[2018] UKUT 38 (TCC)

Appeal number: UT/2016/0131

INCOME TAX – discovery assessment – whether "discovery" – whether insufficiency of tax brought about deliberately

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellant

- and -

RAYMOND TOOTH

Respondent

TRIBUNAL: The Honourable Mr. Justice Marcus Smith
Judge Charles Hellier

Sitting in public at The Rolls Building, Fetter Lane, London EC4A 1NL on 4 December 2017

Richard Vallat, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellant

Julian Ghosh, Q.C. and Charles Bradley, instructed by Pinsent Masons LLP, for the Respondent

DECISION

A. INTRODUCTION

1. On 24 October 2014, the Appellant – the Commissioners for Her Majesty's Revenue and Customs ("HMRC") – made a "discovery" assessment under section 29 of the Taxes Management Act 1970 ("TMA") in respect of income tax for 2007-2008 in the sum of £475,498.20 in relation to the Respondent's (Mr. Tooth's) participation in a failed tax avoidance scheme (the "Assessment").

2. A self-assessment had been contained in Mr. Tooth's tax return, which was made under section 8 TMA.

3. Section 29 TMA provides (so far as material):

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

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

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

(c) that any relief which has been given is or has become excessive

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

…

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

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

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

unless one of the two conditions mentioned below is fulfilled.

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

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

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

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

…"

4. HMRC raised the Assessment on the basis that:

(1) An officer of the Board or the Board had discovered, as regards Mr. Tooth and the year of assessment 2007-2008, that an assessment to tax was or had become insufficient within section 29(1)(b) TMA.

(2) Mr. Tooth had made and delivered a return within section 29(3) which satisfied the condition within section 29(4) TMA, namely that the insufficiency of the assessment had been brought about deliberately by Mr. Tooth or a person acting on his behalf.

5. Before the First-tier Tribunal Tax Chamber (the "FTT"), Mr. Tooth contended that these requirements of section 29 TMA were not met in two regards:

(1) First, because there had been no "discovery" within the meaning of section 29(1) TMA.

(2) Secondly, because the situation within section 29(1) TMA (i.e. that the assessment to tax was or had become insufficient) had not been brought about deliberately by Mr. Tooth or a person acting on his behalf.

In order successfully to challenge the Assessment it was only necessary for Mr. Tooth to succeed on one of these grounds.

6. In a decision dated 25 October 2016 (the "Decision"), the FTT determined that:

(1) HMRC had made a discovery within the meaning of section 29(1) TMA.[1]

(2) But that the situation had not been brought about deliberately so that section 29(4) TMA was not satisfied.[2]

Accordingly, Mr. Tooth's appeal against the Assessment was allowed by the FTT.[3] The Assessment was, thus, invalid.

7. HMRC now appeal against this decision, contending that the FTT was correct to find that there had been a discovery, but had erred in law in holding that section 29(4) (the requirement of "deliberateness") was not satisfied. Permission to appeal was granted by the FTT.

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[1] See Decision at [43] to [46].

[2] See Decision at [47] to [58].

[3] Decision at [59].

8. Mr. Tooth – in his response to HMRC's notice of appeal – contended the precise converse: namely that the FTT had erred in holding that there had been a discovery, but had correctly held that the requirement of "deliberateness" was not satisfied.

9. The "discovery" assessment provisions in the TMA constitute one route by way of which HMRC can review past assessments to tax or claims to relief. Two other routes – enquiries under Schedule 1A TMA (into claims) and enquiries into a return under s 9A TMA – also exist. Each route has a prescribed time limit. In other words, each route permits HMRC to review past assessments to tax up to a certain temporal limit.

10. One aspect of this appeal is very much about such temporal limits: there is no dispute that absent limitation periods restricting the extent to which HMRC can inquire into past assessments to tax, and a question as to when and whether the officer had made a discovery, the Assessment was soundly based. In other words, it is common ground that Mr. Tooth's self assessment was or had become insufficient. The questions before the FTT, and before us, were whether the Assessment lies sufficiently far in the past to protect it from further inquiry, and whether the discovery condition for the making of the assessment had been satisfied.

11. In the first instance, therefore, it is necessary to consider the various provisions that exist delimiting HMRC's ability to consider claims and past assessments. These provisions are considered in Section B.

12. We then consider – in Section C – the findings of fact made by the FTT.

13. Sections D and E then consider, in turn, the points at issue on this appeal. Section D considers the question of "deliberateness"; and Section E considers the question of "discovery".

B. THE RELEVANT "LIMITATION" PROVISIONS

(1) Introduction

14. As noted, there are three relevant sets of provisions for reviewing assessments to tax:

(1) An enquiry under Schedule 1A TMA.

(2) An enquiry into a return under section 9A TMA.[4]

(3) A discovery under section 29 TMA.

[4] This is the relevant provision in the case of self-assessments, which we are here concerned with. All assessments which are not self-assessments are made by an officer of HMRC. The normal time limit for making such an assessment is within 4 years after the end of the tax year: section 34 TMA. Once an enquiry has been notified, there is no statutory time limit within which it must be completed.

15. We consider these three sets of provisions below. As the ambit of Schedule 1A TMA and section 9A TMA is mutually exclusive, it is convenient to consider these sets of provisions together. We then consider the section 29 TMA regime.

(2) The Schedule 1A TMA and section 9A TMA regimes

16. Section 9A provides that an officer of the Board may enquire into a return made under section 8 or section 8A TMA or into any amendment of such a return. That enquiry extends to anything contained in the return or required to be contained in the return, including any claim or election included in the return.

17. The time limits for initiating such an enquiry (which is done by way of a notice to the taxpayer) are relatively tight. Essentially, the period for giving such a notice is 12 months from the filing of the return, provided the return is filed in time. Provision is made for an extension, if the return is filed late.[5]

18. An enquiry under Schedule 1A TMA can only apply as regards any claim which is not included in a return. It follows, therefore, that where a claim is made in a return made under section 8 or 8A TMA, no enquiry under Schedule 1A TMA can be made. To this extent, therefore, the Schedule 1A TMA enquiry regime gives way to the enquiry regime under section 9A TMA.

