Neutral Citation: [2022] UKFTT 216 (TC)

Case Number: TC08539

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal references: TC/2020/02328
TC/2020/02330

Income tax – underdeclaration of income derived from companies – liabilities established by reference to net cash received in the absence of reliable records – closure notices and assessments adjusted accordingly – deliberate inaccuracy penalties partly upheld, though some reduced to careless inaccuracy penalties – appeals allowed in part

Heard on: 6 December 2021,
16-17 March and 26 May 2022
Judgment date: 06 July 2022 2022

Before

TRIBUNAL JUDGE KEVIN POOLE
JANE SHILLAKER

Between

MARTYN ARTHUR and
DENISE ARTHUR

Appellants

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Martyn Arthur, the first Appellant in person and representing the second Appellant

For the Respondents: Simon Bracegirdle, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. These proceedings are concerned with liabilities for income tax sought to be imposed by HMRC on the Appellants in respect of the tax years 2013-14, 2014-15 and 2015-16, with associated penalties, in respect of various payments made to them by companies which they controlled.

2. The first Appellant (referred to in this decision as "Mr Arthur") had previously run a business providing advice and representation for taxpayers appealing to this Tribunal in respect of decisions made by HMRC. His business (which at various times operated through various different companies which he controlled and partially owned) ran into difficulties and was finally closed. The second Appellant (his wife, referred to in this decision as "Mrs Arthur") had no significant involvement in the business, but was a shareholder in the two companies concerned in this appeal, Martin F Arthur Limited ("MFA") and Martyn Arthur Forensic Accountant Limited ("MFAFA") (together "the Companies"), which were two of the companies through which Mr Arthur had carried on his business. Mrs Arthur had previously been a director of both Companies, but had resigned as such before the period covered by this appeal.

3. Mr Arthur was convicted in May 2020 of cheating the public revenue over the period up to 2012-13. This appeal was concerned with establishing what, if any, undeclared tax liabilities of the Appellants arose in respect of the tax years 2013-14 to 2015-16. The confusion arose largely as a result of the chaotic state of the affairs and records of the Companies and the numerous transfers of money that had taken place involving the Companies and both the Appellants. HMRC had also imposed penalties on the Appellants for deliberate inaccuracies in their returns in respect of the tax which they said had been underdeclared.

THE FACTS

Introduction

4. We received a main bundle of documents (of 3,710 pages), a supplemental bundle (of 288 pages), a bundle of authorities (of 126 pages) and various additional documents. We heard oral evidence from HMRC officer Mark Lamb (the assessing officer) and from Mr Arthur. Mrs Arthur did not give evidence beyond a written witness statement which stated, in essence, that she entirely delegated the conduct of her financial affairs to Mr Arthur, whom she trusted, she had no knowledge or understanding of the case but felt that she had not acted carelessly in entrusting the conduct of her affairs to Mr Arthur and allowing him to effectively control her bank accounts. In spite of her non-attendance, we admitted her witness statement but placed less weight on it than we might have done if she had participated in the hearing to answer questions about it.

5. Mr Arthur was unable to give any clear evidence about events during the relevant period. Whilst accepting that he had conducted the business of the Companies (and managed their bank accounts, his own and Mrs Arthur's) irrationally, he put this down to his mental health problems and alcohol dependency. There were very few matters of primary fact relevant to the issues before us upon which Mr Arthur could provide any meaningful evidence, accordingly his credibility as a witness was not as significant as might have been expected in such a case. As a general observation, however, we did not place much weight on his assertions of fact except where they were borne out by the contemporaneous documents before us. He had a tendency to make general statements accepting responsibility for the shortcomings in his conduct of the financial affairs of the Companies but then seeking to qualify that acceptance not only by reference to his mental health and alcohol dependency but also by complaints about the conduct of HMRC and their supposed shortcomings in conducting the investigation. In one

respect, we agree with him: whilst HMRC had provided him with an arithmetical calculation of the liabilities they were seeking to impose on him, they did not provide a clear and detailed explanation of how they had selected the particular payments which formed the basis of that calculation. It was only after we adjourned the hearing for the provision of such a full explanation that it was provided in a form which could be followed clearly. Whilst the investigation generally appears to have been carried out by Mr Lamb with great care (and indeed forbearance, in the face of some of the entirely unwarranted accusations levelled at him and HMRC more generally by Mr Arthur in correspondence), this gave a slight unfortunate initial impression that HMRC regarded Mr Arthur's criminal conviction as giving them "carte blanche" to impose whatever liabilities they considered appropriate without the usual level of supporting explanation. We hasten to add that this impression was in large part fuelled by the manner in which Mr Arthur approached the conduct of the enquiry, and was fully dispelled during the course of the hearing.

6. Mr Arthur represented both himself and Mrs Arthur.

Summary of disputed liabilities

Introduction

7. During the course of the hearing, it was confirmed on behalf of HMRC that they would not be defending the assessments that had been raised against both Appellants for the tax year 2013-14, and they would be withdrawing those assessments and the related penalties.

8. We were therefore concerned solely with closure notices issued to the two Appellants in respect of 2015-16 and discovery assessments issued to them in respect of 2014-15, along with the associated penalties.

9. Mr Arthur confirmed he did not dispute the validity of the discovery assessments or the closure notices, only their amounts. We also accept their validity.

10. The original assessments raised in respect of 2014-15 were both dated 5 May 2020 and imposed additional tax of £1,168.70 on Mrs Arthur and £5,479.72 on Mr Arthur. For Mrs Arthur, this was the additional tax computed on the basis of undeclared profit from self-employment of £2,708 which HMRC argued arose as a result of unexplained payments received into her personal bank accounts from accounts held in the names of MFA and MFAFA. For Mr Arthur, the basis of computation was the same, but giving rise to undeclared profit from self-employment of £12,031.

11. The closure notices in respect of 2015-16 were dated 5 May 2020 (in relation to Mrs Arthur) and 6 May 2020 (in relation to Mr Arthur).

