[2016] UKFTT 708 (TC)

# TC05437

**Appeal number: TC/2015/02303**

***CAPITAL GAINS TAX – deductibility of expenses – apportionment of expenses – whether penalties due – yes – amounts assessed upheld as amended – appeal dismissed***

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

**JOHN KING** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ANNE FAIRPO**

**Sitting in public at Fox Court, London on 27 January 2016**

**Mr J King appeared in person**

**Mr Hall, presenting officer for HM Revenue and Customs, for the Respondents**

DECISION

## Introduction

1. This is an appeal against an assessment to capital gains for the year 2006-7 in respect of the sale of residential property, issued on 27 July 2011, and a penalty determination arising thereon.

2. It is agreed between the parties that Private Residence Relief is not available in respect of the gain. The issues to be decided are the correct value of the taxable gain arising on the sale of the residential property, and the quantum of the penalty.

## Background

3. The Appellant ('Mr King') purchased three leasehold properties in London in January 1999: number 5, 6, and 7 Coleridge Court. He subsequently acquired the freehold of the three properties on 5 April 2005.

4. 7 Coleridge Court was sold by Mr King on 26 February 2007 for £485,000, and it is the gain arising on this sale that is the subject of this appeal.

5. Mr King's self-assessment tax return for the 2006-7 period was submitted on 18 December 2008 (having been due by 31 January 2008); this did not report any capital gains tax transaction.

6. Information held by HMRC indicated that a capital gain had arisen on the sale of 7 Coleridge Court and a check into Mr King's 2006-7 return was opened on 16 April 2010.

7. Following correspondence, including the issue of formal requests for information by way of Schedule 36 Notices on 24 May 2010, 4 October 2010, 14 February 2011 (with penalties imposed for failure to comply), HMRC issued a computation in respect of the gain on 26 April 2011 and an assessment in respect of capital gains tax on 27 July 2011.

8. Mr King appealed the assessment on 25 November 2013 on the basis that he had not received the assessment of July 2011 and that he had provided all the information requested by HMRC. Following permission given by the Tribunal to make a late appeal (without hearing the substantive appeal), HMRC reviewed the matter in the light of additional information provided by Mr King. Further correspondence was entered into, and a further formal information request by way of Schedule 36 Notice was issued on 5 September 2014. An amended computation was produced by HMRC and notified to Mr King on 4 November 2014.

9. Mr King requested a review of the amended computation: the review conclusion was issued on 13 February 2015. Mr King appealed the conclusion on 11 February 2015 on the grounds that "not all costs have been taken account of correctly".

*Calculation elements summary*

10. To set the context, the following table details the elements involved in the calculation of the gain on the property: those in dispute at the start of the hearing are highlighted in bold italics.

| **Item** | **Appellant's position** | **HMRC position** |
|---|---|---|
| Net sale proceeds | £467,827.21 | £467,827.21 |
| ***Purchase price*** | ***£245,00.00*** | ***£244,000*** |
| ***Stamp duty*** | ***£2,750.00*** | ***£2,440*** |
| Solicitors' fees | £682.39 | £682.39 |
| Bridging loan costs | Agreed not allowable | Not allowable |
| Land Registry fees | £800.00 | £800.00 |
| ***'Extra cost'*** | ***£46,666.67*** | ***Not allowable*** |
| ***Cost of acquiring freehold*** | ***£1,755.00*** | ***£1*** |
| Leases | £398.64 | £398.64 |
| RJB Fees | £295.75 | £295.75 |
| ***Boodle Hatfield fees*** | ***£421.54*** | ***Not allowable*** |
| ***Refurbishment costs*** | ***£2000.00*** | ***Not allowable*** |
| ***External refurbishment*** | ***£5,493.50*** | ***Not allowable*** |

## Relevant law

11. Section 38 Taxation of Chargeable Gains Act 1992 ('TCGA') provides that

> (1) Except as otherwise expressly provided, the sums allowable as a deduction from the consideration in the computation of the gain accruing to a person on the disposal of an asset shall be restricted to—
>
> *(a)* the amount or value of the consideration, in money or money's worth , given by him or on his behalf wholly and exclusively for the acquisition of the asset, together with the incidental costs to him of the acquisition or, if the asset was not acquired by him, any expenditure wholly and exclusively incurred by him in providing the asset,
>
> *(b)* the amount of any expenditure wholly and exclusively incurred on the asset by him or on his behalf for the purpose of enhancing the value of the asset, being expenditure reflected in the state or nature of the asset at the time of the disposal, and any expenditure wholly and

exclusively incurred by him in establishing, preserving or defending his title to, or to a right over, the asset,

(*c*) the incidental costs to him of making the disposal.