19. The time limit for such a Schedule 1A TMA enquiry is, again, relatively short. In broadbrush terms, it is essentially 12 months from the date of the claim.[6]

(3) The borderline between the Schedule 1A TMA and section 9A TMA regimes

20. The enquiry processes under section 9A TMA and Schedule 1A TMA are thus mutually exclusive. Which regime applies depends on whether the taxpayer has made a claim in a return (in which case section 9A applies) or whether that claim is not included in a return (in which case Schedule 1A TMA applies).

21. The question of what was, and what was not, included in a return, was considered in *Revenue and Customs Commissioners v. Cotter* [2013] UKSC 69, [2013] 1 WLR 3514. Coincidentally, *Cotter* concerned exactly the same tax avoidance scheme as Mr. Tooth participated in. There is, therefore, considerable factual similarity between the Assessment of Mr. Tooth, and that considered by the Supreme Court in the case of Mr. Cotter.

22. The borderline between the two regimes turns on what constitutes a "return" under section 8 or section 8A TMA, and this borderline was specifically considered in *Cotter*, which held that a "return" did not comprise

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[5] See s 9A(2) TMA.

[6] See paragraph 5(2) of Schedule 1A TMA.

the entirety of the material or information set out in a return, but only that information that was submitted for the purpose of establishing the amount in which a person is chargeable to tax for a year of account. The relevant paragraphs in the decision of Lord Hodge JSC, giving the judgment of the Supreme Court, are set out below:

"24. Where, as in this case, the taxpayer has included information in his tax return but has left it to the revenue to calculate the tax which he is due to pay, I think that the revenue is entitled to treat as irrelevant to that calculation information and claims, which clearly do not as a matter of law affect the tax chargeable and payable in the relevant year of assessment. It is clear…that the purpose of a tax return is to establish the amounts of income tax and capital gains tax chargeable for a year of assessment and the amount of income tax payable for that year. The revenue's calculation of the tax due is made on behalf of the taxpayer and is treated as the taxpayer's self-assessment…

25. The tax return form contains other requests, such as information about student loan repayments (page TR2), the transfer of the unused part of a taxpayer's blind person's allowance (page TR3) or claims for losses in the following tax year (box 3 on page Ai3) which do not affect the income tax chargeable in the tax year which the return form addresses. The word "return" may have a wider meaning in other contexts within the [TMA]. But, in my view, in the context of sections 8(1), 9, 9A and 42(11)(a) [TMA], a "return" refers to the information in the tax return form which is submitted for "the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax" for the relevant year of assessment and "the amount payable by him by way of income tax for that year"…

26. In this case, the figures in box 14 on page CG1 and in box 3 on page Ai3 were supplemented by the explanations which Mr. Cotter gave of his claim in the boxes requesting "any other information" and "additional information" in the tax return. Those explanations alerted the revenue to the nature of the claim for relief. It concluded, correctly, that the claim under section 128 of the 2007 Act in respect of losses incurred in 2008/2009 did not alter the tax chargeable or payable in relation to 2007/2008. The revenue was accordingly entitled and indeed obliged to use Schedule 1A [TMA] as the vehicle for its inquiry into the claim…

27. Matters would have been different if the taxpayer had calculated his liability to income and capital gains tax by requesting and completing the tax calculation summary pages of the tax return. In such circumstances the revenue would have his assessment that, as a result of the claim, specific sums or no sums were due as the tax chargeable and payable for 2007/2008. Such information and self-assessment would in my view fall within a "return" under section 9A [TMA] as it would be the taxpayer's assessment of his liability in respect of the relevant tax year. The revenue could not go behind the taxpayer's self-assessment without either amending the tax return (section 9ZB [TMA] …or instituting an inquiry under section 9A [TMA]."

23. The line drawn by Lord Hodge is, thus, extremely clear:

(1) Where the taxpayer has left it to HMRC to calculate the tax he is due to pay, the "return" for purposes of section 9A TMA comprises that

material within the document which affects the income tax chargeable in the tax year which the return form addresses.

(2) Where the taxpayer has calculated his own tax liability, the material used to effect that calculation, as well as the tax calculation summary pages of the return, would comprise the "return" for the purposes of section 9A TMA.

24. It is necessary to explain Lord Hodge's reference to section 128 in [26] of *Cotter*. Section 128 of the Income Tax Act 2007 makes provision for employment loss relief against general income. The precise detail does not matter, but in *Cotter* Lord Hodge held (at [16]) that a taxpayer, who had suffered an employment loss in a later year ("year 2") could attribute that loss to an earlier year of assessment ("year 1") and obtain relief, but that such relief would not cause any change in the tax chargeable and payable in respect of year 1. It was for this reason that Lord Hodge held (at [26]) that Mr. Cotter's "claim under section 128 of the 2007 Act in respect of losses incurred in 2008/2009 did not alter the tax chargeable or payable in relation to 2007/2008. The revenue was accordingly entitled and indeed obliged to use Schedule 1A [TMA] as the vehicle for its inquiry into the claim".

(4) The time limits for a "discovery" assessment

25. So far as material to the present case, the time limits that apply in the case of a discovery assessment under section 29 TMA are:

(1) Save where a loss of tax has been brought about carelessly or deliberately (when longer time limits apply), the time limit for making an assessment is not more than 4 years after the end of the year of assessment to which the assessment relates.[7]

(2) Where the loss of tax has been brought about carelessly by the taxpayer,[8] the time limit for making an assessment is not more than 6 years after the end of the year of assessment to which the assessment relates.[9]

(3) Where the loss of tax has been brought about deliberately by the taxpayer,[10] the time limit for making an assessment is not more than 20 years after the end of the year of assessment to which the assessment relates.[11]

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[7] Section 34(1) TMA.

[8] "Taxpayer" includes not merely the person subject to the assessment, but any person acting on his behalf: section 36(1B) TMA.

[9] Section 36(1) TMA.

[10] "Taxpayer" includes not merely the person subject to the assessment, but any person acting on his behalf: section 36(1B) TMA.

[11] Section 36(1A) TMA.

26. Section 118 TMA deals with interpretation. So far as material, it provides:[12]

"(5) For the purposes of this Act a loss of tax or a situation is brought about carelessly by a person if the person fails to take reasonable care to avoid bringing about that loss or situation.

(6) Where –

(a) information is provided to Her Majesty's Revenue and Customs.

(b) the person who provided the information, or the person on whose behalf the information was provided, discovers some time later that the information was inaccurate, and

(c) that person fails to take reasonable steps to inform Her Majesty's Revenue and Customs,

any loss of tax or situation brought about by the inaccuracy shall be treated for the purposes of this Act as having bee brought about carelessly by that person.

