Neutral Citation: **[2025] UKUT 00063 (TCC)**

Case Number: UT/2022/000131

UPPER TRIBUNAL
(Tax and Chancery Chamber)

By remote video hearing

INCOME TAX – discovery assessment and penalties for deliberate behaviour – adequacy of reasons given by First-tier Tribunal – consideration of decision of Court of Appeal in English v Emery Reimbold & Strick *– review of FTT's reasons in the context of HMRC statement of case and skeleton argument - appeal dismissed*

Heard on: 4 November 2024
Judgment date: 19 February 2025

Before

JUDGE NICHOLAS ALEKSANDER
JUDGE KEVIN POOLE

Between

HENRY RAFFERTY

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Joseph Quinn, accountant

For the Respondents: Rebecca Sheldon, counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal against a decision of the First-tier Tribunal which dismissed Mr Rafferty's appeals against:

(a) a closure notice for the year ended 2014/15;

(b) discovery assessments for the years 2001/02 to 2013/14, and 2015/16 to 2016/17;

(c) penalty determinations for the years 2001/02 to 2008/09, and penalty assessments for 2009/10 to 2011/12, and 2012/13 to 2016/17; and

(d) A penalty issued under Schedule 36 of FA 2008 for failure to comply with an information notice.

2. Mr Quinn represented Mr Rafferty, and had represented Mr Rafferty at the hearing before the FTT. Ms Sheldon represented HMRC before us, but she had not appeared before the FTT.

THE BACKGROUND

3. On 11 January 2017, HMRC opened an enquiry Mr Rafferty's tax return for the year 2014/15 under section 9A of the Taxes Management Act 1970 ("TMA").

4. On 12 May 2017 HMRC issued a notice requesting information including all bank statements for the tax year 2014/15 under Schedule 36 of the Finance Act 2008. On 20 June 2017 HMRC charged an initial penalty of £300 for failure to comply with the 12 May 2017 notice. Some bank information and a summary of interest received was sent on behalf of Mr Rafferty. HMRC issued daily penalties on 24 August 2017 for continuing to fail to comply with the 12 May 2017 notice, however £620 daily penalties were subsequently withdrawn following various explanations given by Mr Rafferty.

5. On 22 June 2018, HMRC issued a notice under Schedule 36, Finance Act 2008 requiring Mr Rafferty to provide copies of bank statements covering the period from 1 January 2012 to 1 February 2017 which had not previously been provided. As this information was not provided by the due date, on 4 September 2018, HMRC issued a penalty under Schedule 24 Finance Act 2008. Following a review, the period covered by the Schedule 36 notice was limited to the period commencing on 22 June 2012, but in all other respects, the review upheld HMRC's decision (including the penalty). Mr Rafferty appealed against information notice and the penalty, and applied to the FTT for a direction that a closure notice be issued.

6. The appeal in respect of the Schedule 36 notices was heard by the FTT on 21 January 2020. The hearing was adjourned to allow Mr Rafferty additional time to comply with the Schedule 36 notices. Subject to this compliance, HMRC was directed to advise the FTT by 21 April 2020 (subsequently extended to 21 May 2020) whether a closure notice for 2014/15 had been issued. Most (but not all) of the outstanding information was provided to HMRC by 20 February 2020.

7. On 4 June 2020, HMRC issued a closure notice for the enquiry into the 2014/15 tax year for £5864.68. Discovery assessments were also issued for the years 2001/2002 to 2013/14, and for 2015/16 to 2016/17.

8. On 4 June 2020, penalty notices were issued for the years 2001/02 and 2016/17 on the basis that Mr Rafferty's behaviour was deliberate.

9. The total amount of tax assessed by the closure notice and discovery assessments was £135,141.57. The total amount of penalties was £31,319.54.

10. Mr Rafferty's appeal was heard by the FTT on 24 February 2022, and a decision notice, dismissing the appeal, was released on 10 May 2022.

