[2017] UKUT 0389 (TCC)

Appeal number: UT/2016/153

CORPORATION TAX – declaration under s.153A TCGA 1992 (business assets roll-over relief) ceasing to have effect – s.153A(4) providing that all necessary adjustments shall be made – whether that provides for a 'freestanding' power – no – whether decision notice by HMRC can be treated as discovery assessment – no – appeal dismissed.

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Appellants**
- and -	
BENHAM (SPECIALIST CARS) LIMITED	**Respondent**

TRIBUNAL: Mr Justice Warren
Judge Colin Bishopp

Sitting in public at the Rolls Building, Fetter Lane, London EC4A 1NL on 19 and 20 June 2017

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

Keith Gordon, instructed by RSM UK Ltd, for the Respondent

DECISION

Introduction

1. This is an appeal against a decision of the First-tier Tribunal (Judge John Walters QC and Ms Caroline de Albuquerque) ("**the FTT**") released on 9 May 2016 ("**the Decision**"). The FTT allowed the appeal of the Respondent, Benham (Specialist Cars) Limited, ("**Benham**") against the decision of the Appellants ("**HMRC**") requiring payment of corporation tax of £622,134 in respect of Benham's accounting period running from 1 January to 31 December 2007 ("**the 2007 Accounting Period**").

The legislation

2. It is helpful, we think, to set out the relevant legislation before turning to the facts. It is found in a combination of the Income and Corporation Taxes Act 1988 ("**ICTA**"), the Taxation of Chargeable Gains Act 1992 ("**TCGA**") and the Finance Act 1998.

3. Section 393(1) ICTA as it stood in respect of the 2007 and 2008 Accounting Periods provided as follows:

> "Where in any accounting period a company carrying on a trade incurs a loss in the trade, the loss shall be set off for the purposes of corporation tax against any trading income from the trade in succeeding accounting periods; and (so long as the company continues to carry on the trade) its trading income from the trade in any succeeding accounting period shall then be treated as reduced by the amount of the loss, or by so much of that amount as cannot, under this subsection or on a claim (if made) under section 393A(1) be relieved against income or profits of an earlier accounting period."

4. Section 393A(1) ICTA provided as follows:

> "…., where in any accounting period ending on or after 1st April 1991 a company carrying on a trade incurs a loss in the trade, then, ……, the company may make a claim requiring that the loss be set off for the purposes of corporation tax against profit (of whatever description) –
>
> (a) of that accounting period, and
>
> (b) if the company was then carrying on the trade and the claim so requires, of preceding accounting periods falling wholly or partly within the period specified in subsection (2) below;

and, subject to that subsection and to any relief for an earlier loss, the profits of any of those accounting periods shall then be treated as reduced by the amount of the loss, or by so much of that amount as cannot be relieved under this subsection against profits of a later accounting period."

Subsection (2) is not material for present purposes.

5. Section 152 TCGA provides for roll-over relief in respect of the replacement of business assets. Subsections (1) and (3) are relevant for present purposes and provide as follows:

"(1) If the consideration which a person carrying on a trade obtains for the disposal of, or of his interest in, assets ('the old assets') used, and used only, for the purposes of the trade throughout the period of ownership is applied by him in acquiring other assets, or an interest in other assets ('the new assets') which on the acquisition are taken into use, and used only, for the purposes of the trade…..then the person carrying on the trade shall, on making a claim as respects the consideration which has been so applied, be treated for the purposes of this Act –

(a) as if the consideration for the disposal of, or of the interest in, the old assets were (if otherwise of a greater amount or value) of such amount as would ensure that on the disposal neither a gain nor a loss accrues to him; and

(b) as if the amount or value of the consideration for the acquisition of, or of the interest in, the new assets were reduced by the excess of the amount or value of the actual consideration for the disposal of, or of the interest in, the old assets over the amount of the consideration which he is treated as receiving under paragraph (a) above,

……..

(3) … this section shall only apply if the acquisition of, or of the interest in, the new assets takes place, or an unconditional contract for the acquisition is entered into, in the period beginning 12 months before and ending 3 years after the disposal of, or of the interest in, the old assets, or at such earlier or later time as the Board may by notice allow."

6. Section 153 CGTA makes provision for roll-over relief where assets are only partly replaced.

7. Section 153A CGTA ("**section 153A**") makes provision for provisional application of section 152. It provides materially as follows:

"(1) This section applies where a person carrying on a trade who for a consideration disposes of, or of his interest in, any assets ('the old assets') declares, in his return for the chargeable period in which the disposal takes place -

(a) that the whole or any specified part of the consideration will be applied in the acquisition of, or of an interest in, other assets ('the new assets') which on the acquisition will be taken into use, and used only, for the purposes of the trade;

(b) that the acquisition will take place as mentioned in subsection (3) of section 152; and

(c) that the new assets will be within the classes listed in section 155

(2) Until the declaration ceases to have effect, section 152 or, as the case may be, section 153 shall apply as if the acquisition had taken place and the person had made a claim under that section.

(3) The declaration shall cease to have effect as follows –

(a) if and to the extent that it is withdrawn before the relevant day, or is superseded before that day by a valid claim made under section 152 or 153, on the day on which it is so withdrawn or superseded; and

(b) if and to the extent that it is not so withdrawn or superseded, on the relevant day.

(4) On the declaration ceasing to have effect in whole or in part, all necessary adjustments –

(a) shall be made by making or amending assessments or by repayment or discharge of tax; and

(b) shall be so made notwithstanding any limitation on the time within which assessments or amendments may be made.

(5) In this section 'the relevant day' means –

(a) in relation to capital gains tax, the third anniversary of the 31st January next following the year of assessment in which the disposal of, or of the interest in, the old assets took place;

(b) in relation to corporation tax, the fourth anniversary of the last day of the accounting period in which that disposal took place."

8. It can be seen that a declaration can be withdrawn at any time or it can be superseded by an actual claim for relief. If it is not withdrawn or superseded by a valid claim, section 153A(5)(b) provides a long-stop date on which the declaration ceases to have effect. When it does cease to have effect, section 153A(4) applies. It is the effect of that subsection which is the central issue in this appeal.

9. Schedule 18 Finance Act 1998 ("**Schedule 18**") made provision for company tax returns, assessments and related matters. We describe the relevant detail of Schedule 18 starting at para 19 below.

The facts

10. The relevant facts are not in dispute. They appear in [4] to [25] of the Decision from which we take the following summary:

    a. At the beginning of the 2007 Accounting Period, Benham had trading losses brought forward under section 393(1) ICTA of £354,535.

    b. During the 2007 Accounting Period, Benham incurred further trading losses, of £1,260,829. Of these losses, £567,893 was utilised in other ways and the balance of £692,936 ("**the 2007 Losses**") was added to the amount of losses brought forward under section 393(1) ICTA, bringing the total amount of those losses to £1,047,471.

    c. Also during the 2007 Accounting Period, Benham realised chargeable gains of £2,766,716 ("**the Gains**") on the disposal of business assets.

    d. Benham made a declaration ("**the Declaration**") in relation to the Gains in its corporation tax return for the 2007 Accounting Period. The Declaration was made under section 153A. As to that section, see paragraph 7 above.

    e. The Declaration had the effect that (subject to the other provisions of section 153A), the Gains were relieved from corporation tax by the operation of roll-over relief for the replacement of business assets. This resulted in no corporation tax being initially payable by Benham in relation to the 2007 Accounting Period.

    f. Benham's tax return for the accounting period running from 1 January to 31 December 2008 ("**the 2008 Accounting Period**") showed trading losses for that period of £1,215,625 ("**the 2008 Losses**"). Of these losses, £7,095 was utilised in other ways, and the balance of £1,208,530 was added to the figure of trading losses carried forward under section 393(1) ICTA, giving a total of £2,256,001 of trading losses brought forward as at 1 January 2009. The FTT noted that these

figures were not formally agreed between the parties, but had been presented to them for ease of reference in the appeal.