(7) In this Act references to a loss of tax or a situation brought about deliberately by a person include a loss of tax or a situation that arises as a result of a deliberate inaccuracy in a document given to Her Majesty's Revenue and Customs by or on behalf of that person."

C. FINDINGS OF FACT MADE BY THE FTT

(1) Mr. Tooth's participation in the "Romangate" scheme

27. Towards the end of 2008, Mr. Tooth sought tax planning advice from Grunberg & Co Chartered Accountants as to how he could legitimately reduce his income tax liability for 2007-2008. He was advised of the "Romangate" scheme – which, in fact, was the scheme Mr. Cotter participated in and which was considered in *Cotter* – promoted by NT Advisers.[13]

28. In early 2009, Mr. Tooth attended a meeting at which the Romangate scheme was explained to him. In particular, he understood as a result of this meeting that, if he participated in the scheme, employment related losses of £1,185,987 would be generated for 2008-2009. These could then be set-off

[12] Sections 118(5) to (7) were amended, by way of amendments taking effect on 1 April 2010. They, therefore, apply in a retrospective fashion to Mr. Tooth's tax return, submitted in January 2009. Mr. Ghosh, Q.C., on behalf of Mr. Tooth, submitted that whilst the new wording applied to Mr. Tooth, it should be construed in light of the legislation it replaced, because of the retrospective effect. We do not accept this submission. Whilst there is, undoubtedly, a presumption that legislation should not be read as retrospective unless that is the clear legislative intent, if (as here) the legislation is retrospective, we see no basis for construing the words of the statute other than in the ordinary way.

[13] Decision at [7].

against income recorded in his 2007-2008 self-assessment return, thereby reducing his tax liability for that year.[14]

29. Having received advice that the Romangate scheme, although a complex tax planning arrangement, had a reasonable prospect of success, and knowing it had been sanctioned by leading counsel, Mr. Tooth entered into it on 23 January 2009.[15]

30. In terms of tax payment, participants in the Romangate scheme were told:

(1) That it was recommended that participants in the scheme should settle their tax bills in full and seek repayment in due course once agreement had been reached with HMRC on the efficacy of the arrangement.

(2) That it was recognised, however, given the view of tax counsel that any challenge to the scheme was capable of being resisted, that some individuals would wish to withhold payment of their tax liability, contrary to this advice.

(3) How to complete their self-assessment tax return in order to claim the tax accruing under the scheme.[16]

(2) Mr. Tooth's self-assesment tax return

31. At about the same time – January 2009 – Grunberg & Co began to prepare Mr. Tooth's self-assessment tax return. To do this they used HMRC-approved software provided by IRIS Software Limited.[17] More specifically:

(1) Following the instructions as to how to complete the self-assessment tax return (see paragraph 30(3) above), it was sought to enter the income loss sustained by Mr. Tooth into box 3 on page Ai3.[18]

(2) It was not possible to access this box so as to make this entry. Grunberg & Co contacted IRIS about this problem, and an engineer confirmed that box 3 could not be accessed because of a technical issue with the IRIS software. The engineer advised that, to ensure the claim was included in the 2007-2008 return the loss should be included on another part of the return and reference made in the "white space" to explain what had been done.[19]

(3) Following this advice, Grunberg & Co entered the employment related loss on the partnership pages of the return (in box 7). This created an

[14] Decision at [8].

[15] Decision at [9].

[16] Decision at [10], [11] and [14].

[17] Decision at [15].

[18] Decision at [15].

[19] Decision at [15].

additional problem. Because there was no partnership, there was no ten-digit partnership unique taxpayer reference ("UTR") number which was necessary for the electronic submission of the return. Having encountered similar problems previously, where clients had not been allocated a UTR in advance of the self-assessment filing date, Grunberg & Co had used a UTR of "99999-99999" and was able to file the return electronically before the deadline, thus preventing the imposition of a late-filing penalty. This was the course followed – albeit for a different reason – in the case of Mr. Tooth's return, and a UTR of "99999-99999" was entered in the partnership pages of Mr. Tooth's return.[20]

(4) The following text was entered at box 19 on page TR6 of Mr. Tooth's return:[21]

"…During the tax year ending 5 April 2009, I sustained an employment related loss for which relief is being claimed now in accordance with section 128 ITA 2007.[22] Please refer to the partnership pages of my return. Full details of this loss will be reported on my 2008/09 tax return in due course."

(5) The following information was entered in the boxes on the partnership pages of the return:[23]

Box 1	("Partnership reference number")	99999-99999
Box 2	("Description of partnership trade or profession")	…
…		
Box 5	("Date your basis period began")	06-04-2007
Box 6	("Date your basis period ended")	05-04-2008
Box 7	("Your share of the partnership's profit or loss")	£1,185,987.00
…		
Box 19	"Adjusted loss for 2007-2008…"	£1,185,987.00
Box 20	("Loss from this tax year set off against other income for 2007-2008")	£1,185,987
…		
Box 30	("Any other information")	During the year ending 5 April 2009, I sustained an employment related loss for which relief is being claimed now in accordance with the provisions of s 128 ITA 2007 (via section 11 ITEPA 2003). I have

[20] Decision at [16].

[21] Decision at [17].

[22] A reference to the provision described at paragraph [24] above.

[23] Decision at [18].

		reported the details of the loss claimed against my other income using box 3 above, which relates to a claim for a partnership Loss from this tax year set-off against other income for 2007–8. However, there is no equivalent box to claim relief now for employment related losses despite the provisions of s 128 ITA 2007. Full details of this loss will be reported on my 2008–09 tax return in due course. The loss arose pursuant to arrangements for which a scheme reference number is required under DOTAS (from AAG at HMRC) – at this time the scheme has not been granted a reference number. When such number is obtained I will report it on my 2008–09 tax return, as that is the year in which the loss arose. I acknowledge that my interpretation of the tax law applicable to the above transactions and the loss (and the manner in which I have reported them) may be at variance with that of HM Revenue & Customs. Further please note that although I have reported (and hereby claim the loss pursuant to section 128 ITA 2007) in box 3 above I wish to make it clear that the deduction I am claiming on my return is not what you would regard as a loss for this tax year set-off against other income from 2007–08 – for all these reasons I assume you will open an enquiry.

