[2017] UKFTT 0543 (TC)

TC05992

Appeal number: TC/2016/03437

INCOME TAX – Omissions from a taxpayer's tax returns – whether deposits to a building society account were taxable – held, they were – whether penalties imposed on the basis that the inaccuracies in the returns were deliberate should be upheld, the taxpayer contending that the inaccuracies were careless – found and held that the inaccuracies were deliberate, and, in one case, deliberate and concealed – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVINDER HEAVEN **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN WALTERS QC
TERENCE BAYLISS

Sitting in public at Centre City House, Birmingham on 31 May 2017

John Greany, Counsel, for the Appellant

Mrs Chris Cowan, HMRC, for the Respondents

DECISION

1. The Appellant, Mrs Davinder Heaven, appeals against assessments to income tax and Class 4 National Insurance Contributions ("NICs") for the years 2008/09 and 2009/10, and a closure notice in relation to the year 2010/11, so far as they relate to deposits totalling £20,443.47 made between June 2009 and January 2010 to an account in her name with Nationwide Building Society ("the Nationwide account"). The assessments (which charge additional tax of £130,203.32 for the 3 years in question) also relate to other sources of income, and, in respect of those sources of income, they are accepted by Mrs Heaven. Mr Greany, for Mrs Heaven, told us that there was no issue as to the computation underlying the assessments. It is not clear to us how the assessment for the year 2008/09 and the closure notice for the year 2010/11 can relate to the deposits in question, but that does not signify in the appeal. Mrs Heaven's case is that the sums deposited to the Nationwide account represent savings, or profits already taxed. Mrs Cowan, for the respondent Commissioners ("HMRC"), submits that they represent untaxed income.

2. Mrs Heaven also appeals against penalty assessments for the 3 years made under Schedule 24, Finance Act 2007 ("FA 2007") as follows: in relation to 2008/09, £14,328.61; in relation to 2009/10, £20,127.57; and in relation to 2010/11, £39,485.75. These penalties total £73,941.93, no part of which was suspended.

3. In detail, these penalties are as follows:

- in relation to understated partnership profits: for the year 2009/10, £11,890.72; and for the year 2010/11, £29,054.67;
- in relation to omitted partnership takings: for the year 2008/09, £4,726.89; for the year 2009/10, £5,583.58; and for the year 2010/11, £7,298.15;
- in relation to disallowed expenses: for the year 2008/09, £2,028.69; for the year 2009/10, £2,396.86; and for the year 2010/11, £3,132.93;
- in relation to omitted taxed interest: for the year 2008/09, £547.14; and for the year 2009/10, £256.41; and
- in relation to understated takings: for the year 2008/09, £7,025.89.

4. All of these penalties have been assessed on the basis that HMRC believe that Mrs Heaven's behaviour in relation to the related inaccuracies in her tax returns was deliberate, and, in the case of the penalties assessed in relation to disallowed expenses, that it was deliberate and concealed. Mrs Cowan maintained HMRC's position at the hearing of the appeal.

5. Mrs Heaven appeals against the penalty assessments on the basis that any inaccuracies in her tax returns were careless, not deliberate. Except in relation to the issue regarding the deposits to the Nationwide account, the inaccuracies on which the penalty assessments are based are accepted by Mrs Heaven.

6. We heard oral evidence from Mrs Heaven and from Officer Richard Lindley, the officer of HMRC responsible for Mrs Heaven's case. Both witnesses also provided a Witness Statement. We had before us a bundle of documents.

7. At the conclusion of the hearing we told the parties that we were minded to dismiss the appeal insofar as it related to the deposits made to the Nationwide account on the basis that we were not satisfied on the balance of probabilities that Mrs Heaven had been overcharged (cf. section 50(6), Taxes Management Act 1970 – the burden of proving that she was overcharged, being on Mrs Heaven, see: *Norman v Golder* (1944) 26 TC 293 at p.297). We also said that, although we had not then decided that the inaccuracies in Mrs Heaven's tax returns were deliberately, rather than carelessly, made, there was a definite possibility that we would so decide because (contrary to the submission made on Mrs Heaven's behalf by Mr Greany in Reply) we had not regarded Mrs Heaven's evidence as compelling. We indicated that we were prepared to defer deciding the appeal in order to give the parties a further opportunity to settle the appeal.

8. In response, the parties welcomed the opportunity to settle the appeal and requested time to do so. We therefore directed on 2 June 2017 that the parties had until close of business on 20 June 2017 to communicate to the Tribunal whether or not the appeal had been withdrawn as a result of a settlement having been arrived at. However, the Tribunal was informed by a letter from HMRC dated 21 June 2017 that no settlement had been reached. It is therefore necessary for us to make this Decision.

