Neutral Citation: **[2025] UKUT 00145 (TCC)**

Case Number: UT/2023/000126

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, London

Income Tax - discovery assessments and penalties imposed by National Crime Agency ("NCA") adopting Revenue functions – whether FTT erred in not requiring NCA to meet a burden of showing loss of tax arising from trade of money laundering – effect of section 319 POCA 2005 – whether FTT entitled to find that there was a loss of tax – whether FTT entitled to find that the Second Appellant brought about a loss of tax deliberately – appeal dismissed

Heard on: 3 and 4 February 2025
Judgment date: 9 May 2025

Before

UPPER TRIBUNAL JUDGE SWAMI RAGHAVAN
UPPER TRIBUAL JUDGE JONATHAN CANNAN

Between

MOHAMMED BUTT
MAHFOOZ BEGUM

Appellants

and

NATIONAL CRIME AGENCY

Respondent

Representation:

For the Appellants: Laurent Sykes KC and Ben Blades, Counsel, instructed by Aliant Law

For the Respondents: Sarah Black, Counsel, instructed by the National Crime Agency

DECISION

INTRODUCTION

1. Under the Proceeds of Crime Act 2002 ("**POCA**") the National Crime Agency ("**NCA**") can carry out HMRC's tax and penalty assessment functions, where certain qualifying conditions are met. In its decision of 21 September 2023, the First-tier Tribunal ("**FTT**") upheld a number of tax and penalty assessments which the NCA made on the Appellants, a married couple, Mr Butt and Mrs Begum. The tax assessments were discovery assessments for tax years 1996/7 to 2012/13 totalling £744,121.76 for Mr Butt and totalling £151,463.22 for Mrs Begum in respect of tax years 1997/8 to 2011/12 ("**the FTT Decision**"). With the permission of the FTT, the Appellants appeal against the FTT Decision on various grounds arguing that the FTT was wrong not to have found that the assessments were invalid.

2. The Appellants' central ground of appeal is that the FTT failed to recognise the particular burden that lay on the NCA, for the purposes of the extended time limit provisions in s36 Taxes Management Act ("**TMA**") and which applied to the discovery assessments that had been made. The Appellants argue that the NCA was required to prove a loss of tax arising from a specific trade source. In the circumstances of this case, the alleged trade must have been money laundering. The NCA could not meet that burden and it was not open to the FTT to find that there had been a tax loss that was derived from a money laundering trade based on the evidence before it. The assessments were therefore invalid.

3. The NCA defends the FTT Decision and the validity of the assessments. It submits that s36 TMA required it to establish a *prima facie* case that there was a tax loss, which it did. It was not necessary for the NCA to prove the tax loss or that the tax loss arose from a trade of money laundering.

LEGISLATIVE PROVISIONS

4. Pursuant to section 317(1)(a) POCA the NCA may, upon service of certain notices on HMRC, take on general Revenue functions (which pursuant to s323 POCA are such of the functions vested in HMRC as relate to income tax, CGT, corporation tax and National Insurance Contributions) if the NCA:

> " …has reasonable grounds to suspect that —
>
> (a) income arising or a gain accruing to a person in respect of a chargeable period is chargeable to income tax or is a chargeable gain (as the case may be) and arises or accrues as a result of the person's or another's criminal conduct (whether wholly or partly and whether directly or indirectly)…"

5. The income tax statutory provisions relevant to this appeal are the familiar discovery assessment (s29) and extended time limit (s36) provisions found in the TMA.

6. Section 29 TMA provided as relevant:

> "29.— **Assessment where loss of tax discovered**
>
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive, the officer, or as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his

> or their opinion to be charged in order to make good to the Crown the loss of tax.
>
> (2) …
>
> (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—
>
> (a) in respect of the year of assessment mentioned in that subsection…
>
> (b) … unless one of the two conditions mentioned below is fulfilled.
>
> (4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
>
> (5) The second condition is that at the time when an officer of the Board —
>
> (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or
>
> (b) informed the taxpayer that he had completed his enquiries into that return,
>
> the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.
>
> …"

7. Section 36(1) provided as relevant:

> "36.— **Loss of tax brought about carelessly or deliberately etc**
>
> (1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at anytime not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).
>
> (1A) An assessment on a person in a case involving a loss of income tax or capital gains tax—
>
> (a) brought about deliberately by the person, [*or*]
>
> (b) attributable to a failure by the person to comply with an obligation under section 7,
>
> …
>
> may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision of the Taxes Acts allowing a longer period)."

8. Prior to 6 April 2010, s36 provided for extended time limits in the case of fraudulent or negligent conduct. Further, Article 7 of *SI 2009/403* provided that section 36(1A)(b) shall not apply where the year of assessment is 2008-09 or earlier, except where the assessment is for the purposes of making good to the Crown a loss of tax attributable to the taxpayer's negligent conduct or the negligent conduct of a person acting on the taxpayer's behalf.

9. The reference in section 36(1A)(b) to an obligation under section 7 is to the obligation on a taxpayer to notify HMRC that they are chargeable to income tax.

10. Returning to the provisions of POCA the other provision which is raised in this appeal is s319 POCA which is relevant where the NCA makes a discovery assessment under s29 TMA. That provides as follows:

> "(1) For the purpose of the exercise by the National Crime Agency of any function vested in it by virtue of this Part it is immaterial that the National Crime Agency cannot identify a source for any income.
>
> (2) An assessment made by the National Crime Agency under section 29 of the Taxes Management Act 1970 (c 9) (assessment where loss of tax discovered) in respect of income charged to tax under Chapter 8 of Part 5 of the Income Tax (Trading and Other Income) Act 2005 must not be reduced or quashed only because it does not specify (to any extent) the source of the income.
>
> (3) If the National Crime Agency serves on the Board a notice of withdrawal under section 317(4), any assessment made by the National Crime Agency under section 29 of the Taxes Management Act 1970 is invalid to the extent that it does not specify a source for the income."

11. The reference in s319(2) to Chapter 8 of Part 5 of Income Tax (Trading and Other Income) Act 2005 is to the charge to tax on income not otherwise charged to tax. Income would otherwise be chargeable to tax if it was taxable, for example as trading income.

BACKGROUND FACTS AND FTT DECISION

12. In this section we summarise the facts and background from the FTT Decision in order to put the Appellants' grounds into context. We will set out further detail as appropriate when we come on to discuss the individual grounds. References in square brackets are to paragraphs in the FTT Decision.

13. On 25 September 2012, following a criminal investigation into allegations of drug trafficking and money laundering by Mr Butt and ten other members of his family, Mr Butt was arrested on suspicion of money laundering in connection with an OCG (Organised Crime Group) in Luton. In the absence of sufficient evidence for a criminal prosecution, no charges were brought against him. Two of his brothers and his two sons were charged and convicted of money laundering and/or drug trafficking offences ([23]). Mrs Begum was never arrested either in connection with these investigations or at all ([24]).

14. The NCA served notices on HMRC under s317(2) POCA to adopt its general Revenue functions on 13 August 2014 in relation to Mr Butt's and Mrs Begum's tax liabilities for the years 1998/99 to 2011/12. The NCA served further notices on 25 March 2015 and 25 June 2015 in respect of Mr Butt for 1997/98 and 2012/13 and 1996/7 ([45]-[48]).

15. On 2 December 2015 the NCA wrote to the Appellants to inform them of their decision to adopt HMRC's revenue functions and to issue the assessments covering all the years under appeal ([51],[52]). The assessments were accompanied by covering letters. Penalty assessments were subsequently issued on the basis of deliberate behaviour. The assessments were issued pursuant to section 29 TMA and included the following narrative or equivalent depending on the tax years to which they related:

> "Assessment for Income Tax
>
> under section 18 (Schedule D) of the Income and Corporation Tax Act 1988 under Case I and/or in the alternative Case II and/or in the alternative Case VI, or in the alternative pursuant to Section 319 of the Proceeds of Crime Act 2002."

16. The NCA subsequently, on 2 May 2017 issued individual "view of the matter" letters to Mr Butt and Mrs Begum ([57] – [62]). These included a year-by year summary of the basis upon which amounts had been assessed. In broad outline the amounts assessed were based on various items of expenditure in connection with property transactions, loans, personal expenditure including overseas travel and funds received into bank accounts in respect of which the source of funds had not been accounted for. The amounts identified were assessed to income tax and class 4 national insurance contributions. Class 4 national insurance contributions are payable by self-employed earners.

