



**TC06932**

**Appeal number: TC/2017/03411**

*INCOME TAX – invalid Closure Notice “replaced” by discovery assessment – whether Tribunal misled – whether discovery stale – further assessments based on presumption of continuity – whether Appellant engaged in a single business in partnership with his father and his wife – whether expenditure schedule provided was for the family or for the Appellant alone – extent of debt – whether Appellant’s behaviour was “deliberate” – assessments and penalties cancelled and appeals allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**RANGA NELSON**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ANNE REDSTON**

**Sitting in public at the Tribunal Centre, Taylor House, Rosebery Avenue,  
London on 7 November 2018 and 19 December 2018**

**The Appellant in person, assisted by his wife, Mrs Samanathi Vidanalage**

**Ms Amy Biney of HM Revenue and Customs’ Solicitors Office, for the  
Respondents**

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## DECISION

1. At the hearing of Mr Nelson's appeal, HM Revenue & Customs ("HMRC") asked the Tribunal to uphold assessments totalling £33,838.93 for the years 2007-08 to 2012-13, and penalties totalling £11,131.08 for four of those years.
2. The assessments and penalties under appeal are CANCELLED and Mr Nelson's appeals allowed. In summary, this is because:
  - (1) from December 2008 through to June 2013, Mr Nelson, his wife Mrs Samanathi Vidanalage ("Mrs Nelson"), and his father Mr Mervyn Nelson carried on a business in partnership trading on e-Bay. For reasons to do with immigration law, the family decided to allocate the profits for all but one of those years to Mr Mervyn Nelson, and reported them to HMRC on the basis that he was the proprietor of that business. HMRC wrongly decided that Mr Nelson was running a second e-Bay business, in addition to the one reported by his father;
  - (2) HMRC based their 2011-12 assessment on an expenditure schedule provided by Mrs Nelson ("the Expenditure Schedule"). It was clear on the face of that document, and confirmed by Mrs Nelson, that the expenditure was that of the family, not of Mr Nelson alone. HMRC refused to accept this was the position, and in consequence also refused to take the earnings of other family members into account when calculating whether expenditure exceeded income;
  - (3) the assessments for the other five years were based on the presumption of continuity. There was no basis for the application of that presumption, because:
    - (a) the assessment for the base year, 2011-12, was fundamentally flawed; and in any event
    - (b) for 2007-08 there was no e-Bay trade at all; for 2008-09 to 2010-11 there was no shortfall in income; and the shortfall in 2012-13 was met from borrowings, as was clearly evidenced by third party documentation;
  - (4) Mr Nelson had not deliberately understated his liability to tax in 2011-12 or in any of the other years;
  - (5) HMRC assessed Mr Nelson to two inaccuracy penalties for deliberate behaviour. Mr Nelson did not deliberately give HMRC documents containing inaccuracies; and
  - (6) HMRC also issued two penalties on the basis that Mr Nelson had deliberately failed to notify liability. Not only was there was no "deliberate" failure, but the first penalty was for 2007-08, when the e-Bay trade had not commenced.

### **The hearing and the Directions**

3. The hearing was listed for a single day, which proved insufficient. It was relisted for a further day, on a date agreed with the parties. Directions ("the Directions") were given orally at the end of the hearing, and issued in writing shortly

afterwards. The parties confirmed at the hearing that they could meet the time limits set by the Directions.

#### **The assessments at the hearing date**

4. HMRC's skeleton argument for the appeal hearing asked the Tribunal to confirm the assessments and the Closure Notice set out below, in the following amounts:

<b>Year</b>	<b>Type</b>	<b>TMA</b>	<b>Assessment</b>	<b>Tax</b>
2007-08	Discovery	s 29	£17,770	£3,495.90
2008-09	Discovery	s 29	£21,336	4,332.28
2009-10	Discovery	s 29	£33,306	£7,573.48
2010-11	Discovery	s 29	£28,523	£6,547.04
2011-12	Closure Notice	s 28A	£21,471	£5,569.34
2012-13	Discovery	s 29	£29,745	£6,320.89
<b>Total</b>				<b>£33,838.93</b>

5. The skeleton also set out the following penalties, which HMRC asked the Tribunal to confirm:

<b>Year</b>	<b>Type</b>	<b>Law</b>	<b>Penalty</b>
2007-08	Failure to notify	TMA s 7(1)	£1,774.17
2010-11	Inaccuracy	FA 2007, Sch 24	£3,322.62
2011-12	Inaccuracy	FA 2007, Sch 24	£2,826.44
2012-13	Failure to notify	FA 2008, Sch 41	£3,207.85
<b>Total</b>			<b>£11,131.08</b>

6. As is clear from the first table above, HMRC's skeleton stated that a Closure Notice had been issued for 2011-12, and discovery assessments for the other years. The HMRC Officer who conducted the investigation into Mr Nelson and issued all relevant assessments was Mr Dheerandra Patel. I took the parties to Mr Patel's opening letter of 10 November 2014 and pointed out that it appeared to have been issued outside the statutory time limit permitted by the Taxes Management Act 1970 ("TMA"), s 9A. Ms Biney checked the Closure Notice in the Bundle, which said that it had been issued under TMA s 28A, and asked for a short adjournment to discuss with Mr Patel.

7. After that adjournment, Ms Biney said that Mr Patel's opening letter of 10 November 2014 was not a TMA s 9A enquiry. She pointed out that his letter does not refer to TMA s 9A, but instead had merely said he was opening "a check" into Mr

Nelson's return. She added that although Mr Patel had mistakenly issued a Closure Notice, he replaced it on 16 December 2016 by a further assessment.

8. No copy of that "replacement" assessment had been included in the Bundle, but Ms Biney handed up a copy to the Tribunal. The first paragraph said:

"I am sending this assessment to you because we have found there is additional tax due that was not previously shown on your tax return. It is now too late for us to amend your tax return so this assessment allows us to collect the additional tax."

9. The assessment does not refer to the section under which it was issued, but Ms Biney said she assumed it had been made under the "discovery" provisions at TMA s 29.

10. The Directions issued at the end of the first day of the hearing asked that HMRC provide a submission to include:

"the legal basis on which the Closure Notice and related amended self-assessment for 2011-12 was 'replaced' by an assessment made under Taxes Management Act 1970 s 29, taking into account in particular TMA s 30A(4) and also the conditions contained in TMA s 29 which are required to be met in order to make a valid discovery assessment."

11. When that HMRC submission was received, it stated that the Closure Notice had been wrongly issued; that the further assessment had been made on the basis that Mr Nelson had acted "deliberately", and that TMA s 29(4) was therefore satisfied. At the relisted hearing, Ms Biney was unable to elaborate further on the legal issues which may arise when an invalid Closure Notice is "replaced" by an assessment under TMA s 29, and I set out my own analysis in the next following paragraphs.