The evidence

9. We recite the material evidence, which we accept except insofar as we indicate to the contrary.

10. Mrs Heaven was born on 20 August 1970. She is married to Mr Michael Heaven (they married in 1997). She qualified as a solicitor in 1999. She worked as a para-legal, and later under a training contract, and then as a solicitor, in all cases on an employed basis. From 2007 until 2008 she worked for Blakemores, Solicitors. In 2008, her husband, Mr Michael Heaven (who did not give evidence before us, and who is also a solicitor) obtained a Legal Services Commission (Legal Aid) Contract. As Mr Craig Tully, partner in Gilbert Tax Consultants LLP, put it in a letter to HMRC on behalf of Mr and Mrs Heaven dated 19 September 2013 (a letter, on the contents of which Mrs Heaven placed great reliance in her Witness Statement), 'this [the legal aid contract] gave some stability to their income and … in the light of this, Mrs Heaven was able to leave her employment and join in business partnership with Mr Heaven during April 2008'. The partnership practised under the name of Heaven & Company. (Mr Heaven had commenced practice as a solicitor on his own account in January 2006, specialising in family and child protection law.)

11. Mrs Heaven gave birth to a daughter on 2 February 2003. She said in evidence (and we accept) that she suffered post-natal depression after the birth (although she was not aware at the time that this was her condition). She did not, however, interrupt her working life, and her daughter was placed in nursery care at the age of three weeks so that Mrs Heaven could go back to work (at the time, as an employed

solicitor). From 2006, when Mr Heaven was practising as a solicitor on his own account, he was involved in caring for their daughter at home.

12. Mrs Heaven gave birth to a second child (a son) on 10 February 2007. Again, Mrs Heaven returned to her employment soon after the birth. When working for Blakemores she also was involved in family law and child protection cases. Mr Heaven was the main carer for both of the children. Mrs Heaven's depression became more intense after the birth of their son, but she did not seek any professional help in relation to it – and we were not shown any medical evidence to corroborate her evidence. Also, Mrs Heaven did not tell Mr Heaven about her depression and her evidence was that Mr Heaven did not know that she was suffering from post-natal depression.

13. Mrs Heaven said in evidence that she went into partnership with Mr Heaven in 2008 because she was being bullied by the person for whom she worked at Blakemores. However that may be, we notice that the partnership income achieved by Heaven & Company was very substantial and that Mr Tully had said, in the letter dated 19 September 2013 which we have already referred to, that the legal aid contract obtained by Mr Heaven had given some stability to their income and enabled Mrs Heaven to join the partnership.

14. The accounts of Heaven & Company prepared by Mazars LLP of Dudley, West Midlands ("Mazars") were in evidence. They showed turnover for the period from 7 April to 31 May 2008 of £7,322, turnover for the year to 31 May 2009 of £258,566, and turnover for the year to 31 May 2010 of £476,215. The net profit for those periods was, respectively, £4,145, £202,299 and £411,895. Although we were not shown any partnership agreement, we understood that the partnership profits were shared equally by Mr and Mrs Heaven. There was no evidence before us of the amount of the salary which Mrs Heaven was earning at Blakemores, but we regard it as highly probable that a factor in her decision to leave her employment there and to go into partnership with Mr Heaven was the prospect of a greatly increased income.

15. A great deal of the work under the legal aid contract was emergency work related to clients who were in domestic violence refuges, and the rules of the refuges forbade men to enter the premises. For this reason Mr Heaven could not (even if he had wanted to) attend client meetings in refuges to take instructions (where such meetings generally took place) and Mrs Heaven undertook this work and the follow-up work of drafting documents and attending court to obtain injunctions and so forth. We gained the impression that Mrs Heaven herself earned most of the fee income of the partnership of Heaven & Company and she told us that she dealt with the Legal Aid Agency on behalf of the partnership and that there were no staff employed by the partnership.

16. Mrs Heaven played very little part in the care of her children, leaving this to Mr Heaven. The pressure of work meant that she could never "switch off". She described the atmosphere in the household as 'frantic'. The only holiday taken in recent years had been a weekend two years ago when Mr and Mrs Heaven took their children to Disneyland, Paris.

17. Mrs Heaven carried out the work of submitting income tax returns for herself and for Mr Heaven. The return for the year 2008/09 was submitted late, on 6 February 2010. The returns for the years 2009/10 and 2010/11 were submitted just in time, at 10:50 pm on 30 January 2011 and on 30 January 2012, respectively. Her evidence was that she was 'in a panic' when she submitted the returns. She said that she realised in retrospect that it was foolish of her not to obtain professional help in submitting the returns. She accepted that there were significant omissions in the returns and that they were 'wrong'.

18. On 13 December 2012, HMRC (Officer Mrs Ashman) wrote to Mrs Heaven stating that they were 'checking' (opening an enquiry into) her tax return for the year 2010/11, stating that the officer intended only to look at the business expenses claimed by Mrs Heaven but that, when she looked at this aspect, she may find it necessary to extend her check.

