TC04287

Appeal number: TC/2013/06524

FIRST-TIER TRIBUNAL
TAX CHAMBER

Income tax – self-assessment – HMRC strike out application - barrister – move from cash to true and fair basis - time limit for overpayment relief – overpayment between two underpayment years – tax paid twice on same profits – revenue discretion – Application of European Convention on Human Rights and Human Rights Act -held- No jurisdiction to consider discretion applied by HMRC – High hurdle to rely on Human Rights legislation – Taxpayer and agents at fault – Out of time claim to tax repayment not "property" for ECHR purposes –ECHR could not be relied on to extend time limits –Strike out allowed for overpayment year- ECHR claim against double taxation in earlier years –reasonable argument that disproportionate for HMRC to pursue tax already paid –application for strike out rejected for underpayment years.

MR IGNATIUS FESSAL **Appellant**

- and -

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

TRIBUNAL: JUDGE RACHEL SHORT
MR MICHAEL BELL

Sitting in public at 45 Bedford Square, London WC1B 3DN on 22 May 2014 and at Fox Court, 14 Gray's Inn Road London on 27 November 2014

Mr Patel of H.M Patel & Co (on 22 May) and Ms Lovejoy (on 27 November) representing the Appellant

Mr Bradley (on 22 May) and Mr Stone (on 27 November) instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

1. This appeal concerns a refusal by HMRC to accept the Appellant's claim for recovery of overpaid tax made for the 2006 -7 tax year or to offset that claim against tax payments due from the Appellant, Mr Fessal for the 2005-6 and 2007-8 tax years. HMRC have applied to have the appeal struck out under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 ("the Tribunal Rules") on the basis that it is out of time and the Tribunal have no jurisdiction to consider it or that it has no reasonable prospect of success under Rule 8(3)(c).

2. This appeal was adjourned by the Tribunal on 22 May 2014 in order to allow both parties to provide further arguments based on the Human Rights Act 1998 s 3(1) ("HRA") and the European Convention on Human Rights ("ECHR") issues raised by the Appellant. The adjourned appeal was heard before the same Tribunal on 27 November 2014.

Agreed Facts

3. Mr Fessal is a barrister and was in the "transitional regime" applicable to barristers moving from the cash to the "true and fair" basis of recognising profits for tax purposes under s 42 Finance Act 1998 for the three tax years 2005-6, 2006-7 and 2007-8. HMRC opened an enquiry into Mr Fessal's self-assessment for the 2008 – 9 tax year on 10 January 2011 as a result of which Mr Fessal's representatives submitted further information on 19 February 2011. HMRC responded with their final analysis of how the true and fair basis should have been applied for the 2006 -7, 2007 - 8 and 2008-9 tax years on 14 April 2011. The Appellant struggled to obtain the relevant information for the earlier years because his former accountant, Mr Jitu Patel had died in 2008. Further details were not provided to HMRC until 11 August 2011.

4. Revised returns were submitted for the four tax years 2005 – 6, 2006 – 7, 2007 -8 and 2008 – 9. Further tax was payable two of those years but for 2006 -7 and 2008-9 tax had been overpaid. The correct application of the true and fair basis resulted in profits being decreased for the 2006-7 tax year and increased for the 2005-6 and 2007-8 tax years. HMRC informed the Appellant on 14 December 2011 that any claim for overpayment relief for the 2006 -7 year was out of time.

5. The Appellant agreed HMRC's revised computations for each of these years on 25 January 2012, but subject to a claim that the overpayment for 2006 -7 should be offset against the payments due for 2005-6 and 2007-8.

6. HMRC wrote to the Appellant on 27 March 2012 raising discovery assessments under s 29 Taxes Management Act 1970 ("TMA 1970") for the 2005-6 and 2007-8 years going back six years on the basis that the Appellant had been "careless" and without taking account of the overpayment claim. HMRC confirmed to the Appellant on 16 July 2012 that "*there were no reasons to admit a late overpayment claim in this case*". The Appellant's representatives wrote to HMRC on 12 September 2012 appealing against the assessments for 2005-6 and 2007-8. HMRC confirmed to the Appellant on 1 March 2013 that the time limit for any overpayment claim expired on 5 April 2011 and that the Appellant had no right of appeal.

