TC02882

Appeal numbers: TC/2012/03987, TC/2012/03983 & TC/2012/03994

INCOME TAX – discovery assessments – whether made within time limits – which time limits applied – whether conduct of respective appellants fraudulent or negligent – whether in relation to subsequent assessments their conduct negligent or deliberate – held, assessments made within time – assessments confirmed – penalties confirmed – appeals dismissed
CORPORATION TAX – discovery assessments – whether within time limits – which time limits applied – whether conduct of company and directors fraudulent or negligent – held, assessments made within time – assessments confirmed – assessments under s 419 ICTA 1988 confirmed – penalties confirmed – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DR SAMUEL EASOW (1)
MRS MERCY SAMUEL (2)
TAMMYS LTD (3) **Appellants**

- and -

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

TRIBUNAL: JUDGE JOHN CLARK
NIGEL COLLARD

Sitting in public at 45 Bedford Square London WC1B 3DN on 21 June 2013

Adam Routledge, Controlled Tax Management Limited, for the Appellants

B R Morgan, Appeals Presenting Officer, HM Revenue and Customs, for the Respondents

DECISION

1. These appeals by the three Appellants relate to discovery assessments raised under s 29 of the Taxes Management Act 1970 ("TMA 1970"), assessments raised under s 419 Income and Corporation Taxes Act 1988 ("ICTA 1988"), and related penalty assessments raised under s 95 TMA 1970 and Schedule 24 to the Finance Act 2007 ("Sch 24 FA 2007").

The law

2. The legislation applicable to assessments made in 2011-12 in respect of the time limits for making assessments is the following version of s 36 TMA 1970, which provides:

> "**36 Loss of tax brought about carelessly or deliberately etc**
>
> (1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).
>
> (1A) An assessment on a person in a case involving a loss of income tax or capital gains tax—
>
> (a) brought about deliberately by the person,
>
> (b) . . .
>
> (c) . . .
>
> may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period).
>
> (1B) In subsections (1) and (1A), references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person.
>
> . . ."

3. This amended form was substituted by paragraph 9 of Schedule 39 to the Finance Act 2008 ("Sch 39 FA 2008"). By virtue of article 2(2) of the Finance Act 2008, Schedule 39 (Appointed Day, Transitional Provision and Savings) Order 2009 (SI 2009/403), s 36 TMA 1970 applies in the above form to assessments made after 31 March 2010.

4. In respect of income tax assessments made before 1 April 2010, s 36 TMA 1970 applied in its previous form, as follows:

> "**36 Fraudulent or negligent conduct**
>
> (1) An assessment on any person (in this section referred to as "the person in default") for the purpose of making good to the Crown a loss

of income tax or capital gains tax attributable to his fraudulent or negligent conduct or the fraudulent or negligent conduct of a person acting on his behalf may be made at any time not later than 20 years after the 31st January next following the year of assessment to which it relates.

. . ."

5. For corporation tax, the corresponding provision is paragraph 46 of Schedule 18 to the Finance Act 1998 ("Sch 18 FA 1998"). For assessments made before 1 April 2010, para 46 is as follows:

"46—(1) Subject to any provision of the Taxes Acts allowing a longer period in any particular class of case no assessment may be made more than six years after the end of the accounting period to which it relates.

(2) In a case involving fraud or negligence on the part of—

(a) the company, or

(b) a person acting on behalf of the company, or

(c) a person who was a partner of the company at the relevant time,

an assessment may be made up to 21 years after the end of the accounting period to which it relates.

(3) Any objection to the making of an assessment on the ground that the time limit for making it has expired can only be made on an appeal against the assessment."

6. For assessments made on or after 1 April 2010, para 46 Sch 18 FA 1998 was amended by para 42(3) Sch 39 FA 2008:

"46—(1) Subject to any provision of the Taxes Acts allowing a longer period in any particular class of case no assessment may be made more than 4 years after the end of the accounting period to which it relates.

(2) An assessment in a case involving a loss of tax brought about carelessly by the company (or a related person) may be made at any time not more than 6 years after the end of the accounting period to which it relates (subject to sub-paragraph (2A) and to any other provision of the Taxes Acts allowing a longer period).

(2A) An assessment in a case involving a loss of tax—

(a) brought about deliberately by the company (or a related person),

(b) . . .

(c) . . .

may be made at any time not more than 20 years after the end of the accounting period to which it relates (subject to any provision of the Taxes Acts allowing a longer period).

(2B) In this paragraph "related person", in relation to a company, means—

(a) a person acting on behalf of the company, or

(b) a person who was a partner of the company at the relevant time.

. . ."

The background facts

7. The evidence consisted of three lever-arched files containing nearly 800 pages of documents. These included witness statements given by Steven Hancox of the Respondents ("HMRC"), and Dr Easow. Both Mr Hancox and Dr Easow gave oral evidence. From the evidence we find the following background facts; disputed matters are considered later in this decision.

8. Dr Easow is originally from Kerala in Southern India, where he graduated as a Doctor of Medicine in 1971. He subsequently taught and worked in Nigeria. In 1987 he came to the UK on holiday, and remained here on his beginning work for the National Health Service ("NHS").

9. In 1988 Dr Easow and his wife Mrs Samuel, who had come to the UK at the end of March 1991, set up an offshore bank account; shortly after Dr Easow had started work for the NHS, Barclays Bank had advised them that they were eligible to set up such an account as neither of them was domiciled within the UK.

10. In 1997 Dr Easow began working for an agency rather than being directly employed by the NHS. In 1998 he established the company Tammys Ltd ("Tammys") to receive payment from the agency; as a director, he received a salary from Tammys.

11. In 2007, Dr Easow was resting at home after a major bypass operation, and saw a BBC report on HMRC's request for individuals with offshore accounts to come forward and declare them. He instructed Crowthers Ltd ("Crowthers"), the accountants acting at the time for all three Appellants, to make a disclosure on behalf of Dr Easow and Mrs Samuel.

12. On 10 October 2007 Crowthers wrote to HMRC to inform them that on 23 December 1993 Dr Easow and Mrs Samuel had opened a joint account with Halifax International (Jersey) Ltd; this account had become an account with Bank of Scotland International Ltd in the Isle of Man. The amount of interest on this account for the period from 23 December 1993 to 11 July 2007 amounted in total to £39,888.86. Crowthers referred to a previous account with National Westminster Bank plc in Jersey; no bank statements were available, but Crowthers estimated that the interest from the date of opening the account up to December 1993 had been approximately £18,000.

13. Crowthers explained that details of these accounts had only recently been brought to their attention as their clients had assumed that as neither of them was domiciled in the UK, the income arising on the offshore account was exempt from UK taxation and therefore did not have to be declared on their tax returns. As a result, pages NR1 and NR2 had not been completed for the years prior to 2006-07.

14. On 21 October 2008, Mr Sleight of HMRC gave notice to Tammys under para 24(1) Sch 18 FA 1998 of an enquiry into its tax return for the period 1 June 2006 to

31 May 2007. On the same date Mr Sleight wrote to Crowthers asking for information concerning the books and records of Tammys.

15. On 27 November 2008 Crowthers responded with details relating to Tammys. In the same letter they enclosed bank statements relating to Dr Easow and Mrs Samuel for the period 23 December 1993 to 30 April 2007, together with Crowthers' reconstruction of some missing statements to 20 July 2007. Crowthers stated:

> "There are a few statements missing however the missing monies can safely be assumed to be deposits into the account."

16. They also enclosed copy bank statements for a private account with Royal Bank of Scotland ("RBS") for the period from 1 November 2006 to 20 June 2007. They commented that the only connection between this account and Tammys bank account appeared to be in the form of inter-account transfers. There had also been transfers from the Bank of Scotland offshore account to the private account totalling £20,000; these amounts had been included on the clients' 2006-07 self assessment returns as remittances. No documentary evidence was available in respect of deposits into the offshore account; Dr Easow had advised Crowthers that these were all either transfers from their private account or family money from offshore sources.

17. In his response dated 5 December 2008 Mr Sleight asked whether Dr Easow and Mrs Samuel would, on a voluntary basis, be able to obtain copy bank statements for the joint RBS account for the period 1 June 2006 to 31 October 2006.

18. On 16 December 2008 Mr Jones of Crowthers telephoned Mr Sleight to respond to his letter. Mr Jones stated that further private bank statements had been obtained and would be forwarded to Mr Sleight. Mr Sleight indicated that the reconstruction of the business bank statements was a true reflection of those statements from working papers, and further copies would not be required. On 18 December 2008 Mr Jones wrote to Mr Sleight enclosing the statements for the joint RBS private account, but pointed out that three statements were missing for the period 11 September 2006 to 31 October 2006 inclusive.

19. On 26 January 2009 Mr Sleight requested details of statements to establish whether deposits amounting to £6,450 during June 2006 were transfers from private accounts. He asked for a copy of the relevant statement, and also requested details of credit card statements. He then referred to the need for an early meeting with Dr Easow. In his reply dated 5 February 2009, Mr Jones explained that the RBS business account and the joint private account had been closed, so that it might be difficult to obtain duplicate statements. He enclosed certain credit card statements.

20. Mr Sleight replied on 18 March 2009, stating that as it had not been possible to verify the source of deposits to the private bank accounts, further checks were being made within HMRC's systems to ensure that all information was to hand prior to him formulating his proposals to conclude his enquiries. In a subsequent letter dated 12 May 2009 he asked for a meeting with Dr Easow to be arranged.