19. On 3 January 2013, Mrs Heaven telephoned Mrs Ashman to say that she would be approaching Mazars to act on her behalf and that she was seeing them the next day. On 4 January 2013, Mr Lee Sullivan, of Mazars, telephoned Mrs Ashman. He told her that he 'need[ed] to discuss the case as there is a lot to mention'. On 10 January 2013, Mrs Ashman telephoned Mr Sullivan, who told her that although Mazars had prepared the accounts, they had not filed the tax returns for Heaven & Company. He confirmed to Mrs Ashman that the returns were 'all wrong with double counting of entries' and that he would prepare amended returns and send them to Mrs Ashman. On 14 February 2013, Mr Sullivan sent to Mrs Ashman an amended return for the year 2010/11 for Mrs Heaven and, we find, an amended return for the same period for Mr Heaven.

20. The amended return for Mrs Heaven, which was in evidence, showed Mrs Heaven's share of the taxable profits from the partnership's business in the basis period of 12 months ending 31 May 2010 as £202,969 (slightly less than one half of the net profit of the partnership recorded in the accounts for that year - £411,895). We were not shown the returns as originally submitted and so do not know the amount of the under-declaration of income. However, we note from the tax calculation for 2010/11 attached to the closure notice for that year (issued by Officer Lindley on 14 January 2016) that whereas Mrs Heaven had declared income tax and Class 4 NICs due for that year of £14,470.44, the revised computation, based on profits from the partnership of £229,555, showed income tax and NICs due of £97,207.10 – a difference of £82,736.66. The under-declaration of profits must therefore have been very significant. £14,470.44 is less than 15% of £97,207.10.

21. On 2 April 2013, Mrs Ashman telephoned Mr Jon Claypole, Head of Tax Investigations at Mazars, who was then dealing with Mr and Mrs Heaven's case. He told Mrs Ashman that 'there was a story behind the errors', that Mr and Mrs Heaven 'work exceptionally long hours, just the two of them, and when it came to 31 January they were suffering from fatigue, panicked, and filed an incorrect return'. Mr Claypole was evidently concerned that HMRC would treat the matter as criminal evasion and he was anxious to avoid this.

22. On 12 April 2013, additional income tax and NICs of £70,887 was paid by Mr Heaven and additional income tax and NICs of £68,177.00 was paid by Mrs Heaven, in both cases in respect of the year 2010/11.

23. Following the advice of Mr Claypole, £487.70 was paid by each of Mr and Mrs Heaven on 22 April 2013 in respect of outstanding income tax and NICs for the year 2009/10.

24. On the same date (22 April 2013), again following Mr Claypole's advice, payments in respect of outstanding income tax and NICs were paid by Mr Heaven (£28,714.80) and Mrs Heaven (£28,022.64). Although Mr Tully of Gilbert Tax Consultants advised Mrs Heaven that these payments had been made in respect of 2008/09, they were, according to Officer Lindley, in fact paid in respect of 2009/10. On this basis, and having regard to the accounts provided, an amount of income tax and NICs of £18,248.69 in respect of 2008/09 remained unpaid – although Mrs Heaven was not made aware of this position.

25. By July 2013, Mr and Mrs Heaven had withdrawn instructions from Mr Claypole and were dealing with Mrs Ashman directly. On 11 July 2013, Mrs Ashman wrote to Mrs Heaven informing her that adjustments to the self-assessment for 2010/11 would need to be made, asking for partnership accounts and a partnership return for the next year to be supplied and indicating that the returns for the years 2009/10 and 2008/09 may also need to be amended – this way of putting it is surprising, given the fact that additional payments had already been made in respect of 2009/10 on any basis.

26. On 30 July 2013, Officer L K Ford, a fraud investigator of HMRC, wrote to Mrs Heaven informing her that HMRC had information which gave them reason to suspect that Mrs Heaven had committed tax fraud. HMRC's Fraud Code of Practice (COP9) was applied to her tax affairs from 30 July 2013 and the use of the Contractual Disclosure Facility ("the CDF") was offered to her.

27. This prompted the letter dated 19 September 2013 to HMRC (Officer Ford) from Mr Craig Tully of Gilbert Tax Consultants LLP, which we have already mentioned. In that letter, Mr Tully described in detail the pressure of work which Mrs Heaven had been under, her post-natal depression and her 'blind panic' when submitting self-assessment returns. He also stated that Mr Heaven had never 'completed, looked at or considered' the returns, and had left matters to Mrs Heaven whom he trusted, he having no knowledge that she was suffering from post-natal depression. He enclosed a form signed by Mrs Heaven which gave her confirmation that she had not committed any tax fraud and her refusal to take up the CDF.

28. Mr Tully's letter contained the following passage:

> 'As you will know from the file, as soon as Mr Heaven realised there was a problem with his Self Assessment Return he instructed Mazars to make a voluntary disclosure to HMRC and he has cooperated fully with his accountants throughout the process as has Mrs Heaven.

