to buy out her husband's interest in Bishops Mooring. This is because mortgage liability was incurred in order to purchase the business property. But the interest on the later mortgages was rightly disallowed by HMRC. This is because they were not shown to have been used for the purpose of the property rental business: Ms Vowles did not know the purpose of them.

108. HMRC's amendments of her tax returns and the discovery assessments were made on the basis of estimated amounts of interest. The estimate was based on a mortgage statement provided by the appellant some years ago, adjusted for fluctuations in rates of interest generally. Ms Vowles did not question the basis of the assessment and we consider that it was reasonable. We uphold HMRC's amendments which excluded interest expenses as set out above.

109. HMRC also halved a claim for other expenses contained in the first two returns and assessed on the same basis the next two years: each year the returns had shown 'other expenses' of £3,750. Ms Vowles was unable to explain to what these related. It was in these circumstances generous of HMRC to allow anything; but we do not disturb it. The expense should be disallowed to the extent it was disallowed.

110. In conclusion, we agree with HMRC's amendments in respect of property income which resulted in the following liability:

| Y/E | Rental income | Interest | Other expenses | Profit assessed |
|---|---|---|---|---|
| 2008 | 16,800 | 7,832 | 1,750 | 7,218 |
| 2009 | 16,800 | 7,500 | 1,750 | 7,550 |
| 2010 | 16,272 | 7,000 | 1,750 | 7,522 |

| | | | | |
|---|---|---|---|---|
| 2011 | 16,272 | 6,500 | 1,750 | 8,022 |
| 2012 | 16,000 | 5,280 | 1,750 | 8,970 |
| 2013 | 15,500 | 5,280 | 1,750 | 8,470 |
| 2014 | 15,252 | 5,280 | 1,750 | 8,470 |

*Late filing penalties YE 08 and 09 and 10*

111. Late filing penalties were imposed on Ms Vowles in respect of her returns for YE 2008-2010, totalling £16,879. They were tax geared penalties with a reduction set at 75%.

112. The first question is whether the returns were filed late. This was not in dispute (see §47-48) and we find that each was filed over one year late potentially giving rise to the tax geared penalties imposed. We note that we have dismissed Ms Vowles' case that she was not responsible for this: we consider that, however unwisely, she had entrusted her affairs to Mr Walker and Mr Robson, and their failures to submit her returns on time become hers.

113. So far as whether she had a reasonable excuse is concerned, she said Mr Walker had informed her that he didn't believe in paying bills until he received court papers, and he didn't believe in filing tax returns on the due date as the £100 filing penalty was preferable to dealing with HMRC. In that sense, we consider that she must have realised, if she had thought about it, that she was entrusting her tax affairs to someone who did not believe in prompt filing on the due date and she can therefore scarcely be surprised or blameless when her returns were not filed promptly.

114. On the other hand, we accept that she was in an abusive relationship, and we accept that in some circumstances an abusive relationship could make it extremely difficult to comply with legal obligations such that the taxpayer would have a reasonable excuse for non-compliance. But we do not think that that is the case here.

115. The relationship described by Ms Vowles was one in which she chose to leave her accounting and legal affairs in the control of Mr Walker, and was not under any overwhelming duress to do so. She trusted him, however unwisely. She did not claim that she had ever made any attempt to regularise her position with HMRC nor that Mr Walker had prevented her doing so.

116. In these circumstances, we are not satisfied that she had a reasonable excuse for the failure to file the tax returns for 2008-2010 on time.

117. We would uphold the penalty in principle, but as it is a tax-geared penalty, for the reasons given below at §175 the penalty must be very substantially reduced. If the parties are unable to agree the figures, they must revert to the Tribunal for determination.

*Inaccurate return penalties*

118. HMRC charged Ms Vowles penalties under Schedule 24 Finance Act 2007 for making inaccurate returns in 2009-2011 and in particular for omitting dividend income and property income. They allege that the inaccuracies were careless. As we have said, whether the returns were prepared carelessly is also relevant to the question of whether the tax assessments for years ended 2010 and 2011 were valid (§74).

