[2016] UKFTT 330 (TC)

TC05084

Appeal number: TC/2014/2601

CORPORATION TAX – declaration under s.153A TCGA 1992 (business assets roll-over relief) ceasing to have effect – s.153A(4) providing that all necessary adjustment shall be made – whether that provides for a 'free-standing' power or alternatively incorporates a reference to the assessment and amendment powers in Sch. 18, FA 1998 – held s.153A(4) TCGA incorporates such a reference – HMRC's decision under s.153A(4), the subject of the appeal, purporting to be an amendment to the Appellant's self-assessment in its company tax return, of no effect as no power under Sch. 18 FA 1998 enabled the making of it – there being no provision for an appeal against that decision, the Tribunal had no jurisdiction to entertain the appeal and the appeal is therefore struck out

FIRST-TIER TRIBUNAL
TAX CHAMBER

BENHAM (SPECIALIST CARS) LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE JOHN WALTERS QC
CAROLINE DE ALBUQUERQUE

Sitting in public at the Royal Courts of Justice, Strand, London on 22 June 2015

Keith Gordon for the Appellant

Laura Poots, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction including the Facts

1. The decision which has given rise to this appeal is a decision of the Respondents ("HMRC") to require payment (to use a neutral phrase) of corporation tax of £622,134 in respect of the accounting period of the Appellant ("Benham") running from 1 January to 31 December 2007 ("the 2007 Accounting Period").

2. Benham's case is that the profits said by HMRC to be chargeable to corporation tax in the 2007 Accounting Period fall to be reduced or eliminated by the carry-back of trading losses from the next accounting period, running from 1 January to 31 December 2008 ("the 2008 Accounting Period").

3. The parties presented a Statement of Agreed Facts and Issues ("the Statement") for the use of the Tribunal. From the Statement we find facts as follows.

4. At the beginning of the 2007 Accounting Period, Benham had trading losses brought forward under section 393(1) Income and Corporation Taxes Act 1988 ("ICTA") of £354,535.

5. During the 2007 Accounting Period, Benham incurred further trading losses, of £1,260,829. Of these losses, £567,893 were utilised in other ways and the balance of £692,936 ("the 2007 Losses") was added to the amount of losses brought forward under section 393(1) ICTA, bringing the total amount of those losses to £1,047,471.

6. Also during the 2007 Accounting Period, Benham realised chargeable gains of £2,766,716 ("the Gains"). We understand that the Gains (or the bulk of them) were realised on a sale and leaseback by Benham of its business premises.

7. Benham made a declaration ("the Declaration") in relation to the Gains in its corporation tax return for the 2007 Accounting Period. The Declaration was made under section 153A of the Taxation of Chargeable Gains Act 1992 ("TCGA").

8. We interrupt our findings of fact to note the relevant provisions of section 153A TCGA. They are:

> '(1) This section applies where a person carrying on a trade who for a consideration disposes of, or of his interest in, any assets ("the old assets") declares, in his return for the chargeable period in which the disposal takes place-
>
> (a) that the whole or any specified part of the consideration will be applied in the acquisition of, or of an interest in, other assets ("the new assets") which on the acquisition will be taken into use, and used only, for the purposes of the trade;
>
> (b) that the acquisition will take place as mentioned in subsection (3) of section 152 [that is, in the period beginning 12

months before and ending 3 years after the disposal, or at such earlier or later time as HMRC may by notice allow]; and

(c) That the new assets will be within the classes listed in section 155 [TCGA – that is, buildings, fixed plant or machinery, ships, satellites, goodwill, etc.].

(2) Until the declaration ceases to have effect, section 152 [TCGA – roll-over relief for the replacement of business assets] or, as the case may be, section 153 [TCGA – assets only partly replaced] shall apply as if the acquisition had taken place and the person had made a claim under that section.'

9. Thus the Declaration had the effect that (subject to the other provisions of section 153A TCGA, to which we refer below) the Gains were relieved from corporation tax by the operation of roll-over relief for the replacement of business assets. This resulted in no corporation tax being initially payable by Benham in relation to the 2007 Accounting Period.