g. On 16 November 2011, Benham submitted a tax return for the accounting period ended 31 December 2010. HMRC raised various requests in response to the information included in that return. From the consequential communications between HMRC and Benham's advisers, it became clear to HMRC that the Gains had become chargeable to corporation tax and that Benham was seeking to set off various losses (including the 2008 Losses) against the Gains.

h. The Gains became chargeable, on HMRC's case, because no actual claim for roll-over relief for the replacement of business assets was made (under section 152 or section 153 TCGA). The FTT said that this was presumably because no "new assets" within the classes listed in section 155 TCGA were acquired by Benham within the applicable time limit, which expired on or before 31 December 2010.

i. On 6 November 2013, HMRC wrote to Benham's representatives noting that there was no acquisition of new assets before 31 December 2010 "and, in accordance with S153A(4A) TCGA 1992 [the FTT noted that presumably section 153A(4)(a) was meant], an assessment will now be made for £830,014.80 being the amount of tax unpaid in respect of the gain on the original disposal".

j. On 7 November 2013, HMRC issued to Benham a document on form CT620 AMD headed "Corporation Tax – Amendment to a company tax return" in the top right corner of the form, which purported to show amendments made to the figures, including the tax payable, on the company tax return made for the 2007 Accounting Period. The amendments showed tax payable of £963,610.87, £830,014.80 of which was referable to the inclusion of the Gains in the computation of taxable profits. The document included the following statement:

> "This notice shows the amendments I have made to the figures, including the tax payable, on the company tax return. For more information please read the 'Amendment of return' section in the enclosed *CT620 Notes*."

k. That document ("**the Disputed Decision**") was accompanied by an HMRC document headed "Notes for forms CT620" which starts with the following explanation:

"**What these Notes cover**

These Notes cover the various types of acknowledgment, notice, assessment, determination or claims we issue on forms CT620. The description in the top right corner of the form will tell you which heading to look for on the following pages. For example, if you have received an *Acknowledgement of a company tax return*, you will find information under 'Acknowledgement – CT620 ACK'. Please read the notes for the form you have received."

l. The relevant section in the Notes is headed "Amendment of return – CT620 AMD" and provides as follows (there is also a section "Assessment – CT620 DIS" which deals with discovery assessments):

"**Amendment of return – CT620 AMD**

Please read this note if your form is headed *Amendment to a company tax return*.
This notice shows our revised figures and calculations and any amount payable or overpaid.

Please pay any amount due. We charge interest on any amount of tax unpaid by the normal due date(s) for payment. See 'Payment of Tax' on page 3.

If you do not agree with the figures you can appeal against the notice within 30 days of the amendment being notified to the company. You should address your appeal to the officer who issued the notice of amendment."

m. Benham appealed and, following a review of the Disputed Decision, HMRC, in a letter dated 10 April 2014 to Benham, informed Benham that the tax said to be payable would be reduced to £622,134 following their agreement that the 2007 Losses could be set off against the Gains "under the s393A(1)(a) ICTA 1988 claim made in the original return". This is a reference to the claim made under section 393A(1)(a) ICTA in Benham's corporation tax return for the 2007 Accounting Period to utilise trading losses incurred in the 2007 Accounting Period to set off against non-trade loan relationship income of £22,408 in the 2007 Accounting Period. (These were part of the losses of £567,893 referred to in paragraph b. above.) HMRC's Review Officer (Mr Gerald Beane) explained in the letter that:

"a company cannot restrict the claim [under section 393A ICTA] to cover only particular items of income or gains and there is nothing in the legislation which restricts a claim to the amount of profit it can be set against at the point when the claim is made, or up until the point when the normal time limit to make a claim expired. It merely states that where there is a claim the loss will

be set against the company's profits of that accounting period. Here there was a s393A(1)(a) claim made in time, profits have been increased by the amendment and therefore the available losses can be set off against them."

n. The corporation tax of £622,134, said to be payable in respect of the 2007 Accounting Period had been calculated by including the Gains in the chargeable profits for the 2007 Accounting Period, but not allowing the 2008 Losses to be set against the Gains.

The opposing positions

11. Benham's case before the FTT was (as recorded in paragraph 23 of the Decision) that on the Declaration ceasing to have effect (on 31 December 2011) the correct course for HMRC to have taken would have been to raise a discovery assessment under paragraph 41, Schedule 18 – which gives power to make an assessment to make good a loss of tax where an officer of HMRC discovers that relief has been given which is or has become excessive (paragraph 41(1)(c), Schedule 18). Mr Gordon, for Benham, argued that this would have given Benham the opportunity to make a consequential claim under paragraph 62, Schedule 18 (within one year from the end of the accounting period in which the assessment was made) to carry back sufficient of the 2008 Losses to set against the Gains to reduce the consequent corporation tax liability for the 2007 Accounting Period to nil. That remains Benham's position before us.
12. In the absence of a discovery assessment, Benham's representative made what its advisers called a 'protective consequential claim' on 24 October 2014 in respect of the 2007 Accounting Period. That claim purported to be made under the provisions of paragraphs 61 to 64, Schedule 18 and sought to carry back losses of £1,208,530 from the 2008 Accounting Period "to partially cover the liability arising for [the 2007 Accounting Period] as a result of HMRC Revenue Amendment dated 7 November 2013". It stated that the claim was made notwithstanding and without prejudice to Benham's position that there was not as yet an assessment under paragraph 41 Schedule 18, but that it was made in order to comply with the 12 month time limit in paragraph 62 Schedule 18 – the time limit for consequential claims given by paragraph 62(1)(a) Schedule 18. The claim was acknowledged by HMRC on 3 November 2014, who stated that, in the event that the Tribunal were to find that such a claim was admissible, then it was agreed that it had been made in time.

13. HMRC's position before the FTT was that section 153A(4) provides a "freestanding" power for HMRC to make or amend an assessment, without reference to any other assessing provision. Their position was that an assessment or amendment under section 153A(4) is not within the categories of amendments or assessments in relation to which a consequential claim under paragraph 62 Schedule 18 can be made, reference being made to paragraph 61(1) Schedule 18. In particular, such an assessment or amendment is not a discovery assessment within paragraph 61(1)(b). The Disputed Decision was made pursuant to this freestanding power.
14. It is not, and never has been, HMRC's position that Benham had no right to set the 2008 Losses against the Gain. As the FTT records at [11] of the Decision, if Benham had made a claim after 31 December 2008 under section 393A ICTA, HMRC accept that it would have been entitled to set the 2008 Losses against the Gains. They accept that section 393A(1) ICTA provided (in the context of this appeal) for a claim to be made to set off trading losses against profits (of whatever description – which would include chargeable gains) of the accounting period in which the trading loss was incurred and of a preceding accounting period falling wholly or partly within the period of 12 months immediately preceding that accounting period. But they contend that the ordinary time limit for making a claim under section 393A(1) ICTA applied: that period expired on the second anniversary of the end of the accounting period in which the loss concerned was incurred – that is to say, in relation to the 2008 Losses, on 31 December 2010 (see section 393A(10) ICTA). It was therefore open to Benham to make an in-time claim. It remains HMRC's position that they accept that Benham would have been entitled to set the 2008 Losses against the Gains if only a claim had been made in time.

