[2019] UKUT 0041 (TCC)

Appeal number: UT/2017/0076

INCOME TAX – discovery assessment – whether new discovery made or discovery "stale" - whether insufficiency in tax return "brought about" by carelessness of taxpayer or person acting on his behalf - appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

RICHARD ATHERTON **Appellant**

- and -

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

TRIBUNAL: MR JUSTICE FANCOURT
JUDGE THOMAS SCOTT

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London on 17 and 18 October 2018

Keith Gordon, Counsel, for the Appellant

Kate Balmer, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is the decision on the appeal by Richard Atherton ("Mr Atherton") against the decision of the First-tier Tribunal (Tax Chamber) ("FTT") reported at [2016] UKFTT 831 (TC) ("the Decision").

2. The appeal relates to a discovery assessment issued by HMRC to Mr Atherton for the tax year 2007/08. Two issues are raised by the appeal. The first is whether there was a valid discovery by HMRC and, in particular, when any discovery was made and whether it was stale. The second is whether the insufficiency in the 2007/08 return (which is accepted by Mr Atherton) was brought about by the carelessness of Mr Atherton or a person acting on his behalf.

The facts

3. There is no material dispute between the parties as to the FTT's findings of primary fact, although Mr Atherton takes issue with certain of the inferences drawn by the FTT from those facts. The facts found by the FTT relevant to this appeal are as follows (paragraph references being to paragraphs in the Decision):

(1) At the relevant time, Mr Atherton was a partner in a hedge fund, having worked previously in financial institutions. The FTT considered that this background gave him "a reasonably good lay understanding of tax returns and tax matters": [65].

(2) Mr Atherton retained a firm of accountants, Fitzgerald and Law, ("F&L") to complete his tax returns: [59].

(3) In 2008 Mr Atherton was introduced through F&L to NT Advisers ("NTA"), a company which marketed tax avoidance schemes: [57]. Mr Atherton wanted to avoid tax on his 2007/08 partnership income of £5 million: [58], [66].

(4) NTA told Mr Atherton about a scheme called Romangate, devised and marketed by NTA. He understood that the scheme aimed to generate artificial employment losses, unrelated to his partnership, and that the scheme was risky: [66].

(5) In January 2009 Mr Atherton entered into the Romangate scheme. The resultant employment loss arose in the tax year 2008/09: [1].

(6) Mr Atherton discussed his tax return for 2007/08 with F&L prior to its submission. F&L explained to him that he had two options in claiming the Romangate loss. He could make a "standalone" claim for loss relief, or he could claim the relief in his 2007/08 self-assessment tax return. With a standalone claim, the tax he owed for 2007/08 would be paid up front, and HMRC would repay it if and when they accepted that the loss was validly claimed. With a claim in his 2007/08 return, the tax he would otherwise have to pay on 31

January 2009 would be reduced by the Romangate loss. Mr Atherton chose the second option: [67].

(7) F&L completed and submitted the 2007/08 return ("the Return") on 30 January 2009: [59]. The effect of claiming the Romangate loss in that return was to reduce his tax liability for 2007/08 from just over £2 million to nil: [2].

(8) The Return contained the following relevant entries ([5]):

(1) Box 3: The standard tax return pages for 2007/08 included 'Additional Information' pages. The Additional Information pages entitled the taxpayer to make a claim for relief in Box 3 under the heading 'income tax losses' in respect of the sub-heading

> Relief now for 2008-9 trading, or certain capital, losses.

Mr Atherton entered his manufactured employment loss of £6,149,999 which arose in 2008/09 in this box.

(2) White space disclosure: Mr Atherton made a fairly lengthy white space disclosure in his tax return. The disclosure referred to a 2008/09 employment related loss being claimed 'using box 3' and explained that box 3 was being utilised, despite its title about trading or capital losses, as there was no other equivalent box for employment losses. The disclosure went on to mention details about the scheme, including its DOTAS (Disclosure of Tax Avoidance Schemes) number. It said:

> I acknowledge that my interpretation of the tax law applicable to the above transactions and the loss (and the manner in which I have reported them) may be at variance with that of HMRC.

It repeated at the end that, although the claim was made in box 3, it might not be seen by HMRC as appropriate to that box and concluded, for these reasons:

> I assume you will open an enquiry.

(3) Box 20: Mr Atherton also entered the figure of £5,048,602 into Box 20 of the Partnership pages of his tax return for 2007/8. It was accepted that this figure was the employment income loss capped at the amount of Mr Atherton's actual income.

However, box 20 was under the main heading:

> Your share of the partnership's trading or professional losses

Box 19 under the same heading asked the taxpayer to enter the loss for 2007-08 from the working sheet. Box 20 itself was headed:

> Loss from this tax year set-off against other income for 2007-08

(9) Mr Atherton knew that it was broadly NTA's advice that he could put the loss claim "in" his 2007/08 tax return. He knew that counsel (Rex Bretten QC) had advised NTA on this point, and that NTA had a copy of that advice, but Mr Atherton had not seen it himself: [68].

