Neutral Citation: **[2026] UKUT 00112 (TCC)**

Case Number: UT/2024/000116

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, London

INCOME TAX – discovery assessments under s29 TMA 1970 containing multiple insufficiencies of tax– whether taxpayer can argue overcharged to the extent insufficiencies not brought about carelessly or deliberately and/or that extended time limits under s36 TMA not met – yes – FTT Decision upheld – appeal dismissed

Heard on: 26 November 2025
Judgment date: 11 March 2026

Before

JUDGE SWAMI RAGHAVAN
JUDGE KEVIN POOLE

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Appellants

and

SHAUN HARTE **Respondent**

Representation:

For the Appellants: Joshua Carey, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

For the Respondent: Laurent Sykes KC, instructed by WLH Taxation Ltd.

DECISION

INTRODUCTION

1. This is HMRC's appeal, brought with permission of the First-tier Tribunal (Tax Chamber) ("the FTT"), against the decision *Harte v HMRC* [2024] UKFTT 00493 (TC) released on 30 May 2024 ("the FTT Decision"). Except where the context requires otherwise, in this decision references to paragraph numbers are to paragraphs in the FTT Decision. The appeal concerns discovery assessments and the operation of extended time limits under the Taxes Management Act 1970 ("TMA").

2. In outline terms, s29(1) TMA confers the power to make an assessment where an officer "discovers" that tax ought to have been assessed or that an assessment is insufficient. Where a return has been filed, s29(3) limits that power unless certain conditions are met. The condition under consideration in these proceedings is the "conduct" condition in s29(4) (that an insufficiency of tax was brought about carelessly or deliberately). Sections 34 and 36 set time limits, including an ordinary time limit of 4 years which is extended to 6 years for carelessness cases and 20 years for deliberate cases.

3. The core point of law is whether, as HMRC argue, when a single assessment figure for a year is made up of insufficiencies of tax relating to different errors, the conduct and time-limit conditions in ss 29 and 36 TMA 1970 in relation to any one insufficiency validates the assessment as a whole. In other words the argument is, for example, that as long as part of the discovery assessment concerned a loss of tax that was brought about by deliberate conduct, the whole assessment would be valid even if some of the loss of tax comprised in it was brought about by non-culpable conduct (i.e. because the loss of tax arose despite the taxpayer having been found to have taken reasonable care). It is also argued that the 20 year time limit for deliberate conduct would apply to the whole assessment even if parts of it concerned losses of tax that were brought about by careless conduct or non-culpable conduct notwithstanding the stricter time limit for raising an assessment which would normally apply in relation to such conduct.

4. In agreement with the Respondent Mr Harte, the FTT concluded that showing one type of conduct for one of the insufficiencies reflected in an assessment did not allow HMRC to include in the assessment other insufficiencies which did not arise from that type of conduct. For the reasons explained below the FTT was correct to so find and HMRC's appeal must be dismissed.

BACKGROUND AND FTT DECISION

5. During the relevant period Mr Harte was self-employed, his trading activities involved the provision of consultancy services to a company, Tasca Tankers Limited ("TTL") and other parties together with other ad hoc activities including the sale of plant and machinery equipment ([(37(1)]). The appeal before the FTT covered appeals Mr Harte had made against a closure notice, various discovery and income penalty assessments and a VAT belated notification penalty.

6. Mr Harte's appeal included appeals against six discovery assessments under s29 TMA 1970 issued on 3 July 2018 in relation to the tax years ended 5 April 2010 to 2016 (except the tax year ended 5 April 2015, in relation to which HMRC had opened an in-time enquiry and therefore issued a closure notice). The amounts HMRC sought in respect of each year ranged from £58,653.84 to £78,682.76 ([1(2)]).