7. The Appellant applied to this Tribunal on 16 September 2013 in respect of the assessments made for the 2005-6 and 2007-8 tax years which he said should take account of the overpayment of tax for 2006 – 7 year which should be offset against the tax due in those assessments.

Law

8. The relevant legislation is set out at Schedule 1AB Taxes Management Act 1970 ("TMA 1970") including the relevant time limit for overpayment claims at paragraph 3(1) of that Schedule:

> "3(1*) A claim under this Schedule may not be made more than 4 years after the end of the relevant tax year*"

It is not disputed that these time limits applied to Mr Fessal's overpayment relief claim for 2006 – 7. The statutory time limit for making a claim expired on 5 April 2011, a few days before HMRC notified Mr Fessal's advisers of their reallocation of profits for that year.

9. HMRC's discovery assessments for the 2005-6 and 2007-8 years were served under s 29 TMA:

> "s *29 Assessment where loss of tax discovered*
>
> *29(1) If an office of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment-*
>
> *(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 any 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 their opinion to be charged in order to make good to the Crown the loss of tax"*

10. The usual four year time limit for assessments is extended by s 36(1) TMA 1970 to six years in circumstances where a loss of tax is brought about carelessly.

11. The relevant provisions of the European Convention on Human Rights as applied by the Human Rights Act 1998 s 3(1) are: ECHR Protocol 1, Article 1,

> "*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The proceeding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties"*.

12. It is not disputed that the correct application of the true and fair basis resulted in profits which had been subject to tax in 2006-7 being removed from that tax year and included in Mr Fessal's taxable profits for the 2005-6 tax year.

13. It is not disputed that Mr Fessal's previous accountants had failed to apply the true and fair basis correctly for each of the disputed tax years.

14. It is not disputed that, other than arguments related to the ECHR, HMRC's discovery assessments for 2005-6 and 2007-8 were validly made.

Appellant's Arguments

The hearing on 22 May

15. The Appellant put forward a number of arguments before the Tribunal on 22 May:

(1) It was accepted that "by law" the appeal in respect of the overpayment should have been made by 5 April 2011 but the Appellant was only aware of the relevant information about the over and underpayments as a result of HMRC's letter of 14 April 2011, by which time it was already too late to make a claim.

(2) The overpayment year fell between two underpayment years and it was not fair to allow HMRC to claim for the 2005-6 and 2007-8 years, the "Underpayment Years" but not allow the taxpayer to claim the for the intervening year, 2006-7, the "Overpayment Year". HMRC should exercise its discretion to allow set off between the over and underpaid years, there would be no overall loss to the public purse if this was allowed. HMRC had an inherent discretion which could and should be exercised in the taxpayer's favour.

(3) A claim would have been made before the deadline had the Appellant been aware of the basis for that claim before the time limit had expired. The Appellant had written to HMRC on 19 February 2011 but HMRC had not responded until 14 April 2011, after the time for making a claim had expired.

(4) The Appellant should not be penalised for the faults of others, in this instance his former accountant who had failed to properly apply the "true and fair" approach for 2005-6 and 2006-7; as a result profits had been charged to tax twice, once in 2006-7 and then again, under HMRC's amended assessments for 2005-6.

Human Rights Act Arguments

16. At the hearing on 22 May Mr Fessal argued that the application of the time limits in the TMA 1970 had led to him paying tax on the same profits twice and this was counter to the Human Rights Act 1998.

HMRC's arguments

17. Before the Tribunal on 22 May HMRC argued that Mr Fessal's appeal should be struck out because

(1) It was Mr Fessal's obligation to file correct returns. If his returns had been made correctly in the first instance there would have been no need to rely on overpayment claims and the four year cut off period would not have been in point.

(2) Mr Bradley accepted that HMRC had been slow in dealing with Mr Fessal's enquiry, but Mr Fessal and his agents had also been slow to provide information to HMRC.

(3) HMRC did not respond to the Appellant's Human Rights Act arguments on the basis that they had not been aware that this would be raised.

Adjournment Decision

18. Having heard both parties the Tribunal concluded that any issues concerning the Human Rights Act were of sufficient significance that both parties should be given the opportunity to consider and present arguments on the application of that legislation to Mr Fessal's case and the hearing was adjourned to allow the parties to consider whether they wished to take this opportunity.

19. Both parties raised further arguments relating to the application of the HRA and the ECHR which were considered at the adjourned hearing on 27 November 2014.

ECHR and Human Rights Act Arguments – Hearing on 27 November 2014.

