[2019] UKFTT 81 (TC)

TC06965

Appeal number: TC/2018/01076

INCOME TAX AND CAPITAL GAINS TAX – discovery assessments - penalties for "deliberate" behaviour - whether assets held in trust - no trust document -whether income and gains belonged to Appellant

FIRST-TIER TRIBUNAL
TAX CHAMBER

LILY P TANG **Appellant**

- and -

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

TRIBUNAL: JUDGE MARILYN MCKEEVER
MRS CAROLINE DE ALBUQUERQUE

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 14 January 2019

The Appellant appeared in person

Ms Gill Clissold, Presenting Officer, for the Respondents

DECISION

Introduction

1. The Appellant held a large sum of money in her name or jointly with others, initially in London and then in banks in the far east. The Appellant asserts that the funds were held by her as bare trustee for family members resident in Hong Kong so that she has no personal liability for the income and gains which arose on them. HMRC take the view that the funds were held in her name and no evidence of any trust was produced. They have raised discovery assessments in respect of the years 2008-9 to 2015-16 inclusive in relation to the income and gains arising on the account and penalties for a deliberate failure to notify liability to tax for the same tax years. The income tax and Capital Gains Tax assessments total £55,718.40 and the penalties total £42,135.92 which, together, amount to £97,854.32.

The Law

2. The tax assessments are "discovery assessments" under section 29 Taxes Management Act 1970 ("TMA").

3. Section 29, so far as relevant, provides 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]2 —
> (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]3 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, … 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."

4. So HMRC must "discover" that the taxpayer has not paid enough tax. Further conditions apply where the taxpayer has submitted a tax return but, in the present case, the Appellant had not submitted a tax return. The onus lies on HMRC to prove that they have made a discovery of a loss of tax and the burden of proof then passes to the Appellant to show that the assessment is excessive.

5. The penalties for failing to notify liability for the year 2008-9 are charged under section 7 TMA. Those for the subsequent tax years are charged under schedule 41 Finance Act 2008. These provisions charge different levels of penalty depending on the degree of culpability and the jurisdiction involved. HMRC allege that the Appellant "deliberately" failed to notify her liability to tax. The onus lies on HMRC to show that the Appellant deliberately failed to notify them of her liability to income tax and Capital Gains Tax.

6. The standard of proof in each case is the normal civil standard on the balance of probabilities.

The issues

7. The main issue in this case is whether the Appellant was holding the funds in question for her own benefit or upon a bare trust for non-UK resident family members.

8. The Appellant also disputes the quantum of the tax liabilities. This is only relevant if she owned the funds beneficially.

The facts

9. We had before us a bundle of documents and heard oral evidence from Mrs Tang herself and from Mr Turner, the officer of HMRC who latterly dealt with the case and raised the assessments.

10. Mrs Tang is a midwife in the NHS. She and her husband have three children. At the relevant time the youngest child was three years old and as childcare was so expensive, Mrs Tang worked night shifts so that she could look after the child during the day. In the tax year 2007-8 she earned just under £22,000. By 2015-16 she was earning about £40,000 a year. Mr Tang worked for the UK branch of the Singapore bank Oversea-Chinese Banking Corporation Limited ("OCBC"). At the relevant time he was engaged in the retail banking part of the business and earning about £35,000 to £40,000. They lived in a house they bought in 1998 for £73,000 with the aid of a mortgage.

11. Mrs Tang also received a modest amount of building society interest. At the time, basic rate tax was deducted at source.

12. Mrs Tang's case was that she had no obligation to complete a tax return as she was a basic rate taxpayer and all the tax due was deducted under PAYE in the case of her salary and by the building society in the case of the interest. The interest and capital gains arising on the disputed account did not belong to her beneficially and so she had no obligation to report those either.