7. Four categories of insufficiency were identified, these concerned: (i) undeclared bank receipts ("Bank Statement insufficiency"); (ii) personal expenditure on a corporate credit card treated as income (Credit Card insufficiency"); (iii) capital allowances claimed for a vehicle

("Capital Allowance insufficiency); and (iv) a home-office expense claim ("Deductible Expense insufficiency")([2]).

8. Although those errors were identified as a result of the enquiry into Mr Harte's 2014/15 tax return HMRC had concluded that similar errors were likely to have occurred in other tax years in which Mr Harte had operated as a self-employed consultant with TTL.

9. On conduct, the FTT found that the Bank Statement insufficiency was deliberate; that the Capital Allowance insufficiency and Deductible Expense insufficiency were careless; and that the Credit Card insufficiency was a mistake that arose despite Mr Harte having taken reasonable care ([37(27)]–[37(29)]; see also [58]–[61]).

10. HMRC argued was that once deliberate conduct had been established in connection with the Bank Statement insufficiency HMRC could competently assess under s29(4) for both that insufficiency and the Credit Card insufficiency even though the Credit Card insufficiency was not brought about by deliberate or careless conduct and that the 20 year time limit provided for in s36(1A) TMA applied. On behalf of Mr Harte it was argued the assessments should be reduced to exclude from charge any amounts that were not brought about by deliberate or careless conduct and that discovery assessments for tax years 2009/10 to 2011/12 should be reduced to the extent they included amounts which had been brought about by careless as distinct from deliberate conduct (while those were within the 20 year time limit for deliberate conduct they fell outside the 6 year time limit for careless conduct, the discovery assessments having been made on 3 July 2018).

11. The FTT's view of the relevant law in summary, contrary to that of HMRC, was that it was open to a taxpayer to show that an assessment which included some element of deliberate insufficiency, whilst prima facie valid, was excessive to the extent that it also included other insufficiencies in respect of which (i) conduct falling within s29(4) TMA had not been shown, or (ii) the time limit for assessment under s36(1) TMA had passed ([76]-[78]).

12. As applied to the facts, because there was no deliberate or careless conduct in respect of the Credit Card insufficiency, that meant Mr Harte had been overcharged to tax in relation to it. The FTT therefore required that the part of the discovery assessment that related to the Credit Card Insufficiency should be removed as it was not attributable to any conduct falling within s29(4) TMA. It also required the removal of the Capital Allowance insufficiencies and Deductible Expenditure Insufficiencies for 2009/10- 2011, as they could not have been separately assessed by virtue of the 6 year time limit in s36(1) TMA ([77]-[78]).

13. HMRC's appeal to this Tribunal challenges those conclusions in principle. HMRC contend that once deliberate conduct is found for any insufficiency in a particular year of assessment, the assessment for that year is valid as a whole and the 20 year limit in s36(1A) applies to all parts of it. Mr Harte, on the other hand, argues that each distinct insufficiency is its own "case" or "situation" for ss 29 and 36, so that insufficiencies which have arisen despite reasonable care having been taken should be excluded altogether from the assessment and insufficiencies which have arisen carelessly should be excluded from it if a separate assessment for them would be precluded by virtue of the time limit in s36(1).

14. That is essentially a question of the statutory interpretation of the relevant TMA provisions in s29 and s36 to which we now turn.

LAW

15. The relevant provisions of s29 (discovery assessments) and of the time limit provisions in s34 and s36 TMA 1970 at the relevant time were as follows:

> **29.— Assessment where loss of tax discovered.**

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment —

(a) that any income… which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax have not been assessed,

(b) that an assessment to tax is or has become insufficient, or

…

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

…

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

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

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

unless one of the two conditions mentioned below is fulfilled

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

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

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

…

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.

…

(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

34.— Ordinary time limit of 4 years.

(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax, capital gains tax may be made at any time not more than 4 years after the end of the year of assessment to which it relates.

36.— Loss of tax brought about carelessly or deliberately etc

(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).

