Neutral Citation: **[2023] UKUT 00038 (TCC)**

Case Number: UT/2018/000004

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Hearing venue: Video hearing

INCOME TAX - discovery assessment - whether HMRC had discharged burden of establishing discovery - whether the Upper Tribunal is bound to follow the decision of the Court of Appeal in Tooth *that a discovery assessment may become "stale" because the contrary decision of the Supreme Court in that case was* obiter *- quantum of assessment - appeal dismissed*

Heard on: 2 November 2022
Judgment date: 03 February 2023

Before

JUDGE THOMAS SCOTT
JUDGE ASHLEY GREENBANK

Between

PAUL HARRISON

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Harriet Brown and Ross Birkbeck, instructed by direct access

For the Respondents: Sadiya Choudhury, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. The Respondents ("HMRC") issued a "discovery" assessment to the Appellant ("Mr Harrison") assessing him to income tax for the tax year 2007/08 in respect of his share of the proceeds of sale of a property. The First-tier Tribunal ("FTT") dismissed Mr Harrison's appeal against the assessment, in a decision published at [2018] UKFTT 359 (TC) (the "Decision"). The FTT refused Mr Harrison permission to appeal, but the Upper Tribunal granted him permission to appeal against the Decision on certain grounds, discussed further below. This is the decision on that appeal.

2. Mr Harrison was represented by Ms Brown and Ross Birkbeck acting *pro bono*, for which the Tribunal is most grateful. We are also grateful to Ms Brown and Ms Choudhury for their helpful submissions.

LEGISLATION

3. For the purposes of this appeal, the primary relevant legislation is that relating to HMRC's ability to raise a discovery assessment. At the time when the assessment was issued this was contained in section 29(1) of the Taxes Management Act 1970 ("TMA 1970"), 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—
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> > (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
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> > (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,
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> 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.

4. Subsections (2) and (3) apply only where a tax return has been made, which was not the case here.

BACKGROUND AND SUMMARY OF FACTS

5. References below to paragraphs in the form [x] are, unless indicated otherwise, to paragraphs of the Decision.

6. The FTT set out its findings of fact at [9], which, in summary, were as follows:

> (1) Mr Harrison was in partnership with his wife from the 1980s. The partnership initially traded as forensic accountants and later, from 1990, as property developers.
>
> (2) By 2006 Mr Harrison and his wife expected to receive funds in settlement of litigation in which the partnership had become involved. They had agreed to purchase a property called Bearsted from the settlement monies, but the settlement did not materialise. Mr Harrison's son and daughter-in-law bought the property instead and sold it in November 2007 at a profit.

(3) It was agreed between Mr Harrison and his wife and their son and daughter-in-law that the partnership would receive £200,000 from the proceeds of sale of Bearsted. This was recorded in two emails (the "2008 emails").

(4) Mr Harrison took the view that he and his wife had losses and expenses which they could set against this £200,000, and so no tax would be due from him. He did not notify HMRC of his chargeability to tax on the amount or file a self-assessment return for that year.

(5) HMRC became interested in the tax affairs of Mr Harrison's son, who had not submitted a tax return for 2007/08, and in 2012 searched his premises. In 2013 he pleaded guilty to fraud and was convicted and sentenced.

(6) Court experts were appointed to investigate the financial affairs of Mr Harrison's son, and in the course of that investigation Mr Harrison informed HMRC of the sums received by him and his wife in respect of Bearsted.

(7) On 25 September 2015, Officer Raven of HMRC raised a discovery assessment on Mr Harrison in respect of what was described as a £200,000 "finder's fee" on the sale of Bearsted.

(8) Mr Harrison appealed against the assessment on 20 October 2015, accepting that £200,000 had been received but stating that it was received by the partnership and that there were partnership trading losses and expenses to be set against it.

(9) Mr Harrison considered that HMRC had come into possession of the 2008 emails when they had searched his son's premises in 2012. He asked HMRC to confirm his understanding that "HMRC may only raise an assessment on a person in respect of VAT, Income tax or CGT within 12 months of becoming aware of or notified of such a taxable liability".

(10) Officer Raven confirmed that this was the case. That was incorrect. Officer Raven also said that the emails were insufficient in themselves to satisfy him that Mr Harrison was liable to tax.

(11) Mr Harrison formed the view that HMRC were out of time to have issued the assessment on him, because they must have had the 2008 emails and so made their discovery of an insufficiency of tax by, at the latest, November 2012. HMRC disagreed, and discussions continued.

(12) HMRC revised its assessment on Mr Harrison to reflect that the £200,000 was received by the partnership and not by him alone, and assessed him on a profit figure of £100,000.

7. During the hearing of this appeal, Ms Brown objected to what she considered to be an attempt by Ms Choudhury to "re-litigate" the case by referring to certain facts which, said Ms Brown, were irrelevant to the appeal. For the record, in reaching our decision we have only found it necessary to have reference to the facts as summarised in this decision, which are those found in the various FTT decisions and the appeal documents filed by the parties before the FTT.

8. There was a case management hearing (the "CMH") in relation to Mr Harrison's appeal against HMRC's discovery assessment before a differently constituted FTT (Judge McNall) on 21 September 2017. That tribunal issued its decision (the "CMH decision") on 3 October 2017. Mr Harrison does not have permission to appeal against the CMH decision, but since the parties do not agree on which issues it determined, it is necessary to describe it in some detail. We discuss its relevance to this appeal below.

9. The CMH was convened in order to deal with applications by Mr Harrison for disclosure by HMRC and for three witness summonses; HMRC's application to strike out the appeal, and Mr Harrison's application for the hearing of a preliminary issue. It is only the last of these applications which is relevant to this appeal. Judge McNall stated that "this appeal pivots on the issue of whether the assessment is in time". He recorded that Mr Harrison's case was that HMRC had sufficient information as long ago as November 2012 to assess him, and the assessment was "massively out of time", whereas HMRC argued that because Mr Harrison had brought about the loss of tax deliberately, the extended 20 year time limit[1] for raising the assessment applied. Judge McNall agreed with HMRC. He stated that:

> In the absence of any notification to chargeability within the statutory notification period, it makes absolutely no difference whether HMRC made a discovery in 2014 or 2012.

10. Judge McNall went on to dismiss Mr Harrison's assertion that there had been no loss of tax in the following terms:

> 28…once HMRC discharges the burden that the statutory condition in section 29(1) justifying the issue of a discovery assessment has been met (and I did not understand this to be in dispute) then the assessment 'stands good' and the burden of showing that the assessment is wrong moves to the Appellant. It is down to the Appellant to attack the assessment, in whole or in part. It is not enough to defeat the Assessment for the Appellant to simply assert - as he does - that 'there is no loss of tax to the Crown'.
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> 29. In summary: The assessment was made in time. The Appellant's arguments in relation to timing of the assessment are misconceived, and must be dismissed.