11. Permission to appeal was refused by the FTT on 12 October 2022.

12. Mr Rafferty renewed his application before the Upper Tribunal. The grounds of appeal as extracted by the Upper Tribunal from the application documents submitted can be summarised as follows:

> (a) procedural irregularity in relation to the FTT's refusal to give permission to appeal, namely that the judge who refused permission to appeal on 12 October 2022 was the same who presided at the substantive hearing of the appeal, which does not meet the requirement for a review of an original decision to be heard by an independent judge;
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> (b) that the FTT (like HMRC) failed to recognise that Mr Rafferty was separated from his wife in the period 2002 to 2016 so HMRC had used the incorrect Office for National Statistics figures when calculating the average family expenditure and his outgoings - he did not live with his wife and family during the period 2002 to 2016;
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> (c) that there was a procedural irregularity because HMRC relied on a document produced at the hearing in February 2022 after a 25 minute delay (see para [2] of the decision). This was relied on to Mr Rafferty's disadvantage without him knowing its content in advance and being unable to prepare and submit a rebuttal or defence. This new document held important points that would have advantaged Mr Rafferty;
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> (d) the FTT erred at [10], [161], [162] and [215] of the Decision because HMRC admitted that the benefits and income were received by Mr Rafferty's family but did not give credit against the further assessments. The findings of the FTT at [161] and [162] of the Decision were contradicted by that at [10]; and
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> (e) the FTT erred at [45] of the Decision because it took into account Mr Rafferty's failure to meet HMRC on 17 February 2020 but he had attended the 21 February 2022 hearing before the FTT and HMRC had the opportunity to cross examine him but they chose not to. It was incorrect for HMRC to submit they asked for a meeting with him as he had been unable to attend the Tribunal hearing.

13. Judge Jones was satisfied that it is arguable that the FTT had erred in law in making its decision but not for all the reasons submitted by Mr Rafferty. Judge Jones granted permission in respect of the ground set out in paragraph [12(b)], but refused permission in respect of the other grounds of appeal (whilst also recording that "<u>if it is right that</u> HMRC did not cross examine the Applicant at the hearing then he may renew [the ground of appeal set out at [12(e)] above]" – emphasis added). However, Judge Jones granted permission to appeal on two additional grounds which were not set out in Mr Rafferty's application (see below).

14. Of the original grounds of appeal, Mr Rafferty was granted permission to appeal on solely the following ground in respect of the matters raised at [12(b)] above:

> (a) that the FTT erred in law because it: (a) failed to take into account relevant evidence, (b) failed to make a decision on a fact in issue, and (c) failed to give sufficient reasons for its decision (Ground 1).

Judge Jones also granted permission to appeal on the following additional new grounds:

(b) that the FTT misapplied and/or misinterpreted the (statute and case) law when upholding HMRC's discovery assessments in the assessment appeals for the years 2001/02 to 2013/14, and 2015/16 to 2016/2017, in particular between paragraphs [231]-[241] of its decision, the FTT:

(i) failed to identify and apply the legal test of what constitutes a discovery and the relevant case law;

(ii) failed to identify and apply the correct burden of proof (being upon HMRC) that there had been a discovery;

(iii) failed to address and give reasons for rejecting the Appellant's argument that there had been no discovery, for example, because information relied upon by HMRC was produced during the section 9A TMA 1970 enquiry into tax years 2014/15; and

(iv) failed to explain and give sufficient reasons why HMRC was entitled to make discovery assessments (in particular for assessments in relation to tax years up to 20 years earlier)

(Ground 2); and

(c) that the FTT misapplied and/or misinterpreted the (statute and case) law when upholding HMRC's penalty assessments in the penalty determination and assessment appeals for the years 2001/02 to 2008/09, and 2009/10, 2011/12 and 2012/13 to 2016/17, in particular:

(i) it failed to identify and apply the test of what constitutes deliberate conduct;

(ii) it failed to identify and apply the correct burden of proof (being upon HMRC) to establish whether there had been such deliberate conduct;

(iii) it failed to give any substantive reasons for finding that the Applicant had acted deliberately in failing to file returns or filing inaccurate returns

(Ground 3).