12. The 2015-16 closure notice addressed to Mrs Arthur imposed additional tax of £10,822.80 on her, arising from £31,457 of additional taxable income. This arose as a result of HMRC adding £14,000 to her declared employment income (said to arise as a result of obvious errors in the PAYE real time information returned by MFA, which information had been carried over into her return) and showing £17,457 of profit from self-employment (arising in the same way as the previous year).

13. The 2015-16 closure notice addressed to Mr Arthur imposed additional tax of £42,471.26 on him, arising from £84,482 of additional taxable income. This arose as a result of HMRC showing that amount of profit from self-employment (arising in the same way as the previous year). This closure notice was subsequently corrected to take account of an HMRC pension of £4,229 which had been paid to Mr Arthur (less tax of £845.80 deducted at source), but the other amendments remained, increasing the undeclared income from £84,482 to £88,711 and the undeclared tax liability from £42,471.26 to £43,528.51. Finally at the hearing (see below) HMRC asked that the undeclared income figure be reduced by £2,000 to £86,711 due to an

error in their calculation, with a consequential reduction of £940 in the tax liability claimed (at the hearing, the final tax liability figure was stated to be £42,688.51, but a deduction of £940 from their previously revised claimed figure of £43,528.51 leaves a net figure of £42,588.51, which is the figure we take them to be defending).

14. Following the issue of the assessments and closure notices, HMRC turned their attention to the question of penalties. They ultimately imposed deliberate inaccuracy penalties on both the Appellants, at a rate of 63% of the potential lost revenue, applying mitigation within the 35%-70% range of 5% for "telling", 5% for "helping" and 10% for "giving". This resulted in penalties for Mrs Arthur of £736.28 for 2014-15 and £6,818.17 for 2015-16; and penalties for Mr Arthur of £3,452.34 for 2014-15 and £26,756.89 for 2015-16. Penalty assessment notices were issued accordingly on 14 August 2020 to both the Appellants. These notices also included penalties for 2013-14 (which, as mentioned above, HMRC have confirmed they are cancelling). Clearly the 2015-16 penalties claimed against Mr Arthur would also need to be adjusted in line with the final amendments claimed in respect of his increased tax liability for the year.

HMRC's method in arriving at the disputed liabilities

15. The accounting and other records of the two companies over the relevant period, to the extent provided to HMRC, were considered by them to be incomplete, chaotic and substantially unreliable. They could not be reconciled with the extremely numerous payments of money made by online bank transfers between the two Appellants and the Companies. HMRC therefore approached the situation by working from the bank statements that they were able to obtain for all four parties. These at least disclosed a reliable record of the payments that had been passed to and fro, which could be compared with the entries on the tax returns which had been submitted by Mr & Mrs Arthur. HMRC then compiled a list for each year of the payments from the Companies to each of the Appellants which HMRC regarded as giving rise to taxable income of some sort. In doing so, they disregarded certain payments to the Appellants which they considered to be employment earnings as returned by them, payments to the Appellants where there was an obvious offsetting payment on or about the same day in the opposite direction, and also some particular payments made to MFA which were then paid out by it to a third party on completion of a house purchase by Mr (and possibly Mrs) Arthur.

16. In summary, this resulted in HMRC arriving at the following conclusions.

Claimed liability for Mr Arthur for 2014-15

17. HMRC identified 8 payments to Mr Arthur from the Companies during the year which they regarded as referable to taxable income of some kind derived by him from the Companies. These 8 payments totalled £67,942.84. In identifying these 8 payments, HMRC had disregarded 12 other payments (totalling £13,858.18) which they regarded as referrable to Mr Arthur's employment income due to their amounts and recurrence (though Mr Arthur's declared gross employment income for the year totalled £11,844, with tax deducted of £367), and 4 other payments (totalling £2,960) for reasons which are unclear. There were also 11 payments from MFA to the Companies, totalling £108,383.57. HMRC disregarded 5 of them (totalling £96,995.20) because they represented part payment for a house in Porthcawl which Mr Arthur was buying (possibly together with Mrs Arthur, the evidence was unclear) and the money was paid out by MFA on their behalf when the purchase was completed; their reasons for disregarding the other 6 (totalling £11,388.37) are unclear. This property was then occupied by one or both of the Companies, and MFA paid rent to Mr Arthur for it. In addition, a grandchild of Mr Arthur's also lived in the property and intermittently paid him rent for it.

18. Having settled on the figure of £67,942.84 as having been paid to Mr Arthur by the Companies aside from his employment remuneration, HMRC allocated £55,911 of this sum to a dividend of that amount which Mr Arthur had included on his return. The remainder

(£12,031.84) they regarded as unexplained income, which they now seek to charge as profit from self-employment of Mr Arthur. The additional tax they seek to impose is £5,479.72 above the originally declared amount of £10,797.64 (their calculation of liabilities showed a figure 20p higher, but we adopt the figure actually shown on the discovery assessment).

Claimed liability for Mrs Arthur for 2014-15

19. HMRC identified 4 payments to Mrs Arthur from the Companies during the year which they regarded as referrable to earnings of some kind derived by her from the Companies. These 4 payments totalled £40,000. In arriving at these 4 payments, HMRC had disregarded 12 other payments to her (totalling £11,373.53) which they regarded as referable to her employment income due to their amounts and recurrence (her declared gross employment income for the year totalled £11,844, less tax deducted at source of £2,368). There was also a payment of £45,000 from Mrs Arthur to MFA which HMRC disregarded as it also clearly represented part payment for the house referred to above.

20. Having settled on the figure of £40,000 as having been paid to Mrs Arthur by the Companies by way of taxable income aside from her employment remuneration, HMRC allocated £37,292 of this sum to a dividend of that amount which Mrs Arthur had included in her return. The remainder (£2,708) they now seek to charge as profit from self-employment of Mrs Arthur. The additional tax they now seek to impose is £1,168.70 above the originally declared amount of £1,081.07.

Claimed liability for Mr Arthur for 2015-16

21. HMRC noted that Mr Arthur had not included anything in his return in respect of his pension, and they amended his return to include an additional £4,229 in respect of it (and the associated tax deducted at source). That amendment is agreed by him, on the basis that the original omission was a simple oversight on his part (he had included a similar amount in respect of the same pension in his previous year's return).