21. On 9 June 2009 a meeting took place between Mr Sleight and Mr Jones. They discussed untaxed interest in relation to offshore accounts; Mr Jones agreed to provide correspondence relating to the claims to non domiciled status. In relation to accounting matters, Mr Jones explained that although Crowthers had prepared accounts and returns for Dr Easow and Tammys over many years, personal contact had been minimal, with contact being by letter, telephone and email. Accounts had always been prepared from bankings, with Dr Easow advising that invoices were rarely issued.

22. Dr Easow had confirmed that he had no other bank accounts apart from those of which he had provided details, and had no other sources of income. Mr Sleight explained to Mr Jones the result of the review of the bank statements; savings in these accounts could not be from declared income from Tammys. The claim that deposits to the offshore accounts were from either drawings or family members was not supported by detailed scrutiny of those deposits. Mr Sleight requested further information. The drawings from Tammys appeared to do no more than cover living expenditure; without evidence as to the source of the deposits, all deposits and savings to the offshore accounts would be regarded as omitted business income. Mr Sleight provided HMRC's "HRA" leaflet to be given to Dr Easow.

23. On 7 June 2009 Mr Jones wrote to Dr Easow, explaining that Crowthers had taken "further specialist tax advice". After consideration, Crowthers recommended that Dr Easow should not use the HMRC "amnesty", but should instead declare the details of the offshore account in the normal way. This was for three reasons. First, the time limit was too short to prepare an accurate assessment of any potential tax underpaid and to provide details of the various deposits into the account. Secondly, in relation to the "amnesty", HMRC were not prepared to discuss questions of domicile; the assumption was that the taxpayer was domiciled in the UK. Thirdly, all payments under the "amnesty" were subject to a 10 per cent penalty, whereas in some cases of genuine differences of opinion with HMRC, where negligence was not involved, no penalties would be chargeable. Mr Jones asked Dr Easow and Mrs Samuels to give details relating to their domicile status, including their country of domicile; if they considered themselves to be UK domiciled, a formal disclosure would be needed. Mr Jones asked for various further items of information.

24. On 10 June 2009 Mr Sleight wrote to Crowthers setting out details of the matters which he regarded as outstanding following the meeting. He requested various items of information.

25. Mr Whelan of Crowthers replied on 9 July 2009, explaining that he had requested Dr Easow to provide copy RBS statements for 2004-05 to 2006-07 inclusive; he had provided some, but the balance of missing statements was awaited. He enclosed a copy of Mr Jones' letter to Dr Easow dated 7 June 2007. In relation to untaxed bank interest, he indicated Crowthers' view that Dr Easow and Mrs Samuel were correctly claiming non-domiciled status, so that any interest credited to the offshore account would be taxed on the remittance basis. Mr Whelan stated that the remittances in the early years were fairly small, and should probably be netted off against the investments into the account for those years. He continued:

> "However there was a large withdrawal of £150,000 on 11 July 2000, which we understand was used to repay our clients [*sic*] mortgage on their UK private residence."

He raised detailed questions as to the way in which this amount should be treated, and asked for Mr Sleight's observations. In relation to the information which Mr Sleight had requested, Mr Whelan explained that Dr Easow and his family were about to leave for a holiday in India and would not be returning to the UK until the end of August.

26. On 11 September 2009, Mr Hancox of HMRC's Civil Investigation of Fraud ("CIF") section wrote separate letters to Mrs Samuel, Dr Easow and Tammys giving notice of an investigation into their respective tax affairs, to be conducted under Code of Practice 9 ("COP 9"). Mr Hancox indicated that he would like to arrange a meeting. Each of the three Appellants would be invited to make a full disclosure of all irregularities.

27. Mr Jones telephoned Mr Hancox on 22 September 2009; he had been surprised to receive the letter from Mr Hancox, having thought that matters would be concluded by Mr Sleight. Mr Hancox explained that there was a suspicion of serious fraud and the case had therefore been referred to him. Mr Jones and Mr Hancox discussed other matters, including attendance at the meeting. Mr Hancox indicated that if Dr Easow was able to answer all necessary questions then Mrs Samuel's attendance was not perhaps essential. Mr Jones indicated that he was perhaps not the best person to advise his clients in relation to the COP 9 enquiry.

28. On 2 October 2009 Michael Blake, a taxation consultant, telephoned Mr Hancox to introduce himself, explaining that he had been asked by Crowthers to act in relation to the COP 9 enquiry. On 6 October 2009 Mr Blake wrote to Mr Hancox enclosing a letter of authority signed by Dr Easow and Mrs Samuel on behalf of themselves and Tammys.

29. A meeting took place on 24 November 2009, at which Dr Easow, Mr Blake, Mr Hancox and Mr Vickers of HMRC's CIF Team were present. A 14 page note of the meeting was dictated the following day, and subsequently signed by Mr Hancox, Mr Vickers and Dr Easow. When indicating that he would be producing a note, Mr Hancox asked that any comments or amendments considered necessary should be made on a separate sheet of paper to be attached to the note of the meeting.

30. After explaining HMRC's practice as set out in COP 9, Mr Hancox asked Dr Easow five questions in relation to Direct Taxes. Dr Easow gave his responses and then provided them in written form, and signed the document. He accepted that transactions had been omitted from, or incorrectly recorded in the books of a business with which he had been concerned. He acknowledged that the business accounts sent to HMRC were not correct and complete, and that his business and personal tax returns were not correct and complete. He agreed to allow an examination of business books, business and private bank statements and any other business and private records in order that HMRC might be satisfied that his answers to the earlier questions were correct.

31. In relation to the period October 2004 to October 2008, Mr Blake explained that agencies had made payments of approximately £90,000 into a private account held with RBS; these payments had been made by BACS transfer. It was Dr Easow's belief that this was the only period during which business receipts had been paid directly into a personal account. Mr Blake said that when he had become involved in the case, he had asked Dr Easow about possible irregularities, but Dr Easow could think of none. It had only been when the bank statements had been reviewed that the discrepancies had become apparent. Dr Easow added that he had simply got into a muddle. When Mr Hancox suggested that Dr Easow must have given the agencies his account number for the RBS account, Dr Easow said that he could not be certain how this had happened but maintained that it was due to some sort of misunderstanding.

32. Dr Easow made a disclosure relating to payments for assessments under the Mental Health Act; we consider this later. The only further disclosure made related to the interest received from the offshore bank account. On behalf of Dr Easow, Mr Blake stated that he was not aware of any irregularities apart from those already disclosed. Dr Easow stated that the funds deposited into the offshore account had been his savings from his Nigerian earnings along with some savings from his UK earnings.

33. Mr Hancox asked Dr Easow what the reasons had been for the amendment of the account holder details for the Halifax International (Jersey) account (later Bank of Scotland International) in March 2001 to include Tammys Ltd. Dr Easow was unable to recall why this had happened.

34. Mr Hancox asked Dr Easow whether the only two sources of funds deposited into the offshore accounts had been either transfers from other accounts or family money from offshore sources. Dr Easow confirmed that this was correct.

35. Paragraph 27 of the meeting note stated:

> [Mr Hancox] referred to the £150,000 that had been transferred from the offshore account to the UK on 11 July 2000. He asked [Dr Easow] to confirm that this had been used to repay his mortgage. [Dr Easow] said he was not sure that this was the case. He thought the mortgage may have been paid off in 2000 but was not sure that the transfer that [Mr Hancox] had referred to was the source of the funds used to repay the mortgage. After giving the matter further consideration it was explained that funds to repay the mortgage may have come from his brother and the £150,000 transferred to the UK was then used to repay the brother. [Mr Hancox] asked if the implications of this remittance had been discussed with Crowthers. [Dr Easow] said they had not been.

36. At a later point in the meeting Mr Hancox explained that Dr Easow might wish to appoint a professional adviser to prepare a report to quantify all irregularities in relation to Dr Easow's tax liabilities. Dr Easow confirmed that he would commission a report. The meeting continued; Mr Hancox asked various further questions and indicated how matters should progress. At the end of the meeting, Mr Blake wished to clarify something; he stated that there had been no deliberate attempt on Dr Easow's

part to move money away from HMRC's attention; it had simply been an innocent error and Dr Easow was determined to put things right as soon as possible.

37. At a subsequent meeting (described as a "Scoping Meeting") between Mr Hancox and Mr Blake, Mr Hancox told Mr Blake that if the information held by HMRC was correct, it would seem that a full and complete disclosure had not been made by Dr Easow at the opening meeting. Mr Blake said that he had on more that one occasion advised Dr Easow as to the importance of making a full and complete disclosure.

38. On 19 January 2010, Mr Blake wrote to Mr Hancox enclosing a cheque from Dr Easow of £50,000 as a payment on account. Mr Blake indicated the state of progress in relation to the information required by Mr Hancox. Mr Blake enclosed a brief note of minor amendments to the note of the November 2009 meeting as prepared by Mr Hancox; these did not relate to the matters set out above.

39. After further correspondence between Mr Blake and Mr Hancox, on 16 February 2010 Mr Blake wrote to Mr Hancox. The first paragraph of his letter stated:

> We write to advise you that our professional engagement has been terminated and we no longer act for the above clients." [ie Dr Easow and Mrs Samuel.