119. The penalties can only stand to the extent that the returns did in fact declare a lower liability than Ms Vowles' true liability. To the extent that the returns were inaccurate, we consider whether Ms Vowles was careless and whether she had a reasonable excuse for that carelessness. We are only concerned with the property income as we have found that she was not liable to declare the dividend income. (And even if it was careless to include the dividend income when it was not hers, that is not relevant carelessness for S 29 as the only relevant carelessness is carelessness which leads to a non-assessment of income – s 29(1)).

120. We have already concluded that Mr Walker and Mr Robson were persons authorised to act on behalf of Ms Vowles in the completion of her tax returns and therefore their carelessness is the carelessness that matters for s 29(4). So the question is whether we are satisfied that it was careless to claim as an allowable expense interest which was not deductible. In the absence of any explanation as to why they did that, we are satisfied that it was careless. The taxpayer has a duty to submit a correct tax return; when they do not, unless there is a good reason for it, that duty has been breached. We have no evidence from Mr Walker and Mr Robson about why (on behalf of Ms Vowles) they over-claimed the deductible mortgage interest on the two properties in the year ended 2010 and 2010 returns. They have therefore not given a good reason for the apparent breach of duty and so we find that they did do it carelessly.

121. That finding is sufficient for s 29(4) and means the discovery assessments were technically valid albeit for reasons explained below at §168 they must be discharged.

122. For the penalties, we would also need to consider reasonable excuse and special circumstances. We had no explanation as to why Ms Vowles' agents completed her tax return carelessly, so we cannot find that they had a reasonable excuse. Ms Vowles' chose to entrust the completion of her tax return to Mr Walker and Mr Robson as she trusted them. We have already said that, despite the abuse, we are not satisfied that Ms Vowles had made out a case of duress (see §58); moreover, she appeared aware that Mr Walker at least was unlikely to handle her tax affairs satisfactorily (§113). In these circumstances, we are unable to accept she had a reasonable excuse for permitting persons to handle her tax affairs carelessly. For the same reasons, we are not satisfied that she has made out a case of special circumstances.

123. However, so far as the penalties for years 2009-2011 are concerned, this is all beside the point, as we find that the assessments have to be entirely discharged for the reasons given below at §174.

*Deliberate inaccuracy penalties*

124. HMRC also charged Ms Vowles penalties under Schedule 24 Finance Act 2007 for making inaccurate returns in 2012-2014 and in particular for omitting dividend income, benefits in kind and property income. They allege that the inaccuracies were deliberate.

125. These penalties can only stand to the extent that the returns did in fact declare a lower liability than Ms Vowles' true liability and we deal with the extent of that below at §§137-138.

126. HMRC's case on the deliberateness of the omissions largely turned on the omissions of the dividends and benefits in kind because, not long before the returns had been submitted, Ms Vowles and Mr Ashby had had a conversation in which the dividends and car had been discussed and Mr Ashby had effectively reminded her to include them. The property income was not omitted from the returns but it was understated because (a) the deductions were inflated by interest which was not allowable, and (b) the rent from one of the properties was omitted.

127. While Mr Ashby reminded Ms Vowles to include the dividends and benefits in kind, we have found she was not liable to tax on them and was entitled to omit them. Even if this omission was deliberate, it was irrelevant so far as the penalty was concerned as it did not lead to an understatement of liability.

128. We consider that deliberate in this contest means that the taxpayer made the deductions or omitted the income while knowing she was not entitled to do so or being reckless as to whether she was entitled to do so. We find that HMRC have not proved that the understatement of the property income was deliberate.

129. So far as the omission of the rent from one of the properties was concerned, her answer was that at the time her tax return was completed, it was the least of her concerns. Her unchallenged evidence, which we accept, was that in August 2015, Mr Walker had obtained custody of the children by making an ex parte application to a judge in which he made unfounded allegations that Ms Vowles was a drug addict and her brother a paedophile. The custody battle that followed exhausted her father's financial resources. She herself sent Mr Walker threatening messages, breached a restraining order and at some point as a result ended up in prison for 7 hours. Moreover, the omission of the rental stream was made apparent to HMRC in a phone call with Ms Vowles not long after the returns were submitted: it was clear she was making no attempt to hide from HMRC the rental values, which supports our conclusion that the omission was not deliberate. It was our conclusion that in these circumstances we were satisfied that she failed to give much thought to her tax returns at all, and had not omitted the rental income deliberately.