22. HMRC then identified 18 payments to Mr Arthur from the Companies during the year which they regarded as referable to earnings of some kind derived by him from the Companies. These 18 payments totalled £135,458.96. In arriving at these 18 payments, HMRC had disregarded 4 payments (totalling £83,460.25) which had effectively been "netted off" by equal payments in the opposite direction within a maximum of four days. They also disregarded a further 19 payments (totalling £26,255.20) for reasons which are not clear, but perhaps partly in acknowledgment that Mr Arthur had himself made 6 payments to the Companies during the year totalling £29,250.29.

23. HMRC then allocated £34,500 of the £135,458.96 to a dividend of that amount included in Mr Arthur's tax return for the year, and deducted £16,476.21 (the amount of net employment earnings paid to Mr Arthur during the year according to the RTI information submitted to HMRC). This left a residue of £84,482.75, which they sought to charge as profit from self-employment of Mr Arthur.

24. At the hearing, HMRC accepted that one of the 18 payments referred to at [22] above, in the sum of £2,000, had been included in error. This resulted in a £2,000 reduction in the amount they were seeking to bring into charge. In contrast, they had also spotted a typing error in the list of payments to Mr Arthur – one of them was listed as £1,413.33 when in fact the payment amount had been £1,431.13. They did not seek a corresponding increase of £17.80 in the amount they were seeking to bring into charge. The figure they therefore sought to defend was £82,482.75. The overall additional tax sought in respect of the above matters is £42,588.51 above the originally declared amount of £6,239.10.

Claimed liability for Mrs Arthur for 2015-16

25. HMRC identified 13 payments to Mrs Arthur from the Companies during the year which they regarded as referrable to taxable income of some kind derived by her from the Companies. These 13 payments totalled £88,457.32. In arriving at these 13 payments, HMRC had disregarded a payment of £30,000 to Mrs Arthur (matched by two payments in the opposite direction on the same day in the same total amount) and also, for reasons which are unclear, 5 further payments from the Companies to Mrs Arthur totalling £5,568.80.

26. HMRC then allocated £22,000 of the £88,457.32 to dividend income from the Companies (as the "white space" on her return included reference to such a figure, out of the total of £24,000 total dividend income set out in the return itself). They then deducted £49,000.13, which was the net salary paid to Mrs Arthur according to the RTI information sent to HMRC by the Companies. This left a residue of £17,457.19, which they sought to charge as profit from self-employment of Mrs Arthur.

27. In addition, HMRC considered that the RTI information supplied to HMRC, if the £49,000.13 net pay figure was accepted as accurate, contained an obvious error in the total gross pay, which was shown as £64,294. There was, they said, a clear arithmetical error in relation to the month 9 line, where a gross pay figure of £5,000 was shown, resulting in net pay of £9,000; by reference to a similar figure in month 10, this should clearly have been a gross pay figure of £15,000. In addition to this, the cumulative gross pay total for month 9 showed an increase of only £1,000 on the previous month, when it should have shown an increase of £5,000 on the basis of the gross pay figure given on that line. The cumulative effect of these two errors was that £14,000 needed to be added to the gross pay as returned in the RTI information, from £64,294 (which had been carried over into Mrs Arthur's return) to £78,294.

28. Thus overall, HMRC sought to defend the additional tax arising from an increase of £14,000 in Mrs Arthur's earnings from employment and self-employment income of £17,457.19 for 2015-16. The overall additional tax sought in respect of both matters is £10,822.80 above the originally declared amount of £1,849.25.

Summary of amounts of disputed tax

29. In summary, therefore, the following amounts of tax are in dispute:

(1) Mr Arthur 2014-15 - £5,479.72.

(2) Mrs Arthur 2014-15 - £1,168.70.

(3) Mr Arthur 2015-16 - £42,588.51 (save that an estimated £1,691 of this figure, attributable to the undeclared pension of £4,229, is not disputed).

(4) Mrs Arthur 2015-16 - £10,822.80.

The evidence

The transactions

30. We did not have any coherent or reliable records before us of the business or affairs of the Appellants or the Companies, other than the bank statements (which ran to approximately 1,000 pages, but were still not complete). Even if HMRC had exercised in full their statutory powers to obtain all available information and documents from the Companies' accountants (as Mr Arthur argued they ought to have done), the evidence which was before us suggested that this would not have advanced the case materially and would be likely to have given rise to as many questions as it answered.

31. Mr Arthur maintained that the records of the Companies were kept on a Sage accounting system (in which he was not trained) by professional book keepers; the accounts of the

Companies were prepared by Chartered Certified Accountants in accordance with those records and ought therefore to be reliable; following the failure of the businesses in 2018 the book keeper was made redundant and the accounting system she had maintained was "sabotaged" by her; but the accountants in any event held nearly all the relevant data as well; he had sought to obtain it from them but they had not responded (possibly, he thought, because of the criminal prosecution to which he was subject at the time); and the state of his mental health at the time had prevented him from pursuing the matter.

32. Mr Arthur claimed that the payments made by the Companies to the Appellants should, except so far as they reflected dividend, employment earnings or payment to him of rent, be transferred to loan accounts between them and the Companies. He pointed to the fact that entries appeared in the unaudited accounts of both MFA and MFAFA in respect of "Directors current accounts" (MFA) and "Transactions with the Director" (MFAFA). On closer consideration, the picture disclosed by those accounts (the last to be produced in relation to each company) was as follows:

(1) MFA for year ended 31 July 2013: £367 owed by Mr Arthur to MFA;

(2) MFA for year ended 31 July 2014: £1,026 owed by Mr Arthur to MFA:

(3) MFA for year ended 31 July 2015: £10,590 owed by Mr Arthur to MFA;

(4) MFAFA for year ended 1 January 2014: £19,779 owed by Mr Arthur to MFAFA.

