[2016] UKUT 32 (TCC)

INCOME TAX AND NATIONAL INSURANCE CONTRIBUTIONS – payment by HMRC of amount shown as repayable in self-assessment return – amendment to return by HMRC following closure notice – appeal by taxpayer to FTT establishing that amount shown as repayable in amended return too small but amount claimed in original return too high – whether FTT correct to conclude no jurisdiction to further amend return to reflect amount found by it to be repayable – No – appeal determined accordingly

Appeal number: UT/2016/0070

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN:

THE COMMISSIONERS
FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and –

ERIC WALKER

Respondent

Tribunal: The Hon Mr Justice Warren
Judge Greg Sinfield

Sitting in public at Royal Courts of Justice, Rolls Building, Fetter Lane, London, EC4A 1NL on 12 January 2017

Christopher Stone, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

The Respondent not appearing

DECISION

Introduction

1. This appeal raises an important point concerning the powers of the First-tier Tribunal (Tax Chamber) ("FTT") to amend an individual's self-assessment tax return which has previously been amended by HMRC pursuant to its powers under section 28A Taxes Management Act 1970 ("TMA"). In form, the appeal is made by HMRC against a decision of the FTT (Judge Richard Thomas and Leslie Howard) released on 23 August 2016, [2016] UKFTT 0123 (TC) ("the Decision") in which, having made findings of fact concerning the figures relevant to the tax position of the Respondent ("Mr Walker"), the FTT decided that it had no jurisdiction to make any further amendment to Mr Walker's self-assessment return.

The facts

2. The facts as found by the FTT can, for present purposes, be stated quite briefly:

> (1) In the tax year 2011-12 Mr Walker was engaged as a sub-contractor in the construction industry. Payments to Mr Walker by the three contractors for whom he worked were made by bank transfer to his bank account.
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> (2) Mr Walker made a tax return for the year on 28 June 2012. This showed a repayment due to him of £6,040. He claimed to have been paid net under the rules of the CIS. Included in his tax calculation was £6,627.25 of tax which he claimed had been deducted by the three contractors when making payments to him.
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> (3) Under their policy of "process now, check later", HMRC gave effect to that return by making a payment to Mr Walker on 19 February 2012 of £6,040.
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> (4) HMRC subsequently opened an enquiry into Mr Walker's return on 14 March 2013, which was concerned with (i) his claimed turnover; (ii) the expenses that he had deducted from his turnover to arrive at his net profit; and (iii) the level deductions of tax that he had suffered under the CIS.
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> (5) The level of expenses was agreed between HMRC and Mr Walker's accountants during the course of the enquiry.
>
> (6) So far as concerned the deductions of tax, HMRC had no record of any deductions from payments to Mr Walker having been returned and paid to HMRC. HMRC therefore asked for documents to verify the amounts returned by Mr Walker.
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> (7) During the course of the enquiry, HMRC accepted that £3,379 of tax had been deducted by one contractor, Dubicki, and £500 deducted by another, Euco Limited. Mr Walker claimed that the amount deducted by Euco was £3,845.
>
> (8) HMRC issued a closure notice on 24 June 2014. The decision of the Inspector was that Mr Walker had understated his turnover, had overstated his tax deductions and was unable to substantiate his expenses claim. The Inspector stated that she had amended Mr Walker's Self-Assessment return to reflect her decisions, the effect of the amendments being to reduce the

amount of overpaid tax from £6,040 to £821.07, a difference of £5,218.93.

(9) She also stated that she had updated Mr Walker's Self Assessment statement to reflect this change which then showed that Mr Walker was due to pay to HRMC a total of £3,983.39. This also reflected events which had taken place since the end of the 2011-12 tax year.

(10) Mr Walker appealed against the closure notice.