(2) For the purposes of this section and for the purposes of all other provisions of this Act, the incidental costs to the person making the disposal of the acquisition of the asset or of its disposal shall consist of expenditure wholly and exclusively incurred by him for the purposes of the acquisition or, as the case may be, the disposal, being fees, commission or remuneration paid for the professional services of any surveyor or valuer, or auctioneer, or accountant, or agent or legal adviser and costs of transfer or conveyance (including stamp duty or stamp duty land tax) together—

(*a*) in the case of the acquisition of an asset, with costs of advertising to find a seller, and

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

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

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

12. Section 39 TCGA (as relevant) provides that:

(1) There shall be excluded from the sums allowable under section 38 as a deduction in the computation of the gain any expenditure allowable as a deduction in computing the profits or losses of a trade, profession or vocation for the purposes of income tax or allowable as a deduction in computing any other income or profits or gains or losses for the purposes of the Income Tax Acts and any expenditure which, although not so allowable as a deduction in computing any losses, would be so allowable but for an insufficiency of income or profits or gains; and this subsection applies irrespective of whether effect is or would be given to the deduction in computing the amount of tax chargeable or by discharge or repayment of tax or in any other way.

(2) Without prejudice to the provisions of subsection (1) above, there shall be excluded from the sums allowable under section 38 as a deduction in the computation of the gain any expenditure which, if the assets, or all the assets to which the computation relates, were, and had at all times been, held or used as part of the fixed capital of a trade the profits of which were (irrespective of whether the person making the disposal is a company or not) chargeable to income tax would be allowable as a deduction in computing the profits or losses of the trade for the purposes of income tax.

13. Section 40 TCGA (as relevant) provides that:

(1) Where—

(*a*) a company incurs expenditure on the construction of any building, structure or works, being expenditure allowable as a deduction under section 38 in computing a gain accruing to the company on the disposal of the building, structure or work, or of any asset comprising it, and

(*b*) that expenditure was defrayed out of borrowed money,

the sums so allowable under section 38 shall, subject to subsection (2) below, include the amount of any interest on that borrowed money which is referable to a period or part of a period ending on or before the disposal.

(2) Subsection (1) above has effect subject to section 39 and does not apply to interest which is a charge on income.

14. Section 29 of the Taxes Management Act 1970 ('TMA') provides (as relevant) that:

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

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

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

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

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

…

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant [year of assessment][2], he shall not be assessed under subsection (1) above—

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

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

unless one of the two conditions mentioned below is fulfilled.

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

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

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

(*b*) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

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

(*a*) it is contained in the taxpayer's return under [section 8 or 8A][2] of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

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

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

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

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

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

(7) In subsection (6) above—

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

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

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

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

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

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

(9) Any reference in this section to the relevant year of assessment is a reference to—

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

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

15. Section 36 TMA provides that:

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

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

(*a*) brought about deliberately by the person,

(*b*) attributable to a failure by the person to comply with an obligation under section 7, or

(*c*) attributable to arrangements in respect of which the person has failed to comply with an obligation under section 309, 310 or 313 of the Finance Act 2004 (obligation of parties to tax avoidance schemes to provide information to Her Majesty's Revenue and Customs),

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

(1B) In subsections (1) and (1A), references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person.][7]

…

(3) If the person on whom the assessment is made so requires, in determining the amount of the tax to be charged for any chargeable period in any assessment made in a case mentioned in subsection (1) or (1A) above, effect shall be given to any relief or allowance to which he

would have been entitled for that chargeable period on a claim or application made within the time allowed by the Taxes Acts.

(3A) In subsection (3) above, "claim or application" does not include an election under any of sections 47 to 49 of ITA 2007 (tax reductions for married couples and civil partners: elections to transfer relief).

(4) Any act or omission such as is mentioned in section 98B below on the part of a grouping (as defined in that section) or member of a grouping shall be deemed for the purposes of subsections (1) and (1A) above to be the act or omission of each member of the grouping.

16. Section 50(6) TMA provides that:

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.