10. Benham's tax return for the 2008 Accounting Period showed trading losses for that period of £1,215,625 ("the 2008 Losses"). Of these losses, £7,095 was utilised in other ways, and the balance of £1,208,530 was added to the figure of trading losses carried forward under section 393(1) ICTA, giving a total of £2,256,001 of trading losses brought forward as at 1 January 2009. We should say that these figures are not formally agreed between the parties, but have been presented to us for ease of reference in this appeal, which, the parties say, involves questions of principle only. In the Statement it is said that the parties hope to be able to finalise the figures (if relevant) on the basis of the Tribunal's decision and without further recourse to the Tribunal.

11. If Benham had made a claim after 31 December 2008 under section 393A ICTA, HMRC accept that it would have been entitled to set the 2008 Losses against the Gains. Section 393A(1) ICTA provided (in the context of this appeal) for a claim to be made to set off trading losses against profits (of whatever description – which would include chargeable gains) of the accounting period in which the trading loss was incurred and of a preceding accounting period falling wholly or partly within the period of 12 months immediately preceding that accounting period. The ordinary time limit for making a claim under section 393A(1) ICTA expired on the second anniversary of the end of the accounting period in which the loss concerned was incurred – that is, in this case, in relation to the 2008 Losses, on 31 December 2010 (see: section 393A(10) ICTA). There is provision in section 393A(10) ICTA for HMRC to allow the ordinary time limit to be extended.

12. The carry-forward of a trading loss under section 393(1) ICTA does not require a claim to be made. It operates automatically in the absence of a claim being made for another relief – for example, relief under section 393A ICTA.

13. On 16 November 2011, Benham submitted a tax return for the accounting period ended 31 December 2010. HMRC raised various requests in response to the information included in that return. From the consequential communications between HMRC and Benham's advisers, it became clear to HMRC that the Gains had become

chargeable to corporation tax and that Benham was seeking to set off various losses (including the 2008 Losses) against the Gains.

14. The Gains became chargeable because no actual claim for roll-over relief for the replacement of business assets was made (under section 152 or section 153 TCGA), presumably because no 'new assets' within the classes listed in section 155 TCGA were acquired by Benham within the applicable time limit, which expired on or before 31 December 2010.

15. Again, interrupting our findings of fact, we explain that this situation is provided for by section 153A(3) to (5) TCGA in the following terms:

> '(3) The declaration shall cease to have effect as follows-
>
> (a) if and to the extent that it is withdrawn before the relevant day, or is superseded before that day by a valid claim made under section 152 or 153, on the day on which it is do withdrawn or superseded; and
>
> (b) if and to the extent that it is not so withdrawn or superseded, on the relevant day.
>
> (4) On the declaration ceasing to have effect in whole or in part, all necessary adjustments-
>
> (a) shall be made by making or amending assessments or by repayment or discharge of tax; and
>
> (b) shall be so made notwithstanding any limitation on the time within which assessments or amendments may be made.
>
> (5) In this section "the relevant day" means-
>
> (a) in relation to capital gains tax, the third anniversary of the 31st January next following the year of assessment in which the disposal of, or of the interest in, the old assets took place;
>
> (b) in relation to corporation tax, the fourth anniversary of the last day of the accounting period in which that disposal took place.'

16. The 'relevant day' for the purposes of section 153A TCGA in relation to the facts of this appeal was 31 December 2011, being the 4th anniversary of the last day of the 2007 Accounting Period – see: section 153A(5)(b) TCGA. On that day the Declaration ceased to have effect and section 153A(4) TCGA was brought into play. The main dispute in this appeal turns on the question of what are the procedural requirements attendant on the application of section 153A(4) TCGA on the facts of this case.

17. On 6 November 2013, HMRC wrote to Benham's representatives noting that there was no acquisition of new assets before 31 December 2010 'and, in accordance with S153A(4A) TCGA 1992 [presumably section 153A(4)(a) was meant], an assessment will now be made for £830,014.80 being the amount of tax unpaid in respect of the gain on the original disposal'.

18. On 7 November 2013, HMRC issued to Benham a document on form CT620 AMD headed 'Corporation Tax – Amendment to a company tax return' in the top right corner of the form, which purported to show amendments made to the figures, including the tax payable, on the company tax return made for the 2007 Accounting Period. The amendments showed tax payable of £963,610.87, £830,014.80 of which was referable to the inclusion of the Gains in the computation of taxable profits. The document included the following statement:

> 'This notice shows the amendments I have made to the figures, including the tax payable, on the company tax return. For more information please read the 'Amendment of return' section in the enclosed *CT620 Notes*.'