The words used in box 30 followed the instructions as to how to complete the self-assessment tax return (see paragraph 31(1) to (3) above).

(6) Before sending a copy of the draft return to Mr. Tooth to review, Grunberg & Co ran this approach past NT Advisers, who confirmed that it was sensible.[24]

32. The return was sent to Mr. Tooth for his approval, Mr. Tooth approved it and the return was electronically filed on 30 January 2009.[25]

(3) HMRC's initial response: a Schedule 1A TMA enquiry

33. On 14 August 2009, HMRC wrote to Mr. Tooth:[26]

"…in respect of your claim to employment losses incurred during 2008-2009 for which you request £914,999 relief be given effect in 2007-08.

This letter is formal notice of HMRC's intention to enquire into that claim under the provisions of Schedule 1A TMA 1970. As a result no effect will be given to the claim at the present time."

[24] Decision at [19].

[25] Decision at [21] to [22].

[26] Decision at [23].

34. The letter continued by stating that it was understood that the claim might be part of a disclosable scheme with a DOTAS reference number and requested confirmation whether or not that was the case. The letter also referred to an announcement made on 1 April 2009 that the 2009 Finance Bill was to include legislation that would have the effect of refusing relief for losses under that scheme.[27]

35. The proposed legislation referred to in the letter became section 68 of the Finance Act 2009. This inserted a new section 128(5A) ITA which precluded, with retrospective effect, a deduction for an employment loss made in 2008-2009 if that loss was made "as a result of anything done in pursuance of arrangements the main purpose, or one of the main purposes, of which is the avoidance of tax."[28]

36. In subsequent correspondence between HMRC and NT Advisors (who took over this aspect of Mr. Tooth's tax affairs), it was acknowledged that clients of NT Advisors (such as Mr. Tooth) who carried out the Romangate scheme would *prima facie* fall within the provisions of section 128(5A) ITA, subject only to any arguments "in regard to human rights matters on retrospective legislation and also a valid enquiry having been opened to allow the claim to be denied by HMRC."[29]

(4) The effect of *Cotter*

37. On 4 March 2014, HMRC wrote to Mr. Tooth in regard to "payment of overdue tax", stating:[30]

> "Following a decision of the Court of Appeal in the case of *HMRC v. Cotter* in February 2012, we have not (until now) been actively seeking to enforce payment by you of your overdue tax and interest arising on it. This is because we considered your circumstances were similar to those of Mr. Cotter and therefore governed by that decision. HMRC has now successfully appealed to the Supreme Court, which reversed the Court of Appeal's decision, and as a result we are now able to enforce payment of the tax and interest that you owe. The Supreme Court's decision is final."

38. Grunberg & Co responded on behalf of Mr. Tooth to say that, in fact, as a result of the decision of the Supreme Court in *Cotter*, HMRC had incorrectly made an inquiry under Schedule 1A TMA, when (according to *Cotter*) it should have opened a section 9A enquiry. In these circumstances, Mr. Tooth's self-assessment calculations must stand, for the reasons given by Lord Hodge in *Cotter*.[31]

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[27] Decision at [24].

[28] Decision at [24].

[29] Decision at [25] to [26].

[30] Decision at [27].

[31] Decision at [28].

39. The relevant law has been described in Section B above. On 23 May 2014, HMRC accepted that this was indeed the case, and that collection of tax was therefore suspended. A closure notice of the Schedule 1A TMA enquiry was referred to the scheme investigator for consideration.[32]

(5) The "discovery" assessment

40. What happened next is extremely important, and it is appropriate to set out in full the findings of the FTT:

"30. On 28 July HMRC wrote to Mr Tooth as follows:

"Dear Mr Tooth

Self Assessment tax return – year ended 5 April 2008

I believe that your return for the above year is inaccurate.

This is because you have claimed a partnership loss which was in fact an employment loss carried back from the year ended 5 April 2009.

What happens now

I am carrying out a check so that I can confirm the amount of tax you should have paid.

At the moment I do not need you to do anything. This is because at this stage, we already have everything we need.

I will let you know if I do need you to do anything.

HMRC removed a claim for a partnership loss of £1,210,229 from your 2007–08 return on 14 April 2010. This was done so as to not give effect to a claim as an enquiry into that claim had been opened under Schedule 1a [*sic*] Taxes Management Act 1970 . The Supreme Court decision in Cotter v HMRC makes clear that Schedule 1a did not give HMRC the power to remove this claim under the circumstances.

It is however my intention to make an assessment under the provisions of s 29 TMA 1970 . Further s 36(1A) TMA enables HMRC to make:

(1A) An assessment on a person in a case involving a loss of income tax or capital gains tax–

(a) brought about deliberately by the person,

may be made at any time not more than 20 years after the end of the year of assessment to which it relates (subject to any provision in the Taxes Acts allowing for a longer period).

[32] Decision at [29].

> You submitted your tax return for the year to April 2008 on 30 January 2009. You included on a separate partnership page, with the UTR 99999 99999, a claim for your share of the partnership loss of £1,210,229. This was in fact employment losses carried back from 2008–09. It is my view that your actions in making this claim were deliberate.
>
> As this claim has already been removed from your return, I do not intend to make any further amendments."

31. In response, by letter dated 12 August 2014, Grunberg disputed that there had been a deliberate act that had resulted in a loss of income tax and [said] that if there had been a loss of income tax it was because HMRC had not accepted that the carry back claim could only be enquired into under s 9A TMA rather than schedule 1A TMA and it was this that had resulted in HMRC being out of time to issue an assessment.

32. In relation to the assessment Ms. Thorley (of HMRC) explained that she had worked as a HO Manager in a team in Salford finalising enquires and making assessments in relation to individuals, such as Mr. Tooth, who had participated in the Romangate scheme. In doing so she had liaised closely with a "Technical Lead", Mr. Nigel Williams. His role was to decide whether an assessment should be issued and provide guidance on the assessing provisions. Generally, a caseworker in Ms. Thorley's team would send a submission to the Technical Lead who would then check the facts and circumstances of the case and provide a template letter for the caseworker to send to the taxpayer formally making the assessment. Responsibility for the decision to assess to tax rested with the Technical Lead, in this case Mr. Williams. Mr. March also worked as a Technical Lead for HMRC's response to the Romangate schemes. He explained that Mr. Williams, who has since retired, reviewed Mr. Tooth's file in October 2014 and had come to the conclusion that a discovery assessment should be issued.