15. At the hearing of the appeal, it became clear that Mr Quinn had not appreciated the nature of a decision by the Upper Tribunal to grant permission to appeal, and was under the impression that Judge Jones had made a decision in favour of Mr Rafferty in respect of the grounds on which permission was given. Mr Quinn believed that the purpose of the hearing before us was to decide on the issues covered by the grounds for which permission was not given. We drew the attention of Mr Quinn to the following paragraphs included at the end of Judge Jones' decision which were set out in bold text:

> 23. It is to be emphasised that the grant of permission is acknowledgement that the appeal is arguable but does not indicate what the eventual outcome of the appeal will be. There is to be no guarantee or expectation that just because permission is granted, the appeal will succeed. It simply means that the appeal will proceed to a full determination after considering further submissions from both parties.
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> 24. The Applicant should also be made aware that should he choose to pursue his substantive appeal on which he has been granted permission but ultimately he is unsuccessful and the appeal is dismissed, he may be liable to pay HMRC's legal costs of defending the appeal (which may be significant).

16. We directed Mr Quinn to limit his submissions solely to the issues for which permission had been given, and we have not had regard to those parts of his skeleton argument that addressed the grounds for which permission had been refused.

ABSENCE OF CROSS-EXAMINATION OF MR RAFFERTY

17. We consider first the issue of whether to accept this as a ground of appeal (Judge Jones having initially refused permission as set out at [13] above. This ground of appeal arises from a paragraph in Mr Rafferty's original application for permission to appeal to the FTT which read as follows:

> Point 45 FTT of 10.05.22 Decision. H Rafferty did attend the 21.02.22 Tribunal hearing at which HMRC had the opportunity to cross examine him but they chose not to. It is incorrect for HMRC to state they asked for a meeting with H Rafferty as he had been unable to attend the Tribunal hearing.

18. In his decision refusing permission, Judge Gemmell WS refused permission on this ground as not amounting to an error of law, without making any further comment on it.

19. Judge Jones in the Upper Tribunal also refused permission on this ground, saying it was "unarguable, amounts to an argument on the facts and does not give rise to any issue of law". However, he made the further statement set out at [13] above, allowing the application to be renewed "if it is right that HMRC did not cross examine the Applicant at the hearing." He expanded on this point as follows:

> It would be arguable that any failure by HMRC to cross examine the Applicant at the hearing would give rise to a procedural error by the FTT in making adverse findings against him that he engaged in deliberate under-declaration or failure to declare his income. It would be arguable that the FTT would have erred in making findings of deliberate tax avoidance when the Applicant had been denied the opportunity to rebut the allegations in his oral evidence. At this stage however, I cannot determine whether the Applicant was cross examined by HMRC simply by reading the FTT Decision (nor does the Decision identify the representatives of the parties).

20. The ground being advanced refers to paragraph [45] of the FTT's decision. It is necessary to set out that paragraph in full, in the context of the paragraphs immediately preceding it, in order to understand it properly:

> 42. On 8 March 2019, HR appealed to the Tribunal against the £300 penalty and applying for a closure notice on the 2014/2015 enquiry.
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> 43. The Tribunal hearing took place in Belfast on 21 January 2020 and on 30 January 2020 the Tribunal issued directions adjourning as part heard allowing time for compliance with the information notices dated 12 May 2017 and 22 June 2018. Subject to this compliance, HMRC was to advise the Tribunal by 21 April 2020 whether a closure notice 2014/15 had been issued.
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> 44. On 12 February 2020, HR's agent provided missing credit union statements.
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> 45. On 17 February 2020, HMRC confirmed that the information notice dated 22 June 2018 had now been complied with and also listing the information outstanding in respect of the May 2017 notice. HMRC also again asked for a meeting with HR as he had been unable to attend the Tribunal hearing.

21. This makes it clear that the "Tribunal hearing" being referred to in paragraph [45] was the earlier hearing on 21 January 2020 of Mr Rafferty's application for a closure notice and appeal against an information notice penalty (several months before the issue of the closure notice and assessments which are the subject of the current proceedings). The last sentence of

[45] is the one complained of in the application for permission to appeal. It is quite clear, by reference to the 17 February 2020 letter from HMRC (which was included in the hearing bundle) that this final sentence of paragraph [45] of the FTT's decision does indeed contain an error – in their letter dated 17 February 2020, HMRC asked for a meeting with Mr Rafferty because he had been able to attend that hearing, and not because he had been unable to do so (by reason of mental health problems that were referred to at various stages). However, this error is minor and peripheral, and we do not see any basis upon which it could have influenced the FTT's decision on the substantive issues before it.

