[2016] UKFTT 0723 (TC)

TC05452

Appeal number: TC/2015/02859

INCOME TAX – Discovery assessment – Whether discovery – Yes – Whether insufficiency of tax brought about deliberately – No – Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

RAYMOND TOOTH **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at the Royal Courts of Justice, London on 11 October 2016

Julian Ghosh QC and Charles Bradley, instructed by Pinsent Masons LLP, for the Appellant

Richard Vallat, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Mr Raymond Tooth appeals against a 'discovery' assessment issued by HM Revenue and Customs ("HMRC") on 24 October 2014 under s 29 of the Taxes Management Act 1970 ("TMA") in respect of income tax for 2007-08 in the sum of £475,498.20 in relation to his participation in a failed tax avoidance scheme. It is common ground that it is for HMRC to establish the relevant conditions for the issue of a discovery assessment under s 29 TMA have been met and that the assessments were in time by reference to s 36 TMA. It is also accepted that if HMRC establish the validity of the assessment the appeal cannot succeed.

2. Mr Richard Vallat, who appears for HMRC, contends that HMRC not only discovered an insufficiency of tax within the meaning of s 29(1) TMA but that this was brought about deliberately by Mr Tooth or a person acting on his behalf thereby fulfilling the condition in s 29(4) TMA. As such, he says, the time limit for making an assessment is extended, under s 36(1A) TMA, to 20 years. Mr Julian Ghosh QC and Mr Charles Bradley, who appear for Mr Tooth, contend that there was neither a discovery nor, even if there was a discovery (which is denied), was any insufficiency of tax brought about deliberately.

Evidence and Facts

3. In addition to a bundle of documents, which included a copy of Mr Tooth's 2007-08 self-assessment tax return and correspondence between the parties, I heard from Mr Tooth and Mr Peter McMahon, a Tax Partner with Grunberg & Co Chartered Accountants ("Grunberg"). Mr McMahon advised Mr Tooth in relation to the tax avoidance scheme and completion of his 2007-08 tax return. Both Mr Tooth and Mr McMahon were cross-examined by Mr Vallat.

4. Mr Christopher March and Ms Julie Thorley, both of HMRC, gave evidence on its behalf and were cross-examined by Mr Ghosh.

5. I was also provided with a witness of Mr Ian Anders of HMRC. As he was unable to attend the hearing Mr Ghosh submits that the statement should not be admitted. However, I accept Mr Vallat's submission that it should be admitted, but having done so, consider that little, if any, weight be attached to it given Mr Anders was not available for cross-examination.

6. It is on the basis of this evidence that I make the following findings of fact.

7. Towards the end of 2008 Mr Tooth sought tax planning advice from Mr David Grunberg (the Senior Partner of Grunberg) as to how he could legitimately reduce his income tax liability for 2007-08. He was advised that a scheme, known as "Romangate", which was promoted by NT Advisers ("NT"), might be of interest. Mr Grunberg asked a colleague of his, Mr McMahon, to contact NT and provide more information to Mr Tooth.

8. On 20 January 2009 Mr Tooth attended a meeting with Mr McMahon, Mr Grunberg and Mr Anthony Mehigan of NT at which Mr Mehigan explained how the Romangate scheme operated. Although Mr Tooth did not grasp all of the technicalities of the scheme (and it is not necessary to describe the scheme for the purposes of this case) he did understand that if he participated in it employment related losses of £1,185,987 would be generated for 2008-09. These could then be set off against income recorded in his 2007-08 self-assessment return thereby reducing his tax liability for that year. Mr Tooth recalls Mr McMahon and Mr Grunberg raising questions at the meeting with Mr Mehigan who confirmed that NT were content that the stated tax treatment was correct having obtained the opinion of leading tax counsel to that effect.

9. Having received further advice from Mr Grunberg and Mr McMahon that the Romangate scheme, although a complex tax planning arrangement, had a reasonable prospect of success and knowing it had been "sanctioned by leading tax counsel" Mr Tooth entered into it on 23 January 2009.