13. Mrs Daniells, an officer of HMRC opened an enquiry into Mrs Tang's tax position by a letter dated 15 November 2013 on the basis of information received that Mrs Tang had over $900,000 in an account in her name with Standard Chartered Bank in Singapore. The copy letter in the bundle referred to a schedule of requested information but the schedule was not attached. HMRC said that Mrs Tang had been uncooperative, had not responded to letters and as a result, they issued a formal information notice under schedule 36 Finance Act 2008 ("Schedule 36"). The notice was issued on 27 February 2014.

14. In fact Mr Tang had written to HMRC on 9 December 2013 in response to the 15 November letter. This reply was not in the bundle but Mrs Tang produced a copy from her own records. It stated that the Standard Chartered account was in the

joint names of Mr and Mrs Tang and that "the fund belongs to my family overseas, and our roles were only to manage the money for it". It also stated that he was unable to provide details of his family for reasons of privacy and confidentiality. He referred to computations of capital and interest.

15. Ms Clissold stated that a number of requests for information were made before the issue of the information notice. If so, they were not in the bundle. We had only a note of an attempt to contact Mrs Tang by telephone on 4 December 2013.

16. The Appellant did not comply with the notice and HMRC charged penalties.

17. There was further correspondence and requests for information and HMRC with the permission of this Tribunal issued a third party notice under Schedule 36 to OCBC.

18. The Appellant's position from the outset up to and including the hearing was that the money belonged to overseas members of her family and so she had no tax liability in respect of it.

19. It is also clear from the correspondence that the Appellant was greatly distressed by the enquiry and was anxious to resolve matters. In her letter of 5 October 2015 she indicates that the whole family is suffering enormous emotional and mental stress and that it is having a damaging effect on the family's health and wellbeing. At the hearing, Mrs Tang stated (though did not produce any medical evidence) that she had had a nervous breakdown and had obtained medication from her doctor.

20. From the correspondence and evidence at the hearing, we find that the following transfers were made.

21. In April 2008, the sum of £422,000 was deposited in the London branch of OCBC in an account in Mrs Tang's sole name.

22. In 2009, it was anticipated that Mr Tang might be posted to Singapore, and in the light of this, the funds were transferred to an account with Standard Chartered Bank in Singapore in the joint names of Mr and Mrs Tang in April 2009. In the event, Mr Tang remained in the UK as Mrs Tang did not want to disturb the children's schooling. Mrs Tang stated that the transfer was made on the instructions of her parents-in -law.

23. The money was transferred back to OCBC in November 2009.

24. In March 2010, it was transferred to an account at Standard Chartered Bank (Hong Kong) Ltd in the joint names of Mrs Tang and her parents-in-law. The parents-in-law lived in Hong Kong.

25. In 2017, the funds were returned to the parents-in-law, on their instructions.

26. Mrs Tang stated that she had provided bank statements to HMRC in relation to the Standard Chartered Singapore account, though Ms Clissold said that HMRC obtained the information from the bank following the issue of an information notice. It may have been that Mrs Tang only provided interest statements.

27. She said that she had not provided the OCBC statements because she was concerned that it might cause problems for her husband if it were known at the bank that his parents' money was held in an account at his employer. This was also the reason why the account was in her sole name.

28. Although her parents-in-law trusted her, she was not a blood relation, so when it looked as if her husband was going to be posted to Singapore, they required the account to be moved and to be in the joint names of her and their son. The transfer to the Hong Kong branch of Standard Chartered was made on the instructions of the parents-in-law as they lived there. Mrs Tang said that she did not provide the bank statements for this account because her parents-in-law would not permit her to do so. They considered they had a right to privacy and confidentiality and as the funds were their money and they had no UK tax obligations in respect of it, they did not want their personal information passed to HMRC. Mrs Tang acknowledged that her parents-in-law were aware of the enquiry, but she had shielded them from the full extent of what was going on and from the impact it was having on the family's health. She did not want to affect her elderly parents-in-law's health through them worrying about it.