22. There is some confusion in the application for permission to appeal around the date of the hearing being referred to in it. It asserts (see [17] above) that Mr Rafferty did attend "the 21.02.22 hearing", but in fact there was no hearing on that date. The previous hearing had been held on 21 January 2020, and the hearing in the FTT in these proceedings took place on 24 February 2022. In context, the hearing being referred to in the application was clearly the earlier hearing on 21 January 2020.

23. However, when Judge Jones gave permission to renew the application "if it is right that HMRC did not cross examine the Applicant at the hearing", he was clearly referring to the substantive hearing on 24 February 2022, and giving Mr Rafferty the opportunity to raise that point. He made clear the potential issues when doing so (see [19] above). However, the point was not raised on behalf of Mr Rafferty until the hearing before us.

24. In opening before us, Mr Quinn explained that Mr Rafferty was extremely upset when he gave his evidence before the FTT in February 2022 – to such an extent that the judge paused his giving of evidence for five to ten minutes to allow him to regain composure. Mr Quinn submits that Mr Rafferty was stood down by the hearing judge because of his emotional state, without HMRC having asked Mr Rafferty any questions. Ms Sheldon – who had not appeared before the FTT - told us that she was instructed that Ms O'Reilly, the officer representing HMRC before the FTT, had cross-examined Mr Rafferty. Mr Quinn's response was that he was adamant that Mr Rafferty had not been cross-examined at the FTT hearing.

25. The FTT's decision refers in a number of places to Mr Rafferty giving evidence. For example, at paragraph [12] it states

> 12. [Mr Rafferty] gave evidence that in October 2006 his father had given him £26,000 …

The FTT's decision on the application for permission to appeal also refers to Mr Rafferty giving evidence, and that the FTT did not believe Mr Rafferty's assertions were proved as matters of fact.

26. Although there is no express statement that Mr Rafferty was cross-examined in either the FTT's substantive decision or in its decision to refuse permission to appeal (no doubt, in the latter case, because of the lack of clarity in the application for permission to appeal itself), it is clear from both the decision notices that the FTT did not believe Mr Rafferty's oral evidence.

27. We note that nowhere in either of the applications for permission to appeal (both to the FTT and subsequently to the Upper Tribunal) was any submission made that the FTT erred in law because it failed to take into account the fact that Mr Rafferty's evidence was unchallenged. Nor was this raised anywhere in Mr Quinn's skeleton argument. HMRC were therefore, unfairly, taken by surprise when this was raised at the hearing.

28. As this issue was not raised in the application to the FTT for permission to appeal, we do not have the benefit of the view of Judge Gemmell WS (who presided at the FTT hearing) on this matter. But in any event, as this matter was not raised in either of the applications for

permission, permission to appeal on this ground was not given, it would not be appropriate to grant it at this stage and we therefore decline to consider it.

GROUND 1 - ONE OR TWO HOUSEHOLDS

29. Mr Quinn submits that the FTT declined to take account of a spreadsheet showing family income calculations, and letters from various insurers, solicitors, and government departments showing amounts of compensation, property sale proceeds, and benefits paid to Mr Rafferty.

30. However, we find that it is clear that the FTT gave consideration to the spreadsheet (which the FTT called the "Rafferty/HMRC table" in its decision). Reference to this spreadsheet is made at paragraphs [77], [149], [207], [213], and [214]. The FTT also referred in its decision to the various insurance claims (see [18]), the property sale (see [14]), and the benefits (references throughout the decision). It is clear that the FTT, having considered the spreadsheet, found that it was not reliable in the absence of documentary or other evidence to support the figures within it (see [213]), and that it lacked credibility as a significant number of the sums were round numbers. The FTT made a clear finding at [219] that there was insufficient documentary and oral evidence to satisfy them as to how Mr Rafferty had funded the purchase of 64 Coolnasilla Park East Belfast without a mortgage.

31. We also find that at [235] the FTT accepted the facts and submissions put forward by HMRC with regards to the discovery assessments, which had been put on the basis that there was only one household (see [116]). The FTT also found at [209] to [210] that there were inconsistencies in Mr Rafferty's evidence as to whether he was caring for his sons or caring for his mother. We note that in the FTT's decision on the application for permission to appeal, Judge Gemmell WS confirms at [7] that the FTT had found that there was only one household.