The Decision

15. In the light of facts identified by it and its observations on the legislation, the FTT set out 6 agreed issues for it to determine – Issues A to F set out in [26] of the Decision. For the purposes of the present appeal, the dispute can, as Ms Poots suggests, be distilled into three broad issues:
    i. **Issue 1**: Does section 153A(4) provide a freestanding right for HMRC to make or amend an assessment in order to bring the Gains into charge?
    ii. **Issue 2**: If not, and the only assessment power available to HMRC here was the discovery assessment power, does the Disputed Decision amount to a discovery assessment?

iii. **Issue 3**: Whatever the nature of the Disputed Decision, is Benham entitled to make a claim for relief in respect of the 2008 Losses, outside the time limit imposed by section 393A(10) ICTA?

16. The FTT concluded that section 153A(4) does not provide a freestanding power for HMRC to make or amend an assessment: see Decision [44] to [58]. It also concluded that the Disputed Decision was an amendment and not an assessment: see Decision [39] and [66]. HMRC had power to make a discovery assessment and still have such power, but the Disputed Decision could not be treated as such an assessment: see Decision [42], [60] to [63] and [68]. It made no decision about the time-limit issue in the light of its decision on Issues 1 and 2: see Decision [65].
17. HMRC's position on Issue 1 before us remains as it was before the FTT, that is:
    i. section 153A(4) provides a freestanding power for HMRC to make or amend an assessment and the Disputed Decision was made using this power.
    ii. If that is wrong, then on Issue 2 the only power available to HMRC to make the necessary adjustments was the power to make a discovery assessment. The Disputed Decision should be taken to be such an assessment.
    iii. On Issue 3, Benham is not entitled to make a claim for relief in the respect of the 2008 Losses outside the time-limit imposed by section 393A(10) ICTA. Benham did not make a claim within that time limit.
18. Benham's position before us also remains as it was before the FTT. It is, equally briefly, as follows:
    i. On Issue 1, section 153A(4) describes what is to be done – namely the making of adjustments in one of the four ways specified – but does not itself confer any power. The power to make or amend an assessment must be found in other provisions on the legislation, in particular in Schedule 18.
    ii. On Issue, 2, the Disputed Decision cannot be treated as a discovery assessment.
    iii. On Issue 3, Benham is entitled to make a consequential claim under paragraph 62 Schedule 18.

Schedule 18

19. Before addressing the rival submissions, we need to say something more about the material provisions of Schedule 18.
20. Schedule 18 contains a code dealing with company tax returns, assessments and related matters. It was introduced by section 117 Finance Act 1998 and, so far as concerns

corporation tax, replaces (among other provisions) the provisions of parts II and IV of the Taxes Management Act 1970 ("**TMA**") (which parts dealt with returns, assessments and claims); it is to be construed as if it were contained in that Act.

21. Paragraphs 3 to 6 are concerned with the making of returns and the periods for which they must be made. A "company tax return" is the return which a company is required to make under paragraph 3. Paragraph 7 requires every return for an accounting period to include an assessment (a "self-assessment") of the amount of tax which is payable for that period "taking into account any relief or allowance for which a claim is included in the return of which is required to be given in relation to that accounting period". Some claims cannot be made without a return having been made (see paragraph 9) and some claims can only be made in a return (see paragraphs 10 and 57 to 59).
22. Paragraph 15 makes provision for the amendment by a company of its company tax return by notice. Ordinarily, the time limit for making an amendment is 12 months after the filing date.
23. Paragraph 16 makes provision for an amendment of a company tax return by an officer of HMRC so as to correct (a) obvious errors or omissions and (b) anything else in the return that the officer has reason to believe is incorrect in the light of information available to the officer. A correction cannot be made under this power more than 9 months after (a) the day on which the return was delivered or (b) where an amendment is made under paragraph 15 by the company, the day on which the amendment was made.
24. Paragraph 30 is a provision designed to protect HMRC where notice of any enquiry has been given and, before the enquiry is complete, an officer of HMRC forms the opinion that (a) the amount stated in the company's self-assessment is insufficient and (b) unless the assessment is immediately amended there is likely to be a loss of tax. The self-assessment may then be amended by the officer to make good the deficiency. An appeal may be brought against an amendment under this paragraph.

25. Paragraph 34 makes provision for the amendment of a return after an enquiry. The end of the enquiry will result in a closure notice. The closure notice must make any amendment of the return which is required to give effect to the conclusions stated in the notice. The company has a right of appeal against the amendment.

26. Paragraph 41(1) applies where an officer of HMRC discovers as regards an accounting period that an amount which ought to have been assessed to tax has not been assessed or

an assessment has become insufficient or relief has been given which is or has become excessive. The officer may make an assessment (a "discovery assessment") to make good the loss of tax.

27. The power to make a discovery assessment is restricted by paragraph 42 and is only exercisable in the circumstances set out in paragraphs 43 or 44.

28. Paragraph 43 permits a discovery assessment to be made where the situation mentioned in paragraph 41(1) (resulting in the loss of tax) has been brought about carelessly or deliberately by the company (or certain other persons not relevant in the present case). Paragraph 44 permits a discovery assessment to be made if at a time when an officer of HMRC ceased to be entitled to give notice of an enquiry into the return (as to which see paragraph 24), the officer could not have been reasonably expected, on the basis of the information made available before that time, to be aware of the situation mentioned in paragraph 41(1).

29. Paragraph 47 is concerned with assessment procedure. Notice of an assessment to tax must be served on the company stating (a) the date of which the notice is issued and (b) the time within which any appeal against the assessment may be made.

30. Paragraph 48 provides a right of appeal against any assessment (including a discovery assessment) which is not a self-assessment.

31. Paragraph 51 deals with claims for relief for overpaid tax or excessive assessments.

32. Paragraph 55 imposes a general time limit for making claims; it is normally 4 years from the end of the accounting period to which it relates

33. Paragraph 62 deals with the consequential claims, and is of some importance. The material parts are as follows:

> "(1) A claim, election, application or notice to which this paragraph applies—
>
> (a) may be made or given at any time within one year from the end of the relevant accounting period, or
>
> (b) if previously made or given may at any such time be revoked or varied–
>
> (i) in the same manner as it was made or given, and

(ii) by or with the consent of the same person or persons who made, gave or consented to it (or, if a person has died, by or with the consent of his personal representatives),

unless, by virtue of any enactment, it is irrevocable.

(2) This paragraph applies to a claim, election, application or notice—

(a) relating to the accounting period in respect of which the amendment or assessment is made, or
(b) made or given by reference to an event occurring in that period,

whose making, giving, revocation or variation has or could have the effect of reducing a relevant liability of the company.

(3) The following are relevant liabilities of the company for this purpose—

(a) the increased liability to tax resulting from the amendment or assessment;

(b) any other liability to tax of the company–
(i) for the accounting period to which the amendment or assessment relates, or

(ii) for any subsequent accounting period ending not later than one year after the end of the relevant accounting period.

(4) Where a claim, election, application or notice is made, given, revoked or varied by virtue of this paragraph, all such adjustments shall be made, whether by way of discharge or repayment of tax or the making of amendments, assessments or otherwise, as are required to take account of the effect of the taking of that action on any person's liability to tax for any chargeable period."

Issue 1

34. Before embarking on a discussion of Issue 1, we wish to comment briefly on how roll-over relief would apply in the absence of a declaration under section 153A. Suppose a company realises a gain in year 01 and also replaces the asset in year 01, becoming entitled to full relief under section 152. The company tax return for year 01 (submitted in year 02) would reflect this relief, with the disposal of the asset being on a no gain/no loss basis. Likewise, the self-assessment in that return would reflect the absence of any chargeable gain on the disposal. Now suppose that the asset is not replaced until year 03 (within the period allowed by section 152(3)). The return for year 01, and the self-assessment, will have reflected the gain and the consequential tax payable. Having replaced the asset in year 03, the company is entitled to make a claim under section 152. This is a freestanding claim under Schedule 1A TMA which entitles the company to repayment of overpaid tax. There is no question of amendment of any assessment being

required in order for the company to assert its claim. Having said that, we do not see why an amendment to the company's tax return for year 01 should not be made to reflect the claim if such an amendment can be made within the time limit set out in paragraph 15(4) of Schedule 18 (that is within 12 months of the filing date as defined in paragraph 14).

