[2016] UKFTT 0806 (TC)

TC05531

Appeal number: TC/2015/00099

INCOME TAX – discovery assessment – whether HMRC entitled for make discovery assessment for 2011-12 – yes – whether appellant entitled to bad debt relief or relief in respect of credit notes issued – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANDREW ADELEKUN **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS

Sitting in public at The Royal Courts of Justice, Strand, London on 12 October 2016 and having considered additional written submissions submitted on 11, 17 and 18 November 2016.

The Appellant in person

Karen Powell, Officer of HM Revenue & Customs, for the Respondents

DECISION

1. On 18 February 2016, the Tribunal released a decision (the "Preliminary Decision") on a number of preliminary issues relevant to Mr Adelekun's appeal. The Tribunal determined that other matters relating to Mr Adelekun's tax liability for the years in question would need to be determined at a subsequent hearing. In the interests of brevity, I will not repeat all findings of fact that were made in the Preliminary Decision. I will also use defined terms used in the Preliminary Decision.

2. The principal issue determined in the Preliminary Decision was that Mr Adelekun's activity of owning, operating and leasing an "oil water separator" (the "OWS Trade") amounted to a separate trade from his project advisory and consulting activities (the "Consulting Trade"). It therefore follows that losses associated with the OWS Trade cannot be carried forward (under s83 of ITA 2007) against profits of the Consulting Trade.

3. At the hearing in October 2016, the Tribunal was asked to determine the final amount of Mr Adelekun's liability to tax and penalties for the tax years under appeal (2009-10 to 2012-13) in the light, in particular, of Mr Adelekun's claim, made subsequent to release of the Preliminary Decision, for bad debt relief. At the hearing, HMRC stated that they had withdrawn the penalty that they had charged for 2012-13. They had also withdrawn their claim (referred to at [7] of the Preliminary Decision) that Mr Adelekun had understated taxable income by £10,000 in the tax year 2010-11. Therefore, the points that remain to be determined are as follows:

(1) Whether HMRC have satisfied the requirements necessary to make a discovery assessment for 2011-12.

(2) Whether Mr Adelekun is entitled to bad debt relief (or relief in respect of credit notes issued).

(3) How Mr Adelekun's tax liability for the tax years in question should be computed given that he is carrying on two separate trades.

Evidence

4. I had oral evidence from Mr Adelekun and Ms Powell cross-examined him. I also had the bundle of documentary evidence that was available at the hearing leading to the Preliminary Decision. Ms Powell prepared a bundle of some additional documents. Mr Adelekun also produced further documentary evidence at the hearing relating to the claims for bad debt relief. Ms Powell did not object to the admission of that evidence and I have, therefore, considered it.

Facts

5. In addition to the facts found in the Preliminary Decision, the following facts were either agreed between the parties or were determined by me.

Profits and losses of the Consulting Trade and the OWS Trade prior to the claims for bad debt relief in dispute

6. Mr Adelekun has been operating both the Consulting Trade and the OWS Trade for a number of years. He makes up accounts (covering both trades combined) on 31 December in each year. It follows that the "basis period" for each tax year relevant to this appeal is the 12-month period ending with the 31 December falling in that tax year.

7. Immediately prior to the commencement of the 2009-10 tax year, the parties were agreed Mr Adelekun had £204,537 of losses available for carry forward against taxable profits of 2009-10 and subsequent tax years. The parties agreed that 75% of that amount (£153,403) related to losses arising from the OWS Trade and the remaining 25% (£51,134) related to losses arising from the Consulting Trade.

8. The parties were agreed that in the tax years 2009-10 to 2012-13, 60% of Mr Adelekun's gross income related to the Consulting Trade and 40% related to the OWS Trade. Similarly, with the exception of specific matters referred to below, 60% of Mr Adelekun's gross expenses related to the Consulting Trade and 40% to the OWS Trade.

9. The parties were agreed that, in 2009-10, £9,980 of capital allowances that Mr Adelekun claimed related specifically to the OWS Trade. They were also agreed that, in the profits for the tax year 2012-13 he was entitled to bad debt relief (not reflected in his tax returns as originally submitted but included in an amendment to that return) for £20,000 in respect of invoices to a client of his known as Ponti Fisiani. Having reviewed relevant correspondence, I consider that bad debt related specifically to the Consulting Trade.

