[2018] UKFTT 12 (TC)

TC06291

Appeal numbers: TC/2016/07246
TC/2016/07250
TC/2016/07255

Capital Gains Tax – discovery assessments – penalties – whether or not there was a chargeable capital gain in 2008/2009 – yes – whether or not the assessments should be reduced further than as already amended – no – whether or not the inaccuracies were deliberate but not concealed – yes – whether or not the disclosure was prompted – yes – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) HAIDER ALI HASHMI **(2) TAHIRA JABEEN** **(3) SYED ALI HASHMI**	**Appellants**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE RICHARD CHAPMAN

Sitting in public at Phoenix House, Rushton Avenue, Bradford, BD3 7BH on 10 October 2017

Mr Taher Nawaz, Chartered Accountant, for the Appellant

Mr Aidan Boal, Presenting Officer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

© CROWN COPYRIGHT 2018

DECISION

Introduction

1. These appeals have been case managed and heard together. Mr Haider Hashmi and Mrs Tahira Jabeen are married and Mr Syed Hashmi is their son. For the avoidance of confusion, I shall refer to Mr Haider Hashmi and Mr Syed Hashmi by their full names and, where appropriate, I shall refer to all three appellants together as "the Appellants". I say at the outset that I am grateful to both Mr Nawaz and Mr Boal for the helpful and constructive way in which they gave their submissions.

2. The Appellants carry on business together in partnership under the name HA Plumbers Merchants ("the Partnership"). As the trade name suggests, the Partnership supplies goods and services relating to plumbing. Although the Partnership provided the context for HMRC's investigation into the Appellants' tax affairs, the subject matter of these appeals as now constituted in fact relates to assessments for capital gains tax and penalties in the Appellants' personal capacities. In particular, HMRC raised separately on each of the Appellants a discovery assessment dated 2 September 2016 in the sum of £14,907.78 pursuant to section 29 of the Taxes Management Act 1970 ("the TMA 1970") and a penalty assessment in the sum of £7,826.58 pursuant to schedule 24 of the Finance Act 2007 ("FA 2007"). In short, HMRC's position in making these assessments and imposing these penalties was that the Appellants had purchased a property in Dubai in 2006 ("the Dubai Property"), that a relevant disposal of the Dubai Property took place in the year 2008/2009, that this was not declared by any of the Appellants in their returns for the year 2008/2009, that this was due to inaccuracies which were deliberate but not concealed and that the disclosure was prompted.

3. The Appellants' notice of appeal made reference to what have been referred to within the hearing and documents as minor assessments, both in relation to the Partnership and each of the Appellants. However, these minor assessments do not form any further part of this decision for two reasons.

4. First, by directions released on 30 August 2017, Judge Poole directed as follows:

> "[2] Unless the Appellants specify precisely which other HMRC decisions they wish to dispute in these proceedings pursuant to the wording referred to above which was incorporated in paragraphs 1 and 8 of the notice of appeal, with sufficient precision and clarity for HMRC and the Tribunal to understand in advance the extent of the dispute and the case which the Appellants intend to put at the hearing, then the Appellants shall be precluded from pursuing any such dispute at the hearing. The Appellants must do so within 14 days of the release of these Directions, in order to give HMRC sufficient time to consider and address the matter properly before the hearing."

5. The Appellants did not comply with this direction and there has been no application to vary it or to extend the time for compliance.

6. Secondly, the parties agreed at the hearing that a determination is not required in respect of the minor assessments, penalties thereon or any suspension conditions.

7. Towards the end of the hearing, Mr Nawaz made an application to adjourn the appeal so that further evidence could be obtained from the Appellants (who did not attend the hearing and had not provided any witness statements). I dismissed his application for reasons which are set out in a separate decision.

The Factual Background

8. The following background was not in dispute. On 5 July 2012, HMRC opened a routine enquiry into the Partnership's return for the year ended 5 April 2011. The enquiry subsequently included consideration of the Dubai Property. One of Mr Syed Hashmi's friends, Mr Amar Hussain, had introduced the Appellants to an investment which involved the off-plan purchase of properties in developments known as Jumeira and Palm. In the event, funds provided to Mr Hussain by the Appellants were used to purchase the Dubai Property in 2006, again off-plan, on a development named Blu Mirage. Although a sale agreement shows the Dubai Property to have been in Mr Haider Hashmi's name, the Appellants and HMRC all accept that Mr Haider Hashmi was acting on behalf of the Appellants and held the Dubai Property on trust for each of the Appellants in equal shares, such that they each had a one third beneficial interest in it.

9. It appears from a document signed by Mr Haider Hashmi entitled "Memorandum of Understanding" ("the Memorandum") that the original purchase price of the Dubai Property was (in United Arab Emirates dirham) AED 4,680,000 but that, as the Dubai Property was still being developed, the Appellants had by the date of the Memorandum only paid their vendor (who was the developer) AED 2,340,000. The sum paid had been largely financed by the re-mortgage of the family home which was registered in the name of all three Appellants.