(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…

may be made at any time not more than 20 years after the end of the year of assessment to which it relates…

…

16. Section 50(6) TMA provides as follows:

(6) If, on an appeal notified to the Tribunal, the Tribunal decides –

(a) that the appellant is overcharged by an assessment;

…..

the assessment… shall be reduced accordingly, but otherwise the assessment… shall stand good.

GROUNDS OF APPEAL AND DISCUSSION

17. Mr Carey, who appeared for HMRC, helpfully clarified in relation to the two grounds on which the FTT had granted permission that they turned in essence on the following issue regarding the FTT had adopted the wrong legal approach by requiring that in respect of each insufficiency that the insufficiency was brought about the relevant type of conduct (deliberate conduct or carelessness). In HMRC's view, once one insufficiency meets the conditions in s29 or the extended time-limit provisions in s36, the assessment for the year is valid in its entirety. The statute, he argued, is written at the level of "an assessment", not at the level of each underlying error. In the light of that and various other textual indicators, sections 29(4) and 36 ask only whether there is any culpable conduct resulting in a loss of tax in that year. Once that threshold is crossed, the whole assessment stands valid, subject to the taxpayer's right to show excessiveness in amount. By way of support HMRC also rely on passages in the Upper Tribunal's decision in *Hargreaves v HMRC* [2022] UKUT 34 which had considered the Court of Appeal's operation of the discovery and assessment and time limit provisions in *Hargreave v HMRC* [2016] EWCA Civ 174.

18. Mr Sykes KC, for Mr Harte, submitted that s29 confers a power by reference to the particular loss of tax discovered, and that the conditions in s29(2)–(5) and the time limits in ss 34 and 36 attach to that insufficiency. It cannot be right, he submits, that the happenstance of aggregating multiple losses into a single assessment allows the most generous time-limit to HMRC to govern all items, including those that, if considered individually, would be subject to shorter limits. He further noted that aligning time limits with the culpability for the specific loss reflects the approach of the Schedule 24 Finance Act 2007 penalty regime, which examines deliberate or careless conduct in relation to inaccuracies discretely.

19. The issue for us, as it was for the FTT, is therefore narrow but significant: does the gateway in s29(4), and the corresponding time-limit provisions in s36, operate once per assessment, or must those conditions be satisfied for each loss of tax that HMRC wish to include within the assessment? There are in fact two discrete points. The first concerns the scope of s29 and whether an assessment made under it can validly encompass losses of tax which are found not to satisfy the discovery assessment conditions. The second concerns the application of time limits where some of the loss does not satisfy the relevant conduct condition (e.g. whether a loss brought about carelessly can validly be captured within an assessment that had relied on the 20 year time limit because of another loss that was found to be brought about deliberately). Both however raise the common theme of whether provisions relating to conduct such as carelessness or deliberate conduct apply at the level of an assessment, as HMRC argue, or the more granular level of loss of tax, as the taxpayer argues. The fact pattern in this appeal

neatly illustrates the way this issue throws up real financial consequences in appeals against discovery assessments: the Credit Card insufficiency was not brought about by careless or deliberate conduct at all; the Capital Allowance and Deductible Expense insufficiencies were careless, not deliberate but for certain years, while falling within the 20 year time limit in respect of deliberate conduct, fell outside of the 6 year time limit in respect of carelessness.

20. While many aspects of s29 and s36 have been explored in some detail by a number of authorities we agree with the FTT's observation that the authorities stop short of the question that needs to be answered in this case. The appropriate starting point is the wording and scheme of the statutory provisions but before looking at those it is helpful to note the following points.