35. Turning to Issue 1, it is common ground that the Declaration ceased to have effect on the longstop date, 31 December 2011. Section 153A(4) was therefore engaged and required "all necessary adjustments" to be made. Those adjustments "shall be made by making or amending assessments or by repayment or discharge of tax" (with the ordinary time limits for making or amending assessments being inapplicable). The objective of this provision is clearly that a taxpayer should ultimately be liable for the same amount of tax as if the declaration had not been made in the first place. Thus, if provisional relief is given and a valid claim for roll-over relief is subsequently made, no adjustment should be necessary. In contrast, if no such claim is made, the taxpayer should, in principle, be liable for corporation tax on the gain which had been provisionally relieved from charge. It is a separate question, to which we will turn later, whether the necessary adjustments should reflect a claim for relief under section 393A which the taxpayer could have made if it had not made a declaration under section 153A.
36. HMRC's case is that section 154A(4)(a) itself confers the power to make the necessary adjustment by making an appropriate assessment or by amending an existing assessment. They contend that it is unnecessary to refer to any other provisions: the language of the provision gives HMRC the powers to make adjustments to remove the provisional relief. Further, as a matter of principle, HMRC should be free to make the necessary adjustments without meeting further conditions. If reference was needed to other statutory powers, this would impose conditions which are not envisaged by section 153A(4).
37. Benham's case is that the power to make an assessment or amendment is not contained in section 153A itself. Instead, reference must be made to the powers which are to be found in Schedule 18. In practice this means that HMRC must make a discovery assessment. They have no power to amend Benham's company tax return or the self-assessment contained within that return. We would add that we see no reason why a taxpayer should not itself, if it is in time to do so, amend its company tax return and the self-assessment in such a return.
38. The FTT concluded that reference must be made to the powers found in Schedule 18 in order to give effect to the various methods of making the necessary adjustments. This means that HMRC must make a discovery assessment or amend a return. This latter

course in practice means making an amendment upon closing an enquiry into a return. No enquiry has even been opened, let alone closed, in the present case.

39. The FTT considered (see Decision [56]) that section 153A "provides, at a high level, for the mechanics by which the adjustments are to be made" and that this "necessarily implies that the detailed rules in Schedule 18, FA 1998 for making or amending assessments are to apply". In essence, it accepted Mr Gordon's submission (see Decision [47]) that the disapplication of the time-limits for making assessment and amendments by section 153A(4) means that the subsection should be read subject to an implication that any assessment or amendments are made under powers which in a case outside section 153A would be subject to time limits on their exercise.
40. The FTT also agreed with Mr Gordon's submission that if HMRC are correct on Issue 1, the legislation provides no right of appeal from the exercise of the freestanding power and rejected Ms Poots' submission that paragraph 48 of Schedule 18 provides such a right of appeal. As to paragraph 48, that, as we have already noted, provides that an appeal may be brought against any assessment to tax on a company which is not a self-assessment. The FTT had already decided that the Disputed Decision was an amendment and not an assessment. It did not address the (hypothetical) question whether an assessment in exercise of the purported freestanding power would fall within paragraph 48 but it did conclude that an amendment to an existing assessment would not itself be within paragraph 48, which it stated "does not provide an appeal against an amendment".
41. It is convenient for us to deal at this stage of our decision with the point about rights of appeal. The position may differ as between assessments and amendments. Clearly, if section 153A creates a freestanding power to make or amend assessments, an assessment made by HMRC pursuant to that power would not be a self-assessment. The company would have a right of appeal under paragraph 48.
42. HMRC's case is that an amendment under section 153A to the self-assessment in a company tax return (assuming of course that such an amendment can be made) would itself result in an assessment to tax on the company. It would not be a self-assessment and therefore falls within paragraph 48.
43. As to that, it is clear to us that, where an amendment is made to a company tax return as defined in paragraph 3 of Schedule 18 under one of the powers contained in Schedule 18, that amendment results in an amended return which remains within the definition of company tax return. Further, where the amendment includes amendment to the self-assessment itself, the amended self-assessment continues to be an assessment of some

sort. This is clearly the result where the company itself amends its return under paragraph 15 and also where HMRC correct a return under paragraph 16. And we consider that the same is the case where amendments are made by the company under paragraph 31 or by HMRC under paragraph 34. The question for us, however, is not simply whether the amended self-assessment is an assessment but whether it retains its status as a self-assessment for the purposes of paragraph 48.

44. In our view, an amendment, under the powers conferred by Schedule 18, of a self-assessment contained in a company tax return results in an assessment which remains a self-assessment. The term "self-assessment" is defined in paragraph 7 of Schedule 18. It is the assessment which must be included in a company tax return of the amount of tax which is payable by the company on the basis of the information contained in the return and taking into account reliefs. An amendment to a self-assessment under those powers remains, in our view, within that definition. This conclusion is consistent with other paragraphs of Schedule 18. Thus:

    i. Paragraph 15 provides for a company to amend its return within the relevant time limit. If part of that amendment involves an amendment to the self-assessment, the amended assessment clearly remains a self-assessment. This is not because it is a new assessment made by the company itself (thus a "self" assessment) but because it is an amendment to an existing assessment which remains conceptually the same assessment, albeit in a different figure, and thus a self-assessment.

    ii. Paragraph 16 provides for correction of a return by HMRC. If the correction changes the amount of the assessment, the assessment clearly, in our view, remains a self-assessment. The company is able to reject the correction by amending the amended return (including the amended self-assessment) under paragraph 15. In our view, the changing figures in the self-assessment do not affect its character which continues at all times as a self-assessment.

    iii. Paragraph 30 provides for amendment to a self-assessment to avoid loss of tax. The character of the assessment as amended is again, in our view, maintained and remains a self-assessment. It is to be noted that an express right of appeal is given against such an amendment.

    iv. Paragraph 34 requires a closure notice following completion of an enquiry to make amendments (if needed) to the return subject to the enquiry to give effect to the conclusions in the notice. The return is a "company tax return" as defined and remains such even after amendment. In our view, an amendment which includes an

amendment to the self-assessment results in an assessment which remains a self-assessment. The fact that the draftsman has thought it necessary to confer a right of appeal against the conclusions set out in a closure notice is consistent with that analysis.

v. In contrast, a determination under paragraphs 36 or 37 is not an assessment but is enforceable under paragraph 39 as if it were a self-assessment by the company. If an amendment to a self-assessment under the provisions discussed in the preceding paragraphs did not remain a self-assessment, it would not be enforceable as a self-assessment, which would be a very surprising result.

45. On Benham's approach, paragraph 48 only applies where no other right of appeal exists. On HMRC's approach, there would be an overlap between the right of appeal under paragraph 48 and the rights of appeal expressly provided in other paragraphs. And so, focusing on the paragraphs which we have mentioned in the preceding paragraph (other than paragraph 15 which does not involve a decision by HMRC at all), the taxpayer has a right to challenge HMRC's decision in each case. Thus:

i. Paragraph 16(4)(a) permits the taxpayer to amend its return so as to reject HMRC's correction. There is no need for a right of appeal at all (and, if HMRC wishes to challenge the rejection, the correct course will be for an enquiry to be opened).

ii. Paragraph 30 provides an express right of appeal against HMRC's amendment of a self-assessment. There is no need for reliance to be placed on some other provision, that is to say, paragraph 48, in order to protect the taxpayer from an incorrect amendment. It is to be noted that the right of appeal under paragraph 30 is against the amendment to the self-assessment, not to the underlying assessment itself. A taxpayer cannot (once the time limit for corrections under paragraph 15 has expired) amend other aspects of the original self-assessment. If HMRC's approach to paragraph 48 were correct, not only would there be an overlap between the appeal rights we have identified, but also an amendment by HMRC under paragraph 30 would entitle the taxpayer to appeal against the entire assessment (since on that approach it ceases to be a self-assessment): this would be contrary to the structure of Schedule which provides no right of appeal by a taxpayer against its own self-assessment and gives the taxpayer only limited powers to amend such an assessment.

iii. Similarly, paragraph 34 gives the taxpayer a right of appeal against an amendment to a company's return (including amendment to the self-assessment). We make the

same points in relation to this paragraph as we have just made in relation to paragraph 30.