10. Appendix 1 sets out my findings (in the form of a table) as to the aggregate profits of the Consulting Trade and the OWS Trade.

The disputed bad debt relief and credit notes - evidence

11. Mr Adelekun produced letters written by a firm of accountants based in Nigeria, Olabode Ayodele & Co, dated 10 February 2016 and 10 May 2016. The letter of 10 February 2016 was introduced by a statement that:

> Following our review of your financial affairs, we confirm that the following debts need to be written off in your books at the earliest possible time.
>
> [A table of total debts, broken down by debtor was included.]
>
> The above debts are bad and doubtful. Despite the efforts of recovery over the years, there is no longer any realistic prospect of recovering these debts.

12. None of the "bad and doubtful" debtors identified in the letter at [11] was owed by Lubbe Construction (one of Mr Adelekun's major clients and the entity to whom the

credit notes referred to below were issued). The total amount of bad debts identified in accounting periods up to 31 December 2014 was £91,067.

13. In addition to the total figure of £91,067, Olabode Ayodele & Co included a list of debts relating specifically to the financial years ended December 2012 and December 2014 stating that they had previously "advised you verbally to write off the following debts as there is also no longer any realistic prospect of recovery". I will not reproduce the schedule of the debts relating to the financial year ended December 2014 since they are not relevant to the tax years under appeal for the purposes of these proceedings, but note only that Lubbe Construction was not mentioned as a bad debtor. For the financial year ended 31 December 2012, a debt of £30,000 owed by Ponti Fisiani was mentioned. As noted, the parties have reached an agreement that bad debt relief of £20,000 should be allowed in relation to this debt.

14. On 10 May 2016, Olabode Ayodele & Co wrote a further letter to Mr Adelekun. This letter was headed "Financial Accounts Discrepancy – Completion of the last 5 Years financial accounts – Years ended 31 December 2010-2014". That letter was broken into sections, with each section relating to a different calendar year. (Curiously, there were two sections dealing with the calendar year ended 31 December 2013 which appeared to contain identical information but no section dealing with the calendar year ended 31 December 2011.) Each section indicated that, for the year in question, one or more credit notes relating to work done for Lubbe Construction had been "erroneously omitted". For example, the section relating to the year ended 31 December 2012 indicated that a credit note of £4,500 had been issued against the invoice "LUBBE/12/12" and all invoice numbers quoted were in a similar format to this. No underlying invoice numbers were quoted in relation to the year ended 31 December 2010 with the stated reason being that those invoices were over 5 years old and no longer held.

15. I was shown two documents headed "Credit Note" and dated variously "December 2012" and "December 2013"[1]. Those documents were on the letterhead of "Capital Development Consultants" (a trading name that Mr Adelekun uses), were addressed to Lubbe Construction and listed a number of invoices that had been issued with a corresponding entry in a column headed "Credit Note". They were both signed by Mr Adelekun. The figures in the Credit Note dated December 2012 tallied with the breakdown for 2012 set out in the letter of Olabode Ayodele & Co dated 10 May 2016 referred to at [14].

16. The figures in the Credit Note dated December 2013 for the most part tallied with the breakdown for 2013 in that letter. However, there were some anomalies. The letter of 10 May 2016 listed the final credit note in that year as being for £10,000 and being applied against invoice LUBBE/12/13. The credit note for December 2013 did not refer to invoice LUBBE/12/13 at all. Instead it referred to the figure of £10,500 being allocated against invoice LUBBE/08/13 (which was not referred to in the letter). In addition, while the totals shown on the Credit Note for December 2013 and the letter

[1] I was also shown a document dated "December 2014", but that cannot be relevant to the tax years under appeal and therefore I have not referred to it.

of 10 May 2016 were both £30,000, the actual arithmetic total of the sums shown on that credit note was £30,500.

17. I was also shown two letters dated 7 July 2016 on the letterhead of Lubbe Construction. Both letters were signed by Mr M S Lubbe, the managing director of the company. The first letter started with the following paragraph:

> We hereby confirm that the following credit notes applied for the periods in question are as follows:

There then followed a table containing two columns: one headed "Calendar Year" and one headed "Credit Note Amount". The totals shown in the "Credit Note Amount" column matched, in most cases, the totals in the letter of 10 May 2016 of Olabode Ayodele & Co. However, Lubbe Construction's letter contained an entry in relation to 2011 whereas, as noted at [14], Olabode Ayodele & Co gave no figure for 2011 but rather quoted information for 2013 twice.

