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Case Number: UT/2022/000108

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Royal Courts of Justice, Rolls Building,
Fetter Lane, London EC4A 1NL

CAPITAL GAINS TAX AND INCOME TAX *– Appellant bought and sold four residential properties – whether a trade – whether the capital gains were within the exemption for job-related accommodation – whether discovery assessments were validly issued – penalties for deliberate behaviour – appeal allowed in part*

Heard on: 30 June 2023
Judgment date: 03 November 2023

Before

JUDGE THOMAS SCOTT
JUDGE GUY BRANNAN

Between

MARK CAMPBELL

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Keith Gordon and Siobhan Duncan, instructed pro bono via Advocate

For the Respondents: Laura Inglis, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. This appeal relates to the tax liability of Mr Campbell in respect of four residential properties which he sold between 2010 and 2016. The substantive issue is whether he was liable to capital gains tax ("CGT") on the disposals, or to income tax, or to neither. There are also procedural issues as to the validity of the tax assessments issued by HMRC, and a challenge to the quantum of the penalties imposed by HMRC.

2. Mr Campbell appeals against the decision of the First-tier Tribunal (the "FTT") released on 8 February 2022 (the "Decision"), and HMRC cross-appeal against one aspect of the Decision.

3. We thank all counsel for their detailed submissions, and are grateful to Mr Gordon and Ms Duncan for representing Mr Campbell pro bono, enabling important issues to be fully argued.

4. One sensitive aspect of this case relates to the medical condition of Mr Campbell's father. We have, as requested, avoided giving details of his condition, and refer to him below simply as "Mr Campbell's father".

BACKGROUND

5. On 27 August 2017, HMRC wrote to Mr Campbell asking him to submit a self-assessment return for the tax year 2015-16. HMRC said that they were in receipt of information that he had disposed of a property which was not his main residence, being 8 Wigshaw Lane.

6. Mr Campbell responded that that the property was not liable to CGT as it fell within the exemption for job-related accommodation (discussed below). He delivered a tax return as requested.

7. On 19 December 2017, HMRC wrote to Mr Campbell disputing that the exemption was available. HMRC became aware that Mr Campbell had bought and sold four properties between 2010 and 2015, as follows:

(1) **10 Woodhouse Close**, purchased on 17 December 2010 for £80,000 and sold on 24 April 2012 for £116,000.

(2) **28 Bramhill Close**, purchased on 12 October 2012 for £95,000 and sold on 22 January 2015 for £125,000.

(3) **2 Bramhill Close**, purchased on 8 February 2013 for £100,000 and sold on 20 June 2014 for £147,000.

(4) **8 Wigshaw Lane**, purchased on 17 June 2015 for £95,000 and sold on 31 March 2016 for £245,000.

8. HMRC requested further information and documents from Mr Campbell concerning these transactions. Mr Campbell's agents wrote supplying certain information, and stating that the only chargeable gain related to 2 Bramshill Close.

9. On 24 January 2018, HMRC issued an information notice requiring further information, and opened an inquiry into his 2015-16 tax return.

10. In due course, HMRC issued assessments and a closure notice, assessing Mr Campbell to income tax or, in the alternative, CGT. They also issued penalties to him for deliberate failure to notify his liability to tax.

11. The discovery assessments (the "Assessments"), issued under sections 29 and 36 of the Taxes Management Act 1970 (the "TMA"), and the closure notice, issued under section 28A TMA (the "Closure Notice"), were as follows:

Tax Year	**Decision**	**Profits Assessed**	**Additional Tax**	**Date of Issue**
2012-13	Discovery Assessment	£27,110.00	£8,043.25	17 July 2018
2014-15	Discovery Assessment	£63,089.00	£23,925.69	17 July 2018
2015-16	Closure Notice	£131,438.00	£35,963.35	18 July 2018

12. The penalties (the "Penalties"), issued pursuant to Schedule 41 of the Finance Act 2008 ("Schedule 41"), for failure to notify liability to tax, were as follows:

Tax Year	**Description**	**Penalty**	**Date of Issue**
2012-13	Schedule 41	£3,659.67	10 August 2018
2014-15	Schedule 41	£10,886.18	10 August 2018
2015-16	Schedule 41	£25,923.85	10 August 2018
		£40,469.70	

13. The penalties charged for 2015-16 were calculated by reference to the total liability for the year, on the basis that the total liability was notified late.

14. Mr Campbell appealed against the Assessments, the Closure Notice and the Penalties.

CGT LEGISLATION

15. We will set out the relevant legislation on discovery assessments and closure notices and on penalties when we consider the appeals on those issues. As regards the CGT position, the relevant provisions of the Taxation of Chargeable Gains Act 1992 ("TCGA") for the periods in this appeal were as follows:

> **222 Relief on disposal of private residence**
>
> (1) This section applies to a gain accruing to an individual so far as attributable to the disposal of, or of an interest in—
>
> (a) a dwelling-house or part of a dwelling-house which is, or has at any time in his period of ownership been, his only or main residence
>
> …
>
> (8) If at any time during an individual's period of ownership of a dwelling-house or part of a dwelling-house he—
>
> (a) resides in living accommodation which is for him job-related, and
>
> (b) intends in due course to occupy the dwelling-house or part of a dwelling-house as his only or main residence,

this section and sections 223 to 226 shall apply as if the dwelling-house or part of a dwelling-house were at that time occupied by him as a residence.

(8A) Subject to subsections (8B), (8C) and (9) below, for the purposes of subsection (8) above living accommodation is job-related for a person if—

(a) it is provided for him by reason of his employment, or for his spouse or civil partner by reason of the spouse's or civil partner's employment, in any of the following cases—

(i) where it is necessary for the proper performance of the duties of the employment that the employee should reside in that accommodation;

(ii) where the accommodation is provided for the better performance of the duties of the employment, and it is one of the kinds of employment in the case of which it is customary for employers to provide living accommodation for employees;

…

223 Amount of relief

(1) No part of a gain to which section 222 applies shall be a chargeable gain if the dwelling-house or part of a dwelling-house has been the individual's only or main residence throughout the period of ownership, or throughout the period of ownership except for all or any part of the last 36 months of that period.

THE FTT'S DECISION

16. It will be necessary to consider the Decision in detail when we turn to the grounds of appeal, but what follows is a brief summary. References to paragraphs in the form [x] are to paragraphs of the Decision, unless stated otherwise.

17. The FTT determined the appeal on the papers, without a hearing. We discuss this below.

18. The FTT identified the issues as follows, at [17]-[22]:

17. The issues raised in this appeal are (in respect of the Assessments and the Closure Notice):

(1) Was there a discovery?

(2) Have HMRC correctly issued a Closure Notice for the 2015-16 fiscal year?

18. This will involve consideration of the following questions:

(1) Was the Appellant carrying out an adventure in the nature of trade (i.e., was the repeated activity by the Appellant trade activity)?

(2) If so, what was the profit?

(3) If not, is the gain a capital gain?

(4) If so, is it exempt under s 222 TCGA?

(5) If not, what is the gain?

19. In respect of the Penalties, the issues are:

(1) Was there a failure to notify liability to tax?

(2) If so, was there a reasonable excuse?

(3) If not, was the failure deliberate or non-deliberate?

(4) Have HMRC correctly applied the Schedule 41 Penalties?

