[2021] UKFTT 0087 (TC)

TC08069

Appeal number: TC/2017/07132

INCOME TAX – assessments – whether fair inferences – yes – whether displaced by appellant – in part – penalties – whether correctly raised – yes – appeal upheld in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

CHANG LING **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE FAIRPO
MR JOHN ADRAIN

Sitting in public at Manchester on 11 and 12 December 2018, 7 February 2019, and 2 May 2019

Mr Nawaz, accountant for the Appellant

Mrs Cunliffe, litigator for the Respondents

DECISION

Introduction

1. This is an appeal against assessments to income tax and an assessment to capital gains tax, together with associated penalty determinations and penalty assessments for the tax years 2007/08 to 2014/15 inclusive.

2. The amounts of these assessments, and adjustments to be made to them, are set out in Appendix 1 to this decision.

3. The hearing took place over a number of days between December 2018 and May 2019 and was followed by written submissions. Due to the appellant's limited ability to speak English, an interpreter was provided by the tribunal service. On the final day of the hearing, we noted that there were some difficulties between the appellant and the interpreter whilst the appellant was giving evidence and that the interpreter was becoming uncomfortable with comments being made about her interpretation by the appellant's partner. Bearing in mind the fact that the hearing had already had to be postponed twice, we endeavoured to make adjustments to facilitate the hearing continuing.

4. In closing submissions, the appellant's representative explained that the appellant's partner considered that the interpreter had on occasion ignored the appellant's request for more context in respect of matters put to him and that he was not always able to understand the questions put to him. No specific examples were given. We have taken into account these submissions and made some allowances for the language issues involved.

Background

5. The appellant is a Chinese national. He moved to the UK in 2006, having previously been living and working in Italy. He acquired a rental property in the UK in 2008, and two further rental properties in 2012.

6. The appellant is a director of Zhongda Investments Limited, which owns a property in Manchester which is rented out to third parties. He had also been the owner and director of Zhongda Property Limited, which had acquired land in the same area of Manchester with the intention of developing that land. He had also previously been employed by Soyo Trading Limited, an importer of clothing.

7. HMRC wrote to the appellant on 14 June 2013, advising that they suspected that the appellant that committed tax fraud and so intended to investigate under Code of Practice 9 (COP9). The appellant was offered the opportunity to make a full disclosure under the contractual disclosure facility. On 9 August 2013, the appellant signed a document accepting that offer which stated that he understood the COP9 process. An attached outline disclosure stated that there had been under declaration of

tax in respect of rent (£32,500), interest (£1,142.23), bonuses (£20,255) and commission (£68,836) in the tax years 2007/08 to 2012/13. A disclosure report was to be prepared to provide further details of the amounts undeclared.

8. There followed correspondence and the appellant changed advisers in April 2014. His new adviser stated (in summary) that there was some difficulty obtaining information and that little documentation was available due to the way that the Chinese community operated.

9. In August 2015, as the disclosure report had still not been prepared, HMRC opened an investigation into the appellant's tax affairs for the relevant periods. In October 2015, the appellant's adviser provided HMRC with copies of bank statements, accounts and share sale documentation, and confirmed document supplied earlier in relation to a divorce settlement and loan statements. Mandates to enable HMRC to obtain further bank statements and details of a casino account were provided.

10. Following further correspondence, as HMRC did not accept the appellant's contention that no further amounts were assessable, the assessments were raised on 19 April 2017, a penalty determination for 2007/8 to 2009/10 (inclusive), was issued on 10 May 2017, and penalty assessments for the remaining years were issued on 25 May 2017.

11. HMRC reviewed the decision to issue the assessments and penalties on 25 August 2017. The decision to issue the assessments was upheld. The percentages on which the penalty assessments were based were upheld, but some of the assessments were varied to deal with administrative errors.

12. During the hearing HMRC accepted that the appellant had provided evidence with regard to a small number of items of income and produced revised figures for the assessments and penalties. These amounts are set out in Appendix A to this decision.

13. The issues for this tribunal are as follows:

With regard to the assessments:

(1) did HMRC make a discovery which leads to a loss of tax brought about by the carelessness or deliberate action of the appellant, such that they are entitled to raise assessments within an extended time limit?

(2) if a valid discovery was made, has the appellant provided evidence to reduce or set aside HMRC's assessments?

With regard to the penalties:

(3) has HMRC shown that the appellant failed to notify his liability to tax at least negligently (in respect of the years 2007/8 and 2008/9) and deliberately (in respect of the tax years 2009/10 to 2011/12 inclusive)?

(4) has HMRC shown that the appellant deliberately failed to make a tax return on or before the filing date in respect of the years 2012/13 to 2014/15 (inclusive)?

Validity of assessments

14. s29 TMA 1970 provides that HMRC can raise an assessment where they discover (inter alia) that assessable income and/or capital gains have not been assessed, or that an assessment is or has become insufficient. This power is subject, in this context, to the time limits in s36 TMA 1970.

15. The time limit for HMRC to raise assessments under s29 TMA 1970is twenty years after the end of the relevant tax year where HMRC discover (inter alia) that either:

(1) there has been a loss of tax and that the loss of tax has been brought about deliberately (s36(1A)(a) TMA 1970), or

(2) there has been a loss of tax which is attributable to a failure to notify HMRC under s7 TMA 1970 (s36(1A)(b) TMA 1970).

16. For the 2007/8 and 2008/9 tax years, the provisions of s36(1A)(b) TMA 1970 will only apply where the loss of tax is attributable to negligence on the part of the appellant or a person acting on his behalf (Finance Act 2008, Schedule 39 (Appointed Day, Transitional Provision and Savings) Order 2009, Article 7).

HMRC's submissions

17. HMRC submitted that there had been, for each relevant year, a discovery leading to a loss of tax as a result of the disclosures made under the COP 9 process and the documents subsequently provided by the appellant.

18. No tax returns were issued to the appellant for the tax years 2007/8 to 2011/12, and the appellant did not notify his liability to tax for any of these years within the relevant time limit. HMRC submitted that the appellant knew that he was in receipt of income which he had an obligation to notify. As such the appellant had failed to comply with his oblations under s7 TMA 1970 and so HMRC submitted that they were entitled to raise assessments for the tax years 2009/10 to 2011/12.

19. For 2007/08 and 2008/09, the failure to notify must be attributable to negligent conduct on the part of the taxpayer or a person acting on their behalf. HMRC submitted that the appellant had been negligent in his failure to notify, taking into account the decision in *Anderson v HMRC* [2009] UKFTT 259 at §22 that the test for negligence is to "consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done". HMRC submitted that the appellant's confirmation in the outline disclosure document that he had deliberately brought about a loss of tax, and the fact that he knew he was in receipt of income which he had an obligation to notify, meant that the loss of tax was brought about negligently and so HMRC had raised the assessments within the relevant time limits.

20. HMRC submitted that, for the tax years 2012/13 to 2014/15, the loss of tax was brought about deliberately for the same reasons and so the assessments were correctly raised in accordance with the provisions in s36(1) TMA 1970.

Appellant's submissions

21. The appellant does not dispute that there was a discovery made by HMRC in respect of the amounts disclosed in respect of bonuses and rent on the outline disclosure for the Contractual Disclosure Facility.

22. The appellant submitted that the amounts included in the outline disclosure as commissions were incorrect and did not represent taxable income and, as such, that no discovery of such amounts had been made.

23. In response to HMRC's closing submissions, the appellant's representative stated that there was no taxable income to assess for the relevant periods and therefore there had been no failure to notify in respect of amounts outside the interest, bonuses and rent in the outline disclosure. It was submitted that the appellant did not understand the UK tax system.

24. It was further submitted that the appellant was led to believe that the matter was settled once he had disclosed bonuses, interest and rent received which had not been taxed.

Discussion

25. There was no dispute that HMRC had not issued self-assessment tax returns to the appellant for the tax years 2007/8 to 2011/12 inclusive. It was not disputed that the appellant had not notified HMRC of a liability to tax in those years.