46. In contrast with those provisions, no express power is contained in paragraph 41 for a taxpayer to appeal against a discovery assessment (which is, of course, not a self-assessment). Instead, the taxpayer must rely on paragraph 48. There is no overlap: and the appeal is against the discovery assessment which itself is not an amendment of any pre-existing self-assessment but is an entirely freestanding further assessment. A taxpayer could not raise an appeal against its own assessment as part and parcel of an appeal against a discovery assessment. If HMRC's approach to paragraph 48 is correct, a distinction would fall to be drawn between an amendment to a self-assessment under paragraphs 30 or 34 and a discovery assessment under paragraph 41. In the former case, the whole assessment would be subject to a right of appeal under paragraph 48; in the latter case, only the discovery assessment would be subject to such a right. There is, so far as we can see, no rational basis for such a distinction.

47. Our conclusion, taking into account all those considerations, is that an amendment to a self-assessment remains a self-assessment for the purposes of paragraph 48. Accordingly, if HMRC are correct in saying that section 153A provides a freestanding power to amend a self-assessment, such an amendment is not subject to any right of appeal under paragraph 48. This is the same conclusion as that reached by Patten J in *Morris v HMRC* 79 TC 184 at [38] in relation to the corresponding provisions of TMA applicable to individuals. HMRC have not identified any other provision under which a taxpayer would have a right of appeal in relation to such an amendment; its only remedy would be an application for judicial review.

48. We return, now, to consider the substance of Issue 1 in the light of that conclusion. The policy behind section 153A at a high level is to ensure that the "right" amount of tax is paid in respect of a gain. The "adjustment" it seems to us is a reference to an adjustment in the amount of tax due, the adjustment, if necessary in the first place, being made in one of the four ways set out in section 153(4)(a). The necessary adjustment (*ie* to what is owing one way or the other between the taxpayer and HMRC) is one thing; the method of effecting that adjustment is another. If no adjustment is necessary (for instance because the declaration ceases to have effect on the making of a valid claim under section 152 in accordance with section 153A(3)(a)), there is no question of the making of an assessment or the repayment or discharge of tax; nor is there any need for an amendment of any assessment to achieve the necessary adjustments.

49. In favour of Benham's approach are the following arguments:

i. If HMRC's approach is correct, the absence of a right of appeal in relation to an amendment would be surprising. Further, on any view, if HMRC are correct then paragraph 48 does apply to an assessment (in contrast with an amendment) made pursuant to section 153A(4) since such a (freestanding) assessment is clearly not a self-assessment. The result would be that a distinction has to be drawn, for appeal purposes, between making the necessary adjustments by, on the one hand, an assessment and, on the other hand, by an amendment to a self-assessment. We think that this result makes the absence of an appeal right in relation to an amendment even more surprising. Why, we wonder, should there be a right of appeal if the adjustment is effected in one way (assessment) but not in another (amendment to self-assessment)?

ii. If HMRC's approach is correct, there does not appear to be any formal requirement for notice of an amendment to be given. Amendments by HMRC which fall within the express provisions of Schedule 16 require notice to be given: see paragraphs 16(2), 30(1) and 34(2) and (2A). Correspondingly, where HMRC make a determination under paragraphs 36 or 37, notice must be given to the taxpayer: see paragraphs 36(4) and 37(3). There is no express requirement to give notice of an amendment by HMRC, if one is permitted, under section 153A. In practice, of course, the taxpayer would have to be told of the amendment, but it is again surprising that there is no express requirement for HMRC to do so especially when there would be an obligation to give notice of an assessment made under that sub-section in accordance with paragraph 47(1).

iii. HMRC accept (correctly, in our view) that it is open to the taxpayer to make an amendment to its self-assessment to give effect to section 153A(4). We understand it to be common ground that paragraph 15 can be relied on by the taxpayer if it wishes itself to effect an amendment to its self-assessment return to give effect to the necessary adjustments. Even if it is not common ground, we consider that to be the correct analysis. It would not, therefore, be necessary to regard section 153A(4) as also providing a power to do so. There is no need to construe section 153A(4) as conferring a power on the taxpayer which is simply not needed although that section does need to be relied on to disapply the time limit for amendment which would otherwise apply.

iv. HMRC also accept (again correctly, in our view), that the detailed statutory rules for making and amending assessments in Schedule 18 are not excluded entirely. They accept that notice must be given under paragraph 47 and that it is necessary for the time limits under paragraph 46 to be disapplied expressly. Benham contends that Schedule 18 provides a self-contained code for returns, assessments and amendments. Unless a clear express power to assess or amend is provided outside the scope of that code, a provision requiring assessment or amendment should be interpreted as referring to the powers to assess and amend found in Schedule 18; section 153A does not provide such a clear express power.

50. In favour of HMRC's approach are the following arguments:

i. Nothing is said in section 153A about how an amendment or assessment should be made. Since section 153A imposes a requirement to make adjustments, it should be construed as itself containing and conferring the necessary power. The provisions of Schedule 18 applicable to any assessment or amendment are to apply save to the extent that they are expressly disapplied.

ii. To require the necessary adjustments to be effected by use of powers within Schedule 18 would be to impose conditions which are not imposed by section 153A.

51. Subject to paragraph 57 below, Benham's approach is, in our judgment, correct. We consider the absence, as we have held to be the case on HMRC's approach, of a right of appeal against an amendment to be the most significant factor single factor in reaching our conclusion. That is the argument referred to in paragraph 49.i. above. There is considerable force, also, in the arguments referred to in paragraphs 49.ii to iv. HMRC's arguments referred to in paragraph 46 above are really different aspects of the same point. Although not without some merit, we do not think that the arguments are strong enough to counter those on behalf of Benham.

52. Further, the argument that Benham's approach would impose conditions which section 153A itself does not impose does not really stand up to scrutiny. It is accepted by HMRC, as we have said, that Schedule 18 is not altogether excluded; for instance, there remains an obligation to give notice of an assessment. In the same vein, we consider that the correct approach is to regard Schedule 18 as providing an exhaustive code for the making of assessments and amendments save to the extent that some other provision supplements (and possible also overrides or displaces) the provisions of that Schedule. It would be possible for a statutory provision expressly to provide a power of assessment or

amendment; such an express power would displace the need for reliance on a power within Schedule 18. But that is not the present case where, as we see it, there is insufficient to confer a power going beyond those already found in Schedule 18.

53. There is this additional point. The FTT relied on a comparison between section 153A(4) and section 248C TCGA. This latter section is concerned with roll-over relief on disposal of joint interests in land, which is only available where the land acquired is not "excluded land". It is provided in section 248C(3) that if land was not excluded at the date of the acquisition, but becomes excluded land, the amount of any chargeable gain which had previously accrued should be "re-determined". Section 284C(4) then provides that any adjustments under sub-section (3) "whether by way of assessment or otherwise" may be made at any time.

54. The FTT (whose conclusion is supported by Mr Gordon) described (see Decision [56]) section 284C(4) as drawn in "similar" terms to section 153A(4) and concluded that this showed that there is "no fundamental objection" to the conclusion that the detailed statutory rules for making and amending assessments are to apply where section 153A(4) applies.