33. No supporting detail for these figures was provided, or any reconciliation with the figures that Mr Arthur was now proposing as the balances on any loan account (see below). Also, the accounts clearly only referred to transactions with Mr Arthur (who was the sole director of both Companies at all material times), and not with Mrs Arthur. We consider the accounts unreliable insofar as they purport to show the true state of account between the Appellants and the Companies and attach no weight to them in considering that situation during the period 6 April 2013 to 5 April 2016.

34. Mr Arthur argued that any balance "overpaid" to him or Mrs Arthur by the Companies ought to be regarded as a director's loan and taxed accordingly. However, he sought to demonstrate by reference to a combination of an examination of the available accounts of the two Companies and the movements on the bank statements, that:

(1) at the start of the tax year 2013-14, the Companies owed a total of £22,506.30 to the Appellants (made up of a debt owed to Mrs Arthur by the Companies of £17,402.21 and a debt owed to Mr Arthur by the Companies of £5,104.09);

(2) this total then increased during the tax year 2013-14 by £152,731.09 (to £175,237.39 at 5 April 2014) (owed as to £128,784.35 to Mrs Arthur and as to £46,453.14 to Mr Arthur)[1], before

(3) reducing during the tax year 2014-15 by £15,888.24 (to £159,349.15 at 5 April 2015) (owed as to £126,546.79 to Mrs Arthur and as to £32,802.46 to Mr Arthur), and

(4) reducing during the tax year 2015-16 by a further £14,062.68 (to £145,286.47 at 5 April 2016) (owed as to £138,071.86 to Mrs Arthur and as to £7,214.71 to Mr Arthur).

35. Mr Arthur acknowledged that his calculations were rendered somewhat inaccurate (to the tune of, he estimated, some £25,000) because of his treatment of PAYE on salary in calculating his running balance. He also indicated he accepted that he had made some kind of oversight in relation to rent, leading to a further error estimated by him at £5,000. He did not provide details of these supposed errors on his part. Even taking account of this level of

[1] The 10p discrepancy cannot be explained, but is not material. It carries through to the following years.

flexibility in the figures he advanced, it is difficult to see how those figures can be reconciled with any of the other material in front of us, particularly the figures from the accounts of the Companies referred to at [32] above.

36. At the hearing Mr Arthur did not pursue his calculations. Instead, he accepted the approach suggested by the Tribunal, namely simply to compare the overall balance of net payments in each tax year between the two Companies and each of the two Appellants with the net taxable income deriving from the Companies actually returned for that tax year by each of them, but adjusting for any payments to the Companies that were clearly made by way of reimbursement of personal expenditure actually paid by the Companies. He did not withdraw his argument that the running balance should be treated as a running director's loan account for each of the Appellants, nor therefore his argument that any balance at the end of any tax year should simply be carried over to the next tax year.

37. Whatever the truth of Mr Arthur's assertions about the accounts and records of the Companies, the fact of the matter was that the only reliable evidence before us was the content of the bank statements and we consider that in attempting to base their view of the Appellants' true tax position on those statements, HMRC were acting reasonably.

38. Mr Bracegirdle for HMRC sought to persuade us that the approach adopted by HMRC was robust and appropriate, and that any review of the overall net balance between each Appellant and the two Companies in each year should take account of the likelihood of material payments by the Companies for personal expenditure. He took us to a few specific items in the MFA bank statements, one payment of £5,000 to "NWS Stockbrokers" on 13 May 2013 and one payment of £5,000 to "Dick Lovett Porsche" on 28 January 2016. Whilst there appeared to be clear funding of these amounts by payments to MFA from Mr Arthur in the previous few days, it illustrated the point that the Companies had paid out for items of personal expenditure and therefore it would not be appropriate to treat Mr Arthur's reimbursement of these amounts as being credited to some kind of running balance between him and the Companies which only took account of actual payments to and fro between them. He then referred us to payments made by MFA to Cardiff University on 2 September 2013 (of £2,250) and John Lewis on 2 October 2013 and 27 May 2014 (of £135 and £145). These, he submitted, should be regarded as further examples of personal expenditure of Mr Arthur paid for by MFA (though Mr Arthur disagreed, but without being able to remember precisely what these payments were for).

39. On a review of the bank statements, there did not appear to be any other similar examples, save for various small payments made to Amazon, which Mr Bracegirdle said he would disregard on the basis that such expenditure was "more likely" to be business expenditure. This view appears to be borne out by the inclusion of significant numbers of receipts from Amazon for what appear to be business purchases in the mass of material included in our bundle, and by the fact that Mr Arthur's personal bank accounts reflect numerous payments made by him personally to Amazon.

40. In addition, there were a large number of payments by the Companies to an account identified as "Halifax Arthur", but HMRC did not seek to include those payments in their exercise for reasons which are not clear, bearing in mind the total payments to it by the Companies over the period from 6 April 2014 to 5 April 2016 totalled nearly £180,000, of which £152,000 was paid in round sum amounts of between £4,000 and £20,000. As HMRC have not included these payments, we consider them no further.

Mr Arthur's mental health

41. Mr Arthur claimed that much of the chaos and disorganisation in the financial affairs of both the Appellants and the Companies resulted from his own personal mental health problems.

He provided some evidence to show he had been diagnosed with mild ADHD and he had suffered from alcohol dependency for many years. He had also had bouts of mild depression from time to time and had been assessed as having "emotionally unstable personality traits." In a pre-sentence report before he was sentenced in 2020 after his conviction, the psychiatrist noted that he could "see no direct connection between his mental health and the offences. His diagnoses are all of some length and started before the offences which commenced in 2008."

THE LEGISLATION

42. Relevant extracts from the legislation are set out in an appendix to this Decision.

43. No issue has been raised in respect of the validity of HMRC's enquiry into the Appellants' 2015-16 returns, or their issue of closure notices amending those returns. There is no need therefore to set out the relevant legislation in that area.

THE ISSUES

44. The first issue to be addressed, before coming to grips with the details of the various payments, is whether Mr Arthur is right in his argument that all payments between the Appellants and the Companies in any given tax year should simply be regarded as debits or credits to a running loan account, with any net balance owing to the Companies being subject to the appropriate tax charge under the loans to participators provisions; or whether HMRC are correct in their argument that the net balance of such payments in each year should, insofar as they exceed the taxable income from the Companies declared by the Appellants in their returns for the years in question, be regarded as profit of the Appellants from self-employment, and taxed as such.