10. The Memorandum goes on to record (in summary) that it is an agreement, executed on 15 January 2009, in which Mr Haider Hashmi agrees to sell the Dubai Property (although I note that the effect of this more properly relates to his rights in respect of the Dubai Property insofar as it has not yet been conveyed to him or insofar as it remains undeveloped) to the purchaser for the sum of AED 5,856,850. The purchase price was to comprise a payment to Mr Haider Hashmi by the purchaser of AED 2,340,000 within 12 months of the Memorandum, a payment to the developer by the purchaser of the sum of AED 234,000 (representing the remaining sum owed by Mr Haider Hashmi pursuant to the original purchase) and a further payment to Mr Haider Hashmi by the purchaser of a premium of £1,176,850 within 24 months of the Memorandum. The Memorandum also provided for a payment by Mr Haider Hashmi of a fee of AED 468,000 to the agents involved in negotiating the Memorandum. Again, the parties all treat Mr Haider Hashmi as acting on behalf of the Appellants in this regard.

11. In summary, the Appellants asserted in correspondence with HMRC as follows: that they did not know what they had invested in; that Mr Hussain was making payments to them which they treated as reimbursements of their interest payments on their re-mortgage; that they thought they had made a capital loss upon the disposal of the Dubai Property; and that payments continued longer than expected, which ultimately did result in a capital gain which they declared on their personal returns for 2012/2013. The Appellants do not treat the capital gain as resulting from a sale of the Dubai Property in 2009 and so did not declare any capital gains in 2008/2009; instead, they treat the capital gain as resulting from a return on their investment which did not materialise until 2013 and which was declared in their personal returns for 2012/13 and continued until July 2013. I make findings of fact in respect of these assertions later in this decision.

12. Taking into account all payments received, the Appellants maintained that their net chargeable capital gains were £18,834 each. This was based upon total proceeds received of £771,212 with credit for payments which represented reimbursement of mortgage interest in the sum of £162,992, less the purchase cost of £522,918. This, on the Appellants' case, produced a net gain of £85,302, distributed between each of them in the sum of £28,434. The Appellants then each applied the personal exemption of £9,600, resulting in a net chargeable gain of £18,834 each. In later correspondence, this reduced yet further as the personal exemption applicable to the year 2012/2013 was used.

13. HMRC did not accept the Appellants' approach. Discovery assessments were eventually made on 23 August 2016, based on the figures in the Memorandum rather than the amounts received and refusing to make any allowance for interest. HMRC treated the selling price of the Dubai Property as AED 5,856,840, less the amount paid to the developer of AED 2,340,000 but with the addition of the premium to the Appellants of AED 1,176,850, resulting in sale proceeds of AED 4,693,690. The allowable costs were the acquisition cost of AED 2,340,000 and fees and expenses of AED 468,000, resulting in a taxable gain of AED 1,885,690. Using a conversion rate (which is agreed by the parties for the purposes of this appeal) of £0.147035 to AED 1, HMRC calculated (in round figures) the taxable gain at £277,262, attributed to each of the Appellants equally, giving each a taxable gain of £92,420, less the personal exemption of £9,600 each, producing a net chargeable gain of £82,820 each. Using the exact conversion figures rather than rounded figures, the tax due from each of the Appellants was therefore assessed at £14,907.78.

14. Further, HMRC assessed each of the Appellants to a penalty in the sum of £7,826.58. This was based upon a penalty percentage of 52.5% as HMRC treated the inaccuracy as deliberate but not concealed, treated the disclosure as prompted, and applied a 50% reduction for disclosure.

15. The Appellants requested a review of the discovery assessments and the penalty assessments. These were upheld by decisions dated 3 November 2016.

16. Part of the Appellants' argument had been that, even on HMRC's case, the calculations were incorrect because they duplicated the premium by including it in the

sale price and also as a receipt in its own right. At the start of the hearing, Mr Boal said that HMRC now accepted this and informed me that the assessments and penalties had been amended accordingly. He provided me with a spreadsheet which, for each of the Appellants, reduced the net gain to £37,742, the net chargeable gain (after application of the £9,600 personal exemption) to £25,142, the tax payable to £4,525.56 and the penalties to £2,375.92. For the purposes of this appeal, I shall therefore treat the discovery assessments and the penalties in issue as being in these amended forms.

The Issues

17. The grounds of appeal are not straightforward and so, to ensure that the Appellants' case is fully analysed, I will set out the relevant paragraphs before then summarising the issues which require a determination as a result.

