



**TC05104**

Appeal numbers: TC/2014/01305  
TC/2015/03454

*CAPITAL GAINS TAX – PENALTIES – application to admit oral witness evidence – residential property acquired with intention of own occupation – never occupied – change of intention – whether property held as an adventure in the nature of a trade or as a capital asset – HMRC amendment to appellant’s return upheld – penalties for failure to notify chargeability and inaccuracy – whether due – two tax-geared penalties in respect of the same tax – TMA s 97A – whether mitigation percentages correct – penalties varied – appeals dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**REBECCA STAYTON**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ANNE REDSTON  
MRS SUSAN LOUSADA**

**Sitting in public at the Tribunal Centre, Howard St, Bedford on 12 February  
2016 and 6 April 2016**

**Mr Stephen Arthur of Counsel, instructed by Anna Arthur and Associates, for  
the Appellant**

**Mr Brian Horton, of HM Revenue & Customs Appeals and Reviews Unit, for the  
Respondents**

## DECISION

1. On 3 June 2005 Mrs Rebecca Stayton purchased a residential property in Manland Avenue, Harpenden (“the Property”). The Property was substantially redeveloped before being sold on 25 May 2007.
- 5 2. Mrs Stayton did not notify chargeability on disposal of the Property. When she did file her self-assessment (“SA”) return, she reported a capital gain.
3. HM Revenue and Customs (“HMRC”) opened an enquiry into her SA return and subsequently made the following three decisions:
  - 10 (1) to increase her 2008-09 tax from £5,173.45 to £56,569.35 consequent upon a recomputation of the capital gain;
  - (2) to charge a penalty of £1,034.60 for failure to notify chargeability. This was 20% of the tax shown as due on Mrs Stayton’s submitted SA return, so 80% mitigation had been granted; and
  - 15 (3) to charge a penalty of £15,418.77 for negligently submitting an inaccurate return. This was 30% of the further tax due after HMRC’s amendment to the return, so the maximum penalty had been reduced by 70%.
4. Mrs Stayton appealed all three decisions. In relation to the disposal of the Property, she submitted that it had been held as an adventure in the nature of a trade. However, the Tribunal found that the Property was held as a capital asset, and upheld 20 HMRC’s amendment to her SA return.
5. Taking into account all the circumstances, and having reminded both parties at the inception of the hearing as to the Tribunal’s powers to remove, uphold, increase or decrease the penalties, we decided that the failure to notify penalty should be mitigated by 70% and the inaccuracy penalty by 65%.
- 25 6. Because both penalties were “tax-gearred” as defined by the Taxes Management Act 1970 (“TMA”) s 97A, we applied that provision to the failure to notify penalty so that it became £1,552.03; the inaccuracy penalty was £17,988.57. Total penalties therefore increased to £19,540.60.
7. The Tribunal also dealt with four preliminary issues:
  - 30 (1) the late notification of the appeals to the Tribunal;
  - (2) Mr Horton’s application to strike out Mrs Stayton’s witness statement;
  - (3) Mr Arthur’s application for Mr Robert Stayton, Mrs Stayton’s husband, to give oral evidence; and
  - (4) whether to continue with the hearing in the absence of the appellant.
- 35 8. We explain our decisions on those issues at §12ff.

### **The substantive issues in dispute**

9. The substantive issues in dispute were:

(1) whether the Property was held as an adventure in the nature of a trade at all times. This was Mr Arthur's primary contention;

5 (2) whether the Property, although not initially held as an adventure in the nature of a trade, became one when Mrs Stayton decided not to move into the Property. This was Mr Arthur's alternative contention; or

(3) whether the Property was held as a capital asset, as HMRC contended.

10. Although Mrs Stayton had consistently contested HMRC's amendments to the CGT calculation, Mr Arthur advised the Tribunal at the beginning of the April hearing that, were the Tribunal to find that the Property had been held as a capital asset, Mrs Stayton accepted HMRC's computations as to the amount of the gain. Any computational issues were therefore not considered by the Tribunal.

15 11. For completeness we record that Mr Arthur did not submit that Mrs Stayton was engaged in a trade of property holding and/or development, as distinct from an adventure in the nature of a trade.

### **The late appeal**

#### *The facts*

20 12. HMRC's Review Officer, Mrs Rowena Harper, issued her decision on the substantive issue on 24 January 2013. Her letter explained how to appeal to the Tribunal. The time limit for notification was therefore 23 February 2013.

25 13. On 13 February 2013 Mrs Stayton wrote to Mrs Harper and said she wished to appeal. Another HMRC officer replied on 19 February 2013, reiterating that she needed to notify the Tribunal. On 3 March 2014, Mrs Stayton signed her Notice of Appeal. This was received on 6 March 2013, around two weeks late.

14. On 4 July 2014 Mr Axbey, the HMRC Officer who carried out the enquiry into Mrs Stayton's returns, issued penalty decisions for failure to notify and for submitting an inaccurate SA return. On 12 July 2014 Mrs Stayton wrote to Mr Axbey appealing the penalties.

30 15. The substantive issue was listed for a Tribunal hearing in September 2014. However, on 13 August 2014 HMRC asked the Tribunal to vacate the hearing, as Mrs Stayton had now appealed against the penalties and it would be sensible for the appeals to be joined. The Tribunal vacated the hearing.

35 16. At some date in January 2015 (the date has been omitted from the signed document) the parties jointly applied to the Tribunal for the substantive case to be postponed as (a) Mrs Stayton was shortly to make "further appeals to the Tribunal" and (b) an application would then be made for those appeals to be joined to the substantive appeal. The application was made on Mrs Stayton's behalf by Anna Arthur & Associates, Mrs Stayton's solicitors.

17. On 30 April 2015 a further application was made by both parties in the same terms. On 22 May 2015, Mrs Stayton signed her Notice of Appeal to the Tribunal; this was received on 25 May 2015, over a year after the penalty decisions under appeal.

5 *Submissions*

18. Both parties agreed that the delay in notifying the substantive appeal was short and understandable on the facts.

19. In relation to the penalty appeals, Mr Arthur submitted that throughout the period of the delay HMRC had been fully aware that these appeals would be notified to the Tribunal, so there was no prejudice to HMRC. Moreover, he said that both parties had understood that the Tribunal had accepted that there would be a delay, and it would therefore be unfair not to allow the appeals to proceed. Mr Horton confirmed that HMRC had no objection to the late notification. Neither party was able to explain why it had taken a year for these appeals to be notified.

15 *Whether to allow the appeals to proceed*

20. We considered the facts and the parties' submissions in the light of the tests set out in by Morgan J in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) and in particular the questions posed at [34] of that judgment.

21. We also considered the recent Court of Appeal decision in *BPP Holdings v HMRC* [2016] EWCA Civ 131. This found at [11] that "the stricter approach to compliance with rules and directions made under the CPR as set out in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 and *Denton v TH White Ltd* [2014] 1 WLR 3296 applies to cases in the tax tribunals." Although in *BPP* the Court of Appeal expressly did not analyse *Data Select*, see [44] of the judgment, we considered whether, if we took that stricter approach, we should give permission.

22. We first considered the delay in notifying the substantive appeal. This was caused by Mrs Stayton writing to HMRC rather than to the Tribunal. The delay was short, around two weeks, and a very short time after Mrs Stayton had been informed of her mistake. It is clearly in the interests of justice to allow the substantive appeal to proceed.

23. We had more difficulty with the appeals against the penalties. Neither party could explain why it had taken a year to notify the appeals to the Tribunal. Mrs Stayton was professionally represented, not only by Mr Leong of Michael Leong & Company Ltd, her accountant, but also by Anna Arthur and Associates, her solicitors. The appeal against the substantive issue had been notified without delay as soon as Mrs Stayton was aware of the position, so she knew the correct procedure.

24. A year is a long time. In the recent case of *Romasave Property Services v HMRC* [2015] UKUT 254 the Upper Tribunal (Judges Berner and Falk) said at [96]:

40 "Time limits imposed by law should generally be respected. In the context of an appeal right which must be exercised within 30 days from the date of the document notifying the decision, a delay of more

than three months cannot be described as anything but serious and significant.”

25. However, we accept that (for whatever reason) HMRC concurred in the delay. The Tribunal was also aware from 13 August 2014 that further appeals were to be made and agreed to postpone the hearing of the substantive appeal on that basis.  
5 Both parties appear to have operated on the understanding that the Tribunal had, in terms, consented to the delayed notification.

26. A further factor is the prejudice to the parties. Mrs Stayton has been assessed to penalties totalling £16,453, a significant sum. Moreover, the inaccuracy penalty is based on an omission from her return of a capital gain. If, as she contends, she was instead engaged in an adventure in the nature of a trade, refusing permission to appeal means that the penalties will stand (subject to any exercise of HMRC’s discretion), even though they are no longer based on the correct underlying assessment.  
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27. Taking into account all the circumstances, we found that it was in the interests of justice for Mrs Stayton to be allowed to notify late appeals against both the amendment to her 2007-08 return and against the penalties.  
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### **The Tribunal’s jurisdiction**

28. At the inception of the hearing the Tribunal reminded the parties of its jurisdiction. TMA s 50 is headed “Procedure” and, so far as relevant to the substantive issue in this case, reads:  
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“(6) If, on an appeal notified to the tribunal, the tribunal decides

(a) that the appellant is overcharged by a self-assessment;

(b) ...; or

(c) that the appellant is overcharged by an assessment other than a self-assessment,  
25

the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

(7) If, on an appeal notified to the tribunal, the tribunal decides

(a) that the appellant is undercharged to tax by a self-assessment<sup>6</sup>

(b) ...; or  
30

(c) that the appellant is undercharged by an assessment other than a self-assessment,

the assessment or amounts shall be increased accordingly.”

29. The penalties levied on Mrs Stayton were issued under TMA s 100, which gives HMRC officers power to impose a penalty “setting it at such amount as, in his opinion, is correct or appropriate.”  
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30. Where, as here, a penalty is not “required to be of a particular amount” the Tribunal is empowered, under TMA s 100B(2)(b)

“(i) if it appears that no penalty has been incurred, set the determination aside,

(ii) if the amount determined appears to be appropriate, confirm the determination,

5 (iii) if the amount determined appears to be excessive, reduce it to such other amount (including nil) as it considers appropriate, or

(iv) if the amount determined appears to be insufficient, increase it to such amount not exceeding the permitted maximum as it considers appropriate.”

10 31. The Tribunal provided the parties with copies of both provisions. We summarised our jurisdiction as being able to remove, uphold, reduce or increase the assessments and the penalties in the light of our findings, following consideration of the evidence, the law, and the submissions.

### **The evidence**

15 32. The parties provided helpful bundles of documents which included:

(1) the correspondence between the parties and between the parties and the Tribunal;

20 (2) various documents concerning the purchase, redevelopment and sale of the Property, including a Valuation Report dated 24 May 2005 (“the Valuation”) and pictures of the Property;

(3) Mrs Stayton’s tax returns from 2004-05 through to 2009-10;

(4) Documents entitled “Mrs RV Stayton Financial Accounts” for the accounting periods ending 5 April 2005; 5 April 2006 and 25 May 2007; and

25 (5) documents relating to a further property at West Common Grove in Harpenden.

30 33. At the beginning of the reconvened Tribunal hearing in April 2016, Mr Arthur handed up a valuation for the Property as at 17 January 2006 (“the January 2006 Valuation”). This had been carried out on 23 March 2016 by McNeill Lowe & Palmer, a firm of chartered surveyors. Mr Horton did not object to its late provision and the Tribunal admitted the document into evidence.

34. Mr Axbey provided a witness statement, gave evidence in chief, was cross-examined by Mr Arthur and answered questions from the Tribunal. We found him to be a transparently honest and credible witness.

### *Mrs Stayton’s failure to attend as a witness*

35 35. Mrs Stayton provided a witness statement dated 20 November 2015, but did not attend the hearing. The Tribunal had given Directions to the parties on 9 September 2015. These included a direction that a party seeking to rely on a witness statement:

40 “must call that witness to be available for cross-examination by the other party (unless notified in advance by the other party that the evidence of the witness is not in dispute).”

36. Mr Horton confirmed that HMRC had not notified Mrs Stayton or her representatives that her witness statement was not in dispute. The Tribunal asked Mr Arthur why Mrs Stayton was not present, despite the Tribunal's direction. He said she was under stress, had been prescribed medication and had a heavy cold.

5 37. Mr Horton asked that Mrs Stayton's witness statement be withdrawn. He said that a key issue in this case was Mrs Stayton's intention at various points in time, and he had come prepared to cross-examine her on the witness statement, with particular reference to her alleged changes of intention.

10 38. Mr Arthur apologised on behalf of his client, but did not withdraw her witness statement or ask for the case to be adjourned so that Mrs Stayton could attend to give evidence at a later date. He informed the Tribunal that his instructions were that Mrs Stayton did not want the case adjourned; he added that he was in any event confident that her case could be made by relying on the documents in the Tribunal Bundles.

*Mr Arthur's application for Mr Stayton to give evidence*

15 39. Mr Arthur then submitted an application for Mr Stayton to be allowed to give oral evidence, on the basis that he could "speak to his wife's evidence."

20 40. Mr Horton objected. He said that Mr Stayton could, at best, give hearsay evidence about his wife's intention. Mr Stayton had not provided a witness statement, so HMRC had not been able to consider his evidence before the hearing. It was unfair to HMRC for Mr Stayton now to be allowed to give evidence orally.

