[2022] UKFTT 91 (TC)

TC 08422/V

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/01786

INCOME TAX; CAPITAL GAINS TAX – whether undeclared self-employment income – yes – whether gain on sale of property taxable as self-employment income – yes – whether capital gain on sale of investment property – yes – whether penalties correctly assessed – yes - appeal dismissed

BETWEEN

MR TOM NASH **Appellant**

-and-

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

TRIBUNAL: JUDGE ANNE FAIRPO
RICHARD LAW

The hearing took place on 22 July 2021. The hearing was heard via the Tribunal video platform due to restrictions arising from the COVID-19 pandemic. Written submissions were subsequently received from the parties in August and October 2021.

The Appellant appeared in person

Mrs O'Reilly, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

Introduction

1. This is an appeal against:

(1) discovery assessments for 2005/06 to 2012/13 (inclusive), issued under s29 TMA 1970, as follows:

(a) 2005/06: £6,380.70

(b) 2006/07: £6,472.52

(c) 2007/08: £73,887.04

(d) 2008/09: £7,520.92

(e) 2009/10: £4,479.20

(f) 2010/11: £4,547.80

(g) 2011/12: £26,852.86

(h) 2012/13: 6,284.06

(2) a closure notice for the tax year 2013/14, issued under s28A Taxes Management Act (TMA) 1970 in the amount of £12,259.44

(3) a penalty charged under s(8) TMA 1970 for 2005/06, in the amount of £3,838.00

(4) penalties charged under s95(1)(a) TMA 1970 for 2006/07 and 2007/08, in the total amount of £48,129.00

(5) penalties charged under Schedule 24 Finance Act 2007 for 2008/09 to 2013/14 (inclusive), in the total amount of £17,192.75

(6) a further penalty charged under Schedule 24 Finance Act 2007 for 2013/14 in the amount of £4,399.69

2. HMRC contend that the appellant (Mr Nash) has failed to declare income from self-employment for 2005/06 to 2012/13, failed to declare capital gains on the sale of property, and submitted an inaccurate self-assessment return for the tax year 2013/14.

3. There was some confusion as to whether the capital gains tax elements were being appealed; Mr Nash was not represented at the hearing but his advisers had previously indicated that there was no dispute as to the capital gains tax. Mr Nash stated in the hearing that he was appealing all of the assessments and penalties. In the circumstances, written submissions were requested and provided by the parties after the hearing in respect of the capital gains tax aspects of the assessments.

Background

4. Mr Nash registered with HMRC as self-employed on 13 December 2006, filling a CWF1 form which described his business as that of 'property developer'. He submitted tax returns for 2006/07 onwards. The amounts declared on his returns were as follows:

(1) 2006/07 - income of £641 (PAYE from 'Tristar')

(2) 2007/08 - self-employment loss of (£18,808)

(3) 2008/09 - self-employment loss of (£12,465)

(4) 2009/10 - self-employment loss of (£651)

(5) 2010/11 - self-employment profit of £4,153

(6) 2011/12 - self-employment profit of £3,942

(7) 2012/13 - self-employment profit of £9,796

(8) 2013/14 - self-employment profit of £12,580

5. On 30 September 2015, HMRC opened an enquiry into his 2013/14 tax return under s9 TMA 1970, requesting copies of all business records, details of rental income since 5 April 2008 and details of all property transaction since 5 April 2008.

6. Following correspondence and meetings, HMRC wrote to Mr Nash on 29 March 2017 closing the enquiries and making the following adjustments:

(1) self-employment turnover for 2005/06 to 2013/14 calculated as 2.5 times expenses claimed. For 2010/11, turnover and expenses were revised to align with other years as the figures for this return did not follow the same pattern as the others;

(2) income from sale of 19RHL added to turnover for 2007/08 as income from property development;

(3) funds received from brother-in-law treated as self-employment income due to lack of evidence otherwise;

(4) gain on disposal of land to the rear of 147TR and 149TR assessed to capital gains tax for 2011/12;

(5) rental income in respect of the Flat (for 2004/05 to 2006/07) and 149TR (for 2006/07 to 2011/12) treated as no profit/no loss

7. Discovery assessments for 2005/06 to 2012/13 were issued on 9 May 2017; penalties for 2005/06 to 2007/08 were issued on the same day.

8. Penalties under Schedule 24 Finance Act 2007 were issued on 11 May 2017. Penalties were charged for all years.

9. Mr Nash appealed to HMRC on 8 June 2017 and requested a review of the decision on 15 September 2017. The review was concluded on 30 January 2018: the decisions were upheld, but the penalty in respect of the capital gains tax on the disposal of 147TR was suspended as the review officer concluded that suspension conditions could be set.