19. That document ("the Disputed Decision") was accompanied by an HMRC document headed "Notes for forms CT620" which starts with the following sentences:

> '**What these Notes cover**
>
> These Notes cover the various types of acknowledgment, notice, assessment, determination or claims we issue on forms CT620. The description in the top right corner of the form will tell you which heading to look for on the following pages. For example, if you have received an *Acknowledgement of a company tax return*, you will find information under 'Acknowledgement – CT620 ACK'. Please read the notes for the form you have received.'

20. The relevant section in the Notes is headed 'Amendment of return – CT620 AMD' as follows (there is also a section 'Assessment – CT620 DIS' which deals with discovery assessments):

> '**Amendment of return – CT620 AMD**
>
> Please read this note if your form is headed *Amendment to a company tax return*.
>
> This notice shows our revised figures and calculations and any amount payable or overpaid.
>
> Please pay any amount due. We charge interest on any amount of tax unpaid by the normal due date(s) for payment. See 'Payment of Tax' on page 3.
>
> If you do not agree with the figures you can appeal against the notice within 30 days of the amendment being notified to the company. You should address your appeal to the officer who issued the notice of amendment.'

21. Benham appealed and, following a review of the Disputed Decision, HMRC, in a letter dated 10 April 2014 to Benham, informed Benham that the tax said to be payable would be reduced to £622,134 following their agreement that the 2007 Losses could be set off against the Gains 'under the s393A(1)(a) ICTA 1988 claim made in the original return'. This is a reference to the claim made under section 393A(1)(a) ICTA in Benham's corporation tax return for the 2007 Accounting Period to utilise trading losses incurred in the 2007 Accounting Period to set off against non-trade loan relationship income of £22,408 in the 2007 Accounting Period. (These were part of the losses of £567,893 referred to in paragraph 5 above.) HMRC's Review Officer (Mr Gerald Beane) explained in the letter that:

> 'a company cannot restrict the claim [under section 393A ICTA] to cover only particular items of income or gains and there is nothing in the legislation which restricts a claim to the amount of profit it can be set against at the point when the claim is made, or up until the point when the normal time limit to make a claim expired. It merely states that where there is a claim the loss will be set against the company's profits of that accounting period. Here there was a s393A(1)(a) claim made in time, profits have been increased by the amendment and therefore the available losses can be set off against them.'

22. The corporation tax of £622,134, said to be payable in respect of the 2007 Accounting Period has been calculated by including the Gains in the chargeable profits for the 2007 Accounting Period, but not allowing the 2008 Losses to be set against the Gains.

23. Benham's case is that on the Declaration ceasing to have effect (on 31 December 2011) the correct course for HMRC would have been to raise a discovery assessment under paragraph 41, Schedule 18, FA 1998 – which gives power to make an assessment to make good a loss of tax where an officer of HMRC discovers that relief has been given which is or has become excessive (paragraph 41(1)(c), Schedule 18, FA 1998. This, Mr Gordon, for Benham, argues, would have given Benham the opportunity to make a consequential claim under paragraph 62, Schedule 18, FA 1998 (within one year from the end of the accounting period in which the assessment was made) to carry back sufficient of the 2008 Losses to set against the Gains to reduce the consequent corporation tax liability for the 2007 Accounting Period to nil.

24. Benham's representatives made a 'protective consequential claim' on 24 October 2014 in respect of the 2007 Accounting Period. That claim purports to be made under the provisions of paragraphs 61 to 64, Schedule 18, FA 1998 to carry back losses of £1,208,530 from the 2008 Accounting Period 'to partially cover the liability arising for [the 2007 Accounting Period] as a result of HMRC Revenue Amendment dated 7 November 2013'. It is stated that the claim is made notwithstanding and without prejudice to Benham's position that there is not as yet an assessment under paragraph 41, Schedule 18, FA 1998, but that it is made in order to comply with the 12 month time limit in paragraph 62, Schedule 18, FA 1998 – the time limit for consequential claims given by paragraph 62(1)(a), Schedule 18, FA 1998. The claim was acknowledged by HMRC on 3 November 2014, who stated that in the event that the

Tribunal finds that such a claim is admissible, then it was agreed that it had been made in time.