18. I was shown a further letter (also dated 7 July 2016) which was expressed to be a "replacement" for that sent on 7 July 2016 which was "retyped and resent by e-mail on 12 July 2016". That letter read as follows:

> We hereby confirm that the summary of the information on our sales ledger for your project advisory work during the periods 2010 to 2014 is as follows:
>
> [There then followed a table that set out the gross amounts paid, the amount of credit notes issued, and net figure remaining after credit notes were deducted.]
>
> Each credit note was received and applied in each year as shown. Previous communication on the subject matter shows the gross turnover.
>
> This letter serves to amend any previous communication on the related subject matter. As advised, Lubbe Construction is not in a position to provide its accounting ledger to a 3rd party.

19. Mr Adelekun showed much of the above material to HMRC in order to substantiate a claim for bad debt relief. By letter dated 26 May 2016, HMRC advised Mr Adelekun that he would need to submit revised returns if he wished to make this claim. Mr Adelekun did submit revised returns. The revised return for the tax year 2012-13 was submitted on 31 January 2015 (within the time limit for submitting an amended tax return for that year). All other amended returns were submitted outside the applicable time limit.

20. A chain of correspondence evidently ensued. On 26 July 2016, HMRC wrote a letter to Mr Adelekun that included the following paragraphs:

> 1. The Revenue is of the opinion that the respective credit notes are not legally dated and do not reflect the actual decision date for the issue of the credit notes. They only reflect the accounting year to which they apply.

> 2. The Revenue is interpreting the decision date for these credit notes as being the date of the accountant's letter dated 10 May 2016.
>
> 3. The letters from Lubbe Construction also do not confirm the actual issue date(s) of these credit notes but solely give indication of years of trade to which they relate.

The disputed bad debt relief and credit notes – conclusions on the evidence

21. As noted at [11], the parties were agreed that Mr Adelekun suffered a bad debt of £20,000 in the tax year 2012-13. I will not, therefore, make any determination on that issue and the discussion below therefore focuses on those credit notes and bad debts that were not agreed.

22. In cross-examination, Ms Powell put it to Mr Adelekun that the credit notes had not been issued in any of the tax years under appeal. Rather, she suggested that, to the extent there had been a decision to issue credit notes or to write off bad or doubtful debts, that decision had only been made on or after 10 May 2016. Mr Adelekun denied this, but I am not able to accept his evidence to this effect for reasons set out below.

23. In a witness statement he prepared for the hearing Mr Adelekun said:

> In November 2015, I verbally requested Olabode Ayodele & Co to carry out a 5 year review of my business. A five year cycle was agreed as is [sic] believed that a 5 year cycle is a better representation of my business…. <u>On paper, it appears I am making a lot of money, but I do not have the cash to match what I appear to have earned on paper</u>. [emphasis added]

If credit notes were issued during the tax years in issue, it must follow that Olabode Ayodele & Co, who Mr Adelekun described as the accountants who audited his business accounts, must have overlooked them when preparing those accounts as otherwise there would no discrepancy between his actual cash receipts and his "paper" profits. Mr Adelekun gave no satisfactory explanation of how his accountants came to overlook such significant credit notes.

24. In his witness statement, Mr Adelekun said:

> Unfortunately, I fell out with Lubbe Construction towards the end of 2015, and I do not see myself doing any work with the company in the near future.

Yet, in July 2016, the managing director of Lubbe Construction was personally signing statements as to the number of credit notes that Mr Adelekun had issued going back over five years.

25. There were also internal inconsistencies in the evidence. For example, on 2 June 2014, Lubbe Construction sent Mr Adelekun a letter (signed, not by the managing director, but by Fortunata Mabasa whose job title was "accountant") which read:

> **Confirmation of Paid Invoices between 2007 and 2012 for your Project Advisory Services**
>
> As we are not in a position to provide copy invoices as you have requested, kindly find below the breakdown of the above…

The figures that Lubbe Construction quoted for 2011 and 2012 were of amounts before deduction of the credit notes that Mr Adelekun said had been issued. Mr Adelekun sought to explain this by saying that Lubbe Construction intended to refer, not to "paid invoices", but rather to "the total of issued invoices without taking into account credit notes". I found that explanation implausible as the letter plainly referred to "paid invoices" and, if the intention truly was to refer to "issued" invoices, I could think of no good reason why Lubbe Construction would not mention credit notes that had been issued. Rather, I concluded that the contemporaneous evidence supported a conclusion that no credit notes had been issued by 2 June 2014.