40. On 22 February 2010 Mr Jay of Pearson McKinsey Ltd wrote three separate letters to Mr Hancox to inform him that the firm was now acting for Tammys, Dr Easow and Mrs Samuel. Forms 64-8 were enclosed with the letters. In his reply dated 26 February 2010 Mr Hancox acknowledged that, although the disclosure report was due to be submitted by the end of May 2010, a little further time might now be required.

41. On 22 March 2010 HMRC wrote to Dr Easow and Mrs Samuel enclosing assessments in respect of each of them for the year 2000-01. In his witness statement, Mr Hancox stated that these were protective assessments. We accept his evidence on this point, which was unchallenged. In his letter to Mr Jay dated 8 April 2010, Mr Hancox referred to the remittance of £150,000 in July 2000, and to Crowthers' estimate of the amount of interest remitted having been approximately £58,000.

42. Assessments in respect of Tammys were issued during March 2010 for the years ended 31 May 1999, 2000, 2001, 2002, 2003 and 2004. On 12 April 2010 Pearson McKinsey gave HMRC notice of appeal against the assessments for the years ending May 2000, 2001, 2002 and 2004. On 26 April 2010 Mr Hancox acknowledged these appeals, and stated that he had not as yet received any appeals against the assessments raised for the periods ending May 1999 and 2003. In their letter to Mr Hancox dated 28 April 2010, Pearson McKinsey gave notice of appeal in respect of the assessment for the year to 31 May 2003; they also enclosed a copy of a letter to him dated 25 March 2010, giving notice of appeal against the assessment for the year to 31 May 1999 and requesting information concerning the estimated addition of £50,000 trading profits.

43. On 4 June 2010 Mr Jay wrote to Mr Hancox enclosing a Disclosure Report on behalf of Dr Easow, Mrs Samuel and Tammys. He drew attention to the absence of a witness in respect of the certificate of full disclosure.

44. After further correspondence, a meeting took place on 28 September 2010, attended by Dr Easow, Mr Jay and Amanda Bentley from Pearson McKinsey Ltd, Mr Vickers and Mr Hancox. Dr Easow stated his continuing belief that the Disclosure Report was a full and complete disclosure.

45. In respect of liability on sums remitted to the UK from the offshore bank accounts, Mr Hancox read the following extract from the Disclosure Report:

> "The payment of £150,000 on 11 July 2000 was paid to Dr Easow's brother to repay a loan used to pay off his mortgage. It is believed that this was paid to an India bank account and is not therefore taxable under the remittance basis."

46. Mr Hancox then referred to his statement in a letter dated 17 June 2010 that he considered this to be a constructive remittance. He asked if it could now be accepted that the £150,000 was effectively a remittance from the offshore account. Dr Easow explained that he had met his brother in July and his brother had said that this was not what had happened. Mr Hancox asked Dr Easow what was thought to have happened; Dr Easow said that he could not remember, although he was sure that whatever happened had happened offshore.

47. Further discussion on this subject continued; as the position is contested as between the parties, we return to this subject later in this decision.

48. After indicating that the source of deposits into offshore accounts did not appear to have been considered during the preparation of the Report, Mr Hancox referred to the possibility that unrecorded business income might have been deposited into private accounts before May 2002. We return to this issue later. In respect of liability under s 419 ICTA 1988, Mr Jay accepted that liability would arise; after hearing explanation of the position, Dr Easow said that it seemed unfair as he was being taxed twice on the same income. The subject was left to be considered further once the adjustments had been agreed.

49. On 4 January 2011 Pearson McKinsey Ltd wrote to Mr Hancox to submit proposals for settlement on behalf of Tammys, Dr Easow and Mrs Samuel. On 2 March 2011 Mr Hancox responded, confirming that he did not consider the proposals to be acceptable. On 14 May 2011, Dr Easow wrote to Mr Hancox stating that he was left with no option other than to withdraw the conditional offers made in respect of the £150,000 under the remittance basis and credits of £14,756.73 to the offshore account. He made no reference to the offer made in respect of undeclared income.

50. On 24 May 2011 Mr Hancox wrote letters to Dr Easow, Mrs Samuel and Tammys setting out the decisions which he had reached in relation to their respective tax affairs. On the same date, Mr Hancox wrote to Pearson McKinsey Ltd to inform them of the sums which he considered to be payable by each of the Appellants. The

liabilities totalled £206,186.11, including penalties under s 95 TMA 1970 and (for Tammys) under FA 1998. He indicated that penalties under Sch 24 FA 2007 also needed to be considered.

51. On 1 July 2011 Pearson McKinsey responded with a further proposal for settlement, described as Dr Easow's response and final offer for settling the investigation. Dr Easow requested HMRC to withdraw the statement that he had acted 'fraudulently or deliberately' in relation to the undisclosed income for Tammys or his personal tax affairs.

52. Mr Hancox replied on 18 July 2011. He did not consider it to be appropriate to withdraw the statement referred to by Dr Easow. Mr Hancox expressed surprise at the low level of the amount offered to settle the investigation.

53. On 5 October 2011 Mr Hancox wrote to Mrs Samuel. He explained that his views remained as set out in his letter of 24 May 2011. He enclosed an assessment under s 29 TMA 1970 for the year 2005-06, and indicated that formal penalty determinations would follow in the near future.

54. On the following day Mr Hancox wrote to Dr Easow, expressing similar views. However, he noted that he had made an error in his previous calculations; the culpable duty for the years to 2007-08 inclusive totalled £19,535.32, and a 50 per cent penalty amounted to £9,767 rather than the figure previously given. Mr Hancox apologised for the error. He enclosed assessments under s 29 TMA 1970 for the years 1993-94, 1994-95, 1996-97, 1997-98, 1998-99, 1999-2000, 2001-02, 2002-03, 2003-04, 2004-05, 2005-06, 2006-07, 2007-08 and 2008-09. Again he indicated that formal penalty determinations would follow in the near future.

55. He referred also to an incorrect return having been submitted for the year 2008-09; he attached a penalty notice and penalty calculation summary in relation to penalties chargeable under Sch 24 FA 2007.

56. Mr Hancox wrote to Tammys on 26 October 2011. He stated that his views on the liability under s 419 ICTA 1998 had since changed, so that the liability was reduced by approximately £1,500 to £55,898. The "culpable duty" for the years up to 31 May 2008 inclusive (corporation tax plus the s 419 liability) appeared to total £84,979.84; on the basis of a 50 per cent mitigation, the penalty amounted to £42,489. The penalty under Sch 24 FA 2007 in respect of the year to 31 May 2009 remained to be considered. He set out the interest due on the unpaid duty up to 1 January 2012 amounted to £29,895.62, but did not include credit for any payment on account. He indicated that further corporation tax assessments were being issued that day for the accounting periods ending 31 May 2005, 2006, 2007, 2008 and 2009, under para 41 Sch 18 FA 1998.

57. Notices in respect of penalties under s 95 TMA 1970 were issued to Dr Easow on 21 October 2011 and to Mrs Samuel on 26 October 2011.

58. On 25 October 2011 Pearson McKinsey wrote to Mr Hancox notifying him that Dr Easow and Mrs Samuel wished to appeal to the Tribunal, and requested

postponement of all assessments and penalties pending hearing of the appeals by the Tribunal; they did not wish to take up the offer of an independent review.

59. In his letter dated 28 October 2011 Mr Hancox acknowledged the appeals of Dr Easow and Mrs Samuel. He indicated that the £50,000 paid on account did not seem to be sufficient to cover the tax unpaid; he indicated that the total tax payable by Tammys for the eight years covered by its appeals would be approximately £85,000. He enclosed a copy of another letter and penalty assessment issued to Tammys that day.

60. On 21 November 2011 Pearson McKinsey Ltd wrote to Mr Hancox giving notice of appeal on behalf of Tammys against the assessments referred to in his letters dated 28 October 2011; the offer of an independent review was not taken up.

61. Mr Hancox wrote two letters to Pearson McKinsey on 8 December 2011. In the first, he indicated that the amounts of tax suggested for postponement in respect of Tammys for various years were not all agreed; he proposed postponement of reduced amounts for several of the years concerned. In his second letter he explained his reasons for his proposal that Tammys should pay an additional total sum of £33,423.50. He emphasised that his views on the corporation tax liabilities remained as outlined in his letters dated 24 May and 26 October 2011.

62. On 5 December 2011 Dr Easow sent three letters to Mr Hancox, who received them on 12 December. In one, Dr Easow referred to Mr Hancox having had private conversations with Pearson McKinsey Ltd, as appeared from his letter dated 26 October 2011 [ie the letter referred to above concerning Tammys]. He continued:

> "Pearson McKinsey disputes your statement and denies having any communications or conversations with you about [s 419 ICTA 1988].
>
> Therefore, your discussions with Pearson McKinsey will remain private and our decisions thereon are not binding on us."

(We consider this later in this decision; it is not necessary to refer to the other letters sent by Dr Easow, which concerned preparation for the eventual Tribunal hearing.)

63. Further correspondence from Dr Easow addressed to Mr Hancox concerned the conduct of the COP 9 enquiry. As the conduct of an enquiry is not as such a matter within the jurisdiction of the First-tier Tribunal, we make no further reference to that correspondence or to the matters considered by a Complaints Manager of HMRC in relation to Tammys and Dr Easow's personal tax affairs.