25. HMRC's case is that section 153A(4) TCGA provides a 'freestanding' power for HMRC to make or amend an assessment, without reference to any other assessing provision. Miss Poots, for HMRC, argues that an assessment or amendment under section 153A(4) TCGA is not within the categories of amendments or assessments in relation to which a consequential claim under paragraph 62, Schedule 18, FA 1998 could be made – see: paragraph 61(1), Schedule 18, FA 1998. In particular, it is not a discovery assessment within paragraph 61(1)(b).

26. Against the factual background given above – as to which there is no disagreement between the parties – the Statement sets out the agreed issues for the Tribunal's determination as follows:

> What is the true nature and effect (if any) of the Disputed Decision? ("**Issue A**")
>
> Does section 153A(4) TCGA provide for a 'freestanding' right for HMRC to make an assessment or amend a company's corporation tax assessment (as contended for by HMRC); or does it merely entitle HMRC to use its powers as provided for elsewhere by statute (as contended for by Benham)? ("**Issue B**")
>
> Further, if HMRC's contention on this point is correct, is Benham entitled to an adjustment for the 2008 Losses against the tax charged by the Disputed Decision? ("**Issue C**")
>
> Alternatively, if Benham's contention on this point is correct, does HMRC's failure to specify (either at the time the Disputed Decision was made or at any later time) the statutory basis (in addition to section 153A(4) TCGA) under which the Disputed Decision was made, render the Disputed Decision a nullity? ("**Issue D**")
>
> Alternatively, if Benham's contention on this point is correct, can HMRC in the circumstances now rely on any powers in Schedule 18, Finance Act 1998 ("FA 1998")? ("**Issue E**")
>
> Alternatively, if Benham's contention on this point is correct and the Disputed Decision was actually a discovery assessment, does the claim made by Benham entitle it to consequential relief for the 2008 Losses under section 393A ICTA and paragraph 62 of Schedule 18, FA 1998? ("**Issue F**")

Issue A

27. Benham's 'primary' case on Issue A (as to the true nature and effect – if any – of the Disputed Decision) is that the Disputed Decision is not a discovery assessment, or any assessment, but is an amendment, because it is so described on its face (see: paragraph 17 above) and the accompanying documentation makes it clear that there are distinctions between assessments and amendments, such distinctions being

consistent with the legislation itself which provides for amendments to be made in some circumstances and assessments in others. Mr Gordon also points to HMRC's Capital Gains manual, reference CG60700 – published guidance to HMRC officers on the administration of taxation – which states that in the circumstances relevant to this case any tax payable should be recovered by the raising of an assessment under section 153A(4) TCGA.

28. Mr Gordon submits that in the circumstances of this case an amendment of Benham's corporation tax self-assessment could not be made. (Miss Poots accepts that the circumstances of the case do not fall within any of paragraphs 16, 30 or 34 of Schedule 18, FA 1998 – power to amend a company tax return to correct errors; power to amend a self-assessment during an enquiry to prevent loss of tax; power to amend a return after an enquiry.) Mr Gordon's case is that because the Disputed Decision purports to be an amendment and is not an assessment, it is therefore 'a nullity and/or should be set aside'.

29. He noted that Schedule 18, FA 1998 provides distinct rights of appeal against amendments and assessments respectively – see, paragraph 30(3) and (4) and paragraph 34(3) and (4), dealing with appeals against amendments, and paragraph 48, dealing with appeals against assessments (which are not self-assessments).

30. HMRC's 'primary' position on Issue A is that the Disputed Decision is either an assessment or an amendment to an assessment and is made under section 153A(4) TCGA. The question of whether it is one or the other is, on HMRC's case, irrelevant, because section 153A(4) permits either to be made and an assessment and an amendment to an assessment both have the same consequences.

31. HMRC's reserve position is that the adjustments called for by section 153A(4) must be capable of being given effect to, and some power – under Schedule 18 FA 1998 – must cover the case. Schedule 18 FA 1998 should not be construed so as to render section 153A(4) TCGA entirely ineffective.