45. If HMRC's argument is preferred to Mr Arthur's, the next issue is whether the figures arrived at by HMRC in their closure notices and assessments represent appropriate estimates of the additional taxable income and resultant tax liabilities of the Appellants.

46. Finally, the appropriateness of the penalties charged by HMRC must be considered.

THE ARGUMENTS

47. In respect of the nature of the "excess" net payments by the Companies to the Appellants, Mr Bracegirdle submitted there was no coherent evidence to support the suggestion that this should be treated as a loan account or accounts. The Companies' accounts disclosed amounts which bore no relationship to the reliable evidence. Referring to *Mubin Merchant v HMRC* [2020] 130 (TC), he submitted that "the lack of audit trail, the vagueness of identification of the nature of the payments [and] the inconsistencies in the evidence" should lead the Tribunal to the conclusion that there was in fact no loan account here of any sort. He submitted that the better view, following the approach of the FTT in *Larry John Barreto* [2017] UKFTT 101 (TC), was to treat the unexplained excess as income from self-employment which (in the absence of any associated expenses) should be treated as entirely taxable as profit from that source.

48. Mr Arthur submitted that any excess net payments should simply be regarded as credited to loan accounts between the Appellants and the Companies. If that were not done, he did not contest Mr Bracegirdle's submission that the proper approach was to regard them as profit from self-employment, taxable as such.

49. Whatever the correct treatment of the excess net payments, there was disagreement about their amount. Mr Bracegirdle stood by the computation already carried out by HMRC (subject to the minor adjustments mentioned above). Mr Arthur argued that on a proper examination of the state of account, there either were no excess net payments at all, or payments of a substantially smaller amount than claimed by HMRC.

50. Finally, as to penalties, Mr Bracegirdle argued firstly that the question of whether the Appellants had been guilty of "deliberate" inaccuracy should be tested by reference to the formulation set out in *Auxilium Project Management Limited v HMRC* [2016] UKFTT 249 (TC) at [63]:

> In our view, a deliberate inaccuracy occurs when a taxpayer knowingly provides HMRC with a document that contains an error with the intention that HMRC should rely upon it as an accurate document. This is a subjective test. The question is not whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time.

51. For this purpose, he submitted that "blind eye" knowledge should also be imputed to the Appellants, relying on *Chohan Management Limited v HMRC* [2021] UKFTT 0196 (TC) at [112] to [113]:

> 112. The Tribunal in *Clynes* held that a behaviour can be deliberate if a person consciously or intentionally chooses not to find out the correct position. Ms Sheldon submits that *Clynes* can be distinguished in this case as Mr Bashir is not a professional accountant, whereas the relevant individual in *Clynes* had an accounting qualification and ran an accountancy business. I disagree. I find that *Clynes* provides an example of "blind eye knowledge". It is dishonest for a person deliberately to shut their eyes to facts which they would prefer not to know. If he or she does so, they are taken to have actual knowledge of the facts to which they shut their eyes. Such knowledge has been described as "Nelsonian" or "blind-eye" knowledge. Although not cited to me, Lord Scott in *Manifest Shipping Company Limited v. Uni-Polaris Shipping Company Limited and Others* [2001] UKHL 1 at [112] said the following about blind-eye knowledge:
>
> > "Blind-eye" knowledge approximates to knowledge. Nelson at the battle of Copenhagen made a deliberate decision to place the telescope to his blind eye in order to avoid seeing what he knew he would see if he placed it to his good eye. It is, I think, common ground - and if it is not, it should be - that an imputation of blind-eye knowledge requires an amalgam of suspicion that certain facts may exist and a decision to refrain from taking any step to confirm their existence. Lord Blackburn in *Jones v. Gordon* (1877) 2 App Cas 616, 629 distinguished a person who was "honestly blundering and careless" from a person who "refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind - I suspect there is something wrong, and if I ask questions and make farther inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover". Lord Blackburn added "I think that is dishonesty".
>
> 113. I find that the principles articulated by Lord Scott relating to blind-eye knowledge are applicable to the subjective assessment of knowledge for the purposes of Schedule 24, and are binding upon me. The fact that the relevant individual in *Clynes* had a professional accounting qualification was not relevant to the decision of the Tribunal, rather it was the fact that the individual consciously and intentionally chose not to find out the correct position.

52. Mr Arthur argued that if any penalties were found to arise, then they should certainly not be regarded as arising from "deliberate" inaccuracies; at worst, any inaccuracies should be considered careless and at best they were not even careless but simply attributable to Mr Arthur's mental health problems and alcohol dependency. It was also implicit in his

submissions generally (though he did not say so explicitly) that the quality of the disclosure on behalf of the Appellants merited greater mitigation than HMRC had allowed. He did not argue that a "special reduction" was appropriate in this case.

DISCUSSION

Introduction

53. We find (and Mr Arthur did not seriously argue to the contrary) that, to the extent they exist, both the Appellants' records and the Companies' records for the relevant period are incomplete, chaotic and unreliable. In those circumstances, we consider HMRC's approach of attempting to reach a clear picture primarily by relying on (and drawing inferences from) the one clearly reliable part of the available records – the bank statements – to have been a reasonable and sensible approach. It is clear (see Walton J in *Johnson v Scott* 52 TC 383) that the state of the records forced HMRC to draw reasonable inferences from such reliable material as was before them, and we are satisfied that they made a bona fide attempt to do so. It follows therefore that the burden lies on the Appellants to satisfy us that HMRC have drawn incorrect inferences from the material before them.

54. There are two aspects to this. First, if Mr Arthur can satisfy us that the movements of money between the Companies and the Appellants truly represented nothing more than payment and repayment on rolling loan accounts, then HMRC would have failed to establish any basis for the payments (or any part of them) as being income from self-employment (and taxable as such). Second, even if Mr Arthur fails in that first task, it is still open to him to satisfy us that the amounts of taxable income claimed by HMRC are excessive.

