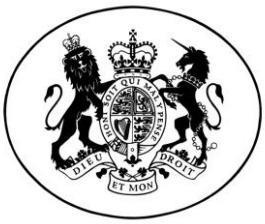
[2019] UKUT 0071 (TCC)



Appeal number: UT/2017/142

CAPITAL GAINS TAX – principal private residence relief – discovery assessment (s. 29 TMA 1970) – whether carelessness of taxpayers' advisers in issue before FTT – whether FTT entitled to consider issue – fairness

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

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

- and -

WILLIAM RITCHIE and HAZEL RITCHIE **Respondents**

TRIBUNAL: MR JUSTICE NUGEE
JUDGE CHARLES HELLIER

Sitting in public in the Rolls Building on 23 January 2019

Simon Pritchard, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellant

Keith Gordon, instructed by Cleaver Fulton Rankin, Solicitors, for the Respondents

DECISION

Introduction

1. In January 2007 Mr and Mrs Ritchie sold a plot of land of about 0.7 hectare on which was the house they had built, together with other buildings including a very large shed. Their tax returns for the year of disposal contained no reference to the sale and reported no chargeable gain. The returns were prepared by their accountant, Mr Weir.

2. On 12 March 2013 and 27 March 2013 HMRC made "discovery" assessments under section 29 Taxes Management Act 1970 (**"TMA"**) on Mr and Mrs Ritchie. These assessed each of them to CGT on a chargeable gain from the sale of the land. The assessments were made on the basis that the gain which arose on the sale of the land was not wholly exempt under the principal private residence provisions of section 222ff TCGA 1992 (the **"PPR provisions"**)[1].

3. Mr and Mrs Ritchie appealed against the assessments and the appeals were heard by the FTT in March 2017. There were two issues before the FTT: the first related to the extent to which the gain on the sale of the land was exempt from CGT under the PPR provisions; the second was whether the conditions in section 29 TMA for the making of a discovery assessment and the time limit provisions in section 36 TMA were satisfied. One of those conditions is that the loss of tax counteracted by the assessment must be due to the carelessness of the taxpayer or a person acting on his or her behalf.

4. In a clear and comprehensive decision the FTT found that a larger part of the gain on the sale of the land was exempted under the PPR provisions than had been allowed by HMRC, and that the provisions of section 29 and 36 TMA were satisfied by reason of the carelessness, not of Mr and Mrs Ritchie, but of their advisers. It reduced the chargeable gain significantly, but upheld the making of the assessment.

5. HMRC appealed to this tribunal against the FTT's findings in relation to the effect of the PPR provisions. Mr and Mrs Ritchie appealed against the FTT's findings that the carelessness condition was satisfied.

6. We first heard argument on the carelessness issue. At the conclusion of the argument on that issue we gave a brief oral decision to the effect that the FTT had erred in law in concluding that the carelessness condition was satisfied, and said that we would give written reasons in due course. These are those reasons. We did not hear any argument on the issues in relation to the

---

[1] HMRC considered that those provisions rendered taxable that part of the gain attributable to the period before the house had been built, that the shed should not be treated as part of the exempted dwelling, and that not all of the 0.7 ha should qualify for relief.

application of the PPR provisions, and this decision therefore relates only to the carelessness issue.

Sections 29 and 36 TMA

7. It is convenient to set out the relevant statutory provisions (in the form in which they were at the relevant time) at the outset.

8. Section 29 TMA 1970, so far as relevant, provided:

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

9. It can be seen that section 29 provides that if an officer discovers that tax which ought to have been assessed has not been assessed (a loss of tax) the officer may assess the amount, or the further amount, which ought in his opinion to be charged in order to make good the loss of tax, but that where the taxpayer has delivered a tax return, the power to assess is subject to one of two conditions being fulfilled, which appear in subsections 29(4) and 29(5). In the present case the FTT found that both those conditions were fulfilled. No appeal is made against the FTT's finding in relation to subsection 29(5), so for the purposes of satisfying the requirements of section 29, the question whether the carelessness condition in subsection 29(4) was also fulfilled is not material.