32. Miss Poots drew our attention to HMRC's letter of 6 November 2013 which referred to an assessment and submitted that the Disputed Decision was an amending assessment, such as was referred to in the wording of section 153A(4) TCGA - 'all necessary adjustments … shall be made by making or amending assessments …'. She referred us to paragraph 97, Schedule 18, FA 1998 which provides in particular that:

> '[a]ny reference in the Tax Acts (however expressed) to a person being assessed to tax, or being charged to tax by an assessment, include a reference to his being so assessed, or being so charged – (a) by a self-assessment under this Schedule, or an amendment to such a self-assessment …'

33. She did, however, submit that paragraph 97 does not apply in relation to Schedule 18 FA 1998 itself (because, as we understand her submission, the Schedule is not included in the expression 'the Tax Acts') but she submitted that it is intended to make clear the position in relation to other Acts – it is not needed for the construction of Schedule 18 FA 1998.

34. She submitted that paragraph 48, Schedule 18 FA 1998 (which provides that an appeal may be brought against any assessment to tax on a company which is not a self-assessment) does indeed provide for an appeal against an amendment to a self-assessment, notwithstanding the specific provisions for appeals against amendments in paragraphs 30 and 34, Schedule 18, FA 1998. Those specific provisions, in her submission, include, but provide for wider rights of appeal than, appeals against amendments to self-assessments.

35. She submitted that while an amendment to an assessment was an assessment, it was not a discovery assessment. A discovery assessment is an assessment made under the discovery powers (paragraph 41, Schedule 18, FA 1998) and does not include an assessment made under section 153A(4) TCGA. She made the point that the discovery powers were restricted as provided by paragraphs 42 to 45, Schedule 18 FA 1998 and that such restrictions were not appropriate to an assessment made under section 153A(4) TCGA.

36. She cited the decision of the Upper Tribunal (Judges Avery Jones and Sadler) in *Gunn v Revenue and Customs Commissioners* [2011] UKUT 59 (TCC) for the proposition that there is no requirement to state in an assessment the statutory provision under which the assessment is made. She also cited *Vickerman (HMIT) v Mason's Personal Representatives* [1984] STC 231 for the proposition that if HMRC have notified a taxpayer that they rely on a specified provision for making an assessment, they can nonetheless justify the assessment by reference to another statutory provision.

37. We consider that notwithstanding the terms of HMRC's letter dated 6 November 2013, which referred to an assessment to be made in accordance with section 153A(4) TCGA, the Disputed Decision issued on form CT620 AMD on the following day (7 November 2013) was quite clearly, and in accordance with its terms and the supporting Notes which accompanied it, and amendment. If (contrary to HMRC's primary submission) it matters for any relevant purpose whether the Disputed Decision is an assessment or an amendment, it is an amendment rather than an assessment. This is because a taxpayer is, in our judgment, entitled to know from its face the nature of a decision addressed to him by HMRC – compare *Vodafone 2 v Revenue and Customs Commissioners* SpC 479 [2005] STC (SCD) 549 at [17].

38. The circumstances of this case are not covered by either *Gunn* or *Mason's Personal Representatives*. Those decisions deal with cases where there is a decision of a certain status – an assessment – holding that the decision need not state the statutory provision under which it is made and can be justified by a statutory provision other than the one relied on when it was made. They are not authority for the proposition that a decision of a certain status – an amendment – can be implemented on the basis that it is a decision of a different status – an assessment.

39. Further, the reference in section 153A(4) TCGA to all necessary adjustments being made 'by making or amending assessments' cannot be read as contemplating a special status of assessment made by HMRC and styled as an 'amending assessment'. Clearly there is a distinction in the management regime applicable to corporation tax

between an amendment and an assessment. It is to be noted that an assessment may be a self-assessment (made by a company and included in its company tax return – see: paragraph 7(1) Schedule 18, FA 1998) or an assessment made by an officer of HMRC. Such an assessment is a discovery assessment for the making of which power is provided by paragraph 41 Schedule 18, FA 1998 or an assessment to recover excessive group relief made under the power in either paragraph 75A or paragraph 76, Schedule 18, FA 1998. It is also relevant to note that where no company tax return is delivered in response to a notice requiring one, an officer of HMRC has power to make a determination of the amount of tax payable by the company and such determination has effect for enforcement purposes 'as if it were a self-assessment by the company' (paragraph 39, Schedule 18, FA 1998). Such a determination can be 'superseded' by an actual self-assessment made by a company in a company tax return delivered after the determination has been made (paragraph 40, Schedule 18, FA 1998).

40. Amendments, on the other hand, are amendments to a company tax return which may be made by the company (paragraph 15, Schedule 18, FA 1998) or an officer of HMRC (paragraph 16 or paragraph 34, Schedule 18, FA 1998) or amendments to a company's self-assessment which may be made by an officer of HMRC (paragraph 30, Schedule 18, FA 1998).

