[2021] UKFTT 0454 (TC)

TC 08338A/V

INCOME TAX AND CORPORATION TAX – closure notices, discovery assessments and penalty assessments issued in respect of incorrect tax returns filed by an individual and a company – errors in relation to the profits of a property business carried on by, and employment income received by, the individual and in relation to the expenditure incurred by the company – loans deemed to have been made under Section 455 of the Corporation Tax Act 2010 – appeals dismissed except to the extent that the relevant assessment depended on the inaccuracies' being deliberate – held that the Appellants had acted carelessly and not deliberately in filing the relevant returns – penalties reduced accordingly

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/05310;
TC/2019/05311

BETWEEN

JT QUINNS LIMITED (1)
QUEEN-ROSE GREEN **Appellants**

-and-

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

TRIBUNAL: JUDGE TONY BEARE
MS ELIZABETH BRIDGE

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 15 and 16 November, 2021, with Mrs Green attending by telephone at her request

Mrs Queen-Rose Green, for the Appellants

Mr Lloyd Ellis, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This decision relates to connected appeals by JT Quinns Limited (the "First Appellant") and Mrs Queen-Rose Green (the "Second Appellant" and, together with the First Appellant, the "Appellants" and each an "Appellant") against a number of closure notices, discovery assessments and penalty assessments. The full list of the closure notices, discovery assessments and penalty assessments to which this decision relates is as follows:

The accounting period ending ("APE") or the tax year ending ("TYE")	Nature of assessment/closure notice	Issued to	Date of issue	Amount (£)
31-08-11	Discovery assessment	The First Appellant	14-12-18	6,441.80
31-08-11	Penalty assessment	The First Appellant	28-08-19	4,396.52
31-08-12	Closure notice	The First Appellant	14-12-18	14,509.05
31-08-12	Penalty assessment to a penalty	The First Appellant	28-08-19	9,902.42
31-08-13	Discovery assessment	The First Appellant	14-12-18	5,234.55
31-08-13	Penalty assessment	The First Appellant	28-08-19	3,572.58
31-08-14	Discovery assessment	The First Appellant	17-12-18	16,681.10
31-08-14	Penalty assessment	The First Appellant	28-08-19	11,066.39
31-08-15	Discovery assessment	The First Appellant	17-12-18	27,285.80
31-08-15	Penalty assessment	The First Appellant	28-08-19	18,410.98
31-08-16	Closure notice	The First Appellant	14-12-18	20,240.30
31-08-16	Penalty assessment	The First Appellant	28-08-19	13,814.00
TOTAL				**151,555.49**
05-04-11	Discovery assessment	The Second Appellant	11-12-18	4,017.20
05-04-11	Penalty assessment	The Second Appellant	28-08-19	2,812.04
05-04-12	Discovery assessment	The Second Appellant	11-12-18	7,423.85
05-04-12	Penalty assessment	The Second Appellant	28-08-19	5,196.69

05-04-13	Closure notice	The Second Appellant	11-12-18	3,784.20
05-04-13	Penalty assessment	The Second Appellant	28-08-19	2,648.94
05-04-14	Discovery assessment	The Second Appellant	11-12-18	4,759.80
05-04-14	Penalty assessment	The Second Appellant	28-08-19	2,974.86
05-04-15	Discovery assessment	The Second Appellant	11-12-18	4,854.80
05-04-15	Penalty assessment	The Second Appellant	28-08-19	3,398.36
05-04-16	Closure notice	The Second Appellant	11-12-18	4,386.60
05-04-16	Penalty assessment	The Second Appellant	28-08-19	3,070.62
05-04-17	Closure notice	The Second Appellant	11-12-18	3,878.20
05-04-17	Penalty assessment	The Second Appellant	28-08-19	2,714.74
TOTAL				**55,920.09**

THE LEGISLATION

2. The following legislation is relevant in relation to the closure notices, discovery assessments and penalty assessments referred to above.

Provisions relating to corporation tax

3. Under paragraph 21 of Schedule 18 to the Finance Act 1998 ("Schedule 18"), a company is required to keep such records as may be needed to enable it to deliver a correct and complete return for each accounting period and to preserve those records for the period specified in the relevant provision. Those records include, inter alia, records of all expenses incurred in the course of the company's activities and the matters in respect of which the expenses arise.

4. Under paragraph 24 of Schedule 18, an officer of the Respondents is entitled to enquire into a company's tax return provided that he or she gives notice to the company of his or her intention to do so within the period specified in the provision. Broadly, in the case of a company which is not a member of a group, where the return was delivered on or before the date on which it was required to be filed, notice of an enquiry may be given at any time up to 12 months from the date on which the return was delivered.

5. Under paragraph 32 of Schedule 18, an enquiry is completed when an officer of the Respondents issues a notice to the company (a "company closure notice") to the effect that he or she has completed his or her enquiries. Paragraph 34 of Schedule 18 provides that the company closure notice in question must state the officer's conclusions and, where appropriate, make the amendments to the company's return that are required to give effect to those conclusions. The company is entitled to appeal against any amendment so made by giving notice in writing to that effect to the officer by whom the company closure notice was given within 30 days of being notified of the amendments.

6. Under paragraph 41 of Schedule 18, if an officer of the Respondents discovers as regards an accounting period of a company that an amount which ought to have been assessed to tax has not been assessed, an assessment to tax has become insufficient or a relief which has been

given is or has become excessive, then the officer may make an assessment (a "company discovery assessment") in the amount or further amount which ought in his or her opinion to be charged in order to make good to the Crown the loss of tax. Paragraphs 42 to 45 of Schedule 18 provide that the power to make a company discovery assessment in relation to an accounting period for which the company has delivered a tax return is exercisable only:

(1) if the circumstances described above were brought about carelessly or deliberately by, inter alia, the company or a person acting on behalf of the company; or

(2) if, at the time when an officer of the Respondents ceased to be entitled to give a notice of an enquiry into the relevant return or issued a company closure notice in relation to any such enquiry, "the officer could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of [the relevant circumstances]"

and that no company discovery assessment may be made for an accounting period for which the company has delivered a return if the relevant circumstances are attributable to a mistake in the return as to the basis on which its liability ought to have been computed and the return was made in accordance with the practice generally prevailing at the time when the return was made.

7. Paragraph 46 of Schedule 18 provides that, subject to any provision of the Taxes Acts allowing for a longer period in any particular class of case:

(1) no assessment to corporation tax may be made more than 4 years after the end of the accounting period to which it relates;

(2) an assessment to corporation tax in a case involving a loss of tax brought about carelessly by, inter alia, the company or a person acting on behalf of the company may be made at any time not more than 6 years after the end of the accounting period to which it relates; and

(3) an assessment to corporation tax in a case involving a loss of tax brought about deliberately by, inter alia, the company or a person acting on behalf of the company may be made at any time not more than 20 years after the end of the accounting period to which it relates.

8. Paragraph 47 of Schedule 18 provides that a notice of an assessment to tax on a company must be served on the company stating the date on which the notice is issued and the time within which any appeal against the assessment may be made.

9. Paragraph 48 of Schedule 18 provides that an appeal may be brought against any assessment to tax on a company which is not a self-assessment provided that the notice of appeal is made in writing within 30 days of the date on which the assessment was issued to the officer of the Respondents by whom the notice of assessment was issued.

Provisions relating to income tax

10. Under Section 12B of the Taxes Management Act 1970 (the "TMA"), a person who may be required to make and deliver a return for a tax year is required to keep such records as may be needed to enable it to deliver a correct and complete return for that tax year and to preserve those records for the period specified in the relevant provision.

11. Under Section 9A of the TMA, an officer of the Respondents is entitled to enquire into an individual's tax return provided that he or she gives notice to the individual of his or her intention to do so within the period specified in the provision. Broadly, where the return was delivered on or before the date on which it was required to be filed, notice of an enquiry may be given at any time up to 12 months from the date on which the return was delivered.

12. Under Section 28A of the TMA, an enquiry is completed when an officer of the Respondents issues a notice to the individual (an "individual closure notice") to the effect that he or she has completed his or her enquiries. The section provides that the individual closure notice in question must state the officer's conclusions and, where appropriate, make the amendments to the individual's return that are required to give effect to those conclusions. Under Sections 31 and 31A of the TMA, the individual is entitled to appeal against any amendment so made by giving notice in writing to that effect to the officer by whom the individual closure notice was given within 30 days of being notified of the amendments.

13. Under Section 29 of the TMA, if an officer of the Respondents discovers as regards an individual and a tax year that an amount which ought to have been assessed to income tax or capital gains tax has not been assessed, an assessment to income tax or capital gains tax has become insufficient or a relief which has been given is or has become excessive, then the officer may make an assessment (an "individual discovery assessment") in the amount or further amount which ought in his or her opinion to be charged in order to make good to the Crown the loss of tax. The section goes on to provide that the power to make an individual discovery assessment in relation to a tax year in respect of which the individual has delivered a tax return is exercisable only:

(1) if the circumstances described above were brought about carelessly or deliberately by the individual or a person acting on the individual's behalf; or

(2) if, at the time when an officer of the Respondents ceased to be entitled to give a notice of an enquiry into the relevant return or issued an individual closure notice in relation to any such enquiry, "the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of [the relevant circumstances]"

and that no individual discovery assessment may be made for a tax year in respect of which the individual has delivered a return if the relevant circumstances are attributable to a mistake in the return as to the basis on which the individual's liability ought to have been computed and the return was made in accordance with the practice generally prevailing at the time when the return was made.

14. Sections 34 and 36 of the TMA provide that, subject to any provision of the Taxes Acts allowing for a longer period in any particular class of case:

(1) no assessment to income tax or capital gains tax may be made more than 4 years after the end of the tax year to which it relates;

(2) an assessment to income tax or capital gains tax in a case involving a loss of tax brought about carelessly by the individual in question may be made at any time not more than 6 years after the end of the tax year to which it relates; and

(3) an assessment to income tax or capital gains tax in a case involving a loss of tax brought about deliberately by the individual in question may be made at any time not more than 20 years after the end of the tax year to which it relates.

Provisions relating to both corporation tax and income tax

Appeals

15. Under Section 50 of the TMA, on any appeal against an assessment to corporation tax or income tax, if the tribunal decides that the appellant has been over-charged or under-charged, the relevant assessment shall be reduced or increased but, otherwise, the assessment will stand good.

Penalties

16. Schedule 24 to the Finance Act 2007 ("Schedule 24") contains the provisions relating to penalties in the case of both corporation tax and income tax. It provides that a penalty becomes payable where, inter alia, an inaccuracy in a return which is either careless or deliberate amounts to, or leads to, an understatement of a liability to tax, a false or inflated statement of a loss or a false or inflated claim to a repayment of tax. In the case of deliberate inaccuracies, the schedule distinguishes between those inaccuracies which are not concealed and those which are. The schedule also distinguishes between "domestic matters" and "offshore matters" in order to create different categories of penalty.

17. Since the present case concerns only domestic matters, any exible penalty would fall within "category 1" and the maximum amount of the penalty would therefore be 30% of the additional amount of tax which becomes due as a result of correcting the inaccuracy in question (the "potential lost revenue") in the case of a careless action, 70% of the potential lost revenue in the case of a deliberate but not concealed action and 100% of the potential lost revenue in the case of a deliberate and concealed action (see paragraph 4 of Schedule 24).

18. Paragraphs 9 and 10 of Schedule 24 provide for a reduction in the penalty where a person discloses the inaccuracy by telling the Respondents about it, giving the Respondents reasonable help in quantifying the inaccuracy or under-assessment and allowing the Respondents access to records for the purpose of ensuring that the inaccuracy or under-assessment is fully corrected. In this context, the provisions distinguish between prompted and unprompted disclosures, with the latter's being a disclosure made at a time when the person making it has no reason to believe that the Respondents have discovered or are about to discover the inaccuracy or under-assessment in question. The provisions specify that, in the case of a category 1 penalty, the penalty in the case of a careless action can be reduced to 15% in the case of a prompted disclosure and 0% in the case of an unprompted disclosure, the penalty in the case of a deliberate but not concealed action can be reduced to 35% in the case of a prompted disclosure and 20% in the case of an unprompted disclosure and the penalty in the case of a deliberate and concealed action can be reduced to 50% in the case of a prompted disclosure and 30% in the case of an unprompted disclosure.