3. At Decision [2], the FTT identified the issues before it:

> "The sole question for us as presented by the parties was what was the amount of deductions from payments made to him by contractors that the appellant was entitled to treat as satisfying any income tax charge and any Class 4 National Insurance Contributions ("NICs") charge on his trading profits for 2011-12, and to have the excess repaid to him. But it was also agreed that the amount of turnover and hence the amount of the trading profit was affected by the answer to the question."

4. The FTT found in favour of Mr Walker on the facts, and concluded that he was entitled to treat as deducted the full amount which he had entered on his tax return. This is recorded in Decision [3]. However, because of amendments to the amount of deductible expenses agreed between Mr Walker and HMRC and because of the consequential effect on turnover of the FTT's decision, the FTT concluded in that paragraph that

> "…..the calculations we have made show that the appellant was entitled to a smaller repayment than the one actually made to him. That amount is however larger than the amount of repayment shown as due on the amended self-assessment or on HMRC's subsequent amendments to that figure."

Decision [25] shows that the FTT calculated that £3,781 was repayable to Mr Walker by HMRC under section 59B TMA.

5. Notwithstanding these findings of fact, the FTT decided that it had no power further to amend Mr Walker's return in order to reflect what, on its findings, were the correct figures. This was because the FTT considered that the amendments previously made by HMRC had not resulted in Mr Walker being either overcharged nor undercharged for the purposes of section 50(6) and (7) TMA. HMRC do not appeal against the FTT's finding as to the level of tax deducted. They do, however, challenge the FTT's conclusion concerning its powers to amend the return.

Application to withdraw appeal

6. We mention at this stage that HMRC sought, in late December 2016, to withdraw their appeal. Their rationale for wishing to take this course is set out in their letter to the tribunal dated 22 December 2016. In that letter, HMRC refer to Decision [39] where the FTT said this:

> "**Decision**
>
> 39 In accordance with s 50(6) and (7) TMA (including those subsections as applied by paragraph 8 Schedule 2 SSCBA) we consider that the appellant is

> neither overcharged nor undercharged by a self-assessment as amended by a s 28A closure notice, so the self-assessment charging the sum of nil stands good."

7. HMRC then note that the only self-assessment being considered by the FTT was the self-assessment as amended by HMRC's closure notice. The FTT considered that it had no power to adjust that self-assessment (whether by increasing or decreasing the assessment) and did not do so. The result of the appeal was to leave the self-assessment as it was. HMRC argue that, although not expressly stated, the FTT in effect rejected the appeal against the self-assessment (as amended by the closure notice). Accordingly, HMRC suggest that they were the winners of the appeal with the result that the self-assessment stands good in the amount of income tax overpaid of £821.07 with further tax still to pay (taking account of the £6,040 already repaid by HMRC to Mr Walker) of £5,218.93. HMRC take the position that, following the decision of Nugee J in *Price v HMRC* [2015] UKUT 0164 (paragraph 31*ff*), they must withdraw the appeal. The principle which that decision illustrates is that an appeal lies against a judgment or order and not against the reasons given by the judge or tribunal. The court will not entertain an appeal against an order which a party has obtained in their own favour: see *Lake v Lake* [1955] P 336.

8. *Lake v Lake* was referred to in *Cie Noga d'Importation et d'Exportation SA v 12 Australia and New Zealand Banking Group Ltd* [2002] EWCA Civ 1142 ("***Noga***"). In his judgment in that case, Waller LJ explained that

> "*Lake v Lake* [1955] P 336 properly understood means that if the decision when properly analysed and if it were to be recorded in a formal order would be one that the would-be appellant would not be seeking to challenge or vary, then there is no jurisdiction to entertain an appeal… That this is so is not simply by virtue of interpretation of the words 'judgment' or 'order', but as much to do with the fact that the court only has jurisdiction to entertain 'an appeal'. A loser in relation to a 'judgment' or 'order' or 'determination' has to be appealing if the court is to have any jurisdiction at all. Thus if the decision of the court on the issue it has to try (or the judgment or order of the court in relation to the issue it has to try) is one which a party does not wish to challenge in the result, it is not open to that party to challenge a finding of fact simply because it is not one [sic – this should no doubt be "is one"] he or she does not like."