THE DECISION

11. In summary, in the Decision which forms the subject of this appeal, the FTT decided as follows:

(1) The CMH decided that HMRC had the statutory power to raise the assessment more than 12 months after making the discovery. It therefore determined the timing issue in relation to the discovery assessment.

(2) HMRC must also prove that a discovery has not become "stale" by the time the assessment is issued. That issue must also have been determined at the CMH, as it was an inherent part of the question of whether the assessment was made in time.

(3) It was necessary to determine whether the loss of tax was attributable to the negligent conduct of Mr Harrison in order to establish whether the assessment could be issued under the extended time limits for such situations[2]. That matter had not been determined at the CMH. The burden was on HMRC to establish this.

(4) In relation to the amount of profits assessed, the relevant statutory provisions looked to the amount which a trade or business was entitled to receive, not to cash actually received if different. The figure of £200,000 was confirmed as the profits of the partnership from the proceeds of sale of Bearsted.

(5) As to whether the partnership had incurred losses or expenses in respect of a trade or property development which it could set against the £200,000, the FTT did not accept that the evidence produced by Mr Harrison discharged the burden of proof on him to establish the losses or expenses and that they had been wholly and exclusively incurred

[1] Section 36 TMA 1970.
[2] Section 36 TMA 1970.

in that trade. It therefore concluded that there were no such losses or expenses to set against the 2007/08 income of the partnership.

(6) In relation to Mr Harrison's argument that earlier losses and expenses of the partnership's trade as forensic accountants could be set against the £200,000, the FTT agreed with HMRC that a partnership could not carry forward a loss from one trade to set against the profits of another trade. The FTT was not satisfied in any event that there were any such expenses or losses.

(7) In light of its conclusions at (4), (5) and (6), negligent conduct was established.

(8) Mr Harrison's appeal was dismissed.

GROUNDS OF APPEAL

12. The FTT refused Mr Harrison permission to appeal. He applied for permission to this Tribunal, and in his decision Judge Richards grouped Mr Harrison's lengthy grounds of appeal into various headings. He then granted permission to appeal on the following grounds:

(1) Ground 1: The FTT erred in law in concluding that HMRC had discharged their burden of proving that they made a "discovery" for the purposes of section 29(1) TMA 1970 and/or that any such discovery had not become "stale".

(2) Ground 2: The FTT erred in law in concluding that Mr Harrison was liable to tax by reference to a 50% share of a "receipt" of £200,000 and not by reference to a lower amount.

13. Judge Richards refused permission to appeal in respect of Ground 3, which he had described in the following terms:

> I do not understand Mr Harrison to be complaining about the FTT's decision in relation to losses of the forensic accounting profession…However, he argues that the FTT should have taken into account his offer to HMRC to provide evidence of costs and expenses associated with the property development trade and were therefore wrong to conclude…that he had not discharged his burden of establishing that those losses were available to be set against income received.

14. Ground 1 encompasses two distinct issues, namely the existence of a discovery and the question of staleness. We therefore consider below the following issues:

(1) The discovery issue.

(2) The staleness issue.

(3) The quantum issue.

THE DISCOVERY ISSUE

15. In order to be able to issue an assessment under section 29(1) TMA 1970, it is necessary that an officer of HMRC must "discover" an insufficiency of tax as described in section 29(1). The burden of proving such a discovery, to the ordinary civil standard of the balance of probability, rests on HMRC. HMRC also bear the burden of establishing carelessness or deliberate behaviour if they are relying on either of those factors to issue an assessment outside the normal time limits. This was confirmed by the Upper Tribunal in *Burgess and Brimheath Developments Ltd v HMRC* [2016] STC 579 ("*Burgess*")[3].

16. Ms Brown asserts in her skeleton argument that it is "crucial…that the FTT Decision makes no mention of the fact that the burden of proving a discovery is on HMRC, and not the

[3] Judge Scott was a member of the Tribunal.

Appellant". She says that "HMRC have failed to do anything to discharge the burden of proving a discovery (and to succeed they must do something)". More particularly, she argues that HMRC have failed to discharge the burden of proof because:

(1) There is no finding of fact as to whether or not HMRC made a discovery.

(2) HMRC provided no evidence of a discovery, and

(3) HMRC advanced no positive case before the FTT that they had made a discovery.

17. We consider these submissions in turn.

18. The assertion that the FTT made no mention of the burden of proving a discovery being on HMRC is wrong. In discussing what was determined at the CMH, the FTT stated, at [21], (emphasis added to original):

> **There are a number of aspects which the Respondents must establish when they raise an assessment under Section 29 TMA 1970. In this case it has been accepted** by the Appellant that the partnership received £200,000 (not all of it in cash) and **that the Respondents made a discovery** (although, as outlined above, there was dispute about when that discovery was made.) As we set out above, in the decision of 3 October 2017 the Tribunal determined that in September 2015 the Respondents were within time to raise a Section 29 assessment for 2007/08 upon the Appellant, and that the Appellant had failed to fulfil his obligation to notify chargeability under Section 7 TMA 1970. The decision of 3 October 2017 sets out the legislation relevant to the time limits **but there is no reference to the other aspects relevant to Section 29 which must be demonstrated if the Respondents are to be successful in having a discovery assessment confirmed on appeal by the Tribunal.** There is also no reference in the decision to other legislation or case-law relevant to competency.

19. It is clear from this that the FTT was well aware of the burden on HMRC to prove a discovery.

20. The second assertion is that there is no finding of fact whether or not HMRC made a discovery. This is not made out. In its discussion of the evidence which had been before the FTT at the CMH, at [25], the Decision contains the following footnote (emphasis added to original):

> **Officer Raven's evidence before us, which we accept, was that he made a discovery** when he received the statement of 28 November 2014, and that he was in negotiation with the Court appointed experts in the period from receipt of this statement until September 2015.

21. This is a clear finding of fact by the FTT. There is nothing odd about it being contained in a footnote rather than the body of the decision in light of the FTT's finding at [21] that it had been accepted by Mr Harrison that HMRC made a discovery, although there was a dispute about when it had been made. Ms Brown said that this statement went only to staleness and was irrelevant, and was in any event not a finding of fact. We do not agree. It is clear and concise in its terms, it addresses both the occurrence of a discovery and the time when it occurred, and is a finding of fact which was open to the FTT based on Officer Raven's evidence.