(10) In his meeting with F&L prior to submission of the 2007/08 return, Mr Atherton noticed that on its face Box 20 was not appropriate to claim the

Romangate loss, because it was not a partnership loss. He said that he considered that Box 20 could be read as referring to losses arising in 2008/09. He also said that any concern he had about how the return was completed was assuaged by what he considered to be a very full disclosure in the white space: [69].

(11) Following submission of the return on 30 January 2009 HMRC (Mr Clarke) wrote to Mr Atherton on 7 May 2009 opening an enquiry into the loss relief claim under Schedule 1A of the Taxes Management Act 1970 ("TMA"): [83].

(12) Following further correspondence, HMRC initiated a claim against Mr Atherton in the county court for the £2 million of tax which would have been paid but for the Romangate loss. The action was stayed: [87].

(13) On 19 December 2013 NTA wrote to HMRC, accepting that, because of retrospective legislative changes, the Romangate scheme was ineffective to create the loss claimed by Mr Atherton. NTA did not, however, accept that users of the scheme were necessarily liable to repay the relevant tax: [90].

(14) Following the NTA letter, Mr Clarke, who had opened the Schedule 1A enquiry in January 2009, consulted with technical colleagues within HMRC. He reached the view that the enquiry opened in January 2009 was invalid in light of the decision of the Supreme Court in *Cotter v Revenue & Customs Commissioners* [2013] UKSC 69 ("*Cotter*"), which had been delivered in November 2013. Mr Clarke arranged for Officer Taylor of HMRC to issue, on 31 March 2014, the discovery assessment which was the subject of the FTT hearing and this appeal: [91]. By the discovery assessment, Mr Atherton was assessed to £2,010,855.20 tax: [22].

Relevant legislation

4. In so far as applicable, section 29 TMA provided at the relevant time as follows:

> 29 **Assessment where loss of tax discovered**
>
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.
>
> (2) …
>
> (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment: or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

5. The normal time limits for issuing an assessment are extended in certain circumstances by section 36 TMA, which, so far as relevant, provides as follows:

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…

(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.

6. Section 118(5) TMA states as follows:

(5) For the purposes of this Act a loss of tax or a situation is brought about carelessly by a person if the person fails to take reasonable care to avoid bringing about that loss or situation.

The issues

7. The FTT dealt with various procedural issues which are not the subject of this appeal. These included whether HMRC had sufficiently pleaded a case that Mr Atherton's advisers (as distinct from Mr Atherton) had been careless, and whether on the evidence called by HMRC there was a prima facie case for Mr Atherton to answer. Although Mr Gordon's skeleton argument on behalf of Mr Atherton lists 22 separate "grounds of appeal", including these procedural matters, it was in the event agreed by the parties that there were only two substantive issues before us. Had the appeal against the procedural matters been pursued, we would have had no hesitation in rejecting those grounds of appeal. The FTT properly exercised its discretion to permit HMRC to contend that Mr Atherton's advisers had been careless, and it was right to conclude that, in view of the contents of the tax return, there was a prima facie case of carelessness for Mr Atherton to answer.

8. The first substantive issue ("the Discovery Issue") was whether Mr Clarke of HMRC made a discovery within the meaning of section 29 in early 2014, or whether the only such discovery occurred in early 2009, and, if the only discovery was in 2009, was the issue of the discovery assessment in March 2014 deprived of its validity because it was by then "stale"?

9. The second issue ("the Carelessness Issue") was whether the insufficiency in Mr Atherton's 2007/08 return was brought about by the carelessness of Mr Atherton or a person acting on his behalf, thereby extending the normal time limits for issuing assessments with the result that the discovery assessment was issued in time.

The Discovery Issue

The discovery rules

10. Two important principles underpin the construction and application of the discovery assessment provisions.

11. First, as this Tribunal stated in *Burgess v HMRC* [2015] UKUT 578 (TCC), at [59]:

> "It must be recognised… 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."

12. In this case, the burden of proof is on HMRC to establish on the balance of probabilities that the discovery assessment was validly made.

13. Secondly, the discovery provisions now in force were intended to be more restrictive of HMRC's powers than the provisions in force prior to the introduction of self-assessment in 1996-97. In the context of the pre-2008 rules, which referred to fraudulent or negligent conduct, Moses LJ stated in the Court of Appeal's judgment in *Tower MCashback LLP 1 v HMRC* [2010] EWCA Civ 32, at [24]:

> "… apart from a closure notice, and the power to correct obvious errors or omissions, the only other method by which the Revenue can impose additional tax liabilities or recover excessive reliefs is under the new s29. That confers a far more restricted power than that contained in the previous s29."