12. The Closure Notice sent out by Mr Patel on 5 April 2016 was a nullity. TMA s 28A only applies where an enquiry has been opened under TMA s 9A, and that was not the position here. Although TMA s 30A(4) provides that after an assessment has been issued, it "shall not be altered except in accordance with the express provisions of the Taxes Acts", that section is not engaged on the facts of this case, because the Closure Notice which purported to amend Mr Nelson's self-assessment was invalid.

13. However, in order to make an assessment under TMA s 29, an HMRC Officer must first "discover" that "income which ought to have been assessed to income tax... has not been assessed" or that "an assessment to tax is or has become insufficient", see TMA s 29(1). In *Charlton v HMRC* [2012] UKUT 770 (TCC), the Upper Tribunal (Norris J and Judge Berner) held at [37] (emphasis added):

"...no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself. If an officer has concluded that a

discovery assessment should be issued, but for some reason the assessment is not made within a reasonable period after that conclusion is reached, it might, depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment.”

14. In *HMRC v Tooth* [2018] UKUT 38 (TCC) (“*Tooth*”) the Upper Tribunal (Smith J and Judge Hellier) said at [79(3)] that they “entirely agree with the Upper Tribunal in *Charlton* that on making a discovery, HMRC must act expeditiously in issuing an assessment”.

15. Mr Patel had clearly concluded that there was an insufficiency in Mr Nelson’s self assessment when he issued the purported Closure Notice on 6 April 2016. The discovery assessment was made more than eight months later, on 16 December 2016. It is therefore arguable that Mr Patel’s discovery was stale when he issued that “replacement” assessment.

16. However, as neither party had addressed this point, and as I had heard full argument on the substantive issues, and because I have in any event decided the case in Mr Nelson’s favour for the reasons set out later in this decision, it was not necessary for me to decide whether Mr Patel’s discovery had become stale.

#### *Burden of proof and misleading the Tribunal*

17. I reminded Ms Biney that the burden of proof in discovery assessments was on HMRC, whereas in Closure Notices the burden is on the taxpayer. Had I not noticed the date on the opening letter, but instead simply accepted the summary of the position set out in HMRC’s skeleton argument, the hearing could have progressed on entirely the wrong basis. Ms Biney acknowledged that this was the position.

18. I considered whether HMRC attempted to mislead the Tribunal as to the burden of proof, given the skeleton argument and the failure to include the 2011-12 assessment in the Bundle. However, on re-reading the detail of Mr Patel’s witness statement, which set out the history of the case, I noted his summary of the “corrections” about which he informed Mr Nelson on 20 December 2016. Included in that list was the following :

“2011/12 Enquiry was opened as a discovery but closed by amendment. Tax return was reverted back to its original state and a Revenue Assessment was raised instead...”

19. Although brief and somewhat opaque, this passage was sufficient for me to decide that HMRC had made a mistake in the skeleton argument, and a further mistake when collating the documents for the Bundle, and had not deliberately sought to mislead the Tribunal.

#### **The evidence**

20. On the first day of the hearing, HMRC provided the Tribunal with a Bundle of documents which included:

- (1) correspondence between the parties, and between the parties and the Tribunal;
- (2) notes of a meeting between Mr Nelson and Mr Patel;
- (3) various PayPal and bank statements in Mr Nelson's name; and
- (4) various schedules prepared by Mr Patel relating to the enquiry.

21. During that first day, Mr Nelson provided the Tribunal and HMRC with financial accounts for the years 2008-09 through to 2011-12; these had previously been provided to HMRC, but were not in the Bundle. He also handed up copies of Mr Mervyn Nelson's payslips.

22. On the second day of the hearing, the Tribunal was provided with further evidence in supplementary Bundles, which included:

- (1) PayPal statements for Mr Mervyn Nelson;
- (2) bank statements in the name of Mr Nelson and Mr Mervyn Nelson;
- (3) copies of the tax returns filed by Mr Nelson and by Mr Mervyn Nelson;
- (4) extracts from HMRC's SA system for both Mr Nelson and Mr Mervyn Nelson.

23. Mr Nelson, Mrs Nelson and Mr Mervyn Nelson all provided witness statements, gave oral evidence, were cross-examined by Ms Biney and answered questions from the Tribunal. I found them to be reliable and credible witnesses who gave straightforward answers to the questions asked, even though these did not always show them in a good light – see, for example, the steps they had taken to minimise the risks of challenge by the immigration authorities, at §35 and §42.

24. Mr Patel also provided a witness statement, gave oral evidence led by Ms Biney, was cross-examined by Mrs Nelson and answered questions from the Tribunal. He gave honest evidence as to the way in which he had conducted his enquiries.

25. On the basis of the evidence summarised above, I make the findings of fact in this decision.

### **Findings of fact about the organisation of the business**

26. The findings of fact in this part of the decision are based on the oral and written evidence of Mr and Mrs Nelson, and of Mr Mervyn Nelson. None of it was challenged by HMRC.

27. Mr Nelson arrived in the UK in 2002 as a student. Initially he enrolled on an English course, but later studied software engineering and business management. In January 2006 he met his wife, and from November 2007 they lived together in a flat in Watford ("Ashleigh Court"). In January 2008, Mr Mervyn Nelson moved to live with Mr and Mrs Nelson in Ashleigh Court.

28. In December 2008, Mr Nelson saw an opportunity to use the internet to make money by trading online. He realised that it was possible to buy vehicle parts from wholesalers, and sell them to individuals via an e-Bay shop and make a profit on the transaction. A few months after the business started, he opened a second, almost identical, e-Bay shop to give the illusion of competition.

29. A typical transaction was as follows:

- (1) the customer ordered an item from the online shop;
- (2) the customer paid via Paypal;
- (3) the item was ordered from the wholesaler, it arrived the following day;
- (4) the item was re-packaged;
- (5) labels were printed out showing the customer's address and the correct postage; and
- (6) the item was sent by post to the customer's address.

30. Most items were purchased after receipt of the customer order, but Mr Nelson also sought to identify "fast-moving" items he could order in bulk. This gave the business some stock on hand, but also increased the risk of loss.

31. The money from trading on e-Bay was used to support the lifestyle of Mr Nelson, Mrs Nelson and Mr Mervyn Nelson. The three family members worked together; their responsibilities were broadly divided as follows:

- (1) Mr Nelson had the computer skills to establish the e-Bay shops, deal with most of the ordering and set up the banking and PayPal arrangements;
- (2) Mr Mervyn Nelson had no computer knowledge, but dealt with deliveries and despatch, unpacking goods received from the wholesalers and repackaging them into the correct parcels for the customers; and
- (3) Mrs Nelson kept the business books and records, including managing the online banking and Paypal; she transferred orders to the wholesalers and checked that they delivered what had been ordered; she also helped Mr Mervyn Nelson with the packaging.