10. But TMA also contains time limits for the making of assessments. Section 34 TMA provides for an ordinary time limit for the making of any assessment of 4 years from the end of the year to which the assessment relates. This is however subject to section 36 TMA.

11. Section 36, so far as relevant, provided 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 (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).
>
> …
>
> (1B) In subsections (1) and (1A), references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person."

12. In the present case the assessments were made more than 4 years after the relevant year. They were thus invalid unless section 36 was satisfied, that is to say unless the loss of tax had been brought about carelessly or deliberately by the taxpayers or persons acting on their behalf. There was no suggestion that the loss had been brought about deliberately.

The FTT's findings

13. The FTT held that that an officer had made a discovery within section 29(1): there is no appeal against that finding. It also found that the conditions in subsections 29(4), 36(1) and 36(1B) were satisfied, holding that although Mr and Mrs Ritchie had not themselves been careless, the loss of tax had been brought about carelessly by both Mr Weir and Mr Russell, each of whom had been acting on their behalf. Mr Weir, as already referred to, was the Ritchies' accountant who had completed their tax returns for them; Mr Russell was a consultant that Mr Weir sent Mr Ritchie to go and see.

14. Mr Pritchard, who appeared for HMRC, told us that HMRC did not rely upon

the FTT's conclusion that Mr Russell was a person acting on behalf of Mr and Mrs Ritchie. As a result the only issue before us on this aspect of the case was whether or not the FTT erred in law in finding that Mr Weir had been careless.

15. The taxpayers argue that the FTT erred in its conclusion because the way in which it dealt with the issue of carelessness in relation to Mr Weir was unfair and thus an error of law.

16. There was no dispute about the following factual findings of the FTT:

    (1) Mr and Mrs Ritchie used Mr Weir to prepare and file their tax returns [105];

    (2) Mr Ritchie recognised that the sale of the land was out of the ordinary and sought the advice of Mr Weir about the tax consequences [105];

    (3) Mr Weir was aware that the sale might give rise to a CGT liability and told Mr Ritchie that he was not an expert on this type of issue. He referred Mr Ritchie to Mr Russell [106, 122] whom Mr Weir regarded as excellent and as giving very sound advice [122];

    (4) Mr Russell was a former tax inspector [131]. Mr Ritchie went to see him and answered all his questions [106];

    (5) after the consultation with Mr Russell, Mr Ritchie had told Mr Weir that there was no problem about tax on the sale, and this was Mr Ritchie's honest interpretation of what Mr Russell had told him [119(5)];

    (6) Mr Weir accepted Mr Ritchie's account of Mr Russell's advice without further research [128(2)] and completed the tax returns making no disclosure of the sale or of any gain arising on it [123].

The progress of the appeal before the FTT

17. Before the notice of appeal was given the correspondence between the parties in relation to the assessments had been limited to the applicability of the PPR provisions.

18. In their Notice of Appeal Mr and Mrs Ritchie said:

> "3. The assessment is out of time because HMRC cannot show that the under-assessment of tax is due to careless or deliberate conduct by the taxpayer or a person acting on the taxpayer's behalf"

and, in a covering letter, put forward the contention that as Mr and Mrs Ritchie had obtained professional advice from an ex-HMRC officer the requirements of section 36 had not been met.

19. The FTT made directions for the service of: a statement of case by HMRC,

witness statements and skeleton arguments.

20. In their statement of case, dated 4 July 2016, HMRC quoted section 36(1) and (1B), and made only one reference to the conduct of Mr and Mrs Ritchie's advisers, when in paragraph 39 they said

> "... HMRC do not accept that any individual or indeed his or her advisor, taking reasonable care, could have concluded [there was no CGT]".