130. So far as the mortgage interest deductions were concerned, while we consider Ms Vowles certainly should have appreciated by 2015, having received the earlier amendments and assessments from HMRC, that HMRC believed that not all the interest incurred was deductible, we accept her explanation was that she did not understand the letters from HMRC and didn't give them much attention in any event

because of the circumstances mentioned in the previous paragraph. We were not satisfied that her continuing to deduct the mortgage interest in full was deliberately done in the sense that she understood she was not entitled to do so.

131. On the other hand, we did consider that the three tax returns had been completely carelessly. She certainly should have included the full rental income and been aware that she was not entitled to deduct most of the interest which she did seek to deduct. Her explanation for why her returns were inaccurate amounted to saying that because, at the time, she was caught up in the custody battle over the children, she simply didn't care about the tax returns. Effectively she admitted the carelessness, albeit by putting forward an excuse for it.

132. So the next question we must consider is whether she had a reasonable excuse for the carelessness. We understand why she prioritised her children above her duties to HMRC: nevertheless, she found time (with the help of Mr Hewitson) to submit the tax returns and include the property rental business on them. We do not think that being too busy with more important matters is really ever likely to be an excuse for failing to submit tax returns; we do not think that it can be an excuse for submitting one containing careless errors. So we do not consider that she had a reasonable excuse.

133. Our conclusion is that to the extent that tax was underdeclared, the penalties should be reduced to penalties for carelessness with equivalent deductions for disclosure which she had already been given. She has not suggested and we do not consider that HMRC's conclusions on the appropriate deductions should be disturbed.

134. So far as special circumstances are concerned, as before, we do not think that there are any circumstances other than those we have considered and rejected as reasonable excuse. We do not consider that there were special circumstances justifying mitigation of the penalty.

**Conclusion on the tax assessments**

135. The appeal was brought against amendments and assessments made by HMRC. We have found that those which related to Ms Vowles' property income were justified and those which related to dividends and benefits in kind were not.

136. But that finding does not dispose of the appeal against the tax assessments.

*The second appeal*

137. We need to determine to what extent, if any, the assessments, amendments and penalties can stand. For the second appeal, which relates to the amendments to the self-assessment returns for 2012-2014 the answer is relatively straightforward. We discharge the amendments to her tax returns for years ended 2012-2014 made in respect of dividends and car benefit as we have found she is not liable to tax on these. We uphold the amendments in so far as they reflect the underdeclared property income.

138. In effect, that means we have found she was liable to tax in those years on the following property income: £8,970 for year ended 2012, £8,470 for year ended 2013 and £8,470 for year ended 2014. We do not have the ability to calculate the tax liability arising from this but it is very considerably less than assessed.

139. And so far as the penalties are concerned, we have already stated that the deliberate inaccuracy penalties for 2012-2014 must be reduced to careless inaccuracy penalties; they must be further reduced to reflect that the inaccuracy was only in respect of the property income. The same % deductions as before must be applied for cooperation. Again, we are not in a position to calculate this exactly.

140. If the parties are unable to agree the figures of the assessment or penalty they must revert for a determination by the Tribunal.

*The first appeal*

141. The question of Ms Vowles' tax liability is much more complex in respect of the first appeal which related to the years 2008-2011, and that is because, while Ms Vowles' challenged her liability to the assessments for 2011 and 2012 (as well as the amendments for 2012-2014) which, amongst other matters, charged her to tax on dividends and benefits in kind from Nettex, she had not sought to amend her self-assessments for any of the four years at issue in the first appeal (2008-2011). As s 9ZA gives one year after filing as the time limit for taxpayers to amend self-assessments she is long out of time to do so. But it inevitably follows from our finding that she did not receive the dividends and benefit in kind in any of the years under appeal that we consider that Mr Walker/Mr Robson on her behalf did over-declare Ms Vowles' income in 2008-2011 in respect of the dividends and benefit in kind.

142. Two issues arise from this. The first is whether her liability to tax on the underdeclared property income can be off-set against her overdeclared liability to tax in the same tax year, even though she is out of time to amend her tax returns. This affects both her liability to the amendments/assessments and her liability to the penalties.