29. The funds were not invested, but interest arose on the various accounts. On the instructions of her parents-in-law, Mrs Tang made various currency trades and under the rules which applied at the time, currency gains in bank accounts were chargeable gains. Substantial currency gains were realised, the highest total being £125,932 in 2008-9.

30. HMRC wrote various letters to Mrs Tang, not all of which appeared to be in the bundle, calculating the amount of additional income tax and capital gains tax alleged to be due. The sums varied, according to Mrs Tang, between approximately £31,000 and £35,000. Mrs Tang disputed the figures and pointed out that HMRC even had the wrong figures for her salary, providing them with her P60.

31. By a letter of 23 February 2017, Mrs Tang, whilst continuing to assert that she was merely managing the account for family members, offered to pay £18,682 to HMRC in order to settle the matter. This was her computation of the total tax which would be due on the income and gains. The offer was conditional on the closure of the enquiry and HMRC allowing her to pay the amount in 24 equal monthly instalments as "this is a substantial amount of money". Mrs Daniells was unable to accept this offer.

32. Mrs Daniells became ill and unfortunately died in May 2017. Mrs Tang's case was taken up by Mr Turner who gave evidence at the hearing.

33. On 11 July 2017 Mr Turner issued formal assessments for tax and penalties for deliberate failure to notify in the total amount of £318,154.84. The assessments covered the tax years from 1998-9 to 2015-16.

34. Mr Turner explained that Mrs Daniells had had statements and information about the funds for the period from April 2008 to 2010. Her letter of 14 December 2016 indicated that she was considering making assessments for earlier years as she had no evidence that Mrs Tang had only acquired the funds in 2008, and that income and gains for earlier and later years could be extrapolated from the figures available. Mr Turner adopted Mrs Daniells' approach and assumed that the funds had belonged to Mrs Tang all along. He accordingly issued assessments for all the years where it was open to him to do so on the basis of deliberate behaviour. He further assumed that income and gains of similar amounts had arisen in the earlier and later years (but disregarded currency gains from 2012-13 which were not taxable owing to a change in the law) and calculated the assumed income and gains by adjusting the known figures backwards and forwards.

35. Following a statement made by the parents-in-law, which we discuss below, Mr Turner accepted that Mrs Tang had received the money only in April 2008 and vacated the assessments for the earlier years. His letter of 8 January 2018 set out the revised tax and penalties due, totalling £97,854.32.

36. Although Mrs Tang dealt with HMRC herself for most of the time. She did seek help from accountants on two occasions. In June 2015, she appointed a local firm and our bundle contained notes (made by Mrs Daniells) of two telephone conversations with the agent. The second note, on 6 July 2015, stated:

> "Tina said it appeared to be a family cultural issue that she would not divulge the details of the family member or supply evidence of the receipt and return of funds to that person. They would not tell her the details either, so she was no further forward than I was. …She had told Mrs Tang that …[HMRC]… needed to see evidence"

37. Mrs Tang explained that she had had one meeting only with the accountants. They had asked her for a copy of the trust document relating to the account and when she told them there was no document, said they could not help her. Mrs Tang accordingly dispensed with their services.

38. Following the receipt of the July 2017 assessments, Mrs Tang appointed BDO to deal with the matter. Mr Morley of BDO held a meeting with Mr Turner on 9 August 2017. Ms Clissold asked why Mrs Tang did not attend. Mrs Tang said that she wanted to attend but Mr Morley had discouraged her from doing so. In our experience it is usual for agents to meet HMRC without the clients present.

39. Mr Turner accepted that Mrs Tang could not have saved up the money from her earnings as an NHS midwife, but asserted that there was no evidence of a trust. The meeting note, which was in a brief, bullet point style included a comment from Mr Turner that "There was a transfer in the name of Geoffrey Tang Trustee" but it is not clear to what this relates. Mrs Daniell's letter of 14 December 2016 states "The bank record [from OCBC] noted that the account is held in your name

but noted "in trust for Jeffrey (sic) Tang though the bank have no evidence of any trust".