> 20. The burden of proof is on HMRC to establish that there was a discovery and that the Assessments were validly issued. Once this issue is discharged, the onus is on the Appellant to displace the Assessments and Closure Notice by showing that the Assessments are excessive; and to demonstrate any entitlement to relief from being taxed upon any capital gain produced. Finally, it is for HMRC to show that the Penalties have been correctly applied.
>
> 21. The standard of proof is the civil standard; that of a balance of probabilities.

19. In relation to the assessments in the alternative to CGT and income tax, the FTT stated as follows:

> 46. The Appellant was assessed to income tax or, in the alternative, CGT**.** Before applying the provisions of s 224(3) TCGA, it is necessary to consider the possibility that the Appellant has undertaken an adventure in the nature of trade (i.e., whether an income tax charge may arise on the gains from transactions in the circumstances of this appeal). This is because income tax takes priority over CGT. The question of whether a trade is being carried on with a view to realisation of profit is a subjective test.

20. In considering whether Mr Campbell's activities amounted to a trade, the FTT placed emphasis on its finding that those activities had no connection with an existing trade. Although it did not say so explicitly, the FTT found that the activities did not amount to a trade for tax purposes: [48]-[79].

21. In relation to CGT, Mr Campbell argued that as regards 28 Bramshill Close, he was entitled to the relief in section 222(1) TCGA as it was his only or main residence, and that the exemption in section 222(8) for job-related accommodation ("JRA") applied to the gains on 10 Woodhouse Close and 8 Wigshaw Lane: [83].

22. The FTT first considered the availability of the JRA exemption: [86]-[97]. Mr Campbell stated that he was living in his parents' home while employed providing medical care for his father, and he intended to occupy the other properties as his main residence, such that the conditions of section 222(8) were satisfied and the gains on those other properties were exempt. The FTT did not accept this, concluding that "I…do not accept that the Appellant was living in JRA, as I do not accept that the accommodation was provided for the purposes of employment": [97].

23. As to whether any of the disposals would benefit from the main residence exemption in section 222(1), the FTT considered this at [98]-[128], apparently in relation to each of the properties. After discussing various authorities on the meaning of "residence", the FTT concluded at [109]:

> Having considered all of the evidence, cumulatively, I find that the Appellant did not intend that any of the properties would be his main residence. This is because the evidence before me does not support a finding that there was any degree of permanence, continuity or expectation of continuity in relation to any of the properties. In reaching these findings, I have considered the nature, quality, length and circumstances of any occupation relied on.

24. The FTT then set out a number of findings of fact which presumably had led it to this conclusion. At [128], the FTT set out its conclusion that the main residence exemption did not apply in relation to any of the properties.

25. The FTT considered the validity of the Assessments and Closure Notice at [129]-[146]. The FTT found that because Mr Campbell did not submit tax returns for 2012-13 or 2014-15, HMRC were able to issue an assessment for those years within 20 years of the end of the relevant year of assessment: section 36(1A)(c) TMA. The FTT was satisfied that HMRC made a "discovery" of a loss of tax for the years in which the assessments were issued.

26. The FTT then found that Mr Campbell had not discharged the burden on him, the assessments having been validly issued, of displacing the quantum of tax assessed.

27. As regards the tax year 2015-16, the FTT concluded that the Closure Notice was issued in the correct amount.

28. The Schedule 41 penalties were considered relatively briefly at [147]-[151]. The penalties were calculated by HMRC on the basis that Mr Campbell's failure to notify his tax liabilities was "deliberate", and his disclosure was "prompted". The FTT found that Mr Campbell's behaviour was deliberate, and in relation to the reduction of the penalties the FTT simply described the basis of calculation by HMRC: [151]. It is apparent, however, from [152] that the penalties were upheld by the FTT.

GROUNDS OF APPEAL

29. Mr Campbell has permission to appeal on the following four grounds:

(1) The FTT erred in law in deciding that the exemption in section 222(8) TCGA was not available.

(2) The FTT erred in law in concluding that the Assessments were validly made.

(3) The FTT erred in law in concluding that in relation to the Penalties Mr Campbell's failure to notify was deliberate.

(4) The FTT erred in failing to consider the quantum of the Penalties and in not giving full mitigation.

30. HMRC have permission to cross-appeal on the ground that the FTT erred in law in concluding that Mr Campbell was not trading.

31. We will consider first HMRC's cross-appeal, since if it were to succeed, there would clearly be implications for Mr Campbell's grounds of appeal.

THE CROSS-APPEAL ON TRADING

Submissions of the parties

32. HMRC appealed on the basis that the FTT erred in law by applying the wrong test in determining whether Mr Campbell was trading, and that on the facts, if the FTT had applied the correct test, it would have reached the conclusion that he was trading.

33. Ms Inglis said that the ordinary meaning of "trade" is a commercial operation whereby a person provides goods or services to customers for reward. Section 989 of the Income Tax Act 2007 extends that meaning to include "any venture in the nature of trade". The identification of a trade requires an evaluation of all the facts in light of the framework established by case law. The so-called "badges of trade" are helpful indicators of trading, but are not to be treated as a checklist and no single badge is decisive: *Marson v Morton* [1986] STC 463 ("*Marson v Morton*") .

34. In this case, said Ms Inglis, the FTT provided three reasons for its decision. These were the absence of any connection between Mr Campbell's activities and an existing trade; the absence of evidence to support a finding that Mr Campbell had engaged in a similar activity over a protracted period of time, and the fact that Mr Campbell was not a professional property developer. The first factor entailed the FTT focussing on one badge of trade to the exclusion

of all others, effectively elevating this factor to the status of a pre-condition for the existence of a trade. The second and third factors were not relevant to trading status. As a result, the FTT erred in law by evaluating the facts according to the wrong framework. This was an error of principle. Ms Inglis said that HMRC's appeal was not a challenge based on *Edwards v Bairstow* [1956] AC 14 ("*Edwards v Bairstow*") to the FTT's findings of fact, but was an assertion that the FTT had not applied to the facts the correct statutory and case law framework.

35. If account is taken of all relevant facts found by the FTT, argued Ms Inglis, then the preponderance of factors pointed towards trading, and if the FTT had applied the correct legal test it would have reached the conclusion that Mr Campbell was trading.

36. For Mr Campbell, Mr Gordon emphasised the guidance given by the Upper Tribunal in *Jerome Anderson v HMRC* [2018] UKUT 0159 (TCC) to the effect that an appellate tribunal should only interfere with an FTT finding as to the existence of a trade if the FTT has made an error of principle. HMRC's argument as to the "three reasons" given by the FTT for its decision was based on taking one paragraph of the Decision ([77]) in isolation. The FTT correctly directed itself as to the law, including the direction in *Marson v Morton* that the badges of trade were simply one step in the analysis. The reference to the duration of Mr Campbell's activities was a permissible finding in building up a picture, and did not mean that the FTT thought that a short-term activity could not constitute a trade. In any event, the overall facts did not point to Mr Campbell's activities being a trade.

Discussion

37. The principles to be applied in determining whether activities amount to a trade for income tax purposes are well-established. We did not detect any material disagreement between the parties on those principles. In *Eclipse Film Partners No 35 LLP v HMRC* [2014] EWCA Civ 95 ("*Eclipse*"), the Court of Appeal said this, at [114]:

> In *Marson v Morton* at pp 1348-1349 Sir Nicholas Browne-Wilkinson V-C set out a list of matters which have been regarded as a badge of trading in reported cases. He emphasised, however, that the list was not a comprehensive statement of all relevant matters nor was any one of them decisive in all cases. He said that the most they can do is to provide common sense guidance to the conclusion which is appropriate; and that in each case it is necessary to stand back and look at the whole picture and, having regard to the words of the statute, ask whether this was an adventure in the nature of trade…

38. In brief summary, the badges of trade were described in *Marson v Marton* as follows:

(1) Whether the transaction was one-off.