19. The schedule also allows the Respondents to reduce a penalty in the case of "special circumstances" (paragraph 11 of Schedule 24) and provides that, on an appeal against a penalty, the First-tier Tribunal may affirm or cancel the Respondents' decision or substitute for the Respondents' decision another decision which the Respondents' had the power to make (paragraph 17 of Schedule 24).

Loans to participators

20. Section 455 of the Corporation Tax Act 2010 (the "CTA 2010") provides that, where a "close company" makes a loan or advance to, inter alia, a "participator" in the company or an "associate" of such a participator, "there is due from the company, as if it were an amount of corporation tax chargeable on the company for the accounting period in which the loan or advance is made, an amount equal to such percentage of the amount of the loan or advance as corresponds to the dividend upper rate specified in section 8(2) of [the Income Tax Act 2007] for the tax year in which the loan or advance is made." The tax in question is due on the day following the end of the period of 9 months following the end of the accounting period in which the loan or advance was made. It is common ground that the First Appellant is a "close company" and that the Second Appellant is a "participator" in the First Appellant.

21. The section provides that the cases in which a close company is to be treated as making a loan to a person for the purposes of the section include a case where that person incurs a debt

to the close company or a debt due from that person to a third party is assigned to the close company (Section 455(4) of the CTA 2010).

22. Section 458 of the CTA 2010 provides that, to the extent that the debt arising from any loan or advance which has given rise to a charge under Section 455 of the CTA 2010 is repaid, written off or released, a claim for relief may be made within 4 years of the end of the financial year in which the repayment, writing off or release takes place, whereupon, depending on when the repayment, writing off or release occurs, the company in question will either be relieved from the charge or be entitled to a repayment of the tax which it has paid.

23. To the extent that the debt in question is written off or released, Sections 415 to 417 of the Income Tax (Trading and Other Income) Act 2005 imposes a charge to income tax in respect of the written off or released amount on the person to whom the loan or advance was made.

BACKGROUND

24. The following is the background to the appeals:

(1) on 25 February 2014, the Respondents opened an enquiry into the First Appellant's tax return for the APE 31 August 2012 which had been filed with the Respondents on 31 August 2013 and an enquiry into the Second Appellant's tax return for the TYE 5 April 2013 which had been filed with the Respondents on 30 January 2014. In opening those enquiries, the Respondents requested some information and documents to be provided to them by each of the Appellants;

(2) on 12 May 2014, as the requested information and documents had not been provided to the Respondents, the Respondents issued each Appellant with a notice under Schedule 36 of the Finance Act 2008 ("Schedule 36");

(3) on 24 July 2014, the Respondents issued each Appellant with a £300 penalty for failing to comply with the notices under Schedule 36;

(4) on 10 September 2014, the Respondents issued each Appellant with a further £750 penalty for the continuing failure to comply with the notices under Schedule 36;

(5) on 23 January 2018, the Respondents opened an enquiry into the First Appellant's tax return for the APE 31 August 2016 which had been filed with the Respondents on 29 August 2017 and an enquiry into the Second Appellant's tax return for the TYE 5 April 2016 which had been filed with the Respondents on 31 January 2017. The Respondents again requested some information and documents to be provided to them by each of the Appellants;

(6) on 6 March 2018, the Respondents issued each Appellant with a second notice under Schedule 36;

(7) on 4 April 2018, the Appellants' agent wrote to the Respondents to request further time for each Appellant to comply with the second notice under Schedule 36;

(8) on 11 April 2018, the Respondents issued each Appellant with a £300 penalty for failing to comply with the second notice under Schedule 36;

(9) on 17 April 2018, the Respondents wrote to the Appellants' agent to say that the extension requests referred to in paragraph 24(7) above had not been received until after 11 April 2018 but that they would in any event have been refused. In those letters, the Respondents refused the extension request and informed each Appellant that further penalties would become due if the information and documents were not to be provided;

(10) on 8 May 2018, the Appellants' accountant wrote to the Respondents to say that the First Appellant was unable to comply with the notice in relation to the APE 31 August 2012 and to explain that the First Appellant was in the process of gathering the information and documents required by the notice in relation to the APE 31 August 2016;

(11) on 16 May 2018, the Respondents issued each Appellant with a further penalty of £1,080 for the continuing failure to comply with the second notices under Schedule 36;

(12) on 29 June 2018, the Respondents issued the Second Appellant with a further penalty of £2,150 for the continuing failure to comply with the second notice under Schedule 36;

(13) on 15 August 2018, the Respondents wrote to the Second Appellant asking for comments on a settlement proposal made by the Respondents in relation to the Second Appellant's affairs;

(14) on the same date, the Respondents opened an enquiry into the Second Appellant's return for the TYE 5 April 2017 which had been received on 31 January 2018;

(15) on 10 September 2018, the Respondents held a meeting with the Second Appellant at the Second Appellant's home;

(16) on 14 September 2018, the Respondents sent a copy of the notes of that meeting to the Second Appellant and asked the Second Appellant to let them know of any errors or omissions in those notes. In the letter enclosing the notes, the Respondents again requested that the Second Appellant provide to them information in relation to her tax affairs, including her personal bank statements;

(17) the Second Appellant did not provide the Respondents with any comments on the notes of the meeting or provide the Respondents with her personal bank statements but, on 12 October 2018, the Second Appellant provided the Respondents with mortgage interest statements in relation to two of the properties which she owned;

(18) on 11 December 2018, the Respondents issued the Second Appellant with the closure notices and discovery assessments set out in relation to the Second Appellant in paragraph 1 above. (The amounts due under these closure notices and discovery assessments were later adjusted on review – see paragraph 24(25)(b) below);

(19) on 14 and 17 December 2018, the Respondents issued the First Appellant with the closure notices and discovery assessments set out in relation to the First Appellant in paragraph 1 above. (The amounts due under these closure notices and discovery assessments were later adjusted by the Respondents – see paragraph 24(24) below);

(20) on 4 January 2019, the Respondents issued each Appellant with penalty assessments. (The penalty assessments were later cancelled on review – see paragraph 24(25)(c) below);

(21) on 21 January 2019, each Appellant appealed against the closure notices, the discovery assessments and the penalty assessments;

(22) on 19 March 2019, the Appellants accepted the Respondents' offer to review the closure notices, the discovery assessments and the penalty assessments;

(23) on 13 May 2019, the First Appellant provided the Respondents with its bank statements for the period 31 August 2011 to 31 August 2016;

(24) on 30 May 2019, the Respondents, having considered this new evidence, revised the amounts due from the First Appellant under the closure notices and discovery assessments to those shown in relation to the First Appellant in paragraph 1 above;

(25) on 17 July 2019, the Respondents issued its review conclusion letter to each Appellant which:

(a) upheld the revised closure notices and discovery assessments in relation to the First Appellant;

(b) revised the amounts due from the Second Appellant under the closure notices and discovery assessments in relation to the Second Appellant to those shown in relation to the Second Appellant in paragraph 1 above; and

(c) cancelled the penalty assessments referred to in paragraphs 24(19) and 24(20) above;

(26) on 15 and 16 August 2019, the Appellants appealed to the First-tier Tribunal;

(27) on 28 August 2019, the Respondents issued each Appellant with the penalty assessments set out in relation to that Appellant in paragraph 1 above;

(28) on 25 September 2019, the Appellants appealed against the penalty assessments;

(29) on 5 November 2019, following an appeal against the penalty assessments and the acceptance by the Appellants of the Respondents' offer to review the penalty assessments, the Respondents issued its review conclusion letter to each Appellant which upheld the penalty assessments; and

(30) on 15 November 2019, the Respondents applied to the First-tier Tribunal for the appeals against the closure notices, the discovery assessments and the penalty assessments to be heard together.

THE EVIDENCE

25. The evidence in these appeals was largely documentary in nature. In addition to the documents charting the course of the investigation which led to the appeals, the documents bundle contained witness statements from both of the Second Appellant's daughters and the Second Appellant's son-in-law - Ms Tosh Ernest, Mrs Jasmine James and Mr Daniel James - and a Mr Daniel Jebb of the London Fire Brigade.

26. The witness statements made it clear that:

(1) of the 7 properties which were set out in the tax returns of the Second Appellant as being the subject of the Second Appellant's property business, the property at 71 Clarendon Green was at all relevant times owned by Ms Ernest and the property at 89 Tillingbourne Green was at all relevant times occupied by Mr and Mrs James and not available to let;

(2) on 9 February 2012, the property at 107 Northover Road had suffered a fire requiring the attendance of the London Fire Brigade; and

(3) in the opinion of Ms Ernest and Mr and Mrs James, the Appellants had been the subject of negligent treatment by the Appellants' accountant.

27. We also heard the oral evidence of the officer of the Respondents who had primary responsibility for the investigation which led to the closure notices, the discovery assessments and the penalty assessments, a Mr Kieran Killen, and the Second Appellant herself. Given the nature of the dispute, the line between that evidence and the parties' respective submissions was not altogether clear and so we have included the relevant parts of the evidence in our description of those submissions below.

28. However, we should at this juncture record that, whereas we were impressed with the professionalism and calm of Mr Killen, we considered the Second Appellant generally to be evasive, unreliable and inconsistent. For example:

(1) at an early stage in the hearing, we asked the Second Appellant why she had consistently refused to send her bank statements to the Respondents despite being served with formal notices requiring them to be provided and she said that that was because she had given the originals of the statements to the Appellants' accountant, the Appellants' accountant had refused to return them and her bank had refused to provide her with duplicates. We considered that the latter strained credulity and, in any case, in response to the same question from the Respondents toward the end of the hearing, she said that the reason why she had refused to provide the statements was that the bank account belonged to her family as a whole and that the other members of her family had not allowed her to provide the statements; and

(2) the entries in the bank statements for the First Appellant showed regular monthly payments of £863.21 to NatWest Mortgages. Having initially asserted confidently that those payments were "interest only" and related exclusively to the four mortgages over the properties that she held for letting, she then changed her position and said, just as confidently, that they were "interest only" and related exclusively to the mortgage over her property at 20 Duppas Hill Road. In fact, the records showed that the payments comprised both interest and principal and related to the mortgage over her property at 107 Northover Road.

29. In short, we did not feel confident that the Second Appellant had any meaningful grasp over the details of her financial and tax affairs.

THE SUBMISSIONS OF THE RESPONDENTS

The First Appellant

The issues

30. The following issues need to be addressed in relation to the First Appellant:

(1) did the First Appellant overclaim its expenses and make loans to a participator or an associate of a participator?

(2) were the closure notices issued to the First Appellant by the Respondents valid?

(3) were the discovery assessments issued to the First Appellant by the Respondents valid? and

(4) were the penalty assessments issued to the First Appellant by the Respondents valid?

31. The Respondents' submissions on each of these issues are set out in paragraphs 32 to 46 below.

Did the First Appellant overclaim its expenses and make loans to a participator or an associate of a participator?