10. On 28 February 2018, Mr Nash appealed to this Tribunal.

11. We considered that Mr Nash was not a particularly reliable witness, although this may have been due to the passage of time. His recollection of events did not accord entirely with information in documents in the bundle and at times he appeared to have convinced himself of matters which were shown to be otherwise in documentation. We have noted this where relevant in the discussion below.

Inheritances

12. Mr Nash's case is, essentially, that he did not earn anything from self-employment and that the property purchases and renovations were funded from inheritances received by himself and his wife from their fathers in Iran, and then from re-mortgaging property when the inheritances ran out. We therefore consider it appropriate to set out the evidence available to us with regard to these inheritances.

13. Mr Nash stated in a telephone call to HMRC in May 2016 that he had inherited approximately £280,000-£300,000 from his father (in Iran) in 2002. A subsequent document provided in June 2016 stated that he had received his share of his father's estate, amounting to £255,300, in 2005.

14. In June 2016, Mr Nash stated that his wife had inherited £250,000 from her father and had also at some point received compensation of approximately US$300,000 as her father had died when Iran Air Flight 655 was shot down. No evidence was provided as to when she may have received any such money, and we take judicial note that Flight 655 was shot down in 1988 and the settlement between Iran and the United States was concluded in 1996. In correspondence in August 2016, Mr Nash's advisers stated that she had received her share of her father's estate, being £238,000, between 2005 and 2007.

15. In the hearing, Mr Nash stated that his wife had received an inheritance of £600,000 in 2004 and 2005, and that this was evidenced by her bank statements. The bank statements for Mrs Nash which were provided by Mr Nash to HMRC and contained in the bundle cover the period July 2005 to January 2006 show overseas amounts received of approximately £30,000 and, as such, do not support Mr Nash's contention. As noted above, the inheritance received by Mrs Nash was shown in correspondence from Mr Nash's advisers to be £238,000. We prefer the evidence of the correspondence in this context.

Self-employment income

16. The grounds of appeal state that HMRC's calculation of Mr Nash's self-employment income, as 2.5 times the recorded expenses, was far too high and that, in any case, Mr Nash had not been self-employed in the 2005/06 and 2006/07 tax years.

When commenced self-employment

17. Mr Nash registered as self-employed in December 2006 but did not include any self-employment income in his 2006/07 tax return. His tax returns for the tax years 2007/08 to 2009/10 (inclusive) show losses. Subsequent tax returns included turnover of between £3,942 and £12,580 with expenses of between £13,835 and £22,933. However, the return for 2010/11 included turnover of £5,985 and expenses of £1,832. No explanation was provided by Mr Nash as to why the expenses for this year were considerably lower than for other years.

18. HMRC contended that Mr Nash had stated, in correspondence, that he had obtained the mortgage for 19RHL in 2005 on the basis of being self-employed with an accountant's letter as proof of income. HMRC submitted that, on the balance of probabilities, Mr Nash had therefore commenced self-employment during the 2005/06 tax year, as he had moved to the UK from Iran in April 2005.

19. In the hearing, Mr Nash stated that he started work once he had settled in the UK with his family, and agreed that he had arrived in April 2005. He also stated that a friend had suggested doing property development and Mr Nash had started to work with him in 2004/05, giving the friend £9,000 as part of the start-up of the business. Mr Nash stated that this had never been repaid, and his friend had made the bulk of the money from the business, such that Mr Nash made only losses, and that Mr Nash and his family were living off their inheritances and then borrowing by remortgaging their properties.

Discussion

20. Mr Nash registered as self-employed in December 2006, such that the contention that he was not self-employed in the 2006/07 tax year is clearly not sustainable.

21. Although he was vague on dates and in the hearing gave evidence which indicated that he had become self-employed in the UK before moving here in 2004/05, we consider that Mr Nash also gave clear evidence in the hearing was that he had started work once he had settled in the UK with his family. He agreed that they had settled in the UK in April 2005.

22. On the balance of probabilities, from the evidence before us, we find that Mr Nash was self-employed from 2005/06 onwards.

Quantum assessed

23. Mr Nash's advisers stated, in October 2015, that Mr Nash had lost the paperwork relating to his business when he moved house in 2013 so that he did not have any sales or purchase invoices for his self-employment. However, Mr Nash advised HMRC that he had provided his records to his accountants to prepare his tax return for 2013/14 and that the records had been lost thereafter. His tax return for 2013/14, filed on 27 October 2014, did not state that it contained any provisional or estimated figures. Mr Nash's advisers subsequently noted in correspondence in May 2016 that the figures in this return had been estimated by his previous accountant.

