[2015] UKUT 0578 (TCC)

Appeal numbers: UT/2014/0064
UT/2014/0065

INCOME TAX/CORPORATION TAX – discovery assessments – competence issues – TMA, s 29 and FA 1998, Sch 18, paras 41–43 – time limit issues – TMA, s 36(1A) and FA 1998, Sch 18, para 46(2A) - whether failure by FTT to consider competence and time limit issues was an error of law – whether issues were required to be raised by HMRC or appellants – burden of proof – appeal allowed – whether to remit to FTT – case not remitted

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

(1) MICHAEL BURGESS
(2) BRIMHEATH DEVELOPMENTS LIMITED **Appellants**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER
JUDGE TOM SCOTT

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 1 October 2015

Conrad McDonnell, instructed by Devonshires LLP, for the Appellants

Laura Poots, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. These are appeals from the decision of the First-tier Tribunal ("FTT") (Judge Brooks and Ms Redston) released on 25 March 2015 by which the FTT confirmed, with one exception, assessments made on each of the appellants, Mr Burgess and Brimheath Developments Limited ("Brimheath").

2. The assessments in question were in every case discovery assessments made, in relation to Mr Burgess, under s 29 of the Taxes Management Act 1970 ("TMA") and in relation to Brimheath under paragraphs 41 to 43 of Schedule 18 to the Finance Act 1998 ("FA 1998"). In the case of Mr Burgess, the assessments were made on 7 November 2011, and were for income tax in relation to alleged failures to return profits of his business as a sole trader for the tax years 1996-97 to 1999-2000. In the case of Brimheath the assessments were made on 22 November 2011 and related to corporation tax on alleged under-declarations of profits of Brimheath for the accounting periods ended on 30 November in each of the years 1999 to 2008, apart from the year 2000.

The FTT's decision

3. The FTT decided that there were for the years in question undeclared profits of each of Mr Burgess and Brimheath and, with one exception, upheld the assessments. The exception arose because it was accepted by HMRC that if the FTT were to uphold the assessment on Mr Burgess for 1999-2000, the relevant amounts could not also be attributed to Brimheath for its accounting period ended 30 November 1999. Brimheath's appeal was therefore allowed in respect of the assessment on it for that period.

4. There is no appeal from these conclusions of the FTT, nor from the findings which led to those conclusions. The focus of these appeals is on the question of the underlying validity of the assessments which, so the appellants submit, was not properly considered by the FTT, such that the FTT made errors of law.

5. There are two strands to this argument. The first is what has been described as a "competence" issue, namely whether the relevant conditions for the issue of a discovery assessment under s 29 TMA (in the case of Mr Burgess) and FA 1998, Sch 18, paras 41–43 (for Brimheath) had been met. The second, the "time limit" issue, is whether the assessments were in time, by reference to s 36 TMA (Mr Burgess) and FA 1998, Sch 18, para 46 (Brimheath). The terms "competence issue" and "time limit issue" distinguish those issues from the "substantive issue" of whether Mr Burgess and Brimheath had under-declared their profits for the relevant periods.

6. The FTT made no reference to the time limit issue. It did, however, refer to s 29 TMA and the corresponding FA 1998 provisions, setting out, at [4], the material parts of s 29. In doing so it included the text of s 29(4), which provides for one of the conditions which may be satisfied for a valid discovery assessment in a case where a return had been made, namely that the loss of tax was brought about carelessly or

deliberately by the taxpayer or a person acting on his behalf. It omitted s 29(5), which provides an alternative condition based on what a hypothetical HMRC officer might reasonably have been expected to have been aware of from certain information supplied, remarking simply that s 29(5) was not applicable to the appeals.

7. The FTT did not set out the provisions of paras 41–43, Sch 18, FA 1998. But by referring to para 43, and not to para 44, the FTT was similarly limiting the applicability of the discovery provisions to Brimheath's case to the condition requiring conduct which had been careless or deliberate.

8. The FTT went on to say, at [5]:

> "Therefore, if HMRC 'discover' income which ought to have but has not been assessed for income or corporation tax they may make an assessment in that amount to make good the loss of tax. If a return has been submitted HMRC may only make an assessment for this purpose if the loss of tax has been brought about as a result of the careless or deliberate action of the taxpayer or a person acting on his or its behalf."

9. Having made these remarks, the FTT did not refer again to the provisions of s 29 or to the FA 1998 provisions. It did however find, at [49], that Mr Burgess had not made returns for the relevant tax years. It referred, at [31], to the evidence of Mr Murphy, the HMRC officer who had made the discovery assessments, to the effect that Mr Murphy had concluded that the omission of profits had been deliberate, and at [34] to the submission for HMRC that Mr Burgess' failure to file self assessment returns for the relevant periods had been deliberate. No similar submission in relation to Brimheath is recorded. Nor does the FTT refer to any submission on the part of Mr Burgess or Brimheath that their conduct was not deliberate.