(2) Whether the transaction related to an existing trade of the taxpayer.

(3) The nature of the subject matter.

(4) The way in which the transaction was carried through.

(5) The source of finance.

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

(7) Whether a resold item was broken down into saleable lots.

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

(9) Whether the item purchased provided enjoyment for the purchaser or produced income pending resale.

39. A helpful analysis of the leading authorities was undertaken by the Court of Appeal in *Ingenious Games LLP v HMRC* [2021] EWCA Civ 1180. That analysis referred[1] to the following observations of Sir Terence Etherton C in *Eclipse*:

> [112] As an ordinary word in the English language "trade" has or has had a variety of meanings or shades of meaning. Its meaning in tax legislation is a matter of law. Whether or not a particular activity is a trade, within the meaning of the tax legislation, depends on the evaluation of the activity by the tribunal of fact. These propositions can be broken down into the following components. It is a matter of law whether some particular factual characteristic is capable of being an indication of trading activity. It is a matter of law whether a particular activity is capable of constituting a trade. Whether or not the particular activity in question constitutes a trade depends upon an evaluation of all the facts relating to it against the background of the applicable legal principles. To that extent the conclusion is one of fact, or, more accurately, it is an inference of fact from the primary facts found by the fact-finding tribunal.
>
> [113] It follows that the conclusion of the tribunal of fact as to whether the activity is or is not a trade can only be successfully challenged as a matter of law if the tribunal made an error of principle or if the only reasonable conclusion on the primary facts found is inconsistent with the tribunal's conclusion. These propositions are well established in the case law…

40. The FTT considered this issue under a section headed "Was the repeated activity by the Appellant trade activity?". It set out the arguments made by HMRC, that the properties were bought, sold and redeveloped at a profit, acquired for the purpose of generating a profit, that any residential use was purely incidental, and that all of the properties had been modernised. So, the FTT had those submissions in mind when it set out on its discussion.

41. The FTT referred to *Macmahon & MacMahon v IRC* [1951] 32 TC 311 as demonstrating that the fact that a property has been used as a residence is not fatal to a trading argument. It then set out the statutory definition of trade, and referred to the badges of trade. In relation to the badges of trade, the FTT pointed out the significance of repeated transactions which was discussed in *Pickford v CIR* [1927] 13 TC 251. It noted that modification of an asset is a badge of trade, but "by itself, that is not enough". It then discussed cases dealing with other badges such as the nature of the asset; the source of finance, and the length of ownership. The FTT continued by setting out the badges of trade described in *Marson v Marton*, and noted that they were not to be used as a checklist.

42. At [63]-[78] the FTT then considered the four properties in question, which it noted had produced profits before expenses of £263,000. It stated at [67]:

> I find that the Appellant has been very active on the property market over a relatively short period of time, and this does not sit well with the claim that the Appellant was merely looking for somewhere to live, whilst also caring for his father.

43. The FTT then made various findings of fact in relation to the four properties, which were largely adverse to Mr Campbell or did not accept his explanations: [68]-[75].

44. The FTT set out its conclusions at [76]-[78]:

> 76. Having considered all of the evidence, cumulatively, whilst the Appellant clearly generated profits from the sale of the properties, and whilst the length of ownership for all but the very first purchase was relatively short, I find that

[1] At [53]-[54] of *Ingenious Games*.

> this does not point towards trading. I find, however, that the properties were modified in order to be sold, and that this generated a profit.
>
> 77. Whilst a single badge of trade is sufficient to show trading, I find that in the appeal before me, the Appellant's activities had no connection with an existing trade. There is no evidence before me to support a finding that the Appellant had engaged in a similar activity over a protracted period of time. In reaching these findings, I have considered all of the arguments, together with the documentary evidence included in the bundle. I accept that the Appellant is not a professional property developer.
>
> 78. In *Salt v Chamberlain* [1979] STC 750, a research consultant made a loss on the Stock Exchange after trying to forecast the market. The loss was made after several years and over 200 transactions. This was not seen as a trade, but was considered to be capital in nature. It was concluded that share trading by a private individual can never have the badges of trade. Connection with an existing trade is a relevant consideration.

45. It is in our opinion evident when the FTT's decision is considered as a whole that the FTT did not, as HMRC asserted, simply give three reasons for their decision, or treat connection to an existing trade as a pre-condition to trading status. The FTT correctly directed itself as to the law, and made a number of detailed findings relevant both to the badges of trade and to the more impressionistic approach to the existence of a trade left open by *Eclipse* and *Ingenious Games*. It is tolerably clear that, read together, at [76] and [77] the FTT is focussing on profit generation, length of ownership, modification and connection to an existing trade as the most relevant factors in its analysis. It sets out its conclusions at [76] that while modification of the properties resulting in a profit is indicative of trading, the generation of profit and length of ownership, while normally pointing towards trading, in this case did not. It would have been preferable if the FTT had spelt out why it considered that they did not point to trading on the facts, but we infer that the FTT accepted Mr Campbell's evidence (which it had described) as to at least some of the reasons for the relatively short length of ownership of all but the first of the properties.

46. At [77], the FTT then identified factors which it considered pointed away from a trade. We do not consider that any of those factors can be said to be irrelevant, and, as we have explained, the authorities establish that a "checklist" approach based on the badges of trade is not necessary.

47. At [78], the FTT did not accurately describe the decision in *Salt v Chamberlain*. In fact, it was one of the taxpayer's arguments in that case that the commissioners had erred by applying a rule that an individual could never trade in securities for tax purposes, but it was held that this had not been the basis of the commissioners' decision. However, it was made clear in *Ingenious Games* that in order to amount to an error of law, a tribunal's error must have been material to its decision as to the existence of a trade. Here, the FTT had given its reasons for its decision before its gratuitous reference to *Salt v Chamberlain*, and in concluding [78] by stating "Connection with an existing trade is a relevant consideration", the FTT made no error. Therefore, we do not consider that this was a material error by the FTT in reaching its decision.

48. In concluding as it did at [77], the FTT may well have approached the trading question differently from the way in which we, or a differently constituted FTT, might have approached it. However, it is made abundantly clear by the Court of Appeal's reversal of the Upper Tribunal's decision in *Ingenious Games* regarding the FTT's finding as to the trading question that that is not the test in this appeal. The test is whether the FTT made an error of principle or whether a conclusion that Mr Campbell was trading was the only reasonable conclusion for a

tribunal to have reached: *Eclipse* at [113]. The weight to be given to a particular factor, as long as it was not irrelevant, was a matter for the FTT, and is not for this Tribunal to second-guess. That is patently so where, as here, that factor (connection to an existing trade) was a conventional badge of trade.

Disposition

49. In conclusion, we find that the FTT's decision on this issue was one which involved no error of principle and which was within the range of decisions open to it. HMRC's cross-appeal is therefore dismissed.