> "1. This is a case of a family partnership called H A Plumbers, consisting of the father (Mr H A Hashmi), the mother (Mrs T Jabeen) and a son (S A Hashmi). Whilst the partnership has minor assessments in respect of the years 2010/11 to 2012/13 inclusive as yet unclarified despite seeking clarification by way of an emailed letter of 14 September 2016, the principal issue is that of a capital gain and receipt of reimbursement of interest where the Respondents claim that the entire sums received were the proceeds of disposal and as such subject to capital gains tax whereas the Appellant taxpayers maintain that they had specific reimbursements of interest and as such these payments should be excluded from the Capital Gains computations and relieved against the interest actually incurred and which was specifically reimbursed.
>
> 2. This is a difficult case principally because the taxpayers invested in what was meant to be a property investment through a third party in Dubai and the bank transfers suggested investment in named property which it appears did not take place, or if it did, the third party chose to treat the particular investment(s) as his and paid interest for the use of the funds on proof of interest incurred. One of the principal difficulties that the appellant tax payers had was that they had no documentation other than bank records relating to the sums invested and eventually returned/realised and were therefore very much in the hands of the third party and were, in the end, very lucky to recover their investments and even make a profit as the Dubai property market improved.
>
> 3. Of the realisations received from Dubai it is clear that the initial amounts received were matched penny for penny with the interest being paid on a mortgage taken for the purpose and which, in the final analysis, totalled £162,992 by way of interest during the period over which the sums were invested, starting with the first investment on 26/10/06 and ending with the final receipt on 20/3/13. The fact is that the third party utilised the funds and, other than interest suffered and reimbursed, the net receipts amounted to £608,220.
>
> 4. The sums were invested in three instalments, in the period between 26/10/06 and 25/2/07 and amount in total to £522,918.

> 5. The Dubai property marked suffered falls and the initial view was that there was a capital loss arising on disposal but the third party managed to get realisations well beyond what was deemed to be the disposal date and eventually there was a capital gain of £85,302.
>
> 6. The essential difference between the Respondents and the Appellants is that whilst the Respondents claim that the entire receipts are chargeable to CGT the Appellants maintain that there were specific payments for interest and these should be recognised as such.
>
> 7. There are penalties applied and the case for the appellants is that they volunteered all the information correctly with no attempt to mislead or any incorrect information supplied and there is in fact no discovery whatsoever on the part of the Respondents and, in these circumstances, there is no evidence of dishonesty and penalties should not be applied although any applicable interest would be appropriate if there is late payment of tax."

18. The issues which arise for determination are therefore as follows:

(1) Whether or not the conditions for a discovery assessment were met.

(2) Whether or not the assessment should be reduced.

(3) Whether or not the penalty should be affirmed, substituted or cancelled.

19. These issues turn upon whether or not there was a disposal in 2009, the effect of the Memorandum, the significance of the amounts received by the Appellants, and the significance of the Appellants treating part of the payments received as reimbursement of mortgage interest.

The Legal Framework

20. The relevant statutory framework is set out in the annex to this decision.

21. Neither of the parties addressed me as to the meaning of "deliberate". This question was discussed in *Clynes v HMRC* [2016] UKFTT 369 (TC) ("*Clynes*") (Judge Harriet Morgan and Mr Philip Jolly) as follows at [80] to [86]:

> [80] There is some suggestion in materials published at the time that the penalty provisions were revised in 2007, that the use of the new terms was not intended to make any material change to the tests which applied previously. In the explanatory notes published with the draft legislation in 2007, it was stated that the new terms of deliberate and careless behaviour were to "provide a uniform language for behaviours, using more accessible language across the taxes covered." However, our view is that, even if it is permissible to look to such materials for guidance as to the intent of Parliament in interpreting legislation, the statements in the materials are not sufficient to conclude that the new terms are simply interchangeable with the previous ones. Parliament has chosen to use different words and it is those words which must be interpreted. The starting point must be that the term "deliberate inaccuracy" has to be interpreted according to the

usual principles of statutory interpretation. In our view, therefore, cases on the meaning of "dishonesty" are not of material assistance in interpreting the provisions of schedule 24 as regards "deliberate" conduct.

[81] On that basis we must seek to interpret the relevant provisions in schedule 24 according to their natural meaning looking at the context of their use in the overall scheme of schedule 24. We take the dictionary definition of the term "deliberate" as a starting point which states (in the Oxford English dictionary) that deliberate (as regards action) means:

"Well weighed or considered; carefully thought out; formed, carried out, etc. with careful consideration and full intention; done of set purpose; studied; not hasty or rash."

[82] On its normal meaning, therefore, the use of the term indicates that for there to be a deliberate inaccuracy on a person's part, the person must to some extent have acted consciously, with full intention or set purpose or in a considered way.

[83] In a sense, in the context we are concerned with, simply filling in a VAT return with particular information can be held to be a deliberate act (in the sense of being undertaken with intent or a set purpose of filling in the form) whether or not the person knew or had any consciousness as regards the accuracy of the information. Our view is that such an interpretation cannot be correct on a purposive interpretation looking at the natural wording and the scheme and context of the overall provisions. The term is used in the context of an "inaccuracy" which was "deliberate" on the relevant person's part. The fact that the deliberate conduct is tied to the inaccuracy, indicates that for this penalty to apply the person must have, in a subjective sense, acted with some level of knowledge or consciousness as regards the inaccuracy. In the case of a Company we take the relevant awareness or knowledge to be that of the relevant officers, such as the appellant acting as director, acting on its behalf.