Apart from this there were at least four repetitions of the mantra that the loss of tax had been brought about carelessly "by the appellants" without any reference to advisers or to those acting for the appellants. Indeed there was no express allegation that the advisers acted on behalf of Mr and Mrs Ritchie. At the end of the statement of case they said [43]:

> "The discovery assessments under appeal for 2006/07 were made to prevent the loss of tax brought about by the appellants' careless behaviour. As such the onus of proof rests on HMRC. For the reasons set out above HMRC argue that these assessments have been validly made and are necessary because of the situation arising clearly brought about by appellants' careless behaviour. The Standard of Proof..."

21. Witness statements were prepared in August and September 2016. The witness statement of Mr Ritchie explained that he had taken advice from Mr Weir and, on his advice, from Mr Russell. Mr Weir's witness statement was very short. He explained that he knew of the sale, was aware that the sale might give rise to CGT and therefore referred Mr and Mrs Ritchie to Mr Russell. He had relied on Mr Russell's advice in completing the tax returns. Mr Russell's statement was one page. It recounted Mr Ritchie's visit and the advice he had given him.

22. The parties produced skeleton arguments for the FTT hearing. That for the Ritchies is dated 27 February 2017 and was prepared by Mr Gordon who appeared for them at the hearing, as he did before us. It referred, under the heading "Outline of the Appellants' case", to the Ritchies being entitled to believe, in accordance with the professional advice taken at the time, that the gain was fully exempt and "thus there has been no carelessness"; and under the heading "The discovery assessments" stated as follows:

> "15. The Appellants will need to address any relevant submissions advanced by HMRC in due course and once they are fully articulated.
>
> 16. However, the Appellants maintain that they clearly took reasonable care when dealing with their disposal, as further evidenced by the fact that they sought expert advice from a former inspector of taxes, such advice not being obviously wrong…"

23. That for HMRC is dated 6 March 2017 and was prepared by Mr Foxwell, an advocate in HMRC Solicitor's office, who appeared for HMRC in the FTT. Having referred to (but not quoted) section 36(1) and (1B) TMA, this said in a

section headed "ISSUES":

> "33. Whether HMRC had made a discovery of a loss of tax which was brought about carelessly by the appellants within the meaning of section 29 TMA.
>
> 34. Whether HMRC made its discovery assessments within the time limits allowed for extended time in its assessment where tax was lost as a result of the appellants carelessness."

The submissions included the following:

> "70 …this loss of tax was brought about carelessly by the taxpayer per section 29(4) TMA.
>
> 73. In terms of the careless behaviour of the appellants, HMRC would cite...
>
> 81. HMRC submit it is not taking reasonable care to assume that the advice sought from a former tax inspector would negate the need to alert HMRC to this substantial sale or consider it more closely.
>
> 83. Given the above, HMRC submits that the loss of tax arising is attributable to the careless behaviour of both appellants… HMRC do not accept that any individual or their advisor, taking reasonable care, could have concluded [that no CGT was payable]."

Further there is no express argument in the skeleton argument that Mr and Mrs Ritchie's advisers were persons acting on their behalf; indeed there is no reference to Mr Weir or Mr Russell by name at all. Their witness statements had been provided to HMRC before the skeleton argument.

24. The hearing of the appeal lasted three days, from 21 to 23 March 2017. The FTT recorded that in cross-examination Mr Weir agreed that he had received nothing in writing from Mr Russell. The FTT concluded that he took no steps to corroborate Mr Ritchie's account of Mr Russell's advice and accepted that account without further research. In relation to Mr Russell's evidence it recorded that he had been cross-examined about his experience and about the advice he had given to Mr Ritchie. He was asked by the tribunal about the documentation he may have had about the permitted area for PPR relief and issues covering the period before Mr and Mrs Ritchie had built and occupied the house. The FTT found that he had consulted HMRC's manual.