22. It is then argued by Ms Brown that HMRC advanced no positive case before the FTT that they had made a discovery. We do not agree. HMRC's Statement of Case in the appeal before the FTT included the following:

> **6. Respondent's Contentions**

> 6.1 HMRC say that they were correct to issue an assessment for the year ending 5 April 2008 because as a result of receiving a payment from his son, in the 2007/08 tax year, the appellant was liable to income tax which he failed to give notice of chargeability to HMRC.
>
> 6.2 HMRC say they correctly raised the assessment in accordance with the legislation at Section 29 (1) (a) TMA 1970 because HMRC had discovered that income which ought to have been assessed to income tax and had not been assessed.
>
> 6.3 HMRC relies on the definition of discovery given at paragraph 37 in the case of Charlton and others v HMRC:
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> > "In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment".

23. HMRC's skeleton argument before the FTT included the following:

> 6. On 28 November 2014 [Mr Harrison] signed a statement which was given to HMRC which indicated that he had received income for the tax year ending 5 April 2008.
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> 7. [Mr Harrison] had not notified HMRC of the chargeability of that income within the specified notice period as required pursuant to section 7 of TMA 1970.
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> 8. On 25 August 2015 HMRC were given two e-mails however, which on their face showed that [Mr Harrison] had received £200,000 as a finder's fee for the sale of a property known as Bearsted.
>
> 9. As a result of receiving this information HMRC considered that [Mr Harrison] had received income that ought to have been assessed for Income Tax but which had not been assessed. HMRC therefore completed an assessment pursuant to section 29 TMA 1970, to make good that loss of tax to the Crown.
>
> …
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> 71. HMRC submit that it was entitled to make an assessment under section 29 TMA 1970, because there was a discovery of income chargeable to Income Tax; [Mr Harrison] accepted that the partnership had received £200,000 and correspondence between him and [his son] confirms this.

24. We consider that HMRC did advance a positive case that a discovery had been made. This clearly distinguishes the position from that in *Burgess*. In *Burgess*, it was found that HMRC had advanced no positive case as to either the competence issue (namely, the existence of a discovery) or the time limit issue. It was determined that in those circumstances, where those issues had not been conceded by the taxpayers, HMRC had not discharged its burden of proof. In this case, HMRC advanced a positive case that it had made a discovery in its Statement of Case and in its skeleton argument, and the FTT accepted the evidence of Officer Raven that a discovery had been made, in November 2014.

25. A further material distinction between the facts in *Burgess* and the facts in this case is that in *Burgess*, not only had the appellants failed to conceded the competency and timing issues, but in fact they had indicated by the terms of their defence that they contested them. That is apparent from [49] of *Burgess*:

> For HMRC to succeed before the FTT, either the competence and time limit issues had to be determined in their favour, or those issues had to have been

> conceded by the appellants. There was no such express concession and, in our judgment, none can be inferred. HMRC were wrong to assume, as it appears from their statement of case that they did, that the absence of reference by the appellants to the competence and time limit issues in their respective grounds of appeal, meant that those issues, on which HMRC's case depended, did not have to be determined in their favour…They were wrong too, once the appellants' first skeleton argument had been received, not to have appreciated that, far short of there being any concession on matters relevant to the competence and time limit issues, those matters were clearly the subject of dispute. The assertions on behalf of the appellants that they had not deliberately understated profits may not have been expressed in the form of challenges to the competence and time limit issues, but it should have been clear to HMRC that that was their effect.

26. In this case, Mr Harrison did not seek to assert, expressly or in layman's terms, that HMRC had not made a discovery of an insufficiency of tax. His argument was about *when* they had made it. Mr Harrison's position to this effect is clearly recorded at [21], set out above. The CMH decision also states, at paragraph 28 of that decision, that the FTT in that hearing did not understand it to be in dispute that the statutory condition in section 29(1) justifying the issue of a discovery assessment had been met.

27. Ms Brown sought to argue that any concession by Mr Harrison on this issue must be set aside, because otherwise Judge Richards would not have granted permission to appeal on this ground. As a matter of principle, we do not accept that any such consequence would flow merely from a grant of permission to appeal. In any event, the point is not supported by the terms of Judge Richards' decision. In considering this ground of appeal, Judge Richards decided that it was not arguable that (as Mr Harrison sought to argue) the FTT was wrong to conclude that Officer Raven's evidence that he made a discovery in November 2014 was reliable. Judge Richards then continued as follows:

> However, I do think it is arguable that the FTT erred in law in concluding that HMRC had discharged their burden of establishing that HMRC had made the requisite "discovery". Mr Harrison's argument that HMRC had just one year after making a discovery to make an assessment was misconceived: there is no statutory rule to this effect. However, as noted in the Decision, it is possible for a discovery to become "stale" and some of the points that Mr Harrison was making about the length of time between HMRC making the alleged "discovery" and issuing the assessment were relevant to the question of "staleness".
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> In the Decision, the FTT concluded that the question of "staleness" had been determined in the Preliminary Decision. The Preliminary Decision was made following what was described as a "case management" hearing and it is not clear to me that Mr Harrison would necessarily have realised that the important factual question of "staleness" would have been determined at that hearing. Nor is it clear to me whether Officer Raven gave evidence at the case management hearing or whether Mr Harrison had an opportunity to challenge that evidence. It is also arguable that it was procedurally unfair for the FTT to make findings going to the staleness of the assessment without directing HMRC to disclose some internal documentation to Mr Harrison.

28. This was the basis on which permission was then granted for what had been framed in the application as Ground 1. It appears that the permission related to the staleness issue, not to the question of whether there had been a discovery in the first place. Indeed, any question of staleness arises by definition only where a discovery has been made. The terms of the grant of permission may simply reflect the doctrine of staleness as it was thought to apply at the time

of Judge Richards' decision, namely that a discovery which had become stale was not a "discovery" within the terms of section 29(1). The permission was, of course, granted before the decision of the Supreme Court in *Tooth*.

29. This may suggest that the permission granted was intended to cover only the staleness issue. However, HMRC did not seek to argue that point, and we have proceeded on the basis that permission was granted in relation to the discovery issue.

30. We conclude that HMRC did discharge the burden of establishing that they made a discovery within the terms of section 29(1). Mr Harrison had accepted that a discovery had been made (though he clearly contested when it had been made), HMRC had pleaded a positive case that a discovery had been made, and the FTT accepted Officer Raven's evidence that he had made a discovery.