Appellant's Arguments

Obligation to interpret tax statutes in line with HRA

20. For Mr Fessal Ms Lovejoy explained that unlike other cases considered by the FTT in the context of the TMA four year time limit, Mr Fessal's case was not merely about the exercise of HMRC's discretion or some general unfairness in the application of the time limit. The fact that Mr Fessal had been forced to pay tax twice on the same profits put his case into a different category which did bring the ECHR into play. It was clear on the basis of decisions such as *Autologic* that the Tax Tribunal, as a public body interpreting legislation, was obliged to take account of the ECHR"*The special commissioners had the same powers and duties as the High Court in giving effect to all directly enforceable Community rights by disapplying or adapting domestic statutory requirements.....*" *(Autologic Holdings plc v Inland Revenue Commissioners [2006] 1 AC 118)*

21. In considering whether Mr Fessal could take advantage of the ECHR, the Tribunal had to take account of all of the relevant circumstances of the case, including that Mr Fessal's tax over-payment was caught between two underpayment years and in particular that the income of 2006-7 (on which Mr Fessal had already paid tax) was assessed again by the discovery assessments raised in respect of 2005-6.

22. Ms Lovejoy stressed that she was not arguing that the TMA time limits were in themselves incompatible with the ECHR, but only that, as explained in the *R v Waya (Terry) ((SC(E)) [2013] 1 AC* 294) decision, in this particular instance the TMA rules had to be interpreted in a way which did not lead to an abuse of human rights, being the double charge to tax.

Tax reclaim as property.

23. Ms Lovejoy argued that it was clear that tax could be treated as "property" for ECHR purposes (see *Burden & Anor v UK [2008] STC 1305* and (*R (on application of St Matthews (West) Ltd & Others v HM Treasury & Anor* [2014] EWHC 1848 Admin). It was not the case that because Mr Fessal had already paid the tax over to HMRC he no longer had possession of any property. Mr Fessal had a claim to the tax due and that was a possession for ECHR purposes, as is made clear by the authorities in this area in particular the *Burden* decision and also as suggested in *Kopecky v Slovakia* ([2005] 41 EHRR 43) and the *Prince Hans* decision (*Prince Hans-Adam II of Liechtenstein v Germany* Application no 42527/98). The concept of a possession could include a right or expectation of claim. Mr Fessal had wrongly paid the tax claimed and therefore this could be treated as a possession. A claim to the right to have tax repaid could be a possession if that claim is sufficiently substantiated, as Mr Fessal's was. The retention of the tax by HMRC breached Mr Fessal's rights under Article 1, Protocol 1 ECHR.

24. Under the terms of the ECHR the fundamental question is whether the UK's tax legislation is proportionate and it is not proportionate to pursue Mr Fessal for further tax which he has already paid on the same income. HMRC's role is the collection of tax properly due, not, as here, collecting more tax than is due. HMRC had acted disproportionately in both not agreeing to apply set- off between the Overpayment Year and the Underpayment Years and in enforcing the four year time limit. It could not be in pursuance of a legitimate aim to seek further tax from Mr Fessal which was not due. It was unfair and disproportionate for the time limits in respect of the Overpayment Year to be applied when the late claim was made as a result of circumstances outside the taxpayer's control, such as the death of his accountant. It was unfair for a taxpayer like Mr Fessal who had put a return in to be put in a worse position that a taxpayer who had not, who would be able to rely on section 3A of Schedule 1AB TMA 1970 under which HMRC could extend the time limits for an overpayment claim.

HMRC's inherent discretion.

25. Ms Lovejoy made clear that her argument did not concern HMRC's failure to exercise its discretion, but was predicated on the result of that failure, which brought the ECHR and questions of proportionality into play. HMRC are responsible for the management of revenue and their own internal guidance confirms that; s 5 Commissioners for Revenue and Customs Act 2005 gives them discretion to extend statutory time limits in the appropriate circumstances.

Restitution

26. Ms Lovejoy also argued that Mr Fessal should be able to rely on the common law principle of restitution which is applicable on the principle that it removes unjust enrichment, corrects a wrong doing and vindicates property rights. In this case Mr Fessal had a claim for unjust enrichment equal to the amount of tax overpaid and should be able to make a claim for that amount in the High Court. Applying the ECHR to the statutory time limit applied by the TMA would be consistent with the principles of restitution and the purpose of the tax system, which is to collect the correct amount of tax due.