[84] The alternative interpretation would set the bar for a deliberate penalty at a lower level than that for a careless penalty. There is a careless penalty only where the inaccuracy arises as a result of the failure by the person to take reasonable care. That penalty is set at a maximum of 30% of the potential lost revenue. A deliberate penalty is set at a maximum of 70% or 100% of the potential lost revenue depending on whether the person has made arrangements to conceal the inaccuracy or not. The potential doubling or tripling of the penalty for such deliberate inaccuracies indicates that a deliberate penalty is intended to apply only where there is more a serious failing by the taxpayer than a failure to take reasonable care.

[85] In our view, therefore, there would clearly be a deliberate inaccuracy on the part of the Company as regards the relevant VAT returns, to the extent that the appellant, as the officer acting on its behalf in this respect, actually knew that the FRS did not apply, that the return for 12/11 failed to account for the 3 month period ending on

> 09/11 and that amounts retained by the factoring agent should be included in the returns.
>
> [86] However, we consider that the term "deliberate inaccuracy on a person's part" can extend beyond this. Our view is that, depending on the precise circumstances, an inaccuracy may also be held to be deliberate where it is found that the person consciously or intentionally chose not to find out the correct position, in particular, where the circumstances are such that the person knew that he should do so. A person cannot simply escape liability by claiming complete ignorance where the person clearly knew that he should have taken steps to ascertain the position. We view the case where a person makes such a conscious choice not to take such steps with the result that an inaccuracy occurs, as no less of a "deliberate inaccuracy" on that person's part than making the inaccuracy with full knowledge of the inaccuracy."

22. *Clynes* is not binding on me as it is a First-tier Tribunal decision. However, I adopt the extract cited above as an accurate statement of the law. In the present context, therefore, the test of deliberate conduct is as to whether the Appellants knew that they should have declared the disposal of the Dubai Property in the 2008/2009 return but consciously or intentionally chose not to do so.

23. The parties agreed that the burden of proof is upon HMRC to establish that there was a discovery of an inaccuracy leading to a loss of tax, and that this was brought about by the carelessness or deliberate action of the Appellants. If this is established, the burden of proof is upon the Appellants to provide evidence that the assessment should be reduced or set aside. The burden of proof is also upon HMRC to establish the entitlement to impose the penalty assessments. Mr Boal referred me to *Jonas v Bamford* 51 TC 1 and *Bookey v Edwards* [1982] STC 135 in respect of these propositions.

24. In all respects, the standard of proof, even in penalty cases, is that of the civil standard of the balance of probabilities (see the Upper Tribunal decision of *Khawaja v HMRC* [2014] STC 150 (Judge Herrington and Judger Berner)). Contrary to the suggestion by Mr Nawaz in the course of submissions, there is no requirement for any heightened standard of proof or any greater level of cogency (see *Re B* [2009] 1 AC 11 *per* Lord Hoffman at [13] and Lady Hale at [70] and [73]).

The Parties' Submissions

HMRC

25. Mr Boal's submissions can be summarised as follows:

(1) The conditions for a discovery assessment were met.

(2) The Appellants had acted deliberately as they had known about the disposal of the Dubai Property and yet not declared it on their personal returns. Mr Boal said that this was the case for each of the Appellants but also by virtue

of the fact that Mr Haider Hashmi was acting on behalf of the other Appellants within the partnership, relying upon section 36(2) of the TMA 1970.

(3) There is no basis for the reduction of the assessment. The reimbursement of interest formed part of the purchase price by the purchaser and no allowance can be made for interest. The rest of the figures used in the calculations are by reference to the Memorandum.

(4) There is no basis for interfering with the penalties. The Appellants' behaviour was deliberate for the same reasons as in respect of the discovery assessment and the reductions for disclosure were fair.

(5) Mr Boal also referred me to the First-tier Tribunal decision of *Ashton v HMRC* [2013] UKFTT 140 (TC) (Judge Christopher Staker and Mr Richard Thomas). However, I found this of limited assistance as it relates to careless inaccuracies whereas HMRC's case is that there was a deliberate inaccuracy by each of the Appellants.

The Appellants

26. Mr Nawaz's submissions can be summarised as follows:

(1) There was no discovery as there was no capital gain in 2008/2009. Further, the Appellants had informed HMRC about the Dubai Property in April 2009. Mr Nawaz relied upon a letter dated 15 April 2009 (albeit that only the third page was available), which stated as follows:

> "18. An investment was made in Dubai which is in the process of being disposed of and the sums have largely been returned in that a small balance is outstanding and appropriate capital gains tax computations will be supplied in the relevant tax returns when the transaction is completed. There was no income as such from this source as it is understood that this was not a completed property but an off-plan purchase, which was sold as such."

(2) It was (as Mr Nawaz put it) "nonsense" to suggest that there was deliberate behaviour as the Appellants had disclosed the capital gain in their 2012/2013 returns and they did not have access to the paperwork from Dubai.

(3) The assessment should be reduced in accordance with the calculations set out in paragraph 12 above. This involved relying on the amount received and giving an allowance for mortgage interest. Mr Nawaz also asked for an allowance to be given for the non-receipt of the full sums under the Memorandum.