The FTT hearing and Decision

17. The Appellants appealed the assessments and the penalty assessments to the FTT. In a hearing lasting six days, the FTT, as well as receiving a large documents bundle, heard oral evidence from the Appellants. The FTT did not find Mr Butt to be a "particularly helpful or reliable witness" explaining that his evidence was "at best, somewhat vague" ([8]). As for Mrs Begum the FTT said it was "unable to derive much assistance from her evidence which was limited in nature" ([11]). The FTT also heard evidence from Raymond Davidson, who had been instructed by the Appellants as an expert witness to analyse their available bank statements with a view to establishing that the monies put through their bank and accumulated were not the result of illegal activity. Again the FTT found it was "unable to derive much, if any assistance" from this evidence finding it to be "of limited value only". The FTT noted the reports Mr Davidson produced had not questioned or sought further underlying documents to support the accuracy of figures that had been provided by Mr Butt, Mrs Begum and their solicitors ([12] to [17]). On behalf of the NCA, the FTT heard evidence from Kevin Diedrick, the NCA officer who issued the s317 notices, assessments and penalties. It found him to be "a very credible and straightforward witness" ([18]).

18. The FTT recorded various findings of fact including that in the years before 1998-1999 Mr Butt had said he was based in the Netherlands and had operated a string of "reasonably profitable" fashion businesses in Amsterdam ([21]). From 1980 he had established a grocery business in Amsterdam. The FTT detailed various property transactions in Luton, the Netherlands, and London, an extension to the family home, various loans and transfers made, rental income (some of which Mr Butt had declared) in relation to the various properties held, and purchase costs incurred on Mr Butt's car ([20] – [43]).

19. The FTT dealt with the history of the tax investigation, quoting at length sections from the year by year explanation in the "view of the matter" letters as to the basis on which the assessments had been made. These explanations identified the declared income and then described the sums required to fund known expenditure and unexplained deposits into bank accounts. Similar letters were served on Mrs Begum except that in her case she had not declared any income for tax purposes. The justification in her letters was similarly analysed year by year and by reference to rental income and unaccounted for expenditure on holidays and council tax payments. The FTT also detailed the course of the criminal investigation into the OCG and family members including Mr Butt ([44] –[74]).

20. The FTT identified various issues for determination at [75] as follows:

> "(1) whether the qualifying condition for the Section 317 Notices was met;
>
> (2) whether Mr Butt was resident in the UK for tax purposes during 1996-97 and 1997-98;
>
> (3) the validity of the 'discovery' assessments;
>
> (4) whether the assessments were made in time;
>
> (5) quantum of the assessments; and
>
> (6) Penalties"

21. The FTT found that the qualifying condition for the NCA's s317 notices was met ([77] to [102]). As set out by the FTT (at [83]) this entailed the NCA establishing that Mr Diedrick had "an objectively reasonable suspicion that there was criminal conduct and that Mr Butt and/or Mrs Begum received some income, in the years for which they were assessed, either directly or indirectly as a result of that criminal conduct." The FTT had earlier noted that the threshold in s317(1)(a) POCA of "reasonable grounds to suspect" was low, that it was not necessary to have evidence amounting to a *prima facie* case in order to have a reasonable suspicion and that hearsay evidence might be sufficient. It concluded (at [88]) that "Mr Diedrick's belief that some income of Mr Butt and Mrs Begum (whose evidence was that she had relied on her husband for financial support) had been derived from criminal conduct was reasonable". The FTT reached that conclusion "having regard to the whole surrounding circumstances, particularly the close family relationships that existed between Mr Butt, Mrs Begum and their adult children who lived with their parents and contributed towards the household bills and purchase of assets…". The FTT also concluded (at [100]) that the basis of the assessments, as set out in the "view of the matter" letters was sufficient for Mr Diedrick to have had reasonable grounds to suspect that taxable income and/or chargeable gains accrued to Mr Butt and Mrs Begum in the years for which they were assessed.

22. The FTT dealt under the heading "source issue" at [89] – [100] with a submission on behalf of the Appellants that it was clear from the assessments that the income being charged to tax was from a trade which had been identified by Mr Diedrick as the trade of money laundering and that any suspicion the income had been obtained from money laundering was unreasonable. At [92], the FTT rejected the submission that Mr Diedrick had made the assessments on the basis of a trade of money laundering. At [100], the FTT also rejected a submission that it was necessary for the NCA to establish that any of the income assessed arose from criminal conduct.

23. As regards whether the discovery assessments were valid and in particular whether the NCA had shown that it had discovered a loss of tax for the purposes of s29 TMA, the FTT noted at [110]:

> "110. At paragraph 108 of his skeleton argument and again in his oral submissions Mr Blades confirmed that it was accepted that if the s317 POCA qualifying condition was satisfied i.e. the NCA had reasonable grounds for suspecting that chargeable income/gains arose to Mr Butt and Mrs Begum as a result of criminal conduct, it was not disputed that the NCA had discovered a loss of tax."

24. In the next paragraph, which the Appellants' grounds highlight as showing significant errors of law, the FTT continued:

> "111. Given our conclusion that the s 317 POCA condition has been satisfied it is not necessary to consider whether the NCA discovered a loss of tax, it has been accepted it has. Even if this was not the case, we agree with Ms Black that, given that both Mr Butt and Mrs Begum clearly has access to funds and a lifestyle that exceeded their declared income for which there is no other justifiable or credible explanation, there was a loss of tax for each of the years assessed."

25. The FTT concluded at [112] that subject to any time limit issues, the assessments were therefore valid. It also concluded at [116] and [117] that Mr Butt had deliberately not declared all his income in his tax returns so that the condition in s29(4) TMA was satisfied. In any event, the condition in s29(5) was also satisfied.

26. The FTT then considered whether the assessments had been made in time ([119] to [129]). The assessments on both Appellants for 2011-12 and on Mr Butt for 2012-13 fell within

the standard four-year time limit under s34 TMA. The FTT found that the assessments for 1996-7 to 2010-11 in respect of Mr Butt were also in time by reference to the extended time limit in s36 TMA given its finding that Mr Butt had deliberately omitted to include income in his tax returns. Similarly, in relation to Mrs Begum, the FTT found that the assessments on her for 1998-1999 to 2010-11 were on the basis that she had deliberately failed to notify taxable income.

27. The FTT considered and rejected (at [130] to [144]) the Appellants' various points on the quantum of the assessments concluding at [145] that as the Appellants had not produced sufficient evidence to reduce or set aside the assessments they stood good. The FTT also upheld the penalties that had been imposed on both Appellants.

GROUNDS OF APPEAL

28. The Appellants have permission to pursue the following five grounds of appeal which we will address in turn. Grounds 1 to 4 are relevant to both Mr Butt and Mrs Begum. Ground 5 is only relevant to Mrs Begum:

(1) **Ground 1** is that the assessments, properly construed, were raised on the basis that income was derived from money laundering or other criminal activity. The NCA's case was also pleaded on this basis. It follows that the burden was on the NCA to establish that income was derived by the Appellants from such activities which each of them carried on but the NCA has failed to do so. The FTT erred in law in concluding that the NCA did not need to discharge its burden on the basis of an admission by the Appellant that had only been made in relation to rental income.

(2) **Ground 2** is that the Tribunal erred in law in concluding that s 319 POCA relieved the NCA of the need to make good their case that the Appellants derived income from money laundering or other criminal activities which they themselves carried on.

(3) **Ground 3** is that, to the extent the judgment reflects a finding that the Appellants derived income from criminal activities, this was a finding that the FTT was not entitled to make, and reflects a failure to take account of relevant evidence and the taking into account of irrelevant considerations.

(4) **Ground 4** is that the assessments, properly construed, do not relate to rental income and therefore the rental income should have been excluded.

(5) **Ground 5** is that the FTT erred in concluding that Mrs Begum could, even on the NCA's own view, have deliberately brought about a loss of tax.

GROUND 1 –THE NCA'S BURDEN IN RELATION TO LOSS OF TAX

29. The Appellants submit that the NCA bore a burden to establish that income was derived by the Appellants from money laundering or other trading activities which each of them carried on. It is said that the FTT erred in law in concluding that the NCA did not need to discharge that burden. The fundamental point advanced is that the FTT erred in failing to appreciate that the NCA was required to prove an actual loss of tax in relation to a trade, that trade being money laundering. The FTT was wrong to consider at [111] that the relevant burden to show loss of tax had been satisfied because of its earlier conclusion that the qualifying condition in s317 had been satisfied. Mr Sykes submitted that the FTT confused the requirement for the NCA to show there was a discovery under s29(1) TMA with the requirement to show loss of tax under s29(4) TMA and flowing from that a loss of tax for the purposes of s36 TMA.