41. The words 'making or amending assessments' in section 153A(4) TCGA must, in our judgment, refer to the making of assessments or the amending of self-assessments (originally made by a company and included in its company tax return).

42. Clearly the Disputed Decision was intended to be made pursuant to section 153A(4) TCGA to make the adjustment necessary on the Declaration ceasing to have effect. It was, as we have said, an amendment. If the Disputed Decision has any effect its effect is that it is an amendment of Benham's self-assessment for the 2007 Accounting Period.

43. Whether it has that (or any) effect depends on what the correct determination of Issue B is. As the parties made clear, Issue B is at the heart of the appeal.

Issue B

44. Issue B is whether section 153A(4) TCGA provides for a 'freestanding' right for HMRC to make an assessment or amend a company's self-assessment or merely entitles HMRC to use its powers as provided for elsewhere by statute.

45. Arguing that section 153A(4) TCGA does not provide such a 'freestanding' right, Mr Gordon submits that the entitlement to make an assessment or amendment to make the necessary adjustments to a person's tax liability on a declaration under section 153A TCGA ceasing to have effect is derived from section 153A(4), but there is a necessary implication that the actual assessment or amendment would need to be made pursuant to HMRC's powers as provided elsewhere – in the context of this appeal, in Schedule 18, FA 1998.

46. He submits that the appropriate power to be used will depend on the circumstances of the case. Thus, for example, if an enquiry into the relevant company tax return were open, the appropriate power to use would be that in paragraph 34, Schedule 18, FA 1998 – in making a closure notice amending the return. He notes that, in such a case, a right of appeal is clearly provided by paragraph 34(3), Schedule 18, FA 1998.

47. He also submits that the Tribunal should infer from section 153A(4)(b) TCGA which allows assessments or amendments pursuant to section 153A to be made 'notwithstanding any limitation on the time within which assessments or amendments may be made' that section 153A(4)(a) should be read subject to an implication that any assessments or amendments are to be made under powers which in a case outside section 153A would be subject to time limits on their exercise.

48. He argued that the lack of guidance on the face of section 153A(4) TCGA as to whether an assessment or alternatively an amendment should be made in any particular case militates against HMRC's position that a 'freestanding' power to assess or amend is conferred by the subsection. If HMRC are right, he submits, the lack of guidance leaves it open to them to choose unilaterally (as in this case) to take a course which denies a taxpayer a relief to which it would otherwise be entitled. This submission is made on the basis that if HMRC had chosen to make an assessment, rather than an amendment, such assessment would have been a discovery assessment, giving rise, in the circumstances of this case, to an entitlement to make a consequential claim under paragraphs 61(1)(b) and 62, Schedule 18, FA 1998. Mr Gordon adds that if (as is the case) HMRC argue that consequential relief would not be available in relation to either an assessment or an amendment under section 153A(4) TCGA, they would face the difficulty of explaining why Parliament had provided for adjustments to be made in two apparently different ways (assessment and amendment) where there is no practical difference in the consequences of one procedure rather than the other.

49. Mr Gordon submits that the only relevant rights of appeal to the Tribunal are provided under Schedule 18, FA 1998. If HMRC are correct that section 153A(4) TCGA confers a 'freestanding' right to make or amend an assessment, there is no right of appeal to the Tribunal, with the consequence that this Tribunal has no jurisdiction to hear this appeal and the only remedy a taxpayer would have against an incorrect adjustment would be to seek judicial review of the decision to make it. It is, he submits, wholly unlikely that Parliament would have intended such an outcome. If he is correct that necessary adjustments where section 153A(4) TCGA applies are to be made by the exercise of powers contained (in the circumstances of this case) in Schedule 18, FA 1998, then the rights of appeal provided in that Schedule would apply.

50. Miss Poots, for HMRC, makes the following submissions in support of her case that section 153A(4) TCGA provides for a 'freestanding' right to make the necessary adjustments by making or amending assessments.

51. First, she submits that it is unnecessary to refer to any other provision. The language of section 153A(4) gives HMRC the necessary powers which are not subject to any conditions such as apply to the exercise of the powers to amend or assess under Schedule 18, FA 1998 – in particular the conditions on the exercise of the power to make a discovery assessment. Further, on Benham's analysis, section 153A(4) TCGA has no purpose – it does not empower HMRC to do anything which they were not already entitled to do under other amending or assessing powers.