40. The meeting note indicates that Mr Morley explained that the capital of the fund derived from the parents-in-law's restaurant business which they had carried on in the UK. In the 1990s, they sold the business and retired to Hong Kong. Following a health scare in 2008 "the money was then moved to [Mrs] Tang as a crude way of ensuring protection of the money for the nominee, Geoffrey Tang". Geoffrey is stated to be the parents-in-law's grandson whom they ultimately wanted to benefit from the money. At the time of the meeting, the funds were in the names of the parents-in-law in Hong Kong.

41. Mr Morley said that his Hong Kong office had approached the parents-in-law who were prepared to assist and suggested that they obtain an affidavit confirming the position. It was agreed that there would be a further meeting once BDO had gathered the evidence.

42. BDO duly obtained the statement from the parents-in-law which was signed and dated 6 September 2017.

43. The statement began with a heading "Ownership of funds" under which it states:

> "We [names] confirm that the monies we currently hold with Standard Chartered Bank in Hong Kong of approximately $900k that were held in the name of our daughter-in-law Mrs Ping Tang between approximately 2008 and 2017 have always been, and continue to be, beneficially owned by us."

44. The statement goes on to explain that the funds derived partly from the sale of their UK restaurant business and partly from an inheritance received in 1991. Part of the money was used to invest in two properties in the UK. One was rented out. They used the other property when visiting family in the UK. As they became older and more frail, their visits became less frequent and they stopped coming to the UK in 2012 when the second property was also rented out. All rental income was declared to HMRC.

45. It continues:

> "In 2008 I [name] suffered ill health including suffering a stroke. As a result of this health scare, and to ensure that the family continued to have access to the funds in case we were to pass away, we transferred the monies into an account in Mrs Tang's name.
>
> The funds were transferred into Mrs Tang's name, our daughter-in-law, rather than our son, due to the fact that our son works for Overseas-Chinese Banking Corp Ltd. London. He felt that there could be a conflict of interest should this large sum of money be placed in an account in his name.
>
> We confirm that when we placed these monies into Mrs Tang's name, it was not a gift; the funds were simply transferred into her name in order to allow the family to continue to access them. We reiterate that these funds have always been, and continue to be, beneficially owned by us.

We further confirm that although Mrs Tang as the account holder had a legal access to the funds, she was not allowed to benefit from them and indeed did not do so from 2008 until 2017 when the account was transferred back in to our names".

46. BDO and HMRC had a second meeting on 19 September 2017. Mrs Tang was, again, not present. In the light of the signed statement by the parents-in-law, Mr Turner was prepared to accept that Mrs Tang had only acquired the funds in April 2008 and was prepared to make a without prejudice offer to vacate the assessments for the earlier tax years. On the basis that the funds were in Mrs Tang's name, he proposed to assess the later income and gains on her. There was some negotiation on the question of penalties as a result of which Mr Morley suggested that a settlement of around £40,000 should be agreed.

47. Whilst the final figure was not agreed at the meeting, it was clear that Mr Turner was prepared to accept a settlement for a sum considerably less than the tax and penalties which he considered to be due and in respect of which he subsequently issued the revised assessments.

48. Mrs Tang did not accept the offer of a settlement. She maintained her position that the monies belonged to her parents-in-law and she was not liable for tax on the income and gains which had arisen from them. She had previously offered to pay £18,000 in order to bring the matter to a close, but £39,000 was too much and as a matter of principle she refused to pay tax and penalties which she did not consider were due from her and preferred to put her case to this Tribunal.

The Appellant's submissions

49. Mrs Tang contends that the funds never belonged to her beneficially. She held them on bare trust for her parents-in-law who were the true beneficial owners.

50. The trust was created orally, so there was no "paperwork" to prove its existence.

51. She had never had any benefit from the capital or income of the money because it was not hers.

52. She had always acted on the instructions of her parents-in-law in relation to the funds including transferring the accounts and making the currency trades.