Meaning of discovery

14. In *HMRC v Charlton* [2012] UKUT 770 (TC), this Tribunal stated (at [28]):

> "…the word "discovers" does connote change, in the sense of a threshold being crossed. At one point an officer is not of the view that there is an insufficiency such that an assessment ought to be raised, and at another he is of that view. That is the only threshold that has to be crossed. We do not agree that the lawyer, in Lord Denning's example, would be regarded as having made a discovery any the less by waking up one morning with a different

> conclusion from the one he had earlier reached, than if he had changed his mind with the benefit of further research. It is, we think, evident that the relevant threshold for there to be a discovery may be crossed as a result of a "eureka" moment just as much as by painstaking research."

15. It is well established that the threshold at which a discovery arises for the purposes of section 29 is low. In *Hankinson v HMRC* [2011] EWCA Civ 1566, the Court of Appeal stated that it simply meant that the officer came to a conclusion, or satisfied himself, as to an insufficiency of tax. No new information, of fact or law, is required in order for there to be a discovery. It includes a case where an officer (acting honestly and reasonably) changes his mind, changes his opinion or corrects an oversight: *Charlton* at [37].

Staleness

16. The parties agreed that when HMRC opened their enquiry in May 2009 they did so having made a discovery of an insufficiency within section 29. Given this, why did it matter whether they made a further such discovery in early 2014?

17. The answer lies in the supposed concept of staleness. This asserts that, in order for a discovery assessment to be valid, it must be issued by HMRC without undue delay after they have discovered an insufficiency. In this case, Mr Gordon submits, the delay between the 2009 discovery and the issue of the discovery assessment in March 2014 would clearly have rendered the assessment stale and therefore invalid. If, on the other hand, there was a discovery in early 2014, then, as Mr Gordon accepts, no such concern would arise.

18. Ms Balmer argued forcefully that the concept of staleness has no place in the legislation. We acknowledge the cogency of the argument. However, in *Pattullo v Revenue & Customs Commissioners* [2016] STC 2043, this Tribunal decided that on the natural meaning of section 29 there was a requirement for HMRC to act upon a discovery while it remained fresh. This was part of the ratio of the decision in *Pattullo*. Although for the reasons given below it is unnecessary for us to decide the point, we would record our agreement with the recent conclusions and comments of this Tribunal in *Clive Beagles v Revenue & Customs Commissioners* [2018] UKUT 0380 (TCC), as follows:

> "58. In the absence of the authorities, we can see some force in the submission that the concept of "newness" involved in a discovery relates simply to the nature of the discovery at the time at which it is made. Whilst we accept Mr Firth's arguments that the implication of a requirement for HMRC to act promptly following any discovery promotes efficiency in the administration of tax and that the concept of a discovery must clearly involve something new (as confirmed by the House of Lords in *Cenlon*), on the words of s29(1), there is nothing express which would appear to provide for any requirement that the discovery must retain that quality until the assessment is made. The only requirement on the face of the

> legislation is that an assessment under s29(1) can only be made following a discovery.
>
> 59. Nevertheless, whatever might be said of the status of the statements of the Upper Tribunal in *Charlton* or in *Tooth* on this issue, in our view, the decision of the Upper Tribunal in *Pattullo* is not obiter. A decision of the Upper Tribunal is not binding on a later Upper Tribunal (see *Raftopoulou v Revenue and Customs Commissioners* [2018] STC 988 at [24]). As a tribunal of coordinate jurisdiction the later tribunal will follow the decision of the earlier one unless it is convinced that the earlier decision is wrong (see *Gilchrist v. Revenue and Customs Commissioners* [2014] STC 1713 at [94] referring back to *Secretary of State for Justice v B* [2010] UKUT 454 (AAC) at [40]). We are not convinced *Pattullo* is wrong, particularly given the existence of the other similar (obiter) statements and so we will follow it.
>
> 60. It seems to us that, given the state of the authorities at the Upper Tribunal level, the question of whether a discovery is capable of becoming "stale" is a matter best reviewed by the higher courts. We recognise both sides of the argument, particularly, on the one side, the point that it seems wrong not to require HMRC to make an assessment promptly once a discovery has been made, and, on the other, the simple point that the legislation does not make any express provision for any kind of limitation period except that specified by s34 TMA and so in *Pattullo* the Upper Tribunal pressed the word "if" into action to achieve that end."

19. On that basis, HMRC must establish that there was a new discovery in 2014, since the 2009 discovery is accepted (assuming the concept of staleness applies) to have become stale by the time of the discovery assessment in March 2014.

Claims in a tax return and standalone claims

20. It is necessary in relation to both issues in this appeal to understand the two routes by which a taxpayer such as Mr Atherton could claim a loss such as the supposed Romangate loss and the resultant processes by which HMRC could then enquire into that claim.

21. HMRC may enquire into self-assessment returns either under Schedule 1A TMA or under section 9A TMA. Section 9A provides that an HMRC officer may enquire into a return made under sections 8 or 8A TMA, or into any amendment of such a return. That enquiry extends to anything, including any claim, which is "in" the return. A Schedule 1A enquiry, by contrast, can only be made as regards a claim which is not included "in" a return, sometimes called a "standalone" claim. The two regimes are mutually exclusive; if the section 9A regime applies, the Schedule 1A regime cannot.