9. HMRC's application to withdraw their appeal was refused by Judge Berner. He proceeded on the footing that it was HMRC's assumption, which it clearly was, that the effect of the Decision was that HMRC had won the appeal. Judge Berner, however, was not satisfied that the assumption was correct. It appeared to him to be contrary to the granting of permission to appeal by the FTT which would not have been granted if HMRC's assumption were correct. He took the view that it would not be in the interests of justice for the tribunal to consent to the withdrawal of an appeal on a basis which is not clearly correct. It would leave open a question which would be likely to give rise to further dispute were HMRC to seek enforcement of the *prima facie* liability under the self-assessment return as amended by the closure notice.

10. We accept that, in one sense, HMRC can be said to have won the appeal before the FTT in that the FTT has not amended the self-assessment return. But they lost on a major issue, namely the correct quantum of the deduction of tax paid at source under the CIS. In any case, HMRC as a responsible tax-gathering body, have a proper

concern to see that the law is interpreted properly and to see that the correct amount of tax is collected. Unlike in cases such as *Lake v Lake* and *Noga*, HMRC do seek to challenge the decision even though the amount of money which it can, apparently, claim pursuant to the self-assessment as amended by HMRC is larger than the amount which it could properly claim if effect is to be given to the FTT's findings of fact. Quite reasonably, HMRC seek to overturn the FTT's decision concerning the extent of its powers in order to establish the availability of a straightforward way of collecting the correct amount of tax without the need to resort to the exercise of a discretion (*ie* in the present case to collect only the correct amount of money rather than the amount to which they are apparently entitled under the amended self-assessment return) pursuant to their powers of general administration under TMA. We consider that HMRC were entitled to bring their appeal and that we have jurisdiction to hear it. We do not consider that HMRC's analysis in their application to withdraw the appeal is correct; we think that Judge Berner was correct to refuse them to withdraw the appeal on the basis contended for.

The statutory framework

11. We return to the substantive appeal and now address the statutory framework. The sections referred to are those of the TMA. In considering these provisions, it is important to recognise that there are two separate aspects of relevance. The first aspect is the self-assessment return; we are concerned with the obligation of the taxpayer to make a return, the contents of that return, the powers of HMRC to amend the return and a taxpayer's rights of appeal in relation to amendments, in particular amendment by a closure notice and a challenge to the contents of a closure notice. The second aspect is the liability of the taxpayer or HMRC to make payment or repayment as the result of an original self-assessment return or any subsequent amendment to it.

12. The obligation to make a self-assessment return is found in section 8 which includes the following:

> (1) For the purposes of establishing the amount in which a person is chargeable to income tax and capital gains tax for a year of assessment and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board –
>
> > (a) to make and deliver to the officer …. a return containing such information as may reasonably be required in pursuance of the notice, and
> >
> > (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be required.
>
> ……..
>
> (1AA) For the purposes of subsection (1) above –
>
> > (a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts which take into account any relief or allowance a claim for which is included in the return; and
> >
> > (b) the amount payable by a person by way of income tax is the

> difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source…...
>
> ……
>
> (5) In this section and sections 8A, 9 and 12AA of this Act, any reference to income tax deducted at source is a reference to income tax deducted or treated as paid on any income."

13. As to subsection (1AA)(b), the amount in which the taxpayer is chargeable may be smaller than the amount of income tax already deducted at source. The taxpayer will then have a right to repayment of the difference under other provisions. As to subsection (5), a deduction by an employer under the CIS falls within the subsection since, under section 62(2) Finance Act 2004, a deduction in the case of a subcontractor who is an individual, is treated as being income tax paid in respect of the subcontractor's relevant profits or, under section 62(3), if the sum is more than sufficient to discharge his liability in respect of those profits, so much of the excess as is required to discharge any liability for Class 4 NICs is to be treated as a Class 4 NIC in respect of those profits.