(a) 2009/10-2011/12 assessments

26. It is clear from the amounts for bonuses and rent included in the outline disclosure, which the appellant did not dispute were taxable income, that the appellant had failed to notify HMRC of a liability to tax in respect of those amounts in those years.

27. We also find, as set out below, that the appellant had other assessable income and gains in those tax years which he failed to notify to HMRC. The appellant's submissions were simply that these amounts were not assessable: there was no dispute as to whether the amounts were validly discovered by HMRC. We consider that such amounts were discovered by HMRC from the bank statements and evidence of the appellant, as set out below, and therefore in respect of the assessable amounts, that HMRC were entitled to raise assessments in respect of the assessable income and gains for the tax years 2009/10 to 2011/12.

(b) 2007/08 and 2008/09 assessments

28. For the tax years 2007/8 and 2008/9, HMRC must show on the balance of probabilities that the loss of tax is also attributable to negligence on the part of the appellant.

29. It was submitted for the appellant that he did not understand the UK tax system, but there was no evidence put forward to show that he had made any effort to understand what his tax obligations were.

30. We agree with the decision in *Anderson v HMRC* [2009] UKFTT 259 at [22] that the test for negligence is to "consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done".

31. We noted the appellant's evidence that he had been in business for some years before coming to the UK, and that he came to the UK initially as part of a delegation looking for business investment opportunities, We consider that a person with that background and experience, acting reasonably, would be aware that tax would be payable on items such as rent, interest, and commissions and would take steps to ascertain his obligations with regard to tax. We consider that the appellant, having failed to take any such steps, was therefore negligent in failing to notify HMRC of his liability to tax in respect of the items declared in the outline disclosure.

32. For the reasons set out below, we find that the appellant had additional assessable income for the relevant tax years and, for the same reasons, that the appellant was negligent in failing to notify HMRC of his liability to tax in respect of those items.

33. We consider, therefore, that there was a discovery of a loss of tax attributable to a failure to notify, and that this was attributable to negligent conduct on the part of the appellant. As such, HMRC were entitled to raise assessments for the 2007/8 and 2008/9 tax years.

(c) 2012/13 to 2014/15 assessments

34. For these periods, s36(1) TMA 1970 states that an assessment may be made at any time not more than six years after the end of the year of assessment to which it relates if the loss of tax is brought about carelessly by the taxpayer. A longer period is allowed in cases of deliberate behaviour but, as the assessments in respect of these years were made during 2017, they were in each case made within six years of the end of the relevant year of assessment. The question for this tribunal is therefore whether the appellant's behaviour was careless.

35. The appellant was issued with notices to file self-assessment returns for these years, but no returns were filed. The appellant's evidence was that he did not know what had happened to the returns. The appellant was aware by August 2013 that HMRC were enquiring into his tax affairs but, nevertheless, failed to submit his subsequent returns or failed to ensure that his returns were submitted by his

representative. Even if the appellant had believed that making the contractual disclosure facility meant that matters were settled, that cannot explain a failure to submit returns for subsequent tax years. This behaviour is at the very least careless and, accordingly, we consider that the assessments were validly raised.

36. There were submissions made as to whether the discovered loss of tax had arisen as a result of the appellant's deliberate behaviour. For the reasons set out above, we do not consider it necessary to establish at this point whether the appellant's behaviour was deliberate for the purposes of determining whether the assessments were validly raised as neither s36(1) TMA 1970 nor s36(1A)(b) TMA 1970 require that the relevant behaviour be deliberate as such.

Whether assessment amounts incorrect

37. It was submitted for the appellant that the HMRC assessments were not made to best judgement because HMRC had not done enough to follow up the explanations given by the appellant in the spreadsheet. Criticism was also made to the effect that the HMRC officer was inexperienced, which we took to be submissions to the effect that the assessments were not made to best judgement.

38. When considering whether one or more assessments have been made based upon fair inferences (for direct tax purposes; "best judgement" is a phrase used in a VAT context) being drawn from established facts, or to best judgement, the principal authorities are *Van Boeckel v C & E* [1981] STC 150 ('*Van Boeckel*') and *Rahman (No. 2) v HMRC* [2003] STC 150 ('*Rahman (No. 2)*'). Although these decisions related to VAT legislation, the principles established will clearly also apply where HMRC are making assessments for direct tax purposes. The principles are that :

(1) HMRC must be in possession of some material upon which a best judgement assessment can properly be based,

(2) HMRC are not required to undertake the work which the taxpayer would ordinarily undertake so as to arrive at a conclusion about the exact amount of tax due,

(3) HMRC are entitled to exercise their best judgement power by making a value judgement on the material available,

(4) This Tribunal should not treat an assessment as invalid simply because it takes a different view as to how the best judgement could or should have been applied to the material available to the respondents. Before the Tribunal interferes, it needs to be satisfied that the purported best judgement assessment was wholly unreasonable.

(5) The Tribunal is to start by assuming that HMRC have made an honest and genuine attempt to arrive at a fair assessment.

(6) It is for the Tribunal to arrive at the proper sum for the tax payable in the event that it decides that the assessment(s) fail to satisfy the best judgement criteria.

39. In *Pegasus Birds Ltd v HMRC* [2004] EWCA Civ1015 (‘*Pegasus Birds*’) Carnwath LJ referred, with approval, to the two-stage test set out in *Rahman (No. 1) v C & E* [1998] STC 826 that the Tribunal should adopt a two-stage approach:

> “…. The practice is to consider these cases into stages: (1) consideration whether the assessment was made according to the “best judgement of the commissioners”; if not, the assessment fails and stage (2) does not arise; (2) if the assessment survives stage (1), consideration whether the amount of the assessment should be reduced by reference to further evidence of further argument available to the Tribunal ……”
>
> Accordingly, if we consider that HMRC has made the assessments according to “best judgement” (or, in the context of direct tax, drawn fair inferences) then the burden is on the appellant to establish the correct amount of tax due. Further in *Pegasus Birds,* the court concluded that:
>
> “[14] Generally, the burden lies on the taxpayer to establish the correct amount of tax due: ‘The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgment assessment, as the cases have established, do not serve to displace the validity of the assessments, which are prima facie right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right.’”

40. In this case, HMRC have made their assessments on the basis of information taken from the appellant’s bank statements which they consider has not been explained by the appellant. Although, as set out in *Van Boeckel* and *Rahman (No 2),* HMRC are not required to undertake work which the taxpayer would ordinarily undertake, we consider it is clear that, contrary to the submissions made for the appellant, HMRC have in fact analysed the information provided and have not assessed income for which they could find an explanation in the information provided by the appellant.

41. In addition, credit has been given for information which HMRC has been able to determine, such as the credit given for amounts paid under PAYE in each year. In the hearing, the appellant submitted that certain small amounts were returns of earlier expenditure. HMRC agreed with these submissions and adjusted the assessments accordingly.

42. The fact that we have found that some adjustments have been made and certain amounts described as “from China” in 2010 and 2012 are not assessable to income tax does not mean that HMRC did not exercise best judgement in respect of these amounts: rather, it is that we find that the appellant has now shown positively at the hearing a particular correction that needs to be made in order that the assessment to income tax is correct. We do not consider that HMRC’s decision to assess the amount in the first instance was one which could not have been made by an officer seeking to exercise best judgement in the circumstances (per *Pegasus Birds* at §21).

43. Similarly, in the course of examining the evidence in the bundle, in attempting to determine whether vague statements made on behalf of the appellant have any merit, we have further identified one amount which we consider should be treated as a loan rather than unexplained income (see below) and, as such we find that this amount should not be assessed to income tax.

44. As with the amounts from China, we do not consider that this adjustment (in the context of approximately three hundred pages of bank statements) means that HMRC did not exercise best judgement: we consider that they simply overlooked the counter-transaction in this instance in the spreadsheets and bank statements produced by the appellant. The spreadsheets did not connect the loan and repayment; indeed, the appellant's submissions were that the receipt was "in overall terms … a contra" against payments made by the appellant. It was only during time-consuming review of the bundle by the tribunal after the hearing that the probable connection between the loan and the repayment was noted.