10. The FTT made no express findings on the competence issue, namely whether the conditions of s 29 or Sch 18, paras 41–43 were satisfied. It made no express finding that the conduct of either Mr Burgess or Brimheath was deliberate or careless. It did not address at all the time limit issue.

11. The FTT addressed the question of the burden of proof by reference to the provisions of s 50(6) TMA, which provides that if, on an appeal, it appears to the tribunal that an appellant is overcharged by an assessment the assessment shall be reduced, but that "otherwise the assessment … shall stand good", and a number of authorities, *Johnson v Scott* 52 TC 383, *T Haythornthwaite & Sons v Kelly* 11 TC 657 and *Moschi v Kelly* 33 TC 442. On that basis, it introduced its own discussion of the issues, at [41], by directing itself that the onus was on Mr Burgess and Brimheath to displace the assessments on them. It is common ground in this appeal that the issues in question were the substantive issues whether, in the case of each of Mr Burgess and Brimheath, there had been under-declarations of profits.

12. The FTT summarised its findings in the following way (at [49]):

> "In the circumstances, given the unreliable and inconsistent evidence adduced by and on behalf of Mr Burgess and Brimheath, we find that

> Mr Burgess has not discharged the burden of proof that he did submit returns for the years 1996-97 to 1999-00; and that the unidentified lodgements into Mrs Bather's bank account were unrecorded trading income as was the source of funds in the safety deposit box and that Brimheath has not discharged the burden of proof in relation to the assessments made on it."

13. The FTT concluded, at [50], that there were grounds on which HMRC could base the assessments on Mr Burgess and that the evidence adduced by and on his behalf was insufficient to displace the assessments raised against him. Likewise, in relation to Brimheath and the assessments for 2001 to 2008, the FTT found, at [52], that the evidence was insufficient to displace those assessments.

This appeal

14. Permission to appeal was given by the FTT (Judge Kempster). The grounds can essentially be summarised as follows:

(1) The FTT made an error of law in approaching the case throughout on the basis that the burden of proof fell on the taxpayers. The burden of proof in relation to the competence issue lay on HMRC.

(2) The FTT made an error of law in confirming the assessments without considering at all the time limit issue, and without regard to the burden of proof in that respect, which lay on HMRC.

(3) To the extent that HMRC alleged fraudulent conduct, the FTT made an error of law in failing to refer to the rule that for an allegation of fraud to be proved it requires cogent evidence commensurate with the seriousness of the alleged conduct.

(4) The FTT appeared to have accepted the argument of HMRC that even if nil returns had been submitted by Mr Burgess (which HMRC had admitted was a possibility), the position was the same as if no returns had been submitted. This was an error of law, since if returns were made, one of the relevant conditions of s 29(4) or (5) TMA would require to have been met. The burden of proof in that respect lay on HMRC.

(5) There was a procedural error, such that the appellants did not receive a fair hearing, in that despite their alleging conduct that could only realistically be considered to be an allegation of fraud, and despite fraudulent conduct being an essential element of HMRC's case on time limits, HMRC was not required to open their case and call their evidence first.

Legislation

15. We do not consider it necessary to burden this decision with extensive reference to the terms of statutory provisions we have referred to. They are however, for convenience, set out in the Appendix.

Issues in this appeal

16. Mr McDonnell put his case in the alternative. Either the FTT did not deal at all with the competence and time limit issues, or if it could be inferred that it had done so the conclusions reached were made on the basis of applying the burden of proof wrongly. In either case, he submitted, the FTT made an error of law.

17. In our judgment the question on these appeals resolves itself into whether, by omitting to address those issues, the FTT erred in law. We are satisfied that the FTT did not deal with competence and time limits. Although the FTT referred to s 29 TMA and the corresponding provisions of FA 1998, and noted the relevant conditions that required to be met, it cannot be inferred simply from the FTT having confirmed the assessments that it had accepted that those conditions had been satisfied. Confirmation of the assessments is the appropriate course for a tribunal on dismissing an appeal whether or not the validity of the assessment is in issue. No such inference is therefore possible.

18. That applies even more clearly in the case of the time limit issue, where the FTT did not refer to that issue at all.

19. HMRC did not argue that the competence and time limit issues were raised before the FTT, and that the FTT simply failed to make relevant findings. Ms Poots for HMRC submitted that it was for the appellants to determine the basis on which they wished to challenge the assessments, and that burden of proof became relevant only to the extent that a relevant issue had been raised by the appellants. HMRC's understanding was that there was no challenge on competence or time limits, but that the challenge was confined to the substantive issue whether, and to what extent, there had been an under-declaration of profits by each of Mr Burgess and Brimheath. Mr McDonnell, by contrast, argued that it was clear that the appellants had made such a challenge, which had not been waived or conceded; that being the case then it was for HMRC, on whom the burden of proof lay, to make their case to the FTT on the competence and time limit issues.