33. On 23 October 2014, Ms. Thorley received an instruction, by email, from Mr. Williams, via a colleague, to issue a discovery assessment. She allocated this task to Mr. Ian Anders. In an email, dated 23 October 2014, Mr. Anders sought clarification from Mr. Williams as to whether the discovery assessment was to replace the amendment made in April 2010 under schedule 1A TMA…in the light of the decision of the Supreme Court in Cotter . The email continued:

> "If this is correct should remove the informal standovers of the amounts on SA relating to the S[chedule] 1A amendment and reverse the amendments made to the Self Assessment in 2010?
>
> Finally, am I correct in thinking the discovery assessment will be in the same as the S[chedule] 1A amendment ie assessment of £475,498.37 additional tax resulting from removal of the loss of £1,210,229?"

34. Mr Williams responded within an hour of receiving the email from Mr Anders:

> "I'm afraid that I don't know much about ITSA [Income Tax Self-assessment] (as has become painfully obvious since I took on Romangate!) What you suggest seems right. Certainly we will be making a discovery assessment to replace the Sch1A amendment following the *Cotter* decision, and in the same figures.

> Cancelling the Sch1A amendments and associated stand-overs makes sense, and I assume this is what has been done in earlier cases."

35. Later that day Mr Anders confirmed, again by email, that he would raise the discovery assessment and let Mr Williams know when the appeal was received. On 24 October 2014 Mr Anders wrote to Grunberg to say that the assessment under s 29 TMA would be issued "shortly". That letter continued stating that Mr. Tooth:

> "… attempted to obtain immediate relief for the loss carry back to year 1 by knowingly and deliberately making entries in his 2007–08 tax return to the effect that the loss was a partnership loss of the current year. This was nothing to do with "technical software issues" as you suggest in your letter. The claim could, and should, have been made outside the return, where the existence or not of 'appropriate boxes' would have had no relevance." The amounts claimed were clearly not appropriate to be entered into these boxes, and the notes submitted with the return confirm that your client was fully aware of this. The only possible conclusion is that there was a deliberate failure to report something correctly on his tax return in an attempt to make him less liable for tax than would otherwise be the case.
>
> In my opinion, this conduct falls squarely within Schedule [sic] 36(1A) as involving a loss of income tax or capital gains tax brought about deliberately by the person."

36. The discovery assessment in the sum of £475,489.20 was issued on 24 October 2014. The decision to uphold the assessment was upheld on 20 March 2015 following a review. Mr Tooth appealed to the Tribunal on 17 April 2015."

(6) The appeal to the FTT

41. The outcome of the appeal to the FTT has already been described.

D. "DELIBERATENESS"

(1) "Deliberate inaccuracy in a document"

42. HMRC contends that Mr. Tooth – and we include in this and subsequent references to Mr. Tooth anyone acting on behalf of Mr. Tooth – brought about a loss of tax deliberately within the meaning of section 29(4) TMA. We take into account the gloss supplied by section 118(7) TMA, that this case "includes" a situation that arises as a result of a deliberate inaccuracy in a document given to HMRC.

43. This is a case where HMRC is contending for a deliberate inaccuracy in a document given to it. The "document" in which the deliberate inaccuracy was contained must, as it seems to us, be the return made by Mr. Tooth in January 2009. We stress that, in this case, we do not use the term "return" in the limited sense defined in *Cotter*. In our judgment, the word "document" in section 118(7) must be broadly construed and in this case will include not merely the entire tax return, but also the six-page computation that accompanied the tax return.

44. We shall refer to this document as the "Return" and the six-page computation which formed part of it as the "Computation".

45. When considering whether there was an inaccuracy in this "document", so defined, and whether that inaccuracy was deliberate, it is necessary to consider the document as a whole. It would, in our judgment, be entirely wrong to "cherry-pick" one instance of inaccuracy in an entry in a document, ignoring a correction or explanation elsewhere in that document, and assert that (provided the correction was ignored) there was indeed an inaccuracy. The question of accuracy – just as the question of deliberateness – is a matter of context.

46. Whilst section 118(7) TMA constitutes a non-exclusive interpretative "gloss" of section 29(4) TMA, we do not consider that this gloss removes from section 29(4) the requirement that "the situation mentioned in [section 29(1) TMA] was brought about" by a deliberate inaccuracy in a document given to HMRC. The situation mentioned in section 29(1) TMA is, in this case, the second situation (in section 29(1)(b) TMA), namely that "an assessment to tax is or has become insufficient". Reading section 118 with section 29(4), it is clear that the inaccuracy must give rise to the insufficiency in that there is a causal connection between the two.

47. Therefore, in order for section 29(4) TMA to be satisfied in the case of a document, the following conditions must be satisfied:

(1) There must be an inaccuracy in a document given to HMRC.

(2) That inaccuracy must have been deliberate.

(3) The deliberate inaccuracy must have brought about an insufficiency in an assessment to tax.

48. We consider these three requirements in turn below.

(2) Inaccuracy

(i) The nature of the inaccuracies

49. The documents Mr. Tooth gave to HMRC might be said to be inaccurate in two respects:

(1) First, by the insertion of the employment loss into the partnership pages of the Return.

(2) Secondly, by deducting that loss in the Computation.

There is something of an overlap between these two alleged inaccuracies. Common to both is the treatment of the employment loss, and it is this that we consider first. Over-and-above this, there is the fact that, in the case of the Return, the employment loss was contained in the wrong part of the Return.

(ii) Treatment of the employment loss

50. It is now accepted that the deduction Mr. Tooth sought to make in the Return and in the Computation, was not permitted: see paragraph 24 above. At the time of submitting the Return and the Computation, Mr. Tooth was well-aware that the deduction he had made was likely to be controverted by HMRC. The note included in Box 30 of the Return (see paragraph 31(5) above) stated:

"I acknowledge that my interpretation of the tax law applicable to the above transactions and the loss (and the manner in which I have reported them) may be at variance with that of HM Revenue & Customs. Further please note that although I have reported (and hereby claim the loss pursuant to section 128 ITA 2007) in box 3 above I wish to make it clear that the deduction I am claiming on my return is not what you would regard as a loss for this tax year set-off against other income from 2007-08 – for all these reasons I assume you will open an enquiry."