In respect of the Self Assessment Returns, to the best of our clients' knowledge and belief they have provided everything necessary to their accountants, Mazars, and they, in turn, have made a full disclosure to HMRC.'

29. We find on the basis of this evidence, that it was Mr Heaven, not Mrs Heaven, who initiated the voluntary disclosure made by Mazars.

30. From 22 October 2013, Mrs Heaven withdrew instructions from Gilbert Tax Consultants and, as she informed Officer Ford, chose to represent herself in the matter.

31. Officer Ford wrote to Mrs Heaven on 29 October 2013 proposing a meeting to discuss her tax affairs in more detail and asking for information and records. This was declined by Mrs Heaven, who stated in a letter dated 15 November 2013 to Officer Ford that she had 'provided a full payment of all taxes owed', and suggesting that HMRC were infringing her fundamental human rights 'acting maladministratively [*sic*] and causing me additional distress'.

32. Officer Ford wrote to Mrs Heaven on 6 December 2013 asking for specified information and documents. Mrs Heaven declined to provide the information and documents requested. She persisted in her claim that her human rights were being infringed. She repeated that all outstanding amounts due had been paid before COP9 had been applied and she refused to enter into further correspondence until an assessment of penalties and interest had been provided.

33. This resulted in a notice to provide information and produce documents under paragraph 1, Schedule 36, Finance Act 2008 ("FA 2008") being issued to Mrs Heaven by Officer Ford on 19 February 2014. Mrs Heaven declined to comply with the notice.

34. This gave rise to a penalty notice for non-compliance dated 1 April 2014. This also was not complied with. There was a further extensive exchange of correspondence (headed 'Without Prejudice' in the case of Mrs Heaven's long letters) in which no progress was made towards the resolution of the case. One letter, dated 15 September 2014, from Mrs Heaven to Officer Mrs Hammond, was not headed 'Without Prejudice'. In that letter Mrs Heaven accused HMRC of engaging 'in an activity in direct contravention of the terms of the Fraud Act 2006'.

35. Eventually (on 20 October 2014), Mrs Hammond wrote to Mrs Heaven stating that she intended to issue notices under paragraph 2, Schedule 36, FA 2008 to provide information and produce documents to various banks and other third parties (including Mazars) in connection with Mrs Heaven's case. Mrs Heaven wrote a very long letter running to 5 pages, dated 7 November 2014 objecting to the issue of the notices. That letter was to be presented to the Tribunal on any application by HMRC for approval for the issue of the notices. Notices were nonetheless issued and responses obtained.

36. On 24 March 2015, Officer Lindley, who had by then taken over the case, raised a further assessment on Mrs Heaven in respect of outstanding income tax and NICs due

for 2008/09 in the sum of £19,030.33. This included tax and NICs in respect of the partnership profits as disclosed by the accounts prepared by Mazars and also interest received net of tax deducted at source from the Chelsea Building Society and the Nationwide Building Society (£1,542.23 and £1,585.61 respectively), details of which had been received by HMRC in response to the third party notices issued under paragraph 2, Schedule 36, FA 2008, and which had not been declared in Mrs Heaven's tax return for 2008/09.

37. As a result of this evidence we are satisfied that Mrs Heaven's earlier statements to the effect that to the best of her knowledge and belief she had provided everything necessary to Mazars, and they, in turn, had made a full disclosure to HMRC were incorrect.

38. On 28 August 2015, Officer Lindley wrote to Mrs Heaven raising specific questions on Mazars' computations of income from the partnership (which in the event were resolved to HMRC's satisfaction by information received from the Legal Aid Agency) and also raising queries regarding payments into an account with Barclays Bank in the name of Mrs Davinder Heaven trading as Proserve and the Nationwide account which we have already mentioned. At the hearing of the appeal, it was accepted on behalf of Mrs Heaven that the payments into the Proserve account were indeed taxable. Mrs Heaven responded to Officer Lindley's letter by requesting that another officer be allocated to her case.

39. On 11 December 2015, Officer Lindley wrote to Mrs Heaven setting out his proposals regarding the assessments and penalties which he considered to be due for the 3 years in question.

40. Regarding the deposits to the Nationwide account, totalling £20,443.47, he noted that Mrs Heaven had provided no information as to the nature of these deposits and he therefore made the assumption (which we consider to be reasonable) that the deposits represented earned income from the partnership which should have been deposited into the partnership account. Officer Lindley observed that Mazars, in drawing up the partnership accounts, had 'primarily referred to the partnership bank accounts when calculating the amount of income received' and were therefore unlikely to have been aware of other partnership income which had not been credited to the partnership bank accounts.