41. We took a short adjournment to consider whether to allow Mr Stayton to give evidence. We came to our conclusion after considering Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") which require us to "deal with cases fairly and justly."

25 42. We decided to refuse the application for the following reasons:

(1) although we accepted that Mr Stayton could give relevant evidence about the background facts of this case, he could not give reliable evidence about Mrs Stayton's intention at various times. We did not accept that he could "speak to his wife's evidence";

30 (2) Included in the directions issued to the parties was Direction 2, which read:

35 "Witness statements: Not later than 20<sup>th</sup> November 2015 each party shall send or deliver to the other party statements from all witnesses on whose evidence they intend to rely at the hearing, setting out what that evidence will be ('witness statements') and shall notify the Tribunal that they have done so."

No witness statement had been filed and served for Mr Stayton. He was not a witness who had emerged at a late stage of the proceedings, but had been closely involved with the matters under appeal throughout. If Mrs Stayton had

wished to rely on her husband's evidence, she had had ample opportunity to ask him to provide a witness statement;

5 (3) the purpose of witness statements is for each party to be aware of the evidence on which the other party relies, in good time before the hearing. This allows them to prepare properly for the hearing, including identifying any areas of cross-examination. If we were now to allow Mr Stayton to give oral evidence without a witness statement, HMRC would be unfairly disadvantaged;

10 (4) Mrs Stayton is not a litigant in person, but represented by a solicitor and by Counsel, so this is not a case where the appellant has not understood the nature and purpose of witness statements; and

(5) almost two years since HMRC made their decision on the substantive issue, so Mrs Stayton had had plenty of time to consider, with her solicitor and Counsel, the witness evidence on which she wished to rely at the hearing.

15 43. Although Rule 2(2)(b) states that dealing with cases fairly and justly includes "avoiding unnecessary formality and seeking flexibility in the proceedings," the direction to provide witness statements was not an "unnecessary formality."

20 44. Rule 2(2)(c) requires that the Tribunal ensure "so far as practicable, that the parties are able to participate fully in the proceedings." While allowing Mr Stayton to give evidence might assist Mrs Stayton, for the reasons given above it would prevent HMRC from participating fully in the proceedings.

45. Rule 2(2)(e) says that the Tribunal must avoid delay, so far as compatible with proper consideration of the issues. Mr Arthur has not requested an adjournment, and has expressed his confidence that the issues can be properly considered on the basis of the documents.

25 46. After we gave our decision in relation to Mr Stayton, Mr Arthur confirmed that he was not changing his position on applying for an adjournment but on the contrary was content to proceed on the basis of the documents in the Bundles.

### *Rule 33*

30 47. Mrs Stayton is not only a witness, but the appellant. The Tribunal considered Rule 33 of the Tribunal Rules, which says:

#### **"Hearings in a party's absence**

If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—

35 (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

(b) considers that it is in the interests of justice to proceed with the hearing."

40 48. We were satisfied that Mrs Stayton had been notified of the hearing, and considered that it was in the interests of justice to proceed in her absence. In coming



to that conclusion we took into account in particular Mr Arthur's statement that he had been instructed not to apply for an adjournment and was content to proceed.

*Whether Mrs Stayton's witness statement should be excluded*

49. In relation to Mrs Stayton's witness statement, Mr Horton had in terms asked that we exclude that evidence under Rule 15(2)(b). We decided that excluding Mrs Stayton's evidence would not be in the interests of justice, but pointed out to both parties that Mrs Stayton's absence meant that her evidence could not be tested in cross-examination, so the weight to be placed on her statement was likely to be significantly reduced. We advised Mr Arthur that we would be looking for documentary confirmation, from the material in the Bundles, of the various assertions in the witness statement.

## THE SUBSTANTIVE ISSUE

### **The facts**

50. On the basis of the evidence provided, we find the following facts. We make further findings of fact later in our decision.

51. Mrs Stayton is married to Mr Stayton, the director and owner of Stayton Homes Limited ("SHL"), a property development company. SHL obtained some of its funding in the form of loans from BM Samuels Finance Group plc ("BMS"), which had transacted business with SHL for some years before the events with which we are here concerned.

52. At some point before 12 November 2004, the Property was put on the market by FPD Savills. The sale particulars described it as "an attractive semi-detached home...requiring thorough updating and refurbishment." The guide price was £375,000.

53. On 12 November 2004 FPD Savills sent out a "Notification of Sale" stating that the Property had been sold "Subject to Contract"; the purchase price was £335,000 and the purchaser was Mrs Stayton. Under "Conditions of Sale" is written "contracts to be exchanged before Christmas – no mortgage required."

54. On 8 April 2005 contracts for the sale of the Property were exchanged between Mrs Stayton and the vendors, for £335,000.

55. The vendors agreed to allow access to the Property before completion, and on 18 April 2005, Mrs Stayton signed an "Access Undertaking" which included the following:

"in consideration of your allowing us access to the property between exchange of contract and completion, we hereby undertake as follows:

1. That we will not take up occupation of the property until such time as completion takes place and we will return the key of the premises to the selling agents during office hours for each day that access is taken.

2. That access is required purely for the purposes of general decoration, cleaning and gardening and we will not carry out any structural alterations or repairs whatsoever.

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3. That we will be responsible for any damage caused. We will indemnify the Vendor in respect of such damage or any work which results in a diminution of the value of the property.

4. That we will be responsible for all outgoing in connection with the property from the day access is granted.”

56. On 13 May 2005, a firm called “Acorn Preservation Company” issued two guarantee certificates subsequent to the treatment of the Property’s roof void for common furniture beetle, and the treatment of all external walls to prevent rising damp. There is no information about who ordered this work to be done or who paid that company’s invoice.

57. At some point before 24 May 2005, the Valuation was commissioned from Lancaster Brown Ltd, a firm of chartered surveyors. When completed, the Valuation was sent to BMS with a covering letter which begins “As I am sure you are aware, Robert Stayton contacted me last week with a view to undertaking a valuation of [the Property].”

58. The Valuation includes the following passages:

20 “the property is in the course of refurbishment by Stayton Homes.

**Progress of Refurbishment**

At the present time, the interior of the house has been stripped and new stud partition walls have been built in readiness for the installation of first fix services (electrical and plumbing) and also plastering and decoration finishes. The main roof area has been overhauled. We understand that PVCU double glazed windows will be fitted throughout the subject house. We are advised that the property should be refurbished and extended by the middle of July this year.

30 **Proposed extension**

We understand that it is proposed that a 3 metre extension will be built to the rear of the property to provide additional reception accommodation. We understand that this extension will be built under the provisions of permitted development and that formal planning is not therefore required.”

59. The Valuation Report lists a number of other planned improvements, including the installation of a new kitchen, a new bathroom and an ensuite shower room attached to one of the bedrooms. It gives a “present valuation” for the Property of £400,000 and a “proposed value” of £500,000, once the refurbishment was completed.

60. On 27 May 2005 BMS wrote to SHL setting out the terms of a loan facility (“the Loan Facility”). The letter begins

5 “Dear Sirs, with reference to your application submitted to us, we desire to inform you that we and/or jointly with others (“the Lender”) are prepared to grant to you (“the Borrower”), a loan facility of £300,000 (“the Facility”) on the following terms and conditions.”

61. The first numbered paragraph states that “the Borrower” is SHL. The second paragraph repeats the identity of “the Lender” set out above; the next two paragraphs read:

**“3. The guarantors**

10 Mrs Rebecca Stayton (“the First Guarantor”) and Mr Robert Stayton (“the Second Guarantor”), together “the Guarantors.” For the avoidance of doubt, the liability of Mrs Rebecca Stayton will be limited to £300,000 plus any outstanding interest and fees  
15 outstanding under the Facility at any time and will be discharged on full repayment of the Facility.

**4. Security**

Security for the facility will comprise the following:

- a) The guarantee of the First Guarantor, supported by a first legal charge over [the Property]
- 20 b) A legal Debenture over the assets of the Borrower for the amount of the Facility.
- c) The guarantee of the Second Guarantor.”

25 62. Paragraph 7 is headed “Purpose” and says that “the Facility will be used to provide the Borrower with working capital funding.” Paragraph 9(b) says that the rate of interest is 1.3% per month. At the bottom of each page are three signature boxes. The first two are entitled “Terms accepted (Stayton Homes Limed)” and “Terms Accepted (Robert Stayton)”. The third box is entitled “guaranteed by (Rebecca Stayton).” On 1 June 2005 Mr Stayton signed the first two boxes and Mrs Stayton signed the third box.

30 63. The Bundle also contains an unsigned, undated document headed “Replies to mortgage requirements and enquiries” drafted by Clyde and Co, who acted for Mrs Stayton in relation to the purchase of the Property. We were not provided with the questions to which these were draft answers. In the document, the “lender” is given as BMS, and the borrower is Rebecca Stayton. Item 1G contains the text “To follow  
35 (Rob and Becky please see attached declaration and confirm that we can say that all funds over and above the mortgage advance was supplied from your own resources etc)”. Item 4 is headed “occupation of the Property” and 4A says “the Property is vacant at present [Rob and Becky – will you be letting this property. If you have a tenant already, please provide details]. Item 4D says “Confirmed. [Rob – if you are  
40 planning to occupy the property then you must sign a form of Consent”]. Item 9 says “Confirmed [Rob and Becky – this means that Becky will own both the legal and beneficial title to the property in her own right”].

64. On 2 June 2005, BMS advanced £288,489.75 to SHL, being the £300,000 less certain fees and costs. In the period to 4 April 2007, further sums totalling £185,000 were borrowed under the Loan Facility. Some of these further sums were rolled up interest on the £300,000 borrowings, but the balance was lent to SHL and not to Mrs Stayton. The Statement of Account issued by BMS for the period from 3 June 2005 through to 31 March 2009 gives the “account name and address” as “Stayton R” at SHL’s address.

65. Mrs Stayton said in her witness statement that she and Mr Stayton planned to sell their jointly owned property and would use the money raised to replace the £300,000 borrowed from BMS. This was not disputed.

66. On 3 June 2005, the Property was purchased. Mrs Stayton is named on the deeds as the sole owner of the Property. Clyde & Co invoiced Mrs Stayton. HMRC have not sought to argue that she was other than the beneficial owner of the Property; this is also her position. The Tribunal has proceeded on the basis that her beneficial ownership of the Property is an agreed fact which is not in dispute.

67. The parties also agree that initially Mrs Stayton intended to move into the Property as her residence. In her witness statement, Mrs Stayton says that “in late 2004 my marriage to Robert Stayton started to become very strained” and that this was behind her decision to move house. HMRC did not dispute that there were stresses in the marriage.

68. The Bundle contained some documentary evidence of the renovations carried out in the Property. On 22 June 2005, CW Windows and Conservatories installed 12 windows in the Property. The documentation in the Bundle does not contain a customer name.

69. On 22 August 2005, SHL obtained a Building Notice for a single storey extension to the Property and paid the fee for that Notice by cheque. On 29 September 2005, Mr Paul Lambert of Paul Lambert Associates, a firm of architectural designers and engineers, issued a bill for £145.40 to “Mr R Stayton, Stayton Building Contractors.” The covering letter was also addressed to “Mr R Stayton” and says:

“Dear Robert...I have as instructed prepared structural calculations for the beams across the rear opening to the property on which you are working....I trust that this is sufficient for your purposes and that you will pass on copies to the local Building Control Dept for their file.”

70. On 1 October 2005, a firm called Solopark sold £1,449.20 of flagstones and bricks to SHL.

71. On 10 December 2005, Underwood & James Limited wrote to Mr and Mrs Stayton. The letter said “following my conversation with Mrs Stayton on the phone today, I confirm the following amendments and final quotation for your new kitchen at Manland Avenue.

72. On 13 March 2006, CW Windows and Conservatories installed a further two windows in the Property. Again, the documentation in the Bundle does not contain a customer name.

5 73. On 31 March 2006, SHL sent Mrs Stayton two invoices, for “cost incurred and work done at 34 Manland Avenue.” The first invoice is for £28,620.25 plus VAT of £5,008.54, making a total of £33,628.79. The second is for £8,691.39 plus VAT of £1,520.99, making a total of £10,212.38. No detail as to the “cost incurred and work done” was shown.

*The dispute with the Neighbours*

10 74. During August 2005, in preparation for constructing the extension, SHL’s employees began removing some of the fencing which separated the Property from the next-door house. The owners of that property (“the Neighbours”) contacted Mr Stayton, who indicated that the extension would respect the existing boundary.

15 75. In late September 2005, SHL began constructing the extension. On 25 November 2005, a Mr CJ Waghorn, described as “Manager” of SHL, wrote to the Neighbours advising them that “having effected clearance [of the back garden] it is evident that over the years there has been an encroachment from our site.”

76. On 1 December 2005, the Neighbours responded by saying that the existing boundary was to be respected and that any encroachment would result in legal action.

20 77. On 8 December 2005, certain trees and shrubs along the boundary were removed by SHL’s employees, who also began to erect a fence.

78. On 12 January 2006, the Neighbours wrote to Mrs Stayton, saying that legal action was to commence following the wrongful removal of trees and shrubs from the back garden.

25 79. On 17 January 2006 Mr Stayton sent a memo (“the Memo”) to “Lou, Sean, Chris and Elaine” who were employees of SHL. The Memo reads (text as in original):

“Dear All

30 I went round and saw Becky last night and due to the boundary dispute, Becky has decided not to move into to the house...Rather than the kitchen coming from Underwood and James, Lou, Becky is going to see Steve at Howdens to sort out the kitchen can you call Becky and meet her and give her a list of what we need.