The parties' cases before the FTT

20. Mr Burgess made his appeal on 7 June 2012. His grounds for appeal focused on the alleged absence of returns made by him. The grounds referred to a letter dated 12 May 2011 in which HMRC had stated their view, based on their self assessment records, that Mr Burgess had not at any time disclosed income or profits from his trade from its commencement in October 1990 to its cessation in 1999. The appeal stated that this was not the case, and that there was credible evidence to the contrary.

21. Brimheath's appeal was also made on 7 June 2012. The company disputed the assessments by HMRC on the basis that accounts had been prepared and filed and corporation tax paid, that there was a full audit trail and that HMRC were wrong to base assessments on cash held in a safety deposit box.

22. HMRC served their statement of case covering both appeals on 16 October 2012. The statement referred to the assessments as discovery assessments,

respectively under s 29 TMA and para 41, Sch 18 FA 1998. It set out the issues to be determined as follows:

> "(a) Michael Burgess, trading as M J Bradley's failed to return the full profits arising for periods up to cessation of trading in 1999;
>
> (b) Brimheath failed to return the full profits arising from trading in the periods up to 30 November 2008."

23. Under the heading "The onus of proof", HMRC submitted that it was the appellants who bore the burden of proof of showing that they were wrongly assessed to tax in the years of the assessments under appeal, and that the standard of proof was the ordinary civil standard of the balance of probabilities.

24. After setting out the background to the case, which included a brief description of the underlying facts concerning the trading activities in question, but no reference to the making of the assessments, the legislation was set out. This comprised s 29(1), (3) and (4) TMA, and s 36(1A) TMA, and paras 41 – 43 and 46, Sch 18 FA 1998.

25. HMRC's contentions were set out, including the contention that the conclusions reached by HMRC following their review of the evidence obtained during the course of their enquiries were discoveries of insufficiencies within s 29 TMA and para 41, Sch 18 FA 1998. HMRC's case also included the contention that the omission of significant sums from the business records meant that the insufficiencies were brought about deliberately by Mr Burgess and Mr Brimheath. This, it was argued in the statement of case, entitled HMRC to raise assessments on both Mr Burgess and Brimheath for the periods assessed, under s 36 TMA and para 46, Sch 18 FA 1998 respectively.

26. The statement also included the following paragraph with regard to the competence and time limit issues:

> "There has been no appeal on the ground that the discovery assessments under s 29 TMA and paragraph 41 Sch 18 were not competent, and therefore the Respondents consider that the assessments are competent unless the Appellants can show that the sums assessed are not unrecorded business receipts."

27. The hearing before the FTT took place on 8 and 9 August 2013 and on 13 and 14 February 2014. On or about 1 July 2013, HMRC served and filed a skeleton argument in which they reiterated the issues they considered to be before the FTT, and the burden and standard of proof, and repeated the legislation they had set out in the statement of case with the addition of s 7 TMA dealing with the requirement for a person chargeable to tax to give notice of chargeability. Various authorities were cited concerning the burden of proof on the substantive issues.

28. HMRC's contentions, as set out in their skeleton argument, may be summarised as follows:

> (1) No self assessment returns were made by Mr Burgess for the relevant tax years. Alternatively, if such returns were made, they showed no source of

profits or losses from trading. In either event, the profits arising from the business known as M J Bradley's were not returned for the tax years 1996-97 to the cessation of trade. If returns were made, they were incorrect. For years where no returns were issued to Mr Burgess, it was contended that for years when he had continued to trade there had been a failure to notify chargeability under s 7 TMA.

(2) The omission of profits was deliberate on the part of Mr Burgess.

(3) In relation to the cash of £97,970 placed into a safety deposit box by Mr Burgess, the source of those funds was unrecorded takings by Brimheath.

(4) The understatement of profits by Brimheath was deliberate.

29. The skeleton argument set out further argument in relation to HMRC's case concerning both appeals. In relation to Mr Burgess, this included argument in relation to the asserted absence of Mr Burgess' self assessment returns. HMRC elaborated on their case by setting out an explanation of the fact that their records showed that nil returns had been processed for 1996-97 and 1997-98. That did not mean, according to HMRC's argument, that Mr Burgess had submitted self assessment returns with no income or profits for the years in question. Nil returns had been processed for administrative purposes only to avoid certain computer-generated debts being pursued incorrectly.

30. In relation to Mr Burgess, the skeleton argument argued that the failure to return profits was deliberate, and not the result of carelessness. It was an intentional failure to return the profits and not inadvertent. Similarly, in relation to Brimheath, it was argued that the sales of Brimheath were deliberately understated because Mr Burgess drew unrecorded cash from the business. It was contended that this was a deliberate act on his part, as a director of the company.

31. The appellants served and filed two skeleton arguments covering their two appeals. The first was on 7 August 2013. So far as material, as well as refuting HMRC's statement of case in its entirety, that skeleton argument included the following:

(1) It was asserted that accounts and returns in relation to Mr Burgess' trading activities had been filed, and that credible evidence would be produced to that effect.