55. HMRC argue that section 284C provides a useful contrast with section 153A. The former does not provide that the re-determination has to be made using a specified method: the wording "by assessment or otherwise" makes it clear that it is necessary to look elsewhere to find how to give effect to that re-determination. The latter gives a clear description of the powers available to make the necessary adjustments.

56. For our part, we do not gain any assistance from the provisions of section 248C. It is worded very differently from section 153A. It was enacted to give effect to a pre-existing extra-statutory concession in 2010. The circumstances were entirely different from those relating to section 153A by Finance Act 1996, that provision reflecting the wording already found in section 152 in relation to provisional relief granted following an unconditional contract for the acquisition of a new qualifying asset.

57. As we understand the parties' positions, it is common ground that it was open to HMRC to make a discovery assessment to make good the tax which can, retrospectively, be seen to be due on the Gains. However, we should note that HMRC maintained at an early stage that it was not open to them to make a discovery assessment. As we understand it, Ms Poots agreed before us that it was open to HMRC to make a discovery assessment, at least if section 153A did not confer a freestanding power. If, in fact, HMRC's original position is correct, so that there was no power to make a discovery assessment, then that

would have a serious impact on our reasoning on Issue 1. We proceed on the basis that this common ground is correct adding only that, without deciding the point, it appears to us to be correct.

58. Although it is Benham's position that HMRC could, and should, have made a discovery assessment early in this saga, Mr Gordon reserves its position should HMRC seek hereafter to make a discovery assessment. He suggests that it may be that such an assessment could be challenged on one or both of two grounds: first, that a discovery can become stale and cannot be acted on so as to support a discovery assessment and that, on the facts of the present case, the discovery will be stale when an assessment is made; secondly, that it would be an abuse of process for HMRC to make a discovery assessment in all the circumstances of the case. We express no view on the merits of either of those potential challenges should HMRC raise a discovery assessment, although we note that the first challenge, if correct, would qualify the apparent absolute requirement in section 143A that the necessary adjustments shall be made.

59. We raised the possibility with the parties after the hearing that paragraph 16(1)(b) might apply so as to provide HMRC with power to amend a company tax return to give effect to the necessary adjustments required by section 153A. It was pointed out to us that paragraph 16(1)(b) was introduced with effect from 1 April 2010 by Finance Act 2008, long after section 153A came into force. We agree with Ms Poots that it cannot be relevant to the question whether section 153A(4) creates a freestanding power, in particular it cannot be argued that because the paragraph provides HMRC with a power to amend a company tax return there is no need to find a freestanding power in section 153A(4).

60. The answer to Issue 1 is "No". Section 153A(4) does not provide a freestanding right for HMRC to make or amend an assessment in order to bring the Gains into charge. We agree with the conclusion of the FTT.

Issue 2

61. Issue 2 is whether the Disputed Decision amounts to a discovery assessment. The FTT held (see Decision [37], [42] and [59]) that it was an amendment and not an assessment (rejecting the contention that there was such a thing as an "amending assessment"). It is worth setting out the whole of [42]:

> "Clearly the Disputed Decision was intended to be made pursuant to section 153A(4) TCGA to make the adjustment necessary on the Declaration ceasing to have effect. It

was, as we have said, an amendment. If the Disputed Decision has any effect its effect is that it is an amendment of Benham's self-assessment for the 2007 Accounting Period."

62. It can be seen that the FTT acknowledged that the Disputed Decision was intended to be made pursuant to section 153A(4). The letter dated 6 November 2013 stated that an assessment would be made for the sum of £830,014.80 being the amount of tax unpaid in respect of the gain on the original disposal. That is the same figure shown in the Disputed Decision as the amount of tax due (the balance of the amended figure being interest). Reading the two documents together, it is clear that the Disputed Decision was intended to make the necessary adjustments required by section 153A(4). We read the FTT as making a finding that, objectively, the intention of the Disputed Decision was clear and not simply that, although that was the actual intention, it was not one which the objective reader of the Disputed Decision would have divined.

63. At Decision [60] to [63] the FTT addressed the issue whether the Disputed Decision was a nullity. It decided that the Disputed Decision could not be treated as if, after all, it were an assessment. It also decided that it was not rendered a nullity "simply by reason of the fact that no statutory basis is given for making it, other than section 153A(4)". They accepted Ms Poots' submission to that effect based on *Gunn v Revenue & Customs Commissioners* [2011] UKUT 59 (TCC), [2011] STC 1119 ("***Gunn***") and *Vickerman (IT) v Mason's Personal Representatives* [1984] STC 231 ("***Mason***") and also referred to her reliance on section 114 Taxes Management Act 1970 which provides that an assessment

> "which purports to be made in pursuance of any provision of the Taxes Act shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts".

In effect, the FTT was saying that it would depend on the precise terms of the document concerned whether it was a nullity.

64. A separate issue was whether HMRC could, in all the circumstances, rely on such powers as they possessed under Schedule 18 to support the Disputed Decision. The short answer (see Decision [64]) was that they could not do so because the Disputed Decision

> "is an amendment (not an assessment) and the powers to make an amendment, which are contained in Schedule 18, FA 1998 (paragraphs 16, 30 and 34) are, as Miss Poots

> accepts, not applicable in the circumstances in this case – in the case of paragraph 16 because such an amendment would be out of time and, anyway, could be rejected by the company, and, in the case of paragraphs 30 and 34, because there is no open enquiry or closure notice. There was therefore no statutory basis for making the Disputed Decision and in our view it can have no effect. The powers in Schedule 18, FA 1998 can however be relied on to raise a new assessment."

65. Ms Poots makes essentially the same submission to us as she did to the FTT. She points out that Schedule 18 does not specify any formalities for making an assessment, save that notification of the assessment must be given.

66. She submits that an assessment – in the present case the Disputed Decision – does not need to state the statutory basis on which it is made. Reliance is placed on *Gunn* where, at [8] of its decision, the Upper Tribunal agreed with HMRC's contention that there is no requirement that a notice of assessment must state the statutory provision under which it is made. The tribunal considered that section 114 (stating that "an assessment… which purports to be made in pursuance of the provisions of the Taxes Act….") cannot contain an implication that the provision of the Taxes Act must be stated either in the assessment or in the notice of assessment. This was for two reasons. First this was a provision relieving mistakes in the assessment and not the place where the requirements of a valid assessment are to be found. The second reason was that if such an important requirement existed, the statute would say so expressly. In relation to the first reason, the tribunal said this:

> "The apparent explanation for the words is that an assessment clearly is made pursuant to a provision in the Taxes Act, but if for any reason it is defective it is not made pursuant to a provision in the Taxes Act (because of the defect), and hence s 114, seeking to put right the defect, has to say that it is purportedly made under the relevant provision – in other words 'an assessment which would have been valid had it been properly made under the provision under which it purports to have been made shall be valid.'"

67. Even if the tribunal's explanation is correct (as to which we say nothing at this stage) it does not, in our view, assist Ms Poots in her wider contention that the Disputed Decision is a valid assessment. In *Gunn*, the documents on which HMRC relied clearly purported to be assessments. HMRC had written on 16 September 2005 stating that the officer would shortly be arranging for the issue of assessments. It was stated that the assessments were to be made under section 29(1) TMA. Notices of assessment were issued on the same day. The argument raised on behalf of the taxpayer was that the assessments were invalid because (i) they were not on a form specified by the board in accordance with section 113(3) TMA and (ii) they did not state the statutory provision under which they

were made, that is to say that they failed to state that they were made under section 29(1) TMA. It is in that context that the tribunal said what it did in [8] of its decision. What it said lends no support to (although it is not inconsistent with) the proposition that a document which purports to be an amendment to an assessment and which does not purport to be an actual assessment, can nonetheless be treated as an assessment.