14. Section 9 (headed "Returns to include self-assessment") provides as follows:

> " … every return under section 8 … of this Act shall include a self-assessment, that is to say –
>
> (a) an assessment of the amounts in which, on the basis of the information contained in the return and taking into account any relief or allowance a claim for which is included in the return, the person making the return is chargeable to income tax and capital gains tax for the year of assessment; and
>
> (b) an assessment of the amount payable by him by way of income tax, that is to say, the difference between the amount in which he is assessed to income tax under paragraph (a) above and the aggregate amount of any income tax deducted at source …
>
> but nothing in this subsection shall enable a self-assessment to show as repayable any income tax treated as deducted or paid by virtue of [provisions not relevant to the present appeal]."

15. It can be seen that both sections 8 and 9 draw a distinction between the amounts chargeable to income tax and capital gains tax and the amounts payable by way of income tax. And so under section 9(1), a self-assessment comprises two elements: (i) an assessment of the amounts chargeable to income tax and capital gains tax and (ii) an assessment of the amount payable by way of income tax. The amount payable reflects the aggregate amount of any income tax deducted at source which, as a result of section 8(5), includes income tax deducted or treated as paid on any income.

16. Section 9(1)(b) refers to the amount payable by way of income tax as being the

difference between the amount assessed to income tax under paragraph (a) and the aggregate amount of tax deducted at source and certain tax credits. The latter might exceed the former. The tailpiece to subsection (1) envisages the possibility of a self-assessment showing an amount as repayable, but excludes certain items from that treatment. Deductions under the CIS are not within that exclusion; a self-assessment return can, therefore, show as repayable an excess of CIS deductions over the income tax which would otherwise be payable.

17. Section 9ZA allows a person to amend, within a specified time-limit, his return under section 8 by notice to an officer of the Board. Section 9ZB allows an officer of the Board to amend, within a specified time, a return under section 8 to correct (a) an obvious error or (b) anything else in the return that the officer has reason to believe is incorrect.

18. Section 9A(1) authorises the commencement of an enquiry into a return under section 8. Under subsection (4) an inquiry extends, among other matters to anything contained in the return or required to be contained in the return, including any claim or election included in the return: see subsection (4)(a).

19. An enquiry under section 9A(1) is completed when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions: see section 28A(1). A closure notice must either (a) state that no amendment of the return is required or (b) make the amendments of the return required to give effect to his conclusions: see section 28A(2).

20. One provision which deals with recovery of overpayment of tax is section 30, which provides that where an amount of income tax or capital gains tax has been repaid to any person which ought not to have been repaid to him, that amount of tax may be assessed and recovered as if it were unpaid tax. This provision does not apply where the amount of tax which has been repaid is assessable under section 29 (*ie* a discovery assessment). And subsections (2) to (8) of section 29 apply in relation to an assessment under section 30(1) as they apply in relation to an assessment under section 29(1): the circumstances in which HMRC can make a discovery assessment are thus circumscribed and there can be cases where an amendment to a return pursuant to a closure notice could be made where it would not be possible, as an alternative route to recovery, to make an assessment under section 30.

21. Under section 31(1)(b), the taxpayer is given a right of appeal against "any conclusion stated or amendment made by a closure notice under section 28A".

22. The only relevant provisions to which we have been referred concerning the remedy in case of a successful appeal are found in section 50 (and we know of no other relevant provision). The relevant provisions include the following:

> "(6) If, on an appeal notified to the tribunal, the tribunal decides—
>
> (a) that, ... the appellant is overcharged by a self-assessment;
>
> (b) … ; or
>
> (c) that the appellant is overcharged by an assessment other than a self-

assessment,

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

(7) If, on an appeal notified to the tribunal, the tribunal decides

(a) that the appellant is undercharged to tax by a self-assessment

(b) …; or

(c) that the appellant is undercharged by an assessment other than a self-assessment,

the assessment …. shall be increased accordingly.