(2) It was denied that the omission of profits by Mr Burgess had been deliberate.

(3) HMRC's assertion that the cash from the safety deposit box resulted from unrecorded takings was challenged.

(4) It was denied that the turnover of Brimheath was understated and that this was a deliberate act of Brimheath or Mr Burgess.

32. The second of the appellants' skeleton arguments was served and filed on 21 January 2014, that is to say between the two hearing sessions. The second skeleton argument followed disclosure by HMRC, as directed by the FTT at the August 2013

hearing, of redacted copies of papers (described as a police report) which had been obtained by HMRC from the Metropolitan Police regarding the police enquiries into the contents of the safety deposit box (Operation Rize). The skeleton amplified the appellants' submissions on the facts, including the continuing submission that relevant returns had been made by Mr Burgess. It was also further denied that the turnover of Brimheath had been understated and that this was a deliberate act of Mr Burgess and Brimheath.

Discussion

33. It is clear from HMRC's statement of case that at that stage, although HMRC themselves were keenly aware of the need to demonstrate that the assessments had properly been made by reference both to s 29 TMA and the FA 1998 provisions, and the time limits in s 36(1A) TMA and para 46, Sch 18 FA 1998, HMRC's own understanding, from the way in which the appellants had set out their respective grounds of appeal, was that only the substantive issues required to be determined in each case by the FTT. The competence and time limit issues had been laid out, and HMRC's understanding that these were not considered to be separately in issue had been expressed.

34. Ms Poots submitted that it is for an appellant to decide the basis upon which a challenge to an assessment is to be made by way of an appeal. In support of that argument she referred us to *Hargreaves v Revenue and Customs Commissioners* [2014] UKUT 0395, a case in this tribunal which concerned the question whether the competence of HMRC to make a discovery assessment should be heard as a preliminary issue.

35. In the course of his analysis, Nugee J addressed the question of the disadvantage caused to Mr Hargreaves by a single hearing of the competence issue and the substantive issue in that case because he would be required to call evidence if he wished to maintain his substantive case, whereas if the competence issue were heard separately, HMRC would have to make that case, and Mr Hargreaves could then elect to call no evidence on the competence issue. He said (at [29]):

> "… Mr Hargreaves could by abandoning any attempt to establish that he was in fact resident outside the UK in the years in question confine the issues to the competence issue. Then (assuming he also abandoned the s. 29(2) ground) HMRC would go first and he could call no evidence if he wanted to. But if he wishes, as he evidently does, to appeal not only on the competence issue but also on the substantive issue on which the burden lies on him, he is obliged in practice to call his evidence to establish the substantive ground. (The practice of requiring the taxpayer to assume the burden of challenging an assessment to income tax as too high is apparently of very long-standing and was explained by Atkinson J in the *Dixon & Gaunt* case at 293 as being justified by the 'very good reason' that 'otherwise the taxpayer would only have to keep no books, no banking account, insist on being paid in Treasury notes, and no one living could ever prove what his income was or establish any liability to Income Tax'). This

> does not subvert the burden of proof on the s. 29(4) and 29(5) issues or infringe his right to call no evidence: it is just the ordinary consequence of bringing a case in which the burden on some issues lies on him and in which it is therefore unlikely to be advantageous to him to exercise the right."

36. In our judgment, *Hargreaves* cannot be relied upon for a general proposition that the scope of an appeal must be conclusively determined by reference to the case put by an appellant. The scope of an appeal, and the issues that fall to be determined by the FTT, must be established by reference to all the circumstances. Those circumstances will include, in our view, the legislative framework, the burden of proof in relation to relevant issues and the way in which the respective cases of the parties have been put.

37. In relation to the legislative framework, it is the case that, both in relation to discovery assessments and time limits, objections to the making of an assessment may only be made on an appeal against the assessment. This is expressly provided in s 29(8) TMA and para 42(3), Sch 18 FA 1998 (discovery assessments) and s 34(2) TMA and para 46(3), Sch 18 FA 1998 (time limits). We do not construe those provisions, however, as mandating that, for competence or time limits to be in issue, an appellant is required to make an express objection or challenge to the validity of the making of an assessment. We agree with Mr McDonnell that those provisions are properly to be understood as confining the forum for such disputes to an appeal before the tribunal. They do not prescribe the manner in which such issues may be brought before the tribunal.