17. Section 95 TMA (for 2006-7) provides that:

(1) Where a person fraudulently or negligently—

(*a*) delivers any incorrect return of a kind mentioned in section 8 or 8A of this Act (or either of those sections as extended by section 12 of this Act), or

(*b*) makes any incorrect return, statement or declaration in connection with any claim for any allowance, deduction or relief in respect of income tax or capital gains tax, or

(*c*) submits to an inspector or the Board or any Commissioners any incorrect accounts in connection with the ascertainment of his liability to income tax or capital gains tax,

he shall be liable to a penalty not exceeding the amount of the difference specified in subsection (2) below.

(2) The difference is that between—

(*a*) the amount of income tax and capital gains tax payable for the relevant years of assessment by the said person (including any amount of income tax deducted at source and not repayable), and

(*b*) the amount which would have been the amount so payable if the return, statement, declaration or accounts as made or submitted by him had been correct.

(3) The relevant years of assessment for the purposes of this section are, in relation to anything delivered, made or submitted in any year of

assessment, that, the next following, and any preceding year of assessment.

*Burden of proof*

18. Under common law, the onus of proof rests on the person making the assertion. In this case, therefore, the burden of proof is first on on HMRC to show that there has been a discovery leading to a loss of tax, and that this was brought about by the carelessness of the Appellant (under ss29 and 36 TMA).

19. If HMRC satisfy that requirement, the burden of proof shifts to the Appellant. For the assessment to be varied, the Appellant must satisfy the Tribunal that HMRC's figures are incorrect (s50(6) TMA).

20. With regard to the penalty, the burden of proof is on HMRC to show that the Appellant delivered an incorrect return, with at least negligence (s95 TMA).

**Appellant's evidence and submissions**

21. Mr King gave oral evidence and explained that he had not included the gain on the sale of 7 Coleridge Court in his tax return for 2006-7 because he believed at the the time that the Private Residence Relief would apply to eliminate any tax charge on the sale as he had lived at the property between 15 January 1999 and 25 February 1999. He had moved into 5 Coleridge Court when a potential tenant for one of his other flats required a larger property, and was prepared to pay enough rent to make it worthwhile for Mr King to move into 5 Coleridge Court in order to make 7 Coleridge Court available for rent. He now accepted that Private Residence Relief was not available in respect of 7 Coleridge Court.

22. With regard to the specific elements of the calculation in dispute:

*The purchase price*

23. Mr King pointed out that the purchase price was listed as £245,000 on the Land Registry records for 7 Coleridge Court and that this was therefore the figure that should be taken as the purchase price of the property,

*Stamp duty*

24. Mr King stated that the figure of £2,750.00 was taken from the completion statement which he had received from the solicitors when he purchased 7 Coleridge Court.

*'Extra cost'*

25. Mr King explained that this cost arose as a result of the way in which the property was purchased. He had acquired three properties together: 5, 6 and 7 Coleridge Court. The total asking price for the three properties had been £975,000 but, as he was purchasing three properties together, he had negotiated a discount of

£100,000 on the total price. After application of the discount, the purchase price of 7 Coleridge Court was £291,666.67.

26. Mr King had to take out mortgages in order to acquire the properties; he explained that, as he had intended to live in 7 Coleridge Court, the mortgage for that property had to be based on personal income and not rental income. The relative prices of the three properties were therefore adjusted, reducing the amount allocated to 7 Coleridge Court in order to ensure that he could obtain a mortgage on the property. The balance was attributed to 5 Coleridge Court, increasing the amount of the purchase price on that property instead.

27. Accordingly, Mr King explained that this 'extra cost' represented part of the total purchase price of 7 Coleridge Court, being the difference between the element of £875,000 attributed to 7 Coleridge Court and the price shown on the Land Registry return. That difference had been added to the purchase price of the other properties, so that he had still paid £875,000 in total.

*Cost of acquiring freehold*

28. Mr King explained that there were a number of costs which made up the total figure claimed of £1,755. The total cost of acquisition of the freehold was £5,000; this was divided amongst the flats in Coleridge Court and the amount allocated to 7 Coleridge Court was £556. In addition, there were legal expenses of £338 allocated to 7 Coleridge Court, a share of the buy-out of the lease of the entry-phone system of £370, and a share of 'legal contingency' fees of £100. These last fees were to be returned if not spent; they had not been returned, but Mr King had no evidence to confirm this.

29. In addition, the cost of acquiring the freehold included a further £147 in respect of the freehold of 5 Coleridge Court.