55. We address these two aspects in turn, dealing first with the question of whether the payments to and fro should simply be regarded as payments and repayments of loan accounts.

Loan account or taxable income?

56. Bearing in mind that movements of money involving Mrs Arthur were initiated by Mr Arthur on her behalf and with her general authority (and indeed, on her evidence, she did not even know about them as Mr Arthur managed her bank accounts online himself), we consider that it is Mr Arthur's state of mind when such payments were made that is relevant to the position of both Appellants.

57. On Mr Arthur's own admission, there was no underlying rationale for the movements of money that he initiated. He clearly regarded the Companies' money as an asset that was freely available to himself and his wife, and whilst he generally reimbursed the Companies for significant items of expenditure which they incurred which were clearly for the benefit of himself and his wife (most obviously, the property purchase), there was no evidence before us to suggest that he was keeping a careful (or indeed any) record of the various money flows in order to ensure that they were appropriately credited or debited to any loan account. Such figures as were reflected in the accounts of the Companies in relation to director's loans bore no relationship to what Mr Arthur now maintains to have been the running balance. On the contrary, money was just made to "slosh around", almost at random, between the Appellants and the Companies. Most tellingly, when Mr Arthur applied to the Registrar of Companies for the dissolution of the Companies, there was no evidence of any attempt on his part to ensure that any outstanding balance owed to them by himself and his wife was ascertained and repaid. This reinforces the clear view we take that Mr Arthur regarded the payments the Appellants had received from the Companies as being their own money, with no obligation to repay it.

58. Mr Arthur did not argue, if we reached this conclusion, that there was any other basis upon which HMRC should be precluded from charging tax on the payments in the manner that

they had done. He did not, for example, seek to argue that the payments should be regarded either as additional dividend income or as earnings from employment.

Approach to calculating amounts

59. Having addressed this first question of principle, we now turn to the amounts.

60. As a general point, we consider that in principle the appropriate way to approach ascertainment of the true amount of taxable excess payments made to the Appellants in any given tax year is to take account of all payments back and forth between each Appellant (on the one hand) and either of the Companies (on the other). Any payments to the Companies which amount to reimbursement of personal expenditure paid out by the Companies on behalf of the Appellant (for example, in relation to the property purchase) should be disregarded in this exercise. The net amount found to have been paid to each Appellant should then be compared with the amounts included on that Appellant's return for the year in question. Any excess over and above the declared amounts should be allocated to additional income from self-employment.

61. Applying this approach, which appears to us to be more coherent than HMRC's approach of simply disregarding certain payments, or allocating payments to employment income which are different from the amounts returned, we turn to consider each year in relation to each Appellant.

Consideration of each year for each Appellant

Mr Arthur 2014-15

62. After disregarding the house purchase payments, Mr Arthur received a net amount of £73,372.68 from the Companies during the tax year. On his tax return, he declared net dividends of £55,911 and net employment income of £11,477 (after deduction at source of £367 in tax as stated in the return). In addition, his return included rental income of £6,995, all of which was derived from the Companies. In total, therefore, his return included net cash income from the Companies of £74,383, slightly more (by £1,010.32) than his net receipts from the Companies during the year. We therefore consider that no addition to his taxable income for the year is justified.

Mrs Arthur for 2014-15

63. After disregarding the house purchase payment made by her, Mrs Arthur received a net amount of £51,373.56 from the Companies during the tax year. On her tax return, she declared net dividends of £37,292.06 and net employment income of £9,476 (after deduction at source of £2,368 in tax as stated in the return). In total, therefore, her return included net cash income from the Companies of £46,768.06, £4,605.50 less than the cash she actually received. We therefore consider that the assessment should be varied by increasing her profit from self-employment from £2,708 to £4,605.50, with the associated additional tax to be calculated and charged on her.

Mr Arthur for 2015-16

64. The picture for this year is somewhat more complicated.

65. After disregarding his reimbursement of the £5,000 paid out to the Porsche dealer by MFA on his behalf, Mr Arthur received a net amount of £127,120.47 from the Companies during the tax year.

66. On his return, Mr Arthur declared net dividends of £34,500, employment income of £21,900 (after deduction at source of £4,444 in tax as stated in the return) and £6,420 of rent received.

67. It is clear, however, that not all that rent was received from the Companies – from Mr Arthur's bank statements it is clear that he received payments totalling £2,455 from the grandchild referred to at [17] above during the tax year which we consider constituted rent. Therefore, we consider that only the residue of the rental income figure in his return, namely £3,965, was rent from the Companies.

68. In addition, in the "white space" on his return, it was made clear that of the £34,500 dividends, only £33,000 was attributable to MFA, the source of the other £1,500 dividend being unclear.

69. Thus Mr Arthur's returned net taxable income from the Companies was £58,865, £68,255.47 less than the net amount he actually received from the Companies. This sum of £68,255.47 is therefore the amount that we consider should be added to his returned income as profit from self-employment, rather than the £82,482 claimed by HMRC.

70. In addition, as mentioned above, the addition of £4,229 of pension income is not disputed. In calculating Mr Arthur's overall additional tax liability, HMRC included a credit of £845.80, being the deduction at source at 20% which would have been applied to this payment. We accept this approach.

Mrs Arthur for 2015-16

71. Mrs Arthur received a net amount of £92,426.12 from the Companies during the tax year.

72. On her return, she declared total net dividends of £24,000 and net employment earnings of £44,768 (after deduction at source of £19,526 from a gross amount of £64,294 as stated in the return). In the "white space" on her return, however, it was made clear that of the £24,000 dividends, only £22,000 was attributable to MFA, the source of the other £2,000 dividend being unclear. Thus her returned net taxable income from the Companies was £66,768.

73. Thus Mrs Arthur received £25,658.12 more cash from the Companies then was reflected in her return.

74. HMRC noted from the real time information supplied to them under PAYE that there was a self-evident error in that information, resulting in an understatement of £14,000 in her gross earnings from employment, which was carried over into her return. They therefore attributed £14,000 of the excess (less tax that should have been deducted from it at source at 40%) to net underdeclared earnings from employment. Mr Arthur did not dispute this approach in principle, and we accept it. Thus, of the excess payment of £25,658.12, £8,400 (being £14,000 less 40%) should be allocated as payment of additional net earnings from employment (on an additional gross earnings amount of £14,000), leaving £17,258.12 as additional taxable earnings, derived from self-employment.