21. The first is to note that the FTT's powers on appeal, as set out in s50(6) TMA include provision empowering the FTT, where it appears to them that the taxpayer is overcharged by any assessment, to reduce the assessment accordingly. As s29(8) TMA makes clear, if a taxpayer wishes to challenge a discovery assessment as incompetent because either of the two conditions contained within s29 are not met, then the taxpayer must raise this in an appeal against the assessment. Likewise, if a taxpayer wishes to challenge whether the assessment complied with the time limit provisions then that too must be raised in an appeal against the assessment. On an appeal there is no dispute that the FTT is able to reduce the assessment, including to nil. The dispute here concerns the scope and construction of the discovery assessment conditions and time limits, not the FTT's ability to reduce the assessment to a lower figure or nil as appropriate if or to the extent the discovery assessment is found to be excessive or invalid.

22. Second, as regards the inter-relationship arising out of the common references to carelessness and deliberate conduct in s29(4) TMA and s36 TMA, as confirmed in *Mullens v HMRC* [2023] UKUT 244 at ([35]), if HMRC discharge their burden under s29(4) then they need do nothing further to discharge their burden under s36 (beyond proving that the extended time limit assessment was made within the 6 year or 20 period specified in the relevant time limit).

Centrality of loss of tax

23. The logical provision to start with is s29 because without an assessment no question of that assessment's compliance with time limits arises.

24. Section 29(1) contains a threshold condition that the officer (or the Board) discovers any income that ought to have been assessed but was not or that an assessment to tax is or has become insufficient. Where a return is filed, under s29(3) the person cannot be assessed unless one of s29(4) (culpability in the form of deliberate conduct or carelessness) or s29(5) (disclosure, before closure of the enquiry window, of information that ought to have alerted HMRC to the insufficiency) is satisfied.

25. Both of these conditions refer to the "the situation mentioned in subsection (1)", namely that "any income which ought to have been assessed…[has] not been assessed" or that an "assessment…is or has become insufficient". As the UT explained in *Mullens* (see [32]) that cross reference back to subsection (1) concerns the objective fact of the undercharge.

26. HMRC highlight the reference to "any" income in support of their case that it is enough that some of the loss is linked to the culpable conduct. We agree however with Mr Sykes that the reference to "any income" in s29(1) must be read alongside the requirement in the same subsection that the amount assessed be the amount "to make good to the Crown the loss of tax." All of the "situations" referred to in s29(1) are ultimately relevant to an assessment purpose of making good the loss of tax which has come about through those situations. It can thus be seen that basic structure of s29 entails: 1) discovery of loss of tax; 2) consideration of

whether one or of the other two conditions is satisfied; 3) assessment in order to make good the loss of tax.

27. Through the reference to "the situation mentioned in subsection (1)" the statutory language directs attention to the particular loss discovered. Section 29(4) thus asks whether the discovered loss was brought about deliberately or carelessly. There is no indication that Parliament intended this causal link to be diluted or satisfied "in part". The question posed is: was *this* loss of tax brought about by culpable conduct? To read s29(4) as though it said "wholly or in part" would be to add words that Parliament did not use.

28. The situation of a loss of tax that was not brought about by deliberate or careless conduct (in this case the Capital Allowance insufficiency and the Deducted Expenditure insufficiency), in circumstances where there is no suggestion the alternative condition s 29(5) is relied upon, brings into stark relief the difficulty of reconciling HMRC's interpretation with the words of s29 in that there is nothing in the text that allows such a loss to be brought within a discovery assessment by reason of culpable conduct relating to a <u>different</u> loss.

29. Thus purely as a matter of straightforward construction of the words of s29 it is plain that the assessment power is limited to charging the amount that corresponds to the discovered loss which satisfies one or other of the conditions referred to in s29(3). In other words, a loss of tax that is not brought about by deliberate or careless conduct (and where s29(5) is not in play) cannot be validly included in an assessment.

Section 36 and the time-limit provisions

30. We turn then to the time limit provisions to consider whether there is anything there which alters the above analysis, and also to consider whether those operate by reference to an assessment (which might encompass different losses of tax brought about the different level of culpability) as HMRC argue, or whether as the FTT's analysis entailed and the taxpayer argues, they operate separately in respect of each relevant loss of tax.