35 Chris can you cancel the Bathroom and en-suite from R and D Plumbing and sort out a budget bathroom and en-suite with Becky A.S.A.P. Becky is happy to go to Park street and see Dave and Mark again and sort this out but can you make sure she does this next week.

Lou can you change the electric plates from brushed steel to plastic please.

Sean can you update Becky when you have had your site meeting with the neighbours.

Can you all see where we can save money for Becky now.”

80. On 23 January 2006 Mr Waghorn and Sean met the Neighbours on site, but the dispute escalated. Lawyers were instructed on both sides. On 31 October 2006, Clyde and Co invoiced Mrs Stayton the sum of £18,761 including VAT. The detailed fee analysis provided by that firm begins by recording a discussion about the boundary in relation to the “case for Robert Stayton.” It contains 11 references to calls, discussions or emails between that firm and Robert Stayton. It also refers once to a call to Rebecca Stayton. It also includes 16 references to communications with “RS.” We considered whether these referred to Mrs Rebecca Stayton or to Mr Robert Stayton. Two of the references occur before there is any mention of Mrs Stayton, so can reasonably only refer to Mr Stayton. In addition, the end of the fee note contains the following entries:

15                                   “9/10/06   Discuss with counsel...call to RS; attendance notes of telcon and call to RS. Various further discussion with Robert Stayton about Part 36 procedure...

  13/10/06   Email to RS re Part 36 offer, need for funds to be paid over to us for onward payment into court, and question of level of offer.

20                                   18/10/06   call to RS with message re disclosure. Email to RS re disclosure and statements; email to RS re Part 36.”

81. From the reference to “further discussions” with Mr Stayton about the Part 36 procedure we find that Clyde & Co must already have held discussions with him about that matter. The preceding and subsequent references to RS in the context of the Part 36 offer can therefore only refer to Mr Stayton, not Mrs Stayton.

82. Taking into account the above evidence, we find that all references in this fee note to “RS” are to Mr Stayton, not to Mrs Stayton.

83. After some further legal discussions, the boundary dispute was settled by way of a Consent Order dated 18 December 2006. Under the terms of the Order, £18,000 was paid to the Neighbours.

#### *The sale of the Property*

84. On 20 February 2007, Savills wrote a letter addressed to “Mr and Mrs R Stayton,” which begins:

35                                   “Dear Rob and Becky, thank you very much for inviting Savills to advise you on the marketing of your property. I enjoyed our meeting and would be delighted to act for you in the sale.”

85. On 20 March 2007, Clyde and Co wrote a letter addressed to “Mr and Mrs R Stayton” which begins “Dear Robert and Rebecca.” The letter referred to prospective purchasers who had offered £575,000 for the Property (“the Purchasers”).

86. On 3 April 2007, the Purchasers instructed McNeill, Lowe & Palmer, a firm of Chartered Surveyors, to carry out a Building Survey Report (“the Purchasers’ Report”) on the Property. The Purchasers’ Report states that when inspected the Property was “unoccupied and unfurnished.” Under the heading “Description” it says  
5 “it is assumed that the current owners purchased the property with a view to renovating and extending it for profit.”

87. On 10 May 2007, the local authority certified that the extension had been completed in accordance with Building Regulations.

88. The sale of the Property completed on 25 May 2007 at a price of £575,000.

10 89. On 29 May 2007, Mr Samuels of BMS wrote to Mr Stayton at SHL’s address, referring to conversations the previous week and saying:

15 “I am writing to confirm that we initially received the sum of £482,797.35 from Clyde & Co Solicitors in order for you to redeem your borrowings appertaining to the above subject property. However, as you are aware I subsequently agreed to reduce our settlement figure by the sum of £12,000 and this sum was remitted back to Clyde & Co on the same day.”

90. On 3 June 2007, Mr and Mrs Stayton’s joint account was debited with £31,010.25 payable to Clyde & Co relating to the Property.

20 **The case law**

91. We were provided with a wealth of authorities on the question of whether or not a transaction such as the one in issue here is an adventure in the nature of a trade. We have considered all of those judgments, even though not all are cited in this decision.

25 92. From those cases, we first set out the following general principles, which were not in dispute:

(1) A single short-term venture can be an adventure in the nature of a trade (*CIR v Livingston* (1927) 11 TC 538).

30 (2) An isolated transaction of the purchase and re-sale of property is either an adventure in the nature of trade, or simply a case of sale and re-sale of property (*Leeming v Jones* [1930] AC 415 *per* Lord Buckmaster at p 421 and Viscount Dunedin at p 422, both approving the words of Lawrence LJ in the Court of Appeal).

35 (3) Whether or not any transaction is an adventure in the nature of trade is essentially a question of fact (*Wisdom v Chamberlain* [1969] 1 WLR 275, *per* Salmon LJ at p 282 and Cairns LJ at p 285).

*Badges of trade*

93. In *Marson v Morton* [1986] STC 463 the Vice-Chancellor, Sir Nicholas Browne-Wilkinson, first considered the authorities and then set out the following “badges of trade”:

(1) Whether it is a single transaction, as “although a one off transaction is in law capable of being an adventure in the nature of trade, obviously the lack of repetition is a pointer which indicates there might not here be trade but something else.”

5 (2) Whether the transaction in some way related to the trade which the taxpayer otherwise carries on.

(3) The nature of the subject matter.

(4) Whether the transaction was carried through in a way typical of the trade in a commodity of that nature.

10 (5) The source of finance of the transaction.

(6) Whether work was done on the item for the purposes of resale.

(7) Whether the item purchased was resold in the same single lot as when it was bought, or whether it had been broken down into saleable lots.

(8) The intentions as to resale at the time of purchase.

15 (9) Whether the item provided enjoyment for the purchaser.

94. The Vice-Chancellor emphasised that this was:

20 “in no sense a comprehensive list of all relevant matters, nor is any one of them so far as I can see decisive in all cases. The most they can do is provide common sense guidance to the conclusion which is appropriate.”

95. He added:

25 “...no single item is in any way decisive. I believe that in order to reach a proper factual assessment in each case it is necessary to stand back, having looked at those matters, and look at the whole picture and ask the question--and for this purpose it is no bad thing to go back to the words of the statute--was this an adventure in the nature of trade?”

96. Of the listed items, the main factor in contention between the parties was whether or not a person has to have an intention to trade, and if so, whether that intention must subsist at the time the property is acquired.

30 *Whether there an adventure in the nature of a trade, if there is no intention to trade*

97. Mr Arthur’s submission was that a person could be found to have engaged in an adventure in the nature of a trade without having that intention. He relied on two cases in particular, of which the first was *Iswera v IRC* [1965] 1 WLR 663, a decision of the Privy Council. The facts are set out in the headnote:

35 “The appellant, who wished to reside near the school which her daughters were attending, entered into an agreement for the purchase for Rs. 450,000 of a site of about two and a half acres of land near the school – she had tried to buy a part only, but the vendor would only sell the site as a whole. She borrowed, and paid, the amount of the deposit, Rs.45,000, and then divided the site into 12 building lots, nine

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5 of which she sold to nine sub-purchasers for Rs.434,725, keeping two lots for her own house and one for conveyance to the vendor. Out of the Rs.434,725 she paid the balance of the purchase price, Rs.405,000, so that in the result she had had to find only Rs.15,275 of her own money and had got a site for her house, the then market value of which was Rs.87,040. Assessments to income tax were made on the appellant's husband (since deceased) in the sum of Rs.71,765 – the difference between the Rs.87,040 and the Rs.15,275 – on the ground that the whole transaction was an adventure in the nature of trade and that the site purchased by the appellant for her house must be brought into the computation of profit from such adventure at its market value.”

10 98. Mr Arthur relied on the following passage from Lord Reid’s judgment at p 668 without, however, citing the final sentence:

15 “Before their Lordships, counsel for the appellant came near to submitting that, if it is a purpose of the taxpayer to acquire something for his own use and enjoyment, that is sufficient to show that the steps which he takes in order to acquire it cannot be an adventure in the nature of trade. In their Lordships' judgment that is going much too far. If, in order to get what he wants, the taxpayer has to embark on an adventure which has all the characteristics of trading, his purpose or object alone cannot prevail over what he in fact does. But if his acts are equivocal his purpose or object may be a very material factor when weighing the total effect of all the circumstances.”

20 99. Mr Horton drew the Tribunal’s attention to the immediately following paragraph, which reads:

25 “In the present case not only has it been held that the appellant's dominant motive was to make a profit, but her actions are suggestive of trading as regards the greater part of the site which she bought. She had to and did make arrangements for its subdivision and immediate sale to the nine sub-purchasers before she could carry out her contract with the vendor of the site. The case may be a borderline one in the sense that the Board of Review might have taken a different view of some of the evidence. But, on the facts as found by the board, their Lordships find it impossible to hold that in law they were not entitled to reach their conclusion.”

30 100. This is, of course, a Privy Council case and so not directly binding on this Tribunal. However, we agree that a person’s intention alone cannot outweigh all other facts: as Lord Reid said, “If, in order to get what he wants, the taxpayer has to embark on an adventure which has all the characteristics of trading, his purpose or object alone cannot prevail over what he in fact does.”

35 101. Mr Arthur also relied on *Gray and Gillitt v Tiley* (1944) 26 TC 80. The facts are again apparent from the headnote:

45 “In 1930 the first-named Appellant, a builder and contractor who had bought, developed and sold land in the course of his business, contracted to purchase a farm within 2 miles of Coventry at a price of about £100 per acre. The next day he offered a half share of the benefit

5 of his contract to the second-named Appellant, a grocer, who had had a previous transaction in land on the profits of which he had been held liable to Income Tax. The offer was accepted and the conveyance was made to the Appellants jointly. In 1932 they purchased a small piece of land adjoining the farm because it provided access to a road and rounded off the estate. They did not develop the land or advertise or otherwise offer it for sale, but in 1935 they were approached by an estate company in which they were in no way interested which bought part of the land, and in 1936 they sold the remainder to another estate company of which they were both directors and held more than half the shares.”

15 102. At first instance, before the General Commissioners, both appellants stated in evidence that at the time of the purchase of the farm they regarded it as a long-term investment and had no intention of developing the estate and had no thought of an early resale.

103. The Commissioners nevertheless found that the transactions were in the nature of trade and that the profits were assessable to Income Tax, and this was upheld by the High Court. Mr Arthur submitted that the case was authority for the proposition that “facts override intention.”

20 104. It seems to us, however, that the High Court judgment was based on a different principle. We set it out in full because it is a key authority on which Mr Arthur placed reliance. Macnaghten J said at p 85:

25 “The General Commissioners are local people. They presumably know about the land near Coventry and whether there is a demand there for building land. With that knowledge they have come to the conclusion I have stated. It seems to me, with no knowledge of Coventry, that, on the facts set out in the Case, no other conclusion was possible. Here are two gentlemen, one a contractor and the other a grocer. They buy land within two miles of Coventry, at a price which looks as if it considerably exceeded its agricultural value. If so, the conclusion that Grange Farm had a building value in March, 19 30, seems highly probable.

35 If it were building land when the Appellants bought it, the presumption arises that the Appellants bought it with that object in view. This, of course, may not be the proper inference. It may be that they were minded to present it to the National Trust, or were thinking of entering into a covenant with the National Trust which would have the effect of preventing the erection of any buildings upon Grange Farm. But, in the absence of any evidence of such intention, one would naturally suppose that these two gentlemen had bought building land and intended to dispose of it for that purpose. When it is found that within 40 six years they did dispose of part of it to a development company and the rest of it to another development company in which they held more than half the shares, and of which they were the directors, it seems only reasonable to assume that the company bought the land with that object in view.

5 As against that inference, there is the evidence of the Appellants before the General Commissioners; and Mr. Talbot says that their evidence negatives the presumption which the other facts strongly suggest. I am bound to say I draw precisely the opposite conclusion from the statement of their evidence set out in the Case. It seems to me that their evidence supports strongly the presumption that, when they bought the land, they bought it as building land, to be developed when it was ripe for that purpose. They said they had no intention of developing, or plotting, or sub-dividing the estate, and had no thought of an 'early' resale, a statement which seems to imply that they did contemplate its resale at a later date.

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15 Mr. Talbot also relies upon their further statement that they had regarded its purchase as 'a sound long-term investment', and that Mr. Gray thought it might be a good property to pass on to his children. But there again, the expression 'a sound long-term investment' may mean, as the expression that they had 'no thought of an early resale', that a considerable time would elapse before the land could be developed profitably as a building estate.

20 The fact that within six years of the purchase the whole of Grange Farm was sold at enhanced prices for development as building land, confirms the view which the other facts strongly suggest."

105. In other words, *Gray and Gillitt v Tiley* was decided on the basis that the appellants did in fact have an intention to trade. It is therefore not authority for a general proposition that "facts override intention."

25 106. We therefore find, consistently with *Iswera*, that there can be an adventure in the nature of a trade, even if the person entered into the project with some other motivation. But for such a finding, the other factors must show that there is such an adventure. This Vice-Chancellor came to a similar conclusion in *Marson v Morton*, when he said at p 470 that intention was "in no sense decisive by itself."