26. Mr Adelekun engaged a firm of UK tax advisers to assist him with tax compliance matters. If credit notes were issued between 2010 and 2013 as Mr Adelekun claimed, it would follow that those tax advisers calculated his taxable income without taking into account those credit notes. Mr Adelekun sought to explain this away by saying that the credit notes were simply overlooked. But it seems unlikely that such a large amount of credit notes was overlooked. The consequence of overlooking these credit notes would be that Mr Adelekun was paying tax on money that he had not earned, and would never earn. It is reasonable to assume that Mr Adelekun (who had personally signed the credit notes) would take more care to avoid this outcome.

27. The timing of the correspondence with Lubbe Construction also raises questions. In its first letter of 7 July 2016, Lubbe Construction simply confirmed that credit notes were issued, but was silent as to when they were issued. However, apparently just a few days later, Lubbe Construction amplified its conclusions, seeking to emphasise that credit notes had been issued in the years in question. There must be, at the very least, a question as to whether Lubbe Construction's sudden wish to volunteer additional information came about because Mr Adelekun realised that the earlier statement was not sufficient for his purposes.

28. There were anomalies in the credit note documents themselves as noted above (for example incorrect addition and the inclusion of two tables for 2013 (and none for 2011) in the letter from Olabode Ayodele & Co referred to at [14].

29. The above discussion has dealt extensively with credit notes. In his written skeleton argument, Mr Adelekun suggested he was not pursuing his argument in relation to bad debts. However, his oral submissions tended to suggest he was continuing to pursue the point. Therefore, so that there is no misunderstanding, I will determine the issue. The letter from Olabode Ayodele & Co referred to at [11] suggests that the debts referred to had, at the time of writing, only recently become bad or doubtful. That conclusion follows from the reference to the "efforts at recovery over the years". That letter does not therefore support an argument that the debts referred became bad or doubtful between prior to 31 December 2012.

30. Ms Powell suggested to Mr Adelekun in cross-examination that the credit notes referred to at [15] were not issued at all. That was a clear allegation of fraud that was put explicitly to Mr Adelekun. As noted above, there were some oddities with the credit notes. It also seemed slightly odd that the credit notes used the letterhead of "Capital Development Consultants" whereas other correspondence between Lubbe Construction and Mr Adelekun was sent by, and addressed to, Mr Adelekun with no reference to that trading name. However, documents can have oddities in them without being forged and I will not make a finding of fraud since I have not heard evidence from Lubbe Construction or Olabode Ayodele & Co. Nevertheless, the points above have led me to conclude that I am not satisfied that the credit notes to which Mr Adelekun referred were issued at any time on or prior to 31 December 2012. I am also not satisfied that the bad debts referred to in the letter of 10 February 2016 from Olabode Ayodele & Co became bad or doubtful at any point on or prior to 31 December 2012.

The discovery issue relevant to 2011-12

31. Mr Adelekun submitted his tax return for 2011-12 on 30 January 2013, by the applicable deadline. In that return, he showed an aggregate profit figure for the OWS Trade and Consulting Trade combined (which, at the time, he thought amounted to a single trade) of £62,225. He claimed to set carried forward losses against that taxable income with the result that remaining profit subject to tax was nil. That tax return described the business that Mr Adelekun carried on as that of a "Project Advisor". No entry was made in the "white space" of that tax return.

32. Having read Mr Adelekun's tax return and his returns for 2010-11 and 2009-10, I am satisfied that a reasonable officer of HMRC reading those returns would not have realised that Mr Adelekun was claiming to carry forward losses incurred in the OWS Trade against profits made in the Consulting Trade. Nor would such an officer have been aware that the OWS Trade and Consulting Trade were different trades for tax purposes (or even that they might be different trades). The tax returns made no mention of the OWS, or the respective activities of the OWS Trade and Consulting Trade that would have enabled a reasonable officer to be aware of this issue.