(4) The penalty suffered from the same difficulties in that the capital gains had been properly calculated and there was no deliberate behaviour.

Discussion

Findings of Fact

27. I make the following findings of fact. In doing so, I bear in mind the burden of proof and standard of proof set out above.

28. For the avoidance of doubt, I accept as facts the agreed background set out at paragraphs 8 to 10 above. HMRC does not appear to dispute that the amount received by the Appellants collectively was £771,212 and that the mortgage interest for the period was £162,992 and so, in the absence of any evidence to the contrary, I accept that these are accurate.

29. Paragraph 2 of the grounds of appeal appears to suggest that the Appellants did not know that they had acquired the Dubai Property as distinct from general investments in Dubai. I find as a fact that they did know this. I reach this conclusion for the following reasons.

30. First, the hearing bundle includes an agreement entitled "Blu Mirage Sale and Purchase Agreement" which names Mr Haider Hashmi as the buyer, and which is signed on the final page by Mr Haider Hashmi above the description "Buyer". This is not the same property as the Dubai Property, but Mr Nawaz's explanation of this document in an email to HMRC dated 19 October 2015 suggests that the documentation for the Dubai Property was the same. He says as follows:

> "A copy of the documents relating to the Blu Mirage plot is attached herewith. It names Mr Haider Ali Hashmi and, by way of explanation, whilst the front cover appears to have come through as a blank page the actual hard cover has an embossed impression of what look[s] like potentially three buildings with their reflections in the water. As discussed this is the only property for which the actual title documents are available with the documents for earlier disposal having been handed over at disposal. Hopefully this confirms that the acquisitions were in the name of the partner(ship)."

31. Secondly, the Appellants all joined in raising finance by way of a re-mortgage of their jointly owned home. I infer from the amount involved and the fact that they would all have had to co-operate in entering into the re-mortgage that, on the balance of probabilities, they all knew why they were raising these funds. There is no evidence to suggest that any of the Appellants did not know.

32. Thirdly, the Appellants have provided a document from Mr Amar Hussain which states as follows:

> "I Amar Hussain … hereby confirm that H A Plumbers partnership of Shabir Ali Hashmi, Tahira Jabeen, Haider Ali Hasmi [sic] and Hassan Ali Hashmi, sent funds to me in Dubai for investment. The investment was long term and initially I was instructed to invest in Jumeira and Palm developments but these were not available. However, I was able to invest in alternative investment(s) when the first choice was not available and duly remitted funds on disposal of the property acquired. Although the intention was to let the properties it became apparent that there were problems with developers and the property was therefore disposed of. I have also paid the interest on the mortgage as I had agreed to do. Whilst there is a balance still held in apartments in Ras Al Khaima (Blue Mirage Project) no payment is due until sold. I have to add that there are problems with the Project (these apartments) as

> the plot of land has had no development since 2012 with just a lift shaft and podium (parking level development) and other investors have lost interest and with no further funds the developers are unable to fulfil their commitment to develop the premises."

33. There is no suggestion in this document that Mr Hussain acted without reference to the Appellants and the tenor of what Mr Hussain says is that he was acting on instruction (particularly by virtue of his comment that "initially I was instructed"). I therefore find on the balance of probabilities that he was either instructed by the Appellants to purchase the Dubai Property or at least informed them that he had done so. Again, there is no witness evidence from the Appellants stating that they did not know about this.

34. Fourthly, on any view Mr Haider Hashmi knew that he had purchased the Dubai Property by 15 January 2009 as otherwise he could not have entered into the Memorandum selling the Dubai Property to a new purchaser. There is no suggestion (and certainly no evidence) that Mr Haider Hashmi was acting without reference to the other Appellants or that the other Appellants did not know about the terms of the Memorandum that he had entered into on their behalf. Instead, the only evidence is that they did know what was in the Memorandum, even if they did not actually have the document in their possession until late on in the enquiry; in correspondence throughout the enquiry Mr Nawaz refers to his clients collectively (rather than making any distinction between Mr Haider Hashmi and the other Appellants) and acknowledges that there was a disposal by each of them. A particularly stark example of this is the following extract from a fax dated 25 February 2016 on behalf of the Appellants to HMRC, which states as follows:

> "Further to my letter of 12 January I write to advise you that I have heard from Mr Amar Hussain who has been able to trace a Memorandum of Understanding and it has been explained to me that our clients, who had initially intended to acquire property in "Jumerah Village South G+4", where the deal fell through, appear to have acquired property at Villa A-38 Al Waha Villa, Dubailand, Dubai. When half the stage payments had been made it became possible to dispose of the property to Ali Salf Alem Salf Abunawas who agreed to pay the investment made by our clients and to give them a "premium", or profit. A copy of the MoU is attached herewith.
>
> You will no doubt have seen that whilst the amount of the quantified profits have been agreed between HMIT and us our clients did not have any documentation to prove what precisely had been acquired and or disposed of. This MoU now seems to confirm what we had been asked to maintain all along, that the proceeds represented the sale of a property which had produced no rent but a gain which needs to be assessed as a capital gain rather than some non-descriptive income that HMRC has assessed."