75. In passing, we note that HMRC's amended tax calculation including the pension income, issued after their original closure notice, appears to have given credit for an additional £6,000 of tax deducted at source, which we consider to have been an arithmetical error – if adding £14,000 of earnings from employment and giving credit for the tax which ought to have been deducted at source at the rate of 40%, the additional credit for tax deducted would be only £5,600.

Time limit

76. Given the conclusion we have reached (see below) that the inaccuracies identified in Mrs Arthur's return for 2014-15 were careless (i.e. due to her failure to take reasonable care), it follows that the assessment for that year, made just over five years after the end of the tax year, was made by HMRC within the relevant time limit set out in s. 36 TMA, set out in the appendix.

Clearly as the 2015-16 liabilities are imposed by reference to closure notices, there is no potential time limit issue in relation to them.

Summary of conclusions on tax liabilities

77. In principle, therefore, we hold as follows:

(1) The assessment for 2014-15 on Mr Arthur should be cancelled (see [62] above).

(2) The assessment for 2014-15 on Mrs Arthur should be varied by increasing the figure for profit from self-employment from £2,708 to £4,605.50, with the necessary consequential increase in her additional tax liability (see [63] above).

(3) The addition of the further pension income of £4,229 (with associated credit for deduction of tax at source) in the revised closure notice calculation for 2015-16 in relation to Mr Arthur is confirmed, but the additional "profit from self-employment" in the notice should be reduced from £84,482 to £68,255.47, with the necessary consequential reduction in his additional tax liability (see [69] & [70] above).

(4) The closure notice for 2015-16 in relation to Mrs Arthur is amended by reducing the figure for profit from self-employment from £17,457 to £17,258.12, with the necessary consequential reduction in her additional tax liability (see [74] above).

78. If the parties are unable to agree the consequential adjustments to the tax computations in each case, they are at liberty to apply to the Tribunal for a final decision on the amounts in question.

THE PENALTIES

79. We dismiss the suggestion that any of the inaccuracies which might otherwise be considered as "deliberate" should instead be regarded as "careless" by reason of Mr Arthur's mental health and alcohol dependency, or that he should be absolved altogether from responsibility for any inaccuracies. On any view, his ADHD condition has been diagnosed as "mild", and there is no suggestion that it (or his other complaints) rendered him incapable of making an accurate return. As he has demonstrated at times, both during the investigation and during the hearing, Mr Arthur is well able to apply his mind quite adequately to his affairs when he wishes to; he finds it difficult at times to control himself, but that does not in our view render his inaccuracies in the various returns any less deliberate.

80. So far as Mr Arthur's 2014-15 penalty is concerned, since we have found there to have been no potential loss of revenue, the penalty must be cancelled.

81. In relation to Mrs Arthur, in both years, she simply delegated responsibility and authority to Mr Arthur for compiling and submitting her return, on the basis of records (such as they were) that she had left it to him to keep. There is no evidence that she took any steps to check the accuracy of the returns being submitted on her behalf. Such inaccuracies as the returns contained were in our view at the very least careless; the question is whether they were deliberate.

82. We agree with the basic statement of the Tribunal in *Auxilium* set out at [50] above. We would also endorse the principle that if a taxpayer is aware of the existence of facts or circumstances which they know will or might render a return inaccurate and they choose not to investigate further in the light of those facts or circumstances in order to verify the accuracy of the return, then any inaccuracy which they would have uncovered if they had done so should be regarded as being a deliberate inaccuracy so far as the taxpayer is concerned. This is simply another way of expressing the proposition set out in *Clynes v HMRC* [2016] UKFTT 369 (TC) at [86]:

> 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.

83. From the documents before us, it appears that HMRC started their overt criminal investigation of Mr Arthur's affairs with a raid on 15 August 2015. We consider, on a balance of probabilities, that Mrs Arthur became aware no later than that date that her husband's conduct of their tax affairs was perhaps not as proper as it should have been. From that point on, she clearly knew that she should not simply continue to entrust the making of her returns to Mr Arthur without checking them herself.

84. The evidence before us did not show whether Mrs Arthur's return for 2014-15 had been delivered by 15 August 2015, therefore HMRC have not satisfied us that any inaccuracy in that return was deliberate on her part (in the sense of having been submitted without further checks, in spite of the knowledge that her trust in Mr Arthur might have been misplaced). However, so far as her 2015-16 return is concerned, she was clearly aware of the ongoing criminal case against Mr Arthur by the time her return was submitted and, by nonetheless allowing its submission without checking its accuracy herself, we are satisfied that the inaccuracies contained in it were deliberate, so far as she was concerned.

85. Whatever Mr Arthur's state of mind in relation to Mrs Arthur's 2014-15 return, the legislation makes no provision for it to be imputed to Mrs Arthur. It follows that we consider that the penalty imposed on Mrs Arthur in respect of 2014-15 should be recalculated on the basis of being a careless inaccuracy, whereas for 2015-16 a deliberate inaccuracy penalty is warranted.

86. In relation to Mr Arthur's 2015-16 penalty, we are satisfied that the inaccuracy, so far as it involved the omission of his pension income of £4,229 (gross) (£3,383.20 net after deduction of tax at source) was careless rather than deliberate. So far as the remaining inaccuracies are concerned, we consider them to have been deliberate. In our view, Mr Arthur was well aware that his return could not be supported by such records as he had, and that it was inaccurate.

87. In relation to both the Appellants, we see no reason to interfere with the penalty mitigation applied by HMRC in respect of disclosure, nor do we consider there to be any circumstances justifying a special reduction in any of the remaining penalties. Accordingly the remaining penalties should be mitigated applying the same percentage reduction, in each case, within the relevant band (5% for "telling", 5% for "helping" and 10% for "giving"). We also confirm that we agree with HMRC's view (which the Appellants have not disputed) that the disclosure of the inaccuracies was prompted.