30 107. We also note that Lord Reid concluded his judgment in *Iswera* by saying that motive "may be a very material factor when weighing the total effect of all the circumstances" if the taxpayer's acts are "equivocal." It follows that the presence or absence of a trading motive may properly be used as a tie-breaker, if the position is otherwise equally balanced.

35 *Whether the intention has to subsist at the time the asset is acquired*

108. Mr Horton relied on *Simmons v IRC* [1980] STC 350 ("*Simmons*"), where Lord Wilberforce said at p352:

40 "Trading requires an intention to trade; normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment?"

109. Mr Horton submitted that an intention to trade therefore normally subsisted at the time the asset was acquired, although he accepted that Lord Wilberforce went on

to say that “Intentions may be changed. What was first an investment may be put into the trading stock, and, I suppose, vice versa.”

110. Mr Horton also referred us to *Taylor v Good* [1974] TC 148, where the taxpayer acquired a house with the intention of living in it, but problems arose when he took his wife to see the property :

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“There was a good deal of rubbish in the house. It had a gas geyser in the bathroom, the decoration was in a very poor state and it had no electricity. The taxpayer assured his wife that the defects could be remedied, but she raised other objections; her daughters did not think it was practical or convenient, she was troubled by its isolation, and its proximity to a local refuse tip. Some vandals had committed damage and boys raided the orchards. The property was a long way from the newsagent's business and post office which she managed in Cheltenham, and as she did not drive a car she would have found it difficult to get to the shop early in the morning.”

111. The judgment records that “in face of his wife's attitude the taxpayer abandoned the idea of living in the property.” Mr Taylor obtained planning permission and the site was sold at a profit. The General Commissioners found that the events *including* the purchase constituted trading. At the High Court, Megarry J found that the taxpayer's intention had changed *after* the purchase, so there was what he called “supervening trading.”

112. However, that decision was overturned at the Court of Appeal. Russell LJ gave the only judgment, with which the other two members of the court agreed. He first considered a number of cited authorities, before saying at p 154:

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“All these cases, it seems to me, point strongly against the theory of law that a man who owns or buys without present intention to sell land is engaged in trade if he subsequently, not being himself a developer, merely takes steps to enhance the value of the property in the eyes of a developer who might wish to buy for development.”

30 113. He went on to say at p 155, having considered further case law authorities:

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“If of course you find a trade in the purchase and sale of land, it may not be difficult to find that properties originally owned (for example) by inheritance, or bought for investment only, have been brought into the stock-in-trade of that trade...But where, as here, there is no question at all of absorption into a trade of dealing in land of lands previously acquired with no thought of dealing, in my judgment there is no ground at all for holding that activities such as those in the present case, designed only to enhance the value of the land in the market, are to be taken as pointing to, still less as establishing, an adventure in the nature of trade. Were the commissioners, on a remission to them, to decide otherwise, it seems to me they would be wrong in law.”

114. Mr Arthur submitted that *Taylor v Good* did not change the principle that a single transaction is an adventure in the nature of a trade if the facts as a whole show that this is the case, whatever the intention of the taxpayer.

115. From the above cases we find that:

- 5 (1) normally a taxpayer who acquires a single property without the intention of trading in that property is not engaged in an adventure in the nature of a trade; and
- 10 (2) it is possible for intentions to change, so that there is “supervening trading”, but that would be unusual in the case of land unless there was a pre-existing trade of dealing in land into which the asset was subsumed.

### **The parties’ submissions in outline**

116. It was common ground that when Mrs Stayton acquired the Property, she did not have an intention to enter into an adventure in the nature of a trade. Both parties therefore accepted that she could only succeed in her appeal if she could show that

15 either:

- (1) despite her lack of initial intention, the facts as a whole showed that this was an adventure in the nature of a trade; or
- (2) her intention changed at some point, and that changed intention together with the other facts showed she met the test for supervening trading.

20 117. Mr Arthur’s primary submission was that the facts clearly support Mrs Stayton’s case that she had held the Property as an adventure in the nature of a trade from inception. Although she had initially intended to live in it as her family home, he said that the case law showed that if a transaction was a trade, the person’s intention did not change that outcome.

25 118. He submitted in the alternative that the adventure in the nature of a trade began when Mrs Stayton changed her intention. He dated this as 17 January 2006, the date of the Memo (see §79). This submission was made after the Tribunal had drawn the parties’ attention to the agreed fact that Mrs Stayton had changed her intention part way through the period in question.

30 119. Mr Horton said that it was clear on the facts that the Property was always a capital asset in Mrs Stayton’s hands. She initially intended to live there, and decided to sell the Property following the dispute with the Neighbours. The case law shows that intention at the outset is usually determinative, and this appeal is not one which falls into the very few exceptions to that principle. Mrs Stayton had originally filed

35 her return on the basis that it was a capital asset and she only changed her position when she realised that the interest was not a deductible cost in her CGT calculations, and following a conference with Counsel.

120. Both parties’ submissions depend on the facts, and we now make further findings in relation to:

- 40 (1) Mrs Stayton’s involvement with the Property;

- (2) the property at West Common Grove; and
- (3) Mrs Stayton's change of intention

**Further findings of fact relating to Mrs Stayton's involvement with the Property**

121. Mrs Stayton's witness statement says:

5                    "I was very involved in all aspects of the project. During the purchase process I liaised with solicitors, estate agents, surveyors...on a day to day basis.

122. We cannot accept this. There is no evidence that Mrs Stayton liaised with the solicitors on a day to day basis, other than in relation to what was necessary for her to  
10 take title to the Property. Even then some of the correspondence is directed to both her and her husband: the draft questionnaire was sent by Clyde & Co to both Mr and Mrs Stayton, and the questions are directed to either to "Rob and Becky" or to "Rob" alone, see §63. It was also Mr Stayton (not Mrs Stayton) who contacted the surveyors to obtain the Valuation, see §57.

15 123. In relation to the Loan Facility, Mrs Stayton's witness statement says:

                         "I approached Andrew Samuels of BM Samuels Finance Group PLC as I had known him and his wife Sarah as well as the rest of his family for many years. Andrew had agreed to support me in this new venture and to support me with bridging finance to purchase the Property giving me enough time to redevelop the Property and to give me and  
20 my husband enough time to sell our jointly owned property and then I would use the equity from this sale to repay the Bridging loan from BM Samuels Finance Group Limited."

124. We have already found that it was SHL who applied for the loan facility, not  
25 Mrs Stayton and that the borrower was SHL, not Mrs Stayton (see §§60-61). It was SHL and Mr Stayton who signed "accepting" the Facility Agreement. Mrs Stayton only signed as guarantor (see §62). The Statement of Account issued by BMS gives the "account name and address" as Stayton R and SHL's address (see §64). SHL drew down significant further sums under that agreement in addition to the £300,000  
30 secured on the Property and that money was used for SHL's business, not for any trade carried on by Mrs Stayton (see §64). When BMS was repaid, Mr Samuels wrote to Mr Stayton at SHL (not to Mrs Stayton) saying that he had received money from Clyde and Co "in order for you to redeem your borrowings appertaining to the above subject property" (see §89).

35 125. Mr Arthur invited the Tribunal to find that the Facility Agreement was entered into by SHL as nominee for Mrs Stayton. Again, we cannot accept this. It is consistent neither with the wording of the Loan Facility, where Mrs Stayton is the guarantor and SHL the Borrower, nor with the use made of the Facility by SHL.

40 126. We instead find that Mrs Stayton was not involved in taking out the loan to purchase the Property, but that it was obtained by SHL as part of its business dealings with BMS, and secured on the Property owned by Mrs Stayton.

127. Mrs Stayton's witness statement also says:

5 "There were extensive refurbishments carried out to the property...I was very much the project manager. I was heavily involved with all day to day aspects of the project. I sourced and chose all materials including the bricks for the extension which I had to go to Solopark in Cambridge for so that I got an exact match for the rest of the house. I designed the whole of the interior of the property including the electrical layouts and bathrooms and kitchen layouts. I chose all the colours that were to be used on the walls and did all the interior design.  
10 I obtained all quotes for all aspects of the renovations and dealt with all suppliers and subcontractors. I selected and sourced all fittings and tiles for the bathrooms."

128. There is nothing in the Bundles to support these statements. SHL applied for the Building Notice, and Mr Lambert, the structural engineer, wrote to Mr Stayton,  
15 not Mrs Stayton. With one exception, all the invoices and quotations with which we have been provided either do not specify to whom they are addressed, or are to SHL. The exception is the quotation from Underwoods for the kitchen, which is to Mr and Mrs Stayton and referred to a conversation with Mrs Stayton. However, in the Memo Mr Stayton said that Becky was now going to get a cheaper kitchen from Howdens  
20 and asked his employee, Lou, to "call Becky and meet her and give her a list of *what we need*" (our emphasis). In other words, it was SHL which decided what to purchase in relation to the cheaper kitchen, not Mrs Stayton.

129. The witness statement also says that after Mrs Stayton decided not to move into the Property, she "began to alter the specifications for the development to reduce the  
25 expenditure by around £40,000 and therefore increase the profit margin."

130. However, in the Memo Mr Stayton asked another employee, Chris, to "cancel the Bathroom and en-suite from R and D Plumbing" and then to "sort out a budget bathroom and en-suite with Becky." It was therefore not Mrs Stayton who cancelled the bathroom, but Chris, in accordance with instructions from Mr Stayton.

30 131. The Memo goes on to say that "Becky is happy to go to Park street and see Dave and Mark again and sort this out." It continues by instructing Mr Waghorn: "can you make sure she does this next week." The picture painted is not of Mrs Stayton being the "project manager" but of Mr Stayton requiring his employees to ensure her continued co-operation with the refurbishment.

35 132. It is also Mr Stayton, not Mrs Stayton, who tells Lou to "change the electric plates from brushed steel to plastic" and he ends the Memo by asking his staff "can you all see where *we can* save money for Becky now" (emphasis added).

133. We find as a fact that Mrs Stayton did not alter the specifications for the development to increase the profit margin, but that these actions were initiated and  
40 managed by Mr Stayton.

134. Mrs Stayton's witness statement also says that she "instructed contractors to clear the garden" and that subsequently "I was approached by the neighbours at

number 36.” Although it is correct that she was contacted in relation to the dispute with the Neighbours, it is clear from the facts already found that she had little or no direct involvement. It was Mr Waghorn and Sean who attended the site meetings. It was Mr Stayton who was initially contacted by the Neighbours in August 2005, and it was he who liaised with Clyde & Co and agreed the Part 36 offer.

135. We find that Mrs Stayton had the sort of input into the Property which would be expected of an owner who was planning to move in following its refurbishment. But she did no more than this. The extracts from her witness statement cited in the preceding paragraphs of this decision are inconsistent with the other evidence and we find them to be unreliable.

### **Findings of fact about the property at West Common Grove**

136. Mrs Stayton’s witness statement also says that she also intended to buy and develop a second property at West Common Grove in Harpenden (“the WCG Property”), together with the garden of a neighbouring property. She said she planned to knock down the WCG Property and build a new property on the enlarged plot; this was to “become her second development” as part of a “new career” in property development. However, it then transpired that Jarvis Group Ltd (“Jarvis”) owned a key “ransom strip.” Jarvis purchased both the WCG Property and the adjoining garden and so the project was aborted.

137. The other evidence about the WCG Property consisted of the following:

- (1) An unsigned memorandum dated 30 March 2006 on the headed paper of Harrison Murray, a firm of estate agents. This refers to the “proposed sale” of the WCG Property to Mrs Stayton for £875,000; a site plan is attached.
- (2) A note of telephone conversation between Clyde & Co and a Mr Foster of Jarvis dated 12 July 2006. The purpose of the conversation was to establish whether Jarvis would sell a strip of land in front of the WCG Property and if so the price and other conditions. The note records that “Mr Foster...is not prepared to waste time dealing with this unless my clients are prepared to pay his costs...our clients have offered to pay £7,500 for the transfer of the land...my clients are the ones who want the land.”
- (3) A letter dated 13 July 2006 from Clyde & Co to Mr Foster which opens by confirming that the firm “acts for Rebecca Stayton who is about to exchange contracts for the purchase of [the WCG Property].” It goes on to say that “our client” would like to acquire the strip of land described further in that letter.

138. We accept that, had this purchase gone ahead, Mrs Stayton would have been the owner of the WCG Property. However, the only evidence that she was to develop this property came from her witness statement. Of the two documents prepared by Clyde & Co, the internal memo refers to “our clients,” which we assume is a reference to both Mr & Mrs Stayton. We have found Mrs Stayton’s evidence on the refurbishment of the Property to be unreliable and we also place no reliance on her statements about the WCG Property.



139. As a result, we do not accept that the WCG Property was to “become her second development” or that it supports her case that she had begun a “new career” in property development.

### **Findings of fact relating to Mrs Stayton’s intention in January 2006**

5 *The parties’ submissions*

140. The parties agreed that Mrs Stayton’s original intention was to move into the Property as her main home and that there was a change of intention in early January 2006. The question is: what was her new intention.

10 141. Mrs Stayton’s witness statement says that, because of the dispute with the Neighbours, she “decided to continue with the refurbishment as a property development, this was around the beginning of January 2006.”

15 142. Mr Arthur said that the change of intention was evidenced by the Memo, and that this was the date from which Mrs Stayton intended to “turn this project into a property development” as she put it in her witness statement. He relied on Mrs Stayton’s witness statement and the fact that she had secured access to the Property before purchase, this being characteristic of a developer who is seeking to reduce the carried interest costs. He said this conclusion was also consistent with the statement in the Purchasers’ Report that “it is assumed that the current owners purchased the property with a view to renovating and extending it for profit.”

