

Neutral Citation Number [2026] UKUT 00380 (TCC)



**UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)**

Neutral Citation Number:

Applicant: Patrick Kearney	Tribunal Ref: UT/2026/000064
Respondents: The Commissioners for His Majesty's Revenue and Customs	

**RECONSIDERATION OF APPLICATION FOR PERMISSION TO APPEAL
FOLLOWING ORAL HEARING**

DECISION NOTICE

JUDGE TRACEY BOWLER

1. The Applicant applies to the Upper Tribunal (Tax and Chancery) for permission to appeal against the decision of the First-tier Tribunal (Tax Chamber) (the “FTT”) released on 14 January 2026 (the “Decision”). The Applicant applied to the FTT for permission to appeal but the FTT refused permission, in a decision dated 28 April 2026 (the “FTT PTA Decision”).

2. In a decision on the papers I granted permission on one of the two grounds on which permission to appeal was sought. This is the decision following the Applicant’s request for an oral hearing to reconsider my decision to refuse permission on the other ground. The hearing was held remotely on 2 September 2026 and was attended by both parties. The Applicant was represented by Keith Gordon of Counsel and HMRC by Colm Kelly of Counsel.

When can an appeal be made?

3. An appeal to this Tribunal can be made only on a point of law: section 11 of the Tribunals, Courts and Enforcement Act 2007. It must be shown that it is arguable that the

FTT made an error of law in reaching its decision. “Arguable” means that the argument stands a realistic as opposed to fanciful prospect of success.

The Decision

4. References to paragraphs of the Decision are in the form [x].
5. In the Decision the FTT refused the Applicant’s appeal of discovery assessments made under s.29 Taxes Management Act 1970 (“TMA”) for the years 2004/05, 2005/06, 2006/07 and a closure notice for the year 2009/10; as well as related penalty determinations issued on the basis that the Applicant had acted negligently/carelessly.
6. The assessments and closure notice were issued on the basis that the Applicant was UK tax resident during the Relevant Period.
7. The FTT decided that:
 - (a) the Applicant was UK tax resident throughout the Relevant Period;
 - (b) the Applicant was careless/negligent when he submitted his self-assessments returns for the tax years in question, and his carelessness/negligence led to a loss of tax;
 - (c) the assessments were validly raised in accordance with s.29 TMA.
8. The Applicant does not challenge (a) and (b). The applicant challenges (c).

Grounds of appeal

9. The grounds for which permission is sought are:
 - (a) Ground 1 - it was not objectively reasonable for the HMRC officer to conclude that the Applicant was resident in the years in question based on the limited information available to the officer when the assessments were made; and
 - (b) Ground 2 – the FTT erred in its approach when deciding that the assessments reflected “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”.
10. In the case of Ground 1 the Applicant expressly identifies that he says that the wrong legal test was applied (Ground 1A) and/or the application of the legal test was not supported by the facts (Ground 1B).
11. Permission to appeal was granted by me on Ground 2 on the basis that that it is arguable that the FTT erred in its Decision in its approach to the quantum element of the assessments. I considered it to be arguable that the combination of evidence from the HMRC officer issuing the assessments did not support the conclusions reached by the FTT regarding certain amounts. It is arguable that the FTT’s approach to what was described as “a rounding up” was incorrect in law.

12. The Application prepared by Mr Gordon had set out the arguments relied on by the Applicant in some detail. This was supplemented orally at the hearing. I will address the arguments made in the paragraphs explaining my decision.

Evidence from the Applicant received after the hearing

13. After the hearing the Applicant's tax advisor emailed the Tribunal to pass on information from the Applicant saying that he had been unable to communicate with his team when the hearing came to a close and was therefore unable to pass on to them various matters he wanted brought to my attention. Those matters were further evidence about his business activities at the relevant time. However, the FTT's findings have not been challenged and the evidence is not considered further by me in this decision. For the avoidance of doubt I would make clear that the matters described by the Applicant have no impact on my decision regarding the Application.

My decision

Ground 1A - The FTT erred in law in determining whether the objective condition for a discovery was met.

14. Both parties rely on the case of *Jerome Anderson v HMRC* [2018] UKUT 0159 (TC) where the legal test for a discovery assessment was set out.

15. In paragraph 24 of *Anderson* the Upper Tribunal sets out the established propositions for determining whether the conditions of paragraph 29 TMA have been met. Those propositions make clear that there is a subjective test and an objective test. This is not disputed.

16. The subjective test is set out at paragraph 28 of *Anderson*:

..."The officer must believe that the information available to him points in the direction of there being an insufficiency of tax"

That formulation, in our judgement, acknowledges both that the discovery must be something more than suspicion of an insufficiency of tax and that it need not go so far as a conclusion that an insufficiency of tax is more probable than not."

17. It was conceded by the Applicant before the FTT that the subjective test was met after the evidence of the issuing officer was heard.

18. The next element is the objective test which was set out in *Anderson*, in particular at paragraph 30:

"The officer's decision to make a discovery assessment is an administrative decision. We consider that the objective controls on the decision making of the officer should be expressed by reference to public law concepts. Accordingly, as regards the requirement for the action to be "reasonable", this should be expressed as a requirement that the officer's belief is one which a reasonable officer could form. It is not for a tribunal hearing an appeal in relation to a discovery assessment to form its own belief on the

information available to the officer and then to conclude, if it forms a different belief, that the officer's belief was not reasonable."