38. There was no dispute on the burden of proof as regards any issue. It was common ground that the burden of proof on the substantive issues had, as the FTT had described, rested on the appellants. It was also accepted that, in relation to each of the competence and time limit issues relevant to these appeals, the burden of proof rested with HMRC. We were referred, in relation to discovery assessments, to *Revenue and Customs Commissioners v Household Estate Agents Limited* [2008] STC 2045, where the position (by reference to the Sch 18, FA 1998 provisions, but which is accepted as being equally applicable to s 29 TMA) was summarised by Henderson J in the following way (at [48]):

> "… it seems to me that the burden of establishing that paras 43 or 44 apply must rest on HMRC, because in the absence of any evidence of fraud or negligent conduct (para 43), or of material to satisfy the test of objective non-awareness (para 44), there would be no basis for a conclusion that either of those paragraphs applied, and nothing to displace the general rule that discovery assessments may not be made. I would add, however, that in relation to para 44 the question is unlikely to be of much practical significance, because the nature of the enquiry is an objective one and the return and accompanying documents which have been submitted to HMRC should always be available. So cases where there is no evidence, or where the commissioners are unable to reach a conclusion without recourse to the burden of proof, should be rare if not non-existent. With regard to para 43, placing the burden upon HMRC would accord with the long-

> established general rule, before self-assessment, that the Revenue had to establish fraud or wilful default in order to make an assessment outside the normal six year time limit: see for example *Hudson v Humbles (Inspector of Taxes)* (1965) 42 TC 380 at 384 and *Brady (Inspector of Taxes) v Group Lotus Car Companies plc* [1987] STC 635 at 639, 60 TC 359 at 386 per Dillon LJ."

39. Ms Poots argued that, wherever the burden of proof might lie, it was not for HMRC to put their case on a matter which had not been put into issue. She argued that to require HMRC to make a case by reference to s 29(4) or (5) TMA, or the corresponding FA 1998 provisions, irrespective of whether an appellant had put the matter into issue, would go against the reasoning of the Court of Appeal in *Hankinson v Revenue and Customs Commissioners* [2012] STC 485, where it was held that HMRC was under no obligation to consider, at the time of making the assessment, whether the conditions in s 29(4) or (5) had been met, and that consequently a failure to consider those matters at that stage did not render the assessments unlawful.

40. We do not consider that *Hankinson* can be relied upon to that effect. It was dealing with a very different issue to that arising on these appeals. The fact that a discovery assessment may not be invalidated merely on the ground that at the time the assessment was made the HMRC officer had not considered the application of s 29(4) or (5) TMA says nothing about the question of responsibility for raising an issue, or proving a party's case, in the circumstances of these appeals.

41. We were not referred to any authority on the meaning of burden of proof, but that is so well-established as to be uncontroversial. According to *Phipson on Evidence* (18th edition), at 6-01, that expression is used to describe the duty which lies on a party either to establish a case or to establish the facts upon a particular issue. At 6-03, *Phipson* says that one effect of the burden of proof is that if the party bearing the burden has not pleaded a positive case, the other party need not plead and prove that alternative states of affairs do not exist. The case of *Seashore Marine SA v Phoenix Assurance Plc (The Vergina) (No.1)* [2001] 2 Lloyd's Rep 719 is cited as authority for that proposition.

42. Although Mr McDonnell took us to *Rhesa Shipping Co SA v Edmunds and another* [1985] 1 WLR 950 to demonstrate that in cases of doubt the consequence could be that the party with the burden of proof had failed to discharge that burden, that case is in this context more instructive as to the nature of the respective cases that each party can be expected to make. Thus, Lord Brandon in the House of Lords, with whom the other law lords agreed, said (at p 951):

> "… the burden of proving, on the balance of probabilities, that the ship was lost by perils of the sea, is and remains throughout on the shipowners. Although it is open to underwriters to suggest and seek to prove some other cause of loss, against which the ship was not insured, there is no obligation on them to do so. Moreover, if they choose to do so, there is no obligation on them to prove, even on a balance of probabilities, the truth of their alternative case."

43. In this case, therefore, HMRC had the duty of establishing their case on both the competence and time limit issues. The burden of proof lay on them in each of those respects. There was no obligation on the part of Mr Burgess or Brimheath to raise those issues. As Henderson J said in *Household Estate Agents*, in the absence of relevant evidence there is nothing to displace the general rule that discovery assessments (and we would add assessments outside the normal four-year time limit) may not be made. The provisions of s 50(6) TMA that have the effect that an assessment stands good unless the tribunal decides that an appellant has been overcharged by it, which leads to the burden being on an appellant to displace an assessment that has been validly made, do not affect this general rule as to the validity of the assessment.

44. HMRC did, in their statement of case, make a positive case with respect to both the competence and time limit issues. However, it was not open to them to seek to discharge the burden that lay upon them of proving those cases by purporting to limit the issues before the FTT to the substantive issues. Nor can HMRC's assertion that there had been no appeal made by the appellants on the competence and time limit issues serve to shift the onus of making a positive case onto Mr Burgess or Brimheath. Any concession or waiver by the appellants on those issues would have to have been clearly given, and HMRC could not assume that silence implied any such concession or waiver. It was not incumbent upon the appellants to respond to HMRC's assumption as to what they would, and would not, be required to prove.