41. Regarding the payments into the Proserve account, amounting to about £5,000, Officer Lindley again noted that Mrs Heaven had declined to provide any information. In those circumstances he formed the view that the deposits came from withdrawals from the bank account of Heaven & Company, treated as deductible expenses by Mazars in compiling the partnership accounts. At the hearing, Mrs Heaven explained that these deposits represented fees for serving documents on the husbands of her clients, or respondents to proceedings which she was handling, which Mrs Heaven had regarded as properly her income rather than income of the partnership and had for that reason set up a separate bank account to receive these fees. She accepted, as we have already noted, that she should have put them in her tax returns, but explained that she had not done so because she thought that income under

£10,000 would not attract income tax and would not give rise to any extra tax liability. As to the bank interest paid on the amounts held in the Proserve account, Mrs Heaven accepted at the hearing that this gave rise to an income tax liability. Her excuse for not including that interest in her returns was that she thought that the liability would have been discharged by way of deduction of tax at source by the bank. Officer Lindley's evidence was that HMRC had not been made aware of these facts until the hearing.

42. In relation to the penalties which Officer Lindley believed were due, he stated HMRC's case as follows. He regarded Mrs Heaven's behaviour in understating her partnership income in her returns and omitting bank interest from those returns as deliberate. In support of this conclusion he stated:

> '1. You have submitted returns showing incorrect profits even though accounts were prepared by Mazars.
>
> 2. Although the 2008/09 return was submitted prior to the accounts being completed by Mazars, the amount of expenses claimed by you were so much higher than the expenses actually incurred by the partnership that you must have been aware that the amounts claimed were incorrect.
>
> 3. Additionally upon receipt of the accounts produced by Mazars, you took no steps to correct the errors in the 2008/09 return.
>
> 4. You have deposited into a personal building society account [the Nationwide account] money which you would have known was partnership income. Knowing that Mazars would be unaware of the income, you did not inform them that the money was so deposited.
>
> 5. You have created a bank account with the trading name of one of the partnership suppliers [Proserve] and paid money into that account allowing the accountant to believe that the payments represented legitimate business expenses.
>
> 6. You have omitted from your tax returns interest that you have received and the amounts were such that you would have been aware that you had been paid interest.'

43. Turning to the explanation given for Mrs Heaven's behaviour, her depression, Officer Lindley stated HMRC's case as follows:

> 'In view of your reported illness, I have considered whether a special reduction might be due and sought advice on this matter. HMRC considers that a special reduction is due where the circumstances are uncommon or exceptional or where the strict application of the penalty law produces a result that is contrary to the clear compliance intention of that penalty law. Whilst your circumstances may have been distressing, it is not considered that your circumstances as outlined to HMRC [in Mr Tully's letter mentioned above] meet the criteria mentioned above. Therefore a special reduction is not appropriate.

> Whilst not wishing to appear unsympathetic to your illness, you are a solicitor and must be therefore considered to be a competent person. It has been stated that the returns were completed in a blind panic due to your illness which prevented you from functioning at any level other than your job. HMRC considers that in some respects completing an accurate tax return is a close parallel to what is required in your day to day role as a solicitor. Based on the evidence at hand, I consider that the completion of the incorrect returns was a deliberate act on your part. HMRC has seen no medical evidence which might confirm the nature or extent of your illness. It is unfortunate that you have chosen to decline the offer of a meeting with myself or Mrs Hammond during which HMRC may have been able to gain a greater understanding of how the illness may have affected you and how you came to complete the incorrect returns. In addition you have not explained how you have come to hold an account in a false business name.'

44. Officer Lindley closed his letter dated 11 December 2015 with a further invitation to Mrs Heaven to provide information if she was unable to agree his proposals.

45. Mrs Heaven responded to Officer Lindley's letter with letters headed 'Without Prejudice' which rejected his calculations.

46. The assessments for 2008/09 and 2009/10 and the closure notice for 2010/11 were issued in January 2016 and correspondence continued through to August 2016 to which it is not necessary to refer in any detail. The notice of appeal to this Tribunal was dated 21 June 2016.

47. At the hearing, Mrs Heaven appeared very contrite and acknowledged that she had been 'stupid'. She was adamant, however, that the accepted inaccuracies in her returns were the result of carelessness caused by stress and her depression and were not deliberate.

48. She was also adamant that the deposits to the Nationwide account totalling £20,443.47 represented taxed savings, although she could not produce any evidence to corroborate that. It was noted that the deposits were all in uneven amounts rather than round sums. She could give no explanation for this. Officer Lindley's evidence was that HMRC had looked through the partnership bank statements to see whether the deposits represented sums taken out of the partnership bank accounts but they had been unable to trace any such movements (this being in contrast to the position regarding the sums credited to the Proserve account). Mrs Heaven said that it was not possible that these deposits were amounts which came direct from clients of Heaven & Company, because such clients always paid by cheques payable to Heaven & Company. She provided no corroboration for this evidence.

49. Mrs Heaven's explanation for why she had not based the amounts returned as profits of her profession on the accounts prepared by Mazars was that those accounts had been prepared for the purposes of the Legal Aid Agency and she 'didn't know they were needed for tax'.