10. On 27 January 2009 Mr Mehigan of NT sent an email to Mr McMahon and Mr Grunberg which included the following:

> "Please note that having taken [leading tax counsel's] detailed advice on the matter it is perfectly acceptable to set off the loss when calculating the final 2007-08 tax payment.
>
> Also please note that, in our experience to date, HMRC do not proceed with the collection process where the SA is completed as recommended in the attached note."

11. The note attached to the email (the "Note") recommended participants in the Romangate scheme to settle their tax bills in full and seek repayment in due course once agreement had been reached with HMRC on the efficacy of the arrangement. It also recognised, on the basis that tax counsel was of the view that any challenge to the scheme was capable of being resisted, that some individuals would wish to withhold payment of their tax liability contrary to this advice. The Note continued:

> "HMRC are of the view that a later year's loss may not be used to reduce a prior year's tax liability. However, leading tax Counsel has confirmed to NT Advisors (and they confirm to you) [that] as long as the loss is incurred before the final payment date for such tax it may be correctly set-off."

12. However, this advice proved to be incorrect as a result of the decision of the Supreme Court in *Cotter v HMRC* [2013] STC 2480 [2014] 1 All ER 1 which concerned participant in the same type of scheme as Mr Tooth. In *Cotter* the Supreme Court held that a claim to carry back the loss was for TMA purposes a claim made outside of a 'return', notwithstanding that it was included on the face of Mr Cotter's self-assessment tax return in boxes 3 and 4 on the Additional information page Ai3. As a result, the claim was governed by schedule 1A TMA and not subject to the usual 'process now, check later' mechanism of self-assessment. Having opened an enquiry into Mr Cotter's carry back claim under paragraph 5 of schedule 1A TMA, HMRC were not obliged to give effect to it pending the completion of that enquiry (by virtue

of paragraph 4(3) of Schedule 1A TMA) and were entitled to collect the tax due from Mr Cotter on his income for 2007-08, the carry back claim being strictly irrelevant to the calculation of his liability for that year.

13. At [27] Lord Hodge said:

> "Matters would have been different if the taxpayer had calculated his liability to income and capital gains tax by requesting and completing the tax calculation summary pages of the tax return. In such circumstances the Revenue would have his assessment that, as a result of the claim, specific sums or no sums were due as the tax chargeable and payable for 2007/08. Such information and self-assessment would in my view fall within a "return" under section 9A of TMA as it would be the taxpayer's assessment of his liability in respect of the relevant tax year. The Revenue could not go behind the taxpayer's self-assessment without either amending the tax return (section 9ZB of TMA) or instituting an enquiry under section 9A of TMA."

14. Returning to the Note. It also explained the entries that should be included on the 2007-08 self-assessment tax returns of participants in the scheme to enable them to claim losses. In particular, they were instructed to enter, on the Additional Information pages, Ai3, in box 3 the amount of income losses and in box 4, "2007-09". In the "white space" for 'Additional information'. on page Ai4, the instruction was to enter the explanation, in the terms as stated in the Note, ie that an employment related loss had been sustained in the year to 5 April 2009 and that details of that loss had been reported in box 3. The explanation continued stating that details of the loss, which arose pursuant to a scheme for which a DOTAS reference was required, would be provided in the 2008-09 return. It concluded by stating that because the interpretation of the law "may be at variance" with that of HMRC it was assumed that an enquiry would be opened.

15. In January 2009 Mr McMahon prepared Mr Tooth's 2007-08 self-assessment tax return using software provided by IRIS Software Limited ("IRIS") which is approved by HMRC and used by many firms in the accounting and taxation sector. However, Mr McMahon was unable to access box 3 on page Ai3 and enter the income loss there as instructed in the Note. He therefore, on 28 January 2009, contacted IRIS and spoke with an engineer who confirmed that box 3 could not be accessed because of a technical issue with the IRIS software. The engineer advised Mr McMahon that to ensure the claim was included in the 2007-08 return the loss should be included on another part of the return and reference made in the "white space" to explain what had been done.