50. We move on to the world of CGT.

GROUND 1: SECTION 222(8) TCGA

51. The Upper Tribunal (Judge Herrington) granted Mr Campbell permission to appeal on the ground that "the FTT has wrongly discounted the application of section 222(8) [TCGA] to the facts of the case".

52. There is no appeal against the FTT's finding that none of the properties benefitted from the "main residence" exemption in section 222(1).

53. HMRC raised two issues regarding the scope of this ground of appeal.

54. First, section 222(8) requires both that the accommodation in which the taxpayer lives was provided by reason of employment, and also that the taxpayer intended to occupy the property disposed of as his only or main residence. Ms Inglis argued that Ground 1 did not extend to a challenge to the FTT's finding on the latter issue. In our opinion, that would be a highly curious result, because it would make little sense to grant permission on terms which meant that even if the taxpayer succeeded, the FTT's finding that section 222(8) was not available would be undisturbed. Ms Inglis confirmed that that was indeed HMRC's position. Having considered the application for permission to this Tribunal, we are satisfied that it extends to all aspects of the exemption in section 222(8).

55. Second, before the FTT Mr Campbell conceded that he could not benefit from the main residence exemption in section 222(1) in relation to 2 Bramshill Close. Ms Inglis said that he could not now seek to argue for the first time in this appeal that he was exempt from CGT on the disposal of that property on the alternative basis of the exemption in section 222(8). Mr Gordon accepted that the section 222(1) point had been conceded, but argued that the FTT had put the section 222(8) issue "in play" in relation to 2 Bramshill Close by considering and making findings as to Mr Campbell's intentions in relation to all four properties. We consider this point below when we deal with the disposition of Mr Campbell's appeal on this ground.

Submissions of the parties

56. Mr Gordon said that the exemption in section 222(8) turns on two separate tests, namely:

> (1) That the individual intends to occupy the dwelling-house disposed of as his only or main residence, and
>
> (2) In the meantime, the individual is residing in JRA as defined in Section 222(8A).

57. Mr Gordon argued that the FTT did not address the statutory definitions of JRA and disregarded the unchallenged evidence on behalf of Mr Campbell which demonstrated that those tests were met on the facts. In particular, the FTT wrongly discounted the medical evidence as to the JRA issue, and the written evidence was not challenged. The FTT wrongly assumed that because Mr Campbell was living in "the family home" or what he referred to as "home" it could not fall within the statutory definition. The FTT also erred in misapplying the "intention" requirement in section 222(8), and again ignored the unequivocal and unchallenged

evidence. The FTT referred to "the nature, quality, length and circumstances of any occupation relied on", but that confused the test of intention with that of actual occupation as a main residence. In reaching its decision on intention, the FTT focussed on actual occupation, ignored material factors and took into account immaterial factors.

58. For HMRC, Ms Inglis submitted that this ground of appeal amounted to a series of challenges to the facts found by the FTT, based on *Edwards v Bairstow*, which did not satisfy, or even engage with, the very high threshold for such a challenge. She argued that Mr Gordon's invitation to the Tribunal to reconsider large swaths of evidence as if it were the first-instance decision maker was simply impermissible.

59. In relation to whether Mr Campbell was living in JRA at the times of the disposals, Ms Inglis said that the FTT was entitled to discount the medical evidence and to take into account that he was living in "the family home". The other facts referred to by the FTT in determining this issue were all relevant and material. In relation to the intention element of the test, the FTT gave full and detailed consideration to this issue in relation to each property. Contrary to Mr Gordon's assertions, said Ms Inglis, Mr Campbell's evidence was neither unequivocal nor unchallenged.

What did the FTT decide in relation to section 222(8)?

60. The exemption from CGT provided by section 222(8) treats as a person's only or main residence (and therefore exempt under section 222(1)) a dwelling-house owned by that person during a period in which he satisfies two conditions. The first is that he resides "in living accommodation which is for him job-related" (the "JRA condition"). The second is that he "intends in due course to occupy the dwelling-house…as his only or main residence" (the "Intention condition").

61. Living accommodation is "job-related" if it is provided by reason of the person's employment and (relevantly in this appeal) (1) it is necessary for the proper performance of the duties of employment that the employee should reside in that accommodation, or (2) the accommodation is provided for the better performance of the duties of employment, being an employment in which it is customary for employers to provide accommodation for employment: section 222(8A)(a)(i) and (ii).

62. The FTT stated at [85] that it would first consider the JRA issue, before considering the main residence exemption. The first section, headed "Does the Appellant reside in JRA?", is at [86]-[97]. It is followed by a longer section headed "Does PRR apply?", at [98]-[128].

63. The first section deals solely with the JRA condition in section 222(8), and says nothing about the Intention condition. It concludes at [97]:

> I therefore do not accept that the Appellant was living in JRA, as I do not accept that the accommodation was provided for the purposes of employment. It is then necessary to consider whether the properties were acquired for the purpose of occupying them as a main residence.

64. The section which follows does make a number of findings as to Mr Campbell's intentions in relation to all four properties. However, it makes those findings not in relation to the Intention condition in section 222(8), but (as its heading suggests) in relation to the main residence exemption in section 222(1).

65. On a straightforward reading, the FTT made no findings in relation to the Intention condition in section 222(8), because it did not need to do so, having found that that the JRA condition was not satisfied. On the other hand, in the section dealing with section 222(1), the FTT considered and made detailed findings as to intention, and both parties appear to have assumed in this appeal that those findings apply to the Intention condition in section 222(8).

66. Notwithstanding the parties' assumption, we consider that the natural and better reading of the relevant sections of the FTT's decision is that the FTT did not intend to, and in fact did not, make any finding whether the Intention condition was satisfied. That is what the FTT was saying at [97]: having found that the JRA condition was not satisfied, it was unnecessary to consider whether the remainder of section 222(8) was satisfied. That is why there was no consideration of the Intention condition in the section of the judgment dealing with section 222(8). The reason why Mr Campbell's intentions are considered, and findings made, in the section dealing with section 222(1) is in our view presumably that while it is actual occupation which is most relevant to section 222(1), the authorities indicate that, in the absence of any statutory definition of "only or main residence", *intention* or *expectation* is also relevant. The leading authority in that regard is the decision of the Court of Appeal in *Goodwin v Curtis* [1998] STC 475, in describing the "quality of occupation" which must be assessed in considering the "only or main residence" definition as being determined in part by the expectation of permanence and continuity of occupation[2].

67. The result of the FTT's approach is that while there is no finding as to the Intention condition in section 222(8), there are findings of fact as to Mr Campbell's intentions as regards the four properties in the context of section 222(1). We will consider what that means for this ground of appeal when we have considered the appeal under this ground against the FTT's finding on the JRA condition, since if we dismiss the appeal on that issue, the Intention condition would become academic.

The JRA condition

68. Living accommodation must be provided by reason of a person's employment as part of the definition of JRA. Although it was not referred to by the FTT, for this purpose "employment" has the meaning given by Chapter 2 of Part 3 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"): Section 222(8D) TCGA. Under section 66 ITEPA, "employment" broadly means an employment the earnings from which are taxable as general earnings under ITEPA.