64. On 7 February 2012 a meeting was held at the offices of Pearson McKinsey Ltd, attended by Dr Easow, Mrs Samuel, Mr Jay, Ms Bentley; the HMRC representatives were Mr Garrahy and Mr Hancox. After a discussion of the conduct of the investigation, the parties considered how matters might be brought to a conclusion. Dr Easow accepted that the tax in respect of the deposits of approximately £190,000 into the private accounts needed to be paid. He stated that this had not been his fault, but that of his bank. (We consider this below.) Dr Easow did not accept that any liability arose under s 419 ICTA 1988 or on the interest credited to his offshore account.

Discussions followed concerning remittances from the offshore bank account[s], deposits into offshore accounts, and s 419 ICTA 1988. Suggestions were made with a view to settling matters, but no agreement was reached. Mr Hancox agreed to provide computations based on the figures which he had suggested.

65. On 14 February 2012 Mr Hancox wrote to Pearson McKinsey Ltd to give details on a without prejudice basis of the liabilities which would arise on the basis of the figures he had proposed at the meeting.

66. On 7 March 2012 Dr Easow wrote two letters to Mr Hancox. One concerned HMRC's notes of the 7 February meeting; we do not consider that it affects the account of the matters set out above. The other letter contained a final offer in settlement. Mr Hancox received both letters on 16 March 2012, and replied on both subjects in a single letter dated 19 March 2012. In relation to the final offer, Mr Hancox stated that this was not acceptable. Mr Hancox referred to matters concerning the COP 9 enquiry, and to the payment of Tammys' income into Dr Easow's personal account. We return to these issues later.

67. Further exchanges of correspondence ensued, in which Dr Easow indicated his dissatisfaction with the way in which matters had been described in the note of the 7 February meeting and in various letters. As we review disputed matters later in this decision, we do not record the details here, apart from one matter. In various letters to Mr Hancox written during March 2012, Dr Easow made the following request:

> "Please reply directly to me to save time and cost."

In these letters, we find that he gave no indication that he had withdrawn his instructions to Pearson McKinsey Ltd to act as his agents.

68. In his letter to Mr Hancox dated 2 April 2012 in response to a letter dated 30 March 2012, Dr Easow stated:

> "At the outset, I am very disappointed that you have broken the codes of privacy by copying the letters to Pearson McKinsey Ltd against my advice to communicate directly to me until I appoint a lawyer in the near future."

69. In one of two letters to Dr Easow dated 11 April 2012, Mr Hancox responded:

> "Thank you for your letter dated 2 April 2012.
>
> You have suggested that I have "broken the codes of privacy" by copying my letters to Pearson McKinsey Ltd. Whilst you requested, in recent letters, that I reply directly to you, you do not seem to have asked me not to send letters to your agent.
>
> In view of your comments I am not sending a copy of this letter to Pearson McKinsey Ltd. Unless I hear from you to the contrary I will not send copies of any further correspondence or documents to this agent.
>
> . . ."

We return later to these matters.

70. At some point during March 2012, Notices of Appeal in respect of Tammys, Dr Easow and Mrs Samuel were submitted to the Tribunals Service; the forms were undated. On 30 March 2012 Directions were issued requiring the appeals to be joined together and heard at the same time, and requiring HMRC to submit Statements of Case in respect of each appeal within 60 days. On 17 April 2012 Mr Morgan requested on behalf of HMRC that there should be a stay in the submission of statements of case pending clarification of the years and assessments under appeal. On 19 June 2012 Controlled Tax Management Ltd served amended Notices of Appeal on behalf of Mrs Samuel, Tammys, and Dr Easow. Statements of Case were subsequently issued by HMRC in respect of Dr Easow, Mrs Samuel and Tammys. (The copy of the Statement of Case in respect of Mrs Samuel included in the bundle appears to be incomplete; it consists of a covering page and a distorted copy of the first page, with nothing further attached.)

Arguments for HMRC

71. As a significant proportion of the disputed assessments consisted of "extended time limit" assessments, it was agreed that HMRC should open their case first.

72. Mr Morgan stated that the appeals related to discovery assessments raised under s 29 TMA 1970 and Sch 18 FA 1998, together with assessments raised under s 419 ICTA 1970, and corresponding penalty assessments raised under s 95 TMA 1970 and Sch 24 FA 2007.

73. He indicated that the burden of proof rested under common law with the person making the assertion. The burden was on HMRC to show negligence or deliberate behaviour on the part of the Appellants. The burden was on the Appellants to show why the assessments (including those under s 419) were incorrect.

74. The standard of proof was the ordinary civil standard of proof "on the balance of probabilities".

75. HMRC contended that Dr Easow had acted deliberately in attempting to conceal amounts of income in the UK so that the correct amount of tax had not been charged. On this basis, HMRC had been correct in raising assessments beyond the normal time limits and in raising corresponding penalty assessments.

76. In relation to Tammys, HMRC contended that income had been withdrawn from its accounts, effectively creating a director loan account on which a s 419 charge was due.

77. HMRC submitted that the penalty assessments raised were valid and in reasonable amounts.

78. HMRC also contended that there had been an effective remittance of £150,000 into the UK in 2000 which gave rise to a charge to tax and interest on that amount.

79. Mr Morgan referred to the background facts and the evidence given by Mr Hancox. He submitted that Dr Easow had deliberately organised his affairs so that payments from various bodies, properly liable to tax, were diverted to his private accounts and remained undisclosed for tax purposes. It followed that HMRC were entitled to raise assessments to make good a loss of tax for the periods so assessed.

80. Mr Morgan made other submissions on factual matters; as these concerned questions purely of fact, we consider these questions later, together with the matters covered by Mr Routledge's submissions.

81. HMRC submitted that "deliberate action" had been proved, and that accordingly the assessments had been correctly raised within the legislative time limits, and should be upheld.

82. Mr Morgan submitted that Dr Easow and Mrs Samuel had deliberately submitted incorrect returns, that the discovery assessments were correct in law, that the penalty charges in respect of each year were reasonable, that the s 419 assessments were correctly made, and that the amounts assessed should be confirmed.

Arguments for the Appellants

83. Mr Routledge referred to the background facts, and to the respective contentions of the Appellants and HMRC as to the issues involved. He indicated the extent to which the respective Appellants did or did not accept the assessments made by HMRC; we deal with this below.

84. In his skeleton argument, Mr Routledge referred to s 36 TMA 1970; as discussed below, the version of the legislation which he cited was an obsolete one which referred to "fraud or wilful default". He argued that what was required was more than simply inaction on the part of the taxpayer; instead, there should be a deliberate action intended to conceal the default in respect of the taxpayer's liabilities. He submitted that there had been no deliberate action on the part of any of the three Appellants to conceal or assist in any default in respect of their taxation liabilities.

85. He argued that the Tribunal should consider:

(1) Whether HMRC could prove that any of the relevant alleged liabilities were brought about by wilful and deliberate default, rather than simply carelessness on the part of the Appellants;

(2) Whether HMRC had been able to prove that, on the balance of probabilities, either Dr Easow or Mrs Samuel had deliberately submitted returns which they knew to be incorrect.

These questions and the answers to them are considered later in this decision.

86. He explained that Mrs Samuel would not be giving evidence, and that she would accept the same decision as that in respect of Dr Easow.

87. He made submissions on factual issues; we consider these below.

Discussion and conclusions

88. Before turning to the issues of fact, we find it necessary to address questions of law. In a case such as this, involving assessments in respect of a number of years, and where not all of the assessments were made at the same time, it is essential to establish what version of the legislation applies to any particular assessment.

89. In his skeleton argument, Mr Routledge cited what he referred to as "Section 36 1B TMA 1970". The version of the section set out at paragraph 25 of his skeleton argument differs from the versions of s 36 TMA 1970 set out at paragraphs 2 and 4 above. It appears to be the version which can be found on the "legislation.gov.uk" website, ie the original form of s 36 TMA 1970. Users of that website need to be aware that it does not show amendments to the legislation as originally enacted; as a result, there is a risk that an out of date and therefore incorrect form of the legislation will be cited by the user. The statutory provision may have taken various different forms for different years; those different forms and their effects will not be apparent from the website. In relation to s 36 TMA 1970, the concept of "wilful default" ceased to be used following the Finance Act 1989. Parties and their representatives in hearings before the Tribunal should ensure that they are basing their submissions on the correct version of the legislation.

90. For HMRC, Mr Morgan referred only to the version of s 36 TMA 1970 set out at paragraph 2 above. This is correct for assessments made in 2011-12. However, assessments in respect of the year 2000-01 were made on Dr Easow and Mrs Samuel on 22 March 2010; it is clear from a telephone message left by Mr Hancox for Mr Jay on 18 March 2010 that HMRC made these at that stage in order to protect their position, ie to ensure that the assessments were made within the time limits and on the basis of the legislation applicable at that time, rather than the amended regime about to come into effect.

91. As a result, the test applicable to these two assessments is that provided by the version of s 36(1) TMA 1970 set out at paragraph 4 above. If the conduct of Dr Easow and Mrs Samuel was either fraudulent or negligent, the time limit for assessment is 20 years from the filing date.