53. As the income and gains did not belong to her, she had no liability to tax in respect of them. Accordingly, HMRC could not have made a "discovery" of a loss of tax so that the discovery assessments under section 29 TMA were invalid.

54. For the same reasons, she had not failed to notify HMRC of a tax liability and so the penalties for failure to notify were also invalid.

HMRC's submissions

55. Mrs Tang held the legal title to the funds and had the power to control the money.

56. She had received the income and capital gains on the funds and her father-in-law had no legal claim to them.

57. The Appellant had not co-operated with the enquiry.

58. There was no evidence that a trust had been set up.

59. Accordingly the income and gains belonged to the Appellant and the discovery assessments had been properly made.

60. For similar reasons, the Appellant was required to notify her liability to tax and she had deliberately failed to do so. She had no reasonable excuse for her failure.

61. Accordingly the penalties for failure to notify a tax liability had been properly charged.

Discussion

62. The question we must determine is whether Mrs Tang held the money in the OCBC and Standard Chartered accounts for her own benefit or as bare trustee for her parents-in-law. If the money belonged to her, she is liable to tax on the income and gains arising from it and had an obligation to report that liability. In this case, subject to a consideration of the actual figures and any issues of reasonable excuse, the discovery assessments were correctly raised and the penalties for failure to notify were correctly charged. If on the other hand, Mrs Tang was merely acting as a bare trustee, the income and gains belonged the the beneficial owners; the parents-in-law and she had no tax liability and so no obligation to notify HMRC of a non-existent liability. In this case, HMRC were not entitled to raise the discovery assessments or charge penalties. Nor would the parents-in-law be liable to any tax as they are not resident in the UK.

63. It is common ground that Mrs Tang was the legal owner of the funds in the accounts. As between her and the banks, she had control over the money and was entitled to give instructions to transfer the monies to another account and to make the currency trades.

64. HMRC's view seems to be that as there was no trust document, there cannot be a trust. As the money was in Mrs Tang's name and under her power and control, it was her money and she is liable for tax on the income and gains arising.

65. Ms Clissold challenged Mrs Tang about the fiduciary duties which trustees owe to their beneficiaries and queried why she had not sought professional advice on the management of the funds. Mrs Tang had not really considered this. So far as she was concerned she did not own the money and simply followed the instructions of the beneficial owners.

66. Mr Turner accepted the statement by the parents-in-law as evidence that they had given the funds to Mrs Tang in April 2008 and vacated the assessments for the earlier years. However, he did not accept the statement as evidence that the parents-in-law were the beneficial owners of the money from 2008. His approach was that Mrs Tang had power and control over the money and, *ipso facto*, it was hers, as were the income and gains. A significant factor appears to have been the lack of a written trust document.

67. It is well settled under English law that a trust does not need to be in writing and may be made orally.

68. There is also a distinction between a substantive trust, where the trustee has some sort of discretion or dispositive power over the trust assets, and a bare trust, which is effectively a nominee arrangement. The nature of the fiduciary duties which the trustee owes is very different in the two cases. A trustee of a substantive trust must act in the best interests of the beneficiaries and must seek advice about the management of the assets. The trustee is a taxpayer in his own right. By contrast, the duty of a bare trustee is to do what he is instructed to do by the beneficial owner. He has no duty to manage the investments himself, nor is he liable for failing to do so. He must invest in what the beneficial owner tells him to invest and transfer the assets where the beneficial owner tells him to transfer them. The assets belong to the beneficial owner, and the beneficial owner, not the trustee, is the person who may be liable to tax on the income and gains arising.

69. We accept that, from HMRC's point of view, the Appellant appeared to be uncooperative and that they had to resort to information notices to obtain the bank statements. However, the Appellant's assertion that she was unable to provide the statements because the money belonged to her parents-in-law and for reasons of privacy and confidentiality they did not want her to produce them is consistent with her contention that she was a bare trustee.