32. The revised closure notices and discovery assessments referred to in relation to the First Appellant in paragraph 1 above were calculated following the provision by the First Appellant of its bank statements after the original closure notices and discovery assessments were issued. Those calculations reflect the following:

(1) in respect of the APE 31 August 2011:

(a) a disallowance of the amount of £22,500 which was shown as employee wages in the accounts because there was no evidence in the First Appellant's bank statements that this amount was actually paid;

(b) a disallowance of the amount of £5,400 which was shown as rent and rates in the accounts because there was no evidence in the First Appellant's bank statements that this amount was actually paid;

(c) a disallowance of the amount of £2,942 which was shown as repairs and maintenance in the accounts because the First Appellant owned no properties and the Respondents considered that this amount was the personal expenditure of the Second Appellant;

(d) a disallowance of all but £2,636 of the amount of £7,500 which was shown as travel expenditure in the accounts. There was no evidence in the First Appellant's bank statements that any of the £7,500 was actually paid but, because the bank statements showed that £2,636 was paid for travel cards in later accounting periods of the First Appellant, the Respondents were prepared to allow a deduction for that part of the expenditure in this accounting period despite the absence of evidence in the First Appellant's bank statements that it was paid;

(e) a disallowance of the mortgage payments to NatWest Mortgages of £12,281 which appeared in the First Appellant's bank statements because, as noted in paragraph 32(1)(c) above, the First Appellant owned no properties and the Respondents considered that this amount was the personal expenditure of the Second Appellant; and

(f) a charge under Section 455 of the CTA 2010 ("Section 455") in respect of the amounts referred to in paragraphs 32(1)(c) and 32(1)(e) above, to reflect the fact that, by meeting those expenses of the Second Appellant, the First Appellant was effectively making a loan to the Second Appellant;

(2) in respect of the APE 31 August 2012:

(a) following the adjustments referred to in paragraph 32(1) above, a disallowance of the carried forward loss of £3,956;

(b) a disallowance of a single payment of £9,600 which appeared in the First Appellant's bank statements as rent and rates because the First Appellant was operating from the Second Appellant's home such that there was no need for the First Appellant to pay rent and rates, there were no regular payments of this character such as one would expect in the case of rents and rates and, in any event, the Second Appellant had not taken the receipt of such rent and rates into account in her tax return. (The Respondents added that, were relief to be given to the First Appellant in respect of this payment, then there should be a corresponding increase in the taxable income of the Second Appellant in respect of the tax year or tax years in which the payments accrued);

(c) a disallowance of the amount of £6,524 which was shown as repairs and maintenance in the accounts because the First Appellant owned no properties and the Respondents considered that this amount was the personal expenditure of the Second Appellant;

(d) a disallowance of all but £2,636 of the amount of £8,356 which was shown as travel expenditure in the accounts. Although there was evidence in the First Appellant's bank statements that £4,256 of the £8,356 had actually been paid, no

additional evidence had been provided to establish that the amount exceeding the £2,636 paid for travel cards was for the purposes of the First Appellant's trade;

(e) a disallowance of the mortgage payments to NatWest Mortgages of £12,281 which appeared in the First Appellant's bank statements because, as noted in paragraph 32(1)(c) above, the First Appellant owned no properties and the Respondents considered that this amount was the personal expenditure of the Second Appellant; and

(f) a charge under Section 455 in respect of the amounts referred to in paragraphs 32(2)(c) and 32(2)(e) above, to reflect the fact that, by making the payments on behalf of the Second Appellant, the First Appellant was effectively making a loan to the Second Appellant;

(3) in respect of the APE 31 August 2013:

(a) a disallowance of the amount of £9,792 which was shown as rent and rates in the accounts because there was no evidence in the First Appellant's bank statements that this amount was actually paid;

(b) a disallowance of the mortgage payments to NatWest Mortgages of £12,147 which appeared in the First Appellant's bank statements because, as noted in paragraph 32(1)(c) above, the First Appellant owned no properties and the Respondents considered that this amount was the personal expenditure of the Second Appellant;

(c) a disallowance of certain other payments which appeared in the First Appellant's bank statements – such as payments to EDF Energy, Bromley Council and UK building compliance – amounting in aggregate to £1,588 because the Respondents considered that these amounts were the personal expenditure of the Second Appellant; and

(d) a charge under Section 455 in respect of the amounts referred to in paragraphs 32(3)(b) and 32(3)(c) above, to reflect the fact that, by making the payments on behalf of the Second Appellant, the First Appellant was effectively making a loan to the Second Appellant;

(4) in respect of the APE 31 August 2014:

(a) a disallowance of £7,500 of the amount of £22,500 which was shown as employee wages in the accounts because there was no evidence in the First Appellant's bank statements that that part of the relevant amount was actually paid;

(b) a disallowance of the amount of £11,463 which was shown as rent in the accounts because there was no evidence in the First Appellant's bank statements that this amount was actually paid;

(c) a disallowance of £4,230 of the amount of £7,141 which was shown as travel expenditure in the accounts. This is because the First Appellant's bank statements showed that, in addition to the usual travel card payments aggregating to £2,911, there had been a payment of that amount to the Second Appellant and no evidence had been provided that that payment was for the purposes of the First Appellant's trade;

(d) a disallowance of the amount of £12,309 which was shown as repairs and maintenance in the accounts because the First Appellant owned no properties and

the Respondents considered that this amount was the personal expenditure of the Second Appellant;

(e) a disallowance of the mortgage payments to NatWest Mortgages of £11,344 which appeared in the First Appellant's bank statements because, as noted in paragraph 32(1)(c) above, the First Appellant owned no properties and the Respondents considered that this amount was the personal expenditure of the Second Appellant;

(f) a disallowance of certain other payments which appeared in the First Appellant's bank statements – such as payments to EDF Energy, Tesco, PayPal and NatWest – amounting in aggregate to £7,719 because the Respondents considered that these amounts were the personal expenditure of the Second Appellant;

(g) a disallowance of cash withdrawals of £710 which appeared in the First Appellant's bank statements because the Respondents considered that these amounts were the personal expenditure of the Second Appellant; and

(h) a charge under Section 455 in respect of the amounts referred to in paragraphs 32(4)(c) to 32(4)(g) above, to reflect the fact that, by making the payments on behalf of the Second Appellant, the First Appellant was effectively making a loan to the Second Appellant;

(5) in respect of the APE 31 August 2015:

(a) a disallowance of the amount of £8,978 which was shown as rent in the accounts because there was no evidence in the First Appellant's bank statements that this amount was actually paid;

(b) a disallowance of the amount of £9,667 which was shown as repairs and maintenance in the accounts because there was no evidence in the First Appellant's bank statements that £3,610 of this amount was actually paid and, as regards the balance of £6,057 which did appear in the First Appellant's bank statements, the First Appellant owned no properties and the Respondents considered that this amount was the personal expenditure of the Second Appellant;

(c) a disallowance of £7,500 of the amount of £10,000 which was shown as employee wages in the accounts because there was no evidence in the First Appellant's bank statements that that part of the relevant amount was actually paid;

(d) a disallowance of the amount of £20,000 which was shown as an education grant in the accounts because there was no evidence in the First Appellant's bank statements that this amount was actually paid;

(e) a disallowance of the amount of £12,524 which was shown as an insurance loss in the accounts because there was no evidence in the First Appellant's bank statements that this amount was actually paid and, in addition, no explanation had been provided as to how any such loss had arisen in the course of the First Appellant's trade;

(f) a disallowance of the mortgage payments to NatWest Mortgages of £9,791 which appeared in the First Appellant's bank statements because, as noted in paragraph 32(1)(c) above, the First Appellant owned no properties and the Respondents considered that this amount was the personal expenditure of the Second Appellant;

(g) a disallowance of certain other payments which appeared in the First Appellant's bank statements – such as payments to EDF Energy, Tesco and something described as "Administration" – amounting in aggregate to £8,760 because the Respondents considered that these amounts were the personal expenditure of the Second Appellant;

(h) a disallowance of cash withdrawals of £4,510 which appeared in the First Appellant's bank statements because the Respondents considered that these amounts were the personal expenditure of the Second Appellant; and

(i) a charge under Section 455 in respect of:

(i) the £6,057 referred to in paragraph 32(5)(b) above, to reflect the fact that, by making the payments on behalf of the Second Appellant, the First Appellant was effectively making a loan to the Second Appellant;

(ii) the amounts referred to in paragraphs 32(5)(f) and 32(5)(g) above, to reflect the fact that, by making the payments on behalf of the Second Appellant, the First Appellant was effectively making a loan to the Second Appellant; and

(iii) payments aggregating to £25,000 which were shown in the First Appellant's bank statements as having been made to the Second Appellant and were described in the First Appellant's bank statements as wages but which did not appear in the First Appellant's accounts in respect of the relevant accounting period; and

(6) in respect of the APE 31 August 2016:

(a) a disallowance of the amount of £6,819 which was shown as rent in the accounts because there was no evidence in the First Appellant's bank statements that this amount was actually paid;

(b) a disallowance of the amount of £13,722 which was shown as repairs and maintenance in the accounts because there was no evidence in the First Appellant's bank statements that £917 of this amount was actually paid and, as regards the balance of £12,805 which did appear in the First Appellant's bank statements, the First Appellant owned no properties and the Respondents considered that this amount was the personal expenditure of the Second Appellant;

(c) a disallowance of £3,500 of the amount of £13,740 which was shown as employee wages in the accounts because there was no evidence in the First Appellant's bank statements that that part of the relevant amount was actually paid;

(d) a disallowance of the amount of £14,000 which was shown as an education grant in the accounts because, although the relevant amount was reflected in the First Appellant's bank statements, no evidence had been provided that it was for the purposes of the First Appellant's trade;

(e) a disallowance of £1,400 of the amount which was shown as travel expenditure in the accounts. This was because the First Appellant's bank statements showed that, in addition to the usual travel card payments, there had been payments aggregating to that amount to the Second Appellant and no evidence had been provided that those payments were for the purposes of the First Appellant's trade;

(f) a disallowance of payments aggregating to £4,070 which were made to the Second Appellant and described in the First Appellant's bank statements as "Office and Bills" because no evidence had been provided that those payments were for the purposes of the First Appellant's trade;

(g) a disallowance of the mortgage payments to NatWest Mortgages of £9,349 which appeared in the First Appellant's bank statements because, as noted in paragraph 32(1)(c) above, the First Appellant owned no properties and the Respondents considered that this amount was the personal expenditure of the Second Appellant;

(h) a disallowance of payments aggregating to £1,760 which had been made to "E NKantah" and described in the First Appellant's bank statements as relating to "DH bill and electricity" because the Respondents considered that these payments related to the outgoings on the Second Appellant's property at 20 Duppas Hill Road and, as that was owned by the Second Appellant, that was personal expenditure of the Second Appellant;

(i) a disallowance of certain other payments which appeared in the First Appellant's bank statements – such as payments to EDF Energy, Tesco, Sky Digital, Amazon and lastminute.com – amounting in aggregate to £9,789 because the Respondents considered that these amounts were the personal expenditure of the Second Appellant;

(j) a disallowance of cash withdrawals of £5,897 which appeared in the First Appellant's bank statements because the Respondents considered that these amounts were the personal expenditure of the Second Appellant; and

(k) a charge under Section 455 in respect of:

(i) the £12,805 referred to in paragraph 32(6)(b) above, to reflect the fact that, by making the payments on behalf of the Second Appellant, the First Appellant was effectively making a loan to the Second Appellant;

(ii) £9,000 of the £14,000 referred to in paragraph 32(6)(d) above because that amount had been paid to the Second Appellant's daughter, who was an "associate" of the Second Appellant for the purposes of the section; and

(iii) the amounts referred to in paragraphs 32(6)(e) to 32(6)(j) above, to reflect the fact that, by making the payments on behalf of the Second Appellant, the First Appellant was effectively making a loan to the Second Appellant.

Were the closure notices issued to the First Appellant by the Respondents valid?

33. The Respondents had issued a closure notice in respect of each of the APE 31 August 2012 and APE 31 August 2016. Each closure notice had been issued under paragraph 32 of Schedule 18 following an enquiry opened into the relevant accounting period under paragraph 24 of Schedule 18. The enquiry giving rise to each closure notice had been commenced within one year of the filing of the relevant tax return and was therefore within the time limit prescribed by paragraph 24 of Schedule 18. Each closure notice had then been issued to the First Appellant on 14 December 2018 and had stated the conclusions drawn by the relevant officer and made the amendments to the tax return required to give effect to those conclusions. It had thus complied with the terms of paragraph 32 of Schedule 18. Each closure notice was therefore valid.

Were the discovery assessments issued to the First Appellant by the Respondents valid?

34. The Respondents had issued a discovery assessment in respect of each of the APE 31 August 2011, the APE 31 August 2013, the APE 31 August 2014 and the APE 31 August 2015. Each discovery assessment had been issued under paragraph 41 of Schedule 18. In order for each discovery assessment to be valid:

(1) it needed to have been issued following the discovery by the relevant officer of the Respondents of, inter alia, an insufficiency of the tax assessed on the First Appellant in respect of the relevant accounting period (paragraph 41(1) of Schedule 18);

(2) either:

(a) at the time when the Respondents ceased to be entitled to give a notice of enquiry into the relevant return, it must have been the case that the relevant officer of the Respondents could not have been reasonably expected, on the basis of the information available to him or her at that time, to be aware of the insufficiency (paragraph 44 of Schedule 18); or

(b) the insufficiency in question must have been brought about carelessly or deliberately by the First Appellant or a person acting on behalf of the First Appellant (paragraph 43 of Schedule 18); and

(3) it needed to have been issued within the time limit set out in paragraph 46 of Schedule 18.