16. Following that advice Mr McMahon entered the employment related loss on the partnership pages of the return (in box 7). However, this created an additional problem. Because there was not a partnership there was no ten-digit partnership unique taxpayer reference ("UTR") number which was necessary for the electronic submission of the return. Having encountered similar problems previously, where clients had not been allocated a UTR in advance of the self-assessment filing date, Mr McMahon had used a UTR of "99999-99999" and was able to successfully file the

return electronically before the deadline and prevent the imposition of a late filing penalty. He therefore entered a UTR of 99999-99999 in the partnership pages of Mr Tooth's return.

17. Other than the reference to the "partnership pages" instead of "box 3 on page Ai3" Mr McMahon, as instructed in the Note, entered the following at box 19 'Any other information', on page TR6, of Mr Tooth's return:

> "…During the tax year ending 5 April 2009, I sustained an employment related loss for which relief is being claimed now in accordance with s 128 ITA 2007. Please refer to the partnership pages of my return. Full details of this loss will be reported on my 2008/09 tax return in due course."

18. He then entered the following information in the boxes on the partnership pages of the return:

> Box 1 ('Partnership reference number'): 99999 99999
>
> Box 2 ('Description of partnership trade or profession') …
>
> Box 5 ('Date your basis period began'): 06-04-2007
>
> Box 6 ('Date your basis period ended'): 05-04-2008
>
> Box 7 ('Your share of the partnership's profit or loss'): £1185987.00
>
> Box 19 ('Adjusted loss for 2007-08…'): £1185987.00
>
> Box 20 ('Loss from this tax year set off against other income for 2007-08'): £1185987
>
> Box 30 of the same partnership pages ('Any other information'):
>
> > "During the year ending 5 April 2009, I sustained an employment related loss for which relief is being claimed now in accordance with the provisions of s 128 ITA 2007 (via section 11 ITEPA 2003). I have reported the details of the loss claimed against my other income using box 3 [sic] above, which relates to a claim for a partnership Loss from this tax year set-off against other income for 2007-8. However, there is no equivalent box to claim relief now for employment related losses despite the provisions of s 128 ITA 2007. Full details of this loss will be reported on my 2008-09 tax return in due course. The loss arose pursuant to arrangements for which a scheme reference number is required under DOTAS (from AAG at HMRC) – at this time the scheme has not been granted a reference number. When such number is obtained I will report it on my 2008-09 tax return, as that is the year in which the loss arose. I acknowledge that my interpretation of the tax law applicable to the above transactions and the loss (and the manner in which I have reported them) may be at variance with that of HM Revenue & Customs. Further please note that although I have reported (and hereby claim the loss pursuant to section 128 ITA 2007) in box 3 [sic] above I

> wish to make it clear that the deduction I am claiming on my return is not what you would regard as a loss for this tax year set-off against other income from 2007-08 – for all these reasons I assume you will open an enquiry."

The words used in box 20 were as instructed by NT in the Note, even down to the reference to 'box 3' even though the loss was included in box 7 of the partnership pages rather than box 3 of the additional information pages as advised because of the software difficulties.

19. Before sending a copy of the return to Mr Tooth to review Mr McMahon sought the advice of Mr Mehigan of NT and, having spoken on the telephone in the afternoon of 28 January, the following email exchange took place between Mr McMahon and Mr Mehigan:

> **28/01/09 at 16:47 from Mr McMahon to Mr Mehigan:**
>
> "As per our discussion today, IRIS does not accept the loss in the suggested box. I am therefore including as a self-employment loss with a note to explain."
>
> **29/01/09 at 07:16 from Mr Mehigan to Mr McMahon:**
>
> "Thanks Peter [McMahon], can you tell me which boxes you are not using from our note and the ones that you are please?
>
> Also a copy of your note would be much appreciated …"
>
> **29/01/09 at 10:09 from Mr McMahon to Mr Mehigan:**
>
> "Copy of wording used, entered on partnership pages.
>
> Clients may have difficulty submitting as there is no UTR, "99999 99999" should ensure the return goes through."

Attached to the final email was a copy of the statement included in box 30 of the ('Any other information') of the partnership pages of the return (see above). Mr Mehigan subsequently confirmed by telephone such an approach to be sensible.