The parties' submissions

50. Mr Greany, who in the Tribunal's view represented Mrs Heaven at the hearing with great skill, saying everything which could be said in support of her case, referred in his Skeleton Argument to 'any omissions [from the tax returns] on her part', acknowledging that '[h]ad such significant omissions been made by an individual in normal circumstances, then the tribunal would have little choice but to attribute the omissions to deliberate not careless behaviour'.

51. He submitted, however, that 'before reaching any conclusion, the tribunal [should] give due weight to Mrs Heaven's live evidence and explanations for the omissions as the best evidence of the true reasons behind them in the particular circumstances she found herself in at the time'.

52. He placed great weight on Mrs Heaven's evidence that she was suffering from an extended period of acute post-natal depression and could not function properly outside her day to day work. He handed up for our information an article from a website 'www.motherandbaby.co.uk' reporting that '[a] new study has found that depressive symptoms are more common four years after a first baby, than during the first 12 months of your little one's life'.

53. He reminded the Tribunal that Mrs Heaven had explained her position in full to HMRC in Mr Tully's letter, and had provided to HMRC the partnership accounts, prepared by Mazars, at an early stage in the enquiry but the later extensive correspondence (to which we have made reference above) 'demonstrates that there was then a real breakdown in the relationship, and a feeling of mutual suspicion, between individual HMRC officers and Mrs Heaven'.

54. Mr Greany submitted that Mrs Heaven's decision not to provide further material to HMRC should be considered in this context and that the Tribunal should be cautious in drawing any adverse inference against Mrs Heaven (for example, for not attending any meetings with HMRC) 'unless they disbelieve her live evidence'.

55. He invited the Tribunal to find that the deposits to the Nationwide account were not additional income – in other words that Mrs Heaven's evidence should be accepted as discharging the burden of proof on her to show that she was overcharged by the relevant assessment.

56. On the question of the meaning of 'deliberate' and 'careless' in the context of the degrees of culpability laid down by the penalties legislation in Schedule 24, FA 2007, Mr Greany pointed to the definition of 'careless' in paragraph 3 of the Schedule – namely, that an inaccuracy was careless 'if the inaccuracy is due to failure by P to take reasonable care'. He also made the point that 'deliberate' is not defined in the Schedule, although the expressions 'deliberate but not concealed' and 'deliberate and concealed' are defined – in terms of what constitutes concealment, that is, making arrangements to conceal (for example, by submitting false evidence in support of an inaccurate figure).

57. He submitted that if we concluded that Mrs Heaven had been reckless, that is, that she had not cared whether her returns were accurate or not, then we should conclude that her behaviour had been careless rather than deliberate. He referred to a principle of statutory construction, that penal statutes should be interpreted (where there is ambiguity) in favour of the person against whom wrongdoing is alleged.

58. While Mr Greany accepted that if we found that Mrs Heaven's conduct in relation to one of the inaccuracies was deliberate, we could take that finding into account in deciding whether her conduct in relation to others of the inaccuracies was deliberate, we were not bound to do so and should look at each omission in each year separately.

59. He also submitted that it was not a necessary consequence of a conclusion that the deposits to the Nationwide account were taxable as income that Mrs Heaven's omission of them from her tax return was deliberate rather than careless.

60. Mr Greany asked for a decision in principle on the following issues:

1. Whether the omissions from her returns which Mrs Heaven accepted had been made were the result of 'deliberate' or 'careless' behaviour.

2. Whether the sums deposited in the Nationwide account were taxable income, or savings arising out of taxed income.

3. If the Tribunal held that the sums deposited in the Nationwide were taxable income, whether the omission of those sums from Mrs Heaven's return was 'careless' or 'deliberate'.

4. Whether each of the penalties raised by HMRC had been charged at the appropriate level.

5. Whether the penalties should be suspended.

61. Mrs Cowan, for HMRC, submitted that Mrs Heaven had provided no credible explanation of the source of the deposits into the Nationwide account which would discharge the burden on her of showing that she was overcharged by the assessment. We ought not, therefore, to reduce or discharge the relevant assessment (section 50(6) TMA refers).

62. She referred us to the decision of this Tribunal in *Graeme Allan v Commissioners for HM Revenue & Customs* [2016] UKFTT 0504 (TC) (a Decision of Judge Poon and Ms Sumpter, released on 20 July 2016), where she had represented HMRC. In that Decision the Tribunal had emphasised that the only person who could have definitive knowledge of the source and origin of unexplained lodgements was the taxpayer and that it was his responsibility to provide evidence to discharge an assessment based on the reasonable assumption that they represented taxable income.

63. Mrs Cowan accepted that the burden of proof in relation to the imposition of penalties lay on HMRC. She was not able to assist the Tribunal on the question of whether 'reckless' behaviour would be classified for relevant purposes as 'careless' or

'deliberate'. Her case was that Mrs Heaven deliberately chose not to take Mazars' figures into account in submitting her returns for the two later years, and that she had submitted all the returns in the full knowledge that they were inaccurate.