92. For assessments made after 31 March 2010, there is a distinction between the time limits for an assessment involving a loss of tax brought about carelessly and one involving a loss of tax brought about deliberately. For the former, the time limit is six years after the end of the year of assessment. For the latter, the time limit is 20 years after the year of assessment. (Article 10 of SI 2009/403, which in certain cases delays the introduction of the amendments to s 36 TMA 1970 until 1 April 2012, is not relevant in the circumstances of Dr Easow and Mrs Samuel.)

93. In relation to s 419 ICTA 1988, the version of the section which Mr Morgan provided in his bundle of authorities was inadequately printed out, so that words on the right hand side were omitted. Further, that version of the section, which was the original form apparently similar to that found on the "legislation.gov.uk" website, underwent various amendments as a result of various legislative provisions from 1992 onwards. As the first accounting period of Tammys covered by the assessments under

s 419 was that to 31 March 1999, it is incorrect to cite the original version of the section. In the interests of brevity, we have not set out the relevant form of the section in this decision.

94. Under that later version of s 419, tax in respect of any loan or advance to a director became due on the day after the expiry of nine months from the end of the company's accounting period. (The position for the first accounting period, to 31 May 1999, is that the corporation tax "pay and file" regime applied to that period; it is not necessary for us to state the position in greater detail.) We consider below the application of the section in the context of the particular circumstances involving Tammys.

95. On the basis that tax was considered to be due under s 419, as well as corporation tax in respect of additional profits considered to have been omitted from those shown in Tammys corporation tax returns, assessments were made under para 20 Sch 18 FA 1998. As the corporation tax assessments in relation to the six accounting periods to 31 May 2004 were made before 1 April 2010, para 46 Sch 18 FA 1998 applies in its original unamended form, as set out at paragraph 5 above. However, in relation to the s 419 assessments, the position is different. As it appears to us that they were made after 1 April 2010 (see below), para 46 applies in the amended form (see paragraph 6 above).

96. There is a significant difference. Under the original version, an assessment can be made within 21 years whether the conduct amounts to fraud or negligence. Under the amended version, if the conduct is careless, the time limit is six years; it is only where the conduct leading to the loss of tax is deliberate that the time limit is extended to 20 years.

97. Thus in relation to the corporation tax liabilities of Tammys for the six accounting periods to 31 May 2004, the 21 year time limit applies whether its conduct was fraudulent or negligent. In contrast, in relation to the assessments to tax under s 419 ICTA 1988, if the loss of tax was brought about carelessly, the time limit is six years; if the loss of tax was brought about deliberately, the time limit is 20 years from the end of the accounting period in each case.

98. Mr Routledge made clear that Mrs Samuel did not dispute liability in respect of the assessment made on her in relation to 2005-06, and that Tammys did not dispute liability in respect of the corporation tax assessments for the five years ending 31 May 2005 to 2009 inclusive. As a result, the disputed assessments are:

(1) all those made on Dr Easow;

(2) the assessment made on Mrs Samuel for the year 2000-01;

(3) the corporation tax assessments made on Tammys for the six accounting periods ending 31 May 1999 to 2004 inclusive;

(4) the assessments made on Tammys under s 419 ICTA 1988 for the 11 accounting periods ending 31 May 1999 to 2009 inclusive.

99. The issues in relation to the assessments made on the respective parties are therefore as follows:

(1) In relation to Dr Easow, were the conditions for making assessments fulfilled in the case of

(a) the assessment for 2000-01;

(b) all the other assessments for the years from 1993-94 to 2008-09 inclusive?

(2) In relation to Dr Easow, where the conditions for making assessments have been fulfilled (in particular, that they have been made in time), are there any grounds to show that the amounts assessed should be amended, or should those assessments stand?

(3) In relation to Mrs Samuel, were the conditions for making assessments fulfilled in respect of the assessment made on her for the year 2000-01?

(4) In relation to Mrs Samuel, if those conditions were fulfilled, are there any grounds to show that the amount assessed on her for the year 2000-01 should be amended, or should it stand?

(5) In relation to Tammys, were the conditions for making assessments fulfilled in respect of the disputed corporation tax assessments?

(6) In relation to Tammys, if those conditions were fulfilled, should those corporation tax assessments stand?

(7) In relation to Tammys, were the conditions for making assessments fulfilled in respect of the s 419 assessments, and if so, should those assessments stand?

The factual issues

(a) Whether the 2000-01 assessment on Dr Easow was correctly made

100. We deal first with the questions concerning Dr Easow. As only one of the assessments was made before 1 April 2010, we consider it first. The initial issue is whether there was a loss of income tax attributable to his conduct, whether fraudulent or negligent. In his letter to Dr Easow dated 24 May 2011, Mr Hancox referred to Crowthers' statement in their letter dated 10 October 2007 that there appeared to have been a remittance to the UK of £150,000 on 11 July 2000. They had indicated that a total of £57,888.86 untaxed interest had been earned on the offshore accounts up to 11 July 2000. Mr Hancox stated that the amount assessed was one half of the total interest referred to by Crowthers.

101. Was the assessment for 2000-01 made for the purpose of making good a loss of tax? For HMRC, Mr Hancox took the view that the matters disclosed by Crowthers on Dr Easow's behalf showed that there had been a remittance which in part represented interest income derived overseas. This appeared to give rise to a liability to income tax. We do not consider it to be necessary that an officer of HMRC needs to have conclusive proof that there is a liability to tax before making an assessment. A

discovery assessment is made pursuant to s 29 TMA 1970. Mr Routledge did not raise any question as to the validity of the assessments made under this section; his challenge was based solely on the time limit imposed by s 36 TMA 1970. The latter section does not impose the tax charge; it merely states the time limit for making an assessment. Under s 29(1), the assessment is to be made in the amount which in the opinion of the officer ought to be charged in order to make good to the Crown the loss of tax.

102. We are therefore satisfied that the assessment was made for the purpose of making good a loss of tax. The wording of s 29(4) TMA 1970 as it applied before 1 April 2010 requires that the loss of tax was attributable to fraudulent or negligent conduct on the part of the taxpayer; this corresponds to the wording of s 36 TMA 1970 as it applied before 1 April 2010.

103. Various decisions of the Tribunals, the High Court and the Court of Appeal have established that once the initial validity of a discovery assessment has been established, it is for the Tribunal to test whether the conditions for making that assessment have been fulfilled. Thus we are required to consider whether there is a loss of tax attributable to fraudulent or negligent conduct on Dr Easow's part in relation to remittance of money to the UK.

104. In giving his oral evidence, Dr Easow contended that there had been no remittance of £150,000 to the UK. In his witness statement he said that at the 2009 meeting he had explained that he believed his brother had assisted in repaying the mortgage. He continued:

> ". . . though upon examination of this, I am no longer sure this is what had actually occurred. I certainly do not understand why Crowthers may have insinuated that the £150,000 withdrawn from the Offshore Bank Account was used to directly repay our mortgage, we would not have instructed them to say this nor do we believe that to be true."

105. In cross-examination, Dr Easow was asked about his statement during examination in chief that the cost of his house had been less than £150,000. Mr Morgan referred to paragraph 63 of the note of the meeting on 24 November 2009, in which Dr Easow was recorded as saying that the cost was thought to have been between £150,000 and £160,000, and that the property had been purchased with the aid of an HSBC mortgage which was thought to be approximately £154,000. The note continued:

> "[Dr Easow] thought he had been on a two year deal at the time and decided to repay the mortgage rather than taking out a further deal. It did, however, take a little time to withdraw the funds from the overseas bank account and he had therefore borrowed money from his brother to repay the mortgage. His brother was subsequently repaid once he had obtained funds from the overseas account."

106. In response to Mr Morgan's questioning, Dr Easow stated that he did not think that the note was correct. Mr Morgan asked him why he had signed the note as

correct, and why in his amendment to the notes, Mr Blake had stated, in commenting on paragraph 27, that:

> "The facts are correctly stated at paragraph 63 of the note."

107. Dr Easow's answer was that this had not been correct.

108. Mr Morgan referred to the following statement in Crowthers' letter to Mr Sleight dated 9 July 2009 concerning the £150,000:

> "The remittances for the early years are fairly small and should probably be netted-off against the investments into the accounts for those years. However there was a large withdrawal of £150,000 on 11 July 2000, which we understand was used to repay our clients mortgage on their UK private residence."

Dr Easow responded that he had not given any instructions to Crowthers to make this statement.

109. In oral evidence, during his examination in chief, Dr Easow accepted that the £150,000 had left the offshore account, as shown by the reconstruction of the bank account statement evidencing a CHAPS transfer on 11 July 2000. He emphasised that this did not show that this sum had got to the UK. He stated that he was still an Indian; he had paid his brother John Easow. He then said: "I bought property in India". He then indicated that he had said he did not have a mortgage and that the house had been worth less than £150,000 when he had first bought it.

110. There are thus three different explanations which have been put forward for the application of the £150,000, ie (1) that it was used to pay off the mortgage on the UK property, without reference to involvement of any party, (2) that it was used to repay John Easow, who had assisted in providing the money for the repayment of Dr Easow's mortgage, and (3) that it was used to pay John Easow in India for property there.