52. Secondly, Miss Poots submits that a right of appeal against a 'freestanding' power to make or amend an assessment under section 153A(4) TCGA exists by virtue of paragraph 48 of Schedule 18, FA 1998 which provides that '[a]n appeal may be bought against any assessment to tax on a company which is not a self-assessment'. She submits that this includes a right of appeal against an 'amended assessment'.

53. Dealing with this last point first, paragraph 48(1), Schedule 18, FA 1998 provides that '[a]n appeal may be brought against any assessment to tax on a company which is not a self-assessment'. This wording does not provide a right of appeal against an amendment. We have decided that the Disputed Decision was an amendment. No right of appeal against it can therefore be founded in paragraph 48, Schedule 18, FA 1998. Further, the reference to 'amending assessments' in section 153A(4) TCGA can only, as we have explained, be a reference to amending a self-assessment. A self-assessment is amended by means of an amendment rather than an assessment, and the wording of the Disputed Decision clearly indicates that what HMRC intended by it was an amendment to the self-assessment included in Benham's company tax return for the 2007 Accounting Period.

54. Therefore a right of appeal against the Disputed Assessment would have to be looked for in paragraph 30(3) or paragraph 34(3), Schedule 18, FA 1998 (which apply to appeals against an amendment), but, as Miss Poots has accepted, neither of these provisions is applicable to this case, because paragraphs 30 and 34, Schedule 18, FA 1998 can only be relevant in situations where HMRC have opened an enquiry and there was no open enquiry in the present case – indeed, as she said, where a claim for provisional relief under section 153A TCGA has fallen away, there will often not be an open enquiry.

55. We therefore consider that there is force in Mr Gordon's objection that on HMRC's case (that section 153A(4) TCGA provides for a 'freestanding' right to assess or amend) an amendment made pursuant to that sub-section may well (as in the not unusual circumstances of this case) be an amendment against which there is no right of appeal to this Tribunal – thus leaving an aggrieved taxpayer with only the remedy of seeking judicial review. We agree with Mr Gordon that it is unlikely that Parliament can have meant to legislate that result for this situation and certainly can see no rational ground for Parliament having done so.

56. Section 153A(4) TCGA plainly provides for all necessary adjustments to be made (in terms of creating a liability on the taxpayer to increased tax or creating an obligation on HMRC to give credit for, or refund, tax which has become no longer due). Section 153A(4)(b) has the obvious purpose of disapplying the application of

any time limit to the making of such adjustments. Section 153A(4)(a) provides for the mechanism of making such adjustments (by making or amending assessments or by repayment or discharge of tax). We consider that on the basis on which Mr Gordon's submissions were made a useful effect for section 153A(4)(a) TCGA is discernible – it provides, at a high level, for the mechanics by which the adjustments are to be made and, we consider, necessarily implies that the detailed rules in Schedule 18, FA 1998 for making or amending assessments are to apply. Disagreeing with Miss Poots, we consider that it is necessary to refer to those detailed rules to amplify the provision that necessary adjustments (in terms of increased tax liability) must be made by making or amending assessments. Section 248C(4) TCGA is drawn is similar, but not identical terms to section 153A(4)(a), and is dealing with a similar problem – the reinstatement of a chargeable gain that has provisionally been treated as subject to roll-over relief. Section 248C(4) provides that '[a]ny adjustments of capital gains tax in accordance with subsection (3), whether by way of assessment or otherwise, may be made at any time, despite anything in section 34 of the Management Act (time limit for assessments)'. On this wording it is, in our view, even clearer that there is an implication that the detailed statutory rules for making or amending assessments (which are to be found elsewhere) are to apply. We consider that this shows that there is no fundamental objection to the conclusion that section 153A(4)(a) also implies that such rules are to apply and, indeed, that the most reasonable, and correct, construction of the provision is that there is such an implication.