Paragraph 41(1) of Schedule 18

35. The discovery assessments had been issued on 14 and 17 December 2018 following the discovery made at the meeting on 10 September 2018 that, despite purporting to have incurred considerable expense on rent and repairs over the accounting periods in question, the First Appellant carried on its activities from a room in the Second Appellant's home and did not own any properties itself. This meant that the relevant officer of the Respondents discovered at that stage that the First Appellant had overclaimed its expenditure in its tax return in relation to each relevant accounting period and that therefore the tax paid in respect of each relevant accounting period was insufficient. The revised discovery assessments had been issued following the belated provision to the Respondents of the First Appellant's bank statements, which showed that large amounts of money had been extracted from the First Appellant to meet the expenditure of the Second Appellant. This meant that a Section 455 charge had arisen and that the tax assessment in relation to each relevant accounting period was insufficient. Accordingly, each discovery assessment met the condition set out in paragraph 41(1) of Schedule 18.

Paragraph 44 of Schedule 18

36. In addition, there was nothing in the tax returns of the First Appellant for the relevant accounting periods which meant that, at the time when the Respondents ceased to be entitled to give a notice of enquiry into the relevant return, the relevant officer of the Respondents could have been reasonably expected, on the basis of the information available to him at that time, to be aware of the insufficiency. Accordingly, each discovery assessment met the condition set out in paragraph 44 of Schedule 18.

Paragraph 43 of Schedule 18

37. Moreover, although it was not strictly necessary for the Respondents to establish that each discovery assessment met the condition set out in paragraph 43 of Schedule 18, the Respondents considered that the tax insufficiency described above had been brought about

deliberately or, in the alternative, carelessly by the First Appellant or a person acting on behalf of the First Appellant.

Paragraph 46 of Schedule 18

38. The question of whether the First Appellant or a person acting on behalf of the First Appellant had acted deliberately or carelessly in bringing about the loss of tax was in any case relevant in relation to the time limit for making the discovery assessments. This was because of the terms of paragraph 46 of Schedule 18. If the First Appellant or person acting on behalf of the First Appellant had acted deliberately in bringing about the loss of tax, then all of the discovery assessments would be in time because of the 20 year time limit in paragraph 46(2A) of Schedule 18, whereas, if the First Appellant or person acting on behalf of the First Appellant had acted carelessly in bringing about the loss of tax, then all but the discovery assessment in respect of the APE 31 August 2011 would be in time because of the 6 year time limit in paragraph 46(2) of Schedule 18.

39. The Respondents submitted that the losses of tax in this case had been brought about deliberately by the Second Appellant in acting on behalf of the First Appellant. They noted that there was no statutory definition of the word "deliberate" in this context but that the Second Appellant's conduct fell within the description of deliberate error set out in *Auxilium Project Management Limited v The Commissioners for Her Majesty's Revenue and Customs* [2016] UKFTT 0249 (TC) ("*Auxilium*") at paragraph [63] or, failing that, the description of deliberate error set out in *Clynes v The Commissioners for Her Majesty's Revenue and Customs* [2016] UKFTT 0369 (TC) ("*Clynes*") at paragraphs [81] to [86].

40. In *Auxilium*, the First-tier Tribunal said as follows:

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

41. In *Clynes*, the First-tier Tribunal said as follows:

"However, we consider that the term 'deliberate inaccuracy on a person's part' can extend beyond this. Our view is that, depending on the precise circumstances, an inaccuracy may also be held to be deliberate where it is found that the person consciously or intentionally chose not to find out the correct position, in particular, where the circumstances are such that the person knew that he should do so. A person cannot simply escape liability by claiming complete ignorance where the person clearly knew that he should have taken steps to ascertain the position. We view the case where a person makes such a conscious choice not to take such steps with the result that an inaccuracy occurs, as no less of a 'deliberate inaccuracy' on that person's part than making the inaccuracy with full knowledge of the inaccuracy."

42. In the Respondents' view, the Second Appellant had acted deliberately within the description set out in the above cases because, prior to submitting the First Appellant's tax returns, the First Appellant's accountant sent those returns to the Second Appellant for approval. Those returns contained obvious errors of which the Second Appellant would have been aware and, even if she was not so aware, that could have been only because she chose not to identify them. For example:

(1) the returns set out the amounts paid to the Second Appellant and the amounts so shown were different from the amounts shown in the First Appellant's bank statements as having been paid to the Second Appellant; and

(2) certain of the expenses in respect of which the First Appellant claimed relief in the returns were personal expenses of the Second Appellant and did not relate to the First Appellant's trade.

Thus, the loss of tax arising from each return had been brought about deliberately and each discovery assessment was within the time limit set out in paragraph 46(2A) of Schedule 18.

43. Each discovery assessment was therefore valid.

44. In the alternative, the Second Appellant had, at the very least, acted carelessly in submitting the First Appellant's returns so that each discovery assessment apart from the discovery assessment issued in respect of the APE 31 August 2011 was valid pursuant to the time limit set out in paragraph 46(2) of Schedule 18.

Were the penalty assessments issued to the First Appellant by the Respondents valid?

45. The tax returns submitted by the First Appellant were in a category of document falling within the table set out in paragraph 1(1) of Schedule 24, they contained inaccuracies leading to an understatement of tax and those inaccuracies were deliberate or, in the alternative, careless. Accordingly, the terms of paragraph 1 of Schedule 24 were satisfied.

46. In terms of quantifying the penalty, the Respondents considered that the inaccuracies in question were deliberate for the reasons set out in paragraphs 39 to 42 above. The inaccuracies were not concealed but the disclosure of the inaccuracies had been prompted because that had occurred only after the Respondents had opened enquiries into two of the First Appellant's tax returns. The penalty for a deliberate unconcealed inaccuracy the disclosure of which was prompted could be between 35% and 70% of the tax lost by reason of the inaccuracy. Precisely where in that range was appropriate in any given case depended on the quality of the disclosure. In this case, the First Appellant had not been particularly co-operative. The Respondents had had to issue two notices under Schedule 36 and impose various penalties for the First Appellant's failure to comply with those notices. Accordingly, it was appropriate that only a small discount – equal to 5% of the difference between the maximum penalty of 70% and the minimum penalty of 35% - which is to say 1.75% - had been given in calculating the penalty.

The Second Appellant

The issues

47. The following issues need to be addressed in relation to the Second Appellant:

(1) did the Second Appellant include within her tax return the correct amount of rental income?

(2) did the Second Appellant include within her tax return the correct amount of employment income?

(3) were the closure notices issued to the Second Appellant by the Respondents valid?

(4) were the discovery assessments issued to the Second Appellant by the Respondents valid? and

(5) were the penalty assessments issued to the Second Appellant by the Respondents valid?

48. The Respondents' submissions on each of these issues are set out in paragraphs 49 to 81 below.

Did the Second Appellant include within her tax return the correct amount of rental income?

49. The tax returns filed by the Second Appellant stated that she had made the following losses for the tax years in question:

(1) the TYE 5 April 2011 - £89,867.80;

(2) the TYE 5 April 2012 - £50,096.51;

(3) the TYE 5 April 2013 - £30,533.01;

(4) the TYE 5 April 2014 - £31,340.00;

(5) the TYE 5 April 2015 - £42,270.20;

(6) the TYE 5 April 2016 - £95,621.00; and

(7) the TYE 5 April 2017 - £23,840.00.

That equated to aggregate losses over the period in question of £363,568.52.

50. The Respondents submitted that the Second Appellant had not provided any evidence to demonstrate how those losses were financed and that, because of this, the losses could not have been incurred.

51. The Second Appellant's tax return for the TYE 5 April 2011 stated that the Second Appellant was claiming losses for the following properties:

(1) 635 Old Kent Road;

(2) 20 Duppas Hill Road;

(3) 107 Northover Road;

(4) 152 Keedonwood Road;

(5) 89 Tillingbourne Green;

(6) 71 Clarendon Green; and

(7) 70 Greenway.

52. At the hearing, it was common ground that none of the latter 3 properties was available for rent. 89 Tillingbourne Green was occupied by Mr and Mrs James, 71 Clarendon Green was owned by Ms Ernest and 70 Greenway was occupied by the Second Appellant herself as her home and part of it was used by the First Appellant for its activities.

53. At the meeting of 10 September 2018 which is referred to in paragraph 24(15) above, the Second Appellant had informed the Respondents that she was in receipt of the following rental income per month for each property which was available for rent:

(1) 107 Northover Road - £1,200;

(2) 152 Keedonwood Road - £1,200;

(3) 635 Old Kent Road - £0; and

(4) 20 Duppas Hill - £400

54. This information was recorded in the notes of that meeting and, as mentioned in paragraph 24(16) above, a copy of those meeting notes had been sent to the Second Appellant and she had not informed the Respondents of any errors or omissions in those notes.

55. Following that meeting, the Respondents had received a letter from Denham Estate Agency which said that the Second Appellant had actually received £7,000 of rental income for 635 Old Kent Road in the TYE 5 April 2016.

56. The tax assessments and closure notices referred to in relation to the Second Appellant in paragraph 1 above had been calculated by:

(1) calculating the rental income in respect of each tax year using the figures referred to in paragraph 53 above, as amended by the information referred to in paragraph 55 above;

(2) allowing a deduction for the mortgage interest in respect of 107 Northover Road and 152 Keedonwood Road as shown in interest certificates which the Second Appellant had belatedly provided to them;

(3) allowing a deduction for 50% of the following amounts, which had been identified from the bank statements of the First Appellant as relating to works of repair and maintenance in the accounting periods corresponding to the tax years in question:

(a) the APE 31/08/11 - £2,492;

(b) the APE 31/08/12 - £6,624;

(c) the APE 31/08/13 - £0;

(d) the APE 31/08/14 - £12,039;

(e) the APE 31/08/15 - £6,507.00; and

(f) the APE 31/08/16 - £12,805.00.

The figure of 50% was used because the Respondents were unable to identify from the First Appellant's bank statements the properties to which the relevant expenses related or the nature of the work done. The Respondents considered that, given that no relief was due for work done on the three properties which weren't available for rent and that no relief was available for expenses of a capital nature, the figure of 50% was reasonable; and

(4) finally, allowing a deduction for a 10% wear and tear allowance.

57. The Respondents said that, following the issue of the closure notices and the discovery assessments, the Second Appellant had provided new information to the Respondents on 10 July 2021. That new information was as follows:

(1) a statement from the Second Appellant to the effect that the caretaker of certain of her properties had wrongly withheld from her £8,050 of the rent which he had collected from tenants in the TYE 5 April 2016;

(2) there had been a fire at 107 Northover Road on 9 February 2012, as Mr Jebb had testified in the witness statement referred to in paragraphs 25 and 26(2) above, which the Second Appellant told the Respondents had led to that property's remaining vacant for around a year; and

(3) a document which demonstrated that the roof of 635 Old Kent Road had had to be repaired in 2015.

58. The information set out in paragraph 57 above had led the Respondents:

(1) to reduce the rental income in the TYE 5 April 2015 by £8,050 – see paragraph 57(1) above;

(2) to reduce the rental income in the TYE 5 April 2012 by £2,400 and the rental income for the TYE 5 April 2013 by £12,000 – see paragraph 57(2) above; and

(3) to accept that no rental income was received in respect of 635 Old Kent Road during the period in question apart from £7,000 in the TYE 5 April 2016 and £8,400 in the TYE 5 April 2017 – see paragraph 57(3) above. (The figures for the latter two tax years were derived from the fact that the Respondents had received the letter from

Denham Estate Agency referred to in paragraph 55 above and the fact that the Second Appellant had said in her notice of appeal that she had received £8,400 of rent in respect of 635 Old Kent Road in the TYE 5 April 2017).