69. So, the first question for the FTT was whether Mr Campbell had a relevant employment. Mr Campbell's case was that he was employed as a carer for his father, who (it was common ground) suffered from a serious medical condition. The issue which the FTT had initially to determine was, we assume, whether such responsibilities as Mr Campbell had arose under an employment. We would have expected this question typically to have involved consideration of whether Mr Campbell had an enforceable contract for caring responsibilities, and with whom, and what the terms of that contract were. In fact, the FTT made no findings as to any of those issues and referred to no evidence on those issues. However, in discounting medical evidence which referred to Mr Campbell being "employed as [his father's] carer since April 2010", the FTT did state (at [92]) that this reference was unlikely to have resulted from "independent knowledge that there was a legally enforceable contract of employment in place".

70. The phrase "legally enforceable contract of employment" in [92] might be thought to refer to the existence of an employment contract. However, although neither party had said so in their skeleton arguments, we were told in the hearing that in fact it was common ground that Mr Campbell did have a contract of employment, with the relevant authority, to care for his father. We find it inexplicable that the FTT made no findings on that issue, but we have proceeded on the basis of the common ground between the parties, and the absence of any challenge by HMRC to the existence of an ITEPA employment.

[2] The importance of the taxpayer's intentions or expectations in relation to principal private residence relief is illustrated by *Morgan v HMRC* [2013] UKFTT 181 (TC) and *Core v HMRC* [2020] UKFTT 440 (TC). The FTT discussed *Morgan* and *Goodwin v Curtis* in the Decision.

71. On that basis, under section 222(8A) TCGA, whether or not the family home in which Mr Campbell resided during the relevant period was JRA turned on two questions. First, was the living accommodation in the family home "provided for him by reason of his employment"? Second, if so, was it necessary for the proper performance of the duties of the employment that Mr Campbell should reside in that living accommodation?

72. As regards the second question, Mr Gordon pointed out that the second requirement could alternatively be satisfied (under section 222(8A)(a)(ii)) if the living accommodation was provided for the better performance of the employment duties and the employment was of a kind in which the provision of such accommodation for employees was customary. We agree, but it does not appear from the Decision that that was an alternative basis which was considered by the FTT at any stage, or as to which the FTT referred to any evidence regarding what was "customary": [86]. Therefore, we do not consider that it can properly form an element of an appeal against the FTT's decision, and we consider only the "necessary for the proper performance" alternative.

73. We turn to the first question, namely whether the family home in which Mr Campbell resided and in which he carried out his caring responsibilities was "provided for him by reason of his employment". As we have said, the FTT considered that issue at [86]-[97]. At [86], the FTT appears to have wrongly conflated the first and second elements of section 222(8A):

> The first question which must be answered is whether accommodation has been provided by reason of employment. The test is whether it is necessary for the Appellant to reside in the accommodation in order to perform his employment duties.

74. It appears from this introductory paragraph that the FTT may have thought that the "by reason of employment" test was whether it was necessary to reside in the accommodation to perform the duties.

75. The FTT considered medical evidence submitted on behalf of Mr Campbell, and concluded that all it did was to confirm the medical position and needs of Mr Campbell's father, and that this care was being provided by Mr Campbell: [89]. The FTT placed weight on the references in that evidence to the living accommodation as "the family home": [90], [91]. The FTT considered that the fact that Mr Campbell bought 10 Woodhouse Close with the initial intention of moving into that property with his girlfriend was inconsistent "if he was under a contract of employment to provide round the clock care": [92]. The FTT appears to have found that Mr Campbell's parents would not require him to leave their property if he had nowhere else to reside and that this "would not be so if the accommodation were JRA as an employer would be under no obligation to continue to provide accommodation once the employment relationship has come to an end": [93]. The FTT referred to Mr Campbell's evidence that he was "living at home" as not sitting well with the accommodation only being provided because of care needs: [94], [95]. At [96], the FTT stated:

> The argument that the Appellant resides in JRA further does not sit well with the Appellant's alternative suggestion that one of his motivations for purchasing bungalows was to make them accessible for his father. If the Appellant's parents' home was JRA, then it is not clear why the Appellant would have to select and adapt other properties to facilitate his father's presence at those other properties. This therefore strongly suggests that there was nothing more than a family arrangement.

76. The FTT set out its conclusion at [97]:

> I therefore do not accept that the Appellant was living in JRA, as I do not accept that the accommodation was provided for the purposes of employment.

> It is then necessary to consider whether the properties were acquired for the purpose of occupying them as a main residence.

77. The issue being considered by the FTT was whether the accommodation in which Mr Campbell was residing (the family home) was provided "by reason of [the] employment" which (it was apparently common ground) existed for his caring responsibilities in relation to his father. It is striking that the FTT did not consider what the words "by reason of employment" meant in this context as matter of law. In our opinion, there is nothing to displace the assumption that they should bear the same meaning as they have in the other contexts in which they occur in ITEPA, such as the codes dealing with securities or benefits acquired by reason of employment. There are many decisions on the meaning of "by reason of employment", including in particular *Wicks v Firth* 56 TC 318. In *John Charman v HMRC* [2021] EWCA Civ 1804 ("*Charman*") the Court of Appeal said this about the test, at [47]:

> 47. There was little, if any, dispute between the parties as to the correct test to be applied to determine whether an interest is acquired "by reason of" employment. It is not necessary for HMRC to show that the interest was acquired by reason *only* of employment. Nor is the test a "*causa sine qua non*" or "but for" test. The test that has found favour in subsequent authorities (see *Mairs v Haughey* [1992] STC 495 at 525 (Hutton LCJ (NI)), *Wilcock v Eve* [1995] STC 18 at 29 (Carnwath J) and *Vermilion Holdings Ltd v Revenue and Customs Commissioners* [2021] CSOH 45, [2021] STC 1874 at [45]-[46] (Lord Campbell of Alloway dissenting) and [69] (Lord Doherty)) is that stated by Oliver LJ in *Wicks v Firth* [1982] 1 Ch 355 at 371:
>
> > "One is directed to see whether the benefit is provided by reason of the employment and in the context of these provisions that, in my judgment, involves no more than asking the question 'what is it that enables the person concerned to enjoy the benefit?' without the necessity for too sophisticated an analysis of the operative reasons why that person may have been prompted to apply for the benefit or to avail himself of it."

78. The test can give rise to difficult questions where there may be more than one causative effect of the relevant benefit.

79. In *Charman*, The Court of Appeal emphasised that the FTT's evaluation of this issue can only be challenged on appeal on limited grounds, at [46]:

> 46. The FTT's decision that Mr Charman acquired the Axis Capital Restricted Shares by reason of his employment can only be challenged by Mr Charman on the ground that the FTT erred in law. The correct approach to such an appeal was described by Mummery LJ in *Kuehne + Nagel Drinks Logistics Ltd v Revenue and Customs Commissioners* [2012] EWCA Civ 34, [2012] STC 840 at [34]:
>
> > " … these appeals are confined to questions of law: it was for the judge in the FTT, entrusted by statute with the judicial function of finding the facts, to consider all the relevant documents and oral evidence and to make findings of primary fact and proper inferences of fact, to which he then had to apply the tax legislation, as interpreted by the courts. It follows that it is not the task of the UT, or of this court, to re-decide or second guess the primary facts, their proper function being limited to questions of law, such as whether the FTT misinterpreted the law, or misapplied it to the facts, or made perverse findings of fact unsupported by any evidence, or reached a conclusion that was plainly wrong."
>
> There are numerous other authorities to the same effect.

80. On 25 October 2023, the Supreme Court released its decision in *HMRC v Vermilion Holdings Ltd* [2023] UKSC 37. Although the appeal was determined on a different ground, the decision does summarise at [11]-[12] the meaning of "by reason of employment".