68. Ms Poots submits that the fact that HMRC have notified a taxpayer that they rely on one statutory provision for making the Disputed Decision does not preclude them from justifying it by reference to another statutory provision. Reliance is placed on *Mason*. One issue which arose was whether an assessment raised by HMRC was valid where the assessment should have been made under section 29(3)(b) TMA but, in correspondence, HMRC had placed reliance only on section 29(3)(c): the actual assessment made no reference to either statutory provision. The judge (Scott J) (see at p 234e to g) held that the validity of the assessment once made was a matter of law and it was a point of irrelevance what justification prior to the assessment may or may not have been given by the Revenue to explain the assessment which they were proposing to make. As he summarised his decision at p 235e to f,

> "The second contention was that the inspector, having expressed his reliance on s 29(3)(c), it was not open to him to raise an assessment and justify it by a reference to another statutory provision. In my judgment that contention is wrong in law."

69. In *Mason*, as in *Gunn*, there was an assessment. The different question was whether, in seeking to uphold that assessment, the Revenue could rely only on the provisions on which they had relied in earlier correspondence. The answer was that that they were not so constrained. What conclusion the judge would have reached if the assessment itself had expressly purported to rely on section 29(1)(c) we do not know although he would, no doubt, have addressed the meaning and effect of section 114. The actual decision does not support (but like *Gunn* is not inconsistent with) the proposition that a document which purports to be an amendment to an assessment and which does not purport to be an actual assessment, can nonetheless be treated as an assessment.

70. The FTT said this at Decision [38]:

> "The circumstances of this case are not covered by either *Gunn* or *Mason's Personal Representatives*. Those decisions deal with cases where there is a decision of a certain status – an assessment – holding that the decision need not state the statutory provision under which it is made and can be justified by a statutory provision other than the one relied on when it was made. They are not authority for the proposition that a decision of a certain status – an amendment – can be implemented on the basis that it is a decision of a different status – an assessment."

71. It is to be noted that in that paragraph the FTT was not saying that the proposition in the last sentence is incorrect; it was saying no more than that *Gunn* and *Mason* do not support it. It was not saying there saying that an amendment to an assessment was of a different status from an assessment. We agree with what it did say.
72. However, from reading the Decision as a whole, and Decision [39] to [41] in particular, it is clear that the FTT did reach the conclusion that an amendment was of a different status from an assessment. Ms Poots observes that, on the FTT's analysis, the Disputed Decision would stand if it had purported to be an assessment rather than an amendment to an assessment and that to treat an amendment as a decision of a different status is too generalised an approach. The real issue is whether the Disputed Decision has the same effect, in substance, as a discovery assessment. In this context, she relied on section 114(a) TMA which we have set out at paragraph 63 above.
73. As to effect, she points out the main purpose of the power to raise a discovery assessment conferred by paragraph 41 of Schedule 18 is to enable HMRC to impose an additional charge to tax in circumstances where a loss of tax has been discovered after an enquiry window has closed (as to which there has been no enquiry opened in the present case and the time for doing so has passed). HMRC must, she accepts, give notice of such an assessment under paragraph 47. She submits that the Disputed Decision does precisely that: it notifies the taxpayer than an additional charge to tax is being imposed.
74. In particular, she contends that it is clear from the Disputed Decision, and the letter sent to Benham's advisors, that the effects of the Disputed Decision were as follows:
    i. it having been discovered that the Gains had become chargeable under section 153A, to make an adjustment to reflect that;
    ii. to deny the utilisation of the 2008 Losses against the Gains; and
    iii. to impose upon Benham a liability to pay the corporation tax that resulted from the Gains becoming chargeable.
75. It was also clear that Benham was informed that it had a right of appeal against the Disputed Decision, to be exercised within 30 days. This is the period relevant to a discovery assessment.
76. In all these circumstances, the substance of Ms Poots' submission as we understand it is that the description of the Disputed Decision as an amendment rather than an assessment was simply a misdescription. This was a matter of form and not substance. The substance could only be given effect if the Disputed Decision could take effect as a discovery

assessment. Given a choice between an approach which leads to invalidity and one which leads to effect being given to the intention in making the Disputed Decision, the latter is to be preferred.

77. The FTT spent some time in considering whether the Disputed Decision was an assessment or an amendment to an assessment, concluding that it was the latter. In relation to reliance by HMRC on their powers under Schedule 18, it dealt with this in Decision [64] which we have already set out at paragraph 64 above. The FTT did not grapple in that paragraph (where one might expect it to have been dealt with) with the proposition that the Disputed Decision, although expressed as an amendment, could be treated as an assessment, saying in Decision [64] that reliance could not be placed on such provisions because "the Disputed Decision is an amendment (not an assessment) …..". The only point at which the FTT can be taken as touching on this point is in Decision [37] where it said this:

> "If (contrary to HMRC's primary submission) it matters for any relevant purpose whether the Disputed Decision is an assessment or an amendment, it is an amendment rather than an assessment. This is because a taxpayer is, in our judgment, entitled to know from its face the nature of the decision addressed to him by HMRC – compare *Vodafone 2 v Revenue and Customs Commissioners* SpC 479 [2005] STC (SCD) 549 at [17] ["***Vodafone***"] ."

78. *Vodafone* is not binding on us although we of course find any decision of the Special Commissioners involved (Judge Walters QC and Theodore Wallace) of assistance. In that case, the inspector sent a notice to Vodafone requesting documents and detailed information. It did not state that that it was intended to be a notice under paragraph 27 of Schedule 18. It was held (see [17] of the decision) that a notice under paragraph 27 must clearly indicate that it was such a notice, leaving the recipient in no doubt as to the legal obligations, including penalties for non-compliance, which it imposed. The absence of such indications together with the use of the word "request" rather than "requirement" was a conclusive indication that the letter was not a notice under paragraph 27 but an informal request.

79. Without intending to cast any doubt on the correctness of the decision in *Vodafone*, we do not consider that it provides us with any assistance. In *Vodafone*, the taxpayer could not know from the letter whether it was being subject to a request which it was not compelled to answer or to a requirement, failure to comply giving rise to potential penalties. A request and a requirement would have entirely different consequences. In contrast, in the present case, it is clear that Benham was told precisely what its liabilities were and that it

had a right of appeal: the substance of what it was told was the same as would have been if the Disputed Decision had been described as a discovery assessment.

80. Since section 114(1) TMA has been referred to by Ms Poots, we should say something about it. We have already set out the apparent explanation for certain of the wording of this subsection given by the tribunal in *Gunn*. The tribunal was there focusing on one particular type of application of the section, namely a situation where the correct provision was being relied on but, because of some defect in the assessment, it would otherwise be quashed or rendered void or voidable. "In other words" as the tribunal said, "an assessment which would have been valid had it been properly made under the provision under which it purports to have been made shall be valid".

81. It seems to us, however, that the subsection also covers a different sort of case where the assessment purports to have been made under one power of assessment which is not, in fact, available but where the assessment, had it been made under another provision, would have been valid. Suppose, for example, that in *Mason* the assessments had been expressly raised under section 29(3)(c) TMA. They would, on the face of it, have been invalid because they should have been raised under section 29(3)(b). We think that section 114(1) would have come to the rescue of HMRC. In this example, the relevant documents certainly purport to be assessments made under section 29(3)(c): they fall within the words "An assessment…which purports to be made in pursuance of any provision of the Taxes Act". The reference to the incorrect power of assessment seems to us to be a "defect" or possibly a "mistake" within the meaning of section 114(1): in a case where there is a power to make the assessments (the power under section 29(3)(b)) but reference is made to the wrong power (namely the power under section 29(3)(c)) the assessments are defective, the defect being that incorrect reference. Section 114(1) applies so that the defect is not to affect the assessments provided, of course, the that assessments are in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts. In the example, the assessment would, in our view, be in substance and effect in conformity with and according to the intent and meaning of section 29(3)(b). A similar analysis could be applied in relation to "mistake" rather than "defect" although it may be that mistake is to be restricted to cases where HMRC intended to use one power but mistakenly referred to another.