35. I find as a fact that the Memorandum constituted a disposal of the Dubai Property on 15 January 2009. Mr Nawaz's submissions appear to be predicated upon the proposition that there was no disposal in 2009. This cannot be right. The

Memorandum is clear that there was a sale of the Dubai Property on 15 January 2009 and there is no evidence to suggest that this was in any way incorrect.

36. I also find as a fact that the Appellants acted deliberately in that they all knew that they had made a chargeable capital gain but consciously or intentionally did not declare it in their personal returns for 2008/2009. I emphasise that this finding is in respect of each of the Appellants acting deliberately rather than only Mr Haider Hashmi acting deliberately on behalf of the other Appellants. This is for the following reasons.

37. First, as set out above, the Appellants knew about their acquisition of the Dubai Property.

38. Secondly, as set out above, the Appellants knew about the Memorandum and its contents. It follows that they therefore knew from the Memorandum that there had been a disposal. The information disclosed on the Memorandum means that their knowledge of it also means that they knew what the contract price was for the sale, that this included a premium and that they knew that this produced a chargeable capital gain. I note in this regard that Mr Nawaz accepted during the hearing that if the Appellants knew about the premium at the time that the personal returns for 2008/2009 were filed then the inaccuracy was deliberate (although he did not accept that they did know). As I find that they did know about the premium by that time, it follows that the inaccuracy was deliberate.

39. Thirdly, paragraph 5 of the Appellants' notice of appeal suggests a conscious decision not to declare the disposal. Whilst the reason given for that conscious decision was that there was a capital loss rather than a capital gain, I have already found that the Appellants in fact knew that there was a capital gain by reference to the Memorandum.

40. Fourthly, the following was included in a letter dated 17 November 2014 written to HMRC on the Appellants' behalf:

> "At one stage – when the capital loss was returned – the impression our clients had was that they had received whatever they could have expected but, as the property market in Dubai improved, their partners have paid more and this has now converted into a capital gain. Our clients are unable to put any pressure on their partners for fear of alienating them and forfeiting all future returns, if any."

41. I take this to mean that the Appellants knew that there had been a disposal in 2009, but that the amount received pursuant to that sale had not yet resulted in a gain. However, this emphasis upon receipt ignores the fact that what they were entitled to pursuant to the Memorandum produced a chargeable capital gain.

42. Fifthly, the Appellants received payments into their partnership account. In particular, they received the sum of £349,993 on 9 February 2009 and then continued to receive further payments. I infer from the circumstances set out above (and the

absence of any evidence to the contrary) that the Appellants knew that this represented part payment of their entitlements pursuant to the Memorandum.

43. Sixthly, there is no witness evidence from the Appellants saying that the inaccuracy was not deliberate or giving some other reason for the inaccuracy (or, indeed, any witness evidence at all). I am conscious that it is not for the Appellants to prove a negative and that the burden of proof in this regard is upon HMRC. However, the absence of such evidence means that there is nothing to contradict the features which I have set out above.

44. Seventhly, I do not accept Mr Nawaz's argument that the inaccuracy could not be deliberate in the light of it being declared in the Appellants' 2012/2013 returns. This casts no light upon why the capital gains were not declared in the 2008/2009 returns and no witness evidence was adduced in that regard.

The Discovery Assessment

45. I accept that the discovery assessment was validly made. For the reasons set out above, the failure to declare the disposal and chargeable capital gains in respect of the Dubai Property in the Appellants' personal tax returns for 2008/2009 was brought about deliberately. It follows that there was a discovery and that the assessment was within the requisite 20 year time limit.

46. For the avoidance of doubt, in reaching this conclusion I disregard section 36(2) of the TMA 1970 relied upon by HMRC. A feature of this appeal is that on various occasions the parties have conflated the position in respect of the Partnership and the individual Appellants. However, the parties have agreed that the beneficial interest in the Dubai Property and in its proceeds of sale were owned by the three Appellants equally in their own capacities and that any chargeable capital gains tax, assessments or penalties relate to them in their personal capacities rather than by virtue of the Partnership. The situation envisaged by section 36(2) is where the assessment made against the partners of the person in default relates to, "the profits or gains of the trade, profession or business," and so does not arise in the present case.

The Computation of the Assessment

47. I accept HMRC's computation of the assessment. This is for the following reasons.

48. First, it is clear from sections 28 and 48 of the Taxation of Chargeable Gains Act 1992 ("the TCGA 1992") that the time of disposal of the Dubai Property was 15 January 2009 (being the date the contract of sale was entered into) and that the consideration was the full amount due pursuant to the Memorandum. The Appellant's approach in treating the consideration as the amount received is therefore the wrong starting point.

49. Secondly, the amount received might be relevant for the purposes of section 48 if the remainder of the consideration was irrecoverable or contingent. However, the

Appellants have provided no evidence that the consideration not yet paid is irrecoverable or contingent as distinct from simply not having been received.