32. We agree with Ms Sheldon's submission that if there were two households, the financial position of Mr Rafferty would be worse – not better – as it is more likely than not that his expenditure would increase.

33. We find that in relation to the issue of whether there were two or one households, the FTT (i) took account of the relevant evidence, (ii) made a decision on a fact in issue, and (iii) gave sufficient reasons for its decision. We find that as regards Ground 1, the FTT made no error of law.

GROUND 2 – DISCOVERY ASSESSMENTS

34. This was not a ground of appeal raised on behalf of Mr Rafferty, but was one that was raised by Judge Jones when granting permission to appeal.

35. It became clear from Mr Quinn's submissions and our questioning that he did not understand the nature of HMRC enquiries or discovery assessments. He referred us to HMRC's letter of 4 June 2020 in which the HMRC investigating officer states that she will be issuing a closure notice for 2014/15 and tax assessments for 2001/2002 through to 2013/2014, and for 2015/2016 and 2016/2017. Mr Quinn submitted that:

> (a) as the enquiry into 2014/15 was "closed", no tax was payable for that tax year; and
>
> (b) for the same reason, HMRC had not "discovered" anything.

36. Mr Quinn referred us to his letter to HMRC of 13 October 2017 and to the Rafferty/HMRC table which he submits provided a complete explanation of Mr Rafferty's finances. Mr Quinn submits that the FTT in reaching its decision did not take account of all the documentary evidence.

37. Mr Quinn submits that there was a lack of candour and that the FTT relied on misinformation. He refers in an email of 5 April 2024 to HMRC to a "so-called suspicious document":

> My client also wants the HMRC Officers explanations of the following events. At the 21.01.20 Tribunal Hearing the Judges were just about to order a Closure Notice on the 14/15 Enquiry when [HMRC officer] intervened with a concern of a suspicious document that needed explained before 14/15 was formerly closed. The Judges accepted the request in good faith and ordered the so called suspicious document to be explained. Subsequently it was explained by my client, proved to be completely innocent and it was obviously so. The Judges order was honored by my client and therefore a Closure Notice was to be formally issued by 21.04.20 as per point 3 of Judge Staker Direction dated 30.01.20. It was not. I have reviewed the HMRC Bundle for that Hearing and the so called suspicious document of concern was not in their Bundle and then how could it have been a matter of such concern for HMRC to stop the Judges from determining an immediate Closure Notice on 21.04.20. I believe this last minute introduction of a so called suspicious document was a fake Red Herring document issue designed to prevent the Judges from carrying out their legal duty and a deliberate interference in the Judicial Process. Consequently, and without any influence of the fake suspicious document, the HMRC officers ignored the Tribunal deadline of 21.04.20 and finally issued a Closure Notice for 14/15 on 04.06.20, after I demanded it to be issued, but immediately declared they had found Discovery. They did not. It subsequently transpired that a figure detailed in a document that had been withheld from the Respondent and the Judges before the 24.02.22 Hearing and only handed over during this second 24.02.22 Hearing after a Judge asked for sight of the Discovery evidence that prompted the Further Assessments for 01/02 to 16/17. It was another document not in their Hearing Bundle that they relied on at a Hearing. I refer you to Case (2019) UKFTT 692 (TC) which is another of which is another of [HMRC officer's] cases that lacked candour.

38. We briefly note that the decision to which Mr Quinn refers in his email relates to discovery assessments, and criticism is made of the HMRC litigator (who also represented HMRC before the FTT in this case) for failing to cite to the Tribunal the decision of the Court of Appeal in *Tooth* on "staleness" in relation to discovery assessments. Although the decision of the Court of Appeal in *Tooth* was subsequently reversed by the Supreme Court, it was clearly wrong for the HMRC litigator not to have referred the FTT in that other case to then state of play in relation to staleness in discovery assessments. However, failure to refer the tribunal to case law is a very different matter from lack of candour in relation to evidence – and the decision in Case [2019] UKFTT 692 (TC) does not in our view provide any grounds for suspecting that the HMRC officer concealed evidence from the Tribunal. The "so-called suspicious document" was raised in Mr Rafferty's application to the Upper Tribunal for permission to appeal, and permission to appeal on this ground was refused. The reasons given by Judge Jones were as follows:

> Any procedural irregularity in relation to the document produced and relied upon by HMRC during the hearing is not material because [Mr Rafferty] had the right to make full written submissions on this document after the hearing where he could address any points that he wanted to rely upon on in his favour. It is clear that was able to and did file full written closing written submissions for the FTT appeal after the hearing.