31. Section 36 concerns time-limits. It speaks of "an assessment", but it presupposes that there is already a valid discovery assessment in respect of the relevant loss. Whether HMRC may rely on the extended limits in s36(1) or (1A) depends on whether the conduct or information gateway in s29 has been passed for that loss. If HMRC consider a loss to be deliberate but the FTT finds it was careless, s29(4) remains satisfied. If the FTT finds that the loss would have arisen despite reasonable care, then s29(4) is not satisfied, and no valid discovery assessment of that loss can exist; in those circumstances, the time-limit in s36 cannot assist. The statutory sequence runs in that order, not the other way around.

32. HMRC relied on three textual pointers: "an assessment", the word "case", and the breadth of the term "involving". They also referred back to "any income" in s29(1). But those terms cannot be read in isolation. Section 36 is not the starting point. Its use of "in a case involving a loss of tax" must be understood in the context of s29, where the "case" is the discovered insufficiency. When read coherently with s 29, the "case" in s36 is the insufficiency to which the s29 power relates; it is not a label for whatever amounts HMRC choose to aggregate under a single assessment.

33. On HMRC's construction, a loss of tax that cannot meet the s29 gateways can nevertheless be kept within an assessment by virtue of s36(1A) because a different loss does meet the condition. That approach is structurally problematic. It gives primacy to the time-limit provision rather than to the validity gateway in s29, and for that reason we reject it.

34. It is also unpersuasive to argue that the existence of a single overall amount under s29(1) dictates a global analysis. A single ultimate number may reflect several different losses, each discovered and each requiring its own analysis of whether the relevant assessment validity

conditions are satisfied. The question under s29 is whether this loss was properly brought under assessment, and the time-limit under s36 follows accordingly.

Purposive construction - regard to consequences

35. In advancing the taxpayer's interpretation Mr Sykes set out how Parliament has calibrated the varying time-limits according to different levels of culpability. It would, he submits, be an astonishing outcome if an item shown to have arisen despite reasonable care could nonetheless be assessed twenty years later simply because a different item in the same year involved deliberate conduct. Mr Sykes illustrated the point with the "£1" example: if HMRC could show that £1 was deliberately omitted but the remaining £X were attributable to reasonable care, HMRC's reading would nonetheless permit a twenty-year limit across the board. Likewise for the six-year limit in careless cases. He also drew attention to s36A, which imposes a twelve-year period where there is an offshore element; nothing in the statute suggests that those extended limits were intended to attach indiscriminately to unrelated domestic elements.

36. HMRC's response was that there was no unfairness or undermining of taxpayer protections in the above outcomes depicted. The starting point was the "venerable principle" that there was a public interest in taxpayers paying the right amount of tax. The conduct conditions were just gateways for HMRC being able to make good losses of tax outside of the normal time limits. The specified culpable behaviour meant taxpayers losing the "shield" of time limits but even then they retained the back up of contesting the amount on its merits. These points do not meet the valid concerns Mr Sykes has identified. Parliament has, in the way it has constructed the discovery provisions and time limits, put particular restraints on HMRC's ability to recover lost tax which mean there will inevitably be situations where the right amount of tax is not necessarily recovered by virtue of the taxpayer protections embodied in the scheme of the provisions. The venerable principle is in any case not absolute and may be subject to issues such as procedural fairness (see *Tower MCashback LLP1 and LLP2 v HMRC* [2008] EWHC 2387 (Ch) at [115]). Also, the reliance on s 50(6) TMA to mitigate any unfairness misses the point. The question is what may *properly* be included within the scope of a discovery assessment in the first place. A construction that forces the taxpayer to litigate the amount of a loss that never satisfied s29(4) at all does not sit well with the statutory scheme.