31. Therefore, the appeal in relation to the discovery issue is dismissed.

THE STALENESS ISSUE

32. Before the FTT, Mr Harrison argued that HMRC must have discovered an insufficiency of tax in 2012, with the result that by the time they issued the discovery assessment in 2015 the discovery had become "stale" and therefore ceased to form a valid basis for the purported assessment. The FTT concluded (at [23]-[25]) that it was no longer open to it to consider that issue, because it must have been determined by the CMH decision.

33. An assessment must be issued within certain time limits, but the concept of "staleness" asserts that a discovery may in any event cease to be a "discovery" within the meaning of section 29 TMA 1970 if HMRC delay unduly between making the discovery and issuing the necessary assessment.

34. Mr Harrison has permission to appeal on the ground that the FTT erred in law in concluding that any discovery had not become stale. The first question we must determine is whether such a concept applies at all. If, but only if, we were to conclude that it did, we would then need to consider whether on the facts the discovery in this appeal had become stale (or, more precisely, whether the FTT erred in law in concluding that that issue had been determined against Mr Harrison by the CMH decision).

35. We therefore begin by considering whether a discovery can lose its character as a discovery if it becomes "stale".

36. The existence of such a concept has always been controversial. Following a number of decisions by the FTT and Upper Tribunal, the question of whether a discovery could cease to be a discovery because it had become stale was one of the issues considered by the Court of Appeal in *HMRC v Tooth* [2019] EWCA Civ 826 ("*Tooth CA*").

37. The issues in *Tooth CA* were described by Floyd LJ (who gave the only decision concerning the staleness issue, with which the other judges agreed) as follows, at [2] of the decision:

> There are two broad issues on this appeal. The first ("the discovery issue") is whether HMRC made a relevant "discovery" about Mr Tooth's self-assessment, and in particular whether HMRC "discover[ed] … that an assessment to tax [was] insufficient" within the meaning of section 29(1)(b) of TMA. The second ("the deliberateness issue") is whether Mr Tooth, or a person acting on his behalf, can be said to have "deliberately" brought about a situation in which "an assessment to tax is or has become insufficient" within sections 29(1)(b) and (4) of TMA. If so, HMRC were not prevented by section 29(3) from raising the assessment. A closely related question is whether HMRC can show, as they must, that they can take advantage of the 20 year

> time limit for raising an assessment provided by section 36(1A)(a) of TMA, which applies if a "loss of … tax … [is] brought about deliberately" by a person or someone acting on his or her behalf.

38. In relation to the discovery issue, the Court of Appeal did not refer to staleness, but to whether it was necessary that HMRC's discovery was "new" when they issued the discovery assessment to Mr Tooth, and, if so, whether on the facts HMRC had proved this to be the case. Floyd LJ stated as follows, at [60]-[61] of the decision:

> 60.Both parties accepted that the legal approach to whether there is a "discovery" is correctly set out in this first passage from the decision of the UT in *Charlton & others v RCC* [2012] UKUT 770 (TCC); [2013] STC 866 at [37], where the tribunal said:
>
> > "37. In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight."
>
> The UT continued in a second passage:
>
> > "The requirement for newness does not relate to the reason for the conclusion reached by the officer but to the conclusion itself. If an officer has concluded that a discovery assessment should be issued, but for some reason the assessment is not made within a reasonable period after that conclusion is reached, it might, depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment."
>
> 61.I agree with the UT's approach in both passages. The requirement for the conclusion to have "newly appeared" is implicit in the statutory language "discover". The discovery must be of one of the matters set out in (a) to (c) of section 29(1). In the present case the officer must have newly discovered that an assessment to tax is insufficient. It is his or her new conclusion that the assessment is insufficient which can trigger a discovery assessment. A discovery assessment is not validly triggered because the officer has found a new reason for contending that an assessment is insufficient, or because he or she has decided to invoke a different mechanism for addressing an insufficiency in an assessment which he or she has previously concluded is present.

39. The Court of Appeal determined that on the facts HMRC had not discharged their burden of establishing that they had "newly discovered" an insufficiency of tax in Mr Tooth's assessment. HMRC's appeal against the decision of the Upper Tribunal was therefore dismissed on the basis of the discovery issue. The Court of Appeal found, by a majority, that, had it been necessary to determine the issue, there had been a deliberate inaccuracy in Mr Tooth's return.

40. At the time when Judge Richards granted permission to appeal in relation to the staleness issue, although the decision in *Tooth CA* had not been released, Upper Tribunal authority had endorsed the existence of the concept of staleness[4].

41. In May 2021 the Supreme Court issued its decision on the appeal and cross-appeal from the decision of the Court of Appeal, reported at [2021] UKSC 17 ("*Tooth SC*"). The Supreme Court held that there had been no deliberate inaccuracy within Mr Tooth's return. That was

[4] See, in particular, *Pattullo v HMRC* [2016] UKUT 0270 (TCC).

sufficient to require the dismissal of HMRC's appeal seeking to uphold the validity of the discovery assessment[5].

42. However, relevantly to this appeal, Lord Briggs and Lord Sales, delivering the unanimous decision of the Supreme Court, dealt with the issue of staleness at length. The Supreme Court decisively rejected the existence and application of such a concept, concluding that:

> …there is no place for the idea that a discovery which qualifies as such should cease to do so by the passage of time[6].

43. Following the decision of the Supreme Court, numerous Upper Tribunal decisions have been reached on the basis that a discovery could no longer be argued to be "stale": see *Thomas William Good v HMRC* [2021] UKUT 0281 (TCC) at [20]-[21]; *John Hargreaves v HMRC* [2022] UKUT 00034 (TCC) at [6], [10], [13]; *HMRC v Jafari* [2022] UKUT 00119 (TCC*)* at [2], [21]; *Edward Cumming-Bruce v HMRC* [2022] UKUT 00233 (TCC) at [4], and *HMRC v Nicola Martino* [2022] UKUT 00128 (TCC) at [6], [11].

44. Ms Brown argues that all of these decisions were wrong to have concluded that *Tooth SC* had this effect. She submits that because the statements of the Supreme Court in relation to staleness were *obiter dicta*, the Upper Tribunal has no option but to follow the binding *ratio* of *Tooth CA* to the effect that the concept of staleness applies to discovery assessments.

45. Ms Brown says that the rule that *obiter dicta* are not binding authority is fundamental because it underpins the certainty of the common law. She refers to the statements to this effect in *Davidson v M'Robb* [1918] AC 304 at page 323 and *Latham v Johnson & Nephew Limited* [1913] 1 KB 398 at page 409. Ms Brown argues that it is of paramount importance that the rules of *stare decisis* are respected, and while the Court of Appeal might in future decide to follow *Tooth SC,* this Tribunal is strictly bound by *Tooth CA* and has no discretion not to follow it.