143. The second issue is whether the Tribunal can actually correct Ms Vowles' self-assessments for 2008-2011, thus not only discharging the HMRC assessments/amendments but actually reducing her declared tax liability. The sums involved are such that (if the tax declared in Ms Vowles' returns has <u>not</u> yet been paid) such jurisdiction would greatly decrease Ms Vowles' outstanding liability to HMRC, but if the tax declared in Ms Vowles' returns for 2008-2011 <u>has</u> already been paid, such jurisdiction will make HMRC Ms Vowles' debtor, rather than vice versa, even taking into account the tax due for 2012-2014.

144. This can be seen from the figures as follows (taken from the tables at §52, §75 and §110):

*2008*

145. For 2008, we have found Ms Vowles declared a loss on property of £11,043 when she should have declared a profit of £7,218, making a total under-declaration of her property income of £18,261.

146. However, we have found that her declaration of liability to tax on dividends and a benefit in kind was incorrect, and so in the same return she over-declared her income by £62,614.

147. So we find that Ms Vowles' 2008 tax return over-declared her income by £44,353.

*2009*

148. For 2009, we have found Ms Vowles declared a loss on property of £9,749 when she should have declared a profit of £7,550, making a total under-declaration of her property income of £17,299.

149. However, we have found that her declaration of liability to tax on dividends and a benefit in kind was incorrect, and so in the same return she over-declared her liability by £146,024.

150. So we find that Ms Vowles' 2009 tax return over-declared her income by £128,725.

*2010*

151. For 2010, we have found Ms Vowles declared a profit on property of £7,279 when she should have declared a profit of £7,522, making a total under-declaration of her property income of £254.

152. However, we have found that her declaration of liability to tax on dividends and a benefit in kind was incorrect, and so in the same return she over-declared her income by £73,832.

153. So we find that Ms Vowles' 2010 tax return over-declared her income by £73,578

*2011*

154. For 2009, we have found Ms Vowles declared a profit on property of £5,093 when she should have declared a profit of £8,022, making a total under-declaration of her property income of £2,929.

155. However, we have found that her declaration of liability to tax on dividends and a benefit in kind was incorrect, and so in the same return she over-declared her income by £72,363.

156. So we find that Ms Vowles' 2011 tax return over-declared her income by £67,434.

*Jurisdiction to consider the over-declarations in the self-assessments?*

157. So in all four years it is clear that the income underdeclared by Ms Vowles was significantly exceeded by the income overdeclared. Should the Tribunal discharge the 2008 and 2009 amendments, and the 2010 and 2011 assessments, to reflect Ms Vowles' over-declarations in her tax returns in those years?

158. And does the Tribunal have jurisdiction to go further and actually reduce Ms Vowles' self-assessments for 2008 and 2009, or even 2010 and 2011, to reflect its findings of fact that liability to tax was overdeclared even after the underdeclared property income is taken into account, thus actually reducing Ms Vowles' liability to tax for those years?

159. Section 50 TMA 70 provides that:

> (6) If, on an appeal notified to the tribunal, the tribunal decides –
>
> (a) that the appellant is overcharged by a self-assessment;
>
> ....
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment
>
> the assessment ....shall be reduced accordingly, but otherwise the assessment ...shall stand good.

160. This provision has been considered before. In *Tower MCashback LLP* [2008] EWHC 2387 (Ch) at p 735 Henderson J said at [115], albeit in a very different context, that:

> "... the wording of section 50(6) and (7), which applies alike to appeals relating to self-assessments and appeals against assessments made by an officer of HMRC, reflects similar wording of very long standing which goes back long before the introduction of self-assessment. There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the Commissioners in exercise of their statutory functions to have regard to that public interest."