81. In this case, we consider that unfortunately the FTT did misdirect itself in law as to the applicable test. Not only did it not consider the meaning of the words "by reason of employment", it appears from [86] that it may have considered the test to be whether it was necessary for Mr Charman to reside in the family home in order to perform his employment duties. That is a materially different, and stricter, test, and is indeed an additional requirement imposed by the definition in section 222(8A). Further, its conclusion, at [97], was that the accommodation was not provided "for the purposes of employment", which again is a different question. In relation to the factors taken into account by the FTT in reaching its decision (summarised at paragraph 75 above), it is difficult to see that several of these are material to the test(s) enunciated in *Wicks v Firth*, and the factor relied on by the FTT at [96] is in our view clearly irrelevant.

82. If one approaches the question by asking, as suggested by Oliver LJ in *Wicks v Firth*, what it was that enabled Mr Campbell to enjoy the ability to reside in the family home, we do consider that the FTT was justified in considering whether this was merely a "family arrangement". However, we agree with Mr Gordon that there is nothing in the JRA condition which precludes accommodation in a family home from being provided by reason of employment. We also agree with Mr Gordon that the medical evidence, discounted by the FTT, in fact was directly relevant to the second question arising under the JRA condition, namely whether the accommodation was necessary for the proper performance of the employment duties.

83. We have concluded that the FTT erred in law in its conclusion that the accommodation lived in by Mr Campbell was not provided by reason of employment, because it failed to direct itself as to the correct test, and took into account irrelevant factors.

84. However, as we have explained, in order to succeed on Ground 1, Mr Campbell would also need to establish that he satisfied the Intention condition. We have set out above our conclusion that, while the FTT made no finding on this issue in the context of section 222(8), it clearly did make findings as to Mr Campbell's intentions in the context of section 222(1). Those findings appear unhelpful to Mr Campbell's case in relation to the Intention condition. However, we do not consider that those findings can simply be directly read across, and therefore considered in this appeal, in relation to section 222(8). That is because those findings were made in relation to a different question, namely a multi-factorial evaluation of whether the properties qualified as Mr Campbell's only or main residence. The Intention condition in section 222(8) looks solely at intention, so the intermingling of findings as to intention with findings as to actual occupation in the FTT's conclusions relating to section 222(1) cannot be safely transposed to amount to a clear finding in relation to section 222(8).

85. There is another difficulty with evaluating the FTT's findings as to intention. The Decision records at [13] that neither party had "requested an oral hearing". Given that the hearing took place at a time when Covid was still a significant concern, it is not surprising that the parties did not want a hearing in person. However, it was clear that questions of fact and evidence would be central to the appeal, particularly as regards the Intention condition and the challenge to HMRC's finding of deliberateness in relation to the penalties. Against that background, we are surprised that the FTT did not exercise its discretion to direct a video hearing, so that Mr Campbell and the witnesses could be examined and cross-examined, and questions asked by the tribunal. While we are satisfied that there was no procedural error in

determining the appeal on the papers, this was sub-optimal given the central importance of contentious issues of fact.

Ground 1: disposition

86. We have found that:

(1) The FTT erred in law in its determination of whether or not the relevant accommodation was provided by reason of employment and/or was necessary for the performance of the employment duties.

(2) The FTT made no finding specifically in relation to the Intention condition in section 222(8).

87. Since we have found that the FTT's decision on this issue involved an error of law, we may, but need not, set that decision aside. If we do set that decision aside, we may remake it or remit it to the FTT with instructions for its reconsideration: section 12 Tribunals, Courts and Enforcement Act 2007.

88. We consider that the error was material, so the decision should be set aside. Regretfully, we have concluded that we should remit this issue to the FTT. The right question was not asked by the FTT when it looked at the "by reason of employment" issue, and questions of Mr Campbell's intentions in relation to the properties disposed of must be considered by reference to section 222(8), not section 222(1). Both of those issues turn on findings of fact which we are not in a position properly to make, and in respect of which there has been no oral hearing of the evidence.

89. In remitting this issue, we consider it sensible and in accordance with the overriding objective for the application of section 222(8) to be determined by the FTT in relation to all four properties in question, including 2 Bramshill Close.

90. We consider that it would be preferable for a differently constituted FTT, taking a fresh approach to the issues, to determine the remitted appeal.

91. In reconsidering this issue, we instruct the FTT to determine, by way of oral hearing (either in person or remote, as the FTT directs), whether Mr Campbell was exempt from CGT on any or all of the relevant disposals under section 222(8), and in so doing to determine :

(1) Whether the accommodation in which Mr Campbell resided was provided by reason of his employment as carer for his father, applying the test summarised above.

(2) Whether the accommodation fell within section 222(8A)(a)(i) TCGA, taking into account the medical evidence before the FTT at the original hearing[3].

(3) Whether section 222(8)(b) TCGA was satisfied.

92. The reconsideration shall be on the basis of the findings of primary fact made in the Decision, although not inferences drawn from primary fact. Each party has permission to adduce further evidence.

GROUND 2: DISCOVERY ASSESSMENTS NOT VALIDLY MADE

93. The Assessments for 2012-13 and 2014-15 were issued by HMRC under section 29 TMA. Section 29, so far as material, provided as follows for the relevant periods:

> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—

[3] For the avoidance of doubt, Mr Campbell does not have permission to argue that section 222(8A)(ii) is satisfied.

> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax…

94. HMRC's position was that since Mr Campbell did not submit tax returns as required under section 7 TMA for those years, the normal time limits for issuing an assessment were extended by section 36(1A) TMA as follows:

> (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) attributable to a failure by the person to comply with an obligation under section 7…
>
> 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).

95. Ground 2 of Mr Campbell's appeal asserts that the FTT erred in law because the burden was on HMRC to prove (1) that HMRC had made a discovery of an insufficiency of tax and (2) that Mr Campbell had failed to submit tax returns under section 7, and the FTT had no evidence, or at least referred to no evidence, as its basis for concluding that HMRC had discharged its burden as regards these conditions. As a result, the Assessments had not been proved to be valid and could not stand.

96. Mr Gordon argued that the FTT's only reference to the procedural validity of the Assessments was at [131] and [133], and to some extent the paragraph at [150] dealing with penalties, and these contained no discussion of the law or the evidence on which the FTT had relied. He said that HMRC had provided no evidence that they had made a discovery or that Mr Campbell had failed to comply with section 7.

97. Ms Inglis argued that the FTT clearly understood that the burden in relation to procedural validity was on HMRC. Moreover, she said, HMRC advanced a clear and positive case in this regard before the FTT, supported by the witness evidence of Mr Malcolm Weir.

Discussion

98. The burden of establishing that HMRC made a discovery of an insufficiency of tax, and that Mr Campbell had not complied with section 7 so that the extended time limit applied, lay with HMRC. The FTT had to be satisfied that HMRC had discharged the burden as to both those issues.