20. At the hearing, Mr March (of HMRC) explained that if the loss had been included, as advised, in boxes 3 and 4 of the Additional information pages, Ai3, of the return it would have resulted in a free standing credit, albeit of the same amount, and would not have been subject to the automatic and immediate relief obtained as a result of it being entered in the partnership pages. However, as is clear from the advice given to him by NT in the Note (see paragraph 11, above) and the above email exchange, neither Mr Tooth nor his advisers knew this to be the case.

21. On 29 January 2009 a draft copy of the return was sent by courier to Mr Tooth for his review. The covering letter from Mr McMahon explained that he had:

> "… claimed relief for the employment loss during 2008-09 and offset this against your income for 2007-08. The relief has to be exhausted in 2007-08 with the balance carried forward and offset against your income for 2008-09. You have, therefore, overpaid tax during the year

> ended 5 April 2008 by £13,212.00 which should be refunded to you in due course.
>
> As discussed in our recent meeting, a Revenue enquiry is inevitable into your Return and the outcome will not be known for possibly three years. In the event that the scheme is unsuccessful there will be additional tax payable as outlined in David [Grunberg's] letter of 21 January."

22. Having approved the contents of the return Mr Tooth sent a signed copy to Mr McMahon who filed it electronically on 30 January 2009.

23. On 14 August 2009 HMRC wrote to Mr Tooth:

> "... in respect of your claim to employment losses incurred during 2008-09 for which you request £914,999 relief be given effect in 2007-08.
>
> This letter is formal notice of HMRC's intention to enquire into that claim under the provisions of Schedule 1A TMA 1970. As a result no effect will be given to the claim at the present time."

24. The letter continued stating that it was understood that the claim may be part of a disclosable scheme with a DOTAS reference number and requested confirmation whether or not that was the case. The letter also referred to an announcement made on 1 April 2009 that the 2009 Finance Bill was to include legislation that would have the effect of refusing relief for losses under that scheme. The proposed legislation referred to in the letter became s 68 of the Finance Act 2009. This inserted a new subs-section, (5A), into s 128 of the Income Tax Act 2007 ("ITA") and precluded, with retrospective effect, a deduction for an employment loss made in 2008-09 if that loss was made "as a result of anything done in pursuance of arrangements the main purpose, or one of the main purposes, of which is the avoidance of tax."

25. On 15 April 2010 HMRC wrote again to Mr Tooth advising him that his 2007-08 self-assessment tax return had been amended to withdraw the claim for losses of £1,210,299 that arose in 2008-09 and which was subject to an enquiry. The letter also stated that authority under paragraph 4(3) of schedule 1A to TMA had been used to ensure that no effect would be given to the claim until the enquiry was completed.

26. Grunberg responded, on 28 April 2010, on Mr Tooth's behalf advising HMRC that NT would now be dealing with this aspect of Mr Tooth's tax affairs. NT wrote to HMRC in this regard on 7 June 2010. Following further correspondence between NT and HMRC, on 19 December 2013 NT Advisors 2009 LLP wrote to HMRC, on behalf of their client NT, confirming that a client of NT (such as Mr Tooth):

> "… who carried out the [Romangate scheme] would prima facie fall squarely within the provisions of section 128(5A) ITA 2007 in respect of their [loss] claim. This is only subject to any arguments in regard to human rights matters on retrospective legislation and also a valid enquiry having been opened to allow the claim to be denied by HMRC"

27. On 4 March 2014 HMRC wrote to Mr Tooth in regard to "payment of overdue tax stating, *inter alia*:

> "Following a decision of the Court of Appeal in the case of *HMRC v Cotter* in February 2012, we have not (until now) been actively seeking to enforce payment by you of your overdue tax and interest arising on it. This is because we considered your circumstances were similar to those of Mr Cotter and therefore governed by that decision. HMRC has now successfully appealed to the Supreme Court, which reversed the Court of Appeal's decision, and as a result we are now able to enforce payment of the tax and interest that you owe. The Supreme Court's decision is final."