30. On review, Mr King accepted that these figures amounted to £1,511 rather than £1,755 and requested that his claim should be amended accordingly.

*Boodle Hatfield fees*

31. Mr King referred to an email of 13 December 2000 confirming payment of £1264.61 being "the balance due to you plus interest", and a letter from Boodle Hatfield of 13 November 2000 confirming instructions to act in negotiations and/or a claim for the freehold of Coleridge Court. The two documents together clearly show the amount paid as being related to the freehold purchase and he explained that it "could not be about anything else".

*Refurbishment costs*

32. Mr King explained that these were costs of internal decoration (painting walls and woodwork) to the property, paid principally in cash, in order to 'get the property

into shape for selling'. As such, these were costs of sale as the property had to be fit for sale.

*External refurbishment*

33. Mr King explained that these were maintenance costs. The work was undertaken after the date of sale, and the work had to be done as a condition of sale. As such, the expenses were a deductible cost of sale.

*Penalties*

34. Mr King submitted in his appeal that no penalty should be due. He had not included the gain on his return because he was counting on the Private Residence Relief, but it appeared that he had not done the right things for that relief to be available.

35. With regard to HMRC's contention that he had not declared the gain, Mr King said that the information had originally been provided on self-assessment capital gains tax pages but that these had apparently been lost in the system and, when he provided copies of the return, he had omitted these pages at first.

36. He explained that he was a private individual and could not understand the requests for information, and had had to try to navigate his way through the tax system. HMRC had had the information for a long time, and this should all be borne in mind when considering the penalties.

**HMRC evidence and submissions**

37. With regard to Mr King's statement that he had lived in 7 Coleridge Court from 15 January 1999 to 25 February 1999, Mr Hall referred to correspondence with Westminster City Council who had confirmed that during the period 15 January 1999 to 25 February 1999, Mr King had been the person liable for council tax at 7 Coleridge Court but that he had received a discount on council tax on the property as he had declared that it was empty and unfurnished. For the same period (and subsequently), 5 Coleridge Court had been subject to council tax as occupied by Mr King. An invoice from Pickfords for the removal of Mr King's effects on 13 January 1999 was marked as being for removal to 5 Coleridge Court.

38. Assessment

39. Mr Hall submitted that HMRC was entitled to raise the assessment under section 36 TMA as Mr King had been at least careless in his submission of the return. The return submitted did not have the capital gains tax box checked and did not include the capital gains tax pages. The capital gains tax pages eventually supplied by Mr King were also substantially incorrect, showing (for example) a stamp duty deduction of £6,500 which could not have been correct regardless of which purchase price was being considered. The purchase price deducted was also £325,000 which, Mr Hall noted, was the original asking price and not the discounted price which Mr

King claimed to have paid, let alone the price shown on Land Registry documentation.

40. Even if the enquiry window had closed, an officer of HMRC could not have been aware at the relevant time (as required by section 29(6) TMA) that the loss of tax had occurred: there was no information in the return submitted which would indicate that there had been a gain. Accordingly, HMRC were entitled to raise the assessment out of time.

*Calculation elements*

41. With regard to the elements of the calculation in dispute, Mr Hall submitted that the general principle on deductibility of costs in calculating the capital gain on disposal of an asset is set out in section 38 TCGA, which describes the permitted deductions as the cost of acquisition of the asset and the incidental costs of acquisition, together with enhancement costs reflected in the asset at the time of disposal and the incidental costs of the disposal. Interest costs are specifically not permitted unless they are certain types of corporate expenditure set out in section 40 TCGA. Section 39 TCGA goes on to exclude from calculation expenditure that is allowable as a deduction in computing the profits or losses of a trade (including a property rental business) or otherwise deductible against income.

42. Mr Hall submitted that the case of *Bi-Flex Caribbean v Board of Inland Revenue* [63TC515] made it clear that, as the facts of the case are within the knowledge of the taxpayer, the taxpayer needs to show not only that an assessment is incorrect but must positively show what the correct figures are.

43. With regard to the specific calculation elements in dispute:

*Purchase price*

44. Mr Hall accepted that the purchase price recorded at the Land Registry was £245,000, but noted that the purchase price set out in the statement of account provided by the solicitors showed the purchase price as £244,000, made up of the balance of the deposit (£23,500) and the balance of the purchase price (£220,500).