51. The question therefore arises as to whether an entry in a document that is explicitly based on a *bona fide* albeit controversial interpretation of tax law, which subsequently proves to be wrong, can amount to an inaccuracy.

52. An inaccuracy is something that is not accurate. Something is accurate if it conforms with the truth or with a given standard. In our judgment, where a taxpayer adopts a position in his return which, albeit controversial cannot (at the time of the return) be said to be wrong and takes the trouble to identify the position he has taken (and the fact that it is controversial) in that return cannot be guilty of an inaccuracy when, subsequently, it is established that the position taken by the taxpayer is wrong.

53. In such a case, it can be said that the Return becomes inaccurate. But it cannot, in our judgment, be said that the Return was, at the time of its making, inaccurate.

54. That is our conclusion both in relation to the Return and the Computation. (Although the Computation does not contain, in terms, the clarification in Box 30, it obviously must be read with the Return.)

55. The question is whether a document that subsequently becomes inaccurate is "inaccurate" for the purposes of section 118(7) TMA. We do not consider that section 118(7) TMA – which, after all, seeks to define a case where a loss of tax arises deliberately (a most serious case, tantamount to fraud) – can extend to a case where a document, not inaccurate when submitted, is rendered inaccurate by subsequent events.

56. Accordingly, because the Return and the Computation stated a position that was arguable rather than wrong in relation to the employment loss, and clearly highlighted the position that had been adopted, we find that these documents were not inaccurate by reason of their treatment of the employment loss.

(iii) Insertion of the employment loss treatment into the partnership pages of the Return

57. Viewing, solely, the entry into the partnership pages of the Return, these pages were clearly inaccurate. Figures were inserted into those pages that had nothing to do with partnership, and everything to do with the employment loss being claimed by Mr. Tooth. There was, in short, a complete mismatch between the data that these pages were intended to contain and the data that was, in fact, inserted by Mr. Tooth.

58. Once again, however, it is necessary to consider the overall context:

(1) As has been described in paragraph 31 above, the FTT found as a fact that it was not possible to complete the Return in the manner Mr. Tooth intended. The Return – and electronic document – was produced by software that was HMRC approved.

(2) In these circumstances, given the nature of the return that Mr. Tooth wanted to file, the information regarding the employment loss had to be set out somewhere in the Return, and the partnership pages were used.

(3) An explanation was provided, in the Return, of what Mr. Tooth had done.

59. Given that the use of the "wrong" pages was effectively forced upon Mr. Tooth, but that he gave an explanation of his approach to dealing with the problem, we cannot accept that the Return – considered as a whole – was inaccurate.

(iv) Conclusion on inaccuracy

60. Accordingly, even before we reach the question of deliberation, we hold that the pre-conditions to the operation of section 29 were not met, in that there was no inaccuracy, and that HMRC's appeal must fail.

61. However, because the other points before us were fully and carefully argued, it is right that we deal with these points also.

(3) Deliberate inaccuracy

62. Assuming, for this purpose, that the Return and the Computation were inaccurate within the meaning of section 118(7) TMA, the next question is whether such (putative) inaccuracies were deliberate.

63. It is clear that, in terms of the applicable time limits, the relevant legislation contains a hierarchy based upon culpability. As was set out in paragraph 25 above in the case of discovery assessments, the normal period is one of 4 years, increasing to 6 in the case of carelessness and to 20 in the case of deliberation. An allegation of deliberately bringing about a tax loss is a serious one, tantamount to an allegation of fraud.

64. Self-evidently, the mere completion of a return – whilst a deliberate act, in the sense that the taxpayer deliberately fills it in and submits it – cannot of itself amount to a deliberate inaccuracy in a document. The deliberation must relate to the inaccuracy, not merely the completion and submission of the document.

65. In a case said to fall within section 29(1)(b) TMA ("an assessment to tax is or has become insufficient"), we consider that section 118(7) does no more than make clear that an "insufficiency" within section 29(1)(b) TMA can be brought about by a deliberate inaccuracy in a document given to HMRC.

66. The mere insertion of a figure into a document that is inaccurate may be a deliberate act, but it is not, necessarily, a deliberate inaccuracy. In this case, we do not consider that the inaccuracies alleged by HMRC can be said to be deliberate, because Mr. Tooth took steps to draw the (putative) inaccuracies to the attention of HMRC.

67. Accordingly, we find that Mr. Tooth did not act deliberately within the meaning of section 29(4) TMA (as elucidated by section 118(7) TMA), and that HMRC's appeal must fail on this ground also. We consider that the FTT did not err in finding that that Mr. Tooth had not acted deliberately. There is no evidence of any intent on the part of Mr. Tooth to bring about an insufficient assessment of tax or give to HMRC a deliberately inaccurate document. (Obviously, Mr. Tooth wished to pay as little tax as was legally permissible, but that is not paying an insufficient amount of tax). HMRC contended that the FTT had wrongly distinguished the decision in *Moore v. HMRC* [2011] UKUT 239 (TCC). We disagree with HMRC's contention and agree with the reasoning of the FTT for, essentially, the reason given by the FTT. *Moore* was concerned with an alleged negligent insufficiency of tax which, we consider, involves very different considerations to where the insufficiency is said to have been brought about deliberately.

(4) Did a deliberate inaccuracy bring about an insufficiency in an assessment to tax?

68. Assuming, for this purpose, that the Return and the Computation contained deliberate inaccuracies within the meaning of section 118(7) TMA, the question is then whether these (putative) deliberate inaccuracies brought about an insufficiency in an assessment to tax.

69. Given the conclusions we have already reached, we propose to deal with this question very briefly. The position is complicated by the fact that – through the fault of neither party – the proper route to challenging Mr. Tooth's Return was unclear until the decision of the Supreme Court in *Cotter*.

70. As we have described, HMRC opened a Schedule 1A TMA enquiry in response to Mr. Tooth's Return. There clearly can be no question of HMRC having been misled by Mr. Tooth's return. What can be said is that neither Mr. Tooth nor HMRC appreciated the proper characterisation of the entries in Mr.

Tooth's Return and – as a consequence – the correct enquiry route. It was only after the decision of Supreme Court in *Cotter* that it became clear that a Schedule 1A enquiry was not the correct way to challenge the Return. By this time, of course, the route under section 9A TMA was unavailable.