22. The question of what was or was not included in a return was considered by the Supreme Court in *Cotter*, which also concerned the Romangate scheme. The Court held that the critical question was what constituted a "return" under section 8 or 8A,

and that this was limited to information submitted for the purposes of establishing a person's tax liability for a year of account. Importantly for this appeal, Lord Hodge stated (at paragraph 27 of the judgment) that there was a difference between a situation where a taxpayer left it to HMRC to calculate his tax liability and one where he made his own calculation of that liability in submitting his return. In the former case (as on the facts of *Cotter*) HMRC must enquire into the return under Schedule 1A, whereas in the latter they must enquire under section 9A.

23. In this case, HMRC accept that, following *Cotter*, the effect of the way in which F&L completed Mr Atherton's return was to include the claim for the Romangate loss in the 2007/08 return, even though it arose in the subsequent year. The claim may have been "forced" into that return by using an inappropriate box on the form, but nevertheless it was effective to move what would otherwise have been a standalone claim across Lord Hodge's dividing line so that it was a claim in the 2007/08 return.

24. This gave rise to a problem for HMRC. While they had acted promptly in 2009 in opening an enquiry into Mr Atherton's return, that enquiry was opened under Schedule 1A. It followed from *Cotter* that it should have been opened under section 9A. The time limits for HMRC to open enquiries under both the section 9A and Schedule 1A regimes are relatively tight, and by the time *Cotter* was published HMRC were long out of time to open an enquiry under Section 9A. That realisation prompted the issue of the discovery assessment. The Discovery Issue is whether HMRC's realisation of the effect of *Cotter* was itself a section 29 discovery.

The FTT's decision

25. The FTT analysed in some detail the distinction summarised above between standalone claims and claims in a tax return, and the effect on the enquiry process of *Cotter*: see paragraphs [7] to [19] of the Decision. On its analysis of the facts, the FTT found that HMRC opened a Schedule 1A enquiry in 2009 because at that time they were "of the consistent view" that Mr Atherton had only made a standalone claim: paragraph [225]. It set out its findings as follows:

> "228.In other words, from the first, we find Mr Clarke was of the view that as a matter of law, Mr Atherton's self assessment did not include the loss relief claim. It is clear from his letters and actions that he held this view despite the completion of box 20 and the fact that the self-assessment calculation incorporated the claim.
>
> 229.The evidence clearly shows that HMRC only realised that the self-assessment was insufficient following the decision in *Cotter* when it was made plain that a claim for carried back losses which was included in a self-assessment was not a standalone claim, but simply an invalid claim leading to an insufficient self-assessment."

26. The FTT concluded that, in light of *Cotter*, HMRC had wrongly understood what comprised the tax return proper: paragraph [233]. As a consequence, while HMRC knew from 2009 that the Romangate loss claim was invalid—so in that sense they knew of a substantive insufficiency in the 2007/08 return—the insufficiency in the self-assessment was only discovered in 2014 following *Cotter*: paragraph [234].

The 2014 realisation was a valid discovery within section 29 because HMRC "crossed a threshold", they acted reasonably, and the discovery was new to them: paragraphs [236] to [248].

Arguments of the parties

27. Mr Gordon submitted that the only discovery which occurred was in 2009, and that it was stale by the time the discovery assessment was issued in 2014. All that happened in 2014 was that HMRC realised that they had previously pursued the wrong line of enquiry. That was not a discovery of an insufficiency of tax, because HMRC had known there was an insufficiency since 2009. HMRC had simply taken the wrong procedural course to enquire into that insufficiency. Further, Mr Gordon argued, on the facts HMRC already knew by autumn 2009 about the point eventually confirmed by *Cotter*. Finally, he submitted, Mr Atherton's position was on all fours with the taxpayer in *Revenue & Customs Commissioners v Tooth* [2018] UKUT 38 (TCC), and the Upper Tribunal had not held in that case that HMRC's understanding of *Cotter* gave rise to a discovery.

28. For HMRC, Ms Balmer essentially agreed with the reasoning and conclusion of the FTT that there was a discovery in early 2014.

Discussion

29. We reject Mr Gordon's argument that HMRC did not "cross a threshold" in 2014 because their actions from 2009 onwards were consistent with their understanding that Mr Atherton had indeed made a claim in his tax return for the Romangate loss. That deduction was firmly rejected on the facts by the FTT. As the FTT observed, it was HMRC's perception that Mr Atherton had made a standalone claim which lay behind not only its decision not to open an enquiry under Section 9A, but also its subsequent failure to correct the return under section 9ZB TMA. In so far as this submission seeks to attack the FTT's findings of fact, we see nothing in the FTT's findings on this point which would approach an *Edwards v Bairstow* error of law.