30. The key issue here is whether the majority of the assessments were in time under s36 TMA. Section 29(4) TMA is relevant because, as explained in *Mullens v HMRC* [2023] UKUT 244 (TCC), a case we look at in more detail below, the same burden as to loss of tax applies in

relation to s36 time limits as to loss of tax in s29(4) TMA. The issue is one which applies to assessments for all years apart from 2011/12 and 2012/13 (Mr Butt) and 2011/12 (Mrs Begum).

31. The Appellants' argument that the FTT erred in its consideration of the NCA's burden comprises a number of elements which we will deal with in turn:

(1) What is the position, as a matter of law, regarding the burden on the NCA for the purposes of s36. In other words what did the NCA need to show?

(2) Did the FTT misinterpret the Appellants' concession in relation to s317 at [111] of the FTT Decision? There is an issue as to whether this is a new ground of appeal which requires our permission, and if so whether we should grant permission.

(3) Were the NCA's assessments and pleadings made and drafted on the basis that the tax loss arose from a trade of money laundering? If so, was it procedurally unfair for the NCA to run its case on a different basis?

(1) Burden of proof in relation to loss of tax – Mullens v HMRC

32. The Appellants say that the NCA did not satisfy the burden on it to establish a loss of tax for the purposes of s29(4) and s36(1A) because it did not identify a source of income. The FTT failed to appreciate that the NCA was required to establish a source and had not done so.

33. We begin by noting a number of propositions which were not in dispute. Subject to s319, the NCA steps into the shoes of HMRC when making assessments. It therefore falls to the NCA to show that there was a discovery within s29(1) TMA that income which ought to have been assessed has not been assessed, in other words a loss of tax. It must also show that one of the conditions in s29(4) or (5) are satisfied. Section 29(4) requires that the situation mentioned in s29(1) has been brought about carelessly or deliberately. The extended time limit in s36 also requires that a loss of tax be brought about carelessly or deliberately. Both parties relied on what was said by the Upper Tribunal in *Mullens* and neither party suggested that we should depart from the reasoning in that case.

34. *Mullens* concerned a taxpayer who had failed to declare various payments received from his employer, contending that the payments were gifts. The Upper Tribunal drew a distinction at [30] to [32] between a discovery, involving a subjective test, and the existence of an actual tax loss being a question of objective fact:

> "30. Thus, and by contrast with the version of s 29 considered in para [24] above, to make a discovery assessment for a period for which a taxpayer had submitted a self-assessment return, it was no longer sufficient for an inspector or the Board to 'discover' certain matters. Additional threshold conditions needed to be satisfied as well (see s 29(3)). The condition relevant to this appeal concerns culpable conduct on the part of the taxpayer, namely sub-s (4). It is not in dispute that HMRC bear the Section 29(4) Burden of showing that the condition in s 29(4) is met.
>
> 31. The 'situation' referred to in sub-s (4) is a reference to what has been described as an 'actual insufficiency' in the amounts charged to tax (see [33] to [34] of the judgment of Auld LJ in *Langham (Inspector of Taxes) v Veltema* [2004] EWCA Civ 193, [2004] STC 544, (2004) 76 TC 259, which considered the meaning of 'the situation' in the context of s 29(5)) or the 'fact of the undercharge' in *Hargreaves v Revenue and Customs Comrs* [2014] UKUT 395 (TCC), [2015] STC 905 ('*Hargreaves UT*') at [21](6)). The 'situation mentioned in subsection (1)', therefore, is not a reference to HMRC's making of the discovery, as specifically confirmed in *Hargreaves UT* at [21](6).
>
> 32. More generally, and contrary to some of Mr Goldberg KC's oral submissions, s 29(4) is not concerned with the officer's subjective opinion but

> with objective fact (see [21] to [28] of Lewison LJ's judgment in *Hankinson v Revenue and Customs Comrs* [2011] EWCA Civ 1566, [2012] STC 485, [2012] 1 WLR 2322). It follows, therefore, that s 29(4) is asking whether the 'fact of the undercharge' was brought about by a taxpayer's careless or deliberate conduct: HMRC's opinions on the taxpayer's conduct, and the amount of the undercharge, are not relevant."

35. It was not in dispute before us that where HMRC has discharged a s29(4) burden then they would need to do nothing further to discharge the s36 burden, beyond showing the assessment in question was made within the 6 year or 20 year time limits. That was the issue that lay at the heart of *Mullens.* Was there an additional requirement for the s36 burden beyond the s29(4) burden? The parties in the present case disagree in their analysis of what that burden requires. The Appellants argue that an actual loss of tax arising from a particular source needs to be identified to meet the s29(4) burden and therefore the s36 burden. The NCA argues that this is not required. It should be noted the FTT did not have the benefit of *Mullens* which was issued a month after the FTT issued the Decision in this case.

36. It is also worth pointing out that the issue in the present appeal is not whether the section 29(4) burden has been met, but whether the section 36 burden for extended time limits has been satisfied. That is because, as the FTT found at [117], even if the NCA had not established the s29(4) burden then the condition for a discovery assessment in section 29(5) would have been satisfied. The tax loss was not something an officer could have been aware of at the time the officer ceased to be entitled to commence an enquiry into each of the relevant years of assessment.

37. We consider that the UT's analysis in *Mullens* provides a complete answer to the Appellants' case that the legal principles on s29(4) TMA and therefore s36 TMA require the NCA to establish an actual loss of tax from a specified source, namely a trade of money laundering.

38. To understand the Upper Tribunal's reasoning in *Mullens* it is helpful first to appreciate what was common ground in that case and the particular matters which the taxpayer had argued that it fell to HMRC to establish (referred to as "Constituents"). The Upper Tribunal explained the grounds in *Mullens* as follows (at [9(1)]):

> "9… (1) Grounds 1 to 4 (the "Assessment Appeal") relate to the ETL [extended time limit] assessments only (dealing with Payments 1 to 4). It is common ground that, given the way that HMRC put their case, they bore a burden of proof in two respects. First, they had to establish that the pre-condition set out in s.29(4) of TMA was present (a "Section 29(4) Burden"). Second, they had to establish that the requirements of s.36(1) or (1A) of TMA were met so that they could make an ETL discovery assessment (a "Section 36 Burden"). Mr Mullens has not challenged the FTT's decision so far as relating to the Section 29(4) Burden. However, he argues that the FTT erred by failing to realise that, for HMRC to discharge their Section 36 Burden, they had to show, in addition to culpable conduct, there was an actual loss of some tax in the years of assessment covered by the ETL assessments. Mr Mullens argues that to discharge their Section 36 Burden, HMRC needed to establish matters such as (i) the taxable source from which the payments derived; (ii) the status of the payments as income (rather than capital); and (iii) that the payments were taxable in the years specified in the ETL assessments, as distinct from other tax years ("Constituents (i) to (iii)"). Mr Mullens argues that the FTT erred by failing to recognise that HMRC bore this Section 36 Burden and/or by upholding the ETL assessments relating to Payments 1 to 4 when HMRC had not discharged that burden."

39. The Upper Tribunal closely analysed *Hurley v Taylor* [1998] EWCA Civ 1605, *Hudson v Humbles (HMIT)* (1965) 42 TC 380 and *James v Pope (HMIT)* (1972) 48 TC 142. It stated at [48]:

> "48. In our judgment, the effect of *Hudson,* when read together with s.47(1) of the Income Tax Act 1952 was that (i) the Revenue bore the burden of proving a threshold condition, namely the presence of "fraud or wilful default" in connection with or in relation to income tax; (ii) to discharge that burden, the Revenue necessarily had to establish that some income tax is unpaid; (iii) to discharge that burden, the Revenue did not need to establish Constituents (i) to (iii); but instead (iv) if the Revenue could show (for example, by way of capital statements) that there was a prima facie case of income tax not being paid as a result of fraud or wilful default which the taxpayer did not satisfactorily answer, that was sufficient for the Revenue to discharge their burden and the burden then shifted to the taxpayer to show why the assessment was incorrect."