111. As to the new explanation (3) we find that it lacks any credibility. In particular it raises the question: if this money was used to pay for property overseas, where did the funds come from to enable the mortgage to be repaid? In the course of the respective meetings with HMRC, Dr Easow did not give any indication that the funds might have come from some other source; indeed, his responses at the various stages were distinctly unsatisfactory, and changed over time, until the point where he indicated to HMRC that he did not wish to respond to their questions on the matter. Various statements which he made at later meetings contradicted what he had previously said. Explanation (3) also contradicts the statement in John Easow's letter dated 2 May 2010, addressed to "To Whom It May Concern", that he had lent £150,000 to his brother Dr Easow and that he (Dr Easow) had returned the money to John Easow later.

112. In relation to explanation (2), Dr Easow may not have appreciated at the point when he gave it in the course of the 2009 meeting that the actions described would result in a "constructive remittance". When Mr Hancox stated that if Dr Easow had

borrowed £150,000 from John Easow and money from the offshore account had been then used to make repayment to John Easow, this would effectively have been a remittance to the UK from the offshore account, Dr Easow indicated that he was no longer sure what had actually happened.

113. We find that the absence of any alternative explanation means that either explanation (1) or explanation (2) is correct. For the purposes of deciding whether there was a loss of tax, there is no practical difference; in either case, there was a remittance, although in relation to (2), it was constructive. Was the loss of income tax attributable to Dr Easow's conduct, whether fraudulent or negligent? We find that it was; Dr Easow did not disclose anything concerning the remittance until Crowthers sent their letter dated 10 October 2007, setting out explanation (1). At the very least, failure to make any reference in his tax return for the year 2000-01 to the position concerning the remittance was negligent, particularly as no notification concerning the domicile status of Dr Easow (or Mrs Samuel) was given for years before 2006-07.

114. Dr Easow's subsequent varying explanations and refusals to comment in the course of the meetings with HMRC indicate to us something going beyond mere negligence; he appears to have taken the view that the repayment of the mortgage ought not to be regarded as having any effect on his tax position, and therefore sought to counteract the results of what had been said on his behalf by his respective previous advisers. We find that he was attempting to conceal information from HMRC; this was not merely negligent conduct, but fraudulent conduct.

115. We find that the conditions for making assessments were fulfilled in respect of the assessment made on Dr Easow for the year 2000-01.

(b) Whether the assessments on Mrs Samuel were correctly made

116. In relation to Mrs Samuel, it was accepted on her behalf that the decision in relation to Dr Easow would be regarded as having effect in relation to her. As the sole disputed assessment concerning her is that for 2000-01, which is the one covering her share of the overseas interest income becoming taxable as a result of the remittance of £150,000 in July 2000, the acceptance implies that our above findings extend to her. Our difficulty is that there is no specific evidence relating to her actions. We do not think that Dr Easow's behaviour can necessarily be regarded as an indication of her behaviour. In particular, we do not find it appropriate to regard her conduct as fraudulent as a result of our findings concerning Dr Easow. We find that her conduct was, at the very least, negligent, in that she made no reference in her tax return for 2000-01 to the position concerning the remittance, and that it was negligent not to have notified HMRC that her tax returns for the years before 2006-07 were being submitted on the basis that she was not domiciled within the UK.

117. We find that the conditions for making assessments were fulfilled in respect of the assessment on Mrs Samuel for the year 2000-01.

(c) Whether the other assessments on Dr Easow were correctly made

118. We now consider the same question in respect of all the other assessments made on Dr Easow for the years from 1993-94 to 2008-09 inclusive. These assessments were made on 6 October 2011, so that in each case the time limit for making assessments was six years from the end of the year of assessment if the loss of income tax was brought about carelessly by the person being assessed, or 20 years from the end of the year of assessment if the loss of tax was brought about deliberately by that person. (See s 36(1) and (1A) TMA 1970 as set out at paragraph {2} above.)

119. Thus the question in respect of time limits is whether Dr Easow brought about a loss of income tax either carelessly or deliberately. The six year time limit under s 36(1) TMA 1970 means that the assessments made after 5 April 2011 for years before 2004-05 may only be confirmed to have been validly made where it can be shown that deliberate conduct was involved. The assessments for 2004-05 to 2008-09 may be found to be validly made within the time limit if Dr Easow's conduct was either careless or deliberate.

120. In reviewing these questions, we bear in mind that it was on Dr Easow's initiative, following his having heard about HMRC's "amnesty" in relation to holders of offshore accounts, that Crowthers were instructed to disclose matters to HMRC.

121. In his letter to Dr Easow dated 24 May 2011, Mr Hancox set out his conclusions under the heading "Undeclared income from self employment". He referred to information derived from the Disclosure Report showing undeclared income from self employment having been paid into a Halifax account held by Dr Easow. Mr Hancox also referred to a schedule of non round sums deposited into the account from February 1994 to August 2002, and to what was suggested in the Disclosure Report to have been the first deposit of undeclared business income to have been made into a particular RBS account on 24 May 2002. Mr Hancox had expressed his concern to Dr Easow at the September 2010 meeting that this particular deposit had not been the first.

122. In that letter, Mr Hancox stated his intention to issue assessments for the years in question. He continued:

> "The assessments will be issued for the purpose of making good to the Crown losses of tax which have been underpaid by reason of your deliberate and fraudulent conduct in submitting tax returns which are believed to be incorrect."

123. Thus the view which HMRC took of Dr Easow's conduct was that it was deliberate. As s 36 TMA 1970 had been amended, it was not necessary for Mr Hancox to refer to Dr Easow's conduct as "fraudulent"; the latter word harked back to the earlier version of s 36. HMRC's approach was clearly based on their conclusion that losses of income tax had been brought about deliberately by Dr Easow.

124. There was a considerable amount of documentary evidence concerning the deposits considered to represent undeclared business income. We do not consider it necessary or appropriate to reflect all this evidence in our decision. Having reviewed

the evidence, we are satisfied that it formed an appropriate basis for HMRC to conclude that there had been a loss of tax. In arriving at their view, we consider that HMRC were justified in regarding the disclosed deposits of undeclared business income as merely examples of what was likely to be a more widespread practice. This is what has often been described as the "presumption of continuity"; see, for example, *Rosette Franks, (King Street) Ltd v Dick* (1955) 36 TC 100 and *Nicholson v Morris* (1977) 51 TC 95 (CA).

125. Was Dr Easow's conduct in relation to all these years of assessment deliberate? If it was, we do not need to examine the question (in relation to the years from 2004-05 onwards) whether Dr Easow's conduct was careless.

126. During the meeting between Mr Jones of Crowthers and Mr Sleight of HMRC on 9 June 2009, Mr Jones stated:

> "Accounts had always been prepared from bankings, with Easow advising that invoices were rarely issued."

127. Dr Easow disclosed during the November 2009 meeting that he had received payments for assessments under the Mental Health Act, and also provided psychiatric reports for which a payment of between £100 and £200 was received on each occasion. The implication of his answer was that these payments were not particularly frequent; he referred to making one or two assessments a year, whilst the maximum might have been one a month, and in relation to the reports, there might be one or two a year. Cheques for the assessments and reports were made payable to Dr Easow personally and deposited into his private Halifax account. When asked why this income had not been disclosed, Dr Easow said that this had been "because of ignorance or stupidity".

128. We find that, as Dr Easow's accounts were based on his "business" bank accounts, the effect of depositing income into any other account was to prevent that income from being brought into the calculation of his business profits. We do not find credible his explanation of the reason for lack of disclosure; we are satisfied that HMRC were correct in taking the view that his conduct was deliberate. In coming to our conclusion, we take into account the more general picture based on other evidence relating to the time sheets for Dr Easow's main work covered by payment to Tammys; we examine this later.

129. As with the assessment for 2000-01, we are satisfied that the assessments on Dr Easow for all these other years were each made for the purpose of making good a loss of tax. We have found that Dr Easow's conduct was deliberate. The first condition under s 29(4) TMA 1970 as it applied for 2011-12 (the year during which these other assessments were made) is that the loss of tax was brought about carelessly or deliberately by the taxpayer. We are satisfied that the requirements set out at s 29(1)-(4) TMA 1970 are met in respect of all these assessments.

(d) Whether the assessments made on Dr Easow should be confirmed

130. The next question is whether all of the assessments made on Dr Easow should stand, or whether there are any grounds on which the amounts assessed should be adjusted. Under s 50(6)(c) TMA 1970, if the Tribunal decides that the appellant is overcharged by an assessment other than a self assessment, the assessment or amounts shall be reduced accordingly, but otherwise the assessment [...] shall stand good. The burden of proof falls on the person making the appeal, as the person making the assertion. The practical effect is that, as we have found the assessments to have been validly made, Dr Easow has to satisfy us, on the balance of probabilities, that the assessments are incorrect.

131. Mr Routledge's challenge to the assessments was on the basis that they had not been made within the relevant time limits. He made a general statement, applicable to all the appeals, that apart from the issue of the £150,000, the amounts and transactions were not disputed.

132. We find that there is no evidence to satisfy us that any of the assessments in respect of Dr Easow should be adjusted in any way. In relation to 2000-01, we have found that the interest income derived from the offshore accounts up to 11 July 2000 became chargeable to income tax as a result of the remittance (direct or constructive) of £150,000. The figures provided by Crowthers were the best available estimate of the earlier interest income, plus the actual interest income known to have been derived from the offshore account. A half share of this total was assessed on Dr Easow. There is no basis for any reduction of the amount so assessed. We confirm all the assessments.