24. In a telephone call with HMRC in June 2016, Mr Nash stated that he was a general builder and was not working within CIS. He undertook local work on residential properties via referrals. He did not issue invoices or receipts to customers. He was paid either in cash or by bank transfer. In the hearing, he stated that he would go to the business sites, buy materials and collect money from clients. This was usually in cash and would be split 50/50 with his friend. At a meeting with HMRC in March 2017, Mr Nash stated that he did not generally bank the cash amounts received. As such, HMRC contended that his bank statements would not provide reliable evidence as to his turnover.

25. HMRC submitted that, in the absence of any records to support Mr Nash's returns, they are required to consider all of the evidence and base their assessment on the evidence available to them.

26. HMRC considered that Mr Nash was unlikely to have understated his expenses in his tax returns. They considered that an appropriate method for estimating his turnover for the 2013/14 tax year was to apply a multiple of 2.5 to his expenses. This multiple was based on internal analysis of data from other similar traders. They contended that it was reasonable to believe that the same understatement of turnover applied to earlier years, following *Jonas v Bamfor*d [1973] STC 519. A further adjustment was made for the 2010/11 tax year in order to bring this into line with the other tax years, as no explanation had been provided to account for the difference in the tax return in this year.

27. HMRC also noted that Mr Nash had explained in a meeting that he was paid £150 per day, with materials and expenses being charged to the customer in addition to this at cost. HMRC contended that, based on working five days a week, four weeks per month, for ten months of the year (allowing for holidays, sickness etc) this would indicate income of approximately £30,000 which was comparable to the figure calculated by reference to the evidenced expenses. This explanation was used to calculate the taxable income for the 2005/06 tax year and the 2006/07 tax year for which no expenses had been declared.

28. Mr Nash did not provide any detailed explanation as to why he considered that HMRC's estimates were too high. He stated that his main funds had been the inheritance which he had received from his father, and the inheritance received by his wife from her father. He had started borrowing money when the inheritance funds ran out.

29. Mr Nash also stated that when funds started to run low 'in 2008' he sought work as a limo driver with Tristar for a couple of months. However, PAYE records show that he worked for Tristar some considerable time earlier, in the 2006/07 tax year. This would indicate that any funds available from inheritances had already started to run out by then. Mr Nash did not indicate that he sought any alternative employment, even though his evidence was that he had taken on this employment because funds were running low.

30. Mr Nash stated that his previous accountant had all of his records for 2013/14, although some paperwork had also gone missing when he moved house in 2013. Under cross-

examination, it appeared that Mr Nash's reference to records in this context was intended to mean his bank statements and credit card statements, as he stated that these had been provided to the accountant to undertake the filing. He did not think that the figures on his return had been estimated. He also noted that he had given HMRC mandates to get information from the banks and the mortgage companies to verify his information.

31. Mr Nash argued that, if he had had the money which HMRC contended he had earned, he would not have taken on so much debt and would not have defaulted on his mortgage.

Other income

32. HMRC had also assessed two amounts of £5,785.86 and £22,000 which appeared in Mr Nash's bank statements with the description 'fees'. Mr Nash had explained that these were loans from his brother in law, and provided a letter confirming this from his brother in law's company. The amount of £22,000 was shown in his bank statements to have been repaid later. In the hearing, HMRC confirmed that they accept that both of these amounts were loans and therefore not taxable, and that they would adjust the assessments accordingly.

Discussion

33. Mr Nash has contended that HMRC have over-assessed his income from self-employment, but he has been unable to provide any evidence to support that contention. Various, not entirely consistent, explanations have been given for the lack of records. The partial bank statements that have been provided include some deposits for which no clear explanation has been provided. In the case of a few deposits into a Barclays account which were explained as being transfers from a Halifax account, there is no corresponding withdrawal in the relevant Halifax statements.

34. In the absence of records, particularly when a proportion of receipts were stated to have been in cash and not banked, we consider that basing the taxable earnings on a multiple of declared expenses is reasonable. We also consider that, for the two tax years for which no expenses information was returned, basing the taxable earnings on information provided by Mr Nash as to his income is reasonable. The further adjustment for 2010/11 to eliminate an unexplained inconsistency was not specifically disputed and we see no reason to amend it.

35. Mr Nash's contention that he would not have defaulted on his mortgage if he had received the income calculated by HMRC is also not credible; HMRC have effectively assessed his net earnings at between £20,000 and 35,000 per year, during which time Mr Nash appears to have been funding mortgage payments in excess of £2,000 per month, or at least £24,000 per year. We do not consider that HMRC's calculations provide figures which would have enabled Mr Nash to sustain the levels of mortgage payments which he had taken on.