27. In conclusion striking out the Appellant's claim would be unfair and unjust and not in line with the Tribunal's over-riding objective.

HMRC Arguments

28. On behalf of HMRC Mr Stone clarified that he was considering the ECHR arguments in relation both to the application of the TMA time limits for the 2006-7 tax period, the Underpayment Year and to the fact that HMRC were not offsetting overpayments against the underpayments for the Overpayment Years.

Does the Tribunal have jurisdiction to consider the 2006 -7 tax period?

29. Mr Stone started by stressing that the Tribunal had to have a relevant appeal to consider; this appeal was made outside the statutory time limits and therefore there simply was no appeal. The Tribunal was a creature of statute and could not consider appeals which were time barred by statute. If there was no appeal, there was nothing for the Tribunal to consider, including nothing to which the ECHR applied. The Tribunal did not have jurisdiction to consider a "free standing" ECHR appeal, which could only be raised through judicial review proceedings. The situation, Mr Stone said, would have been different if an appeal had been properly made and then ECHR issues had been raised.

30. As far as the offsetting of the Overpayment Year's tax and the Underpayment Years' tax due, Mr Stone accepted that tax legislation could amount to interference with a individual's possessions but that could not be said in circumstances where, as here, HMRC were pursuing the tax legally due from Mr Fessal.

31. Mr Stone made clear that he considered that any issues concerning HMRC's unfairness or failure to exercise its discretion were outside the remit of the Tribunal. The Tribunal had no jurisdiction to consider questions of fairness and natural justice in the exercise of HMRC's discretion. This had been made clear in a number of cases including *Raftopoulou v HMRC [2014] UKFTT 818 (TC)* and *Lawford* v *HMRC* [2014] UKFTT 582 (TC).

32. In respect of the Underpayment Years – (the earlier and later years for which further tax had been assessed), Mr Stone accepted that valid appeals could be made for those years and the ECHR could be in point, accepting the Appellant's argument on the basis of *Autologic*. However, Mr Stone stated that the Appellant's appeal did not raise any specific arguments in respect of the Underpayment Years which seemed in any event to have been agreed with HMRC.

Restitution & Judicial Review arguments

33. Any question of restitutionary claims should be made as a common law claim through the civil courts and any issues with the exercise of HMRC's powers should be made by way of judicial review.

Is the tax overpaid a possession?

34. In respect of Mr Fessal's repayment claim for the Overpayment Year as a possession for ECHR purposes, Mr Stone suggested that a possession should be narrowly defined for these purposes, the purpose of the ECHR being to guarantee existing property rights and not extending to creating rights over something which was not owned. Mr Fessal did not have a right to reclaim the tax due because that right was extinguished on the termination of the four year time period for claims. A possession for these purposes could include a chose in action, but not a claim which was uncertain or uncontested. Mr Fessal did not fulfil the conditions for making a claim and so never had an unconditional claim for the return of the overpaid tax.

35. Mr Fessal had no valid claim and no right or expectation on which a ECHR claim could be made. By reference to the *Kopecky* decision Mr Stone said that states had no general obligation to give back to individuals money paid to the state and it was proper for the state to apply conditions which had to be satisfied. Mr Fessal had no possession, but only a claim; he had failed to meet the statutory criteria to make that claim and therefore he had no possession. An expectation based only on the exercise of HMRC's discretion in a taxpayer's favour was not a possession for these purposes (as made clear in R (*Carvill) v Inland Revenue Commissioners (no 2)* ([2003] STC 1539). Mr Fessal had "no possessory right to the expectation of a repayment", other than in respect of the Underpayment Years, where he did have possession, because he had not yet paid over the tax assessed for those years.

Is the ECHR engaged?

36. To demonstrate that HMRC have interfered with Mr Fessal's right to property it must be demonstrated that HMRC's actions are not legitimately pursued and are not proportionate. Mr Stone argued that the TMA time limits are lawful and pursue a legitimate aim. It is a legitimate aim to impose a time limit on tax claims to ensure finality over closed tax years. To suggest that there should be some set-off in Mr Fessal's case would be to ignore the reality of the tax system, which has a legitimate aim and strikes a fair balance between community rights and individual rights. The basis of an ECHR claim is not mere "unfairness". HMRC had applied statutory time limits to Mr Fessal and have no discretion about this.