45. As already stated, HMRC are not required to undertake work which the taxpayer would ordinarily undertake to establish the correct amount of tax due. Neither are the Tribunal so required. We consider that the obligation on an appellant to positively show what corrections should be made is not fulfilled by providing a mass of documents and stating that the answer is in there somewhere, nor that it is fulfilled by stating that the appellant has substantial amounts of unevidenced non-taxable receipts and that the unexplained income must be part of those receipts.

46. It was also submitted for the appellant that none of the amounts could be assessable income as he was not involved in any business in the UK, and that the bank accounts for which statements were provided were all personal accounts. However, we note that the appellant's witness statement shows that he was self-employed when he first came to the UK as he states that he first arranged to sell products for Soyo Trading Ltd and only subsequently became employed by them. That is, he was in business on his own account when he first came to the UK. He also made references in the meeting with HMRC in November 2013 to his ability to act for investors and raise investments and stated that he had received commissions.

47. In addition, the appellant's evidence was that he represented a group of Chinese investors which acquired a property in Manchester for £1,700,000 in November 2010 and controlled most of the units at the property, which were leased out for rental income. The acquisition had been made through a company, Zhongda Investments Limited, in which the investors had shares. The appellant stated that he was responsible for finding the property and that he dealt with everything on behalf of the investors, including all agreements and documents. The appellant's evidence was that he did not benefit personally from the project and received only a salary from Zhongda Investments Limited for this work.

48. HMRC submitted that it was not credible that the appellant did not receive any amounts other than a small amount of salary from this project.

49. The appellant's bank statements show receipts of £1,300 from Zhongda Investments Limited marked as salary although it would appear from the company's bank statements, disclosed in the bundle, that it also met substantial expenses which appear to be expenditure incurred on behalf of the appellant personally such as costs relating to a trip to Euro Disney around October 2014 and the purchase of a Land Rover for over £100,000 in November 2013. There is no indication that such amounts were taken in account for PAYE purposes by Zhongda Investments Limited.

50. Together with other factors set out in relation to specific amounts below, we consider that there was material before HMRC on which they could form a view that the appellant had undertaken activities which are capable of being business activities for tax purposes and, as such, it is not the case that the assessments are not made based on fair inferences.

51. We find that HMRC made an honest and genuine attempt to arrive at a fair assessment and, as such, the burden of proof moves to the appellant to show that the assessments are wrong and also what corrections should be made in order to make them right.

52. The extent of the burden on the appellant in this context was made clear in *Pegasus Birds*, as set out above. In this case, unfortunately, many of the submissions made for the appellant focus only on why the assessments might be wrong, rather than addressing the burden set by *Pegasus Birds*: showing positively what corrections should be made.

53. There were various submissions to the effect that HMRC had not verified certain matters or statements: we consider that HMRC did undertake what checks they could, notwithstanding the fact that the burden of proof is on the appellant and noting in particular part (b) of the principles set out in *Van Boeckel*. Further, a submission that HMRC could have done more does not make a positive case for a correction to be made.

54. The submissions also included substantial reference to the fact that receipts were "easily explained lodgements, at least in overall terms". It is clear from *Pegasus Birds* that the appellant has to show what the correct figures are, to explain them and not simply take an overall position. Even if the appellant was entitled to a significant sum in China, this does not make a positive case to show that other assessable amounts were wrong. Similarly, the statement that the appellant had "ample resources available to explain unidentified receipts or cash lodgements" does not assist where these are not in fact positively connected to explain specific receipts.

55. Similarly, as noted above, it was submitted by the appellant that HMRC had failed to make allowance for "obvious contras", being amounts received which had matching outgoings such as returns of payments. The small amounts pointed out by the appellant in the hearing were accepted by HMRC; it was unclear why these had not been identified to HMRC in the correspondence during the enquiry period or before the hearing. In submissions it was stated that "There are others" in reference to

such "contras", but these were not identified. As already noted, the burden of proof is on the appellant to make a positive case that specific amounts are incorrect.

56. We find that the generalised submissions do not fulfil the requirements for amendment of the assessment set out in *Pegasus Birds*. We have considered the specific categories of receipts in dispute in turn below.

£68,836 commissions in disclosure

57. The appellant submitted that the taxable disclosure of commission amounting to £68,836 should be withdrawn from the disclosure as these were funds that were brought in by the appellant from China when he first came to the UK in 2006 and therefore cannot be assessable income. It was submitted that he had been advised to declare them as commissions because he could not provide any evidence that he had brought the funds into the UK when he arrived.

58. HMRC submitted that the appellant had completed the outline disclosure with these amounts shown as commissions and that there was no good reason given to show why they should not be so treated.

Discussion

59. As HMRC had taken these amounts into account when determining the unexplained income in the appellant's accounts, the withdrawal of the element of the disclosure means that such amounts would be regarded as unexplained. The appellant therefore needs to make a positive case to show why these amounts were not otherwise assessable.

60. It was submitted by the appellant that this amount actually represented funds given to the appellant by other Chinese investors who came with him to the UK in 2006. During the hearing, it was also submitted that amounts deposited during late 2007 amount to approximately £60,000 and should be taken to be deposits relating to the amounts brought into the UK. No explanation was given as to why the appellant had held these amounts as cash for approximately a year, and then deposited them in several deposits in multiple bank accounts over a period of time. These amounts are described simply as "cash" in the spreadsheet provided by the appellant, and so the spreadsheet offers no indication that these could have been amounts brought into the UK or received from investors.

61. In the meeting with HMRC in 2013, the appellant also stated that he arrived in the UK with approximately £60,000 and that he had tried to deposit £50-60,000 into a HSBC account. He explained that HMRC closed the account because they would not accept the deposit, citing money laundering concerns. The appellant stated that he had received a cheque for the deposited money and the cheque was deposited in a Lloyds bank account.

62. This explanation is not entirely consistent with the information in the bank statements provided. The appellant's evidence was that he came to the UK at

beginning of November 2006. The tribunal bundle included statements for an HSBC account from 13 November 2006, which was closed in March 2008. There are no single deposits of £50-60,000 shown in those statements. The statements do show three deposits totalling £32,000 in September 2007, described as cash in the appellant's spreadsheets. The balance of the account was subsequently reduced by a withdrawal of £20,000 in cash in November 2007 and other smaller withdrawals. We note that other deposits which, in addition to the £32,000 amount to approximately £60,000, were made into the appellant's other bank accounts in late 2007.

63. Having reviewed the statements provided, although the HSBC account was closed at the end of March 2008 this was several months after the deposits were made. The closing balance was £2,403.19. The appellant also had a Lloyds account from 30 November 2006, into which a deposit of £2,403.19 was made on 2 April 2008. Although we note that the appellant's spreadsheet states that this amount was salary, we consider on the balance of probabilities that this is a mistake by the appellant.

64. The appellant also provides an alternative explanation for the bank deposits in 2007 as he states in his witness statement that unexplained amounts in his bank statements were loans from friends to tide him over when he first moved to UK.

65. Further, the disclosure includes only amounts of £24,800 as commission in the tax year 2007/08. An explanation of £60,000 of deposits made in 2007/08 does not specifically provide an explanation for this amount or for otherwise unexplained amounts of £30,735 in the tax year 2008/09, £5,790 in the tax year 2009/10 and £7,511 in the tax year 2010/11.

66. The explanations in respect of the amounts disclosed as commission are therefore variously that some of these amounts were loans and that some were amounts brought into the UK a year before they were deposited into either one or various bank accounts.

67. Given the conflicting explanations and inconsistencies with the bank statement evidence and spreadsheet provided by the appellant, we consider that the appellant has not discharged the burden of proof on him with regard to these amounts and that, as such, the assessment in respect of these amounts stands.