59. As a result of the adjustments referred to in paragraph 58 above, the Respondents now considered that the rental income received by the Second Appellant in each tax year was as follows:

(1) the TYE 5 April 2011 - £19,08;

(2) the TYE 5 April 2012 - £15,085;

(3) the TYE 5 April 2013 - £9,926;

(4) the TYE 5 April 2014 - £14,939;

(5) the TYE 5 April 2015 - £10,729;

(6) the TYE 5 April 2016 - £21,922; and

(7) the TYE 5 April 2017 - £31,011.

60. The Respondents submitted that the above figures had been reached on the basis of the limited documentation which had been made available to them, using the best judgment of the relevant officer of the Respondents and in accordance with the principles set out by Woolf J in *Van Boeckel v Customs and Excise Commissioners* (1980) 1 BVC 378 ("*Van Boeckel*"). Those principles were that:

(1) the Respondents should exercise their judgment honestly and in good faith;

(2) the Respondents should exercise their judgment based on all the material before them and, based on that material, come to a decision which was reasonable and not arbitrary; but

(3) the Respondents should not be required to do the work of the taxpayer. The Respondents were therefore not required to carry out exhaustive investigations.

In this case, the primary obligation to provide the documentation which supported the relevant claims made by the Second Appellant remained with the Second Appellant and the Respondents' obligation was merely to reach an honest good faith assessment of the Second Appellant's tax liabilities based on the material which the Second Appellant had provided.

Did the Second Appellant include within her tax return the correct amount of employment income?

61. The tax returns submitted by the Second Appellant stated that she had received the following by way of employment income from the First Appellant:

(1) the TYE 5 April 2011 - £6,500;

(2) the TYE 5 April 2012 - £6,500;

(3) the TYE 5 April 2013 - £6,500;

(4) the TYE 5 April 2014 - £0;

(5) the TYE 5 April 2015 - £10,000;

(6) the TYE 5 April 2016 - £0; and

(7) the TYE 5 April 2017 - £0.

62. The Respondents submitted that, based on the accounts of the First Appellant, the Second Appellant had in fact received the following by way of employment income from the First Appellant:

(1) the TYE 5 April 2011 - £1,000;

(2) the TYE 5 April 2012 - £25,000;

(3) the TYE 5 April 2013 - £0;

(4) the TYE 5 April 2014 - £12,000;

(5) the TYE 5 April 2015 - £10,000;

(6) the TYE 5 April 2016 - £12,500; and

(7) the TYE 5 April 2017 - £780.

63. However, as the First Appellant had not operated PAYE in relation to the payments in question, the Second Appellant was entitled to a tax credit in respect of her receipt of those payments in an amount equal to any tax which was payable in respect of those payments. As a result, the closure notices and discovery assessments referred to in relation to the Second Appellant in paragraph 1 above did not include any additional tax by reference to those payments.

Were the closure notices issued to the Second Appellant by the Respondents valid?

64. The Respondents had issued a closure notice in respect of each of the TYE 5 April 2013, the TYE 5 April 2016 and the TYE 5 April 2017. Each closure notice had been issued under Section 28A of the TMA following an enquiry opened into the relevant tax year under Section 9A of the TMA. The enquiry giving rise to each closure notice had been commenced within one year of the filing of the relevant tax return and was therefore within the time limit prescribed by Section 9A of the TMA. Each closure notice had then been issued to the Second Appellant on 11 December 2018 and had stated the conclusions drawn by the relevant officer and made the amendments to the tax return required to give effect to those conclusions. It had thus complied with the terms of Section 28A of the TMA. Each closure notice was therefore valid.

Were the discovery assessments issued to the Second Appellant by the Respondents valid?

65. The Respondents had issued a discovery assessment in respect of each of the TYE 5 April 2011, the TYE 5 April 2012, the TYE 5 April 2014 and the TYE 5 April 2015. Each discovery assessment had been issued under Section 29 of the TMA. In order for each discovery assessment to be valid:

(1) it needed to have been issued following the discovery by the relevant officer of the Respondents of, inter alia, a failure to assess income of the Second Appellant which ought to have been assessed to income tax in respect of the tax year or an insufficiency of the tax assessed on the Second Appellant in respect of the tax year or an excess in the relief which had been given to the Second Appellant in respect of the tax year (Section 29(1) of the TMA);

(2) either:

(a) at the time when the Respondents ceased to be entitled to give a notice of enquiry into the relevant return, it must have been the case that the relevant officer of the Respondents could not have been reasonably expected, on the basis of the information available to him at that time, to be aware of the insufficiency (Section 29(5) of the TMA); or

(b) the insufficiency in question must have been brought about carelessly or deliberately by the Second Appellant or a person acting on behalf of the Second Appellant (Section 29(4) of the TMA); and

(3) it needed to have been issued within the time limit set out in Section 36 of the TMA.

Section 29(1) of the TMA

66. The discovery assessments had been issued on 11 December 2018 following the discovery made at the meeting on 10 September 2018 that the Second Appellant had claimed losses in respect of properties which she was not making available for rent. This meant that the relevant officer of the Respondents discovered at that stage that the relief which had been given to the Second Appellant in respect of the relevant tax years was excessive. Accordingly, each discovery assessment met the condition set out in Section 29(1) of the TMA.

Section 29(5) of the TMA

67. In addition, there was nothing in the tax returns of the First Appellant for the relevant accounting periods which meant that, at the time when the Respondents ceased to be entitled to give a notice of enquiry into the relevant returns, the relevant officer of the Respondents could have been reasonably expected, on the basis of the information available to him at that time, to be aware of the excess relief. Accordingly, each discovery assessment met the condition set out in Section 29(5) of the TMA.

Section 29(4) of the TMA

68. Moreover, although it was not strictly necessary for the Respondents to establish that each discovery assessment met the condition set out in Section 29(4) of the TMA, the Respondents considered that the excess relief described above had been brought about deliberately or, in the alternative, carelessly by the Second Appellant or a person acting on behalf of the Second Appellant.

Section 36 of the TMA

69. The question of whether the Second Appellant or a person acting on behalf of the Second Appellant had acted deliberately or carelessly in bringing about the excess relief was in any case relevant in relation to the time limit for making the discovery assessments. This was because of the terms of Section 36 of the TMA. If the Second Appellant or person acting on behalf of the Second Appellant had acted deliberately in bringing about the loss of tax arising out of the excess reliefs, then all of the discovery assessments would be in time because of the 20 year time limit in Section 36(1A) of the TMA, whereas, if the Second Appellant or person acting on behalf of the Second Appellant had acted carelessly in bringing about that loss of tax, then all but the discovery assessments in respect of the TYE 5 April 2011 and the TYE 5 April 2012 would be in time because of the 6 year time limit in Section 36(1) of the TMA.

70. The Respondents submitted that the losses of tax in this case had been brought about deliberately by the Second Appellant. They noted that there was no statutory definition of the word "deliberate" in this context but that the Second Appellant's conduct fell within the description of deliberate error set out in *Auxilium* at paragraph [63] or, failing that, the description of deliberate error set out in *Clynes* at paragraphs [81] to [86].

71. In the Respondents' view, the Second Appellant had acted deliberately within the description set out in the above cases because, prior to submitting the Second Appellant's tax returns, the Appellants' accountant sent those returns to the Second Appellant for approval. Those returns contained obvious errors of which the Second Appellant would have been aware and, even if she was not so aware, that could have been only because she chose not to identify them. In particular:

(1) the Respondents referred us to an email from the Second Appellant to the Appellants' accountant of 13 May 2014 in which the Second Appellant expressly pointed out to her accountant that certain of the properties in respect of which losses were being claimed in her tax return were not available for rent. Notwithstanding this knowledge, the Second Appellant had submitted the tax returns in question and had not drawn this error to the Respondents' attention;

(2) the Respondents pointed out that:

(a) as a director of the First Appellant, the Second Appellant would have been aware of the amounts paid to her by the First Appellant and yet she had not included those amounts in her tax returns; and

(b) the aggregate amount of losses claimed by the Second Appellant in respect of the properties over the period from 6 April 2010 to 5 April 2017 was £363,568.52 and it must have been obvious to the Second Appellant that she did not have the funds sufficient to finance losses of this magnitude.

Thus, the loss of tax arising from each return had been brought about deliberately and each discovery assessment was within the time limit set out in Section 36(1A) of the TMA.

72. Each discovery assessment was therefore valid.

73. In the alternative, the Second Appellant had, at the very least, acted carelessly in submitting her returns so that each discovery assessment apart from the discovery assessments issued in respect of the TYE 5 April 2011 and the TYE 5 April 2012 were valid pursuant to the time limit set out in Section 36(1) of the TMA.

Were the penalty assessments issued to the First Appellant by the Respondents valid?

74. The tax returns submitted by the Second Appellant were in a category of document falling within the table set out in paragraph 1(1) of Schedule 24, they contained inaccuracies leading to an understatement of tax or a false or inflated statement of a loss and those inaccuracies were deliberate or, in the alternative, careless. Accordingly, the terms of paragraph 1 of Schedule 24 were satisfied.

75. In terms of quantifying the penalty, the Respondents considered that the inaccuracies in question were deliberate for the reasons set out in paragraphs 70 and 71 above. The inaccuracies were not concealed but the disclosure of the inaccuracies had been prompted because that had occurred only after the Respondents had opened enquiries into three of the Second Appellant's tax returns. The penalty for a deliberate unconcealed inaccuracy the disclosure of which was prompted could be between 35% and 70% of the tax lost by reason of the inaccuracy. Precisely where in that range was appropriate in any given case depended on the quality of the disclosure. In this case, the Second Appellant had not been co-operative. The Respondents had had to issue two notices under Schedule 36 and impose various penalties for the Second Appellant's failure to comply with those notices. Moreover, even now, the Second Appellant was refusing to provide the Respondents with her bank statements. Those bank statements would have enabled the Respondents more accurately to calculate the rents and employment income received, and the expenses incurred, by the Second Appellant. Accordingly, no discount had been given.

Request to revise the amounts shown in the closure notices, the discovery assessments and the penalty assessments

76. As a result of the new evidence which the Second Appellant had provided to the Respondents on 10 July 2021 – as to which, see paragraphs 57 to 59 above – the Respondents requested us to exercise our powers to make variations to the amounts shown in the closure

notices, the discovery assessments and the penalty assessments in the course of determining the Second Appellant's appeal.

77. Based on that new information, the Respondents considered that the amount of the closure notices and discovery assessments should be determined as follows:

(1) the TYE 5 April 2011 - £2,721.20;

(2) the TYE 5 April 2012 - £3,980.10;

(3) the TYE 5 April 2013 - £364.20;

(4) the TYE 5 April 2014 - £2,989.80;

(5) the TYE 5 April 2015 - £2,145.80;

(6) the TYE 5 April 2016 - £4,386.60; and

(7) the TYE 5 April 2017 - £4,158.20.

78. The Respondents submitted that:

(1) each of the amounts set out in paragraphs 77(1) to 77(6) above was lower than the amount set out in the original closure notice or discovery assessment and that we had the power to reduce the amount set out in the relevant closure notice or discovery assessment under Section 50(6) of the TMA; and

(2) the amount set out in paragraph 77(7) above was higher than the amount set out in the original closure notice and that we had the power to increase the amount set out in the relevant closure notice under Section 50(7) of the TMA.

79. Based on the new information and the revised figures set out in paragraph 77 above, the Respondents considered that the penalty assessments should be determined as follows:

(1) the TYE 5 April 2011 - £1,904.84;

(2) the TYE 5 April 2012 - £2,786.07;

(3) the TYE 5 April 2013 - £254.94;

(4) the TYE 5 April 2014 - £2,092.86;

(5) the TYE 5 April 2015 - £1,502.06;

(6) the TYE 5 April 2016 - £3,070.62; and

(7) the TYE 5 April 2017 - £2,910.74.

80. The Respondents submitted that we had the power under paragraph 17 of Schedule 24 to determine the penalty assessments in the amounts described above because that provision allowed us to substitute for the original decision another decision which the Respondents had the power to make.

81. As a result of the changes described in paragraphs 76 to 80 above, the total amount due from the Second Appellant would be reduced from £55,920.09 to £35,268.03.