20 143. Mr Horton said that the first mention of Mrs Stayton’s supposed intention to carry on a trade was on 13 September 2011, after a meeting with Counsel and after she realised that the interest costs were not deductible for CGT purposes. This was over four years after the Property had been sold. There was no contemporaneous evidence of any such intention. Instead, when Mrs Stayton realised she could not live in the Property because of the acrimonious relationship with the Neighbours, she simply decided to dispose of it once the refurbishment was complete. Mr Horton said that this was a case to which Lord Greene MR’s dictum in *Henriksen v Grafton Hotel* [1942] 2 KB 184 at p 193 applied:

30 “It frequently happens in Income Tax cases that the same result in a business sense can be secured by two different legal transactions, one of which may attract tax and the other not. This is no justification for saying that a taxpayer who has adopted the method which attracts tax is to be treated as though he had chosen the method which does not, or vice versa.”

35 *The Tribunal’s findings*

144. It is well established that the state of a person’s mind is just as much a fact as the state of his digestion, see *Edgington v Fitzmaurice* (1885) 29 Ch D 459.

40 145. We have already considered the relevant part of Mrs Stayton’s witness statement. We have found that, after the change of intention, she did not begin “to alter the specifications for the development to reduce the expenditure by around £40,000 and therefore increase the profit margin” as she said was the case. We have

also found that there is no reliable evidence to support her statement that the WCG Property was a second development of a similar nature.

146. Although Mr Arthur is right that early access to the Property was obtained, this was at that time when Mrs Stayton still intended to move into the Property, so it cannot be evidence of her changed intention the following January. As for the Purchasers' Report, this was issued following instructions given by the Purchasers, not by Mrs Stayton. Moreover, as is clearly stated in that document (see §86), the surveyor is simply making an assumption that Mrs Stayton "purchased the property with a view to renovating and extending it for profit." An assumption in the Purchasers' Report cannot be evidence as to Mrs Stayton's intention.

147. We therefore agree with Mr Horton. We find as a fact that Mrs Stayton had no intention of developing the Property as an adventure in the nature of a trade.

### **Application of those case law principles to the facts**

148. We have already found that the acquisition, refurbishment, and disposal of a single property can be an adventure in the nature of a trade, despite the lack of intention, but only if the facts as a whole show this to be the case. We therefore considered the badges of trade set out in *Marson v Morton*, while bearing in mind the Vice-Chancellor's warnings set out at §§94-95. We treat the badges of trade, as he recommended, as "common-sense guidance."

(1) This was a single transaction, so there is a lack of repetition; this is a pointer "which indicates there might not here be trade but something else."

(2) The transaction is not related to any trade carried on by Mrs Stayton.

(3) The nature of the subject matter is land. Both parties concurred that this factor was neutral, because land can be held as an investment or used in a trade, and we agree.

(4) We have found that Mrs Stayton did not have the involvement in the Property which would be typical of a property developer. Mr Horton described her involvement as "minimal" and again we agree.

(5) The transaction was largely financed by a loan provided to SHL, Mr Stayton's company; although guaranteed by Mrs Stayton, this was no different to a mortgage. Indeed, Mrs Stayton said that she intended to replace the loan with equity once the existing family home had been sold. There is nothing in the financing which supports this being an adventure in the nature of a trade.

(6) Although work was done on the Property, this was carried out by SHL. Mrs Stayton's involvement was only that of a house owner. Moreover, for the first part of the period, the purpose of carrying out the work was to improve the Property so Mrs Stayton could move into it. In the second part of the period, one of the main obstacles to a quick sale was the boundary issue, and it was Mr Stayton (not Mrs Stayton) who engaged with the lawyers and resolved that dispute. Although some further refurbishment was carried out after Mrs Stayton decided not to move into the Property, her involvement was again minimal.

(7) The Property was resold as one lot; it was not broken down into smaller lots.

(8) Mrs Stayton intended to move into the Property at the time of purchase.

5 (9) The Property was purchased in order to provide enjoyment for Mrs Stayton although that enjoyment was frustrated by the dispute with the Neighbours.

10 149. Standing back and looking at the whole picture it is absolutely clear that Mrs Stayton was not engaged in an adventure in the nature of a trade. Instead, she purchased a house with the intention of living in it; her husband's company organised the funding and took responsibility for its refurbishment. Her involvement was no different from that of any owner who asks a third party to renovate his home. Because of the dispute with the Neighbours, Mrs Stayton decided she could not move into the Property, but she could not sell it until the dispute was resolved and the refurbishment completed. It was Mr Stayton who sorted out the dispute and organised  
15 completion of the refurbishment.

150. It follows that we do not accept Mr Arthur's primary submission that the facts as a whole show that this was an adventure in the nature of a trade.

151. We also do not accept his secondary submission that there was supervening trading from January 2006. This is because we have found as facts that (a) Mrs  
20 Stayton did not have a trading intention at any time, and (b) after January 2006 she had no more involvement with the Property's development than she had had previously.

### **The January 2006 Valuation**

152. We have thus not needed to consider the January 2006 Valuation, which was  
25 put forward to provide an opening value for the Property were we to find that there was supervening trading. The January 2006 Valuation said that the Property was worth £370,000 on January 17 2006, an increase of £35,000 over the purchase price agreed in November 2004. Mr Arthur submitted that on the basis of that valuation, Mrs Stayton's trading profit would be around £72,000.

30 153. Mr Horton had little to say about the January 2006 Valuation as, on HMRC's case, there was no trade in any event. The Tribunal, however, had significant reservations, which we note here for completeness:

35 (1) The January 2006 Valuation was dependent on certain assumptions provided to the surveyor, notably that the cost of works carried out in period between 18 April 2005 (the date of the Access Undertaking) and 17 January 2005 (the date of the Memo) was only £10,000.

(2) No reference was made to any growth in value consequent upon the obtaining of permission to build the extension.

40 (3) The period from the original offer in November 2004 to the Purchasers' offer in March 2007 was around 28 months. January 2006 was roughly the mid-point between the two offers. The growth in value over the entire period was

£240,000 (£575,000 - £335,000). Although we were willing to accept that the growth in value did not accrue evenly over that period, we doubted that the Property's value in the first part increased by only £35,000, but in the second grew by £205,000.

5 (4) Our doubts were reinforced when we noted that the contemporaneous Valuation obtained in May 2005 stated that the Property was worth £400,000 at that date, see §59. This was some six months before January 2006 and before many of the renovations had been carried out.

10 (5) For completeness we note that this apparent dip in value (£400,000 in May 2005 compared to £370,000 in January 2006) was not attributable to the boundary dispute, as in coming to the 2006 Valuation the surveyor was instructed to assume that relations with the Neighbours were amicable.

15 154. Had we found that there was supervening trading, we would therefore have been unwilling to rely on the January 2006 Valuation as the basis for the transfer value of the Property.

#### **Decision on the substantive issue**

155. As is clear from the foregoing, we find that the Property was held as a capital asset and was therefore subject to capital gains tax on disposal.

20 156. As the earlier challenges to HMRC's computational adjustments were abandoned at the beginning of the April hearing, we confirm HMRC's amendment to Mrs Stayton's 2006-07 SA tax return and find that tax of £56,569.35 is payable.

#### **THE PENALTIES**

157. The penalty assessments are underpinned in part by what happened during the enquiry process, on which we now make findings of fact.

#### **25 Findings of fact about the enquiry process**

158. The Property was sold in the 2007-08 tax year. Mrs Stayton was not in self-assessment, and did not notify chargeability in respect of the gain made on the Property.

30 159. At some point before 8 July 2010, Mr Axbey identified Mrs Stayton's sale of the Property from Stamp Duty Land Tax ("SDLT") records. On 8 July 2010 Mr Axbey met Mr Leong to discuss Mr Stayton's tax affairs, and asked about the Property. Mr Leong said he would look into the matter.

35 160. In August 2010, Mr Axbey arranged for Mrs Stayton to be issued with SA tax returns. At a further meeting on 15 September 2010, he told Mr Leong that the returns had been issued. On 22 December 2010, Mr Leong had another meeting with Mr Axbey at which he handed over Mrs Stayton's completed SA returns for four tax years, including that for 2007-08. This declared a capital gain of £36,226 before the annual exemption, and tax due of £5,173.48.

161. Mr Leong also gave Mr Axbey a cheque for £6,000 on account of Mrs Stayton's liabilities. We infer from the correspondence that this sum related to the tax shown to be due for 2007-08, plus interest and surcharges under TMA s 95C for late payment of tax.

5 162. On 26 January 2011 Mr Axbey opened enquiries under TMA s 9A into all four  
of Mrs Stayton's SA returns. Attached to the opening letter relating to the 2007-08  
return was a request for documents, including the completion statement for the  
Property, invoices supporting the claimed deductions in the CGT computation, all  
correspondence about the loan from BMS and copies of correspondence with Clyde &  
10 Co that had given rise to the claimed legal expenses. Mr Axbey also asked Mrs  
Stayton to identify the relevant expenditure from her bank statements, and to explain  
her own role in the purchase, renovation and sale of the Property. Mr Axbey's  
enquiry letter and the information request were copied to Mr Leong.

15 163. No reply having been received by 8 March 2011, Mr Axbey issued a Notice  
under Finance Act 2008, Schedule 36, para 1 ("a Sch 36 Notice"). The Notice  
required the same documents and information as set out in Mr Axbey's earlier letter.

164. On the following day, 9 March 2011, Mr Axbey met Mr Leong. Mr Leong  
handed over a bundle of papers relating to Mrs Stayton which he had been given the  
night before.

20 165. On 14 March 2011, Mr Axbey wrote to Mr Leong, saying that some of the  
information he had originally requested had not been provided. He also made the  
following points:

25 (1) interest of £126,783.56 had been claimed in the CGT computation. This  
was not an allowable deduction and some of it in any event related to other  
borrowings by SHL from BMS;

(2) legal fees to Clyde & Co of £16,031 had been claimed twice;

(3) fees to Savills of £5,750 for the sale of the Property had been claimed  
twice; and

30 (4) some of the claimed expenses arose after the sale of the Property and so  
were unlikely to relate to the Property.

166. On 5 May 2011, Mr Axbey wrote a follow-up letter to Mrs Stayton and attached  
a separate warning letter advising that a penalty of £300 would be imposed if his letter  
of 14 March 2011 was not responded to by 20 May 2011.

35 167. By a letter dated 20 May 2011, Mrs Stayton replied to Mr Axbey, enclosing  
some of the requested information and documents. She copied Mr Leong.

168. On 23 May 2011 Mr Axbey replied, saying that some of the requested  
information and documents still remained outstanding; he copied Mr Leong. He then  
emailed Mr Leong on 8 June 2011 and reiterated that HMRC still had not received  
invoices supporting all the claimed deductions; neither had it received all the  
40 correspondence with BMS or Clyde & Co.

169. On 24 June 2011, Mr Leong sent Mr Axbey the Clyde & Co information together with statements from BMS relating to the loan and two invoices from SHL for costs incurred during the renovation.

5 170. On 7 July 2011 Mr Axbey asked about the boundary dispute which was evident from the Clyde & Co invoices, and reiterated that the interest was not an allowable deduction. On 1 August he sent a follow-up letter. No reply was received.

171. On 13 September 2011 Mr Axbey called Mr Leong and was told that “Stayton had sought Counsel’s opinion and were now intending to claim that Mrs Stayton was in fact trading.”

10 172. On 19 September 2011 Mr Axbey wrote a detailed letter to Mrs Stayton. This repeated his earlier point that £21,781.20 of expenses had been claimed twice and asked again for the BMS information. Mr Axbey adjusted the CGT computation to remove the duplicate expenses and the interest from BMS. As a result of these amendments the CGT due was increased from £5,173.45 to £63,084.65. Mr Axbey  
15 copied the letter to Mr Leong.

173. By a letter also dated 19 September 2011, Mr Leong confirmed that Mrs Stayton had taken Counsel’s advice and that it was his view that she “was in fact trading as a property developer and that we had made an error in presenting this activity as a capital gain.” He included an amended tax return for 2007-08 and  
20 financial statements and computations for the four years ending 5 April 2005, 2006 and 2007 and for the period to 25 May 2007. A cheque of £1,200 was attached, reflecting the further tax due on the basis of these revised computations in addition to the £6,000 already paid.

174. On 21 December 2011, Mr Axbey replied to Mr Leong’s letter of 19 September,  
25 reiterating the points made in his own letter of the same date and saying he did not yet have enough information to consider the new submission on trading. Mr Leong replied on 11 January 2012, saying that the amounts borrowed under the Loan Facility were all borrowed by Mrs Stayton and used in her business, and that SHL was acting as nominee. He disputed that there were any duplicated expense claims.

30 175. On 28 February 2012, Mr Axbey requested copies of all the correspondence between Mrs Stayton and BMS relating to the loan; information about what she did with the extra amounts borrowed and a copy of the drawings account maintained by Mrs Stayton relating to her “business.” He asked again for copies of all the invoices for which expense deductions were claimed, and said that he was “struggling to find  
35 any evidence that Mrs Stayton actually traded on her own account and would appreciate your assistance in this regard.”