Wages paid

68. The appellant submitted that three amounts stated to be unexplained and assessable were wages from the appellant's employment and should not be assessed as they had already been taxed.

69. For the 2007/08 year, it was submitted by the appellant that £2074.18 received on 18 May 2007 was salary.

70. HMRC submitted that PAYE records show that total pay from employment recorded in this year was £6,419. Wages receipts identified in the bank statement by HMRC amounted to £5,229.90, with tax deducted of £1,020.09. HMRC submitted

that, amounts received from an employer are assessable if PAYE has not been accounted for. HMRC has no record of this amount being received through PAYE in this year.

71. For the 2009/10 tax year, it was submitted by the appellant that £5,271.99 received on 17 November 2009 represented accumulated wages unpaid for over five months. £1,670 received on 21 May 09 was also salary.

72. HMRC explained that, for this year, the PAYE records showed that the appellant had been paid £26,000. Tax of £3,904.19 had been deducted, which was appropriate for that level of earnings in that tax year. However, the wages receipts identified by HMRC in the bank accounts amounted to only £12,712.02.

73. As the amounts identified as wages by HMRC and these two amounts identified by the appellant were, in aggregate, less than the amounts on which PAYE had been declared, and full credit for the amounts accounted for through PAYE had been given in making the tax assessments, these additional amounts identified by the appellant as salary had not in fact been assessed to tax.

Discussion

74. We note HMRC's evidence as to the PAYE records. It is unfortunate that HMRC did not provide copies of these in evidence but we accept Officer Shaw's evidence that the amounts recorded were credited. In addition, we note that the amounts credited are in the appellant's favour as the credit given was generally higher than the amounts shown in the appellant's own records that these disputed amounts were not in fact assessed to tax.

75. *Amount in 2007/08*: For the tax year 2007/08, the appellant's PAYE records show that he was paid £6,149 and tax was deducted of £1,020.09. Given the tax rates and thresholds in effect at the time, the tax due on earnings of £6,149 would have been £92.40 (as the personal allowance for that year was £5,225 and the balance of earnings of £924 would have been taxed at the starting rate of 10% then in effect). We were not provided with any explanation as to why the tax deducted under PAYE was so much higher than would have been expected on the payments recorded.

76. The additional tax due on the £2074.18 which the appellant states to have been wages would have been £1,306 at 10% (as the threshold for the starting rate was £2,230) and the balance of £768.18 at 22%, making a tax total of £299.60. In aggregate with the tax actually due on earnings of £6,149, this is less than the tax deducted under PAYE, for which full credit has been given by HMRC and, as such, we find that the amounts stated by the appellant to be salary have not in effect been assessed to tax and no amendment to the assessment is required.

77. *Amounts in 2009/10*: Having considered the evidence we agree that the amounts identified by the appellant as salary have, in the same way, already been taken into account in the PAYE credit given in making the assessment and so have not been assessed to tax and no amendment to the assessment is required.

Reimbursement of expenses

Appellant's submissions and evidence

78. It was submitted by the appellant that other unexplained receipts were reimbursements from Soyo Trading Ltd, the appellant's employer, of expenditure incurred by the appellant on their behalf.

79. In particular, it was submitted that shipping costs of £5,569.50 were paid in shipping costs at the end of September 2008 and that £46,246.85 was paid between 26 March 2009 and 17 April 2009.

80. It was explained that the appellant paid these expenses when there were insufficient funds in the Soyo business account and was reimbursed as and when possible.

HMRC submissions

81. HMRC submitted that the appellant had not provided any evidence that these were expenses incurred on behalf of Soyo Trading Ltd, nor that the expenditure was on shipping and customs charges. It was also submitted that it was not credible that the appellant would be expected to incur costs of this level in comparison to his salary. As such, they submitted that none of the unexplained receipts were reimbursements of such expenditure.

Discussion

82. The appellant's submissions included a slightly higher amounts for these costs, but the analysis of these figures included small amounts described as "shopping" and an amount paid to Direct Line insurance which is the same as amounts paid to Direct Line in other months. We consider these were included by mistake and so have disregarded them.

83. The submissions did not identify any receipts in the bank statements which should be regarded as being reimbursement from Soyo Trading Ltd. There are no entries on the spreadsheets produced by the appellant which are marked as being reimbursements from Soyo Trading Ltd.

84. The appellant's witness statement states that these expenses are "an example of a three week period". However, a review of the spreadsheets provided by appellant shows no other entries in the enquiry periods for shipping and customs other than these in March/April 2009 and the two expenses at the end of September 2008.

85. No further evidence was provided by the appellant as to why these expenses were incurred or what they were incurred for, such as the products involved and where they were going to or had come from. The spreadsheets provided by the appellant simply say "shipping" or "customs" and do not mention Soyo Trading Ltd.

86. We also note that, in the tax years during which these amounts were paid by the appellant, his income (per PAYE records) from Soyo was £24,999 for 2008/09 and £26,000 for 2009/10. That is, the amounts which were stated to have been paid on behalf of Soyo Trading in a matter of a few weeks amount to almost his entire gross earnings for those two years.

87. We do not consider that it is credible that an employee would incur expenditure on behalf of his employer to this extent, especially when no corresponding repayments from Soyo have been identified by the appellant.

88. As such, we do not consider that the appellant has shown that any adjustments should be made to the assessments as a result of these outgoings in his bank account.

Receipts from Italy

Appellant submissions and evidence

89. In his witness statement the appellant states that the receipts in his bank account described as being from Italy were funds owed from his trading there before moving to the UK. In his witness statement, he states that he had set up a garment manufacturing factory in Italy when he moved there with his wife in 1991. The receipts in his account were amounts which were paid to the appellant by a retailer who operated over 100 shops in Italy. The retailer had had financial difficulties due to the recession and was unable to pay the debt until March/April 2009. The appellant also stated in his witness statement this was not the only debtor from that business, that other debts were also paid over a period of time.

90. The appellant's evidence in the hearing was that the Italian business had operated from 1996 to 2000, and that it was managed by his ex-wife and that he did not know anything about the business. The appellant also stated that there were no debts owed to the former Italian business. He had gone back to Italy to collect debts which were owed to him personally as he had lent money to friends, including a friend who owned a Chinese restaurant with the name La Grande Muraglia.

91. It was submitted that these amounts were a recovery of past debts owed to him personally which were not assessable for income tax purposes.

HMRC submissions

92. HMRC submitted that no evidence had been provided, such as closing accounts information, to support that there were any debts on cessation of the business in Italy.

Discussion

93. The bank statement entries are for a series of receipts of €1999.99, six on March 24 2009 and nine on 25 March 2009, all described in the bank statement as "BGC MONEY 2 MONEY S.R. EUROS 1999.99 XR 1.0831"; the sterling amounts shown are each £1,846.54. In the spreadsheet these are marked as "ITALY".

94. There is also a receipt of £11,540.95 marked as "BGC LIN GUI EUROS 12500.00 XR 1.0831" on 24 March 2009. In the spreadsheet, this is described as "ITALY LINGUI". Finally, on 2 April 2009, there is a receipt marked as "BGC LA GRANDE MURAGLIA EUROS 12400.00 XR 1.1017" for £11,255.33. On the spreadsheet, this is described as "ITALY LA GRANDE MURAGLIA"

95. The explanations given for these amounts are inconsistent. The appellant's witness statement also states that other debts paid to the former business in Italy were paid over a period of time. We were not referred to any other bank account deposits in Euros to support this and, on review of the spreadsheet provided by the appellant, could not identify any other entries stated to be repayments of business debts.

96. In the hearing, the appellant sought to introduce a statement which purported to be from a person in Italy confirming that they had owed money to the appellant. Given the late request to submit the information, the fact that the individual was not produced as a witness for cross-examination and the fact that the document had not been attested to formally, together with the fact that the statement did not provide any particular detail, we decided that it was not appropriate to admit the document as we would be unable to give it any weight as evidence.