(7A) If, on an appeal notified to the tribunal, the tribunal decides that a claim or election which was the subject of a decision contained in a closure notice under section 28A of this Act should have been allowed or disallowed to an extent different from that specified in the notice, the claim or election shall be allowed or disallowed accordingly to the extent that the tribunal decides is appropriate, but otherwise the decision in the notice shall stand good.

……..”

By virtue of paragraph 8 Schedule 2 Social Security Contributions and Benefits Act 1992, section 50 applies to Class 4 NICs as it applies to income tax, with any necessary modifications. We note that by section 16(1)(a) of that Act, provisions as to assessment of income tax in the Income Tax Acts (which includes TMA) apply to Class 4 NICs with any necessary modifications.

23. It is clear that the reference in section 50(6)(a) to a self-assessment is, or at least includes, a reference to a self-assessment as amended by HMRC as the result of a closure notice. A taxpayer cannot appeal his own self-assessment; but where a closure notice results in an amended assessment showing an increase in the assessment, he is able to appeal.

24. The provisions which we have so far considered all relate to contents of a return and self-assessment and to appeals from any conclusion stated in a closure notice. There are, of course, also provisions dealing with payment and collection of tax. Of relevance in the present case is section 59B, which includes the following:

“(1) Subject to subsection (2) below, the difference between--

(a) the amount of income tax and capital gains tax contained in a person's self-assessment under section 9 of this Act for any year of assessment, and (b) the aggregate of any payments on account made by him in respect of that year (whether under section 59A of this Act or otherwise) and any income tax which in respect of that year has been deducted at source,

shall be payable by him or (as the case may be) repayable to him as mentioned in

subsection (3) or (4) below …

[(3) and (4) deal with the timing of payment and repayments]

(4A) Where in the case of a repayment the return on the basis of which the person's self-assessment was made under section 9 of this Act is enquired into by an officer of the Board –

(a) nothing in subsection (3) or (4) above shall require the repayment to be made before the day on which, by virtue of section 28A(1) of this Act, the officer's enquiries are treated as completed; but

(b) the officer may at any time before that day make the repayment, on a provisional basis, to such extent as he thinks fit.

(5) An amount of tax which is payable or repayable as a result of the amendment or correction of a self-assessment under—

(a) section 9ZA …. or 28A of this Act (amendment or correction of return under section 8 or 8A of this Act), or

(b) …

is payable (or repayable) on or before the day specified by the relevant provision of Schedule 3ZA to this Act.

(7) In this section any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income."

25. Section 59B(1) envisages the possibility not only of a payment by a taxpayer to HMRC but also of a payment to a taxpayer by HMRC, in each case based on the figures contained in the original self-assessment return. Section 59B(2) and (3) make provision for the timing of the payment or repayment. Section 59B(5) applies where there is an amendment or correction to a self-assessment return under sections 9ZA or 28A and, as a result, an amount of tax becomes payable or repayable (that is to say, an amount reflecting the difference between the amount payable or repayable under the original assessment and the amount payable or repayable under the amended or corrected assessment). It makes provision for the timing of the payment or repayment of that amount.

26. Where an actual payment is made, whether by the taxpayer or by HMRC, such payment must be taken into account in determining at any stage the state of account between the taxpayer and HMRC and what is owing in either direction. That is given express articulation by subsection (4A)(b) in the particular circumstances of a provisional payment during the course of an enquiry.

Discussion

27. In the present case, Mr Walker's original self-assessment return showed an amount of income tax due. Had his original self-assessment return not been subject to an enquiry, there is no doubt that the sum owing to him, the amount "repayable" within

section 59B(1), would have been £6,040. Likewise, if Mr Walker had not appealed against the closure notice, the amount of his entitlement to repayment (ignoring for the moment the £6,040 actually paid) under section 59B would have been £821.07. However, on an appeal from the conclusions of the closure notice, the FTT's findings of fact result in an entitlement to repayment of £3,781. On that footing, Mr Walker had been overpaid by HMRC £2,259 (being the difference between the £6,040 actually paid and the £3,781 calculated by the FTT).