37. For these reasons, we consider the FTT's and the taxpayer's construction preferable. We do not put it as highly as the taxpayer did: in line with Mr Careys' submission, we accept that Parliament might design a regime in which *any* culpable conduct both permits the assessment and then applies the longest time limit to it, even if the loss of tax brought about brought about by the culpable conduct formed only a small part of the overall assessment. However that is not what Parliament enacted here. The language and structure of ss 29 and 36 point towards a regime that aligns both the basis of assessment and the applicable time limit with the conduct relating to each discovered loss. The FTT's and the taxpayer's construction also avoids the unsatisfactory position under HMRC's reading, where an assessment containing a mixture of deliberate, careless and non-culpable losses gives rise to competing time-limits with no clear rule of priority.

Hargreaves CA and Hargreaves UT and other case-law

38. HMRC's points made by reference to case-law also do not assist. *Hargreaves CA* concerned whether the taxpayer had a right to a separate hearing to determine whether the conduct/officer awareness condition (i.e. s29(4) and s29(5) were satisfied. One of the arguments considered in that context was the taxpayer's argument that power to make a discovery assessment was "penal in its effect":

Draconian effect of tiny error?

> 46. Mr Goldberg submits that the power to make a DA is penal in its effect. He submits that, if the taxpayer makes a small mistake, the door is open to HMRC to reopen the computation of all tax for the relevant period. This is because "the situation mentioned in subsection (1) above" (used in subsections (2) and (5)) is that "any income which ought to have been assessed to income tax" has not been assessed. Thus, if the taxpayer had treated income of £100 as not liable to tax, and HMRC assesses the full £100 to tax but HMRC can show that the conduct condition is met only in respect of £50, then on a literal reading of section 29 it would appear to follow that the whole of the assessment meets the conduct/officer condition and is validly made. This is a startling conclusion.
>
> 47. I do not consider that this difficulty exists. I accept the submission of Mr Nawbatt that, once HMRC have shown that the conduct/officer condition is met, the taxpayer can show that the amount assessed is excessive. The position under section 29 is analogous to that where an assessment is made under section 36 TMA on the grounds of the taxpayer's fraudulent or negligent conduct: see per Aldous LJ in *Hurley v Taylor* [1999] STC 1, 8
>
> > "The burden does not rest on the Revenue to any greater extent than the section 36 burden [fraudulent or negligent conduct]. If they establish some fraudulent and negligent conduct and some loss of tax attributable to it they have finished section 36. From then on section 50(6) takes over and applies as it does for in-date assessments: that is say, thereafter the burden rests on the taxpayer to establish that the assessment is wrong…":

39. In *Hargreaves UT* the above passage was considered further in dealing with parties' rival submissions regarding awareness of an actual insufficiency in relation to income tax and whether, as the taxpayer there argued, the lack of that meant that s29(5) operated with the result that HMRC were precluded from making a discovery assessment relating to CGT even if the hypothetical officer could have no awareness of an insufficiency as regards CGT. In other words the taxpayer's position was that the whole assessment would be invalid (because of the awareness in relation to income tax, irrespective of the awareness condition being satisfied for CGT purposes). In contrast, HMRC relied on the reference in s29(1) to "any" income tax or CGT not being assessed, so even if income tax insufficiency was readily apparent from the face of the return that would not preclude them from making a discovery assessment as regards both income tax and CGT (it was enough that there was a lack of awareness of the CGT insufficiency. The UT explained why it preferred HMRC's submission as follows by reference to [46] of *Hargreaves CA* above:

> 57. In this passage, Arden LJ does not expressly accept the premise of Mr Goldberg's argument set out at [46] of the extract. She states only that its effect was not "draconian" because if HMRC made the assessment of £100 the taxpayer would be entitled to appeal to the FTT and seek to establish that the assessment was excessive. However, it might be expected that, if she disagreed with the premise of Mr Goldberg's submission, she would have said so. Accordingly, we prefer HMRC's submission set out in paragraph [55] above to Mr Hargreaves' competing submission set out in paragraph [54].