46. We agree that:

(1) Applying a conventional approach to the distinction between *ratio* and *obiter dicta*, the comments regarding newness in *Tooth CA* were part of the *ratio* in that case, and the comments regarding staleness in *Tooth SC* were *obiter*.

(2) This Tribunal is bound by decisions of the Court of Appeal and Supreme Court.

(3) As a matter of general principle, *obiter dicta* are not binding.

47. However, we do not accept that it follows inexorably from this that this Tribunal must simply close its mind to the pronouncements on staleness in *Tooth SC*. We would be failing in our duty if we were to do so. We therefore begin by considering what was said on that issue by the Supreme Court, and the terms on which those statements were expressed.

48. In *Tooth CA*, the Court of Appeal did not set out or refer to any of the competing arguments relating to what is described as "newness". Rather, the judgment recorded paragraph 37 of *Charlton*, and stated the Court's agreement with *Charlton* that the requirement for newness is implicit in the word "discover".

49. In *Tooth SC*, by contrast, the Supreme Court devoted as much of its judgment to a discussion of staleness as it did to the deliberate inaccuracy issues. The material points from its discussion and analysis can be summarised as follows:

[5] See [59] and [87] of *Tooth SC*.
[6] *Tooth SC* at [76].

(1) It began with the following observation:

> …the important question as to whether there was even a qualifying discovery was fully argued, in fact at greater length than the issue as to deliberate inaccuracy. To that we now turn.[7]

(2) It described the decision of the Upper Tribunal that where an assessment had become stale, because it was "based on a discovery made some time previously but allowed to lie unactioned in the file for a significant period", the discovery had ceased to be a discovery because it was no longer new: [61]. The Court of Appeal agreed with that analysis: [62].

(3) The FTT, Upper Tribunal and Court of Appeal "all based their consideration of this issue on what was said by the UT in *Charlton*": [63]. The submissions of Ms McCarthy KC, leading counsel for HMRC, opposing that conclusion were set out at [64]. It was then stated, at [65]:

> We accept the submissions of Ms McCarthy. The points she makes have wider significance than the present case, so we set out our reasoning below. We will deal with the issues of collective knowledge, what is required for a discovery within the meaning of section 29(1) and the legal protections where there is a delay between discovery and the issuing of an assessment.

(4) A detailed analysis of section 29 in the context of the self-assessment system demonstrated that section 29(1) focuses on the state of mind of an officer of the Board. That view was supported by consideration of section 29 as it was originally enacted. There was no applicable concept of the "collective knowledge" of HMRC in this context.

(5) The leading authority on what qualifies as a discovery for the purposes of section 29(1) remained the decision of the House of Lords in *Cenlon Finance Co Ltd v Ellwood* [1962] AC 782. That decision endorsed the very wide meaning given to the word "discover" by the Court of Session in *Inland Revenue Comrs v Mackinlay's Trustees* 1938 SC 765.

(6) The essential conclusions of Lord Briggs and Lord Sales were set out at [75]-[77]:

> 75. There was no suggestion in the *Mackinlay's Trustees* case or in the *Cenlon Finance* case that any notion of staleness applied or that a discovery might lose its quality as such simply by the effluxion of time. That would be contrary to the ordinary use of language. Viscount Simonds' reference in the latter case to discovery covering "any case in which … it newly appears that the taxpayer has been undercharged" was a reference to the state of mind of the person said to have made the discovery, to whom it "newly appears" that an assessment to tax is insufficient. A discovery is a particular event in time, and does not cease to be such with the passage of time. As is made clear in both cases, a discovery within the meaning of what is now section 29(1) of the TMA may consist simply in a new appreciation of the legal significance of a set of circumstances.
>
> 76. In our judgment, contrary to the latter part of para 37 in the decision in *Charlton*, there is no place for the idea that a discovery which qualifies as such should cease to do so by the passage of time. That is unsustainable as a matter of ordinary language and, further, to import such a notion of staleness would conflict with the statutory scheme. That sets out a series of limitation periods for the making of assessments to tax, each of them expressed in

[7] *Tooth SC* at [59].

> positive terms that an assessment "may be made at any time" up to the stated time limit.
>
> 77. There is no basis for implication of an additional and stricter time restriction as suggested by the UT in *Charlton*. The UT in that case appears to have arrived at its view in the latter part of para 37 by misreading Viscount Simonds' reference to something "newly appear[ing]" in the *Cenlon Finance* case. In our view, in using that expression, Viscount Simonds was only referring to the initial change in the officer's state of mind required to satisfy what was described in the *Anderson* case as the subjective element of the test for a discovery in section 29(1). Further, the UT's statement in *Charlton* was an obiter dictum not supported by detailed reasoning; on the facts in the case, it found that the relevant officer (Mr Cree) had acted in time.

(7) This interpretation was capable of coherent operation in practice, and there were a number of other protections for the taxpayer in relation to exposure to a discovery assessment. These included ordinary principles of public law.

(8) It was concluded that Mr Tooth's challenge to the FTT's decision on the discovery issue:

> …was based on legal points which we have found to be unsustainable. Therefore, if the Revenue's appeal to this court had depended solely on the discovery issue, we would have been disposed to allow it. However, it does not.[8]

50. The Supreme Court's decision was clearly given in order to provide general guidance on the "important question" of staleness. At [65], the Court explained that it was setting out its reasoning precisely because the points had "wider significance than the present case". The decision was exhaustive in its analysis; was given on the basis of full argument by leading counsel and took into account and dealt with a number of competing arguments, encompassing statutory interpretation, policy objectives and practicalities. It explained why *Charlton*, which was the basis for *Tooth CA*, was wrongly decided on the issue. In those circumstances, we do not accept that we must or should ignore the Supreme Court's decision, and follow *Tooth CA*, solely for the reason that the Supreme Court's decision on staleness was not part of the *ratio* in that case.