40. By way of background, capital statements are statements of assets and liabilities and income and expenditure that were frequently used in tax investigations to reveal under-declared income by reference to changes in the taxpayer's net assets over time. They will not necessarily identify the source of an unexplained increase in net assets. In the present appeal, the NCA carried out a more straightforward exercise focussing on expenditure which was not apparently funded by any known income.

41. The Upper Tribunal went on to explain at [49] to [50] the nature of the burden on HMRC and its rationale:

> "49. Having concluded that was so as a matter of statutory construction, Pennycuick J [*in Hudson*] went on (at p.387) to say that this outcome was in accordance with the justice and common sense of the matter: "The taxpayer knows the full facts, and the Revenue does not. In the nature of things, it must often be the case that, even if the Revenue can show a prima facie case that receipts have not been satisfactorily accounted for, it has no material upon which to set up a prima facie case for bringing the receipts in question under one or other source of income. On the other hand, it is always open to the taxpayer to challenge the assessment, not only on the ground that there has been no wilful default but also on the ground that the receipts did not represent income from the particular source selected by the Revenue."
>
> 50. That judgment was approved in *James v Pope* (Inspector of Taxes) (1972) 48 TC 142 in a judgment given by Ungoed-Thomas J. The limited nature of the burden on the Revenue was again emphasised: "'prima facie case' may in the present context be used in the sense of a case which requires explanation on the part of the taxpayer of the unexplained receipts or, alternatively, in the sense of a case which requires either such explanation or explanation why such explanation cannot be given".

42. The above propositions were summarised by Park J in *Hurley* and his summary was incorporated in the Upper Tribunal's discussion in *Mullens* at [60] which also helpfully incorporated references where the Court of Appeal in *Hurley* differed from Park J:

> "…1. By s 36(1) of the Taxes Management Act 1970 an assessment to income tax can be made on a person outside the normal six years period (but subject to a maximum 20 years cut-off) 'for the purpose of making good to the Crown a loss of tax attributable to his fraudulent or negligent conduct'.
>
> 2. This requires the Revenue to show: (1) fraudulent or negligent conduct by the taxpayer; and (2) a loss of tax attributable to it.

3. On appeal to the commissioners the burden rests on the Revenue of establishing para 2(1) and (2). If they do not discharge the burden the appeal should be allowed (see e g *Hillenbrand v IRC* (1966) 42 TC 617 at 623 per the Lord President (Clyde)). I will call this 'the s 36 burden'.

4. The burden does not rest on the Revenue to any greater extent than the s 36 burden. If they establish some fraudulent and negligent conduct and some loss of tax attributable to it they have satisfied s 36. From then on s 50(6) takes over and applies as it does for in-date assessments: that is to say, thereafter the burden rests on the taxpayer to establish that the assessment is wrong (see eg *Johnson v Scott (Inspector of Taxes)* [1978] STC 48 at 53).

5. Reverting to the s 36 burden which rests on the Revenue, it may or may not be discharged simply by capital statements which show deficiencies. Whether it is so discharged or not depends on whether the taxpayer tenders any explanation of the deficiencies, and if he does, on how the commissioners view his explanation. [There was a further sentence here in Park J's judgment which is not repeated because it was rejected by the Court of Appeal]. Normally it makes no difference whether a tribunal says that it rejects some item of evidence or that it does not accept it, and the two expressions are often used indiscriminately. Where, however, the burden of proof is in issue the distinction between them can be important.

6. To be precise about a case where the Revenue produce and prove capital statements which show deficiencies:

6.1 If the taxpayer advances no explanation for the deficiencies the capital statements by themselves can, and usually do, discharge the s 36 burden (see *Hudson v Humbles (Inspector of Taxes)* (1965) 42 TC 380 at 386 per Pennycuick J, *James v Pope (Inspector of Taxes)* (1972) 48 TC 142 at 150 per Ungoed-Thomas J).

6.2 If the taxpayer advances an explanation but the commissioners reject it (that is, they positively disbelieve it) the capital statements by themselves can, and usually do, discharge the s 36 burden. Commissioners often have cases where the taxpayer gives evidence seeking to explain the deficiencies by reference to betting winnings. The commissioners listen to the evidence, including the cross-examination, and in many cases they reject it: they find it to be untrue. That, taken with capital statements which show deficiencies, is enough for the Revenue to discharge the s 36 burden. This judgment should not be understood as indicating that in my view whenever a taxpayer alleges that he won money by betting, the Revenue must produce specific evidence that he did not. What I have said in the above paragraph is subject to 7.1 below.

6.3 [This paragraph is not repeated because it was rejected by the Court of Appeal].

7.1 If the commissioners reject the taxpayer's explanation and therefore conclude that the capital statements are themselves sufficient for the Revenue to discharge the s 36 burden, their decision may be challenged by the taxpayer on appeal to the High Court but only on the *Edwards v Bairstow* ground that a decision positively rejecting the explanation (as opposed to one merely not accepting it) was one which no reasonable body of commissioners could possibly reach. …"

43. The Upper Tribunal summarised its own conclusions as follows at [69]:

"69. From our review of the statutory provisions and authorities, we derive the following conclusions:

(1) As a matter of statutory construction, if HMRC have discharged a Section 29(4) Burden, they need do nothing further to discharge a Section 36 Burden beyond proving that the ETL assessment in question was made within the 6-year or 20-year period specified in s 36(1) or s 36(1A) of TMA as the case may be. Nothing in the authorities we have been shown, including *Hurley*, alters that conclusion.

(2) Where HMRC do not need to discharge a Section 29(4) Burden (for example, where a discovery assessment is made in reliance on s 29(5) of TMA or where the taxpayer has not submitted a self-assessment return for the tax year in question), the approach to the Section 36 Burden set out in *Hurley* remains valid notwithstanding changes to the statutory landscape since it was decided. By way of a summary of that approach as applicable to the facts of Mr Mullens' appeal (which should not be taken as a substitute for the more detailed approach set out in *Hurley* itself):

(a) There is a clear asymmetry in information between taxpayers and the tax authorities: taxpayers know about their affairs while HMRC can, in the absence of information as to those affairs, often do little more than make inferences from such information as they do have.

(b) In the most egregious cases (such as fraud on the part of the taxpayer) HMRC are likely to be faced with taxpayers who have attempted to conceal the true position or put obstacles in the way of HMRC finding out the relevant material;

(c) Consequently, if HMRC wish to make a discovery assessment, they will, almost inevitably in those egregious cases, struggle to do the job that the taxpayers are required by law to do, namely analyse a full and complete set of facts and then produce an accurate assessment of their tax liabilities.

(d) The law recognises that essential difficulty by imposing a Section 36 Burden requiring HMRC to demonstrate only that the conduct in question meets the relevant culpability standard having a link to the tax being assessed and that the assessment was made in the requisite 6-year or 20-year period. Discharging the Section 36 Burden requires HMRC to demonstrate that the conduct resulted in some tax going unpaid as otherwise the requisite link will not be present.

(e) However, the law does not require HMRC to do something that they are not equipped to do in those cases such as establish the presence of Constituents (i) to (iii).

(f) The paradigm case in the past was where the Revenue produced capital statements which, prima facie, showed a loss of tax as a result of culpable conduct requiring an explanation from the taxpayer. If that explanation was not accepted, the Revenue would have met their Section 36 Burden. It would then fall to the taxpayer to displace the assessment: there is nothing unfair or unexpected in that as it is the taxpayer who has the relevant information.

(g) However, the paradigm case considered in *Hurley* is not the only case. HMRC can meet their Section 36 Burden by putting forward a prima facie case of a loss of tax brought about by culpable conduct that does not rely on capital statements if the taxpayer fails to answer that prima facie case adequately.

44. In the above paragraphs it can clearly be seen that identification of a specified source (Constituent (i)) was not viewed as necessary in the context of meeting the s36 burden. As regards the relevance of that conclusion to this case, we agree with Ms Black that the exercise of putting together capital statements, with their limitations in terms of identifying the source

of any particular income, was similar in character to the exercise the NCA carried out here of identifying expenditure and bank deposits that were unaccounted for and called for an explanation. In his oral submissions Mr Sykes took us to a number of cases where although capital statements had been accepted, a source *had been* identified. However to the extent that in such cases a source could be identified the cases do not assist; they plainly cannot stand as authority for a proposition that if no such source had been identified then the s36 burden would not have been met.