28. Grunberg replied on behalf of Mr Tooth on 11 March 2014 explaining that his case is one described by Lord Hodge in *Cotter* at [27] (see paragraph 13, above) stating:

> "Mr Tooth did complete the self-assessment tax return pages showing the reduction in tax for the 2008 tax year was as a direct consequence of the loss carry back claim. The Revenue has not amended his self-assessment return under section 9ZB TMA 1970 or opened a section 9A enquiry and as such his self-assessment calculations must stand as Lord Hodge has explained."

29. On 23 May 2014, having been chased by Grunberg on 19 May 2014 for a response to their letter of 11 March 2014, HMRC confirmed their agreement in a recent telephone conversation that Mr Tooth's circumstances were similar to that set out by Lord Hodge at [27] of *Cotter* and that collection of tax was therefore suspended. HMRC's letter also said that a request for a closure notice made on Mr Tooth's behalf had been referred to the scheme investigator for consideration.

30. On 28 July HMRC wrote to Mr Tooth as follows:

> "Dear Mr Tooth,
>
> **Self Assessment tax return – year ended 5 April 2008**
>
> I believe that your return for the above year is inaccurate.
>
> This is because you have claimed a partnership loss which was in fact an employment loss carried back from the year ended 5 April 2009.
>
> **What happens now**
>
> I am carrying out a check so that I can confirm the amount of tax you should have paid.
>
> At the moment I do not need you to do anything. This is because at this stage, we already have everything we need.
>
> I will let you know if I do need you to do anything.
>
> HMRC removed a claim for a partnership loss of £1,210,229 from your 2007-08 return on 14 April 2010. This was done so as to not give effect to a claim as an enquiry into that claim had been opened under Schedule 1a [sic] Taxes Management Act 1970. The Supreme Court

> decision in Cotter v HMRC makes clear that Schedule 1a did not give HMRC the power to remove this claim under the circumstances.
>
> It is however my intention to make an assessment under the provisions of s 29 TMA 1970. Further s 36(1A) TMA enables HMRC to make:
>
> (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,
> 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 in the Taxes Acts allowing for a longer period).
>
> You submitted your tax return for the year to April 2008 on 30 January 2009. You included on a separate partnership page, with the UTR 99999 99999, a claim for your share of the partnership loss of £1,210,229. This was in fact employment losses carried back from 2008-09. It is my view that your actions in making this claim were deliberate.
>
> As this claim has already been removed from your return, I do not intend to make any further amendments."

31. In response, by letter dated 12 August 2014, Grunberg disputed that there had been a deliberate act that had resulted in a loss of income tax and that if there had been a loss of income tax it was because HMRC had not accepted that the carry back claim could only be enquired into under s 9A TMA rather than schedule 1A TMA and it was this that had resulted in HMRC being out of time to issue an assessment.

32. In relation to the assessment Ms Thorley (of HMRC) explained that she had worked as a HO Manager in a team in Salford finalising enquires and making assessments in relation to individuals, such as Mr Tooth, who had participated in the Romangate scheme. In doing so she had liaised closely with a 'Technical Lead', Mr Nigel Williams. His role was to decide whether an assessment should be issued and provide guidance on the assessing provisions. Generally, a caseworker in Ms Thorley's team would send a submission to the Technical Lead who would then check the facts and circumstances of the case and provide a template letter for the caseworker to send to the taxpayer formally making the assessment. Responsibility for the decision to assess to tax rested with the Technical Lead, in this case Mr Williams. Mr March also worked as a Technical Lead for HMRC's response to the Romangate schemes. He explained that Mr Williams, who has since retired, reviewed Mr Tooth's file in October 2014 and had come to the conclusion that a discovery assessment should be issued.

33. On 23 October 2014 Ms Thorley received an instruction, by email, from Mr Williams, via a colleague, to issue a discovery assessment. She allocated this task to Mr Ian Anders. In an email, dated 23 October 2014, Mr Anders sought clarification from Mr Williams as to whether the discovery assessment was to replace the amendment made in April 2010 under schedule 1A TMA (see paragraph 25, above) in the light of the decision of the Supreme Court in *Cotter*. The email continued:

> "If this is correct should remove the informal standovers of the amounts on SA relating to the S[chedule] 1A amendment and reverse the amendments made to the Self Assessment in 2010?
>
> Finally, am I correct in thinking the discovery assessment will be in the same as the S[chedule] 1A amendment ie assessment of £475,498.37 additional tax resulting from removal of the loss of £1,210,229?"