99. We consider first the FTT's findings and then the case put forward by HMRC to support those findings.

100. We firmly reject Mr Gordon's contention that the only relevant passages in which the FTT discussed these issues were [131] and [133]. The relevant sections of the Decision are in fact as follows:

> 129. HMRC issued discovery assessments for 2012-13 and 2014-15. The Appellant did not submit tax returns for these years. HMRC however opened

> an enquiry into the tax return that the Appellant submitted for 2015-16, and issued a Closure Notice. I shall return to consider this later.
>
> 130. If HMRC 'discover' income which ought to have, but has not, been assessed for income or corporation tax, they may make an assessment in that amount to make good the loss of tax. The conditions in s 29(3) and s 29(5) do not apply to taxpayers who have not submitted a tax return for the relevant tax year. The conditions therefore do not apply in the appeal before me (in relation to the Assessments) as the Appellant did not submit tax returns for 2012-13 and 2014-15. The normal time-limit for an assessment imposed by s 34 TMA is extended by s 36 TMA.
>
> 131. Section 36(1A)(c) TMA provides that an assessment on a person in a case involving loss of income tax or capital gains tax attributable to a failure by the person to comply with an obligation under s 7 TMA 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 provisions of the Taxes Act allowing a longer period).
>
> …
>
> 133. Apart from the 2016 tax return which was submitted in relation to 8 Wigshaw Lane, the evidence shows that in the period between 12 April 2012 and 31 March 2016, the Appellant made gains, before expenses, of £263,000.00. HMRC were aware of the purchase and sale of the properties, as well as the Council Tax information. The Appellant did not comply with the obligation under s 7 TMA.
>
> 134. I am satisfied that there was a discovery (in relation to the gains referred to above - in circumstances where I have found that JRA and PRR do not apply).

101. Earlier in the Decision, the FTT had summarised HMRC's statement of case as including the following, at [14(18)]:

> In respect of the Assessments, the burden is upon HMRC to show that a source of income, which should have been taxed but has not been, was discovered; and that the Assessments have been raised within the time-limits. Once this is discharged, it is for the Appellant to displace the amounts assessed.

102. At [20], the FTT stated:

> The burden of proof is on HMRC to establish that there was a discovery and that the Assessments were validly issued. Once this issue is discharged, the onus is on the Appellant to displace the Assessments and Closure Notice by showing that the Assessments are excessive; and to demonstrate any entitlement to relief from being taxed upon any capital gain produced. Finally, it is for HMRC to show that the Penalties have been correctly applied.

103. So, the FTT appreciated that the burden of proof lay with HMRC on both procedural issues. The FTT addressed those issues, and found that there had been a discovery ([134]) and that no returns had been made as required by section 7 ([133]).

104. The argument that the FTT had no evidence to reach these conclusions is not accepted. HMRC's Statement of Case included statements that both conditions had been satisfied (as recorded at [14(18)]). In fact, the Statement of Case discusses the discovery position in some detail. As regards the witness statement of Malcolm Weir produced on behalf of HMRC, Mr Weir was the HMRC decision-maker in relation to the matters in question. His witness statement addressed both the existence of a discovery on the facts, and the failure to notify tax liability under section 7, and explained why in Mr Weir's view both conditions were satisfied,

so that the Assessments were validly issued. Mr Campbell did not seek to challenge or question the failure to comply with section 7.

105. Mr Gordon suggested that there was some doubt about whether Mr Weir's witness statement had been before the FTT, and indeed whether it had been received by Mr Campbell. We gave HMRC permission to produce evidence relevant to those issues, which they duly did, from which we are fully satisfied both that the witness statement was part of the evidence before the FTT, and that it had been provided before the hearing to Mr Campbell (who had in fact given written comments on it).

106. We have concluded that the FTT made no error of law in relation to the issues of whether HMRC made a discovery and the extended time limit in section 36(1A)(b). The FTT correctly directed itself as to the law, and made findings on the basis of the evidence which it was entitled to make.

107. The appeal under Ground 2 is dismissed.

GROUND 3: FAILURE TO NOTIFY NOT DELIBERATE

108. The Penalties were imposed on Mr Campbell under Schedule 41. The aggregate penalties were substantial, exceeding £40,000.

109. Under paragraph 1 of Schedule 41, a penalty is payable for failure to notify chargeability to tax under section 7 TMA, unless the taxpayer can show that he has a reasonable excuse for the failure. The penalty is expressed as a percentage of potential lost revenue, and varies depending on whether the failure was "deliberate and concealed", "deliberate but not concealed", or neither deliberate nor concealed. Reductions are available depending on whether there has been disclosure by the taxpayer, and whether any such disclosure was prompted or unprompted. HMRC also have power to reduce a penalty for "special circumstances".

110. In this case, the penalties were calculated by HMRC on the basis that the failure to notify was deliberate but not concealed, and that disclosure was prompted.

111. Ground 3 of Mr Campbell's appeal is that the FTT erred in law in deciding that the failure to notify in this case was deliberate. Mr Gordon says that the FTT gave no consideration to the meaning of "deliberate" in this context, and in any event had insufficient evidence on which to reach its conclusion. Ms Inglis said that this was again an *Edwards v Bairstow* challenge which failed to meet the high hurdle, and the FTT was entitled to reach its decision on the evidence before it.

112. The FTT's consideration of this issue was contained in the following paragraphs:

> 147. HMRC concluded that the Appellant's behaviour was 'deliberate' and that the disclosure 'prompted'. This is because the Appellant did not notify liability and an enquiry had to be opened.
>
> 148. I have considered the Appellant's statement, in the email to HMRC, dated 1 September 2017, where the Appellant said this:
>
> > "Whilst owning the property I owned NO other property and was living at home with my parents."
>
> 149. I find that there is considerable force in HMRC's submission that this email suggests an understanding of CGT by the Appellant.
>
> 150. The Appellant failed to keep any evidence of expenditure, or other records. I find that it is not unreasonable to conclude, as HMRC have concluded, that the Appellant should have known that the disposal of multiple properties would have tax implications. The Appellant did not however take any action to notify his liability to tax, or indeed to make enquiries with

> HMRC as to the likely tax implications. I find that the behaviour in this appeal was deliberate.

113. The categorisation of Mr Campbell's failure to notify as deliberate was an important issue for the FTT to consider in relation to the appeal against the penalties. In addition to affecting significantly the maximum potential amount of the penalties, while a finding of deliberateness is not the same as a finding of dishonesty, it clearly signifies a high degree of culpability. In addition, the Schedule 41 regime which was applicable in this case, in contrast to some other codes, does not provide for reduced penalties for a failure to notify which is merely careless rather than deliberate.

114. It is, therefore, unfortunate that the FTT did not refer to the legislation or to any case law on the meaning of "deliberate". In *HMRC v Tooth* [2021] UKSC 17, the Supreme Court said this in relation to the meaning of deliberate inaccuracy in a tax return:

> 42…The question is whether it means (i) a deliberate statement which is (in fact) inaccurate or (ii) a statement which, when made, was deliberately inaccurate. If (ii) is correct, it would need to be shown that the maker of the statement knew it to be inaccurate or (perhaps) that he was reckless rather than merely careless or mistaken as to its accuracy.
>
> 43. We have no hesitation in concluding that the second of those interpretations is to be preferred, for the following reasons. First, it is the natural meaning of the phrase "deliberate inaccuracy". Deliberate is an adjective which attaches a requirement of intentionality to the whole of that which it describes, namely "inaccuracy". An inaccuracy in a document is a statement which is inaccurate. Thus the required intentionality is attached both to the making of the statement and to its being inaccurate.
>
> …
>
> 47…for there to be a deliberate inaccuracy in a document within the meaning of section 118(7) there will have to be demonstrated an intention to mislead the Revenue on the part of the taxpayer as to the truth of the relevant statement or, perhaps, (although it need not be decided on this appeal) recklessness as to whether it would do so[4].