70. Nor was the Appellant able to produce a trust document to support her case because none existed.

71. The Appellant's consistent position, from the outset, has been and remains that she was looking after the money on behalf of her parents-in-law. The money remained theirs. It was not a gift. She dealt with it in accordance with their instructions. She took no benefit from it, had never used any of the capital for herself or received any of the income and gains for her own benefit. Indeed she was indignant at the suggestion she could have had the money and stated that to take it would have been stealing.

72. Given that the trust, if there was one, was oral, we have to look at the other evidence to see if it is consistent with the existence of such a trust.

73. Mrs Daniell's letter of 14 December 2018 stated that the bank record from Standard Chartered noted that the account was in Mrs Tang's name but noted "in trust for Jeffrey Tang". It is not uncommon for bare trust accounts to be denoted

in such a way. Mrs Daniell's did not attach any weight to the note because the bank had no "evidence" of any trust.

74. It appears that all the interest was added to the accounts. There is no evidence that Mrs Tang made withdrawals from any of the accounts.

75. From what we were told of Mr and Mrs Tang's jobs it is unlikely that either of them had the knowledge to carry out successful currency trading.

76. Mr and Mrs Tang's circumstances, as described at the hearing and inferred from the correspondence appear to be quite modest. Mrs Tang is an NHS midwife. Mr Tang worked in retail banking. Both had average or a little above average salaries. Mrs Tang worked nights because childcare was so expensive. They lived in a house they purchased in 1998 for £73,000 with the aid of a mortgage and they have not moved since. When Mrs Tang offered to settle the matter for £18,000 she could only do so on the basis that she was allowed to pay it off over a two year period because it was such a large sum of money.

77. BDO negotiated a settlement of around half of the liability ultimately assessed, but Mrs Tang refused to settle on principle because she did not owe the tax and because the amount was too much.

78. The above facts are inconsistent with Mrs Tang having $900,000 at her disposal.

79. We would also question why, if the money was a gift, it was given to a daughter-in-law and not the son, who was the blood relative.

80. Finally, there is the statement made by the parents-in-law.

81. The notes of the meeting between HMRC and BDO indicate that Mr Morley asked Mr Turner to comment on the statement. He responded that that "it could be viewed as being manufactured to match the facts in this case or entirely genuine." It seems to have been accepted that the money was returned to the parents-in-law in 2017, although Mr Turner suggested that "this could have been a manufactured scenario to match the facts". It is not clear why Mr Turner accepted that the statement was genuine in relation to the time when the money was transferred to Mrs Tang, but refused to accept it was genuine in its statement that the funds had always been beneficially owned by the parents-in-law.

82. The statement was not sworn, but it was obtained by BDO, a large and reputable firm of accountants and there is nothing to suggest that it is not genuine. The statement sets out a coherent and credible account of where the money came from and why it was dealt with as it was. It very clearly emphasises that although Mrs Tang was the legal owner of the funds, the parents-in-law were the beneficial owners and Mrs Tang was not allowed to benefit from the money and did not do so at any time during the period in question. We are inclined to attach substantial weight to this statement.

83. We have carefully considered all the evidence, documentary and oral and we find, on the balance of probabilities that Mrs Tang held the funds in the bank accounts as trustee only on bare trust for her parents-in-law throughout the period in question. Also that she transferred the funds back to them, as beneficial owners in 2017.

84. Consequent on that finding, the income arising on the accounts and the currency gains realised did not belong to Mrs Tang and she was not taxable on them.

85. As Mrs Tang had no tax liability to report, she did not fail to notify her liability. She had no liability to notify.

Decision

86. For the reasons set out above, we have concluded that Mrs Tang had no liability for income tax or capital gains tax in relation to the monies in the OCBC and Standard Chartered accounts.

87. Accordingly we cancel the discovery assessments and the penalties and allow the appeal.

88. 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.

MARILYN MCKEEVER
TRIBUNAL JUDGE

RELEASE DATE: 06 FEBRUARY 2019