32. When the e-Bay trading began, the position under immigration law was as follows:

- (1) Mr Mervyn Nelson had the right to live and work in the UK;
- (2) Mr Nelson did not have a right to reside. He was allowed to work on a part-time basis, but was already employed as a minicab driver for the permitted number of hours; and
- (3) Mrs Nelson had no right to work in the UK.

### **One e-Bay business, or two e-Bay businesses?**

33. Mr Nelson's position was that there was a single e-Bay trading business in which all three family members participated. HMRC's position was that there were two parallel businesses, one run by Mr Nelson and one by Mr Mervyn Nelson.

### **Mr Nelson's position**

34. I begin by setting out the basis for Mr Nelson's position that there was a single e-Bay trading business. The following paragraphs summarise his evidence, that of his wife, and that of Mr Mervyn Nelson; they are also based on the financial accounts and on HMRC's tax filing documentation. HMRC's position is set out at §52 below.

#### *From December 2008 to April 2010*

35. Mr Mervyn Nelson had an unfettered right to work in the UK, and the family decided that the profits should be allocated to him. Mr Nelson provided a local accountant with the financial records compiled by Mrs Nelson for the family's e-Bay business and explained the immigration difficulties. The accountant confirmed that the profits could be allocated to Mr Mervyn Nelson and advised that his tax return be completed on the basis that the e-Bay trade was his business.

36. The accountant drew up financial accounts for the period from 1 December 2008 to 5 April 2009, and called the business "M Nelson t/a New Auto Parts". On the second page of those accounts, Mr Mervyn Nelson is shown as the proprietor.

37. HMRC had not issued Mr Nelson, Mrs Nelson or Mr Mervyn Nelson with a self-assessment ("SA") tax return for 2008-09. The accountant downloaded an SA return for that year from the internet and completed it using the information in the financial accounts; Mr Mervyn Nelson signed the return, and the accountant submitted it. This voluntary return was received by HMRC on 23 January 2010, a week before the 2008-09 filing deadline. HMRC did not enquire into the return.

38. On 6 April 2010, HMRC issued Mr Mervyn Nelson with a SA return for 2009-10. The accountant produced a second set of financial accounts for Mr Mervyn Nelson for the year to 5 April 2010, and completed the SA return using the figures in the financial accounts; it was then signed by Mr Mervyn Nelson. HMRC did not enquire into this return either.

#### *What happened in 2010-11*

39. During 2010, Mr Nelson was given the right to reside in the UK. As he had initiated the business, the family decided the profits should now be allocated to him. This change was discussed and agreed with the accountant. The 2010-11 financial accounts were headed "New Auto Parts" and showed Mr Nelson as the proprietor.

40. Mr Nelson had not been issued with a 2010-11 SA return. The accountant downloaded an SA return from the internet and completed it with the same figures as were in the financial accounts. The return was signed by Mr Nelson, and submitted on 31 January 2012. It included the e-Bay trading income and profits, together with Mr Nelson's employment income from his part-time job as a minicab driver. HMRC did not open an enquiry into that return.



41. Because Mr Mervyn Nelson had filed an SA return for the previous two years, he was issued with a 2010-11 SA return. However, HMRC accepted that he had no trading income or profits for that year, and closed his SA record.

*What happened in 2011-12*

42. At some point during 2011-12, Mr Mervyn Nelson decided to try to bring his wife, Mr Nelson's mother, to join them in the UK. Mrs Nelson senior was still living in Sri Lanka. In order to succeed, Mr Mervyn Nelson needed to show the UK immigration authorities that he had sufficient income and/or assets to support his wife. The family decided to allocate the e-Bay business to Mr Mervyn Nelson for 2011-12, and the accountant agreed this was acceptable.

43. As HMRC had removed Mr Mervyn Nelson from the SA system the previous year, the accountant filed another voluntary return. This was received by HMRC on 25 January 2013. The self-employment pages state that Mr Mervyn Nelson had begun a new trade on 15 April 2011, being the "e-Bay selling of motor spare parts".

44. The accountant also prepared the 2011-12 financial accounts. The figures and all relevant details in that set of accounts are identical to the numbers included in Mr Mervyn Nelson's 2011-12 SA return. However, the accountant forgot to change the proprietor, so Mr Nelson was the named proprietor, as he had been the previous year.

45. As Mr Nelson had filed a SA return for 2010-11, he was issued with an SA return for 2011-12. The accountant completed that return by including the income from his employment as a minicab driver, but did not enter anything in the self-employment pages, because the e-Bay business had, once again, been reported in his father's name. Mr Nelson signed that return and it was submitted to HMRC.

*What happened in 2012-13 and subsequently*

46. In 2012-13, the e-Bay business began making losses, and it ceased on 12 June 2013. The family decided to leave matters as they had been in 2011-12. A loss of £1,451 was allocated to Mr Mervyn Nelson for 2012-13 and a loss of £63 for 2013-14, and those figures were reported to HMRC.

**Was there a partnership?**

47. Having heard the oral evidence of Mr and Mrs Nelson and Mr Mervyn Nelson on the first day of the hearing, and having read their witness statements and reviewed the documents in the Bundle, I asked HMRC whether they had considered whether the Nelson family were working in partnership running a single e-Bay trading business.

48. Ms Biney and Mr Patel said that this had not been considered. The Directions issued at the end of the first day of the hearing therefore required that HMRC provide a further submission by 5 December 2018, to include a response to the following question:

“whether, having considered the evidence given at the hearing, HMRC now consider that Mr Nelson, Mr M Nelson and Mrs Nelson were partners in a partnership which was trading vehicle parts on e-Bay; and

if so, the consequences for the assessments and penalties which are under appeal.”

*The legal principles*

49. A partnership is defined by Section 1 of the Partnership Act 1890 (“PA 1890”) as “the relation which subsists between persons carrying on a business in common with a view of profit”. For a partnership to exist there must be a single business, and the persons involved must be working together (“in common”) with a view to making profits.

50. If those conditions are satisfied a partnership can exist, even if the individuals involved are unaware of the legal nature of their relationship, see for example *George v Platt* (1954) 35 TC 440, which approved the earlier Court of Session decision in *Gardner and Bowring Hardy v IRC* (1930) 15 TC 602.

51. Partners can decide for themselves how to apportion the profits of a business between them, see PA 1890, s 24(1) read with s 19. HMRC’s Business Income Manual at BIM82055 accepts that this is the position. Having first referred to the legislation, it then says:

“Profits, losses or other income may be shared as the partners may mutually agree from time to time. The sharing ratio need not be in proportion to contributions of effort or capital.”