25. Earlier in the hearing Mrs McIvor, an HMRC officer, gave evidence in relation to the making of the assessments. The FTT recorded that she was asked about carelessness by Mr Gordon. It recorded her response that she thought Mr and Mrs Ritchie were careless. The tribunal then says:

> "64. She added that whether there was carelessness in relation to the tax advice from Mr Russell depended upon what facts were given and how the advice was acted on."

A question arises as to whether by this the tribunal took her to be alluding to carelessness by Mr Russell or carelessness by Mr Ritchie. It seems to us however that it cannot be safely concluded that she was referring to carelessness by Mr Russell in giving advice, as the reference to "how the advice was acted on" must be referring to what Mr Ritchie did as a result of the advice. The more natural interpretation is that this evidence was directed at whether Mr Ritchie was careless in taking and acting on Mr Russell's advice, and not at whether Mr Russell was careless in giving it.

26. At the end of the second day, after the evidence of all the witnesses had been heard (and as we understood it after the departure of the witnesses), there was an exchange between Mr Gordon and the tribunal. Mr Gordon asked whether there was a likelihood of the case ending early. He explained to us that he was confident that the FTT would find that the Ritchies had not been careless which would mean that none of the PPR issues would arise. Judge Thomas replied that he was not fully satisfied on the question of carelessness by persons acting on the taxpayers' behalf.

27. In the course of his closing submissions on the last day Mr Foxwell indicated that HMRC were arguing that the loss of tax had been caused by the carelessness of Mr Weir and/or Mr Russell as persons acting on the taxpayers' behalf. Mr Gordon made submissions in reply that: (a) the question whether Mr Weir or Mr Russell had been careless had not been adequately pleaded, and (b) that Mr Russell was not a person "acting on behalf of" Mr and Mrs Ritchie.

28. We accept Mr Gordon's account, from which Mr Pritchard did not dissent, that the way in which he understood the case until after the close of evidence was that HMRC's case on carelessness was premised on the proposition that Mr and Mrs Ritchie had themselves been careless, and for the reasons given above we do not read the reference in paragraph [64] of the decision as indicating clearly to the contrary.

The FTT's conclusions

29. Having found that Mr and Mrs Ritchie were not careless, the FTT said:

> "346. The assessments on [Mr and Mrs Ritchie] can therefore only be justified if another person acting on their behalf failed to take such reasonable care. Before we consider this issue we deal with Mr Gordon's submissions on this "agency" point.
>
> 347. We do not accept that HMRC did not adequately plead this issue. Contrary to what Mr Gordon says, the point was raised in HMRC's Statement of Case at paragraph 39 and their skeleton at paragraph 83, and s 36(1B) TMA was cited. What is more it was only in cross-examination that the full facts about the actions and omissions of the relevant parties became known to HMRC.
>
> 348. We also consider that paragraph 30 of *Atherton* is exactly in point

here. HMRC do not have specifically to plead carelessness (and there is also support for that proposition in *Ingenious Games LLP and ors v HMRC* [2015] UKUT 105 (TCC)) at [40] and [62] where Henderson J (as he then was) distinguished between dishonesty which had to be properly pleaded and less serious misconduct which did not, carelessness clearly being a less serious form of behaviour in his eyes (and ours).

349. We therefore think that we are entitled to consider the evidence of Mr Russell and Mr Weir (the only candidates for agency) and to decide if they were careless and, if so established, that their carelessness brought about the tax loss."

30. It then found that Mr Russell, and "more emphatically" Mr Weir had been careless. It concluded:

> "371. Our conclusion then is that Mr Weir's, and to a lesser extent Mr Russell's, careless conduct brought about a tax loss and it follows that the assessments on both [Mr and Mrs Ritchie] (as Mr Weir was acting for [Mrs Ritchie] when he completed her tax return) were made within the time allowed by s 36(1) TMA, and that the condition in s 29(4) TMA is met."