36. On balance, we consider that HMRC's assessment of Mr Nash's self-employment income for each of the years under appeal is fair and reasonable and that Mr Nash has not, on the balance of probabilities, shown that an alternative figure should be assessed.

19RHL

37. This property was purchased on 27 July 2005 for £390,000 plus stamp duty land tax of £11,700. It was sold on 17 April 2007 for £665,000.

38. In a letter from Mr Nash received by HMRC in June 2016, Mr Nash stated that he had paid a 15% deposit of £58,500 for 19RHL from an inheritance from his father. That letter also stated that he had obtained the mortgage for 19RHL on the basis of self-employment, using an accountant's letter as proof of income.

39. Mr Nash also stated in a telephone call to HMRC on 19 December 2016, repeated at a meeting with HMRC in March 2017, that he had funded the improvements at this property

from his inheritance funds. He agreed that this was the case in the hearing, and that he had used up his inheritance on the renovations.

40. Mr Nash stated that, a month after purchasing the property, they decided that they needed more space and so decided to build an extension. They applied for planning permission in October 2005. One neighbour commented in respect of the first application that "the owner intends to sell the property after extending the house". Mr Nash stated in the hearing that "anyone can object" but did not deny that he had intended to sell the property after renovation. The family moved out into 147TR and work on the extension started in February 2006.

41. The grounds of appeal stated however that this property was purchased by Mr Nash's wife in late July 2005, and that she had paid for the deposit from an inheritance. This contention was first put by Mr Nash in a meeting with HMRC in March 2017. In the hearing, he stated that she had paid a £39,000 deposit for the house, and had obtained a self-certified mortgage in the same way that he had done for a flat which he had purchased in 2004. A statement from Cheltenham & Gloucester Building Society was provided in the bundle which was addressed to Mr Mash's wife at 19RHL, dated 31 December 2005. Prior to the hearing, Mr Nash had stated that his wife did not work. In the hearing he explained that she had worked as a hairdresser from approximately 2008, after undertaking some training.

42. The local council confirmed in a letter of 21 December 2016 that Mr Nash's wife was registered in respect of 19RHL for the purposes of council tax from 27 July 2005 to 16 April 2007, and that a structural repair exemption applied to the property from 27 February 2006 until 26 February 2007, and that the property was registered as empty thereafter until it was sold.

43. HMRC contended that Mr Nash had acquired at least the beneficial ownership in the property and that it had been purchased with the intention of developing and reselling the property, as part of his self-employment as a property developer.

44. Mr Nash contended that 19RHL was purchased by his wife and was intended to be used as the family home; they had moved out whilst building works were undertaken to extend the property and had eventually decided to sell the property but this had not been done with any business intention.

Discussion

45. Mr Nash has provided various different explanations for the source of the deposit, including a clear statement in correspondence in June 2016 that he had paid the deposit for the acquisition of 19RHL. There is nothing in this letter to indicate that 19RHL might have been beneficially owned by Mr Nash's wife.

46. We note that the completion statement for the sale of 19RHL confirms that the 'balance' of the funds from the sale was to be paid to Mr Nash; the statement provides that his wife would receive a fixed amount of £100,000 from the proceeds. This is consistent with the beneficial ownership in the property being with Mr Nash, rather than his wife, even if the legal title to the property was with Mrs Nash. Further, the estate agents' invoice of 17 April 2007 relating to the sale of 19RHL is addressed to Mr Nash and refers to his instructions in selling the property.

47. Mr Nash also stated that he had used (and apparently exhausted) his inheritance monies to fund the building work which was carried out on the property.

48. Mr Nash stated that this property had been purchased as the family home. However, he gave no reason why, if this was the intention, they had purchased a property which was apparently substantially smaller than they required, and then applied for planning permission to make alterations, within a very short time of moving in. We consider that Mr Nash believed at the time that they could afford somewhere larger, given that 147TF was purchased less than

a year later whilst the family was still paying the mortgage on 19RHL as well as funding the building work on 19RHL.

49. We consider that Mr Nash clearly understood the investment potential of property as this was his explanation as to why 147TR had been purchased, rather than renting a property during the refurbishment of 19RHL. The planning documents provided make it clear that other properties in the same road had been extended in a similar manner, such that opportunity for development and profit would have been clear. In the circumstances, we consider that 19RHL was purchased with the intention of making a gain on the property once it had been extended and refurbished. We note also that at least one of the explanations given for the later purchase of 149TR was that it was acquired for the same purpose of extension and resale. We note that 149TR was acquired at or around the same time that the development work on 19RHL was being completed, indicating a continuity of activity.