*HMRC’s response to the Directions*

52. In their response to the Directions, HMRC stated that they did not accept there was a single e-Bay business, because “the evidence provided by the Appellant demonstrates that there are two separate businesses”. In putting forward that submission, HMRC relied on the following:

- (1) a sentence in the notes of a meeting between Mr Patel and Mr Nelson which took place on 18 June 2015, which says “RN’s father, Mervyn Nelson, also has a similar business”;
- (2) the existence of two Paypal accounts, one in Mr Nelson’s name and one in Mr Mervyn Nelson’s name. In 2011-12 the latter was 553 pages long, and the former 35 pages long;
- (3) bank transfers made from a bank account in Mr Mervyn Nelson’s name to one in Mr Nelson’s name; and
- (4) bank deposits in Mr Nelson’s name had (in HMRC’s submission) not been declared as part of the profits of the e-Bay business reported by Mr Mervyn Nelson.

53. Taking each of those points in turn:

- (1) The meeting notes are those of Mr Patel; Mr Nelson did not sign them and he denied saying his father had run a “similar” business. Moreover, Mr Patel’s meeting notes also record that Mr Nelson made the following statement, which only makes sense in the context of there being a single business:

“In 2011/12 the income from New Auto Parts was declared in RN’s father’s tax return. The reason for this was that his father wanted to call his wife (RN’s mother) to the UK from Sri Lanka and so had to show the authorities he had enough funds to support her.”

(2) The existence of two PayPal accounts does not mean there were two separate business. Both PayPal accounts were operated by Mr and Mrs Nelson, because Mr Mervyn Nelson had no computer skills.

(3) Having two bank accounts does not mean that there were two businesses. Mr Mervyn Nelson did not manage the online bank accounts, because he could not operate a computer. The money was moved around by Mr and Mrs Nelson to meet the various requirements of the family and of the business.

(4) HMRC’s submissions about undisclosed turnover are considered later in this decision (see §109ff). In summary, they are unsupported by the evidence, and Ms Biney confirmed at the end of the hearing that they had been abandoned.

*Findings of fact and law*

54. I accept the evidence put forward by Mr and Mrs Nelson, and by Mr Mervyn Nelson. The picture they painted is consistent with (a) their immigration situation; (b) the tax filing and financial accounts; and (c) the explanations given by Mr Mervyn Nelson and by Mr Nelson in the course of Mr Patel’s enquiries. In contrast, HMRC’s case does not explain how Mr Mervyn Nelson could be running a separate e-Bay trading business, when he could not even operate a computer.

55. I find that Mr Nelson’s position as described at paragraphs §34 to §46 is correct; those paragraphs therefore constitute findings of fact. To avoid any possible doubt, I also make the following further findings:

(1) a single e-Bay trading business was set up in December 2008; it closed in June 2013;

(2) Mr and Mrs Nelson, and Mr Mervyn Nelson worked together in that business with a view to making profits, and were therefore partners in that business;

(3) they allocated the profits to Mr Mervyn Nelson for all years except 2010-11, and to Mr Nelson in 2010-11, as they were entitled to do as a matter of partnership law;

(4) the business was reported to HMRC under Mr Mervyn Nelson’s name for all years except 2010-11, when it was reported as Mr Nelson’s business;

(5) for the first three years, the partners decided to allocate the profits to Mr Mervyn Nelson because Mr Nelson had only a limited right to work, and Mrs Nelson had no right to work; and

(6) in 2011-12 the partners decided to allocate the profits to Mr Mervyn Nelson because he wanted to show the immigration authorities that he could afford to bring his wife to the UK.

### Further findings of fact

56. I next consider other parts of the factual background to this case. Unless otherwise stated, none of the facts here set out was challenged.

#### *Purchasing the property*

57. As already noted, in November 2007 Mr and Mrs Nelson moved into Ashleigh Court. Mr Nelson purchased this flat on the advice of a friend who was involved in the mortgage business. It was valued at £292,500, and this is the figure shown on the Land Registry records.

58. However, the builder, Barratt's Homes, incentivised the purchase by paying the deposit and the legal fees, so that the amount Mr Nelson was required to find was £263,175. This was provided by a loan from the mortgage lender, arranged by Mr Nelson's friend. Mrs Nelson's evidence was that she saw this as "a chance to get a flat without a deposit" and "pushed" her husband to take up the offer, and that they both "thought this was a good opportunity" to get on the housing ladder without any capital. Their monthly mortgage was roughly double the rent they had previously paid on their rented property, being around £1,200 a month rather than £600, but they thought they could manage.

59. However, after moving in, Mr and Mrs Nelson had an unpleasant surprise when they realised that the first mortgage payment was around double what they had been expecting, because of the method the mortgage company used to calculating the initial payments. Mr and Mrs Nelson were unable to fund this extra amount, and obtained a bank overdraft.

#### *The income and expenditure from the e-Bay business*

60. Financial accounts had been provided to the Tribunal for the years to 5 April 2012, but not for the final two loss making years. However, the turnover and loss positions for those years were provided by HMRC, and were not in dispute. I have tabulated the figures as follows:

period end	Sales	Cost of sales	Gross profit	%	E'ee costs	other costs	total costs	Net	%
5/4/09	15,462	10,133	5,329	34	1,620	1,255	2,875	2,454	16
5/4/10	79,345	56,243	23,102	29	6,470	6,587	13,057	10,045	13
5/4/11	69,847	55,460	14,387	21	50	8,985	9,035	5,352	8
5/4/12	59,079	47,658	11,421	19	0	2,563	2,563	8,858	15
5/4/13	27,247	N/A	N/A	N/A	N/A	N/A	N/A	-1,451	-5
12/6/13	1,404	N/A	N/A	N/A	N/A	N/A	N/A	-63	-4

61. No individual was paid to work in the business, and no salary was paid to any of the family. The "employee costs" figure was simply an allocation made by the

accountant. The figure for “other costs” included “home as office” expenses, which are identified in the notes to the accounts.

62. Based on the financial accounts and tax filing documents, I find that the position of the business was as follows:

(1) In 2008-09, the gross margin was high, at 34%, and the true net profits, after taking into account the amount allocated to “employees”, was 26%. Costs relating to the use of home were £240. Tax on the profits was £100. The business therefore contributed around £4,214 to the family’s financial position, made up of profit (£2,454), employee allocation (£1,620) and use of home (£240), less tax (£100).

(2) In 2009-10, turnover was much higher, although the gross margin had fallen by 5%, and the unadjusted net profit had reduced to 13%. However, when the employee allocation was added back, net profit was £16,515, a margin of 24%. In addition, rent of £862 and “use of home” of £2,080 had been allocated to the business. Tax of £1,060 was payable on the profits. Thus, the business contributed around £18,397 to the family’s finances, either as after-tax profits or a contribution to costs.