176. On 11 July 2012 a Ms Dormer of HMRC wrote to Mr Leong, pointing out that he had not yet replied to Mr Axbey’s letter of 28 February 2012. She said that Mrs Stayton had not produced any contemporaneous evidence that she was trading as a  
40 property developer and asked for copies of the documentation which Mrs Stayton had presumably showed to Counsel when seeking his opinion and asked why she had not

5 notified HMRC that she was trading. She proposed a meeting with Mrs Stayton to allow her to explain her “trade.” She also repeated the requests for all the correspondence between Mrs Stayton and BMS, information about the purpose to which the further BMS loan amounts were put, copies of her drawings account and evidence of the claimed expenses.

177. On 31 October 2012, in the absence of a response, Mr Axbey issued Mrs Stayton with another Sch 36 Notice, giving a deadline of 7 December 2012. This Notice set out the information and documents already requested informally, and asked for a copy of the Counsel’s opinion obtained by Mrs Stayton.

10 178. By letter dated 7 December 2012, Mr Leong replied. He said that “there was hardly any correspondence on the financing” in view of “the close business relationship between Mr Stayton and BM Samuels Finance plc.” He provided a drawings account, and said that Counsel’s opinion had been given verbally.

15 179. On 3 January 2013, Mr Axbey responded, saying he found it “hard to believe” that there was no further written documentation about the loan to Mrs Stayton and asking again for all the relevant documents. He added that there was no sign of these further borrowings from BMS in Mrs Stayton’s bank accounts. He resent the information notice with a warning about penalties for failure to comply. He copied both the letter and the Sch 36 Notice to Mrs Stayton. No reply was received.

20 180. On 4 July 2013, Mr Axbey wrote a long and detailed letter to Mr Leong, again copied to Mrs Stayton. This summarised the position as he saw it, and covered both the CGT and trading possibilities. In relation to the former, Mr Axbey stated that he was disallowing both the interest and the duplicated expenses. In relation to the other expenses claimed, although he had received no further analysis he proposed  
25 disallowing 25% on a without prejudice basis. In relation to the trading, he said “you have proposed no evidence to suggest that Mrs Stayton actually undertook any aspect of the work or incurred a single item of expenditure.” He said that a closure notice would be issued, increasing the tax charged from the £5,169 shown on the SA return, to £67,789.40. He invited any further submissions within 30 days.

30 181. On 9 September 2013, having received no reply, Mr Axbey issued the closure notice and amended the return on the basis set out in his letter of 4 July 2013.

35 182. On 17 September 2013, Mr Axbey issued a penalty notice under TMA s 7(8) for failure to notify liability, in the amount of £27,117. However, this was subsequently replaced by the penalties discussed later in our decision, and we do not consider it further.

183. On 18 September 2013, Mr Leong asked for a statutory review of the amendment to Mrs Stayton’s return.

40 184. On 4 October 2013, Mr Leong wrote two letters to Mr Axbey. The first asked for a statutory review of the penalty assessment, on the basis that Mrs Stayton had “co-operated fully” with the enquiry and because it was based on the wrong figure. The second letter continued to dispute that the legal and estate agent costs had been

deducted twice, and also refused to accept the 25% without prejudice deduction to the un-itemised capital expenses.

185. On 7 October 2013, before Mr Axbey received the letter of 4 October 2013, he received an email from Mr Leong asking him to call. When he did so, Mr Leong  
5 apologised for the tone of the letter he had sent, and said he had “an obligation to write what his client tells him to” and that “things only happened because [Mr Axbey] raised the assessment.” Mr Axbey and Mr Leong also discussed the double deduction for certain expenses.

186. On 10 October 2013 Mr Axbey responded to Mr Leong’s letter of 4 October,  
10 again explaining the double deduction and estimated expenditure points.

187. On 21 October 2013, Mrs Rowena Harper, the HMRC Review Officer, wrote to Mrs Stayton setting out HMRC’s view of the matter by reference to the earlier correspondence. An extended deadline for the issuance of the review conclusion letter was agreed with Mr Leong.

188. On 20 December 2013, Mr Leong forwarded a copy of the Consent Order in  
15 relation to the dispute with the Neighbours and asked for the £18,000 paid to the Neighbours to be taken into account in the computations.

189. On 24 January 2014, Mrs Harper issued her review letter. She allowed a  
20 deduction for the £18,000 and related legal costs of £761.76. She otherwise confirmed Mr Axbey’s decision, other than disallowing two amounts of insurance, both of £723.45, which were revenue costs.

190. The outcome of the statutory review was that Mrs Stayton’s tax liability was adjusted to £56,569.35. This is £51,395.90 more than the capital gains tax of £5,173.45 declared her 2007-08 return as submitted.

191. On 4 July 2014, the earlier penalty notice issued was withdrawn and two new  
25 penalties were imposed, one for failure to notify, and one for submitting an inaccurate return.

### **The failure to notify penalty**

192. The failure to notify penalty was imposed under TMA s 7. So far as relevant to  
30 this appeal, the then current legislation read:

“(1) Every person who—

(a) is chargeable to income tax or capital gains tax for any year of assessment, and

(b) has not received a notice under section 8 of this Act requiring  
35 a return for that year of his total income and chargeable gains

shall, subject to subsection (3) below, within six months from the end of that year, give notice to an officer of the Board that he is so chargeable.

...



(8) If any person, for any year of assessment, fails to comply with subsection (1) above, he shall be liable to a penalty not exceeding the amount of the tax—

- 5 (a) in which he is assessed under section 9 or 29 of this Act in respect of that year, and
- (b) which is not paid on or before the 31st January next following that year.”

10 193. HMRC accepted that it had the burden of proof in relation to whether the penalty was chargeable. Mr Horton said that Mrs Stayton fell within TMA s 7(1) as she was chargeable to income tax or capital gains tax for 2007-08, and had not received a Notice under TMA s 8, being an SA return. She should therefore have notified chargeability by 31 October 2008, being six months after the end of that tax year.

15 194. Mr Arthur did not dispute this. He agreed that Mrs Stayton had tax to pay for 2007-08, whether she had realised a capital gain or a trading profit, and he accepted that HMRC had met their burden of proof on this point. He focused instead on the quantum of the penalty; we return to this at §228ff. However, in the course of making those submissions, Mr Arthur said that Mrs Stayton was experiencing marital difficulties, suffering from stress, and “thought she didn’t make a profit or not much.”

20 The last of these comments echoes Mrs Stayton’s witness statement, where she said “once I had sold the Property I believed I had made no profit at all and accounts were therefore never prepared.”

25 195. Although those points were not put to the Tribunal as submissions that Mrs Stayton had a reasonable excuse for her failure to notify chargeability; indeed Mr Arthur expressly stated that he was not putting her case in that way, we nevertheless thought it right to consider whether she had a reasonable excuse.

196. TMA s 118(2) provides that:

30 “For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the Commissioners or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if

35 he did it without unreasonable delay after the excuse had ceased.”

197. The term “reasonable excuse” is not defined, but in *Nigel Barrett v HMRC* [2015] UKFTT 0329 (TC) Judge Berner said at [154] that:

40 “The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard.”

198. We respectfully agree. Although the test is essentially objective, it contains elements of the subjective: we must establish what a reasonable taxpayer *in the position of the taxpayer* would have done *in those circumstances*.

5 199. We first considered whether or not Mrs Stayton had a reasonable excuse because she thought there was no need to notify chargeability on the basis that she believed (a) she had no liability (as she asserted) or (b) she had a low liability (as Mr Arthur submitted).

10 200. We started from the position that, when she purchased the Property, Mrs Stayton already had a home. She did not move into the Property, so it was never her residence. The purchase price was £335,000 and she made a gross gain of £240,000. We accepted that the expenses were significant, including legal and estate agents' fees, SDLT, the costs of renovation and the interest (which Mrs Stayton thought was deductible). But even on the basis of the original computation, a significant gain of  
15 £27,026 remained. The reasonable person in Mrs Stayton's position – one who was capable of purchasing and selling a property – would not have thought she had made no profit at all.

20 201. We also note that Mrs Stayton's witness statement states that, after she decided not to move into the Property, she "began to alter the specifications for the development to reduce the expenditure by around £40,000 and therefore increase the profit margin." Although we have found that it was *Mr* Stayton who altered those specifications, the aim was to "increase" the profit accruing to Mrs Stayton. That is not possible to reconcile with her assertion that she believed that she had made no profit at all.

25 202. We do not impute any knowledge of capital gains exemptions and thresholds to this hypothetical reasonable person in Mrs Stayton's position, but find that as the Property had never been her main home, she would then have sought advice as to whether she had any tax obligations as a result of her gain. She could have contacted HMRC or instructed an accountant; either would have advised that she was required to notify chargeability. Simply doing nothing, despite a net gain of over £25,000, is  
30 not the action of a reasonable person in Mrs Stayton's position.

203. We find that Mrs Stayton's belief as to her lack of (much) profit does not provide her with a reasonable excuse.

35 204. Mr Arthur also referred to Mrs Stayton's marital difficulties and the stress she suffered. Mrs Stayton's witness statement does not, however, say she was unable to notify chargeability because she was suffering from stress or because of her marital difficulties. There is no evidence at all as to the state of Mrs Stayton's health or her marriage around October 2008, when she was required to comply with her obligations under TMA s 7. In relation to reasonable excuse, the burden is on the appellant and we find that on these grounds too, Mrs Stayton does not have a reasonable excuse.

40 205. We discuss mitigation of this penalty at §247ff, but first we consider the inaccuracy penalty.

## The inaccuracy penalty

206. The inaccuracy penalty was charged under TMA s 95, which reads:

### “Incorrect return or accounts for income tax or capital gains tax

(1) Where a person fraudulently or negligently–

5 (a) delivers any incorrect return of a kind mentioned in section 8  
...of this Act...or

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

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

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

15 (2) The difference is that between–

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

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

(3) The relevant years of assessment for the purposes of this section  
are, in relation to anything delivered, made or submitted in any year of  
assessment, that, the next following, and any preceding year of  
25 assessment.”

207. Mr Horton relied on *Anderson v HMRC* [2009] UKFTT 206 where Judge  
Berner said at [22]:

30 “The test to be applied, in my view, is to consider what a reasonable  
taxpayer, exercising reasonable diligence in the completion and  
submission of the return, would have done.”

208. He also relied on *Colin Moore v HMRC* [2011] UKUT 239 (TCC) (“*Moore*”) where Judge Berner’s summary was cited with approval by Judge Bishopp, see [13]. He said that these authorities showed that the test was objective.

209. Mr Horton accepted that HMRC had the burden of proof in showing that Mrs Stayton had been negligent, but submitted that this was clear from the facts. Her SA return:

- 35 (1) included duplicate expenses for both legal fees and estate agency fees;  
(2) deducted interest which was not allowable for capital gains purposes;  
(3) included expenses as allowable without having any analysis or supporting  
40 documents.

210. Mr Arthur accepted that Mrs Stayton was liable to an inaccuracy penalty and expressly disavowed any reasonable excuse submission.

5 211. Despite those concessions, the Tribunal nevertheless thought it proper to consider whether Mrs Stayton had been negligent, and if so, whether she had a reasonable excuse.

### *Discussion*

10 212. We agree that the reference to “a reasonable taxpayer” in TMA s 95 means that the statutory test is objective: we are required to consider how the hypothetical reasonable taxpayer exercising reasonable diligence in the completion and submission of the SA return would have acted.

213. In *Moore* at [13], Judge Bishopp approved the submission of Mr Jones, Counsel for HMRC, that a determination of negligence required a two-stage approach

15 “First, one must consider whether a person whose conduct is under scrutiny had a duty of care and, if so, the nature of the duty. That, he said, was a question of law. Once a duty of care has been identified, it is necessary to go on to decide whether the person has satisfied the duty. That, he said, is a question of fact.”

214. Judge Bishopp went on to say at [15] that:

20 “There can, I think, be no doubt that any taxpayer completing a self-assessment return has a duty to take care when doing so: the obligation upon him is plainly to submit an accurate return.”

215. A person can satisfy that duty of care by either submitting the return himself, or instructing an agent to do so. If he acts through an agent, and the return is inaccurate because the agent falls below the standard required, is the taxpayer negligent?

25 216. As a matter of general law a person who carries out particular acts through an agent remains liable for torts, including negligence. In Halsbury’s Laws of England, Chapter 6(4) of the Agency volume states, under the heading “Tort liability”:

30 “[150] Where a principal gives his agent express authority to do a particular act which is wrongful in itself, or which necessarily results in a wrongful act, the principal is responsible, jointly and severally with the agent, to third persons for any loss or damage occasioned thereby.

35 [151] Where the act complained of is not expressly authorised by the principal, the principal is, while the agent is acting within the scope of his implied authority or within the scope of his apparent or ostensible authority, jointly and severally responsible with the agent, however improper or imperfect the manner in which the authority is carried out. It is immaterial that actual malice is an essential ingredient of the wrongful act, that the wrongful act is also a crime, or that the act in  
40 question has been expressly prohibited by the principal.”

217. There is no reason why this general principle does not also apply to an agent's submission of an SA return. We observe that any resulting harshness is more apparent than real, because TMA s 95 must be read with TMA s 118(2). In other words, a taxpayer found to be negligent because of the actions of his agent may then  
5 be able to claim the defence of reasonable excuse.

218. We find that the reasonable taxpayer would have either established, by reference to HMRC guidance or other sources, how to complete her return correctly, or would have instructed an accountant. Mrs Stayton instructed Mr Leong. However, her computation as prepared by Mr Leong contained mistakes such as the inclusion of  
10 interest as a deduction, when even a cursory review of the legislation or published guidance would have shown this to be incorrect. Duplicate expense claims were made and other sums deducted without receipts or other evidence. Mrs Stayton, acting through her agent Mr Leong, was therefore negligent.