37. Even if the ECHR did apply to these facts, the setting of a four year time limit for the making of claims fell within the "wide margin of appreciation" available to the UK for setting their tax procedure rules. To successfully argue that the ECHR is relevant to a taxation provision is a "very high hurdle" and Mr Fessal's arguments in this case did not reach that hurdle.

Decision

Questions in dispute

38. We have approached this question aware of our overriding objective to deal with all cases fairly and in the interest of justice, considering both the impact of allowing HMRC's strike out application but also the potential significance of allowing the full weight of the ECHR legislation to bear upon matters of tax administration and procedures.

39. The basis of a claim under the ECHR was formulated slightly differently by the two parties. Mr Fessal made it clear that his appeal did not relate to the 2006 -7 tax year, for which the four year time limit applied, but to his right to offset the tax owing for that year against the open years for which HMRC had claimed additional tax, years 2005 – 6 and 2007 – 8. His appeal notice referred to those two years and not to 2006 -7. HMRC concentrated their arguments on Mr Fessal's claim to re-open the 2006 -7 tax year despite the four year time limit having elapsed and suggested that the 2005 - 6 and 2007 -8 years had been agreed by Mr Fessal's advisers and no grounds of appeal had been raised for those years.

40. The Tribunal has approached the ECHR question on the basis that there are two separate claims to which that legislation could apply; whether Mr Fessal can rely on

the ECHR to extend the four year time limit for re-claiming tax due for the 2006 – 7 tax year and whether Mr Fessal can rely on the ECHR to object to the way in which HMRC assessed him to tax for the 2005 - 6 and 2007 -8 years. We have assumed as a starting point that these are discrete arguments and that even if the ECHR cannot be relied on by Mr Fessal in one of these lines of argument, it might nevertheless still be available in the other.

41. On the basis of the evidence we have proceeded on the assumption that the 2005 -6 and 2007 -8 years have not been agreed and that Mr Fessal's appeal can be treated as valid appeal in respect of both of those years. In this regard we have taken account of both the terms of Mr Fessal's appeal of 16 September 2013 and the correspondence between his advisors and HMRC, particularly their letters of 25 January 2012 and 20 September 2012 making a formal appeal against the 2005-6 and 2007-8 assessments.

42. The Tribunal has made the following Findings of Fact;

(1) As a result of errors made by Mr Fessal's original accountants Mr Fessal's tax returns for the three years 2005 -6, 2006- 7 and 2007 – 8 did not correctly reflect the "true and fair" profits which should have been brought into tax for each of those years.

(2) The correct application of the true and fair basis resulted in profits from the 2006 -7 year being moved back a year so that they fell into charge in the 2005-6 tax year. This resulted in profits which had been subject to tax in 2006 - 7 (pursuant to the Appellant's original self-assessment return) also being subject to tax in 2005-6 (pursuant to the discovery assessment issued by HMRC).

(3) Mr Fessal's new advisers were notified by HMRC of how the true and fair basis should be applied for those years on 14 April 2011 a few days after the deadline for making an overpayment claim for 2006-7 had expired.

HMRC Discretion

43. At the original hearing on 22 May a number of points concerning the fairness or otherwise of HMRC imposing the four year time limit regime and as a corollary refusing to exercise their discretion to set-off the over and underpayments were made by the Appellant. In considering these arguments the Tribunal has first to decide whether these are issues which fall within its jurisdiction. On the basis of the decisions in *HMRC v Hok* ([2012] UKUT 363 (TCC)), *HMRC v Abdul Noor* [2013] UKUT 071 (TCC) and *Prince & Others v HMRC* ([2012] UKFTT 157 (TCC)) it is clear that the Tribunal has no general supervisory jurisdiction in relation to the conduct of HMRC, including its application or otherwise of its discretion. Therefore the Tribunal has no jurisdiction to consider the fairness or otherwise of HMRC's decisions not to exercise its discretion in this case which can only be dealt with through judicial review proceedings in the administrative court.

ECHR & Human Rights Act Arguments – 2006 -7 overpayment.