THE SUBMISSIONS OF THE APPELLANTS

The primary submission

82. The Appellants' primary submission – and indeed the only submission contained in the skeleton argument which was belatedly delivered to the Respondents and the First-tier Tribunal a few days before the hearing – was that the Second Appellant was not a tax expert and had relied entirely on the Appellants' accountant to deal with her tax affairs and the tax affairs of the First Appellant. The accountant had, since preparing the relevant returns, refused to engage

in further contact with the Second Appellant and refused to return to the Second Appellant a number of original documents, including the Second Appellant's bank statements. The Second Appellant submitted that, since she knew nothing about tax, it was incomprehensible to expect her to know that there was anything wrong with the Appellants' tax returns or to expect her to rectify the Appellants' returns and that the Respondents instead needed to take matters up with the Appellants' accountant directly and require the accountant to amend the returns appropriately. In short, the Second Appellant submitted that:

(1) the errors in the returns were not her responsibility;

(2) the Respondents should compel the Appellants' accountant to perform his obligations to prepare accurate tax returns; and

(3) neither she nor the First Appellant should be held to be responsible for the prior inaccuracies.

Additional submissions

83. At the hearing, the Second Appellant made some additional submissions which had not been pre-figured in her skeleton argument. None of those submissions related to the procedural validity of the closure notices, the discovery assessments or the penalty assessments. Instead, they related solely to the amount of tax set out in the closure notices and the discovery assessments. Those submissions may be summarised as follows:

(1) the Respondents had been wrong in assuming that the sole activity of the First Appellant was to carry on a nursing agency. In fact, the registration details at Companies House when the First Appellant had been incorporated showed that the First Appellant carried on two activities – a nursing agency and the provision of property management services. That explained why the First Appellant had claimed relief for expenses associated with properties which it did not own. The expenditure on repairs and the mortgages were therefore deductible for the First Appellant;

(2) the First Appellant had engaged the services of two students to assist with those two activities – the Second Appellant's daughter and a person unrelated to the Second Appellant, a Mr DR James. The payments to those individuals were the amounts described in the accounts of the First Appellant as "education grants". They were effectively salaries paid to people engaged in working for the First Appellant and were therefore deductible trading expenses;

(3) similarly, it was perfectly legitimate for a company to occupy a room in the residential premises of a director and to pay rent to the director for its use of the premises. Thus, the amounts which appeared as rent in the accounts of the First Appellant were also deductible trading expenses of the First Appellant;

(4) more generally, the First Appellant needed to incur various expenses in carrying on its trades. Its payments to Sky Digital for internet services and its payments to EDF Energy for electricity were the sort of expenditure which a business would generally incur. In addition, the provision of nurses entailed expenditure on food, accommodation and travel. Thus, its payments to Tesco for food and to lastminute.com for accommodation should have been allowed as deductions. So far as travel was concerned, the Respondents were wrong to have limited the deductions to the specific travel cards to which they referred in their submissions. All of the travel expenses were deductible; and

(5) turning to her own tax position, she explained that a lot of money had had to be spent on improving the properties as each of them was in a dilapidated state when acquired. The time spent working on the properties, together with the fire which occurred

at 107 Northover Road, meant that there were long periods when the properties were not generating any income.

DISCUSSION

Introduction

84. We should start this part of our decision by saying that, unfortunately, the Second Appellant's evidence and submissions in relation to the appeals repeatedly indicated a failure on her part to understand some of the basic principles of finance and tax. Whilst that is not surprising, it has made the determination of these appeals somewhat difficult. Examples of the Second Appellant's misunderstandings were:

(1) her belief that, because the First Appellant had been registered with Companies House as a company which intended to carry on property management services as well as nursing services, that was sufficient in and of itself to mean that it was carrying on the trade of providing property management services notwithstanding the absence of any income from that activity in the First Appellant's accounts;

(2) her failure to understand:

(a) that each Appellant was responsible as a matter of law for that Appellant's obligations in relation to tax and that therefore each Appellant was responsible for the actions taken on that Appellant's behalf by the Appellants' accountant;

(b) that the burden was on the Appellants to establish that the nature of the expenditure incurred by them was such that that expenditure qualified for relief - for example, by the production of invoices or receipts for the relevant payments;

(c) the distinction between allowable expenditure of a revenue nature and non-allowable capital expenditure; and

(d) the need to show that expenditure incurred by the First Appellant had to be wholly and exclusively incurred for the purpose of its trade in order to be deductible for tax purposes; and

(3) her belief that the First Appellant could pay rent to her which would be deductible for the First Appellant but tax-free in her hands.

85. These views did tend to support the impression given by the documentary evidence that an appropriate distinction between the activities of each Appellant had not been maintained.

86. Notwithstanding the difficulties experienced by the Second Appellant in dealing with her tax affairs, we do not accept her primary over-arching submission in relation to the two appeals, which was that responsibility for the Appellants' tax affairs lay with the Appellants' accountant and that it was up to the Respondents to ensure that the Appellants' accountant complied with the Appellants' tax obligations. At the start of the hearing, we explained to the Second Appellant that it was not for the Respondents to compel the Appellants' accountant to do anything in relation to the Appellants' tax affairs. That was a matter for the Appellants. The Appellants had an obligation to file the tax returns which they submitted and any inaccuracies in those returns were ultimately their responsibility when it came to dealings with the Respondents. Thus, the Second Appellant's ignorance of the basic principles of finance and tax and reliance on the Appellants' accountant is of no relevance when it comes to the various substantive questions underlying the amounts set out in the closure notices and the discovery assessments.

87. However, those factors do have considerably more relevance when it comes to considering whether the inaccuracies in the Appellants' tax returns were deliberate or merely careless. In that regard, we have concluded that the Second Appellant's ignorance of the

basic principles of finance and tax and reliance on the Appellants' accountant mean that the relevant inaccuracies cannot be seen as deliberate.

88. In reaching this conclusion, we have taken into account the two cases on this subject which were cited to us by the Respondents – *Auxilium* and *Clynes*.

89. It is clear from the decision of the First-tier Tribunal in *Auxilium* that the relevant test to apply in this case is subjective and not objective. The question is not "whether a reasonable taxpayer might have made the same error or even whether this taxpayer failed to take all reasonable steps to ensure that the return was accurate. It is a question of the knowledge and intention of the particular taxpayer at the time". The key point is that the particular taxpayer must have known that what appeared in his or her tax return was inaccurate and nevertheless have submitted the return to the Respondents with the intention that the Respondents should rely on it as an accurate document. Bearing that in mind, we think that, looking at the subjective state of mind of the Second Appellant, her understanding of the relevant principles of finance and tax was so hazy and her reliance on the Appellants' accountant was so absolute that it would be quite wrong to conclude that she was aware of the inaccuracies in the Appellants' tax returns. That being the case, the inaccuracies cannot in our view be seen as being deliberate.

90. The decision in *Clynes* is potentially more helpful to the Respondents in this regard in that the First-tier Tribunal in that case held that "depending on the precise circumstances, an inaccuracy may also be held to be deliberate where it is found that the person consciously or intentionally chose not to find out the correct position". We can see how there may be circumstances where a taxpayer has deliberately put his or her head in the sand and thus deliberately chosen to maintain a state of ignorance in order to disavow responsibility for an inaccuracy. However, in order for that to be the case, we think that the taxpayer must at least suspect that an entry in the tax return is inaccurate and then make a conscious decision not to explore whether or not that is the case. Having heard the evidence and submissions of the Second Appellant, we have concluded that the present case does not fall within that category. In *Clynes*, the taxpayer in question had an accounting qualification and ran his own accounting business. He was also vastly experienced in acting as a director of similar businesses and there was evidence of a pattern of previous tax defaults (see *Clyne*s at paragraphs [87] to [89]). When viewed in that light, and taken together with other aspects of the evidence in that case, the relevant appellant's ignorance of the inaccuracy was held to be "implausible" (see *Clynes* at paragraphs [90] to [99]). The facts of the present case are some distance from the facts in *Clynes*. However misguided some of the Second Appellant's views on the application of the relevant tax legislation may be, we accept that she did not deliberately close her mind to the possibility that there were inaccuracies in the Appellants' tax returns but instead relied on the Appellants' accountant to get the tax returns right.

91. We were not persuaded that the examples given by the Respondents and outlined in paragraphs 42 and 71 above showed that either:

(1) the Second Appellant was aware of the inaccuracies in the tax returns of the Appellants and deliberately chose to file the Appellants' tax returns despite that awareness; or

(2) deliberately closed her mind to the question of whether the Appellants' tax returns contained the inaccuracies.

Instead, we believe that she was firmly of the view that the Appellants' tax returns were accurate. Indeed, from her submissions at the hearing, it would seem that, even now, the Second Appellant does not accept that many of the entries in the Appellants' tax returns were in fact inaccurate. Although we have already said that we found the Second Appellant generally to be an unreliable witness, we concluded that the conviction with which she argued

the specific points at issue in the appeals was genuine. That being the case, it is hard to see how it can be said that the Second Appellant was aware of the inaccuracies at the time when the tax returns were filed or deliberately closed her mind to the question of whether or not the relevant entries were inaccurate.

92. For example:

(1) the correspondence to which the Respondents referred at the hearing in relation to the properties which were not available for rent but still included in the Second Appellant's tax returns – see paragraph 71(1) above – showed that the Second Appellant was asking the Appellants' accountant whether the inclusion of those properties in the relevant returns was correct. At the hearing, the Second Appellant said that, in response to that email, the Appellants' accountant told her that it was correct and that all of the properties needed to be included and not just those available for rent. The fact that the Second Appellant asked the Appellants' accountant whether the properties which weren't available for rent should be included in her tax returns merely indicates that she was concerned about the rectitude of doing so. If she was then told by her accountant that that was correct and saw no reason to doubt that answer – as she alleged at the hearing – then that would negate a conclusion that the error in question was deliberate;

(2) similarly, we are not convinced that the Second Appellant ever knew that the amounts recorded in the First Appellant's accounts as having been paid to her were less than the amounts shown in the First Appellant's bank statements as having been so paid or that the latter amount exceeded the amount which was included by the Second Appellant in her own tax returns. We accept that she relied on the Appellants' accountant to ensure that the relevant amounts were properly recorded;

(3) in addition, we accept that the Second Appellant relied on the Appellants' accountant to ensure that the expenses which were claimed as deductions by the First Appellant actually related to the activities of the First Appellant and were not her own personal expenses; and

(4) finally, whilst the losses recorded in the Second Appellant's tax returns were significant enough to ensure that a reasonable person might well have queried the relevant number with his or her accountant, we accept that the Second Appellant did not notice this and simply relied on the Appellants' accountant to have got the number right.

93. In the light of the above, we have concluded that the inaccuracies in the Appellants' tax returns were not deliberate.

94. However, the nature of the inaccuracies is such that we do not think that the Second Appellant can plausibly say that she did not act carelessly in signing the tax returns of the Appellants. We think that she did not take reasonable care to satisfy herself that the tax returns were accurate. She was entitled to place some reliance on the Appellants' accountant in relation to the preparation of the tax returns but, ultimately, it was incumbent on her to consider whether the entries on the tax returns looked reasonable and to take reasonable steps to ascertain the accurate position. Had she done that, she would have become aware, for example, that:

(1) the properties which were not available for rent should not have been included in her tax returns;

(2) there was a mismatch between the amounts recorded in the First Appellant's accounts as having been paid to her and the amounts shown in the First Appellant's bank statements as having been paid to her and that not all of the latter amounts were included in her tax returns;

(3) some of the expenses which were claimed as deductions in the First Appellant's tax returns were her own personal expenses; and

(4) the losses claimed by her in her property business were too high to have actually been incurred.