45. The Appellants also relied on a passage from the judgment of Ungoed-Thomas J in *James v Pope* where he said as follows:

> "For the taxpayer it was submitted that to establish a prima facie case of wilful default the Revenue had to prove that the unexplained receipts were income receipts from a particular source. Pennycuick J. decided that there was nothing in the proviso which restricts the nature of the evidence required to establish a prima facie case of wilful default, and that therefore it was not necessary for the Revenue to show the particular quality or source of the receipts. I respectfully agree. It follows that the taxpayer's contention that the Revenue has to establish that the unexplained receipts are income receipts fails. But of course this does not exclude the possibility that cases in which there is the identification of the unexplained receipts with income receipts, or even income receipts from a particular source, might not, in the light of all the evidence available when the existence of a prima facie case has to be established, be helpful or even crucial to establish that prima facie case."

46. We do not consider that this assists the Appellants. Clearly what is required to establish a *prima facie* case will depend on the circumstances of the particular case.

47. The taxpayer in *Mullens* had also argued on the basis of Park J's proposition 2 above that HMRC had to show an "actual loss of tax".

48. The Upper Tribunal addressed the taxpayer's point at [62] as follows, acknowledging the need for it to be established "…that some tax is unpaid as a consequence of the culpable conduct", by which it meant the requisite fraudulent or negligent conduct:

> "Mr Mullens relies strongly on the second of Park J's propositions to the effect that the Revenue must show both fraudulent and negligent conduct and a loss of tax attributable to it. In our judgment, that emphasis is misplaced. As we have explained, establishing that a taxpayer has behaved fraudulently or negligently in relation to tax affairs necessarily requires it to be established that some tax is unpaid as a consequence of the culpable conduct. When *Hurley* is read as a whole, it is clear that Park J was concerned with the same issues that arose in *Hudson* and *James*, namely whether the Revenue needed to prove the taxability of particular items of income for particular years (for example Constituents (i) to (iii)) or whether they could discharge their burden by presenting a prima facie case, based on capital statements, that the taxpayer did not adequately answer. Once that is appreciated, the conclusions expressed by Park J as approved by the Court of Appeal are no different from those reached by the High Court in the cases of *Hudson*, *James* and *Johnson*."

49. In rejecting the taxpayer's case in *Mullens* that the s36 burden required something more than s29(4), the UT thus explained in very clear terms that, read in their proper context, the authorities on s29(4), and in turn s36, did <u>not</u> require HMRC to show an actual loss of tax by proving the taxability of particular items of income. All that was needed was for the Revenue to present a *prima facie* case that the taxpayer did not adequately answer.

50. In reply, Mr Sykes emphasised proposition 4 in Park J's summary above where it is said that the Revenue "must establish…some loss of tax…". How, he asked could one establish a loss of tax attributable to a failure to notify or deliberate conduct without first establishing a loss of tax? It was not enough, he submitted, to show there were funds that HMRC, or in this case the NCA, did not understand. However that was precisely the question which the Upper Tribunal in *Mullens* had grappled with concluding at [48] and [49] that such proof was not required as a matter of legal principle.

51. In conclusion, there was no error of law on the part of the FTT as regards what s36 TMA required the NCA to show in respect of a loss of tax. The NCA did not have to establish an actual loss of tax, but did have to show a *prima facie* case that there was a loss of tax that the taxpayer did not adequately answer. It did not have to show a loss of tax from a specified source. To require that would plainly be inconsistent with the legal principles and the rationale for them explained by the Upper Tribunal in *Mullens*.

52. When this decision was circulated in draft for typographical corrections, Mr Sykes indicated that his submission had been that a taxable source or a number of possible taxable sources needed to be established, without the NCA needing to specify which was the relevant source in the latter case. He invited us to address that submission. We consider it ultimately still requires one source or a number of possible sources to be specified and is answered by our analysis above.

2) Scope of Appellants' concession on s317

53. The Appellants also argue under Ground 1 that the FTT misunderstood the Appellants' concession at [111]. All that the Appellants were conceding was that if they lost on s317 and the NCA established "reasonable grounds for suspecting chargeable income arose as a result of criminal conduct", then a relevant discovery had been made for the purpose of s29(1) TMA. What the FTT was saying was that because of the concession made on s317 regarding a discovery being satisfied, that meant the loss of tax requirement was also satisfied. The FTT wrongly considered that the requirement to show a loss of tax was being conceded in the event the Appellants lost on the s317 issue.

54. There are two distinct strands to this alleged error regarding the concession:

(1) That the FTT wrongly *reasoned* that failure on s317, which it was accepted would satisfy the discovery requirement, would mean failure on loss of tax.

(2) That the FTT wrongly interpreted the *scope* of the concession. It wrongly thought the appellant's concession was that if they lost on the s317 point then the Appellants were conceding that they would lose on the loss of tax requirement. In fact their concession only related to discovery.

55. The Appellants accept that this is a new point, which was not included in their grounds of appeal. They say that no prejudice arises from it being taken late in the day. The point was anticipated in the NCA's Response to the grounds of appeal dated 2 February 2024 where the NCA said in the context of Ground 1 that to the extent the Appellants were seeking to resile from their concession, this should not be allowed. However, what was being anticipated there was not that the FTT had wrongly interpreted the concession but that the Appellants were seeking to resile from a concession that had been made. The Appellants' argument that the FTT had misunderstood the concession was taken for the first time by the Appellants in their skeleton argument for the hearing before us and in their oral submissions.

56. A challenge to the FTT's reasoning, although new, could be addressed without prejudice to the NCA. It goes nowhere however as there is no suggestion in the Decision that the FTT was proceeding on the basis that a s29(1) discovery, which it was agreed was subjective in

nature and depended on the state of mind of a particular officer, was equivalent to the objective question of whether there had been an actual loss of tax for the purposes of s29(4) TMA. It is not the case therefore that the FTT's reasoning was flawed.

57. The second aspect is more problematic. The scope of the concession that the Appellants actually made before the FTT is essentially a finding of fact as to what was communicated by the Appellants in their written and oral submissions. While we have the written submissions we do not have a transcript of the proceedings before the FTT. Although the Appellants sought to give their account in the form of a note from Mr Blades of counsel who had appeared below, this was not accepted by the NCA for whom Ms Black recollected that there had been oral discussion of the scope of the concession following questions from the FTT. This well illustrates the difficulty of raising this kind of issue for the first time at a hearing on appeal before the Upper Tribunal. If the point had been raised, as it could have been, at the permission stage, the FTT could have addressed it. Both parties could have asked for the FTT's notes, and provided their own notes with any conflict between them being put to the Judge: see the Upper Tribunal decision in *Fiander v HMRC* [2021] UKUT 156 (TCC) at [30] – [40] for a helpful discussion of the procedure used where there was a conflict of evidence as to what occurred in proceedings before the tribunal whose decision was under appeal.

58. In *William Archer v HMRC* [2022] UKUT 61 (TCC) there was a dispute over the scope of a concession made before the FTT. The Upper Tribunal was provided with the Judge's hearing note (see [159]). In that case the note did not help. The Upper Tribunal went on to say that, absent a transcript, it had little choice other than to accept that the concession was made in the terms recorded in the FTT's decision. That is the position we would find ourselves in, albeit without the benefit of the Judge's notes or observations on the issue. We must therefore find that the scope of the concession was that recorded by the FTT at [111].

59. We note the first sentence of [111] stated: "Given our conclusion that the s317 POCA condition has been satisfied it is not necessary to consider whether the NCA discovered a loss of tax, it has been accepted that it has". Read in isolation, we can see there would be some ambiguity as to whether the concession was confined to the question of discovery or whether it also extended to satisfying the requirement for loss of tax. Any such ambiguity is however resolved when the sentence is read, as it must be, in context with the remainder of the paragraph. The fact the FTT considered the "loss of tax" issue in the alternative confirms that the FTT regarded the concession as extending not just to the discovery but to the existence of a loss of tax.

60. Accordingly, even if the Appellants had permission to argue this new point it would be to no avail as the scope of the concession would, as found by the FTT, extend to an acceptance that if the Appellants had lost on the s317 point they also lost on the loss of tax issue. It is worth pointing out that even if there was any error in the FTT's interpretation of the concession, it would not assist the Appellants. That is because in our view, even if the FTT got the scope of the concession wrong it would inevitably have found that there was a loss of tax for the reasons expressed in the second part of [111]. That conclusion is challenged under Ground 3 as a finding the FTT was not entitled to reach. However, for the reasons we explain under that ground, the Appellants' challenge is rejected.