(3) In 2010-11, turnover dropped back by around £10,000 (about 12%), and the gross profit margin also dropped significantly, to only 21%. The net profit margin was significantly lower, at 8%, and only £50 was allocated to “employee costs”. The sum of £3,640 was deducted as “use of home”. Tax payable was £916. The business therefore contributed around £8,126 ( $£5,352 + £50 + £3,640 - £916$ ) to the family finances.

(4) In 2011-12, turnover continued to fall, by another £10,000. The gross margin fell further to 19%. Net profits were £8,858, with nothing allocated to staff, and £510 to “use of home”. Tax of £1,421 was due on the profits. The 2011-12 financial contribution was therefore £7,957 ( $£8,858 + £510 - £1,421$ ).

(5) In 2012-13 the business moved into a net loss position, and closed in June 2013.

#### *Further findings about income*

63. In 2008-09, in addition to the £4,214 contributed by the e-Bay business, Mrs Nelson earned cash in hand of £300 a week as an employed cleaner, or around £15,000 a year. Her employer did not deduct PAYE or National Insurance Contributions (“NICs”). Mr Mervyn Nelson was working as a sales assistant, being paid around £750 a month after tax and NICs, or £9,000 a year. Mr Nelson worked part-time as employed taxi driver, being paid around £6,000 net of tax and NICs. Adding these items together gives a total household income/contribution to costs of £34,214.

64. In 2009-10, in addition to the £18,397 contribution from the e-Bay business, Mr and Mrs Nelson and Mr Mervyn Nelson continued to work as before. The total household income was thus around £48,000.

65. In 2010-11 other e-Bay sellers began to enter the market and undercut the Nelsons' business. This change is reflected in the financial accounts, which show significantly lower gross and net profits. The family began to get into financial difficulties. In October 2010, they decided to move out of Ashleigh Court. This was let via an agency, but produced no net profit after mortgage interest, agency fees and other associated costs.

66. The family rented a flat for £1,000 pcm. In December 2010, Mrs Nelson's employer terminated her cleaning contract, and at some point during the year Mr Mervyn Nelson lost his job and was taken on as a porter on a "bank" basis. In reliance on his 2011-12 tax return, I find that he was paid around £8,500 a year gross for that work. The available household income had therefore dropped to around £33,600 (£8,126 from the e-Bay business; £8,500 from Mr Mervyn Nelson; £6,000 from Mr Nelson and around £11,000 from Mrs Nelson for the period before her contract was terminated).

67. However, that income was not evenly spread during the year, and after Mrs Nelson lost her job, the fall in income combined with the deterioration of the e-Bay trading meant that the family began to struggle to make ends meet. Mr Nelson started to take on increasing levels of debt, using loans and credit cards.

68. In 2011-12 their available household income was made up of the contribution from the e-Bay business of £7,957, plus Mr Mervyn Nelson's earnings of £8,693, from which PAYE of £741 was deducted (giving a net figure of £7,952) and £7,440 of earnings from Mr Nelson, making an overall total of £23,349. Mrs Nelson gave birth to their first child during 2011, so there was another mouth to feed. The family's debt position worsened.

69. In 2012-13 the e-Bay trading business became loss-making, and the family's financial position deteriorated further. On or before 14 August 2013, Mr Nelson had a meeting with Stepchange, a debt charity. He provided a letter from Stepchange dated 14 August 2013, which begins:

"During your advice session, we discussed the best way to deal with your debts. Everything we discussed with you is included in this personal action plan"

70. The attached Personal Action Plan, which is attached, shows total debts of £43,751 which had arisen from eleven different sources: seven credit cards, a store card, two overdraft facilities and a personal loan. The Bundle also includes a letter from Moorcroft Debt Recovery Limited, dated 25 May 2015, to Mr Mervyn Nelson, seeking to recover £5,821 owed to HSBC.

71. Mr and Mrs Nelson referred to this accumulated debt when they gave evidence on 7 November 2018, the first day of the hearing. Mrs Nelson said that they had sent the Stepchange evidence and related correspondence to HMRC, but it had not been included in the HMRC Bundle.

72. At the relisted hearing, the Stepchange letter and the Moorcroft letter were included in the new Bundle. However, HMRC did not accept that Mr Nelson had the debts shown in the Stepchange letter. They relied instead on an email from Mr Patel to Mr Nelson, dated 23 November 2018, which said:

“At the hearing you mentioned you live off credit card debt. I have information from a Credit Reference Agency which shows that your outstanding debt at 2014 was only in the region of £1,300.”

73. The email also said that Mr Patel was unable to show Mr Nelson that Credit Reference Agency report. At the relisted hearing:

(1) Mr Patel informed the Tribunal that HMRC were not putting that Credit Reference Agency report into evidence; and

(2) Mr and Mrs Nelson pointed out that the £1,300 on the Credit Reference Agency report was self-evidently wrong, because it failed even to include their mortgage debt, which had been £263,175 but had subsequently increased because they had failed to meet some of the payments.

74. I accept Mr and Mrs Nelson’s evidence and place no reliance on Mr Patel’s email of 23 November 2018 or the undisclosed report to which he makes reference. From the limited evidence he provided it was impossible to know the content of that report or the basis on which it had been compiled. I also agreed with Mr and Mrs Nelson that the figure of £1,300 was clearly incorrect, because it made no mention of the mortgage. In contrast, the letter from Stepchange was both contemporaneous and detailed, setting out the precise amounts owed on eleven different debts.

75. In 2013 the tenants left Ashleigh Court, and Mr and Mrs Nelson and Mr Mervyn Nelson moved back into the property. As already noted, the e-Bay business ceased altogether in June 2013, and Mr Nelson obtained employment on a full-time basis.

#### *The Expenditure Schedule*

76. On 10 November 2014, Mr Patel asked Mr Nelson to “please complete the enclosed means questionnaire and tell me who lived with you from 6/4/11 to 5/4/12”. That Expenditure Schedule was completed by Mrs Nelson, who managed the family finances. The expenditure came to £28,911, including £12,000 of rent because in that year Ashleigh Court was occupied by tenants.

77. As already noted, the Tribunal issued Directions to the parties after the first day of the hearing. HMRC’s submission in response to the Directions included the following sentence:

“HMRC submit the [Expenditure Schedule] did not take into account any one off payments that Mr Nelson may have made, eg TV licence, cable/satellite costs, internet costs, maintenance/repairs etc.”