45. In fact, of course, the appellants did respond. They challenged, in their first skeleton argument, the assertion by HMRC that the failure on the part of both Mr Burgess and Brimheath to return profits had been deliberate. The nature of that conduct was material only to the questions of competence and time limit. It was not necessary for the appellants to express their challenge as one relating specifically to the competence or time limits issues where the matters disputed amounted in substance to such a challenge. HMRC had not raised carelessness as a basis for making any of the assessments, nor had they argued on any other basis, such as by virtue of s 29(5) TMA or para 44, Sch 18 FA 1998, for the validity of the discovery assessments, or in the case of Mr Burgess that the time limit for the making of the assessments was extended to 20 years because he had failed to notify chargeability to tax; s 7 TMA had been included in HMRC's skeleton argument, but with no reference to a case by reference to s 36(1A)(b). HMRC's case as set out in their statement of case, both as regards competence and time limits, was stated to be based on the deliberate conduct of Mr Burgess and Brimheath, and it was the nature of that conduct which the appellants disputed.

46. Mr Burgess also challenged HMRC's assertion that he had not filed self assessment returns for the relevant periods. Although that assertion formed part of HMRC's substantive case that Mr Burgess had failed to make a self assessment in respect of his profits, it was also relevant to whether it was necessary for one of the conditions of s 29(4) or (5) TMA to be met in order that the discovery assessments in his case could validly be made having regard to s 29(3).

47. Ms Poots argued that the competence and time limit issues are new points of law, not argued by the appellants before the FTT, and that as such the appellants should not be permitted to raise them. She relied upon the principles set out in this respect in *Jones v MBNA International Bank* [2000] EWCA Civ 514, per Peter Gibson LJ at [38]:

> "It is not in dispute that to withdraw a concession or take a point not argued in the lower court requires the leave of this court. In general the court expects each party to advance his whole case at the trial. In the interests of fairness to the other party this court should be slow to allow new points, which were available to be taken at the trial but were not taken, to be advanced for the first time in this court. That consideration is the weightier if further evidence might have been adduced at the trial, had the point been taken then, or if the decision on the point requires an evaluation of all the evidence and could be affected by the impression which the trial judge receives from seeing and hearing the witnesses. Indeed it is hard to see how, if those circumstances obtained, this court, having regard to the overriding objective of dealing with cases justly, could allow that new point to be taken."

48. We are unable to accept, in the circumstances of this case, that either the competence or time limit issues can be regarded as new issues of law within the scope of the *MBNA* principle. Those issues were issues with respect to which HMRC had the burden of proof, and which, for HMRC to succeed, had to form part of HMRC's own case. They were not issues that the appellants had to raise or argue, and cannot therefore be regarded as points not taken by the appellants before the FTT for which permission of this tribunal is now required.

49. For HMRC to succeed before the FTT, either the competence and time limit issues had to be determined in their favour, or those issues had to have been conceded by the appellants. There was no such express concession and, in our judgment, none can be inferred. HMRC were wrong to assume, as it appears from their statement of case that they did, that the absence of reference by the appellants to the competence and time limit issues in their respective grounds of appeal, meant that those issues, on which HMRC's case depended, did not have to be determined in their favour. Those matters formed an essential element of HMRC's case, on which HMRC bore the burden of proof, and which if not proved would fail to displace the general rule that the assessments could not validly have been made. They were wrong too, once the appellants' first skeleton argument had been received, not to have appreciated that, far short of there being any concession on matters relevant to the competence and time limit issues, those matters were clearly the subject of dispute. The assertions on behalf of the appellants that they had not deliberately understated profits may not have been expressed in the form of challenges to the competence and time limit issues, but it should have been clear to HMRC that that was their effect.

50. In those circumstances it is difficult to see why HMRC persisted with its approach of limiting the issues to be determined by the FTT to the substantive issues, and not seeking to prove their case as well on the competence and time limit issues. The result was that, although the FTT referred to the tests (or at least certain elements

of the tests) required to be satisfied in order that discovery assessments could be made in the case of each of Mr Burgess and Brimheath, it made no findings that the assessments had been properly made, either under s 29 TMA or the corresponding FA 1998 provisions. Nor did the FTT refer at all to the conditions required to be satisfied for an assessment to be made outside the normal four-year period, and consequently no findings were made in that respect.

51. It is the case that, in relation to Mr Burgess, the FTT did make a finding on the question of the filing of his tax returns for the relevant periods. The FTT found, at [49], that Mr Burgess had "not discharged the burden of proof that he did submit returns for the years 1996-97 to 1999-00". But in our judgment, agreeing with Mr McDonnell in this respect, that cannot be regarded as a finding that in relation to the discovery assessments for those periods it was not necessary for either of the conditions in s 29(4) or (5) TMA to be met. The FTT made no positive finding that the returns had not been submitted; its finding was confined to the failure of Mr Burgess to discharge the burden of proof. Although it might be the case that the evidential burden in this respect might readily shift from HMRC to the taxpayer once HMRC put forward a case that there was no record of relevant returns having been received by them, the burden of proof as to the validity of the assessments remains with HMRC. A finding on the basis described by the FTT cannot be regarded as a finding that HMRC have discharged that burden.