219. We also find that Mrs Stayton was herself negligent. Having provided her  
15 accountant with information about her expenses, the reasonable person would have checked that each was only included once, and would have provided evidence to support the claims. A reasonable person would also have informed her accountant that some of the interest paid to BMS did not relate to the Property, but instead arose on borrowings used by SHL in its business. The return would still have been  
20 inaccurate, but the size of the inaccuracy would have reduced.

220. We went on to consider whether Mrs Stayton had a reasonable excuse because she relied on Mr Leong. As we have already said at §197, the test under TMA s 118(2), unlike that for negligence, contains an element of subjectivity. We must ask how would the reasonable person *in Mrs Stayton's position* have acted?

221. We find that this hypothetical person would not have known that interest was  
25 not deductible in a CGT computation, and we also find that it was reasonable for her to accept Mr Leong's advice that it was allowable. But she would have known that some of the interest was unrelated to the Property; she would have checked that each expense was only included once, and she would have provided appropriate and  
30 reliable evidence to support the expenses claimed. We therefore find that Mrs Stayton does not have a reasonable excuse for the failures on the basis that she relied on Mr Leong, because the reasonable person in her position would have realised that there were inaccuracies in the return.

222. We also considered whether she had a reasonable excuse because of the stress to  
35 which Mr Arthur referred. We know that she received her return in around September 2010 and filed it on 22 December 2010, but we have no evidence at all as to her mental health, or her marital difficulties, during that period, and the burden of proof in establishing reasonable excuse rests on an appellant. We therefore do not accept that either Mrs Stayton's stress, or her marital difficulties, provide her with a reasonable  
40 excuse for negligently submitting an inaccurate return.

223. For the reasons set out above, we find that Mrs Stayton was negligent, and that she does not have a reasonable excuse.

### **The quantum of the penalties charged**

224. The failure to notify penalty was based on the tax shown as due on Mrs Stayton's originally submitted SA return, namely £5,173.45. The maximum 100% penalty was abated by 80%, made up as follows:

- 5 (1) 10% (out of 20%) for disclosure, on the basis that the chargeability would not have been notified had HMRC not identified the disposal from the SDLT records.
- (2) 30% (out of 40%) for co-operation, on the basis that Mr Leong agreed on Mrs Stayton's behalf to look into the matter, and because the 2007-08 return  
10 was not submitted until 22 December 2012.
- (3) 40% (out of 40%) for "size and gravity." Mr Axbey's letter says "this is a single transaction which is unlikely to recur" and "the actual amount of tax due is not significant in real terms."

225. The inaccuracy penalty was based on the further tax due following HMRC's  
15 statutory review, being £51,395.90 abated by 70%, made up as follows:

- (1) 10% (out of 20%) for disclosure. Mr Axbey's explanation said that "the correct amount of tax was disputed throughout with a number of expenses claimed twice. These errors have not been acknowledged."
- (2) 25% (out of 40%) for co-operation, on the basis that Mrs Stayton had  
20 made two payments on account and responded to one letter, but that otherwise "co-operation has been poor and responses to letters still remain outstanding." Mr Axbey said during his evidence in chief that that it was "traditional" for HMRC to allow abatements for payments on account of liabilities
- (3) 35% (out of 40%) for "size and gravity." The text of the letter says "this  
25 is a single transaction which is unlikely to recur. The actual amount of tax due (£56,569.35) is not significant in real terms." Mr Axbey said in his evidence that the word "not" had been inserted in error, so that it should have read "is significant in real terms." He echoed the words in Mr Horton's skeleton argument, namely that this sum was "large in size in relation to the tax declared  
30 £5,173.45, ten times the amount." He also informed the Tribunal that the figure in brackets should have been £51,395.90 not £56,569.35.

### **Submissions**

226. Mrs Stayton originally appealed against these penalties on the basis that they were out of time and invalid, but those challenges were sensibly abandoned by Mr  
35 Arthur at the reconvened April hearing. The only other issue was the amount of mitigation.

227. In relation to the penalty for late notification, Mr Arthur submitted that the abatement for co-operation should have been higher than 10%.

228. In relation to the inaccuracy penalty, Mr Arthur's skeleton argument said that  
40 the abatements for co-operation and size and gravity were inadequate and inconsistent

with HMRC's published guidelines. However, no further details were provided as to these claimed inconsistencies.

229. Mr Arthur submitted at the hearing that:

5 (1) in relation to co-operation, Mrs Stayton's state of mind should have been considered and she had been suffering from stress; and

(2) there should be full abatement for size and gravity, because it was arguable that Mrs Stayton had been trading; in particular it was possible that she had been trading from January 2006 and this had not been considered by the parties before the hearing.

10 230. Mr Horton asked the Tribunal to confirm the penalties and he reiterated the points made by Mr Axbey when the penalties were issued, see §§225-226. In relation to the possibility of supervening trading, Mr Horton said that even if this was the position (which he did not accept), on Mr Arthur's calculations it still gave rise to a profit of £72,000, so Mrs Stayton's return was still significantly incorrect.

15 231. We invited the parties to consider whether the late notification penalty should have been based on the tax due after Mrs Stayton's SA return had been amended by HMRC, rather than on the figure as submitted. We said that on our reading of the law, taking TMA s 7 together with TMA s 9 and s 28A, it seemed to us that the latter was technically correct.

20 232. Mr Horton said that it was HMRC's practice to impose late notification penalties on the basis of the amount shown on the face of the submitted return, rather than on the amount after any subsequent amendment to that figure, to prevent the same amount of tax being the basis for two penalties. Mr Arthur had no submissions, but did not dissent from HMRC's approach.

25 233. We said we would consider the calculation of the penalties further before giving our decision. Our understanding is set out at in the next following paragraphs.

### **The penalty for late notification**

#### *The legislation*

30 234. TMA s 7(8) says that the maximum penalty is 100% of the tax to which the person "is assessed under section 9" in respect of that year.

235. TMA s 9 says that every SA return "shall include a self-assessment." If HMRC open an enquiry into the return under TMA s 9A and issue a closure notice, TMA s 28A provides, again so far as relevant to this case:

#### **"Completion of enquiry into personal or trustee return**

35 (1) An enquiry under section 9A(1) of this Act is completed when an officer of the Board by notice (a 'closure notice') informs the taxpayer that he has completed his enquiries and states his conclusions...

(2) A closure notice must either--

- (a) state that in the officer's opinion no amendment of the return is required, or
- (b) make the amendments of the return required to give effect to his conclusions.”

5 236. The closure notice therefore amends the return submitted by the taxpayer. Once  
the amendment has been made, the “amount in which he is assessed under section  
9...of this Act in respect of that year” is based on the return as amended. It is that  
“amount in which he is assessed under section 9” which forms the basis of the TMA s  
7 penalty. It follows that the penalty is based on the sum shown on the return *after*  
10 the HMRC amendment, not before it.

237. This means that the late notification penalty should have been charged, not on  
the basis of the £5,173.45 shown on Mrs Stayton’s return, but on the amended amount  
of £56,569.35.

238. However, we also need to consider TMA s 97A, which reads as follows:

15 **“Two or more tax-geared penalties in respect of same tax**  
Where two or more penalties--  
(a) are incurred by any person and fall to be determined by reference  
to any income tax or capital gains tax with which he is chargeable for a  
year of assessment;  
20 (b) ...  
each penalty after the first shall be so reduced that the aggregate  
amount of the penalties, so far as determined by reference to any  
particular part of the tax, does not exceed whichever is or, but for this  
section, would be the greater or greatest of them, so far as so  
25 determined.”

239. Where, as here, a person is charged a failure to notify penalty under TMA s 7(8)  
and an inaccuracy penalty under TMA s 95(1)(a), there are “two or more tax-geared  
penalties in respect of the same tax.” TMA s 97A then requires that both penalties are  
computed, but that only the higher amount is charged on the taxpayer.

30 240. How this works can be most easily explained by using an example, unrelated to  
the facts of this case. Assume that:

- (1) a failure to notify penalty was charged at 10% on a liability of £50,000,  
giving rise to a penalty of £5,000; and
- (2) an inaccuracy penalty was subsequently issued at 40% on £40,000 of that  
35 sum, giving rise to a penalty of £16,000; then
- (3) the particular part of the tax which formed the basis of both penalties  
would be £40,000.
- (4) However, by the time the inaccuracy penalty is charged, a penalty of  
£4,000 (£40,000 x 10%) has already been levied. The inaccuracy penalty is  
40 therefore reduced by £4,000 to £12,000.



(5) The total of both penalties is £17,000 (£5,000 plus £12,000).

241. Where both penalties are issued at the same time (as in Mrs Stayton’s case), it is immaterial which is treated as the first penalty and which is treated as the second, provided that the tax common to both penalties is charged only at the higher percentage.

242. We note that HMRC’s own guidance at EM6062 takes the same approach. Using an example involving a failure to notify penalty and an inaccuracy penalty, it starts from the position that a TMA s 7 penalty is calculated on the basis of the full amount payable after the issuance of a closure notice and an amendment to the return, as we have already found is the case. In the example, the s 7 penalty is chargeable at 10% and the inaccuracy penalty at 30%, so the lower penalty falls away to the extent that it is charged on the same underlying tax.

243. In accordance with the analysis set out above, we first considered each penalty separately and then applied TMA s 97A.

15 *HMRC’s approach to mitigation*

244. HMRC assess penalties under three headings, disclosure, co-operation and size/gravity. Although we are not bound to follow the same approach, we agree it is a sensible one. Both Mr Arthur and HMRC were content that the Tribunal used these three headings. However, in so doing we bear in mind that the Tribunal has a wide discretion and can take into account matters not before Mr Axbey when he set the penalties, see *Willey v HMRC* [1985] STC 56 per Scott J at page 61.

245. One of Mrs Stayton’s grounds of appeal was that Mr Axbey did not follow HMRC’s own guidance on how to apply these three headings. Questions about how HMRC apply their guidance are, however, not matters over which the Tribunal has jurisdiction. Whether or not Mr Axbey correctly applied HMRC’s guidance is therefore not a relevant factor for the purposes of our decision.

*Mitigation of the failure to notify penalty*

246. The first heading is disclosure. HMRC’s guidance at EM6070 of their Enquiry Manual says that the term means “a disclosure of irregularities” or “an admission that the returns or accounts have been wrong” and implies a positive, voluntary and useful contribution to HMRC’s knowledge of the irregularity. At one extreme is the taxpayer who makes a complete, voluntary and spontaneous disclosure; at the other is a refusal to admit that anything wrong, even after a Tribunal hearing.

247. In the context of a failure to notify penalty, one end of the spectrum is thus the taxpayer who belatedly realises that he had a liability and should have filed a return, and contacts HMRC to request that one be issued. At the other is a refusal to accept that there was any obligation to complete a return.

248. Mrs Stayton’s failure to notify was discovered by Mr Axbey when he reviewed the SDLT filings, but once the failure had been identified, Mrs Stayton did not dispute that she should have completed a return. We agree that 10% mitigation is appropriate.

249. The second heading is co-operation. HMRC's guidance at EM6075 discusses co-operation in the course of an enquiry and is not apposite for a failure to notify offence. It seemed to us that a taxpayer who receives an SA return and completes it by the due date has co-operated. We considered whether the accuracy of the return was relevant to this heading, but in our view accuracy is a separate matter which goes beyond the failure this penalty is designed to punish. We have therefore only considered whether the SA return was filed by the due date.

250. Mr Axbey sent to Mrs Stayton at some point between his meeting with Mr Leong on 8 July 2010 and their further meeting on 15 September 2010: we know this because the notes of that second meeting refer to the return as having been issued by that date.

251. TMA s 9(1G) provides that a return issued after 31 October following the end of the second year after the end of the tax year in question must be filed within three months of the date on the return. We understand that in practice a further two weeks is given by HMRC to allow for postal delays. This means that if the return were issued on 14 September 2010 (to give Mrs Stayton the benefit of the latest possible date on the basis of the information provided), the filing date would have been by 28 December 2010. In fact, it was filed on 22 December 2010. We find as a fact that the SA return was filed on or around the due date.

252. Mr Axbey gave 30% mitigation for co-operation (out of 40%). The reduction was because the 2007-08 return was not submitted until 22 December 2010. We understand from this that Mr Axbey took into account that the 2007-08 return was filed a long time after the end of that tax year. But that is at the heart of the failure to notify itself; it cannot be relevant to how Mrs Stayton behaved once the failure had been identified. In our judgment, Mrs Stayton should be given full mitigation for co-operation, namely 40%, because her return was filed on or before the due date.

253. The third heading is size and gravity. Mr Axbey awarded full mitigation, partly on the basis that the failure to notify was "a single transaction which is unlikely to recur." We found this difficult to understand. Penalties for SA returns are always charged on a per return basis, in contrast, say, to the VAT default surcharge or the penalties for late payment of PAYE.

254. Mr Axbey's other reason for giving full mitigation under this heading was that "the actual amount of tax due is not significant in real terms." We would have disagreed with that statement even had we not taken a different view of the interaction of TMA ss 7, 9 and 28A, with the result that the amount of tax chargeable before the application of TMA s 97A had remained at £5,173.45. In our judgment, over £5,000 is a significant sum for which full mitigation is inappropriate.