34. Mr Williams responded within an hour of receiving the email from Mr Anders:

> "I'm afraid that I don't know much about ITSA [Income Tax Self-assessment] (as has become painfully obvious since I took on Romangate!) What you suggest seems right. Certainly we will be making a discovery assessment to replace the Sch1A amendment following the Cotter decision, and in the same figures.
>
> Cancelling the Sch1A amendments and associated stand-overs makes sense, and I assume this is what has been done in earlier cases."

35. Later that day Mr Anders confirmed, again by email, that he would raise the discovery assessment and let Mr Williams know when the appeal was received. On 24 October 2014 Mr Anders wrote to Grunberg to say that the assessment under s 29 TMA would be issued "shortly". That letter continued stating that Mr Tooth:

> "… attempted to obtain immediate relief for the loss carry back to year 1 by knowingly and deliberately making entries in his 2007-08 tax return to the effect that the loss was a partnership loss of the current year. This was nothing to do with "technical software issues" as you suggest in your letter. The claim could, and should, have been made outside the return, where the existence or not of 'appropriate boxes' would have had no relevance."
>
> The amounts claimed were clearly not appropriate to be entered into these boxes, and the notes submitted with the return confirm that your client was fully aware of this. The only possible conclusion is that there was a deliberate failure to report something correctly on his tax return in an attempt to make him less liable for tax than would otherwise be the case.
>
> In my opinion, this conduct falls squarely within Schedule [sic] 36(1A) as involving a loss of income tax or capital gains tax brought about deliberately by the person."

36. The discovery assessment in the sum of £475,498.20 was issued on 24 October 2014. The decision to uphold the assessment was upheld on 20 March 2015 following a review. Mr Tooth appealed to the Tribunal on 17 April 2015.

Law

37. Section 29 TMA, insofar as it applies to this appeal, provides:

> (1) If an officer 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 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.
>
> (2) …
>
> (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—
>
> (a) in respect of the year of assessment mentioned in that subsection; and
>
> (b) ... in the same capacity as that in which he made and delivered the return,
>
> unless one of the two conditions mentioned below is fulfilled.
>
> (4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
>
> (5) The second condition is that at the time when an officer of the Board—
>
> > (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or
> >
> > (b) informed the taxpayer that he had completed his enquiries into that return,
>
> the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

38. The Upper Tribunal (Norris J and Judge Berner) summarised the test for discovery in *HMRC v Charlton Corfield & Corfield* [2013] STC 866 ("*Charlton*") at [37] as follows:

> "In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself. If an officer has concluded that a discovery assessment should be issued, but for some reason the assessment is not made within a reasonable period after that conclusion is reached, it might, depending on the

> circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment."

39. The Upper Tribunal went to say at [42]:

> "on the basis of our finding that nothing new is required except the conclusion, the question in a case such as that put by [counsel for the taxpayer] would, we suggest, not be on the collective corporate knowledge of HMRC, but on the newness of that conclusion. Without deciding the matter, we can certainly envisage an argument that the passing of a file from one HMRC officer to another could not have the effect of refreshing a conclusion that was no longer new. But that does not depend on something new being discovered by reference to HMRC's collective knowledge. It is solely concerned with the newness of the conclusion."

40. Under s 34 TMA an assessment to income tax or capital gains tax may not be made "more than 4 years after the end of the of the year of assessment to which it relates". However, s 36 TMA provides:

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

41. Section 118(7) TMA provides:

> In this Act references to a loss of tax or a situation being brought about deliberately by a person include a loss of tax or a situation that arises as a result of deliberate inaccuracy in a document given to Her Majesty's Revenue and Customs by or on behalf of that person.

Discussion and Conclusion

42. The following issues arise:

(1) Whether HMRC made a "discovery" within the meaning of s 29(1) TMA; and

(2) If so, whether this was brought about deliberately by Mr Tooth or a person acting on his behalf.