33. HMRC did not open any enquiry into Mr Adelekun's tax return for 2009-10. HMRC opened an enquiry into Mr Adelekun's tax return for 2010-11 on 12 July 2012. Mr Adelekun provided documents and information in response to questions that HMRC raised. The enquiry into the 2010-11 tax return was was still ongoing by the time Mr Adelekun submitted his tax return for 2011-12 and did not end until 27 March 2014 when HMRC issued a closure notice in relation to the 2010-11 tax year.

34. I have reviewed correspondence relating to HMRC's enquiry for 2010-11 contained in the hearing bundle. Mr Adelekun did not suggest that there was other relevant correspondence in which he gave information relating to the OWS and I have therefore concluded that there was none. I have concluded that the chain of correspondence relating to HMRC's enquiries up until 31 January 2014 (the date on which HMRC ceased to be able to open an enquiry into the 2011-12 tax return) can be summarised as follows:

(1) HMRC first became aware that Mr Adelekun owned the OWS on or around 6 November 2012 following a meeting that they had with him. HMRC prepared a note of that meeting. The meeting note records HMRC's understanding that capital allowances on the OWS generated losses that Mr Adelekun was seeking to carry forward against profits of his business as a whole and that the HMRC officer needed to "see more evidence regarding this project to enable him to approve the application for loss relief". While Mr Adelekun indicated to HMRC at the time that he did not regard a number of points recorded in that meeting note as accurate, he does not appear to have expressed any concern as to the parts of the meeting note dealing with the OWS and I have concluded that the meeting notes were accurate in this respect.

(2) The focus of HMRC's enquiry was not, at least initially, on the OWS. It was on the totality of his business. They had concerns that he may have been involved in property management and did not understand the description of his business as "property design and management". They also had questions about entries in Mr Adelekun's bank accounts and the amount of cash that he took from his business by way of drawings. On 16 November 2012, Mr Adelekun provided some information that he had promised following that meeting. That information included photographs of the OWS and some evidence (in the form of a letter from the vendor of the OWS) that Mr Adelekun had bought it in 2003 or 2004.

(3) On 15 February 2013, in a letter that asked for details about certain bank account entries and property transactions, HMRC asked Mr Adelekun for some information on the OWS including when "the trade" commenced, where the business involving the OWS was managed from and how much money was transferred to the UK from Nigeria in connection with the OWS in each year. Beyond referring to the OWS as "the trade", HMRC did not state expressly that they regarded operation of the OWS as a separate trade.

(4) Between March and April 2013 there was some further correspondence dealing with the question of when the OWS became operational and the amount of time that Mr Adelekun spent on activities involving the OWS.

(5) On 11 September 2013, HMRC wrote Mr Adelekun a letter that included the paragraph:

> No evidence has been supplied to date to me or my VAT colleague that confirms the exact nature of your trade(s) and I still have large gaps in information and supporting papers which would enable me to confirm your trade.

(6) Focus then shifted towards Mr Adelekun's claim to be VAT registered (and there was a Tribunal hearing on this issue in early 2014). There was no further material reference to the OWS in the correspondence that I have seen prior to 31 January 2014.

35. HMRC made their discovery assessment for 2011-12 on 27 March 2014, the same date as that on which they issued their closure notice for 2010-11.

36. Neither party made any detailed submissions on what conclusions a reasonable officer might be expected to reach from the documents referred to above, though Ms Powell did make the narrow point that Mr Adelekun's tax return for 2010-11 did not mention any issue as to whether the OWS Trade and Consulting Trade were separate. Neither party referred me to any other correspondence (not referred to above) between the parties relating to the OWS or any other documents sent to HMRC in the course of enquiries into any of Mr Adelekun's tax returns for the tax years 2011-12 or previous years which referred either expressly, or by implication, to the possibility that the OWS Trade and Consulting Trade were, or might be, separate trades for tax purposes or that Mr Adelekun was seeking to carry forward losses from the OWS Trade against profits of the Consulting Trade. I have concluded that there were no such documents.

Statutory provisions

37. Section 29 of the Taxes Management Act 1970 ("TMA 1970") provides as follows:

> **29 Assessment where loss of tax discovered**
>
> (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.
>
> …
>
> (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.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) In subsection (6) above—

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes—

i) a reference to any return of his under that section for either of the two immediately preceding chargeable periods…

(9) Any reference in this section to the relevant year of assessment is a reference to—

(a) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) above, the year of assessment mentioned in that subsection; and

(b) in the case of the situation mentioned in paragraph (c) of that subsection, the year of assessment in respect of which the claim was made.