64. The penalty raised in relation to the undeclared bank interest was assessed on the basis that the inaccuracy (the omission of the bank interest from Mrs Heaven's returns) was deliberate and prompted. Mrs Heaven's explanation that she thought that the full tax liability had been discharged by the paying bank, by way of deduction of tax at source, ought not, she submitted, to be accepted by us. Deduction at source only covered liability to tax at the basic rate. Here, there was an additional higher rate income tax liability.

65. The penalty raised in relation to the payments deposited in the Proserve account was, she submitted, correctly assessed on the basis that the inaccuracy in Mrs Heaven's return was deliberate and concealed. She had made arrangements to conceal the income by opening a separate bank account to receive it and not alerting Mazars (who were drawing up the partnership accounts) to the fact that the relative payments out of the partnership's bank account (disallowed expenses) were payments to herself rather than an unconnected third party.

66. She submitted that if the Tribunal accepted that the deposits to the Nationwide account were taxable income, then it would follow that Mrs Heaven's omission of them from her tax return was deliberate.

67. As to Mrs Heaven's depression, Mrs Cowan commented that there was no medical evidence or formal diagnosis. She reiterated the points made in correspondence by Officer Lindley that Mrs Heaven had coped with the demands of a stressful professional job and should equally have been able to ensure that her tax affairs were properly in order.

Discussion and Decision

68. It is convenient to recall guidance given by the House of Lords in *In Re B (Children)* [2008] UKHL on the subject of the burden of proof and the place of the consideration of the inherent probability or improbability of an event in assessing whether or not it has been discharged. In his opinion in that appeal, Lord Hoffmann, with whom Lord Rodger and Lord Walker agreed, said, in discussing the standard of proof to be applied in civil cases (of which this is one), that:

> '[t]here is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not' (*ibid.* [13])

He went on to say that:

> '[t]here is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities.' (*ibid* [15]).

69. Lord Hoffmann also approved a dictum of Lord Nicholls in *In Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, where he said (at p.568) that:

> 'the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.'

70. We address, first, the issue of the sums deposited in the Nationwide account.

71. As we have said, the assessment of the sums deposited in the Nationwide account being *prima facie* reasonable, the burden of proof in this appeal is on Mrs Heaven to show that she was overcharged by the relevant assessment. This means that it was for her to show that it is more probable that the sums deposited in the Nationwide account were savings out of taxed income than untaxed receipts from her profession.

72. These sums were brought to the attention of HMRC by Nationwide Building Society in a response (dated 3 March 2015) to an information notice, dated 23 February 2015, issued to Nationwide Building Society under paragraph 2, Schedule 36, FA 2008.

73. Mrs Heaven, as we have noted, simply stated in evidence at the hearing of the appeal (albeit under oath) that the deposits to the Nationwide account represented taxed savings. She did not produce any corroborative evidence, for example, evidence of the savings accounts from which the sums were taken prior to their deposit in the Nationwide account. She did not provide any explanation as to why the deposits were in uneven amounts. She could give no evidence as to the background circumstances in which the deposits were made.

74. We find that she has not discharged the burden of proof on her to show that it is more probable that these sums represented taxed income rather than untaxed receipts of her profession (perhaps payments made direct by clients). We accordingly find, so far as it is a question of fact, and hold, so far as it is a question of law, that the sums deposited in the Nationwide account were properly assessable as income subject to income tax.

75. We turn now to the question of the penalties assessed.

76. As we have already noted, Mr Greany, in our view rightly, recognised that the significant inaccuracies in Mrs Heaven's tax returns (incorrect statement of profits, inflated expenses, failure to correct the 2008/09 return on receipt of Mazars' accounts, failure to return the deposits to the Nationwide account, failure to declare the sums deposited into the Proserve account and failure to declare significant amounts of interest income) would, in normal circumstances, indicate deliberate rather than careless behaviour on the part of the taxpayer concerned.

77. Mr Greany's submission was that Mrs Heaven's evidence to the Tribunal should persuade us that nevertheless, in her case, the inaccuracies were the result of careless rather than deliberate behaviour.

78. We have also noted that while there is a definition of 'careless' for relevant purposes (in paragraph 3, Schedule 24, FA 2007), there is no definition of 'deliberate'. In our view, 'deliberate' is to be contrasted with careless and effectively means 'intentional', perhaps with the added element of understanding the fact that the behaviour understated the liability of the taxpayer.

79. It may be difficult to determine whether reckless behaviour should be classed as 'careless' or 'deliberate'. However, we have reached the view that Mrs Heaven's behaviour was neither careless, nor reckless, but deliberate.

80. We have reached this view because, recognising that the burden of proof in relation to the charging of penalties is on HMRC rather than Mrs Heaven, we nevertheless found Mrs Heaven's uncorroborated evidence to be too weak to counteract the inherent improbability of what she asserted was the fact.