HMRC's arguments

31. Mr Pritchard says that the FTT's conclusion that the contention that the advisers' carelessness justified the assessment had been adequately pleaded in the statement of case was a mixed finding of fact and law which could not be described as perverse. The FTT had adequate material on which to reach that conclusion: (1) the quotation in the statement of case of section 36(1B) which related only to the carelessness of agents; (2) the statement at paragraph 39 of the statement of case, that HMRC did not accept that "an individual or his or her advisor" could have concluded that no CGT was due; and (3) the repetition of that phrase in the skeleton argument.

32. In any event, he says, it could not be right to require HMRC to anticipate in its statement of case the defence that the appellants were not responsible by virtue of the loss having been due to someone acting on their behalf.

33. Further it was always open to the FTT to consider new arguments arising from the evidence (citing *MCashback* – see [36] below). It was noted that the taxpayers had not sought an adjournment or the opportunity to adduce further evidence.

Discussion

34. Rule 5 of the FTT procedure rules (SI 2009/273) provides that the tribunal may regulate its own procedure and Rule 2 provides that in so doing it must seek to give effect to the overriding objective of dealing with cases justly and fairly. Rule 2(2) provides that so dealing includes:

> "(b) avoiding unnecessary formality and seeking flexibility in the proceedings,
>
> (c) ensuring so far as practicable that the parties are able to participate fully in the proceedings."

35. Rule 25 provides that HMRC must deliver a statement of case which sets out the legislative provisions under which an appealed decision was made and their position in relation to the case. Rule 20 requires the appellant to set out its grounds of appeal in the notice of appeal.

36. In *Tower MCashback LLP 1 and anor v HMRC* [2011] UKSC 19 the Supreme Court considered, inter alia, the question of whether HMRC could pursue arguments supporting a conclusion in a closure notice which had not been advanced in the notice itself. Lord Walker at [15] quoted with approval the words of Henderson J in the High Court:

> "There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the commissioners [the predecessors of the FTT] in exercise of their statutory functions to have regard to that public interest. [The judge then considered changes in the tax system and continued] For present purposes, however, it is enough to say that the principle still has at least some residual vitality in the context of section 50, and if the commissioners [that is to say now the FTT] are to fulfil their statutory duty under that section they must in my judgment be free in principle to entertain legal arguments which played no part in reaching the conclusions set out in the closure notice. Subject always to the requirements of fairness and proper case management, such fresh arguments may be advanced by either side, or may be introduced by the commissioners on their own initiative."

37. These sources make clear that in determining what arguments the tribunal may permit to affect its decision the guiding principle must be fairness in the circumstances of the case. Fairness does not require formality, and Rule 2(2)(b) expressly requires formality to be avoided. Fairness does not require, for example, that to advance an argument not present in its statement of case or the notice of appeal a party must always formally apply to amend its earlier pleading. On the other hand it does require that the other party is given adequate opportunity in the circumstances to meet the point, whether by argument or with evidence.

38. If a new argument is a pure point of law it might be addressed, as the case may be, after: a few minutes' thought; an evening's consideration; or one or more days' research. Provided that the other party has an appropriate opportunity to meet the point, it would generally not be unfair for the tribunal to take that argument into account.

39. When the argument gives rise to the possibility that it may be rebutted by further evidence, the other party must have a fair opportunity to bring that evidence to the tribunal. Depending on the circumstances that may mean no

more than asking a few extra questions of a witness who is at the hearing in any event; or it may mean arranging for documents to be provided, or further evidence called, the next day; or seeking a longer adjournment. We do not wish to be thought to be laying down any particular rules, as what fairness requires will depend on all the circumstances of the case, and cases in the FTT vary enormously from informal appeals that take a very short time to elaborately argued cases that last for many days.

40. On the other hand, there will be circumstances where it is simply too late for a point to be raised. Where it is not reasonably possible in the circumstances of the case – having regard in particular to the resources of the parties and the need to avoid delay – for the other party to have a fair opportunity to rebut a new point, that is likely to mean that it would be unfair for a new point to be taken.