30. We also reject the argument that *Tooth* supports the view that there was no discovery in 2014 in this case. As we discuss below in relation to the Carelessness Issue, while *Tooth* does concern the Romangate scheme and there were similarities in the taxpayer's disclosure, the facts of *Tooth* were materially different. In relation to the question of whether there had been a discovery, the Upper Tribunal's decision turned on the precise facts, and proceeded from the conclusion that "the relevant findings of fact made by the FTT [in relation to discovery] do not emerge clearly from the Decision": paragraph 85 of the judgment. It also appears (from paragraph 88 of the judgment) that in *Tooth* HMRC "expressly disavowed any contention that the decision in *Cotter* had been the "discovery" triggering the section 29 TMA assessment in this case".

31. We consider that the FTT was correct to conclude for the reasons it did that HMRC made a discovery within section 29 in 2014. Although the 2014 discovery

clearly related to the same issue as the 2009 discovery, namely the Romangate loss, it was a different discovery. The new discovery was that Mr Atherton should have been treated as having made a claim for relief "in" his tax return.

32. While we do not consider that the same HMRC officer could make the same discovery more than once, we see nothing to prevent an officer such as Mr Clarke making successive different discoveries in relation to Mr Atherton's 2007/08 tax liability. Section 29 refers in the alternative to a discovery of any of three situations. The discovery in 2014 falls squarely within subsection 1(b) of section 29 as being a discovery "that an *assessment to tax* is or *has become insufficient*" (emphasis added). The self-assessment had become insufficient because, following *Cotter*, the entry made by F&L in Box 20 took effect to reduce the "assessment to tax" to nil.

33. The effect of Lord Hodge's judgment in *Cotter* was that HMRC had been wrong to open the 2009 enquiry on the basis that the loss claim was a standalone claim. However, the consequence of that was not, as Mr Gordon sought to suggest, confined to a realisation by HMRC that they had used the wrong procedure in 2009. While HMRC was both cognisant of the relevant facts and of the ineffectiveness of Romangate well before 2014, it was *Cotter* which demonstrated that their understanding of the law had been wrong. The FTT expressed the position accurately at paragraph [230] of the Decision:

> "…[HMRC's] understanding of the law up until *Cotter* led them to conclude that the self-assessment *in law* was, or had to be treated as being, for £2 million and therefore was not insufficient despite in practice the self-assessment on its face including the invalid loss relief claim, and being expressed to be nil. Mr Clarke discovered in early 2014 that his view of the law was wrong and that the self-assessment *in law* was for nil and was therefore insufficient."

Decision

34. HMRC did make a discovery in early 2014, and the discovery assessment issued in March 2014 was therefore valid.

The Carelessness Issue

35. Having held, for the reasons that we have given, that the FTT was right to conclude that there was a discovery within the meaning of section 29(1), the officer was entitled - subject to subsections (2) and (3) of section 29 - to make an assessment of the correct amount of tax to be charged to the taxpayer.

36. Only subsection (3) applies in this case. It provides that one or other of the conditions in subsections (4) and (5) must be satisfied before a discovery assessment can be made. Subsection (4) was the only condition invoked. Its effect in combination with section 36 TMA is that HMRC are entitled to make a discovery assessment outside the normal time limits if the insufficiency in the original assessment was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf. HMRC did not allege deliberate behaviour so the only issue was carelessness.

37. A loss of tax or an insufficiency in an assessment is brought about carelessly if the taxpayer or a person acting on his behalf "fails to take reasonable care to avoid bringing about the loss or situation": section 118(5) TMA. The reasonable care which should be taken by a taxpayer is assessed by reference to a prudent and reasonable taxpayer in the position of the taxpayer in question.

What was the FTT's decision?

38. There is incomplete agreement between the parties as to what exactly the FTT's decision was in this regard. They agree that the FTT concluded that Mr Atherton or F&L acting on his behalf were careless in submitting the tax return as they did. In our judgment, it is clear that the FTT did hold that it was careless to submit the tax return, using box 3 in the Additional Information pages of the return to make a standalone claim for relief and box 20 on the partnership pages to try to "force" the year 2 loss into the computation of year 1 liability, without making express disclosure of the purpose of so doing.

39. However, HMRC contend that the FTT held that it was careless to use box 20 on the partnership pages at all, regardless of how much disclosure of his intention was made. Mr Atherton does not agree. It is material to note that in their rule 24 response to the appeal HMRC did not give notice of an intention to argue that if the FTT did not in fact reach that conclusion it should have done so, nor did they so argue at the hearing. The initial question for us is therefore whether the FTT did make that finding. That is a question of interpretation of the decision.

40. We consider that the FTT did not hold that use of box 20 was careless regardless of what Mr Atherton disclosed about his use of box 20 and its purpose. It held only that it was careless to use box 20 in that way without making specific disclosure of the purpose of so doing, and without indicating that the losses in respect of which relief was claimed were the same losses as formed the basis of the box 3 standalone claim for relief. Although paragraph [159] of the Decision, read alone, supports the argument of HMRC that the FTT held that use of box 20 was careless regardless of any explanation proffered, many other paragraphs of the Decision express a contrary conclusion. We refer particularly to paragraphs [160], [161], [182], [189] and [191]. These paragraphs, which include the FTT's final conclusions on carelessness, make it clear that the FTT held that it was only the absence of an appropriate explanation of the use of box 20 that made it careless to submit the tax return in the form that it was submitted. In other words, had the white space entry also explained the use of box 20 and how it related to box 3, the FTT would have held that Mr Atherton was not careless. We believe that the explanation of the words in paragraph [159] on which HMRC rely is that Judge Mosedale was using a rhetorical formulation in order to emphasise her conclusion that it was certainly careless to have used box 20 without any adequate explanation of its use.