81. Specifically, in our judgment, it would have stretched credulity too far for us to have accepted that Mr Heaven did not know that Mrs Heaven was suffering from post-natal depression between February 2010 and February 2102 – the period during which the returns in question were submitted. This was a period about four years after the birth of their second child when, we understood, the effects of post-natal depression would be at their most intense.

82. We are doubtful that Mrs Heaven's explanation for the reason she went into partnership with Mr Heaven gave the full story. She said she was being bullied in her old employment. This is an explanation for her leaving that employment. It does not explain why she went into partnership with Mr Heaven. We infer that she did so because of the very high rewards which participation in that partnership promised, and which were in the event achieved.

83. The reliability of Mrs Heaven's evidence was further weakened, in our judgment, by her repeated insistence in the correspondence and in her Witness Statement that she had provided everything necessary to Mazars and that they had made full disclosure to HMRC, so that all outstanding amounts of tax and NICs due had been paid before COP9 had been applied (30 July 2013), when that was not the position – on her own case at the hearing – in relation to the undeclared interest income and the undeclared deposits into the Proserve account.

84. We do not accept that she did not declare the interest income because (as she said) she thought that the full liability in respect of it had been satisfied by deduction at source. We also do not accept that she did not declare the deposits into the Proserve account – despite benefitting from a deduction in the partnership accounts in respect of it – because (as she said) she thought it escaped tax altogether because it amounted to less than £10,000. Her evidence on these points was, in our judgment, too weak to counteract the inherent improbability that she, being a person of intelligence with a

professional qualification, had believed what she said she had understood to be the position.

85. However, we also observe that Mrs Heaven's explanations of the non-declaration of the interest income and the deposits into the Proserve account would suggest that she adopted a thoughtful approach to what she would, and would not, include in her returns. This further undermines her general explanation that she submitted the returns in a 'blind panic'.

86. This brings us on to a consideration of the central argument advanced by Mrs Heaven, that she did not intend or understand the import of the inaccuracies in her returns because of the effects of her post-natal depression, as to which she provided no medical evidence.

87. We consider there is much force in HMRC's observation that the requirements for truth and accuracy in the submission of tax returns are equivalent to the requirements for truth and accuracy in the legal work which Mrs Heaven was at all relevant times carrying out on behalf of the partnership of Heaven & Company. Put simply, if Mrs Heaven's post-natal depression did not prevent her carrying out her legal work to an acceptable standard, there is no reason for us to accept that it prevented her from submitting true and accurate tax returns.

88. We add, to reinforce this point, that Mrs Heaven's post-natal depression obviously did not prevent her sending many very long, detailed and legalistic letters to HMRC resisting their enquiries and disputing the resultant assessments and amendment and the penalties sought to be imposed.

89. In considering all the circumstances, we have reached the view that Mrs Heaven's evidence relating to her post-natal depression is not strong enough to counteract the inherent improbability that she submitted the returns in a 'blind panic'. On the whole, we conclude on the balance of probabilities that the inaccuracies were deliberate.

90. Our conclusion that the inaccuracies were deliberate also covers the omission from Mrs Heaven's returns of the deposits to the Nationwide account, which we have found above to be taxable. In reaching this conclusion we take into account that we have found Mrs Heaven's conduct in relation to the other inaccuracies to be deliberate. There is no good reason, in our view, to take a different view in relation to the deposits to the Nationwide account.

91. We are satisfied that HMRC has charged the penalties at the appropriate levels. All the inaccuracies concerned were the result of deliberate behaviour on Mrs Heaven's part. The arrangement to claim a deduction from the partnership's profits for the sums paid into the Proserve account and to open an account to receive those sums for Mrs Heaven's benefit, without declaring them, amounts, in our judgment, to concealment for the purposes of the definition of 'deliberate and concealed' in paragraph 3(c), Schedule 24, FA 2007.

92. Finally, we do not criticise HMRC's decision not to reduce the amount of the penalties (or any of them) because of special circumstances, pursuant to paragraph 11,

Schedule 24, FA 2007. We observe that it would only be in a case where we were minded to reduce the penalty pursuant to paragraph 17 of the Schedule (which we are not) that consideration of paragraph 11 would arise, and then we could only interfere with HMRC's decision if we considered it was flawed when considered in the light of the principles applicable in proceedings for judicial review (paragraph 17(3) and (6), Schedule 24, FA 2007). It was not argued that HMRC's decision not to reduce the amount of any of the penalties because of special circumstances was flawed in this sense, nor could it have been. An appeal against HMRC's decision not to suspend all or any part of any of the penalties under paragraph 14, Schedule 24, FA 2007 cannot succeed. Suspension can only apply to a penalty for a careless inaccuracy (see: paragraph 14(1) of the Schedule). We have found (and held) that all the inaccuracies in this case were deliberate.

93. For the reasons given above, we dismiss the appeal.

94. 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.

JOHN WALTERS QC
TRIBUNAL JUDGE

RELEASE DATE: 05 JULY 2017