50. We also note that Mr Nash registered as a self-employed property developer with HMRC at approximately that time that building work was being completed on 19RHL and the purchase of 149TR was being contemplated.

51. We therefore find that Mr Nash had a beneficial interest in 19RHL, even if the name on the legal title was that of his wife. We were not provided with any documentation to show who in fact was the registered owner. We find that 19RHL was acquired with the intention of developing and reselling the property. This is not negated by the short period in which the family were in residence in the property. We consider that the purchase and subsequent renovation was a business activity on the part of Mr Nash and that the profit on sale of the property was therefore income of his business as a property developer, as registered with HMRC.

147TR land strip

52. 147TR was purchased in February 2006 for £525,000. Mr Nash did not dispute that he was the owner of this property.

53. In June 2016, Mr Nash advised HMRC that £200,000 of the total proceeds received on the sale of 149TR had been received for the sale of part of the garden of 147TR. Mr Nash stated that he had separated a strip of land from the gardens of both 147TR and 149TR by adding a fence across the gardens. This strip of land had been sold with the remainder of 149TR, both to the same purchaser.

54. The contract for sale of the land (together with 149TR) states that £120,000 was paid for the part of 147TR's garden.

55. In a letter of 24 February 2017, HMRC advised that as the land had been physically separated from the garden of 147TR with the intention of developing it, it no longer qualified for PPR as the land was no longer enjoyed with the residence.

56. A Valuation Office report dated March 2017 provided a value for the land derived from 147TR as at 23 February 2006 (ie: acquisition cost) as £30,000 as, at that date, no planning permission was available and there was limited scope for development as Mr Nash did not then own 149TR.

57. HMRC contended that there was, therefore, a gain on the sale of the land sold from the garden of 147TR, calculated as follows:

58. The sale proceeds were £120,000, and estimated incidental costs of disposal of £10,000 were deductible. This gave net sale proceeds of £110,000. As the property was acquired as part of a larger property, the open market valuation from the Valuation Office should be taken to be the purchase price (£30,000). HMRC allowed estimated incidental costs of acquisition, of

£5,000, giving a total deductible cost of £35,000. The chargeable gain was therefore £75,000, taxable on Mr Nash as the owner of 147TR. No main residence relief was available as the land had been fenced off from 147TR for development at the time of sale and so was not available to be occupied and enjoyed with the rest of 147TR.

59. Mr Nash submitted that no gain had been made on the sale because he contended that the interest costs of £2,300 per month on the mortgage on 147TR should be taken into account as deductible expenses. In addition, the mortgage company had required him to repay the proceeds of sale of the land to them as he was in default on the mortgage. He also contended that architects' fees, fencing costs, and planning permission costs should also be deducted.

60. In his written submissions, Mr Nash stated that a gate had been included in the fence between 147TR and the land strip and that the family used the land for barbecues and had an inflatable pool there.

Discussion

61. We consider that Mr Nash has failed to understand the distinction between general personal expenditure and deductible expenditure for capital gains tax purposes. He has also made unsupported statements as to expenses incurred. The only deductions which may be made in calculating a capital gain for tax purposes are those permitted by law.

62. Mr Nash's submissions as to the lack of gain start with the premise that the purchase price of £530,000 should be taken as the base cost for calculating the gain on the sale of the land strip. This is misconceived, as this was the price for the purchase of the entire property and not the land strip alone. We agree with HMRC that the Valuation Office's estimate of the open market value of the land strip at the date of acquisition is the appropriate base cost for calculating the gain on the sale of the land strip.

63. Mr Nash's contention that mortgage interest costs should be deducted from the proceeds of sale in calculating a taxable gain is also incorrect. No such deduction is permitted in tax law. The repayment of mortgage monies from the proceeds of sale is also not deductible (other than to the extent that it is reflected in the relevant original cost which can, and has been, taken into account). The fact that the mortgage company required such repayment before it would release its charge over the land strip does not mean that the repayment is deductible for tax purposes.

64. Mr Nash provided no evidence as to the amounts incurred in respect of other fees (nor, indeed, any information as to what those amounts might have been).

65. In the absence of any such evidence, we consider that HMRC's estimated costs of disposal are appropriate. We also consider that their calculation of the gain is fairly made on the basis of the evidence available.

66. Mr Nash's submissions relating to the gate in the fence, and the use of the land by the family, were introduced for the first time in his written submissions, which were provided two months after HMRC provided their written submissions. He made no such submissions in the hearing, referring only to a fence separating the land from the rest of 147TR. Similarly, in correspondence, there is no reference to a gate having been included in the fence. Mr Nash has also provided no explanation as to why this part of the garden of 147TR was fenced off at all if it was to continue to be used by the family prior to sale.