51. We consider that Ms Brown's approach fails to take into account that such clear and comprehensive general guidance given by the Supreme Court cannot be discounted or ignored altogether simply because it did not, strictly speaking, form part of the *ratio* of the decision. As Megarry J said in *Brunner v Greenslade* [1971] Ch 993 at pages 1002-1003 (emphasis added to original):

> In the Lawrence case [1939] Ch. 656, Simonds J. held, in a reserved judgment, that on the facts before him no general scheme of development existed. It was accordingly not necessary to determine what rights as between the sub-purchasers there might have been if the main scheme had been held to exist. However, **as the point had been fully argued, he expressed his views on it. I do not think that such views can simply be stigmatised as being obiter and so of little weight. A mere passing remark, or a statement or assumption on some matter that has not been argued, is one thing; a considered judgment on a point fully argued is another, especially where, had the facts been otherwise, it would have formed part of the ratio. Such judicial dicta, standing in authority somewhere between a ratio decidendi and an obiter dictum, seem to me to have a weight nearer to the former**

[8] *Tooth SC* at [86].

> **than the latter**; and, perhaps I may add, anything uttered by Simonds J. carries its own intrinsic authority.

52. In *Tooth SC*, it was made clear, at [86], that, absent its conclusion on deliberate inaccuracy, the Supreme Court would have found against Mr Tooth on the staleness issue.

53. Megarry J's observations were recently endorsed by Sir James Munby in *An NHS Trust v X* [2021] EWHC 65 at [59], where he said "as a great judge once said, there are obiter dicta and obiter dicta". In responding to Counsel's argument that a particular decision of the Court of Appeal should be followed notwithstanding a subsequent decision of the Court of Appeal to the contrary, on the basis that the statements in the subsequent decision were *obiter dicta*, he observed, at [60]:

> Here, we have two authorities in each of which the Court of Appeal, having had the benefit of vigorous adversarial arguments by Leading Counsel, delivered three lengthy judgments dealing with the points at issue in carefully considered and commanding detail. Indeed, as we have seen, in *In re W (A Minor) (Medical Treatment: Courts Jurisdiction)* [1993] Fam 64, where the hearing spread over three days, the court deliberately reconsidered what it had previously said in *In re R (A Minor) (Wardship: Consent to Treatment)* [1992] Fam 11 because of the criticism to which it had been subjected. How sensibly can this be treated as mere obiter? I do not criticise counsel for taking the point, but I have to say that it is the kind of point which probably has more traction amongst the dreaming spires of the Academy than in the robust and ultimately pragmatic world of the court room.

54. Ms Brown submitted that these pronouncements were not applicable in the present appeal, because they were made in the context of conflicting decisions at the same judicial level, whereas we were concerned with conflicting *obiter dicta* of a superior court. We do not agree. While that was the factual context in each case, the remarks made were of general application, to the effect that certain *obiter dicta* may, as Megarry J put it, have a weight which is closer to a *ratio*. It is difficult to conceive of a clearer such example than the *dicta* concerning staleness in *Tooth SC*. In any event, it seems to us that the comments of Megarry J and Sir James Munby carry even greater force where the statements which are strictly *obiter dicta* were made by the Supreme Court and the *ratio* was in a decision of an inferior court.

55. We consider that in *Tooth SC*, for the reasons summarised above, the Supreme Court clearly set out definitive general guidance which it intended should be followed, by all courts and tribunals. The basis of the decision in *Tooth CA* was *Charlton*, which the Supreme Court had now said was wrongly decided on this issue, and the Court of Appeal did not discuss in reaching its conclusion the decisions in *Cenlon Finance* and *Mackinlay's Trustees* which the Supreme Court held were the leading authorities on the meaning of "discover". The Supreme Court described the argument that a discovery can become stale as "unsustainable". We consider that in these circumstances it would be quite wrong to ignore the statements of the Supreme Court, with which we respectfully agree, for the reasons given by Ms Brown.

56. We consider that we are also justified in reaching this view on the basis of the decision of the Court of Appeal in *R v Barton and another* [2020] EWCA Crim 575 ("*Barton*").

57. In *Barton*, the issue was whether the test of dishonesty in criminal proceedings remained governed by the decision of the Court of Appeal in *R v Ghosh* [1982] QB 1053 following the *obiter dicta* of the Supreme Court in *Ivey v Genting Casinos (UK) Ltd* [2018] AC 391. Lord Burnett, delivering the judgment of the court, concluded as follows, at [1] of the decision:

> For 35 years the approach to dishonesty in the criminal courts was governed by the decision of the Court of Appeal Criminal Division in *R v Ghosh* [1982] QB 1053. In *Ivey v Genting Casinos (UK) (trading as Crockfords*

> *Club)* [2017] UKSC 67; [2018] AC 391 the Supreme Court, in a carefully considered lengthy *obiter dictum* delivered by Lord Hughes of Ombersley, explained why the law had taken a wrong turn in *Ghosh* and indicated, for the future, that the approach articulated in *Ivey* should be followed. These appeals provide the opportunity for the uncertainty which has followed the decision in *Ivey* to come to an end. We are satisfied that the decision in *Ivey* is correct, is to be preferred, and that there is no obstacle in the doctrine of *stare decisis* to its being applied as the law of England and Wales.

58. It was argued by the defendants in *Barton* that the test of dishonesty set out in *Ivey* should not be followed because it was contained in *obiter dicta*. Lord Burnett explained at [93] of the decision:

> There is no doubt that the discussion on dishonesty in *Ivey* was strictly *obiter* because it was not necessary for the decision of the court. It is for that reason that the appellants submit that it has no legal impact on the decision in *Ghosh*. We note that the possibility was raised in argument that *Ghosh* itself was obiter but we approach the question on the basis that, subject to the status of *Ivey*, it is binding not least because it was applied as the law of England and Wales for 35 years, including by this court. The appellants submit that we should apply *Ghosh* and then let the matter return to the Supreme Court. They point out that the Supreme Court did not appear to hear argument on the issue. They recognise that would give rise to the distinct possibility that the wrong test for dishonesty would be applied in the meantime in thousands of cases in the Magistrates' and Crown Courts but that is a consequence of following properly the rules of precedent.