78. There are a number of problems with that submission:

(1) although both Mr and Mrs Nelson gave evidence and were cross-examined on both days of the hearing, they were not asked whether there were any omissions from the Expenditure Schedule;

(2) the Expenditure Schedule was received by Mr Patel exactly four years earlier, in December 2014, and HMRC had never previously suggested in correspondence, in the Statement of Case, or in the skeleton argument, that it was incomplete or inaccurate;

(3) instead, Mr Patel had relied on the Expenditure Schedule to make his discovery assessments, see §91; and

(4) the Directions did not give HMRC permission to amend their Statement of Case to include challenges to the Expenditure Schedule, on which the assessments under appeal had been based.

79. For all those reasons, I refused to consider HMRC's new submission about the Expenditure Schedule.

80. The first question at the top of the Expenditure Schedule was "What members of the family live with you". Mrs Nelson wrote "wife, baby son and father", and she told the Tribunal that the expenditure listed on the schedule was for "me, Ranga, my son and my father-in-law". HMRC, however, submitted that the expenditure related only to Mr Nelson.

81. I accept Mrs Nelson's evidence, which is consistent with her answer to the first question on the Expenditure Schedule and with the itemised costs themselves. For example, these included £12,000 of rent for the property occupied by the family, and £300 for "children's meals".

82. In answer to the question "is any income other than drawings available to cover living expenses", Mrs Nelson replied "£14,000". That figure is entirely consistent with the information in the 2011-12 tax returns of Mr Mervyn Nelson and Mr Nelson:

(1) Mr Mervyn Nelson's net employment earnings were £7,952;

(2) Mr Nelson's net employment earnings were £7,440;

(3) from this total of £15,392, Mr Mervyn Nelson owed a further £1,421 of tax on the e-Bay business profits (see §62(4)), leaving £13,971: almost exactly the £14,000 stated by Mrs Nelson as being available for the family.

83. When the pre-tax contribution from the e-Bay business of £7,957 is added to that £13,957, the total family income rises to £23,349 (as already found at §68). The total expenditure was £28,911, so the shortfall was £5,562.

84. However, the Expenditure Schedule included £5,300 of debt repayments to banks and credit card companies. Mrs Nelson's evidence was that this was the amount the family was supposed to pay, but they often failed to meet those repayment obligations, and this in turn caused more debt to accrue. Again, I accept that evidence, which is consistent with the Stepchange letter, see §69-70. I find as a fact



that in 2011-12 the shortfall of around £5,562 between the family's income and expenditure was met by borrowings.

*The HMRC investigation*

85. On 10 November 2014, Mr Patel wrote to Mr Nelson, saying:

“I believe your self-assessment form for 2011-12 is inaccurate. I have reason to believe you have been trading online for which you have received income but have not declared on your tax return.”

86. Mr Patel went on to say that he was “carrying out a check” so he could “confirm the amount of tax” which Mr Nelson should have paid. He attached a schedule of information and documents which he asked Mr Nelson to provide, including the blank Expenditure Schedule.

87. On 8 December 2014, Mrs Nelson sent Mr Patel the completed Expenditure Schedule, and Mr Mervyn Nelson wrote to Mr Patel, heading his letter “RS Nelson” and saying:

“Please be informed the above person is my son. During 2011/12 I was living with him. I took his e-Bay business in April 2011 and filed my tax return under reference [xx]. Hereby I give authority to my son RS Nelson to deal with my tax affairs.”

88. On 18 June 2015, Mr Nelson attended a meeting called by Mr Patel. He was unrepresented. He told Mr Patel about the total accumulated debt, and Mr Patel asked detailed questions about transfers to and from the bank accounts which he had been sent. The meeting notes record that Mr Nelson explained (as previously noted at §53(1)) that:

“In 2011/12 the income from New Auto Parts was declared in RN's father's tax return. The reason for this was that his father wanted to call his wife (RN's mother) to the UK from Sri Lanka and so had to show the authorities he had enough funds to support her. RN said that unfortunately his mother was not able to come to the UK and is still in Sri Lanka.”

89. Mr Nelson also told Mr Patel that Mrs Nelson had never worked. However, in his submission to the Tribunal he explained why he had made that statement:

“...my then girlfriend Samantha Silva (now my wife) was living with me at that time. We lived together and she contributed to the living expenses. At the time she did not have the right to work in the UK and hence I tried to protect her...The miscommunication happened because of that.”

90. I accept that evidence, and find as a fact that Mr Nelson did not tell Mr Patel that Mrs Nelson was working in the period before December 2010 because he was seeking to conceal her breach of the relevant immigration requirements.

91. After the meeting, Mr Patel and Mr Nelson continued to communicate, but Mr Patel was not satisfied with the degree of co-operation. On 4 February 2016, he wrote to Mr Nelson saying:

“I have decided to close my enquiries as follows: Mr Nelson completed a means questionnaire for 2011/12 and according to this he requires at least £28,911 to live on. I will RPI (Retail Price Index) this figure for the earlier and subsequent years.”

92. As already noted, Mr Patel issued a Closure Notice for 2011-12 and discovery assessments for years 2007-08 through to 2013-14; the total extra tax was £47,789. He subsequently issued inaccuracy penalties under FA 2007, Sch 24 for 2008-09 through to 2013-14, and a penalty for failure to notify liability under TMA s 7 for 2007-08.

93. Mr Nelson sought to appeal against those assessments after the 30 day time limit. Mr Patel refused to accept the late appeal, and Mr Nelson applied to the Tribunal. On 12 December 2016, the Tribunal (Judge Robin Vos) allowed his application to make a late appeal.

94. On 16 December 2016, Mr Patel issued the discovery assessment for 2011-12 (see §7). On 20 December 2016, he wrote to Mr Nelson to explain that the Closure Notice had been replaced with “a Revenue Assessment”, but stating that in his view the discovery assessments for years other than 2011-12 remained valid.

95. He also said that he had wrongly issued penalties for 2008-09, 2009-10 and 2012-13 under FA 2007, Sch 24; the first two of those should instead have been made under TMA s 7(8) for failure to notify and the third should have been issued under FA 2008, Sch 41, also for failure to notify. Notices charging these new penalties were sent to Mr Nelson, dated 19 December 2016. Mr Patel invited Mr Nelson to appeal the new assessments and offered an HMRC review.

96. On 15 March 2017, the Review Officer, Mr Telfer, issued the conclusions of his review. He cancelled the 2013-14 discovery assessment, because in that year the e-Bay trade no longer existed, and he removed the related Sch 24 penalty. He also cancelled the new failure to notify penalties for 2008-09 and 2009-10 for unexplained “procedural reasons”. All other assessments were upheld.

### **The assessments and “deliberate” behaviour**

#### *Whether invalid because of failure to refer to TMA s 29*

97. HMRC’s skeleton argument states that Mr Nelson’s failure to declare the income included in the discovery assessments was “deliberate”. However, none of the assessments say that they were made on that basis; none refer to TMA s 29 and none say that Mr Patel had made a “discovery”. I therefore considered whether the assessments were invalid because they did not explain the basis on which they had been made.