52. The FTT approached this matter in the way that it did because it was concerned only with the substantive issue, on which it is common ground that the burden of proof lay with the appellants. Its finding on that basis in relation to the filing, or non-filing, of returns by Mr Burgess cannot be treated as a finding on the competence issue in relation to him. Furthermore, even if the FTT's finding in this respect were to be regarded as material to the competence issue, it would remain the case that the assessments, in order to be validly made, would have to have satisfied the terms of s 36(1A) TMA. The FTT made no findings by reference to that provision. Although the FTT referred, at [34], to the submission of HMRC that Mr Burgess' failure to file returns had been deliberate, it did not go on to make such a finding, confining itself instead to the conclusion that Mr Burgess had failed to discharge the burden of proof that he had submitted the returns. Nor, because the issue was not raised, did the FTT concern itself with whether Mr Burgess had given notice of his chargeability to tax under s 7 TMA.

53. In these circumstances we must find that the FTT made an error of law. It is not the case that the FTT simply failed to address an issue that was put before it. Despite the FTT having referred in its decision to s 29 TMA and the corresponding FA 1998 provisions, it is accepted that the only issue put before the FTT in respect of each of the appeals was the substantive issue. The error of law is not that the FTT failed to address a relevant issue. It is that in the absence of a positive case put by HMRC in relation to the competence and time limit issues, the FTT erred in law in not finding that HMRC had failed to discharge the burden of proof in those respects such that the assessments could not be regarded as having been validly made and the appeals must accordingly be allowed.

54. On that basis, we now consider whether, and to what extent, the decision of the FTT should be set aside. In that regard, Ms Poots argued that, if the appeal did not fall to be dismissed, this Tribunal was nonetheless able, on the basis of the findings of the FTT, at least to find that the assessments on Brimheath for the periods ended 30 November 2005 to 2008 were valid. The argument is that the FTT's finding, at [49], that the funds within the safety deposit box and bank account were unrecorded trading income and consequently that Brimheath failed to record trading income received in cash were sufficient to enable this Tribunal to find that Brimheath acted carelessly at least.

55. We do not agree. Although we accept that, in relation to the assessment on Brimheath for those periods, it would have been sufficient for HMRC to have advanced their case, both as respects the competence and time limit issues, on the basis that the loss of tax had been brought about carelessly (see paras 43 and 46(2), Sch 18 FA 1998), no such case was in fact advanced. Furthermore, it is clear that the FTT was approaching all these questions of fact by reference to the substantive issue, where the burden of proof was on the appellants and not, as would have been the case on the competence and time limit issues, on HMRC.

56. This is therefore effectively a new issue which we are being invited by HMRC to permit to be raised for the first time on this appeal. On the basis of *MBNA*, to which we referred earlier, we refuse permission. This was evidently an issue that HMRC could have raised before the FTT, but failed to do so. It is also an issue on which further factual findings, by reference to the applicable burden of proof, would have to be made.

57. Accordingly, we set aside the decision of the FTT. The question then is whether we should remit the appeals to the FTT, and whether to the same or a different panel.

58. We have concluded that this is not a case that can or ought to be remitted. Were the error of law to have consisted of the FTT having failed to make a relevant finding in respect of a case put to it, or an issue before it, we would have remitted it so that such an error could be remedied. But that is not this case. In the absence of HMRC having put a positive case to the FTT on the competence and time limit issues, the only course open to the FTT was to allow the appellants' appeals. In those circumstances, to remit the appeals would allow HMRC to have a second bite of the cherry. That, in our judgment, would not be in the interest of justice and fairness.

59. The result, viewed objectively, may appear unsatisfactory. Each of the appellants has been found by the FTT to have seriously understated their taxable income over an extended period. That taxable income will remain untaxed. It must be recognised, on the other hand, that the assessment system that Parliament has legislated for is designed to provide a balance between HMRC and the taxpayer. Part of that balance is the requirement, in relation to discovery assessments and assessments outside the normal time limits, that HMRC satisfy the FTT that the relevant conditions for those assessments to have been validly made have been met. If HMRC fail to do so, for whatever reason, the fact that a taxpayer might escape tax

that would otherwise have been due is simply the consequence of the operation of a system that provides such a balance. It is not for this tribunal to seek to achieve any result other than that prescribed by the law.

60. Nor should it be thought that our conclusion in this case places any undue burden on HMRC in cases of a similar nature. It is always open to HMRC to seek to clarify an appellant's case, and to seek confirmation whether or not a particular matter is conceded, including where necessary by applying for a direction of the FTT.