I shall consider each in turn.

Discovery

43. The discovery relied upon by HMRC is of an insufficiency of income tax declared in Mr Tooth's 2007-08 self-assessment tax return.

44. As this was first identified in HMRC's letter of 14 August 2009 (see paragraph 23, above) Mr Ghosh contends that the fact of the insufficiency cannot have "newly appeared" to an officer in October 2014 and cannot therefore have been a discovery within s 29(1) TMA. In any event, he says, that by October 2014 when the assessment was made the discovery was stale. Relying on the comments of the Upper Tribunal at [37] of *Charlton* (see paragraph 38, above) and Lord Glennie in *Pattullo v HMRC* [2016] STC 2043 (at [46] – [56]) Mr Ghosh submits that HMRC's right to make the assessment is lost.

45. However, given the low threshold necessary for there to be a discovery (which is apparent from the observations of the Upper Tribunal in *Charlton*, eg a "change of view, change of opinion or correction of an oversight"), I prefer Mr Vallat's argument that it is necessary to consider the position of the assessing officer, in this case Mr Williams, and whether he made a discovery which does not depend on something new being discovered by reference to HMRC's collective knowledge. As such, I find that Mr Williams did make a discovery of an insufficiency of tax in October 2014 as confirmed by the emails of 23 October 2014 (see paragraph 33, above).

46. As the assessment was issued on 24 October 2014 it follows that the discovery cannot have lost its freshness and clearly does not fall within Lord Glennie's "most exceptional" of cases in which inaction on the part of HMRC would result in the discovery losing its required newness by the time the assessment was made. In the circumstances it is not necessary for me to consider whether a discovery can become stale and, if so, the effect of this on an assessment.

Whether brought about deliberately

47. Before considering the condition in s 29(4) TMA (ie whether the insufficiency of tax was brought about deliberately by Mr Tooth or a person acting on his behalf) and whether it has been fulfilled, I should record HMRC rely only on this condition in support of the validity of the discovery assessment. It is not part of HMRC's case to rely on the condition in s 29(5) TMA (the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the insufficiency of tax). As is clear from the correspondence, eg the letter from HMRC to Mr Tooth of 14 August 2009 (see paragraph 23, above), HMRC were fully aware that Mr Tooth had claimed employment, not partnership, losses during 2008-09 which he wished carry back and set off against 2007-08 income.

48. If HMRC are able to establish that the insufficiency of tax was brought about deliberately, and it is common ground that burden of doing so is on HMRC, not only would the discovery assessment be valid but HMRC would also be entitled to rely on the extended time limit of 20 years under s 36(1A) TMA.

49. Also, in the context of this case, I agree with Mr Vallat who contends that "deliberately" means "intentionally" or "knowingly" (see eg *Duckitt v Farrand* [2001] Pens LR 155 at [9]).

50. Relying on s 118(7) TMA Mr Vallat says a loss of tax is brought about deliberately if it arises as a deliberate inaccuracy in a return. There is no further need for the taxpayer to intend to create an insufficiency as the legislation refers to deliberately not dishonestly. He says if a scheme loss is entered in the wrong box in a return and the scheme fails resulting in an insufficiency, it is a deliberate inaccuracy irrespective of the taxpayer's belief or whether he relied on advice. If a return is deliberately incorrect on its face, Mr Vallat submits that a taxpayer cannot rely on a correction in the white space, rather such a correction would confirm the inaccuracy was deliberate.

51. In the present case he contends that the action of Mr Tooth (or someone acting on his behalf), in claiming relief for losses carried back from 2008-09 by forcing the claim into his 2007-08 return, was deliberate. This is because the use of the partnership boxes was clearly wrong. Mr Vallat says that the notes in the "additional information" white space confirm that Mr Tooth was aware that this was an inappropriate manner to report the losses and by including these in the return he obtained automatic and immediate relief as a consequence of the "process now, check later" regime of self-assessment leading to an insufficiency of tax.