41. We have some doubt about whether the conclusion reached by the FTT is justified by the terms of section 29. It seems to us that the sufficiency of any disclosure given to HMRC by the taxpayer or those acting on his behalf is primarily addressed by section 29(5), and that section 29(4) is primarily concerned not with

disclosure as such but with carelessness or deliberate conduct that brings about the insufficiency in the tax return. However, this point was not raised by HMRC in their rule 24 response, even though the point was alluded to in HMRC's statement of case before the FTT (at para 31). Nor was the argument taken up by Counsel for HMRC when the possibility of that argument was referred to by Judge Scott during the hearing, by reference to the case of *Moore v Revenue and Customs Commissioners* [2011] UKUT 239 (TCC) at [16].

42. Accordingly, it would be unfair to dismiss this appeal on the basis that disclosure was irrelevant to the assessment of carelessness in section 29(4) and that the FTT's reasoning was thereby flawed. Counsel for Mr Atherton did not have a fair opportunity to address that argument. We must consider whether the FTT was wrong, as Mr Atherton contends, to conclude that he was careless to use box 20 in the way that he did without an explanation of that use, and if so whether the insufficiency in the assessment was brought about carelessly.

43. A substantial part of the lengthy Decision is concerned with assessing the evidence that it heard on the question of whether any of Mr Atherton himself or F&L or NTA were careless in advising on or completing a tax return that included tax losses in box 3 of the Additional Information pages, white space disclosure apparently relating to box 3, and employment losses "forced" into box 20 on the partnership pages of the return. The FTT found that the white space disclosure related only to the box 3 entry and that it was careless to make use of box 20 in the way that the taxpayer did without providing an explanation.

44. Mr Atherton seeks to challenge the FTT's findings in that regard. He contends that the white space disclosure, on its true interpretation, relates to both the box 3 and the box 20 entries, and that in any event he was not careless in that he reasonably relied on advice given to him that he could force his employment loss into year 1 by using a box that was not appropriate for such a loss. However, the FTT found as a fact that NTA had not advised Mr Atherton or F&L to use box 20 in that way and had not advised them to do so without providing an explanation. The advice to use box 20 came from F&L, who (the FTT found) did not advise expressly about giving an explanation to HMRC of its use but who must be taken implicitly to have advised Mr Atherton that the white space disclosure was adequate (paragraph [105]). F&L clearly were persons acting on the taxpayer's behalf, within the meaning of section 29, even if NTA were not.

45. Given the FTT's finding of fact that NTA did not advise F&L to "force" the tax loss by making use of box 20 in the way that F&L did, which cannot realistically be challenged, Mr Atherton cannot succeed on his argument that he reasonably followed professional advice. Only F&L (impliedly) advised him to use box 20 in that way, and since F&L were acting on his behalf within the meaning of section 29(4) any carelessness by F&L is treated in the same way as carelessness by Mr Atherton. In view of this factual finding, it is not necessary for us to decide whether NTA was a person acting "on behalf of" Mr Atherton within section 29, and we express no view on that issue.

46. The remaining issues are therefore, first, whether the FTT was wrong to find that the white space narrative related only to the box 3 entry and not the box 20 entry and, second, if the FTT was right so to conclude, whether it was right to find that it was careless of Mr Atherton or F&L (it matters not which) to use box 20 in that way without an appropriate explanation.

47. The FTT's reasons for finding that the white space narrative did not relate to the box 20 entry were, first, that on its face it did not do so, there being no mention of box 20 or of using the partnership pages for relief against employment losses; and second, that the form of disclosure written in the white space was not intended by its author to explain the use of box 20. That was because the disclosure given in Mr Atherton's tax return emanated from NTA and was generic rather than specific (as the FTT found): NTA's clients were not all set on forcing the claim for tax relief into year 1 rather than making a standalone claim for relief. The wording was therefore drafted for use with a standalone claim and was not designed for the use of box 20 made by Mr Atherton.

48. Even if the terms of the disclosure were drafted for that purpose, as found by the FTT, we do not consider that fact to have any bearing on the question in issue. If, despite being drafted for use in a standalone claim, the disclosure in fact was also sufficient in its terms adequately to explain the use of box 20 then that was its effect when incorporated in the taxpayer's tax return. If it was insufficient then it did not have that effect. The only question is as to the proper interpretation of the words used.