ECHR and Statutory Time Limits

44. In considering whether, in specific circumstances, the ECHR can override statutory time limits, such as the four year time limit for claims applied by TMA 1970 Schedule 1AB the Tribunal has concluded that the ECHR can override statutory time limits but that this will only occur in exceptional circumstances. It is also clear, as

stated by the Appellant that ECHR can be applied to override a statutory time limit if this limitation can be shown to be counter to ECHR in a particular case without needing to establish that the time limits themselves are not proportionate. HMRC's arguments to the contrary seem to us to be circular; to suggest that ECHR cannot be considered because there is no valid appeal is to beg the very question which the Tribunal is asked to consider. We cannot see any logic in concluding that the ECHR cannot be viewed in "isolation" if the potential result of that is to allow an appeal which would otherwise be time barred. On that point we agree with the Appellant that this is clearly within the remit of this Tribunal and indeed part of our obligations.

Is this re payment claim a possession?

45. Our answer to the question whether Mr Fessal's claim to a repayment for the 2006 -7 tax year outside the statutory time limit for making a claim amounts to property or a possession for the purposes of the ECHR is no. The distinction between what can and cannot be treated as a possession for this purpose is made clear in the *Prince Hans* decision:

> *"possessions can be existing possessions or assets, including claims, in respect of which the Appellant can argue that he has at least a legitimate expectation of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of survival of an old property right which it has long been impossible to exercise effectively cannot be considered a possession".* (*Prince Hans-Adam II of Liechtenstein v Germany Application no 52527/98)*

Our view is that Mr Fessal's claim falls marginally on the wrong side of this line, even though his claim is a claim for repayment for which the deadline had only recently expired.

46. We have come to the decision particularly by reference to the conclusion of the Court in the *Carvill* case;

> "*although a whole range of economic interests were protected under Article 1, Protocol 1, including a legitimate expectation that a certain state of affairs would apply, in the cases where that principle had been established, the legitimate expectation was an incident of the right and not a right itself. An expectation of consideration for the exercise of an administrative discretion to repay what was lawfully due to the Revenue was not a possession or property right within the meaning of the Convention. Moreover a refusal to repay in the exercise of a discretion was not a deprivation of a possession within the meaning of the Convention". R(Carvill) v IRC (No2) [2003] STC 1539.*

Our view is that any claim by Mr Fessal to be able to re-claim the tax paid in 2006 -7 outside the statutory time limit for making a claim is "an expectation of the exercise of an administrative discretion" which cannot be treated as a property right.

Arbitrary or disproportionate actions

47. Having decided that Mr Fessal's right to re-claim tax for the 2006 -7 Overpayment Year is not a possession, Article 1, Protocol 1 is not engaged and it is not strictly necessary for us to consider whether the time limits at Schedule 1AB TMA pursue a legitimate aim in a proportionate manner. In brief, were this relevant, we would conclude that the time limits included at Schedule 1AB TMA 1970 do pursue a legitimate aim, being to ensure certainty and closure of tax issues for both taxpayers and HMRC, in a manner which is reasonably proportionate. In considering

whether in Mr Fessal's particular case those time limits have been applied in an arbitrary or disproportionate way we do not consider that they have been.

48. As made clear in *Axa General Insurance Ltd & Ors v HM Advocate & Ors* ([2012] 1AC 868), the state has, as Mr Stone stressed, a "wide margin of appreciation" in how it applies time limits to tax claims; the ECHR will overturn domestic legislation only if it can be shown to be "*manifestly without reasonable foundation*". In considering whether Mr Fessal can rely on his rights under the ECHR we also think it is relevant to take account of why HMRC could rely on a six year time limit for making their discovery assessments but Mr Fessal's claim was subject to a four year limit; HMRC's right to assess for these earlier years was because, in accordance with s 36 TMA 1970 their discovery assessments were based on the taxpayer's "carelessness". We consider that the behaviour of the taxpayer must be relevant if the ECHR is in consideration. If a taxpayer has rights under the ECHR, that is balanced by obligations under the state's tax legislation. In Mr Fessal's case he and his agents failed to make the correct returns in first instance. Mr Fessal's tax loss is not due solely to the failure of HMRC to notify him of how the true and fair basis should be applied, or to deal with his queries in a timely manner, it also arises from the failure of his original accountants to apply the rules correctly. It was suggested to us by HMRC and we agree that to call in his aid the ECHR a taxpayer has a high hurdle to jump. We have concluded that as part of this a taxpayer needs to demonstrate the he has fulfilled his side of the bargain, which is not the case here.