161. The second sentence in the passage above was expressly approved by Lord Walker in the Supreme Court appeal of that case: [2011] UKSC 19 at [15]. The public interest in taxpayers paying the correct amount of tax is not only a principle by which HMRC should abide, and which could be enforced as a matter of public law, it is also an aid to statutory interpretation and s 50 TMA in particular: see *Walker* [2016] UKUT 32 (TCC) where the Upper Tribunal said:

> [33] Given the general principle to which Henderson J referred, we consider that section 50(6) and (7) should be construed, insofar as their

> language sensibly allows, so as enable the FTT to amend a self-assessment return to give effect to the decision which they have made in relation to an appeal which is properly before them. In the present case, it was within the appellate jurisdiction of the FTT to make the decisions of fact which it did since those findings were made in an appeal "against... any conclusion stated or amendment made by a closure notice under section 28A". It would, as we see it, be a surprising result if the FTT were then unable to give effect to its findings by amending the return.
>
> [34] It is to be noted that section 50 is not concerned only with appeals in relation to self-assessment returns let alone only appeals in relation to closure notices. It is not, therefore, to be expected that there should be precise correlation between the provisions of section 50 and those of sections 8 and 9.
>
> .....
>
> [37] But section 50(6)(a) is not restricted to an overcharge in the amount assessed in accordance with section 9(1)(a). It will also include, in our view, an excessive assessment in accordance with section 9(1)(b). ....

162. Our conclusion is that, in line with *Walker*, s 50(6)(a) must be given a broad interpretation as the policy is that a taxpayer should only pay the correct amount of tax.

163. What is that broad interpretation? It seems right that if HMRC put the correctness of one aspect of a tax return in issue, they must accept that the taxpayer can counter by proving (if he can) that another aspect of the same tax return was unduly favourable to HMRC, even if the taxpayer would be out of time to make a stand-alone correction under s 9ZA. That must be especially the case here, where the dividends and benefit in kind were an issue in the appeal in any event, at least in respect of 2010 and 2011.

164. We are not aware that this issue has had to be decided before. While there are a number of cases which have considered the meaning of s 50(6), the facts have all been quite different to that of this case. The most relevant is *Auckland v PAVH (International) Ltd* [1992] STC 712 where the General Commissioners on the facts before them formed the view that the taxpayer had paid too much tax in earlier years, which were not under appeal, and consequently set off those overpayments against the assessments for later years which were under appeal. They were overturned on appeal, Hoffman J saying:

> '[counsel for the appellant said] that [s 50(6) TMA] meant that the commissioners could reduce the assessment before them if they were satisfied that the taxpayer company had been overcharged on some other occasion, in this case the 1979 and 1980 assessments. But that is not how I read the section. It says that if the appellant is overcharged by any assessment the assessment shall be reduced accordingly. In my judgment, the only assessment that can be reduced is the assessment in respect of which the commissioners think that the taxpayer has been

> overcharged. As I have said, it was no longer open to the commissioners to reduce the 1979 or 1980 assessments. In any event, there was no appeal against those assessments before them. They were not entitled on account of their views about those assessments to reduce the assessment against which the appeal had actually been brought. The result is that in my judgment the commissioners thereby erred in law and the appeal must be allowed.'

165. What is relevant is the implicit assumption made by the Judge that the General Commissioners were entitled to reduce the assessment which they had jurisdiction to consider (because it had been appealed) if they thought *that* assessment overcharged the appellant.

166. So our conclusion to issue 1 is that applying s 50(6)(a), Ms Vowles was over-charged by the self-assessments as amended by HMRC for 2008 and 2009 because, although HMRC were right that she had under-declared her property income, nevertheless her tax returns for those years wrongly declared her liability to dividends and a benefit in kind in a sum which far outweighed her under-declaration.

167. So we discharge the amendments to the self-assessments for 2008 and 2009.

168. Similarly, applying s 50(6)(c) we find that the discovery assessments for 2010 and 2011 overcharged the appellant to tax because, although HMRC were right that she had underdeclared her property income for those years, firstly, they were wrong to assess her to further tax on dividends and benefit in kind (2011 only) in addition to what she had declared and, secondly, the wrongly declared dividends and benefit in kind in her self-assessment returns far outweighed her under-declaration of property income.

169. So we discharge the discovery assessments for 2010 and 2011.

170. So far as the second issue is concerned, we do not see that it is fundamentally any different to the first issue. It might be said that the only issue before the Tribunal for 2008 and 2009 is the validity of the amendments which HMRC made to the appellant's self assessments for those years, and therefore, while the Tribunal could reduce those *amendments* to nil, it cannot go further and reduce the *self assessments.* But we think that is to give s 50(6) an unduly narrow reading: it refers to whether 'the appellant is overcharged by a self-assessment'. For each of 2008 and 2009 only one assessment is in issue, which is the appellant's self assessment as subsequently amended by HMRC. By amending that self assessment, HMRC put the entire self-assessment within the jurisdiction of the Tribunal.