3) Procedural unfairness

61. The Appellants argue that the NCA put its case to the FTT on the basis that under-declared income arose from a trade of money laundering or other criminal activity. That was therefore the case the Appellants were required to meet and it is argued effectively as a matter of procedural fairness that it should not have been open to the NCA to establish an actual loss of tax through any other route. The Appellants rely on the assessments, the "view of the matter"

letters, the NCA's statement of case, and Mr Diedrick's evidence that the assessments were raised and supported on the basis that there was under-declared trading income derived from criminal activity. To understand the Appellants' argument on this point we need to detail some passages from the relevant documents.

62. The earlier assessments made on both Appellants state they are made under Schedule D Income and Corporation Tax Act 1988 "…Case I and/or in the alternative Case II and /or in the alternative Case VI [*later assessments refer to the successor provisions s5 and s687 Income Tax Trading and Other Income Act 2005 ("**ITTOIA**")*]; or in the alternative pursuant to s319 [POCA]". The Appellants rely on the fact that each year shows class 4 NICs as payable which is only consistent with a trade being carried on.

63. Mr Diedrick's "view of the matter" letter in respect of Mr Butt in relation to the loss of tax stated:

> "When the enquiry commenced I had reasonable grounds to suspect that you had been involved in alleged money laundering and as a result, you had received income that had not been fully declared to HMRC."
>
> …
>
> "Whilst it is my view that at least part of your taxable income for each year under appeal were derived from acquisitive criminality, I have also given very careful consideration to the possibility that some figures may encompass an element of the undeclared taxable income/profits from legitimate trading activity."

64. In respect of Mrs Begum, the "view of the matter" letter stated the following:

> "The information available to me gives me sufficient reason to believe that you have directly benefitted from your husband's unlawful activities, as you have managed to purchase two properties… for cash, as neither of these properties are secured by a mortgage. Both of these properties have been acquired by you for cash, despite there being no legitimate source of income for you being declared to HMRC that would have shown that you had the financial resources available to fund the purchases of these properties.
>
> Whilst it is my view that at least part of your taxable income for each year under appeal were derived directly from your husband's unlawful activity, I have also given very careful consideration to the possibility that some figures may encompass an element of the undeclared taxable income/profits from a legitimate trading activity." (underlining added)

65. The NCA's Statement of Case stated:

> "The NCA believe there are reasonable grounds to suspect that the Second Appellant has been involved in fraud and has been receiving monies from her husband which has been acquired as a result of criminal conduct. For example, the legal ownership of… Dunstable Road, Luton has been transferred on multiple occasions, to and from different family members and often for little or no consideration."

66. Mr Diedrick's witness statement referred to the shortfall in funds available to meet Mr Butt's expenditure and expressed his opinion that it came from criminal conduct. In relation to Mrs Begum, Mr Diedrick referred to the criminal conduct of others. The Appellants say this was consistent with Mr Diedrick's initial view that he was assessing income from a trade, being a trade of money laundering, and carried on by someone other than Mrs Begum.

67. We agree with Ms Black that none of these documents, when properly considered in their full context, show that the NCA had put its case on loss of tax in terms of the loss deriving

from a trade of money laundering or other criminal activities, or that there was accordingly any procedural unfairness in the FTT not insisting that the NCA prove its case in such terms.

68. The assessments and the cover letters to the assessments made no mention of a trade of money laundering. The cover letter for Mr Butt contrasts his declared income with his asset purchases and details how the NCA officer had carried out a comprehensive review of the available documents including bank statements and property purchase documents concluding that the officer was therefore of the opinion that there had been a significant loss of tax due to Mr Butt's failure to notify that he had been in receipt of taxable income. The cover letter in respect of Mrs Begum was written in similar terms that referred to unaccounted for expenditure and funds.

69. There was an issue as to whether the "view of the matter" letters could inform the scope of the assessments. In any event, those parts of the letters relied on by the Appellants were directed at explaining how the qualifying condition in s317 POCA had been met, in particular whether the NCA had reasonable grounds to suspect that "all or part of the income, profits or gains [had] arisen or accrued (directly or indirectly) as a result of criminal conduct (including the conduct of a third party)".

70. It is also notable that the year by year analysis contained in the "view of the matter" letters simply reflects the NCA's explanation that personal expenditure, loans, and property purchase funds were unaccounted for and said to give rise to taxable income. There is no mention of a trade of money laundering.

71. We also agree with Ms Black that the Appellants cannot read into the fact that Mr Butt's "view of the matter" letter had mentioned his legitimate businesses but did not attribute income to those businesses, that the income must then be from the money laundering also mentioned in the context of the qualifying condition. The reference to Mr Butt's legitimate businesses simply reflected the fact that Mr Butt had claimed to have declared all taxable income from those businesses.

72. We do note that in Mrs Begum's "view of the matter" letter there is a passage that reads: "when the enquiry commenced I had reasonable grounds to suspect that you had been involved in alleged fraud and received monies from your husband's… unlawful activities and as a result, you had received income that had not been declared to HMRC" (emphasis added). Read in isolation this might be taken to suggest that the NCA were proceeding on an erroneous assumption that Mr Butt's income from unlawful activity was somehow to be treated as Mrs Begum's income. However, when read in context that would not be a fair interpretation given the text is in a section explaining the s317 qualifying condition and given the remainder of the letter makes clear that the basis for the assessment is that there was unaccounted for expenditure that was not tied to a particular source. Moreover, the letter also acknowledges that source could be a legitimate trade source.

73. The Appellants rely on [78] of Mr Diedrick's witness statement in which he addresses Mr Butt's argument that loans for family, friends and businesses were funded from his business and rental income and the disposal of a property in the Netherlands. Mr Diedrick explains that the declared income was modest and that Mr Butt did not know what had happened to the sale proceeds which had never been deposited into his bank accounts. Mr Diedrick continued: "…it is in my opinion that any shortfall in funds to meet his expenditure, came from another source i.e. criminal conduct". In relation to Mrs Begum, at [79] Mr Diedrick noted she did have legitimate rental income, but that bank deposits included refunds and business income from Mr Butt's business, and that she claimed these deposits came from Mr Butt. Mr Diedrick continued: "This leads me to believe that she has benefitted from the criminal conduct of

others". Again however, this is all under the topic of Mr Diedrick's belief that the qualifying condition in s317 had been met.

74. The Appellants also referred to [120] of Mr Diedrick's witness statement which addresses points made in the forensic accountant report that travel expenses could have been funded from rental income or bank deposits. Mr Diedrick noted that Mr Butt had also said he paid for overseas travel for family members and went on to state: "This means that this expenditure could not have been solely from his legitimate source of income or the revised amount of income, as per Mr Davidson's report. So I believe that the shortfall was funded from another source i.e. criminal conduct". This was all in a section in the statement dealing with Mr Davidson's report, expressing Mr Diedrick's belief that it did not provide any evidence that supported or substantiated the Appellants' claim to reduce the tax assessments.

75. We also note in this context the FTT's findings at [49] and [92] in the context of the qualifying condition:

> "49. … As for the criminal conduct concerned, although in evidence Mr Diedrick agreed, when questioned, that income assessed was "probably the result of money laundering" he also said, particularly in relation to the personal and travel expenditure and the unidentified income of Mr Butt and Mrs Begum that "it was not all related to money laundering."
>
> "92. Before we consider s 319 POCA, on which the NCA relies to contend it is not required to identify the source of the chargeable income or gain, it is necessary to point out that Mr Diedrick's evidence was that the income arising as a result of criminal conduct was "probably" the result of money laundering. However, he did not say that this was the only source of funds. He also said that the personal and travel expenditure and unidentified income was not all related to money laundering (see paragraph 49, above)."

76. Overall, we do not consider that the NCA put its case in relation to the loss of tax on the basis that the income was from a money laundering trade or other criminal activities. That conclusion should not be surprising given there was, as set out above and in relation to Ground 2 below, no requirement for the NCA to tie the loss of tax to a particular source such as a trade of money laundering. The NCA only needed to show a *prima facie* case of a loss of tax which the Appellants had not adequately answered.

Conclusion on Ground 1

77. For the reasons given above, we reject each of the alleged errors of law under Ground 1.

GROUND 2 – SECTION 319 POCA

78. The FTT considered the effect of s319 POCA in a section dealing with the qualifying condition in s317. It concluded at [100] that it was not necessary for the NCA to establish that any of the income assessed arose from criminal conduct.