95. In the light of the above, we have concluded that the inaccuracies in the Appellants' tax returns were careless.

The First Appellant

96. Following those introductory observations, we now turn to address the questions which arise in relation to the appeal by the First Appellant. Our views on those questions are as follows:

(1) the Respondents made the following generic changes in issuing the closure notices and discovery assessments set out in relation to the First Appellant in paragraph 1 above:

(a) they disallowed amounts shown in the First Appellant's accounts which were not reflected in the First Appellant's bank statements;

(b) even where they were reflected in the First Appellant's bank statements, they disallowed amounts shown in the First Appellant's accounts to the extent that insufficient evidence was produced to show that the payments related to the conduct of the First Appellant's trade and, in particular, to the extent that such evidence as had been provided suggested that the payments related to the property business of the Second Appellant or to the non-business private activities of the Second Appellant; and

(c) they imposed a charge under Section 455 to the extent that such evidence as had been provided suggested that payments either had been made to, or had discharged the obligations of, the Second Appellant (or, in the case of part of the education grant in the APE 31 August 2016, the Second Appellant's daughter);

(2) we agree with the Respondents' decision to disallow expenses which appeared in the First Appellant's accounts but were not reflected in the First Appellant's bank statements. That is because, as regards such expenditure, there is simply no evidence that the relevant expenses were ever actually incurred;

(3) we also agree with the Respondents' decision to disallow expenses which both appeared in the First Appellant's accounts and were reflected in the First Appellant's bank statements but for which insufficient evidence has been produced by the First Appellant to show that:

(a) the payments were incurred wholly and exclusively for the purposes of a trade carried on by the First Appellant; and/or

(b) the payments met the other relevant qualifications for relief, such as having a revenue, as opposed to a capital, nature;

(4) in relation to this issue, the submissions of the Second Appellant at the hearing were very much focused on the generic as opposed to the specific. By that we mean that the Second Appellant's submissions were directed at establishing that expenditure on things like rent, the internet, electricity, food, travel and accommodation were deductible in principle for the First Appellant but she failed to understand that, in order for the particular expenses which had been described as such in the First Appellant's accounts and/or the First Appellant's bank statements to qualify for relief, it was necessary to provide the evidence demonstrating exactly what the relevant entry related to and to

establish that, in the light of the specific nature of the expense, the expense qualified for relief in the hands of the First Appellant – see paragraph 21 of Schedule 18;

(5) by way of example, the amounts paid by the First Appellant to Sky Digital, Tesco, EDF Energy and lastminute.com, and the cash withdrawals, were just as capable of relating to the personal expenditure of the Second Appellant and her family as they were to the conduct of the First Appellant's trade. In order to secure relief for the expenditure, the First Appellant needed to adduce evidence – for example, invoices – to show that the expenditure fell within the latter category and not the former. However, no such evidence has been provided;

(6) we consider that the amounts paid by the First Appellant in respect of mortgages and the building works were also not deductible because those amounts related to the properties owned by the Second Appellant and, as such, could be deducted only by the Second Appellant, where appropriate. In this regard, we find as a fact that the First Appellant was not carrying on the trade of providing property management services, notwithstanding the fact that it may have been registered as such at Companies House, because there is no evidence that the First Appellant ever carried on that activity. The activity is not mentioned in the First Appellant's accounts and there is no evidence in those accounts or the First Appellant's bank statements that the First Appellant ever received any amount from the Second Appellant in return for carrying on the activity. Since the expenditure in question all related to properties owned by the Second Appellant, if the First Appellant had been carrying on a trade of providing property management services, one would have expected to see some evidence of payments made by the Second Appellant to the First Appellant to reimburse the First Appellant for the expenditure incurred by the First Appellant in the course of that activity and to pay the First Appellant a fee for services rendered in respect of that activity (or at the very least some contemporaneous evidence of an obligation on the part of the Second Appellant to make such payments in the future). No such evidence has been provided.

At the hearing, in response to our question as to why the accounts of the First Appellant showed no revenue from her as the recipient of the property management services which the First Appellant was purportedly providing, the Second Appellant said that that was because the properties had given rise to such significant losses and that the intention had been for her to pay the First Appellant for such services as soon as the properties became profitable. We do not accept that explanation. Instead, we find as a fact that there was never any intention for the Second Appellant to pay the First Appellant for any such activities at any time. We would add that, in this respect, we have drawn an adverse inference from the fact that the Second Appellant had never mentioned to the Respondents prior to the hearing that the First Appellant carried on a second trade of providing property management services in addition to its trade of running a nursing agency. Her failure to make this point during the long course of the investigation into the affairs of the Appellants is in our view telling;

(7) a similar point may be made in relation to the rent which was purportedly paid by the First Appellant for its occupation of the room in the Second Appellant's home at 70 Greenway. We agree with the Second Appellant that, in principle, a company occupying a room in the home of its shareholder is entitled to a deduction for the rent which it pays to that shareholder in return for that right. However, we consider that insufficient evidence has been produced to show that that is what has occurred in this case. The rent shown in the accounts of the First Appellant in respect of the APE 31 August 2011, the APE 31 August 2013, the APE 31 August 2014, the APE 31 August 2015 and the APE 31 August 2016 was not reflected in the First Appellant's bank statements at all, thereby

strongly suggesting that it wasn't paid. The bank statements did contain an entry for a payment made to the Second Appellant in the APE 31 August 2012 which was described as rent paid but, in the absence of any other evidence that a tenancy existed and in the light of the unsubstantiated claims to deduct rent in respect of the other accounting periods of the First Appellant as referred to above, we think that the First Appellant has failed to discharge the burden of proving that the relevant amount was in fact paid as rent to the Second Appellant. (We would add that, even if the characterisation of the payment as deductible rent were to be accepted, there would be a matching receipt in the hands of the Second Appellant which has not been taken into account in the closure notices and discovery assessments in relation to the Second Appellant which are set out in paragraph 1 above and therefore it would not be to the advantage of the Appellants taken together for that to be the case);

(8) we also believe that the Respondents were correct in imposing a charge under Section 455 to the extent that such evidence as has been provided suggests that payments either have been made to, or have discharged the obligations of, the Second Appellant (or, in the case of part of the so-called "education grant" in the APE 31 August 2016, the Second Appellant's daughter). We say that because:

(a) the payments made directly to the Second Appellant (or to her daughter) were clearly "advances" of money falling within the language in Section 455(1) of the CTA 2010 and made to the Second Appellant (a "participator" in the First Appellant) or to the Second Appellant's daughter (an "associate" of a "participator"). There is no evidence to the effect that that they were dividends or gifts from the First Appellant or payments for services rendered to the First Appellant and therefore the relevant amounts created an indebtedness on the part of the recipient to the First Appellant; and

(b) the payments made to discharge certain obligations of the Second Appellant were, in our view, correctly treated by the Respondents in precisely the same way. In that regard, we see no difference between an advance made by A to B and an advance made by A to a person whom B is obliged to pay. That is a natural reading of the section in any event but the position is put beyond doubt by the language in Section 455(4) of the CTA 2010 to the effect that a close company is to be treated as making a loan to a person in circumstances where the person incurs a debt to the close company. In our view, in the absence of any evidence that a dividend or gift was intended or that the payment was in return for services rendered by B to A, the consequence of a payment made by A to discharge an obligation of B is that B thereby becomes indebted to A;

(9) turning then to the validity of the closure notices and the discovery assessments, we agree with the Respondents that:

(a) the enquiries were validly opened in accordance with paragraph 24 of Schedule 18 and the closure notices were validly issued in accordance with paragraph 32 of Schedule 18; and

(b) the discovery assessments satisfied the conditions in paragraph 41(1) of Schedule 18 and paragraph 44(1) of Schedule 18.

This is largely for the reasons which the Respondents have given but we would note that, in our view, each of the matters which is reflected in each discovery assessment – as outlined in paragraph 32 above - satisfied the conditions in paragraph 41(1) of Schedule 18 and paragraph 44(1) of Schedule 18 and not merely the matters to which the Respondents referred as outlined in paragraph 35 above.

We would add that the exclusion set out in paragraph 45 of Schedule 18 for mistakes in tax returns which reflected generally prevailing practice at the time of filing the returns is of no relevance in this case;

(10) however, for the reasons set out in paragraphs 87 to 95 above, we have concluded that the errors in the First Appellant's returns leading to the losses of tax were not deliberate but were merely careless. As a result:

(a) each revised discovery assessment other than the revised discovery assessment in respect of the APE 31 August 2011 satisfied the conditions in paragraph 43 of Schedule 18;

(b) each revised discovery assessment other than the revised discovery assessment in respect of the APE 31 August 2011was issued within the time limit allowed by paragraph 46 of Schedule 18;

(c) the revised discovery assessment in respect of the APE 31 August 2011 is out of time, so that it is invalid and, as this means that there is no potential lost revenue in respect of that accounting period, the penalty assessment in respect of that accounting period must be cancelled. The First Appellant's appeal therefore succeeds to that extent; and

(d) so far as concerns the revised closure notice in respect of the APE 31 August 2012, we have considered whether the fact that the revised discovery assessment in respect of the APE 31 August 2011 is out of time and therefore invalid means that the Respondents are precluded from denying relief to the First Appellant for the loss of £3,956 which the First Appellant has claimed to carry forward from the earlier accounting period to the later accounting period. We have concluded that that is not the case. In our view, the only effect of paragraph 46 of Schedule 18 is to preclude the Respondents from issuing an assessment in respect of the earlier accounting period. It does not mean that, in issuing a closure notice in respect of the later accounting period, the Respondents are bound to ignore the conclusions which they have reached in relation to the earlier accounting period. We therefore uphold the revised closure notice in respect of the APE 31 August 2012; and

(11) as regards the quantum of the remaining penalty assessments, we agree with the conclusion of the Respondents that, based on the manner in which the investigation proceeded – as outlined in paragraph 46 above - the relevant inaccuracies were not concealed but the disclosure of the inaccuracies was prompted and the quality of the disclosure was limited. We therefore consider that the Respondents' decision to give a small discount equal to 5% of the difference between the maximum penalty and the minimum penalty was entirely appropriate although that discount should now be calculated by reference to 5% of the difference of 15% between the maximum penalty (of 30%) and the minimum penalty of (of 15%), given that the inaccuracies and consequent losses of tax were careless and not deliberate. Consequently, we have decided to substitute for the Respondents' decision to issue a penalty assessment to the First Appellant in respect of each of the APE 31 August 2012, the APE 31 August 2013, the APE 31 August 2014, the APE 31 August 2015 and the APE 31 August 2016 a penalty assessment in the amount of 30% minus 0.75% (which is 5% of 15%) of the tax shown in the revised closure notice or discovery assessment set out in relation to the First Appellant in paragraph 1 above which relates to each relevant accounting period. We can perceive no "special circumstances" within the meaning of paragraph 11 of Schedule 24 which would justify any further reduction.

97. In relation to paragraphs 96(10) and 96(11) above, we note for the sake of completeness that the Respondents would have been entitled to succeed in relation both to the validity of the discovery assessment in respect of the APE 31 August 2011 and to the calculation of the penalties in respect of that and the other accounting periods by reference to deliberate behaviour if they had been able to establish that the Appellants' accountant (as distinct from the Second Appellant) had acted deliberately in including the inaccuracies in the tax returns for those accounting periods and thus in bringing about the losses of tax in respect of those accounting periods. However, whilst it is not surprising, the Respondents made no pleading (and adduced no evidence) to that effect at the hearing, and therefore we have focused exclusively on the Second Appellant and not both the Second Appellant and the Appellants' accountant in reaching the conclusions in those paragraphs.