50. Thirdly, the Appellants' claim for allowance for reimbursement of mortgage interest appears to treat the mortgage interest as an expense of acquisition. However, section 38 of the TCGA 1992 makes it clear that no payment of interest is allowable in such circumstances.

51. Fourthly, the Appellants' calculations treat the cost of acquisition and disposal as £522,918 whereas HMRC treat those costs as AED 2,808,000, which converts to £412,874.28. The Appellants give no explanation or evidence for their figures, whereas HMRC's figures are based upon the Memorandum.

The Penalties

52. I affirm the penalties. This is for the following reasons.

53. First, for the reasons set out above, the Appellants' 2008/2009 returns contained inaccuracies which led to an understatement of a liability to tax in that they did not include the chargeable capital gains from the disposal of the Dubai Property.

54. Secondly, for the reasons set out above, these inaccuracies were deliberate on the part of each of the Appellants.

55. Thirdly, I accept (and HMRC do not argue to the contrary) that the inaccuracies were not concealed.

56. Fourthly, I find that the disclosure was prompted. The enquiry into the Partnership returns had already raised the question of the receipts from Dubai before they were declared in the 2012/2013 returns. Further, the references to the Dubai Property in the Appellants' letter dated 15 April 2009 do not constitute an unprompted disclosure as only the third page is available, there was no evidence as what the letter related to and it was incorrect in that by that time the Dubai Property was not, "in the process of being disposed of" as there had already been a disposal on 15 January 2009.

57. Fifthly, I find that the 50% reduction for disclosure was fair in the circumstances. In the Appellants' favour, they have sought out and provided documentation where possible, particularly by providing HMRC with the sample sale and purchase agreement and the Memorandum. However, even in the context of this appeal, the Appellants have failed to give a full and clear explanation of their position. Further, the Appellants have (without evidence) asserted that they did not know about the chargeable capital gains in 2008/2009 in circumstances in which, for the reasons set out above, I have found that they did have such knowledge.

Disposition

58. It follows that I dismiss the Appellants' appeals.

Appeal Rights

59. 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.

RICHARD CHAPMAN
TRIBUNAL JUDGE

RELEASE DATE: 8 JANUARY 2018

ANNEX

(The Relevant Legislation)

1. For the purposes of this appeal, the relevant sections of the Taxation of Chargeable Gains Act 1992 are as follows:

> "28 Time of disposal and acquisition where asset disposed of under contract
>
> (1) Subject to section 22(2), and subsection (2) below, where an asset is disposed of and acquired under a contract the time at which the disposal and acquisition is made is the time the contract is made (and not, if different, the time at which the asset is conveyed or transferred).
>
> (2) If the contract is conditional (and in particular if it is conditional on the exercise of an option) the time at which the disposal and acquisition is made is the time when the condition is satisfied.
>
> …
>
> 38 Acquisition and disposal costs etc.
>
> (1) Except as otherwise expressly provided, the sums allowable as a deduction from the consideration in the computation of the gain accruing to a person on the disposal of an asset shall be restricted to –
>
> (a) the amount or value of the consideration, in money or money's worth, given by him or on his behalf wholly and exclusively for the acquisition of the asset, together with the incidental costs to him of the acquisition or, if the asset was not acquired by him, any expenditure wholly and exclusively incurred by him in providing the asset,
>
> (b) the amount of any expenditure wholly and exclusively incurred on the asset by him or on his behalf for the purpose of enhancing the value of the asset, being expenditure reflected in the state or nature of the asset at the time of the disposal, and any expenditure wholly and exclusively incurred by him in establishing, preserving or defending his title to, or to a right over, the asset.
>
> (c) the incidental costs to him of making the disposal.
>
> (2) For the purposes of this section and for the purposes of all other provisions of this Act, the incidental costs to the person making the disposal of the acquisition of the asset or if its disposal shall consist of expenditure wholly and exclusively incurred by him for the purposes of the acquisition or, as the case may be, the disposal, being fees, commission or remuneration paid for the professional services of any surveyor or valuer, or auctioneer, or accountant, or agent or legal adviser and costs of transfer or conveyance (including stamp duty or stamp duty land tax) together –
>
> (a) in the case of the acquisition of an asset, with costs of advertising to find a seller, and

(b) in the case of a disposal, with costs of advertising to find a buyer and costs reasonably incurred in making any valuation or apportionment required for the purposes of the computation of the gain, including in particular expenses reasonably incurred in ascertaining market value where required by this Act.

(3) Except as provided by section 40, no payment of interest shall be allowable under this section.

(4) Any provision in this Act introducing the assumption that assets are sold and immediately reacquired shall not imply that any expenditure is incurred as incidental to the sale or reacquisition.

…

48 Consideration due after time of disposal

(1) In the computation of the gain consideration for the disposal shall be brought into account without any discount for postponement of the right to receive any part of it and, in the first instance, without regard to a risk of any part of the consideration being irrecoverable or to the right to receive any part of the consideration being contingent; and if any part of the consideration so brought into account subsequently proves to be irrecoverable, there shall be made, on a claim being made to that effect, such adjustment, whether by way of discharge or repayment of tax or otherwise, as is required in consequence.