28. HMRC have a policy of "process now, check later", which we have mentioned at paragraph 2(3) above. Under this policy, where an individual's self-assessment return shows an amount owing to the taxpayer, HMRC give effect to that return by making a payment to the taxpayer of the amount shown. HMRC's position is that, if it subsequently transpires that the payment should not, either in whole or in part, have been made, they are entitled to recover the overpayment. This is so, in particular, in the situation where a closure notice results in an amendment to the return which shows that an overpayment has been made. We do not decide whether HMRC's position is correct: if there were to be a dispute about that, it is one which would need to be resolved in enforcement proceedings, although our own view (without deciding the point) is that HMRC's position is correct. In other words, the rights of the taxpayer and HMRC in relation to payment and repayment are determined by the contents of the self-assessment return as amended from time to time.

29. Applying that to Mr Walker's case, if he had not appealed the closure notice, the amount of tax shown as overpaid on the self-assessment return would have been £821.07. This would have formed the basis of the account between HMRC and Mr Walker with the result that HMRC would be entitled (assuming HMRC are correct in the position adopted by them which we have just mentioned) (i) to take credit for the difference between that figure and the £6,040 in fact paid when striking the balance owing one way or the other and (ii) accordingly to recover anything then shown to be owing to them.

30. HMRC contend that the position is no different when the correct figures are established as the result of an appeal from a closure notice. Once the FTT has decided as a matter of fact what the correct figures are (as it has done in the present case), it is argued that the FTT must give effect to those conclusions by amending the self-assessment return. Once that is done, the position is no different in principle from that which obtains in relation to any other amendment to the return, in particular an amendment made as a result of a closure notice.

31. The FTT held, however, that it had no power to amend the self-assessment. The FTT considered that the powers available to it were restricted to those found in section 50(6) and (7) and held that those powers did not enable the necessary amendments to the self-assessment return to be made. Those subsections were considered in In *Tower MCashback LLP v HMRC* 80 TC 641. At p 735, Henderson J said:

> "… the wording of section 50(6) and (7), which applies alike to appeals relating to self-assessments and appeals against assessments made by an officer of HMRC, reflects similar wording of very long standing which goes back long before the introduction of self-assessment. There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the

> Commissioners in exercise of their statutory functions to have regard to that public interest."

32. The second sentence in the passage above was expressly approved by Lord Walker in the Supreme Court appeal of that case: 80 TC 641, at p 768 para 15.

33. Given the general principle to which Henderson J referred, we consider that section 50(6) and (7) should be construed, insofar as their language sensibly allows, so as enable the FTT to amend a self-assessment return to give effect to the decision which they have made in relation to an appeal which is properly before them. In the present case, it was within the appellate jurisdiction of the FTT to make the decisions of fact which it did since those findings were made in an appeal "against… any conclusion stated or amendment made by a closure notice under section 28A". It would, as we see it, be a surprising result if the FTT were then unable to give effect to its findings by amending the return.

34. It is to be noted that section 50 is not concerned only with appeals in relation to self-assessment returns let alone only appeals in relation to closure notices. It is not, therefore, to be expected that there should be precise correlation between the provisions of section 50 and those of sections 8 and 9. However, there does appear to be a close correlation between section 9(1)(a) and section 50(7)(a). Both of those provisions are concerned with a charge to tax: section 9(1)(a) refers to an assessment of the amount to which a person "is chargeable to income tax and capital gains tax" and section 50(7)(a) refers to a person being "undercharged to tax by a self-assessment".

35. Accordingly, if the FTT finds on an appeal that the self-assessment with which it is concerned (in the present case, the assessment as amended as a result of the closure notice) states too small an amount as the amount chargeable to income tax, there is power under section 50(7)(a) to increase the assessment, that is to say in the context of a self-assessment, the assessment under section 9(1)(a).