39. Although in his submissions Mr Quinn did not address the law arising in respect of Ground 2, Ms Sheldon did.

40. It is unfortunate that the FTT's decision does not set out the statutory provisions relating to discovery assessments, nor the relevant case law. Nor does the decision address in terms why the conditions relating to discovery assessments were satisfied. If it had done so, it is highly unlikely that Judge Jones would have granted permission to appeal on this ground.

41. Ms Sheldon referred us to the decisions of the Court of Appeal in *Flannery and Another v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 and *English v Emery Reimbold & Strick Ltd, D J & C Withers (Farms) Ltd v Ambic Equipment Ltd, Verrechia v Commissioner of Police of the Metropoli*s [2002] EWCA Civ 605.

42. In *English*, Lord Phillips MR said the following:

> [24] We are not greatly attracted by the suggestion that a judge who has given inadequate reasons should be invited to have a second bite at the cherry. But we are much less attracted at the prospect of expensive appellate proceedings on the ground of lack of reasons. Where the judge who has heard the evidence has based a rational decision on it, the successful party will suffer an injustice if that decision is appealed, let alone set aside, simply because the judge has not included in his judgment adequate reasons for his decision. The appellate court will not be in as good a position to substitute its decision, should it decide that this course is viable, while an appeal followed by a rehearing will involve a hideous waste of costs.
>
> [25] Accordingly, we recommend the following course. If an application for permission to appeal on the ground of lack of reasons is made to the trial judge, the judge should consider whether his judgment is defective for lack of reasons, adjourning for that purpose should he find this necessary. If he concludes that it is, he should set out to remedy the defect by the provision of additional reasons refusing permission to appeal on the basis that he has adopted that course. If he concludes that he has given adequate reasons, he will no doubt refuse permission to appeal. If an application for permission to appeal on the ground of lack of reasons is made to the appellate court and it appears to the appellate court that the application is well founded, it should consider adjourning the application and remitting the case to the trial judge with an invitation to provide additional reasons for his decision or, where appropriate, his reasons for a specific finding or findings. Where the appellate court is in doubt as to whether the reasons are adequate, it may be appropriate to direct that the application be adjourned to an oral hearing, on notice to the respondent.
>
> *The approach of the appellate court*
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> [26] Where permission is granted to appeal on the grounds that the judgment does not contain adequate reasons, the appellate court should first review the judgment, in the context of the material evidence and submissions at the trial, in order to determine whether, when all of these are considered, it is apparent why the judge reached the decision that he did. If satisfied that the reason is apparent and that it is a valid basis for the judgment, the appeal will be dismissed. This was the approach adopted by this court, in the light of *Flannery's* case in *Ludlow v National Power plc* (unreported) 17 November 2000; Court of Appeal (Civil Division) Transcript No 1945 of 2000 . If despite this exercise the reason for the decision is not apparent, then the appeal court will have to decide whether itself to proceed to a rehearing or to direct a new trial.

43. In the light of the decision of the Court of Appeal, we are required to review the FTT's decision in the context of the material evidence and the submissions made at the hearing.