49. As to this, the wording referred to the ability to use box 3 for "relief now" for year 2 trading losses but stated that "there is no equivalent box to claim relief now for employment related losses despite the provisions of s128 ITA 2007". The natural reading of those words is that Mr Atherton was explaining why he had used box 3 for year 2 employment losses, which were not year 2 trading losses. The narrative then stated that Mr Atherton was aware that the manner in which he had reported his claim might be at variance with HMRC's expectations. But that does not necessarily indicate that what was being sought, contrary to and instead of what box 3 was being used for, was a year 1 deduction of the amount of losses specified in box 20 of the partnership pages. The statement that the loss was being claimed pursuant to section 128 ITA 2007 does not signify that it was to be treated as a year 1 deduction from partnership profits rather than as a standalone claim.

50. There was, finally, a reference to "the deduction that I am claiming on my return" that is not regarded by HMRC as "relief now for 2008-09 trading and certain capital losses". The use of the word deduction is capable of referring to year 1 relief rather than a standalone claim, but the reference to trading and capital losses is, in our judgment, more apt as an explanation of why the claim for relief has been inserted in box 3 in the Additional Information pages: it explains why box 3 on those pages is being used despite the fact that employment losses do not fall within the description attached to that box.

51. Mr Atherton relied on the case of *Tooth,* discussed at [30] above. The FTT and the Upper Tribunal held that the taxpayer in that case had not deliberately brought

about an insufficiency because he had drawn what he had done to the attention of HMRC, even though the entry made in the tax return was inappropriate. But the facts of that case are materially different. The white space explanation was not provided in the Additional Information pages in relation to box 3 but was provided in the white space in box 30 of the partnership pages. Although the narrative referred to "box 3", there was no relevant entry in box 3 in the partnership pages, and the reference was taken to be to the amount of the loss inserted in box 7 of the partnership pages. So in that case the taxpayer had provided his explanation in the only section of his tax return where he had claimed the employment loss.

52. That is different from the facts of this case, where the disclosure was provided in the Additional Information pages white space and referred expressly to box 3, which in this case was an apt reference to box 3 on those pages in which the claim to relief was made. Moreover, the question at issue in *Tooth* was a different one, namely whether there was a deliberate inaccuracy in the tax return; the question here is whether on its true interpretation the disclosure given in the Additional Information pages of the tax return relates to the entry in box 20 of the partnership pages. So a conclusion in *Tooth* that the provision of the white space disclosure prevented there from being a deliberate inaccuracy does not answer the question in this case.

53. In our judgment, the FTT was right to find that the white space disclosure related only to the box 3 entry, not also to the box 20 entry, and that it said nothing about the interrelationship between each of those entries.

54. The next issue is therefore whether it was careless of Mr Atherton or F&L to use box 20 in the way that they did, without any disclosure or explanation relating to it or to the interrelationship between box 20 on the partnership pages and box 3 on the additional information pages. The FTT asked itself that question having concluded that the entry of a figure for year 2 employment losses in a box relating to year 1 partnership losses was prima facie evidence of carelessness, such that Mr Atherton had a case to answer (a submission of no case to answer on carelessness having been made by Mr Gordon on day 1 of the FTT hearing). Having heard the evidence on behalf of Mr Atherton, the FTT returned to the question, identifying the test for carelessness as being whether a reasonably diligent taxpayer, mindful of the need to make a complete and accurate tax return, would have made the entry in box 20 as F&L did without explanation. If it was careless then the FTT had already determined at paragraph [119], that the carelessness caused the insufficiency of the assessment (see also paragraph [188]).

55. The FTT held that use of box 20 without any explanation was careless, essentially for the following reasons:

(1) No reasonable person completing the tax return could think that box 20 related to anything other than a partnership loss incurred in the tax year 2007/08 (paragraph [138]);

(2) Although it was not unreasonable to consider that a year 2 loss could be "forced" into a year 1 tax return, a reasonable and conscientious taxpayer would not have done so without providing an explanation (paragraphs [153-156]);

(3) Mr Atherton had made an unexplained duplicate claim for the same loss in box 3 (paragraphs [160], [161]), and

(4) Neither Mr Atherton nor F&L were reasonably relying on advice in so doing (paragraph [182]).

56. In our view, having held that providing an explanation or making disclosure could be relevant under section 29(4), the FTT was entitled on that basis to reach the conclusion that a reasonably diligent taxpayer, mindful of the need to make a complete and accurate tax return, would not have made the entry in box 20 as F&L did without providing an explanation of what he was doing. Having held that Mr Atherton (acting through F&L) was careless in submitting his tax return, the FTT concluded that the insufficiency was brought about (i.e. caused) by that carelessness.

57. Mr Atherton argued, as a further ground of appeal, that even if his other arguments on discovery and carelessness were to fail, the FTT was nevertheless wrong to conclude that the carelessness caused the insufficiency. That raises the issue of the need for a causative link between the carelessness and the insufficiency, which is represented in section 29(4) by the words "was brought about carelessly". Mr Atherton argued that the insufficiency in the return was attributable only to the numerical entry in box 20, and that the lack of explanation of that entry had no causal effect. Even if a full explanation of the use of box 20 had been provided in white space on the tax return, the insufficiency would still have arisen by virtue of the presence of the figure in box 20.