Discussion

The discovery assessment for 2011-12

38. *Charlton and another v Revenue and Customs Commissioners* [2012] UKUT 770 is authority for the proposition that the condition as to "discovery" is satisfied if:

> … it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment.

39. That was clearly the case in this appeal. Mr Adelekun genuinely thought that he had a single trade for income tax purposes and submitted his returns on that basis. When HMRC came to review the detail of his business, they formed the view that he had two trades and that losses of the OWS Trade could not be carried forward against profits of the Consulting Trade. That was clearly a "discovery" for the purposes of s29 TMA 1970.

40. The relevant question, therefore, is whether the requirements of either s29(4) or s29(5) of TMA 1970 are satisfied. I will focus on s29(5). At the hearing, Ms Powell put the case that there was nothing in Mr Adelekun's return for 2011-12 or surrounding papers which would have alerted a reasonable officer to the issue. However, an analysis of the 2011-12 return is not sufficient since the combined effect of s29(6) and s29(7)(a)(i) of TMA 1970 is that account must be taken not only of documents relating to the 2011-12 tax return, but also of tax returns and other information (including responses to HMRC enquiries) for the two previous tax years. It is for that reason that I have performed the detailed review of the correspondence in the hearing bundle set out at [31] to [36] above. I am satisfied from that review that a reasonable officer could not have been expected to realise on or prior to 31 January 2014, from information falling within s29(6) and s29(7) of TMA 1970, that the OWS Trade and the Consulting Trade were separate. I have therefore concluded that the condition in s29(5) of TMA 1970 is satisfied.

41. There is a further point. In his return for 2011-12, Mr Adelekun claimed to use £62,225 of losses in order to shelter profits arising in the 2011-12 tax year. As the parties were agreed, the total of losses available for carry forward immediately prior to commencement of the 2009-10 tax year was £204,537. Mr Adelekun had claimed to use £85,040 of these in his tax return for 2009-10 (leaving a balance of £119,497 available for carry forward). In 2010-11, he claimed to use £94,585 of losses leaving a balance available for carry forward of £24,912. Therefore, even if there had been no impediment to carrying forward the loss against profits of the Consulting Trade, as a matter of simple arithmetic, Mr Adelekun would not have had enough losses to shelter £62,225 of profits in 2011-12. While I do not believe that it was careless of Mr Adelekun to fail to appreciate that the OWS Trade and Consulting Trade were separate trades for tax purposes, it was careless of him to make such an elementary arithmetic error involving such a large amount of tax. However, it is not clear to me that this carelessness caused the insufficiency of tax in Mr Adelekun's self-assessment. The insufficiency was caused because Mr Adelekun was simply not allowed at all to carry forward losses incurred in the OWS Trade and set them against profits of the Consulting Trade. Section 29(4) requires the "careless" action to bring

about the insufficiency of tax. HMRC have not satisfied me of the requisite causal link in this regard and I have therefore concluded that the conditions of s29(4) are not satisfied although this does not really matter given my conclusion that s29(5) is satisfied.

42. It follows that I have concluded that HMRC were entitled to issue the discovery assessment for 2011-12.

Bad debt relief and credit notes

43. Ms Powell argued that Mr Adelekun was not entitled as a matter of law to additional relief in respect of bad debts or credit notes for any of the tax years 2009-10 to 2012-13 as he had not amended his tax returns for those years within the specified time limits in order to claim that relief.

44. I have not accepted Ms Powell's argument in this regard. Assessments and closure notices for all tax years from 2009-10 to 2012-13 are under appeal to this Tribunal. The Tribunal's jurisdiction on these appeals is set out in s50(6) of TMA 1970 which provides as follows:

> (6) If, on an appeal notified to the tribunal, the tribunal decides—
>
> (a) that the appellant is overcharged by a self-assessment;
>
> (b) that any amounts contained in a partnership statement are excessive; or
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment,
>
> the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

45. Were the assessments and closure notices not under appeal, the position might well be as Ms Powell outlined. However, given that they are under appeal, I have concluded that, if Mr Adelekun were able to satisfy me that debts went bad in the tax years in question, or that he had issued credit notes in the years in question so that he did not make as much profit as was taken into account in HMRC's assessments and closure notices, I would have power to reduce the amount charged even if the time limit for submitting amended returns had passed.