71. We do not consider that this uncertainty about the proper route to challenging a return can be relevant to the question of whether there was or was not an insufficiency in an assessment to tax. We consider that the insufficiency exists whether or not HMRC takes the correct route to enquiring into it. It may be that – where HMRC takes the incorrect route – the insufficiency is or becomes incapable of challenge. But that does not mean that there is no insufficiency at all.

E. WAS THERE A "DISCOVERY"?

(1) Introduction

72. Two questions arise. First, what does section 29 TMA mean when it refers to an officer of the Board or the Board discovering one of the situations set out in section 29(1)(a), (b) or (c)?

73. Secondly, was there a discovery, properly understood, in the present case?

74. We consider these questions in turn below.

(2) The nature of a discovery

75. Where an officer of the Board or the Board "discovers" that one of the situations set out in section 29(1)(a), (b) or (c) pertains, a change in a state of mind is connoted:[33]

> "…the word "discovers" does connote change, in the sense of a threshold being crossed. At one point an officer is not of the view that there is an insufficiency such that an assessment ought to be raised, and at another he is of that view. That is the only threshold that has to be crossed. We do not agree that the lawyer, in Lord Denning's example,[34] would be regarded as having made a discovery any the less by waking up one morning with a different conclusion from the one he had earlier reached, than if he had changed his mind with the benefit of further research. It is, we think, evident that the relevant threshold for there to be a discovery may be crossed as a result of a "eureka" moment just as much by painstaking research."

76. No new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that one of the situations set out in section 29(1)(a)

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[33] *Charlton v. Revenue and Customers Commissioners* [2012] UKUT 770 (TCC) at [28].

[34] This was a reference to a *dictum* of Lord Denning in *Centlon Finance Co Ltd v. Ellwood (Inspector of Taxes)* [1962] 1 AC 782 at 799-800, referenced in *Charlton v. Revenue and Customers Commissioners* [2012] UKUT 770 (TCC) at [27].

may pertain. That can be for any reason, including a change of view, change of opinion, or correction of an oversight.[35]

77. Whether or not there is a discovery is essentially subjective: it is the officer's (or officers'[36]) state of mind that matters.[37]

78. "Newness", it was held in *Charlton v. Revenue and Customers Commissioners* [2012] UKUT 770 (TCC) at [37], relates not to the reason for the conclusion reached by the officer, but to the conclusion itself:

"The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself. If an officer has concluded that a discovery assessment should be issued, but for some reason the assessment is not made within a reasonable period after that conclusion is reached, it might, depending on the circumstances, be the case that the conclusion would lose its essential newness by the time of the actual assessment. But that would not, in our view, include a case such as this, where the delay was merely to accommodate the final determination of another appeal which was material to the liability question. Such a delay did not deprive Mr. Cree's conclusions [Mr. Cree was the relevant officer] of their essential newness for section 29(1) purposes."

79. Broadly speaking, we agree with this statement of the law. However, for the purposes of determining this case, it is necessary to consider the question of "newness" and its corollary "staleness" in a little greater detail:

> (1) The "discovery" in section 29(1) TMA relates to one of the three situations set out in section 29(1)(a), (b) or (c). If it is discovered that such a situation pertains (or may pertain: all that is required is for the officer to act honestly and reasonably), then the officer is at liberty to make an assessment under section 29 TMA.
>
> (2) We should say that we see no reason why one officer cannot make the discovery and delegate to another officer the making of the assessment.[38] That is what occurred in this case: see [32] to [35] of the Decision, set out in paragraph 40 above. However, it is important, we consider, to bear in mind that section 29 TMA envisages two stages – *(i)* the discovery and *(ii)* the making of the assessment consequent upon the discovery.
>
> (3) We entirely agree with the Upper Tribunal in *Charlton* that on making a discovery, HMRC must act expeditiously in issuing an assessment. If, to

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[35] *Charlton v. Revenue and Customers Commissioners* [2012] UKUT 770 (TCC) at [37].

[36] We see no reason why officers in combination cannot make a discovery. Indeed, that is confirmed by the reference to the "Board" (a collective) in section 29(1) TMA.

[37] *Pattullo v. Revenue and Customs Commissioners* [2016] UKUT 270 (TCC) at [41].

[38] *Cf Burford v. Durkin (Inspector of Taxes)* [1991] STC 7.

use the words of *Charlton*, an officer has made a discovery, then any assessment must be issued whilst the discovery is "new".[39]

(4) It follows from this that the same officer (or officers) cannot make the same discovery twice. We see no reason, however, why the same officer cannot, for different reasons, discover that one of the situations set out in section 29(1)(a), (b) or (c) pertains a second time. Suppose an officer discovers that an assessment to tax has become insufficient for a certain reason, but HMRC decides not to issue an assessment because the point is controversial and the amount small. Suppose that officer then – for different reasons – discovers that the assessment has become insufficient. We consider that this, second, discovery could justify the making of an assessment.

(5) The position is, obviously, *a fortiori* where two different officers are independently involved. Again, provided the basis for the discovery is different, there is a statutory basis under section 29(1) for issuing two assessments.

(6) What, however, if two different officers independently make the same discovery? In our judgment, as a matter of ordinary English, a discovery can only be made once. We accept that section 29(1) TMA is framed by reference to the subjective state of mind of an officer or the board, but what is a "discovery" is an objective term. It seems to us that in this case, the first officer makes the discovery; the second officer simply finds out something that is new to him. In particular if one officer is made aware of, and accepts, the conclusion of another officer it cannot be said that the first officer made a discovery.

(7) We consider that such a construction is necessary for the protection of both the taxpayer and officers of HMRC:

(a) The taxpayer, as we have found, should be protected from stale assessments. It follows that, if the first officer – for whatever reason – having made the discovery and (following the two-stage process we have described in paragraph 79(2) above) having determined not to issue an assessment, that outcome ought to be binding on HMRC. No doubt such an officer would record his discovery, and the reason for not issuing an assessment, in the files.

(b) As to HMRC's position, in their own interests, officers need to have clarity as to what constitutes a "discovery" for the purposes of section 29 TMA. For example, any second officer making a "discovery" in succession to another officer might, should an assessment be issued, be faced with a contention that his "discovery" was in some way an illicit attempt to re-open a stale point. Inevitably, there would have to be questions regarding what the second officer knew of the first officer's work, and whether the second officer's "discovery" was related to that of the first officer and so not his own at all. As can be seen from paragraph

[39] See, also, *Pattullo v. Revenue and Customs Commissioners* [2016] UKUT 270 (TCC) at [46] to [56].