88. If the parties are unable to agree the final penalty figures based on this decision in principle, they are at liberty to apply to the Tribunal for a final decision on the actual penalty amounts in each case.

CONCLUSION AND SUMMARY

89. We have decided as follows:

(1) The assessment and associated penalty in respect of Mr Arthur for 2014-15 are to be reduced to nil (see [77(1)] and [79] above).

(2) The assessment on Mrs Arthur for 2014-15 is to be increased by an appropriate amount, reflecting an increase in her profit from self-employment from £2,708 (as set out in the assessment) to £4,605.50. The associated penalty is to be recalculated on the basis that the inaccuracy was careless, applying a 20% rate of mitigation within the 15-30% band, i.e. a final penalty loading of 27% (see [77(2)] and [85] above).

(3) The closure notice addressed to Mr Arthur for 2015-16 is amended to include the £4,229 of pension income (credit to be given for the tax deducted at source) and the profit from self employment figure is reduced from £84,482 to £68,255.47, with a corresponding adjustment to the additional tax liability due. The associated penalty is to be recalculated on the basis that the failure to include the pension income was a careless inaccuracy and the failure to include the correct figure for self-employment income was a deliberate inaccuracy, applying a 20% rate of mitigation within the 15-30% and 35-70% bands respectively, resulting in final penalty loadings of 27% and 63% respectively (see [77(3)] and [86] above).

(4) The closure notice addressed to Mrs Arthur for 2015-16 is amended by reducing the figure for profit from self-employment from £17,457 to £17,258.12, with the necessary consequential reduction in her additional tax liability. The associated penalty is to be recalculated on the basis that the inaccuracy was deliberate, applying a 20% rate of mitigation within the 35-70% band, i.e. a final penalty loading of 63% (see [77(4)] and [85] above).

(5) The parties are at liberty to apply if they are unable to agree final figures on the basis of the above decisions in principle.

90. To the extent set out above, therefore, the appeals are in principle ALLOWED IN PART.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

91. 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.

KEVIN POOLE
TRIBUNAL JUDGE

Release date: 13 JULY 2022

APPENDIX

Extracts from legislation

In relation to tax liabilities

1. In respect of the assessments for 2014-15, the power to make an assessment arises under s. 29(1) Taxes Management Act 1970 ("TMA"):

(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,

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

(c) that any relief which has been given is 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. As regards the power to make an assessment in the first place, both Appellants having delivered returns in respect of the year 2014-15, HMRC may only make an assessment if one of two conditions is satisfied. The condition upon which HMRC rely in this case is that contained in s. 29(4) TMA:

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

3. There is an ordinary time limit of four years after the end of the year of assessment for making an assessment under s. 34(1) TMA:

(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains tax may be made at any time not more than 4 years after the end of the year of assessment to which it relates.

4. The assessments in this case were issued on 5 May 2020, just over five years after the end of the tax year 2014-15. Therefore HMRC are relying on the longer time limit contained in s. 36(1) TMA, which reads as follows:

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…

5. Once either an assessment under s. 29 TMA or an amendment to the taxpayer's return under s. 28A TMA has been made, and an appeal against that assessment or amendment is notified to the Tribunal, s. 50 TMA sets out the powers of the Tribunal:

50. Procedure

(6) If, on an appeal notified to the tribunal, the tribunal decides –

(a) that the Appellant is overcharged by a self-assessment;

(b) that any amounts contained in a partnership statement are excessive; or

(c) that the appellant is overcharged by an assessment other than a self-assessment,

the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

(7) If, on an appeal notified to the tribunal, the tribunal decides

(a) that the appellant is undercharged to tax by a self-assessment

(b) that any amounts contained in a partnership statement are insufficient; or

(c) that the appellant is undercharged by an assessment other than a self-assessment,

the assessment or amounts shall be increased accordingly.

In relation to Penalties

6. There was no dispute about the relevant provisions of schedule 24 Finance Act 2007 ("Sch 24"), which provides for penalties to be imposed in respect of documents containing inaccuracies leading to an understatement of tax. In the present case, HMRC have imposed penalties on both Mr and Mrs Arthur for what they consider to have been accuracies which were "deliberate but not concealed", in relation to both 2014-15 and 2015-15.

7. Paragraph 3(1)(b) of Sch 24 defines this as follows (para 3(1)(a) is included for completeness):

(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…

8. Paragraph 4 of Sch 24 sets out the penalty payable:

(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…

9. It is not disputed that the inaccuracies in the present case, should they be found to exist, fall within "category 1".

10. There is no dispute that the "potential lost revenue", if any, in the present case, would be "the additional amount due or payable in respect of tax as a result of correcting the inaccuracy" (see paragraph 5(1) of Sch 24), and that "tax" includes national insurance contributions (see paragraph 5(3) of Sch 24).

11. Paragraphs 9 and 10 of Sch 23 provide as follows in relation to reductions for disclosure, so far as relevant to the present case:

9 –

(A1) Paragraph 10 provides for reductions in penalties –

(a) under paragraph 1 where a person discloses an inaccuracy that involves a domestic matter…

…

(1) A person discloses an inaccuracy… by –

(a) telling HMRC about it,

(b) giving HMRC reasonable help in quantifying the inaccuracy…, and

(c) allowing HMRC access to records for the purpose of ensuring that the inaccuracy… is fully corrected.

…

(2) Disclosure –

(a) is "unprompted" if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the inaccuracy…, and

(b) otherwise, is "prompted".

(3) In relation to disclosure, "quality" includes timing, nature and extent.

…

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,…

Standard %	Minimum % for prompted disclosure	Minimum % for unprompted disclosure
30%	15%	0%
70%	35%	20%
100%	50%	30%

12. Paragraph 11 of Sch 24 provides for special reductions to penalties:

11 –

(1) If they think it right because of special circumstances, HMRC may reduce a penalty under paragraph 1…

(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 overpayment 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.

13. Appeal rights are set out in paragraphs 15-17 of Sch 24:

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 the 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 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 tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed.

…

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