41. These requirements of fairness seem to us to arise however a new point emerges, that is whether the argument is one raised expressly or implicitly by: the appellant – for example by a non-represented appellant who has provided only a rudimentary notice of appeal; by HMRC – for example an argument which arises as a result of the questioning of a witness; or by the tribunal itself.

42. In the same way that a statement of case should set out HMRC's arguments clearly and unequivocally with sufficient detail, a new argument should only be taken into consideration if, among other things, it has been made clear to all parties what it is, and that it is being made.

43. In HMRC's case the FTT's Rules require the statement of case to set out their position in relation to the appeal, but flexibility, fairness and the tribunal's duty to seek that taxpayers pay "the correct amount of tax" require that they should not be so constrained by the arguments there set forth that no other argument may be raised. Whether or not that is permissible will depend upon whether the taxpayer can be given a fair opportunity to meet it. It would be contrary to the objectives of avoiding unnecessary formality and seeking flexibility if a greater hurdle for raising a new argument were placed in front of HMRC simply because it had set out its view at a particular time in the proceedings. That would risk Statements of Case becoming burdened by boilerplate and generalities rather than plainly indicating HMRC's real concerns.

44. Mr Pritchard says that it cannot be right to require HMRC to anticipate in a statement of case defences that might be run, such as a defence that if there was any carelessness it was not that of the appellants. HMRC cannot be required to plead so as to foresee defences. We do not disagree with this proposition. There is nothing in Rule 25 or in the requirements of fairness and proper case management which requires the statement of case to deal with all contingencies. But if a statement of the taxpayer's defence or the evidence supporting it opens the possibility of another line of argument in HMRC's

support, and HMRC wish to run that argument, the appellant must be given a fair opportunity to deal with it: that requires, at the least, its clear articulation.

45. In this appeal we have asked ourselves: first, whether the material advanced by HMRC before the end of the evidence gave the appellants adequate notice that HMRC intended to argue that Mr Weir's carelessness gave rise to the loss of tax so as to justify and permit the discovery assessment, such that the appellants had a fair opportunity to rebut the point; and second, if the issue was first raised by the tribunal, whether the tribunal afforded such an opportunity to the appellants.

The FTT's decision that the issue had been adequately pleaded

46. In our judgment a fair reading of HMRC's statement of case and skeleton argument does not clearly indicate that HMRC were intending to argue that the assessment could be justified by the carelessness of the advisers (whether or not they were "acting on behalf of" the taxpayers). The repetition and emphasis on the appellants' carelessness eclipse the reference to section 36(1B) and even the single reference to "advisor" in each document makes no unequivocal suggestion that they were persons acting on behalf of the taxpayers whose action could trigger the operation of section 36(1B). Nor was there anything in the prior correspondence between the parties which could cast these statements in a wider light. As we read them, the references to "advisor" in the pleadings and in HMRC's skeleton argument were put forward, not as an alternative allegation that Mr Weir and Mr Russell were careless, but as part of the argument that Mr and Mrs Ritchie themselves were careless.

47. In our view the FTT's conclusion that the issue had been adequately pleaded was one not reasonably open to it on the material before it (and Mr Gordon's understanding that HMRC's case on carelessness was premised on the Ritchies themselves having been careless was a reasonable one). We find that the FTT erred in law in this respect.

The raising of the issue by the FTT

48. The FTT noted that it was only in cross examination that the full facts about the actions or omissions of the relevant parties had become known to HMRC. That could have been good grounds for permitting the argument to be raised if the appellants were given a fair opportunity to deal with it. In those circumstances, while we fully accept that the tribunal itself (in accordance with Lord Walker's endorsement of what Henderson J said in *MCashback)* has the right to investigate matters which have not in fact been put in issue by the parties, and that in some circumstances has a duty to do so, this is subject to the requirements of fairness.