(e) Whether the assessments made on Mrs Samuel should be confirmed

133. In relation to Mrs Samuel, as the only disputed assessment is that for 2000-01, the position is exactly the same. We confirm the assessment, and, as a matter of formality, we also confirm the undisputed assessment for 2005-06.

(f) Whether the corporation tax assessments made on Tammys were correctly made

134. The corporation tax assessments made on Tammys cover the eleven accounting periods ending 31 May 1999 to 2009 inclusive. Copies of the assessments for the periods ending 31 May 2005 to 2009 inclusive were included in the bundles. However, copies of the assessments for the earlier accounting periods were not included in the evidence. Mr Routledge made clear in his skeleton argument that Tammys accepted the assessments made for the five accounting periods to 31 May 2005 onwards; as a result, the only assessments in dispute are those for which we have no copy assessments. The details shown in his skeleton argument concerning all the assessments include only the additional corporation tax assessed; there is therefore no indication of the original profits figures, nor of the amounts of the additions to profits made by the assessments. We must therefore work with the limited information available. We comment further on this below.

135. As far as we can discern from the evidence, the six disputed assessments appear to have been made on 22 March 2010. They were referred to in a letter of that date from Mr Hancox to the Company Secretary of Tammys. He said:

> "Following a change of legislation brought about by Schedule 39 FA 2008 in relation to HMRC time limits for the issue of assessments and determinations, I have decided to issue assessments to the company in order to protect HMRC's position and ensure that any potential tax due is not lost. The notices of assessment will be issued separately. Copies have also been issued to Pearson McKinsey Ltd."

As the five undisputed assessments are all shown by the documentary evidence to have been issued on 26 October 2011, it is clear that the assessments referred to in the letter from Mr Hancox are those for the six earlier accounting periods.

136. The significance of our latter finding is this. As intended by HMRC, the legislation applicable at the time of making the assessments was para 46 Sch 18 FA 1998 in its earlier form, before amendment by Sch 39 FA 2008. This is the form set out at paragraph 5 above. If either fraud or negligence could be shown on the part of the company or a person acting on behalf of the company, the time limit for making assessments was 21 years. As the assessments issued on 26 October 2011 are not now disputed, the later form of para 46 set out at paragraph 6 above is not in point in relation to corporation tax as such; we deal later with the liabilities under s 419 ICTA 1988.

137. In the Disclosure Report prepared by Pearson McKinsey Ltd, which was signed by Dr Easow and Mrs Samuel for themselves and on behalf of Tammys and submitted on 4 June 2010, reference was made to the need for amendments to the corporation tax returns for the years 2001 to 2009. The Report stated that for the years ending 31 May 2002 to 2007, the undeclared income was banked in error into Dr Easow's personal RBS account. (Other information was given concerning the periods 2005, 2007, 2008 and 2009; as the corporation tax assessments for these years are undisputed, we make no further reference to this.)

138. Although the Disclosure Report was submitted after the six assessments on Tammys had been issued, it is clear from the note of the November 2009 meeting that Mr Hancox was then made aware of substantial irregularities in relation to Tammys. At that meeting, Mr Blake stated that as a result of his investigation, it had been established that during the period October 2004 to October 2006 agencies had made payments of approximately £90,000 into a private account held with RBS.

139. Dr Easow explained that his income as a freelance psychiatrist was paid through Tammys; its customers were the agencies through which he worked. He indicated that he kept the business records; he kept a time sheet which was handed to the agency on a weekly basis. He kept a copy himself, but this was destroyed once the agency had made the appropriate payment. Mr Hancox indicated that if such checks were made, it must have been apparent that £90,000 of business income had not been deposited into the business account.

140. In his letter to Dr Easow dated 23 February 2010 referring to Mr Blake having ceased to act, Mr Hancox reminded Dr Easow that his completed Disclosure Report should, under COP 9, be submitted within six months of the opening meeting, ie by 24 May 2010. Mr Hancox was therefore aware that the Report would not be available before 1 April 2010, the date on which the relevant amendments made by Sch 39 FA 2008 would take effect.

141. We are satisfied that there had been major omissions from the accounts of Tammys as a result of the failure to ensure that monies paid from the agencies went into its bank account. As its accounts and consequently its corporation tax computations were prepared by reference to its bank records, the diversion of agency payments caused its taxable profits to be significantly understated. At a much later stage, during the course of the February 2012 meeting, Mr Hancox asked Dr Easow who had been responsible for the £190,000 being paid into his private accounts. (It appears that this figure includes other deposits taken into account in making the subsequent assessments on Tammys, as Mr Hancox later referred to "the omitted profits of £190,642".) Dr Easow stated that this had been the fault of his bank. He suggested that the bank might have got the account numbers mixed up as the account numbers were very similar.

142. In oral evidence Dr Easow stated that the change in the offshore bank account details mentioning Tammys was a change which had mistakenly been made by the bank. In cross-examination Mr Morgan asked him why a reputable bank would change the name of the account without being instructed to do so. Dr Easow replied that he had not told the bank to make the change.

143. We find Dr Easow's two explanations set out in the two preceding paragraphs totally lacking in credibility. It is not impossible for banks to make occasional mistakes in relation to bank credits, but the scale of these alleged mistaken credits is totally improbable. In relation to the name of the account, the strict controls on banks make it extremely unlikely, if not impossible, that a bank would change an account name without instructions from the account holder. We find that Dr Easow's answers were intended to divert attention from matters which he preferred to conceal, and that this was symptomatic of his approach throughout the investigation. In arriving at this conclusion, we take into account the respective terminations of his earlier advisers' engagements; our interpretation is that he did not wish to continue with them when they had stated matters with which he sought to disagree as a result of his wish to deflect the attention of HMRC's enquiries.

144. As a result, we find that the assessments made on Tammys for the six accounting periods ending 31 May 1999 to 2004 inclusive were made on the basis that fraud was involved on the part of Tammys and on the part of Dr Easow acting on behalf of Tammys. Even if this finding were to be held incorrect or unjustified, we find that serious negligence on the part of Dr Easow and Tammys was involved. We consider that the assessments for all the periods were justified on the basis of the presumption of continuity.

145. We find that the necessary conditions for making discovery assessments pursuant to paras 41 to 45 (inclusive) Sch 18 FA 1998 were fulfilled. Mr Routledge's sole challenge against the six disputed assessments was on the basis that they fell outside the scope of the respective assessment periods; we have found that the assessments were properly made in accordance with para 46(2) Sch 18 FA 1998.

(g) Whether the corporation tax assessments made on Tammys should be confirmed

146. As to whether the assessments should stand, we find that there is no evidence to justify any reduction in their amount. (We deal separately below with the question of the liabilities in respect of s 419 ICTA 1988.) Again, Mr Routledge did not challenge the quantum of the additional corporation tax assessed. Accordingly, we confirm the six assessments in the amounts assessed. We also confirm the undisputed assessments for the five subsequent accounting periods.

(h) Whether the s 419 assessments were correctly made, and if so, whether they should be confirmed

147. We now consider the position of Tammys in relation to liabilities under s 419 ICTA 1988. As shown by Mr Hancox in his calculation made in June 2011, the total liability for the eleven years ending 31 May 1999 to 2009 inclusive was £55,898.00. Mr Routledge stated in his skeleton argument that Tammys appealed against any and all assessments made under s 419, and made clear that all the additional amounts assessed were disputed.

148. In his letter to Tammys dated 24 May 2011, Mr Hancox stated that after computing the movements on the overdrawn directors' loan account, he considered the s 419 liability to be £57,436. (He subsequently amended this figure, as referred to above.) This suggests to us that the liabilities were not assessed before 1 April 2010. Under para 1 Sch 18 FA 1998, liability in respect of s 419 ICTA 1988 is assessable or chargeable as if it were corporation tax. As a result, the principles discussed above concerning time limits for assessment and the making of discovery assessments apply to assessments relating to s 419. The version of para 46 Sch 18 FA 1998 set out at paragraph 6 above therefore applies. This means that the applicable test is whether the loss of tax in question was brought about deliberately by Tammys or any person acting on its behalf (in which case the time limit is 20 years from the end of the accounting period), or, in the case of assessments made within six years from the end of the accounting period, the loss was brought about carelessly.

149. We arrive at the latter conclusion in the absence of any evidence to suggest that HMRC dealt with the s 419 liabilities by adjusting assessments already made before 1 April 2010; in that event, the applicable form of para 46 Sch 18 FA 1998 would have been that set out at paragraph 5 above.

150. For the reasons already set out above, we consider that the loss of tax in respect of s 419 ICTA 1988 was brought about deliberately by Tammys and by Dr Easow acting on its behalf. The money which should have been paid into Tammys' business

bank account found its way into Dr Easow's personal bank account (or accounts). As a result, Dr Easow had the benefit of money belonging to Tammys. Under s 419, that gives rise to a charge to tax. In appropriate circumstances, where money treated under s 419 as lent to a director is repaid within appropriate time limits, the charge to tax is removed. There is no evidence to suggest that Dr Easow repaid funds to Tammys at any stage.

151. We find that the s 419 assessments were made in time, that they were properly made in accordance with the "discovery assessments" provisions of Sch 18 FA 1998, and that there is no evidence justifying any reduction in the charges to tax under s 419. We therefore confirm the assessments in respect of the s 419 charges for all the eleven years ending 31 May 1999 to 2009 inclusive.