97. Given the inconsistencies and lack of any details or supporting evidence for any of the explanations given in respect of these receipts, we do not consider that the appellant has, on the balance of probabilities, shown a positive case to displace the amount assessed.

98. We note also that it was submitted for the appellant that HMRC should have verified these amounts with the Italian authorities, but there was no indication as to how HMRC were expected to have verified entries from bank statements and spreadsheets which had minimal detail. This submission also, as already discussed, does not take into account the fact that the burden of proof is on the taxpayer to make a positive case to displace an assessed amount.

Receipts from China

Appellant's submissions and evidence

99. For the appellant it was submitted that various receipts were non-assessable amounts received from China as follows:

(1) Receipts in July 2008 were the proceeds of sale of a property; the closing submissions for the appellant stated that he had brought in £50,000 in 2008.

(2) Receipts in May-July 2010 and in March-April 2012 were proceeds from the appellant's divorce settlement. This was evidenced by a translated copy of a Civil Mediation Agreement from the People's Court of Ouhai district, Wenzhou City, Zhejiang Province in China, dated 27 January 2010. This agreement confirmed that the parties voluntarily divorced and then set out details of certain properties which were stated to be jointly owned by the appellant and his then wife, and then to be owned by the appellant's wife. The agreement requires the

appellant's wife to pay him twelve million RMB by 31 December 2010; ten million RMB by December 21, 2011; and six million RMD by December 31, 2012.

100. The appellant explained that, in accordance with Chinese customs, the jointly owned assets were held in his wife's name, and that the effect of the settlement was to transfer his share in those properties to her and that she was required to pay him for his share of those properties. The amounts received in 2010 and 2012 were part of the required payments. The actual receipts were in multiple transactions from different people because it was submitted that individuals were only permitted to transfer $50,000 per year from Chinese bank accounts, and it "required ingenuity" and "risk" to remit the funds to the appellant in the UK. Accordingly, the appellant's ex-wife had given the funds in cash to the appellant's father in China, which was then distributed to friends and family, who had in turn deposited these amounts into their bank accounts and transferred the amounts to the appellant's bank account.

101. The appellant also explained in his witness statement that he received additional amounts from the divorce settlement from visitors to the UK, although there were no further amounts specified as being from China in the appellant's spreadsheet analysis of the bank statements.

HMRC submissions

102. HMRC submitted that the civil mediation agreement document showed only that the appellant was entitled to receive certain amounts and was not evidence that he had actually received these amounts. There had been conflicting information as to the amounts, as the appellant had stated that he had not received the full proceeds due under the agreement but had also stated in his witness statement that he had the full proceeds of the divorce settlement available to him in the enquiry period.

103. HMRC accepted that the payments were made by individuals in China but argued that no documentary evidence had been provided to confirm that assets had been sold and that the funds had come from the appellant's ex-wife. It was submitted that the appellant's explanation as to how the payments had been made was convoluted and not credible and that the proceeds of sale could have been transferred from the appellant's ex-wife to one of his Chinese bank accounts. The appellant had agreed in the hearing that he still had open Chinese bank accounts, although no statements or other documents in respect of these had been provided. HMRC also submitted that the appellant's ex-wife could have transferred the funds directly to his UK bank account.

Discussion

(d) 2008/09 receipts

104. The appellant submitted that the two receipts marked as being from China into the Lloyds Bank account on 8 July 2008 were proceeds from the sale of a property in China. No further information was given as to the date of sale, the nature of the

property, where it was located, when it was disposed of, nor when it had been acquired. The appellant's spreadsheet analysis of his bank statements described the payments simply as "from china (sic)". The entries in the statements have the following descriptions: "TFR F/FLOW /3303811988" and "TFR F/FLOW /3303251964"

105. In the notes of a meeting with HMRC in November 2013. the appellant explained that he had sold of a piece of land in China for £110,000. Of this, he had used £50,000 as a deposit on a property in the UK and had used £60,000 to live on. In closing submissions, it was stated that the appellant had brought into £50,000 to the UK from the sale of a property in 2008. None of this clearly explains two deposits amounting in aggregate to £29,986.

106. In the absence of any information to support the contention that these two amounts were from the sale of property, and the inconsistency between the appellant's submissions as to the amounts brought into the UK and the amounts shown on the bank statement, we do not consider that the appellant has satisfied the burden of proof on him to displace the assessment to income tax for 2008/09 in respect of these amounts.

(e) 2010/11 receipts and 2012/13 receipts

107. The Tribunal agreed on the first day of the hearing that, if the appellant could produce evidence from Lloyds Bank as to the $50k transfer limit from China when the hearing resumed the next day, it would allow that evidence to be admitted. Given the size of the Chinese community in Manchester, it seemed possible that the appellant might be able to locate a bank representative with knowledge of the matter who could give evidence. To assist the appellant, the Tribunal noted that the evidence could be given orally rather than requiring a written witness statement as it seemed unlikely that the bank would be able to provide a written statement at short notice.

108. The hearing was, in the event, postponed on the next day. When the hearing eventually resumed some months later, the appellant produced untranslated documents in Chinese and asked for these to be admitted as evidence of the Chinese source of the payments. As HMRC accepted in the hearing that the funds transferred originated in China, so that the evidence was unnecessary, and as the untranslated documents could not contribute anything to add to the information on the Lloyds Bank statements (specifically, the only information which could be identified in the absence of a translation was the date of transfer, the name of the transferee and the amount transferred - these amounts were the same as in the Lloyds Bank statements), we considered that it was not necessary or appropriate to allow permission for these documents to be admitted as evidence.

109. The translation of the Chinese civil mediation agreement was not notarised by a UK notary nor did it have an apostille. However, HMRC accepted in the hearing that this was evidence of a divorce settlement agreement and we did not see any reason to depart from that.

110. We have considered the evidence put forward. We note HMRC's contentions that the appellant's wife could have made payments in other ways, and also note that there are some inconsistencies in the appellant's submissions. In particular, we note that the explanation that there is a restriction of $50,000 per year on transfers is unlikely to be correct, as many of the payments were made by a small number of people in a short space of time. The relevant Lloyds Bank statements include (in some format) the names of the individuals making the transfers, and most of these transfers are in the region of approximately £32-33,000. A couple of transfers by identified individuals are for smaller amounts, both in excess of £10,000.

111. The appellant's spreadsheet analysis for June and July 2010 also notes a number of receipts of £2,500 each as being "CHINA", totalling £50,000. Two other payments of £2,500 on 17 June 2010 are described in the spreadsheet as "CASH" and so we find that these two are not payments in relation to the civil mediation agreement.

112. Each payment of £2,500 is identified in the Lloyds Bank statements with the description "BGC LLOYDS TSB BANK PL". It was suggested in the course of the hearing that these may have been payments from bank accounts which had a maximum transfer limit of £2,500 and that they might have been transferred to Lloyds TSB bank in China first and then transferred from there. No evidence was provided as to the nature of such bank accounts, nor any explanation given why the payments would have been made in this way when other payments were made in larger amounts by individuals who were identified in the transfer descriptions in the bank statements.

113. With regard to the larger receipts, we consider that the timescale is consistent with the payments being from the civil mediation agreement. The apparently slightly baroque arrangements for payment do not significantly weigh against this. Accordingly, we find that on the balance of probabilities the appellant has shown that the series of transactions in 2010 and in 2012 marked as "CHINA" each in excess of £10,000 in the spreadsheet analysis were payments required by the civil mediation agreement in respect of the appellant's divorce. As such, we find that these receipts do not have the character of income and so are not subject to income tax. The assessments for 2010/11, 2011/12 and 2012/13 are to be reduced accordingly.

114. However, we do not agree that the appellant has discharged the burden of proof in respect of the amounts of £2,500 marked as "CHINA", as we were provided with only suggestions and no clear explanation as to why these payments are markedly different from the rest both in amount and description on the bank statements. As noted in *Pegasus Birds*, the appellant is required to make a positive case as to why the assessments are not correct. The suggestions made on behalf of the appellant as to why these payments might have been made differently to the others are not sufficient to satisfy the burden of proof on the appellant to displace the assessment.