49. For these reasons we do not consider that Mr Fessal has a claim under the ECHR to extend the time limits for making a repayment claim under TMA 1970 Schedule 1AB in respect of the 2006 -7 Overpayment Year and we allow HMRC's strike out application in respect of this aspect of Mr Fessal's claim.

Human Rights Arguments – Underpayment Years 2005/6 and 2007/8 periods.

50. We have approached this aspect of the strike out application as a discrete issue and considered whether, even taking account of our conclusions about the 2006-7 Overpayment Year, there is any other basis on which the Appellant might be able to make a claim under the ECHR for these periods which has a reasonable prospect of success.

Is this tax claim a property or possession?

51. The arguments about whether Mr Fessal's tax claim can amount to a claim for disputed property or possessions are rather different for these years than for the Overpayment Year; Mr Fessal does still have the cash representing the amount of tax owed and any claims made by HMRC for tax for those years will result in denying him that property. We think it is clear, and it was not disputed by HMRC, that Mr Fessal has possession or property to which the ECHR can apply for these years.

Arbitrary or disproportionate actions

52. In order not to offend against the principles of the ECHR and interfere with an individual's property rights legislation must comply with the principle of lawfulness and pursue a legitimate aim in a proportionate manner. HMRC argued that there was no arbitrary or disproportionate action in making assessments for these periods, since HMRC had merely applied the taxing statutes to claim tax which was due. The

Tribunal does not entirely agree with this conclusion. It might be correct that HMRC were not acting "arbitrarily" in applying the taxing statutes to Mr Fessal and that the tax statutes are lawful in themselves, but the Tribunal considers that it is nevertheless at least arguably disproportionate for HMRC to collect tax for the 2005-6 period when it has already collected tax on those profits in the now closed 2006-7 self-assessment return. This is particularly the case because at the time when HMRC issued their discovery assessments for 2005-6 and 2007–8, they already knew that the Overpayment Year was closed and the only result could be that the same profits which had already been taxed in that period would be taxed again in the 2005- 6 period. This application of the legislation meant that the result of Mr Fessal's and his advisers' carelessness was an effective penalty of 100% of the tax due for the 2006-7 period. This put Mr Fessal in a worse position than a taxpayer who had failed to make a return at all, who would have been able to rely on the extended time limits in Schedule 1AB TMA 1970.

53. We consider that there is at least an argument that it cannot be proportionate for legislation to be applied in a way which has this result and we note that in other places in the UK tax legislation a 100% penalty is reserved for situations in which information has been deliberately withheld or concealed. Proportionality, as described in the *Axa General Insurance* case entails

> "a *reasonable relationship between the means employed and the aims pursued and a fair balance between general interests and individual fundamental rights.*"

The means employed here is HMRC's issue of discovery assessments and the aims pursued are that the correct amount of tax be collected for relevant years, as stipulated by s 29 (1). Our view is that it is at least arguable that the issuing of assessments which HMRC are aware at the time when they are issued will give rise to double taxation of profits does not reflect a reasonable relationship between the ends and the means. Moreover there is an imbalance between general interests, that each taxpayer should pay their fair share of tax and Mr Fessal's fundamental rights, not to be knowingly taxed twice on the same profits and therefore wrongly deprived of his property or possessions.

54. We have considered whether nevertheless the issuing of these assessments by HMRC comes within the state's "*wide margin of appreciation*" or whether the application of the law in this instance should be viewed as "*manifestly without reasonable foundation*". On the premise that the reason for issuing assessments is to collect the correct amount of tax due and not to charge the same profits to tax more than once, we have concluded that in these circumstances it is at least arguable that HMRC's actions are without reasonable foundation and could be subject to the restrictions provided by the ECHR.

55. For the avoidance of doubt we think that it is possible to come to this conclusion without also accepting that the 2006-7 time period for claims should be extended. Our application of the ECHR to the Underpayment Years rests not on the need to access and carry forward or back the overpayment for 2006-7 but on the principle that the 2005-6 and 2007 -8 assessments give rise to double taxation of those profits which have already been recognised and assessed for taxation purposes in another year.

56. For these reasons we have concluded that the Mr Fessal's argument that the ECHR Article 1, Protocol 1 is in point in respect of the Underpayment Years does have a reasonable prospect of success. HMRC's strike out application on this aspect of Mr Fessal's appeal is therefore refused.

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.

RACHEL SHORT
TRIBUNAL JUDGE

RELEASE DATE: 17 February 2015