40. The upshot was the UT thought that as long as s29(5) was met for CGT, it would not have mattered if it was not met for income tax.

41. Dealing first with the Court of Appeal's views, these were *obiter* on the precise question before us. The Court was addressing the question was it penal that HMRC could impose a discovery assessment where only part satisfied the conduct condition? The answer was that it

was not penal because the taxpayer retained the right to argue about the amount of the tax. The submission was made in the context of other submissions directed towards explaining why in the taxpayer's view a separate hearing was required regarding the discovery assessment's validity alongside submissions that a separate hearing was an essential protection of the presumption of innocence and arguments reliant on analogies with criminal law procedure and other areas of civil law. Significantly, the Court of Appeal was not addressed on the question of whether Mr Goldberg's premise was correct. It is right, as the Upper Tribunal in *Hargreaves* noted, that Arden LJ did not question the premise but we do not think too much can be inferred from that because in the case before the Court of Appeal the premise was not disputed. In answering the taxpayer's point that the situation was draconian the more moderate point that arises here is whether HMRC's interpretation was aligned with the purpose of having a regime of time limits calibrated to particular standards of culpability. While it can readily be seen why the characterisation of the discovery assessment's effect with regard to a "tiny error" was not draconian when a taxpayer could still fight over the quantum, it cannot necessarily be assumed the Court of Appeal would have considered that outcome as consistent with the purpose of the different time limits. The issue was not about being able to fight about quantum. Rather, it was over whether it was right that the taxpayer had to resort to that fight in the first place where the taxpayer was simply arguing the assessment was out of time.

42. In relation to the UT's views in *Hargreaves* regarding the interpretation of *Hargreaves CA* and the Upper Tribunal's resulting preference for HMRC's arguments, these were expressly *obiter* (as the UT had already concluded that the FTT there had not erred in its application of s29(5) to the facts it had found). Moreover it should be noted the UT in *Hargreaves* was faced with a more extreme argument on behalf of the taxpayer that the whole assessment was invalid because HMRC could not prove all of the loss of tax comprised in it met the relevant condition, whereas here it is only the loss of tax which has not been brought about by behaviour satisfying the relevant condition which the taxpayer argues should be removed from assessment.

43. In a similar vein HMRC also refer to *Lynch v The Commissioners for HM Revenue and Customs [2025] UKFTT 300 (TC)* at ([78] – [82]). One of the arguments there (based on *Hargreaves UT*) concerned whether, if a hypothetical officer could have reasonably been expected to have the requisite awareness of any part of the insufficiency in the tax self-assessed, a discovery assessment could still made in respect of the entire insufficiency ([76]). In other words the FTT in particular noted that there were two income tax insufficiencies but that the Appellants only need to show an assessing condition was met for either issue (in that case (s29(5) TMA) for an assessment relating to the whole amount of the income tax loss in that year to be valid. The FTT (at [81]) saw no reason to depart from *Hargreaves UT's* interpretation that had preferred HMRC's view in that case. (The FTT rejected an argument that relied on the reference in s29(5) to "the situation" as opposed to "any situation" which is not an argument made or relied on in this case).

44. To the extent the FTT in *Lynch* was, like the UT in *Hargreaves*, also taking from Arden LJ's judgment an implicit endorsement of the parties' undisputed interpretation (i.e. the premise underlying Mr Goldberg's submissions) then that does not take the issue in this appeal any further for the same reasons as given above. The statements in *Hargreaves CA* were *obiter* and did not address the particular issue of statutory interpretation before us.

45. HMRC also rely on a number of cases (*Hurley v Taylor* [1999] STC 1, *Johnson v Scott (HMIT)* [1978] STC 48 and *Hudson v Humbles* (1965) 42 TC 380) for confirmation that there is a two stage analysis with HMRC first showing culpable conduct leading to some loss, but then a second stage where the burden then shifts to the taxpayer to displace quantum if excessive. It is submitted these cases show that HMRC were not required to prove the particular quality or source of each receipt to match conduct to every entry.