Loans

115. The appellant submitted that a number of the receipts, without clearly identifying which, were loans. Further, in response to requests for further details, it

was submitted that in China all borrowing and lending is based on credibility and as such no notes or documents exist to support the loans.

116. The appellant's witness statement includes the statement that cash deposits in the bank accounts represent borrowing from friends in "initial stages". No specific amounts are identified in respect of these loans in the witness statement.

117. A receipt of £40,000 on 31 October 2011 from Diffuse UK was stated to have been a personal loan from a friend, made from the company owned by that friend. It was submitted that the company accounts would clearly show that it was able to make such a loan.

118. HMRC submitted that the appellant had not provided any evidence to support the contention that these amounts were loans.

Discussion

119. We note the appellant's evidence that it is not Chinese custom to record loans in writing. However, we consider that the fact that loans are not evidenced in writing would not preclude the appellant from providing more details about such loans - in particular, why they were required, who they were received from, when they were repaid, on what terms (such as interest) the loans were made.

120. In response to a request for further information about loans received, the appellant provided a series of documents which related to investments made by third parties in Zhongda Investments Limited. It was accepted in the hearing that these were not in respect of loans to the appellant but, as shown on the documents, were details of investments made by others in Zhongda Investments Limited. It was not explained why these had been provided when a request for evidence as to loans was made.

121. The witness statement refers to cash deposits "in the initial stages" being loans, but the spreadsheet analysis provided by the appellant as an explanation of the receipts does not identify any the receipts considered by HMRC to be unexplained in, for example, 2007/08 as being loans: they are described simply as "cash".

122. No explanation was given as to why the spreadsheet prepared by the appellant did not identify these amounts as loans. We noted that, in contrast, certain amounts paid out by the appellant to others were described as loans, and the receipts of corresponding amounts similarly marked as repayment of loans. HMRC did not assess those repayments.

123. With regard to the £40,000 received on 31 October 2011, the appellant's bank statement describes this as "F/FLOW DIFFUSE UK". The appellant's spreadsheet describes this as "borrow from Diffuse UK". No reason was given as to why the appellant required a loan nor why, if it was a loan, it was borrowed from a company rather than from the friend directly. No details as to the friend were given. No evidence as to the terms or duration of the loan were given. At the hearing it was

stated that this amount had not been repaid to Diffuse: we do not consider it credible that the company would not have required at least some payment of a debt of this size in the intervening years.

124. We consider that the appellant has not established, on the balance of probabilities, that these amounts should not be assessed as income.

£20,000 received on 24 November 2010 from Zhongda Investments

125. The appellant submitted in the hearing that this receipt was a loan from Zhongda Investments Ltd, but in closing submissions stated that it should be regarded as "in overall terms … a contra" to unspecified amounts going between the appellant and Zhongda Investments Ltd.

126. HMRC submitted that no evidence had been provided to support this statement.

127. *Discussion*

128. Reviewing the information on the file in detail, we noted that, on 19 September 2012, the appellant paid £20,000 from his bank account to Zhongda Investments Limited (per bank account statement. This was marked as "pay back to Zhongda" on the appellant's spreadsheet.

129. On the balance of probability, based on the bank statements and spreadsheet rather than the appellant's submissions, we find that the receipt of £20,000 on 24 November 2010 is a loan from Zhongda Investments which was repaid on 19 September 2012. As such, we find that it is not assessable as income and the assessment should be adjusted accordingly.

130. We note that the appellant did not refer to this payment to Zhongda Investments to either the tribunal or to HMRC. In cross-examination, the HMRC officer he was asked why did had not undertaken an analysis of all of the transfers in and out of the accounts to find an explanation for this receipt. As set out above, it has been established that HMRC is not required to do the work of the taxpayer. Neither is the Tribunal, but the Tribunal attempted to balance the various aspects of the overriding objective in Rule 2 of The Tribunal Procedure (First–tier Tribunal) (Tax Chamber) Rules 2020 by reviewing and cross-referencing all of the provided information to try to determine whether non-specific submissions had any basis in fact. The time taken to produce this decision is in substantial part due to the amount of time required by that exercise.

Sale of car

Appellant submissions

131. The appellant submitted that two receipts (£20,000 on 16 December 2013 and £12,500 on 15 April 2014) were the proceeds of sale of a car and so are not assessable as income.

132. The spreadsheet analysis provided by the appellant does not cover transactions after May 2013, so no details are available from that source. The transactions in the appellant's bank statements each have the description "F/FLOW XIANG ZHENG"; the entry for 15 April 2014 has a handwritten comment "car sold" next to it.

133. In correspondence in the bundle, the appellant's representative states in October 2015 that the appellant has sold two cars but provides no further details as to these cars.

134. With written closing submissions, Mr Nawaz enclosed a document which purported to be confirmation from a third party that they had acquired a car from the appellant and that the two payments had been made by them using a different name. This is not admissible evidence as it was not raised before or at the hearing so that there was no opportunity to cross-examine the third party on their statement.

135. It was suggested for the appellant that HMRC could have confirmed the point with the DVLA. As stated, the burden of proof on this matter rests with the appellant, who would have the necessary information required to obtain this evidence.

136. On the balance of probabilities, we do not consider that the appellant has discharged the burden of proof upon them to show that this amount was incorrectly assessed.

Gambling

Appellant submissions and evidence

137. It was submitted for the appellant that a number of receipts into his account in 2014 and 2015 are winnings from gambling.

138. In the hearing, the appellant agreed with the statement in the HMRC notes that he had started gambling in 2012 and had gambled £30-40 per day until he lost £9,000 in a single day and then stopped gambling. In his witness statement, the appellant says that "another source of funds … was gambling receipts". No details were given in the witness statement, which did not identify specific amounts as gambling receipts.

139. The appellant had provided HMRC with a mandate to check his casino account, and a list of transactions at the casino (a player's report maintained for management purposes) was included in the bundle. The casino transactions show the amount gambled per visit (that is, amounts 'dropped') and the amounts won or lost in each visit, which would be in addition to or deducted from the amount gambled. It was submitted on behalf of the appellant that the following amounts assessed by HMRC could have been explained as being gambling receipts in correlation with that list, as follows:

> (a) 16 July 2014: a receipt of £26,000 could be explained by the fact that on 15 July 2014, the appellant dropped £28,900 and won £6,800 so

that he would have cash available of £35,700 and so would have enough to cover that deposit the next day.

(b) 7 August 2014: the receipt of £7,000 could be explained by the record of the appellant dropping £2,000 on the same day and winning £4,100 so that he had a total amount on leaving the casino of £6,100.

(c) 12 September 2014: the receipt for £6,000 could be explained by the appellant having dropped £6,000 and won £100 on the same day.

(d) 19 September 2014: the receipt for £6,000 was explained by the appellant dropping "£8,500 on that day and winning £5,900", so that he had a total of £14,400 out of which to make that deposit. We note that the player's report in fact states that the appellant dropped £26,500 and lost £12,100 on this date. The net amount remains £14,400 although the amounts which make up that total are different to those stated in submissions.

(e) 23 September 2014 and 1 October 2014: the receipts of £2,000 on each of these could be explained by the appellant having dropped £4,200 on 22 September 2014 and having won £500 so that he had received a total of more than the £4,000 in his bank account across those two days.

140. For the appellant, it was submitted that HMRC's assertion that the entries could not be explained by gambling because he had lost more than he won overall was incorrect. The appellant's evidence was that he had friends who gambled with him, and that the amounts in the players report included their gambling. He stated that the losses were those of his friends; in closing submissions the appellant's representative noted that the casino had stated that the appellant had been banned from the casino because he was involved in a suspicious transaction with others, confirming that he gambled with others.

141. *HMRC submissions*

142. HMRC submitted that the bank deposits did not relate to gambling as the appellant had made overall losses on the player's report from the casino of more than £100,000. They also submitted that the appellant's suggestion that the player's report related to transactions undertaken by his friends was not credible as the player's report clearly related to the appellant.