171. In conclusion, we exercise our jurisdiction under s 50(6)(a) to reduce Ms Vowles self-assessment for 2008 so that it reflects only the amended property income of £7,218 and her self-employment income of £13,929. Similarly, we exercise our jurisdiction under S 50(6)(a) to reduce Ms Vowles self-assessment for 2009 so that it reflects only the amended property income of £7,550 and her self-employment income of £6,932. In particular, the dividend income and benefit in kind are removed from both tax returns.

172. Should 2009 and 2010 be treated differently because they were discovery assessments and not amendments to self-assessments? In other words, can we go further and not only reduce the discovery assessments to nil under s 50(6)(c) but reduce the self-assessment under s 50(6)(a)? Ms Vowles appealed the discovery assessment but was too late to amend her self-assessment. But, as we have said, s 50(6) should be given a broad interpretation in line with the above authorities to ensure only the correct tax is collected. The discovery assessment is intimately linked with the self-assessment: the 'discovery' is that the self-assessment is insufficient (s 29(1)(b)): by putting the question of whether the self-assessment was insufficient before the Tribunal, HMRC has put the self-assessment within the jurisdiction of the Tribunal and under s 50(6)(a) if the self-assessment overcharges the taxpayer it can be reduced.

173. In conclusion, we exercise our jurisdiction under s 50(6)(a) to reduce Ms Vowles self-assessment for 2010 so that it only reports the amended property income of £7,522 and her self-employment income of £4,333. Similarly, we exercise our jurisdiction under S 50(6)(a) to reduce Ms Vowles self-assessment for 2011 so that it reports only the amended property income of £8,022 and her self-employment income of £869. In particular, the dividend income and benefit in kind are entirely removed from both tax returns.

174. As the assessments and amendments for YE 2008-2011 have been discharged, it follows that the misdeclaration penalties for YE 2009-2011 must also be discharged. Sch 24 provides that a penalty is only payable where there is an inaccuracy in a return which leads to understatement of liability to tax (or overstatement of repayment): paragraph 1(2). Moreover, it is charged on potential lost revenue (paragraph 4) which is defined (paragraph 5(1)) as the additional amount of tax payable. As we have found that there is no further tax due on Ms Vowles' self-assessments for 2009-2011, the inaccuracy penalties for those three returns cannot stand.

175. So far as the late filing penalties are concerned, they were charged under s 93(5) TMA 1970 which provides that the penalty can only be charged if there would have been a liability to tax shown in the return. If Ms Vowles had correctly completed her returns for 2008-2010, they would have shown a liability to tax on the property income and self-employment income only. Therefore, these penalties must be re-calculated in a much lower sum to reflect this much reduced liability to tax.

176. There is an issue over whether Ms Vowles is entitled to offset what she owes to HMRC in respect of under-declarations for YE 2012-2014, misdeclaration penalties YE 2012-2014, and late filing penalties YE 2008-2010 against her overpayments of tax in YE 2008-2011; and whether in fact HMRC ought to repay her the balance (assuming the tax shown on the self-assessments was actually paid). Our preliminary view is that that question is beyond the jurisdiction of this Tribunal to decide as it relates to enforcement (within the jurisdiction of the County Court) rather than liability (within this Tribunal's jurisdiction). However, if the parties are unable to resolve this matter themselves and one or other considers it within the jurisdiction of the Tribunal, they are at liberty to make a reasoned application to the Tribunal for a ruling.

177. We are aware that the outcome of this appeal may come as a surprise to HMRC. We expect they will consider it an unfair outcome: but it seems to us that they should have paid more attention to Ms Vowles' story and to have realised that, if what Ms Vowles said was true, it was Mr Walker who was liable to the tax on the income and benefits from the company: while HMRC may have been uncertain who was telling the truth, HMRC should have protected the public purse by making an alternative assessment on Mr Walker, pending Ms Vowles' appeal to the Tribunal. They may be too late to assess him now although we express no view on that.

178. 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.

**BARBARA MOSEDALE**
**TRIBUNAL JUDGE**

**RELEASE DATE: 23 SEPTEMBER 2017**