79. The FTT returned to consider s319 and whether it could save the validity of assessments which had not specified a source at [113] and [114] of the FTT Decision. It did so in the context of rental income as follows:

> "[113] Mr Butt accepts that for those years he filed a tax return he did not include any rental income despite it being received by him during that period. However, Mr Blades submits that this cannot be part of the loss of tax discovered. He says that the rental income was not included in the s 29 TMA assessment and therefore whether Mr Butt deliberately omitted it from his tax return has no bearing on the validity of the assessment. This is, he says, because there is nothing on the face of the assessments to suggest that rental income has been assessed.

> [114] However, this argument fails to take account of the fact that the assessments on Mr Butt, unlike those in *Chadwick*, specifically refer to s 319 POCA. Given that s 319(2) POCA provides that an assessment under s 29 TMA "must not be reduced or quashed because it does not specify (to any extent) the source of the income" we do not consider this to be a ground on which to conclude the assessments are invalid."

80. It is not clear why the FTT was referring to section 319(2) in this context because that subsection only deals with income not otherwise chargeable to tax. In any event, the Appellants argue that the FTT erred in law in concluding that s319 POCA relieved the NCA of the need to make good its case that the Appellants derived taxable income from money laundering or other criminal activities which they themselves carried on. In particular, the FTT's interpretation of s319 was wrong in law. They say that s319(1) is not on point so far as the burden on the NCA to show loss of tax is concerned in that it simply prevents an assessment which does not identify the source from being invalid for that reason. Mr Sykes submitted that the provision simply enables the NCA to establish a "discovery" for the purposes of s29(1) TMA. It was not concerned with relieving the NCA from specifying a source when it came to "loss of tax" in s29(4) TMA. Further, it was not relevant here because the NCA had in fact identified a source, namely the trade or money laundering albeit as set out in Ground 1 the Appellants argue the NCA had not satisfied the burden they bore to show a tax loss from that source.

81. The Appellants drew further support for their view on the ambit of s319(1) from the Explanatory Notes when POCA was enacted which state as follows:

> "Section 319: Source of income
>
> 455. Assessments to income tax raised by the Inland Revenue are required to specify the source of the income in question, such as a particular trade. This is not the case for capital gains tax or corporation tax. This section enables the Director to raise income tax assessments where he discovers a loss of tax even where he cannot identify the source of the income in question.
>
> 456. The section does not extend to the assessments raised by the Inland Revenue, whose practice and powers will remain unaffected. Because of this, the section stipulates that when the case is transferred back from the Director to the Inland Revenue, any 'no-source' assessment made by the Director is invalid."

82. Accordingly, say the Appellants, the FTT was wrong to consider the assessments could be saved by s319(1). The section did not apply because here a source was specified. The inapplicability of the section, where a source was in fact specified, was also supported by the FTT decisions in *Rose v Director of the Assets Recovery Agency* [2006] SpC 543 and *Chadwick v NCA* [2017] UKFTT 656. The NCA says that the relevant tribunals were wrong about what they said about the scope and effect of s319.

83. Mr Sykes acknowledged in oral submissions that this ground was very much a subsidiary issue. His primary point remained under Ground 1 that the burden lay on the NCA to show the loss of tax by reference to a particular source, the point under Ground 2 being simply that s319(1) did not stand in the way of that. Given our conclusion on Ground 1, based on *Mullens*, it is not strictly necessary for us to deal with Ground 2.

84. Further, the debate on the interpretation of s319(1) is also irrelevant because we cannot see that the FTT actually deployed s319 in the way the Appellants suggest, to explain why there was no burden to show a tax loss arising from a trade of money laundering. The FTT's analysis at [113] and [114] was that the discovery assessments were not invalidated in respect of rental income simply because rental income was not mentioned. It did not use s319 as a basis

to justify the NCA not having to establish a loss of tax arising from a trade of money laundering. That is a sufficient basis to dispose of Ground 2.

85. In the circumstances we would prefer to leave arguments as to the scope and effect of s319 POCA to a case where it is determinative of the issues.

GROUND 3 - *EDWARDS V BAIRSTOW CHALLENGE*

86. The Appellants submit that to the extent the FTT Decision reflects a finding that the Appellants derived income from criminal activities then that was a finding the FTT was not entitled to make. The FTT failed to take into account relevant evidence and took into account irrelevant considerations.

87. The second sentence of FTT [111] in particular is relied on, where the FTT said:

> "Even if this was not case, we agree with Ms Black that, given that both Mr Butt and Mrs Begum clearly has access to funds and a lifestyle that exceeded their declared income for which there is no other justifiable or credible explanation, there was a loss of tax for each of the years assessed."

88. The first point to make is that the FTT did not in fact make any finding that the Appellants derived income or gains from criminal activity. In line with our reasoning on Grounds 1 and 2 above it did not need to. That is a straightforward and complete answer to Ground 3 as put in the notice of appeal. It is also an answer to various points advanced in written submissions and orally that a finding that either of the Appellants was carrying on a trade of money laundering was irrational on the basis of the evidence before the FTT. The NCA did not need to prove such a trade in order to make out its *prima facie* case on loss of tax for the purpose of the s36 burden.

89. The Appellants also mounted challenges to the FTT's conclusion that there was a *prima facie* loss of tax in relation to which no credible explanation was given, and to the adequacy of the FTT's reasoning. For the reasons set out below neither challenge is made out.

1) Finding of no credible explanation

90. As to the finding by the FTT that there was no credible explanation for the Appellants' expenditure, we consider that this was an inference the FTT was plainly entitled to draw from the primary facts. The primary facts concerning bank deposits, personal holiday and property expenditure and loans are not subject to the challenge. The FTT recorded the Appellants' explanations and rejected those explanations. In summary, it considered there was a lack of corroborative documentary evidence for the explanations. It cannot be said that it was irrational for the FTT to take that view in the light of its assessment as to the reliability of evidence given by the Appellants. Whilst the Appellants placed reliance on the evidence of Mr Davidson, the FTT's evaluation was that his evidence was of little assistance. In essence, the information he worked off was what Mr Butt and Mrs Begum had told him. He did not question the reliability of that information or seek underlying documentation to establish its accuracy.

91. The Appellants say that the *Edwards v Bairstow* error was particularly striking in the case of Mrs Begum because there was no evidence that she carried on any trade or was employed, and she relied financially on Mr Butt. We do not agree. As Ms Black pointed out, the FTT did not make any finding that all of Mrs Begum's funds came from Mr Butt. In those circumstances it remained open to the FTT to find that she had undeclared income in relation to which there was no credible explanation.

2) Adequacy of reasoning

92. The Appellants say that there is no reasoning in the FTT Decision to support its finding that Mr Butt's explanation of the source of funds was not credible or that Mrs Butt was carrying on any trade. The key principles relevant to assessing the adequacy of reasoning were not in

dispute and were recently described by the Court of Appeal in *Rahman v Munim* [2024] EWCA Civ 123 at [21]. The extent to which reasons are required to meet the test of adequacy will depend on the subject matter. The judge should "identify and record those matters which were critical to [the judge's] decision". Fairness requires that the judge should also "deal with apparently compelling evidence, where it exists, which is contrary to the conclusion which [the judge] proposes to reach and explain why [the judge] does not accept it".

93. Given the concession made by the Appellants in relation to loss of tax, it is understandable that the FTT chose to deal with the loss of tax issue relatively briefly at [111]. In any event, it would be wrong to restrict the scope of the FTT's reasoning to the second sentence of [111]. That sentence clearly links to unaccounted for personal expenditure identified in the assessments and the FTT's discussion on the issue of quantum at [130] to [145]. The FTT had recorded at [4] the Appellants' case that the income was predominantly from Mr Butt's fashion business and a grocery business but the FTT rejected the Appellant's evidence. It went through each of the years of assessment recording the Appellants' contentions, for example that he was not resident (which it rejected at [103] to [105]), that he did not incur the entirety of the purchase price for a property at Dunstable Road and that the conversion costs estimated by Mr Diedrick were excessive. The FTT stated at [132] that these were mere assertions not corroborated by documentary evidence. The FTT also addressed Mr Butt's arguments in relation to personal and holiday expenditure and that the cost of renovations assumed by the NCA were excessive. The FTT found at [134] that those arguments were not supported by evidence. The FTT explained why it did not accept that it was the proceeds of sale of a Dutch property which funded a loan because that would be inconsistent with evidence that the Appellants did not keep sums of cash at home (see [136]). The FTT agreed with the NCA that the assessments were fair and concluded at [145] that the Appellants had not produced sufficient evidence to reduce or set aside the assessments.