59. The Court of Appeal reviewed the relevant authorities, in particular *R v James* [2006] QB 588. Lord Burnett concluded that the position was even clearer than that in *R v James*, and that the *obiter dicta* in *Ivey* should be followed, stating as follows at [102]-[105]:

> 102. We are in a strongly analogous position, indeed it is stronger because the ordinary rules of precedent require us to follow decisions of the Supreme Court (as the successor of the Judicial Committee of the House of Lords). The undoubted reality is that in *Ivey* the Supreme Court altered the established common law approach to precedent in the criminal courts by stating that the test for dishonesty they identified, albeit strictly contained in *obiter dicta*, should be followed in preference to an otherwise binding authority of the Court of Appeal. As in *James*, we do not consider that it is for this court to conclude that it was beyond their powers to act in this way.
>
> 103. The rules of precedent exist to provide legal certainty which is a foundation stone of the administration of justice and the rule of law. They ensure order and predictability whilst allowing for the development of the law in well-understood circumstances. They do not form a code which exists for its own sake and must, where circumstances arise, be capable of flexibility to ensure that they do not become self-defeating.
>
> 104. We conclude that where the Supreme Court itself directs that an otherwise binding decision of the Court of Appeal should no longer be followed and proposes an alternative test that it says must be adopted, the Court of Appeal is bound to follow what amounts to a direction from the Supreme Court even though it is strictly *obiter*. To that limited extent the ordinary rules of precedent (or *stare decisis*) have been modified. We emphasise that this limited modification is confined to cases in which all the judges in the appeal in question in the Supreme Court agree that to be the effect of the decision. Such was a necessary condition before adjusting the

> rules of precedent accepted by this court in *James* in relation to the Privy Council. Had the minority of the Privy Council in *Holley* not agreed that the effect of the judgment was to state definitively the law in England, it would not have been accepted as such by this court. The same approach is necessary here because it forms the foundation for the conclusion that the result is considered by the Supreme Court to be definitive, with the consequence that a further appeal would be a foregone conclusion, and binding on lower courts.
>
> 105. In the result, the test for dishonesty in all criminal cases is that established in *Ivey*.

60. We consider that the position in relation to staleness falls within the limited modification to the doctrine of *stare decisis* described in *Barton*. As Lord Burnett put it, the rules of precedent "do not form a code which exists for its own sake and must, where circumstances arise, be capable of flexibility to ensure that they do not become self-defeating". As in *Ivey*, the terms and nature of the decision in *Tooth SC* lead to "the conclusion that the result is considered by the Supreme Court to be definitive, with the consequence that a further appeal would be a foregone conclusion, and binding on lower courts".

61. Ms Brown argued that the modification described in *Barton* did not apply in this case because (1) it applies only in criminal proceedings (2) the conditions in which the exception applies are not satisfied and (3) in any event the modification can only be applied by the Court of Appeal and not to lower courts such as this Tribunal.

62. We do not accept these arguments.

63. While it is the case that the criminal courts have been more ready to modify the strict application of *stare decisis*, as discussed at [96] of *Barton*, and while *Barton* concerned the test applicable in criminal cases, the Court of Appeal in *Barton* did not indicate that the limited modification could apply only in criminal cases[9]. In the recent case of *Ideal Shopping Direct Ltd v Mastercard Inc and others* [2022] EWCA Civ 14, one issue considered by the Court of Appeal (at [112]-[113] of the decision) was whether the *Barton* modification applied in relation to the law on service of claims, and there was no indication in that discussion that it did not apply in a civil context. Indeed, at [112] it was stated:

> *R v Barton* makes clear that, if the House of Lords or Supreme Court has directed that an otherwise binding decision of the Court of Appeal should no longer be followed, then this court must follow the direction even if it is strictly obiter, but only if all the judges in the Supreme Court agree that to be the effect of the decision. To that extent only, the doctrine of precedent is modified.

64. We consider that applying the modification is appropriate and justified in this case.

65. In relation to whether the terms of the modification are satisfied in respect of *Tooth SC*, we consider that they are. In the language used at [104] of *Barton*, on any sensible reading the effect of *Tooth SC* is that the Supreme Court has directed that the *ratio* of *Tooth CA* should no longer be followed. Ms Brown argued that there must be a specific formulaic direction in precisely those terms, but we do not agree. Indeed, the terms in which the Supreme Court in *Ivey* decided that the second leg of the test in *Ghosh* should no longer be followed (at [74] of the decision) do not adopt precisely that use of words. As to whether all the judges agreed that to be the effect of their decision in *Tooth SC*, Lord Briggs and Lord Sales delivered the unanimous decision of the Supreme Court, as did Lord Hughes in *Ivey*.

[9] At [63] of *Ivey*, the Supreme Court observed that "there can be no logical or principled basis for the meaning of dishonesty (as distinct from the standards of proof by which it must be established) to differ according to whether it arises in a civil action or a criminal prosecution".

66. If the limited modification to *stare decisis* applies, as we have decided it does in relation to staleness following *Tooth SC*, there is no reason to confine its application in any particular case to the Court of Appeal. At [1] of *Barton*, the Court of Appeal referred to one consequence of failing to apply the dicta in *Ivey* pending a Supreme Court *ratio* as being the application of the wrong test for dishonesty in thousands of cases in the Magistrates' and Crown Courts. The Court of Appeal clearly intended to avoid that result, which is why it refers at the close of [104] to the effect of such a Supreme Court *obiter dicta* as being "binding on lower courts".

67. We do not accept that, notwithstanding *Tooth SC*, the doctrine of staleness is, like Monty Python's parrot, "not dead, only sleeping". It is deceased. Given our decision, we do not need to, and do not, decide whether on the facts the discovery in this case would have been stale.

68. The appeal on this ground is, for the reasons given, dismissed.

THE QUANTUM ISSUE

69. The parties did not agree on the scope of the permission granted in relation to this ground, so it is necessary for us first to determine that issue. The (only) ground for which permission was given was formulated by Judge Richards as follows:

> The FTT erred in law in concluding that Mr Harrison was liable to tax by reference to a 50% share of a "receipt" of £200,000 and not by reference to a lower amount.

70. This clearly relates to the quantum of the amount liable to income tax in the hands of Mr Harrison. However, before the FTT Mr Harrison made a number of separate challenges in relation to the issue of quantum. The FTT identified the issues in dispute which related to quantum as follows, at [33]:

> (i) On what amount of profits should the partnership be assessed?
>
> (ii) Has the partnership incurred losses or expenses in respect of its trade of property development and, if so, in what amount?
>
> (iii) Is the partnership able to set losses from its trade of forensic accountancy against income received in its trade of property development? If so, has the partnership incurred losses or expenses in respect of its trade of forensic accountancy and, if so, in what amount?

71. Judge Richards recorded in his first decision that he did not understand Mr Harrison to seek permission in relation to the FTT's decision relating to issue (iii).

72. We consider that the ground for which permission was granted covers issue (i). That is apparent from the manner in which Judge Richards described Mr Harrison's argument under this ground, which was as follows (emphasis in original):

> He considers that the FTT was wrong to uphold the assessment on the basis that the partnership was <u>entitled</u> to receive £200,000. Rather, any assessment should have been based on the amount that the partnership actually received (which he considers was £52,550).