49. Here the argument was clearly articulated for the first time in the exchange between the tribunal and Mr Gordon. That was after the evidence had closed

and the witnesses had gone home. In the light of our conclusion that the point had not been clearly raised by HMRC and our acceptance that Mr Gordon had reasonably understood that HMRC's case was premised on the Ritchies themselves being careless, that raises the question whether it was fair for the point to be taken into consideration. We have come to the clear conclusion that it was not. It might have been different if the tribunal had considered with Mr Gordon whether he would wish to recall the witnesses, and if so whether that was reasonably feasible and fair, but we consider that it was unfair for the point to be raised after the close of the evidence without any consideration of the question whether an opportunity should and reasonably could be offered to adduce further evidence.

50. The FTT recorded the questioning of the witnesses. There was nothing in that record to indicate that it had been put to the advisers that they had been careless or that an argument was to be run that their carelessness had caused the loss of tax. A suggestion that a witness has been careless is self-evidently not as serious as an allegation that a witness has been fraudulent (where there is a well established rule of practice that the allegation should be put clearly and expressly to the witness); but where that suggestion has not been clearly raised before the witness gives evidence, there are in our judgment three reasons why in some shape or form it should generally be made clear to the witness at some stage during his or her examination that that is what is intended. The first is to alert the other party to the argument; the second is that unless it is clear to the witness that his or her conduct is at issue the witness may fail to mention issues relevant to it (thus depriving the other party of a fair chance of relying on what might have been said and the tribunal of the best evidence); and the third is out of fairness to the witness him or herself. Decisions of the FTT are public documents and in fact routinely published. The reputation of justice is potentially diminished if a tribunal can, having heard a witness, find him or her to have been careless or negligent without giving him or her an opportunity to explain his actions or contest the finding, and perhaps especially so where the witness is a professional and his professional competence is questioned.

51. We understand Mr Pritchard's point that the evidence had come out in cross-examination and that it is not clear what re-examination could have added to it. But it is not necessary for us to consider what re-examination might or might not have added to the evidence; the witnesses had left and the appellants were deprived of any opportunity of exploring the issue with them. We regard it as unfair in the circumstances for the point to have only been taken at that stage without further consideration of how to address the position.

52. On those grounds we propose to allow Mr and Mrs Ritchie's appeal against the decision of the FTT, and set aside the finding that the loss of tax was caused by careless conduct by Mr Weir.

Should the case be remitted?

53. This raises the further question as to what we should do now. The choice is between remitting the matter back to the tribunal, or deciding not to remit the matter back to the tribunal and leave matters as they stand, that is with the appeal allowed and the assessment discharged.

54. That seems to us to raise a discretionary question. We see no reason why we should not make that decision. Had the FTT come to what we regard as the correct view in law, namely that the point was not properly and adequately pleaded so as to give fair notice to the appellants, but had decided to raise the issue of its own motion after the evidence had closed, it would then have had to consider whether it was appropriate to adjourn to give the parties an opportunity to adduce further evidence, or to deal with the case on the basis that the evidence was closed and that it was too late for the point to be raised. It seems to us that we should now make the decision which we consider to be fair in all the circumstances as between remitting the appeal to the FTT for the purpose of taking further evidence on the point or regarding the case as one that has to stand or fall on the evidence that has been adduced.

55. It is true that there is a public interest in the correct tax being collected. But there is also a public interest in litigation being brought to a conclusion. Weighing up these competing interests, we have reached the decision that in the circumstances of this case it would not be appropriate to remit it to the FTT for further evidence. The matters in question date back many years and the hearing before the FTT was the opportunity for the parties to call their evidence and put their case. In the circumstances we have outlined, we do not think that the question of the carelessness of the advisers was squarely before the tribunal, and we think it is now too late, and would be unfair, for that question to be revived.

Conclusion

56. We allow the appeal and discharge the assessment without remitting to the first-tier tribunal.

MR JUSTICE NUGEE

JUDGE CHARLES HELLIER

JUDGES OF THE UPPER TRIBUNAL

RELEASE DATE: 12 March 2019