57. We do not consider that the restrictions on the power to make discovery assessments in practice would fetter HMRC's power to make an assessment pursuant to section 153A(4) TCGA. Paragraph 44, Schedule 18, FA 1998 would ordinarily cover the situation because at the time when the officer of HMRC ceased to be entitled to give a notice of enquiry into the return for the accounting period in which the original disposal of the 'old assets' within section 152 TCGA was made or at the time when the officer completed his enquiries into the return, the circumstance of a declaration under section 153A TCGA ceasing to have effect would be a circumstance of which 'the officer could not have been reasonably expected, on the basis of the information made available to them before that time' to be aware (cf paragraph 44(1), Schedule 18, FA 1998). The restriction in paragraph 45, Schedule 18, FA 1998 (Return made in accordance with prevailing practice) would, we consider, be highly unlikely to apply in any conceivable circumstance.

58. For these reasons, we are against Miss Poots on this central Issue B, and with Mr Gordon in the thrust of his submissions, and hold that section 153A(4) TCGA does not provide for a 'freestanding' right for HMRC to make an assessment or amend a company's self-assessment, but merely provides a mechanism whereby the powers provided for elsewhere in statute are made applicable in a situation where necessary adjustments have to be made on a declaration under section 153A TCGA ceasing to have effect.

Issue C

59. As we have concluded that the Disputed Decision was (or purported to be) an amendment of Benham's self-assessment for the 2007 Accounting Period (Issue A – see: paragraph 42 above) and that there is no 'freestanding' right for HMRC to make

an assessment or amend a company's self-assessment under section 153A(4) TCGA (Issue B – see: paragraph 58 above), we need not address Issue C – which is raised on the basis that HMRC's contention on Issue B is correct.

Issue D

60. However, we address the question of whether HMRC's failure to specify (whether at the time the Disputed Decision was made or at any later time) the statutory basis (in addition to section 153A(4) TCGA) under which the Disputed Decision was made, renders the Disputed Decision a nullity.

61. Mr Gordon submits that the Disputed Decision (being contained in a document which expressly states that it is not an assessment) cannot be treated over a year later as if it were, after all, an assessment. Otherwise there would be the risk of considerable confusion for taxpayers.

62. Miss Poots submits that an amendment to an assessment is not a nullity simply because it does not state the statutory basis on which it is made, or states an incorrect statutory basis. She cites *Gunn* and *Mason's Personal Representatives* in support and also section 114 Taxes Management Act 1970, which relevantly provides that an assessment shall not be 'quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts'.

63. We agree with both submissions. We have held that the Disputed Decision was (or purported to be) an amendment, not an assessment. It cannot be treated as if it were an assessment. However, it is not, in our judgment, rendered a nullity simply by reason of the fact that no statutory basis is given for making it, other than section 153A(4) TCGA.

Issue E

64. The question raised by Issue E is whether HMRC can, in the circumstances, now rely on any powers in Schedule 18, FA 1998 to support the Disputed Decision. The short answer to this question is that they cannot rely on any such power to support the Disputed Decision, because the Disputed Decision is an amendment (not an assessment) and the powers to make an amendment, which are contained in Schedule 18, FA 1998 (paragraphs 16, 30 and 34) are, as Miss Poots accepts, not applicable in the circumstances in this case – in the case of paragraph 16 because such an amendment would be out of time and, anyway, could be rejected by the company, and, in the case of paragraphs 30 and 34, because there is no open enquiry or closure notice. There was therefore no statutory basis for making the Disputed Decision and in our view it can have no effect. The powers in Schedule 18, FA 1998 can however be relied on to raise a new assessment.

Issue F

65. Issue F raises a question on the premise that the Disputed Decision was actually a discovery assessment. We have held that it was not, but that it was an amendment. Accordingly we need not address Issue F.

Decision and Disposition

66. For the reasons given above, our decision is that the Disputed Decision was (or purported to be) an amendment of Benham's self-assessment for the 2007 Accounting Period and there was no statutory basis on which such an amendment could be made, so that it can have no effect. Furthermore, there is no appeal right which Benham may exercise to appeal the Disputed Decision.

67. Therefore we conclude that we have no jurisdiction to entertain Benham's appeal and the appeal must accordingly be struck out in the exercise of our power under rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

68. The correct course for HMRC to take in the light of our decision appears to us to be to issue a fresh discovery assessment pursuant to paragraphs 41 to 47 Schedule 18, FA 1998. They would be in time to do so by virtue of the express provision of section 153A(4)(b) TCGA.

69. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN WALTERS QC
TRIBUNAL JUDGE

RELEASE DATE: 9 MAY 2016