98. An HMRC officer is authorised to issue an assessment under TMA s 29 if the conditions set out in that section are met. None of those statutory conditions require

the officer to include, in the related notice to the taxpayer, any reference to the statutory provision, or to the reasons why he considers that the requirements of that section are satisfied. TMA s 30A(3) deals with the issuance of assessment notices, but provides only that:

“Notice of any such assessment shall be served on the person assessed and shall state the date on which it is issued and the time within which any appeal against the assessment may be made.”

99. I therefore find that the discovery assessments were not invalid because they failed say they were made under TMA s 29, either explicitly or by reference to the requirements of that section.

*Whether invalid because of failure to explain HMRC’s reasoning*

100. It is clear from *Burgess and Brimheath* [2015] UKUT 578 (TCC) (Judges Berner and Scott) that HMRC have the burden of showing that Mr Nelson acted deliberately.

101. In relation to the five discovery assessments made under the presumption of continuity, the skeleton argument acknowledged that HMRC had the burden of showing that Mr Nelson had acted deliberately. In seeking to meet that burden, Ms Biney relied on Mr Telfer’s review decision of 15 March 2017, in which he said:

“Looking at the particular facts of this case, and in particular the large amounts involved, I agree that the decision not to include this income on your 2010-11 and 2011-12 tax returns is most likely to have been a deliberate decision on your part. It is also evident that you did not notify HMRC of your chargeability to tax for the years 2007-08 to 2008-09.”

102. When I issued the Directions at the end of the first day of the hearing, I asked HMRC to explain the basis for the 2011-12 discovery assessment which had been handed up during that hearing. The HMRC submission made in response essentially repeated the passage from Mr Telfer’s letter, but amended the tax years referred to, so that it read (text as in original):

“HMRC state that the particular facts of this case, and in particular the large amounts involved, the Appellant’s decision not to include this income on his 2011-12 tax return is most likely to have been a deliberate decision on the Appellant’s part. It is also evident that the Appellant did not notify HMRC of his chargeability to tax for the years 2007-08, 2008, 2009, 2009-10, 2010-11 and 2012-13.”

103. It is arguable that HMRC’s burden of showing that Mr Nelson acted deliberately is not satisfied by these vague and general references to “the particular facts of the case” together with the conclusions that Mr Nelson’s action “*is most likely to have been a deliberate decision*”.

104. However, I do not need to decide the appeal on that basis, because it is abundantly clear that Mr Nelson did not deliberately understate his tax liabilities for any of the years, for the reasons set out in the next following parts of this decision.

### **The 2011-12 assessment**

105. HMRC's position was that the assessment for 2011-12 should be upheld because:

- (1) the disclosed expenditure of £28,911 was that of Mr Nelson alone;
- (2) after taking into account his employment income of £7,440, there was a shortfall of £21,471;
- (3) that shortfall was filled by the profits of the e-Bay trading business, which had not been disclosed and which had been carried on by Mr Nelson alone.

106. Mr Nelson's position was that:

- (1) the disclosed expenditure was that of him, his wife, his young son and his father;
- (2) his father's 2011-12 employment income also needed to be included when considering whether there was a shortfall;
- (3) the e-Bay trading business was run by him, Mrs Nelson and Mr Mervyn Nelson together, and that in 2011-12 all the profits were allocated to Mr Mervyn Nelson for the reasons set out earlier in this decision, and those profits also needed to be included when considering if there was a shortfall; and
- (4) to the extent that there was any shortfall, it was met by borrowings.

107. I find that there was no unexplained gap between income and expenditure, because:

- (1) the Expenditure Schedule set out the spending of all the family, see my finding of fact at §81;
- (2) Mr Mervyn Nelson's employment income of £7,952 must be included in considering whether there was a shortfall, see §68;
- (3) the e-Bay trading business was run in partnership, and the figures filed by Mr Mervyn Nelson in 2011-12 must therefore also be taken into account; the relevant figure is £7,957, see §62(4); and
- (4) there is thus a shortfall of £5,562 between the family's expenditure and their income; I have found as a fact that this was met by borrowings, see §84.

#### *Alternative income-based approach?*

108. As set out in the immediately preceding part of this decision, Mr Patel's 2011-12 discovery assessment was based on (a) his view of the Expenditure Schedule as being that of Mr Nelson alone, and (b) his refusal to accept that there was a single e-Bay trading business in which all three family members participated. Both assumptions were incorrect.

109. However, HMRC's skeleton argument also stated that Mr Patel's analysis of the bank statements showed that Mr Mervyn Nelson had income of £66,368 in 2011-12, while the declared turnover for the e-Bay business for that year was only £59,079. It also says that the total deposits in Mr Nelson's three bank accounts were £18,095;

£57,027 and £725, a total of £75,845, and that some financial information requested by Mr Patel has never been provided. However, HMRC's submission for the second hearing stated that the undisclosed deposits in Mr Nelson's bank accounts for 2011-12 were £39,000, rather than the £75,845 referred to in the skeleton.

110. I asked HMRC about their submission that there was undisclosed turnover, and whether they were asking the Tribunal to confirm the 2011-12 assessment on an alternative "income" basis. Mr Patel said:

(1) he had done some work on the bank account which he had previously thought had contained turnover of £57,027, but having "eliminated duplicates and amounts which should not have been included", had arrived at the much reduced figure of £14,863.71;

(2) however, this work had not been carried out on the bank statements themselves, but on schedules Mr Patel had created from the bank statements; he was not able to provide the Tribunal or Mr Nelson with (a) the basis for his original figure of £57,027; (b) the basis for his revised figure of £14,863.71; or (c) the basis for the other figures in either the submission or the skeleton argument;

(3) although Mr Patel had used bank statements to create schedules, he had neither retained copies of those bank statements, nor asked Mr Nelson to provide further copies; he had also not brought his schedules to the Tribunal;

(4) he had had insufficient time to work on all of Mr Mervyn Nelson's and Mr Nelson's bank statements and Paypal accounts. This was because some of the material had only been provided to him in response to the Directions, two weeks before the hearing, and he had had other work to do. Although Mr Mervyn Nelson's PayPal accounts were provided to him in April 2017, he had not carried out any analysis of those accounts because he had been concentrating on Mr Nelson, so he was unable to say how the entries in that account tied in to Mr Mervyn Nelson's bank accounts; to Mr Nelson's bank accounts, or to the other PayPal account.

111. Ms Biney then stated that HMRC were not seeking to defend the 2011-12 assessment on an income basis, but only on the expenditure basis put forward in their skeleton argument. She also confirmed that they were not asking for the hearing to be adjourned to allow them to further review the documentation.