255. Had Mrs Stayton's failure to notify not been identified by Mr Axbey, it is reasonable to assume that tax of £56,569.35 would never have been collected. This is a large sum by any standards, and her failure to notify is a serious matter.

256. We also need to consider gravity as well as size; in that context it is relevant that Mrs Stayton did not appreciate that the tax liability would be so high, because she had not understood that the interest paid was disallowable. But even after deducting all the interest, including that attributable to SHL, a gain of £27,026 remained.

5 257. Taking into account both size and gravity, we decided that an abatement of 20% (out of 40%) was appropriate.

258. The maximum penalty of £56,569.35 is therefore reduced by 70% (10%, 40% and 20%), so that the mitigated sum is £16,970.81.

*Mitigation of the inaccuracy penalty*

10 259. Our starting point is the extra tax due as a result of the inaccuracies, namely £51,395.90.

260. The first heading is disclosure. As we have already noted, HMRC use this term to mean “a disclosure of irregularities, or an admission that the returns or accounts have been wrong.” It therefore does not refer to the disclosure of documents or  
15 information, which is dealt with under “co-operation.”

261. Mr Axbey’s position was that “the correct amount of tax due has been disputed throughout with a number of expenses claimed twice.” We agree that:

(1) the duplicate expenses were raised by Mr Axbey in his letters of 14 March 2011 and 19 September 2011, as well as in a number of follow-up letters. In his  
20 letters of 11 January 2012 and 4 October 2013, Mr Leong explicitly rejected Mr Axbey’s view that there was duplication. This issue was only conceded on the second day of the Tribunal hearing.

(2) Mr Axbey first requested details of the capital expenses claimed when he sent his opening letter on 26 January 2011. After failing to receive a substantive  
25 reply for over two years, he finally suggested on 4 July 2013 that 25% be disallowed in order to settle the matter. That offer was not acknowledged until after the issuance of the closure notice and was explicitly rejected on 4 October 2013. Mr Axbey’s suggested disallowance was also only accepted on the second day of this hearing.

30 262. There is no reasonable explanation for Mrs Stayton’s reluctance to acknowledge these obvious errors. We note in particular that Mr Axbey copied Mrs Stayton on his letter of 19 September 2011, so she was clearly aware of the issues with the duplicated invoices and the lack of justification for the expenses.

263. However, we also take into account that the reason why Mrs Stayton did not  
35 accept that the major part of the tax in dispute was payable was because she had received Counsel’s opinion in September 2011. Following that advice she sought to claim that she had been engaged in an adventure in the nature of a trade. We have found against her on this point. But she should not be treated as failing to accept that she was wrong, simply because she relied on a Counsel’s opinion with which neither  
40 HMRC nor the Tribunal agree.

264. We have thus given Mrs Stayton 15% for disclosure out of a possible 20%; this reflects her continuing failure to agree the duplicate expenses and the unsupported invoices, but also recognises her reliance on Counsel's opinion.

5 265. The next heading is co-operation. Mr Axbey awarded 25% abatement, taking into account the two payments on account and one letter sent by Mrs Stayton in the course of the enquiry. Mr Arthur invited us to increase the abatement taking into account Mrs Stayton's state of mind.

266. Our view on co-operation is as follows:

10 (1) Mrs Stayton in fact wrote two letters, one on 3 March 2011 and one on 20 May 2011. But that is of peripheral relevance, as she had instructed Mr Leong to act for her. When considering co-operation, we must also look at Mr Leong's actions as her appointed representative. It is not reasonable to mitigate based only on the letters written personally by Mrs Stayton.

15 (2) Although Mrs Stayton made two payments on account, the first (of £6,000) was only slightly more than the admitted liability of £5,173.45 and included a sum to cover interest and surcharges. The second payment covered the liability accepted to be due if Mrs Stayton was found to be engaged in an adventure in the nature of a trade. Neither was a payment on account of the sums in dispute. We place very little weight on these payments in assessing the level of co-operation.

20 (3) Mr Axbey first asked for documents to support the claimed legal expenses on 26 January 2011. He repeated this request on five further occasions: on 8 March 2011, 14 March 2011, 5 May 2011, 23 May 2011 and 8 June 2011. He did not receive a substantive response until 24 June 2011.

25 (4) On the same dates, Mr Axbey also asked for documents relating to the loan from BMS and the capital expenses claimed. He or his colleague Ms Dormer made eight further requests (13 in total) on 1 August 2011, 19 September 2011, 28 February 2012, 11 July 2012, 31 October 2012, 21 December 2012 and 3 January 2013.

30 (5) Mr Axbey issued two Sch 36 Notices and threatened a £300 penalty, but even these formal interventions produced only some of the required documents and information.

(6) On 11 July 2012 Ms Dormer invited Mrs Stayton to attend a meeting to explain her trading position, but she did not respond.

35 (7) Long periods elapsed during which no response was received from either Mrs Stayton or her agent. As a result, Mr Axbey frequently had to write again, referring to earlier letters and repeating his requests for co-operation and assistance. For example, he waited over two months for a reply to the letters of 26 January 2011, 14 March 2011 and 7 July 2011. There was a nine month gap after his letter of 28 February 2012, with no reply being received until 7  
40 December 2012, despite the issuance of two follow-up letters. After Mr Axbey's letter of 3 January 2013, no reply was received until after he issued the closure notice in September 2013.

(8) The enquiry began on 26 January 2011 but was not concluded until 9 September 2013, two years and nine months later. This protracted period was largely caused by Mrs Stayton and/or her agent failing to respond to Mr Axbey's questions in anything like a reasonable time scale.

5 (9) We have no evidence as to Mrs Stayton's state of mind during the enquiry period. One of the letters on file after the issuance of the closure notice does indicate that she had become stressed, and we know that she did not attend this Tribunal hearing in part because of stress. But neither provides a basis on which we can infer that her lack of co-operation during the enquiry period was  
10 caused by mental health difficulties.

(10) We also find that Mrs Stayton could have been in no doubt about what was required by way of information and documents, because Mr Axbey frequently set out, with admirable clarity, the outstanding issues and the material he needed to close the enquiry.

15 (11) We considered for completeness whether the delays and lack of co-operation were the fault of Mr Leong rather than Mrs Stayton, but we found no evidence that this was the position. Mrs Stayton's witness statement also did not suggest that the delays or lack of co-operation were caused by Mr Leong, and Mr Arthur made no submission of this nature. The only information we had  
20 went in the other direction: Mr Leong told Mr Axbey on 7 October 2013 that he was acting entirely at his client's direction. Moreover, most of the delays were caused by a failure to respond to requests for information and documents, and when these were provided to Mr Leong they were passed to HMRC without delay – for example, on 9 March 2011, Mr Leong gave Mr Axbey various  
25 material which had been provided to him on the previous day.

267. Taking into account the level of co-operation, which can only be described as poor, we decided that mitigation of 20% (out of a total of 40%) is appropriate.

268. The final heading is size and gravity. The amount at issue is, as Mr Axbey said, ten times more than was included on Mrs Stayton's SA return, so its "size" is  
30 significant. It is also large in absolute terms.

269. However, we also need to consider gravity. Mrs Stayton initially did not understand that interest was not deductible from her CGT computation. Later she had Counsel's opinion that she should be taxed on a trading basis.

270. Taking into account both size and gravity, we decided that mitigation of 30%  
35 (out of a total of 40%) was appropriate. In so doing we have given due weight to Mr Arthur's submission that there was some doubt about the correct tax treatment. We do not, however, consider that having an arguable position means that a taxpayer should be automatically given full mitigation under this heading.

271. Adding together these percentages of 15%, 20% and 30% we arrive at an  
40 overall mitigation percentage of 65%. The total inaccuracy penalty is thus £17,988.57 being 35% of £51,395.90.

*Two tax geared penalties*

272. Both the failure to notify penalty and the inaccuracy penalty “fall to be determined by reference to [the]...capital gains tax with which [Mrs Stayton] is chargeable for the year of assessment”, so both are “tax-geared penalties.” We therefore need to consider TMA s 97A.

273. As already set out above, the statute says that where there are two or more tax-geared penalties:

“...each penalty after the first shall be so reduced that the aggregate amount of the penalties, so far as determined by reference to any particular part of the tax, does not exceed whichever is or, but for this section, would be the greater or greatest of them, so far as so determined.”

274. The “particular part of the tax” which here determines part of the penalties is £51,395.90; in other words this is the part of the tax which is counted when calculating both penalties. The failure to notify penalty was charged at 30% and the inaccuracy penalty at 35%, so the latter is the “greater” sum. That sets a cap on the penalty of £17,988.25. There remains the part of the tax underlying the failure to notify penalty which does not form part of the inaccuracy penalty. This is £5,173.45 chargeable at 30% or £1,552.03.

275. As the penalties were both issued at the same time, we treated the inaccuracy penalty as the “first” penalty and the failure to notify penalty as the second, as we explained at §241. As a result we have reduced the failure to notify penalty from £16,970.81 to £1,552.03. The inaccuracy penalty remains at £17,988.57. The total chargeable is therefore £19,540.60.

*Mr Axbey’s calculation*

276. We observe that the methodology we have used gives the same result as the calculation carried out by Mr Axbey. Mr Horton said that this methodology was based on HMRC’s practice of limiting the failure to notify penalty to the sum shown on the return as submitted, and then calculating the inaccuracy penalty on the balance.

277. We suspect, however, that the method used by Mr Axbey has become a shortcut for the statutory basis, because it comes to the same answer. Had we applied our revised mitigation percentages to the figures used as the basis for the penalties, being £5,173.45 x 30% (rather than the 20% used in the Penalty Notice) and £51,395.90 x 40% (rather than the 30% used in the Penalty Notice), we would have arrived at Mr Axbey’s penalty of £22,110.39. In other words, had we agreed with HMRC’s mitigation percentages, Mr Axbey’s approach and our own would have come to the same result. However, we have followed the steps required by the statute and not used a short cut.

278. For completeness, whether HMRC have used a shortcut or whether they have calculated the penalties on the basis explained by Mr Horton does not affect their validity. TMA s 100 gives a HMRC officer wide discretion, allowing him to make a

determination “imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate.”

279. We have subsequently exercised our jurisdiction under TMA s 100B(2)(b)(iv) and decided in relation to both penalties that “the amount determined appears to be insufficient.” We increased both penalties “to such amount not exceeding the permitted maximum as [we considered] appropriate.”

#### *The FA 2007 Sch 24 regime*

280. The penalties we have determined arose under the TMA. More recently, Sch 24 introduced a new penalty code which sets out a codified table of penalties, so that each penalty falls into a fixed band, unlike the penalties in this appeal. Sch 24, para 4(2) specifies that the maximum penalty for carelessness is 30%.

281. We thought it right to consider whether we should use these new provisions as a guide, and cap the maximum penalty for negligence at 30%, but we decided this was not correct, for three reasons.

282. First, the Finance Act 2007, Schedule 24 (Commencement and Transitional Provision) Order SI 2008/568 sets out when the Sch 24 provisions come into force for different parts of the tax system. It provides that Sch 24 applies only where the assessment is for *tax periods beginning after* 1 April 2008. It would have been an easy matter for Parliament to provide, by that Order, that all direct tax penalties *raised after* 1 April 2008 came within Sch 24. Had this happened, Mrs Stayton’s penalties would have been dealt with under the new rules. It is not for us to approach Mrs Stayton’s penalties as if the Order had otherwise provided.

283. Second, unlike negligence, the test for carelessness is not purely objective, but includes a subjective element, see *Harding v HMRC* [2013] UKUT 575(TC) (Judges Bishop and Sadler), discussed in *Martin v HMRC* [2014] UKFTT 1021 (TC) at [124]-[131] (where Judge Redston was also the presiding judge).

284. Third, Sch 24 sets minimum as well as maximum penalties – for example, the minimum penalty for prompted disclosure in a carelessness case is 15%. It also allows for penalties of up to 200% of the “potential lost revenue” in the most serious situations. We decided that we should not use Sch 24 to impose a cap on the penalties charged on Mrs Stayton, any more than we should (on different facts) use it to increase a penalty, for instance by bringing it up to the minimum prescribed for a prompted disclosure. We must apply the law which is actually in force for the period in question, not a completely different set of provisions.

#### **Decision**

285. We therefore dismissed Mrs Stayton’s appeal against the amendment to her 2007-08 return, with the result that tax of £56,569.35 is due. Of this, we understand that £7,120 has already been paid on account.

286. We also dismissed her appeal against the penalties and decreased the mitigation given by HMRC, which has the effect of increasing the penalties. The failure to

notify penalty is now £1,552.03 after mitigation of 70% and the inaccuracy penalty is £17,988.57 after mitigation of 65%. Taken together, the penalties are therefore £19,540.60.

**Other matters**

5 287. Mrs Stayton’s witness statement made a number of allegations against Mr Axbey. This Tribunal has no jurisdiction over allegations of that nature. We can only say that from our detailed review of the correspondence it appeared to us that Mr Axbey acted entirely properly throughout.

10 288. Mrs Stayton also made representations as to the allocation of the payments on account against her liabilities; some of these matters were also raised by Mr Arthur during his cross-examination of Mr Axbey. The allocation of payments to settle liabilities is also outwith the jurisdiction of the Tribunal.

**Appeal rights**

15 289. 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.

20 290. 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.

25  
**ANNE REDSTON**  
**TRIBUNAL JUDGE**  
**RELEASE DATE: 18 MAY 2016**