*Stamp duty*

45. Mr Hall submitted that, regardless of the amounts shown on the completion statement, stamp duty on the purchase of a residential property with a purchase price of less than £250,000 in January 1999 was 1%. The figure of £2,750 therefore cannot be correct, and the amount of stamp duty land tax allowable should be adjusted to be 1% of the purchase price.

*'Extra cost'*

46. Mr Hall indicated that no explanation for this figure had been provided prior to this hearing, although Mr King pointed out that the information was shown on a calculation sheet supplied by him to HMRC on 3 September 2015.

47. Further, no documentation had been produced to support the contention that this was part of the purchase price. Neither the Land Registry documentation and the completion account from the solicitor give any indication that such 'extra cost' had been incurred. Accordingly, the 'extra cost' should not be allowed as a deduction in calculating the gain on 7 Coleridge Court.

*Cost of acquiring freehold*

48. Mr Hall accepted that there would have been costs involved in purchasing the freehold but noted that no substantive evidence as to those costs had been produced. The figure of £5,000, for example, is evidenced only in a letter setting out proposals rather than by way of contract or other binding agreement.

49. However, as there would have been costs involved, he was prepared to accept a deduction of £1,511 by concession, being the amount which Mr King had agreed in his evidence should be claimed.

*Boodle Hatfield fees*

50. Mr Hall noted that the payment and letter are dated in late 2000, whereas the proposal from the freeholder is dated September 2003. The letter from Boodle Hatfield does not explain exactly what it is that they are instructed to do, so it is not clear that the instructions relate to the purchase of the freehold that eventually occurred.

51. Mr Hall explained that, without further detail or evidence, it is not clear whether these fees had already been claimed by Mr King as revenue costs in calculating the profits on rental income. In addition, the payment email refers to interest and so raises the question of apportionment.

52. However, Mr Hall was prepared to accept a deduction of £400 if the Tribunal considered that it was appropriate.

*Refurbishment costs – internal and external*

53. Mt Hall considered that these costs were revenue expenditure allowable against rental income, rather than capital costs deductible from a gain on sale. No evidence had been provided to indicate that the costs had not already been deducted from rental income, and no evidence had been provided to support the costs in any case – the cash withdrawal slips provided by Mr King were only evidence as to withdrawals and did not contain any indication as to how the amounts withdrawn had been applied.

54. In addition, the completion statement on the sale of 7 Coleridge Court had included a similar "apportionment" amount as due from the purchasers. If this amount related to refurbishment costs, then the accounts may have been already taken into account on sale and so, in the absence of evidence to the contrary, should not be deductible in calculating the gain.

*Penalties*

55. Mr Hall noted that Mr King had made no substantive submissions on penalties, only that he had tried his best, was not a tax expert, and that HMRC had lost the figures originally supplied.

56. Mr Hall submitted that the picture looked somewhat different when the evidence was considered: acquiring information had taken considerable time, with formal powers having to be used a number of times, with the imposition of penalties for failure to comply with the formal requests. Accordingly, he submitted that the penalty of 35% should stand. If the Tribunal were to amend the gain assessed, HMRC would amend the penalty accordingly.

57. Mr Hall also undertook to calculate the tax due on the basis of the property gain decided by the Tribunal, so that the decision for this Tribunal is the amount of the gain rather than the tax and penalties thereon as these will flow through automatically.

## Decision

*Assessment*

58. Although Mr King did not submit that the assessment had been made out of time, as HMRC raised the point the Tribunal has considered it.

59. Regardless of whether the original return submitted contained the capital gains tax information, the pages which Mr King provided as a copy of the original have clear errors in respect of the stamp duty and purchase price alone. No explanation for the incorrect figures has been provided; it is therefore clear that the return was not completed with the standard of care that would be taken by a prudent taxpayer and so must be regarded as at least careless.

60. Having considered the evidence presented and the Tribunal and in the documentation provided beforehand, the Tribunal finds that HMRC were entitled to raise the assessment.

*Penalties*

61. Having considered the evidence presented, the Tribunal finds that the penalty rate of 35% is upheld. There have been considerable difficulties in obtaining information to establish the position, as demonstrated by the number of formal notices issued to endeavour to obtain information. Some of the information provided has been inconsistent, and the inconsistencies have not been explained, such as the difference

between the oral evidence as to residence in 7 Coleridge Court and evidence such as the council tax position in respect of 7 Coleridge Court.