67. On balance, we do not consider that Mr Nash's written submissions as to the existence of a gate, and the use of the land, are credible. HMRC had advised in 2017 that the land did not qualify for main residence relief because it had been separated for development. Neither Mr Nash nor his advisers had made any comment at that time to suggest that it had not been separated in that way. In the hearing, Mr Nash referred only to the land being fenced off.

68. We therefore find the land had been separated for development and did not remain available for the enjoyment of the family. We find therefore that no main residence relief was available to reduce the gain on sale of the land strip.

149TR

Ownership

69. HMRC contended that Mr Nash had provided funds for the purchase of this property, having confirmed in the hearing that he and his wife pooled their funds generally, and that therefore he had at least a 50% ownership of the property.

70. Mr Nash stated that his wife had purchased the property and that he had no interest in it.

71. This property was acquired on 20 March 2007 for £592,000 plus stamp duty land tax of £23,680. In his witness statement, and in the hearing, Mr Nash stated that the property was acquired by his wife with the intention of combining it with 147TR as a single home for the family.

72. In a telephone call on 19 December 2016 to HMRC, Mr Nash advised that 149TR was acquired as an investment property, that he and his wife had provided the funds for a 10% deposit used to purchase 149TR, and that his wife had paid the mortgage. Mr Nash subsequently stated that he had borrowed money from his brother and had given this to his wife to purchase the property. Mr Nash had also stated that the intention had been to renovate 149TR but plans had changed and it had been rented out instead.

73. In a letter from his advisers to the Tribunal dated 19 March 2019, Mr Nash's wife was stated to have paid a deposit of 15% in respect of this property. In the hearing, Mr Nash stated that his wife had used funds from the sale of 19RHL to purchase 149TR. Mr Nash's written submissions in respect of the capital gain stated that the deposit was provided by his brother, and that this was repaid when 19RHL was sold.

74. Bank statements for an account in Mr Nash's wife's name in March and April 2009 showed payments to "Abbey Mortgage" of approximately £2,000 per month. The local council confirmed that she was registered at 149TR for council tax from 20 March 2007 to 13 May 2007, 13 February 2008 to 12 May 2008 and 4 May 2011 to 7 May 2011. She was not recorded as residing at the property at any time.

75. We note however that correspondence in November 2006 from solicitors to Mr Nash regarding 149TR refers to his proposed purchase of 149TR and requests funds from him to proceed.

76. In a telephone call with HMRC in May 2016, Mr Nash stated that he had been a "house sitter" in respect of this property and did not own it. In a letter of June 2016, he stated that he managing the property without benefit or income. In a telephone call shortly after, he agreed that he received rental income from 149TR and that it had been rented to a charity. In a further call later in June 2016, Mr Nash stated that his wife received the rental income as the contract was in her name. Her bank statements for a period in 2009 were provided which showed payments each month of £2,000 from a letting agent.

77. The Tribunal bundle included a tenancy agreement for 149TR between Reside Housing Association and Mr Nash, dated 5 May 2008, describing Mr Nash as the landlord. The deposit under the agreement was to be held by a third party company, described as the landlord's agent. Mr Nash had also signed a separate note to the tenants confirming that he would pay any excess costs involved in unspecified works which needed to be carried out at the property. There is nothing in either the tenancy agreement or this separate note to indicate that Mr Nash was acting on behalf of his wife.

Discussion

78. Mr Nash stated in the hearing that this property was purchased with the intention of combining it with 147TR as a single family home. We do not consider that this is a credible explanation as Mr Nash provided no explanation as to how he, whether alone or together with his wife, expected to be able to afford the mortgage repayments on both 147TR and 149TR. We note also that Mr Nash registered as self-employed, describing his business as that of 'property developer', at the time that Mr Nash stated that they had decided to buy 149TR.

79. To the extent that Mr Nash's contentions as to the purpose of the purchase were intended to suggest that it might benefit from main residence relief, we find that 149TR was purchased as an investment property.

80. We note that the deposit for this property was arranged for by Mr Nash, as confirmed in his written submissions where he confirmed that he arranged to borrow the funds for the deposit from his brother, and that this was repaid from the proceeds of sale of 19RHL. As we have found that Mr Nash had a beneficial interest in 19RHL, the repayment of the borrowed deposit was therefore partly-funded by Mr Nash.

81. In his witness statement, Mr Nash stated that he was forced to sell 149TR (and the land strip) because of financial difficulties following the global crash in 2007.