Discussion

143. We do not agree with HMRC's position that the fact that there were overall losses means that the receipts could not be from casino winnings. A person may still win amounts whilst incurring an overall loss over a period of years. The player's report does show that there were occasions on which the appellant had winnings.

144. However, we also consider that the appellant has not satisfied the burden of proof on him to make a positive case to displace the amounts assessed. Firstly, the appellant's submission is that the amounts "could be explained" by gambling wins.

As already noted above, a positive case requires more than a suggestion that something is possible.

145. The spreadsheet analysis of receipts produced by the appellant does not extend beyond May 2013 and so provides no details for these receipts. There are no entries in the spreadsheet which are described as relating to gambling, although the player's report shows that the appellant visited casinos and won on occasions covered by the spreadsheet. The appellant's skeleton argument stated that there were additional receipts relating to gambling, other than those which HMRC considers to be unexplained. No other such receipts have been identified in the spreadsheet or otherwise by the appellant.

146. The entries in the bank statements for these receipts vary in their descriptions so that they cannot readily be identified as all being from the same source.

147. Further, the appellant's representative stated in the hearing that the casino paid winnings by cheque. There was no explanation as to why the receipts were not therefore identical to the net amounts stated to be available to the appellant. If the deposits were cheques from a casino, we would expect that the amounts deposited would be exactly the same as the amount dropped together with the amount won on each occasion and not the largely substantially different amounts set out in submissions.

148. We find that, on the balance of probabilities, the appellant has not displaced the burden of proof on him to show that these amounts were not assessable to income tax.

Capital gain 2014/15

149. The capital gains tax assessment for 2014/15 was raised in respect of the disposal of shares in Zhongda Property Limited.

150. In the hearing, the appellant did not dispute that a gain had arisen and should be assessed but requested that entrepreneur's relief and the annual allowance be taken into account. HMRC accepted that relief would be available and the assessment figures were adjusted by HMRC. In written closing submissions, the amended capital gains tax assessment was accepted by the appellant.

151. The assessment as to capital gains tax, on the adjusted figures, is therefore upheld.

Validity of penalties

2007/08 and 2008/09

152. For 2007/08 and 2008/09 a penalty applies where a person who is chargeable to income tax in a tax year fails to give notice within six months of the end of the tax year under s7(1) TMA 1970 that they are so chargeable (s7(8) TMA 1970).

153. As set out above, the appellant did not submit a tax return for either of these years and did not notify HMRC of his chargeability to income tax. As also set out above, we consider that the appellant acted negligently in failing to notify HMRC of his changeability to income tax.

154. We therefore find that HMRC were entitled to make a penalty determination in respect of these years. The question that arises is whether the penalty determination was made appropriately.

155. *HMRC submissions*

156. In calculating that penalty, HMRC gave reductions in the penalty under s100(1) TMA 1970 as follows:

> (a) 10% for disclosure: HMRC submitted that, when challenged with irregularities in his tax affairs, the appellant made only partial disclosure. The evidence provided lacked enough detail to support the explanations provided.
>
> (b) 25% for cooperation: HMRC noted that the appellant had provided signed authorities to enable HMRC to approach banks, solicitors and a casino chain. HMRC had also taken account of the fact that the appellant is not particularly fluent in English and that there had been difficulties in communication with his representatives. However, the appellant did not complete the disclosure report and had not provided other documents requested by HMRC. There were lengthy delays which resulted in HMRC having to take over the investigation.
>
> (c) 10% for seriousness: HMRC considered that the defaults were serious, involving fraudulent behaviour over a period of eight years and with substantial omissions made.

157. As such, the penalty attributable to these years was calculated at 55% and HMRC submitted that this was an appropriate amount.

Appellant's submissions

158. For the appellant it was submitted that the appellant had made a full disclosure under the Contractual Disclosure Facility and had in fact overstated his liabilities because he had included amounts as commission which it was submitted were non-assessable funds sourced from China. It would be unfair to penalise the appellant given that he was unfamiliar with the UK tax system and spoke no English.

159. It was submitted that there were no other omissions and so the penalties are inappropriate. Further, the appellant had given HMRC an "unrestricted number of mandates" which it was submitted were not properly used by HMRC to verify information. It was submitted that it was HMRC's task to verify matters rather than by provision of documents by the appellant which were then disputed by HMRC.

160. It was also submitted that the appellant did not act deliberately in failing to notify HMRC of his liability to income tax. Further, in the appellant's response to HMRC's closing submissions, it was stated that the hearing was the first time that the appellant realised that HMRC considered that he had acted deliberately in failing to disclose taxable income; his partner stated in evidence that she had translated everything for him, but that she had not explained the word "deliberately".

161. It was also submitted for the appellant that, in cases of dishonesty, a higher standard of proof applies than the ordinary civil standard of the balance of probabilities and that HMRC had not met that standard.

Discussion

162. We consider that the submission that the appellant was not aware that he was being accused of deliberate behaviour is simply not credible: the investigation was opened by the Fraud Investigation team in 2013, and all correspondence came from the Fraud Investigation Service throughout. The appellant has been professionally represented throughout.

163. The appellant completed and signed documents in relation to the contractual disclosure facility and the COP9 process each of which makes clear reference to deliberately bringing about a loss of tax, to fraudulent behaviour, and to criminal investigation of his tax affairs.

164. Regardless of whether or not his partner had explained the word "deliberately" to him, we do not consider that he can have been unaware of the nature of the investigation and the allegations made by HMRC as to his behaviour.

165. We have considered the discounts given by HMRC in respect of the penalty. As is clear from the findings above, we consider that the appellant has not made full disclosure (whether under the contractual disclosure facility or otherwise) of taxable amounts. The appellant has failed to provide adequate information throughout the investigation process and, as noted above, where information has been provided there have been inconsistencies in the explanations offered.

166. With regard to the discount for seriousness, the appellant's submissions as to the standard of proof in matters of dishonesty was not accompanied by any case law in respect of this argument. We note, however, that the High Court held in the case of *Khawaja* [2008] STC 2880 that the standard to be applied to cases of dishonesty is the ordinary civil standard of the balance of probabilities.

167. As already noted, we consider that a person with the appellant's background in business would be well aware of his obligations to comply with tax rules. The appellant has admitted in the contractual disclosure facility that he acted deliberately. The appellant continued to fail to have comply with his tax obligations even after the COP9 process began, as he continued to fail to file tax returns after the investigation started although he continued to receive taxable rental income such as rental income. The appellant therefore failed to declare taxable income and a chargeable gain. We

find, as noted above, that he has given inconsistent explanations for the source of items of income and has not provided details to support other explanations where such details should have been readily available to the appellant. With regard to the failure to file returns, the appellant simply stated that he did not know what had happened to his tax returns: we were provided with no evidence that he had made any effort to complete such returns. Taking all of the circumstances into account, we consider that the appellant deliberately failed to comply with his tax obligations.

168. As such, we do not consider that there is any reason to disturb HMRC"s reduction for seriousness of the penalties for these tax years.

2009/10 to 2011/12

169. For these years, a penalty applies where a person who is chargeable to income tax or capital gains in a tax year fails to comply with the obligation to give notice of that liability under s7 TMA 1970 (para 1, Schedule 41 Finance Act 2008).

170. As set out above, the appellant did not submit a tax return for any of these years and did not notify HMRC of his chargeability to income tax. As also set out above, we consider that the appellant acted negligently in failing to notify HMRC of his changeability to income tax.

171. We therefore find that HMRC were entitled to make a penalty determination in respect of these years. The question that arises is whether the penalty determination was made appropriately.

HMRC submissions

172. HMRC submitted that the behaviour leading to the penalties in these years was deliberate because he must have known that he had a responsibility to notify HMRC of his full income and deliberately chose not to do so despite agreeing to the Contractual Disclosure Facility under the COP9 process. HMRC also submitted that the disclosure was prompted because the appellant did not notify HMRC of his changeability before HMRC had discovered it, or were about to discover it as a consequence of their investigations.