Further ground of appeal: fraudulent conduct

61. In view of our decision, we need not address the appellants' arguments that in the circumstances of this case, and having regard to the allegations concerning the appellants' conduct, the FTT failed to refer to the requisite cogency of the evidence and HMRC had not been required before the FTT to open their case and call their evidence first. Those questions do not arise, because, as we have described, the competence and time limit issues, to which those allegations were relevant, were not put to the FTT.

62. It is also unnecessary for us to consider what we regard as peripheral arguments made by Mr McDonnell based on the decision of this tribunal in *Hargreaves*, and the decision giving permission to appeal to the Court of Appeal in that case. We need offer no view on the matters raised in that case, and it would be inappropriate for us to do so.

Decision

63. For the reasons we have given, we allow these appeals. We set aside the decision of the FTT, and reduce the assessments to zero.

ROGER BERNER
TOM SCOTT

UPPER TRIBUNAL JUDGES

RELEASE DATE: 27 October 2015

APPENDIX

The legislation

Section 7(1) TMA

7 Notice of liability to income tax and capital gains tax

(1) Every person who—

(a) is chargeable to income tax or capital gains tax for any year of assessment, and

(b) has not received a notice under section 8 of this Act requiring a return for that year of his total income and chargeable gains,

shall, subject to subsection (3) below, within six months from the end of that year, give notice to an officer of the Board that he is so chargeable.

Section 29 TMA

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; and

(ii) where the return is under section 8 and the taxpayer carries on a trade, profession or business in partnership, a reference to any partnership return with respect to the partnership for the relevant year of assessment or either of those periods; and

(b) any reference in paragraphs (b) to (d) to the taxpayer includes a reference to a person acting on his behalf.

…

(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

(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.

Section 34 TMA

34 Ordinary time limit of 4 years

(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains tax may be made at any time not more than 4 years after the end of the year of assessment to which it relates.

(2) An objection to the making of any assessment on the ground that the time limit for making it has expired shall only be made on an appeal against the assessment.

Section 36 TMA

36 Loss of tax brought about carelessly or deliberately etc

(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).

(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax—

(a) brought about deliberately by the person,

(b) attributable to a failure by the person to comply with an obligation under section 7, or

…

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.

…

Section 50(6) TMA

50 Procedure

…

(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.

Finance Act 2008, Schedule 39 (Appointed Day, Transitional Provision and Savings) Order 2009 (SI 2009/403), para 7

Section 36(1A)(b) and (c) of TMA 1970 (fraudulent and negligent conduct) shall not apply where the year of assessment is 2008-09 or earlier, except where the assessment on the person ("P") is for the purposes of making good to the Crown a loss of tax attributable to P's negligent conduct or the negligent conduct of a person acting on P's behalf.

FA 1998, Sch 18

41—(1) If an officer of Revenue and Customs discovers as regards an accounting period of a company that—

(a) an amount which ought to have been assessed to tax has not been assessed, or

(b) an assessment to tax is or has become insufficient, or

(c) relief has been given which is or has become excessive,

they may make an assessment (a "discovery assessment") in the amount or further amount which ought in their opinion to be charged in order to make good to the Crown the loss of tax.

…

42—(1) The power to make—

(a) a discovery assessment for an accounting period for which the company has delivered a company tax return, or

…

is only exercisable in the circumstances specified in paragraph 43 or 44 and subject to paragraph 45 below.

…

(3) Any objection to a discovery assessment … on the ground that those paragraphs have not been complied with can only be made on an appeal against the assessment ...

…

43—A discovery assessment for an accounting period for which the company has delivered a company tax return, or a discovery determination, may be made if the situation mentioned in paragraph 41(1) or (2) was brought about carelessly or deliberately by—

(a) the company, or

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

...

44—(1) A discovery assessment for an accounting period for which the company has delivered a company tax return, or a discovery determination, may be made if at the time when an officer of Revenue and Customs—

(a) ceased to be entitled to give a notice of enquiry into the return, or

(b) completed their enquiries into the return,

they could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the situation mentioned in paragraph 41(1) or (2).

(2) For this purpose information is regarded as made available to an officer of Revenue and Customs if—

(a) it is contained in a relevant return by the company or in documents accompanying any such return, or

(b) it is contained in a relevant claim made by the company or in any accounts, statements or documents accompanying any such claim, or

(c) it is contained in any documents, accounts or information produced or provided by the company to an officer of Revenue and Customs for the purposes of an enquiry into any such return or claim, or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in paragraph 41(1) or (2)—

(i) could reasonably be expected to be inferred by an officer of Revenue and Customs from information falling within paragraphs (a) to (c) above, or

(ii) are notified in writing to an officer of Revenue and Customs by the company or a person acting on its behalf.

(3) In sub-paragraph (2)—

"relevant return" means the company's company tax return for the period in question or either of the two immediately preceding accounting periods, and

"relevant claim" means a claim made by or on behalf of the company as regards the period in question or an application under section 751A of the Taxes Act 1988 made by or on behalf of the company which affects the company's tax return for the period in question.

…

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

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

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

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

…

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

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

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

...

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