46. However, for reasons set out above, I am not satisfied that the credit notes to which Mr Adelekun referred were issued on or prior to 31 December 2012. I am also not satisfied that the debts referred to at [11] became bad or doubtful prior to that date. Those credit notes and bad debts do not, therefore, affect the profits of the tax years that are under appeal. It may be that Mr Adelekun can establish that credit notes were issued in subsequent years, or that debts became bad or doubtful in subsequent years. If he can do that, he might be entitled to tax relief in subsequent years. However, he has not satisfied me that he is entitled to relief in the tax years that are under appeal.

Conclusion on amount of taxable income

47. My conclusion, therefore, is that HMRC were entitled to issue a discovery assessment for 2011-12 and that Mr Adelekun is not entitled to any additional bad debt relief, or relief in respect of credit notes, beyond the £20,000 figure that HMRC and Mr Adelekun agreed at the hearing.

48. Appendix 1 contains my calculations of the amounts of Mr Adelekun's taxable profits for income tax purposes of the OWS Trade and the Consulting Trade. HMRC must compute his income tax liability accordingly and must perform a corresponding calculation of his liability to pay national insurance contributions. The parties should try to agree the resulting amount of Mr Adelekun's resulting income tax and national insurance liability within 28 days. If they cannot do so, they may apply to the Tribunal for a determination. The parties should note, however, that the ability to apply to the Tribunal relates only to the arithmetic calculation of Mr Adelekun's tax and national insurance liability. I have now determined the principles that should apply to the calculation of the income tax liability and the Tribunal will not consider further submissions on that issue.

49. 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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 29 NOVEMBER 2016

APPENDIX – TABLES SHOWING MR ADELEKUN'S PROFITS

Table 1 – Mr Adelekun's gross profits prior to disputed bad debt relief

Based on the parties' agreement referred to at [8], I have concluded that the respective profits of the Consulting Trade and the OWS Trade before the bad debt relief in dispute, and before any use of carried forward losses, were as summarised in the following table:

Tax Year	End of 12-month basis period	Total Profits	Profits of Consulting Trade	Profits of OWS Trade
2009-10	31 December 2009	£85,040	£57,012[2]	£28,028
2010-11	31 December 2010	£94,585	£56,751	£37,834
2011-12	31 December 2011	£62,225	£37,335	£24,890
2012-13	31 December 2012	£36,182[3]	£13,709[4]	£22,473

Table 2 – Taxable profits of Consulting Trade after the use of losses

Tax Year	Gross Profits of Consulting Trade	Carried forward losses used	Taxable profits of Consulting Trade	Losses available for carry forward in Consulting Trade
2009-10	£57,012	(£51,134)	£5,878	nil
2010-11	£56,751	nil	£56,751	nil
2011-12	£37,335	nil	£37,335	nil
2012-13	£13,709	nil	£13,709	nil

Table 3 – Taxable profits of OWS Trade after the use of losses

Tax Year	Gross Profits of OWS Trade	Carried forward losses used	Taxable profits of OWS Trade	Losses available for carry forward in OWS Trade
2009-10	£28,028	(£28,028)	nil	£125,375
2010-11	£37,834	(£37,834)	nil	£87,541
2011-12	£24,890	(£24,890)	nil	£62,651
2012-13	£22,473	(£22,473)	nil	£40,178

[2] This figure is not 60% of the total profits because the parties were agreed that, in this year, Mr Adelekun had returned total profits of £85,040 that included deductible capital allowances of £9,980 which were available specifically against profits of the OWS trade. Therefore, Mr Adelekun's total profits (prior to the capital allowances) was £95,020 of which 60% (£57,012) related to the Consulting Trade and £38,008 related to the OWS Trade. The capital allowances are then taken against profits of the OWS Trade, reducing those to £28,028.

[3] Total profits shown in Mr Adelekun's tax return were £56,182 but this should be reduced by the £20,000 bad debt that related specifically to the Consulting Trade.

[4] i.e. 60% of £56,182 (the gross profits prior to the bad debt referred to in footnote 3) less the £20,000 bad debt that was allocable specifically to the Consulting Trade