112. I considered whether to grant an adjournment without an application, but decided that it was not in the interests of justice to do so, because:

(1) HMRC's 2011-12 assessment was based on two incorrect assumptions: that there were two e-Bay businesses and that the Expenditure Schedule related only to Mr Nelson. HMRC should have realised long ago that those assumptions were fundamentally flawed and unsupported by the evidence. In particular:

- (a) Mr Nelson and Mr Mervyn Nelson repeatedly told Mr Patel that there was a single business, beginning with Mr Mervyn Nelson's letter of 8 December 2014 (see §87), exactly four years before this hearing; and
  - (b) the Expenditure Schedule explicitly states that it covers Mr and Mrs Nelson, their son, and Mr Mervyn Nelson;
- (2) the burden of proof in these proceedings is on HMRC. They have not put forward any structured alternative basis (using bank statements or turnover or income) to support the figures for which they are contending;
  - (3) HMRC had a period of over six weeks between the two hearings to review and consider their position in the light of the Directions, the oral evidence, and the documentary evidence already in their possession;
  - (4) HMRC explicitly confirmed to the Tribunal that they would be able respond to the Directions and any new material to be supplied by Mr Nelson, by the relisted hearing date;
  - (5) they had decided that Mr Patel's other work should take priority over analysing the documents for this appeal;
  - (6) they did not ask for the appeal to be relisted in advance of the hearing date, to give them more time to consider the documents; and
  - (7) Mr and Mrs Nelson and Mr Mervyn Nelson have spent over four years worrying about these proceedings, during which time HMRC have threatened Mr Nelson with bankruptcy, and caused the family to suffer considerable stress and anxiety.

*Deliberate behaviour?*

113. In *Tooth* at [63] the UT held that “an allegation of deliberately bringing about a tax loss is a serious one, tantamount to an allegation of fraud”. HMRC's position was that Mr Nelson acted deliberately in failing to include the e-Bay profits as calculated by Mr Patel in his 2011-12 tax return.

114. I have already found that the shortfall in that year between the family's income and expenditure was explained by borrowings, so the basis for Mr Patel's 2011-12 discovery assessment falls away.

115. Moreover, Mr Nelson was not deliberately under-declaring his tax, because:

- (1) there is no evidence that the profits of the e-Bay business as a whole for any year have been understated;
- (2) the business profits in the opening years were allocated to Mr Mervyn Nelson, as is permissible under the law. This was not in order that Mr Nelson could evade tax, but to avoid problems with the immigration authorities. Moreover, Mr Nelson took advice from an accountant who said that this allocation and the related reporting was appropriate and acceptable;
- (3) in 2010-11, when Mr Nelson had a right to reside, the family decided to allocate the profits to him, and this was reported to HMRC;

(4) it was only because of a further immigration issue in 2011-12 that the profits were once again allocated to his father, and in agreeing to that allocation, the Nelsons again consulted with their accountant.

116. I also note that Mr Nelson took the e-Bay financial records to an accountant in good time before the deadline for filing the first tax return, and the accountant filed a voluntary return for 2008-9 and in many subsequent years. That behaviour indicates that he was trying to comply with his tax obligations.

117. HMRC did not seek to argue, in the alternative, that Mr Nelson had acted carelessly. It is clear from *Burgess and Brimheath* that if HMRC want the Tribunal to consider that alternative basis, it must be pleaded. Here HMRC's only submission was that Mr Nelson had acted deliberately, and that is clearly not the position.

#### *Decision on the 2011-12 assessment*

118. I therefore set aside the discovery assessment raised on Mr Nelson for 2011-12. His appeal against that assessment is allowed.

#### **The other discovery assessments**

119. In making the other discovery assessments, HMRC relied on the presumption of continuity. As the 2011-12 assessment has been set aside, that presumption has no application. Moreover, there is no basis on which Mr Nelson's behaviour could be held to be "deliberate", for the reasons explained above. There are also the following additional reasons for setting aside those assessments:

- (1) **2007-08:** there was no e-Bay trade in this year; it began in December 2008, so there is no basis for this assessment;
- (2) **2008-09:** the available family income was £34,214, see §63, more than HMRC's estimated expenditure of £33,336 for that year;
- (3) **2009-10:** the available family income was £48,000, see §64, more than HMRC's estimated expenditure of £33,307;
- (4) **2010-11:** the available family income was £33,600, see §66, very close to HMRC's estimated expenditure of £34,667; the family also began to borrow money in that year;
- (5) **2012-13:** any shortfall was met by debt, which had reached £43,751 by August 2013, see §70.

#### **The penalties for inaccuracy**

120. The inaccuracy penalty assessments were made under FA 2007, Sch 24. The basis for those penalties was explained in the "Penalty explanation" schedule sent to Mr Nelson on 20 December 2016. This said his behaviour had been "deliberate" because:

- (1) he had declared levels of income which were insufficient to meet his private expenditure;
- (2) he managed to save £20,000 towards the deposit on Ashleigh Court;

- (3) he failed to declare rental income for Ashleigh Court when it was let out;
- (4) he admitted to being self-employed in 2010 to 2012, and it was not true that his e-Bay profits were declared by Mr Mervyn Nelson;

121. I have already explained why reasons (1) and (4) were wrong. HMRC rightly abandoned reason (2) during the hearing in the light of the evidence. In relation to reason (3), HMRC accepted on the first day of the hearing that the tenants of Ashleigh Court covered the mortgage and other costs, and there was no profit; in their submission before the second hearing, HMRC explicitly accepted that this was the position, adding that they were “not relying on rental income received from the tenants...to make any discovery assessment or to make or to mitigate any penalties”.

122. I find that there is no basis for the penalties imposed under Sch 24 for 2010-11 or for 2011-12, and they are set aside.

#### **The penalty assessments for failure to notify**

123. Mr Nelson was issued with two failure to notify penalties, both issued on the basis of deliberate behaviour. The first was for 2007-08, for failure to notify that he had begun an e-Bay trading business. That penalty is set aside because the business did not commence until December 2008. I add for completeness that his father notified the business to HMRC in the following tax year.

124. The second penalty was raised under FA 2008, Sch 41 in relation to 2012-13 on the basis that Mr Nelson deliberately failed to notify. I have already found that in 2012-13 the e-Bay profits were allocated to, and assessed on, his father. It is clear that Mr Nelson is not liable to a penalty for deliberate behaviour, and it is set aside.

#### **Conclusion**

125. All the discovery assessments and the penalties are cancelled. Mr Nelson’s appeal is allowed.

126. This document contains full findings of fact and reasons for the decision. If HMRC is dissatisfied with this decision, they have a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to HMRC. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

**ANNE REDSTON  
TRIBUNAL JUDGE**

**RELEASE DATE: 14 JANUARY 2019**