82. Ms Poots did not submit that section 114(1) is directly in point in the present case. She appeared to concede that, if the Disputed Decision is properly to be seen as an amendment, it is not within the subsection in the first place. But it does, she suggests,

indicate an approach, which we take to be that we should strive to give validity to a document which is defective if its validity can be justified if the defect is ignored. We say apparent concession because what she said was that she was "not sure" that the subsection really helps. Perhaps this was an acknowledgement of the force of Mr Gordon's submission that, because an amendment cannot be made under the Taxes Act, the Disputed Decision cannot be "in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts".

83. For our part, we do not consider that section 114 TMA assists. If the Disputed Decision is in fact to be treated as a discovery assessment, there is no need to rely on section 114 in the first place.

84. But if it is not to be treated as an assessment, then it purports only to be an amendment and, as Mr Gordon says, there is no power to make an amendment of this sort. Accordingly, it clearly cannot be in substance and effect in conformity with the Taxes Acts; nor, although this is perhaps less clear, can it be in substance and effect according to the intent and meaning of the Taxes Acts. To conclude that section 114(1) did apply would be to say, in effect, that the Disputed Decision is to be treated as an assessment, contrary to the hypothesis of this paragraph.

85. We are left, therefore, with the question whether the Disputed Decision is a discovery assessment (or is to be treated as a discovery assessment) notwithstanding that on its face it is described as an amendment to Benham's self-assessment and referred to the part of the guidance notes relevant to amendments rather than the part referring to assessments. We do not consider that the Disputed Decision is a discovery assessment or that it can be treated as though it were.

86. We reach that conclusion in the light of the following factors.

    i. First, the wording of the Disputed Decision is perfectly clear. It is, on its face, described as an amendment and not as an assessment.

    ii. Secondly, and perhaps more importantly, its purported function was to give notice to Benham of what HMRC had actually done, namely to have made amendments. As the first paragraph states in its first sentence: "This notice shows the amendments I have made to the figures, including the tax payable, on the company tax return". (We suppose that such amendments were in fact made but in the light of the FTT's decision and our decision, it will be apparent that there was no power to make such amendments and they must be cancelled). Its purported function was not to make an assessment of a further amount to make good to the Crown a loss of

tax. We do not consider that the Disputed Decision purportedly communicating something which had been done (the making of an amendment) is, or is to be treated, as something entirely different (namely a discovery assessment).

iii. Thirdly, Ms Poots' argument proceeds on the basis that it really makes no difference whether the Disputed Decision is an amendment or an assessment. In each case, the liability is precisely the same and, as the Disputed Decision read with the accompanying notes explains, Benham had a right of appeal. However, we have decided that, on the assumption (contrary to our decision) that HMRC had a freestanding power to make an amendment under section 153A(4), there is no right of appeal from the Disputed Decision. There is a material difference in that respect between Benham's position following an amendment (had it been possible to make one) and a discovery assessment.

iv. Fourthly, we see in force in the FTT's view (supported by Mr Gordon) that a taxpayer is entitled to know from the face of the Disputed Decision the nature of the decision addressed to him. The present case is not one where it was obvious from the beginning that a power of amendment was not available and that the only available power was to make a discovery assessment. It has always been HMRC's position that they had a freestanding power under section 153A(4) to make an amendment. Had we reached a conclusion in HMRC's favour on that issue, then the Disputed Decision would be valid – not because it is a discovery assessment but because it is an effective exercise of the freestanding power. We do not consider, particularly in the light of the third factor above, that, having lost on the freestanding power point, HMRC can simply ignore its main contentions and argue that the Disputed Decision was, after all, a discovery assessment having a function entirely different from that of a notice of amendment.

87. Accordingly, the answer to Issue 2 is that the Disputed Decision does not amount to a discovery assessment. We again agree with the conclusion of the FTT.

Issue 3

88. Issue 3 is whether Benham is entitled to make a claim for relief in respect of the 2008 Losses, outside the time limit imposed by section 393A(10), that is to say within the period of 2 years following the accounting period in which the loss is incurred or such further time as the Board may allow. Where a declaration is made under section 153A and before that declaration ceases to have effect, section 152 applies as if an acquisition of

replacement assets had taken place and a claim had been made under that section. Accordingly, in the present case, the disposal by Benham giving rise to the Gains was treated as having been made on a no gain/no loss basis under section 152(2). The Gains would not, therefore, be profits within section 393A(1) of Benham for any accounting period. Unless and until the declaration ceased to have effect, Benham could not have made a valid claim to set the Gains against the 2008 Loss.

89. When the declaration ceased to have effect (no claim having been made under section 152 within the relevant time-limit), section 153A(2) ceased to apply with the result that section 152 was no longer to apply as if the acquisition had taken place. The position was therefore that the Gains became chargeable gains subject to corporation tax. The Gains are to be treated as having arisen in 2007 when they were in fact realised rather than in 2010 when the declaration ceased to have effect. Accordingly, ignoring any applicable time-limit for making a claim, Benham had the right to make a claim under section 393A setting the 2008 Loss against the profits, including the Gains, of 2007. However, such a claim has to be made within 2 years following the accounting period in which the loss occurs (or such further period as HMRC allow). That period ended on 31 December 2011.

90. Benham made what it called a protective claim on 24 October 2014 to carry back losses from 2008 to cover part of the liability for 2007 arising, assuming that such liability did arise, as a result of the amendment effected by the Disputed Decision. That claim was, of course, made well outside the time limit specified in section 393A(10). HMRC's position is that that claim was of no effect being made outside the 2 year time limit specified in that subsection and no extension having been allowed by HMRC. The issue was raised before the FTT (Issue F) as to whether, assuming the Disputed Decision was a discovery assessment, Benham was entitled to consequential relief for the 2008 Losses under section 393A and paragraph 62 of Schedule 18. Since the issue was raised on that assumption which the FTT had held was incorrect, it stated that it did not need to address the issue and it did not do so.

91. In the light of our conclusions on Issues 1 and 2, Issue 3 does not arise at the present time any more than it did before the FTT. It will, however, arise if HMRC hereafter raise a discovery assessment which is not successfully challenged by Benham on one of the grounds suggested by Mr Gordon which we have already mentioned or on some other ground. Mr Gordon's position is that the issue is academic at the present time and may not need to be decided because a discovery assessment might be successfully challenged. Although we have heard argument on Issue 3, that argument was presented on the

hypothesis that a valid discovery assessment could and would be made and that a claim for relief (either the claim already made or a fresh claim following the assessment) would also be relied on by Benham.

92. We take the same approach as the FTT and do not address Issue 3, notwithstanding that the points have been argued. We consider that it would be preferable for this Issue (if it arises at all) to be considered by the First-tier Tribunal in the ordinary way. It is not certain that HMRC will raise a discovery assessment immediately following release of this decision, for instance, they may seek and obtain permission to appeal and leave the making of a discovery assessment until the result of such an appeal is known. Even if a discovery assessment is made, it may be subject to successful challenge with the result, as Mr Gordon points out, that Issue 3 will not need to be decided at all. Further, Issue 3 is a matter on which the Upper Tribunal would benefit from a reasoned decision of the Tax Chamber, and particularly so if questions of fact are raised.

Disposition

93. HMRC's appeal is dismissed.

Mr Justice Warren

Judge Colin Bishopp

Upper Tribunal Judges

Release date: 11 October 2017