44. HMRC's statement of case refers to the relevant statutory provisions for discovery assessments (s29 TMA) and the conditions that HMRC must satisfy in order to make a discovery assessment:

> 11.6 The legislation to enable HMRC to assess years outside the enquiry year is S29 TMA 1970.
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> 11.7 S29(1) allows HMRC to issue an assessment if an Officer of the Board discovers that any income which ought to have been assess to income tax has not been assessed.
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> 11.8 HMRC contend that having reviewed the bank statements for 2014/15 they have discovered that lodgements exceed declared turnover and in absence of documentary evidence to demonstrate the source of these amounts they have been assessed to income tax. HMRC believe this practice to have continued outside the enquiry year so there is a liability to tax. S29(1) is therefore satisfied.
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> 11.9 For the years 2001/2 to 2011/12 there was a failure to notify chargeability therefore the further conditions of S29 do not need to be satisfied.
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> 11.10 For the years 2012/13 onward having satisfied S29(1) HMRC must also satisfy either S29(4) or S29(5) TMA 1970 to allow them to issue an assessment.
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> 11.11 To satisfy S29(4) HMRC must demonstrate that the loss of tax was brought about by the careless or deliberate behaviour of the taxpayer.
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> 11.12 HMRC viewed the evidence and found that the appellant held a taxi licence from 08 October 1997. He admitted at interview on 16 February 2017 that he had commenced self-employment as a taxi driver years ago. HMRC view the behaviour leading to the failure to accurately return income from this source as deliberate therefore S29(4) is satisfied. If it is not found to be deliberate then HMRC state the behaviour was at least careless so S29(4) remains satisfied and HMRC are entitled to issue assessments.
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> 11.13

Year	Return Issued	Return Due	Return Received	Enquiry Window Closed
2012/13	06/04/2013	31/01/2014	01/11/2013	01/11/2014
2013/14	06/04/2014	31/01/2015	21/08/2014	21/08/2015
2015/16	06/04/2016	31/01/2017	24/10/2016	24/10/2107
2016/17	06/04/2017	31/01/2018	29/01/2018	29/01/2019

> The table above shows the dates self-assessment returns were received from the appellant and the date the enquiry window closed.
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> 11.14 It is HMRC's position that when they discovered the insufficiency of tax for these years, following submission of the bank statements on 02 February 2020, they were not entitled to open an enquiry into these returns as the enquiry window had closed. S29(5) is therefore satisfied.
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> 11.15 To enable HMRC to issue an assessment under S29 TMA 1970 it is only necessary to satisfy either paragraph (4) or (5). As detailed above both have been satisfied in this case therefore HMRC are entitled to issue assessment for years outside the enquiry year.

> 11.16 Having satisfied S29 TMA 1970 HMRC then need to consider the time limits in legislation to determine if they can issue the assessments.
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> 11.17 The relevant legislation is S34 & S36 TMA 1970.
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> 11.18 The assessments were issued on 04 June 2020.
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> 11.19 S34 TMA 1970 permits an assessment to be made at any time not more than 4 years after the end of the year of assessment. The assessment for 2016/17 falls within this timeframe.
>
> 11.20 S36 (1) allows for an assessment to be made at any time not more than 6 years after the end of the year of assessment if the loss of tax was brought about carelessly. HMRC's position is that the loss of tax for 2015/16 was brought about deliberately, but if not deliberately then at least carelessly, by the appellant so they are permitted to issue an assessment.
>
> 11.21 S36 (1A) allows for an assessment to be made up to 20 years after the end of the year of assessment if the behaviour that brought about the loss was deliberate. HMRC's position is that by not declaring the full level of his turnover as a self-employed taxi driver for the years 2009/10 to 2014/15 the appellant acted deliberately and therefore HMRC are entitled to issue assessment.

45. Similar statements are made in HMRC's skeleton argument before the FTT.

46. It is clear from the FTT's decision that it had accepted HMRC's submissions on the issues of fact and law relating to the discovery assessments. At [235] the FTT said:

> 235. The Tribunal held that the conditions contained in section 29 TMA to allow assessments to be made for the years 2001/02 to 2013/14 and 2015/16 to 2016/17, had been met on the facts and submissions put forward by HMRC.

47. We therefore read back paragraphs 11.6 to 11.21 of HMRC's statement of case and its skeleton argument into the FTT's decision.

48. Having done so, we are satisfied, and find, that the FTT made no error of law by misapplying and/or misinterpreting the (statute and case) law when upholding HMRC's discovery assessments. We are satisfied, and find, that the FTT

> (a) identified and applied the correct legal test of what constitutes a discovery and the relevant case law;
>
> (b) identified and applied the correct burden of proof (being upon HMRC) that there had been a discovery;
>
> (c) addressed and give reasons for rejecting Mr Rafferty's argument that there had been no discovery; and
>
> (d) explained and give sufficient reasons why HMRC was entitled to make discovery assessments.