58. It is correct that the insufficiency of the assessment made in 2009 resulted from the insertion of £5,048,602 of year 2 employment losses in box 20. As we have discussed in relation to the Discovery Issue, HMRC, believing the claim for relief in relation to employment losses to be a standalone claim, started a Schedule 1A enquiry into the claim for relief. Following the decision of the Supreme Court in *Cotter*, HMRC realised that the Schedule 1A enquiry was ineffective to challenge the relief claimed in the tax return itself and that they were out of time to launch a section 9A enquiry. Subject to the ability of HMRC to rely on the discovery provisions of section 29, therefore, there was income of the taxpayer for the relevant year of assessment that ought to have been but had not been assessed to income tax and the original assessment to tax was, or had become, insufficient.

59. In that sense, the insufficiency can be seen to have been brought about by the tax return submitted by F&L on behalf of Mr Atherton. Having held that the tax return was made carelessly, the FTT concluded—without further consideration of the issue of causation—that the insufficiency was brought about by the taxpayer's carelessness. On that basis it dismissed Mr Atherton's appeal against the discovery assessment. The submission of the carelessly completed tax return did in fact give rise to the insufficiency; as a matter of legal causation, however, there appears to be force in Mr Atherton's argument that the true cause of the insufficiency was the inclusion of the loss figure in box 20 and that no amount of disclosure would have made a difference.

60. Whatever the answer might be as a matter of the general law of causation, the TMA has made specific provision in this regard. Section 118(5) was not referred to by the FTT. It provides that:

> "For the purposes of this Act a loss of tax or a situation is brought about carelessly by a person if the person fails to take reasonable care to avoid bringing about that loss or situation."

61. The reference to the bringing about of a situation carelessly is apt to include the provisions of section 29(4) relating to carelessness of the taxpayer or someone acting on his behalf. Accordingly, the relevant question is not that which would arise under the general law, nor whether the tax return was carelessly submitted, but whether the taxpayer and those acting on his behalf took reasonable care to avoid creating the insufficiency in the assessment.

62. When the question is asked in that way, the answer becomes clear. The duty of the taxpayer is to take reasonable care to avoid bringing about an insufficiency and if he does not do so then the insufficiency is brought about carelessly. Mr Atherton could readily have avoided the insufficiency by not using box 20 in the way that he did. Although he wished to use box 20 in that way, to try to "force" a year 2 loss into his assessment for year 1, he was under a duty to take reasonable steps to avoid the consequences of doing so. Despite his objective, he was bound not to use box 20 in that way. He could reasonably have avoided the insufficiency by confining himself to a standalone claim for relief using box 3.

63. It does not follow that "forcing" a claim into a tax return will necessarily be careless. If a taxpayer were advised by an adviser who was not someone "acting on his behalf" to make use of box 20 in the way that Mr Atherton did, and if reliance on the advice given was reasonable in the circumstances, the taxpayer may well then not have been in breach of his duty to take reasonable care to avoid bringing about an insufficiency. However, on the unimpeachable findings of the FTT, Mr Atherton was not given that advice by anyone who could be argued to be acting otherwise than on his behalf (i.e. NTA or Leading Counsel advising NTA) and it was unreasonable of Mr Atherton and F&L to act in the way that they did. Since F&L were undoubtedly "acting on behalf of" Mr Atherton for the purpose of section 29(4), the implied advice of F&L cannot avail Mr Atherton because F&L were also under a duty to take reasonable care to avoid the insufficiency.

64. As we have indicated, we consider that this conclusion, namely that the insufficiency was brought about carelessly, could have been reached by the FTT by a different route, namely by holding that any disclosure by Mr Atherton was immaterial to an assessment of carelessness under section 29(4). But having held that Mr Atherton had failed to do what a reasonably diligent taxpayer who was mindful of the need to make a complete and accurate tax return would have done, the FTT then failed to ask itself the right question on causation. It should have asked whether Mr Atherton and F&L had taken reasonable care to avoid bringing about the insufficiency. Given the FTT's factual findings about advice given to Mr Atherton and F&L, had that question been asked the answer would inevitably have been that

there was a failure to take reasonable care to avoid the insufficiency, and so the insufficiency was brought about by the carelessness of the taxpayer or someone acting on his behalf.

Decision

65. For these reasons, we conclude that the FTT took the wrong route but nevertheless reached the right conclusion. Taking reasonable care in the circumstances (where F&L were found not to be acting on the basis of specific advice about the use of box 20) required F&L not to use box 20 if it would bring about an insufficiency in his assessment to income tax.

Disposition

66. For the reasons given, the appeal in relation to the Discovery Issue is dismissed. In relation to the Carelessness Issue, we affirm the decision of the FTT but for different reasons and accordingly the appeal on that issue is also dismissed.

MR JUSTICE FANCOURT
JUDGE THOMAS SCOTT

RELEASE DATE: 12 February 2019