73. Mr Harrison also sought permission to appeal on the ground that the FTT was wrong to conclude that he had not discharged the burden of establishing that costs and expenses of the property development trade were available to set against income received. This related to issue (ii). Following an oral renewal hearing to reconsider the decision to refuse permission on this ground, Judge Richards stated that "in Ground 3…Mr Harrison seeks to challenge the FTT's factual findings as to the amount of expenses for which he is entitled to relief when computing

his share of profits of the partnership's trade". He confirmed the refusal of permission to appeal on this ground.

74. So, we consider it clear that the permission to appeal relates solely to issue (i). In a nutshell, this is an argument that (regardless of any losses) the partnership was liable to tax not on the £200,000 to which it was entitled, but to some lesser amount which it actually received.

75. Ms Brown raised a number of arguments regarding what she asserted were errors of law by the FTT in relation to the evidence presented by the parties, and the burden of proof, in respect of the quantum issue. Her skeleton argument set out the arguments as follows:

> …the following principles should be adopted:
>
> 1.Where there are records of the taxpayer then the latitude granted to HMRC [in relation to an estimated assessment] should, by necessary implication, be far less than in the case where there are taxpayer records (even if only those in the taxpayer's mind);
>
> 2.The taxpayer is required to show what the assessment should be;
>
> 3.HMRC must show that the assessment was made on an intelligible basis as an approximation.
>
> In the Appellant's case it is submitted that:
>
> 1.The Appellant's records showed that HMRC's approximation was inaccurate;
>
> 2.The Appellant did show what the assessment should have been; and
>
> 3.In such circumstances it was not "intelligible" for the assessment to be made without taking into account the Appellant's position in that respect.
>
> Further, and given that the Appellant was misled (however innocently) by HMRC, it is submitted that since he only failed to provide evidence of his losses etc due to HMRC's confirmation to him that the assessment was in fact out of time, it is not intelligible that he be assessed without reference to those losses. HMRC being given the benefit of their own incompetence/negligence/error is not consistent with the common law principles of fairness, nor with the ECHR.
>
> Consequently, the Appellant's position is that the assessment over assesses him, and the FTT erred – at paragraphs 46 – 52 of the Second FTT Judgment in saying that the correct figure to assess did not include the losses under the Income Tax (Trading and Other Income) Act 2005, sections 7 and 25. The correct figure to assess was £0 and, therefore, the assessment should be discharged.

76. We agree with Ms Choudhury that these arguments fall outside the permission granted. The only ground for which permission was granted is whether the amount on which the partnership was liable to tax is based on its entitlement to £200,000 or its receipt of a lower amount. There is no permission for issue (ii), which relates to losses and expenses of the partnership's property trade. So arguments relating to the FTT's decision on that issue, including as to evidence and burden of proof, can form no part of the appeal in this case. It is clear from Judge Richards' two decisions, on the papers and following an oral renewal, that permission to appeal on that issue has been refused.

77. We turn to the FTT's decision in relation to the ground for which permission has been granted. This was considered by the FTT at [46]-[52]. The FTT began by noting that the burden was on Mr Harrison to demonstrate that the figures in the assessment raised by HMRC should be displaced. That is clearly correct, as confirmed by the Court of Appeal in *Brady v Group*

Lotus Car Companies plc [1987] STC 635. The FTT stated that Mr Harrison initially accepted that the partnership had received £200,000 in respect of the sale of Bearsted. However, in his skeleton argument he suggested that the cash actually received was only £52,550.

78. The first issue which the FTT had to decide was whether this mattered. In other words, regardless of the amount in fact received, as a matter of law, were the profits of the partnership from its property development trade to be calculated on the basis of its entitlement to profits or on its receipts? If the former, then the fact that it may have received a different amount could make no difference to the quantum.

79. The FTT noted that Mr Harrison did not refer to any legislation or case-law to support his argument that taxation should be on the basis of cash received. It then set out section 7 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"), which states that tax is charged on "the full amount of the profits of the tax year", and referred to section 25 ITTOIA, which provides that the profits of a trade must be calculated "in accordance with generally accepted accounting practice" ("GAAP"). The FTT noted that under GAAP the profits of a business are the amount it is entitled to receive, and not cash actually received. There was no evidence or suggestion, stated the FTT, that the partnership drew up its accounts on a cash basis, as is permitted for some small businesses. The FTT therefore agreed with HMRC that "the full amount of the profits of the tax year" was the amount which the partnership was entitled to receive, and not the lesser amount which Mr Harrison argued was received. The FTT concluded, at [52]:

> The Appellant has accepted, and the evidence confirms, that the amount the partnership was entitled to receive was £200,000. Therefore, we reject the Appellant's submission that the figure of £200,000 should be replaced by the figure of £52,550. We confirm the figure of £200,000 as the profits the partnership of the Appellant and his wife received out of the proceeds of sale of Bearsted.

80. Since Mr Harrison accepted that the partnership was entitled to receive £200,000, in order to succeed on this ground, he would have to show that the FTT erred in law in concluding that under GAAP the "full amount of the profits of the tax year" referred to entitlement rather than cash receipts. Ms Brown's skeleton argument did not address this issue, but in oral argument we understood her to suggest in response to our questions that the error made by the FTT was either that it had failed properly to analyse the evidence of profits, or that it had assumed that GAAP had the effect stated without any expert evidence to that effect. She did not seek to argue that the FTT's understanding of the correct GAAP treatment was wrong.

81. Any complaint as to the FTT's approach to the evidence of profits is nothing to the point when the issue is the correct basis for taxing the partnership's profits as a matter of law. Nor do we accept that the FTT erred in law by not requiring expert evidence of GAAP. The FTT was required to determine a question of law, namely whether, as Mr Harrison argued, the full profits of the partnership for the relevant year were confined to cash amounts actually received. The burden was on Mr Harrison to establish that issue in order to displace the figure in the assessment. It took into account the submissions of the parties and reached a decision. In our view, the FTT reached a conclusion that it was entitled to reach, particularly when viewed in the context of its decision that Mr Harrison was not entitled to deduct any expenses or losses of the property trade in calculating the partnership's profits. Ms Brown asserted that the FTT's analysis "conflates profits with revenue", but she presented no argument as to why that analysis was wrong in law, and we have already explained why no permission has been granted to appeal against the FTT's conclusion as to the set-off of any losses or expenses of the property trade.

82. We can detect no error of law in the FTT's decision that the partnership was liable to tax on its entitlement to profits. The appeal on this ground is dismissed.

DISPOSITION

83. The appeal is dismissed.

JUDGE THOMAS SCOTT

JUDGE ASHLEY GREENBANK

Release date: 06 February 2023