115. The approach laid down in *Tooth* is consistent with that previously proposed in *Auxilium Project Management Ltd v HMRC* [2016] UKFTT 249 (TC) which was approved by the Upper Tribunal in *CF Booth Ltd v HMRC* [2022] UKUT 217 (TCC). Put simply, in order for HMRC to discharge the burden of demonstrating that an act or omission by a taxpayer was deliberate, they will need to establish to the normal civil standard that the act or omission was intentional; the fact that an act or omission may have been careless, mistaken or stupid is not enough.

116. In relation to a failure to notify liability to tax, we consider that, broadly, this means that HMRC needed to establish that Mr Campbell was aware of the obligation to notify and chose not to comply even though he could have done so.

117. The FTT at [147]-[150] gave three reasons for its conclusion that Mr Campbell's failure to notify was deliberate. The first was that a statement made by Mr Campbell in an email to HMRC "suggests an understanding of CGT". The second was that he did not keep records. The third was that Mr Campbell did not "make enquiries with HMRC as to the likely tax implications".

118. These reasons were insufficient to justify a finding of deliberate behaviour. The second and third reasons might be relevant to a consideration of whether Mr Campbell acted carelessly

[4] See now in addition *CPR Commercials Ltd v HMRC* [2023] UKUT 61 (TCC).

in not notifying a liability to tax, but, as we have explained, that was not the question before the FTT. The application by the FTT of an incorrect test to the issue is evidenced by the FTT's statement that Mr Campbell "should have known" that the property disposals would have tax implications; that is not the threshold for deliberateness. As to the first reason, an inference that Mr Campbell understood CGT is insufficient of itself to justify a finding of deliberateness. In any event, this was an inference reached not on the basis of evidence as to Mr Campbell's intentions at the relevant time but on the basis of a statement in an email which was sent after the periods in respect of which the failure to notify arose.

119. We have concluded that the FTT erred in law in concluding that the Penalties should be upheld on the basis of deliberate behaviour. The FTT did not properly direct itself as to the applicable legal test to be applied, and did not give reasons which would justify a finding of deliberate failure to notify.

120. The error was material, and so we set the FTT's decision on that issue aside. We will deal with the disposition of Ground 3 after we have dealt with Ground 4.

GROUND 4: MITIGATION OF PENALTIES

121. Ground 4 asserts that the FTT failed to consider the quantum of the Penalties and accepted HMRC's methodology without demur. In particular, Mr Gordon challenged the basis of what appear to have been HMRC's decisions on the levels of mitigation to be given for disclosure and for co-operation. He argued that the Penalties should have been fully mitigated.

122. Ms Inglis said that since Mr Campbell did not raise any argument before the FTT concerning penalty mitigation, arguing only that there should be no penalties at all, and since Mr Campbell did not have specific permission to appeal on this ground, he could not now raise that issue in this appeal. In any event, she argued, the penalties imposed were within the permitted statutory range and the reductions were in keeping with HMRC's published guidance.

123. We reject Ms Inglis' argument that Mr Campbell does not have permission to appeal on this ground. It is clearly covered by the terms of Judge Herrington's grant of permission to appeal.

124. The entirety of the FTT's discussion of mitigation of the Penalties was as follows:

> 151. The penalty range is 35% to 70%. The Appellant was given a reduction of 20%, for 'telling'. A further reduction of 25% was given for 'helping'. The final reduction given was 25%, for 'giving'. The deductions were applied to the penalty range, resulting in a 24.5% deduction from the 70% maximum. This left a penalty of 45.5%. The penalty charged was therefore £56,975.51.

125. This was no more than a factual description of the bases on which HMRC had calculated the level of mitigation. It contained no consideration by the FTT of whether HMRC's approach was flawed, let alone any reasoning. That may be because, as Ms Inglis said, Mr Campbell did not make specific challenges on the issue of mitigation. However, in deciding (at [152]) to uphold the Assessments and the Closure Notice, the FTT was approving all aspects of HMRC's methodology in relation to penalty mitigation, but without any consideration of whether it was flawed. The failure to give any reasons on that issue was an error of law.

126. We cannot properly determine Mr Gordon's detailed points of criticism in relation to HMRC's approach to mitigation because the FTT did not make the findings of fact or law which would be necessary for us to do so. Therefore, we cannot properly determine the appropriate level of mitigation.

127. However, we agree that the FTT erred in not considering or giving any reasons for upholding the level of mitigation of the Penalties. That error was material, and so we set the decision on that issue aside.

GROUNDS 3 AND 4: DISPOSITION

128. We have set aside the FTT's decisions in relation to the issues of deliberateness and mitigation as regards the Penalties as set out above. We do not consider that we can remake those decisions, because we do not have the evidence and relevant findings of fact which we would need to do so.

129. We therefore remit these matters to a differently constituted FTT, and in reconsidering these issues, we instruct the FTT to determine, by way of oral hearing (either in person or remote, as the FTT decides):

> (1) whether HMRC has discharged the burden of establishing that Mr Campbell's failure to notify for the relevant periods was deliberate, applying the law as we have summarised it above, and
>
> (2) whether HMRC's decision in relation to the amount of the Penalties should be affirmed or be substituted with another decision because HMRC's decision was flawed for the purposes of paragraph 19 of Schedule 41.

130. The reconsideration shall be on the basis of the findings of primary fact made in the Decision, although not inferences drawn from primary fact. Each party has permission to adduce further evidence.

DISPOSITION: SUMMARY

131. We have dismissed HMRC's cross-appeal on the trading issue, and Mr Campbell's second ground of appeal relating to the validity of the Assessments. In relation to Mr Cambell's other three grounds of appeal, the FTT's decisions are set aside and remitted for reconsideration by a differently constituted FTT on the following terms:

Ground 1

> The application of section 222(8) is to be determined by the FTT in relation to all four properties in question, including 2 Bramshill Close.
>
> We instruct the FTT to determine, by way of oral hearing (either in person or remote, as the FTT decides), whether Mr Campbell was exempt from CGT on any or all of the relevant disposals under section 222(8) TCGA, and in so doing to determine :
>
> > (a) Whether the accommodation in which Mr Campbell resided was provided by reason of his employment as carer for his father, applying the test summarised above.
> >
> > (b) Whether the accommodation fell within section 222(8A)(a)(i) TCGA, taking into account the medical evidence before the FTT at the original hearing[5], and
> >
> > (c) Whether section 222(8)(b) TCGA was satisfied.

Grounds 3 and 4

We instruct the FTT to determine, by way of oral hearing (either in person or remote):

> > (d) Whether HMRC has discharged the burden of establishing that Mr Campbell's failure to notify for the relevant periods was deliberate, applying the law as we have summarised it above, and

[5] For the avoidance of doubt, Mr Campbell does not have permission to argue that section 222(8A)(ii) is satisfied.

(e) Whether HMRC's decision in relation to the amount of the Penalties should be affirmed or be substituted with another decision because HMRC's decision was flawed for the purposes of paragraph 19 of Schedule 41.

132. The reconsideration shall be on the basis of the findings of primary fact made in the Decision, although not inferences drawn from primary fact. Each party has permission to adduce further evidence.

JUDGE THOMAS SCOTT
JUDGE GUY BRANNAN

Release date: 03 November 2023