The Second Appellant

98. We now turn to address the questions which arise in relation to the appeal by the Second Appellant. Our views on those questions are as follows:

(1) the Respondents submit that they issued the closure notices and discovery assessments based on their best judgment in the light of the limited information and documents provided to them by the Second Appellant. Before considering the relevance and validity of this submission, we should say that, in our view, there really is no justification for the astonishing level of non-compliance and lack of co-operation which has been shown by the Second Appellant in connection with the investigation into her tax affairs;

(2) we are not at all sure that it is necessary for the Respondents to establish that their conclusions in this regard have been reached to the best of their judgment. That phrase (and its equivalents) are used in certain provisions of the tax legislation – such as the legislation in relation to VAT, paragraph 36 of Schedule 18 and Section 28C of the TMA - but it does not appear in the legislation with which the Second Appellant's appeal is concerned. Section 28A of the TMA merely refers to the setting out by the relevant officer of the Respondents of the conclusions reached in relation to his or her enquiries and Section 29(1) if the TMA merely refers to the making of an assessment in the amount or further amount which, in the opinion of the relevant officer of the Respondents, is required in order to make good to the Crown the loss of tax in question. There is no express reference to best judgment (or anything equivalent to that) at all;

(3) we therefore consider that there is no need for us to address the question of whether the relevant officer of the Respondents has exercised best judgment in connection with the closure notices and discovery assessments. The only relevant question for us is to determine whether the closure notices or discovery assessments should stand good, be reduced or be increased, in each case in accordance with Section 50 of the TMA;

(4) another way of putting the point made in paragraphs98(2) and 98(3) above is that the case law establishes that there are two distinct questions for the First-tier Tribunal to consider when it is dealing with a best judgment assessment in the VAT context. The first is the "jurisdictional" question of whether the Respondents have assessed the amount of tax due "to the best of their judgment" and the second is the "appellate" question of whether the First-tier Tribunal has grounds for changing the quantum of the assessment. This arises out of the fact that the language used in the relevant VAT legislation requires both questions to be addressed - in that Section 83(p) of the Value Added Tax Act 1994 provides for both an appeal with respect to a VAT assessment and an appeal with respect to the amount of such an assessment - see *Rahman (trading as Khayam Restaurant*) v *The Commissioners for Her Majesty's Customs and Excise* [2003] STC 150 at paragraphs

[5] and [6] and *Kyriakos Karoulla (trading as Brockley's Rock) v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKUT 255 (TCC) at paragraph [9]. In the case of the provisions with which are concerned, it is really only the "appellate" question which needs to be addressed;

(5) notwithstanding the above conclusion, for the sake of completeness, we would record that, in our view, the Respondents have done all that they reasonably can in the circumstances to ensure that both:

> (a) the amounts shown as being due in the closure notices and discovery assessments were accurate, based on the information available to the Respondents at the time; and
>
> (b) the revised amounts which they now suggest as the amounts at which those closure notices and discovery assessments should be determined are accurate, based on the new information provided by the Second Appellant on 10 July 2021;

(6) we therefore consider that the Respondents, in so acting, have exercised their judgment honestly and in good faith and, based on all the material before them, come to a decision which was reasonable and not arbitrary. They have therefore complied with the principles summarised in paragraph 60 above in relation to *Van Boeckel*;

(7) turning then to the "appellate" question, for the reasons set out in paragraphs 98(8) to 98(11) below, we have concluded that, subject to the point made in paragraph 98(13)(c) below in relation to the invalidity of the discovery assessments in respect of the TYE 5 April 2011 and the TYE 5 April 2012, we agree with the Respondents' submissions in paragraphs 49 to 63 and 76 to 78 above as to the manner in which the tax due under the closure notices and discovery assessments set out in relation to the Second Appellant in paragraph 1 above was initially calculated and is now to be reduced or increased;

(8) the principles used by the Respondents in calculating the rental income and employment income of the Second Appellant in the tax years in question seem to us to be unexceptionable. If anything, we think that the Respondents have been generous to the Second Appellant in their calculation of the expenditure which they are allowing as a deduction to the Second Appellant in respect of her property business. Given the number of properties owned by the Second Appellant which were not available for rent and the fact that only expenses of a revenue nature, as opposed to a capital nature, are deductible as a matter of law, the deduction for 50% of the expenses which the Respondents have been able to identify for repairs and building work seems to us to be, if anything, generous to the Second Appellant;

(9) we do not accept the Second Appellant's submission that, because each property was acquired in a dilapidated state, that justifies the extraordinary losses which were shown in the Second Appellant's tax returns in respect of the properties. It seems to us to be implausible that the Second Appellant would have been able to finance losses of that amount;

(10) we also think that the Respondents have been extremely generous to the Second Appellant in giving her a credit in respect of the PAYE which ought to have been deducted from the payments of employment income which were made to her by the First Appellant without at the same time assessing the First Appellant in respect of that PAYE;

(11) all in all, we think that the Second Appellant can consider herself fortunate in the circumstances that the amounts in the closure notices and the discovery assessments, and the adjusted amounts which the Respondents now seek in the determination of the appeal

to the extent that the appeal relates to the closure notices and the discovery assessments are as they are;

(12) turning then to the validity of the closure notices and the discovery assessments, we agree with the Respondents that, for the reasons they have given:

(a) the enquiries were validly opened in accordance with Section 9A of the TMA and the closure notices were validly issued in accordance with Section 28A of the TMA; and

(b) the discovery assessments satisfied the conditions in Section 29(1) of the TMA and Section 29(5) of the TMA.

This is largely for the reasons which the Respondents have given but we would note that, in our view, each of the matters which is reflected in each discovery assessment – as outlined in paragraphs 49 to 56 above - satisfied the conditions in Section 29(1) of the TMA and Section 29(5) of the TMA and not merely the matter to which the Respondents referred as outlined in paragraph 66 above.

We would add that the exclusion set out in Section 29(2) of the TMA for mistakes in tax returns which reflected generally prevailing practice at the time of filing the returns is of no relevance in this case;

(13) however, for the reasons set out in paragraphs 87 to 90 above, we have concluded that the errors in the Second Appellant's returns leading to the losses of tax were not deliberate but were merely careless. As a result:

(a) each discovery assessment other than the discovery assessments in respect of the TYE 5 April 2011 and the TYE 5 April 2012 satisfied the conditions in Section 29(4) of the TMA;

(b) each discovery assessment other than the discovery assessments in respect of the TYE 5 April 2011 and the TYE 5 April 2012 was issued within the time limit allowed by Section 36 of the TMA;

(c) the discovery assessments in respect of the TYE 5 April 2011 and the TYE 5 April 2012 are out of time, so that they are both invalid and, as this means that there is no potential lost revenue in respect of those tax years, the penalty assessments in respect of those tax years must be cancelled. The Second Appellant's appeal therefore succeeds to that extent; and

(d) so far as concerns the closure notices in respect of the TYE 5 April 2013, the TYE 5 April 2016 and the TYE 5 April 2017 and the discovery assessments in respect of the TYE 5 April 2014 and the TYE 5 April 2015, we have considered whether the fact that the discovery assessments in respect of the TYE 5 April 2011 and 5 April 2012 are out of time and therefore invalid means that the Respondents are precluded from denying relief to the First Appellant against the profits arising in those later tax years for the losses of £89,867.80 and £50,096.51 which the Second Appellant has claimed to make in those earlier tax years. We have concluded that that is not the case. In our view, the only effect of Section 36 of the TMA is to preclude the Respondents from issuing an assessment in respect of the earlier tax years. It does not mean that, in issuing closure notices and discovery assessments in respect of the later tax years, the Respondents are bound to ignore the conclusions which they have reached in relation to the earlier tax years. We therefore uphold the closure notices in respect of the TYE 5 April 2013, the TYE

5 April 2016 and the TYE 5 April 2017 and the discovery assessments in respect of the TYE 5 April 2014 and the TYE 5 April 2015; and

(14) as regards the quantum of the remaining penalty assessments, we agree with the conclusion of the Respondents that, based on the manner in which the investigation proceeded – as outlined in paragraph 75 above - the relevant inaccuracies were not concealed but the disclosure of the inaccuracies was prompted and the quality of the disclosure was extremely limited. We therefore consider that the Respondents were right to leave the penalty in each case at the maximum possible and without making any discount although that maximum should be the 30% maximum penalty for careless inaccuracies instead of the 70% maximum penalty for deliberate inaccuracies. Consequently, we have decided to substitute for the Respondents' decision to issue a penalty assessment to the First Appellant in respect of each of the TYE 5 April 2013, the TYE 5 April 2014, the TYE 5 April 2015, the TYE 5 April 2016 and the TYE 5 April 2017 a penalty assessment in the amount of 30% of the amounts described in paragraphs 77(3) to 77(7) above. We can perceive no "special circumstances" within the meaning of paragraph 11 of Schedule 24 which would justify any further reduction.

99. In relation to paragraphs 98(13) and 98(14) above, we note for the sake of completeness that the Respondents would have been entitled to succeed in relation both to the validity of the discovery assessments in respect of the TYE 5 April 2011 and the TYE 5 April 2012 and to the calculation of the penalties in respect of those and the other tax years by reference to deliberate behaviour if they had been able to establish that the Appellants' accountant (as distinct from the Second Appellant) had acted deliberately in including the inaccuracies in the tax returns for those tax years and thus in bringing about the losses of tax in respect of those tax years. However, whilst it is not surprising, the Respondents made no pleading (and adduced no evidence) to that effect, and therefore we have focused exclusively on the Second Appellant and not both the Second Appellant and the Appellants' accountant in reaching the conclusions in those paragraphs.

CONCLUSION

100. In the light of paragraphs 84 to 99 above, we hereby:

(1) dismiss the First Appellant's appeal against each of the revised closure notices and the revised discovery assessments set out in relation to the First Appellant in paragraph 1 above (apart from the revised discovery assessment in respect of the APE 31 August 2011). Thus, the amounts due from the First Appellant in respect of those revised closure notices and revised discovery assessments are as follows:

(a) the APE 31 August 2012 - £14,509.05;

(b) the APE 31 August 2013 - £5,234.55;

(c) the APE 31 August 2014 - £16,681.10;

(d) the APE 31 August 2015 - £27,285.80; and

(e) the APE 31 August 2016 - £20,240.30;

(2) uphold the First Appellant's appeal against:

(a) the revised discovery assessment set out in relation to the First Appellant in paragraph 1 above in respect of the APE 31 August 2011; and

(b) the penalty assessment set out in relation to the First Appellant in paragraph 1 above in respect of the APE 31 August 2011;

(3) substitute for the Respondents' decision to issue a penalty assessment to the First Appellant in respect of each of the APE 31 August 2012, APE 31 August 2013, APE 31 August 2014, APE 31 August 2015 and the APE 31 August 2016 a penalty assessment in the amount of 29.25% (30% minus 0.75% (which is 5% of 15%)) of the tax shown in the revised closure notice or discovery assessment set out in relation to the First Appellant in paragraph 1 above which relates to the relevant accounting period. The relevant amounts are therefore reduced to the following:

(a) the APE 31 August 2012 - £4,243.89;

(b) the APE 31 August 2013 - £1,531.10;

(c) the APE 31 August 2014 - £4,879.22;

(d) the APE 31 August 2015 - £7,981.09; and

(e) the APE 31 August 2016 - £5,920.28;

(4) determine the appeal by the Second Appellant against the closure notices and the discovery assessments set out in relation to the Second Appellant in paragraph 1 above (apart from the discovery assessments in respect of the TYE 5 April 2011 and the TYE 5 April 2012) in the amounts requested by the Respondents, as described in paragraphs 77(3) to 77(7) above, namely:

(a) the TYE 5 April 2013 - £364.20;

(b) the TYE 5 April 2014 - £2,989.80;

(c) the TYE 5 April 2015 - £2,145.80;

(d) the TYE 5 April 2016 - £4,386.60; and

(e) the TYE 5 April 2017 - £4,158.20;

(5) uphold the Second Appellant's appeal against:

(a) the discovery assessments set out in relation to the Second Appellant in paragraph 1 above in respect of the TYE 5 April 2011 and the TYE 5 April 2012; and

(b) the penalty assessments set out in relation to the Second Appellant in paragraph 1 above in respect of the TYE 5 April 2011 and the TYE 5 April 2012; and

(6) substitute for the Respondents' decision to issue a penalty assessment to the Second Appellant in respect of each of the TYE 5 April 2013, the TYE 5 April 2014, the TYE 5 April 2015, the TYE 5 April 2016 and the TYE 5 April 2017 a penalty assessment in the amount of 30% of the amounts described in paragraph 100(4) above. The relevant amounts are therefore reduced to the following:

(a) TYE 5 April 2013 - £109.26;

(b) TYE 5 April 2014 - £896.94;

(c) TYE 5 April 2015 - £643.74;

(d) TYE 5 April 2016 - £1,315.98; and

(e) TYE 5 April 2017 - £1,247.46.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

101. 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.

TONY BEARE
TRIBUNAL JUDGE

Release Date: 03 DECEMEBR 2021