94. The Appellants also argued before us that the FTT's finding that there was no credible explanation for the source of the funds was inconsistent with the FTT's earlier findings regarding Mr Butt's fashion and grocery businesses. There was no such inconsistency. The FTT addressed why it did not consider such explanations credible: there was a lack of documentary evidence and the Appellants' oral evidence was unreliable or did not assist.

95. We are satisfied that the FTT identified and recorded those matters which were critical to its decision as to why it did not accept the Appellants' explanations as credible. Its reasoning when looked at in the context of the wider decision was clearly adequate.

96. In conclusion, Ground 3 does not identify any error of law on the part of the FTT.

GROUND 4 –RENTAL INCOME

97. The Appellants say that the assessments did not relate to rental income because class 4 national insurance contributions were included on all sums assessed. As such, they argued that "rent cannot be used to support the assessment[s]" and therefore "rental income should have been excluded from the assessments".

98. The argument that rent cannot be used to support the assessments, as we understand it, is that rent has not been specified as a source for the purposes of the assessments. It does not appear to us that the NCA or indeed the FTT sought to justify the assessments by reference to a tax loss relating to rental income. To that extent we agree with a submission of Mr Skyes that the rental income was therefore irrelevant. However, for the reasons given under Ground 1 that does not invalidate the assessments.

99. The grounds of appeal also assert that class 4 national insurance contributions have been charged on the whole of the income assessed and should not have been payable to the extent that the assessments were justified by reference to rental income.

100. The assessments were not justified by reference to rental income as such. However, it is not disputed that both Appellants, in some of the tax years, received rental income which had not been declared. There appear to have been some written submissions by the Appellants before the FTT that the assessments were invalid in so far as class 4 national insurance contributions were being charged in respect of rental income because it was not income from a trade, profession or vocation. However, we were not addressed on these submissions, the NCA's response or any oral submissions before the FTT. Ms Black did raise the point before us that we do not know whether the rents would have been taxable as rental income or as the trading profits of a business. The FTT did not explore that question in the FTT Decision. Overall, we cannot be satisfied that this income was not subject to class 4 contributions.

101. In the circumstances, we are not satisfied that the FTT made any error of law in relation to rental income.

GROUND 5 – WHETHER MRS BEGUM BROUGHT ABOUT THE LOSS OF TAX DELIBERATELY

102. The Second Appellant submits that the FTT erred in concluding that she deliberately brought about a loss of tax.

103. Section 36(1A)(a) provides for an extended time limit where a loss of tax is brought about deliberately. Section 36(1A)(b) provides for an extended time limit where a loss of tax is attributable to a failure to notify chargeability.

104. The FTT dealt with this issue at [128] and [129] as follows:

> "[128] The NCA contends that Mrs Begum deliberately failed to notify taxable income to HMRC and therefore s 36 TMA applies. Mr Blades contends that Mrs Begum, who accepts that she had income and did not file any tax returns, did not knowingly bring about a loss of tax. However, we disagree. Although Mrs Begum relied on Mr Butt, an individual is nevertheless responsible for his or her own tax affairs. This is clear from the many decisions of the Tribunal in which an appellant has sought to rely on a third party to do something he or she have done.
>
> [129] We also consider that Mrs Begum cannot properly rely on what Mr Blades described not being fortunate enough to have received a good standard of education. As recognised by Simon Brown J in *Neal v Customs and Excise Commissioners* [1988] STC 131 at 136, albeit in relation to VAT, there is a distinction between the primary law including the requirement to notify liability and other aspects which less directly impinge upon such liability. In our view Mrs Begum would have known that there was a requirement to notify HMRC of a liability to tax but deliberately chose not to so. Therefore, the extended time limit of s 36 TMA applies and the assessments were made on time."

105. The position for tax year 2008-09 and prior years was that the extended time limit under s36(1A)(b) for failing to notify chargeability applied only where the loss of tax was attributable to negligent conduct. For tax year 2009-10 and subsequent tax years it was not necessary for HMRC or the NCA to show negligent conduct and any failure to notify chargeability was sufficient to justify the extended time limit. The parties did not address us in detail on the different requirements or criticise the FTT Decision for not clearly identifying the different requirements between s36(1A)(a) and (b) or within s36(1A)(b). The FTT seems to have considered that there was a requirement to show deliberate conduct even in a case where it was alleged that there was a failure to notify chargeability. In effect the FTT was applying a higher

test of deliberate conduct than the test of negligent conduct required by the statutory provisions for some of the relevant tax years.

106. Subject to that point, the FTT discussed at [116] the meaning of "deliberate", referring to the Supreme Court's decision in *HMRC v Tooth* [2021] UKSC 17. This was in the context of Mr Butt, and at [117] it concluded that it was more likely than not that Mr Butt knew he had not declared all of his income in each of his tax returns. It followed that his omission leading to the loss of tax was deliberate.

107. The Second Appellant relies on the following submissions in support of Ground 5:

(1) Mrs Begum's acceptance recorded at [128] that she had income and did not file any tax returns was in relation to rental income only. It did not provide a basis for the FTT's conclusion that there was deliberate conduct in each of the relevant tax years or that all of the alleged loss was brought about deliberately.

(2) To the extent that the FTT's conclusion was based on Mrs Begum failing to declare income on a trade carried on by Mr Butt, Mrs Begum had no obligation to declare that income. Even if Mrs Begum was assessable on someone else's income she did not deliberately fail to declare that income. She could not be taken to be aware of an obligation to declare that income.

(3) There was no evidence before the FTT that Mrs Begum knew she had an obligation to notify chargeability. It was unclear how the case of *Neal* which the FTT referred to was supportive of the FTT's conclusion.

108. In our view, none of these arguments establish any errors of law regarding the FTT's conclusion in respect of Mrs Begum:

109. It was not only the acceptance of rental income that led the FTT to consider that Mrs Begum had undeclared income. The NCA had to establish a *prima facie* case that there was some loss of tax and it was not necessary for it to identify the source of the income. The basis for finding undeclared income included unaccounted for expenditure and deposits which did not only relate to rental income. It was open to the FTT to find that Mrs Begum deliberately brought about a loss of tax.

110. Clearly Mrs Begum could not be assessable on someone else's income. The FTT's conclusion was not based on Mrs Begum failing to declare Mr Butt's income. There was no finding by the FTT that all of Mrs Begum's unaccounted for receipts came from Mr Butt's income. The NCA's case in relation to Mrs Begum was based on sums coming into her accounts, and transactions and assets in her name. The NCA considered there was no corresponding income source to fund her expenditure. At [111] the FTT had also found that she had "access to funds and a lifestyle that exceeded" the declared income "and for which there [was] no other justifiable or credible explanation". The basis of the *prima facie* loss of tax in respect of Mrs Begum was thus unaccounted for expenditure without any identification of source. Mr Sykes made the point that no source was identified but for the reasons discussed under Ground 1 that was not necessary. He also pointed out that having a house is not income but that was not the basis on which the assessments were made. As explained it was specific amounts of expenditure and bank deposits that were unaccounted for.

111. The FTT's point regarding *Neal* was clear enough. Most people would be taken to know that income was chargeable to income tax and should be notified to HMRC. This did not involve a complicated area of law. In other words, Mrs Begum's lack of education did not stand in the way of an inference that she knew her income ought to have been notified. Questions of mental state such as those involved in determining a person's knowledge may not necessarily be resolved by direct evidence but will frequently involve the drawing of inferences from the

surrounding circumstances. It is difficult to see how it can be said the FTT lacked sufficient evidence to draw the inference of deliberate conduct. The evidence included evidence of the transactions to which Mrs Begum was a party, the assets she held, and her lifestyle and expenditure. The FTT also heard evidence from Mrs Begum herself although it was unable to derive much assistance from that evidence. There was clearly some evidence from which the FTT could build a picture of Mrs Begum's knowledge and from which it was at least open to it to infer what Mrs Begum knew as to her obligation to notify chargeability.

112. In the circumstances we are not satisfied that Ground 5 establishes any material error of law.

CONCLUSION

113. For all the reasons given above, the Appellants' appeals are dismissed.

JUDGE SWAMI RAGHAVAN
JUDGE JONATHAN CANNAN

Release date: 13 May 2025