(2) …"

2. Discovery assessments are dealt with at sections 29 and 36 of the Taxes Management Act 1970 as follows:

29 Assessment where loss of tax discovered

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment –

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

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

(2) Where –

(a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and

(b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,

the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis of or in accordance with the practice generally prevailing at the time when it was made.

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

(a) in respect of the year of assessment mentioned in that subsection; and

10 (b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer
15 or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board –

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect
20 of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return, the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

25 (6) For the purposes of subsection (5) above, information is made available to an officer of the Board if –

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

30 (b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which,
35 for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above –

40 (i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) In subsection (6) above –

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes –

(i) a reference to any return of his under that section for either of the two immediately preceding years of assessment;

(ia) a reference to any NRCGT return made and delivered by the taxpayer which contains an advance self-assessment relating to the relevant year of assessment or either of the two immediately preceding chargeable periods; and

(ii) where the return is under section 8 and the taxpayer carries on a trade, profession or business in partnership, a reference to any partnership return with respect to the partnership for the relevant year of assessment or either of those periods; and

(b) any references in paragraphs (b) to (d) to the taxpayer include a reference to a person acting on his behalf.

(7A) The requirement to fulfil one of the two conditions mentioned above does not apply so far as regards any income or chargeable gains of the taxpayer in relation to which the taxpayer has been given, after any enquiries have been completed into the taxpayer's return, a notice under section 81(2) of TIOPA 2010 (notice to counteract scheme or arrangement designed to increase double taxation relief).

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

(9) Any reference to the relevant year of assessment is a reference to –

(a) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) above, the year of assessment mentioned in that subsection; and

(b) in the case of the situation mentioned in paragraph (c) of that subsection, the year of assessment in respect of which the claim was made.

…

36. Loss of tax brought about carelessly or deliberately etc.

(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).

(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax –

(a) brought about deliberately by the person,

… …

may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period).

(1B) In subsections (1) and (1A), references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person.

(2) Where the person mention in subsection (1) or (1A) ("the person in default") carried on a trade or profession or business with one or more other persons at any time in the period for which the assessment is made, an assessment in respect of the profits or gains of the trade, profession or business in a case mentioned in subsection (1A) or (1B) may be made not only on the person in default but also on his partner or any of his partners.

(3) If the person on whom the assessment is made so requires, in determining the amount of the tax to be charged for any chargeable period in any assessment made in a case mentioned in subsection (1) or (1A) above, effect shall be given to any relief or allowance to which he would have been entitled for that chargeable period on a claim or application made with the time allowed by the Taxes Acts.

…"

3. Penalties in such circumstances are provided for by Schedule 24 of the Finance Act 2007. The relevant paragraphs provide as follows:

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

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

(b) Conditions 1 and 2 are satisfied.

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

(a) an understatement of a liability to tax,

…

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

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

(5) …

…

3(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is –

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

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

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

(2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate on P's part when the document was given, is to be treated as careless if P –

(a) discovered the inaccuracy at some later time, and

(b) did not take reasonable steps to inform HMRC.

(3) …

4(1) This paragraph sets out the penalty payable under paragraph 1.

(2) If the inaccuracy is in category 1, the penalty is –

(a) for careless action, 30% of the potential lost revenue,

(b) for deliberate but not concealed action, 70% of the potential lost revenue, and

(c) for deliberate and concealed action, 100% of the potential lost revenue.

(2) ….

…

5(1) "The potential lost revenue" in respect of an inaccuracy in a document (including an inaccuracy attributable to a supply of false information or withholding of information) or a failure to notify an under-assessment is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

(2) …

10(1) If a person who would otherwise be liable to a penalty of a percentage shown in column 1 of the Table (a "standard percentage") has made a disclosure, HMRC must reduce the standard percentage to one that reflects the quality of the disclosure.

(2) But the standard percentage may not be reduced to a percentage that is below the minimum shown for it –

(a) in the case of a prompted disclosure, in column 2 of the Table and

(b) in the case of an unprompted disclosure, in column 3 of the Table.

Standard%	Minimum% for prompted disclosure	Minimum% for unprompted disclosure
30%	15%	0%

70%	35%	20%
100%	50%	30%

11(1) If they think it right because of special circumstances, HMRC may reduce a penalty under paragraph 1, 1A or 2.

(2) In sub-paragraph (1) "special circumstances" does not include

(a) ability to pay, or

(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to –

(a) staying a penalty, and

(b) agreeing a compromise in relation to proceedings for a penalty.

…

15(1) A person may appeal against a decision of HMRC that a penalty is payable by the person.

(2) A person may appeal against a decision of HMRC as to the amount of a penalty payable by that person.

…

16(1) An appeal under this Part of this Schedule shall be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

…

17(1) On an appeal under paragraph 15(1) the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 15(2) the tribunal may –

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the tribunal substitutes its decision for HMRC's, the appellate tribunal may rely on paragraph 11 –

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(b) to a different extent, but only if the appellate tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed.

…

5 (6) In sub-paragraphs (3)(b) (4)(a) and (5)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

10