49. Mr Quinn complains that some of the material on which HMRC's discovery was based had been previously provided to HMRC. This is irrelevant. Even if the information had been previously provided to HMRC, new facts are not required for a discovery to be made. Ms Sheldon referred us to the decision of this Tribunal in *HMRC v Charlton Corfield & Corfield* [2012] UKUT 770 (TCC) which states at [37] that:

> 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.

50. We address the issue of time limits for discovery assessments in the context of deliberate behaviour under Ground 3.

GROUND 3 – PENALTIES FOR DELIBERATE CONDUCT

51. Mr Quinn noted that penalties were assessed as a percentage of the tax found to be owing. On the basis that there had been no discovery, no tax was owing – and there could therefore be no penalties.

52. Mr Quinn accepted that if the decision of the FTT was upheld in relation to the closure notice and discovery assessments, penalties would follow.

53. Again, it is unfortunate that the FTT did not expressly address the law relating to the meaning of "deliberate", although it did refer to Schedule 24, Finance Act 2007 at [236].

54. As Mr Quinn had accepted that if the discovery assessments were upheld, then the penalty assessments (determined as percentages of the tax assessed) would also stand good, it follows that he had accepted that Mr Rafferty's behaviour was deliberate. However, we have taken the same approach as mandated by the Court of Appeal in *English* to the issue of deliberate conduct on the part of Mr Rafferty.

55. HMRC's statement of case at 11.21 refers to the extended time limit that applies in the case of deliberate behaviour. What constitutes deliberate behaviour was addressed in more detail in HMRC's skeleton argument, and in particular the skeleton refers to the decision of the FTT in *Clyne* [2016] UKFTT 0369 (TC):

> 124. HMRC would refer to the case of *Anthony Clynes v The Commissioners for HMRC* [2016] UKFTT 0369 (TC). At point 82 the Tribunal consider deliberate behaviour and explain this as:
>
> > On its normal meaning, therefore, the use of the term indicates that for there to be a deliberate inaccuracy on a person's part, the person must to some extent have acted consciously, with full intention or set purpose or in a considered way.
>
> The Tribunal goes on to say at point 83:
>
> > The fact that the deliberate conduct is tied to the inaccuracy, indicates that for this penalty to apply the person must have, in a subjective sense, acted with some level of knowledge or consciousness as regards the inaccuracy.
>
> Additionally at point 86 the Tribunal states:
>
> > Our view is that, depending on the precise circumstances, an inaccuracy may also be held to be deliberate where it is found that the person consciously or intentionally chose not to find out the correct position, in particular, where the circumstances are such that the person knew that he should do so.

56. It is clear from the FTT's decision that it had accepted HMRC's submissions on the issues of fact and law relating to deliberate behaviour. At [236] the FTT states:

> 236. The Tribunal also held that the penalties for failure to notify under section 7 TMA for the years 2001/2 to 2008/09, on 6 June 2020 and under Schedule 41 Finance Act 2008 for the years 2009/10 to 2011/12, on 05 June 2020, and for the submission of inaccurate documents under Schedule 24 Finance Act 2007 for the years 2012/13 to 2016/17, also on 05 June 2020, were valid on the facts and submissions put forward by HMRC.

57. We therefore read back paragraph 11.21 of HMRC's statement of case and paragraph 124 of its skeleton argument into the FTT's decision. Having done so, we are satisfied that the FTT made no error of law by misapplying and/or misinterpreting the (statute and case) law in upholding the penalty assessments and allowing the extended time limits for assessments. We are satisfied, and find, that the FTT:

(i) identified and applied the correct test of what constitutes deliberate conduct; and

(ii) identified and applied the correct burden of proof (being upon HMRC) to establish whether there had been such deliberate conduct.

CONCLUSION AND DISPOSITION

58. In conclusion, we are satisfied that although the FTT's decision could have been better expressed, it made no error of law in reaching its decision.

59. The appeal is therefore dismissed.

JUDGE NICHOLAS ALEKSANDER
JUDGE KEVIN POOLE

Release date: 19 February 2025