(i) Whether the penalties assessed on each of the Appellants should be confirmed, and if so, in what amounts

152. We now turn to the penalties assessed on each of the Appellants.

153. In relation to Dr Easow, he disputed all the penalties imposed on him. The penalty determination dated 21 October 2011 totalled £9,767 for the 14 years in respect of which he had fraudulently delivered incorrect returns. The penalty was calculated at 50 per cent of the "culpable duty". The maximum penalty under s 95 TMA 1970 would be 100 per cent. In his letter to Dr Easow dated 24 May 2011, Mr Hancox explained what abatements he had decided to make in calculating the penalty to be imposed. As Dr Easow had made an initial disclosure relating to the offshore bank accounts, but had not since admitted that there were any tax consequences, Mr Hancox regarded this as a partial disclosure; he considered an abatement of 10 per cent to be appropriate. In relation to co-operation, in the light of the discussions concerning the £150,000, Mr Hancox considered that Dr Easow had not fully co-operated, so considered an abatement of 25 per cent to be appropriate. In relation to seriousness, Mr Hancox concluded that Dr Easow's actions had been deliberate, and concluded that abatement of 15 per cent was appropriate. The abatements therefore totalled 50 per cent, leaving the penalty as 50 per cent.

154. We find that the penalty was appropriately assessed on Dr Easow, and see no reason to vary the level of that penalty in any way. We therefore confirm the penalty assessment of £9,767.

155. Mrs Samuel disputed only one of the two penalties imposed on her; she accepted the penalty in respect of 2005-06. The penalty determination dated 25 October 2011 totalled £523, covering both 2000-01 and 2005-06. The penalty was for negligently delivering incorrect returns for those years. In his letter to her dated 24 May 2011, Mr Hancox stated that the "culpable duty" was £5,238.30, and the maximum penalty would also be that amount. In relation to abatement for disclosure, he acknowledged that Mrs Samuel had initially disclosed that there appeared to have been a remittance to the UK of interest credited to her offshore accounts. However, she had not since admitted that there were any tax consequences. Mr Hancox regarded

this as a partial disclosure. He considered an abatement of 15 per cent to be appropriate.

156. In relation to co-operation, he considered that Mrs Samuel had not fully co-operated in relation to the £150,000; in his view, abatement of 30 per cent was appropriate. As to seriousness, he considered that Mrs Samuel's failure to disclose to her accountant that the £150,000 had been withdrawn from her account in July 2000 prevented him from having the opportunity to consider the tax implications and enter the appropriate income on her tax return. He took the view that her actions had been deliberate. He considered an abatement of 25 per cent to be appropriate. The total abatements were therefore 70 per cent, leaving a penalty of 30 per cent.

157. We see no reason to disturb the penalty assessment on Mrs Samuel for the two years concerned, and accordingly confirm it in the sum of £523.

158. The penalty determination under para 20(1)(a) Sch 18 FA 1998 in respect of Tammys was made on 25 October 2011. It covered the ten accounting periods ended 31 May 1999 to 2008 inclusive. (The penalty determination for the subsequent accounting period is considered below.) The total amount of the penalty for these periods was £42,489.

159. In his letter to Tammys dated 24 May 2011, Mr Hancox set out his conclusions concerning penalties. (The amount of the "culpable duty" was subsequently varied, as a consequence of his revised calculation of liabilities under s 419 ICTA 1988.) The maximum penalty was 100 per cent of the "culpable tax". In relation to disclosure, Mr Hancox referred to the initial disclosure at the November 2009 meeting that business receipts had been deposited into the director's personal bank account during the period October 2004 to October 2006. The subsequent Disclosure Report had shown that the understatements covered the period May 2002 to January 2009. Mr Hancox believed that business income had first been omitted from Tammys' accounts earlier than stated and that a full disclosure had still not been made. He considered an abatement of 10 per cent to be appropriate.

160. In relation to co-operation, Mr Hancox referred to the history. He described the co-operation during the COP 9 investigation as in general having been good. He considered an abatement of 25 per cent to be appropriate.

161. In respect of seriousness, the profits declared by Tammys in the ten years to 31 May 2008 totalled approximately £50,000. The additional profits that now needed to be taken into account exceeded £200,000 and were therefore very significant when compared with the returned profits. It had been admitted that company income had been deposited into the director's private RBS account. Mr Hancox took the view that this action had been taken by the directors to avoid the payment of tax on these deposits. He also believed that the account holders' names for the offshore bank account had been changed in order that company receipts could be deposited into that account. In his view, these actions were deliberate and amounted to fraud. He considered abatement of 15 per cent to be appropriate. The abatements therefore totalled 50 per cent, leaving the penalty at 50 per cent.

162. We find that the penalty was appropriately assessed on Tammys. Again, we see no reason to vary the level of the penalty in any way. We therefore confirm the penalty in the sum of £42,489.

163. In respect of the accounting period ending on 31 May 2009, a notice of penalty assessment under Sch 24 FA 2007 was issued to Tammys on 28 October 2011. The amount of the penalty was £6,447.70. The penalty calculation summary showed that the potential lost revenue in respect of "understated sales" was £9,238.11. HMRC's view of the behaviour was "deliberate"; the information had been given to HMRC with prompting. The disclosure reduction was 15 per cent for telling HMRC about the understatement, 40 per cent for helping HMRC understand it and 30 per cent for giving HMRC access to records. This gave a total disclosure reduction of 85 per cent. This reduction was applied to the difference between the minimum and maximum penalty percentage. This difference was 35 per cent. The resulting reduction was therefore 29.75 per cent. The penalty rate was reduced from the maximum 70 per cent to 40.25 per cent. The penalty of £3,718.33 was 40.25 per cent of the potential lost revenue of £9,238.11.

164. In relation to s 419 ICTA 1970, the penalty under Sch 24 FA 2007 was £2,729.37. The potential lost revenue was £6,498.50. HMRC's view of the behaviour was "deliberate". The information had been given to HMRC with prompting. The penalty percentage range was between 35 per cent minimum and 70 per cent maximum. The disclosure reduction was 80 per cent, the percentage for telling HMRC being 10 per cent. Application of the 80 per cent reduction to the 35 per cent difference between minimum and maximum resulted in a penalty reduction of 28 per cent. The penalty rate was therefore 42 per cent (28 per cent of the maximum 70 per cent). The penalty of £2,729.37 2 was 42 per cent of the potential lost revenue of £6,498.50. That penalty added to the above penalty of £3,718.33 gave a total of £6,447.70.

165. We find that the penalty assessment was properly made and that there is no reason to adjust it in any way. In accordance with para 17 Sch 24 FA 2007, we affirm HMRC's decision in respect of the penalty.

Disposition of the appeals

166. The results of our findings are:

(1) All the assessments made on Dr Easow are confirmed;

(2) The assessments made on Mrs Samuel for the years 2000-01 and 2005-06 (the latter being undisputed) are confirmed;

(3) The corporation tax assessments made on Tammys for the eleven accounting periods ending on 31 May 1999 to 2009 inclusive are confirmed;

(4) The assessments made on Tammys in respect of liabilities under s 419 ICTA 1988 for those eleven accounting periods are also confirmed;

(5) The penalty determination dated 21 October 2011 in respect of Dr Easow is confirmed in the sum of £9,767;

(6) The penalty determination dated 25 October 2011 in respect of Mrs Samuel is confirmed in the sum of £523;

(7) The penalty determination dated 26 October 2011 in respect of Tammys is confirmed in the sum of £42,489;

(8) The penalty assessment dated 28 October 2011 in respect of Tammys is confirmed in the sum of £6,447.70.

167. The outcome is that the appeals of Dr Easow, Mrs Samuel and Tammys are all dismissed.

General comments

168. We wish to make some general comments. The index to the bundles of documents listed the documents but did not show page or volume references. This has made the task of preparing this decision rather more labour-intensive than it need have been. The index referred to a note of a phone call with Pearson McKinsey dated 8 March 2012; this was not included in the bundle. It is essential for the evidence to be complete and readily accessible. As mentioned above, we did not have copies of the assessments on Tammys for the first six accounting periods, and there were no details of assessments under s 419 ICTA 1988 for those periods; this caused us some difficulty.

169. We have already referred to the need to identify the particular form of the legislation applicable to the year in question; it will be apparent from our decision that it may well make a material difference whether one or other of a choice of versions applies. Parties should ensure that appropriate versions of the legislation are provided. These should be complete; as we have indicated, the copy of s 419 ICTA included in HMRC's bundle was incomplete. Parties should check whether anything is missing before providing materials to the Tribunal.

170. Our other comment arises from Dr Easow's correspondence mentioned at paragraphs 67 and 68. Where an agent has been authorised by a taxpayer to deal with HMRC, HMRC are entitled to assume unless informed to the contrary that they may continue correspondence with that agent. If the taxpayer wishes to withdraw his instructions from the agent, he must make this clear both to the agent and to HMRC. There was no evidence to confirm that instructions had been withdrawn from Pearson McKinsey, and in particular no evidence of any notification sent by Dr Easow to HMRC to the effect that he no longer wished that firm to act as his agents in dealing with HMRC. Dr Easow's criticism of Mr Hancox was therefore entirely unjustified.

Right to apply for permission to appeal

171. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax

Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN CLARK
TRIBUNAL JUDGE

RELEASE DATE: 18 September 2013