82. In the hearing, Mr Nash similarly made a number of references to transactions being undertaken by him which he had otherwise said were undertaken by his wife. He sometimes, but not always, corrected himself. With regard to 149TR, he said that "The house I bought … my wife bought was sold for less because of devaluation". He then tried to explain this, saying that that "I am the front for everybody". Later in the hearing Mr Nash stated that he considered that his money and his wife's money were pooled, and expenses were paid jointly from their funds. He also stated that, if he said "I" it didn't mean "I personally" but should be taken to mean "we", meaning himself and his wife.

83. It is clear from the tenancy agreement in the bundle that Mr Nash dealt with this property as if it were his own, as he is described as the landlord. We note also that charges secured against the property related to Mr Nash's borrowing (for example, renovation costs of £25,000 which were secured against the property because Mr Nash did not have the funds to repay the debt).

84. Taken together with the other evidence, we consider that Mr Nash had at least the 50% beneficial interest in 149TR contended for by HMRC, notwithstanding that the title to the property was in his wife's name.

Gain on sale

85. In June 2016, Mr Nash advised HMRC that 149TR was sold for £780,000, of which £50,000 had been received for the sale of part of the garden of 149TR and £200,000 had been received for the sale of part of the garden of 147TR.

86. However, a letter of August 2016 from the sales agent stated that £250,000 of the sale price was for the land strip, with £530,000 for the house. A contract for sale of part of 147TR and 149TR confirms that £120,000 was paid for the part of 147TR's garden, £130,000 was paid for the part of 149TR's garden and £530,000 was paid for the remainder of 149TR (the house and remaining garden).

87. A completion statement was provided for the sale of the part of the garden of 147TR and the sale of 149TR, as at 4 May 2011. The total sale price shown is £780,000. Deductions from the proceeds are shown to various creditors, including mortgage companies, the local council, Mercedes Benz and payment to satisfy a restriction on the title of the property. £35,000 was

stated to be paid "to clients". The contract for sale, dated 8 March 2011, in respect of 149TR and part of 147TR states that the vendors were Mr Nash and his wife. They are described as together selling the entire property.

88. HMRC contended that there was a gain on the sale of the property, as follows:

89. The sale proceeds were £660,000 (being £530,000 for the house and £130,000 for the land). In the absence of any records to the contrary, HMRC allowed estimated incidental costs of disposal of £15,000. This gave net sale proceeds of £645,000.

90. Set against this was the purchase price of the property (£592,000), estimated incidental costs of purchase in the absence of records (£5,000), stamp duty land tax (£23,680). This resulted in deductible costs of £620,680.

91. HMRC submitted that there was therefore a net gain of £24,320, of which 50% was chargeable on Mr Nash as HMRC contended that he had a 50% beneficial interest in the property.

92. Mr Nash submitted that there was no gain on sale, after deduction of expenses that include a debt charged against the property for renovation costs and the costs of obtaining plans and planning permission and the amount required to repay the mortgage.

Discussion

93. Mr Nash's contention that there was no taxable gain on the sale of 149TR is not sustainable: it appears from his submissions that he has not understood that not all expenses, particularly mortgage interest costs, are deductible when calculating a capital gain for tax purposes.

94. We do not agree with Mr Nash's contention that the unpaid debt secured on the property should be deducted when calculating the gain. Although he described this as costs of renovation, we note that no evidence of expenditure on renovation of 149TR has been provided. We note also that Mr Nash's evidence was that 149TR was rented out because planning permission was refused in respect of the property.

95. Considering the documentary evidence, and particularly the contract for sale, we agree with HMRC's assessment as to the sale proceeds. In the absence of any evidence from Mr Nash, we consider HMRC's estimated incidental costs of sale and costs of purchase to be reasonable.

96. As we have found that Mr Nash had a 50% beneficial interest in the property, we therefore uphold the capital gains tax assessment on Mr Nash in the amount stated by HMRC.

Validity of the assessments

97. Neither Mr Nash nor his adviser (in correspondence) made any specific challenge to the validity of the assessments on procedural grounds.

98. HMRC concluded through their enquiry that there had been an understatement of tax for 2013/14. For other years, they considered that the presumption of continuity applied (per *Jonas v Bamford* 51 TC 1) and discovery assessments were made under s29 TMA 1970, on the basis that an officer has discovered that income which ought to have been assessed had not been assessed.

99. For 2005/6 the was a failure to notify chargeability, therefore the further conditions of s29 do not need to be satisfied for an assessment to be made.

100. For 2006/7 onward, having satisfied S29(1) HMRC must also demonstrate that the loss of tax was brought about by the taxpayer's careless or deliberate behaviour. For 2005/6 to 2009/10, HMRC must show that the behaviour was deliberate and not merely careless.