36. An overcharge to tax will occur, to give an example, where HMRC amend a self-assessment to increase the amount of profit shown on a return (for instance because of an alleged under-declaration of turnover or disallowance of claimed expenses) but where, on appeal, the FTT finds that the taxpayers' figures were correct. In such a case, the taxpayer is "overcharged" within the meaning of section 50(6)(a); and what he is overcharged to is the amount chargeable to income tax.

37. But section 50(6)(a) is not restricted to an overcharge in the amount assessed in accordance with section 9(1)(a). It will also include, in our view, an excessive assessment in accordance with section 9(1)(b). This will occur, to give another example, where (i) the original assessment shows a positive amount as payable by way of income tax (ii) an amendment by HMRC increases that amount, for instance by disallowing part of a claim for tax deducted at source but (iii) the FTT finds on appeal that the taxpayer was entitled to the full deduction which he claimed. In such a case, the taxpayer is "overcharged" within the meaning of section 50(6)(a) by the amended assessment; and what he is overcharged to is the amount "payable" by way of income tax within section 9(1)(b). We agree with what the FTT said in Decision [31] at least to the extent that "overcharge" in section 50(6)(a) covers an overassessment of amounts payable within section 9(1)(b).

38. The FTT, however, saw as a consequence of this interpretation that there is no scope for saying that any amount is "charged" (we would say "overcharged") if the tax deducted at source exceeds the amount in which the person is chargeable to income tax. The FTT reasoned that it was

> "irrelevant so far as s 50 is concerned that a self-assessment (including as amended) may show an amount repayable. Such an amount is given effect to under s 59B TMA and that section is not justiciable before this Tribunal, whether it provides for an amount to be payable or repayable." [Decision [32]]

39. It is, of course, correct that section 59B is not justiciable before the FTT, being concerned with matters of collection and enforcement. But that is beside the point. The appeal in the present case was against the conclusions of the closure notice and the issue is whether the FTT's findings of fact can be given effect by an amendment to the self-assessment return. The impact of such an amendment on the parties' respective rights and obligations under section 59B as a result of such an amendment is an entirely separate, and subsequent, matter.

40. As we have already explained at paragraph 16 above, an amount may be shown in a self-assessment return as income tax repayable, for instance where CIS deductions exceed the income tax which would otherwise be payable. In our view, the word "payable" in section 9(1)(b) is apt to include "repayable". Just as "overcharge" in section 50(6)(a) includes an over-assessment under section 9(1)(b) of amounts payable (see paragraph 37 above), so too "overcharge" in section 50(6)(a) includes, in our view, an under-assessment of amounts repayable by HMRC: if a taxpayer receives less by way of repayment than he is entitled to receive, he can properly be described as having been overcharged. If it were to be suggested that the repayment is not a repayment of tax, we would disagree. What Mr Walker is entitled to is a payment of a sum of money which has been deducted from payments to him by subcontractors and which is treated as payment of income tax. Such a repayment must, we think, have the character of a repayment of tax. In any case, section 50(6)(a) does not refer to an overcharge to tax: it refers simply to overcharge by the self-assessment.

41. We therefore disagree with the contrary conclusion of the FTT and reject what was seen as the consequence of the view that "charge" covered section 9(1)(b) points to the conclusion that there is no scope for saying that any amount is "charged" if the tax deducted at source exceeds the amount in which the person is chargeable to income tax.