52. Mr Vallat also relies on *Colin Moore v HMRC* [2011] UKUT 239 (TCC) in which Mr Moore wrongly claimed a deduction for capital losses in his return explaining the true position on additional sheets filed with it. The Upper Tribunal (Judge Bishopp) said, at [16]:

> "… it is necessary to look closely at what sub-s (4) provides. It allows an officer to assess where "the situation mentioned in subsection (1) … is attributable to … negligent conduct on the part of the taxpayer". The "situation mentioned" in subsection (1)" includes, among others, that "an assessment to tax is insufficient". The assessments in this case – Mr Moore's self assessments – were based not upon what he wrote on the additional sheets, but what he entered in the boxes. In my judgment it follows, … that the tribunal's evident conclusion about what the duty of care entailed was right. His setting out the information on an additional sheet would have given Mr Moore the protection of sub-s (5), but not of sub-s (4) and, as sub-s (3) makes clear, an assessment may be made if either one of the two conditions is fulfilled."

53. However, that case is distinguishable on the facts. Mr Moore was relying on advice given to him in a social context to complete his return inserting incorrect figures whereas Mr Tooth had the benefit of professional advice which he acted upon inserting correct figures, albeit in the wrong box. Moreover, *Moore* was concerned

with whether an insufficiency of tax was brought about negligently not deliberately as in the present case.

54. Mr Ghosh, quite properly, accepts that Mr Tooth (acting by Mr McMahon) entered a figure on the partnership pages of his return that did not represent a partnership loss. However, he says, Mr Tooth did not purport to have incurred a partnership loss and nor could any reader of that return, including HMRC, have taken him to have done so. Indeed, it is clear from the correspondence that this was the case.

55. However, on the argument advanced by Mr Vallat for HMRC, the fact that an employment loss was deliberately entered on the partnership pages of the return is sufficient not only for a discovery assessment to be issued but for the time limit to make such an assessment to be extended to 20 years if, contrary to the understanding when the return was completed, an insufficiency to tax subsequently arises.

56. In my judgment this cannot be right. The deliberate (or indeed careless) conduct necessary to enable the issue of a discovery assessment and extend the time limits for doing so must involve more than the completion of a tax return which, in itself, is a deliberate act. As a person completing a return must do so intentionally or knowingly, and can hardly do so accidentally, HMRC's argument effectively eliminates any distinction between "careless" and "deliberate" rendering otiose the necessity for the different conduct related time limits in s 36 TMA. Mr Vallat's attempt to argue otherwise, saying that if the wrong figures were entered in the right boxes it might be careless but if the right figures were entered in the wrong boxes it would be deliberate, was somewhat reminiscent of, and about as convincing as, Eric Morecambe's riposte to Andre Previn about "playing all the notes, but not necessarily in the right order."

57. To address this issue, as in *Moore*, it is necessary to look closely at what s 29(4) TMA provides. It allows an officer to assess where "the situation mentioned in subsection (1) … is brought about … deliberately by the taxpayer or a person acting on his behalf". The "situation mentioned" in subsection (1)" includes, *inter alia*, that "an assessment to tax is or has become insufficient". Therefore, a causal link between the insufficiency of tax and the deliberate action is required and it is necessary to ask what a taxpayer has done, deliberately, to bring about that insufficiency. In this case the question is what did Mr Tooth do, intending or knowing it would bring about an insufficiency of tax?

58. Although, as Mr March explained, there would have been a free standing credit had the loss been entered on the Additional information pages of Mr Tooth's return as opposed to the immediate and automatic relief obtain by its inclusion on the partnership pages, I have found (at paragraph 20, above) that neither Mr Tooth, who took advice as to the availability of losses as he did in relation to the completion of his tax return, nor his advisers were aware of this. It therefore follows that there was nothing that Mr Tooth, or a person acting on his behalf, did that deliberately brought about an insufficiency of tax. As such, the condition in s 29(4) TMA has not been fulfilled. Given that HMRC do not rely on the condition in s 29(5) TMA, as s 29(3) TMA provides, Mr Tooth "shall not be assessed under" s 29(1) TMA.

59. Therefore, for the above reasons, the appeal is allowed.

Appeal Rights

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

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 25 OCTOBER 2016

Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 2 November 2016