101. HMRC submitted that Mr Nash was aware that he was receiving income which had not been declared on his tax returns, as the minimal amount of income shown could not have supported the family and property acquisitions. They submitted that the behaviour which led to the loss of tax was therefore deliberate.

102. Mr Nash contended generally that he had not made any understatement and that HMRC had failed to take into account the inheritances which he and his wife had received, which he considered had been enough, with borrowings, to cover their cost of living.

103. As set out above, we find that Mr Nash commenced self-employment shortly after arriving in the UK in April 2005 but did not advise HMRC that he had done so until over a year later. He was, by his own evidence, already short of funds in 2006/7 when he worked for Tristar. His evidence in meetings with HMRC as to the level of his earnings exceeded amounts stated in his returns. With regard to his returns, Mr Nash provided contradictory evidence in correspondence as to the extent to which he kept records and what had happened to such records. No business records were provided to the tribunal.

104. On balance, we consider that Mr Nash knew that he had not provided details of all of his income and gains to HMRC in each of the relevant years. Even if he did not know exactly what the correct amount was, we consider that he would have known that the amounts in the return were not correct and yet allowed the returns to be submitted without any note that figures might have been estimated. We consider that this amounts to deliberate behaviour, rather than carelessness, as there was no indication that Mr Nash took any steps to endeavour to ensure that the figures were correct.

105. As we agree that a relevant discovery was made and have concluded that the behaviour which led to the understatement was deliberate, we consider that the assessments were validly raised.

106. For the capital gains tax assessment on the disposal of land and property in 2011/12, there was again no challenge to the procedural validity of the assessment. HMRC contended that they discovered that the gain had not been declared during the enquiry into the 2013/14 tax year and after the enquiry window for the 2011/12 tax year had closed. They considered that the behaviour which led to the failure to declare was at least careless and as such they were entitled to raise an assessment for the tax due on the gain.

107. Mr Nash provided no evidence that he had made any attempt to establish whether or not the gain was taxable. We consider that a reasonable and prudent taxpayer would have taken advice on the point, even if they considered that the transaction was likely to have resulted in a loss. As such we consider that the assessment was validly raised.

Penalties

Failure to notify 2005/6

108. As we have found that Mr Nash was self-employed in the 2005/6 tax year, and did not register as self-employed until December 2006, it follows that there was a failure to notify. No tax was paid for 2005/6. As such, we agree that the penalty is due. HMRC allowed a reduction of 40% (10% for disclosure, 20% for co-operation and 10% for seriousness) and we see no reason to amend that reduction.

2006/7 and 2007/8

109. As set out above, we find that Mr Nash understated his self-employment income and thus submitted incorrect self-assessment returns. Penalties are therefore due under s95 TMA for 2006/7 and 2007/8. HMRC allowed the same 40% reduction for these two tax years and we see no reason to amend that reduction.

2008/9 to 2013/14

110. For these years, Schedule 24 Finance Act 2007 applies a penalty for submission of an inaccurate document. The level of penalty depends on the behaviour which led to the inaccuracy. We have found, as set out above, that the behaviour was deliberate and as such agree that the penalty range is 35% to 70% of the potential lost revenue.

111. The reduction criteria for Schedule 24 differ from those for earlier years. HMRC have given reductions of 15% for telling, 20% for helping and 15% for giving information and the penalty was therefore charged as 52.5% of the potential lost revenue. We see no reason to amend that calculation.

2011/12 capital gain

112. As set out above, HMRC concluded that Mr Nash failed to take reasonable care and so failed to declare the gain. Schedule 24 Finance Act 2007 therefore allows for a penalty of between 15% and 30% of the potential lost revenue. HMRC have given reductions of 15% for telling, 20% for helping and 15% for giving information and the penalty was therefore charged as 22.5% of the potential lost revenue. We see no reason to amend that calculation. The review conclusion letter considered that the penalty could be suspended if relevant conditions for suspension could be agreed. HMRC stated that they would contact Mr Nash to discuss suspension if the penalty was upheld.

Conclusion

113. As set out above, we find that Mr Nash initially failed to notify HMRC of his self-employment; subsequently failed to declare all of his self-employment income, providing inaccurate returns, and is subject to capital gains tax on gains from the sale of land and 149TR. We consider that the assessments and penalties have been correctly raised, subject to noting that HMRC agreed that the amounts of 'other income' set out at paragraph 32 above were not taxable and agreeing to adjust the assessments and penalties accordingly.

114. The appeal is therefore dismissed.

Right to apply for permission to appeal

115. 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: 10 MARCH 2022