46. These points do not help on the issue before us. It uncontentious that there is a two-stage process where the burden is first on HMRC to show the discovery assessment is valid and then a stage where the burden is on the taxpayer to show the quantum is excessive. But the fact there are two stages does not preclude the taxpayer being able to show they have been overcharged because of a loss of tax that was not within the permitted scope of the discovery assessment, and that the quantum should therefore be adjusted. It is not an argument (akin to the one made by the taxpayer in *Hargreaves UT*) that the assessment was invalid and cannot stand at all. If a particular loss was not brought about by carelessness or deliberate conduct (and the officer awareness condition in s29(5) is not relied on or made out) then that does not render the whole assessment invalid, but it means such loss cannot have been within the permitted scope of the assessment and that the assessment has, to that extent, overcharged the taxpayer. Also, as Mr Sykes submitted, these authorities address the burden and ability to raise assessments based on a *prima facie* case. They are not inconsistent with the taxpayer being able to displace that prima facie case. Moreover, none of these cases decide, as regards the time limits, that a culpable component of loss conferring the longest time limit does so in respect of all components.

47. HMRC also refer to a proposition from *Mullens* where the point was made that if HMRC have discharged the s29(4) burden they need do nothing further to discharge the s36 burden beyond proving the extended time limit assessment was made within the 6 year or 20 year period as the case may be. This point does not assist. The observation concerns the relatedness of the conduct test under s29(4) and s36; it does not resolve the present construction point, namely whether the unit to which that test and the time limit attach is the assessment globally or the discovered loss discretely. That the conduct is the same for the purposes of s29 and s36 is not inconsistent with the causality of that conduct being considered at the level of the loss of tax rather than with regard to the assessment as a whole.

48. Thus none of the authorities cited by HMRC stand in the way of the FTT's and the taxpayer's interpretation of the law which we consider to follow from the wording and scheme of the legislation. In so concluding we were not assisted by any analogy being drawn with the Schedule 24 Finance Act 2007 penalty regime which proceeds on an inaccuracy by inaccuracy basis. We agree with Mr Carey that this is a separate regime with distinct functions concerning incentivisation of behaviour to be contrasted with assessments which are about making good loss of tax. The Schedule 24 regime also applies more widely than income tax and capital gains tax so although there might be an overlap in terms some caution is required in seeking to meld the regimes together.

49. The taxpayer also relied on *Clark v HMRC* [2017] UKFTT 392 (at [43]) but we do not place any significant reliance on that for our favoured construction of the legislation. We note the tribunal in *Clark* reached the same view we have that non-satisfaction of conditions (in that case of s29(5)) which meant that a loss of tax was precluded from being assessed would mean the loss of tax was outside the scope of the discovery assessment and thus outside the FTT's jurisdiction to confirm its quantum. That view, which was reached in the FTT, and therefore could not be anything more than persuasive, was not reached with the benefit of the detailed arguments that were made before us.

FTT error?

50. It follows from the above the FTT interpreted the relevant TMA provisions correctly such that the taxpayer was able to argue that he had been overcharged to tax insofar as losses of tax did not meet the relevant culpability conditions in s29(4) TMA and/or the conditions for the extended time limits had not been complied with. Applying that construction to the facts, the FTT was entitled to treat the Credit Card insufficiency, found to have arisen despite reasonable care, as outside the permitted scope of the assessments and to remove it as an overcharge under s50(6). The same analysis justified its treatment of the Capital Allowance insufficiency and the

Deductible Expense insufficiency in 2009/10 to 2011/12 as not assessable on a deliberate basis (FTT at [75]–[78]), again justifying removal as representing overcharges under s50(6) in respect of those years.

CONCLUSION

51. The Appellants' appeal is dismissed

JUDGE SWAMI RAGHAVAN
JUDGE KEVIN POOLE

Release date: 11 March 2026