42. We do not agree with the reasoning in Decision [33]. The FTT saw the amount in which the appellant was assessed to tax as nil. But that is not correct. The assessment required by section 9(1)(a) is of the amount in which Mr Walker is charged to tax for the purposes of section 50(6)(a). That figure is not nil on any view. Mr Walker's figure was £390 and HMRC's figure was £2,033.40 (excluding Class 4 NICs in each case). The FTT's figure was £2,704 according to calculation in Decision [25]. The FTT has, accordingly, determined that Mr Walker has been undercharged to tax even by HMRC's amendments to his self-assessment: that part of the Decision can be reflected in an amendment to the self-assessment pursuant to section 50(7)(a). The amount of tax actually payable by Mr Walker (in contrast with repayable to him) may be nil; but the amount of the assessment required by section 9(1)(b) can result in a repayment to Mr Walker. This was the position under both his original assessment and under HMRC's amended assessment. It would also be the case if the FTT were able to

amend the assessment to reflect its own figures. None of these results in a nil assessment of the amount payable including an amount repayable.

43. Our interpretation does not put any, or any undue, strain on the words used in section 50(6) and (7); it produces a sensible result. The FTT's conclusion, in contrast, has the startling consequence that it is unable to afford a remedy to Mr Walker. To give him a full remedy, the FTT would need further to amend his self-assessment return, as already amended by HMRC as a result of the closure notice, by (i) including the amount of the CIS deductions which it has determined were made and (ii) adjusting Mr Walker's profits, so as to produce the sum payable of £3,718 (a sum which, we note, correctly takes no account of the payment of £6,040, a sum which has no part to play in what should properly be included in the self-assessment return). According to the FTT, it cannot do so. But even if the FTT is right that it cannot give effect to (i), we see no reason why it should not, under section 50(7)(a) amend the return by increasing the assessment required by section 9(1)(a) to give effect to its factual findings. That would put Mr Walker in a worse position, so far as the contents of the self-assessment return are concerned, than if he had not appealed in the first place in spite of having been successful in obtaining findings of fact which ought, in principle, to result in an increase of the repayment to which he is entitled. This would be a bizarre result.

44. Our interpretation results in a sensible application of section 59B. Once an amendment is made to the self-assessment return by section 50(6) and (7), section 59B then applies to the amended return just as it does to an original return or to an amendment following a closure notice which is not appealed. Section 59B(5) expressly contemplates (in paragraph (a)) an amendment to a self-assessment under section 28A as the result of a closure notice. We prefer a construction of section 50(6) and (7) which allows all amendments under section 28A to be brought within section 59B(5). The FTT saw the provision as directed mainly at those cases where an increase of tax results from an amendment. That may be so, but that is no reason to adopt a restrictive interpretation of section 50(6) and (7).

45. We also reject the apparent reliance by the FTT on the possible alternative route said to be open to HMRC, namely an assessment under section 30 which we have considered at paragraph 20 above. It may be that, in some circumstances, that section could be relied on, but in others it could not. In the present case, there is nothing to support a suggestion that section 30 could have been relied on.

46. There may be reasons why HMRC are in practice unable to recover the amounts which, according to the return in the form in which it remains after the Decision, they are entitled. Mr Walker's defence to a claim for the full amount would not be straightforward and would, in essence, depend on the enforcement of public law rights against HMRC, alleging unreasonable conduct in attempting to enforce an amount of tax which ought not properly to be due. We would strive to avoid forcing HMRC and Mr Walker along such a path. Our interpretation of the relevant provisions avoids this result.

Conclusions

47. HMRC's appeal is allowed. The FTT was wrong to conclude that it had no power to amend Mr Walker's self-assessment return to reflect its findings of fact. The FTT

should have made such amendments resulting in a figure of £3,781 owing by HMRC to Mr Walker. It is within our power, on appeal, to do so. We accordingly exercise our powers under section 50(6) and (7) as follows:

(1) increasing turnover to £41,747;

(2) increasing deduction of tax to £7,724; and

(3) expenses adjusted to £20,750.

The result, according to the calculations at Decision [25] is a sum owing to Mr Walker of £3,781 (no account being taken of the £6,040 already paid to him).

Costs

48. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision. As any order in respect of costs will, if not agreed, be for a detailed assessment, the party making an application for such an order need not provide a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The Hon Mr Justice Warren

Judge Greg Sinfield

Release date: 01 February 2017