173. HMRC submitted therefore that the appropriate penalty range was between 35% and 70% of the potential lost revenue under paras 6, 7 and 13 of Schedule 41 Finance Act 2008.

174. HMRC gave the following reductions for the quality of disclosure:

(1) 10% for telling, as only a partial disclosure was made;

(2) 20% for helping as the appellant attended a meeting with HMRC and provided authorities to enable HMRC to make enquiries with third parties. There were nevertheless substantial delays by the appellant and no assistance was given in qualifying liabilities;

(3) 20% for giving as the appellant had completed third party authorities but there had been long delays in responding to requests for documents and further explanations.

175. HMRC submitted that the total reduction was therefore 50%. When applied to the difference between the minimum and maximum penalty, this gave a penalty reduction of 17.5% to be deducted from the maximum penalty of 70%. The penalty was therefore calculated at 52.5% of the potential lost revenue.

Appellant's submissions

176. The appellant's submissions in respect of these penalties were the same as set out above for the penalties for 2007/08 and 2008/09.

Discussion

177. We have already set out our finding as to the deliberate behaviour of the appellant, which apply to these periods in the same way as to the 2007/08 and 2008/09 periods.

178. We find therefore that the behaviour leading to the penalties was deliberate and agree that any disclosure made by the appellant was prompted by HMRC, such that the penalty range applied by HMRC was correct.

179. We do not consider that there is any reason to change the credit given for 'telling" given the limited information provided by the appellant. We note that HMRC have given credit twice for the same actions in respect of 'helping' and 'giving' but do not propose to reduce either of these amounts to remove the duplication and otherwise consider that a reduction of 20% for providing mandates and attending the meeting is appropriate. We therefore consider that there is no reason to disturb HMRC's reductions in respect of these penalties.

2012/13 to 2014/15

180. For these years, a penalty applies where a person fails to make or deliver a return on or before the filing date (para 1, Schedule 55 Finance Act 2009). It was not disputed that the appellant had received notices for file for each of these years and it was not disputed that HMRC had not received returns for each of these years from the appellant.

181. The appellant is therefore liable to a penalty unless he can show that he had a reasonable excuse for the failure to file the returns. It was not specifically submitted that the appellant had a reasonable excuse for the failure: he stated that he did not know what had happened to the returns, but no evidence was provided as to whether the returns had been filed. Even if the appellant had believed that making the contractual disclosure facility meant that matters were settled, that cannot be a reasonable excuse for failure to submit returns for subsequent tax years in which he had been issued with a notice to file. We find that the appellant did not have a reasonable excuse for the failure to file the returns and that a penalty is therefore due.

HMRC submissions

182. HMRC submitted that the appellant must have known that he had a responsibility to file tax returns and deliberately chose not to do so even though he knew that tax was payable on amounts received by him. HMRC also submitted that he failed to declare gains on the sale of shares in 2014/15 and that this failure to file was a deliberate withholding of information.

183. HMRC submitted therefore that the appropriate penalty range was between 35% and 70% of the potential lost revenue under paragraphs 6, 11 and 15 of Schedule 55 Finance Act 2009.

184. HMRC gave the following reductions for the quality of disclosure:

(1) 10% for telling, as only a partial disclosure was made and no disclosure was made of irregularities for tax years after 2012/13;

(2) 20% for helping as the appellant attended a meeting with HMRC and provided authorities to enable HMRC to make enquiries with third parties. There were nevertheless substantial delays by the appellant and no assistance was given in qualifying liabilities;

(3) 20% for giving as the appellant had completed third party authorities but there had been long delays in responding to requests for documents and further explanations. Although the information provided did include information as to the sale of shares, the appellant did not highlight this or provide any calculation of the capital gain.

185. HMRC submitted that the total reduction was therefore 50%. When applied to the difference between the minimum and maximum penalty, this gave a penalty reduction of 17.5% to be deducted from the maximum penalty of 70%. The penalty was therefore calculated at 52.5% of the potential lost revenue.

Appellant's submissions

186. The appellant's submissions in respect of these penalties were the same as set out above for the penalties for earlier periods.

Discussion

187. We have already set out our finding as to the deliberate behaviour of the appellant, which applies to these periods in the same way as to the earlier periods.

188. We find therefore that the behaviour leading to the penalties was deliberate and agree that any disclosure made by the appellant was prompted by HMRC, such that the penalty range applied by HMRC was correct.

189. We do not consider that there is any reason to change the credit given for 'telling" given the limited information provided by the appellant. We note that HMRC have again given credit twice for the same actions in respect of 'helping' and 'giving' but do not propose to reduce either of these amounts to remove the duplication and

otherwise consider that a reduction of 20% for providing mandates and attending the meeting is appropriate. We therefore consider that there is no reason to disturb HMRC's reductions in respect of these penalties.

Whether there were special circumstances

190. As the appellant's submissions were, in summary, that the penalties were inappropriate because there was no additional assessable income, the appellant did not specifically submit that HMRC had failed to take into account any special circumstances which might apply to reduce the penalties.

191. In their review of the decisions dated 25 August 2017, and repeated in submissions, HMRC stated that they had considered the circumstance of the case and had not found any circumstances which would merit a special reduction of the penalties.

192. The tribunal has on a supervisory jurisdiction with regard to the question of special circumstances such that it is only where HMRC's decision is flawed in the judicial review sense that we have any jurisdiction. We do not consider that HMRC's decision with regard to special circumstances in this case is flawed in the judicial review sense.

Conclusion

193. For the reasons set out above, we consider that the appeal is upheld with regard to the loan from Zhongda Investments Limited and the receipts in relation to the civil mediation agreement which we find did not have the character of income and such such the relevant assessments to income tax and related penalties shall be adjusted accordingly, as set out in Appendix A.

194. The appeal is DISMISSED with regard to all other amounts, taking into account the agreed amendments arising in respect of the capital gain and the "contras" identified in the hearing and adjusted for by HMRC.

195. 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: 26 MARCH 2021

Appendix A - assessments and adjustments

2007/08

Additional income assessed: £69,874

Assessment to income tax: £21,805.91

Penalty decision: £11,993.00

No adjustments: assessment and penalty upheld

2008/09

Additional income assessed: £130,909

Assessment to income tax: £51,478.00

Penalty decision: £28,312.00

No adjustments: assessment and penalty upheld

2009/10

Additional income assessed - £5,790

Assessment to income tax - £2,380.21

Penalty decision - £1,249.61

No adjustments: assessment and penalty upheld

2010/11

Additional income assessed: £876,422

Less received in relation to civil mediation agreement: £769,608

Less loan from Zhongda Investments Limited: £20,000

Adjusted additional income assessable: £86,814

Adjusted assessment to income tax: £23,595.90

Penalty decision: £232,159.62

Adjusted penalty decision: £12,387.84

2011/12

Additional income assessed: £162,224

Less received in relation to civil mediation agreement: £123,566

Less amounts agreed by HMRC not assessable: £7921.36

Adjusted income assessable: £30,736.64

Adjusted assessment to income tax: £1,736.52

Penalty decision: £35,969.48

Adjusted penalty decision: £911.67

2012/13

Additional income assessed: £74,189

Less received in relation to civil mediation agreement: £83,486

Adjusted income assessed: nil

Adjusted assessment to income tax: nil

Penalty decision: nil

Adjusted penalty decision: nil

2013/14

Additional income assessed: £22,000

Assessment to income tax: £5,785

Penalty decision: £3,037.12

No adjustments: assessment and penalty upheld

2014/15

Additional income assessed: £64,054

Assessment to income tax: £26,848.60

Penalty decision: £14,095.51

No adjustments: assessment and penalty upheld

Capital gain assessed, adjusted by HMRC: £6,442

Assessment to capital gains tax, adjusted by HMRC: £664.30

Penalty decision, adjusted by HMRC: £338.20

No further adjustments: assessment and penalty upheld