62. Mr King submits that he is not a tax expert and does not have a full understanding of the tax system; nevertheless, this Tribunal considers that a prudent taxpayer would have endeavoured to respond fully to information requests in a timely manner,.

*Gain calculation*

63. Turning to the calculation of the gain, this Tribunal agrees that the principle in *Bi-Flex Caribbean* applies and that the burden of proof is on the taxpayer to demonstrate not only that amounts assessed are wrong but also what the correct amount to be assessed should be. Considering each of the elements of the calculation:

*Purchase price*

64. The Tribunal considers that the purchase set out in the Land Registry registration should apply. As noted below, there are other errors in the completion statement produced by the solicitors and so figures there should be regarded as unreliable. The applicable purchase price is therefore found to be £245,000.

*Stamp duty*

65. The tribunal agrees with HMRC that the amount in the completion statement should not be taken as correct as it clearly does not accord with the amount of stamp duty which was payable under statute. The applicable stamp duty is 1% of the purchase price and therefore is found to be £2,450.

*Extra cost*

66. Having considered Mr King's explanation, the Tribunal finds that whilst he chose to allocable the purchase price in order to obtain a mortgage, it remains the case that on the basis of his evidence the amount described as 'extra cost' was allocated to the purchase of 5 Coleridge Court and so can only be considered for deduction when that property is sold. This Tribunal finds that the 'extra cost' is not an allowable cost in calculating the gain on 7 Coleridge Court.

*Cost of acquiring freehold*

67. Mr King has accepted that the figure claimed should be £1,511 and HMRC have indicated that they will accept this figure by concession as some costs will have arisen in the acquisition of the freehold. On that basis, the Tribunal finds that the deductible cost of acquiring the freehold is £1,511.

*Boodle Hatfield fees*

68. Having considered the evidence supplied, the Tribunal finds that these fess are not allowable. The letter from Boodle Hatfield provided, dated 13 November 2000, refers to a claim for the freehold, but the subsequent invoice provided relates at least partly to advice on the purchase of the freehold of 5 Coleridge Court. The email referencing payment is dated 13 December 2000 and sent to Boyes Turner, solicitors. The email refers to sending payment for the "balance due to you plus interest" to Boodle Hatfield.

69. In oral evidence, Mr King explained that the payment "could not be about anything else". The burden of proof is on the taxpayer to show positively that the amount was deductible in respect of the gain. The Tribunal finds that a statement that the payment "could not be about anything else" does not discharge this burden and the fees claimed are not allowable.

*Refurbishment costs – internal and external*

70. Having considered the evidence, the Tribunal considers that the internal decoration costs are revenue expenditure which could be deductible in calculating the profits of the property rental business, but are not deductible in calculating a capital gain. As such, the Tribunal finds that these costs are not allowable.

71. The evidence provided as to the external refurbishment costs does not set out the nature of the works done; the word 'refurbishment', however, indicates that the expenditure was to return the property to its original state rather than to improve upon that state. Accordingly, as with the internal decoration costs, the Tribunal considers that the internal decoration costs are revenue expenditure which could be deductible in calculating the profits of the property rental business, but are not deductible in calculating a capital gain. As such, the Tribunal finds that these costs are not allowable.

*Summary of the gain calculation elements*

72. The table below summarises (marked in bold italics) the decision in respect of items considered; the other items were not in dispute, as noted at the outset.

| **Item** | **Decision** |
|---|---|
| Net sale proceeds | £467,827.21 |
| ***Purchase price*** | ***£245,000.00*** |
| ***Stamp duty*** | ***£2,450.00*** |
| Solicitors' fees | £682.39 |
| Bridging loan costs | Not allowable |

| | |
|---|---|
| Land Registry fees | £800.00 |
| ***'Extra cost'*** | ***Not allowable*** |
| ***Cost of acquiring freehold*** | ***£1,511.00*** |
| Leases | £398.64 |
| RJB Fees | £295.75 |
| ***Boodle Hatfield fees*** | ***Not allowable*** |
| ***Refurbishment costs*** | ***Not allowable*** |
| ***External refurbishment*** | ***Not allowable*** |

73. The amounts assessed are confirmed as amended and the appeal dismissed accordingly; the penalties rate of 35% is confirmed.

74. 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.

**ANNE FAIRPO**
**TRIBUNAL JUDGE**

**RELEASE DATE: 24 OCTOBER 2016**