19. That approach was reinforced in *Anderson* when at paragraph 43 the Upper Tribunal applied the test and concluded:

"If we apply what we consider to be the correct test, namely, whether Ms Lampard's belief was one which a reasonable person could form on the information available to her, then we would conclude that a reasonable person, acting on that information, could form the belief which she had formed."

20. At the hearing before me Mr Gordon did not dispute this but sought to maintain that the belief that the reasonable person must be one which "tips the balance" towards there being an insufficiency of tax. He accepted that despite this phraseology it was not a balance of probabilities test.

21. However, I find no basis in law to detract from the clear tests set out in *Anderson* not least given the fact that they were endorsed by the Supreme Court in *HMRC v Tooth* [2019] EWCA Civ 826 (see paragraph 72).

22. As said already, it was conceded by the Applicant that the officer had the subjective belief required to issue a discovery assessment and in so doing the Applicant accepted that the officer believed that the information available to him "pointed in the direction" of there being an insufficiency of tax. The objective test must be applied to that belief.

23. This was clearly understood by the FTT which set out the subjective test correctly at [220-221]. The FTT expressly referred to the objective test in *Anderson* on numerous occasions and showed that this was fully understood. For example, at [219] the FTT says that if the officer had merely reached a conclusion to which he was predisposed from the outset the officer could meet the subjective test but that conclusion must meet the objective test and in such circumstances that would not be met. The FTT very clearly had both tests in mind saying at [222]:

"...our task is to decide whether his conclusion that the information available to him at least pointed in the direction of there being an insufficiency of tax) was a reasonable one to reach

and at [226]:

"taken together a reasonable officer might well conclude that [the information] gave rise to much more than a suspicion of an insufficiency of tax and pointed in that direction."

24. I am therefore clear that the FTT correctly set out and had regard to the law in its decision and therefore Ground 1A does not show that there was an arguable error of law in the FTT's decision.

Ground 1B - the application of the legal test was not supported by the facts

25. Despite Mr Gordon's submissions before me I remain of the view that this ground is, in essence, little more than a disagreement with the conclusion reached by the FTT. The

Applicant refers to the list of factors identified by the FTT (which is not disputed) and asserts that they are insufficient “even taken holistically” to reach the conclusion that the applicant had retained his UK residence. In essence, the Application effectively asserts that the FTT’s conclusion is irrational.

26. In the Decision 16 factors are identified by the FTT as relevant to the conclusion by the officer that the information pointed in the direction of an insufficiency of tax. Mr Gordon worked through them at the hearing before me and accepted that nearly all were either neutral or pointed towards the Applicant remaining UK resident. They boiled down to the officer knowing that the Applicant’s wife remained in the UK and he continued to have accommodation available in the UK; he remained as one of several directors of several companies run out of the UK; the companies were profitable and active in the UK property market; the Applicant sold UK properties and was described as a UK property developer; and he visited the UK from time to time. However, Mr Gordon submitted that the factors were not enough for the objective discovery assessment test to have been met.

27. The FTT was clear and correct in its application of the law to these factors. At [225 and 226] of the Decision it recognised that:

“So far as Mr Kearney’s residence status was concerned, the information available the information available did not prove that Mr Kearney remained UK tax resident, but it pointed in that direction, as it indicated that Mr Kearney, regardless of the amount of time he spent in the UK, had not made the required “distinct break”.

None of these pieces of information on their own would suggest that Mr Kearney remained UK tax resident, and none of them on their own or even cumulatively would prove that on the balance of probabilities, but taken together a reasonable officer might well conclude that they gave rise to much more than a suspicion of an insufficiency of tax and pointed in that direction. It does not matter that Officer Shanks’ enquiries had not concluded and that he knew he needed more information. All that matters is that the information he had could reasonably be taken as pointing in the direction of an insufficiency of tax.

28. I am therefore satisfied that the FTT applied the correct legal test and the Application has not identified any error of law in its application of that test to the facts. I am clear that the matters in the list of sixteen factors, when read as a whole, are a rational basis for the FTT to decide that it was shown “that taken together a reasonable officer might well conclude that they gave rise to much more than a suspicion of an insufficiency of tax and pointed in that direction.”.

29. Mr Gordon also sought to argue that there could not have been a discovery made by the officer as the findings made by the FTT showed that while the officer had merely identified a risk that the Applicant was still UK tax resident in November 2009, nothing further came to light prior to his issue of the discovery assessments on 26 March 2010. However, the Decision’s findings showed that other information was obtained after the “risk” was identified. Moreover, the Supreme Court made clear in *Tooth* that a discovery is not dependent upon a new fact being identified. It can be as a result of a new view being formed

(see paragraphs 63-65 and 73). Therefore Mr Gordon's argument does not identify any error of law.

30. Finally, Mr Gordon also sought to rely on HMRC's own experts taking the view that the officer only suspected that the Applicant remained UK tax resident before a meeting from which it was found that nothing more was learnt by the officer. This was a matter expressly addressed by the FTT. The Decision found that the HMRC experts were only addressing the officer's subjective state of mind and that had been conceded at the FTT hearing. No challenge to the finding has been identified by the Applicant and the argument run by Mr Gordon was no more than an attempt to re-run one which had been correctly addressed by the FTT.

31. Overall, I am satisfied that in relation to Ground 1B the Application fails to identify an error of law. In particular, I am clear that in this regard it came to rational, reasonable conclusions which were not perverse, applying the law as correctly articulated by it.

Conclusion

32. For the reasons given, permission to appeal on Ground 1 is refused. Permission to appeal on Ground 2 alone has already been given and is confirmed.

Signed:

Date: 15/10/2026

Judge Tracey Bowler

Issued to the parties on: 15 October 2026