88(7) below, we consider that this is a case where HMRC's officers would have benefited from a clear understanding of the requirements of section 29 TMA.

(3) Was there a discovery in the present case?

80. Mr. Vallat, on behalf of HMRC, contended that the findings made by the FTT in [43] to [46] of the Decision were findings of fact and included a specific finding of fact that there had been a discovery. Since, by virtue of section 11(1) of the Tribunals, Courts and Enforcement Act 2007, appeals from the FTT to the Upper Tribunal are on points of law only, Mr. Vallat contended that we were bound by the finding of the FTT.

81. We accept that where the FTT makes a finding of fact that is not susceptible of challenge on *Edwards v. Bairstow* grounds,[40] that finding binds us. It is, therefore, necessary to consider first precisely what findings of fact the FTT made in [43] to [46] of the Decision.

82. At [43] to [44] of the Decision, the FTT appears to find that the discovery by HMRC was of an insufficiency of income tax first identified in HMRC's letter of 14 August 2009. The 2009 letter – referenced in paragraph 33 above – indicated an intention to enquire under Schedule 1A TMA.

83. No doubt the facts that triggered the letter of 14 August 2009 could have amounted to a "discovery". However, that would mean that the discovery was made in 2009, whereas the discovery assessment was made some five years later in 2014. If and to the extent that this was the discovery, then (for the reason given in paragraph 79(3) above) the assessment upon which it was based was stale and should never have been made.

84. The FTT considered, and rejected, the "staleness" argument in [45] of the Decision. This part of the FTT's Decision relies upon the state of mind of Mr. Williams and appears to find that Mr. Williams made a discovery of an insufficiency of tax in October 2014.

85. The exact findings of fact made by the FTT do not emerge clearly from the Decision. If the FTT found that Mr. Williams simply "discovered" what

[40] [1956] 1 AC 14 at 29 (*per* Viscount Simmonds): "For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarized by saying that the court should take that course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained. It is for this reason that I thought it right to set out the whole of the facts as they were found by the commissioners in this case. For, having set them out and having read and re-read them with every desire to support the determination if it can reasonably be supported, I find myself quite unable to do so. The primary facts, as they are sometimes called, do not, in my opinion, justify the inference or conclusion which the commissioners have drawn: not only do they not justify it but they lead irresistibly to the opposite inference or conclusion. It is therefore a case in which, whether it be said of the commissioners that their finding is perverse or that they have misdirected themselves in law by a misunderstanding of the statutory language or otherwise, their determination cannot stand."

another officer of HMRC already knew in August 2009, then (for the reasons we have given) we consider that this was no discovery by Mr. Williams at all.

86. Accordingly, we conclude that such findings as were made by the FTT in [43] to [46] of the Decision are insufficient to justify in law the conclusion that there was a discovery sufficient to justify the making of the Assessment.

87. We consider, however, that it is appropriate to consider also the detailed findings of fact made by the Tribunal earlier on in the Decision. We have set out the relevant paragraphs of the Decision ([30] to [35]) in paragraph 40 above. This, as we have noted, sets out a detailed narrative of events. In this narrative, it is clear that the critical document is the letter HMRC wrote to Mr. Tooth on 28 July 2014 (at [30] of the Decision). This letter, as it seems to us, suggests that the "discovery" in question was the fact that Mr. Tooth was guilty of "deliberate inaccuracy".

88. Although there is no express finding of fact to this effect in the Decision, we consider that – reading the Decision as a whole – this is a finding that the FTT made. More specifically:

(1) HMRC expressly disavowed any contention that the decision in *Cotter* had been the "discovery" triggering the section 29 TMA assessment in this case.

(2) HMRC did not contend that the recognition of any of the inaccuracies that we have described in paragraph 49 above amounted to a discovery of the insufficiency. We consider that HMRC was entirely right to avoid such a contention: these so-called inaccuracies would have been known to HMRC and "discovered" by an officer of HMRC at the time the Schedule 1A TMA enquiry was issued.[41]

(3) That only leaves "deliberate inaccuracy" as the basis for the discovery which – as we have noted – is expressly adverted to in HMRC's letter of 28 July 2014.

(4) In Section D of this decision, we have held that there was no deliberate inaccuracy. Indeed, we have held that there was no inaccuracy. In this, we have affirmed the Decision and dismissed HMRC's appeal.

(5) However, we also remind ourselves of what we said in paragraph 79(2) above, that section 29 TMA envisages two stages: *(i)* this discovery and *(ii)* the making of the assessment consequent upon this discovery. The "discovery", in this case, is that an assessment to tax is or has become insufficient. Deliberation, negligence or other questions are not relevant to whether there is a discovery. Here, HMRC discovered the insufficiency in 2009. It was incumbent upon HMRC, at that stage, to decide what to do consequent upon this discovery.

[41] See paragraph 33 above.

(6) It was not open to HMRC without more to make a discovery of insufficiency and then to "park" the question of issuing a section 29 TMA assessment until a later date.

(7) In this case, we consider – to put it no higher than this – that there exist serious concerns about the basis upon which HMRC concluded that Mr. Tooth had given HMRC a document that was "deliberately inaccurate". The detailed narrative in [32] to [35] of the Decision indicates no consideration at all of this question by HMRC (other than the thought that went into the writing of the letter of 28 July 2014 itself) which, as we have noted, involves a most serious allegation. Indeed, the narrative in [32] to [35] of the Decision strongly suggests that the discovery assessment was seen (at least by Mr. Williams[42]) as simply a "replacement" for the Schedule 1A TMA enquiry that was being closed. If that was HMRC's thinking, then that thinking was seriously flawed.

89. The burden of showing that the requirements of section 29 TMA are met is on HMRC. We consider that there is no sufficient basis – given the facts found by the FTT – to justify the conclusion that there was, properly speaking, a discovery. Had this been the only point in issue, we would have allowed the appeal, and remitted the matter for further evidence and argument to the FTT. As it is, given our conclusions on the question of deliberate inaccuracy, this course is unnecessary.

F. DISPOSITION

90. For the reasons given in this decision, we dismiss the Appellant's appeal.

The Honourable Mr. Justice Marcus Smith
Judge Charles Hellier

Judges of the Upper Tribunal

Release Date: 7 February 2018

[42] See [34] of the Decision.